

# Standard™

THE E-DISCOVERY

Applied Discovery's Electronic Discovery Newsletter

FALL 04

FEATURE STORY

## The Practical Side of E-Discovery

Courts around the country are issuing orders related to e-discovery at a record pace. Keeping up with the developments in case law and the growing number of new and proposed rules changes is only half the battle. Lawyers are struggling to balance both the legal and practical implications of their discovery obligations while ensuring that their clients are well positioned if a discovery dispute should arise.

**Practicing E-Discovery**

The problem with law schools is that they teach us how to think about law, not how to practice it.

The same is true for most of what has been written about e-discovery. Legal publications have been flooded with detailed analyses of the developing trends in the law. All of this information is important, but it stops short of offering advice about how actually to practice e-discovery.

The following framework can be applied to assist in developing an e-discovery action plan in any case.

**1. Preventative Maintenance**

- *Educate your client about e-discovery.* Begin by conducting an e-discovery training session for

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**CASE LAW UPDATES**

### Zubulake analysis applied in Wisconsin

*Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 2004 U.S. Dist. LEXIS 16310 (E.D. Wisc. Aug. 12, 2004).

Documents placed in storage during bankruptcy proceedings and made available to a plaintiff in a stayed action were being kept in the usual course of business, and providing access to the documents while the action was stayed met production requirements. However, once the defendant company emerged from bankruptcy, it was ordered to restore five of its backup tapes to return to court with information on costs of further restoration of backup tapes. The court held it would then rule on requested cost sharing after evaluation of the seven *Zubulake I* factors.

While Gateway was in bankruptcy and afterwards, its backup tapes were made available to Hagemeyer. None of the backup tapes appeared to contain email, according to the court. However, based on a statement by a company official that backup tapes may “potentially” record email, Hagemeyer asserted that there were additional backup tapes that it should be provided. The court denied Hagemeyer's motion to compel production of email backup tapes prior to Hagemeyer's use of other methods of discovery to determine whether such additional backup tapes existed.

As to the backup tapes that had been available to Hagemeyer, Gateway was asked to perform a search for all email containing specified search terms. Gateway refused to perform the search on the ground that such a search would cause undue burden and expense. Gateway also declined Hagemeyer's offer to search the backup tapes at Hagemeyer's own expense.

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## RESOURCES

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## FEATURE STORY (continued from page 1)

in-house counsel and senior managers. Provide your client with jurisdiction-specific and business-specific counseling.

- **Partner with the company's IT department.** Identify IT personnel likely to be involved in e-discovery, and help them understand relevant legal issues, including document retention and standards for spoliation.
- **Assist your client with employee outreach.** Educate managers about key legal issues, and design a plan for consistent communication from managers to employees. Aid the client in establishing a company culture that encourages prudent document management.
- **Encourage your client to create an electronic data management plan.** Evaluate your client's document retention and destruction practices, backup protocols, tape rotation and recycling schedules, and other practices related to electronic data management. Encourage in-house counsel to evaluate compliance on a regular basis and to schedule audits to ensure that practices comply with the plan.
- **Help your client anticipate the duty to produce electronic data.** Create a cross-functional team with representatives from the law department, IT department, outside litigation counsel, and the e-discovery service provider.

### 2. When Litigation is Pending or Imminent

- **Prepare key employees to carry out their e-discovery obligations.** Notify the necessary IT and records management personnel of document preservation obligations (e.g., halting backup tape rotation and recycling, if necessary), and advise company management of the time to issue a data preservation notice to employees. This is also a good time to select and train an IT or records management liaison to serve as the company's 30(b)(6) witness.
- **Send a preservation letter to opposing counsel if you intend to request electronic data.** Describe the kind of information you intend to pursue. Be as specific as you can without unnecessarily limiting the kind of data requested for preservation.
- **If you decide to issue a preservation letter, expect to receive one in return.** Be prepared to object in writing, if necessary. Put opposing counsel on notice of your client's plan for document preservation, and begin documenting details of the costs and efforts associated with preservation, in the event you want to seek a cost-shifting arrangement.
- **Consider whether the case will require specialized e-discovery expertise.** If the case will involve large volumes of electronic data or will otherwise include complex issues, you may wish to retain an e-discovery service provider that offers consulting to assist in analyzing your client's e-discovery

obligations, or to assist in drafting e-discovery requests to opposing parties.

