

## **ELECTRONIC EVIDENCE: Practicing Law in the New Millennium<sup>i</sup>**

By David H. Schultz

In recent years technology has had a profound impact on the way attorneys practice law. Advancements such as electronic filing, real-time court reporting, and computer-generated courtroom simulations all make the practice of law more efficient and more effective. From the convenience of corresponding with clients via e-mail, to the ease of using a handheld computer to access legal research while in court, technology's contributions cannot be underestimated. As positive and powerful as technology has been to the legal industry, however, it has also created some difficulties.

Simply put, the advancement of technology has created an entirely new source of evidence. Gone are the days of simply reviewing file cabinets and bankers boxes full of hardcopy documents. Today electronic documents and e-mail make up a major portion of relevant evidence in a great majority of the cases. According to researchers at the University of California – Berkley, 93% of the information created by corporations in 1999 was created in electronic form. By some estimates only thirty percent of corporate information today ever finds its way onto paper; the remainder is stored entirely electronically. Attorneys must accept the fact that relevant information is very likely to be stored electronically on the computers, networks and removable media (i.e., floppy disks, CD-ROMs and tapes) of either their clients or their opponents. In other words, attorneys must now be prepared to handle an entirely new form of evidence along with all the new and unique technical and legal issues that come with it.

### **The Old, Paper-Strewn Discovery Process**

In the past, the search for and retrieval of electronically stored documents for litigation was an incredibly lengthy, labor intensive and inaccurate process. Typically documents that

were stored electronically would be opened in their native format (i.e., accessed using the original software application in which they were created), printed one by one, scanned using Optical Character Recognition (OCR) methods, and recreated electronically. From there one could conduct keyword, Boolean and other searches, assign Bates numbers, and comment and redact, among other things. The process is less than 100% accurate and takes considerable time in a situation where time is typically of the essence.

### **High-Tech Discovery Searches**

As with technology in virtually every other industry sector, the technology behind discovery and complex document searches has improved by leaps and bounds in recent years. Today almost any document search and production effort will, at an absolute minimum, need to address documents, spreadsheets and e-mails created in multiple software applications. In addition, it is common to have multiple operating systems (e.g., Windows, Unix and DOS) and e-mail packages (e.g., Microsoft Outlook, Lotus Notes, MacMail). The challenge is to capture all potentially responsive data from each computer custodian (using appropriate forensic methods to ensure authenticity and avoid inadvertent spoliation), conduct useful searches across the universe of data, open and print all documents (with attachments) for review as to privilege and responsiveness, Bates number and redact portions of data as appropriate, insert slip sheets and produce to the opposing party within the strict timeline for production. This means the producing party must own or purchase licenses for all of the applications in the entire set of potentially responsive data. Inevitably, password protection, encryption, and file corruption issues will appear and need to be addressed.

Today responding parties are using automated systems to search for and produce electronically stored documents. Typically parties retain a computer expert to convert the data to

a read-only format such as .pdf or ".tiff" (tagged image file format) in order to ensure authenticity. This allows documents and e-mails, including all attachments, to be produced rapidly without the need to open the file in its original format. It also permits documents to be automatically Bates numbered and "branded" with overlays in the margins (e.g., "Confidential" or "Work-Product") if desired. In this process the data remains in electronic form throughout thereby saving considerable time, space and expense.

### **Data “Culling” –Better than Keyword Searching**

One revolutionary advancement in document handling is in data culling, or the elimination of file redundancies and keyword searching. Although the percentage of redundant electronic documents or e-mails in the typical production varies widely, it is safe to say that approximately 30% is the average and the time and costs savings are virtually always significant. Consider how often e-mails are sent to multiple recipients, either directly or via e-mail's electronic version of a "carbon copy." Then imagine the number of documents that are attached to e-mails, which already appear somewhere on a particular user's hard disk or on the network hard disk. Add to that the number of e-mails and other documents that have been preserved multiple times via tape backup on the network, and it becomes clear that this technology is radically changing the way document productions are handled.

Perhaps the most revolutionary of all new techniques in document searching and management are web-based document viewing tools and repositories. These systems allow attorneys and paralegals to search and view the e-mails and other electronic documents related to a particular case from their own office via the Internet. Typically users can redact, highlight, create notes, flag, and print documents in such a system using a connection that is designed with multiple security features. In addition, co-counsel in different cities or even different countries

can share documents using the repository, allowing unprecedented ease in coordination of claims or defenses.

### **High-Tech, Low-Clutter Litigation**

The technology available today clearly permits lawyers to better manage the investigation and discovery stages of litigation. The benefits, however, reach far beyond that. Whether filing documents in support of an affidavit or memorandum of law, or presenting evidence at trial, attorneys can now simply search, import, attach and transmit documents electronically that once required sorting, re-typing and photocopying. Today's advances have revolutionized litigation, from the way a case is investigated to the way pleadings are filed and beyond.

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