

Planning For The Inevitable

When Technology Doesn't Work

Whether The Technology You've Come To Depend On Handles e-Discovery, Your Cell Phone Or Your Garage Door, It Isn't Fail-Safe.

By Stanley P. Jaskiewicz

People who negotiate tech deals and draft contracts for legal or other services — such as partnerships and the instruments that monitor them and give them teeth — must remember one constant in today's ever-changing world: The technology we depend on every day often does not work.

This is true whether one is dealing with e-discovery, e-commerce or simply day-to-day procurement.

As a result, the traditional wisdom, "failing to plan is planning to fail," has been transformed into a rule of thumb for the tech sector: "plan for failure." Firms that do not explicitly anticipate systems failure run the risk of being unprepared for a catastrophe, just as Floridians must plan for hurricanes in August — and New Orleans must now be prepared for potential dike breaches.

NOT ALWAYS

A SURE THING

Consider, for example, the high profile, widely reported problems recently suffered by industry leaders Microsoft, Apple and Yahoo! at annual trade shows. Last year, Bill Gates endured multiple crashes

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Another Kind Of Room With A View

The Off-Site Document-Review Room Offers A Viable Option For Case Review Demands

By Christy Burke

Ramping up for document-review is a challenging prospect, requiring a firm to react quickly and aggressively, depending on the requirements of the case. The timeline for reviews can be extremely long, requiring attorneys to spend months sifting through information or very short, at times requiring firms to use contract attorneys to scale up to several times their original staffs' size to meet deadlines.

"When very large document-review projects come up, it places terrific strain on the firm's infrastructure," says Nick Gaglio, an associate at Axinn Veltrop & Harkrider, a New York-based firm that concentrates on anti-trust and intellectual-property litigation. "For some document-intensive review projects, there is enormous pressure from the client to finish the review quickly."

Gaglio says that sometimes, his firm's staff balloons from 23 attorneys to more than 200, supplementing the staff with contract lawyers to get through material faster. It's a case-by-case need that the firm has come to juggle adroitly on demand.

"We can accommodate some people in-house, but it's simply not economical to rent a space all year-round for this contingency, so we need to look outside for a solution," Gaglio says.

So, with the kind of work pressure Gaglio's referring to, what does the firm do?

"We rely on our litigation-support vendors to provide off-site document-review rooms," he says.

Vendors are offering off-site document-review rooms (DRRs) more frequently for customers who see the value these resources provide, and the DRR market is expanding. For example, Datum Legal of New York, a litigation-support services outfit (formerly Duplicating USA) was scheduled to open a state-of-the-art DRR in Midtown Manhattan this month.

"Our goal is to assist our clients with their discovery-management needs," says Chris Egan, managing partner of Datum Legal, "so we made it a priority to build a high-tech

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Off-Site Review

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document-review facility which could be up and running within hours.”

Axinn's Gaglio says that he has used several vendors to provide off-site space, and he is looking forward to Datum Legal opening its DRR so that he will have another resource for review space and technical support. DRRs provide a central location where staff and contract attorneys can do collaborative document-review, either short-term or long-term.

THE STATE OF

E-DISCOVERY ADOPTION

Judging from the publicity that e-discovery is receiving, one would think that all law firms, especially the large ones, would have immediately outfitted their offices with the best technology to facilitate electronic-document-reviewing, establishing on-site review rooms with top-quality software, maximum connectivity bandwidth and new workstations. In reality, this proactive approach appears to be more the exception than the rule. According to legal-industry consultants George Socha and Tom O'Connor, who have been observing the progress of the adoption of e-discovery technology, there are still relatively few law firms using electronic-discovery tools. Several factors support this phenomenon. Large firms generally have an abundance of physical space, technology and personnel, but these aren't always accessible for document-review projects. These firms historically have relied on third-party vendors to process their paper and electronic documents, and recently, large firms have also voiced the need for off-site DRRs provided by their litigation-support vendors.

