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Electronic Discovery Newsletter

2003 | Electronic Discovery: The Year in Review

FEATURE STORY

For electronic discovery, 2003 was the year that brought it all: continued news of corporate scandals and "gotcha" emails, rules and regulations changes rolling out faster than any sensible lawyer could absorb, bold technological developments never even dreamt of in years past, and groundbreaking court decisions issued in rapid-fire succession. But through it all, there were moments of clarity, and all factors point back to the one obvious conclusion that can be drawn from the year's events: electronic discovery is here to stay.

Courts Calling the Shots

Significant electronic discovery opinions were issued in a number of jurisdictions in 2003, but no court received more attention than the Southern District of New York. With three critical electronic discovery rulings in the matter of *Zubulake v. UBS Warburg LLC*, Judge Shira Scheindlin quickly became known as the preeminent electronic discovery expert on the bench. Tackling issues like the reach of Rule 26 in electronic discovery disputes, factors for considering cost-shifting requests, and guidelines for analyzing spoliation in the world of backup tapes, Judge Scheindlin set precedent on the prickly subjects many litigants grappled with on a daily basis.

The Eleventh Circuit Court of Appeals joined the electronic discovery game in September, with *In re Ford Motor Company*, an opinion that discussed the reach of Rule 34 to allow an opposing party direct access to a company's computer systems. Gary Hayden, Counsel at Ford Motor Company, has been active in tracking electronic

"For those of us who have toiled in the e-discovery arena for some time, 2003 was the long-anticipated year of significant developments."

- Gary Hayden,
Ford Motor Company

discovery trends for a number of years. "For those of us who have toiled in the e-discovery arena for some time, 2003 was the long-anticipated year of significant developments," said Hayden.

Electronic Discovery: Law and Practice, the first official treatise on the topic, was published in November 2003, signaling the growth and acceptance of the body of law. Adam Cohen and David Lender, co-authors of the book and

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CASE LAW UPDATES

Court sets standards for spoliation of evidence contained on backup tapes.

Zubulake v. UBS Warburg LLC, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y., Oct. 22, 2003)

In *Zubulake IV*, the court considered the scope of a litigant's duty to preserve electronic documents and the consequences of a failure to do so.

The court addressed *Zubulake's* claim that critical evidence was contained on monthly backup tapes reported as missing, and that certain individual emails were deleted from UBS computer systems.

In analyzing the issues, the court noted that a corporation need not "preserve every shred of paper, every email or electronic document, and every backup tape," even when the threat of litigation is recognized, as this would effectively cripple corporations routinely involved in litigation.

The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g. those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be subject to the litigation hold.

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the

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GUEST ARTICLE

From Theory to Practical Application: The Shifting Role of Electronic Discovery in 2003

By Bill Fisher, Esq., Thompson, Coe, Cousins & Irons, L.L.P.

Technology has changed the practice of law. Electronic filing of court pleadings, real-time transcription of testimony and animated trial exhibits are becoming commonplace. Technology has also influenced how information is processed and obtained during pretrial discovery. Attorneys now must discuss computer network drives, backup tapes and gigabytes of information with opposing parties and the courts in order to obtain responsive documents and other data. Although discovery of electronic records and data has been a requirement under the Federal Rules of Civil Procedure since 1970, the area of electronic discovery has only recently become a specialized area of law. Notably, during 2003, several court decisions were issued which provide a framework for electronic discovery and how the related economic issues should be approached.

Who Gets the Bill? Electronic Discovery and Cost Shifting

In 2003, courts focused their attention surrounding electronic discovery on the burden of producing electronic files and the allocation of costs between the parties. The most noted decisions in this area came from Judge Shira Scheindlin of the United States District Court for the Southern District of New York.

First, in *Zubulake v. UBS Warburg LLC*,¹ the court held that backup tapes were relevant to the plaintiff's claims of employment discrimination and retaliation and, thus, were subject to discovery. Judge Scheindlin noted that electronic evidence is often cheaper than traditional production methods.² She reviewed a previous opinion, *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*³ and its eight-factor test,⁴ and noted that the Rowe factors created a presumption in favor of cost shifting.⁵

¹ 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 13, 2003) ("*Zubulake I*").

² *Id.* at **27-28.

³ 205 F.R.D. 421 (S.D.N.Y. 2002).

⁴ The eight factor Rowe test analyzed: "(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party." *Id.* at 429.

⁵ *Zubulake I*, at *36.

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2003's Electronic Discovery "Must Read" List

Electronic Discovery: Law and Practice

Adam I. Cohen, Esq. and David J. Lender, Esq., Weil, Gotshal & Manges LLP
New York, Aspen Publishers, Inc.
November 2003

"The Next Discovery Frontier: Preparing for the Backup Data Request"

Virginia Llewellyn, Esq. and Richard Corbett, Esq., Applied Discovery
ACC Docket
October 2003

"Discovery of Electronic Documents and Other Digital Data"

Honorable Stephen P. Friot, U.S.D.C., W.D. Oklahoma
The Oklahoma Bar Journal
May 10, 2003

"The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery"

Sedona Conference Working Group Series
2003

"E-Discovery: A Common Term That Is Little Understood"

Greg McPolin, Esq., Applied Discovery
New York Law Journal
January 27, 2003

For a full list of the top electronic discovery stories of 2003, visit the News & Events section of our website at www.applieddiscovery.com.

