

Juggling the Worlds of Paper and Electronic Discovery¹

How can outside counsel make sure they are comprehensive in their search for information while minimizing costs?

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Introduction

It's 9 p.m. and you're set to gather up your files, undock your laptop, and head home after a long day drafting responses to the opposing party's discovery requests due the next day. For the past few weeks, you've peered through hundreds of boxes of documents and old computer equipment for information relevant to the plaintiff's requests, which seek "e-mail and other electronic communication, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, Internet usage files, and network access information."

All you really want to do at this point is go home and grab a late dinner when the president of the company you represent is on the line. "I just remembered we have a shed full of old 386 computers in a storage facility on the other end of town," she frantically tells you. "We got these computers when we first opened the business in the early 1980s."

You try to calm the company executive by telling her that certainly nothing relevant – much less incriminating – will be found. Surely, you tell her, the systems are too old to be searched for pertinent information. Besides, you mention that the company wanted to save money, and digging around in more places where old or irrelevant information may exist would certainly not achieve her goal.

While it's easy to ignore "hard to deal with" media types, such as out-of-date backup tapes, antiquated PCs or hot-off-the market personal digital assistants or electronic tablets, many times these media sources are where the smoking gun documents are located.

No longer is it appropriate to hide behind the technology, claiming that the systems are too antiquated, damaged or burdensome to be searched for responsive documents and emails. There are a vast number of experts that are well-equipped and professionally trained to assist you.

In fact, courts are now recognizing the ease in which relevant electronic data can be collected, reviewed and produced. Attorneys who have stayed clear of that CLE on e-discovery and made a point of not getting "up to speed" on the issue or who think that merely sending a preservation letter to their clients meets the burden may face unsympathetic judges in the halls of justice.³ Take, for instance, the stern instructions

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³ For example, in a labor dispute case, *Metropolitan Opera Assoc., Inc. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003), the defendants failed to comply with discovery rules, specifically failing to search for, preserve, or produce electronic documents. The court found that defense counsel: (i) gave inadequate instructions to their clients about discovery obligations; (ii) disregarded that the defendant had no document retention system; (iii) delegated document production to a layperson, who was not instructed as to the scope and procedure of producing documents; and (iv) blatantly disregarded the courts' and plaintiff's repeated discovery requests by responding with baseless representations that all

given to the defense lawyers by U.S. District Judge Shira Scheindlin in *Zubaluke V*: “Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” Indeed, attorneys have a duty to monitor preservation compliance – or face penalty from the bench, including judicial sanctions, ethical violations, and malpractice claims.

Now, more than ever, it’s important for outside counsel to identify all potential places for relevant evidence – evidence that resides in both the paper and electronic worlds. But how can outside counsel make sure they are comprehensive in their search for information while minimizing costs? Remember, outside counsel are supposed to be the expert.

First, outside counsel need to make sure they are thorough in the collection of potentially discoverable material – whether in paper or electronic form. Second, they should make sure their review of the combined universe of discoverable paper and electronic documents are conducted through a single discovery expert, minimizing the amount of time outside counsel would otherwise have to spend in “managing” a large-scale project and in keeping track of who has what documents – and in what form (paper or electronic). Doing so, could potentially slash costs incurred by clients in half. Keep in mind that more than 90 percent of all documents are created in electronic form. Thus, those documents which are in paper form probably originated from an electronic source, thereby tremendously increasing the probability of duplicates between your paper and electronic collections. Last, as outside counsel, you must manage the production process, ensuring that the responsive documents are turned over to the opposing party in the agreed upon format and in the appropriate time frame.

Where’s the Evidence?

From both a substantive and an administrative standpoint, discovery – especially the discovery of documents – has always been a crucial part of any litigation. Document discovery represents one-half of the litigation costs in the average case and up to 90 percent of the costs in an “active” discovery case.⁴ Lawyers spend, on average, more time on discovery (16.7 percent of their time) than on conferring with clients, working on pleadings, negotiating settlements, or conducting legal research.⁵ Of the most frequently used discovery devices, document production outranks the use of depositions, interrogatories, and the like.

