

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.

The court also reminds counsel that the duty to preserve potentially relevant ESI is triggered when litigation is commenced or “reasonably anticipated, not after litigation has commenced.” Thus, “[w]hile the development and implementation of a preservation process after litigation has commenced may not be sufficient by itself to avoid the imposition of sanctions by the Court if potentially relevant ESI is lost or destroyed, the Court will consider the good-faith preservation efforts of a party and its counsel.”

Last, the court states what is the practice in many jurisdictions—the parties and their counsel can agree with opposing parties and their counsel to limit or even forgo the discovery of ESI. Regardless of agreement, the court emphasizes that it is beneficial for parties and their counsel to confer regarding the preservation of ESI early in the litigation. The court also recommends that, after preservation has been addressed, counsel for all parties confer about the scope and timing of ESI discovery.

The Delaware Court of Chancery’s guidelines follow on the heels of several recent federal court opinions addressing the preservation and spoliation of ESI. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*,¹ Judge Scheindlin levied sanctions against many of the litigants for discovery failures and created guidelines for issuing and enforcing legal holds, discharging preservation obligations, and documenting discovery efforts. As with the *Pension Committee* decision, Judge Lee Rosenthal, in *Rimkus v. Cammarata*,² issued a decision providing guidance on how federal courts in the Fifth Circuit should approach ESI preservation failures and the various sanctions permitted for such failures. Continuing in the judicial debate is Magistrate Judge James C. Francis’s opinion in *Orbit One Communications, Inc. v. Numerex Corp.*,³ in which he disagrees with some of Judge Scheindlin’s *Pension Committee* guidelines. In *Orbit One*, the court denied a motion for sanctions and held that the inadequacy of preservation efforts alone is not always sufficient to warrant sanctions and that proof of relevance can also be a determining factor for courts in deciding discovery sanctions.

While the federal case law continues to develop, the Delaware Court of Chancery has firmly established the importance of preserving ESI in that jurisdiction.

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1. *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

2. *Rimkus v. Cammarata*, 07-cv-00405 (S.D. Tex. Feb. 19, 2010).

3. *Orbit One Communications, Inc. v. Numerex Corp.*, 2010 WL 4615547 (S.D.N.Y. Oct. 26, 2010).

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