Socha says there are three major types of law firms in particular that

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are using electronic-discovery tools that would stand to benefit from using an off-site DRR:

- Large firms with the technology budgets to support purchase of e-discovery tools;
- High-end niche firms that specialize in a highly vertical practice area; and
- Joint-defense or plaintiff situations where a neutral place is needed to host the discovery data.

Compelling reasons for attorneys at large and small firms to review off site are easy to name. Review, for instance, can be a long, involved process requiring ready access to resources, quick turnaround and the right technology. According to some attorneys and litigation-support managers, the following factors prompted case teams to use off-site DRRs during the discovery phases of their cases.

MOTIVATING FACTORS

FOR USING DRRS

Space Limitations

Big and small law firms report lack of space to accommodate review teams for the short- or long-term, especially if there was a need for attorneys to have a collaborative team-reviewing environment, which was preferable. Among litigation-support managers, there's a feeling that having all reviewers in the same room was a benefit, at least for the first few days to ensure communication between contract and staff attorneys who could discuss questions and comments freely in a group.

For certain cases, reviews can last several months, which can tie up space and tax some firms. DRRs provide comfortable, fully furnished space on an hourly, daily, weekly or project basis so that teams can use them as needed. Depending on the vendor, DRR facilities can accommodate small groups of attorneys, or considerably larger teams.

“Space is always tight,” says Moshe Azoulai, litigation-support manager of international law firm Simpson Thacher & Bartlett. “When we bring contract attorneys for an online document-review project, document-review rooms give us an option for quick deployment with the entire infrastructure already in place.”

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Backup Tape Restorations: Back To The Present

Careful Process Ensures Bringing Data Needed For Litigation Or Investigations Into The Light Of Today

By Veeral Gasalia

You've broached the topic of electronic discovery and, if you're like many U.S. lawyers these days, you've probably had a taste of this quickly ascending practice of law that no longer really can be called a niche segment of the legal profession.

One major concern in e-discovery is restoring backup tapes of data that may be needed for litigation, or other purposes.

Backup tape restoration can be a costly and time-consuming aspect of any litigation or investigation. Your client may have spent several years creating backup tapes, and now you have only days to locate and restore them.

And, of course, it's not an easy as it would appear, *prima facie*.

To complicate matters, the original hardware and software originally used to create the tapes may not be readily available, because the company has moved on to different backup technologies. Also, your client may have unlabeled tapes with little or no documentation about the content on them. The fact remains, however, that the backup tapes exist — and you are charged with restoring them.

Take a dash up to the bar and prepare to clear this hurdle.

DETERMINE WHAT THE COMPANY HAS

Depending on the size of the company, it may employ a person designated

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for such responsibilities, or staff whose duties include the creation and monitoring of the backup process. These employees will be a good resource to start with to find first-hand information about the backup-tape inventory. They may also be able to provide the latest — and, depending on the employee, historical — backup-policy information. More important, though, is that they may also identify known deviations from the company policy that may not be documented, such as backups for a system that wasn't installed when the policy was made. These policies typically state the frequency with which the company's servers are backed up, and the current process for "recycling" tapes. Recycling is the process by which companies will reuse tapes, rather than purchase new ones; the goal, as you might guess, is to reduce costs. For example, a company may have a retention plan to keep its month-end tapes for one year, meaning that the Jan. 31, 2006, tape will be kept until it is overwritten on Jan. 31, 2007.

While reviewing backup policies is a good start, these guidelines will account only for a portion of the store of tapes that may exist. There may be exceptions, for instance, in which tapes are created outside of these policies for various reasons. For example, system upgrades, emergency maintenance, special projects, testing or a company restructuring are just a few reasons why the company may make an ad-hoc or out-of-policy backup. These out-of-policy tapes are important because they are created outside of the company's normal process, so they may also be excluded from the normal recycling plan. Also, tapes that were meant for recycling or destruction may have been misplaced or otherwise mistakenly retained, and later found at the company.