All discovery documents should be treated equally – whether in paper or electronic form. To best understand the landscape of a case, attorneys need to see a comprehensive snapshot of all the evidence to start developing a theory of the case. Much the way individual puzzle pieces seem indistinct when disconnected from the whole puzzle, the true story of a lawsuit rings clear only when all of the evidence in a case comes together.

For example, if a company’s president is involved in insider trading, emails between the president and a family member indicating that “all of our financial dreams will come true” and Web searches for lavish homes or vehicles might be relevant in building a case of wrongdoing. However, when accompanied by hardcopy receipts of actual stock sales, bank account records, and voicemails to the stock broker, the case against the company president becomes infinitely more formidable.

documents had been produced. The court granted severe sanctions, finding liability on the part of the defendants and ordering the defendants to pay plaintiff’s attorneys’ fees necessitated by the discovery abuse by defendants and their counsel. Other common law sanctions for improper handling of e-discovery have included: adverse inferences, dismissal or default judgment, restrictions on admissible evidence, assignment of costs, or monetary penalties.

⁴ Administrative Office of the United States Courts, *Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls* <<http://www.uscourts.gov/ttb/oct99ttb/october1999.html>>

⁵ David M. Trubek et al, *The Costs of Ordinary Litigation* <<http://polisci.wisc.edu/~kritzer/research/CLRP/clrp.htm>>

But, first, where should one look for the different kinds of evidence?

Paper Documents: Where to Look

The law office still isn't a paperless environment. Discovery teams still must focus their efforts on paper – paper in filing cabinets, paper in boxes, paper in warehouses, offshore paper, and even paper that blew off a table and slid behind a bookcase. In fact, failing to continue to recognize the importance of paper documents in an increasingly electronic environment will cause counsel to miss out on about a third of business documents as more than 90 percent of business documents are now being created electronically⁶ with only 30 percent of those documents ever being printed.⁷

Thus, counsel needs intricate knowledge of all of the locations where paper evidence could be stored, or in some cases, hidden. This will often involve one or more sweeps of all physical locations containing potentially relevant documents.

Electronic Evidence: Where to Look

Contrary to the belief of some attorneys who hold out hope that they won't have to master the universe of issues relating to e-evidence, the simple reality today is that electronic documents are every bit as discoverable as paper documents. Although there is much unsettled law in the area of e-evidence, this is the one inescapable truth: e-evidence is discoverable and practitioners must be prepared to request it, respond to requests for it, and ultimately produce it.

Counsel facing discovery of electronic evidence must become well versed in the many places where data resides – desktops, laptops, servers, floppy disks, CD-ROMs, DVDs, and backup tapes, just to name a few of the common locations. The difficulty with electronic evidence is that the storage locations are virtually endless, and with the development of new technologies, e-evidence types are changing almost daily. It goes without saying that this complexity and sheer volume of information makes finding and retrieving electronic evidence a bit more challenging.

Take, for instance, the number of pages that can be easily stored on the following media:

Where Data Lives	Average Page Count
40-GB Backup tapes	Approx. 3.5 million pages
15-GB Hard Drive	Approx. 1.25 million pages
80-GB USB Drive	Approx. 2.5 million pages
4.7 GB DVD	Approx. 411,250 pages
625-MB CD	Approx. 55,000 pages

Yet, despite the incredible amount of potentially relevant information that could be located on these common storage devices, attorneys need to be aware of other likely places where discoverable information can exist and what kinds of electronic data should be located.

The depth and breadth of this category of electronic evidence sources runs the gambit of technology's latest and greatest developments – personal digital assistants (PDAs) with and without email capabilities, cell

⁶ Crane, Kevin, *Designing a Document Strategy*, McGraw & McDaniel Group, Inc. (2000).

⁷ Hawkins, Dana, "Office Politics in the Electronic Age", *US News & World Report Online* (February 2000).

phones with email, text messaging or other computing functions, BlackBerries, and instant messaging programs. These “outside of the box” technology gadgets should not be left behind when the hard drives and backup tapes are gathered for discovery.

