

DELAWARE COURT OF CHANCERY AMENDS ITS RULES AND INTRODUCES NEW DISCOVERY GUIDELINES

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Beginning on January 1, 2013, amendments made to Delaware Court of Chancery Rules 26, 30, 34 and 45 regarding discovery and the adoption of Rule 5.1 became effective "to account for modern discovery demands" regarding electronically stored information ("ESI") and to "bring the Court's rules in line with current practice."¹ Most significantly and largely following the Federal Rules of Civil Procedure, subsection (d) was added to Rule 34 to address production requests of ESI and subsection (d)(1) to Rule 45 to account for subpoena requests of ESI. Additionally, Rule 5(g) was deleted and replaced by Rule 5.1 in order to update the court's handling of confidential filings.

In conjunction with these amendments, the court also expanded its Guidelines for Practitioners, originally released in January 2012 and reprinted in the *Delaware Journal of Corporate Law*,² to include guidelines regarding discovery and in particular, ESI (the "Discovery Guidelines"). The Discovery Guidelines can be found in Section 7, reproduced herein.

The Discovery Guidelines explain the Court's expectations regarding parties' responsibility to confer early and often regarding discovery, "including about electronic discovery procedures, the overall scope of discovery, preferred procedures for collection and review of discoverable material, including ESI, the privilege assertion process, and the role of Delaware counsel in the discovery process."³ The Court also developed guidelines for expedited discovery in advance of a preliminary injunction hearing. These new guidelines encourage communication among counsel and are intended to assist the Bar in developing reliable and transparent procedures for electronic discovery. The Discovery Guidelines certainly move the Delaware practice to the "front of the line" compared to other

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¹Press Release, Delaware Court of Chancery, Court of Chancery Announces Rule Changes and New Discovery Guidelines (Dec. 4, 2012), *available at* <http://courts.state.de.us/Chancery/rulechanges.stm>.

²Guidelines to Help Lawyers Practicing in the Court of Chancery, <http://courts.delaware.gov/chancery/docs/CompleteGuidelines.pdf>, *reprinted in* 37 DEL. J. CORP. L. 601 & 1003 (2012-13) [hereinafter "Chancery Guidelines"].

³Press Release, Delaware Court of Chancery, *supra* note 1.

states by providing structure for addressing ESI and at the same time encouraging lawyers to be flexible, cooperative, transparent and proactive when it comes to the handling of ESI in Court of Chancery matters – expedited or otherwise.

I. HIGHLIGHTS OF THE GUIDELINES FOR EXPEDITED DISCOVERY IN
ADVANCE OF A PRELIMINARY INJUNCTION HEARING

Role of Delaware Counsel in Expedited Discovery

Another major theme in the Discovery Guidelines is the emphasis of the role of counsel and in particular Delaware counsel in the discovery process. With respect to expedited litigation, the Discovery Guidelines state that "[o]utside litigation counsel should actively oversee the collection of documents. As in any other case, the Court expects Delaware counsel to play an active role in the collection, review and production of documents in expedited litigation."⁴ The Discovery Guidelines also note that "[t]he Court expects outside litigation counsel actively to oversee document collection, review and production pursuant to a reasoned process designed to result in the prompt production of the documents necessary for a fair presentation of the dispute to the Court."⁵

Written Discovery

It is the typical practice in expedited cases seeking a preliminary injunction that written discovery is limited to document requests, as well as narrowly-tailored interrogatories intended primarily to identify persons with relevant knowledge. The Discovery Guidelines note that in order to facilitate prompt responses to written discovery requests and the production of information, "the plaintiff should serve its initial written discovery requests with the complaint or a motion to expedite (or if not feasible, as soon as possible thereafter)."⁶ In addition, while the parties are free to be flexible and forego formal responses to discovery in favor of devising discovery plans that meet the needs of the case, in order to avoid misunderstandings or delays, the Discovery Guidelines note that "responses

⁴Chancery Guidelines, *supra* note 2, at 22-23, *reprinted in* 37 DEL. J. CORP. L. at 1036.

