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Electronic Discovery Newsletter

FEATURE STORY

Electronic Discovery: New Challenges, New Opportunities

Just a few short years ago, the words "electronic discovery" meant something quite different to litigation support professionals from what they mean today. With the proliferation of personal computer usage in the 90s, many discovery documents originated in electronic form. Yet most litigation support departments were still mired in the print-scan-code world. This cumbersome process took documents from computers, reduced them to paper, then converted them to electronic again—as scanned images. A litigation support manager's ("LSM") work often included assessing offshore coding vendors and comparing prices exceeding \$1.50 per page just to get the documents ready for review.

Today, "electronic discovery" refers to the streamlined process of efficient, cost-effective electronic document review. Online document review tools, high capacity production systems, and worldwide access to electronic documents mean that LSMs now face a frontier rich with new challenges and new opportunities.

"In the past five years or so we've moved from an average of just 5% electronic to the point where paper documents are in the minority."

**- Mary Pat Poteet,
Pillsbury Winthrop, LLP**

Changing Times

The sheer volume of electronic data involved in today's cases necessitated the rapid development of electronic discovery technology. "Last year, the number of electronic documents we received for review exceeded paper by a large margin," said Odin Medina, Litigation Support Manager at Fried, Frank, Harris, Shriver & Jacobson in New York. "The split was probably 80/20 in favor of electronic documents." Mary Pat Poteet, West Coast Litigation Support Manager based in the San Francisco office of Pillsbury Winthrop LLP, agrees. "Some cases are entirely electronic now," said Poteet. "In the past five years or so we've moved from an average of just 5% electronic to the point where paper documents are in the minority."

This shift has forced a change in the way LSMs must approach their work. "I've been in litigation support for 12 years," said Poteet, "and I've had to change my thinking quite a bit.

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CASE LAW UPDATES

Follow up opinion in landmark e-discovery ruling.

Zubulake v. UBS Warburg LLC, 2003 U.S. Dist. LEXIS 12643 (S.D.N.Y., July 24, 2003).

The follow up decision to "Zubulake I" demonstrates an extension of the court's analysis of cost-shifting in cases involving information from backup tapes or other "inaccessible" data.

In considering a request for discovery of information contained on backup tapes in the matter of *Zubulake v. UBS Warburg LLC* in May 2003, the court previously established a method for examining electronic discovery disputes in the context of whether requested data is stored in "accessible" or "inaccessible" format. In the follow up ruling, the court ordered a 75/25 split in cost allocation for restoration of backup information, with the defendant bearing the primary burden of restoration costs. The court also set forth a general rule that, even when cost-shifting is allowed with regard to "inaccessible" data, responding parties must pay all expenses associated with review and production of responsive information.

The court noted that the intent of *Zubulake I* was to simplify the Rule 26(b)(2) proportionality test in the context of electronic data and to reinforce the traditional presumptive allocation of costs.

Default judgment entered for failure to comply with e-discovery orders.

Comm'r of Labor of N.C. v. Ward, 2003 N.C. App. LEXIS 1099 (Jun. 3, 2003).

Defendant appealed the trial court's ruling ordering sanctions and granting default judgment. The appellate court affirmed the trial court's ruling.

A discovery order had required defendant to allow plaintiff to enter defendant's place of business at particular locations and "examine,

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GUEST ARTICLE

How to Sway Litigators to Embrace the Electronic Realm

by Robert D. Brownstone, Esq., Fenwick & West LLP

The Terrain

Litigation support managers have long known that the electronic writing is on the wall—or, rather, on the hard drives, back-up tapes, storage devices, web server logs, databases and "deleted" files. The message is that the electronic era is in full swing; 99.997% of information being generated is in electronic form.¹ In the litigation context, e-information is as susceptible to customary discovery rules and principles as paper.²

Still, some litigators continue to view electronic discovery as a "forbidden zone," reminiscent of the region discussed in the penultimate scene of the 1968 sci-fi thriller *Planet of the Apes*:

Taylor: That still doesn't give me the why. There's got to be an answer.

Zaius: Don't look for it. You may not like what you find...

