



NFJE Concludes Successful 2007 Judicial Symposium

The National Foundation for Judicial Excellence (NFJE) held its Third Annual Judicial Symposium in Chicago on June 29–30. The 2007 Symposium was entitled *E-Discovery and Spoliation on Appeal: The Convergence of Law and Technology*. State appellate and supreme court judges from 37 states participated, with a total of 114 judges in attendance.

The event opened with registration and a reception for the judges on June 29. The following morning's sessions addressed theories and practice involving electronic discovery. Robert E. Scott, Jr., of Semmes Bowen & Semmes in Baltimore and President of NFJE, led off the program with introductory remarks. Program Chair H. Mills Gullivan of Gullivan White & Boyd in Greenville, South Carolina, then outlined the topics that were to be covered during the day. Mary Massaron Ross of Plunkett & Cooney in Detroit presented the hypothetical case serving as the basis of that afternoon's program. The hypothetical case involved an employment law dispute in which the plaintiff alleged retaliation for reporting a supervisor who allegedly sexually harassed the plaintiff. The plaintiff accused the employer of destroying emails. Ms. Ross explained that the hypothetical sets forth some of the issues that are coming before courts today. For example what duty does an employer have to preserve electronic data? When does that duty arise? If the duty is breached, are sanctions appropriate? If so, what kinds of sanctions?

The first of the morning's speakers, John Jessen of Electronic Evidence Discovery, Inc., discussed emerging issues in electronic discovery. He addressed problems that arise between corporate clients and their outside counsel with regard to dealing with discovery demands by opposing parties. Mr. Jessen advised cooperation

between the client and outside counsel in creating a comprehensive model to follow for electronic discovery. Without a discovery plan that incorporates a comprehensive and defensible electronic discovery preservation and processing protocol right from the start—and then active management

whether electronically stored information is reasonably accessible within the meaning of amended FRCP 26(b)(2)(B). Mr. Jessen concluded with the observation that a defined, comprehensive and rational electronic discovery model will be able to accommodate the steps necessary to conduct fair and cost-effective discovery. What ultimately matters is whether there are reasonable, cost-effective ways to obtain data.

Professor Richard Marcus of the University of California's Hastings College of the Law offered observations on electronic discovery in state courts from the appellate perspective. He asked the judges in the audience to consider the many ways in which computer technology has affected their lives. Professor Marcus offered examples of how e-discovery is being employed in marital litigation, personal injury litigation and employment litigation. E-mail traffic is often highly significant in these contexts. Thus, electronic discovery is not a phenomenon that relates only

to mega-litigation involving large corporations. Pursuit of e-mail and other electronically stored information (ESI) can only become more pervasive as society employs electronic communications and storage of information more broadly. It is only a matter of time before the judges in the audience see electronic discovery disputes coming before their courts. At a minimum, appellate judges need to understand what is important when confronted by disputes about whether the trial courts properly handled these important issues. State appellate courts can expect to review more trial court rulings in the area, perhaps also providing broad supervision to the trial courts handling these new issues.

Thomas Y. Allman of Mayer Brown Rowe & Maw LLP in Chicago addressed the federal approach to e-discovery issues, and compared it to existing and potential state approaches. The issue remains open



All addressing concerns in electronic discovery (clockwise from upper left): Mary Massaron Ross presents a hypothetical; John Jessen discusses emerging issues; Thomas Y. Allman addresses the federal approach; Gregory P. Joseph discusses spoliation; and Richard Marcus offers observations on state courts from the appellate perspective.

of the timelines and milestones associated with the plan—the perception of negligent or willful destruction may be almost unavoidable in certain situations. He noted that disputes, and subsequent judicial hearings, often revolve around the question of

in the majority of states because only a few states have acted to date—principally Texas and Idaho. Guidelines are available through the Conference of Chief Justices. (See the National Center for State Courts website www.ncsonline.org/.) The Guidelines are not model rules and do not supplant the rulemaking process of individual states. They focus on what judges should do rather than setting forth rules governing the conduct of parties. State courts can rely upon federal court precedents and best practice guidelines, or they can adopt rules that suit their own procedural norms. Regardless of the approach taken, the state appellate courts can and will exercise an important supervisory role pending adoption of specific rules. Mr. Allman echoed Professor Marcus's view that pursuit of e-mail communications and other ESI is bound to become more and more pervasive, and trial and appellate judges will be expected to address an increasing number of disputes.

