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.

Gartner Releases Annual Report on E-Discovery Software Vendors
Gartner, an information technology research and advisory company, released its annual ratings report of the eDiscovery software industry and vendors. The 2015 “Magic Quadrant for E-Discovery Software” report finds the total eDiscovery software revenue marketplace reached $1.8 billion worldwide, an increase of 10.6 percent from 2013. The report, based on a survey of 2,083 users, found interest in cloud-based solutions declined slightly (42 percent compared with 45 percent in 2014), although Gartner predicts cloud-based platforms will continue to grow. Gartner further predicts that by 2017, most users will have access to “self-service” tools to prepare data for analysis. Gartner also surveyed eDiscovery vendors meeting their criteria, which includes revenue of at least $20 million, client base of 50 or more clients and ownership of the intellectual property rights in their software. The 2015 report adds two new vendors from the 2014 report while dropping four others. Although the report is available for purchase on Gartner's site, it may be available at no cost on other sites. For additional information, contact Hedda Litwin, NAGTRI Program Counsel, at hlitwin@naag.org or (202) 326-6022.

"EDiscovery on a Dime" - Article Explores Low-Cost Services
The June 2015 issue of the ABA Journal discusses some barebones e-discovery services, such as basic keyword searches costing as low as $15 to $30 per gigabyte. It provides a good read for those with limited eDiscovery budgets and can be accessed at http://www.abajournal.com/magazine/article/low_cost_e_discovery_services_Target_small_firms_simpler_cases/.
Deduping Globally or By Custodian
Many practitioners do not understand the difference between deduping “globally” or “by custodian,” yet the choice can affect both the cost of discovery and the consistent treatment of documents. Jill Crawley Griset of McGuireWoods, LLP has written an article explaining the difference between the two methods that can be accessed at http://www.mcguirewoods.com/client-resources/alerts/2015/6/e-discovery-update-to-globally-dedupe-or-not.aspx.

Blog: Considerations for Assessing Information Governance Vendors
Selecting the right vendor for an e-discovery project/case is a major issue for most states, and this article from Rob Robinson's ediscovery blog, Complex Discovery,¹ provides the following criteria for doing so, with questions to be asked the vendor for each consideration:

--Technology.  Does the vendor’s technology appear to do what you need it to do?  Can the technology be validated by some entity other than the vendor?

--Domain Knowledge.  Does the vendor understand the domain you are operating or do they just understand their technology?

--Awareness.  Is the vendor known by information governance analysts, thought leaders, influencers and information governance experts?

--Reputation.  Does the vendor have a reputation for being able to deliver on the expectations they set in a timely and accurate manner?

--Free Cash Flow.  Is the vendor able to meet financial commitments to support client needs and internal/external commitments?

--Clients.  Does the vendor have clients who have moved beyond the partner, master services agreement and/or pilot phase of an engagement and are actually using the product/service in a production environment on a regular basis?

--Motive.  Are vendor decisions made for the greater good of clients and vendor support staff or are they personality driven completely based on the personal objectives of the vendor ownership?


E-Discovery Vendor Survey Addresses Pricing Structures, TAR
A survey of e-discovery service providers by Weikum Dunn Communications, a public relations firm, found that more than 60 percent of e-discovery users employ more than one technology vendor. The survey further found that users are moving away from vendors who charge per gigabyte fees for hosting and/or processing data, and many are demanding flat fee arrangements. Of the vendors surveyed,
more than 65 percent offered technology-assisted review (TAR), but they find clients resist using it. The full survey may be accessed at http://www.weikumdunn.com/images/ediscovery_service_providers_survey_4_17_15.pdf.

