

CyberBytes™

Straight Talk about Electronic Evidence Discovery in Civil Cases- January 2007

Inadequate E-Production

Late in December I had the pleasure of having a leisurely lunch with some colleagues in which we were discussing our opinions on the upcoming changes we foresee in civil litigation as a result of the newly adopted amendments to the FRCP Rules concerning electronically stored information (ESI).

A point that I raised in this discussion which I've not heard much dialog about concerns the new provisions in Rule 26(f), which directs the parties to meet and confer in good faith at the outset of litigation concerning electronic discovery. For those of us providing digital forensics discovery services in litigation matters, we have an acute awareness that ESI is routinely generated and stored on a wide assortment of storage media devices. So, if an attorney who represents a producing party

were to identify a list of computers, e-mail servers, and back-up tapes that relevant ESI was stored on, would that necessarily be the full picture? Unfortunately, for most requesting party counselors, such a list might be accepted at face value gleefully.

What both parties may readily overlook in these meet and confer sessions is that the users of these computers of interest may have routinely saved or copied relevant ESI on external media devices e.g., external hard drives, CDs, DVDs, "thumb" drives, etc. The fact that these external storage devices were connected to the computers of interest might never have been revealed or readily apparent when the pre-discovery due diligence was performed-hence, the obligation to disclose all "sources" of accessible and non-accessible ESI to the requesting party may be severely lacking.

A solution to correct this oversight in identifying all potential sources of relevant ESI would be for the requesting party to require an external media inventory report from the producing party in order to verify the type and number of external storage media devices associated with each computer of interest.

Correspondingly, the producing party would also be obligated to locate and conduct their discovery of each external media device to be in compliance with their disclosure responsibilities for the meet and confer session.

CyberControls stands ready to advise litigators in their preparations for the Rule 26(f) and Rule 16 pretrial meet and confer sessions when it comes to electronic discovery and production. Our seasoned staff of computer forensic examiners is experienced in identifying and recovering relevant ESI including a computer user's

behavioral artifacts that can only come from a thorough computer examination.

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This document is neither designed nor intended to provide legal or other professional advice but is intended merely to be a starting point for research and information on the subject of electronic evidence discovery. While every attempt has been made to ensure accuracy of this information, no responsibility can be accepted for errors or omissions.

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