

U.S. Electronic Discovery Update

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On 1 December 2006, the U.S. Federal Rules of Civil Procedure (FRCP) were amended to include all electronically stored information as a requirement in civil discovery. These amendments are the much anticipated result of several years of work by members of the FRCP Advisory Committee. In the months leading up to the implementation of the new rules, several American courts foreshadowed the parameters of the amended rules and practitioners took note by better preparing clients for discovery of electronic data. Now that the amended Rules are in place in the American judicial system, we can only expect the legal landscape of electronic data to be forever changed and follow the lead of already decided case law.

Noteworthy Cases

In recent months, before the proposed amendments took effect, U.S. courts continued to examine electronic discovery issues surrounding the identification, production and preservation of relevant electronically stored information. Noteworthy cases include the following:

- **Court Refuses to Issue Spoliation Sanctions Where Deleted Records Were Recovered**

Crandall v. The City and County of Denver, 2006 WL 2683754 (D.Colo. Sept. 19, 2006). In a case involving exposure to harmful chemicals, the plaintiffs sought sanctions against the defendant for deleting e-mail before and during the litigation. Specifically, the defendant's e-mail protocol automatically deleted e-mails every seven days – this protocol was not changed until 6 months after litigation started. The court found that because the plaintiffs were not prejudiced by loss of the alleged data, sanctions would not be assessed on the defendant.

- **Mere Suspicion of Discovery Misconduct is Insufficient to Order Computer Examination**

Powers v. Thomas M. Cooley Law School, 2006 WL 2711512 (W.D. Mich. Sept. 21, 2006). The plaintiff sought to examine the defendant's computer system with her computer forensics expert because she suspected the defendant destroyed relevant documents. The court refused the forensic examination, holding "mere suspicion that the opponent may be withholding discoverable information" is not enough to order a costly and intrusive examination.

- **Sanctions Issued for Faulty Litigation Hold and Discovery Misconduct**

3M v. Tomar Elec., 2006 WL 2670038 (D. Minn. Sept. 18, 2006). In a patent infringement case, the defendant repeatedly gave false testimony regarding the existence and content of relevant e-mails of employees within his company. The court held that such deliberate failure to comply with any rules of discovery warranted sanctions that included: adverse jury instructions, negative inferences to the jury and monetary sanctions to cover the costs of the plaintiff in bringing the motions related to the discovery and any future depositions needed to correct the defendant's withholdings.

- **Deliberate Deletion of Files from Laptop Warrants Dismissal**

Leon v. IDX Sys. Corp., 2006 WL 2684512 (9th Cir. Sept. 20, 2006). In an employment discrimination suit, the plaintiff deleted over 2,200 files from his work-issued laptop. The defendant's computer forensic expert determined the plaintiff intentionally wiped the laptop's hard drive before turning it over to defendant for examination. The court decided to dismiss the case because lesser sanctions would not be useful and any attempts to rectify the harm done by plaintiff would be "futile."

Conclusion

Current American case law only forewarns civil litigants of the requirements expected for discovery of electronic data. The amended Federal Rules only clarify an already burgeoning area of discovery and solidify the fact that electronic discovery will be a part of the American legal system from this point forward.

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