

# THE LITIGATOR'S TOOLBOX

*Techniques and Support for the Successful Advocate*

## UPLIFT

### Pulling documents right off hard drives saves money, time.

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STAFF REPORTER

FOR LITIGATORS, nothing is as tedious as the beginning of discovery in a big case. First there is document collection. Then there's the document review, the Bates stamping, the photocopying and delivery to the other side. It's a process that makes a lot of associates wonder what they were thinking when they signed up to take the LSAT.

A handful of vendors are promising a new, painless approach to big-ticket discovery: e-discovery. Companies like Seattle's Applied Discovery Inc., Portland, Ore.'s Fios Inc., Seattle's Electronic Evidence Discovery Inc. (EED) and Eden Prairie, Minn.'s Ontrack Data International Inc. move all of a party's electronic documents into a vast, electronic database. Attorneys can then search the database by keyword or concept. This eliminates boxes of paper—and a bunch of associate hours.

The Enron escapades have thrown the issue of access to files into stark relief. But most of what these companies do is a little different from what the Enron investigators are trying to do. These vendors primarily organize electronic files that have not been destroyed.

"[These companies] are definitely set-

ting the trend," said Wondie Russell, a partner at Heller Ehrman White & McAuliffe. "It makes discovery faster, easier and definitely cheaper for the client."

Companies like Fios first ask a company's employees to "uplift" batches of e-mails and documents electronically into a centralized spot on a network server. The vendors then collect the documents from the server and turn them into either PDF, TIFF or HTML files, depending on the vendor. The e-discovery services then run the database through a search engine. In a case featuring hundreds of thousands of relevant documents, attorneys can quickly put their hands on the hundred or so most vital to the case.

For years, law firms created electronic databases by scanning paper copies of documents into programs. But scanners misread words all the time. So searches of these databases are often inaccurate.

#### Lose the paper trail

Bypassing paper also allows these vendors to capture the exact information on a file and also its "metadata." Metadata is invisible information that programs like Microsoft Word attach to each document or e-mail. For instance, Outlook metadata might include who was "bcc'd" on an e-mail. "Obviously, this can be very

important in setting up a 'who knew what and when' type of scenario," said Mark Kroese, the vice president of marketing at Applied Discovery.

Heller Ehrman's Russell has used both Fios and Applied Discovery to handle parts of big litigations. Russell estimates that e-discovery saved her clients "roughly somewhere between 25[%] and 30%."

All three vendors offer a range of pricing options. Applied Discovery, for instance, says it charges "roughly" 15 to 40 cents per page. Fios charges "roughly" between \$3 and \$5 per megabyte of data converted. EED declined even to offer a pricing range. "It depends on the size of the job and whether the client needs services like forensic work," said Deanna



Schuler, EED's vice president of sales and marketing.

But price does not lure every attorney. There's the issue of privileged documents. The big e-discovery vendors all have sophisticated methods for making sure that privileged documents don't end up in enemy hands. For instance, Applied Discovery lets lawyers mark privileged material in each PDF file; unprivileged information is then sent to the other side.

Lawyers are still cautious. "Rationally, we all know these systems can handle the privilege issue," said Geoffrey Howard, a litigation partner at San Francisco's McCutchen, Doyle, Brown & Enersen, "but it's still sort of clunky. And that gives lawyers reason to pause."

Lawyers are also creatures of habit. Browning Marean, a partner in the San

Diego office of Palo Alto, Calif.'s Gray Cary Ware & Freidenrich, insists that looking through a box of documents is quicker than clicking through the same documents on a computer screen. "Until [computer-based review] gets faster, paper is going to be a part of the way I do discovery," he says.

#### Some drawbacks, too

E-discovery has some kinks. It's not well suited for litigations that feature documents made by typewriters and carbon copies. "[Electronic discovery] works fine if the entire population of documents [exists] in a capturable, electronic form," Russell said. "But when it doesn't, you run the risk of coming up with a [confusing], piecemeal solution."

Maybe so. But a lot of lawyers acknowledge that these issues will ultimately fall by the wayside. Today, nearly every document that comes out of the American work force is created on a computer. "Ten years from now, you're not going to see a lot of paper in big litigations," said John Tredennick Jr., the president of CaseShare Inc.

All of these companies are privately held. And they're tight-lipped with their financial information. Last summer, Fios raised \$10.5 million in a second round of venture financing. It expects to be profitable by the end of the year. According to Applied Discovery's Kroese, his company finished last year 20% ahead of its revenue targets. And EED's Schuler says the company has doubled its revenues every year since its founding in 1986.

"As soon as [these companies] figure out how to iron out a few issues, they're going to do very well," predicts Gray Cary's Marean.

And along the way, they might make life easier for the next generation of young associates. ■