

# CALSM NEWS

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## CHICAGO ASSOCIATION OF LITIGATION SUPPORT MANAGERS

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### A New World of Discovery: Integrating Paper and Electronic Document Productions

by David H. Schultz and Michele C.S. Lange

The vast majority of litigation support professionals today believe that best practice for managing the wide array of litigation support needs of a given case is to work with multiple third-party experts and vendors. Law firms typically seek best-of-breed specialists in each of the areas requiring outside assistance in order to gain every possible advantage against an opponent.

Many paralegals and litigation support managers have experienced first-hand the perils of working with a single generalist vendor for tasks which require a much higher degree of expertise than these generalist vendors can offer.

The specialized vendor approach is certainly appropriate for many of the varying support needs in a typical litigation matter. For instance, a copy vendor specializing in high-speed and entirely conventional photocopying, a trial presentation/graphics specialist, and a jury consultant all must have very different backgrounds, tools, and experiences in order to

provide the absolute highest level of service in each of their core competencies.

But this may all change when it comes to discovery.

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<sup>1</sup>. 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<sup>2</sup>. Of the most frequently used discovery devices, document production outranks the use of depositions, interrogatories, and the like.

Like other commonly outsourced areas mentioned above, outsourced document discovery work has traditionally been split between paper and electronic discovery experts. In the past, lawyers and litigation support professionals have simply been content to live with two separate processes to collect, process, and review different discovery materials. After all, one universe of materials usually exists as paper documents while the other originates

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### Calendar of Upcoming Litigation Support Events

September 16-17, 2004 -- E-Discovery Certification Course, hosted by Kroll Ontrack at their company headquarters in Eden Prairie, MN.

Register at  
<http://www.krollontrack.com>.

September 20-21, 2004 -- Illinois E-Discovery Workshop, hosted by KrollOntrack at the Westin Michigan Avenue Hotel in Chicago.

Register at  
<http://www.krollontrack.com>.

October 20, 2004 -- CALSM Meeting. Topic: Roundtable discussion with guests on intelligent database searching.

November 17, 2004 -- CALSM Meeting. Topic: Management issues, such as recruiting, training, creating customer service driven departments in a high-pressure environment, and dealing with stress.

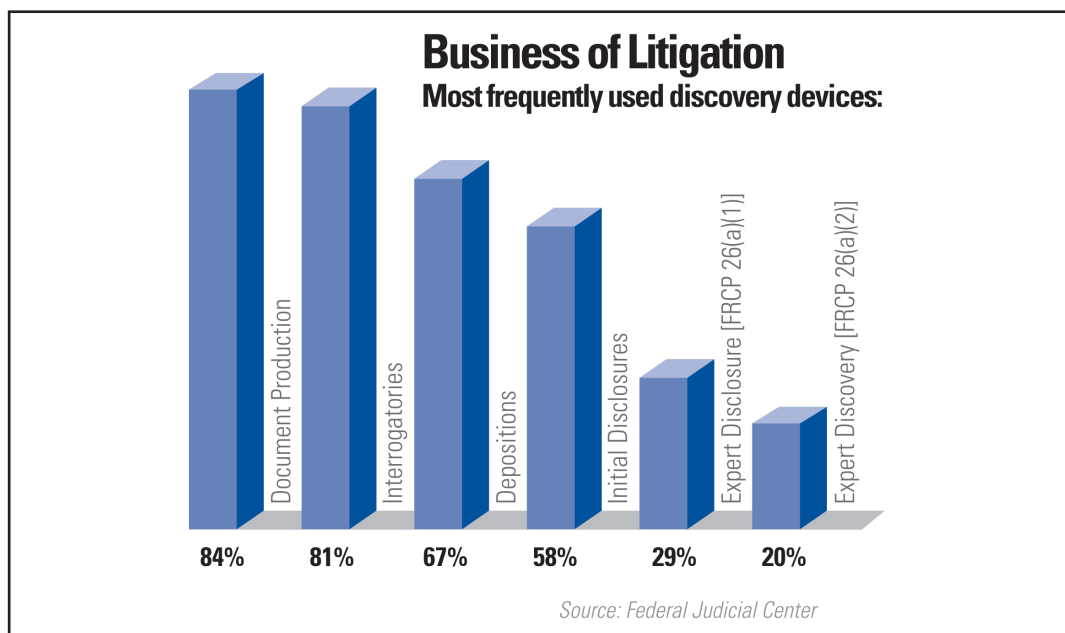


Figure 1

electronically, often with no corresponding paper cousin.

