

# O The Applied Discovery OrangePages

## Electronic Discovery Newsletter

### FEATURE STORY

## E-Discovery Best Practices in Antitrust Document Review

Electronic discovery has evolved from a tool employed in only the largest, most document-intensive cases into a mainstream practice that plays a role in many merger investigations. With businesses generating an astounding volume and variety of electronic documents on desktop and laptop PCs, networks, servers and hand-held devices, this shift from paper to electronic review was inevitable. Today, the broad term "electronic discovery" is commonly understood to include document review practices in antitrust work as well as litigation.

**"...productions by .pdf format, accessed on the web, have proven to be extremely effective, for both the parties and our staff."**

- FTC

The Federal Trade Commission's Bureau of Competition and the Antitrust Division of the Department of Justice have paid increasing attention to electronic discovery practices in the past year, with the FTC including electronic document review as one of the primary topics at its June 2002 merger review "best practices" workshops. D. Bruce Hoffman, Associate Director at the FTC's Bureau of Competition, served as one of the moderators at the workshops, and has been spearheading the FTC's

electronic discovery initiatives. "Both the FTC and DOJ continually look at practices and procedures to ensure we're doing the best job we can," said Hoffman. "The issues associated with reviewing and producing electronic

documents came to our attention with the rapid rise in the size of average second request productions, and the increase in parties' requests to use electronic production techniques. We knew it was time for serious review of this issue." According to Hoffman, there has been a steady increase in the volume of electronic data involved

in merger investigations. Connie Robinson, attorney and Director of Operations of the DOJ's Antitrust Division, agrees with Hoffman's assessment. "Today, we are receiving about 50% of materials in some sort of electronic format," Robinson noted. "The trend is clearly moving toward more and more electronic productions."

Hoffman attributes the rising tide of electronic document productions to two factors:

[See Feature on Page 6](#)

### CASE LAW UPDATES

#### Preliminary injunction requires party to preserve electronic evidence for use in future discovery.

*Dodge, Warren & Peters Ins. Svcs., Inc. v. Riley*, 2003 Cal. App. LEXIS 171 (Cal. App. 4 Dist., Feb. 5, 2003)

In this landmark California decision, plaintiff sued former employees for misappropriation of trade secrets and unfair business practices. The former employees appealed a preliminary injunction by the superior court that required "freezing" of defendants' computers and preservation of electronic evidence that prohibited the former employees from destroying, deleting or secreting from discovery any of their electronic storage media. The appellate court upheld the trial court's issuance of the temporary injunction, finding that the injunction was proper and there was not an adequate remedy at law that would protect plaintiff.

#### Court grants motion for judgment against defendant for failure to comply with discovery rules.

*Metropolitan Opera Ass'n v. Local 100, Hotel Employees & Restaurant Employees Int'l Union*, 2003 U.S. Dist. LEXIS 1077 (SDNY, Jan. 28, 2003)

This matter was heard on plaintiff's motion for sanctions for discovery misconduct by the defendant and defendant's attorneys. Among other allegations, plaintiff claimed that defendant's attorneys failed to conduct the required search for relevant documents, including email and other computer documents, in response to plaintiff's multiple discovery requests. The court ordered judgment against defendant and awarded attorneys' fees.

Documents at issue in the ongoing discovery disputes between the parties included paper documentation as well as email messages, various drafts and "non-identical" copies of documents stored in paper and on computers,

[See Case Law Updates on Page 5](#)

## INSIDE

### 2 GUEST ARTICLE

Implementing Electronic Document Review in Second Request Productions  
by Jennifer M. Vasta, Esq.

### 2 CONTACT US

### 2 THE APPLIED DISCOVERY DIFFERENCE

### 3 MIRANDA WRITES

Review of Native Files Discouraged

### 4 PRACTICE TIPS

Five Steps to Effective Data Gathering

### 4 SPOTLIGHT

Quality Assurance and Quality Control Take Center Stage

### 5 TECH TIPS

Developing an Export Strategy

### 8 APPLIED DISCOVERY IN THE NEWS

### 8 UPCOMING EVENTS

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## Back Issues

Back issues of the Orange Pages are available in limited quantities. Recent issues have included: a litigation focus, with advice from federal experts for electronic discovery practice; security standards of various options for storing and reviewing electronic documents; a description of the differences between traditional litigation support databases and electronic discovery technology; and many other topics. To request back issues, please contact us at [OrangePages@applieddiscovery.com](mailto:OrangePages@applieddiscovery.com).