Zira: What will he find there?

Zaius: His destiny.

Astronaut Taylor proceeds, then finds the Statue of Liberty buried in the sand. Only then does he realize he has not been sojourning on a foreign planet, but on Earth—albeit in a futuristic state.

Similarly, litigation support managers must teach litigators that the future is now and is much like litigation's traditional landscape. Not every lawsuit's e-information universe will contain earth-shattering evidence analogous to Taylor's fictitious post-apocalyptic discovery. However, the sheer volume of potentially responsive e-information has changed the tools needed in almost every lawsuit. A recent e-discovery decision concluded that "in the world of electronic data, thanks to search engines, any data that is retained in a machine[-]readable format is typically accessible" and thus, if responsive, must be produced at the expense of the producing party.³

¹ Peter Lyman and Hal R. Varian, *How Much Information* (UC Berkeley School of Information Management and Systems, 2000), retrieved from <http://www.sims.berkeley.edu/research/projects/how-much-info/>.

² See generally Lisa M. Arent, Robert D. Brownstone & William A. Fenwick, *Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131 (Dec. 2002), update at http://www.fenwick.com/pub/lit_pubs/electronic/ediscovery.htm (June 2003).

³ *Zubulake v. UBS Warburg*, 2003 U.S. Dist. LEXIS 7939, *29, 35 (S.D.N.Y. May 13, 2003) <http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/03-04265.PDF>.

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THE APPLIED DISCOVERY DIFFERENCE

Applied Discovery's co-founders Richard Corbett and Michael Weaver were named "Entrepreneurs Of The Year" in the 2003 Ernst & Young Entrepreneur Of The Year® Awards program in the Pacific Northwest.

This award recognizes:

"[G]reat business achievements around the world. Such accomplishments are made possible by the entrepreneurial spirit—the incredible depth and character that entrepreneurs possess as they develop new technologies, create faster ways to distribute goods and services, and improve the quality of life for people around them."



"Help Me Help You!"

Talking Points to Get Colleagues on the E-Discovery Bandwagon

Dear Miranda,

I'm a litigation support manager at a large firm in Chicago. Our firm is relatively tech-savvy in most areas, but we are having a difficult time convincing our attorneys to try online document review in discovery. Many of the associates are eager to use electronic discovery technology, but most of the partners are still a bit reluctant. What can I do to convince them that electronic discovery is efficient and cost-effective?




Zoe C.
Chicago

Dear Zoe,

When desktop computers emerged as legitimate business tools in the late 1980s, many companies were slow to adopt their use. Before spending the money, decision makers had to be convinced of the benefits: increased efficiency, speed, accuracy, and, ultimately, lower costs. Today, the idea of an office without computers is virtually unheard of.

Similarly, some law firms today have yet to move beyond the antiquated paper review process and adopt electronic review. Skeptical attorneys give a number of common reasons for their reluctance. Some say they prefer to review paper. Others are simply hesitant to try something new. Many believe that electronic review is expensive. Although most lawyers and their clients have realized these objections are outweighed by the benefits of electronic discovery, some skeptics remain.

The chart below includes some common objections and corresponding talking points to help attorneys understand the value of using an online review application.

