

Delaware Court of Chancery Issues Guidelines for Preservation of Electronically Stored Information

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On January 18, the Delaware Court of Chancery joined a growing number of jurisdictions in issuing guidelines concerning discovery of electronically stored information (ESI). The court's guidelines are limited to the preservation of ESI and do not address the collection or production of ESI.

The court begins the guidelines by stating that its purpose is to remind all counsel appearing before the court of their common law duty with respect to the preservation of ESI in litigation. In addition, "[a] party to litigation must take reasonable steps to preserve information, including ESI, that is potentially relevant to the litigation and that is within the party's possession, custody or control." The guidelines require counsel and their clients to take affirmative steps to preserve potentially relevant information. At a minimum, the parties and their counsel must develop and oversee a preservation process, which should include the dissemination of a litigation hold notice to custodians of potentially relevant ESI. "Counsel oversight of identification and preservation is very important and the adequacy of each process will be evaluated on a case-by-case basis." If a lawsuit has commenced and a litigation hold has not already been disseminated, counsel should instruct their clients to take reasonable steps to act in good faith and with a sense of urgency to avoid deletion or spoliation of potentially relevant ESI. "Failing to take reasonable steps to preserve ESI may result in serious consequences for a party or its counsel."

The court will evaluate the "reasonableness" of the steps taken on a case-by-case basis; however, in most cases, a party and its counsel (in-house and outside) should take a collaborative approach to the identification, location, and preservation of potentially relevant ESI, including the involvement of the party's information technology department (if applicable). In addition, a party and its counsel should develop written instructions for the preservation of ESI and distribute them in the form of a litigation hold notice to the custodians of potentially relevant ESI and document the steps taken to prevent the destruction of said ESI.

The court goes on to point out some of the "potential problem areas" regarding preservation of ESI, such as business laptops, home computers (desktops and laptops), external or portable storage devices (e.g., USB flash drives), and personal email accounts. While this list is not exhaustive, the court states that it is a starting point for identifying where potentially relevant ESI is stored. Furthermore, counsel and their clients should discuss how custodians store their information (e.g., document retention policies and procedures) and take reasonable steps to verify information they receive about how ESI is created, modified, stored, or destroyed.

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