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**BNA INSIGHT**

Connolly Bove Lodge & Hutz LLP partners Kevin F. Brady and Chad Stover analyze Delaware's newly revised Default Standard for Discovery Including Electronically Stored Information.

## Delaware's Revised Default Standard for Discovery Emphasizes Need for Party Cooperation, Proportionality



BY KEVIN F. BRADY AND CHAD STOVER

The District of Delaware recently revised its Default Standard for Discovery Including Electronically Stored Information (the "Revised Default Standard"), which applies if the parties are unable to reach agreement on various discovery issues. This is the third version of the default standard.

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**History.** Judge Sue L. Robinson and a committee of practitioners created the first version in 2004, and then in early 2007, the default standard was revised to reflect the December 2006 changes to the Federal Rules of Civil Procedure. The current revision was initiated at the request of Judge Robinson and Magistrate Judge Mary Pat Thyng and drafted by them along with a committee of practitioners and in-house counsel.

The Revised Default Standard updates the default rules regarding electronically stored information (ESI), taking in consideration changes in technology, as well as problems the Court and litigants have experienced in handling ESI issues and problems.

The Revised Default Standard expressly covers preservation of discoverable information, privilege logs, the initial discovery conference, initial disclosures, and electronic discovery procedures. In addition, with the heavy docket that the District of Delaware has in terms of patent cases, there are specific procedures related to initial infringement and invalidity contentions in patent cases.

But, more broadly, the Default Standard for Discovery reiterates the Court's expectation that litigants will meet and confer early in the litigation about all aspects of discovery, and that the parties will agree on reasonable limits to discovery that are proportional and tailored to the parties and the issues.

**Significance of 'Default'.** It is also important to reiterate that this is a "default" standard. Parties are free to look at other jurisdictions for guidance on to how to address ESI issues, such as the Southern District of New York's E-Discovery Pilot Program, the Seventh Circuit E-Discovery Pilot Program, or the Federal Circuit's Model Order for E-Discovery in Patent Cases. In the end, however, if the parties cannot agree, the Revised Default Standard will control.

Some of the key features of the Revised Default Standard include:

### Preservation

- The parties shall preserve non-duplicative discoverable information currently in their possession, custody, or control, but no modification of back-up or archival procedures is required absent a showing of good cause.

- The Court has identified specific categories of ESI in Schedule A to the Standard that presumptively need *not* be preserved absent a showing of good cause. The list includes, among other things, deleted data, slack space, RAM, data in metadata fields that are frequently updated automatically, transient data such as temporary internet files, and instant messages (IM) that are not ordinarily printed or maintained in a server dedicated to IM. This puts the requesting party on notice and shifts the burden onto the party requesting documents to advise the other side of the information it wants to have preserved.

### Search Terms and Production Issues

- Search terms, if used, shall be disclosed by the producing party. The requesting party may request up to 10 additional "focused" terms.

- Search terms shall be used on non-custodial data sources and e-mails and other ESI maintained by the 10 custodians most likely to have discoverable information.

- No on-site inspection of electronic media is allowed absent a showing of specific need and good cause.

- Format of production:

- ▶ Litigants must produce single-page TIFF images and associated multi-page text files containing extracted text or OCR with Concordance and Opticon load files with metadata;

- ▶ Litigants may only produce native versions of files not easily converted to image format, such as Excel and Access files;

- Litigants must preserve and produce the following metadata to the extent it exists:

- ▶ Custodian;

- ▶ Filename, File Path, File Size, File Extension, MD5 Hash;

- ▶ Author, E-mail Subject;
- ▶ Conversation Index;
- ▶ From, To, CC, BCC;
- ▶ Date Sent, Time Sent, Date Received, Time Received, Date Created, Date Modified;
- ▶ Control Number Begin, Control Number End, Attachment Range, Attachment Begin, and Attachment End (or the equivalent thereof).

### Privilege Logs

- The parties must meet and confer about privilege logs, whether certain categories of information can be excluded from the logs, and whether alternatives to document by document logs can be exchanged.

- The default rule is that parties need not log information generated after the filing of the complaint.

- Preservation efforts are protected by the work product doctrine.

- The parties must confer on a non-waiver order. *See Fed. R. Evid. 502.* The default rule is that privileged information, if produced, must be returned if it appears on its face to have been inadvertently produced or if notice of inadvertent production is provided within 30 days.

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**There is an over-arching theme of cooperation, proportionality, reasonableness, and collaboration that is reflected throughout the Revised Default Standard.**

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### Custodians and Initial Disclosures

- Initial disclosures must contain the following:

- ▶ The party's 10 custodians most likely to have discoverable information, ranked from most to least likely.

- ▶ A list of non-custodial data sources (*e.g.*, enterprise systems, databases, Sharepoint, etc.) from most likely to contain discoverable information, ranked from most to least.

- ▶ Notice of (i) any ESI that is not reasonably accessible, (ii) third party discovery, and (iii) information subject to third-party privacy concerns or that may need to be produced from outside the United States.

It is significant that the Revised Default Standard refers to *custodians* and not *key players*. While it is important to identify the key players early on in the litigation, it is assumed that the key players related to the litigation will be disclosed in the initial disclosures and discussed at the Rule 26(f) meet and confer.

### Discovery in Patent Cases

For the District of Delaware's large and ever-expanding docket of patent cases, the Revised Default Standard contains some specific procedures for initial

discovery. These procedures may seem familiar to some litigants with a recent multi-defendant case before Judge Sue Robinson, who has used similar procedures in some of these cases. The default initial discovery is as follows:

(1) Within 30 days of the scheduling conference, the patentee shall identify the accused products and the asserted patents, and produce the file history for each patent.

(2) Within 30 days of (1), the accused infringer(s) shall produce core technical documents (operation manuals, product literature, schematics, and specifications) related to the accused products.

(3) Within 30 days of (2), the patentee shall produce an initial infringement claim chart relating each accused product to the asserted claims.

(4) Within 30 days of (3), the accused infringer(s) shall produce initial validity contentions for each asserted claim, with invalidating references.

These procedures are similar to the infringement and invalidity contentions required in the local patent rules

adopted in many jurisdictions, such as the Northern District of California and the Eastern District of Texas. As emphasized in a footnote, this discovery is “initial” and may be supplemented, which is not always the case under local patent rules.

Finally, the Standard provides that discovery in patent cases is limited to the period extending six years before the filing of the complaint, except as to asserted prior art, conception, and reduction to practice.

## Conclusion

There is an over-arching theme of cooperation, proportionality, reasonableness, and collaboration that is reflected throughout the Revised Default Standard. The Court wants the parties to work together to come up with reasonable solutions for handling ESI, especially in some of the more important areas such as privilege logs where the Court is looking to the parties to reduce the enormous time and expense that is devoted to creating privilege logs dealing with ESI.