COURT OF CHANCERY GUIDELINES FOR THE COLLECTION AND REVIEW OF DOCUMENTS IN DISCOVERY

The goal of these Guidelines is to remind practitioners about the importance of the careful collection and review of documents (which, for the purposes of these Guidelines, includes electronically stored information) in proceedings before the Court of Chancery. The Court has been, and remains, reluctant to adopt a "one-size-fits-all" approach to the collection and review of documents, especially given the variety of cases that come before the Court, where the issues, complexity, timing, relief sought and resources of the parties may differ dramatically. The Court also is mindful of the considerable burdens of collecting documents for review and production, and the potential leverage that these obligations can create in litigation. Thus, it seeks to remain flexible, reasonable and efficient in resolving discovery disputes. To help practitioners, a few observations and problem areas are discussed below.

a. The Court encourages counsel to meet and confer promptly after the start of discovery to develop a discovery plan that includes electronic discovery. Transparency to the other parties regarding the process and parameters used to collect documents (*e.g.*, the custodians, electronic search terms, cutoff dates used, and steps taken) is 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.

b. When interested persons are responsible for the collection or review of their own documents for purposes of production, the reliability of the process is more likely to be questioned. Accordingly, 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. As with many discovery issues, a goose and gander discussion often helps parties reach a reasonable balance fitting to the particular case.

c. Among other things, the procedures used to collect and review documents generally should include interviews of custodians who may possess responsive documents to identify how the custodians maintain their documents and the potential locations of responsive documents, including the files and computers of administrative or other personnel who prepare, send, receive or store documents on behalf of the custodians.

d. Unlike paper documents, electronically stored information is susceptible to modification or deletion during collection. Therefore, counsel should exercise care in developing appropriate collection procedures. In that regard, counsel should be mindful of the obligation to take reasonable steps to preserve information, including electronically stored information, which is potentially relevant to the litigation. Counsel also should consider issues of burden and expense, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the relative importance of the various issues at stake in the litigation.

The Court is aware that in order for litigation to produce justice, the costs of the litigation must be proportionate to what is at stake. That awareness applies with special force to the subject of electronic discovery. Precisely because the extent of electronic discovery that is appropriate depends on case-specific factors, the Court has been reluctant to adopt mandatory requirements that may be unjust because they require expenditures that are unduly costly given the subject of a particular case. But because the Court has eschewed a mandatory approach, it is essential and not optional that the parties discuss this subject directly and try to reach a case-specific accord based on a candid appraisal of the information base each side has, the costs of employing various electronic discovery techniques, and the stakes at issue in the case. Through this process of good faith information sharing and give and take, plus application of the goose and gander rule, counsel should usually be able to fashion an effective, if necessarily imperfect approach. Given the reality of how most business is conducted and even how most of us generate information in our personal lives, it is unlikely that the subject of electronic discovery can be avoided in any class of cases altogether. Most relevant evidence will have been created electronically in the first instance and in the case of e-mails often never printed out in paper form. But the extent to which the parties will go to retrieve information electronically is a subject for good faith, case-specific consideration and counsel are expected to apply common sense judgment. And that especially applies when one party in a case has virtually no discovery burden. That advantaged position does not license the party to expect the other party that will have substantial production burdens to use means of electronic discovery that are disproportionate to the economics of the matter.

e. The Court expects Delaware counsel to play an active role in the discovery process, including in the collection, review and production of documents, and in the assertion of privilege. 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 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. A document can be found at Exhibit 10 that is intended to assist counsel in developing a sound document collection process. Exhibit 10 is not intended to mandate issues to consider in every case, nor is it intended to be an exhaustive list of all issues that should be considered in any particular case.

f. One of the most difficult parts of the discovery process involves reviewing documents for privilege, determining under the time pressure of discovery deadlines whether a document is privileged, and preparing the resulting privilege log. In the first instance, more junior lawyers typically are required to make the initial judgment calls about which documents might be subject to a claim of privilege. Understandably, lawyers are concerned about making a mistake and producing a privileged document. This often leads to a tendency to overdesignate documents as privileged, including by designating as privileged every document received or sent by anyone who is an attorney or any document that refers to an attorney, even though the attorney may not

have been acting as an attorney and the communication may not have been for the purpose of facilitating the provision of legal advice. Likewise, preparing a privilege log is a professionally difficult task, because it requires the lawyer to describe the basis for the application of the privilege sufficiently so that the party seeking disclosure can understand the basis of the privilege assertion, but without disclosing the very information the privilege legitimately protects.

i. Precisely because of these difficulties, and because disputes about the improper assertion of privilege are common, the senior lawyers in the case, especially senior Delaware lawyers, must provide guidance about how the privilege assertion process should unfold. That includes guidance about: 1) the Delaware standards for asserting any privileges the client wishes to assert; 2) protocols for identifying the initial cut of documents that warrant a closer review for privilege; 3) protocols for ensuring that the Delaware standards are applied with fidelity when determining that specific documents are exempt from production on privilege grounds; and 4) the Delaware requirements for setting forth on a privilege log sufficient information about the document to enable the opposing party and the court fairly to assess whether privilege properly has been asserted. Senior lawyers, including senior Delaware lawyers, should make the final decisions on difficult privilege questions. As important, senior lawyers, including senior Delaware lawyers, must ensure that the guidance provided was actually put into practice and followed. Although this does not mean that senior lawyers must personally conduct the privilege review or prepare the privilege log, they must take reasonable steps to ensure that privilege only has been asserted in accordance with a good faith reading of Delaware law, that there has not been systematic overdesignation, and that the privilege log contains sufficient descriptions of the documents in question. One possible approach to fulfilling this duty would be for a senior Delaware lawyer to review a representative sample of the entries on the privilege log and associated documents in order to assess compliance with Delaware law and practice. By this or other means, the senior Delaware lawyers must personally assure themselves that the privilege 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.