You may again ask the backup staff to provide a list of any out-of-policy tapes, but to confirm this information, you should ask them to provide a report from the backup software itself. Most backup software, you see, will maintain an inventory of the backup tapes that it archived data onto. It may even maintain a list of the files that

are on each tape, commonly referred to as a *catalog*. But keep in mind that with recycling, companies may not label each tape with the date of the backup; instead, each tape may have just a bar-code label or unique number on it. Compare the listing you receive from the software against the label of the tape to determine whether any discrepancies exist.

Another source to verify what tapes the company may have involves the company's record-storage vendor, if it has one. Many companies store data offsite at storage firms. While a company may have what appears to be an accurate inventory of tapes it created, the personnel charged with gathering the tapes should ask the company's storage firm to provide confirmation of the materials it believes it's holding for the firm. Additionally, a physical inventory should be taken of the locations where the company stores backups at its offices, as well as at its storage provider's location.

Demands, and the ability to address in-depth each issue that may arise, will vary from situation to situation. Each company should look into each source as the situation, or multiple situations, permits. The best approach is to cross-reference each of the sources against the other to minimize risk of missing something, and to help get a mental and working physical screen capture of the whole picture.

UNDERSTAND WHAT TIME SPAN THE TAPES COVER

Information-technology professionals refer to backup tapes as yearly, monthly, weekly and daily. But how can you be sure what period is contained on a tape, or a batch of them? The answer depends on the type of server backed up, the storage policies of the company and the habits of the employees. Consider this: If a company advises that it has a yearly tape-backup schema, then this may not mean it has a full year's data on a single tape, nor does a monthly tape system mean that the tape specifically contains a month's worth of data. Most backups are snapshots of the data at the moment the backup was run. The nomenclature of a yearly, monthly,

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Backup Tape

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weekly or daily tape is a representation only of the date the backup was created. For example, a yearly date may mean only that the tape was created on December 31 and contains information that was on the server as of that date.

With e-mail, one user may have the habit of deleting all messages the next day, but another user may be a pack rat and save every message. Depending on the company's e-mail server settings, only one day's e-mail may be targeted for retrieval if the yearly tape is restored for the first user, but several years of e-mail may be restored for the second.

Some companies also may have quotas or predefined limitations set

on their servers, commonly used to avoid running low on server-disc space. Probably the two most common types of quotas are size and date, the latter being very helpful in understanding what time periods the tape covers. If a company, for example, has a date quota of storing e-mail only from the last 30 days, then that means e-mail from the first day may be deleted on the 31st day. e-Mail from the second day is deleted on the 32nd day, and so on — which means that an inference can be drawn that the snapshot of e-mail on the tape contains 30 days of e-mail.

RESTORING THE TAPES

Restoring a backup tape generally requires two components: hardware and software. The restoration always requires the original or equivalent type of hardware to restore, but may not

necessarily require the original software. Several software companies and vendors offer methods to restore backup tapes using software that basically have “cracked the code” for the most common backup-software programs. But there are two major exceptions to this capability: incremental and agent-based backups. Incremental backups, or differential backups, contain only the different elements of a file since it was last backed up. Backups created using agents, or specialized backup routines, are typically used to back up data that is in use during the backup process.

RESTORATION TIME

While older tape technologies are slower than newer ones, there are numerous other variables to consider when trying to gauge the amount of

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of his own products, and even suffered his own “blue screen of death,” during his keynote address at the Consumer Electronics Show. (You can use technology to check it out on the Internet at www.vnunet.com/vnunet/news/2126451/blue-screen-death-crashes-gates-ces.)

At the 2005 MacWorld event, Steve Jobs also had to ad lib through unexpected freezes during his keynote. (See, <http://comment.silicon.com/weeklyroundup/0,39024756,39127082,00.htm>.)

