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.

SEVENTH CIRCUIT PILOT OKS MODEL DISCOVERY PLAN

The Seventh Circuit Electronic Discovery Pilot Program Committee approved a final version of their Model Discovery Plan and model Case Management Order (CMO). The Plan is intended to help the parties focus and articulate the scope of discovery, the form of production and review strategies for ESI. It provides a guide for the parties to identify and agree upon the scope of discovery; search protocols, both for cases with limited and those with substantial ESI; production format, both for cases with limited and those with extensive ESI; third party ESI; and identification of e-discovery liaisons. There is also provision for identifying outstanding disagreements between the parties.

The CMO provides a model FRE 502(d) order as well as some suggestions for more efficient and effective logging of privileged documents. The order is comprehensive, with separate provision for delineating privilege logging protocol, challenging asserted privilege and protection, non-waiver and clawback protocol and disputing claims of privilege and protection over produced documents.

Both documents may be accessed at http://www.discoverypilot.com/content/model-discovery-plan-and-privilege-order.

RECENT CASE LAW

DOCUMENT PRODUCTION AGREEMENT: “INEXPENSIVE” TAR PROVIDER

Northstar Marine, Inc. v. Huffman, No. 1:13-00037-WS-C (S.D. Ala. August 27, 2013). The U.S. District Court for the Southern District of Alabama found that plaintiff had failed to act with due diligence to comply with the parties’ agreement. The parties in this case filed a supplement to their Rule 28(f) report delineating their agreement regarding the discovery of ESI as follows:

“Both parties have or will immediately arrange to use computer-assisted search technology that permits efficient gathering of documents, deduplication, maintaining the relationship between emails and attachments, full text Boolean searches of all documents in one pass, segregation or tagging of the search results, and export of all responsive files without cost to the other party. Both parties will share with the other party the specific capabilities of their proposed computer-assisted search
technology, and will endeavor to agree on the technology to be deployed by the other party."

The parties also agreed to the use of certain search terms and that all documents in the search result sets would be produced immediately in native format including all metadata. The plan was adopted by the court in its Rule 16(b) Scheduling Order. One month later, defendant Huffman indicated their readiness to produce and inquired of plaintiff Northstar Marine’s chosen collection method. Northstar responded that its IT provider was unable to perform the required tasks, and it was having difficulty locating an inexpensive outside electronic search technology provider. Huffman filed a motion to compel Northstar’s performance pursuant to the agreement. The district court found Northstar’s failure to comply unacceptable and stated the Scheduling Order could not be disregarded by counsel “without peril.” The court noted Northstar failed to act with due diligence, noting it had not even begun collecting ESI. The court granted the motion to comply and ordered Northstar to comply at a specified date.

**PROPORTIONALITY: NON-ESSENTIAL EVIDENCE**

*Apple Inc. v. Samsung Electronics Co., Ltd.*, 2013 WL 4426512 (N.D. Cal. August 14, 2013). In continuance of this legal saga, the U.S. District Court for the Northern District of California declined to compel plaintiff “to go to great lengths” to produce information that defendant could “do without.” Samsung sought the production of several categories of financial information. While Apple maintained financial databases and did not deny the relevance of the information requested, it argued it did not have the type of reports requested, and it would take a herculean effort to produce even a subset of the reports. While observing it was “generally dubious” of such claims of excessive burden, the district court noted its obligation to limit discovery if the burden or expense of the proposed discovery outweighs its likely benefit. The court determined the financial documents would be of limited value to Samsung because the parties had already submitted their expert damages reports. Therefore, the court determined it would not require Apple to go to great lengths to produce data Samsung could do without. However, recognizing Samsung’s damages experts were open to attack by Apple for their failure to use more granular financial data, the court precluded Apple from challenging those experts “for failing to allocate geographically or by product model in any way that could have been supported by the reports disputed here that were requested but not produced.”