ii. Even more so than with other areas of discovery, it is essential to communicate with clarity about the assertion of privilege with your friends on the other side of the "v." Through the process of give-and-take, the parties often can minimize some of the burdens and the common misunderstandings in the privilege assertion process that lead to motion practice. Here are some suggestions:

1) The Court generally does not expect parties to log post-litigation communications. Although there may be exceptions, particularly in an injunction proceeding in a still-developing situation, frequently parties should be able to use the date on which suit was filed as a cutoff for privilege review.

2) It may be possible for parties to agree to log certain types of documents by category instead of on a document-by-document basis. Categories of documents that might warrant such treatment include internal communications between lawyer and client regarding drafts of an agreement, or internal communications solely among in-house counsel about a transaction at issue. These kinds of documents are often privileged and, in many cases, logging them on a document-by-document basis is unlikely to be beneficial.

3) There are different approaches to logging email chains and email attachments. Some lawyers typically log only the top email in the chain. Others log every email in the chain. Some lawyers describe the attachment separately. Others allow the logging of the e-mail to suffice. Parties should attempt to agree on the procedures that both sides will use.

4) Different cases may warrant different approaches to redactions. Often redacted copies are produced and a redaction log provided. Depending on what is at stake and is cost-effective, the parties may agree that each side will withhold the entirety of a document if any part of the document is subject to a bona fide claim of privilege. Parties also may agree to dispense with a log for partially redacted emails or other communications where the face of the document provides the factual information that otherwise would appear on a log.

iii. When logging documents on a document-by-document basis, parties should bear in mind that a privilege log must describe the document being withheld in such a way that, without revealing information that is itself privileged or protected, the opposing party and the Court can assess the propriety of the asserted basis for withholding the document. It is the exceedingly rare, perhaps apocryphal, description that actually reveals the substance of underlying legal advice. The guiding principle for privilege logs is to provide opposing parties with sufficient information to allow them to challenge decisions to withhold documents for privilege. It is therefore inconsistent with that principle, and with the spirit of these guidelines, for parties who receive a proper privilege log to use it as the basis for a claim that the generation of the privilege log waived privilege in any way. The Court discourages use of a short list of repetitive descriptions. Descriptions should be document-specific, and should provide context so that the reader can understand the basis for the claim of privilege. Therefore, if the privilege in question is the attorney-client privilege, the log should explain the basis for the assertion of privilege and provide a brief identification of the issue involved. Whether the information provided in a privilege log is sufficient may depend on the nature of the claims in the litigation. Rote repetition of "Communication for the purpose of providing legal advice" is not adequate. "Communication for the purpose of providing legal advice regarding securities laws," on the other hand, might be adequate. Similarly, in a case challenging a merger, where both legal and business issues are in play, "Communication for the purpose of providing legal advice regarding merger" is not adequate. But

"Communication for the purpose of providing legal advice regarding terms of draft merger agreement" might be adequate. If the individuals drafting and reviewing the log have difficulty describing the role of the lawyer or why the issue is primarily a legal one on which legal advice was sought or given, that may be an indication that the communication is not privileged. It may instead be a general business discussion on which a lawyer was included, a factual update, a cover email attaching documents, or an effort to schedule a conference call or a meeting. The requirement of a meaningful description thus not only provides necessary information to the other side, but also serves as a check on overdesignation.

iv. The parties should provide information about the individuals identified on the log, including whether they are attorneys, their titles, and their affiliations. The members of the Court have seen too many logs containing names without any identifying information about who is a lawyer and who works for whom. If third parties are recipients or authors of a document, the privilege assertion should address how their relationship with the client or counsel justifies maintaining the privilege (*e.g.*, is there a common interest exception or is the third-party a qualified advisor whose access to privileged communications is permissible). Additional detail and context will be necessary in certain other situations, such as, if someone is acting both as a business person and lawyer. In many situations where lawyers have mixed roles, counsel will have to segregate the privileged portions of communications from those that are non-privileged.

v. To prepare a privilege log with integrity requires the involvement of senior lawyers who know the applicable standards, understand the precise roles played by the client representatives, and have the relationship and stature with the client to discuss documents frankly and make principled assertions of privilege. This is particularly true of the *many* common situations when a document is only partially subject to a claim of privilege (such as a portion of corporate minutes) and where the bulk of the document should be produced if responsive.

g. The goose and gander rule is typically a good starting point for constructive discovery solutions. Through good faith discussion, the parties will better understand the basis for each other's production of privileged documents, reduce disputes based on misunderstandings, and foster a more efficient production process.