And it wasn't just a 2005 curse, either. Yahoo! boss Terry Semel was similarly stumped by crashes during his “glitch riddled keynote” at this year's Consumer Electronics Show. (Again, through the — let's hope glitchless — wonder of technology, see, <http://news.com.com/Yahoos+>

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CES+demo+Mission+impossible/2100-1026_3-6021983.html.)

Now, if anyone ought to be able to make technology work flawlessly, it should be the leaders of the industry, right? One would think that would hold true especially when these leaders are demonstrating new products to eager customers, at a show covered by all the trade press. Presumably, their presentations were tested in advance, and not thrown together the morning of the show — yet still, they all failed at the crucial moment.

But despite these executives' embarrassment, the average IT manager may face much graver risks from tech failures. For example, *The Wall Street Journal* recently reported a study that found an increased death rate following a hospital's installation of a new computer system. (See, http://homepages.utoledo.edu/pfritz/_news/news-2429.htm.)

“These are very complex systems that completely disrupt, and hopefully improve, the work flow in a hospital,” the article quoted health-information technology expert Paul Tang as saying of the system installed in 2002 at the Children's Hospital of Pittsburgh. “If you don't do it right, it can fail miserably and cause harm to patients.”

Tang is also chief medical information officer at the Palo Alto Medical Foundation.

The article included information from *Pediatrics* journal from technologists saying that such systems as computerized physician-order-entry systems, which allow doctors to use computers to prescribe medications and have them administered, require training for health-care practitioners to use properly, and to help the practitioners change some of their practices and mindset to adapt to using technology properly.

Citing classified studies, another journal reported in 2004 that U.S. troops in the Iraq invasion were “plagued by tech glitches” that left ground forces without “access to vital intelligence and surveillance data” (see, www.abc.net.au/news/newsitems/200410/s1218341.htm). The report “uncovered a digital divide that allowed division commanders to get a good view of the battlefield, but left front-line commanders basically in the dark. The problems preventing effective relaying of crucial data included lengthy download times, software failures and lack of access to high-bandwidth communications.”

THE LEGAL WORLD IS ALSO VULNERABLE

In the practice of law, malfunctioning recording technology has exposed clients to judges' wrath — and sanctions

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that can make a courtroom victory near impossible. “Incomplete and missing transcripts and pages peppered with the word ‘inaudible,’” plain old “gibberish,” and the simple “failure to switch on a tape recorder” have generated adverse rulings — and appeals, according to a recent article in *New Jersey Law Journal* — an ALM sibling publication to *e-Discovery Law & Strategy*. (See, www.law.com/jsp/ltn/pubArticleLTN.jsp?id=1118666114493 at Law.com.)

One high-profile case, involving Morgan Stanley and financier Ronald Perelman, even resolved the key liability issue before trial, leading to a \$1.58 billion jury award, when problems with electronic-discovery software prevented the defense from delivering accurate versions of key discovery documents.

But knowing that technology will inevitably fail isn't the same as doing something (or nothing) about it. People who rely on technology can take several steps to try to reduce the costs of the problem, or prevent the problem altogether.

When discussing tech failures, don't forget the human factor — it's surprising how often this factor is forgotten. In many of the failure incidents described above, human error contributed to the problem: failures to turn on a transcription machine, or slow adjustment to new medical systems. “Human error can always be a factor,” said a researcher at the National Center for State Courts who has tracked data on courtroom snafus. And better training for those who must use new technology may be the most prudent way to reap its benefits.

Similarly, expectations about new technology must be realistic. Just because new e-discovery software has been installed, or an e-commerce site has been opened for business, doesn't mean that a failing firm's fortunes or win rate will turn around overnight. Also, the complexity of today's products — hardware and software — has made integration a task in itself. Incompatibilities with a firm's existing software and infrastructure, much less

that of the vendors and customers with whom the firm does business, may create unexpected delays and problems that must be solved.