This dual vendor approach may previously have been justified as the processes for paper and e-discovery had little or no overlap just a few years ago. However, with the recent e-discovery tidal wave - and with no perceived let-up in sight - many generalist vendors have jumped on the e-evidence bandwagon. Chicago, for example, is replete with copy shops, scanners, document storage firms, and trial presentation vendors who now claim to know how to handle e-discovery. The trend in the marketplace with respect to specialist shops, however, is a merging of paper and electronic discovery work by more experienced experts with larger processing capacities. In essence, these vendors specialize in one thing - document discovery.

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 are crucial in discovery. 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 vendor 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 support professionals 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.

**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 vendor that offers both e-discovery and paper discovery services, the law firm and its client will likely realize many administrative advantages.

First, the initial vendor selection processes of interviewing vendors 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 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 a vendor 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 vendor will

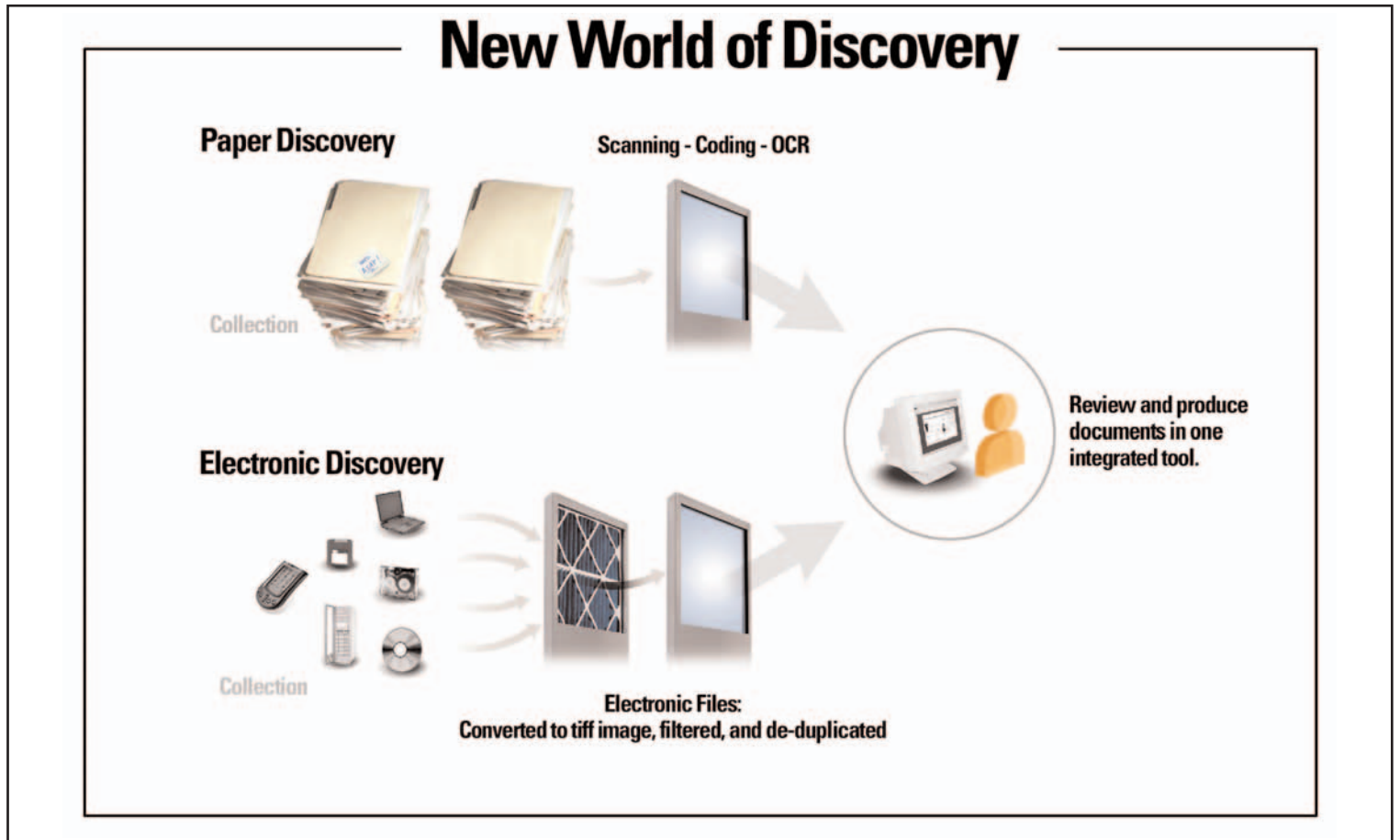


Figure 2

be cut entirely in half.