<h3>Paper Review</h3> 	<h3>Case Management Systems</h3> 	<h3>Cost</h3> 
<p>Objection</p> <p>We prefer to review paper. Why should we switch to online review?</p> <p>Talking Points</p> <ul style="list-style-type: none">• It's faster. Electronic discovery will save a significant amount of time, particularly before and during the review process. On the front end, gathering and printing paper documents, then making multiple sets of the entire document collection for paper review can take weeks, even months. With electronic discovery, you can begin reviewing documents within 48 hours. During the review process, powerful search tools narrow the set of potentially relevant documents in just seconds. Going through mountains of paper manually not only takes longer, but also increases the chance of overlooking documents containing key search criteria.• Ability to print responsive documents. For those who strongly prefer to have paper, you can print selected documents from the entire document collection after searches have been run to narrow the data set to only potentially responsive documents.	<p>Objection</p> <p>Our firm uses Concordance or Summation. We've already spent the money and time for training on this system.</p> <p>Talking Points</p> <ul style="list-style-type: none">• Electronic discovery and case management tools are not mutually exclusive. The first thing to understand is that case management systems such as Summation or Concordance and electronic discovery services are complementary. Summation and Concordance are great trial support tools—but they are not the logical first step in discovery response. Using the search functionality of an online review service, attorneys can quickly narrow large document sets to identify potentially responsive documents. A working set of the responsive documents can then be exported to a Summation or Concordance database for storage with other trial preparation materials.• It's easy to use. Anyone can learn to use Applied Discovery's Online Review application in less than 45 minutes. Training for an unlimited number of users is provided at no cost. The web-based model also means there are no hardware or software costs to be absorbed by your firm. Use of online review technology won't add to your firm's infrastructure expenses, and won't impact the spending choices you've already made for case management tools.	<p>Objection</p> <p>Electronic discovery is too expensive.</p> <p>Talking Points</p> <ul style="list-style-type: none">• Electronic discovery is less expensive than paper discovery. A story in the June/July 2003 issue of Law Office Computing reported that the average cost of paper review is \$.70 per page while the average cost for electronic discovery is \$.23 per page. When you consider that you typically make at least three complete sets of documents during paper discovery (one original, one for review, and at least one for production), printing costs alone can quickly add up. With electronic review, you pay for only one set of documents, and electronic originals are preserved and accessible at all times.• Time is money. Electronic discovery is considerably faster than paper discovery. Documents are typically ready for review within 48 hours, and powerful search technology speeds the process of identifying responsive materials. The added convenience of worldwide access to one document database also saves time and money by allowing your firm to leverage resources from multiple offices, rather than hiring expensive temporary attorneys and paying room and board for an old fashioned "on site" paper review.



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. ■

PRACTICE TIPS

Selecting an Electronic Discovery Service Provider

by Linda Alele, O'Melveny & Myers LLP

In many law firms, the litigation support manager is tasked with the responsibility to research, interview, evaluate, and select an electronic discovery service provider. The following checklist will assist you in making the right decisions.

1. Know what you want to accomplish.

Do you want to host data in-house, or on-line? Do you want simple data conversion, or do you need a complete electronic document review interface? If you have a large data set or reviewers in multiple locations, you may want to handle the project differently from the way you would manage a small case with data from just a few custodians.

2. Remember: experience counts.

Consider whether the service provider has handled cases of similar magnitude, processed similar file types, and managed projects for comparable clients. Every service provider has experienced difficulties with some projects—what they learn from their experiences is the important consideration. These prior situations should serve to make the provider better equipped to handle new projects. Don't be afraid to ask about these issues, and be sure to request references.

3. Assess the provider's review tool.

Be sure the application functions properly in the environment in which your users will be working. A flawless demonstration doesn't necessarily mean the application will work well inside your firm. Ask the provider to demonstrate within your firm's networking environment. Functionality of the review tool is also critical. Look for these important features: ability to redact on the fly; ability to make annotations; safeguards to alert a reviewer that document designations have not been saved; and sophisticated search functionality.

4. Evaluate the ability to track the progress of your case.

A summary screen or snapshot of the review will enable you to track the volume of data and the progress of your reviewers, and will assist you in monitoring costs as data is uploaded. This helps avoid surprises and miscommunications with your client along the way.

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SPOTLIGHT

Security and Infrastructure Take Center Stage at Applied Discovery

This issue's Spotlight column features an interview with Mark Stokes, Vice President of Information Technology (IT) at Applied Discovery. His group is responsible for all IT functions related to client and employee information systems, most importantly ensuring the security of confidential client data.

The Orange Pages (TOP): Mark, can you explain what happens in the IT group and how it's different from the software development department?

Mark Stokes (MS): It's very common to confuse software developers and IT professionals. At Applied Discovery, the development group develops and creates our product, the Online Review application. The IT group takes care of the hardware and applications to support that function. In the simplest of terms, developers handle the software and we handle the hardware.

TOP: Well, that certainly is easy to understand. How do you ensure that clients have secure access to their data 24-hours a day and 7-days a week?

