

# O The Applied Discovery OrangePages™

## Electronic Discovery Newsletter

### FEATURE STORY

## Best Practices for Preparing Your Company for Electronic Discovery

Advice for In-House Counsel from Leading Attorneys

Few words evoke fear and anxiety in the minds of in-house counsel more than these: "electronic discovery." By now, there's no doubt you know what the term means. But what to do about it?

It's likely that you aren't entirely satisfied with your company's level of preparedness for an electronic document request. Implementing a simple four-step plan will give you a significant strategic advantage when the issue arises.

### 1. Assemble Your Team

Early involvement of all necessary parties is critical for effective electronic discovery response. This should include inside and outside expertise on both legal and technical issues. Just as you wouldn't think of defending a lawsuit without hiring outside counsel, you shouldn't try to manage electronic discovery without proper technical assistance. Your e-discovery team should include in-house counsel and outside counsel on the legal side, and internal IT staff and an electronic discovery service provider on the technical side.

"Electronic discovery is a part of every case now," notes Adam Cohen, a partner in the New York Litigation department of Weil, Gotshal & Manges LLP, and co-author of a forthcoming treatise on electronic discovery. "The company's lawyers must oversee the process, but must work with the company's technical staff to understand the new landscape of discovery." Electronic discovery isn't going away, and in-house lawyers must act now to equip themselves with the expertise to guide the company through potentially rocky terrain. "The proportion of electronic documents in discovery has been increasing steadily in recent years, to the point where about 95% of the production in some cases now is email alone," adds Cohen.

**"Electronic discovery is a part of every case now."**

- Adam Cohen,  
Weil, Gotshal & Manges LLP

Whether facing a discovery request in litigation or a document request from the government in the course of a merger review or other investigation, arming the company with a cohesive team is critical. Jonathan Redgrave, a partner in the Washington, D.C. Litigation group of

*See Feature on Page 6*

### CASE LAW UPDATES



**New three-step analysis established for electronic discovery disputes.**

*Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y., May 13, 2003).

Considering a request for discovery of information contained on backup tapes, the court established a method for examining electronic discovery disputes in the context of whether requested data is stored in "accessible" or "inaccessible" format. Relevant electronic information that is stored in an accessible format must be produced at the responding party's expense. A cost-shifting analysis is appropriate when relevant information is stored in an inaccessible format.

The court set forth a new three-step analysis for deciding disputes regarding the scope and cost of discovery of electronic data.

1. The court must thoroughly understand the responding party's computer system, both with respect to active and stored data. For data kept in an accessible format, the usual rules of discovery apply and the responding party will be required to pay for production. A court should consider cost-shifting only when inaccessible data (such as that contained on backup tapes) is at issue.
2. Because the cost-shifting analysis is so fact-intensive, the court must determine what data may be found on the inaccessible media. A "sampling" approach is sensible in most cases.
3. In conducting the cost-shifting analysis, a seven-factor test should be applied and weighted appropriately.

The court modified the earlier cost-shifting analysis set forth in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 2002 U.S. Dist. LEXIS 8308 (S.D.N.Y. May 9, 2002) by removing two factors of the prior test and re-prioritizing the remaining factors. Noting that the Rowe factors generally favor shifting cost of production to the requesting party,

*See Case Law Updates on Page 7*

## INSIDE

### 2 GUEST ARTICLE

E-Discovery from In-House Counsel's Perspective by Gary L. Hayden, Ford Motor Company

### 2 THE APPLIED DISCOVERY DIFFERENCE

### 3 MIRANDA WRITES

Gathering Electronic Data Safely and Efficiently

### 4 PRACTICE TIPS

Electronic Records: Opportunity for Increased Efficiency by William A. Fenwick, Esq., Fenwick & West LLP

### 4 SPOTLIGHT

Online Review: Groundbreaking Speed and New System Functionality

### 5 TECH TIPS

Choosing the Right Media to Transport Data for Electronic Discovery

### 8 APPLIED DISCOVERY IN THE NEWS

### 8 UPCOMING EVENTS

### 8 WHAT'S NEW

## CONTACT US

Our West Coast Headquarters is near Seattle in Bellevue, Washington. Our East Coast Headquarters is in Midtown Manhattan. We have regional offices in Washington, D.C., Houston, Chicago, San Francisco and Los Angeles.

Contact information for local Client Development Representatives is available at [www.applieddiscovery.com](http://www.applieddiscovery.com).



