

# New York Law Journal



Web address: <http://www.law.com/ny>

VOLUME 229—NO. 56

TUESDAY, MARCH 25, 2003

## The Next Frontier

### *Recent Rulings Underscore Emerging Importance of Backups*

Understanding electronic discovery is no longer an option; it is a necessity as federal courts in the past few months have issued several important decisions concerning it.

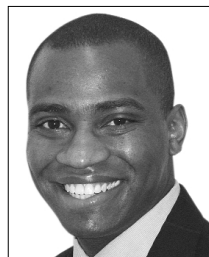
In January, the U.S. District Court for the Southern District of New York granted judgment against a defendant for discovery misconduct, including the failure to properly identify, review and produce e-mails and other electronic documents. (*Metropolitan Opera Ass'n v. Local 100, Hotel Employees & Restaurant Employees Int'l Union*, 2003 U.S. Dist. LEXIS 1077 [SDNY, Jan. 28, 2003].)

The U.S. Court of Appeals for the Second Circuit also recently considered sanctions appropriate for electronic discovery misconduct, and ruled that even ordinary negligence may subject a party to severe sanctions, including an adverse inference jury instruction. (*Residential Funding Corp. v. DeGeorge*

---

**Atiba D. Adams** is corporate counsel for Pfizer Inc., where his work includes management of a variety of product liability and commercial litigation matters. **Virginia Llewellyn**, an attorney, is director of industry relations at Applied Discovery, Inc. The views expressed here are the personal views of the authors and are not intended to reflect the views of any organization or entity.

#### ELECTRONIC DISCOVERY



**ATIBA D.  
ADAMS**



**VIRGINIA  
LLEWELLYN**

*Home Alliance, Inc.*, 2002 U.S. App. LEXIS 20422 [2nd Cir. Sept. 26, 2002].)

Rulings like *Metropolitan Opera* and *Residential Funding* underscore the importance of a coordinated plan for electronic discovery. In both cases, historical information from the parties' computer systems took center stage in the discovery disputes. One of the first steps to formulating a comprehensive electronic discovery plan is outlining the questions to ask with regard to information stored on clients' backup tapes.

#### **E-Discovery Obligations**

The history of rulings on electronic discovery obligations dates to the late 1980s. Most recently, the *Metropolitan Opera* court delineated guidelines for the obligations of attorneys responding

to electronic discovery, and outlined the duty to "establish a coherent and effective system to faithfully and effectively respond to discovery requests."

According to the court's discussion, elements of that system should include:

- A reasonable procedure to distribute discovery requests to all employees potentially possessing responsive information, and to account for the collection and production of the information to the requesting party;
- A method for explaining to the client what types of information — including drafts and non-identical electronic copies as well as "deleted" electronic documents — would be relevant and responsive to discovery requests;
- An inquiry into the client's document retention or filing systems, and implementation of a systematic procedure for document production or for retention of documents, including electronic documents; and
- Proper supervision of all elements of discovery that were to be carried out by non-legal personnel.

While most attorneys are now familiar with the practice of reviewing clients' e-mail messages and other documents stored on PC hard drives and networks, many are still unsure where to begin the process of locating and reviewing information from backup tapes.

## Behind the Law

A backup tape is a copy of information generally made for the purpose of disaster recovery in the event of a system failure or natural disaster. Backups contain documents created by system users — e-mail messages, word processing documents, spreadsheets, and the like — but are often largely comprised of copies of system files required to make the computer's operating systems function properly.

Attorneys almost invariably are interested only in the actual documents created by a company's computer users. A volume of information that may seem intimidating at first glance may actually contain a manageable amount of readable data for purposes of the discovery process.

To gauge how much data is contained on a backup tape, it is important to know what kind of backup was performed. There are three kinds:

**Full Backup:** A complete backup of all information contained on the system. This is the simplest type of backup and yields the most complete backup image.

**Selective Backup:** Specific files and directories are selected for backup procedures. Generally used to avoid-backing up unnecessary program or system files and to focus on data files in known user directories.

**Incremental Backup:** Includes only those files that have changed since the last backup. It is similar to a selective backup, but the files are automatically selected based on whether they have changed recently instead of an arbitrary selection based on directory or file names. This gives the time- and space-saving advantages of a selective backup while ensuring that all changed files are covered.

A mix of full and incremental backups is common in many companies. Backup schedules and rotation of tapes

can vary greatly from company to company, depending on the type and volume of files stored, the company's level of sophistication with regard to technical (and legal) matters, and numerous other factors.

## Backup Procedures

Use the following as a guide to understand the company's backup protocol, schedules, volume of information stored and location of information that could be responsive to a legal document request.

- Does the company have a formalized backup protocol?

If so, obtain a copy and determine whether the written protocol is followed. If it is not set forth in writing, determine which company employee is responsible for backup procedures and immediately interview the employee to understand the backup protocol. This employee should be prepared for the likelihood of a 30(b)(6) deposition.

- What is the company's backup schedule?

A typical schedule might include a full weekly backup, with incremental backups made to capture new data on other days. At the end of each month, the weekly backups might be replaced with one complete monthly backup. The tapes used to create the weeklies may then be put back into rotation (or "recycled") for storage of new data. This procedure is typically followed annually, so that a company would end each year with 12 full monthly backups, and, ideally, no other incremental or partial backups.

Determine whether the schedule is followed rigorously or whether variances are common. Then determine the burden (financial and otherwise) to the company if it were to suspend its process of rotating or recycling backup tapes. This will usually involve increased costs for the purchase of replacement tapes, tape storage costs

and other incidental expenses.

- Does the company's backup protocol adhere to a document retention plan?

The IT department's definition of a "retention plan" (the period of history kept on backups) is likely very different from the legal definition of "document retention." An early conversation between attorneys and the company's IT staff will prevent confusion on this vital issue.

Determine whether the company has a document retention plan. If so, obtain a copy of any written guidelines and immediately determine whether they are being followed. If no document retention plan is in place, meet with the client's technical staff immediately to determine whether computer data is being overwritten or otherwise deleted in accordance with the company's backup protocol. Be sure procedures are in place to avoid any claims of negligent or intentional spoliation.

A document retention plan will typically include a procedure for halting the rotation or recycling of backup tapes on the daily, weekly or monthly schedule. Consider the company's practices and immediately determine whether the company's usual procedures must be interrupted.

## Conclusion

Assessing the client's backup protocol is a critical step in nearly all electronic discovery scenarios.

Knowing the right questions to ask sets the stage for successful communication between outside and inside counsel on this critical issue.

This article is reprinted with permission from the March 25, 2003 edition of the NEW YORK LAW JOURNAL. © 2003 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information contact, American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-03-03-0036