Instead, key employees in the firm must become familiar with the technology, and the most beneficial — and cost-efficient — ways to use it. In fact, with time, a firm's own staff may develop innovative ways to use the technology to its fullest for that firm's particular needs, beyond what the vendor could have anticipated. But those results will not appear on the first P&L statement after the go-live date.

Just as backing up has long been the first rule of data, especially in the age of technology, having readily available alternatives to the technology may also have to be considered. A toll-free phone number for an e-commerce site, for example, can keep a firm in business when its computers crash. When introducing new systems, extensive testing under actual conditions and using real data, but before the system goes live, can help to identify flaws.

Redundancy counts as well. Preserving old systems after replacement may provide a refuge in a catastrophe — as long as the old system's availability doesn't become the crutch that delays acceptance and use of a new system by reluctant employees.

Vendor-provided insurance coverage may be available after the fact to fund costs of fixing a problem. Practical warranty protection — where the vendor steps in, immediately to make the system work under the terms of a service and maintenance contract — rather than the typical limited warranty is also helpful.

Of course, all of these protections must be negotiated, in advance, in the original license agreement. But, unless the vendor has a “blank check” help-desk policy, this type of support can be quite expensive.

Moreover, vendors may be reluctant to extend standard support, particularly for new or cutting-edge products. No vendor wants to offer a perpetual, full-time help desk, unless its cost has been included in the pricing. Third-party support services are available, but may not be helpful to employees or customers working with customized

products beyond basic Office programs, or complex installations.

And ultimately, firms don't introduce new technology to duplicate systems, or costs. They expect it to work, immediately, to justify the expense incurred to acquire it, and the usually much greater cost of installing the new system and training people to use it.

GIVE DUE DILIGENCE

ITS DUE — PLAN, PLAN, PLAN

Indeed, with today's e-commerce volume, traditional backup and redundancy strategies may be obsolete. After all, if the old system could have handled the task, it would not have been replaced. Manual analysis of thousands or millions of e-mail messages, or internal discovery documents, may make settlement of the underlying litigation — even on unfavorable terms — a more cost-efficient alternative than continuing to fight and spend on e-discovery. In the e-commerce context, manual processing, or even redundant electronic fulfillment, may eliminate all cost advantages of the online economy.

So, perhaps the best strategy becomes focusing on making the tech product work, from the beginning, whether it involves e-commerce software, a Web front or just a new in-house back office. As the foregoing “parade of horrors” indicates, however, that process may not be easy, quick or inexpensive.

From a business perspective, then, the best recommendation is to always budget for the unknown time and expense of new technology. The first budget or timeline, at the beginning of every project, must anticipate failures.

No matter how optimistic you may be at the start that everything will work well, assume that it will not. Remember to include all of the costs associated with a failure, and avoiding its potentially harmful consequences — backup and redundant systems, insurance, extended warranties, even overtime and emergency billing costs for consultants to put your firm back in business. In that way, you can hope, the inevitable failure won't stick a firm with impossible deadlines, or cost overruns that could kill the project.

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Without this “failure factor,” the project may never proceed when the realistic costs prove too high.

Similarly, don’t arbitrarily wait until the final week of a discovery period to begin collecting and tagging internal e-mail for production. If business reasons dictate that a site or feature must be available on a certain day, begin to roll it out well before the deadline to allow time for the inevitable fixes.

As for service contracts, if one is available, evaluate its cost as part of acquisition expenses, rather than as an option (regardless of how it is booked under accounting rules). Be sure, though, that it covers ongoing live technical support for a firm’s specific problems, and not just releases of upgrades and comprehensive fixes. Your firm will one day almost certainly need someone to tell you how to fix *your* system, rather than instructions on how to implement or secure a theoretical fix. Don’t trust the vendor with blind faith that it will fix your problem, or make you whole, when all you have is a generic limited warranty, or less, in your license agreement.