### Subscribe Now!

To add your name or the names of colleagues or friends to the Orange Pages mailing list, please contact us at [OrangePages@applieddiscovery.com](mailto:OrangePages@applieddiscovery.com). Please specify whether you prefer to receive the Orange Pages in hard copy or PDF format by email.



### Submit An Article

The Orange Pages accepts guest articles and practice tips from legal and technical professionals interested in electronic discovery. To learn more or request a copy of the author guidelines, contact us at [OrangePages@applieddiscovery.com](mailto:OrangePages@applieddiscovery.com).

### Your Online Electronic Discovery Resource

Applied Discovery's website includes guidelines for use of electronic discovery technology in litigation and antitrust document review, as well as a comprehensive online Law Library. The Law Library features an electronic discovery primer, case summaries, White Papers, articles and more. Visit [www.applieddiscovery.com](http://www.applieddiscovery.com) to learn more.

## GUEST ARTICLE

# E-Discovery from In-House Counsel's Perspective

by Gary L. Hayden, Ford Motor Company

Few corporate law offices have the expertise or resources to perform all aspects of electronic discovery themselves. Therefore, it is likely that in-house counsel will have to seek the assistance of outside counsel and others to perform various functions pertaining to electronic discovery. But if you have never conducted a large-scale electronic document discovery project, or perhaps have no electronic discovery experience, identifying the right outside resources can be challenging. Here are some of the things you can do to help yourself make an intelligent selection.

### Familiarize Yourself with Your Own Desktop Technology

Taking the time to go "under the hood" of common desktop applications, including word processing applications like Microsoft Word or Corel WordPerfect, spreadsheet applications like Microsoft Excel or Lotus 1-2-3, desktop databases like Microsoft Access or Dataflight Software's Concordance, and email applications like Microsoft Exchange, Microsoft Outlook, or QUALCOMM's Eudora can be extremely valuable. Despite the ubiquitous nature of electronic information, the vast majority of electronic discovery still involves production of information from these desktop applications.

In addition, knowledge gained from a general understanding of how such applications work and what information is created and available beyond what is shown on the screen is transferable to many other computer applications. For example, looking at the meta data associated with a Word file or the transactional information that accompanies emails will provide you with information that will be valuable when you must inquire about other types of computerized information sources. Appreciating the fundamentals of basic relational databases will give you a huge head start toward understanding how data is created, manipulated, and stored in much larger enterprise database applications.

### Spend Time with Techies

Discovery in the electronic age still involves identifying the information creators, but it now also necessitates in most instances identifying the people responsible for maintaining the electronic information: database administrators, webmasters, and hardware and software maintenance personnel. Often, users do not even know where data they have created or used is stored, and even if they do know where it is, they may not know how to retrieve the data other than through standardized reports. You will need to rely on IT professionals to help you find the data, retrieve it in a manner that preserves the integrity of the data; and, ensure that the data—once retrieved—is presented in a usable form, consistent with the requirements of the rules of civil procedure in virtually every jurisdiction.

### Read, Ask Questions, Read Some More

There is a vast amount of information publicly available on the subject of electronic discovery. One very good source is [www.kenwithers.com](http://www.kenwithers.com). Applied Discovery and other e-discovery experts

*See Guest Article on Page 7*

## THE APPLIED DISCOVERY DIFFERENCE

Quality | Capacity | Service

Applied Discovery's commitment to quality is demonstrated on a daily basis in many different ways. To read more about the Applied Discovery Difference, visit [www.applieddiscovery.com/adifference](http://www.applieddiscovery.com/adifference).

Applied Discovery recently announced significant enhancements to its Online Review application. Applied Discovery remained dedicated to its high quality standards by performing rigorous quality assurance and quality control testing procedures. In fact, throughout the development process, more than 2,500 test cases were conducted to ensure delivery of optimal performance to new clients, and provide assurance that existing clients will be able to enjoy the new features without impacting their current workflow.

# Gathering Electronic Data Safely and Efficiently

Dear Miranda,

I work for a large corporation that is frequently involved in litigation. We have offices in nine states and three foreign countries. Increasingly, discovery requests seek documents from our computers, particularly employee email. One of our chief concerns with regard to electronic discovery is learning how to efficiently gather data from our computers. How can we be sure we don't inadvertently change the data when we retrieve and copy electronic documents? Do we need to hire a computer forensic expert in all cases?