Instant Messaging

Perhaps first widely used by teenagers wanting to quickly communicate with friends, instant messaging has now entered the workplace, leading to new discovery challenges as well as opportunities. Providing real-time convenience and conferencing capabilities, instant messaging, or IM, creates a written business record that may be subpoenaed and used as evidence in litigation or regulatory investigations.

According to the e-Policy Institute, up to 90 percent of businesses are already engaged in some form of IM, including 25 million employees who are using personal IM tools to communicate via public networks without management’s knowledge, IT’s approval, or written rules or policies in place to reduce liabilities.⁸

With email usage expecting to decline by 40 percent by 2006 as a result of increased IM use, the impact of IMs on litigation will only become more significant.⁹ For example, in *State v. Voorheis*, 2004 WL 258178 (Vt. Feb 13, 2004), the appellate court affirmed the trial court’s finding that “instant messaging” text was sufficient evidence to support the defendant’s conviction of incitement and attempt of use of a child in a sexual performance. The State introduced evidence recovered from a computer forensic examination of the computer system and floppy disks taken from the child’s home. The computer forensic expert recovered text from “instant messaging” conversations in which the defendant discussed with the child’s mother a plan to have a lewd photo shoot. At trial, the expert noted that instant messaging is not usually saved on a computer and that saving it to floppy disks required “concentrated effort.” Based on the instant messaging evidence, the jury found the defendant guilty. The defendant argued that the instant messaging text was “meager evidence” of guilt, since the text had allegedly been altered and edited. The court rejected this claim finding that the retrieved electronic conversations, together with witness testimony, offered ample evidence to support the jury’s findings.

Employees who destroy instant messages and other evidence after they learn about a lawsuit or investigation put the organization and themselves at risk of civil and criminal penalties. Attorneys should make sure they inform their clients to hold onto instant messages that are related to a lawsuit or an investigation and that would otherwise normally be disposed of in the course of business.

Where are instant messages located? There are applications that capture and store IMs as they are transmitted and are typically part of the backup and retention protocol of the organization. It will be imperative to question the client’s IT professional as well as the IT professional of the opposing party at the 30(B)(6) deposition to determine whether that information is in a harvestable media format and, if so, if it is being preserved.

Text Messages

No single case has brought more attention to text messages than perhaps the Kobe Bryant case.

In the sexual-assault case, the judge in June 2004 released to defense attorneys cell phone text messages among the accuser, her former boyfriend and an unidentified third person sent in the hours after her

⁸ E-Policy Institute, *Thirty-Two Instant Messaging Rules: Best Practices to Keep You in Business and Out of Court* (available at <<http://www.epolicyinstitute.com/imr/32rules.pdf>>) (accessed August 4, 2004).

⁹ E-Policy Institute, *Thirty-Two Instant Messaging Rules: Best Practices to Keep You in Business and Out of Court* (available at <<http://www.epolicyinstitute.com/imr/32rules.pdf>>) (accessed August 4, 2004).

encounter with the basketball star. Calling these text messages “relevant,” District Judge Terry Ruckriegle turned the text messages from AT&T Wireless over to prosecutors and the defense team.

Criminal cases in Europe and Asia have hinged on text message evidence, but the Kobe Bryant case appears to be among one of the first in the U.S. in which the material could play a pivotal role.

Typically, information about text messages – such as the sender, recipient and location of sender – is stored for billing purposes. The software used to store that information can also store content of those transmissions. In the case of Kobe Bryant, the text messages were likely retrieved from the phone company’s archival storage system more than four months after the alleged incident.¹⁰

BlackBerries and other PDAs

There are two types of BlackBerry devices: the Exchange Server Edition is meant for use in a corporate environment while the Internet Edition works with various POP email accounts. With the Exchange Server Edition, the email is transmitted to the device through the company’s Exchange Server. Thus, any email traffic sent or received via this communication is passed through the Exchange box and captured on the company’s Exchange Server. These emails presumably are backed up as part of the organization’s retention policy.

