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 Publishes Commentary on Protection of Privileged ESI**

Working Group 1 of the Sedona Conference issued a final release of its new *Commentary on the Protection of Privileged ESI*, which reflects changes made pursuant to the public comment version released in November 2014. Noting that both attorneys and the courts have failed to take advantage of the protections of Rule 502, the Commentary attempts to revitalize the use and understanding of the Rule by 1) reminding counsel of the basics of privilege law in the context of contemporary document productions; 2) encouraging consideration of using Rule 502(d)-type orders in all complex civil matters; 3) articulating a "safe harbor" presumption that protects parties from claims of waiver due to the inadvertent production of privileged materials, provided there is adherence to certain basic best practices in the context of ESI privilege review; 4) encouraging cooperation among litigants to lower the cost and burden of identifying privileged information; and 5) identifying protocols, processes, tools and techniques that can be used to limit the costs associated with identifying and logging privileged material, as well as to avoid disputes relating to the assertion of privilege. The Commentary can be downloaded at [http://www.thesedonaconference.org](http://www.thesedonaconference.org).

**More Sedona News: Patent Litigation Commentary Updated**

The Discovery Chapter to the Sedona Working Group 10’s *Commentary on Patent Litigation Best Practices* has been updated to incorporate all of the comments received in response to the public comment version released in October 2014. The Discovery Chapter sets forth principles and best practices to minimize discovery abuses in patent litigation by streamlining the discovery process, requiring earlier disclosure of the most relevant materials and requiring full disclosure of both
sides' contentions at a relatively early stage in the process. The Chapter can be downloaded at http://www.thesedonaconference.org.

**Chief Justice’s Year-End Report Focuses on New FRCP Rules**

U.S. Supreme Court Chief Justice John Roberts issued his annual report on the federal judiciary, primarily focusing on the 2015 amendments to the Federal Rules of Civil Procedure (FRCP). The report includes a brief history of the development of the new amendments and a discussion of their intended effects, making clear that they present significant change for both attorneys and the judiciary. The report cautions that the goal of amended Rule 1 - “the just, speedy and inexpensive determination of every action and proceeding” - can only be achieved if the entire legal community addresses that challenge. The report can be accessed at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

**Free Book: TAR for Smart People**

E-discovery provider Catalyst is offering a free book on technology-assisted review, *TAR for Smart People*, which confronts some of the difficult issues with the first generation of TAR applications and highlights some of the more advanced protocols to be included in TAR 2.0. The book can be downloaded from their website at http://www.catalyst.com/tarforsmartpeople, but note that you must first provide your contact information.

**Case Law: NYC Sanctioned for Failure to Preserve Evidence**

In *Stinson v. City of New York*, 2015 U.S. Dist. LEXIS 868 (Jan. 5, 2016), the U.S. District Court for the Southern District of New York imposed a permissive adverse inference instruction against the City of New York (“NYC”) for spoliation of evidence. Sharif Stinson and similarly situated individuals filed a class action against NYC, alleging NYC engaged in a pattern and practice of stopping, seizing and issuing summonses without probable cause to fill a summons quota. Pursuant to contentious discovery, Stinson filed a motion for sanctions for spoliation of evidence. The district court made the following findings of fact: 1) NYC did not issue any litigation hold until more than three years after the complaint was filed, and the ensuing litigation hold was not effectively communicated; 2) NYC’s policies for handling ESI provided for document destruction, and email policies provided that emails would be destroyed unless specific steps were taken; 3) NYC destroyed hard copy materials related to crime and performance meetings and officers’ activity reports; 4) NYC failed to preserve text messages sent and received by key
personnel; and 5) NYC produced only a few documents from key custodians' account. NYC argued that the relative paucity of ESI produced resulted from the fact that the NYPD did not operate or communicate by email, but the court found this assertion was contradicted by emails obtained by Stinson through other means. The court decided that, given NYC's lack of bad faith in its spoliation of evidence and the relatively limited showing of relevance made by Stinson, a permissive, rather than a mandatory, adverse inference instruction was warranted. The court determined the jury would be instructed that the absence of documentary evidence does not in this case establish the absence of a summons quota policy. The motion for sanctions was thus granted, but Stinson's request for attorney's fees was denied.

**Case Law: Govt's Failure to Preserve = No Text Messages**

In *U.S. v. Vaughn*, 2015 U.S. Dist. LEXIS 152530 (D.N.J. Nov. 10, 2015), pro se defendant Lamont Vaughn sought sanctions, including dismissal of the indictment, alleging the government failed to preserve text messages from four separate devices relevant to its investigation of Vaughn, particularly those text messages sent between a police officer and a cooperating witness who assisted with the investigation by conducting numerous drug purchases. The court conducted evidentiary hearings, which resulted in the government's acknowledgement of its failure to preserve certain text messages, as well as often changing explanations of that failure to preserve. The court, while acknowledging that discovery obligations in a criminal case differ from those in a civil matter, noted that governmental disclosure of material evidence is part of the constitutional guarantee of a fair trial. The court found that sanctions were warranted for five reasons: 1) the police officer should have been aware of the FBI policy regarding preservation of all text messages between law enforcement and confidential witnesses; 2) the court was not persuaded by attempts to minimize the importance of the lost text messages; 3) the inconsistencies in the government's explanations rendered their claims not credible; 4) the facts belied the government's claim of exerting all efforts to preserve those messages; and 5) the government's differential treatment of text messages depending upon their source. The court ordered that the government would be prohibited from using any text messages in its case in chief and reserved until trial a determination as to whether to impose an adverse inference instruction.
Case Law: Control of Employees' Personal Emails

In Mathew Enterprise Inc. v. Chrysler Group LLC, 2015 U.S. Dist. LEXIS 166553 (N.D. Cal. Dec. 10, 2015), Mathew Enterprise ("Mathew"), a car dealership that buys and resells vehicles from Chrysler, sued Chrysler Group ("Chrysler") for price discrimination in violation of the Robinson-Patman Act, alleging that Chrysler denied it access to its volume growth incentives, but made those incentives available to competing dealerships in the area. Mathew claimed that those dealerships effectively paid lower prices to Chrysler for vehicles of like grade and quality, and those differences were reflected in the prices offered to customers. During discovery, it was revealed that Mathew did not provide email accounts to all of its employees, so many employees used their personal email accounts for business. Accordingly, Chrysler sought to compel production of relevant emails from those personal accounts, but Mathew argued it did not have "possession, custody or control" of the emails and they were outside the scope of party discovery. The court noted that in the Ninth Circuit, control is defined as "the legal right to obtain documents on demand," and thus, documents are not discoverable under Rule 34 if the entity that holds them could legally, and without broaching any contract, refuse to turn over such documents. Chrysler argued that Mathew's employee handbook instructs employees to keep "internal information" in the "sole possession" of the dealership, but the court rejected that argument, reasoning that the handbook was not a contract and did not create a legal right for the dealership to take back any information now stored in personal accounts. The court denied the motion to compel.

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