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.

“Order on One Millionth Discovery Dispute”
On February 2, 2015, Judge Rosemary Collyer of the U.S. District Court for the District of Columbia issued the above-titled order on the latest discovery dispute in Herron v. Fannie Mae, et al, No. 10-943. In that case, Caroline Herron, a former Fannie Mae vice president who was then hired as a consultant to Fannie Mae to help implement Treasury Department programs, sued Fannie Mae for wrongful termination, claiming she was fired in retaliation for reporting how Fannie Mae was handling those programs. Here, Judge Collyer made clear her aversion to the ongoing discovery disputes, as follows: “Much as the Court admires the advocacy of counsel, it is exhausted with these disputes. Contrary to its usual practice, the Court will rule immediately, in writing...”

Florida Bar: Ok for Attorneys to Advise on Removing Social Media Posts
On January 23, 2015, the Florida Bar Professional Ethics Committee issued proposed Advisory Opinion 14-1, finding that before litigation commences, and absent any other preservation obligation, an attorney may advise a client to remove information from social media pages and/or change privacy settings from public to private, as long as the client retains a record of any deleted information. A recap of other Bar opinions on this issue is as follows:

- The New York County Lawyers Association, in Opinion 745 dated July 2, 2013, said attorneys may advise clients to use privacy settings and remove information from social media unless there is a preservation duty and without any violation of law or spoliation of evidence.
- The Pennsylvania Bar Association in Opinion 2014-300 found it was permissible for attorneys to advise clients to delete information from social media as long as the deletion does not constitute spoliation and a record of the deleted information is preserved.
- The North Carolina Bar Association in Opinion 4 issued on July 25, 2014 said attorneys may advise clients to remove information from social media as long as the removal does not constitute spoliation or is otherwise illegal.

- The Philadelphia Bar Association Professional Guidance Committee in Opinion 2014-5 concluded attorneys may advise clients to change their privacy settings, but may not advise them to delete any social media.

The Florida opinion cautioned that attorneys must be aware of other bar opinions on this issue, recognize that this area of the law is rapidly evolving and remember their obligation to remain current.

**ALLEGED SPOLIATION: EVIDENCE CRITICAL TO CLAIM**

Advantor Systems Corp. v. DRS Technical Services, Inc., 2015 U.S. Dist. LEXIS 9721 (M.D. Fla. January 28, 2015). The U.S. District Court for the Middle District of Florida found sanctions were not warranted. Advantor Systems ("Advantor") alleged that DRS Technical Services ("DRS") "poached" Advantor's employee in violation of a non-compete and non-disclosure agreement. When Advantor asked DRS to terminate the employee and preserve all relevant documents and ESI, DRS did so, but not until after reformatting the laptop Advantor's former employee had used while working for DRS. Advantor filed suit and sent a second preservation request. After learning DRS had reformatted the laptop, Advantor moved for sanctions for spoliation. Both parties hired computer forensics experts to examine the reformatted laptop, and both agreed most of the files were corrupted and unreadable. The former employee admitted during deposition that he sent DRS eight proprietary documents by email (all of which DRS eventually produced), but said he did not recall saving any other Advantor proprietary documents on the laptop. DRS stated it saved all of the employee's emails to its server and produced all that were relevant. The district court noted that in the Eleventh Circuit, a court can only order spoliation sanctions against a defendant when it finds that the allegedly spoliated evidence was "critical" to proving the plaintiff's prima facie case, and when the plaintiff makes a showing that the defendant acted in bad faith. In the instant case, the court found that while DRS had a duty to preserve the laptop when Advantor sent the first preservation notice, Advantor put forth no other evidence to show the laptop contained its proprietary information. Finding Advantor had not shown the lost evidence to be critical to its claim, the court denied the motion for sanctions.