



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.

SEDONA CONFERENCE ISSUES COMMENTARY

The Sedona Conference has issued a Commentary on Achieving Quality in the E-Discovery Process.” One of the insights discussed in the Commentary is that metrics and statistics are now indispensable tools of discovery. The opening paragraph of the Executive Summary states:

“The legal profession is at a crossroads: the choice is between continuing to conduct discovery as it has “always been practiced” in a paper world – before the advent of computers, the Internet and the exponential growth of electronically stored information (ESI) – or, alternatively, embracing new ways of thinking in today’s digital world. Cost-conscious clients and over-burdened judges are demanding that parties undertake new approaches to solving litigation problems. The central aim of the present Commentary is to introduce and raise awareness about a variety of processes, tools, techniques, methods and metrics that fall broadly under the umbrella term “quality measures,” and that may be of assistance in taming the ESI beast during the various phases of the discovery workflow process. These include greater use of project management, sampling and other means to verify the accuracy of what constitutes the “output” of e-discovery. Such collective measures, drawn from a wide variety of scientific and management disciplines, are intended only as an entry point for further discussion, rather than any type of all-inclusive checklist or cookie-cutter solution to all e-discovery issues.”

TABLE OF CONTENTS

INTRODUCTION	1
SEDONA CONF. ISSUES	1
RECENT CASE LAW	2

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The obvious reason that quality control is so important is to avoid errors and court sanctions. However, the Commentary lists four other reasons:

1. “Failure to employ a quality e-discovery process can result in failure to uncover or disclose relevant information which can affect the outcome of litigation.”
2. “An inadequate e-discovery process may allow privileged or confidential information to be produced.”
3. “Procedures that measure the quality of an e-discovery process allow timely course corrections and provide greater assurance of accuracy, especially of innovative processes.”
4. “A poorly planned effort can cost more money in the long run if the deficiencies ultimately require that e-discovery must be re-done.”

The Executive Summary also contains the four guiding principles behind the Commentary:

Principle 1. In cases involving ESI of increasing scope and complexity, the attorney in charge should utilize project management and exercise leadership to ensure that a reasonable process has been followed by his or her legal team to locate responsive material.

Principle 2. Parties should employ reasonable forms or measures of quality at appropriate points in the e-discovery process, consistent with the needs of the case and their legal and ethical responsibilities.

Principle 3. Implementing a well thought out e-discovery “process” should seek to enhance the overall quality of the production in the form of (a) reducing the time between the request and response; (b) reducing cost; and (c) improving the accuracy and completeness of responses to requests.

Principle 4. Practicing cooperation and striving for greater transparency within the adversary paradigm are key ingredients to obtaining a better outcome in e-discovery. Parties should confer early in e-discovery, including, where appropriate, exchanging information on any quality measures which may be used.

The Commentary can be accessed at http://www.thesedonaconference.org/dltForm?did=Achieving_Quality.pdf.

RECENT CASE LAW

INACCESSIBLE DATA: ZUBALAKE EXCEPTION

Forest Laboratories, Inc. v. Caraco Pharm. Laboratories, Ltd., 2009 WL 998402 (E.D. Mich. April 14, 2009). In this patent litigation on a drug, Caraco Labs moved for a hearing on sanctions for spoliation, alleging that Forest Labs intentionally or recklessly destroyed backup tapes that would have

shown their drug was not patentable. Forest Labs denied misconduct, claiming they preserved records pursuant to their standard operating procedures. However, they admitted that not all backup tape recycling was stopped. In determining whether there was a duty to preserve the backup tapes, the U.S. District Court for the Eastern District of Michigan noted that in *Zubalake v. UBS Warburg, LLC*, 220 F.R.D. 218 (S.D.N.Y. 2003), the court held that if a party can identify where particular documents are stored on backup tapes, then those tapes should be preserved if the information contained on them is not otherwise available. The *Zubalake* court added that when the exception is applicable, it applies to all tapes. The district court ordered a hearing to determine if the *Zubalake* exception was applicable and, if so, it would consider Forest Labs’ failure to preserve evidence.

ACCESS TO ELECTRONIC DEVICES: RULE 34

Henderson v. U.S. Bank, 2009 WL 1152019 (E.D. Wis. April 29, 2009). In this case involving confidential information misappropriation, U.S. Bank sought production of “all computers used by producers from September 2007 to the present, all electronic storage devices for the same time period, and all access codes in order to access the files stored on the devices.” U.S. Bank said that a computer expert would image the devices and return them. Miles Henderson and other counterclaim defendants objected, arguing that U.S. Bank has essentially asked for all of their ESI. The U.S. District Court for the Eastern District of Wisconsin noted that although F.R.C.P. 34 gave U.S. Bank the right to request ESI, it did not give it the right to conduct its own search of electronic devices. The court denied the motion.

COST OF LITIGATION: SECOND DEPOSITION

Newman v. Borders, Inc., 2009 WL 9311545 (D.D.C. April 6, 2009). In this racial discrimination case, Ronald Newman claimed that Borders' store detective stopped him because of his race. During a F.R.C.P. 30(b)(6) deposition, Borders' representative testified that she did not know their specific policy on e-mail retention, so Newman filed a motion to compel a second deposition. The U.S. District Court for the District of Columbia found that another "costly deposition" was not warranted in a case in which legal fees were likely to "dwarf the potential recovery" and the amount of time and effort spent already on discovery had left the court "stunned." Instead, the court ordered Borders to file an affidavit with knowledgeable responses to the following questions:

1. What kind of e-mail system does Borders use?
2. Is that system programmed to delete e-mails after a specific period of time, and if so, what is that period of time and was that system on or off after the incident involving plaintiff?
3. Does Borders have a policy requiring the retention or deletion of e-mails, and if so, what is the policy and is it in writing? If it is in writing, attach to the affidavit.
4. Was it necessary to make efforts to prevent the deletion of e-mails after the incident involving plaintiff, and if so, what efforts were made?
5. Is Borders aware of the deletion of any e-mails pertaining to the incident involving plaintiff?
6. Who was responsible for searching for any e-mails pertaining to the incident involving plaintiff?
7. How did this person or these persons conduct the search? What receptacles of electronically stored information were searched? Network servers, individual hard drives?
8. If individual hard drives were searched, whose were they?
9. Did the search involve the use of keywords, and if so, what were they?