Brad P.  
Los Angeles

Dear Brad,

The key to successfully gathering electronic documents is to plan ahead. From creating a formal data-gathering plan to deciding how and by whom the plan will be carried out, you must make some important decisions before you receive any document request.

## Outline Your Data-Gathering Plan

Whether you decide to hire a third-party service provider or to use internal IT staff to collect the data, it is the responsibility of the company's legal team to provide the technicians with the legal requirements and work with them to create a plan to ensure that all the requirements are met.

Your plan should accomplish two objectives:

### 1. Maintain the integrity of electronic data.

You will want to ensure that document meta data is not altered, and to track the properties of each piece of data collected, such as custodian (employee) name, original directory structure, and basic system-level meta data (file name and path, dates created and modified, etc.).

### 2. Outline steps for gathering necessary forms of electronic data.

Computer documents often exist in many forms and may be saved in unexpected places. There are typically three types of data that should be considered: active, archived, and inactive.

- **Active data** is information readily available and accessible to users. Active data is typically stored on individual user hard drives or company networks, and is tracked by the operating system.
- **Archived data** is information no longer in use. It is generally stored separately to free space

for active data. Archived data is often copied to portable media, such as backup tapes.

- **Inactive data** is information that appears to be gone, but is still recoverable from the system. This includes recovered "deleted" files and data that is tucked away in areas typically reserved for the operating system.

In many cases, archived data and inactive data must be gathered only if specifically requested; in some cases, courts will not require its retrieval at all. (For legal research on this issue, visit the online Law Library at [www.applieddiscovery.com](http://www.applieddiscovery.com).)

## Determine Who Will Carry Out the Plan

Choosing whether to use in-house resources may simply be a matter of whether your IT staff has the time necessary to dedicate to the project. The advantage of using internal IT staff to gather data is that they already know the landscape: where and how data for each custodian is stored; what software and hardware are in use throughout the company, etc. In most cases, the bulk of the data-gathering work can be done by the company's IT staff, with some well-placed guidance from an expert along the way.

Next, all custodians should be interviewed to determine how they manage their data. To ensure that all the necessary data is captured, prepare a list of questions such as:

- Where do you save your files?
- Do you archive your files and emails? If so, how often?
- Do you perform individual backups? If so, how often?
- Do you use an external hard drive or other storage device?
- Do you ever use a personal home computer for business?
- Have you used any other company-provided computers during your employment?

## Preserve Chain-of-Custody

The purpose of a chain-of-custody log is to prove that the integrity of the evidence has been maintained. Chain-of-custody logs document how the evidence was gathered, analyzed, and preserved for production. Documentation must be kept and readily available for review throughout the life of the evidence—from gathering or receipt to presentation in court.



## Chain-of-Custody Documentation Checklist:

- Date, time, and place of collection or receipt.
- The name of the individual who received the evidence.
- A description of what was obtained, including media-specific information.
- Media type, standard, and manufacturer.
- All movement of evidence (evidence transfer) and the purpose of the transfer.
- Physical (visual) inspection of evidence.
- Procedures used in collecting and analyzing the data.
- Date and time of check-in and checkout of media from secure storage.

Whether using internal IT staff or a third-party service provider, it is crucial to ensure continuity throughout the process. Provide each data gatherer with identical instructions, and include a system of checks and balances to facilitate quality control along the way.

## Implement the Plan

Implementation of the data-gathering plan must take into account these factors: number of physical locations where data must be gathered; number and location of custodians from whom data has been requested; and, number and location of company servers, networks, or other storage areas where data resides.

Whether the matter requires gathering data from one custodian or 100, from one office or twenty-five offices around the world, gathering documents plays a vital role in the electronic discovery process. With a comprehensive plan in place, you'll be able to gather documents efficiently and with confidence.

## Further Reading:

- "Creating a Data-Gathering Plan"
- "Chain-of-Custody Logging for Electronic Media"
- "Storing and Transporting Media Safely"

To request a copy of any of these Fact Sheets related to data gathering, please send your request to [OrangePages@applieddiscovery.com](mailto:OrangePages@applieddiscovery.com).



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

## PRACTICE TIPS

# Electronic Records: Opportunity for Increased Efficiency

by William A. Fenwick, Esq., Fenwick & West LLP

In October 2000, the School of Information Management and Systems at the University of California at Berkeley performed a study titled, "How Much Information."<sup>1</sup> Some interesting conclusions concern how much information is being created annually and what portion of that information is in printed form.

