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ATTORNEY SUPPORT



Backup Tapes Hidden Trove for eDiscovery?

Today's courts recognize the value of data stored on backup tapes. In the past tapes have had a reputation of being burdensome and expensive to process. In careful examination of the cases since *Zubulake* and the December 2006 FRCP regulations, one can clearly see that the trend in collecting data from backup tapes

ery procedures. Improvements in discovery technology have made tape content accessible, where as before the tape restoration process was incredibly onerous, it is now faster and easier. Judges and opposing counsel both are beginning to realize this, so the burden argument where tapes are concerned no longer holds water. It appears that the courts are considering backup tapes as a pri-

“snapshot” of a corporation, organization, government agency or law firm’s data. When you are dealing with a case that requires the collection of electronically stored information (ESI) within a specific time period, June 2007 for example, acquiring the backup tapes for this exact timeframe is typically not a problem because organizations have kept these tapes for disaster recovery purposes. Many corporations store backup tapes in offsite vaults to protect them. It is true that some firms have a strict policy to recycle these tapes but most cannot or do not execute this procedure since they aren’t disciplined about documenting exactly what is on the tapes. In addition, the fear of inadvertently destroying or recycling backup tapes that may contain ESI relevant to a litigation hold has prompted many organizations to take a “save everything” approach for fear of facing sanctions due to spoliation.

Collecting relevant email and files

It appears that the courts are considering backup tapes as a primary data source for eDiscovery and to understand their value.

has increased. In fact, a systematic review of court documents shows that over the past ten years the use of backup tapes for the production of ESI has increased significantly. As Judges such as Judge Shira Scheindlin of the *Zubulake* case and others become more technologically savvy, they come to understand corporate retention policies and disaster recov-

ery procedures. Improvements in discovery technology have made tape content accessible, where as before the tape restoration process was incredibly onerous, it is now faster and easier. Judges and opposing counsel both are beginning to realize this, so the burden argument where tapes are concerned no longer holds water. It appears that the courts are considering backup tapes as a pri-

Examining Backup Tapes

Discovery and collection aside, what do backup tapes actually represent? They are a point in time, a



from a backup tape sounds like a good idea. Asking for these tapes is a significantly less complex task than heading onsite to the client location for a collection from a live corporate network. The tapes contain all documents and e-mails with their metadata pristinely intact. Using tapes as data containers also simplifies the litigation hold process. Tape is a natural litigation hold - no need to worry about tampering since data on tape is forensically sound. As a snapshot of ESI that is forensically sound, tapes seem like the obvious choice when faced with a discovery request. So how did tapes end up with the reputation of being complex and inaccessible?

Tape's Burdensome Past

You can easily find cases where the cost to collect ESI from backup tapes is in the hundreds of thousands of dollars. For example, take a look at the 2002 case, *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 U.S. Dist LEXIS 3196 (E.D. La. 2002). In this case the plaintiff requested the collection of relevant

email from 93 backup tapes. The defense testified that this would cost over \$6.2 million and take over six months to retrieve the ESI. This amounts to almost \$70,000 per tape! Realize also that some companies have many more than 93 backup tapes in storage. In fact, some venerable companies that have been in business since the dawn of the digital world could have thousands of backup tapes lurking in off-site records storage warehouses. At

and reliable versus onsite collection from a live corporate network. In Craig Ball's technology primer from 2009: Backups in Civil Discovery (link: http://www.craigball.com/Ball_Technology%20Primer-Backups%20in%20E-Discovery.pdf) he states "when a lawyer or judge opines that "backups are not reasonably accessible, per se," you can be sure they haven't looked at the options in several years."

Craig Ball also states, "The

Today extracting data from tape has been simplified. You can easily find solutions and service providers that make it far more cost effective and reliable versus onsite collection from a live corporate network.

\$70,000 per tape or even half that, you can imagine how corporate lawyers would try to claim burden for tape discovery.

Today extracting data from tape has been simplified. You can easily find solutions and service providers that make it far more cost effective

conventional wisdom would be to fight any effort to go to the tapes, but the numbers show that, on the right facts, it's both faster and cheaper to do so." As tape discovery becomes more mainstream and widely used, new approaches begin to make sense. As Ball suggests,

using tapes as the first choice for ESI collection may be the smarter and more cost effective approach for certain types of cases.

The Courts Speak

As Judges and lawyers begin to understand how ESI is collected, they are becoming more dependent on discovery of historical data. Lawyers spend a good amount of time arguing around defensible collection. Expert witnesses spend hours detailing the production process and how data is collected, to prove from a forensic point of view that the electronic evidence has not been spoliated. Over time, many judges and lawyers have been forced to become technologists, and to understand backup and retention policies. Of course some judges are not as “tech savvy” as others, but when you are supporting a case, do you want to take a chance that your judge is not one of them?

The recent opinion from aforementioned Judge Scheindlin in the Pension Committee of the University

of Montreal Pension Plan v. Banc of America Securities case highlights the court’s understanding of technology. The Judge stated,

“After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant Zubulake opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold, to identify the key players and to ensure that their electronic and paper records are preserved, to cease the deletion of email or to preserve the records of former employees that are in a party’s possession, custody, or control, and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.”

