



# FORENSICON

computer forensics & electronic discovery specialists

AN ELECTRONIC DISCOVERY NEWSLETTER

Volume V, Issue II

Fall, 2005

## FORENSICON OPENS NEW OFFICE LOCATION IN DOWNTOWN MILWAUKEE

2005 has been a busy year for Forensicon. The year started with a bang in observance of the company's five-year anniversary. In the spring, Forensicon moved to a brand-new facility in Chicago that houses a state-of-the-art computer laboratory and larger office space to accommodate staff expansion.

Following this growth trend, Forensicon is expanding its operations to the heart of Milwaukee, Wisconsin. The new location will be integral to the business activities in the Wisconsin area. As Forensicon expands, Lee

Neubecker, President and founder, sees the merit in establishing a more localized office that's easily accessible to many of Forensicon's clients. With the increase in clients from the Wisconsin area, it made sense to him to establish a site that will facilitate instant response to client needs.

Apart from the increase in physical space, Forensicon's expansion has also increased the involvement of Mr. Neubecker within the legal community, evident in his opportunities to

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## HELP CLIENTS AVOID EVIDENCE SPOILIATION

FEATURE ARTICLE

— *An ounce of prevention is better than a pound of cure (and court sanctions)*

Consider the Following Scenario...

**W**hen John Elder thought he was passed up for a promotion because of his age, he decided to leave Company X. During the exit interview before his departure, John mentioned to the HR personnel that he had a valid reason to think he was being discriminated against because of his advanced age.

After John's departure, the HR personnel, with the help of the IT department, searched John's computer for any signs of "the valid reason" he had mentioned but to no avail. His computer was then redeployed to a new hire.

A few weeks after John's departure, Company X was served with an age discrimination suit, which led in-house counsel to issue a litigation hold. Despite counsel's prompt action, several executives purged their computer of old files to rid their computers of any damaging evidence.

During litigation, the plaintiff requested discovery, and the judge ordered the defendant to produce the computers used by key individuals in Company X. The plaintiff hired a computer forensic expert to uncover files that might support John's allegations. The expert noticed that on John's computer, HR's attempts to search for the evidence John had mentioned during the interview had altered the "modify" dates. Furthermore, the computers of the executives contained mass deletion activities that occurred on the date the litigation hold was issued. This report was sufficient for the court to impose sanctions on Company X for spoliation of evidence, and the case was settled in favor of the plaintiff.

### Understanding How Spoliation Occurs

Apart from willful destruction, electronic evidence spoliation occurs very easily, and often times, without any exertion from an individual. In the preceding scenario, when HR and IT were looking through John's

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### Welcome New Clients:

- *FagelHaber LLC*
- *Jones Day*
- *Meltzer, Purtill & Stelle LLC*
- *Paul, Hastings, Janofsky & Walker LLP*
- *Quarles & Brady LLP*
- *Shayne & Greenwald*
- *Shook, Hardy & Bacon LLP*
- *Tressler, Soderstrom, Maloney & Priess*
- *Whitfield & McGann*
- *Winston & Strawn LLP*

## EVIDENCE SPOILIATION...

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computer, they had inadvertently changed the metadata of the files, which, in this case, was the modify date. Essentially, metadata is data about data. It provides information about a file, such as the date the file was created, modified or deleted, the person who created the file, etc.

When a computer is left turned on, the likelihood of changing the metadata on active files in the normal course of business is extremely high. Data can be overwritten when someone opens and closes a file, during routine automatic electronic document destruction or during the weekly backup of the network data when new data overwrites old data on the backup tape. Sometimes computers are configured to have their hard drives defragmented every month, which can cause meta dates of the files to change, thereby complicating the forensic investigation.

The mutability of electronic evidence is a compelling reason for counsel to exercise extreme caution when dealing with a case that involves electronic discovery. It is important for in-house counsel to understand their client's technology to ensure that they meet their legal obligations during the preservation and discovery process. For example, if counsel is unaware of the recycling of backup tapes, this may pose as a potential problem if the IT department continues to rewrite these backup tapes with new data, consequently destroying old data that may be relevant during litigation.