## Your Online Electronic Discovery Resource

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## GUEST ARTICLE

# Implementing Electronic Document Review in Second Request Productions

by Jennifer M. Vasta, Esq., Howrey Simon Arnold & White, LLP

The volume of electronic documents involved in second request practice today is extraordinary. Implementing an effective process for gathering, reviewing and producing this information to the FTC or DOJ is critical to the success of any second request production. The responsibility of researching, analyzing and presenting different options for electronic document review often falls with an individual attorney at the firm representing a merging party. This article provides guidance for firms considering the switch to electronic discovery practices, and outlines practical tips for those tasked with selecting the best review option.

## Volume of Data Drives Need for New Practices

Companies create millions of pages of electronic documents on their computers each year. In many circumstances, employees save massive amounts of information on network servers, laptop and desktop PCs, and various forms of removable media (such as CDs or floppy disks). The same information often resides in duplicate form on the company's backup tapes. When a company is involved in a transaction subject to regulatory review, all these documents must be reviewed and considered for responsiveness in the context of a second request.

In the "old days" (pre-1990s), companies typically stored information only in paper format. When a company's attorneys had to review documents in a legal action, there was no alternative to paper review. As computer use increased dramatically in the mid- to late-1990s, the volume of information created by employees grew exponentially, with many of the documents stored only in electronic form. Concurrently, attorneys began looking for new ways to manage the growing volume of electronic data.

Toward the goal of developing the right electronic document review practices, many firms have adopted a hybrid paper-electronic review approach. This approach involves an initial review of computer files (email, word processed documents, spreadsheets, etc.) in the native software application. For example, email messages would be reviewed directly in the email program utilized by the company's employees. This "native" review is often used as a way to narrow the scope of potentially responsive documents. In the email example, messages containing jokes or other information unrelated to the company's business would be identified and discarded from the document set. After the first pass review is completed electronically, the information deemed potentially responsive is typically printed for a second review, privilege analysis, and preparation for production.

Unfortunately, this hybrid method of review can be time consuming and expensive. The process of creating paper "blowbacks" for potentially responsive documents typically runs about \$.16 per page. On average, another \$.15 per page is charged to label and copy the documents selected for production by the review team.

*See Guest Article on Page 7*

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Applied Discovery was recently named 2003 "Service Provider of the Year" by the Washington Software Alliance. This honor is awarded to:

"... the company that regularly exceeds client expectations, demonstrating the most exemplary service through a strong use of technology to bring extraordinary quality, creativity and responsiveness to clients."



# Review of Native Files Discouraged

Dear Miranda,

My firm handles a number of second request document productions each year. In the past couple of years, we have been faced with reviewing a growing number of electronic documents. We understand the problems with paper review of electronic documents, so we have been reviewing electronic files on our computers in their native format, then producing the files on disks or hard drives. Now the government says this method of production can be troublesome. Can you shed some light on the best way to prepare these native files for production in a form acceptable to the government?

Leo W.  
Washington, D.C.

Dear Leo,

Many of our clients have reported difficulty in determining the best overall approach for reviewing and producing files from clients' computers in response to a second request. Likewise, the FTC and DOJ are working to conform their standard practices to the way businesses now create and store information. With the FTC's best practices recommendations issued at the end of 2002, now is a good time for everyone involved in second request practice to take a fresh look at the way electronic documents are reviewed and produced in merger investigations.

## Native Review of Electronic Files: Good Files Gone Bad

It would seem that review of electronic files—emails, word processed documents, spreadsheets, and the like—in their native format would be the most logical and "true" form of review for preparing electronic documents for production. Unfortunately, native file review has significant downsides for your team, and even compromises the authenticity of evidence.

### Logistics and Review Limitations

Native file review can be very complicated. Companies use dozens of software applications every day, including spreadsheets, word processors, email, and graphics programs. To complicate matters, corporations often have several different versions of the same program in use; some departments use Microsoft Word 97, while others may use Microsoft Word 2000 or Office XP. If you choose to review these documents with native applications, your firm would need to purchase, install, and maintain dozens of different applications.

Significant efforts are required by your firm's IT staff

to load all the necessary software programs onto every PC that will be utilized for electronic document review. This seemingly simple act can consume months of time and hundreds of thousands of dollars. Even then, members of the review team can view the documents only from PCs with all the necessary software installed.