The world produces between 1 and 2 exabytes of unique information per year, which is roughly 250 megabytes for every man, woman, and child on earth. An exabyte is a billion gigabytes, or 10<sup>18</sup> bytes. Printed documents of all kinds comprise only .003% of the total. Magnetic storage is by far the largest medium for storing information and is the most rapidly growing, with shipped hard drive capacity doubling every year. Magnetic storage is rapidly becoming the universal medium for information storage.

In most companies, the percentage of information stored in paper is probably in the range of 5% to 10%, and likely declining rapidly. That means that 90+% is in electronic form only. The challenge corporate counsel faces is how to decrease the cost of responding to production requests seeking information in electronic form.

Between the information needs of businesses and the legal requirements for reporting, preservation and retrieval of various types of information, there lies an extraordinary opportunity for increased efficiency. The following tips will serve to guide corporate counsel in seizing upon this opportunity:

### 1. Adopt a method for data storage and retrieval that suits electronic records.

- It is no longer economically feasible (or safe) to rely on information storage and retrieval practices left over from paper processes.
- New technologies provide easy access to information stored electronically, and position the company to quickly search electronic data to determine what information is subject to discovery and what information may be relevant.

<sup>1</sup> Peter Lyman and Hal R. Varian, "How Much Information" (2000), <http://www.sims.berkeley.edu/research/projects/how-much-info/>.

See Practice Tips Page 6

## SPOTLIGHT

# Online Review: Groundbreaking Speed and New System Functionality

This issue's Spotlight column features an interview with Mark Chealander, Vice President of Development at Applied Discovery. Mark's group is responsible for developing and ensuring high quality standards for Applied Discovery's Online Review application as the functionality and usability continue to expand and improve to meet the needs of Applied Discovery's clients.

**The Orange Pages (TOP):** Mark, we've heard that there are some new and improved features in Applied Discovery's Online Review application (ORA). Tell us about the changes.

**Mark Chealander (MC):** We are continually looking at new ways to improve our service, and this time, we started by optimizing virtually every part of the ORA. Our existing clients will notice dramatic increases in the speed and performance of key system features. New clients will wonder why they waited so long to begin reviewing documents online.

**TOP:** We always hear that speed is a critical factor in electronic document review. Can you describe the speed enhancements?

**MC:** While reviewing documents online, clients can now expect to advance from document to document in one second or less. This is a breakthrough in electronic discovery technology—no other service provider offering online review can come close to matching this level of performance.

**TOP:** What are the other system upgrades?

**MC:** We've made significant enhancements in Bates numbering, document marking or so-called "branding," and batch printing. These new developments give users a level of control that is far beyond what many thought possible.

**TOP:** Let's start with Bates numbering. What's new there?

**MC:** Previously, clients provided our technical staff with a Bates number format to apply to a document set prior to production. Application of the numbering format was carried out on the

back end, separate from the end-user interface. Now, users—not Applied Discovery technical staff—can create, manage, and apply Bates formats to any set of documents in the database at any time during the review process. Using a simple interface, they can create templates to apply as many as seven different marks or brands in 18 locations on each page. We also enable users to choose formatting options for each brand, including font style, size, and color. Once applied, Bates numbers become part of the document's searchable meta data, providing yet another way to pinpoint key documents quickly and accurately. This is breakthrough technology, unavailable elsewhere in the market.

**TOP:** And what about the enhanced printing features?

**MC:** With the enhanced printing options, users can now easily print entire collections of documents with just a few mouse clicks. A collection may consist of just a few pages or thousands of pages. The enhanced print feature includes two options:

### 1. Print to a local or network printer

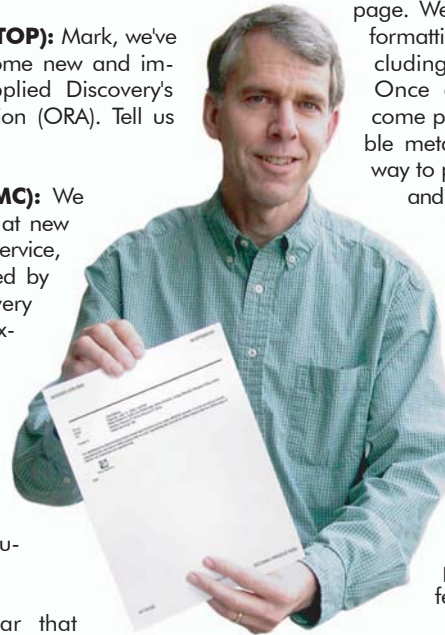
From the ORA interface, users can print documents to local or network printers. This feature is useful in a number of different situations: to review documents prior to depositions; to quickly print important documents for review at client meetings; to preview a sample of Bates numbers or other document brands prior to production; or to actually print an entire document collection to produce to a requesting party.

