The following is a compendium of articles and case law that may be of interest to our AG offices that are dealing with electronic discovery issues. Neither the National Association of Attorneys General nor the National Attorneys General Training & Research Institute expresses a view neither as to the accuracy of the articles nor as to the position expounded by the authors of the hyperlinked articles.

DECEMBER 2015

Interview with Judge Grimm on the 2015 FRCP Amendments
Judge Paul Grimm of the U.S. District Court for the District of Maryland has been a leading jurist in advancing e-discovery and is a member of the Advisory Committee for the Federal Rules of Civil Procedure. The Association of Certified E-Discovery Specialist (ACEDS) interviewed Judge Grimm on how the 2015 FRCP changes came about, what they mean to practitioners and how practitioners could use them to their advantage. The text of that interview may be accessed at http://www.aceds.org/aceds-interview-judge-paul-grimm-why-the-federal-rules-need-fixing/.

Overcoming the FOIA Dilemma
The Freedom of Information Act (FOIA) has burdened federal agencies with the need to conduct electronic discovery for records being requested by individuals and private parties. Likewise, states adopted similar public records laws, which have imposed similar challenges for state agencies. As record requests have dramatically increased in recent years, federal and state agencies have struggled to keep pace, and some agencies now face request backlogs in the tens of thousands. This white paper by experts from Exterro, Deloitte and the South Carolina State Port Authority examines why FOIA requests are on the rise and offers best practices for streamlining the FOIA process. The white paper further discusses how to incorporate subject matter experts into the FOIA process; how to leverage advanced analytics technology to conduct centralized searches and collections across a variety of data sources; and how to expedite the redaction process. It may be accessed at http://www.exterro.com/resources/overcoming-the-FOIA-dilemma/.
Sedona Patent Litigation Commentary Chapter Released
The Sedona Conference Working Group 10 released its Case Management Issues from the Judicial Perspective Chapter of its Commentary on Patent Litigation Best Practices, which has been updated pursuant to the comments received when the public comment version was released last February. The Chapter provides best practice recommendations to help courts manage patent cases. It may be accessed at http://www.thesedonaconference.org.

Kroll Ontrack Lists Top 2015 Case Law Issues
E-discovery provider Kroll Ontrack released its listing on the top e-discovery issues adjudicated this year, noting that the duty to preserve, an emphasis on proportionality and reasonability in form of production dominated its analysis of 55 significant state and federal e-discovery opinions. Kroll reported the classification of issues as: 35 percent dealt with disputes over production and the methods used; 20 percent focused on preservation and spoliation, including when the duty to preserve is triggered; 16 percent addressed cost considerations, such as cost shifting and taxation of costs; 16 percent discussed procedural issues, such as search and predictive coding protocols, cooperation and privilege; and 13 percent issued orders regarding sanctions for spoliation or failure to produce.

Case Law: No Sanctions for Failure to Implement Litigation Hold
In Flanders v. Dzugan, 2015 U.S. Dist. LEXIS 111599 (W.D. Pa. Aug. 24, 2015), the U.S. District Court for the Western District of Pennsylvania denied plaintiff’s motion for sanctions despite defendant’s failure to implement a litigation hold. Edward Flanders sued Fred Dzugan and the Ford City Borough for constitutional violations related to their building permit process. The parties filed a Joint ESI Protocol Status Report in which they agreed to focus their initial discovery efforts on the email of four Borough employees. The Borough produced 33 emails, and Flanders argued there had to be more emails that were not produced. The court ordered the Borough to file evidence of any litigation hold they had put in place, but no evidence was filed, and Flanders moved for sanctions. The court noted that it appeared no litigation hold was put in place, but determined that the other elements of a spoliation claim were not satisfied. The court found that Flanders had failed to provide any evidence that discovery was lost or destroyed, and while the Borough’s handling of discovery was at best “sloppy,” it did not rise to the level of bad faith, noting the Borough’s small size and resources. The motion was denied.
ABA Webinar: Case Management 101
With so many offices considering a change or upgrade in case management software, it may be helpful to attend this webinar by the American Bar Association Technology Research Center entitled “Case Management 101: The Right Software for Your Firm.” While the webinar presents the topic from the standpoint of a small litigation firm, the information can be readily applied to an Attorney General office. The webinar discusses available case management systems and their benefits, as well as how to analyze, review and rank your options. The webinar can be accessed at http://www.lawtechnologytoday.org/2015/10/case-management-101-video/.

Case Law: Production in “More Usable” Format
In U.S. v. Meredith, 2015 U.S. Dist. LEXIS 126487 (W.D. Ky. Sept. 22, 2015), the U.S. District Court for the Western District of Kentucky denied defendant’s motion to compel production of ESI in a more usable format. Gary Meredith, a former government employee, was charged with violating federal conflict of interest laws by creating a contract that included a lucrative post-retirement job for himself. During discovery, the government produced more than 300 GB of ESI which was searchable using common applications, including Microsoft Office. The government also provided written directions on finding specific documents, a discovery index and a media review index, as well as an oral explanation of how it used search terms in reviewing the documents. Despite that assistance, Meredith moved to compel the government to provide ESI in a more usable format. The court stated that the government’s obligation did not include providing only evidence that would be searchable using Meredith’s preferred search tools. The court found the government had fulfilled its obligation by providing ESI searchable by multiple common applications and providing indexes and written and oral instructions for searching the files. The motion to compel was denied.

Seeing is Believing: Predictive Coding Update
Although research has shown that predictive coding typically yields more accurate results than manual review, counsel needs to be comfortable using it, which means confirming to their own satisfaction that a document production is complete. The process is often perceived as a “black box” in that it is not as easily transparent or understandable as the traditional combination of keyword searches and human review. It is therefore important to have multiple tools available for ensuring
confidence that the production is appropriate and is not open to a successful challenge by the court or adversaries. One such tool is discussed in “Seeing is Believing: Using Visual Analytics to Take Predictive Coding Out of the Black Box,” which may be accessed at http://ftitechnology.com/resources/white-papers/seeing-believing-using-visual-analytics-take-predictive-coding-out-black-box.

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