Counsel should take the following necessary measures to ensure their client adheres to proper preservation procedures during litigation, or in anticipation of one, to prevent spoliation of evidence. These measures, when carefully followed, should help save the client a lot of trouble and money during discovery proceedings. As with willful destruction (evident in the previous scenario when the executives in Company X were industriously deleting electronic files), there really is not much counsel can do to reverse the detriment caused by such actions.

### Preventing Evidence Spoliation

A best practice for a company, even when there is no pending litigation, is to anticipate one just to make sure that they are always ready with a response, should litigation arise.

For example, when an employee leaves the company, have a policy in place whereby the computer(s) used by the employee will be turned off and set aside. Personnel from HR or IT should not be allowed to navigate the computer until proper measures have been taken to capture the data on the computer (known as forensic hard drive imaging) to make sure that the information is kept "frozen in time." Optimally, this procedure should be performed by a computer forensic expert.

It is also a good practice to remove the hard drive used by the employee and replace it with a new one before deploying the same computer to a new employee. The old hard drive should be sealed and kept in a secure location for a period of time addressed in the company's document retention policies. When litigation arises, hire a computer forensics expert to perform a forensic analysis on the hard drive that was stored in a secure location. This measure will ensure the information contained within the drive is not tainted by further use, which could prove to be vitally important at a later date.

In a recent landmark case, *Zubulake v. UBS Warburg, Inc.*, a string of decisions were made that influenced many of the processes of electronic discovery today. In one of the decisions, *Zubulake V*, 2004 WL 1620866 (S.D.N.Y. Jul 20, 2004), the court established three steps attorneys should follow to help their clients preserve documents: 1) issue a litigation hold; 2) talk to key individuals about preservation of documents; 3) obtain the electronic documents. In following that decision, in the event of litigation, counsel should not wait but immediately issue a litigation hold to stop all routine destruction of company files. Therefore, it is important for

### RECENT SPOILIATION CASE LAWS:

\* *Broccoli v. Echostar Communications Corp.*  
2005 WL 1863176  
(D. Md. Aug. 4, 2005)

\* *Foust v. McFarland*  
698 N.W.2d 24  
(Minn. Ct. App. 2005)

\* *Institute for Motivational Living, Inc. v. Doulos Institute for Strategic Consulting*  
110 Fed. Appx. 283  
(3rd Cir. 2004)

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## EVIDENCE SPOILIATION

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counsel to understand the infrastructure of the client to be able to target all documents that are discoverable.

The litigation hold should notify every employee to halt all document destruction and deletion. Once issued, counsel has to exercise constant vigilance to ensure that every employee adheres to their preservation duties. Issuing a hold just once at the onset of litigation will not suffice as variables like the addition of new employees may undermine the first decree. Therefore, effective communication between counsel and client is vital to the efficacy of the litigation hold.

Counsel should also take affirmative steps to determine that all sources of information can be ascertained and searched. One

such step is to hire a computer forensic expert to image the hard drives of key individuals identified in Rule 26(a) Initial Disclosures. These individuals should be instructed to gather and segregate electronic copies of files relevant to the case. In the same vein, counsel should identify and set aside backup tapes that concern relevant time frames and key individuals, and keep them at the same secure location as the copy of the imaged hard drives.

In the electronic age, it is reasonable to assume the prominence of electronic data in the discovery process, but as with any new development, it comes with its own set of caveats. However, let this not be a deterrent to counsel's attempts to surmount it. The recommendations set forth herein will facilitate counsel in circumventing the pitfalls of electronic evidence spoliation.

## EMPLOYEE SPOTLIGHT(S): KEITH C. NORMAN AND YADIKA SHARMA



Keith C. Norman  
Client Services Manager

Keith C. Norman joined Forensicon in May, 2005 as Client Services Manager. In this role, Mr. Norman oversees client services to ensure continued customer satisfaction and to help further develop Forensicon's presence in Chicago, as well as nationally. He brings with him vast experience in supporting the entire litigation process technologically, from discovery through verdict.

