



Searching through backup tapes? No sweat

It used to strike fear in the heart, but new technology has simplified matters considerably.

BY TOM O'CONNOR

Backup tapes have been used for decades in the corporate environment for business continuity or disaster recovery. Individual tapes typically contained a snapshot of the company's documents and e-mails for a particular day that gave information technology departments peace of mind in knowing that their data were available in the event of a natural or man-made disaster. But over time, older tapes simply accumulated in storage and were all but forgotten until needed for an audit or, more recently, litigation.

At that point, when the tapes became part of the discovery process, they struck fear into the hearts of legal professionals. Who could know what was on the tape, since it was truly "everything," without a comprehensive search capability? And information technology (IT) personnel were equally fearful about restoring tapes, especially those created with older backup systems, which would require a simulation of the legacy tape environment that had probably been replaced long ago. For these reasons, backup tapes acquired the reputation for being somewhat of a Pandora's box when it came to discovery — nobody wanted to open them for fear of what might be inside.

Difficulties in retrieving large amounts of data from tapes when large amounts of data are involved, ranging from the relatively high costs to the often laborious data-restoration process, historically have made this popular storage medium a less than ideal choice for the long-term archiving and retrieval of business-critical information. Slow deduplicating and short lifespan of backup formats have also contributed to the perception of tape being undesirable and very expensive for discovery purposes.

These factors contributed to widespread acceptance of the inaccessibility of tape. Cases such as *Consolidated Aluminum Corp. v. Alcoa Inc.*, No. 03-1055-C-M2, 2006 WL 2583308 (M.D. La. July 19, 2006) held that backup tapes were presumptively inaccessible so that, by the time the first electronic discovery changes to the Federal Rules of Civil Procedure came about in 2006, backup tapes were presumed to be not reasonably accessible. However, the Committee Note to Rule 26 specifically declared that backup tapes are subject to legal hold and may be discoverable.

The test that had arisen for defining inaccessibility for e-discovery purposes was whether the tapes were regularly used for active information retrieval as set forth by Judge Shira Scheindlin in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218, (S.D.N.Y. 2003). A later case, *Quinby v. WESTLB A.G.*,

No. 04 Civ. 7406 (WHP)(HBP), 2006 WL 2597900, at *7 (S.D.N.Y. Sept. 5, 2006) cited *Zubulake* and held that data that are accessible are "stored in a readily usable format that does not need to be restored or otherwise manipulated to be usable. Conversely, data that is inaccessible is not readily useable and must be restored to an accessible state before the data is usable. Backup tapes are considered an inaccessible format."

Backups were never designed for e-discovery purposes and, until recently, the tools and techniques available to find and produce data from tapes were either nonexistent or rudimentary at best. However, things have changed.

TAPE DISCOVERY TECHNOLOGY EMERGES

Seeing this problem and understanding the challenges counsel face, the e-discovery vendor community has been hard at work to create solutions to these issues. Recent advances have altered the landscape for tape discovery. Software now exists to automate the process of searching and extracting data from tapes through tools that index tape data before any copying or restoration occurs. These tools now allow attorneys to retrieve relevant data from backup tapes in a manner that is defensible, reliable, forensically sound and cost effective.

Backup tapes in today's technology world are not only a reliable and affordable medium for e-discovery, but also are a solid method of information management that allows control of both active and legacy data. New direct indexing technology renders data on offline backup tapes easily accessible. First, tapes typically are dated automatically, so manual indexes are not needed to locate specific tapes. The tapes are then automatically scanned and indexed, so that tape data are accessible via simple query terms. And the original backup software and environment are no longer required.

On Nov. 23, *The Wall Street Journal* mentioned a company called Index Engines Inc., which sells appliances that can access all common tape formats without requiring access to the legacy backup application or even a recovery environment for databases and e-mail servers. Nathan Koppel, "Using Software to Sift Digital Evidence," *Wall St. J.*, Nov. 23, 2010 at B6. The appliance directly indexes data on the tape, making all the data searchable. When relevant information is found, the appliance can extract it to another medium for further review. Many e-discovery service providers and consultancies across North America employ Index Engines' direct tape indexing technology. Integreon Managed Solutions Inc. and D4 LLC have publicized their services powered by this new direct-indexing approach to discover legacy tape data.

The benefit of direct-indexing technology is that clients can now rely on automated systems that avoid inadvertent data spoliation; the appropriate vendor can testify on behalf of clients as to a repeatable defensible process for the collection of data from backup tapes.

Any solution to the tape-discovery dilemma must have two components: The first is technology, but equally important is the establishment of company policies and practices surrounding document retention and preservation.

Document retention and e-discovery policies regarding legacy data archived to tape must begin with a dialogue among the legal, IT, human resources and records-management departments to properly identify the most relevant information to be preserved and in what manner. It often is necessary to start with a broad policy or policies in order to get the most information under control in the shortest time. More

detailed policies can come later, but the perfect shouldn't be made an enemy of the good.

Guidelines for creating a backup tape policy include:

- Don't save everything. Keep documents that need to be retained for business or legal reasons but, to reduce the size of potential productions, avoid overstuffing.

- Index everything the company keeps. Backup tapes traditionally have been synonymous with the phrase "unduly burdensome," but new indexing technology eliminates this objection. Because tapes contain a defensible point-in-time copy of the data, indexing makes tape discovery quick, affordable and reliable.

- Keep an audit trail. Record everything the company does and keep multiple copies.

Courts have become much less tolerant of excuses during the discovery process that result from improper information management and collection processes. Even though backup tapes were not initially designed for e-discovery purposes, many organizations still rely upon them for information retrieval and need an efficient, inexpensive way to retrieve the data they contain. A partnership must be forged between internal counsel, who know the legal requirements of a litigation hold, and IT, who know the technological capabilities of their systems. This collaboration is the only way to ensure that a court can be reasonably satisfied that a repeatable defensible process, defined by legal and executed by IT, is being offered as an explanation for the production or the failure to produce relevant data.

Now improvements in technology have made the management and access to tape data the best solution for that partnership to promote. Tape retrieval is easy to accomplish without the problems of duplication and data loss or the time-consuming waits for processing and exorbitant costs, all of which reduce, if not eliminate, the issue of inaccessibility. How is this possible? Here are several immediate results of how these changes in technology make backup tape usage in the e-discovery process far more manageable:

- Tapes have become a useful tool for information management. The ability to index and catalog all tape data makes the legacy archival process not only more manageable but more meaningful, as IT staff can quickly and easily view

and categorize all the data on their tapes systems.

- Tapes have become a useful tool in the litigation-hold process. Tape users can use indexing technology to quickly locate specific data on tape and begin the preservation process necessary to meet litigation-hold requirements.

- Tapes can reduce collection costs. If data are indexed on tape, there is no need for expensive searching and collecting efforts to support the litigation-hold process. A search of the tape indexes will quickly find all relevant information and allow cost-effective collection directly from the tapes.

The overall result? Newly available tape-discovery products automate collection of tape content, eliminating the duplicate data and system files and make the content searchable in order to find and extract data as needed.

Tape data that were once considered inaccessible can now be easily accessed if the proper technology is deployed. The turnaround time to produce relevant data from tape is reduced to hours instead of weeks or even months — and the cost decreases proportionally, as well. The result is that attorneys will have a hard time arguing that tape data are not reasonably accessible and need to be aware that the window for making this argument is rapidly closing.

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