### 2. Save files to disk

Rather than printing documents on paper, our clients can also use the print interface to save batches of documents to any network drive. This flexibility allows users to view documents while disconnected from the network, to export documents to an in-house case management system, or to produce electronic documents to a third party.

**TOP:** So clients can now prepare their own documents for production?

**MC:** That's right. We also track print job details, such as job name and client matter number,







Mark Chealander's team unveils unprecedented doc-to-doc review times and new stamping and printing functionality.

See Spotlight Page 6

# Choosing the Right Media to Transport Data for Electronic Discovery

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. The amount of data to be transferred is an important consideration when selecting a data storage device. The ease of use for each option must also be evaluated. Finally, it is important to consider the costs associated with each media type.

There are a variety of media options for transporting data to be processed by an electronic discovery service provider. The chart below shows some common choices and their relevant characteristics.

									
<p><b>Hard Drives</b></p> <ul style="list-style-type: none"> <li><b>Capacity</b> With a wide variety of capacity options—some in excess of 200 GB—hard drives offer one of the highest capacity choices for storing and transporting electronic data.</li> <li><b>Ease of Use</b> Many people choose to work with hard drives because they are fast and convenient. Portable external devices are simple to connect to USB and FireWire ports, and internal drives can be easily inserted into most desktop PCs.</li> <li><b>Affordability</b> The cost of using a hard drive to transfer data is very low, primarily because of the large capacity. Additional cost savings are realized because hard drives require no additional software, little or no training time is needed, and data transfer is very efficient.</li> </ul> <p><b>Ideal Use</b> USB and FireWire hard drives are an ideal choice for projects of every size.</p>	<p><b>Backup Tapes</b></p> <ul style="list-style-type: none"> <li><b>Capacity</b> Depending on the type of backup system used, backup tapes currently have a capacity of up to 320 GB. They are commonly used by corporations for the systematic backup of data for disaster recovery purposes.</li> <li><b>Ease of Use</b> There are many backup software packages available, each with an individual set of procedures for creating and restoring backup tapes. These procedures can be time consuming and technically complex.</li> <li><b>Affordability</b> In addition to the potentially high cost of hardware and software required for backup tape systems, the restoration process can be expensive.</li> </ul> <p><b>Ideal Use</b> While backup tapes are the most common choice for storage of data for disaster recovery, they are not optimal for data transfer. Backup tapes should be used only if the data to be transferred exists in no other media type (i.e.: hard drive, network drive, CD, etc.).</p>	<p><b>CDs</b></p> <ul style="list-style-type: none"> <li><b>Capacity</b> At up to 700 MB, CDs are a well-suited option for small amounts of data.</li> <li><b>Ease of Use</b> CD burners are now standard on most new computers. However, some training may be required to use the burning software.</li> <li><b>Affordability</b> Because most new computers already have the hardware, and the price of a blank CD is well under a dollar, the overall cost of using CDs for small amounts of data is very reasonable. However, if the project involves large amounts of data to be copied and transferred at one time, the time involved can translate to greater expense.</li> </ul> <p><b>Ideal Use</b> Due to the size limitation and the amount of time it takes to transfer large amounts of data to a CD, this option is best suited for small amounts of data.</p>	<p><b>DVDs</b></p> <ul style="list-style-type: none"> <li><b>Capacity</b> With an average capacity of 4.7 GB, DVDs can hold six times more data than a CD. DVDs are a common choice for moderate amounts of data.</li> <li><b>Ease of Use</b> Like CDs, some training is required to use burning software and the process of transferring data to a DVD can be time consuming.</li> <li><b>Affordability</b> DVD burners and DVDs are relatively inexpensive, although they typically cost several times more than CDs for both hardware and media.</li> </ul> <p><b>Ideal Use</b> Even though the amount of time it takes to transfer data to a DVD can be lengthy, the capacity, convenience and low cost of using a DVD makes this a viable option best for small to medium amounts of data.</p>						
<table border="1"> <thead> <tr> <th>Low</th> <th>Medium</th> <th>High</th> </tr> </thead> <tbody> <tr> <td><input type="radio"/></td> <td><input checked="" type="radio"/></td> <td><input type="radio"/></td> </tr> </tbody> </table>				Low	Medium	High	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Low	Medium	High							
<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>							

**\*Additional Consideration:**

Whichever media option you choose, it is important to note that a critical element of any data collection process is maintaining the integrity of the data (including the preservation of meta data) during transfer to any storage media. Before you start to collect any data, consult with your IT staff to ensure proper techniques are used, or contact Applied Discovery for assistance.

