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.

THE CASE FOR PROPORTIONALITY: $400,000 IN ATTORNEYS’ FEES IN $2,000 CASE!

If someone is looking to make an argument in favor of proportionality, they need look no further than this recent case from the Seventh Circuit Court of Appeals. The ruling in Montanez v. Simon, 2014 U.S. App. LEXIS 11686 (7th Cir. June 18, 2014), affirming a district court’s decision to reduce a $426,000 fee request by more than $300,000, heralds the court’s willingness to curtail exorbitant legal fees. It also sends a strong message to those who sacrifice cooperation for over-aggressive representation. Here’s the case:

Andy Montanez sued the City of Chicago and Police Officers Vincent Fico and Joseph Simon, alleging Fico used excessive force when he arrested Montanez for public drinking and Simon failed to intervene. He sought damages for his minor injuries under 18 U.S.C. § 1983. Simon was cleared, but Fico was found liable, and a jury awarded him $1,000 in compensatory damages and $1,000 in punitive damages. Montanez’s lawyers submitted more than $426,000 in attorneys’ fees and another $6,500 in costs, which the City challenged as unreasonable. The U.S. District Court for the Northern District of Illinois meticulously scrutinized their submission and, noting Martinez failed to prevail on four of his six claims and was awarded just $2,000, reduced the award to $108,350.87 in attorneys’ fees and $3,051.94 in costs.

Montanez’s lawyers challenged all of the fees and costs disallowed. In the first paragraph of its discussion, the appeals court, with open sarcasm, noted those lawyers spent the entire opening section of their brief on claims of error in calculation of printing costs, amounting to at most $35.20. As the court added, “The willingness to fight so hard for so little goes a long way toward explaining why there is a $426,000 bill for attorneys’ fees in a $2,000 case.” The court found no abuse of discretion in the district court’s decision to settle on an hourly rate of $385 (instead of the $450 requested) for the two most experienced lawyers on the case and $175 for the two junior associates because those rates were within the upper middle of the range supported by evidence from the lawyers’ past cases and rates awarded to other Chicago attorneys in civil rights cases. Further, the court found the district court did not abuse its discretion in reducing the lodestar by 50 percent since Montanez did not achieve “excellent results,” losing four of his six claims. The judgment was affirmed.
OPEN FOR COMMENT: SEDONA COMMENTARY ON PATENT DAMAGES

The Sedona Conference’s Working Group 9 (WG9) has just released the public comment version of its Commentary on Patent Damages and Remedies. The most notable feature is the departure from the current “reasonable royalty” framework to WG9’s proposed “Retrospective Model” for reasonable royalty damages. The Commentary also provides practical guidance for those involved in patent damages litigation. It is the first of seven commentaries in the patent litigation area Sedona plans to publish in the coming months.

The Commentary may be accessed at http://www.thesedonaconference.org. Comments may be sent to info@thesedonaconference.org.

E-DISCOVERY IN THE COURTS

In this issue’s case review, we discuss two recent cases focusing on Rule 30(b)(6) depositions.

DISCOVERY BEFORE DEPOSITION: “THE CART BEFORE THE HORSE”

Miller v. York Risk Services Group, 2014 WL 1456349 (D. Ariz. April 15, 2014). The U.S. District Court for the District of Arizona denied plaintiffs’ motion to compel a Rule 30(b)(6) deposition before discovery. Lauren Miller et al, firefighters and engineers who were or are employed by the City of Phoenix, sued York Risk Services Group (“York”), the City’s third-party workers’ compensation insurance administrator, alleging York, with full knowledge of the City, wrongfully denied or delayed their claims. Miller filed a motion to compel York to participate in a Rule 30(b)(6) deposition regarding the manner and methods used to store and maintain ESI. York argued taking the deposition first before discovery would allow them to tailor their discovery requests and avoid potential disputes. The court disagreed, finding “starting discovery with such an inquiry puts the cart before the horse and likely [would] increase, rather than decrease, discovery disputes.” The court noted, however, if York asserted the retrieval of relevant ESI would be unduly burdensome, then such a deposition might be appropriate. The court denied the motion.

DEPOSITION ON SEARCH METHODS: BENEFIT VS. BURDEN

Koninklijke Philips N.V. v. Hunt Control Systems, Inc., 2014 WL 1494517 (D.N.J. April 16, 2014). The U.S. District Court for the District of New Jersey found defendant failed to show the benefits of the deposition would outweigh the burden. In this intellectual property action, Koninklijke Philips N.V. (“Philips”) filed suit against Hunt Control Systems (“Hunt”) for claims related to denial of a trademark registration. After considerable discovery had been produced, Hunt noticed a Rule 30(b)(6) deposition for a Philips IT witness, and Philips objected and sought a protective order. The court directed Hunt to explain why it thought there were “material deficiencies” in the discovery already produced, and Hunt maintained a deposition was necessary to ascertain whether Philips was using appropriate search tools. Philips argued its approach to discovery was reasonable while Hunt’s approach was unduly burdensome. The court agreed with Philips, finding its approach to e-discovery reasonable. The court also found Hunt failed to show the benefits of the deposition outweigh its burden as it was not clear an alternative search methodology would substantially alter the production already completed. The court further opined the deposition was merely an attempt to open the door to more discovery and granted the protective order.