### 3. After Litigation is Commenced

- **Consider whether e-discovery issues should be raised at the Rule 16(c) pretrial conference.** While e-discovery is not specifically listed as a pretrial conference topic, Rule 16(c)(6) calls for a discussion about the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rules 26 through 37. Weigh the pros and cons of raising the issue of e-discovery at this early conference if opposing counsel has not already done so.
- **Prepare to make Rule 26(a) initial disclosures about your client's electronic data.** Advise your client about the requirements set forth in Rule 26(a)(1)(B). At the commencement of litigation, and before receiving any formal discovery request, a party must disclose to opposing parties certain information, including a description by category and location of documents and data compilations. This requirement means that a party must search available electronic systems for relevant information. Beware of making a "handshake agreement" to waive or limit Rule 26 initial disclosure requirements, as some courts have stated their disapproval of such agreements.
- **Plan to discuss key e-discovery issues at the Rule 26(f) conference.** Some courts have modified their local rules to require attorneys to discuss specific e-discovery issues early in the case. Even in jurisdictions without modified rules, the mandatory Rule 26(f) conference requires parties to confer to develop a proposed discovery plan.
- **Consider whether you wish to propound e-discovery requests to the opposing party.** Schedule a 30(b)(6) deposition early to learn about the opposing party's IT systems, infrastructure, and procedures. This will guide you in identifying the locations of potentially relevant information. Then draft tailored document requests to include production of electronic data. A narrow request that focuses on specific document custodians, time periods, and key issues in the case will stand up in court. Consider whether you want to receive document production from the opposing party in paper or electronic format, and specify this in your request.
- **Consider whether your client will want to seek a protective order.** Assess the need for advance protection for sensitive information or the possible inadvertent production of privileged information. Consider whether a "quick peek" or "clawback" agreement will be appropriate in the case.

### 4. After Receipt of a Document Request

- **Carefully analyze the document request.** Outline the names of document custodians, and map the locations of potentially responsive information. Review document preservation efforts to ensure they are consistent with the needs of the case.
- **Prepare to gather necessary electronic data in an efficient, legally defensible manner.** Identify the custodians of interest based on specific document requests, involvement in specific activities, geography or office location, department or job function, dates of employment, or other variables relevant to the

### IN THEIR OWN WORDS...

*"Turnaround was very fast—ahead of schedule."*

- AmLaw Top 100 Law Firm | July 2004

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# In-House EDD Departments Help Law Firms Scale the Digital Mountain

By Matthew Levy, Esq., Wilson Sonsini Goodrich & Rosati, PC



As litigation continues its headlong rush into the digital age, law firms are faced with an ever-changing landscape in the field of electronic discovery. Foremost is the constantly growing “mountain” of electronic data that our clients routinely use to conduct their daily business. Changes in the law—from court decisions that vary from district-to-district and state-to-state to proposed changes to the Federal Rules of Civil Procedure—present attorneys with a moving target of requirements for prosecuting and defending lawsuits with reasonableness and in good faith. Technology, too, constantly evolves. Electronic data discovery (“EDD”) service providers continuously develop better graphical user interfaces for their Application Service Provider (ASP) review solutions, stronger and more complex search capabilities, and faster methods for processing and filtering electronic data.

In the context of this shifting landscape, law firms must develop best practices for data preservation, collection, review, and production. An in-house EDD department can help a law firm streamline the electronic discovery process, keep litigation costs down, and maximize service to its clients.

## Services Provided

An in-house EDD department provides litigation teams with immediate access to consultation with attorneys, paralegals, and IT professionals experienced in the field of electronic discovery. The in-house EDD department should be equipped to assist litigation teams in formulating the best approach to an electronic discovery project. This may involve:

- ✓ Early consultation with the client’s in-house counsel and IT director on compliance with the law on data preservation;
- ✓ Developing a methodology for the efficient collection of electronic data, including the narrowing of the number of custodians from whom to collect, whenever possible;
- ✓ Providing assistance, when necessary, with the collection of electronic data to minimize disruption to the client’s business operations and to ensure that electronic data is collected in compliance with the law, court orders, stipulations with opposing counsel, and industry standards for meta data preservation;
- ✓ Creating review environments for attorneys and paralegals that are efficient, cost effective, comfortable, and supported.

The EDD industry is expanding at an exponential rate. The number of EDD service providers can be overwhelming for attorneys and paralegals trying to make sense of changes in the law and in technology. Although there has been some consolidation among EDD service providers recently, it appears likely that the industry will continue to build momentum for some time to come. As the industry developed over recent years, reprographic companies expanded their services to include scanning of paper documents into digital format for import into litigation support software such as Introspect and Concordance. These companies now are expanding into data collection and providing ASP solutions for

the review and analysis of electronic data. This expansion is in addition to the already existing EDD service providers, which focused from the start on data collection, data filtering, and ASP review solutions. The company literature distributed at electronic discovery seminars and conventions can, alone, create a mountain of data in an attorney’s or paralegal’s office.

Additionally, EDD service providers are rapidly improving the services offered. The in-house EDD department can evaluate companies and services to develop a database of strengths and weaknesses of each. This allows the firm to make informed decisions about the best fit for a particular project. There is no single EDD service provider that is a perfect fit for every electronic discovery project. Each company brings its own strengths that allow the law firm to tailor each project. The technological differences between companies will diminish over time as companies develop new versions of their applications and technology. In the meantime, empowering the in-house EDD department is the best way for the firm to develop a range of options to be considered for each electronic discovery project.

The in-house department provides a single point of contact for EDD service providers. This delivers the law firm and EDD service providers a number of benefits:

- ✓ The EDD service provider has a single point of contact with which to maintain communication, especially at large law firms;
- ✓ Litigation teams can focus on their cases rather than the next new technology change being rolled out by the industry; and
- ✓ Law firms can develop consistent practices for EDD projects and establish relationships with select vendors.

Ultimately, the aim is to maximize service provided to the law firm’s clients.

