

## District of Delaware Adopts Default Standards for E-Discovery

*The trend continues toward increased judicial involvement in e-discovery to lower litigation costs and promote cooperation among litigants.*

**February 22, 2012**

In its continuing efforts to ease the financial burdens of litigants, the Ad Hoc Committee for Electronic Discovery of the U.S. District Court for the District of Delaware recently amended the court's Default Standard for Discovery (the Standard). This revision continues a recent trend on the part of the federal courts, which have attempted to lower the costs associated with e-discovery by offering guidelines designed to streamline the process. Some examples of this trend include the following:

- In September 2011, the U.S. Court of Appeals for the Federal Circuit unveiled a Model Order for E-Discovery in Patent Cases designed to reduce discovery costs.<sup>1</sup>
- In November 2011, the U.S. District Court for the Southern District of New York implemented Standing Order M10-468, *In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York*, which details the court's expectations regarding e-discovery.<sup>2</sup>
- In January 2012, Chief Judge Randall R. Rader of the Federal Circuit, together with three other members of the Federal Circuit Advisory Council, presented a proposal to the U.S. International Trade Commission (USITC) to streamline e-discovery in ITC section 337 investigations.<sup>3</sup>
- This month, the judges in the U.S. District Court for the Eastern District of Texas intend to discuss a committee report on the Federal Circuit Model Order on E-Discovery in Patent Cases to address what U.S. District Judge Leonard Davis—who will become chief judge of the Eastern

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1. See our September 28, 2011, Law Flash, "Federal Circuit Unveils Model Order for E-Discovery in Patent Cases," available at [http://www.morganlewis.com/pubs/eData\\_LF\\_ModelOrderForE-DiscoveryPatentCases\\_28sept11.pdf](http://www.morganlewis.com/pubs/eData_LF_ModelOrderForE-DiscoveryPatentCases_28sept11.pdf).

2. Standing Order M10-468 is available at [http://www.nysd.uscourts.gov/rules/Complex\\_Civil\\_Rules\\_Pilot.pdf](http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf).

3. Section 337 investigations most frequently involve claims regarding intellectual property rights, including patent infringement claims.

District next year—calls “a very legitimate concern, primarily around the cost of email production.”<sup>4</sup>

- The U.S. Court of Appeals for the Seventh Circuit will complete Phase Two of its E-Discovery Pilot Project in May 2012. There are 18 district court judges, 23 magistrate judges, and three bankruptcy judges from federal courts in Illinois, Wisconsin, and Indiana participating in Phase Two, which includes a model “Standing Order Relating to the Discovery of Electronically Stored Information,” also designed to develop best practices and reduce discovery costs.<sup>5</sup>

The Standard recently implemented by the District of Delaware provides parameters for the discovery of traditional paper records and electronically stored information (ESI), which are applicable until further court order or until the parties reach an alternative agreement. It contains provisions related to general e-discovery issues such as preservation duties, discovery conferences, privilege log protocols, and disclosure requirements, while also addressing patent-specific requirements, search methodologies, production formats, and metadata. The Standard also highlights the importance of cooperation, proportionality, and categories of information that litigants should discuss at the 26(f) conference.

Some of the more significant provisions of the Standard include the following:

- Specific categories of lesser known ESI “need not be preserved” absent good cause. These include forms such as “[d]eleted, slack, fragmented, or other data only accessible by forensics,” temporary Internet files, instant messages, voice messages, certain mobile device data, and network logs.<sup>6</sup>
- Preservation compliance steps “are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).”
- A clawback provision for inadvertently produced privileged and/or work product information.
- The requirement that all parties provide a list, in order of relevancy, of the 10 custodians that they believe will contain the most discoverable information.
- Discovery timelines specific to patent litigation that provide for deadlines to produce or disclose core technical documents, claim charts, invalidity contentions, and invalidating references. After which, absent good cause, any further discovery is limited to six years prior to the complaint, unless related to prior art or “the conception and reduction to practice” of the invention at issue.
- The number of additional search terms the requesting party may ask be added to the search terms being used by the producing party is limited to 10. These additional terms must have a narrow focus and not simply contain product and company names.

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4. See “Efficient E-Discovery: How Will Model Order Impact Eastern District Practice?” available at <http://www.legaltechtoday.com/2011/11/28/efficient-e-discovery-how-will-model-order-impact-eastern-district-practice-texas-lawyer/>.

5. Information on the Seventh Circuit’s Pilot Project is available at [www.discoverypilot.com](http://www.discoverypilot.com).

6. A complete list of the ESI categories can be found in Schedule A of the Default Standard for Discovery.

- Production specifications are defined for file format and metadata, requiring that ESI be produced as text searchable image files with metadata fields specified in the Standard. Only Excel files, or other files not easily converted to images, should be produced in native format.

The Default Standard is available at <http://www.ded.uscourts.gov/SLR/Misc/Electronic-Standard-for-Discovery.pdf>.

With federal courts across the country increasingly adopting standards, protocols, and model and standing orders designed to reduce e-discovery costs and foster cooperation between litigants, expect to see more such measures in the future. Attorneys should keep abreast of such trends in the courts in which they litigate and leverage them in negotiating a proportional, reasonable, and cost-effective discovery plan with the other side.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis eData attorneys and technologists:

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