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Straight & Narrow ETHICS

Protecting Yourself Against E-illiteracy: Avoid Being Duped

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The world of electronic data discovery (EDD), as it is called in litigation, is the current "hotbed" for vendors that are adept in finding the way to the hearts of attorneys involved in litigation. How difficult could that be, considering the e-illiteracy existing in bankruptcy litigation? The only problem is you may find yourself being duped during the EDD process.



Jack Seward

This article is not about those that win and lose in litigation; this is about having the wool pulled right over your eyes by those involved with EDD. How is that done? Easily. Consider this article required reading to come out of the

EDD jungle alive. You will have an understanding of how, when allowed to go unabated, EDD can twist and bend the production of documents rules.

It should be no surprise that e-illiteracy cannot remain in the bankruptcy arena and professionals need to adopt the "best practices." Indeed, the compulsory disclosure requirements to FRCP 26(a)(1) became effective Dec. 1, 2000, requiring parties to

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disclose the existence of electronic documents and other information when a lawsuit is started.

Exactly what are we are talking about? Depicting how information provided by the producing party, including the EDD vendor, subject to the electronic data discovery request, may have less to do with compliance than you expect. Bankruptcy attorneys should seriously consider the following probative questions related to EDD. However, remember that this is not intended to be a course on the responsibilities of document production and responses to EDD request.

- Do you understand that e-mail and electronic communications often contain attached files that are exchanged internally and externally?

- Do you understand that e-mail and electronic communications often seek comments on the information provided in the attached files sent previously and/or currently?

- Do you understand that e-mail and electronic communications exchanged between parties often seek comments?²

- Do you understand that e-mail and electronic communications exchanged between parties often contain attached files?³

- Do you understand that e-mail and electronic communications will often discuss the state of financial affairs of the debtor?⁴

- Do you understand that e-mail and electronic communications exchanged between parties often include responses to earlier e-mail and may be part of an

² Including, for example, corporate officers, corporate directors, audit committee members, current employees, past and dismissed employees, current and past auditors, financial advisors, workout and turnaround consultants, loan liquidators, mergers and acquisitions, tax accountants, offshore partners, investment bankers, lending institutions, leasing companies, appraisers, potential buyers, real estate brokers, credit managers, insurance companies, ASP vendors, computer consultants, related parties and insiders.

³ Including, for example, loan documents, audit reports, internal financial statements, financial investigations, changed financial statements, spreadsheets, accounting reports, journal entries, *pro forma* financial statements, budgets and forecasts, trend statements, management reports, customer information, vendor information, tax returns, taxpayer identification numbers, real estate ownership, joint venture agreements, inventories, contracts, leases and database files.

⁴ Including, for example, out of trust, bogus customers and invoices, insider transactions, capitalizations of loans, backdating transactions and documents, transfer of property, write-down of assets, related party transactions, future recovery of bad debts, side agreements, sale of inventory, offshore entities, off-balance sheet accounts and entities, planned bankruptcy, insolvency, obtaining credit during insolvency, payments to creditors, financial representations during insolvency, fraudulent conduct, executory contracts, accounting fraud and notice from whistleblower.

extended and continuing thread of communications between the parties?

- Do you understand that e-mail and electronic communications threads often only contain a few words—for example "looks good," "OK," "I agree," "I talked with them," etc.?

- Do you understand what steps the producing party and the EDD vendor plan to take for producing EDD, including e-mail and related file attachments, Instant Messaging (IM) and other forms of electronic communications?

- Do you understand that the producing party and the EDD vendor may plan to remove from the production e-mail and electronic communications they claim are duplicates?

- Do you understand the definition that will be used for the removal of "duplicates" by the producing party and the EDD vendor for e-mail and electronic communication?

- Do you understand that if the claimed duplicates are removed, you may not be able to discover "who, what, where and when" about those deduplicated (a.k.a. "de-dupe") e-mail and electronic communications?

- Do you understand that when the claimed duplicates are allowed to be deduped, only one instance of the e-mail and electronic communications is produced?

