



NAGTRI E-Discovery

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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.

PODCAST ON ESI TRENDS AVAILABLE

A podcast on the results and core themes that emerged from Kroll Ontrack's Third Annual ESI Trends Report is now available. Also discussed will be important lessons learned with regard to corporate management of electronically stored information and e-discovery best practices. After that discussion, experts will take a look at the discovery order issued in Alamar Ranch, LLC v. County of Boise. To listen to the podcast, go to <http://www.krollontrack.com/redir/1209ESITrendsPodcast-CLU.asp?news=US CaseLaw Jan 10 txt>.

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PRESERVATION OBLIGATIONS:

LEVELS OF CULPABILITY

Pension Comm. Of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC, 2010 WL 184312 (S.D.N.Y. January 15, 2010). Judge Shira Scheindlin of the U.S. District Court of the Southern District of New York sanctioned 13 plaintiffs for negligence and gross negligence for their failure to preserve electronic files for discovery. Pension plan investors brought suit against two collapsed hedge funds based in the British Virgin Islands seeking to recover losses of \$550 million. Several defendants settled, leaving Citgo Fund Services, which was hired by the hedge funds to provide administrative services, as the chief defendant. Citgo sought sanctions against plaintiffs for failure to preserve electronic files for discovery. Judge Scheindlin found clear evidence to support the motion. She assessed monetary sanctions against all 13 plaintiffs. Additionally, she gave an adverse jury instruction to six of the worst offenders.

Ed. Note: Judge Scheindlin subtitled her 87-page opinion, "Zubulake Revisited: Six Years Later."

IMAGING HARD DRIVES: SUPPORT FOR SPOILIATION CLAIMS

Cornwell v. N. Ohio Surgical Ctr., 2009 WL 5174172 (Ohio Ct. App. December 31, 2009). In this wrongful death litigation, an Ohio Court of Appeals affirmed a lower court order allowing plaintiff's expert to image defendant's hard drives to support claims of spoliation and fraud. John Cornwall's wife suffered cardiac arrest during arthroscopic knee surgery and died. Cornwall sued the N. Ohio Surgical Center for wrongful death. Although the surgeon claimed no knowledge of Mrs. Cornwall's history of hypertension and the medications she was taking, a letter, two office notes and the depositions of the surgeon's assistants seemed to belie that claim. Based upon deposition testimony that "despite Cornwall's request," the Ctr. "permitted an information technologist access to the computer upon which the office note was transcribed" and that the computer was thereafter "rendered nonfunctional," Cornwall amended his complaint to add claims of spoliation and fraud. He then moved for an order to have his expert create a mirror image of the Ctr.'s hard drives which contained the relevant evidence. The Ctr. objected, claiming that the drives contained confidential information about hundreds of patients. The motion was granted, with the court issuing a detailed order defining the protocol to be followed when analyzing the drives. The Ctr. appealed, and the appellate court affirmed, citing the testimony of Cornwall's expert that he would not open or view confidential patient information.