The logistical limitations of native file review are compounded by an inability to efficiently review, search, categorize, redact and produce information from native files. While reviewing native files on a computer screen gives your team an advantage over the expensive and time-consuming process of printing each page for manual review, the process is restricted by the functionality of the native software programs.

unable to effectively redact privileged information.

Production of data from native format, whether produced in paper or electronic form, also requires time-consuming manipulation of files from multiple programs in order to organize the responsive information in one place. Bates numbering or any other document marking must then occur outside the native applications.

### Altering the Data

Even more important than the inconvenience of native file review is the potential for changes to the native files. For example, a document created in a word processing program typically stores a "date last modified" field in the document's meta data. The simple act of opening the file for review, even

### Advantages of electronic discovery in a standard PDF format:

- ☑ Doesn't require software purchase, installation, and support for each native file format.
- ☑ Review from any PC with Internet connection.
- ☑ Search, review, organize, redact, and Bates number all from one interface.
- ☑ Significant time and cost savings.
- ☑ FTC-preferred electronic format.



For example, a large volume of email is typically gathered from clients in responding to a second request. Microsoft Outlook, one of the most common email programs, appears to be relatively user-friendly from a document review standpoint. The "find" functionality allows a user to pinpoint key words in the subject line or body of an email message, and messages can be organized in folders within the application. The program also allows a review of messages sorted by date sent or received, or by message author or recipient. What many people fail to realize, however, is that it is impossible to search attachments to the messages when relying on native program functionality. Native review of email would require the review team to manually open and check each attachment for relevant or privileged information. This method also prevents the review team from identifying any "bcc" designations associated with the messages.

Other problems occur with spreadsheets or word processing programs, which lack point and click "tagging" functionality like that of many email programs. In these programs, documents cannot easily be sorted and organized for responsiveness. In any native software program, your review team will be

when no changes are made, will likely change the document's modification history.

Other changes to the documents can occur when native files are loaded onto the review machines, before the legal team even begins its work. Without proper precautions, material details can be changed. The issue of time zones, for example, can be critical when reviewing email communications. When email files are copied from multiple time zones and loaded for review, the time designations displayed on the face of email messages may be altered. When information concerning the date or time of certain occurrences or communications matters to the case, this distortion of the data can be risky, and may raise issues of overall integrity of your team's document review practices.

### Review of Electronic Files in a Uniform Format: All the Advantages, None of the Risks

Understanding that native file review is a risky proposition, your firm needs an option for electronic review. Perhaps the most straightforward answer to this question lies in the text of the best practices recommendations issued by the FTC in December, 2002. The FTC stated, "Native file productions are unsatisfactory for various reasons, and production by CD often imposes an unacceptable burden on our resources.

See *MirandaWrites* on Page 5



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

## PRACTICE TIPS

# Five Steps to Effective Data Gathering

When a second request is issued, your legal team has a limited amount of time to identify and gather necessary documents from your client's computer systems. Preparing a data gathering plan in advance will enable you to react quickly and efficiently, allowing more time for substantive document review.

### 1. Define the Scope of the Project

Work with your client to review the document request with an eye for the following questions:

- Who are the custodians of interest?
  - > Based on: specific document requests; geography; department; job function; dates of employment; or other variables.
- What are the time periods of interest?
- Must deleted files be produced?
- Are backup tapes within the scope of the project?
  - > If so, must all tapes be restored, or are monthly, quarterly or yearly snapshots acceptable?
- In what form must the data be produced?
- Can in-house IT staff handle the workload, or does it make sense to contract with a service provider for assistance?

### 2. Identify Relevant Data

Gather as much specific information as possible about the layout of the organization's IT systems. Create a diagram to show how the relevant data is distributed throughout the organization.

Areas to consider:

- Electronic Mail Information
  - > What types of electronic mail servers are deployed throughout the organization?
  - > Are email services centralized? If not, where are the mailboxes of the relevant custodians?
  - > What are the email server policies?
  - > How long is email allowed to stay on the server?
  - > What are the mailbox size limits?
- File Server Information
  - > What types of file servers are deployed throughout the organization?
  - > Do users have home directories? If so, on what servers?
  - > What are the size limits for each user?
  - > Does the organization utilize shared folders?
  - > How are shared folders organized? (By department? By geography? By job function?)