Also, remember that most “standard” warranties or service contracts will not cover many problems you are likely to face with technology projects, or provide any real remedy. A warranty of compliance with documentation, for example, may be worthless if the documentation promises little, or is heavily qualified.

In fact, before negotiating, analyze the license agreement from the perspective of what could go wrong in *your* firm, and what problems might shut you down. Then write into the contract remedies for those specific problems, in addition to the typical damages and injunctive relief. Although most contracts proceed from forms, here you should try to be flexible and creative to conjure up your own “insurance” against the harmful effects of a tech glitch.

But be wary of unrealistic caps or limits on damages. While many contract writers include these limits as part of the boilerplate, the right to be compensated for harm caused by a failure to perform goes to the heart of the deal. A party’s refusal to stand behind its promises may tell more about the likelihood of success than any due diligence.

Also, you should investigate whether you — and the other party — have sufficient insurance coverage for losses that may arise as a consequence of a failed project. Be certain to consider whether tech-related losses are insured at all, and not excluded or limited, by the policy terms. If insurance is not available, evaluate whether your firm can absorb the costs created by problems, and of fixing them.

WORKING WISELY WITH THE INEVITABLE

Some tech projects are “all or nothing,” and can’t be rolled out in phases to monitor for problems and control losses. Then the preliminary work of

writing a flexible contract becomes even more important. For example, the right to cancel prematurely, as discussed in the June 2005 edition of our sibling LJN newsletter, *e-Commerce Law & Strategy*, preserves the right not to continue losing money on a failing project. (See, “Use Escape Clauses For Tech Contracts: Breaking Up Is Always Hard To Do, But Don’t Let It Kill Your Business,” p. 1, *e-Commerce Law & Strategy*, June 2005.)

Of course, contracts work two ways. While you may get that right, you also risk seeing a valued deal go awry when the other person exercises his or her right to walk away. Unfortunately, sometimes when a project has failed, cutting losses and switching to an alternative may be the most cost-effective solution. Certainly, it doesn’t make financial or business sense to pour more time and money into something that may not work.

Everyone who works with technology knows that it will fail — just not when. Plan to avoid the false “new deal” optimism of those who haven’t lived through the last tech fiasco.

Instead, draft a contract to minimize the inevitable costs of such failures. While no one goes into a deal expecting failure, protecting the right to control the cost of a failure — and recognizing that failure in tech contracts is more than a possibility — can be the most significant part of a tech-contract negotiation.



Backup Tape

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time required to restore a backup tape. Some major ones are:

- Tape capacity;
- Tape type;
- Restoration hardware; and
- Average file size.

Take this illustration as an example. Restoring an e-mail server tape (DLT IV) where all the data was stored in a single file took almost 5 hours. The same tape format containing mostly smaller files from a file server took several hours longer than

the e-mail tape. One approach to gauge the time required to restore several tapes is to restore one tape from each tape type, and then multiply that amount of time by the number of different tapes to be restored.

CONCLUSION

With the sanctions placed on Morgan Stanley and UBS Warburg regarding the location, preservation and restoration of backup tapes, there has been tremendous focus sharpened on the importance of managing these aspects of data-management and data-retrieval properly, and proactively. Some companies are

moving away from backup tapes altogether and using newer document-retention technology that allows for rapid document-recovery. Other companies continue to use backup tapes, but have strengthened their internal policies regarding the creation and recycling of the tapes. There is no doubt, however, that many companies and their designated personnel have already had to deal with the issue of backup tapes, and will continue to so do for years, and with that scenario, there’s no substitute for sound planning, policy, preparation and practice.



Off-Site Review

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Speed And Convenience

Litigation-support companies are accustomed to responding to tight deadlines. A turnkey vendor can completely outfit a DRR so that lawyers can be up and running in 24 to 48 hours of submitting their paper and electronic files to the vendor. Once on site at the DRR, attorneys and staff can be quickly trained on the various review technologies available there so that they can begin reviewing immediately after document production is completed.

