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The Cost of Electronic Discovery

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In today's world of technological advancement, the vast majority of information is stored electronically, rather than on traditional media. Every segment of society from large corporations to small families is using computers to cut costs, improve production, enhance communications, store data and improve capabilities. Most computer users are aware that word processors, spreadsheets, e-mail programs and other popular used accessories generate information that is stored electronically in the form of files. Computers, however, generate far more information than most users realize. For example, most word processor programs automatically store prior drafts of written documents as well as the time and date of edits and the name of the person who made those edits. This type of hidden or unknown computer data comprises a large portion of discoverable electronic evidence.

It is now black letter law that computerized or electronic data is discoverable if relevant. In most jurisdictions, discovery of electronic "documents" is governed by the same rules that deal with traditional

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Gone Phishin'

David Whelan

The latest attack on your time – and wallets, and identities – is the scam known as "phishing". It starts with a seemingly authentic request from a bank, credit card company, or other e-commerce site, for an update of your personal records. The e-mail may even have appropriate corporate logos and a legitimate-looking e-mail address. Here's an example that purports to be from Citibank and asks that banking details be updated. Let's dissect the problems with this e-mail!

E-mail Address Spoofing

You are used to opening an e-mail, seeing that it's from auntsally@hotmail.com and looking forward to reading the latest news of Aunt Sally and Uncle Bert's trip to Louisville. This familiarity hides a

Cont'd. on Page 4

✓ Use your dart board to evaluate potential damages.

✓ Run to the courthouse every time you need a docket.

✓ Surf a bunch of Internet sites to track down personal and criminal information.

✓ Dash to the library to check a case or statute.

✓ Create your own forms.

✓ Ignore the 500,000 expert-authored briefs available online and search manually. Good luck.

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Electronic Discovery, cont'd from page 1

paper discovery. Federal Rule of Civil Procedure 34(a) broadly defines a "document" as including "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." The requirement that one need only produce "documents" in one's possession, custody or control can extend to information not readily accessible, but capable of being recreated, often at great expense to the producing party.

With traditional paper discovery, the respondent ordinarily bears the cost of gathering and reviewing documents while the requesting party generally bears the cost of copying responsive documents. However, this cost-shifting tactic is less attractive to the producing party within the context of electronic discovery for obvious reasons; litigants are understandably reluctant to simply open up their computer banks and electronic files to the opposing party. Further, litigants must provide the requesting party with vast universe of their relevant non-privileged electronic documents in a useable format.

Within the federal court system and most state court systems, the judiciary is called upon to prevent "undue burden or expense." Fed.R.Civ.P. 26(c). That having been said, it has been noted that "[t]oo often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter." *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. Jan. 16, 2002). In allocating the cost of electronic discovery, the Rowe court fashioned an eight point test

to evaluate a claim of "undue burden or expense":

1. The specificity of the discovery requests.
2. The likelihood of discovering critical information.
3. The availability of such information from other sources.
4. The purposes for which the responding party maintains the requested data.
5. The relative benefit to the parties of obtaining the information.
6. The total cost associated with production.
7. The relative ability of each party to control costs and its incentive to do so.
8. The resources available to each party.

After weighing these factors, the Court determined that the cost of producing e-mail from the defendants' backup tapes and hard drives should be borne by the plaintiffs. However, many courts remain unpersuaded by arguments of undue burden and cost with regard to electronic discovery, especially where the cost and complexity of such production results from the business choice of the producing party, and refuse to shift electronic production costs to the requesting party. The cost allocation analysis is case specific and care should be taken to develop an argument in favor of shifting the cost to the requesting party.

The question thus becomes what can a corporate litigant do to minimize the costs the electronic

discovery. At the outset, care must be taken to inventory, identify and preserve the repositories of relevant electronic data. Active electronic data (information that is readily accessible to the user) can be found in wide variety of sources including personal computers, laptop computers, home computers, handheld computers, cell phones, voicemail, pagers, video recorders, digital cameras, electronic calendars and e-mail systems. However, back-up data, archival data, residual data,

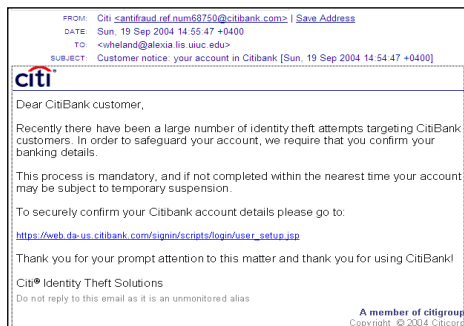
embedded data, legacy data, and internet data must also be considered for responsiveness. Failure to preserve potentially relevant electronic data can result in substantial fines, a spoliation instruction or default judgment. There are also a number of offensive tactics which can be used to limit the cost of electronic discovery. For example, it is possible to limit the scope of discovery -- and thus the cost of discovery -- by negotiating a data exchange agreement with the opposing party. Obviously, the potential cost savings are greater when these tactics are implemented early in the litigation process.