See Practice Tips Page 6

## SPOTLIGHT

# Quality Assurance and Quality Control Take Center Stage

*This issue's Spotlight column features an interview with Rachel Ford, Operations Manager at Applied Discovery. Her group is responsible for developing and ensuring high quality service standards for Applied Discovery's Online Review service as the functionality and capacity expand to meet client demands.*

**The Orange Pages (TOP):** Rachel, you've been with Applied Discovery for more than three years. How has the operations group changed in that time?

**Rachel Ford (RF):** One of the most noticeable changes is that the focus of our group has narrowed as the company has grown. We now have group members solely dedicated to conducting quality assurance and quality control testing. This helps us to maintain our reputation for the highest level of quality in the industry.

**TOP:** Quality assurance and quality control? Aren't they the same thing?

**RF:** No, but they are frequently confused. Both disciplines have the same common goal: to ensure quality. Both are necessary to effectively manage development and maintenance of our technology and services. But the concepts are different.

Quality assurance (QA) is conducted during the product development lifecycle. QA takes a detailed technical requirement and product objective and applies a set of measurable methodologies and standards to ensure the explicit requirements are met, the objectives are achieved, and the code is free of defects and in compliance with industry standards.

By contrast, quality control (QC) activities are continuous and focus on ensuring consistency and quality throughout the delivery of our products and services. Once a client begins using our Online Review application, quality control measures are conducted from the beginning to the end of the project.

**TOP:** How does testing fit into the equation?

**RF:** Testing is performed as part of both QA and QC duties, with the intent of proactively identifying quality variances and measuring success. Testing defines repeatable steps and activities that act as a road map for defining success, and guides the team in determining measurable code acceptance criteria.

**TOP:** Can you give us some examples of testing?

**RF:** At Applied Discovery, three fundamental traits are paramount to our success: quality, capacity and service. We create a custom test plan to ensure every feature in our Online Review application meets these needs. Examples of test coverage include: performance speed, usability, security, data validation, compatibility, and regression testing.

**TOP:** Regression testing? What's that?

**RF:** It is the retesting of the affected components of the system whenever there is any change to the application, no matter how large or small. In some cases, this may mean retesting the entire software application for a very minor service upgrade. This ensures that newly modified code complies with its original core requirements, and that unmodified code has not been affected by the maintenance activity. Also referred to as verification testing, regression testing is initiated after a programmer has changed or added code that may have inadvertently introduced errors.

**TOP:** Can testing be automated?

**RF:** Yes. The more automated the test process, the more efficiently changes can be functionally tested and regression tested. We have invested in a state-of-the-art testing system. Still, there is no single "silver bullet" that will perform the comprehensive test coverage we require. So, in addition to utilizing third party tools, we develop customized internal test tools specific to our application. Of course, we also roll up our sleeves and perform manual tests.

**TOP:** With so many different types of computers and networks these days, how can you be sure that Applied Discovery's application will work for all of your clients?

**RF:** That's an excellent question. There are an infinite number of possible computer configurations in the world today. During every test cycle, we test numerous standard scenarios, from operating systems and network configurations to common virus scanning software and Internet conditions. We continuously poll our clients to find out what they're using, to make sure our scenarios are reproducing their environments. The goal is to ensure compatibility with as many configurations as possible, and also to identify the optimal conditions for our application so we can be sure our clients have the best user experience.



Rachel Ford and company ensure Applied Discovery's service meets the highest quality standards.

See Spotlight Page 7

# Developing an Export Strategy

The export phase of the electronic discovery process is arguably the most delicate. The term "export" refers to the process by which electronic documents are transferred from a centralized database where online review was conducted to some other location or format for production. Whether you opt to produce documents electronically or on paper, it is critical for your legal team to carry out the production in the most efficient manner. The trick to successful exporting is to plan ahead: Develop an export strategy before you begin your review process. The following checklist can help you plan your strategy.

- **Define Data Set**  
Define the data set to be produced. Some options include: all documents in the database, responsive documents, non-privileged responsive documents, etc.
- **Set Production Criteria**  
Establish and enforce criteria to properly code documents for production during the review process.
- **Define Document Export Rules**

*Document Groups:*

Many documents are said to belong to a group or family. In other words, one document can be related to another document. For example, a zip file containing multiple documents is a family group, as is an email with an attachment. Because the email and the attached document are related, rules must be established as to whether to produce one or both documents in the event that only one of the documents in the group is found to be responsive. Established best practices dictate establishing one rule and enforcing it without exception throughout the entire project.