**Another Look at the Proposed Amendments: The Sanctions Framework**


“The Rules Do Not Require a Party to Produce ESI in the Form Most Helpful to the Opposing Party”

*Wilson v. Conair Corp.*, 2015 U.S. Dist. LEXIS 57654 (E.D. Cal. Apr. 30, 2015). The U.S. District Court for the Eastern District of California required the defendant to produce additional ESI in a reasonably usable format. In this consumer product liability class action involving a Conair styling iron that allegedly burst into flames, the parties argued over the production format of ESI provided by Conair. Plaintiff Delia Wilson had asked for a native format production or, alternatively, a production in TIFF format with accompanying metadata; Conair produced the ESI in PDF format, including the Excel files which Conair produced as PDFs in order to redact information. Wilson moved to compel, arguing data produced in TIFF format was better suited for use in a database application, and it would require additional work to make the data produced in PDF format usable. In a Joint Statement, Conair agreed to produce all future documents in TIFF format and to produce the Excel files in native format. Wilson also sought documents pertaining to 45 models of styling irons, whereas Conair argued discovery should be limited to the two models used by the primary plaintiff. The district court noted that the Rules do not require a party to produce ESI in a format most helpful to the opposing party, nor is a party required to produce in more than one format. Conair had agreed in the Joint Statement to produce all future documents in TIFF format, and the court ordered them to do so. The court further ordered Conair to
produce the metadata for all PDF files it had produced without it. Noting that Wilson had identified the commonality between all 45 models of styling irons, the court ordered Conair to supplement its responses to produce data for all 45 models of curling irons. The motion was granted in part and denied in part.

**Relevancy: Production of Personal Employee Information**

*Equal Employment Opportunity Commission v. DolGen Corp. d/b/a Dollar General*, 2015 U.S. Dist. LEXIS 58994 (N.D. Ill. May 5, 2015). The U.S. District Court for the Northern District of Illinois found the personal information sought was relevant to the litigation. The U.S. Equal Employment Opportunity Commission (EEOC) filed a civil rights suit challenging Dollar General’s use of criminal background checks for potential employees as having a disparate impact. Each party had a motion to compel before the court. In its motion, the EEOC sought ESI containing the personal information of Dollar General’s conditional hires as necessary to conduct its disparate impact analysis. Dollar General argued producing the information would infringe upon the privacy of its conditional hires. Noting there was a confidentiality order in place prohibiting the use of personal information except for the purpose stated, the court found the information about the conditional hires relevant to the litigation and granted the motion. In its motion, Dollar General sought 1) information on the EEOC’s pre-suit analysis of the disparate impact of Dollar General’s policies; 2) the EEOC’s policies regarding its own use of background checks; and 3) information on the background checks that the EEOC has found permissible. As to 1) above, the EEOC claimed attorney work product, and the court ordered the EEOC to deliver the information to the court for a work product determination. The court found 2) above not relevant to the litigation, but ordered the EEOC to produce the information requested in 3) above.

**Deposition of Court-Appointed Forensic Expert Allowed**

*Procaps, S.A. v. Patheon, Inc.*, 2015 U.S. Dist. LEXIS 62121 (S.D. Fla. Apr. 24, 2015). The U.S. District Court for the Southern District of Florida granted defendant’s motion to take the deposition of the forensic examiner. In this antitrust case, the district court ordered a forensic examination of Procaps’ “electronic media” due to the company’s failure to issue a litigation hold and its insufficient search for responsive ESI. The court-appointed examiner’s report found thousands of files had been deleted, and approximately 5,700 of those files contained search terms in their titles indicating potential relevance to the litigation. Each party subsequently filed differing summaries of the report. Patheon moved to take the deposition of the forensic examiner, arguing it would
help to clarify Procaps’ failure to preserve and aid in explaining the extent of the spoliation to the court and the jury. Procaps disagreed, arguing it would serve to make the court-appointed examiner into a witness for the defendants. The court, drawing a distinction between a court-appointed expert and one commissioned by a party, found the deposition would be helpful to the court, and to deny the motion would undermine the court’s ability to deal with the many issues in the case. The court ordered the deposition to proceed with the participation of the special master. The court allotted five hours for the deposition, with 2.5 hours allotted for the special master and 1.25 hours allotted for each party.

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