- Do you understand that when the claimed duplicates are allowed to be deduped, all e-mail saved by corporate officers, directors, current employees, past and dismissed employees, workout and turnaround consultants, and those who may have identified the existence of fraud, or made a complaint as a whistleblower on corporate desktop computers, laptops and removable media, will not be included?

- Do you understand that when the de-dupe is allowed to take place, the possibility of reviewing that e-mail document in the complete context of the e-mail thread is difficult, if not impossible, to interpret?

- Do you understand that the producing party and EDD vendor will claim that providing duplicates and not allowing the EDD vendor to remove them will increase costs of production?

- Do you understand that the producing party claim of increased cost is true, but the reason for concern by the producing party and the EDD vendor is the inherent risk of having multiple e-mails, including attached files, one coded responsive and the other privileged?

- Do you understand that if the producing party and EDD vendor was allowed to remove the claimed duplicate e-mail, including attached files, even the identity of the individual who sent or received the electronic communications will affect how it is construed?

- Do you understand if the producing party and EDD vendor was allowed to remove the claimed duplicate e-mail, including attached files, the identity of the individual who sent or received the communications will affect the claim of privilege?

- Do you understand if the producing party and EDD vendor was allowed to remove the claimed duplicate e-mail, including attached files, the claim of privilege may depend on who received it?

- Do you understand that because of the unrestrained use of e-mail, including file attachments, the attorney/client privilege may be waived for electronic communications when it is sent and/or forwarded to someone other than the client, attorney and others involved inside the privilege circle?

- Do you understand that the producing party may have used a 90-day document retention policy and deleted e-mail, including attached files, from back-up media?

- Do you understand that the producing party and EDD vendor does not want to provide the EDD, e-mail duplicates, including attached files, and electronic files that may be stored on corporate desktop computers, laptops and removable media used by employees in the ordinary course and that may already have been deleted from the corporate back-up media after 90 days under the document retention policy?

- Do you understand that the producing party may have used a 90-day document-retention policy improperly and deleted e-mail, including attached files, that would contain important and necessary corporate records, and financial statements that may not be found on the back-up media may be stored on corporate desktop computers, laptops and removable media used by employees in the ordinary course?

- Do you understand that if the producing party and EDD vendor were allowed to remove claimed duplicate e-mail, including attached files, for electronic communications sent from the same person on the same date and with the same

description in the subject line and the same name used for the attached file, that the content may often be dissimilar?

- Do you understand that if the producing party and EDD vendor were allowed to remove claimed duplicate e-mail, including attached files, for electronic communications sent from the same person on the same date and with the same description in the subject line and the same name used for the attached file, and that communication is dissimilar, the implications could have an enormous affect on the outcome of the discovery?

- Do you understand that the context of the e-mail, including attached files, is coded by the producing party and this may be done by a contractor or possibly outsourced offshore, and interpreting if the e-mail is relevant to the discovery request may depend on the other e-mail documents included in the thread?

- Do you understand that e-mail, including attached files may contain what is called “metadata” and this can provide the “who, what, where and when” you need to know?

- Do you understand that metadata is data about data and can provide valuable information?⁵

- Do you understand that unless the request was made for a digital forensic accounting investigation, the producing party and EDD vendor will not provide the contents of the “inactive” data files and “deleted” files existing in the unallocated file space on desktop computers, laptop computers, servers and removable hard disk drives used by employees in the ordinary course?

- Do you understand that unless the request was made for a digital forensic accounting investigation, the producing party and EDD vendor will not provide the contents of the “inactive” data files and “deleted” files existing in the unallocated file space that may include the “metadata” and “deleted” e-mail and attached files, electronic communications and the “debtor’s books and records” and “related financial information” and “documents” located on desktop computers, laptop computers, servers and removable hard disk drives used by employees in the ordinary course?

- Do you understand that unless you are using encryption technology and practicing safe electronic communication for the protection of the attorney-client privilege and work-product doctrine, your own electronic data is not safe from prying eyes, and you can be duped, with no questions asked?

