



INTRODUCTION

This is the latest issue of the NAGTRI E-Discovery Bulletin, a compendium of recent case law, publications and legislation pertaining to electronic discovery issues to be published monthly. It is supported by the National Association of Attorneys General Training and Research Institute (NAGTRI) and written by Hedda Litwin, Cyberspace Law Counsel. The Bulletin welcomes articles and information from its readers for upcoming issues.

COMING THIS YEAR: CHANGES TO RULE 26

A proposed amendment to Rule 26 is now under consideration by the U.S. Supreme Court. The amendment would extend the scope of the work-product doctrine to include draft expert reports and almost all communications between experts and counsel. Pursuant to statute, the Court has until May 1 of this year to send prescribed amendments to Congress. After that date, the amendment will take effect as a matter of law.

The proposed amendment would “apply work-product protection to the discovery of draft reports by testifying expert witnesses, and, with three important exceptions, communications between those witnesses and retaining counsel.” The three exceptions would provide for discovery of communications between counsel and expert as to: “1) compensation for the expert’s study or testimony; 2) facts or data provided by the lawyer that the expert consid-

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ered in forming an opinion; and 3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.”

In support of the amendment, the Judicial Conference referred to evidence that lawyers spend significant time in a deposition trying to find evidence that the expert’s opinion was influenced by the retaining lawyer, rather than on the substantive strength of his or her opinion. Also presented was evidence that both lawyers and experts were taking “elaborate steps to avoid creating any discoverable record,” going as far as retaining two experts – one who would develop the opinion and one who would actually testify.

The Conference also cited New Jersey’s success in implementing a rule similar to the proposed amendment. Concerns had been raised that the proposed amendment could “prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert’s services,” but the Conference decided that “the best means of scrutinizing the merits of an expert’s opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues.”

The Report of the Judicial Conference discussing all proposed amendments can be accessed at http://www.uscourts.gov/rules/Reports/Combined_ST_Report_Sept_2009.pdf.

RECENT COURT DECISIONS

Spoilation and sanctions are always hot topics during our remote e-discovery trainings, so this issue we focus on these issues in our caselaw section,

SANCTIONS: DISMISSAL OF CLAIMS

Bray & Gillespie Mgmt, LLC v. Lexington Ins. Co., 2010 WL 55595 (M.D. Fla. January 5, 2010). The U.S. District Court for the Middle District of Florida found dismissal of the claims arising from or related to the spoliation appropriate and ordered payment of expenses and costs as well. In this insurance litigation, Bray & Gillespie claimed they were unaware of an automatic function of their computerized accounts management system that archived records after six months. Lexington moved for sanctions, and denied Bray & Gillespie's request to be allowed to cure the production defect without sanctions. The court cited Bray & Gillespie's duty of preservation, failure to consult its software provider to attempt to retrieve the archived documents and the minimal effort and expense required for retrieval. The court also noted that its orders regarding discovery were "clear, unambiguous and frequent" and that Bray & Gillespie's willful bad faith actions "evidenced a pattern of inexcusable disregard for the authority of the court."

SPOLIATION: WHETHER TO ORDER TERMINATING SANCTIONS

Rimkus Consulting Group, Inc. v. Cammarata, 2010 WL 645253 (S.D. Tex. February 19, 2010). The U.S. District Court for the Southern District of Texas found that defendants had participated in intentional spoliation of evidence, but denied terminating sanctions because the plaintiff was unable to prove a sufficiently high degree of resulting prejudice. In this case about non-compete agreements, Rimkus accused Nickie Cammarata and other former employees of spoliating relevant evidence, including ESI, and moved for terminating sanctions. The court found that Cammarata had indeed failed to preserve relevant ESI, manually deleted ESI and had given away laptops containing relevant ESI, among other things. The district court found that Cammarata had produced a large volume of evidence despite their spoliation of other ESI; that Rimkus had obtained some of the deleted evidence from other sources; and evidence revealed that some of the deleted records would have been favorable to Cammarata anyway. Therefore, the court concluded that the resulting prejudice was "far from irreparable," which is the necessary showing to justify terminating sanctions. Instead, the court ordered that an adverse inference instruction be given to the jury. The instruction would allow them to determine whether the destruction was intended to prevent the use of the deleted evidence at trial and, if so, would allow the jury to further determine whether to infer that the content of the deleted evidence would have been unfavorable to the defendants. The court also ordered monetary sanctions and ordered Cammarata to pay Rimkus' reasonable costs and attorneys fees "required to respond to the spoliation."

Ed. Note: This case is a good read because of the court's lengthy analysis of spoliation allegations.

PODCAST AVAILABLE ON EFFICIENT WAYS TO PREPARE FOR TRIAL

A podcast on new and efficient ways to prepare for trial has been released by Kroll Ontrack. The podcast will also include a discussion of the discovery order issued in Pension Committee of the University of Montreal Pension Plan v. Banc of American Securities, LLC. It can be accessed at http://www.krollontrack.com/redirect_0210_ESITrialPodcast.asp?news=US_CaseLaw_Mar_10_txt.