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Delaware Insider: Court of Chancery Issues Practice Guidelines; District of Delaware Issues Updated Electronic Discovery Standards

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Delaware Court of Chancery Issues Practice Guidelines

The Delaware Court of Chancery recently issued non-binding guidelines (the Guidelines) to help lawyers and their parties handle common and sometimes complex procedural issues that arise in litigation before the court. The 18-page Guidelines issued in January 2012 cover a variety of “best practices,” from contacting chambers and scheduling expedited or summary proceedings, to expert report and confidentiality agreements. The Guidelines also include sample forms for such proceedings as scheduling a preliminary injunction, a Rule 12(b)(6) motion, or cross-motions for summary judgment.

The Guidelines are the product of a joint effort between the judges of the Court of Chancery and the court’s Rules Committee, which is comprised of experienced Delaware practitioners, and include procedures that the court would prefer counsel to follow. Smart lawyers will treat these Guidelines as gospel. For example, with respect to expert reports, the Guidelines state:

In general, the Court prefers that parties stipulate to limit expert written discovery to the final report and materials relied on or considered by the expert. Counsel should be aware that the Court understands the degree of involvement counsel typically has in preparing expert reports. Cross-examination based

on changes in drafts is usually an uninformative exercise.

With respect to the form of pleadings, the Guidelines state:

An answer should repeat the allegations of the complaint and then set forth the response below each allegation. Otherwise the Court has to look back and forth from answer to complaint to see what is being denied.

One of the more important guidelines issued by the court provides instruction to the legions of non-Delaware lawyers who coordinate with local Delaware lawyers to litigate cases in chancery. About these working relationships, the court gives the following specific direction:

Role of Delaware Counsel

- a. The concept of “local counsel” whose role is limited to administrative or ministerial matters has no place in the Court of Chancery. The Delaware lawyers who appear in a case are responsible to the Court for the case and its presentation.
- b. If a Delaware lawyer signs a pleading, submits a brief, or signs a discovery request or response, it is the Delaware lawyer who is taking the positions set forth therein and making the representations to the Court.

It does not matter whether the paper was initially or substantially drafted by a firm serving as “Of Counsel.”

- c. The members of the Court recognize that Delaware counsel and forwarding counsel frequently allocate responsibility for work and that, in some cases, the allocation will be heavily weighted to forwarding counsel. The members of the Court recognize that forwarding counsel may have primary responsibility for a matter from the client’s perspective. This does not alter the Delaware lawyer’s responsibility for the positions taken and the presentation of the case.
- d. Non-Delaware counsel shall not directly make filings or initiate contact with the Court, absent extraordinary circumstances. Such contact must be conducted by Delaware counsel.
- e. It is not acceptable for a Delaware lawyer to submit a letter from forwarding counsel under a cover letter saying, in substance, “Here is a letter from my forwarding counsel.”

The foregoing should be required reading for any non-Delaware lawyer that uses Delaware co-counsel. These rules militate against using Delaware counsel to merely file whatever non-Delaware counsel requests. Both Delaware and non-Delaware counsel

will be subject to severe penalties for doing so without regard to Delaware standards.

Finally, there are some interesting comments with respect to what counsel should include in compendiums and appendices. The Guidelines show that this is an opportunity to point the court to exactly what counsel want the court to review. There is also a humorous comment where the Guidelines tell counsel they don't have to include everything in a compendium—"Avoid the Manhattan Phonebook. If a submission is huge, uncomfortable to hold, and likely to fall apart, please break it into separate usable volumes."

As the court stated in its announcement:

The goal of the guidelines is to help litigants deal with each other and the Court in a more constructive, less contentious, and therefore more efficient and just manner. . . . All the members of the Court recognize the guidelines as sound and members of the Court will endeavor to avoid the chambers-specific approach that results in litigants having to address the idiosyncratic preferences of multiple members of the same court. All of us on Chancery recognize how challenging it is for lawyers to address complex cases especially in view of evolving issues such as electronic discovery, said Chancellor Leo E. Strine, Jr. By developing these practice guidelines with the invaluable help of our Rules Committee, we hope to make our Bar's life a little easier and to enable all of us to concentrate more on the merits, rather than procedural jousting. This will get cases resolved less expensively and faster.

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District of Delaware Revises Default Standard for Discovery of ESI

On December 8, 2011, the District of Delaware revised its Default Standard for Discovery Including Electronically Stored Information (the Revised Default Standard), which applies if the parties are unable to reach agreement on various discovery issues. This is the third version of the default standard. The Revised Default

Standard updates the prior default rules regarding electronically stored information (ESI), taking into consideration changes in technology, as well as problems the court and litigants have experienced in handling ESI issues and problems. The Revised Default Standard is available [here](#).