Although the law of electronic discovery is in its infancy, it is clear that litigants have a duty to produce electronic documents, and the failure to do so can be more costly than producing the discoverable electronic data.

If you have any questions about electronic discovery, please contact Ramonda C. Lyons at (304) 357-0900.

Gone Phishin', cont'd from page 1

problem, which is that an e-mail address is not always a reliable indicator of the e-mail's origin. An e-mail address can be "spoofed" or faked, so that "Sender A" can appear to be "Sender B". If you attempt to reply to the address, it will sometimes go to a legitimate "Sender B" – who did not send you a message – or it will go into a void. Although this e-mail says it is from Citibank.com, it is unlikely to be a real address.

**Invisible Link**

When you click on a link in an e-mail, it might or might not take you to the link that you can SEE. There are two common types of e-mail formats: plain text and HTML. The latter is a Web page that is sent as an e-mail, and can be programmed to hide all sorts of things. In most cases, these e-mails are benign. When the e-mail is "phish-ing", however, the programming is where the deception is executed. If you were to click on the link in this e-mail, you would actually open a page at this Web site: <http://148.78.251.6/cit/> [This link is now dead; a "phish-er" moves often].

If you were to move your mouse pointer over the text of this message, you would not see the normal "I" cursor, which

denotes that your mouse is over text. Instead, you would see the pointing hand cursor, which indicates the mouse is over a graphic. The entire message is a big, clickable button. When you click on it, it will open two new pages: one is a real Citibank.com page, and the other is a form that asks for your personal information.

Grab the Cannoli

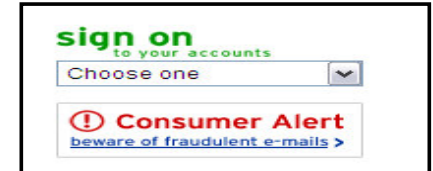
The new window cannot be resized, and it is programmed so that you cannot see the Web site from which it opened. These are hints that you may not be seeing a legitimate Web page! Even the most intrepid Web site purchaser might balk at the type of information this form seeks: mother's maiden name, social security number, credit card number, address information, and so on. Surprisingly, phishing is successful enough that it continues to be a problem. A recent Gartner Group report indicated that the "click-through" rate – those e-mail recipients who clicked on the message to go to the questionable form – was 3%, which is 6 times the success rate for average spam. If a visitor to this form were to type in each piece of information and hit the **SUBMIT** button on the form, it would be sent to the "phish-er" who could then begin to use it for financial transactions or identity theft.

Don't Bite

The easiest solution is to ignore e-mails that seek financial or personal information. That is not always an acceptable solution if, say, your legal research provider wants information or payment! If you are not sure whether the e-mail is legitimate – especially if you were not expecting it – go to the Web site of the company that

appears to be asking for information and look for the same request. If it is not there, there is a good chance you are looking at e-mail bait.

For example, a trip to <http://www.citibank.com> reveals a conspicuous consumer alert warning within information about phish scams.



Alternatively, you may have an account with the company the e-mail purports to be from. Go to that account online, log in, and see if you have any messages or outdated information. Do not click on any link in the e-mail; go the way you would normally go, by typing in the URL, from your Web browser's bookmarks, or a search engine.

Safe Surfing

E-mail has become ubiquitous for lawyers and many of the products and services law firms buy on the Internet. As you engage in online commerce, creating accounts and storing information at virtual Web stores or research databases, be vigilant about e-mail scams.

Phishing Lures

Webopedia Phishing Definition
<http://sbc.webopedia.com/TERM/p/phishing.html>

FTC Phishing Alert
<http://www.ftc.gov/bcp/conline/pubs/alerts/phishingalrt.htm>

Surge in Phishing Attacks Prompts Call for Change
<http://www.computerworld.com/developmenttopics/websitemgmt/story/0.10801.93300.00.html>

Requesting Library Books After Hours

Julie Koehne

You can access the Law Library's online catalog 24 hours a day, and you may now request a book after hours. Library staff will process your request the next morning.

