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.

DC Amends E-Discovery Procedures

Free Webinar: Searching Through Large Volumes of Data
E-discovery vendor Exterro is offering a free webinar entitled Searching Through Large Volumes of Data on September 30, 2015 at 1 pm ET (10 am PT). The webinar will include an overview of search methodologies, including stemming, proximity and Boolean, and their benefits; search techniques for narrowing the scope of the data collection; and the role of sampling and in-place search technology to limit the amount of data collected. Registration for the webinar can be accessed at http://www.exterro.com/data-management-series/searching-through-data/#webinar/.

Sedona Publishes Practical Approaches to Cross-Border Discovery
The Sedona Conference Working Group on International Electronic Information Management Discovery and Disclosure released the public comment version of Practical In-House Approaches for Cross-Border Discovery and Data Protection. The goal of the publication is to provide consensus-based practical guidance and solutions for the cross-border data transfer and discovery challenges that many
Case Law: State Agency Not Responsible for Another Agency’s Deletion

Wandering Dago, Inc. v. N.Y. State Office of General Services, 2015 U.S. Dist. LEXIS 69375 (N.D.N.Y. May 29, 2015). Plaintiff Wandering Dago alleged that the New York Racing Authority (NYRA) and the New York State Office of General Services (OGS) violated the First and Fourteenth Amendments because it denied Wandering Dago’s application for its food trucks to serve at the Saratoga Race Track and at an outdoor lunch program because of the company’s name. The exclusion occurred after NYRA received several complaints, including an email from NYRA’s Deputy Secretary. NYRA eventually settled, so OGS remained the sole defendant. Wandering Dago requested production of the NYRA Deputy Secretary’s emails, but they had been deleted pursuant to the State’s email retention policy. Wandering Dago then sought sanctions against OGS and their counsel for the deletion of those emails. OGS objected, arguing they had no control over those emails and that their counsel did not represent the nonparty Deputy Secretary at the time of the deletions and had no authority to direct a litigation hold. The court agreed with OGS, adding that “...requiring each agency and thousands of officials to institute a litigation hold every time a party contemplates or even commences litigation against another agency would paralyze the State.” The request for sanctions was denied.

Review and Renew: Article Makes the Case for New EDiscovery Approaches

Review and Renew, an article published in Legal Tech News, notes that the impending changes to the Federal Rules, advances in technology and higher judicial expectations have dramatically changed ediscovery. The authors, Tamara Karel and Mathea Bulander of Redgrave, suggest that these changes necessitate a fresh look at our approaches to discovery. The article may be accessed at http://www.legaltechnews.com/id=1202734699369/Reconsidering-Your-Apprach-to-EDiscovery-in-2015.

Article: 10 Things Attorneys Should Know About Digital Forensics

This article addresses such issues as: forensic image vs forensic copy; deleted files vs. deleted overwritten files; unallocated space; and link files. It may be accessed at http://www.lawtechnologytoday.org/2015/07/10-things-attorneys-should-know-about-digital-forensics/.
This Richmond Journal of Law and Technology article by Philip Favro begins by discussing the shortcomings of the current Rules when dealing with ESI. The author then addresses the significance of the sanctions framework under the proposed FRCP amendments. He considers whether those changes adequately address failures with ESI preservation and discusses the questions the amendments leave unanswered. The author ultimately concludes that while they do not solve all ESI preservation issues, the proposed changes resolve many of the shortcomings found in the current Rules. The article may be accessed at http://jOLT.rich mond.edu/index.pup/the-new-esi-sanctions-framework-under-the-proposed-rule-37e-amendments/.

Case Law: Overly High Use of “Highly Confidential” Results in Re-Review
Procaps S.A. v. Pantheon Inc., 2015 U.S. Dist. LEXIS 84010 (S.D. Fla. July 20, 2015). The parties entered into a stipulated confidentiality agreement under which confidential documents would be marked as either “Confidential” or “Highly Confidential,” with the latter to be used only for highly sensitive information and to be viewed only by counsel. The results were not as contemplated, and Pantheon challenged the number of “highly confidential” Procaps documents. Of the 148,636 documents produced by Procaps, 141,525 (95.2 percent) were designated as “highly confidential.” Pantheon determined that 90.9 percent of Procaps’ entire production were marked as “highly confidential.” Pantheon filed a motion for reclassification of Procaps’ “highly confidential” documents. Procaps ultimately acknowledged the “apparent over-designation,” blaming the designation on its third party vendor. The court observed that Procaps attorneys still should have performed a final review and should have realized that a “highly confidential” ratio of more than 95 percent was highly suspect. The court ordered Procaps to re-review and re-designate the documents within 10 days and awarded Pantheon $25,000 in attorney’s fees.

Case Law: The Value of an Established Document Retention/Deletion Policy
Charvat v. Valente, 2015 U.S. Dist. LEXIS 85234 (N.D. Ill. July 1, 2015). Plaintiff Philip Charvat and others similarly situated filed complaints alleging that RMG, a travel agency affiliated with defendant cruise line Carnival Corporation, engaged in improper marketing activities. Contentious discovery ensued, with Charvat moving for spoliation sanctions for Carnival’s deletion of computer files belonging to two former employees. Carnival admitted deleting the files during the course of its
routine business practice of deleting employee files 30 days after termination of employment. Those two employees left Carnival in September and October of 2011, and Carnival’s investigation into the complaints against RMG concluded in July 2011, so Carnival argued it had completed its investigation and did not anticipate any imminent litigation against the travel agency. The court agreed there was no reasonably foreseeable litigation at that time, and also noted Charvat had not provided any evidence that Carnival acted in bad faith to destroy adverse information. The court determined that Carnival’s routine deletion of the former employees’ files was done in accordance with an established document retention policy and denied Charvat’s request for sanctions.

Hedda Litwin is the Editor of the E-Discovery Bulletin and may be reached at 202-326-6022. The E-Discovery Bulletin is a publication of the National Association of Attorneys General. Any use and/or copies of this newsletter in whole or part must include the customary bibliographic citation. NAAG retains copyright and all other intellectual property rights in the material presented in this publication. NAAG, 2030 M Street, NW, Eighth Floor, Washington, DC 20036 (202) 326-6000 | http://www.naag.org/