⁵*Id.* at 23, *reprinted in* 37 DEL. J. CORP. L. at 1037.

⁶*Id.* at 21, *reprinted in* 37 DEL. J. CORP. L. at 1034.

and objections to document requests, whether formal or informal, should make clear what categories of documents will be produced."⁷

Document Collection

While the expedited nature of preliminary injunction applications dictates what is deemed to be "reasonable" by the Court, the Discovery Guidelines note that the Court expects the parties to discuss limitations on expedited discovery. Transparency is key in terms of the parties exchanging information concerning the scope of their respective document collections (*e.g.*, what documents are being collected, how they are being collected, what computers or other electronic devices are being searched, and any search terms or other restrictions being utilized to collect documents). The Discovery Guidelines state that "counsel should interview the custodians from whom they have collected to understand, among other things, any potential sources of relevant documents (*e.g.*, centralized document repositories or systems, PDAs, work and home computers), determine the records that are kept in the ordinary course, and identify any relevant jargon, acronyms or code names."⁸

With respect to what discovery is done after a request for a preliminary injunction is filed, the Discovery Guidelines state:

- The parties should collect and produce the "core documents" associated with that application promptly;
- The parties should identify the key custodians and prioritize information collection efforts on those custodians (note that the Discovery Guidelines refer to *custodians* and not key players – this is an important distinction);
- Each party should make a good faith, reasonable attempt to identify the custodians who are reasonably likely to possess relevant documents;

⁷*Id.* at 21, *reprinted in* 37 DEL. J. CORP. L. at 1034.

⁸Chancery Guidelines, *supra* note 2, at 22, *reprinted in* 37 DEL. J. CORP. L. at 1036.

- The parties should also collect from any centralized document repository or system that is likely to contain relevant documents (*e.g.*, document management systems, sharepoints, central files) even if there is an agreement to limit discovery to a certain number of custodians;
- If search terms are utilized to identify potentially relevant information, the parties should make a good faith, reasonable attempt to negotiate those terms with the opposing parties; and
- With respect to form of production, while the Court does not require documents to be produced in a particular format, the parties are expected to cooperate to produce documents in a format that is usable to the parties. The Discovery Guidelines do note that unless there is an agreement between the parties, it is not necessary to provide OCR (optical character recognition) versions of the data.

II. GUIDELINES FOR THE COLLECTION AND REVIEW OF DOCUMENTS IN NON-EXPEDITED LITIGATION

Role of Delaware Counsel in Document Collection Process

The Court of Chancery has been telling practitioners for some time that it expects Delaware counsel to play an active role in the discovery process. The Discovery Guidelines clarify the role by noting that Delaware counsel should be involved "in the collection, review and production of documents, and in the assertion of privilege."⁹ The level of involvement is highlighted where the Discovery Guidelines state that:

If Delaware counsel does not directly participate in the collection, review and production of documents, Delaware counsel should, at a minimum, discuss with co-counsel the Court's expectations. In addition, Delaware counsel should be

⁹*Id.* at 16, reprinted in 37 DEL. J. CORP. L. at 1027.

involved in making important decisions about the collection and review of documents and should receive regular updates, preferably in writing, regarding the decisions that are made on key issues, such as the selection of custodians and search terms. The Court expects Delaware counsel to be able to answer questions regarding the manner in which the document collection and review was conducted. It is therefore recommended that Delaware counsel and co-counsel collectively maintain a written description of the discovery process, including detailed information regarding efforts to preserve documents, custodians identified, search terms used, and what files were searched.¹⁰

The Discovery Guidelines contain an example of a checklist or outline "to assist counsel in developing a sound document collection process."¹¹ The checklist or outline is not intended to mandate a protocol for every case, nor is it intended to be exhaustive. It is meant as a starting point and will need to be modified to fit the facts of a particular case.