Log In to the Online Catalog

Access the Library's catalog at <http://lawlib.hamilton-co.org/ipac20/ipac.jsp?profile=clla> and sign in. Select the **My Account** tab at the top of the Web page and type in your last name, first name, middle initial if applicable, and library borrower number; type in your name and number as they appear on your newsletter mailing label, or (513) 946-5300 to find out your number.

Online Requests

Search the catalogue by title, keyword, author, or subject. Once you have found the desired material, select the **Holdings** option on the left side of the menu to determine its availability.

The Holdings screen will appear, showing what the Library has and whether it is available. You can select one volume or multiple volumes. To request an item,

click on the **Request Copy** link to the right of the item.

You will be asked to confirm your request. If the Request information is correct – correct volume – then click the **Request** button at the bottom of the screen to submit your request.

The screenshot shows a 'Request Confirmation' form for the item 'Drug testing legal manual and practice aids.' by Zeese, Kevin B. (KF3890 .Z442 V.1). It includes fields for notification method (phone), pickup location (Cincinnati Law Library Assoc.), and an effective date of 08/12/2004. There is a comment field and buttons for 'Request', 'Cancel', and 'Cancel and Logout'.

The next morning, library staff will process requests made after 4 PM the previous day. If there are questions relating to your request, we will call you. If not, the titles you requested will be on the hold shelf at the Circulation desk.



Did You Know Our Members Receive:

- ❖ Free Westlaw Access in the Library
- ❖ Free Internet Access in the Library
- ❖ Free Access to CD-ROM law libraries and forms
- ❖ Free Reference Assistance, in person, by phone, or via e-mail
- ❖ Extensive Ohio and Federal primary law collection in print and electronic formats
- ❖ Practice materials, including:
 - handbooks
 - rules
 - treatises
 - jury verdicts
- ❖ Borrowing privileges to nearly all materials in the Library's collection, including CLE materials.

The screenshot shows the search results for 'Drug testing legal manual and practice aids.' by Kevin B. Zeese. It includes item information, subjects, and a table of copy/holding information.

Collection	Call No.	Status	
Text Room	KF3890 .Z442 V.1	Available	Request Copy
Text Room	KF3890 .Z442 V.2	Available	Request Copy

COMING IN NOVEMBER

Get your wireless on! The Law Library will be activating a wireless network throughout the 6th floor reading area and members lounge.

Watch for details next month!

Law Library E-mail News and Blog

Visit the Cincinnati Law Library's Blog

What is a blog? A blog, short for web log, is a web site on which individuals can quickly post thoughts and interact with people. Individuals may use it as an online diary, a place to espouse personal beliefs or to voice political opinions. Businesses may use it to communicate with customers. Basically, a blog is whatever its user wants it to be.

Blogs also allow viewers to post feedback about the content of your blog. Whether from like-minded individuals or from those at your polar opposite, feedback can provide you an effective tool to communicate with others. Furthermore, you can set your blog to display or hide feedback from others; you can even delete others' postings.

A blog is a convenient way to meet others with similar interests. For example, users and administrators can create profiles that link to their personal blogs and posts. Other links, such as interests and locations, will take you to other blogs whose content you may enjoy.

Blogs are easy to update. You may submit posts via your preferred email program or wireless device. A number of blog programs have downloadable software that makes submitting even easier. Some sites allow users to post pictures, sound files, and even video clips.

To visit the library's blog, visit <http://www.hamilton-co.org/cinlawlib/blog/>.

Get Library News and Practice Updates on CincinnatiLaw

The Law Library's Web site at <http://www.hamilton-co.org/cinlawlib> continues to be our primary way to share information with the world. But we have added a private, e-mail list to share news and practice information for Association members.

CincinnatiLaw is a broadcast-only list, meaning that it will only be used for bulletins on specific topics, and only members of the

Association (including officials designated by statute) may subscribe. Messages will be sent by Library staff on topics related to legal research and information in a variety of practice areas.

Subscribe to CincinnatiLaw by visiting <http://mylist.net/listinfo/cincinnatiLaw> and following the instructions.

Electronic Newsletter?

The October edition of the library's newsletter will be the last one published exclusively in paper. Members may continue to receive a paper copy or they can elect to receive an electronic version of the monthly newsletter instead.

How to get the electronic version?

1. Join the CincinnatiLaw list at <http://mylist.net/listinfo/cincinnatiLaw>
2. Once you have received your confirmation, scroll to the bottom of the screen on which you subscribed to the list, where it says **CincinnatiLaw Subscribers**.
3. Choose to edit your subscription options
When prompted, type in your e-mail address and password received in your confirmation
4. At your subscription screen, scroll down to the topics and select Newsletter (and any other topics you'd like to receive).

