

## **Ruling on Confirmatory Discovery: Defendant's Attorney Must Be Present During Collection of ESI**

**May 5, 2010**

During a recent telephone conference regarding a discovery dispute in *Roffe v. Eagle Rock Energy GP, et al.*, C.A. No. 5258-VCL (Del. Ch. Apr. 8, 2010), Vice Chancellor Laster ruled from the bench that confirmatory discovery—like formal discovery—requires the defendant's attorney to be physically present during the collection of electronically stored information from his/her client; self-collection by the client is not permitted.

On February 9, a class action and derivative lawsuit was filed by a public unitholder of Eagle Rock Energy Partners, L.P. (Eagle Rock) in the Court of Chancery of the State of Delaware against the partnership, the partnership's general partner, Eagle Rock Energy GP, L.P. (GP), and certain affiliates of GP. The complaint alleged, among other things, that (1) the previously announced proposed recapitalization transactions are unfair to the partnership's public unitholders, (2) the preliminary proxy statement filed on January 14 in connection with the proposed recapitalization transactions contains material misstatements and omissions, and (3) the defendants breached their fiduciary duties to the partnership's public unitholders in connection with the proposed recapitalization transactions. During confirmatory discovery, a dispute arose regarding collection of emails from the Conflicts Committee, which consisted of three members of the Eagle Rock board of directors.

Defense counsel informed the court that two of the three members had self-collected and foldered documents relevant to the transaction at issue. Counsel argued that it would be unnecessary to collect from the third committee member because he was simply copied on all the same emails sent and received by the other two members. Counsel stated that, aside from being redundant, it would be costly and burdensome to collect records from the third member, who was located in an area of the country remote from Delaware (Tulsa, Oklahoma) and had a habit of keeping emails related to the matter on his personal computer interspersed with personal and other business emails.

Vice Chancellor Laster ruled that confirmatory discovery is discovery, and that attorneys may not rely upon a defendant to search his/her own email. The Vice Chancellor held that attorneys appearing before the Court of Chancery have an affirmative obligation to go wherever the electronically stored information is located, to be physically present to ensure that the collection is done properly, and to collect relevant documents even if located on a personal computer.

With regard to preservation, the Vice Chancellor expressed concern as to whether adequate measures had been taken to ensure that relevant electronic information had been properly preserved. The Vice