Managers should verify with the vendor that the DRR has tight security and surveillance in place to ensure the safety of documents and personnel. If necessary, some vendors can arrange for 24/7 access to the space for lawyers working well outside normal business hours.

Note that using a vendor-provided DRR eliminates the problem of involving your firm's IT staff to dedicate and set up computers, servers, phones and software for reviewers — red tape that can lead to bureaucratic headaches, more delays and higher costs.

The Technology Factor

Each case's agreements between counsel and the courts are different. That being the case, the document-production and document-reviewing requirements will be unique to particular cases. DRRs can provide high-quality workstations, secure and fast Internet access, phone and fax lines, and additional space for war rooms and client meetings.

Software Applications And Reviewing Tools

Software flexibility is essential, and DRR vendors need to support multiple applications to fulfill most conceivable reviewing needs. Effective DRR vendors are not locked into specific reviewing software of each type, and are flexible enough to adapt to the firm's team and case specifications.

"U.S. Attorneys' offices across the country have standardized on Concordance and IPRO," notes attorney Tom O'Connor, director of The Legal Electronic Document Institute (LEDI), a Washington non-profit organization fostering e-documents education

and standards. "Also, there is the presence of electronic filing. Private attorneys need to be in a position to match that technology when working on a case."

Indeed, technology matching by vendors is critical for off-site data hosting, too.

Mary Pat Poteet is national litigation-support manager for DLA Piper Rudnick Gray Cary and vice president of the International Law Technology Association's (ILTA, formerly LawNet) Litigation Support Peer Group.

Poteet says: "If we use an outside vendor to host the data for us, it is helpful if they use the same technology that we do. That way, when we get the database back, we can use it internally and drop the database onto our server. We don't want to convert any data or import/export from other technologies. That is risky and can lead to corruption, incomplete conversion or loss of data."

Not even use of proprietary technology for processing data is a problem.

"They convert it back to our technology before sending it to us so we can just drop it onto our system," Poteet explains.

Another comfort to law firms strapped with big-order e-discovery projects is that a full-service DRR will provide the implementation and on-site training for the major categories of reviewing software:

- Image-only review;
- Native format review; and
- Conceptual review (documents are clustered together by common content).

Connectivity And Network Security

Because most case teams review discovery documents online, connectivity is also a major issue at law firms, some of which have slower Internet connections.

"Big-volume cases are becoming increasingly common, especially when multiple plaintiffs or defendants are involved," LEDI's O'Connor says. "In cases where there are multiple parties on the defense side, there is an enormous constraint due to the lack of good technology. On one of my current cases, we are using panel public defenders. Many

of these attorneys only have dial-up Internet access since they are small-firm or solo practitioners. This renders them completely ill-equipped to deal with a large volume of electronic-discovery documents."

State-of-the-art DRRs should eliminate connectivity-speed problems. They offer high-speed connections (up to T-3s), along with the highest network security protocols to protect data, and to make data accessible and searchable at a productive pace.

Electronic Storage Space

Storage, of course, is a key consideration when dealing with paper documents and electronic information. DLA Piper's Poteet says she sometimes taps a combination of multiple vendors to fulfill her needs, depending on the circumstances of the case.

"We have a case now where 40 people are reviewing data," she says. "One vendor processed the documents and another vendor is hosting the data for us. When a case comes up with several terabytes of data, we can host it internally if needed, but it is often easier to have an outside third party host the data for us."

Contract Attorney

Access Restrictions

Law firms can have strict rules barring contract attorneys from having full or partial access to their main offices. This can be problematic, especially if the contract attorneys are playing a key role in the review process. A DRR can be used to allow the entire team — including contract attorneys — to freely participate in the review process.