Formerly of Encore Lex Solutio, a document imaging and electronic discovery services company, Mr. Norman provided consulting services to litigation support departments and to major Midwest area law firms. He garnered knowledge of the primary litigation database software solutions in use by firms, from both a user and administrative perspective through his work at Encore Lex Solutio, where he also became one of the leading regional account managers.

Prior to Encore Lex Solutio, Mr. Norman was a professional at Datakeep. His responsibilities included acquisition, distribution and management of stored media and document records.

Mr. Norman graduated from Arizona State University with a Fine Arts degree. His penchant for the arts is evident in his activities outside of work where he is involved in the local music scene with his band. Mr. Norman is also currently at the final stages of completing a movie he wrote and directed—a project over two years in the making.

Yadika Sharma joined Forensicon in August, 2005 as our new Operations Manager. Ms. Sharma received her MS from the Illinois Institute of Technology in Personnel and Human Resource Development and her BA in Psychology from Knox College. Her educational background, coupled with her vocational experience, makes her an invaluable addition to Forensicon's ever-growing needs in personnel recruitment, staff development and administrative management.



Yadika Sharma  
Operations Manager

Prior to her position here at Forensicon, Ms. Sharma managed daily operational functions of three J.B. Grubarts stores in Chicago, Illinois. Her role as the HR Operations Manager required her to hire and train new staff, regulate company rules and procedures, maintain vendor relationships and supervise warehouse audit for all stores on a quarterly basis to ensure optimal inventory control and procurement.

Before J.B. Grubarts, Ms. Sharma was an associate consultant with SHL, USA, Inc. Her duties included the recruitment, interview, and orientation of consultants for the Chicago office of SHL, development of a competency-modeling workshop for an international hotel chain, and management of training projects for an international airline.

When Ms. Sharma isn't multi-tasking at Forensicon, she enjoys some quiet time reading, painting or watching old movies. For adventure, she relishes her time traveling with her husband—her last exploration took her to the tropical haven, Jamaica.

# FORENSICON

AN ELECTRONIC DISCOVERY  
NEWSLETTER

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***Computer Forensics &  
Electronic Discovery Services***

## MILWAUKEE...

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disseminate information about  
computer forensics and electronic  
discovery through his presentations  
to legal professionals.

In the beginning of the year, Mr.  
Neubecker presented a seminar at  
the American Law Firm  
Association's International  
Client Seminar in Boca Raton,

Florida. Additionally, he spoke at the Law Bulletin's E-Discovery Conference in  
June and presented a CLE seminar at the Chicago Bar Association, addressing  
the issues of managing forensics investigations. Just this past October, he joined  
an ensemble cast of attorneys from FagelHaber, LLC in a seminar entitled,  
"Pitfalls to Avoid in the Electronic Era."

Mr. Neubecker believes that his company's expansion is largely attributed to its  
clients' faith in Forensicon's abilities as experts. To necessitate this growth trend,  
Forensicon will continue to exceed client expectations and help elucidate  
computer forensics to willing ears as he believes it is essential to the clients'  
strategy in finding the "smoking gun" to help win their case.



Lee Neubecker as guest speaker at the FagelHaber seminar

## MARK YOUR CALENDAR!

**Wednesday, December 7, 2005, Noon - 1:30 pm**

Forensicon seminar\*:

### **"FORENSIC DISCOVERY VS. ELECTRONIC DISCOVERY: WHAT IS THE DIFFERENCE?"**

Seminar at 226 S. Wabash Avenue, Suite 300, includes lunch

Participants will learn about the various sources of discovery present on a computer, how it is captured and used, and why the standard electronic discovery process of collecting email and native files is not giving them, or their clients, the "whole" picture.

To register for this seminar or for more information, please call Forensicon at 312-427-5667

\*Forensicon conducts a series of seminars to help clients and non-clients understand forensic discovery. Topics covered include incident response best practices, discovery protocols, and basic interpretation of forensic analysis. To join us for any of these seminars, or should you find the need for one conducted in your firm, please contact us at the number above.

#### **Forensicon's Services:**

- Electronic Evidence Preservation & Management
- Computer Forensics
- Data Recovery
- Electronic Discovery
- Expert Reports

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Contained herein are the opinions and observations of Forensicon, Inc., derived from our experience and research in the subject topics.  
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