

EDD: Opportunity At Your Door

by: James D. Shook, Esq.

Whirrr. Bzzz. Pop. Opportunity used to knock, but when it's related to technology, you never know how it will present itself.

That loud noise at your door today is probably Electronic Document Discovery, or EDD. Although it's been around for a while, EDD has become a very hot topic in the legal community. But fortunately, it's not too late for you to be at the forefront of this new specialty.

What is EDD?

Put very simply, EDD is simply a part of good old-fashioned discovery that focuses on electronic documents, especially email. However, because many people still struggle with technology, EDD is generating some significant problems for lawyers and their clients.

Recent Developments

To get a flavor for what is driving all of this buzz about EDD, let's consider two recent cases:

Case One: Coleman Holdings sued investment bank Morgan Stanley for fraudulent activity in connection with a large merger. During discovery, Morgan Stanley failed to timely and completely hand over emails and other data that had been stored on backup tapes, despite its representations to the contrary. Eventually, the judge so tired of Morgan Stanley's misrepresentations regarding electronic discovery that she gave the jury an adverse inference instruction on whether Morgan Stanley had defrauded the plaintiff. Left with having to prove only reliance and damages, the jury awarded Coleman Holdings \$604 million plus another \$850 million in punitive damages – essentially without reaching the facts!

Case Two: A fairly routine employment discrimination case turned into a nightmare when the defendant, UBS Warburg, was accused of destroying relevant emails and backup tapes. Eventually, the judge sanctioned Warburg and permitted the jury to learn of its conduct. The jury returned with a verdict of \$9 million against Warburg plus an additional \$20 million in punitive damages!

In both cases, it is questionable whether the defendants acted in bad faith or just did not understand their E-Discovery responsibilities and the technologies underlying their electronic documents. So let's answer that door and get started on learning just a little bit more about EDD.

What's So Special About EDD?

We are all familiar with the discovery process. So what makes EDD so different, special . . . and scary?

EDD encompasses email, documents, databases, voice mail records, instant messaging, electronic photos, etc. Here are just a few things that make electronic documents very different:

- **Volume.** Estimates on emails received range from 40 to 60 emails per person per day. When you add in attachments, documents created or edited, instant messaging, voice mail and other forms of electronic communication, the amount of data is staggering.
- **Ubiquity.** Data is everywhere. A single email can have several copies – on the sender's computer, each recipient's

computer, the sender and recipient email servers. Transient temporary copies may also exist, and even if the email is deleted, it may be maintained in a recovery area. The same email will also likely exist on one or more backup tapes.

- **Metadata.** Metadata is simply "data about data" and is frequently hidden from normal view. For example, most email programs let you see the sender, recipient, subject line and text of an email. However, an email will also have metadata that may include a unique message ID, information on the originating mail server and the path that the email took, a list of people copied (cc: and bcc:), etc. Excel spreadsheets may include hidden or underlying data that is not available in a printed copy.

What Can You Do?

So what can you do to take advantage of this new opportunity and increase your own skills in this hot area? Here are a few ideas:

- **Get educated.** There are many resources on the Internet with both primary and secondary materials. Many companies are providing free Internet webcasts, and some even provide CLE credits. You can start by visiting the Sedona Conference at www.sedonaconference.org, the Preston Gates law firm blog at www.ediscoverylaw.com or the vendor-neutral site at www.ediscoveryresources.org.
- **Be aware!** If you practice in litigation, make sure that your clients are being counseled on their potential responsibility to maintain electronic documents and even cease normal deletion practices once they are on notice of a potential lawsuit. The five opinions written in Zubulake v. UBS Warburg provide guidance on when this duty begins. If you are a corporate paralegal, whether in-house or at a firm, understand your clients' or company's document retention program and plans for a litigation hold. If there is no such program, you may want to talk about starting one. The cost of not having a good program in place before litigation strikes is evident in many cases, especially Coleman Holdings v. Morgan Stanley.
- **Be Strategic.** The next time you are involved in litigation, consider whether it makes sense to have your client depose the opposing party's IT group to determine what information might be available to support your case. A 30(b)(6) deposition can be a great tool.
- **Act Locally.** Think twice about the documents that you create on your computer, especially email. Remember that those documents may be sent to people that you have never considered as potential recipients, and that they may last for a long time. In accordance with company policies, consider deleting transient emails and documents that really are not needed. Consider saving important emails and documents in a non-transient file or folder.

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