Mail delivery	
Set this option to <i>Enabled</i> to receive messages posted to this mailing list. Set it to <i>Disabled</i> if you want to stay subscribed, but don't want mail delivered to you for a while (e.g. you're going on vacation). If you disable mail delivery, don't forget to re-enable it when you come back; it will not be automatically re-enabled.	<input checked="" type="radio"/> Enabled <input type="radio"/> Disabled <input type="checkbox"/> Set globally
Which topic categories would you like to subscribe to?	
	<input type="checkbox"/> Employment (Details) <input type="checkbox"/> Estates and Trusts (Details) <input type="checkbox"/> Family Law (Details) <input type="checkbox"/> Newsletter (Details) <input type="checkbox"/> Pension Benefits (Details) <input type="checkbox"/> Tax (Details) <input type="checkbox"/> Torts (Details) <input type="checkbox"/> Workers' Compensation (Details)
<small>Topics are used to categorize messages coming from the Library to you. Each topic is focused on a practice area or type of information. Select the topics in which you are interested in order to receive mail on those topics. The Library will not send more than 4 messages a month on any given topic. In addition, you may receive general messages that are not on any topic when there is a message that affects all members.</small>	

5. Scroll down to the very bottom of the page and select the **Submit My Changes** button.

Law Library Announces New Databases from Commerce Clearing House

The Cincinnati Law Library is pleased to announce access to three new database collections in its developing arsenal of members-only online services.

CCH Business Law portal includes databases covering Federal and state securities, banking and finance, capital changes, government contracts, business law, credit regulation, transportation law and public utilities, antitrust and trade regulation, election law, intellectual property and information technology law, product liability and safety law, franchise and distribution law, federal energy guidelines, and international interest areas.

CCH Human Resources databases include safety, OSHA compliance and workers' compensation; unemployment insurance and social security topics, human resource management, payroll, overtime, pensions and benefits, and employment law. There are also numerous forms and other practice tools. The *Performance Impact Workshop* LAN-based performance management solution for small- mid-sized employers was named one of the top ten HR products by Human Resource Executive magazine in 2003.

CCH Tax and Accounting includes a research resource gateway, a tax research network, and an accounting research manager. Among the topic areas are accounting and audits, financial and estate planning, pensions and payroll aspects, and Federal, state, and sales tax sections. The databases are supplemented with financial calculators and checklists. The *ProSystem FX* tax system benefits users from a new intuitive, streamlined interface leveraging the latest technologies. The "worksheet view" allows users to input data directly onto worksheets and consolidate information necessary to complete a form.

The Library also has subscriptions to Hein Online's "top 30 cited journals," Infotrac's Legaltrac periodical index, and PACER's online service center for Federal court information, each of which requires a password from the Reference desk for use. All other resources can be used from any computer on the library's network.

New Print Titles at the Library

- *Alternative Dispute Resolution*
Jay E. Greinig: Thomson West, 2004
- *Effective Management of Sexual Harassment Claims*. OSBA, 2004.
- *Kentucky Real Estate Law*. Virginia L. Lawson: West, 2004.
- *Legal Research: How to Find and Understand the Law*. Stephen Elias: Nolo, 2004.
- *National Survey of State Laws*. Richard A. Leiter, ed.: Thomson Gale, 2005.
- *Ohio Real Estate Transactions*. Samuel S. Wilson and Thomas J. Sherman: Anderson, 2004.
- *Trial Handbook for Indiana Lawyers*. Terrance L. Smith and Adrian P. Smith: Thomson West, 2004.
- *Want's Federal State Court Directory*. Want Publishing, 2004-2005 ed.

Professionalism CLE at the Library

Are you an Ohio lawyer in need of your **mandatory** professionalism CLE credit? The Cincinnati Law Library will offer a one-hour CLE led by Professor James O'Reilly of the University of Cincinnati College of Law called **Dialogue on Lessons Taught and Lessons Learned as New Lawyers Enter Practice**. This course has been approved by the Ohio Supreme Court Commission on Continuing Legal Education for 1 CLE credit hour (1 hour of professionalism).

Join us at the Law Library on Wednesday, November 17, 2004, from 3pm-4pm. Library Association **members: \$10**; Non-members: \$25.

Please call Madonna Gresser at (513) 946-5300 to reserve a place or register online at <http://www.hamilton-co.org/cinlawlib/cle/signup.html>.

**Cincinnati Law Library Association
Hamilton County Courthouse
1000 Main Street, Room 601
Cincinnati, OH 45202**

ADDRESS CORRECTION REQUESTED

INSIDE THIS MONTH

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OCTOBER 2004 LIBRARY NEWSLETTER
