



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.

NEW TECHNOLOGY-BASED INN OF COURT MEETS IN DELAWARE

Delaware’s new Richard K. Hermann Technology Inn of Court, which aims to help judges, attorneys and law students stay abreast of constantly changing technology and the effect it has on the practice of law, especially electronic discovery, held its first meeting on September 14. The first of its kind in the country, it bears the name of a partner in the intellectual property group of Morris James who teaches electronic discovery for the National Judicial College and Widener University School of Law. Hermann is also the director of Widener’s Corporate Counsel Technology Institute. This Technology Inn of Court is expected to meet monthly.

TABLE OF CONTENTS

| | |
|---|----------|
| INTRODUCTION | 1 |
| NEW TECHNOLOGY-BASED COURT MEETS | 1 |
| RECENT CASE LAW | 1 |
| PODCAST AVAILABLE | 2 |

RECENT CASE LAW

FAILURE TO PRESERVE : DEFENDANT AND COUNSEL SANCTIONS

Green v. McClendon, 2009 WL 2496275 (S.D.N.Y. August 13, 2009). The U.S. District Court for the Southern District of New York found that defendant and counsel failed in their duty to preserve evidence and awarded sanctions. Mary and Doyle McClendon committed to purchasing an artwork for \$4.2 million from Richard Green, a London-based art dealer. After making a down payment of \$500,000, the McClendons separated and agreed to divorce. They never paid the balance nor did they take possession of the art. Green sued for breach of contract and promissory estoppel. Despite repeated representations by Mary McClendon and her counsel that they had thoroughly searched for responsive documents and had produced everything, a relevant spreadsheet was produced in hard copy for the first time in response to Green’s motion to compel, followed by three electronic versions of the spreadsheet, all with “clear differences” from the hard copy. Green then filed a motion to compel a forensic examination of McClendon’s computer. In response, McClendon revealed that she had transferred her files to a CD and reinstalled the operating system on her computer, so the original version of any information stored was lost. Green then filed a

motion for sanctions, including an adverse inference. In its analysis, the district court noted that a party seeking an adverse inference must establish: 1) an obligation to preserve, 2) that records were destroyed with “a culpable state of mind,” and 3) that the destroyed evidence was relevant to the claim. The court found that McClendon and her counsel were negligent in their discovery obligations; her counsel apparently failed to explain what information was relevant and to impose a litigation hold. The court found that an adverse inference was not appropriate because McClendon had transferred her files to CD and provided them to Green. However, the court felt that some sanctions were warranted, and authorized further discovery regarding the spreadsheet, including further deposition of McClendon. It also awarded costs and attorney’s fees, in an amount to be determined, to be allocated between McClendon and her attorney.

ABUSE OF DISCRETION: ACCESS TO PARTY’S COMPUTER

In re Weekley Homes, L.P., 2009 WL 2666774 (Tex. August 28, 2009). The Texas Supreme Court ruled that the trial court abused its discretion by ordering defendant’s employees to turn over their computer hard drives for forensic examination. In a breach of contract suit, plaintiff HFG Enclave Land Interests (“HFG”) served requests for production, including emails, on Weekley Homes (“Weekley”). Weekley produced 31 responsive emails, but HFG, believing that more existed, filed a motion to compel additional searching. The trial court denied the motion after Weekley responded that since employees’ inboxes were limited in size, they had to be emptied by manual deletion regularly, and emails were saved only if backed up by an employee on the hard drive. Deleted e-mails were saved on backup tapes for 30 days. KFG pressed on, moving for “limited access” to four employees’ hard drives by a forensic expert who would search for deleted emails, extract them and give them to Weekley to review first. Weekley

argued that the search would be overly intrusive, that it would take away use of the employees’ hard drives and that HFG failed to show the feasibility of obtaining deleted data. The trial court granted HFG’s motion, and Weekley sought mandamus relief from the court of appeals, which was denied. The Texas Supreme Court granted oral argument. The court began by turning to Tex. R. Civ. P. 196.4, under which a party is required to produce responsive electronic information if that is “reasonably available to the responding party in its ordinary course of business.” If not, the court may order targeted production upon a showing that that the benefits outweigh the costs. Because Rule 196.4 gives no guidance on “not reasonably available,” the court looked to the federal rules and courts for guidance. It determined that because HFG “failed to demonstrate the particular characteristics of the electronic storage devices involved, the familiarity of its experts with these characteristics or a reasonable likelihood that the proposed search methodology would yield the information sought, and considering the highly intrusive nature of computer storage search and the sensitivity of the subject matter,” the trial court abused its discretion. *Note to our Texas readers: This opinion provides a summary of the proper procedure for electronic discovery under Rule 196.4.*

PODCAST ON PRESERVATION, SAFEGUARDING INFORMATION AVAILABLE FOR DOWNLOAD

A recent podcast by Kroll Ontrack, “Safeguarding Sensitive Information. Data Breaches and Preservation Issues,” is now available for downloading. Specifically, the discussion addresses how to protect sensitive data from data breaches and explores best practices in responding to a breach incident.

Speakers will also discuss the order issued in *Pin-stripe, Inc. v. Manpower, Inc.*, 2009 WL 2252131 (N.D. Okla. July 29, 2009), which was reported in the September issue of this Bulletin, as well as explore the issue of litigation holds and preservation in discovery. The podcast may be accessed at http://www.krollontrack.com/redir/0909DataBreachPodcast-InvIns.asp?news=US_InvIns_Sep_09_txt.