A third advantage of using one vendor 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 vendor'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 vendor.

Lastly, the production itself will be done in a consistent manner. Terminology will be consistent, as will the form of the output for review and production.

### **Gathering all of the Evidence**

All evidence should be treated equally - whether in paper or electronic form. Working with a single specialized discovery expert will not only ensure streamlined administration of electronic and paper discovery but, perhaps most importantly, it will collate all of the evidence in a case in one centralized depository or database. 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 becomes 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.

For these reasons, when the document review team gathers all of the documentary evidence 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 the attorneys in every other step in the litigation. From motion practice to depositions and trial, the lawyers will be better prepared if they have a full picture of all of the documentary evidence.

In practical terms, this means that 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 to seamlessly review, categorize, redact, and produce paper and electronic documents at once.

Litigation support professionals 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 abbreviated significantly.

### **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. Litigation support professionals, lawyers and entire law firms are judged by current and prospective clients on their ability to 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 the litigation support professionals ability to orchestrate a comprehensive, efficient, and accurate review of hardcopy and electronic discovery documents.

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### **FOOTNOTES**

<sup>1</sup> Administrative Office of the United States Courts, Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls <http://www.uscourts.gov/tb/oct99tb/october1999.html>

<sup>2</sup> David M. Trubek et al, The Costs of Ordinary Litigation <http://polisci.wisc.edu/~kritzer/research/CLRP/clrp.htm>

## Document Production Checklist: Questions to Ask Yourself and Your Attorney

by James B. Salla

Document discovery is the least glamorous and exciting phase of litigation but arguably the most important. The documents you produce to opposing counsel, and the documents they produce to you, lay the foundation upon which an entire lawsuit will be built. A properly managed document production will let your attorneys stand on solid ground before the judge.

A badly managed document production can cause endless delays, complications, cost overruns to the client, and embarrassments to you and your firm. There are many different ways to manage a document production but no absolutely universal "template." What follows is a checklist of questions to ask yourself and your attorneys when you start to work on a production.

In putting together these questions, I have tried to cover the major issues that may arise during complicated discovery projects.

1. How large is the production expected to be? How many boxes of paper documents or CD's of images or electronic files will need to be reviewed and produced? Will we need our own case room?

Obviously, all of these questions are interrelated. In general, I have found that the sheer amount of paper to be produced is the most important single factor determining how a case will be managed. One scenario: A product negligence case comes before a judge and during the initial exchange of discovery request, the parties' counsel determine that approximately fifty boxes of documents will need to be produced. "Very well," the judge says, "I will give you one year to exchange paper and conduct depositions. Fact discovery closes one year from today." Fine, you think. Our dedicated young associate, fresh out of law school and eager to work late nights, can review fifty boxes in time for depositions, and as an experienced paralegal, perhaps working with an established coding vendor, you can maintain good control over the files. And how many privileged documents can their really be in a mere fifty boxes, anyway? Putting together a draft privilege log shouldn't be that onerous.

Consider a second scenario: A second, more complicated, product negligence case comes before the same judge in the same court. This

time, counsel determine that to carry this lawsuit to trial, five hundred boxes of documents will need to be produced. Is the judge going to give the parties ten years to complete their fact discovery? Not very likely. In all probability, the parties in the second scenario are going to be given about a year for discovery. Figuring out how to get through five hundred boxes in a year isn't the judge's problem, it's

yours. Obviously, one associate -- no matter how eager and dedicated -- isn't going to be able to review all five hundred and keep up on the rest of his case load. You will need a team of associates, fitting in review time whenever they can. Do they all understand the issues involved in the case? Are they all communicating and recording important discoveries in the same, consistent way?

Five hundred boxes of paper probably means a lot more witnesses to be deposed. Obviously, one paralegal will not be able to put together every witness file in the case, especially not when you have a six-week trial starting in another case. Do you hire temps? Do you ask your vendor to get the entire five hundred box collection imaged and OCR-converted? Can you justify that expense to the billing partner before you've even had a chance to look at the documents?

And then you discover that a third of these five hundred boxes come from your client's in-house law department. A rough estimate indicates that your eventual privilege log will have six thousand entries...