2004 Predictions: The Year of Increased Expectations

As 2003 draws to a close, I've decided to review all the reader questions received during the year to highlight the most significant electronic discovery issues of 2003, and to identify trends emerging for 2004. If 2003 was the "Year of Electronic Discovery Education," 2004 is shaping up to be the "Year of Increased Expectations."

Many legal professionals will remember 2003 as a year marked by electronic discovery education. Attorneys, paralegals, and litigation support managers embarked on a steep learning curve as they watched the case law develop at a steady pace while trying to make sense of the various product and service offerings designed to make electronic discovery easier. In this issue, we will identify important trends to keep in mind for next year and discuss how those trends affect your discovery practices.

Buyer Beware

The most prevalent theme in my inbox lately is the frustration people feel in trying to sort out relevant claims related to electronic discovery service offerings. As one attorney recently griped, "So many firms are claiming to be 'electronic discovery' service providers. Separating the real e-discovery experts from printing vendors who only can upload a single .pst file to a Concordance database has proven to be very time consuming."

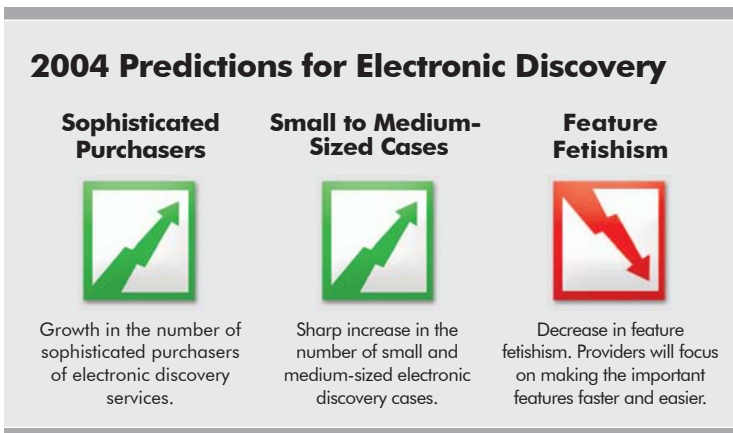
As more law firms gain first-hand experience with electronic discovery, feedback and anecdotal evidence will continue to spread about the good, the bad, and the ugly. Attorneys and legal support professionals are quickly learning two key lessons that will become more apparent in 2004: First, while price is always an important component of selecting an electronic discovery service provider, a botched discovery process caused by an inexperienced or unqualified service provider costs a lot more and is often accompanied by considerable pain and suffering. Second, all service providers are not created equal. Anyone who has walked the aisles of a legal technology event such as LegalTech or the ABA Tech Show has seen dozens of companies advertising "electronic discovery" services. These noisy advertising claims ought to be accompanied with a "Buyer Beware" disclaimer, however, as the claims are not always backed by adequate legal and technology experience in the field.

My prediction for 2004: There will be significant growth in the number of increasingly sophisticated, knowledgeable purchasers of electronic discovery services who will demand reliable technology, adherence to deadlines, and quality client service. Electronic discovery impostors will fall by the wayside and a select few experienced,

reputable service providers will emerge at the end of 2004 as the clear leaders in this field.

It's Not Just the Mega-Cases

Traditionally, attorneys and litigation support professionals viewed electronic discovery technology as relevant only to very large, email-intensive cases. While the number of large cases utilizing electronic discovery services continues to grow at a rapid pace, the demand for electronic discovery services for small and medium-sized cases (typically less than 350,000 pages to review) is growing at an even faster rate.



Law firms and their clients once assumed that the cost-benefit analysis for choosing to use an electronic discovery service provider made sense only for the so-called mega-cases. As the technology has matured, the experience level of users has changed dramatically as well. Attorneys who now have experience with electronic discovery technology are starting to put that experience to work in other cases and discovering that the time and cost savings of electronic discovery are scalable, regardless of case size.

My prediction for 2004: There will be a sharp increase in the number of legal professionals using electronic discovery in small and medium-sized cases. With an average of more than 66% improvement in user productivity and courts demanding that litigants find an efficient way to handle electronic discovery, more cases will move from the old, paper-based methods of discovery to take advantage of the benefits that electronic discovery has to offer.

It's About Productivity

The feedback I received this year indicates that the only features users truly care about when it comes to an online review application are those that make the review more productive and make the application easier to use. As a litigation support

manager asked rhetorically in a recent email, "Why do I need instant messaging and other distracting features in a discovery review application when all the attorneys want to do is review and mark the documents as efficiently as possible?"

In the coming year, service providers will focus on technology that speeds the review process by enabling users to move quickly and efficiently through electronic documents. The effect on productivity can be significant: the extra seconds it takes for slower applications to move from document to document can add up to hundreds of thousands of dollars in wasted time for even a medium-sized case. As one associate lamented recently: "All we want is a way to avoid the mind-numbing experience of staring at the screen while we wait for the next document to come up."

It's not just speed either. Confusing features, cluttered screens, and a general lack of usability are typical complaints of reviewers who have sampled various electronic discovery applications. Electronic discovery service providers are learning that their applications have to respect the workflow and thought processes involved in document review. To quote a recent email, "The most successful experiences I have had with online review have been with those that fit in with the standard review process, provide clear summaries of the case status, and are easy to use."

My prediction for 2004: Feature fetishism will go by the wayside. It's not about more features—it's about making the ones that are most important fast and easy to use.