*Privileged Documents:*

Decide whether a privilege log is required, and determine what categories of information will be included in the log.

- **Bates Numbering and Document Branding:**  
At the beginning of the project, create a Bates number and branding format and adhere to it throughout the project. Elements of a Bates number may include: prefix, suffix, padding length and starting number. Branding considerations include: font, placement, and fixed or dynamic content (e.g., page numbering).

- **File Naming**  
Choose a file naming system for the produced documents such as the Starting Bates number or Applied Discovery's internal Document ID number.
- **File Output**  
Choose your file output options. The most common are PDF or TIFF with ASCII text.
- **Document Reference Data**  
Meta data, privilege logs and cross reference files are commonly produced as a companion to the actual document set. File type options for this data includes: ASCII text, Excel, Access, etc.
- **Output Media**  
There are four media types available for export: CD, DVD, FTP and hard drive. The output media is typically dictated by the size of the data set to be exported but can also be determined by court-mandated requirements and timelines. FTP is the option most often used for productions of less than 1 GB—especially when a quick turnaround is required.

VOLUME	PDF	TIFF
CD-ROM (<650 MB)	~138,000 pages	~10,500 pages
FTP (<1 GB)	~213,500 pages	~16,500 pages
DVD-ROM (<4.7 GB)	~1,000,000 pages	~77,500 pages
Hard Drive (<120 GB)	~25,000,000 pages	~1,980,000 pages

**SELECTING EXPORT MEDIA: One factor to consider when selecting export media type is the total size of the data set to be produced. CD-ROM holds the smallest volume of data, while a hard drive holds the greatest. In all cases, the media will accommodate more PDF files because they are significantly smaller than TIFF files.**

Once the review portion of the project is complete and the documents are ready for export, the next step is to ensure that all the export requirements are met. Choose a service provider that utilizes standard quality control practices throughout the review process and during the export process to verify the collection of documents produced. A typical project should take less than 72 hours to produce, depending on the number of documents, the amount of data, and the complexity of the project.

Developing a plan and setting requirements for the export process before the review process begins is crucial to a project's success.

(continued from Page 1)

and other "electronically-stored" documents. With regard to some of the requested documents, the court found evidence of willful intent to withhold or conceal information. With regard to other requested documents, the court concluded that, at the very least, defense counsel made insufficient efforts to coordinate and carry out a plan to locate, review and produce relevant documents in order to meet the requirements of the discovery rules.

The court concluded that defendant's and defendant's attorneys' conduct comprised a "combination of outrages" sufficient to invoke the most severe sanctions available. In noting the reason for the decision to grant plaintiff's motion, the court indicated a desire to both punish the conduct of the individuals involved in this case, and to deter similar conduct by others in the future. The court stated that defendant had a duty to "establish a coherent and effective system to faithfully and effectively respond to discovery requests." ■


MIRANDA WRITES

(continued from Page 3)

However, productions by .pdf format, accessed on the web, have proven to be extremely effective, for both the parties and our staff." The FTC's stated preference for receipt of information in a standard PDF format, accessed in a web-based database, is good news for your legal team. Web-based review of electronic documents is the most cost-effective and efficient means for reviewing large volumes of diverse types of files in a very short period of time.

An experienced electronic discovery service provider will work with you to gather and process hundreds of thousands—even millions—of pages of documents from many different file types. Information stored on legacy systems, backup tapes, or other media that may have presented a challenge in its native format, can be easily displayed in a uniform format and stored in a web-based repository. By using any PC with an Internet connection, your review team benefits from the functionality of software designed exclusively for the purpose of legal document review. This means that searching, reviewing, organizing, redacting privileged information, and Bates numbering can all be done from one interface.

Even more importantly, this review process enables your team to prepare the documents for production in a form favored by the government: providing access to documents in a web-based database. Numerous measures are in place to ensure confidentiality, including the ability to create an entirely separate database for government review. This method provides significant time and cost savings in the document review stage, and even greater efficiencies during production. ■

 This issue's Tech Tips column was written by Robb Wagoner, a Senior Engineer at Applied Discovery. If you have a technical issue you'd like to see addressed in this column, send a message to [OrangePages@applieddiscovery.com](mailto:OrangePages@applieddiscovery.com). ■

## FEATURE (continued from Page 1)

the increase in creation and storage of electronic information by businesses, and the rapid development of options for electronic review and production. "Email is now the primary form of intracorporate communication," observed Hoffman. "In some recent second request productions, email alone constituted the majority of the production." With the change in business practices has come a change in the way attorneys review their clients' information. "Electronic production techniques have become sufficiently widespread, accessible and affordable that they should be available to parties as a routine matter," continued Hoffman. "Electronic discovery has become very widespread on the civil discovery side and should be equally available on the merger side."

