



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.

LEGISLATION

CALIFORNIA ASSEMBLY PASSES

E-DISCOVERY BILL

On March 12, the California Assembly approved House Bill 5, which amends the state’s Code of Civil Procedure to include rules governing the discovery of electronically stored information. The bill was then sent to the Senate where it was introduced and sent to committee for hearings.

This is the second time that California has considered electronic discovery amendments. On September 27, 2008, the original bill was vetoed by Governor Arnold Schwarzenegger for budgetary reasons. House Assembly Bill 5, which was introduced on December 1, 2008, is nearly identical to the bill that was vetoed.

The text of House Assembly Bill 5 may be accessed at http://www.leginfo.ca.gov/pub/09-10/bill/as_m_ab_0001-0050/ab_5_bill_20081201_introduced.pdf.

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RECENTLY IN THE COURTS

FAILURE TO PRESERVE: “TRANSITORY” DATA

Arista Records, LLC v. Usenet.com Inc., 2009 WL 185992 (S.D.N.Y. January 26, 2009). In this copyright infringement action, Arista Records filed for sanctions against Usenet.com, a web site hosting multiple “newsgroups” which Arista claimed provided Usenet’s subscribers with hundreds of music piracy sites, and its web site operator. Arista argued that after receiving the complaint, Usenet and its operator deliberately destroyed data on their servers that would show requests for music downloads and digital music files. Usenet claimed that their servers didn’t have the capacity to store all of the “live” data requested by Arista. The U.S. District Court for the Southern District of New York found that Usenet had a duty to preserve and that their failure to do so was in bad faith. It further determined that sanctions were warranted and ordered adverse jury instructions which included a finding that copyrighted works that appeared in the files of the disabled music groups were sent to Usenet’s subscribers. The court also ordered reimbursement of Arista’s costs in seeking the sanctions and also barred Usenet from disputing statistical evidence of infringement on their web site.

F.R.C.P. 34: “ORDINARY COURSE OF BUSINESS”

SEC v. Collins & Aikman Corp., 2009 WL 94311 (S.D.N.Y. January 13, 2009). In this securities fraud litigation, Collins & Aikman Corp. (“Collins”) sought production from the Securities and Exchange Commission (SEC) of documents supporting the SEC’s complaint. The SEC responded with 1.7 million documents with 10.6 million pages from 36 databases. Collins objected, calling it a “document dump” and complaining that the SEC had not searched for responsive e-mail. The SEC countered that the production mirrored how the documents were kept in the “ordinary course of business” and that Collins could use search terms to find relevant documents. The U.S. District Court for the Southern District of New York (Judge Shira Scheindlin, author of the well-known Zubalake opinion) ruled that F.R.C.P.’s “usual course of business” requirement for production meant that the documents must be organized and ordered a re-production in accordance with the court’s ruling. Further, the court found the SEC’s refusal to produce any e-mails unacceptable and ordered the parties to meet and negotiate a satisfactory search protocol for the e-mail.

TRIAL LAWYERS PROPOSE E-DISCOVERY PRINCIPLES

On March 11, the American College of Trial Lawyers (ACTL) released its Final Report on discovery and the issues impacting it, a joint initiative between the members of the ACTL Task Force on Discovery and The Institute for the Advancement of the American Legal System. The Report identifies several problem areas, such as in pleadings, experts and dispositive motions. The goal of the initiative was to develop Proposed Principles to address the identified challenges. Included in those Principles were the following:

- “Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional electronic discovery and the allocation of cost among the parties.”
- “Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court’s adjudication, expense and burdens.”
- “The obligation to preserve electronically-stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable action to preserve all potentially relevant electronically stored information.”

A copy of the full report can be accessed at <http://www.actl.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=4008>.

SURVEY: RISE IN GOVERNMENT AGENCIES’ E-DISCOVERY EFFORTS

Government agency personnel report an increase of eight percent in the time they spend dealing with electronic discovery efforts, according to survey results recently released by IE Discovery, a discovery management provider. The survey was

designed to gather opinions and experiences from government attorneys, records managers, paralegals and information technology (IT) personnel regarding their perception of e-discovery preparedness within their agency.

The survey also found that 71 percent of respondents reported spending up to 25 percent of their time on electronic discovery issues. In addition, more than 30 percent of agencies have either hired or designated an “e-discovery attorney.” Participants also reported an increase in the percentage of the litigation budget used for electronic discovery, although most of them did not designate budgets as their most formidable challenge. Rather, the largest number of participants (38 percent) felt “internal systems and processes” was their biggest challenge, followed by “communication with the IT department” (20 percent); “finding good e-discovery staff with the right mix of IT and legal knowledge” (18 percent); “finding the budget to put systems and tools in place” (15 percent); and “getting buy-in from upper management” (10 percent).

The survey was conducted over a nine-day period from September 24 to October 7, 2008 and included 77 government attorneys from 31 government agencies. An executive summary of survey results can be accessed at <http://www.iediscovery.com/services/government/survey.aspx>.