⁵ Including the author, name, initials, company name, computer name, name of the computer network server or the hard disk drive where the document is saved, file properties, summary information about the document, names of the last 10 document authors, document revisions, document versions, template information, hidden text and comments and type of document (Word, Excel, Power Point Presentation, etc.).

- Do you understand that today you are using e-mail technology to communicate and tomorrow it will be Instant Messaging, and it is estimated that 400 million people will be communicating using IM in less than three years?

- Do you understand that present estimates suggest that perhaps 40-60 million people are already using IM in business today?

- Do you still straddle the gap between having a desktop computer, laptop, PDA, Blackberries and handheld devices, and the time when typewriters and carbon paper were the main instruments of writing and business correspondence?

- Do you understand that when you use e-mail, IM, electronic communications, Wi-Fi laptops, PDA, Blackberries and other digital devices, and if those involved fail to use encryption technology, strong pass phrases, security systems and firewalls, you are doing it haphazardly, causing risk to the confidentiality and the attorney/client privilege?

- Do you understand how digital fraudsters operate, and how you can find backdated documents, and that deleting the books and records and financial information is not in the ordinary course regardless of the (bogus) document retention plan?

- Do you understand how digital forensic accounting technology provides the necessary evidence, and when shown to the debtor, insiders, debtor’s auditors, underwriters, board members, preferred shareholders, insiders, employees, creditors and others, the parties may want to settle the dispute before it reaches court?

- Do you understand the need to reduce e-illiteracy in bankruptcy, and do you intend to use encryption technology for the protection of the attorney/client privilege and work product for all forms of electronic communications?⁶

- Do you understand how easily the producing party and EDD vendor can pull the wool over the eyes of the e-illiterate?

- Do you understand that by avoiding being e-illiterate in bankruptcy you avoid being duped?

When the bankruptcy attorney is able to see the big picture and do something about it, you will have taken the first step necessary for the “best practices” and working toward eliminating e-illiteracy in bankruptcy. The author recommends that bankruptcy attorneys and professionals embrace the best practices and use digital forensic

⁶ The author has recently been published on the subject of protecting the attorney-client privilege and work product doctrine using electronic communications. Please see “Practice Tips,” *LJN Legal Tech Newsletter*, published by the Law Journal Newsletters, July and August 2004 issues, and *Product Liability Law & Litigation Report*, published by The National Litigation Bureau, July 2004 issue.

accounting technology⁷ early in a bankruptcy case. ■

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⁷ See the following articles for an analysis on the subject of discovery, recovery, and use of e-data in bankruptcy: Seward, J., "The Debtor's Digital Reckonings," *International Journal of Digital Evidence*, Fall 2003 (www.ijde.org/docs/03_fall_seward.pdf); Seward, J. and Austin, D., "E-sleuthing and the Art of Electronic Data Retrieval: Uncovering Hidden Assets in the Digital Age," *ABI Journal*, Part I, February 2004, Part II, March 2004 and Part III, April 2004; Seward, J., "The Debtor's Digital Autopsy, or Where's the Money!" NABTalk* *Journal of the National Association of Bankruptcy Trustees*, Summer 2003; "How Digital Forensics Can Give You An Edge," *Bankruptcy Law & Litigation Report*, National Litigation Bureau April 2004; Seward, J., "The Debtor's Survival in the Digital Age," *ABI Journal*, June 2004; Seward, J., "Digital Stealth: Secrets and the Act," LJN's *The Corporate Compliance & Regulatory Newsletter*, Law Journal Newsletters, March 2004 (www.ljnonline.com); Brighton, Jo Ann, and Seward, Jack, "Is it a Capital Contribution or a Loan, and How Can Electronic Data Assist in the Analysis or Defense of a Claim for Recharacterization?" *AIRA News*, Association of Insolvency and Restructuring Advisors, Part I June/July 2004, and Part II August/September 2004.