In December 2002, the FTC issued a press release and accompanying statement summarizing the agency's findings during the best practices workshops. The announcement included recommendations for production of electronic documents in second requests, and encouraged parties to produce electronic documents in electronic form when possible. The FTC's announcement stated in part, "Electronic production has become a cost-effective method of producing documents. It has been accepted, in various formats and with various degrees of success, by both us and the Department of Justice. In light of this, we intend to develop options for electronic production."

The FTC's December 2002 best practices recommendations also identified some acceptable specific methods of electronic productions and indicated a preference for production in a web-based database. The statement said in part, "Native file productions are unsatisfactory for various reasons, and production by CD often imposes an unacceptable burden on our resources. However, productions by .pdf format, accessed on the web, have proven to be extremely effective, for both the parties and our staff." Hoffman says there are a number of reasons why a web-based repository appeals to the FTC, but noted one of the main factors is the avoidance of strain on the agency's internal IT resources. Both Hoffman and Robinson note that attorneys representing merging parties have been exploring electronic production options with increasing frequency since the best practices recommendations were issued.

With both the FTC and DOJ working to encourage options for electronic document review, there are substantial implications for attorneys practicing before both agencies. "The FTC and DOJ clearly seem to be working toward a uniform protocol for electronic production," observed Bob Cook, an antitrust attorney with the Washington, D.C. office of Drinker Biddle & Reath LLP, and a participant in the FTC's 2002 workshops. "Without a doubt, this is going to be the future of merger review. As the volume of electronic documents increases, we have almost no other option for how to handle them."

The benefits of electronic discovery practices are

clear to most attorneys, but some are still fearful of making a change from the paper-based document review practices they know and—even though they dislike the manual work—trust. Hoffman believes that attorneys who express a resistance to electronic review and production methods may be unfamiliar with the capabilities of current technologies. "Part of it is a general resistance to change away from familiar, tried and true techniques, and part of it is the concern that trying a new procedure could delay the process when they have a very tight deadline," said Hoffman. Cook agrees, noting that electronic discovery practices must be compatible with the discovery processes attorneys already know. "It's a matter of having a way to conduct review electronically that makes lawyers comfortable with the procedures." Cook worked as a staff attorney at the FTC for nine years, and observed some of these changes taking place from the agency's perspective. He believes that the government may be less conservative than the private bar in this instance, and sees the agencies driving what will ultimately be positive changes for everyone involved.

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**"Electronic discovery has become very widespread on the civil discovery side and should be equally available on the merger side."**

**- D. Bruce Hoffman, Associate Director,  
Bureau of Competition, FTC**

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Some members of the private bar fear that electronic discovery technology makes it too easy for reviewing agencies to search through the parties' documents, potentially harming their clients' position in merger review. Hoffman strongly disagrees. "Producing documents electronically definitely provides the agency with better search and review capabilities, but this is almost universally beneficial to the parties," Hoffman added. "People who've worked with the agency a lot realize one thing that really makes an impact on us is the ability to verify the parties' arguments. Having the documents available to us in searchable format greatly improves that process and speeds the entire review." Hoffman recalls a recent production conducted entirely in electronic form. "It was a great benefit to the parties that the staff lawyers could take arguments presented by the parties and test them and quickly determine they were soundly based. Electronic review significantly improved the review process and the staff's confidence in what the parties were telling them."

Everyone involved agrees that electronic discovery is here to stay, and that the benefits will greatly outweigh any perceived difficulties along the way.