2. When will the client originals arrive? What is our deadline to start producing some of the documents? What is our ultimate deadline to produce all of the documents?

3. What do we mean by "produce"? Do we plan to Bates-label and copy for opposing counsel all non-

privileged, responsive documents? Or are we going to show a large collection of non-privileged, responsive documents to opposing counsel and ask them to tell us which documents they want copied?

REMEMBER: A document is legally "produced" when it is shown to opposing counsel for purposes of complying with discovery. Even if opposing counsel does not ask for a copy of a particular document, it has been produced to them if they saw it as part of their document review.

Now, opposing counsel may still cry foul if your attorneys use that document at a deposition. For that reason, you need to keep track of which client documents were actually shown to opposing counsel when they came to visit. In my opinion, the ideal solution is to Bates-label every document produced to opposing counsel and only those

### Making Page Estimates of Paper Documents

- one storage box** comes to approximately 2,000 to 2,500 pages
- one transfer box** comes to approximately 4,500 to 5,000 pages
- one vertical file drawer** comes to approximately 3,500 to 4,000 pages
- one lateral file drawer** comes to approximately 4,500 to 5,000 pages
- open shelving** comes to approximately 1,500 pages per linear foot
- unbound paper** approximately 100-135 pages per inch

Source: Compulit

### Making Page Estimates of Electronic Evidence

- 3-inch floppy disk** can print out approximately 75-250 pages
- Zip disk** can print out approximately 5,000 - 20,000 pages
- full CD** can print out approximately 50,000 pages
- Jaz drive** can print out approximately 150,000 pages
- DVD** can print out approximately 350,000 pages
- DAT tape** can print out approximately 300,000 to 1.5 million pages
- Travan tape** can print out approximately 1.5 million pages
- DLT tape** can print out approximately 3-6 million pages
- Super DLT** can print out approximately 4-9 million pages
- hard drive** can print out approximately 300,000 pages +

Source: Daticon

documents<sup>1</sup> produced to opposing counsel. But cost considerations may not make this possible.

More on this later.

4. Did counsel exchange any documents prior to the official start of discovery? Although such informal document exchanges are usually not Bates-numbered, you still need to keep careful track of what was exchanged. It may turn out to be important later. One method is to keep a separate file copy of each exchanged document.

5. Will our budget allow us to copy all of the client originals and work with the copies? Or will we need to review the actual originals? It is always safer to work with copies of client originals rather than the originals themselves, but when you are dealing with fifty or a hundred or five hundred boxes of files, the client may not be willing to pay for this extra margin of safety.

6. What will our Bates-numbering conventions be? In the simplest cases, documents produced by plaintiffs can be numbered with a "P" prefix and those produced by defendants with a "D" prefix. It is in every party's best interests to have an uncomplicated and unambiguous rule as to how documents will be numbered and prefixed.

7. Will we be producing documents already produced in another case? Are there already Bates-numbers on these documents?

When producing documents already numbered from another production, attorneys may want you to cover up the earlier Bates numbers. This can substantially increase your labor costs. If documents will be produced with the earlier Bates numbers, you should do some research to make sure that none of the Bates numbers in your case have the same prefixes as numbers in the earlier case.

8. What types of information will we be tracking in the production log?

You should always maintain a production log to keep track of important information about every production in the case. The log does not need to be complicated -- just the Bates range, date produced, party producing documents, and a place for comments are usually enough -- but the log should be kept up religiously. If you find yourself on one of the those cases that has a thousand little document productions rather than one or two big ones, the log will provide an invaluable history of discovery on the case. With a carefully maintained production log, you will quickly and easily be able to explain to your irate attorney that the hot document he just discovered didn't turn up in the witness file for Paul

Logan's October 15 deposition because opposing counsel didn't produce it until November 29, and magically his ire will turn from you to opposing counsel.

**RULE #1 for BATES-NUMBERING:**  
Never produce documents with duplicate or overlapping Bates numbers.

**VENDOR TIP #1:** Ask for all double-sided documents (with the possible exception of checks[footnote 2]) to be copied single-sided. This may increase your volume a little, but it makes the resulting production collection a lot easier to work with, e.g., Bates numbers are all on the same side of the page, the duplicating department doesn't accidentally copy every other page rather than every page, etc. Copy companies charge per impression, not per piece of paper. Asking for single-sided copies does not increase your bill. In fact, it may decrease your bill.