MS: We provide our clients with access to their documents anytime, anywhere via the Internet. Any company can host an online service, but to provide clients with the highest level of security possible is another thing. We use only the best hardware and software systems available. That configuration is housed in a state-of-the-art data center, connected to the Internet using fully redundant networks and firewalls.

TOP: Fully redundant? What does that mean?

MS: Even though we take every precaution to ensure that our networks and firewalls are running day and night, we have to prepare for the worst. We always run in "high availability mode," which means that if a problem is detected in any component, backup systems automatically take over. This applies to all aspects of communication, including Internet access, network infrastructure and firewalls. We even have contingency recovery scenarios and processes in place to cover contingencies. For example, if one of our Internet connections fail, we have automatic access to seven other Internet service providers.

TOP: Can you tell us a little about firewalls?

MS: Firewalls act as a security barrier for traffic

coming into a network by keeping hackers out and confidential data in. Our intrusion detection systems work in concert with our firewalls to block suspicious incoming connections, stop malicious programs from spying on the system, and prevent confidential information from being sent out without permission. Our firewalls are configured as securely as possible. Of the more than 65,000 ports available to transmit data over the Internet, we limit access to only two. Additionally, we employ full-time security experts dedicated to learning about each new virus and constantly updating our systems to make certain nothing gets in.

TOP: What else do you do to secure client data?

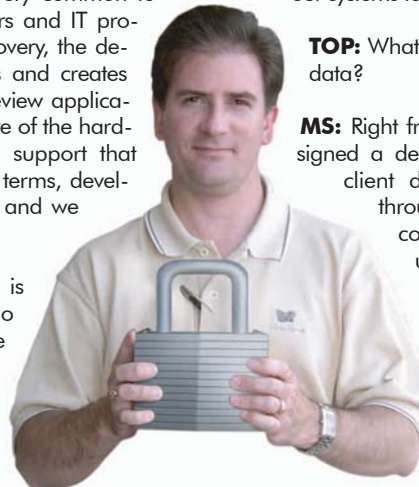
MS: Right from the start, each client is assigned a dedicated server. As we process client data, every document is run through rigorous virus detection. All communications are encrypted using 128-bit SSL encryption technology, which allows users to confirm a web server's identity through a web browser. An SSL connection requires all information sent to and from a server to be encrypted by the sending software and decrypted by the receiving software, protecting information from interception over the Internet. In addition, all data sent over an SSL connection

is protected with a mechanism for tamper detection, automatically determining whether the data has been altered in transit. 128-bit SSL encryption has never been broken. Experts estimate that it would take a trillion-trillion years to crack using today's technology.

As for physical security, our client servers are located in a secure remote facility under 24-hour-a-day guard with seven security checkpoints requiring a combination of authentication methods including cardkeys and biometrics (such as hand scans). Additionally, the building is set to run for two full weeks at full power in the event of a major disaster.

TOP: What can clients do to help maintain the security of their data?

MS: The most important thing clients can do is keep all usernames and passwords secret. Other than that, we take care of the rest. We employ experts in security, data center architecture, network communications, and server management, so our clients don't have to worry about these issues on their end. ■



Mark Stokes and the IT group take extraordinary measures to secure client data.

Find it Fast: Leveraging Meta Data

Many attorneys find that the greatest benefit of electronic document review is the ability to search millions of pages of data quickly and with precision. However, if you limit your searches to basic keywords, you may suffer the same frustration as users of popular search engines such as Yahoo!® or Google™, where too many, too few, or even irrelevant documents are returned because the search parameters were too broad. With electronic discovery, the best way to pinpoint critical documents is to harness the power of meta data.

What is meta data?

Meta data literally means "data about data." It describes how, when, and by whom an electronic document was created, modified, and transmitted. Software programs embed various categories of meta data in documents.

For each document created there can be dozens of fields of meta data that are transparent to the user. In true electronic discovery, where electronic data is gathered in such a way that the meta data is preserved, searching these fields can maximize the benefits of the search process. Although most electronic discovery service providers support meta data searches, the actual search tools vary. The following examples demonstrate how to use meta data to improve search results using Applied Discovery's Online Review application.



