



## **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.

## **SPECIAL MASTERS AND E-DISCOVERY:**

### **A LITTLE-KNOWN REVISION TO THE RULES**

In 2003, a little-known, but much-needed, revision to F.R.C.P. 53, which governs the appointment of special masters in cases involving e-discovery, was made to expand their role and assist courts in handling the increasing caseload. A special master is a technical expert, preferably a lawyer, who is appointed by the court to manage and resolve discovery disputes regarding electronic evidence. A special master may be tasked with such duties as sorting out search terms, developing collection protocols, investigating spoliation claims, resolving privilege claims, arbitrating forms of production, suggesting sampling methodologies, apportioning costs and recommending appropriate sanctions.

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The revised Rule allows the use of special masters on an as-needed basis, with the consent of the parties, or when mandated by exceptional circumstances, by court order. It does, however, require that the appointment order explicitly address the responsibilities of the special master, the cost to the parties, communications between the special master and the court and between the parties and the special master and the standard of review for a special master’s decision.

Judge Shira Sheindlin, a U.S. District Court Judge for the Southern District of New York (and author of the well-known *Zubalake* opinions), and Jonathan Redgrave, Chair Emeritus of The Sedona Conference’s Working Group on Best Practices for Electronic Document Retention and Production, co-wrote an article in the *Cardozo Law Review*, “Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure” which further addresses the Rule and the role of the special master. It can be accessed at <http://www.cardozolawreview.com/content/30-2/SCHEINDLIN.30.2.pdf>.

## FREE PODCASTS AVAILABLE

The following two podcasts were held by Kroll Ontrack this month and are available to download at no cost.

“Federal Rule of Evidence 502, Privilege Review Strategies and Textbook Discovery Abuse” discusses the recent developments and impact of Federal Rule of Evidence 502 since its enactment. Also included is an overview of effective strategies for controlling costs during privilege review, as well as a discussion of the discovery order issued in *Kupperman v. Onex Corp.*, 2009 WL 1473708 (N.D. Ga. May 27, 2009). The podcast can be accessed at <http://www.krollontrack.com/legal-technologies-podcasts/?news=US InTheTrenches July 09 txt>.

“Legal, Economic and Pragmatic Considerations in Cross-Border E-Discovery” explores international litigation and investigations, specifically addressing the legal and pragmatic challenges of cross-border e-discovery in today’s economy. Additionally, there is a discussion of the discovery order issued in *Mintel International Group, Ltd. v. Neergheen*, 2009 LEXIS 7436 (N.D. Ill. February 3, 2009). The podcast can be accessed at <http://www.krollontrack.com/legal-technologies-podcasts/?news=US InvIns July 09 txt>.

## RECENT CASELAW

### RULE 34: SCOPE OF DUTY TO PRODUCE

*Valeo Elec. Sys., Inc. v. Cleveland Die & Mfg. Co.*, 2009 WL 1803216 (E.D. Mich. June 17, 2009). In response to Cleveland’s request for production, Valeo produced over 270,000 pages of emails and other electronically stored information as they were

kept in the ordinary course of business. In addition, they produced two indices identifying the custodian for each bates range, the location in which the file was stored, document titles and “re:” lines of emails and additional information regarding the creation and storage of the information. Despite this, Cleveland filed a motion to compel Valeo to organize the information into 28 categories, arguing that it had to open each file individually and that Valeo had named its files “innocuously” in order to frustrate its review. The U.S. District Court for the Eastern District of Michigan denied the motion, finding that Valeo had satisfied its burden under F.R.C.P. 34. The court said that Rule 34 and relevant case law were clear that once a party has produced documents as kept in the ordinary course of business, it has no further duty, absent exceptional circumstances which were not present in the instant case. To require more would impose an unfair burden on the producing party.

### SEARCH OF SERVER DATA: CONTINGENCY

*Feig v. Apple Organization, Inc.*, 2009 U.S. Dist. LEXIS 49081 (S.D. Fla. May 29, 2009). Marissa Feig filed a Title VII employment action, but two months after she sent a discovery request to Apple, her former employer, the company went out of business. Apple sold its server to a third party with instructions not to destroy electronic information on the server’s hard drive. Feig filed a motion to compel production of email between its 27 employees and Feig, which Apple opposed on grounds that the email of low-level employees would be irrelevant and production would be an undue burden. The U.S. District Court for the Southern District of Florida found that a search was likely to lead to relevant information and that Apple’s undue burden argument was not persuasive “assuming that an electronic search of the server data is possible.” The court granted Feig’s motion and ordered an electronic search of the data, noting that if a keyword search proved to be impossible, Apple could seek a

protective order provided it was supported by a computer forensic expert.

### **PRODUCTION FORMAT: TIMELY OBJECTION**

*Ford Motor Co. v. Edgewood Properties, Inc.*, 2009 WL 1416223 (D.N.J. May 19, 2009). In this environment case, Edgewood propounded an initial production request specifying native format. Ford responded to the production, but stated that the ESI would be produced in TIFF format. Ford's first production was made in March 2008 and its last was made in November 2008. In January 2009, Edgewood objected to the form of production and moved for reproduction in the format requested. The U.S. District Court of New Jersey denied the motion, finding that Edgewood waived its objection to production format by failing to make a timely objection, finding that "one may reasonably expect that if document production is proceeding on a rolling basis where the temporal gap in production is almost half a year apart, a receiving party will have reviewed the first production for adequacy and compliance issues for a reason as obvious as to ensure that the next production of documents will be in conformity with the first production or need to be altered. It was incumbent on [requestor] to review the adequacy of the first production so as to preserve any objections."