The alternative device provides that a separate ISP or POP email account is established by one of the several providers that support the device. This communication may or may not be captured by a corporate server, such as Exchange, depending on how the device is configured.

BlackBerry devices share the same evidentiary value as any other PDA. A delete is by no means a total removal of data on the device. However, a BlackBerry’s always-on, wireless push technology adds a unique evidentiary concern. Changing and updating data no longer requires desktop synchronization. In fact, a BlackBerry doesn’t need a cradle or desktop connection to be useful. The more time a BlackBerry spends with its owner, the greater the chance that the data contained therein is different than what is contained on the user’s synced hard drive. In this situation, an individual’s BlackBerry could more accurately reflect and tell the story about that person’s activities.

Personal Home Computers

The employees and executives of most corporate clients and those of the opposing side often check and review email from home. This is a great resource for electronic discovery. Within the corporate setting, email communications are typically set up on a backup retention schedule. The most frequently seen destruction schedule for email is generally 30 days. However, keep in mind that if an individual is using a laptop computer or a home computer to review emails, that system isn’t part of the corporate retention policy and the data may still be ripe for harvesting. Courts in the past have not hesitated to order discovery of individuals home computers where relevant information is likely contained therein.

Former employees

In the years prior to computers, departing employees, especially secretaries, administrative assistants and executives who would leave an organization would load up a dolly full of boxes of their records. Some of these records consisted of forms that they had created over the years that they would merely use over and over again and may be helpful for their next position. These employees aren’t necessarily “stealing” trade

¹⁰ Associated Press, *Think Before You Text: Wireless Messages Show Up in Court* (available at <<http://www.cnn.com/2004/TECH/ptech/06/07/text.messaging.records.ap/>>) (accessed August 4, 2004).

secret information. Rather, they are just taking their working papers so that they can use them at their next job so that they don't have to recreate the wheel. However, today, this information may be leaving the organization on a drive that is the size of a tube of lipstick, also known as a lipstick drive, pen drive, thumb drive, USB drive or flash disk. A flash disk today can support more than one gigabyte of data. This information, too, isn't part of a document retention policy and may be available if the document they kept as a "form" was the document that is needed to prove or disprove a particular claim.

Administrative Assistants

In the paper world, attorneys would ask for an individual executives "chron book," a binder that contained all of the written communications from an individual. Now keep in mind that this individual didn't necessarily draft these documents themselves. Instead, an administrative assistant or secretary would type up all of the letters, contracts, memorandums, etc., and place a copy in the "chron book."

Things today have not totally changed. Many executives are still having administrative assistants and secretaries draft documents for them. But today it is in the form of an email communication. Attorneys frequently see situations where the secretary prints off the executive's emails, delivers them to the executive for review and response, and then types the response for the executive, much like in the paper world. However, if attorneys are looking to harvest information from an individual computer that typed the communication, it will most likely reside on the administrative assistant's or secretary's computer – not necessarily that of the executive.

ISP

All email communications must pass through an Internet Service Provider. Every corporation or law firm that has email traffic has a contract with an ISP, even if it is just a Hotmail account. Internet Service Providers are potential locations for electronic communications. The problem that arises is that the life of this communication on the various ISP servers varies by ISP as they work diligently to reduce the amount of time that these communications are maintained on the system. There can be issues in collecting data from an ISP; if not properly done, sanctions and a potential suit for violation of privacy may arise.¹¹

Time of the collection

Attorneys have always looked at ways to avoid discovery or at a minimum put it off until later. When receiving a summons and complaint, attorneys contemplate whether they can demurrer to all or part of the causes of action, challenge the service, or, reluctantly prepare a general denial or answer where appropriate. In the electronic world, such conduct might lead to a spoliation sanction which range from monetary sanctions to an adverse inference instruction at the time of trial to a summary judgment. Most corporations have a very short retention policy with respect to electronic data. Essentially what this means is if you think that you have a cause of action against a company, attorneys should consider serving the company with a preservation letter directing that all electronic communications regarding a particular employee, subject, etc., is preserved even before taking the time to draft a summons and complaint.

