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.

JANUARY 2015

**Sedona Conference Publishes Commentary on Privileged ESI**
The Sedona Conference published the public comment version of its Commentary on the Protection of Privileged ESI. Its stated purpose is to “breathe some needed life into the understanding and use of Rule 502…” The Commentary sets forth four Principles on Protection of Privileged ESI:

  "Principle 1. Parties and their counsel should undertake to understand the law of privilege and its appropriate application in the context of electronically stored information.

  Principle 2. Parties, counsel and courts should make use of Rule 502(d) and its state analogues.

  Principle 3. Parties and their counsel should follow reasonable procedures to avoid the inadvertent production of privileged information.

  Principle 4. Parties and their counsel should make use of protocols, processes, tools and technologies to reduce the costs and burdens associated with the identification, logging and dispute resolution relating to the assertion of privilege."

The Commentary may be downloaded at https://thesedonaconference.org.

**CA Bar Revises Interim Opinion on E-Discovery Competence**
In response to considerable public comment, the California State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) revised its Proposed Formal Opinion Interim No. 11-0004 addressing attorneys' duties in the handling of ESI and discovery requests. COPRAC also approved an additional 90-day comment period for the opinion, ending on April 9, 2015. Notably, the revised opinion retains the original guidance on the tasks attorneys should be able to
perform either by themselves or in association with competent co-counsel or outside experts:

“1. Initially assess e-discovery needs and issues, if any;
2. Implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence like electronic information, potentially relevant to the issues raised in the litigation;
3. Analyze and understand a client’s ESI systems;
4. Identify custodians of relevant ESI;
5. Perform appropriate searches;
6. Collect responsive ESI in a manner that preserves the integrity of that ESI;
7. Advise the client as to available options for collection and preservation of ESI;
8. Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
9. Produce responsive ESI in a recognized and appropriate manner.”

The revised opinion may be accessed at [http://www.calbar.ca.gov/aboutus/publiccomment/201501](http://www.calbar.ca.gov/aboutus/publiccomment/201501).

**Discovery of Facebook Photos: Privacy Settings**

*Nucci v. Target Corporation*, 2015 Fla. App. LEXIS 153 (Jan. 7, 2015). The Florida Court of Appeal, 4th District, found the photos sought from plaintiff's social networking site were reasonably calculated to lead to the discovery of admissible evidence. Maria Nucci filed a personal injury suit against Target Corporation, claiming she slipped and fell on a foreign substance on the floor of a Target store. After viewing surveillance video calling into question Nucci's claims of permanent injury, Target sought more than 1,200 photos listed on her Facebook profile. Nucci objected to disclosing her photos, and Target moved to compel inspection of Nucci's Facebook profile, arguing her lawsuit put her physical and mental condition at issue. Nucci argued her Facebook page had always been on a privacy setting preventing general public access to her account, so therefore she had a reasonable expectation of privacy in her Facebook information, and Target's access would invade that privacy right. She also argued Target's motion was an overbroad fishing expedition. The trial court denied the motion to compel as vague, overbroad and unduly burdensome. Target then filed narrower, more focused discovery requests, and Nucci objected on the same grounds. Target moved the
court to disallow Nucci’s objections. The trial court granted the motion in part and denied it in part, issuing an order compelling production of the following social media information:

“1. Copies or screenshots of all photos associated with each social networking account during the two years prior to the date of loss;
2. Copies or screenshots of all photos associated with each social networking account from the date of loss to the present.”

Nucci petitioned the Florida Court of Appeals for certiorari relief to quash the trial court’s order compelling discovery of the photos. The appeals court found the photos were reasonably calculated to lead to the discovery of admissible evidence regarding the quality of Nucci’s life before and after the accident in order to determine the extent of the loss. The court further found Nucci’s privacy interest in the photos was minimal, if any, so the discovery order did not amount to a departure from the essential requirements of law. The petition was denied.