Conclusion

We are excited to see what is ahead for electronic discovery. The industry has progressed beyond the early stages of education to a mainstream part of practice. It will continue to evolve into a mission-critical element of most cases. In 2004, the challenge to service providers is to recognize what's really important and to offer products and services that meet the needs of more sophisticated clients. Users, on the other hand, will need to focus on building relationships with those electronic discovery providers that have developed the capacity, service, and products that attorneys, support staff, and clients are looking for.



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

Lessons From the Trenches in 2003

by Daniel L. Rasmussen, Esq., Payne & Fears LLP

Attorneys run the risk of losing cases when they fail to understand electronic evidence. Litigators must learn how to identify it, how to find it, how to use it, and how to avoid problems when dealing with it. Here is a recap of important lessons from 2003:

- Your discovery plan should not only address discovery of evidence maintained in hard copy, but must also account for any electronic evidence which may be relevant to the dispute. Nothing is as certain to cause a law firm to lose credibility with its client, opposing counsel, or the court as conducting electronic discovery in a haphazard manner.
- Learn something about the way in which evidence is stored on computer hard drives. Even after an electronic document is supposedly "deleted," it may still be found in the magnetic bits and bytes written to a hard drive. Remember that a file does not "go away" until it is written over during the writing (i.e. recording) of new electronic data to the disk.
- Learn something about the way in which email is maintained. The quantity of a witness' diligence in maintaining his/her electronic mailbox could turn into a goldmine or a disaster for you. Find out where mailboxes are archived, if they are even archived at all. Understand SPAM filtering and whether there may be stores of un-reviewed SPAM on a server.
- Learn something about the way in which evidence is stored in different computer backup scenarios. Gain an understanding of client-server network operations. Ask what RAID means. Consider how tapes are written with electronic information and what types of rotation schedules are customary.
- Counsel your client to resist the temptation to "take a quick look" at a witness' computer. If not executed using proper forensic methods, your brief glimpse into the witness' files may create unintended changes in the data or the information that describes the data (a.k.a. meta data). You have better things to do during litigation than defend against claims of spoliation or evidence tampering.
- Make it a practice to ask the court to issue an evidence preservation order. Offer a proposed order in which the court mandates that the hard drive of possible witnesses be imaged immediately. The order

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SPOTLIGHT

Applied Discovery 2003 Retrospective

This issue's Spotlight column features an interview with David Wilner, Vice President of Client Development at Applied Discovery. In addition to forming and managing relationships with the company's clients, his group is responsible for educating legal professionals about the evolving law and practice of electronic discovery.

The Orange Pages (TOP): Dave, it's been a big year at Applied Discovery. Can you tell us about some of the developments?

Dave Wilner (DW): The electronic discovery industry has virtually exploded over the past year, so it has been an exciting time for our group. After tremendous growth in 2002, we realized that in order to keep up with demand and serve our clients better, we needed to grow in 2003. In the first quarter we continued to build our operations on the East Coast by expanding our Washington, D.C. office. On the West Coast, we added staff in Los Angeles and San Francisco. In the second quarter we furthered our expansion in New York, Chicago, and Texas. Of course, all of these developments took place before the news of our merger with LexisNexis in July.

TOP: That is remarkable growth in a short period of time. How do you manage to maintain quality and consistency for clients throughout the process?

DW: At Applied Discovery, we're committed to maintaining the highest standards of excellence in all aspects of business. Many of our clients are not familiar with the process of electronic discovery or with the legal issues involved. Our Client Development team is comprised of former practicing attorneys who bring to the table a deep understanding of the law, including the process of discovery. Through the combined experience and expertise of the Client Development team and our award-winning Client Solutions Group, we are positioned to be an invaluable partner to our clients as they handle electronic discovery in their cases. We've been very successful at building solid relationships with our clients—for example, nearly 70% of our business comes from repeat clients.

During this period of expansion, we were honored with two major awards: WSA "Service Provider of the Year" and Ernst & Young

"Entrepreneur Of The Year®." We also developed significant enhancements to our Online Review application, including unparalleled improvements in speed, production options, and document numbering and marking capabilities. And finally, the really big news in July was the merger with LexisNexis.

TOP: You certainly have been busy this year. How have things changed now that Applied Discovery is a member of the LexisNexis group?

DW: In the relatively short time that has passed since announcing the merger, the biggest change is the tremendous increase in visibility for electronic discovery in general, and Applied Discovery specifically. Over the past 30 years, LexisNexis has become fully entrenched in the legal community. LexisNexis has hundreds of account managers, account coordinators and technical experts around the country uniquely positioned to identify attorneys who require the assistance of an electronic discovery specialist. That's where we come in.

One of the biggest changes for us on the Client Development team is that we can now spend less time trying to connect with attorneys who need electronic discovery assistance, and focus on being true electronic discovery specialists for those who utilize Applied Discovery's services.

TOP: What can we look forward to in 2004?

DW: Recent studies predict that the market for electronic discovery services will grow from \$500 million by the end of 2003 to \$2 billion by the end of 2005. In 2004 and beyond, our main objective is to ensure we have all the resources in place to meet these growing needs. We will continue to serve our clients as the premiere electronic discovery service provider with the highest level of service. To meet that goal, we will persist with adding enhanced functionality to continually improve our service offering and enhance the value we add to our clients' cases.

TOP: Thanks for the information, Dave. If our readers have any questions about where to begin with electronic discovery, how can they get in touch with you?