Task 1: Find all emails for custodian Beth Dole with the word "competition" in the subject line.

Most email programs offer great flexibility to users in ways to address a message to a single recipient. For example, to send a message to "Beth Dole," a sender may type the full address (beth.dole@email.com), or type a display name that will resolve to an actual address (Beth Dole, BethD, Beth, etc.). In addition, the user might send the message directly to the recipient, or may choose to send a copy (by CC or BCC). Searching only for messages sent "To" Beth Dole might exclude potentially critical messages.

Furthermore, you are looking only for messages with the word "competition" in the subject line. The results of a simple keyword search may include irrelevant messages with the word "competition" in the body of the messages.

To retrieve desired results, search specific meta data fields by following these steps:

- Step 1:** View the meta data of one of Beth's emails and copy its SMTP address.
- Step 2:** Paste the SMTP address in the email address field.
- Step 3:** Include all the potentially relevant results by adding the same search term to each email address option (e.g., To, From, CC and BCC).
- Step 4:** Narrow the results to messages that include the word "competition" in the subject line.



Task 2: Find all emails and attachments received by custodian Todd Smithson after January 1, 2002, that contain relevant terms and have not yet been reviewed.

Depositions are often scheduled early in the course of litigation, prior to a complete review of the documents. By combining a keyword search of a custodian's documents within the relevant date range, and limiting search results to documents not yet reviewed, attorneys defending the deposition can quickly find the remaining documents that must be reviewed for witness preparation prior to the deposition.

To retrieve desired results, search specific meta data fields by following these steps:

- Step 1:** Enter the desired search terms into a basic search query.
- Step 2:** Enter "*"Smithson*"† in the email address field.
- Step 3:** Include all documents received on or after January 1, 2002, by entering 01/01/2002 in the date received meta data field, then select "greater than or equal to."
- Step 4:** Using Applied Discovery's advanced search filters, narrow the results by selecting only those documents not in the "reviewed" collection.



Task 3: Find all documents stored in a particular folder.

File directories offer great organizational flexibility to computer users with the ability to create directories, sub-directories, sub-sub-directories, shortcuts, etc. For reviewers, the challenge is to make sense of these unique file directories and find data relevant to the case. In this example, assume that the reviewer has already found an important document that contains information crucial to the case. Chances are that other documents previously saved to that particular folder are also relevant.

To retrieve desired results, search specific meta data fields by following these steps:

- Step 1:** View a document's meta data and copy its internal file path.
- Step 2:** Choose the relevant custodial source or, in the case of shared folders, choose to search all documents from all custodians that have the same internal file path name.
- Step 3:** In the internal file path field, paste the first document's file path into a meta data query to return all additional documents saved in the same folder.



Task 4: Find all spreadsheets that include the word "sales."

To find documents that include a breakdown of financial information, such as sales by quarter or region, it makes sense to search for just spreadsheets, as that type of program is designed specifically for that type of information. Microsoft Excel is a common spreadsheet program; its file extension is ".xls".

To retrieve desired results, search specific meta data fields by following these steps:

- Step 1:** Enter the word "sales" into a basic search query.
- Step 2:** In the file extension field, type ".xls" into file extension meta data query to narrow the results to include only Excel documents.

The term meta data has taken on an unfortunate negative connotation for many legal professionals. In reality, meta data very rarely reveals a "smoking gun" document or otherwise harms a litigant's case. In all cases, use of meta data in your searches will dramatically improve the speed and accuracy of your work.

† An asterisk(*) indicates a wildcard, which means the search engine will find all instances of the search term regardless of what comes before or after it.



This issue's Tech Tips column was written by Carrie Davey, Account Manager in the award-winning Client Solutions Group 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. ■

FEATURE (continued from Page 1)

We can't touch every document now. So much electronic data is irrelevant and not responsive in the case. It is important to find a way to weed through it all."

