

## **E-Discovery Default Standards Revised for Del. Federal Court**

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*Special to the DLW*

In March 2007, the default standard for discovery of electronically stored information for the U.S. District Court for the District of Delaware ("default standards") was updated by the court's ad hoc committee for electronic discovery led by Chief Judge Sue L. Robinson.

The initial version of the default standards was promulgated about three years ago and was summarized in an article published in the *Delaware Law Weekly* on Sept. 15, 2004, available at the following link:

<http://www.delawarelitigation.com/2005/05/articles/selected-articles-by-francis/a-short-overview-of-recent-developments-in-electronic-discovery/>.

The update of the standards was triggered by the amendments to the Federal Rules of Civil Procedure ("federal rules" or "FRCP") relating to electronic discovery, that became effective on Dec. 1, 2006. The new amendments and committee notes are available at this link:

[http://www.klgates.com/FCWSite/DATG/Rules\\_with\\_Notes.pdf](http://www.klgates.com/FCWSite/DATG/Rules_with_Notes.pdf).

The purpose of this short article is simply to highlight the key changes recently made to the default standards. It is important to emphasize that the default standards are not part of the official local rules of the U.S. District Court for the District of Delaware, but instead have been promulgated by Chief Judge Robinson for use by those judges of the court who choose to apply them and as guidance for counsel.

The revisions to the default standards, few in number, are minor changes mainly to conform to the language of the amendments to the FRCP. No real substantive changes were necessary because the default standards have been "ahead of their time" in terms of creative approaches to address e-discovery issues and reduce the burden on the court with e-discovery disputes. Since its inception in 2004, the Delaware default standards have served their intended purpose of getting parties to focus on e-discovery issues and solutions earlier in the litigation process – the same goal as the amendments to the FRCP.

### **Highlights**

The default standards are in the format of numbered paragraphs. In paragraph 2, instead of the words "electronic materials," the phrase that is now used in the amended Federal Rules, "electronically stored information" (ESI), has been

substituted. A redlined version of the updated default standards to indicate the changes compared to the original version from 2004 is available at the following link:

<http://www.delawarelitigation.com/2007/04/articles/commentary/new-default-standards-for-electronic-discovery-in-us-district-court-in-delaware/>.

Paragraph 2 has also been updated to define more clearly ESI that “is not reasonably accessible” in order to conform to the descriptions in the amended Federal Rules.

Paragraph 4 of the default standards was amended to make it clear that initially only ESI that is “reasonably accessible” must be reviewed and produced after receiving a request for production. Moreover, paragraph 4 was clarified to make it clear that ESI that is “not reasonably accessible” need not be searched *until* the initial search is completed and *unless* “good cause” is shown for the need to produce ESI that can only be found with “limited accessibility.” Likewise, requests for on-site inspection of ESI pursuant to Rule 34(b) shall be reviewed to determine “where good cause and specific need have been demonstrated.”

Probably the most significant change in the default standards is in paragraph 6 which clarifies the format in which ESI is to be produced, as “text searchable image files” (e.g., PDF or TIFF). After the text searchable image file format is produced, a party must “demonstrate particularized need” if a native format is requested. It should be noted that the duty to preserve relevant information (including metadata) exists even though one may only be producing image files. *See generally, Wyeth v. Impax Laboratories Inc.* 2006 WL 3091331 (D.Del. 2006) (Farnan, J.) (this decision pre-dates the revisions to the Federal Rules but is noteworthy at least to the extent it applies the default guidelines to an issue about the disputed format for production of ESI.)

Paragraph 7 was revised to refer to ESI as opposed to “electronic documents.” This paragraph also requires counsel for each party to file with the court a “statement of compliance” that steps have been taken to ensure that e-mail of identified custodians are not permanently deleted in the ordinary course of business and that all other ESI will not be altered.

Lastly, paragraph 8 makes it clear that ESI that contains privileged matter or attorney work product *shall be immediately returned* “if such information appears on its face to have been inadvertently produced or if there is notice of the inadvertent production within 30 days of such notice.”

In December 2006, the amendments to the FRCP were implemented to address a number of important areas – the most important of which is to get the parties to focus very early on in the litigation (and in some cases before the litigation starts) on issues regarding the existence, form of production and the

preservation of ESI. The key amendments include: (i) Rule 26(b)(2) – what information is “not reasonably accessible;” (ii) Rule 33(d) – requesting party’s inspection of data which is identified as relevant by the responding party; (iii) Rule 34(a) – the requesting party asking for an opportunity to test or sample information not reasonably accessible; (iv) Rule 34(b) – the form of production and in particular relating to archived or legacy systems; and (v) Rule 37(f) -- “safe harbor” to avoid or limit the sanctions under the FRCP for the loss of ESI as a result of “routine, good faith” operation of a party’s information systems. It is important to note that the duty to preserve relevant information was not addressed by the amendments.

### Other Delaware Courts

The Delaware Superior Court rules committee is considering whether to make any changes to its rules of procedure regarding electronic discovery. The Delaware Chancery Court at the time of this writing is not expected to amend its rules to address specifically electronic discovery issues.

There is a wealth of information available regarding electronic discovery in general. For example, the U.S. Conference of Chief Justices prepared a publication that provides an excellent overview of basic electronic discovery concepts, which is available at the following link: <http://www.delawarelitigation.com/2006/12/articles/commentary/ediscovery-guidelines/>. In addition, the Federal Judicial Center recently published a guide for federal judges with an overview of electronic discovery matters, which is available at: <http://www.delawarelitigation.com/E-discGuidefor%20Judges.pdf>. •

Published 05-16-07

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