"The ultimate goal is a more targeted review," said Hoffman. "In the long run, we believe that electronic production will be better for everyone involved." Robinson agrees, adding that the agencies will continue to do whatever they can to standardize practices for uniformity along the way. Cook recommends that attorneys get started with a mid-sized project or a case involving a tech-savvy client. Once they understand the benefits of electronic discovery, he believes they will be ready to make the switch. "Don't be afraid of electronic discovery," Cook advises. "It works." ■

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## PRACTICE TIPS

(continued from Page 4)

### 3. Prepare the Data Gathering Plan

Once the information is aggregated, a customized retrieval plan can be developed. This should include:

1. A diagram of the locations of data to be gathered.
2. A project plan for all physical locations.
3. A summary of the anticipated impact on operations.
4. Identification of all members of the data gathering team.
5. Identification of points of contact for each location.
6. An inventory of the hardware and software tools to be used to gather data.
7. An outline of the specific collection procedures to be used.
8. Detailed work product checklists for technical staff completing the collection work.
9. Chain of custody instructions for all involved parties.
10. Arrangements for shipment of the media containing the data gathered.

### 4. Conduct a Pilot Test

The plan should be reviewed by a data gathering professional to ensure that the procedures are comprehensive and forensically sound. Upon acceptance of the plan, it is important to test the procedures on non-relevant data. This test will be good practice for the individuals involved, and will reveal any potential problems with the plan.

### 5. Implement the Plan

Completing an electronic discovery project on time depends in large part on effective execution of the data gathering plan. Implementation of the plan should occur as early as possible, and should be managed by a designated person trained to maximize effectiveness of this crucial first step to effective electronic data review.

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**Further Reading:** To request a copy of Applied Discovery's Fact Sheet "Creating a Data Gathering Plan," send your request to [OrangePages@applieddiscovery.com](mailto:OrangePages@applieddiscovery.com). ■

## GUEST ARTICLE (continued from Page 2)

Additional expenses may be incurred throughout the process if working copies are needed in different offices, or when a large volume of documents requires storage in an offsite facility.

### Benefits of Electronic Discovery Technology in Second Request Productions

Electronic discovery technology was developed in response to the need for more efficient solutions to handle massive volumes of electronic data. This technology typically includes several components, beginning with processing the native files to a standard format for review (e.g., TIFF or PDF). Next, the files are uploaded to a centralized database where they can be reviewed from any computer with an Internet connection. Finally, electronic discovery technology allows various production options, including production on CD, via a separate online database, or even production in paper. Charges for these services vary depending on project variables, but are generally less than \$.25 per page from initial processing through production.

The primary benefits of electronic discovery technology are time and cost savings for the review team. Second request production timelines are very tight and the timeline for reviewing millions of pages can be as short as three or four weeks. Reviewing all file types in one standard format—and avoiding the paper step altogether—can greatly speed the document production process. The features of electronic discovery technology also allow the review team to perform the most critical elements of their work in one centralized location. Documents can be searched for responsiveness or privilege, coded, and marked for production all from one interface.

### Advice for a Successful Electronic Production

The following steps will help guide you through a successful transition from manual or hybrid paper-electronic processes to implementing electronic document review in your second request practice.

1. Prepare an "apples-to-apples" comparison of the document review methods considered.
  - A comparison of hard costs is key, but also outline the features and functionality of various review methods considered. Simply printing a piece of paper from a client's

computer may be cheaper than using an electronic discovery service, but consider whether the features of an electronic discovery tool give you other options (e.g., search capability) that will help your case in the short or long term.

- Assess the scalability of various review methods. If the volume of data in your case is greater than early estimates suggest, will your chosen review method be able to keep up?
2. Rally support for the project from key members of the firm.
    - Work with your IT team and firm attorneys who have experience in electronic discovery. People within the firm often have performed research on products and providers that can be utilized by others in the firm on separate projects. Many corporate clients now specifically look for outside counsel with electronic discovery expertise, and this can be a valuable marketing tool for the firm.
    - Once you've outlined the review options, be certain all the necessary decision-makers understand and sign off on the chosen method of review. A demonstration of the technology to key partners and even client representatives is helpful at this stage.
  3. Conduct due diligence before selecting an electronic discovery service provider.
    - Use online resources to research service providers with second request experience. Look for a provider with a solid history in the industry, all the technical functionality your project requires, and proven legal expertise.
    - If appropriate, ask DOJ or FTC staff attorneys if they are familiar with the provider. Agency comfort with your chosen method of review can streamline the production.
    - Ask for attorney references from prior second request projects.
  4. Clearly define the scope of the project with your electronic discovery service provider.
    - Once you select a provider, be sure to set out clear and detailed project expectations early in the relationship. Particularly when you are utilizing electronic discovery technology for the first time, it is important to

discuss turnaround times, delivery schedules, volume of data, preferred production format, and any other project variables up front.