DW: They can reach me at new_clients@applieddiscovery.com or at 877-613-3010. ■



Dave Wilner and Applied Discovery ramp-up for continued growth in 2004.

2003 Tech Tips Highlights

Applied Discovery frequently assists clients with technical advice. These questions vary in technical complexity and come from all kinds of people: attorneys, litigation support managers, government officials, corporate counsel, IT staff, etc. Applied Discovery addresses the most frequently asked questions in the Tech Tips column in each issue of the Orange Pages. Below is a recap of some of the highlights from Tech Tips columns in 2003.

Options for Storing and Accessing Data

The three most common options for storing and accessing electronic data for review are housing data locally, accessing data through a Terminal Services environment, or utilizing the Internet to access data in a web-based repository. To establish an effective electronic discovery plan, consider the risks and benefits of each option.

- **Housing Data Locally:** Some believe that data is more secure if stored within the confines of the law firm or corporation. In reality, data housed locally is quite vulnerable to breaches of security. Also, many firms are not able to provide the significant resources required to maintain the data.
- **Terminal Services Environment:** Although a Terminal Services environment works well for one physical location, it is not optimized to support multiple users. Difficulties also arise with administrative tasks such as permissions, account settings, and configuring and tracking other options to allow remote users access without jeopardizing system security.
- **Web-Based Access:** The virtual security measures in place for data stored remotely and accessed via a secure Internet connection are far superior to security measures in local data housing environments or Terminal Services environments.

Developing an Export Strategy

The export phase of the electronic discovery process is arguably the most delicate. The trick is to develop a strategy that outlines the export requirements before the review process begins.

- **Define Data Set:** Identify types of data such as 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:** Set up rules for document groups and privileged documents.

- **Bates Numbering and Document Branding:** Create a Bates number and branding format scheme.
- **File Output:** Choose your file output options such as PDF, ASCII text, or TIFF.
- **Document Reference Data:** Define criteria for reference data such as meta data, privilege logs and cross reference files, if required.
- **Output Media:** Choose media for export data such as CD, DVD, FTP, or hard drive.

Top Tech Tips of 2003

- ✓ **Storing and Accessing Data**
Three most common options for storing and accessing electronic data for review.
- ✓ **Developing an Export Strategy**
From defining the data sets to outputting media, the tricks to handling the most delicate phase of electronic discovery.
- ✓ **Choosing Media to Transport Data**
Understanding capacity, ease, and cost for transporting data.
- ✓ **Leveraging Meta Data**
Harnessing the power of meta data to pinpoint critical documents quickly and accurately.
- ✓ **In-House and Outside Counsel Working Together**
Improving workflow by managing costs, facilitating communication, and improving efficiency.

Choosing Media to Transport Data

When electronic documents are identified as potentially responsive to a legal document request, a company must decide how to capture the original data and transport the copies for use in the case. Important considerations include the amount of data to be transferred, the ease of use for each option, and the costs associated with each media type.

- **Hard Drives:** Hard drives can hold in excess of 200 GB of data, are easy to use, and are inexpensive. USB and FireWire hard drives are an excellent choice for projects of every size.
- **Backup Tape Systems:** Backup tape systems offer the highest capacity, but can be technically complex and expensive. While backup tapes are the most common choice for storage of data for disaster recovery, they are not optimal for data transfer and should be used only if the data to be transferred exists in no other media type.
- **CDs:** CDs are very inexpensive and easy to use. However, with a low capacity of up to only 700 MB, CDs are best suited for small amounts of data only.
- **DVDs:** The capacity (4.7GB), convenience, and low cost of using DVDs make them a practical option for small to medium amounts of data.

Leveraging Meta Data

Probably the most valuable benefit of electronic document review is the ability to search millions of pages of data quickly and with precision. The best way to pinpoint critical documents quickly and accurately is to harness the power of meta data. Some useful meta data tips are as follows:

- **SMTP Address:** Search email fields using the SMTP address to ensure finding all emails for a particular user.
- **Subject:** Search for keywords contained in an email "subject" field.
- **Date Received/Sent:** Search by dates in the "received" and "sent" fields to quickly find documents relevant to particular dates.
- **File Path:** Search for all documents stored in a particular electronic folder using the "file path" field.
- **File Extension:** Use the "file extension" field (e.g. .xls or .pst) to find only a particular type of document such as spreadsheets or emails.

In-House and Outside Counsel Working Together

Use of web-based electronic discovery technology can improve the workflow between in-house and outside counsel by managing costs, facilitating communication, and improving efficiency. The following are examples of how to leverage electronic discovery tools to improve that relationship.

- **Manage Costs:** Processing electronic documents for review nearly eliminates the expenses of copying, scanning, and coding paper documents.
- **Facilitate Communications:** With assistance from an electronic discovery service provider, in-house and outside counsel can improve communications in many ways, using features that allow both in-house and outside counsel to see a real-time snapshot of the progress of the review, share notes about particular documents, etc.
- **Improve Efficiency:** By categorizing documents in standard and user-defined collections, electronic discovery technology enables a new level of collaboration between in-house and outside counsel that dramatically increases the efficiency of the review process.

Further Reading:

To read the complete Tech Tips articles from back issues of the Orange Pages, visit the newsletter section of our website at www.applieddiscovery.com.

