



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.

JUSTICE BREYER WEIGHS IN ON SEDONA COOPERATION PROCLAMATION

In a major show of support for [The Sedona Conference](#) and its Cooperation Proclamation, Justice Stephen Breyer of the United States Supreme Court has weighed in on e-discovery and written the preface to a special supplement of the [Sedona Conference Journal](#), *The Sedona Conference Journal*, Vol. 10 Supplement, Fall 2009. Here is an excerpt from the Preface by Justice Breyer:

“[The articles in this Supplement] suggest that if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy. I believe this to be a laudable goal, and

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hope that readers of this Journal will consider the articles carefully in connection with their efforts to try cases.”

RECENT COURT DECISIONS

PUBLIC RECORDS REQUESTS: METADATA

Lake v. City of Phoenix, 2009 Ariz. LEXIS 257 (October 29, 2009). In an en banc ruling, the Arizona Supreme Court decided that “if a public entity maintains a public record in an electronic format, then the electronic version, including any embedded metadata, is subject to disclosure under our public records laws.” David Lake, a Phoenix police officer, sought production of metadata associated with notes that he believed had been backdated. The city of Phoenix denied the request, arguing that metadata was not a public record. The Arizona Court of Appeals upheld the decision.

On appeal, the Arizona Supreme Court vacated the opinion, finding that the correct question before the court was not whether the metadata could be considered a public record, as pondered by the ap-

peals court. Rather, the question was whether a public record maintained in electronic format includes any embedded metadata, and the court found that it does. The court said it would be illogical, and contrary to public records law, to find that public entities could withhold information embedded in a document while they would be required to produce it if it were written manually on a paper record.

DATA ON HANDHELD DEVICES: SPOILIATION

Southeastern Medical Services, Inc. v. Brody, 2009 WL 2883057 (M.D. Fla. August 31, 2009). The U.S. District Court for the Middle District of Florida found that the individual defendants had deleted the data on their Blackberries in bad faith and ordered an adverse inference instruction to be provided to the jury. In this case involving confidential information and trade secrets, Southeastern alleged that the Blackberries belonging to individual TEI defendants Norman Brody, James Sherouse and Kevin Smith had been wiped clean of data, despite a court order to preserve all data, and requested sanctions. TEI asserted that the Blackberries were synchronized to TEI's server so that all emails sent or received from the Blackberries and the individual's email account would also reside on TEI's server and be subject to the company's normal backup and archiving process. The individual defendants were ordered to return their Blackberries, which were then given to Southeastern's forensic examiner. The examiner found no data on the Blackberries and surmised that the users had performed a data "wipe" or "hard reset." Although TEI's expert said the data could have been wiped by a third-party administrator accidentally, the district court found bad faith in the destruction of the data and that Southeastern had been prejudiced by the absence of the data. It concluded that an adverse inference jury instruction regarding the individual defendants' failure to preserve data that would have been advantageous to Southeastern was appropriate.

PRELIMINARY RESULTS OF CIVIL RULES SURVEY RELEASED

The Federal Judicial Center released preliminary results of its Case-Based Civil Rules Survey of attorneys in recently closed civil cases. The report presents findings in electronic discovery activities, case management, attorney evaluations of discovery, the costs of litigation and discovery and attorney attitudes towards specific reform proposals and the Federal Rules of Civil Procedure.

Results indicated that issues related to electronic discovery were discussed by the parties in more than 30 percent of the discovery planning conferences. The most common issues discussed were the parties' usual practices regarding retention of ESI and the format of ESI production. In ESI cases, plaintiffs tended to be requesting parties and defendants tended to be producing parties, but more than 40 percent of plaintiff attorneys and more than 50 percent of defendant attorneys reported representing both a requesting and producing party.

Problems relating to ESI occurred in about one-fourth of the cases with a request for production. The most common problem was a dispute over the burden of production that could not be resolved without court intervention. The most common uses of ESI produced in discovery were in preparing and deposing witnesses, interviewing clients and clients' employees and evaluating cases for settlement.

The full report can be accessed at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).