- Establish a communication plan for events that may require immediate attention during the project. Do you need to know if the volume of data processed exceeds a certain page count? Is there an expectation that certain billing thresholds will be communicated if the volume of data exceeds original estimates?
5. Set realistic expectations for timing, costs and measuring success of the project.
    - As attorneys learn the differences between manual review processes and electronic document review processes, clients are also adapting to the changes. Discussing the project with the client before review begins is critical.
    - One of the most common complaints about electronic discovery is the perceived expense. In the days of paper discovery, the "trickle effect" of costs lessened the blow of discovery expenses. Paper flowed through the process for many months, with perhaps \$20,000 for printing charges one month and \$80,000 for copying and labeling charges another month. In contrast, an electronic discovery project typically includes all the costs for the project on one bill. What can seem like a large expenditure may be less expensive than traditional discovery processes on a per-page basis, but your client must be prepared to see the charges in one place.

For attorneys who have been waiting to put electronic discovery to work, the time to do so is now. The latest technologies are more user-friendly and cost-effective than ever before. Combining speed with functionality, electronic discovery technology can replace old, cumbersome processes with simpler, more efficient methods.

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## SPOTLIGHT (continued from Page 4)

**TOP:** How is the operations team involved in issue resolution?

**RF:** Issue resolution is our number one priority. The operations team is very proactive. When a technical issue of any kind comes up, our goal is to mitigate that issue before our client ever notices a problem. For example, while performing a keyword search a client may use invalid syntax and get no results. Because we are continually monitoring and analyzing the performance of our ac-

tive projects, we can quickly identify problems like this and contact our clients to help them get the documents they need. When any problem is identified, the operations team creates a resolution task force composed of members not only from our team but also from all of our other technical departments (networking, production services, development, etc.) to ensure aggressive investigation and immediate resolution.

**TOP:** Why are QA, QC and testing so important?

**RF:** Although QA, QC and testing are often considered expensive, non-revenue generating aspects of a business, Applied Discovery takes these functions very seriously. Our commitment to achieving high quality standards on a regular basis is critical to our clients' success, and is also vital to the success of our company.

**TOP:** Thanks for the information, Rachel. Keep up the good work in the operations group. ■

## UPCOMING EVENTS

Applied Discovery will participate in the following events in the coming months. Please contact us to register to attend or to request more information. For information about other electronic discovery events, visit the News & Events section of our website at [www.applieddiscovery.com](http://www.applieddiscovery.com).

### American Bar Association Section of Antitrust Law

51st Annual Spring Meeting  
JW Marriott Hotel, Washington, D.C.  
Applied Discovery Hosted Cocktail Reception  
April 3, 2003, 6:00 - 8:00 p.m.

### American Bar Association Section of Litigation

Annual Conference Corporate Supporter  
Hyatt Regency, Houston  
April 9-12, 2003

### Daily Journal / LegalWorks

2003 Conference & Exhibition  
E-Discovery Workshop  
San Francisco Hilton, San Francisco  
April 22-23, 2003

### BNA Litigation Forum

Electronic Discovery & Document Retention  
Princeton Club, New York City  
May 1-2, 2003

## IN THIS ISSUE: SPECIAL ANTITRUST FOCUS

- **Read what government officials are saying about best practices for electronic document review. See page 1.**
- **Learn how to make the switch to electronic document review. Guest article by antitrust attorney Jennifer Vasta. See page 2.**

## 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.applieddiscovery.com](http://www.applieddiscovery.com).

### "Cyber Tape: Government Regulators Encourage Electronic Review of Documents in Merger Investigations"

by Rob Hellewell, Esq., Applied Discovery  
*The Deal*  
March 12, 2003

### "Bone Up on Backup: Courts are Getting Tough When it Comes to Searching Backup Tapes"

by Mike Finley, Esq., Applied Discovery and Atiba Adams, Assistant Corporate Counsel, Pfizer, Inc.  
*Legal Times*  
March 10, 2003

### "A Practical Guide for Avoiding Metropolitan Opera Mishaps"

by Virginia Llewellyn, Esq., Applied Discovery  
*Digital Discovery & e-Evidence*  
March 2003

*The information contained herein is not intended to provide legal or other professional advice. Applied Discovery encourages you to conduct thorough research on the subject of electronic discovery.*  
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