@ If you have a technical issue you'd like to see addressed in this column, write to OrangePages@applieddiscovery.com. ■

FEATURE (continued from Page 1)

partners at the New York City office of Weil, Gotshal & Manges LLP, found that keeping up with the pace of published decisions was one of the most challenging aspects of writing the book. "To be effective litigators and corporate counselors in the age of electronic discovery, attorneys need to be familiar with the rapidly developing case law and rules changes in various jurisdictions," said Cohen. "But the good news is that comprehensive resources now exist to aid in that research." Other publications analyzed electronic discovery precedent in the context of broader discovery issues in 2003, including Moore's Federal Practice, which added a chapter entitled "Discovery of Computer-Based Information".

Are the Rules of the Game Changing?

Legal experts have not yet predicted that the Federal Rules of Civil Procedure will be changed to directly address electronic discovery issues, but the Discovery Subcommittee of the Advisory Committee on the Rules of Civil Procedure undertook substantial work in 2003 to evaluate the need for such changes. To define emerging trends in the nascent field, a conference of thought leaders is scheduled for February 2004 in New York. The list of jurisdictions modifying local rules to guide electronic discovery practices grew in 2003. Federal courts in New Jersey, Arkansas, Florida, and Wyoming now have local rules specific to electronic discovery practice. State courts in California, Illinois, Texas, and Mississippi also have modified rules to address technology and electronic discovery in their jurisdictions.

In August 2003, the chair of the ABA's Section of Litigation, Patricia Lee Refo, underscored the growing importance of this area of law when she established the Task Force on Electronic Discovery. "As I look forward to the coming year, I'm hopeful that the Section will be able to make a meaningful contribution through the Task Force," said Refo. "Work is underway now, and the intended result is a set of guidelines and best practices standards for electronic discovery that can be of assistance for practitioners and courts, as the Advisory Committee continues to consider whether rule changes are required." Gregory Joseph, a New York City lawyer and co-chair of the Task force agrees: "The goal is to establish neutral standards, then leave to the courts the job of resolving particular disputes."

The "Electronic Document Retention and Production" working group of the Sedona Conference also spent substantial time tackling the practical implications of applying "old" rules to a new kind of discovery. Hayden, a member of the advisory board of the working group, noted, "The Sedona Conference published its inaugural version of *The Sedona Principles* in 2003. The Principles were cited in several of the year's key electronic discovery opinions, and have been referenced by the Discovery Subcommittee in its work."

Other groups, including the Defense Research Institute, the Association of Corporate Counsel, and various other specialty and local bar organizations devoted significant time and resources to educating members about electronic discovery in 2003. With many conferences and publications addressing the topic already in production for 2004, there is no sign of lagging growth in the field.

"To be effective litigators and corporate counselors in the age of electronic discovery, attorneys need to be familiar with the rapidly developing case law and rules changes in various jurisdictions."

- Adam Cohen,
Weil, Gotshal & Manges LLP

Where Do We Go From Here?

Like it or not, electronic discovery has changed the way we will practice law forever. Those who viewed the phenomenal increase in the volume of electronic documents as a temporary distraction to a litigator's practice are now reconsidering that position. Those who quickly embraced the notion of a new way of conducting discovery are now reaping the rewards of this important skill set. Despite their greater volume, electronic documents—and their inherent power—offer easier and less costly ways to gather, review, and produce.

Wherever you fell on the continuum of electronic discovery acceptance in 2003, you would be wise to hone your electronic discovery knowledge and skills in 2004. This special Orange Pages Year in Review issue is dedicated to summarizing some of the year's greatest lessons and giving you a head start for electronic discovery success in 2004. ■

PRACTICE TIPS (continued from Page 4)

should also address email and server backups.

- It is the rare law firm that can handle electronic evidence alone. Hiring an expert may save you or your client a lot of money and/or aggravation in the long run.

Daniel L. Rasmussen of Payne & Fears LLP heads the firm's Technology Committee. He is a business litigation partner based in the Irvine, CA office. He formerly practiced with the Litigation Department of Paul, Hastings, Janofsky & Walker LLP. ■

CASE LAW UPDATES

(continued from Page 1)

existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.

Id. at *16-17 (emphasis in original).

Plaintiff not entitled to direct access to defendant's computer databases without factual finding of non-compliance in discovery by defendant.

In re Ford Motor Company, 2003 U.S. App. LEXIS 19531 (11th Cir., Sept. 22, 2003).

This case came before the Eleventh Circuit Court of Appeals on appeal from the U.S.D.C., N.D. Alabama. A consumer filed an action against Ford, alleging that the seatbelt buckle of her vehicle was defectively designed. After several document requests, plaintiff filed a motion to compel, seeking direct access to Ford's databases to conduct searches for related claims. The trial court, without a hearing and before Ford had responded, granted plaintiff's motion. Ford filed a motion for reconsideration, and both parties submitted briefs and evidence. The trial court refused to reconsider the discovery order. Ford then filed a petition for a writ of mandamus directing the trial judge to vacate the discovery order.

The appellate court ruled that the trial court made no findings to establish Ford's failure to comply properly with plaintiff's discovery requests. The appellate court also found that plaintiff was not entitled to such discovery without a factual finding of some non-compliance by the defendant. The appellate court determined the trial court abused its discretion by granting such a sweeping order.

In vacating the trial court's order, the Eleventh Circuit examined the extent to which Rule 34 allows one party access to another party's information stored in a database. The court stated that direct access to a party's databases may be appropriate in some cases, but that the current case had not been shown to be appropriate for such an order. The court also indicated that a trial court allowing such discovery should set some parameters on the opposing party's access, including designation of search terms and protocols or other restraints.