DETERMINING THE NEED

FOR AN OFF-SITE DRR

e-Discovery consultant Socha points out that before deciding to use an outside DRR, the firm must do a thorough analysis of the case situation, covering factors including:

- Size of the matter;
- Duration of the matter;
- Risk to the company;
- Whether the firm is acting alone or with others;
- Whether a system is being shared with the other side;
- Whether the client may want the firm to use its own internal system

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e-Discovery DOCKET SHEET

DATA DESTRUCTION PURSUANT TO VALID DOCUMENT RETENTION POLICY DOESN'T WARRANT SPOILIATION SANCTIONS

In a patent-infringement suit, the plaintiffs argued that the defendant's claims should be dismissed based on the defendant's adoption of a document-retention policy that resulted in the destruction of potentially relevant electronic and paper documents. Prior to filing the litigation at issue, the defendant developed a document-retention policy requiring the destruction of e-mail contained on backup tapes after 3 months. In addition, the defendant held several "Shred Days" during which employees were instructed to follow the retention-policy guidelines to determine what to keep and what to throw away. In assessing the plaintiffs' argument, the court noted that the evidence failed to show that the defendant targeted any specific document or category of relevant documents with the intent to prevent production in the upcoming lawsuit. The court further found that the defendant's

adoption of the policy was not designed to prevent the plaintiffs from obtaining evidence that would be helpful to the plaintiffs' defense. For these reasons, the court declined to accept the plaintiffs' argument and declared, "[The defendant's] adoption and implementation of its content neutral Document Retention Policy in mid-1998 was a permissible business decision...[and] did not constitute unlawful spoliation." *Hynix Semiconductor, Inc. v. Rambus, Inc.* No. C-00-20905 RMW (N.D.Cal. Jan. 4, 2006).

MAGISTRATE RECOMMENDS SPOILIATION SANCTIONS FOR FAILURE TO STOP AUTOMATED E-MAIL DELETION

In a breach-of-contract claim relating to the defendant's NASCAR team, the plaintiff sought sanctions against the defendant for destroying relevant e-mails. In defending its actions, the defendant claimed that its computer system was set up to delete internal and external e-mails automatically, unless affirmative efforts were taken

to preserve them. As a result of the automated deletion, internal e-mails from key custodians were "irretrievably lost." One key individual testified that he was never instructed to preserve relevant communications, even after the lawsuit commenced. In considering whether sanctions were justified, a magistrate judge declared "[s]uch normal procedures for destruction of documents must ... be suspended when a party is on notice that they may be relevant to litigation, and the failure to make an adequate search of such documents before their destruction may be evidence of bad faith." Although ultimately finding that the defendant's actions amounted to negligent spoliation and did not show evidence of bad faith, the magistrate found that sanctions would be appropriate and recommended that the trial court issue an adverse-inference instruction and an order allowing the plaintiff to present evidence of the spoliation. *DaimlerChrysler Motors v. Bill Davis Racing, Inc.*, 2005 WL 3502172 (E.D. Mich. Dec. 22, 2005).



Off-Site Review

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- to review documents;
- What type of searching capabilities are permitted, and to whom will they be made available; and
- How much flexibility there is for review method.

Selecting The Right DRR

When selecting a litigation-support company to provide a DRR, it's important to evaluate options according to criteria suiting the team's specific needs. Many top litigation-support

vendors are opening facilities to provide customers with whatever they may need. These vendors are finding that demand among clientele requires a DRR to stay competitive in their industry.

When looking for a DRR/litigation-support resource, consider these tips:

- Look for a turnkey operation;
- Tour and inspect the review space;
- Require best-of-breed technology;
- Consider costs; and
- Evaluate performance in advance by using test data.

CONCLUSION

Document-review rooms provide a lifeline for firms to reach for as they wade through boxes of paper, and terabytes of e-documents and e-mail.

As O'Connor of LEDI states, a sea change is occurring in this area of litigation, with the role of document custodian changed from the past, when attorneys went to court reporters' offices to review paper documents. Today, litigation-support vendors take the custodial role "seriously," and will continue refining DRRs with technology and know-how to meet market demand.



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