



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.

7TH CIRCUIT LAUNCHES E-DISCOVERY PILOT PROGRAM

On October 1, Phase One of the Seventh Circuit's Electronic Discovery Pilot Program, developed as a result of continuing discussions regarding the need for cooperation and reform, particularly in view of the increasing costs and burden of electronic discovery, was launched. The Pilot will be implemented by Standing Orders in selected cases, and will be evaluated using questionnaires completed by participating judges and attorneys.

A committee comprised of trial judges and lawyers, based primarily in the Seventh Circuit, worked in subcommittees over several months to develop the Pilot's Principles Relating to the Discovery of Electronically Stored Information ("the Principles"), to be implemented and evaluated during Phase One

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from October 1, 2009 through May 1, 2010. The Principles incorporate many of the requirements of the Federal Rules of Civil Procedure and focus on cooperation between the parties to resolve electronic discovery issues. They also discuss such areas as scope of preservation, the identification of electronically stored information and production formats. Some of the key points are:

- the requirement that counsel designate an e-discovery liaison to work toward resolution of issues in dispute;
- the identification of specific considerations regarding the use of a preservation letter, as well as appropriate considerations in responding;
- the requirement that counsel confer with opposing counsel before seeking information regarding preservation and collection efforts to determine the need for the information and whether there are alternate means to obtain it;
- the designation of particular categories of information as "generally not discoverable" so that counsel must confer before making a request for such information;
- the encouragement of counsel and the parties to "make a good faith effort to agree on the format(s) for production;" and

- the encouragement of the parties to “discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.”

The findings of the Pilot Program in Phase One will be presented at the 7th Circuit Annual Meeting. Phase Two is scheduled to be implemented from June 2010 through May 2011, at which point the E-Discovery Committee will formally present its findings and issue the final Principles. The Statement of Purpose and Principles of Phase One may be accessed at http://www.ca7.uscourts.gov/7thCircuit_ElectronicDiscovery.pdf.

Note: The Editor thanks Rich Moriarty of the Wisconsin Attorney General's Office for the above information.

RECENT COURT DECISIONS

COOPERATION BETWEEN PARTIES: DISCOVERY PLAN

Mirbeau Geneva Lake, LLC v. City of Lake Geneva, 2009 WL 3347101 (E.D. Wis. October 15, 2009). In this litigation over development of land in the City of Lake Geneva, the U.S. District Court for the Eastern District of Wisconsin directed the parties to cooperate to develop a “meaningful discovery plan.” Mirbeau Geneva Lake, LLC (“Mirbeau”) sought to compel production of all of the City of Lake Geneva’s (“City’s”) computers and other electronic storage devices, arguing that the City’s offer to provide emails in paper form was insufficient. Mirbeau also expressed concern that the City was not preserving ESI for production and moved in a supplement to the motion to compel the City to se-

quester their electronic storage devices. The City responded that Mirbeau had made an inadequate showing of the need for sequestering and that its request was overly burdensome. The district court denied the motion because Mirbeau had not identified the type of information it hoped to discover by forensic mapping the City’s computer system and further that it had not explained that the information it was requesting would be in the form in which the City’s ESI was normally maintained. As to the issue of whether the City was adequately preserving ESI, the court noted the lack of evidence that the City had adequate procedures in place to respond to discovery, but also noted the intrusive nature of Mirbeau’s request. Further, the court expressed deep concern that neither party had offered any alternative proposals for discovery methods or production format other than their own extreme positions. Therefore, the court ordered the parties to enter into open and forthright discussions to develop a “meaningful discovery plan.”

RECKLESS FAILURE TO ENSURE PRESERVATION: STRICT SANCTIONS

Peschel v. City of Missoula, 2009 WL 3364460 (D. Mont. October 15, 2009). In a case involving claims for using excessive force during a wrongful arrest, the U.S. District Court for the District of Montana found that a crucial video was lost as a result of the City of Missoula’s (“the City’s”) recklessness and granted plaintiff Walter Peschel’s motion for sanctions, also designating that the arresting officers used unreasonable force. Peschel, a physician, was arrested on a misdemeanor charge for obstructing a police officer after he refused to move away from the car of a person threatening to commit suicide. The arrest was recorded by another officer’s camera, and the video was later uploaded to the hard drive of a police department computer and viewed by several officers. At “some point,” the video was “lost,” and could not be retrieved in re-

sponse to discovery. Peschel moved for sanctions for the City's failure to preserve the video, asking that a default judgment be entered. The City argued that the video was lost due to "glitches" in its new digital video system, but the court noted the police department's lack of any type of backup system. The court found that the City had a duty to preserve the video because ensuing civil litigation was reasonably foreseeable. Thus, the court found that sanctions were warranted, but rejected Peschel's request for a default judgment. Instead, it "designated, for purposes of the case, that the arresting officers used unreasonable force" to effect Peschel's arrest. The court also rejected the City's attempt to minimize its fault by arguing the loss was accidentally caused, pointing out that the City "utterly failed to have any controls in place to ensure the video recordings from police vehicles were adequately preserved," concluding that it was recklessness on the City's part. The court did consider lesser sanctions, such as an adverse inference, but found that to be insufficient and unable to cure the loss of the evidence.

PODCAST ON STATE E- DISCOVERY RULES AVAILABLE

Kroll Ontrack has made available a podcast on state rule-making activity since the enactment of the 2006 amendments to the Federal Rules of Civil Procedure. Specifically, the podcast discusses the approaches taken by three states – California, New York and Texas – and explores best practices to efficiently navigate the e-discovery process. The podcast may be accessed at http://www.krollontrack.com/redirect/1009TexasRulesPodcast-ITT.asp?news=US_InTheTrenches_Oct_09_txt.