For full summaries of the cases noted above and other cases related to the law of electronic discovery, visit our online Law Library at www.applieddiscovery.com. ■

"[O]f the handful of reported opinions that apply Rowe or some modification thereof, all of them have ordered the cost of discovery to be shifted to the requesting party.¹⁶ Accordingly, the *Zubulake* ruling adopted a new test that maintained the presumption that the responding party pays the cost of discovery⁷ and held that "cost shifting should be considered only when electronic discovery imposes an 'undue burden or expense' on the responding party."⁸ "Close calls should be resolved in favor of the presumption" that the responding party pays for the production of documents.⁹

According to Judge Scheindlin, electronic documents can be separated into two categories: (1) accessible data, such as active online data, near-line data, and archived data, and (2) inaccessible data, like backup tapes and destroyed or deleted data.¹⁰ The responding party usually must pay the costs for obtaining information that is in an accessible format.¹¹ Conversely, cost shifting is appropriate when inaccessible data is requested.¹²

In *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*,¹³ a commercial breach of contract case, Judge Scheindlin considered whether the cost of restoring certain electronic files from decommissioned computer systems should be allocated between the parties.¹⁴ The defendant spent "hundreds of thousands of dollars" to reconstruct the system that stored the optical disks.¹⁵ Because the documents were not accessible at the time of the litigation, Judge Scheindlin applied the seven factor *Zubulake* test and found that the costs of recovering the data should not be allocated between the parties. The court emphasized: (1) the documents were available only on the decommissioned system; (2) the cost of producing the documents (approximately \$400,000) did not outweigh the potential value of the litigation (\$7 billion); and (3) the defendant had significantly more assets and resources than plaintiff.

The scope of electronic discovery and the need for electronic discovery protocols were discussed in *Medtronic Sofamor Danek, Inc. v. Michelson*.¹⁶ Before the court was a request that a corporate plaintiff produce approximately 996 network backup tapes containing 61 terabytes of data and 300 gigabytes of other electronic files.¹⁷ The court applied the Rowe test and determined that cost shifting was warranted. Significantly, the court appointed a special master to oversee the discovery of electronic data, finding that such an appointment of a technology or computer expert was warranted "[g]iven the amount of electronic data at issue."¹⁸

Interestingly, the *Medtronic* court found cost shifting to be appropriate—reflecting Judge Scheindlin's concern that all reported opinions applying the Rowe test granted cost shifting. *Medtronic* was issued on May 12, 2003, one day prior to issuance of Judge Scheindlin's opinion in *Zubulake*.

Lessons Learned—Proactive Measures

Litigation is an adversarial process, and parties frequently are reluctant to cooperate with one another during pretrial discovery. However, the increased use of electronic discovery necessitates that counsel discuss the procedures and parameters of electronic discovery on an ongoing basis. Being proactive establishes that your client is complying in good faith with its obligations under the applicable law. *Zubulake*, *Xpedior*, and *Medtronic* illustrate that courts are relying on practitioners to be well versed in the area of electronic discovery. Even "technologically challenged" attorneys must have a working knowledge of clients' information technology systems and storage methods and be able to discuss them with opposing counsel and the court. The following suggested practice points will assist attorneys and clients in meeting their electronic discovery obligations.

1. Evaluate the scope of electronic discovery with your client at the outset of the case.

Depending on the nature of the lawsuit, the amount of potentially relevant electronic data can vary widely. The amount of electronic data available also depends on efforts the client has made to ensure that electronic files are part of a comprehensive document management program. Assessing the scope of potentially available electronic documents is the first step to ensuring compliance with procedural rules and court orders.

2. Maintain an open dialogue with opposing counsel.

If a particular lawsuit or matter will involve a considerable amount of electronic data, it is prudent to make the opposing party aware of this fact. The gathering of electronic data can be a time-consuming process. In order to assure opposing counsel that you are proceeding with your discovery obligations in good faith, keep them apprised of the progress. Early development of discovery protocols for the case can assist in streamlining the gathering, review, and production of electronic documents.

3. Know the law in your jurisdiction.

Currently, the law governing electronic discovery is unsettled, inconsistent, and highly case-specific. Some jurisdictions have taken the lead in enacting rules to address some of these issues. For example, Texas Rule of Civil Procedure 196.4 addresses cost allocation in electronic discovery based on whether the data is "reasonably available" in the ordinary course of the responding party's business. Federal courts in New Jersey, Arkansas, Florida, and Wyoming have also issued rule changes specific to electronic discovery practice.

4. Know your client's technology and the employees working with the technology.

In order to make a compelling objection that an electronic discovery request is unduly burdensome, attorneys must have knowledge of the type of technology used by the client, the

physical location of electronic media, the type of data, and a general estimate of the amount of time and resources necessary to retrieve such data. Consider having your client identify a skilled employee in the IT department to be the designated contact for litigation matters and electronic discovery. This will allow the company to provide consistent information regarding the time, effort, and expense involved in obtaining electronic information. Additionally, this employee can speak on behalf of the company at Rule 30(b)(6) depositions.

5. Encourage your clients to have a comprehensive document management program.

All employees must be educated about their role in the company's data management plan. Electronic data storage means that every employee is now a document custodian. At a minimum, every employee must have a general understanding of document retention requirements and that retention policies extend to electronic communications such as email.

