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.

**Sedona Commentary on Privacy and Security Available**
Working Group 1 of the Sedona Conference released the public comment version of its *Commentary on Privacy and Information Security* addressing the evolving responsibilities that lawyers have to provide security for their private and confidential information, as well as that of their clients and third parties. The Commentary provides a framework for dealing with these concerns and recommends steps all members of the legal industry should consider to safeguard the private and confidential information they maintain. The Commentary is open for public comment through August 30, 2015 and may be accessed at http://thesedonaconference.org.

**Colorado Federal District Court Issues ESI Guidelines, 26(f) Checklist**
On June 4, 2015, the U.S. District Court for the District of Colorado published *Guidelines Addressing the Discovery of Electronically Stored Information*, as well as a *Checklist for Rule 26(f) Meet-and-Confer Regarding Electronically Stored Information*. The Guidelines include commentaries covering the obligations of counsel, expectations of cooperation, standards of reasonableness and proportionality, being proactive with ESI and treating the meet and confer as a critical step in the e-discovery process. The four-page Checklist covers topics that may need to be addressed at the meet and confer and are useful guidelines for any state. The Guidelines may be accessed at http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery_Guidelines_Final_4_24_15_Rev.pdf. The Checklist may be accessed at http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery_Checklist_Final_4_24_15_Rev.pdf.
California Bar Ethics Opinion on Discovery of ESI Finally Published
On June 30, 2015, the California Bar Standing Committee on Professional Responsibility and Conduct published its much-discussed opinion addressing the question: what are an attorney’s ethical duties in the handling of discovery of ESI? The opinion, CAL 2015-193, is advisory and not binding on the Bar or its members. The discussion section appears to be almost completely rewritten from the earlier draft opinion, addressing the fundamentals of the e-discovery process as well as laying out the mistakes made in the hypothetical by the hapless attorney. The hypothetical is also different from the previous version in that the attorney now has represented the client and his company before, and in this version the company has an IT department. While the mistakes made by the attorney in the hypothetical could have been prevented by a basic understanding of e-discovery, the attorney's decision not to review the documents for privilege is also an abandonment of the duty of competence. The opinion may be accessed at http://ethics.calbar.ca.gov/Ethics/Opinions.aspx.

“Beyond Technophobia: Ethical and Legal Obligations to Monitor Evolving Technology and Security Risks”
In light of the California Bar opinion, as well as the Sedona Commentary, both discussed above in this Bulletin, this title article by Timothy Toohey, published in the Richmond Journal of Law and Technology, appears to be highly relevant. The author suggests that the pervasiveness of electronic data has not only altered the way lawyers interact with clients and other lawyers, but potentially exposes confidential and proprietary information to dissemination. The article argues that lawyers must reassess their ethical duties of competence and confidentiality. The article may be accessed at http://jolt.richmond.edu/v2113/article9.pdf.

“Document Preservation: Know When to Hold ’Em (And When to Fold ’Em)”
This article, written collaboratively by Cathleen Peterson of Kroll Ontrack and Brian Corbin of J.P. Morgan, provides tips for creating clear policies on document preservation policies. The article advises attorneys to: 1) Be proactive in issuing litigation holds; 2) Know when to issue a litigation hold or refresh an existing hold; 3) Document litigation hold decisions; 4) Periodically remind staff of the reasons for a litigation hold; 5) Be consistent in litigation hold procedures. The article can be accessed at http://www.ediscovery.com/cms/pdf/ACC_Docket_May2015.pdf.
More on Document Preservation: “Attorneys’ E-Discovery Preservation Checklist”

E-discovery and information governance software maker Exterro released a document preservation checklist for making preservation activities more defensible. The checklist may be accessed at http://www.exterro.com/resources/attorneys-e-discovery-preservation-checklist/.


“Steer Clear of Form Preservation Letters,” an article written for the New York Law Journal on March 16, 2015 by Joseph Francoeur, partner at Wilson, Elser, Moskowitz, Edelman & Dicker, recommends engaging the client in the preservation effort and lists some basic questions that a lawyer should be asking up front. The author notes that while the list is not exhaustive, it illustrates the collaborative process clients expect lawyers to engage in protect them from sanctions. The article may be accessed at http://www.newyorklawjournal.com/id=1202720399794.

“The Case for TAR and Statistical Sampling in Discovery”

This position paper, presented at the June 2015 DESI VI Workshop, argues that technology assisted review (TAR) and statistical sampling can significantly reduce risk and improve productivity in the e-discovery process. According to the authors, TAR reduces risk by mathematically ranking documents in descending order of relevance, while increasing productivity by prioritizing review on the most relevant documents and potentially avoiding review of the low ranked records. The article may be accessed at http://www.umiac.umd.edu/~oard/desi6/papers/paskach.pdf.

Court Finds Forensic Analysis Improper Without Good Cause Showing

Hawkins v. The Center for Spinal Surgery, 2015 U.S. Dist. LEXIS 89208 (M.D. Tenn. June 18, 2015). The U.S. District Court for the Middle District of Tennessee denied defendant’s motion to compel a forensic examination for lack of good cause. Demica Hawkins, an African-American, sued The Center for Spinal Surgery (“CSS”), her former employer, for employment discrimination and unlawful retaliation, claiming CSS paid her less than similar situated Caucasian employees. During a deposition, Hawkins revealed she had obtained confidential CSS payroll information without permission, copied the records onto a flash drive and gave the information to the Equal Employment Opportunity Commission (EEOC) to support
her discrimination claim. CSS moved to compel a forensic examination of that flash drive, arguing it was justified because there were discrepancies or inconsistencies in Hawkins' production. Specifically, the payroll records CSS provided to the EEOC were all labeled with Bates numbers; the records supplied by Hawkins that CSS obtained from the EEOC did not have their Bates stamping. The district court noted that courts have been cautious about compelling mirror imaging of computers or inspection of hard drives without good cause. The court examined the documents cited by CSS as lacking Bates numbers, noting that it appeared the Bates numbers had been cut off the bottom, so apparently no discrepancy existed to justify a forensic examination. The motion was denied.

ESI Destruction in Bad Faith is a Jury Question in 7th Circuit

*Malibu Media, LLC v. Harrison*, 2015 U.S. Dist. LEXIS 73447 (S.D. Ind. June 8, 2015). The U.S. District Court for the Southern District of Indiana determined a jury should decide whether defendant acted in bad faith. Malibu Media, LLC (“Malibu”), a producer of pornographic films, sued Michael Harrison for copyright infringement for illegally downloading its movies via BitTorrent. Shortly after Malibu filed its complaint, Harrison's computer crashed; he purchased a new laptop and hard drive and had the old hard drive destroyed by an electronic recycling firm. Malibu's computer forensic experts subsequently were unable to find any evidence of downloading on Harrison's new computer. Harrison testified at his deposition that since he was taking other electronics to be recycled, he included the hard drive of the defunct computer. He also testified that although Comcast had notified him of the suit, he did not understand that Malibu had already filed a complaint. Malibu filed a motion for sanctions for destruction of evidence, seeking a default judgment. The magistrate judge recommended the motion be denied, and Malibu objected. The court noted in the Seventh Circuit spoliation requires a finding that 1) the party knew or should have known litigation was imminent; 2) the party destroyed the evidence in bad faith with the purpose of hiding adverse information. The court determined that the question of whether Harrison acted in bad faith must be determined by a jury.

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