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.

SEDONA PATENT LITIGATION COMMENTARY CHAPTERS RELEASED

The first two chapters of the Sedona Conference Working Group 10 Commentary on Patent Litigation Best Practices has just been released for public comment. The goal of the Commentary is to develop best practices and recommendations to improve the patent litigation system, as well as to minimize abuses for the benefit of all stakeholders. The Introductory chapter provides the framework for the Commentary itself. The Summary Judgment chapter calls for a fundamental reconsideration of the proper role for summary judgment motions by encouraging courts to take a greater gatekeeping role at an earlier stage of the case. It also prevails upon all counsel to give more consideration to merits and timing before filing any summary judgment motion. Comments may be sent to info@sedonaconference.org or faxed to (602) 258-2499.

In the coming months, the Working Group will release these four remaining chapters: 1) Use of Experts, Daubert and Motions in Limine; 2) Parallel U.S. Patent and Trademark Office Proceedings; 3) Discovery; and 4) Case Management Issues from the Judicial Perspective.

RECENT CASE LAW

SPOLIATION STANDARDS: PRESENTATION TO JURY

Brookshire Bros., Ltd. v. Aldridge, 2014 Tex. LEXIS 562 (July 3, 2014). The Texas Supreme Court clarified a spoliation jury instruction is only appropriate when the destruction of evidence was intentional or deprived the opposing party of any meaningful ability to present a claim or defense. Jerry Aldridge slipped and fell at Brookshire Bros. store and sued for damages. The fall was recorded on surveillance video, and Brookshire preserved the footage from the time Aldridge entered the store until a short time after the fall. The remainder of the video was automatically erased after 30 days. At trial, Aldridge emphasized Brookshire’s failure to preserve the whole video. The jury was given a spoliation instruction and allowed to decide during its deliberations whether spoliation occurred. The jury found in favor of Aldridge, and the court of appeals affirmed, finding the trial court did not abuse its discretion in admitting evidence of spoliation or giving a spoliation jury instruction. The state Supreme Court disagreed, finding no evidence of the requisite intent to conceal or destroy relevant evidence or any evi-
evidence Aldridge was irreparably deprived of a meaningful ability to present his claim. The court found the trial court abused its discretion in submitting a spoliation jury instruction. Further, the court held the trial court erred in admitting evidence of the failure to preserve the entire video, instructing evidence bearing on whether a party has committed spoliation should not be presented to the jury except as it relates to the substance of the lawsuit. Finding the errors caused an improper verdict, the court reversed and remanded.

PROPORTIONALITY: MIRROR-IMAGING HOME COMPUTERS

Downs v. Virginia Health System, 2014 U.S. Dist. LEXIS 74415 (W.D. Va. June 2, 2014). The U.S. District Court for the Western District of Virginia found mirror-imaging plaintiff’s home computer raised significant issues of confidentiality and privacy. In this employment discrimination case, Virginia Health System sought to mirror-image Christy Downs’ personal computers and filed a motion to compel, claiming it was the only way to prevent spoliation. Those computers allegedly contained ESI because Downs would sometimes send work documents to her personal computer to work on at home. Downs argued the Health System’s own computer logs and reports were readily available information sources, and mirror-imaging her hard drives would be personally intrusive and would violate attorney-client privilege. The court, while acknowledging discovery rules were intended to be broad and liberal, held mirror-imaging Downs’ computers more than three years after her termination raised significant issues of confidentiality and privacy. The court further held Downs had no duty to preserve her personal computers as evidence, and the Health System had failed to justify a forensic examination of those computers. Relying on the proportionality principle of F.R.C.P. 26, the court denied the motion to compel, finding the requested discovery was not sufficiently important as to warrant the potential burden and expense.