The Revised Default Standard expressly covers preservation of discoverable information, privilege logs, the initial discovery conference, initial disclosures, and electronic discovery procedures. In addition, with the heavy docket that the District of Delaware has in terms of patent cases, there are specific procedures related to initial infringement and invalidity contentions in patent cases. But, more broadly, the Default Standard for Discovery reiterates the court's expectation that litigants will meet and confer early in the litigation about all aspects of discovery, and that the parties will agree on reasonable limits to discovery that are proportional and tailored to the parties and the issues.

Some of the key features of the Revised Default Standard include:

Preservation

The parties shall preserve non-duplicative discoverable information currently in their possession, custody, or control but no modification of back-up or archival procedures is needed absent a showing of good cause.

The court has identified specific categories of ESI in Schedule A to the Standard that presumptively need not be preserved absent a showing of good cause. The list includes, among other things, deleted data, slack space, RAM, data in metadata fields that are frequently updated automatically, transient data such as temporary Internet files, and instant messages (IM) that are not ordinarily printed or maintained in a server dedicated to IM. This puts the requesting party on notice and shifts the burden onto the party requesting documents to advise the other side of the information it wants to have preserved.

Search Terms and Production Issues

Search terms shall be disclosed by the producing party, if used. The requesting

party may request up to 10 additional "focused" terms.

Search terms shall be used on non-custodial data sources and e-mails and other ESI maintained by the 10 custodians most likely to have discoverable information.

No on-site inspection of electronic media is allowed absent a showing of specific need and good cause.

Format of Production

Litigants must produce single-page TIFF images and associated multi-page text files containing extracted text or OCR with Concordance and Opticon load files with metadata.

Litigants may only produce native versions of files not easily converted to image format, such as Excel and Access files.

Litigants must preserve and produce the following metadata to the extent it exists:

- Custodian;
- Filename, File Path, File Size, File Extension, MD5 Hash;
- Author, E-mail Subject;
- Conversation Index;
- From, To, CC, BCC;
- Date Sent, Time Sent, Date Received, Time Received, Date Created, Date Modified;
- Control Number Begin, Control Number End, Attachment Range, Attachment Begin, and Attachment End (or the equivalent thereof).

Privilege Logs

The parties must meet and confer about privilege logs, whether certain categories of information can be excluded from the logs, and whether alternatives to document by document logs can be exchanged.

The default rule is that parties need not log information generated after the filing of the complaint.

Preservation efforts are protected by the work product doctrine.

The parties must confer on a non-waiver order. *See* Fed. R. Evid. 502. The default rule is that privileged information, if produced, must be returned if it appears on its face to have been inadvertently produced

or if notice of inadvertent production is provided within 30 days.

Custodians and Initial Disclosures

Initial disclosures must contain the following:

- The party's 10 custodians most likely to have discoverable information, ranked from most to least likely.
- A list of non-custodial data sources (e.g., enterprise systems, databases, Sharepoint, etc.) from most likely to contain discoverable information to least.
- Notice of (1) any ESI that is not reasonably accessible, (2) third party discovery, and (3) information subject to third-party privacy concerns or that may need to be produced from outside the United States.

It is important to note that the Revised Default Standard refers to custodians and not key players. While it is important to identify the key players early on in the litigation, it is assumed that the key players related to the litigation will be disclosed in the initial disclosures and discussed at the Rule 26(f) meet and confer.

Discovery in Patent Cases

The Revised Default Standard contains some specific "default" procedures for initial discovery in patent cases as follows:

1. Within 30 days of the scheduling conference, the patentee shall identify the accused products and the asserted patents, and produce the file history for each patent.
2. Within 30 days of (1), the accused infringer(s) shall produce core technical documents (operation manuals, product literature, schematics, and specifications) related to the accused products.
3. Within 30 days of (2), the patentee shall produce an initial infringement claim chart relating each accused product to the asserted claims.
4. Within 30 days of (3), the accused infringer(s) shall produce initial va-

lidity contentions for each asserted claim, with invalidating references.

As emphasized in a footnote, this discovery is "initial" and may be supplemented. Finally, the standard provides that discovery in patent cases is limited to the period extending six years before the filing of the complaint, except as to asserted prior art, conception, and reduction to practice.

There is an over-arching theme of cooperation, proportionality, reasonableness, and collaboration that is reflected throughout the Revised Default Standard. The court wants the parties to work together to come up with reasonable solutions for handling ESI, especially in some of the more important areas such as privilege logs where the court is looking to the parties to reduce the enormous time and expense that is devoted to creating privilege logs dealing with ESI.

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Both of the guidelines published recently by the state and federal courts in Delaware should be carefully studied and followed by practitioners in these courts. Though not on par with court rules, these standards provide insights on best practices expected by the court, and that the best lawyers will follow.

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