Now that all of this data has been collected, how do attorneys comprehensively review all of the electronic and paper documents given that a majority of the paper documents may be largely duplicative? After all, the paper documents probably originated in electronic form and reside in the electronic information that was also harvested.

Two Universes of Documents Don't Have to Mean Increased Expenses for the Clients

¹¹ See *Theofel v. Farey Jones*, 341 F.3d 978 (9th Cir. 2003).

From a historical perspective, businesses and individuals today are in the midst of a palpable and inexorable communication revolution from hardcopy to electronic. We live in a world in which both hardcopy and electronic documents co-exist. As little as 20 years ago, paper documents largely (if not completely) made up the key documents exchanged by parties in discovery. Electronic documents and email were rare, and certainly not considered the best source of evidence in litigation. During this time, paper automation technology became more advanced, helping producing parties review the volumes of potentially discoverable paper documents more efficiently. As a consequence, nearly every litigation support professional has likely had the opportunity to work with a paper discovery expert for scanning, coding, and OCR services.

Move ahead 20 years into the future, and it is safe to say that electronic documents will make up most of the key material for discovery in any given case. However, in today's legal discovery climate, the fact remains that litigation teams must actively and simultaneously manage both paper document collections and e-document collections. Simply put, law firms must have effective solutions for both paper and electronic data. The advantages of an integrated and unified solution are certainly compelling, and they all point to one clear fact: attorneys can save their clients money by reviewing paper and electronic documents together.

Streamlined Administration

Among the more mundane but nonetheless important reasons to consider an expert that handles both the paper and electronic discovery work together is the reduction of administrative headaches. If a law firm selects a single, specialized expert who offers both e-discovery and paper discovery services, the law firm and its client will likely realize many administrative advantages.

First, the initial expert selection processes of interviewing outside experts and discussing project details will be cut in half with a unified vendor approach. The number of meetings, phone calls, demonstrations, conflict checks, and other non-billable tasks will be drastically reduced and will result in a potentially tremendous time – and cost – savings. Additionally, the “learning curve” to get both the litigation support department as well as the attorneys on the case up to speed and moving forward will take place in a more seamless manner using a unified discovery approach.

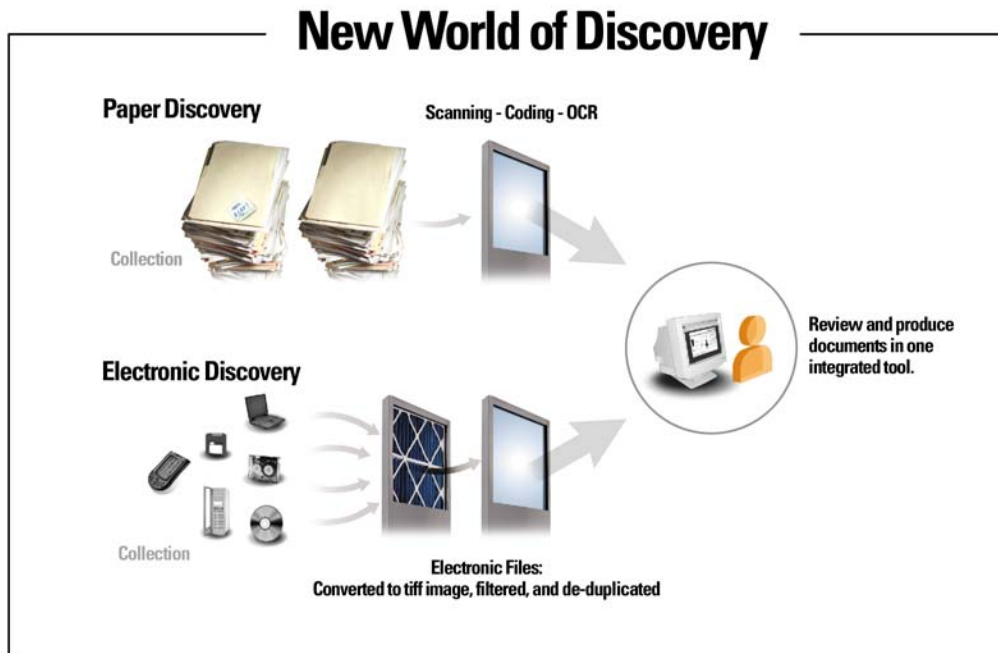
These benefits carry through to a second similar administrative advantage. Once an expert is selected, the logistics of commencing the engagement will be streamlined significantly. One set of contracts, one statement of work, one project scoping sheet, uniform milestone reports, and other standardized forms can be used. In addition, conference calls and on-site visits to the expert will be cut entirely in half.