Conclusion

Zubulake, *Xpedior*, and *Medtronic* demonstrate that courts are becoming increasingly sophisticated about electronic discovery and are willing to step in to define an organized process when litigants are unable to do so on their own. Attorneys must be prepared to address these issues early in the case, and must recognize that electronic discovery has now moved from theory to practical application. Although the area of electronic discovery will continue to evolve, 2003 will be regarded as a banner year in the development of this area of law.

⁶ *Id.* (emphasis in original).

⁷ The court adopted a seven factor test for determining whether cost shifting should occur, which modified the eight factor test discussed by the court in Rowe. The seven factors are: "(1) [t]he extent to which the request is specifically tailored to discover relevant information; (2) [t]he availability of such information from other sources; (3) [t]he total cost of production, compared to the amount in controversy; (4) [t]he total cost of production, compared to the resources available to each party; (5) [t]he relative ability of each party to control costs and its incentive to do so; (6) [t]he importance of the issues at stake in the litigation; and (7) [t]he relative benefits to the parties of obtaining the information." *Id.* at *43.

⁸ *Id.* at **26-27 (emphasis in original).

⁹ *Id.* at *37.

¹⁰ *Id.* at *41.

¹¹ *Id.*

¹² *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284-89 (S.D.N.Y. 2003) ("*Zubulake II*").

¹³ 2003 U.S. Dist. LEXIS 17497 (S.D.N.Y. Oct. 2, 2003).

¹⁴ *Id.* at *17.

¹⁵ *Id.*

¹⁶ 2003 U.S. Dist. LEXIS 14447 (W.D. Tenn. Oct. 3, 2001).

¹⁷ A terabyte is 1024 gigabytes and it would take approximately 728,178 3.5" diskettes to store one terabyte of data. Notably, it would take 711 3.5" diskettes to store one gigabyte of data. *Id.* at nn.2-3.

¹⁸ *Id.* at *27.

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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.

Mealey's E-Discovery Conference

San Francisco
December 9, 2003

2004 National CLE Conference

Law Education Institute
Featuring Honorable Shira A. Scheindlin (S.D.N.Y.)
and Honorable John M. Facciola (D.D.C.)
Aspen, CO
January 4, 2004

LegalTech Conference

New York City
February 2-4, 2004

SPECIAL 2003 YEAR IN REVIEW ISSUE:

- **Feature Story: "Electronic Discovery: Year in Review," featuring interviews with the Chair of the ABA's Section of Litigation and other industry leaders. See page 1.**
- **Practice Tips: "Lessons From the Trenches in 2003," by contributing author Daniel Rasmussen, Esq. See page 4.**
- **Special Pullout Section: Results of Applied Discovery's First Online Electronic Discovery Survey.**

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 of these articles, or view them online at www.applieddiscovery.com.

"Zubulake IV: New Guidelines for Duty to Preserve Backup Data"

by Greg McPolin, Esq., Applied Discovery
New York Law Journal
November 18, 2003

"The Next Discovery Frontier: Preparing for the Backup Data Request"

by Virginia Llewellyn, Esq. and Richard Corbett, Esq., Applied Discovery
ACC Docket
October 2003

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Applied Discovery's

First Annual Online Litigation Support Manager Survey

Applied Discovery conducted its First Annual Online Litigation Support Manager Survey during the months of September and October 2003. Litigation Support Managers and other non-attorney litigation professionals from law firms and corporations around the country were invited to participate. The survey had 97 total respondents, with 40 concentrated from AmLaw 200 law firms.

The survey addressed three key topics: 1) factors involved in selecting and evaluating an electronic discovery service provider; 2) respondents' level of experience with electronic discovery; and 3) trends in electronic discovery education. Highlights of survey responses are provided here (see reverse for an analysis of individual questions).

Selecting and Evaluating an Electronic Discovery Service Provider

Survey results indicate the number one factor considered when selecting an electronic discovery service provider is "overall value" of the provider's offering. Respondents gave this their top vote at 31 percent. Two other criteria tied for a close second, however, with "references and reputation" of the service provider and "functionality of the review tool" each selected as the most important criteria by 28 percent of respondents. (See Fig. 1.)

When applying these criteria to select a service provider, 34 percent reported that the attorney managing the case is the ultimate decision-maker. Thirty percent reported that the Litigation Support Manager makes the final call. Many respondents indicated that the individuals in these two roles often make the decision jointly. (See Fig. 2.)

With regard to functionality of an online review application, 66 percent said that the core ability to search full text and meta data of electronic documents is most important. All other factors were ranked much lower. (See Fig. 5.)

Once the electronic discovery project is complete, the service provider is most frequently judged by whether case deadlines were met, with 40 percent of respondents indicating this is the number one factor for measuring success. Thirty-two percent reported that success is measured by reviewing actual costs versus estimated costs. (See Fig. 3.)

Experience with Electronic Discovery

An impressive 77 percent of respondents said they had

experience utilizing an online review application in electronic discovery. Of the 77 percent, most had experience in between 1 and 5 cases. (See Fig. 4.)

Electronic discovery experience has translated to the formation of specialized practice groups or committees in 31 percent of the respondents' firms and corporations. In the organizations where such groups have been formed, 37 percent reported the primary role is to provide education to others within the firm or company. (See Figs. 6 and 7.)