Out with the Old

Many LSMs learned quickly that the old methods of scanning and coding documents were not well suited for electronic data, and most attorneys were happy to hear that the days of reviewing fuzzy scanned images were limited. Some attorneys still cling to the idea of touching each document in paper review, however, and this poses new challenges for LSMs in the world of electronic discovery. "It is sometimes difficult to get attorneys to understand that it's often not best to simply print the documents from computers for review," said David Couzins, Firmwide Manager of Litigation Support based in the Chicago office of Winston & Strawn. "It takes longer and is more expensive." Medina agrees that convincing attorneys to try something new can be a difficult undertaking. "Concerns about costs and turnaround times are typically the issues we hear," said Medina. While some still balk at the perceived expense of electronic discovery, studies show per-page prices for use of electronic discovery technology are about one-third the price of paper discovery. A recent article in Law Office Computing magazine estimates that paper discovery costs an average of \$.70 per page, while electronic discovery costs an average of \$.23 per page.¹

"As more attorneys gain experience with electronic discovery, the question changes from whether to use electronic discovery technology to which tool to use for review," added Medina.

Adding Value to the Case

Electronic discovery technology offers LSMs the opportunity to add value to the firm's cases in ways they couldn't before. Providing electronic discovery expertise, assisting lead attorneys in managing the progress of review, and helping to set client expectations about costs are all important aspects of the job of most LSMs today.

In the early stages of a case, the LSM is often called upon to provide expertise about various electronic discovery service providers and options for review. At this juncture, it is important to know what services will be required in the case. "You have to consider how many steps the provider will be involved with—whether there will be a consulting component up front, whether the client needs assistance with data recovery at the site, how the data will be processed and reviewed, and ultimately how it will be produced," said Couzins. "Different attorneys have different needs," added Medina, "and it is important to familiarize yourself with all the available options so you can provide advice." Medina notes that this is a critical point at which LSMs offer a distinct advantage: "By leveraging your experience on other projects with other attorneys, you can provide comfort to those who haven't done it before."

Once the document review is underway, electronic discovery technology enables the LSM to provide important information to the attorney managing the case. "The design of quality online review applications allows us instantly to check the status of review for any custodian," said Poteet. "This makes it so much easier to follow the progress of the case and manage the project. It enables the LSM to gauge how close we are to being ready to produce." Poteet noted that this functionality also enables the LSM to assist in making staffing decisions. "In some cases, including a large litigation or a second request, every day costs the client money. The ability to quickly judge the progress of review tells us whether we should throw more people at the project, consider producing on a rolling basis, or make other modifications to our review plan."

As the case progresses, it is critical for the LSM to closely monitor costs. Although the per-page prices are less than for paper discovery, fast turnaround times mean that expenses are incurred sooner. In the days of paper review or

"As more attorneys gain experience with electronic discovery, the question changes from whether to use electronic discovery technology to which tool to use for review."

**- Odin Medina
Fried, Frank, Harris, Shriver
& Jacobson**

the print-scan-code process, discovery expenses tended to trickle in each month. With electronic discovery, the client often receives one bill for the entire case. With foresight and proper management of attorney expectations, the LSM can help avoid surprising the client with an electronic discovery bill. "It can be difficult to estimate electronic discovery costs," noted Couzins, "because you aren't simply counting boxes of paper." Asking your service provider for guidance on this issue is critical. There are a number of ways to help attorneys set reasonable client expectations, even though definitive cost estimates are difficult to make before the electronic data is processed.

Many people fear the unknown and resist anything new. By conveying the benefits and ease-of-use such technology offers, LSMs can bridge the gap for attorneys to embrace electronic discovery sooner rather than later.

¹ 7 Deadly Sins of Electronic Discovery, LAW OFFICE COMPUTING, p. 84, June/July 2003. ■

CASE LAW UPDATES

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inspect and copy" information including "all information stored in computers, computer hard drives, removable electronic data storage media, diskettes, magnetic tapes, CD[-]ROMs, zip discs [sic] and jazz discs [sic]." Defendant was also ordered to provide plaintiff, at defendant's expense, with a copy of any backup data from equipment removed from the site, and to provide plaintiff with a description of the process used to access the data.