Early Case Assessment, Meet and Confer, and Transparency

While there is no formal Rule 26 "meet and confer" requirement under the Court of Chancery Rules like there is in the Federal Rules, the Court of Chancery moves closer to one with the Discovery Guidelines which encourage counsel to meet and confer promptly after the start of discovery to develop a discovery plan that includes electronic discovery. It is important to note that the Discovery Guidelines promote transparency regarding the process and parameters used to collect documents (*e.g.*, the custodians, electronic search terms, cutoff dates used, and steps taken) which the Court views as "essential to (i) identify potential areas of disagreement early in the process, and (ii) provide some protection to parties if problems later arise. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes."¹²

¹⁰*Id.*, reprinted in 37 DEL. J. CORP. L. at 1027-28.

¹¹*Id.* at 17, 37 DEL. J. CORP. L. at 1028.

¹²Chancery Guidelines, *supra* note 2, at 15, reprinted in 37 DEL. J. CORP. L. at 1025.

Another "hot topic" in the Court of Chancery practice recently is "who" must or should do the actual collection of ESI. In the past, the Court has expressed concern when "interested" individuals were solely responsible for identification, preservation, collection or review of their own information. The Discovery Guidelines clarify that issue by noting that "experienced outside counsel should be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced. In addition, as a general matter, the Court prefers that, whenever practicable, outside counsel or professionals acting under their direction will conduct document collection and review."¹³

III. ASSERTION OF PRIVILEGE, THE CREATION OF A PRIVILEGE LOG AND THE ROLE OF DELAWARE COUNSEL

The area of privilege and privilege logs was addressed in both the expedited and non-expedited guidelines. This area garnered so much attention primarily because – thanks to ESI, it is now the most expensive and most confusing part of discovery. How to handle privilege in the age of digital information can be very taxing. There is a significant amount of confusion in the creation of the log in part because we are using "paper-based" reasoning to handle ESI and what we end up with is unsatisfactory at best from all points of view – clients, counsel and the court.

The Discovery Guidelines clarify some of the confusion about privilege logs by noting the priority that privilege logs must now take. The Discovery Guidelines focus on senior lawyers in the case (and especially senior Delaware lawyers) who **must** provide guidance about the assertion of privilege and must also make certain that the guidance provided was actually implemented. While the Discovery Guidelines note that senior lawyers are not being required to personally conduct the privilege review or prepare the privilege log, they must take reasonable steps (sampling, for example) to ensure that privilege only has been asserted in accordance with a good faith reading of Delaware law, and that there has not been systematic over designation. The Discovery Guidelines specifically note that "the senior Delaware lawyers must personally assure themselves that the privilege

¹³*Id.*, reprinted in 37 DEL. J. CORP. L. at 1026.

assertion process has been conducted with integrity. What does this mean in practice? It means that when there is a hearing in the Court, a senior Delaware lawyer must be able to take the podium, explain the basis for the assertion of a disputed claim of privilege, and be knowledgeable about the privilege assertion process."¹⁴

The Discovery Guidelines do provide suggestions for handling privilege log issues:

1. The parties are not expected to log post-litigation communications.
2. The parties are free to agree to log certain types of documents by category instead of on a document-by-document basis.
3. With respect to e-mail chains, parties should attempt to agree on the procedures that both sides will use.

The assertion of privilege and the creation of a privilege log has been the subject of a great deal of discussion and debate in the age of digital information due to the enormous and disproportional cost and time associated with handling privilege review and preparing a privilege log. The clear message from the Court through the Discovery Guidelines is that the parties can be flexible and creative in this area. In particular the Discovery Guidelines say that "[t]he Court encourages the parties to make agreements that reduce the time, expense and burden associated with conducting a document-by-document privilege review"¹⁵ Flexibility here is important. Indeed, there does not appear to be any limitation in the Discovery Guidelines as to how creative the parties can be in this area even to the point where the parties could agree to forego the need for any privilege log. This "*say no to privilege logs*" trend is gaining momentum in many jurisdictions as a way to hold down the skyrocketing costs of addressing privilege and privilege logs.

¹⁴*Id.* at 18, reprinted in 37 DEL. J. CORP. L. at 1029-30.

¹⁵*Id.* at 23, reprinted in 37 DEL. J. CORP. L. at 1038.