A third advantage of using one expert for both paper and electronic productions is simply better coordination. Fewer “cooks in the kitchen” will promote smoother transitions in everything from the client's IT personnel (or whoever is doing the document collection), to the expert's final billing and invoicing work, and everything in between that is so crucial to a project's success. One could even argue that there is less risk for error given the more focused approach from the law firm, the client, and the expert.

Single Review Tool

When the document review team gathers all of the documentary evidence – whether paper or electronic – in one location, the attorneys can develop the most solid theory of the case. Grasping a solid understanding of the evidence in the discovery phase of litigation will assist attorneys in every other step in the litigation. From motion practice to depositions and trial, lawyers will be better prepared if they have a full picture of all of the documentary evidence.

Paper and electronic documents alike need to be gathered and integrated together for document review and production. Let's face it – paper and electronic documents are not created in a vacuum. As we peruse our email in the morning, we typically print off important messages and the corresponding attachments, scribble a few notes, and add them to a file folder to take to a meeting. When reviewing this evidence, it makes sense to be able to review the email message and the paper file at the same time. Discovery experts are quickly developing such integrated document review systems that do just that – allowing litigation teams the ability to seamlessly review, categorize, redact, and produce paper and electronic documents at once.



Attorneys should capitalize on the advancements in the document discovery marketplace, including the use of electronic document review solutions. Most have already seen the benefit of electronic document review. Attorneys save time – and their clients save money – by searching, categorizing, and producing documents in an electronic format.

Using a document review tool that integrates all of the documentary evidence – paper and electronic alike – will not only help the litigation team see the big picture of the case more quickly, it will save clients time and money. By combining paper and electronic documents, counsel will be able to search the entire document set. Reviewers will also be able to concept search across the entire universe, allowing lawyers to compare the themes throughout a document set and find and compare similar documents. The litigation team will also be able to categorize, redact, and organize the document set for production in one process. In most cases, the timeframe for review is significantly abbreviated.

Cost Savings

If the litigation team chooses the alternative to an integrated paper and electronic document review database, counsel and the client will need to understand the various implications. First, managing separate paper and electronic process platforms and review databases can be unwieldy from an administrative

perspective. But perhaps even more important are the cost considerations. Law firms will deal with two sets of technology infrastructure that likely will not have overlapping hardware and software requirements. They will also have to deal with two vendors and eventually need them to work together should they decide to collate the data into one litigation support database. Lastly, counsel will likely expend more attorney review time and litigation support management time to handle separate data sets. Conversely, law firms and clients will likely save costs and reduce the potential for crisis by using one specialized discovery vendor for all of their document discovery needs.

Conclusion

The high-stakes and fast-paced world of litigation simply demands the very latest technology and the most proficient practices available. Lawyers and the litigation support professionals they oversee are judged by current and prospective clients on their ability to cost-effectively manage several different aspects of litigation. While skills in conducting a forceful cross-examination, drafting compelling legal memoranda, or persuading a jury are central to any case, counsel's ability to do so often hinges on their ability to orchestrate a comprehensive, efficient, and accurate review of hardcopy and electronic discovery documents.

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