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*Matthew Levy, EDD Practice Manager at Wilson Sonsini Goodrich & Rosati, PC, has been a litigation attorney for over thirteen years. He heads WSGR’s eDoc Department, which manages the firm’s electronic discovery practice.*

# Duplicate Document Management

## Dear Miranda,

I've just been assigned a matter that includes a large number of backup tapes. In past situations such as this, I've run into thousands of duplicate documents that eat up an enormous amount of our attorneys' time in review. I'm also worried about different attorneys coding duplicate copies of documents differently, particularly when privileged information is involved. What's the best way to handle duplicate documents in an electronic review?

Sarah B., Esq.  
Los Angeles

## Dear Sarah,

Your question touches on two different, but equally important, issues. First, how can firms increase productivity by figuring out ways to limit the number of times they have to look at the same document again (and again and again...)? This is especially important given the sheer number of documents being reviewed in e-discovery applications today. Second, how can attorneys avoid potential privilege waiver by accidentally producing one copy of a document where a duplicate was determined by another reviewer to be privileged? Given the number of attorneys reviewing any given case (and frequently in different offices, states, or even countries), this is far from just a hypothetical question.

So, let's start with the first topic: productivity issues. I generally recommend that clients start with a phased review of their document set. Phase One should focus on cleaning up clearly non-responsive documents so they don't eat up a lot of review time. Large-scale searches can be run to get rid of documents that simply aren't relevant to the specific client matter (e.g., spam, irrelevant calendar items, or meeting requests). Once these types of documents are found, the e-discovery application should then allow the reviewers to bulk tag the non-responsive documents at one time, removing them from the active document set.

After Phase One is completed, attorneys can begin Phase Two, a review that concentrates on a smaller document set that is more likely to contain responsive information. By making the overall document pool smaller, this approach improves attorney productivity dramatically, increasing the ability to turn around cases with tight timelines while remaining within the budget agreed upon with the client.

## Foundations of a Successful E-Discovery Duplicate Document Policy:



- ✓ Establish ground rules.
- ✓ Recognize that each case has different rules—be flexible.
- ✓ Maximize workflow efficiencies through use of technology.

In Phase Two, it's important to set ground rules with the attorneys. What is the universe of documents that each attorney is allowed to review? Some of Applied Discovery's clients, for example, have developed a review workflow that puts one attorney in charge of one custodian. That attorney is responsible for documents within only that custodian's document set. Other clients employ a first-come, first-served approach where attorneys are required to handle each document they review the same way across the entire document set, thus eliminating the need for other attorneys to review those same documents. In short, you need to make sure your e-discovery application provides you with the ability to actually implement these ground rules, i.e., bulk tag duplicates within a single custodian, or across the entire database, or within a set number of search results.

The second issue you've addressed is also an important one: risk of inconsistent document coding. One of the major advantages of good duplicate document management is its ability to ensure that duplicates are treated consistently. Given the workflow issues discussed above, it's easy to run into a problem with different attorneys assigning conflicting issue codes to duplicates. While the worst-case scenario could lead to a privilege waiver, issue-coding duplicates differently is always a possibility that must be considered. You must make sure the application you use provides some sort of reconciliation to ensure that, when relevant, important documents (e.g., privileged ones) are consistently coded. Bulk tagging duplicates is not only a great productivity tool; it also should be seen—and managed—as a great risk mitigation tool.

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### IN THEIR OWN WORDS...

*"Incredible commitment and availability of training."*

Global High Tech Corporation | July 2004

# The Nuts and Bolts of Backup Tape Restoration

Imagine going to a video store that offers tapes of different shapes and sizes, yet you can select only tapes compatible with your video player and television set. To make matters worse, the video will play only when the television is configured for the same channel and volume required by the video camera used to record it; so you have to scroll through each channel at every volume until you finally see and hear the movie.

Fortunately, VHS tapes and players comply with a single standard. If you rent a VHS tape you know your VHS player will read it regardless of the brand and model. Unfortunately, computer backup tapes do not work the same way. Unless you have special data-stripping software, you must have and correctly configure the same type of hardware and exact version of software that was used to create the original data. This process can get particularly complicated with legacy tapes, as it is often extremely difficult to find the required old hardware and software.

If there is a chance that you will ever have a project that requires the restoration of backup tapes, read on. This article provides an overview of the components involved in the making of a backup tape, as well as a summary of the steps required to restore a single Microsoft Exchange Server tape.

## Backup Components

The first piece of the puzzle is the backup target. The backup target is the original computer that

contains the data that is to be or was backed up. Backups can include selective files from the target machine, or can include every file on the computer. Complete system backups are useful in the event of a system failure, as the data on the tape can be used to recreate the contents of a failed computer. Some common types of backup targets are desktop computers, file servers, email servers, and database servers.

The second component is the tape itself. There are many different types of backup tapes that vary in capacity from a few megabytes to hundreds of gigabytes. For example, a 3480 tape can hold only 210 megabytes, while an LTO-2 tape can hold up to 400 gigabytes of compressed data. However, this does not mean the tape actually holds that much usable data, as the tape may not be full or may be mostly comprised of system files.