 If you have a technical issue you'd like to see addressed in this column, send a message to [OrangePages@applieddiscovery.com](mailto:OrangePages@applieddiscovery.com). ■

 At least 50% of all workplace Internet activity is not business-related. (Source: American Management Assoc., 1999) . . . . .

## FEATURE (continued from Page 1)

Jones Day, recommends that outside counsel schedule meetings with both the law department and the IT department even before a request is pending. "Outside counsel should assist in performing an initial scoping exercise to inventory the legal and technical issues likely to arise," advises Redgrave. "Internal IT resources should be leveraged to gather the data, but an outside vendor may be necessary when it comes time to process and review the documents."

### 2. Take Stock of Your Company's IT Systems

"First, we have to make sure there is no ambiguity about the fact that electronic documents must be treated like all other documents in discovery," states Cohen. "If they are relevant, we need to figure out where to find them." Many companies initially fear the discovery of electronic information, forgetting that documentation helpful to the company's case may be found in computer files just as easily as harmful information. "Companies must determine the potential custodians and likely physical locations of beneficial documents," adds Redgrave. "That information must be identified and preserved to support the company's claims and defenses."

In a merger investigation or other situation that requires a rapid turnaround, understanding the layout of the company's IT systems in advance is critical. "The techniques employed depend upon the merger strategy and how a company maintains its files," says Claudia Higgins, a partner in the Washington, D.C. Antitrust/Litigation department of Kaye Scholer LLP. "Some files are, I believe, best reviewed in native format—like intranet sites or data that must be manipulated, for example—while many other files, like email, are better when converted to another form for review." A quality electronic discovery service provider will not try to force the company into a "one size fits all" approach. Rather, they will provide guidance about the best methods for processing and reviewing electronic documents of different kinds.

### 3. Evaluate Your Document Retention Plan

"One of the major points of advice I would give any company is to make certain that your company has in place an appropriate document retention policy," notes Higgins. "It's important to deal with document retention issues earlier rather than later," agrees Cohen. "You have to think about what makes sense for your business, and be sure this is the main driver for your policy."

"Courts don't expect perfection," explains Redgrave, "but you need to have a defensible plan in place." In some companies, the document retention plan is to have no formalized plan at all. No matter what decision has been made by the company, the e-discovery team must be prepared to deal with the im-

plications. When a document request is pending or imminent, you must consider the company's data storage, retention, and destruction practices, and immediately determine whether the usual procedures must be interrupted to avoid spoliation claims.

### 4. Prepare an Electronic Discovery Response Plan

Once the company's IT systems and document retention procedures are understood, it is wise to document the electronic discovery protocol you will follow in a given case. This plan should include an outline of document preservation measures, data-gathering procedures, and a project plan for electronic document review. You will be better positioned to request cost-shifting or other relief from undue burden and expense if you affirmatively present opposing counsel with a proposed plan for handling electronic data in discovery.

---

**"No antitrust lawyer can effectively practice today without becoming proficient in working through the special issues raised by electronic documents."**

- Claudia Higgins,  
Kaye Scholer LLP

---

Securing agreement about electronic discovery protocols early in the case is the best-case scenario. Unfortunately, discovery is contentious in many cases, and opposing counsel may be unwilling to agree to any proposed plan. If this situation arises, seek guidance from the court rather than waiting for a motion to compel. Courts look with favor on a party that is informed of its electronic discovery obligations and has taken necessary steps to educate everyone involved about issues that will be relevant to the case. The simple act of setting forth an electronic discovery plan and seeking approval from the court will make a significant difference in how the company is positioned, should discovery disputes arise.

"I believe that no antitrust lawyer can effectively practice today without becoming proficient in working through the special issues raised by electronic documents," states Higgins. The same is true for litigators, Cohen adds: "Electronic discovery is not an afterthought or something that comes into play only when a special request is made. It must be part of your overall case strategy now." ■

## PRACTICETIPS (continued from Page 4)

### 2. Form a partnership between inside counsel, outside counsel, and IT personnel.

- Few businesses ensure that corporate counsel is involved in the decisions related to the creation, organization, and retention of electronic records, instead treating the area as the preserve of Accounting and IT personnel. Even fewer include outside counsel in these matters.
- From representation of other clients, outside counsel frequently has electronic discovery experience that can be leveraged to benefit the company.