Despite multiple discovery orders, defendant failed to cooperate in providing the required information. The appellate court determined that defendant's conduct in repeatedly attempting to thwart plaintiff's discovery efforts was sufficient to invoke harsh sanctions.

For full summaries of the cases noted above and a complete listing of cases related to the law of electronic discovery, visit our online Law Library at www.applieddiscovery.com. Our Law Library is updated monthly, and also features court rules summaries, white papers, articles and other educational materials related to electronic discovery. ■

PRACTICE TIPS

(continued from Page 4)

5. Keep in mind that not all service providers are created equal.

Although a company advertises "electronic discovery" services, they may not have expertise in this area. Be wary of smaller companies jumping on the bandwagon. Look for proven electronic discovery expertise and quality client service.

Linda Alele is the Manager of Practice Support at O'Melveny & Myers LLP in Los Angeles. She has been a litigation support professional for 20 years. ■

Online Litigation Support Survey



Take Applied Discovery's online survey of litigation support professionals during September and October, 2003 at www.applieddiscovery.com. Be among the first 100 respondents, and receive a \$10 Starbucks Coffee certificate.

In many cases, the vastness of the potentially responsive set of electronic information has made it practically impossible for the litigation team to review hardcopy documents page-by-page. "[B]y comparison to the time it would take to search through 100,000 pages of paper, the average office computer could search all of th[ose] documents for specific combinations of words in minutes, perhaps less."⁴

The E-Litigator's Multi-Faceted Duties

The need to efficiently and effectively tame the electronic beast mandates that litigators become facile with tools enabling compliance with the full range of modern discovery obligations. Litigators' legal and professional duties now include:

- **Requesting Electronic Information from Opposing Parties and Third Parties**
 - > Identify the appropriate scope of e-information.
 - > Send a preservation letter and/or seek a preservation order.
 - > Consider early Fed. R. Civ. P. 30(b)(6) depositions of the opposing party's employee(s) most knowledgeable about the opponent's IT systems.
 - > Assure compliance with the "meet and confer" obligation of Fed. R. Civ. P. 26(f) and Fed. R. Civ. P. 16(b). Some underlying discussion topics could include: information about your client's and opponent's computer systems, such as their breadth, number of users, use of third-party software, file-naming conventions, email programs, websites, search engines, and record retention policies and practices.
 - > For voluminous electronic databases, ask for specific keyword searches. Lack of agreement upon the nature and scope of those searches necessitates court intervention.
 - > Subpoena an opponent's e-information possessed by a third party, such as an Internet Service Provider (ISP), web services provider, or consultant.
- **Anticipating and Responding to an Opponent's Requests**
 - > Be up-to-speed on the layout of a client's computer system, plus the locations and sources of e-information.
 - > Have, or quickly develop, familiarity with a client's information retention/destruction policy.
 - > Notify the client of the duty to preserve evidence, the potential categories of discoverable e-information, and the possible need to cease the usual rotation/recycling of at least some back-up tapes.
 - > Respond promptly to a preservation letter or request for a preservation order, including specific objections and inquiries about the basis for the request.
 - > "[D]oubl[e] back to inquire of the [client's] employee in charge of document

production whether [s/]he conducted a search and what steps [s/]he took to assure complete production."⁵

- **Obtaining and Shaping Computer Experts' Written or Oral Testimony**

When assessing a motion to compel, many judges now expect an expert with sufficient expertise to provide a detailed written or oral explanation of the technical issues. Thus, the prevailing party in an e-discovery dispute may very well be the one who has retained the expert with more impressive credentials and an enhanced ability to explain the client's position.