The third consideration is the tape hardware used to write the data to the tape. This is important, as the hardware can sometimes compress the data with varying degrees of efficiency. For example, a DLT-IV tape created with a DLT-4000 tape drive can hold up to 40 gigabytes of compressed data, while a DLT-IV tape created with a DLT-8000 can hold up to 80 gigabytes of compressed data.

The last component is the software used to copy and format the data onto the tape. Backup software programs may be either run locally on the machine or executed from a backup server.

Depending on the type of data to be backed up and the software package used, software agents may also be required on the target machine.

## Restoration Components

The first restoration component is the destination machine. The destination machine is the machine that will hold a copy of the data from the tape. At the very least, the destination machine requires enough disk space to hold the data to be restored. Depending on the type of data on the backup tape, the destination machine may need to be configured exactly the same as the backup target. For example, for a Microsoft Exchange server restoration, the destination machine must have the same *server* name, the same Exchange *organization* name, and the same *site* name as the original backup target. If these fields do not match, the restoration will fail.

The second component is the restoration server. The purpose of the restoration server is to control the process of copying the data from the backup tape and to the destination server. This computer will have the same backup software installed on it as was used to back up the data, and may have the tape device attached to it. In some circumstances, the restoration server may be the same as the destination machine.

The last two restoration components are the same backup hardware and software components described in the previous section.

## EXAMPLE: A Microsoft® Exchange Tape Restoration

Now that you understand the pieces of the puzzle, it is time to start putting them together. The following section shows an example of the mail extraction process from a Microsoft Exchange backup tape (one of the most common scenarios in e-discovery).

### Step 1: Collect Required Information

To get started, you first need to identify what you have. This list provides an example of information needed to restore the mail tape.

Required Information	Example
Operating System	Microsoft Windows NT 4.0, Service Pack 4
Microsoft Exchange Server	Version 5.5, Service Pack 4
Server Name	seattlemail
Organization Name	ZZZ
Site Name	BBB
Type of Backup	Backup of information store (entire mail database as opposed to backups of individual mailboxes)
Tape Type	DLT-IV
Tape Hardware	DLT-7000
Backup Software	Backup Exec 8.6

### Step 2: Build the Destination Machine

Now that you have the list, you can build the destination machine. Specifically, you will need to build the operating system and the mail server software. For the example above, you would:

- Install and configure NT 4.0 Server named "seattlemail"
- Install and configure Microsoft Exchange 5.5 Server with the organization name "ZZZ" and the site name "BBB"

### Step 3: Prepare Restoration Server

To prepare the restoration server, you need to install and configure the operating system, install the tape reader, and install the backup software. In the example, you would:

- Install and configure NT Server
- Install DLT-7000 Tape Device
- Install and configure Backup Exec 8.6

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# Applied Discovery's COO Looks to The Future


**Michele Vivona**

 LexisNexis Applied Discovery  
 Chief Operating Officer


This issue's Spotlight column features an interview with Michele Vivona, Chief Operating Officer of LexisNexis® Applied Discovery® and LexisNexis® CourtLink®. She oversees all aspects of Applied Discovery's business and leads the senior executive team to drive industry leadership in the electronic discovery market while improving efficiencies in the organization.

**The E-Discovery Standard (EDS):** How would you describe the recent growth of the electronic discovery market?

**Michele Vivona (MV):** In a word—rapid! Despite its beginnings in a soft economy, the electronic discovery market has grown by leaps and bounds, particularly in the past eighteen months or so. Litigation trends have been steady, and government investigations in the energy, banking, and securities industries have driven attorneys to seek new methods for reviewing large volumes of electronic documents. Fortunately, electronic discovery services have been developing and maturing at an equally rapid clip. Today, some form of electronic discovery is conducted in nearly every sizable litigation or investigation. When managed with state-of-the-art services and technology, electronic discovery can deliver attorneys and their clients a tremendous amount of savings in time and money over paper discovery processes, and minimize the risk of missing or mishandling potentially critical evidence.

**EDS:** Applied Discovery was acquired by LexisNexis in July 2003. How does electronic discovery fit into the overall business strategy of LexisNexis?

**MV:** Approximately four years ago, LexisNexis began aggressively implementing a strategy of providing our clients with services aimed at more than research, including developing and delivering products and services above and beyond our core research products. Through market research and analysis, we identified a number of client needs such as practice management, litigation services (including discovery services), client development, and outsourced services. Applied Discovery, a leading provider of electronic discovery services, was a key strategic acquisition intended to directly address our clients' most critical needs in the area of discovery. The union with LexisNexis also provided Applied Discovery with the resources necessary to continue to build on its impressive growth.

The response from clients has been overwhelmingly positive. Applied Discovery also continues to receive industry-wide recognition, including the following awards announced this year:

- 2004 *Law Office Computing* Readers' Choice Award in the Electronic Discovery category
- 2004 TechnoLawyer @ Award for Favorite Electronic Discovery Application
- 2003 *Law Technology News*® Awards for overall Product of the Year and Best Electronic Discovery System

**EDS:** When you reflect on the core strengths of Applied Discovery and its major accomplishments, what comes to mind?

**MV:** In terms of strengths, two things immediately come to mind: the people and the production process. We have tremendously talented and skilled professionals throughout the company. For example, the Client Solutions Group—which consists of account managers from a variety of professional backgrounds, including attorneys, paralegals, litigation support professionals, and experienced IT managers—continuously receives top marks from our clients in post-project satisfaction surveys.

