

CyberBytes

SUBJECT: E-Discovery-Damned if You Don't

5/4/04- In a recent interview posted at Discovery Resources.org e-discovery guru George Socha and Dennis Kennedy shared their perspectives on a revealing statistic about the current adoption level of electronic data discovery in civil litigation.

George Socha: "It has been estimated that although more than 265,000 civil cases were filed in Federal courts in 2002, significant levels of electronic discovery are likely to place in only about 5,000 of those cases. If those figures are correct, at the Federal level electronic discovery is taking place in less than 2% of the cases filed." *Mr. Socha's e-discovery consulting firm is recognized for the 2004 Socha-Gelbmann Electronic Discovery Survey.*

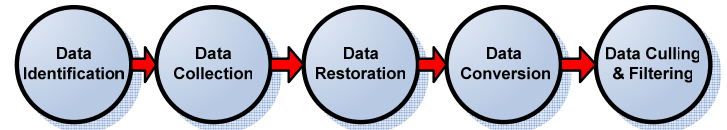
Dennis Kennedy: "Let's look at the "too little" category first. Many lawyers believe electronic discovery is relevant only for a few document-intensive cases. This approach ignores today's reality, where both businesses and individuals keep important information in computer files or e-mail. Key documents may never even be printed. Stories of "smoking gun" e-mail messages abound. Evidence of file deletions can be damaging. If I were a litigation client and found that my lawyers planned no electronic discovery, I'd be horrified."

Mr. Kennedy continues with the following comments:

Dennis Kennedy: "It's easy to make the argument that you need to be in the middle ground, not at the extremes. However, we cannot overemphasize that it is no simple matter to make it to the middle ground. It's a moving target that changes with each type of case, with each change in technology and with changes in discovery tools, rules and techniques. For example, divorce cases today seem to require discovery for Quicken files or spreadsheets. It's difficult to imagine employment discrimination cases where you would not want to see e-mail. Ignoring PDAs, USB key chain drives or home computers used to connect to business networks are likely to result in missing vital information."

At CyberControls, no two cases are the same, but our electronic data collection procedures have to be. This consistent approach to collecting digital evidence often results in

significant digital evidence recovery.



Counsel for the e-discovery producing party, should consider a rising trend in protecting their client from inadvertent spoliation sanctions, by recommending that the client's computer hard drives be forensically copied. By performing the bit stream copying of 'suspect' hard drives and other storage media upon the receipt of an evidence preservation notice, the client's business operations would be able to continue to operate without interruption.

Review of active and deleted data should be the objective of a requesting party as well as the producing party to be assured that a thorough examination has been conducted. By including both categories of data (active and deleted) in an e-discovery request, the requesting party effectively puts the producing party on formal notice of the extent to which digital documents and e-mails are being pursued. The producing party is then compelled to conduct its privilege review of both active and deleted data from the start which will prevent unwelcome surprises arising from opposing forensic expert's recovery of unknown deleted evidence later on. Sometimes, the recovery of exculpatory evidence is the end result of review of deleted evidence which might not otherwise have presented itself.

If your client has to win the case and you are considering whether or not there may be deleted data on someone's computer that would be useful to you, you have nothing to lose in exploring how digital forensics might play a role.

Don't wait any longer in exploring the possibilities as to how computer forensic discovery can support your most difficult cases. Call and ask to speak with one of our forensic consultants for an assessment as to how computer forensics may be a fit for a particular legal matter at **847-756-4890**, or see us on the web at www.cybercontrols.net.