Tips for Shepherding Litigators to Tech Tools

In all the above regards, the litigation support manager can demonstrate to the firm's litigators how technology tools comprise the best method to assure full satisfaction of preservation and production responsibilities, and to generate effective, defensible requests for production. Some tips on fostering a comfort level with e-discovery technology tools include:

1. Talk the Litigation Talk

Learn enough about both traditional discovery and e-discovery to assure litigators that the following key issues are, in essence, unchanged. Focus on the ability to:

- Demonstrate protectiveness of the client's interests, as you:
 - > Preserve attorney-client privilege.
 - > Comply with preservation obligations.
 - > Protect trade secrets.
 - > Lay the foundation for the authenticity of records to be introduced into evidence.
- Be reasonable yet tenacious with opposing parties and third parties.
- Use "meet and confer" to resolve, rather than exacerbate, discovery disputes.
- Avoid the expenditure of resources on return trips to the court to revisit the same discovery issues.
- Efficiently collect, review, organize, and annotate the client's records, and records produced by others.
- Maintain quality control in team members, outside providers, and consultants.
- Fend off opponents' attempts to bury your review team with an avalanche of over-inclusive and/or disorganized records.

2. Do Your Homework

Gain comprehensive knowledge of your in-house tools, tools offered by electronic discovery service providers, and the quality of input offered by outside forensic experts.

3. Educate

Spend extra time preparing and dry-running short, smooth demonstrations of these benefits of technology tools:

- Documents that are location-independent, i.e., available for review by litigation team members anywhere, anytime over a secure Internet connection.
- Automated capabilities to:
 - > Content-search the data set and subsets thereof.
 - > Identify privileged documents.
 - > Redact.
 - > Segregate documents covered by a protective order, including those categorized as "Attorneys' Eyes Only."
 - > Add electronic comments or annotations to copies of documents.
 - > Search subsets encompassing records already reviewed and/or annotated by other team members.
 - > Context-search.
 - > Track productivity of the reviewers.
- Where appropriate, the advantages of retaining a computer forensics expert—especially when the litigator can specify what item(s) the expert should uncover from a hard drive or a web server log or some other device.
- Chain-of-custody/authentication quality control, including assurance that the pertinent information: (1) has not been changed; (2) is a complete copy; (3) was made by a reliable copying method; and (4) has had its original copy preserved.
- Helpful advice you or an outside expert could contribute to the content of a court-ordered neutral expert protocol, or questions for a deposition of an opponent's IT director.

Conclusion

As you share with your litigation team the benefits of electronic discovery, no doubt you have already felt, or will soon feel, the satisfaction of receiving a compliment from a converted litigator recounting how helpful such technology tools were in the discovery process.

⁴ *Id.* at *29 n.50 (quoting Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. Rev. 327, 364 (2000)).

⁵ *Metropolitan Opera Ass'n v. Local 100*, 2003 U.S. Dist. LEXIS 1077, *4-6 (S.D.N.Y. Jan. 28, 2003).



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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.

LawNet 2003: Networking & Education
Boca Raton, FL
August 18-21, 2003

San Francisco LegalTech
San Francisco, CA
August 26-27, 2003

New York LegalTech
New York, NY
September 16-17, 2003

E-Discovery in Civil Litigation
A BNA Litigation Forum
Washington, D.C.
September 25-26, 2003

WHAT'S NEW

Online Litigation Support Survey



Take Applied Discovery's online survey of litigation support professionals during September and October, 2003 at www.applieddiscovery.com. Be among the first 100 respondents, and receive a \$10 Starbucks Coffee certificate.

IN THIS ISSUE: SPECIAL LITIGATION SUPPORT FOCUS

- Read what litigation support managers are saying about the challenges and opportunities of electronic discovery. See page 1.
- Learn how to share the benefits of electronic discovery with your litigation team. Guest article by attorney Robert D. Brownstone, Fenwick & West LLP. 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.

"Tips for Implementing Zubulake"
by Michael Finley, Esq., Applied Discovery
Digital Discovery & e-Evidence
July 2003

"Scope of Electronic Discovery Turns on Accessibility of Data"
by Julie Locke, Esq., Applied Discovery
LA Daily Journal
June 20, 2003

"Shifting Costs: Zubulake Helps Clarify Who Pays for What in E-Discovery"
by Virginia Llewellyn, Esq., Applied Discovery
New York Law Journal
June 17, 2003

"Electronic Discovery Best Practices: Reviewing Documents in a Uniform Format"
by Sean M. Bell, Applied Discovery
LawNet's Peer to Peer
May 2003

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