Another core strength is the company's production process, which allows us to process large amounts of data in market-leading turnaround times. Our capacity currently exceeds five million pages per day.

In terms of accomplishments, we are probably most proud of the fact that thirty-eight of the Top 50 U.S. law firms are clients of Applied Discovery, along with many others in the Top 250. We've worked hard to build our reputation and earn the trust of legal professionals nationwide.

**EDS:** How does Applied Discovery work with clients to understand their needs?

**MV:** We have several groups who work directly with our clients, including our Electronic Discovery Specialists, the Account Managers in our Client Solutions Group, and Product Planning resources. These groups work closely with our clients from the onset of the project to ascertain the specific needs of each case; they also train and guide clients through the electronic discovery process.

We also have a Client Advisory Board comprised of litigation associates and partners from top law firms. They provide strategic perspectives and high-level insights into the opportunities and challenges related to the growth of electronic discovery services within their respective law firms and the industry as a whole.

**EDS:** Where do you see the marketplace and company in five years?

**MV:** In terms of the marketplace, there are currently many companies offering services in the broad category of electronic discovery. However, there are probably only two or three companies that actually perform the full spectrum of electronic discovery services—from data gathering and analysis through processing, online review, and production. In the next few years, the legal community's understanding of electronic discovery will continue to evolve, and the technology will continue to develop to keep up with changing industry needs. We believe the marketplace will become much less fragmented during this time.

In terms of the company's growth, the next five years look amazing. We've set out aggressive goals to enhance our product and to improve and expand the services we provide throughout the discovery process. All the while, we will continue to focus on providing outstanding client service. We are committed to maintaining Applied Discovery's leadership position as the electronic discovery service provider trusted by most of the country's top law firms and corporations. ●

### **MIRANDA WRITES** (continued from page 4)

As always, flexibility is key. While you generally want consistency, when necessary, changing production requirements may force you to adjust. For example, when deciding how to manage duplicate documents for the purposes of review, many attorneys take the easy way out and tell their e-discovery provider to “de-dupe” all duplicates for the purposes of review and then “re-dupe” them for the purposes of production.

While this approach improves productivity, these attorneys often find that production can be painful. Much of the current re-dupe functionality in the marketplace today forces the client to code all duplicates in the entire case the same way as the one unique document that was actually reviewed and coded. While this works in some cases, it doesn't work where the particulars of the client matter may force the attorney to treat individual custodians differently or even duplicates within the custodial source differently.

In short, you need to make sure you establish ground rules and minimize risk, but you also need to have a flexible duplicate document management policy that reflects the needs of the case rather than limitations of the application. ●



**Miranda Glass** is Educational Programs Manager at Applied Discovery. She answers questions from readers in each issue of **The E-Discovery Standard**. You can submit a question to her at [miranda.glass@applieddiscovery.com](mailto:miranda.glass@applieddiscovery.com).

### **IN THEIR OWN WORDS...**

*“Since using Applied Discovery, I cannot imagine reviewing documents and managing a document review and production any other way. In fact, I repeatedly recommend Applied Discovery to my colleagues.”*

**AmLaw Top 10 Law Firm | January 2004**

# More Bytes, Bits & Bucks: Digital Diligence Defined

By John M. Barkett, Esq., Shook, Hardy & Bacon, L.L.P.



Litigants have not yet figured out that electronic document retention habits are not controlled by secretaries, assistants, and filing clerks. In the paper document world, these persons are efficient and know how to follow well-defined rules that satisfy a litigant's need to meet the requirements of tax and other laws, preserve insurance policies, and implement a litigation hold on the files that they control. In the electronic world, the burden of document preservation is falling on their bosses who have not heretofore had to worry about document preservation or production, have inconsistent document retention habits, and operate within an undefined or ill-defined protocol for electronic document management.

As a result, sanctions motions are rampant. In *United States v. Philip Morris USA Inc.* Civ.-99-2496 (D.D.C. July 21, 2004), Philip Morris USA Inc. was ordered to pay \$2.75 million into the registry of the district court because "employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow Order #1, the document retention policies of their own employer, and, in particular, the 'print and retain' policy, which, if followed, would have ensured the preservation of emails which have been irretrievably lost." Order #1, of course, was the first case management order in the matter and, predictably, required preservation of documents which were "potentially relevant" to the subject matter of the litigation. The district court also precluded every employee who failed to comply with Philip Morris' internal document program from testifying at trial.

