

CyberBytes



Subject: Potential Consequences of E-Illiteracy

As with most things having to do with computer technology, it is no wonder that in today's high-stakes court rooms, attorneys can easily fall prey to accepting less than truthful explanations concerning electronic data discovery production and its ensuing results.

In a recent discussion with at CyberControls with partner Jack Seward, we talked about the upcoming article he has written, "**Protecting Yourself Against E-Illiteracy: Avoid Being Duped**", published in the September issue of American Bankruptcy Institute Journal. Jack is a digital forensic accounting expert who provides skills and insight into the intricacies of technology and business practices with particularity to data forensic discovery in litigation and bankruptcy matters.

From the requesting party's perspective, the challenge of identifying specific documents and e-mails to include in a discovery request is only getting to be more difficult. In part, this difficulty is exacerbated by the fact that most attorneys continue to stay focused primarily on those documents and e-mails that are "live" or "active". Beyond those active files and e-mails, there are also "inactive" or "deleted" electronic data that may likely be more valuable to the requesting party.

The omission of requesting inactive documents and/or e-mails at the onset, also can lead to inadvertent, permanent destruction of valuable evidence. To make matters worse for the requesting party, the opposing attorney for the producing party will only be concerned about turning over relevant, active e-documents and e-mails excluding all attorney-client privilege and work production doctrine files.

In Jack's article, he points out that there is a real probability that the culling process performed by most EDD vendors include a process called de-duping, which is designed to eliminate multiple

copies of documents and e-mails to help reduce production costs. It is Jack's contention that this process needs to be scrutinized by the requesting party's attorney in that valuable information can be forever lost as in the following scenario:

The requesting party has requested all e-mails pertaining to a specific business transaction. They have reason to believe that certain senior managers and outside accountants were kept in the loop throughout the questionable transaction. Unbeknownst to the requesting party, these very same senior managers were blind copied (b.c.c.) in numerous e-mails written by the CEO and also sent to the corporation's outside attorney.

The EDD vendor de-dupes all of the duplicate e-mails sent to the senior management staff and accountant and only produces the e-mail version that was sent to the outside attorney. That e-mail is then tagged as attorney-client privilege exempt. Had the blind copies been produced, the debate over whether the attorney-client privilege had been waived by the CEO would be in question.

Had the requesting party stipulated inactive documents and e-mails were to be included in their discovery request, the blind copied versions of that same e-mail would have been recovered.

We recommend that you consider aligning with CyberControls' data forensics litigation support team before you get too deep into the discovery stage. We will help you in avoiding common complications that can arise due to E-Illiteracy.