Trends in Electronic Discovery Education

39 percent of respondents said they rely on peer groups for electronic discovery education, with 31 percent turning to legal journals or magazines. Forty-two percent of respondents felt that a growing acceptance of electronic discovery by legal professionals was the most significant electronic discovery development in 2003. Two other developments tied for second, with "growing body of case law" and "advances in electronic discovery technology" each receiving 23 percent of the vote.

Conclusion

The 2003 survey confirmed some things we already suspected—electronic discovery clients are looking for a core set of services, and they judge service provider performance on references, reputation and overall value. But the survey also turned up some results that surprised us. For example, we were surprised to see only 4 percent of respondents rank per-unit price as the most important factor in selecting a service provider. The combination of these results indicates that clients are looking for a proven, reliable service provider that offers quality products and services at a fair price.

Also surprising was the fact that only 16 percent said the firm's client (or, for a corporation, a corporate executive) makes the final decision about which electronic discovery service provider to work with. This demonstrates that law firms have achieved some centralization of electronic discovery decision-making authority within the firm, regardless of which individual in the firm makes the final call.

As we plan for 2004, we'll take the lessons learned from the 2003 survey and put them to work. The results of this survey will help guide us as we develop our products and services, and tailor our outreach to the legal community as part of our commitment to client satisfaction.



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Fig. 1: Factors for selecting an e-discovery service provider

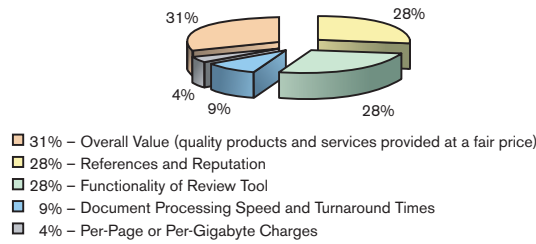


Fig. 2: Decision-maker in selecting an e-discovery service provider

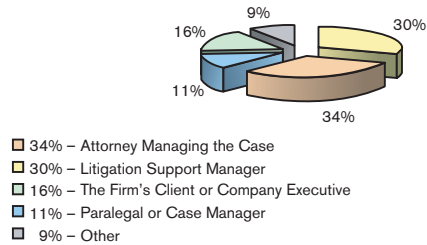


Fig. 3: Factors for judging performance of e-discovery service providers

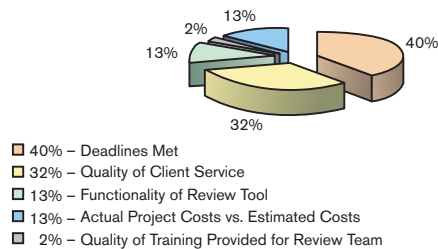


Fig. 4: Total cases in which review team utilized an online review application

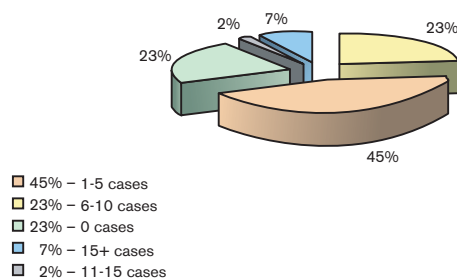


Fig. 5: Importance of functionality in an online e-discovery review application

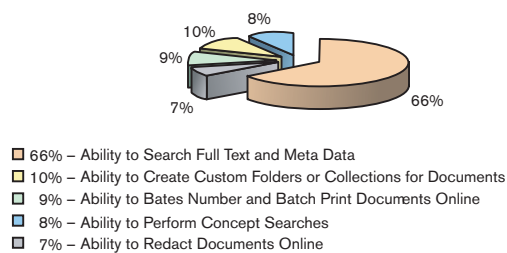


Fig. 6: Firms or corporations with an e-discovery committee or practice group

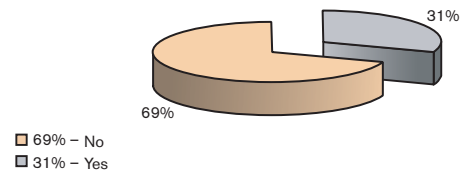


Fig. 7: Goals and objectives of an e-discovery committee or practice group

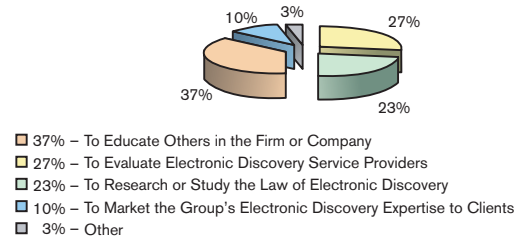


Fig. 8: Sources for learning about e-discovery

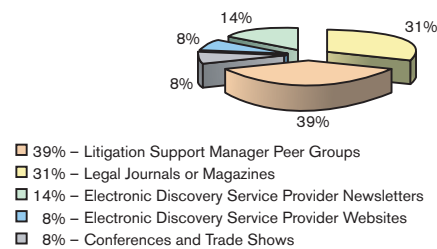
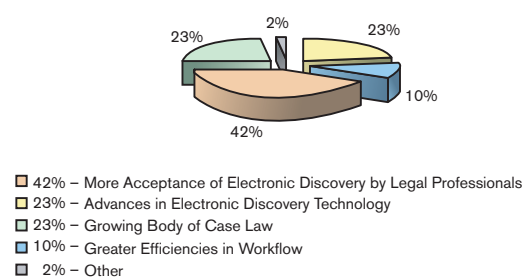


Fig. 9: Most significant development in e-discovery in 2003



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