In *Zubulake V*, an employee termination case, UBS Warburg's woes were worsened by the failure of its counsel to communicate a litigation hold to "all key players. They also failed to ascertain each of the key players' document management habits." Additionally, UBS employees, "for some unknown reasons—ignored many of the instructions counsel gave." As a result, emails were either deleted and lost or deleted and then salvaged but produced nearly two years after they were originally requested. The discovery deadline had long since passed, imposing, in the Second Circuit, at least, an obligation on UBS Warburg to be "as cooperative as possible." Instead, "the extent of UBS's spoliation was uncovered by Zubulake during court ordered re-depositions." This conduct produced a finding of willfulness in the "destruction" of electronic documents, creating a presumption that the lost information was relevant, and resulting in the district court's decision to give the jury an adverse inference instruction with respect to emails deleted after Ms. Zubulake's charge of discrimination was filed with the EEOC. UBS Warburg also had to pay for re-depositions required by the late production of emails and the cost of the sanctions motion. *Zubulake v. UBS Warburg*, 2004 U.S. Dist. LEXIS 13574, \*48-50, 52 (S.D.N.Y. July 20, 2004).

Corporate litigants who wish to avoid digital-related sanctions must make fundamental changes in their approach to electronic document preservation. The following *Digital Diligence* tips can help litigants establish smart electronic document preservation and management practices.

1. Know when the duty to preserve is applicable. In the paper world, most documents are retained for at least seven years so the pre-litigation duty to preserve case law was sparse because anticipated litigation did not affect document retention procedures. In the electronic world, some document recycling programs are triggered after as short a period as thirty days. Such software does not account for anticipated litigation.
2. Immediately consult the company's information technology staff to educate them about litigation issues and to comprehend corporate document storage practices.
3. Simultaneously identify "key players." This concept is very important in sanctions-avoidance. *Zubulake V* contained seventeen references to "key" employee(s) or players. Judges are not unsympathetic to corporate vastness; yet they are unforgiving with respect to corporate thoughtlessness. Identify the persons who will play a material role in resolution of the dispute.
4. Immediately issue the document-hold notice. The notice must recognize that individuals do not control the fate of electronic documents not stored on their computers. In other words, the notice must also go to the persons who control electronic document storage, and it should not be a surprise to them.
5. Determine the electronic document storage habits of the key players. These habits include archiving email on the hard drives of the person's computer; checking out documents onto floppy disks, CDs, DVDs, flash drives; emailing documents to personal email addresses; and identifying document versions residing on notebook computers, PDAs, home computers, or other storage media.
6. Determine the applicable recycling program timetables for the corporate storage media where documents associated with key players reside. Suspend corporate recycling programs or otherwise demonstrate that you have captured all potentially relevant documents.
7. Preserve documents not on the company's storage systems (e.g., archived on the office computer hard drive of the key players, notebook computers, home computers, PDAs, flash drives, CDs, DVDs, and other storage media outside the company that a key player might utilize).

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John M. Barkett is a partner at Shook, Hardy & Bacon, L.L.P. in its Miami office. He is a commercial litigator and for the past several years has been serving as a neutral throughout the country in a variety of high-dollar dispute resolution contexts. He writes and lectures on e-discovery issues, is the author of *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation CLE Conference (May 8, 2004), and assists others at Shook in electronic document management and e-discovery problem solving for clients.

The court in a footnote stated that Gateway “might inadvertently waive any claim of privilege if Hagemeyer views and seeks to use protected material.”

In response to Hagemeyer’s motion to compel Gateway to restore and search the backup tapes, the court ordered Gateway to restore five tapes selected by Hagemeyer as a test run of the cost of retrieving information from Gateway’s backup tapes. Once that cost was determined, the court would consider whether costs of production of information from the backup tapes should be shifted from Gateway in order to avoid any undue burden. After reviewing the evolution of approaches to cost shifting, the court decided that it would apply the seven factor analysis of *Zubulake I* (*Zubulake v. U.B.S. Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003)) because that analysis “brought the cost-shifting analysis closer to the ... proportionality test [of Fed. R. Civ. P. Rule 26(b)(2)].”

### Direct access to computer systems denied

**Convolve, Inc. v. Compaq Computer Corp.**, 2004 U.S. Dist. LEXIS 16164 (S.D.N.Y. Aug. 17, 2004).

Direct access to a defendant’s hard drives, servers, and databases was not warranted, because the requesting party had not shown widespread destruction or withholding of relevant information.

Convolve and the Massachusetts Institute of Technology claimed patent infringement and theft of trade secrets by Compaq and Seagate Technology following a sharing agreement on technology for choosing between faster or quieter computer operation. In resolving a discovery dispute, the court held that Compaq was incorrect in asserting that certain procurement documents did not exist. However, that erroneous assertion did not rise to a “widespread destruction or withholding of relevant information” that would support sanctions and direct access by Convolve to Compaq’s hard drives, servers, and databases. The appropriate remedy was full disclosure of relevant information.

Sanctions also were not warranted due to any failure to preserve relevant documents because Convolve had “made no effort to establish the circumstances under which any emails were deleted.” The court noted that “in the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as email, it is necessary for a party facing litigation to take active steps to halt that process.” However, sanctions for failing to preserve relevant documents were not warranted prior to a showing of intentional destruction of evidence likely to have been favorable to the requesting party. ●

8. Follow up with key players to verify that they are following your instructions.
9. If you don’t have an attorney-client privilege indexing system at the time of electronic document creation, you may unnecessarily multiply your labor costs in segregating attorney-client privileged electronic documents. Any entity large enough to have an in-house legal department should have procedures in place: (a) to avoid the proliferation of privileged email; and (b) to tag privileged email in a manner that easily segregates it, should litigation demands require production of electronic documents of senders’ or recipients’ privileged email.
10. Don’t forget voice mail. Whether it is office voice mail, or voice mail associated with cellular telephones or even home voice mail, it should be the subject of inquiry when the duty to preserve attaches, and then potentially relevant messages should be preserved.

