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.

UPDATE: DC HEARING ON PROPOSED FRCP AMENDMENTS

The Advisory Committee on the Civil Rules held the first public hearing on the proposed amendments to the Federal Rules of Civil Procedure on November 7 in Washington, D.C. More than 40 witnesses giving testimony on the recommended changes, with most of the comments addressing the proposed changes to Rules 26(b) and 37(c).

The major issues discussed on the proposed changes to Rule 26(b) were the added requirement in Rule 26(b)(1) stating a party may obtain discovery “proportional to the needs of the case,” as well as the deletion of the language “relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The testimony on proposed changes to Rule 26(b) seemed to indicate a sharp split between the plaintiffs’ and defendants’ bar. Those arguing in support of the changes cited the effect on controlling costs, while those testifying against expressed concerns the new rule would shift the focus from relevancy to cost proportionality, making it more difficult for consumers and small companies to hold defendants responsible.

The proposed changes to Rule 37(e) also invited many comments. The suggested amendment would create a uniform standard for the imposition of spoliation sanctions. It would provide two types of measures to be imposed if a party fails to preserve discoverable information: 1) a new category of remedies and “curative measures,” such as allowing additional discovery or requiring a party to pay reasonable expenses caused by the spoliation; and 2) traditional sanctions as currently defined by Rule 37(b)(2)(A), or adverse inference instructions. Most of the testimony focused on the necessity of preservation language and the definition of vague terms, such as “willful.”

The next public hearing is on January 8, 2014 in Phoenix, and the final hearing is scheduled for February 7, 2014 in Dallas.

NAGTRI TO OFFER ADVANCED E-DISCOVERY COURSE

The NAGTRI Advanced E-Discovery training will take place in Charleston, South Carolina on February 6-7, 2014 at the Renaissance Charleston. The training will begin in the morning on Thursday, Feb-
February 6, and end around noon on Friday, February 7. Through funding provided by the Mission Foundation, NAGTRI will provide scholarships to Assistant Attorneys General to attend the training.

This 1.5 day course will provide attendees with an understanding of more complex e-discovery issues. It is designed for attorneys with a working knowledge of the rules governing electronic discovery and who have handled cases involving electronic evidence. Topics planned include progressive search methodologies, e-discovery of social media sites and predictive coding for large e-discovery productions. There will also be a session on planning for depositions of critical parties, an update on recent case law affecting electronic productions and e-discovery sanctions, and a presentation on new e-discovery technologies.

For additional information about the course, please contact Hedda Litwin, NAGTRI Program Counsel and NAAG Cyberspace Law Chief Counsel at hlitwin@naag.org or (202) 326-6022.

FREE RANDOM SAMPLER APP AVAILABLE

The University of Florida Levin College of Law and Department of Computer and Information Science and Engineering have collaboratively developed a random sampler app to help attorneys determine the appropriate size of a random sample. The app randomly selects files from a given data population. The sample size is determined by selected confidence intervals and levels. The app is free under an open source license and can be downloaded at http://www.law.ufl.edu/academics/e-discovery-project-random-sampler.

RECENT CASE LAW

“DISCOVERY ABOUT DISCOVERY:” AVOIDANCE BY COOPERATION

Ruiz-Bueno, III v. Scott, 2013 U.S. Dist. LEXIS 162953 (S.D. Ohio November 15, 2013). The U.S. District Court for the Southern District of Ohio concluded Rule 26(b) permits “discovery about discovery.” In this wrongful death case, John Ruiz-Bueno, III moved to compel a response from Zach Scott to two interrogatory questions: 1) what efforts Scott made to comply with Ruiz-Bueno’s previous discovery requests, and 2) what procedures or methods were used to search for responsive ESI. Scott objected, arguing the information sought was irrelevant and outside of the scope of discovery. The district court concluded “discovery about discovery” is permissible under Rule 26(b). However, the court made clear the impasse between the parties could have been avoided by engaging in a collaborative effort to solve the problem. The court found Ruiz-Bueno’s concern about the low amount of ESI produced to be reasonably grounded. It also found Scott was less than forthcoming with information needed to make further discussion a collaborative rather than a contrarian process. While acknowledging “discovery about discovery” might not be appropriate in every case, the court ordered Scott to respond to the interrogatories.

COOPERATION IN DISCOVERY: SEARCHING AND PRODUCING EMAILS

Saliga v. Chemtura Corp., 2013 U.S. Dist. LEXIS 167019 (D. Conn. November 25, 2013). The U.S. District Court for the District of Connecticut ordered the producing party to comply with the requested production format. In this discrimination case, the plaintiff Diane Saliga and defendant Chemtura Corp. were unable to agree on how defendant Chemtura Corp. should search for and produce email evidence. Saliga asked for email production in native format, but Chemtura objected, arguing native for-
mat documents could not be Bates stamped and its standard practice was to produce in searchable PDF or TIFF, Chemtura did not claim any undue burden or expense. The court, noting the requesting party's ability to specify the format for production under Rule 34(b)(1)(c) and Chemtura's failure to state a reason why it could not comply, ordered Chemtura to produce the emails in native format. As to the searches, Saliga asked for 37 search terms, of which 12 were relevant words and phrases and most of the remainder were versions of the custodians' names. Chemtura's proposed terms overlapped with 11 of Salinga's 12 words and phrases, but Chemtura objected to including the custodians' names as cumulative and unnecessary. Chemtura also wanted to require the proposed terms be searched based on whether they were within 50 words of Salinga's name. The court agreed including the custodians' names was superfluous, but ruled Salinga's twelfth proposed search term should be included and found the proximity restriction would unduly narrow the search.