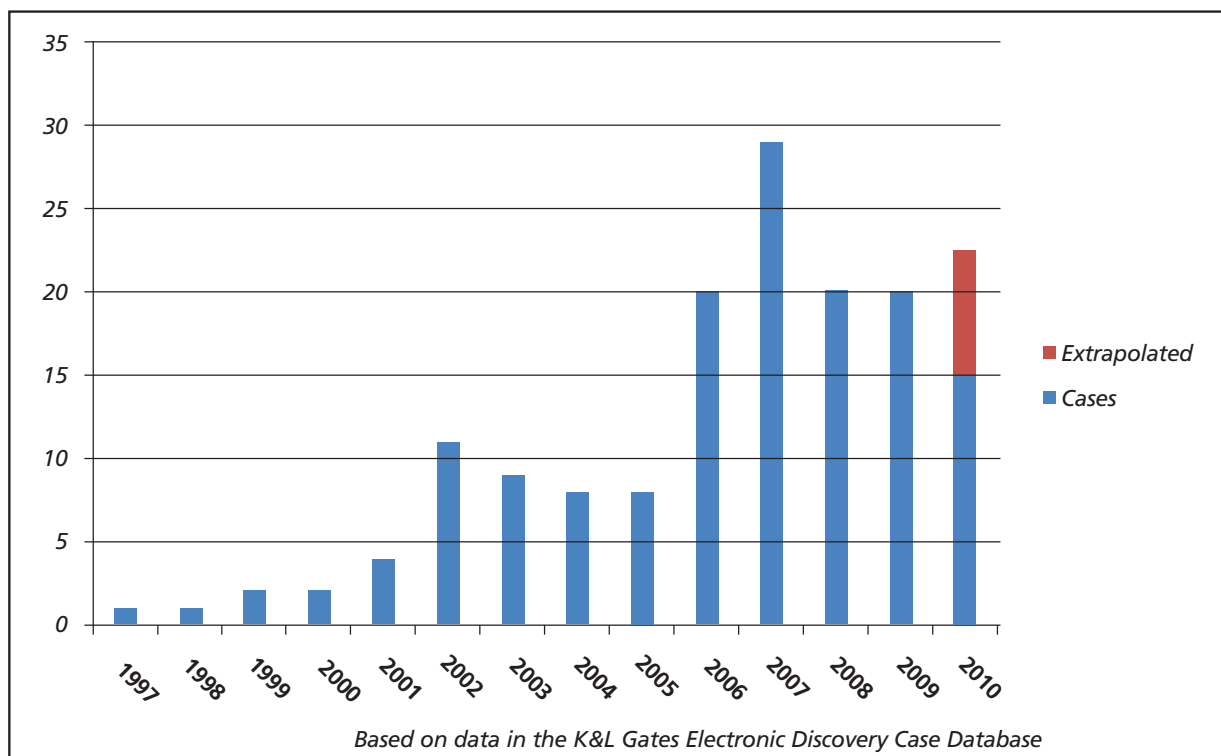
Among other items, in this quote Judge Scheindlin is citing backup

tapes, and their integral usefulness in the collection process. Prior to Zubulake it would have been difficult to find a judge, or even a lawyer, who would understand or even bring up backup tapes, much less cite them in an opinion.

The case history over the past decade is very telling. The analysis of

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electronic discovery cases collected from state and federal jurisdictions around the United States contained in the KL Gates Electronic Discovery Case Database (<https://extranet1.klgates.com/ediscovery/>) shows a trend related to ESI collection from backup tapes. In reviewing the cases over time, you will see that the trend





is increasing. The volume of cases that cite backup tapes is on the rise, and 2010 promises to be one of the strongest years ever. The Zubulake opinions occurred in 2003- 2004 and the key amendments to FRCP were presented in 2006. Together these had a dramatic impact on the volume of cases requiring ESI collection and the citation of backup tapes. As the courts' understanding of stored data, including backup tapes, as a reliable source of ESI expands this trend will most likely continue.

Working with Backup Tapes

What is the real cost (burden) of collecting ESI from backup tapes? You can still get quotes from providers in the thousands of dollars per tape, but the truth is that the cost has dropped significantly. You will still see the odd case where an

expert witness testifies to the fact that it will cost an arm and a leg to produce email from a very old backup tape. But when faced with collection from a typical two to five year old corporate tape this is no longer the case. With the burgeoning eDiscovery vendor population addressing this issue head-on, technology has advanced to meet this challenge, and has effectively made tape discovery reasonable.

The see-no-evil, hear-no-evil method of pretending tape isn't a factor will no longer fly in the courts. As counsel or litigation support professionals, it is a risky proposition to head into court without electronic evidence because you didn't investigate the availability of backup tapes. The word is out that most organizations are hoarding a stockpile of

corporate records sitting on tape, and that these records may be relevant to the litigation at hand. The courts know this and the trends show that they are demanding this ESI can be produced.

Litigation Support Professionals should be prepared to collect ESI from backup tapes if the need arises. Tapes are a reality that cannot be ignored and the case law underscores that fact. **LSI**

Contributor: Material for this article was provided by Jim McGann, VP of Information Discovery, Index Engines. Jim has extensive experience with the eDiscovery and Information Management in the Fortune 2000 sector. He has worked for leading software firms, including Information Builders and the French based engineering software provider Dassault Systemes.