Gregory P. Joseph of the Gregory P. Joseph Law Offices LLC in New York City wrapped up the morning presentations with a discussion of spoliation of evidence. He discussed a series of cases involving spoliation of electronic evidence. He stated that the lasting legacy of the current era of electronic discovery likely will lie in the area of spoliation and sanctions. He outlined the duties of counsel and client, as well as electronic spoliation by a third party and by expert witnesses. Mr. Joseph discussed the state of the law in jurisdictions that recognize an independent tort of intentional spoliation, negligent spoliation, or negligent or intentional spoliation of evidence by third parties. He discussed the sanctions powers available to the federal courts to sanction electronic discovery abuse. He cited the key decision in *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*) on the importance of litigation holds and when a litigation hold should be implemented.

The judges were then treated to an entertaining and informative luncheon presentation by Professor Douglas Lind who spoke on "The Logical Construct of Appellate Arguments and Opinions." Professor Lind, formerly an attorney in private practice, is

a Professor of Philosophy and Chair of the Philosophy Department at the University of Idaho. Professor Lind focused upon Justice Holmes's dictum that "The life of the law has not been logic; it has been experience." He illustrated the jurisprudential use of experience and logic, through broad-ranging examples drawn from the writings of Justice Holmes, philosophers William James and Charles Peirce, playwright Bertolt Brecht, and others. He concluded that logic must be used in conjunction with experience. He advised the judges to use logic enlightened by experience and expe-

The 2007 Judicial Symposium was well-received by the state appellate court judges in attendance. Below are just a few comments drawn from attendee evaluation forms:

"I've attended these symposiums for the past three years and have found them very informative and well-run. I wish all of the seminars I attend were of this high quality. I look forward to next year's program."

"The program featured excellent speakers who really know their topics."

"This was very informative, and it was impartial."

"I will definitely recommend the Symposium to a colleague."

rience viewed through the lens of logic to reach sound decisions.

The balance of the afternoon was devoted to a mock appellate oral argument concerning an appeal from a sanctions dismissal for electronic discovery violations in an employment law case. Michael B. King of the Talmadge Law Group PLLC in Tukwila, Washington, served as counsel for the appellant. R. Daniel Lindahl, of BULLIVANT Houser Bailey PC in Portland, Oregon, served as counsel for the appellee. The issue on appeal, as stated in the brief of the appellee, was whether the trial court abused its discretion in determining that the actions of the defendants in destroying critical evidence contained in e-mails warranted the sanction of barring their testimony on the subject matter of the documents they destroyed. Mr. King argued that not all abuses of discretion are created equal. He

questioned whether the allegedly destroyed e-mails ever existed or whether these e-mails were a product of an overly active imagination. Mr. Lindahl argued in favor of a discretionary standard of review. The sanction, he argued, was in fact a modest sanction despite appellant's characterization of the sanction as a "death penalty."

The argument took place before a panel consisting of Judge John Irwin of the Nebraska Court of Appeals, Justice Elizabeth Lacy of the Supreme Court of Virginia and Justice Maureen O'Connor of the Supreme Court of Ohio. The judges subjected the appellate attorneys to vigorous questioning; afterwards they took part in a Mock Judges' Conference for the benefit of the audience.

The afternoon program concluded with a lively panel discussion involving a group of judges and attorneys who had participated in the day's events. The panelists addressed a number of issues relating to technology and pertinent legal issues and responded to questions from the audience.

The National Foundation for Judicial Excellence is funded by contributions from individual defense lawyers, state and local defense organizations and foundations and corporations. Then NFJE President Scott, citing the valuable benefits conferred by the foundation on the administration of civil justice, encourages defense lawyers and other entities to continue to provide generous support to NFJE and its programs, which include the annual Judicial Symposium. Contributions may be made by contacting Sarah Butler, NFJE Director of Operations and Planning, 150 N. Michigan Ave., Suite 310, Chicago, IL 60601, (312) 698-6280, sbutler@nfje.net.

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