### 3. Do not fear the company's electronic records.

- Information contained in electronic records can help the company's position in a legal proceeding just as easily as it can be harmful.
- Courts are increasingly critical of the "ostrich head-in-the-sand" mentality. Recent decisions require early and thorough review of a company's electronic files.

Profitable survival of many companies may be directly linked to their ability to retrieve and use information in electronic records. Yet, very few companies are developing a database or records ontology that reflects how they are organizing and storing electronic information, which would permit them to quickly determine what information they have and where it is located. The time to adopt a new approach is now.



William A. Fenwick is a founding partner of Fenwick & West LLP and is a member of the Litigation and Intellectual Property Groups. Fenwick & West has offices in Mountain View, CA, Washington, D.C., and San Francisco, CA. ■

## SPOTLIGHT (continued from Page 4)

so users can see a complete history of all print jobs for tracking or billing purposes. Using these print features is ideal for productions of small to medium projects—generally cases with less than 5,000 documents. For larger projects, clients can still rely on Applied Discovery's full service export and production teams.

**TOP:** These sound like great additions to the ORA, Mark. What can clients expect to pay for the new features?

**MC:** That's the million-dollar question! The answer is nothing. These upgrades are included in our standard per-page or per-gigabyte pricing for all clients.

**TOP:** Thanks for the information, Mark. We'll look forward to talking with you again soon.

**MC:** Thanks for stopping by. ■

## GUEST ARTICLE (continued from Page 2)

stay current on developments in both the law and technology, and are excellent sources of information.

There are also a number of Internet-based groups that share information on electronic discovery and regularly engage in online discussions of various issues. Try the "litsupport" group at Yahoo!. Technolawyer.com is another good site for information.

### Make a Plan and Stick to It

Advance preparation is important for three reasons. First, if you have identified sources of e-discovery and developed a plan for efficiently and cost-effectively retrieving, reviewing, and producing e-discovery, you have a much better chance of avoiding turning an e-discovery skirmish into a full-scale war.

Second, if you are unable to avoid a dispute, detailed knowledge of the sources of electronic information in your company and the burdens associated with production of electronic discovery can be extremely helpful in convincing a judge to fashion a reasonable compromise.

Finally, if you are required to undertake a major e-discovery effort, time and money spent in advance preparations will usually be returned multi-fold in cost avoidance during the actual discovery effort. The cost of rework, which is inevitable without detailed advance planning, is astronomical; the rule of thumb I have heard is that the cost of rework is roughly seven times the cost of the initial effort.

### This Is Where the Outside Partners Come In

Advance planning is where companies can often benefit most from the use of outside consultants, including law firms who have practice groups devoted to this area of the law and companies who specialize in computer forensics and e-discovery. The specific needs of every company are unique, but there are general principles that apply in all electronic discovery projects.

Taking advantage of the expertise of lawyers and experts who have gone through electronic discovery wars with other clients in the past can

streamline the process greatly, reducing time and overall cost. Just as requesting parties have their checklists of information to be obtained, law firms who have represented other companies in defending against unreasonable electronic discovery demands and electronic discovery service providers can use information gained through previous engagements to help corporate clients avoid rabbit holes and wild goose chases, and focus their efforts and resources on the most important tasks.

### How Do You Select the Right Partner(s)?

The field of players in the electronic discovery arena today is large and growing by the day. Not very many years ago, there were a handful of visionary companies that offered a relatively limited number of electronic discovery services. Over the past several years, though, several developments have occurred. A number of brand new e-discovery companies have emerged, some as the result of former members of the original firms seeking greener (as in the color of money) pastures. Other companies who were formerly in businesses related indirectly to e-discovery, such as imaging and coding of paper documents, have expanded their offerings.

In addition, two new phenomena have emerged in the law firm sector. Several firms have developed technology subsidiary businesses that offer e-discovery solutions. The North Carolina-based firm Womble Carlyle Sandridge & Rice, PLLC is one example. Other law firms, such as Mayer Brown Rowe & Maw, have created a separate practice group of lawyers whose practice is devoted nearly entirely to electronic discovery-related matters. These firms may have internal technical expertise that the lawyers can draw upon, or they may associate with electronic discovery service providers.