And if these tips are too many to remember, then just follow the Golden Rule. If you traded places with your opponent, would you regard your actions as digitally sensible? Show good faith and exercise good judgment and you will be recognized for good practices. ●

#### Step 4: Restore Information Store

This step involves taking the actual copy of the electronic mail database off the tape. Within the operating console of the backup tape software, you can connect to the tape and direct the output to the destination server. The larger the information store, the longer it takes to restore the data.

- Create and execute restoration job
- Time to complete depends on size of information store

#### Step 5: Manipulate Mail on Destination Server

Once the data has been written to the destination server, you now need to force the destination server to accept the data. This process is analogous to an organ transplant, as the mail server will initially reject the data until you manipulate the information store using special tools.

- Post restore, it is necessary to manipulate the information store so that the destination server does not reject the data
- This process can take several hours

#### Step 6: Mail Extraction

Once the mail server is up and running with the transplanted data, you can now extract the mail from the server.

- Use Exmerge utility to extract mailboxes from destination server
- Specify users to be extracted
- Specify date ranges to be extracted

The example given here is a relatively simple one. If you have a combination of tape types, data types, and software packages, the scenario becomes much more complicated. To ensure a successful outcome for any tape restoration project, it is very important that the first step in the restoration process be to collect the right information. If you take the time to figure out exactly what you have and plan accordingly, you will avoid a tape restoration nightmare. ●

#### IN THEIR OWN WORDS...

*“Our account managers have always been very helpful and professional.”*

- AmLaw Top 50 Law Firm | June 2004

document request. Define the scope of the data-gathering project and prepare a data-gathering plan.

- **Process the electronic data for efficient, cost-effective review.** Once the potentially relevant data has been gathered, the e-discovery service provider prepares the data for attorney review. Discuss any special circumstances in the case in advance of data processing. Work with your e-discovery service provider to prepare realistic cost and time estimates to provide to your client.
- **Review the electronic documents for relevance and privilege.** Establish a review protocol at the outset. Assign a technical lead and a legal lead. Conduct early team meetings to agree on the review methodology, checklists for identifying

relevant and privileged documents, identification of key words or terms for searching, and other details of the legal team’s review process.

- **Produce relevant documents to opposing counsel.** Discuss options for form of production. Electronic documents can be produced in numerous formats—printed to paper, sent electronically via an FTP site, or copied to media such as CD-ROMs, tapes, or removable hard drives. Careful attention must be paid to the legal requirements of various jurisdictions, as some require production of electronic data in electronic format. If the volume of data is significant, consider proposing options for a rolling production to opposing counsel, which could ease review burdens.

### Put It to Work

Every lawyer whose practice involves the exchange of information from electronic sources must develop an action plan for addressing e-discovery issues in any given case. The plan must enable you to start with a 30,000-foot view of the situation, and then assess your client’s rights and obligations at each stage of the proceeding. Not every element of the plan will apply to every case, but a comprehensive, consistent checklist of activities to consider will serve you well in any e-discovery scenario. ●



To request a comprehensive sample “E-Discovery Action Plan,” please email [edstandard@applieddiscovery.com](mailto:edstandard@applieddiscovery.com).

## Management

A key question for the law firm planning to establish an in-house EDD department is: Who should manage the department? The law firm must decide whether the manager should be an IT professional, a litigation support manager, a paralegal, or an attorney.

Electronic discovery is a unique blend of technology and the law. While all of the professional fields listed above bring strengths to the role, a litigation attorney with some technology background is ideally suited to manage the in-house EDD department.

The attorney is uniquely qualified to provide legal advice to both litigation teams and clients on matters involving compliance with the law on discovery issues. To be most effective, the attorney manager should have extensive experience with electronic discovery projects. An attorney who has been in front of a computer conducting an electronic document review, managing the project workflow and working with numerous EDD service providers in all aspects of the field brings real-life experience to the role that other professionals cannot.

Regardless of whether the attorney manager has a technology background, the key is that he/she be backed up by a strong team with experience and training in both technology and litigation. Some firms may opt for a mix of IT professionals and paralegals, while others may deploy a team of paralegals with technology experience. Whatever route the firm takes, it is important to assemble a team of EDD professionals who can effectively communicate with attorneys and clients about the law as well as the technological aspects of data preservation, collection, filtering, review, and production. This is particularly important because corporate IT departments typically are not established to support litigation, and every client has differing degrees of knowledge and experience with electronic discovery and the requirements imposed by litigation.

## Education

Another critical role for the in-house EDD department is to educate attorneys, paralegals, and the firm’s clients on changes in the law regarding electronic discovery, changes in technology, and changes in the best practices applied to EDD projects.

As courts continue to issue new decisions, the in-house EDD department is well suited to ensure litigation teams are advised of changes that can impact the conduct of electronic discovery. For example, decisions such as those recently seen in *Zubulake v. UBS Warburg* in the Southern District of New York are having a huge impact on electronic discovery concerning issues ranging from data preservation to cost shifting.

Changes in technology also happen quickly, both in the way clients conduct business and the way in which electronic discovery is conducted. The in-house EDD department is key to disseminating information on these changes and counseling law firms and clients on how electronic discovery best practices should change in response to technology advances.

## Cost Center vs. Profit Center

One of the major issues law firms encounter when establishing an in-house EDD department is how to recoup the costs of equipment and personnel. Whether to bill in-house EDD personnel at an hourly rate or bill projects on a flat fee basis is a question the law firm must address on a case-by-case basis. The key is for the law firm to be able to demonstrate that the in-house EDD experts add value to the firm’s litigation team. The firm must analyze its practices in the context of its client base.

## Conclusion

Each law firm has several issues to consider and decisions to make before establishing a department to manage its electronic discovery practice. Whatever path the firm decides to take, an in-house EDD department adds value to the firm’s practice by increasing marketability with clients who otherwise would be overwhelmed by the tasks required for electronic discovery and its associated costs. By managing the efficiency with which electronic discovery is conducted, both offensively and defensively, the in-house department can streamline the process, making discovery more efficient and therefore more cost-effective.

In the end, the goal is to maximize service provided to the client while negotiating what can often be the difficult and dangerous terrain of electronic discovery. ●



## LexisNexis Applied Discovery Receives Top Award From Readers of Law Office Computing

On July 26, Law Office Computing announced Applied Discovery as one of two top award winners in the Electronic Discovery category. This is the fourth major award that the company has earned this year.

The awards program honors exceptional software companies that have contributed to technological advancement in the legal industry.



## Applied Discovery Enhances Award-Winning Online Review Application

Applied Discovery is pleased to announce the release of significant new enhancements to its award-winning Online Review Application. As the sheer number of documents being reviewed in electronic discovery applications continues to grow, duplicate document management has become an increasingly important issue. This new version of the Online Review Application specifically addresses duplicate documents and includes several workflow productivity enhancements.

Specifically, the newest version of the Applied Discovery Online Review Application:

- Ensures the highest degree of accuracy in recognizing duplicate documents with full MD5 hashing of all files;
- Enhances capabilities for applying bulk annotations and other bulk tagging options to duplicate documents in a variety of ways while maintaining flexibility in how documents are handled and produced;
- Provides the ability to bulk tag and bulk annotate entire document family groups (emails and their attachments) and conversation threads; and
- Offers several workflow enhancements for online redaction.

These enhancements, when tied to the Applied Discovery easy-to-use interface and industry-leading speed, dramatically improve attorney productivity during review.

# In this issue:

**Guest Article:** "In-House EDD Departments Help Law Firms Scale the Digital Mountain," by Matthew Levy, Esq., Wilson Sonsini Goodrich & Rosati, PC. **See page 3**

**Practice Tips:** "More Bytes, Bits & Bucks: Digital Diligence Defined," by John M. Barkett, Esq., Shook, Hardy & Bacon, L.L.P. **See page 8**

## UPCOMING EVENTS

Applied Discovery will participate in several events in the upcoming months. To register for one of the events or to find more information about other electronic discovery events, visit the News & Events section of our website at [www.lexisnexis.com/applieddiscovery](http://www.lexisnexis.com/applieddiscovery).

OCTOBER						
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■ **Mealey Publications Conferences: E-Discovery Conference**  
Ritz Carlton  
New Orleans, LA  
October 26, 2004

■ **Applied Discovery: E-Discovery Best Practices Certification Course**  
Applied Discovery Headquarters  
Bellevue, WA  
October 28, 2004

NOVEMBER						
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■ **2004 LAMA Annual Conference & Expo**  
Hilton Montréal Bonaventure  
Montréal, Québec  
November 3-6, 2004

■ **Essential Checklist for Electronic Discovery**  
Washington, D.C. Bar Conference Center  
Washington, D.C.  
November 16, 2004

■ **Applied Discovery: E-Discovery Best Practices Certification Course**  
Westin New York at Times Square  
New York, NY  
November 17, 2004

## APPLIED DISCOVERY IN THE NEWS

You may have read about Applied Discovery recently in the following publications. Please contact us to request a copy of any these articles, or view them online at [www.lexisnexis.com/applieddiscovery](http://www.lexisnexis.com/applieddiscovery).

"E-discovery: Don't Let Electronic Evidence Bury Your Firm"  
Legal Assistant Today | May/June 2004 Issue

"Prepare for E-Discovery in Four Easy Steps"  
by Virginia Llewellyn, Esq., Applied Discovery  
Law Practice Today, American Bar Association | July 2004

"Embedded Information in Electronic Documents"  
by Scott Nagel, Esq., Applied Discovery  
Law Practice Today, American Bar Association | July 2004

"New E-Discovery Rules Proposed"  
ABA Journal eReport, American Bar Association | July 2004

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