Do you need to hire a firm that has electronic discovery as a specialty area? Probably not, but your decision depends on several factors, including the urgency of your need, the complexity of your IT infrastructure, and the nature of your litigation. If you have an extremely onerous order to comply with in a limited amount

of time, you will probably not have the luxury of being able to work with a firm that would require a long learning curve to become proficient in e-discovery. On the other hand, if you are systematically developing a plan for complying with ongoing e-discovery demands, and you do not have the time pressures associated with a court order, you may elect to work with a firm that is more familiar with your client and its business but is perhaps not an expert in e-discovery matters. You will need more technical expertise if your client has a network of thousands of servers, thousands of databases, and tens of thousands of PCs distributed worldwide than if your client's IT system is smaller and more centralized. Repetitive, "pattern" litigation will also create needs for outside resources different from the needs for individual, "one-off" cases.

Understanding the unique needs of your client is the essential component to selecting the right outside partner or partners. That, in turn, requires a basic understanding of the principles of e-discovery, and at least a general, high-level plan for compliance. Internal partnering with IT professionals and business people must precede external partnering. No matter how hard they may try, the in-house lawyer will never have all the right questions to ask prospective outside partners, and they should not try. Instead, the in-house lawyers must work with their internal colleagues to develop the basic e-discovery plan framework, in the context of which the evaluation of prospective outside partners will be made. These internal partners should also participate actively in the evaluation and selection of the outside partners; I can virtually guarantee that a critical technical or business consideration will be missed if they are not.



Gary L. Hayden is Counsel and head of the Discovery Group in the Office of the General Counsel of Ford Motor Company. His group is responsible for preparing discovery responses in nearly all of Ford's litigation. ■

## CASE LAW UPDATES (continued from Page 1)

the court reworked the Rowe cost-shifting analysis and presented a new seven-factor test:

1. The extent to which the request is specifically tailored to discover relevant information.
2. The availability of such information from other sources.
3. The total cost of production, compared to the amount in controversy.
4. The total cost of production, compared to

the resources available to each party.

5. The relative ability of each party to control costs and its incentive to do so.
6. The importance of the issues at stake in the litigation.
7. The relative benefits to the parties of obtaining the information.

In ruling on this discovery dispute, the court noted that electronic data is now involved in virtually every case.

For a complete summary of the facts and legal analysis in this case, visit the online Law Library at [www.applieddiscovery.com](http://www.applieddiscovery.com).



### Case Summary Alerts

Applied Discovery offers a complimentary notification service to help you stay up to date on the latest electronic discovery rulings. To learn more or sign up for Case Summary Alerts, visit [www.applieddiscovery.com](http://www.applieddiscovery.com). ■

## UPCOMING EVENTS

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

### BNA Litigation Forum

Electronic Discovery & Document Retention  
Washington, D.C.  
September 25-26, 2003

## WHAT'S NEW

Applied Discovery's founders, Richard Corbett and Michael Weaver, were recently selected as finalists in the Ernst & Young "Entrepreneur of the Year" competition. This is the second year in a row Applied Discovery has been selected as a finalist in this prestigious competition. Read more in the Press Room at [www.applieddiscovery.com](http://www.applieddiscovery.com).



## IN THIS ISSUE: SPECIAL CORPORATE FOCUS

- **Advice from leading attorneys to prepare your corporation for an electronic discovery request. See page 1.**
- **E-discovery from in-house counsel's perspective. Guest Article by Gary Hayden, Ford Motor Company. 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 of these articles, or view them online at [www.applieddiscovery.com](http://www.applieddiscovery.com).

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

**"Bone Up on Backup: Understanding the Nature of Stored Information is Essential to the Preparation of an Effective Discovery Response"**  
by Mike Finley, Esq., Applied Discovery and Atiba Adams, Corporate Counsel, Pfizer Inc.  
*New Jersey Law Journal*, April 21, 2003

**"The Next Frontier: Recent Rulings Underscore Emerging Importance of Backups"**  
by Virginia Llewellyn, Esq., Applied Discovery and Atiba Adams, Corporate Counsel, Pfizer Inc.  
*New York Law Journal*, March 25, 2003

*The information contained herein is not intended to provide legal or other professional advice. Applied Discovery encourages you to conduct thorough research on the subject of electronic discovery.*  
© 2003 Applied Discovery, Inc., All Rights Reserved.



applied | **DISCOVERY**®

200 112th Ave NE Ste. 210  
Bellevue, WA 98004