Copy companies charge different rates depending on the degree of difficulty of the job. Double-sided pages, paper of different sizes, lots of staples... all of these factors can increase the rate because of the increased labor costs to the vendor. A vendor may charge you a high rate to make the first copy set from a complicated set of client originals, but they should charge you a lower rate for any subsequent copies of the initial copy set, because the single-sided copy set is less labor-intensive.

**VENDOR TIP #2:** Always ask the vendor to itemize the invoice as much as possible. Ask them to include the Bates range of the documents labeled and copied on the invoice.

9. Ask about the "who" as well as the "where from," and note this information on the production log.

Often your client will be a large corporation, with dozens of officers and employees who have relevant documents

to submit for production. Whenever possible, try to find out which person's office a given set of documents came from, rather than just noting that they came from the client. If box and file labels don't make this obvious, ask about it specifically. At some point, one of your attorneys may call to say that he needs Assistant CFO Raymond Smith's personal chron file by early tomorrow morning. If you don't know which of the eighty boxes in your collection contain the files from Raymond Smith's office, you may be in for a long night.

10. Do your clients have any lists or indices of their files that they can send you in advance of the documents themselves? Don't put full faith in such lists - corporate record-keeping often leaves a lot to be desired - but don't ignore them either. These lists may tell you that something is missing.

11. Who will be paying for the copying and the Bates-labeling? Opposing counsel are usually asked to bear the cost of copying their own set of production documents. Sometimes attorneys will ask them to pay a portion of the Bates labeling costs. If opposing counsel is to pay for copying and labeling, try to make sure the vendor charges opposing counsel directly. This can save you a lot of hassles later on.

12. If we are receiving electronic files from the client, will they be in file formats that our in-house software can handle?

There are probably thousands of different file formats out there. The following web-sites can provide some assistance to identifying the names and characteristics of the different formats and determining which software applications will work with them.

13. If we are receiving electronic documents, are there chain-of-custody issues that would make it wise to use a third-party electronic discovery vendor?

14. In what form will we produce the client's electronic files? There are at least three possibilities, each with its own advantages and disadvantages: (1) Print them out and produce them as paper. (2) Hire a vendor to convert them to TIFF or PDF

images. (3) Produce them on CD in their original electronic format. If opposing counsel is savvy, they may require the third method. Printing out an Excel spreadsheet or converting it to TIFF images just gives you the numbers, not the formulas behind the numbers. Printing out an MS-Word file or converting it to TIFF images does not give you any tracked changes, metadata, or redline information.

15. If we produce electronic files in their original format, how will we number them or otherwise track them? How will we make sure that opposing counsel doesn't alter the files?

16. Should we create a standardized list of issues (and perhaps sub-issues) for our attorneys to use when reviewing documents? If we are working with co-counsel, what can we do to make sure our list matches theirs?

17. Can we start creating a standard list of document types for coding purposes?

18. Will our attorneys issue-code every non-privileged, responsive document or only those they think are significant or "hot"? If they only issue-code hot documents, will we only need to image and index those they designate as hot?

19. What privileges will be involved when we create the privilege log?

Obviously, "Attorney-Client Communication" and "Work Product" are the most common, but there are others, e.g., "Joint Defense," "Executive Deliberation."

20. Do we have a list of the client's in-house legal staff and outside counsel to help our attorneys determine which documents are privileged? If we update this list with new names, will we need to re-review the parts of the production that have already been reviewed?

21. If privileged and non-responsive documents will be physically removed from the collection - and that is probably the safest procedure - how closely will we need to track where a given pulled document came from?

In other words, if the judge later orders us to produce privileged document #307, and it came between Bates numbers GH 003578 and GE 003579, will we need to produce it as GH 003578A to follow the requirement that documents be produced in their original working order?

This question can lead to some frustrating cost-benefit analyses.

Without Bates numbering all the documents, privileged and otherwise, determining where each privileged page came from

requires a lot of time-consuming work on the paralegal's part. One alternative is to copy the originals and pull privileged documents from the copy set. Because the original set is still intact, it provides a record of exactly where each privileged page came from. Of course, if there are a lot of originals, the client may not be willing to pay to have a complete set made.

If you plan to image and electronically Bates number the documents before producing them, then the question becomes even more complicated. It makes a lot of sense to pull privileged and non-responsive documents from the collection before you send it to the vendor to be imaged. Why pay to have documents scanned and OCR'd if they aren't relevant and you never intend to produce them? And why take the risk that a privileged document might be

accidentally produced? If the vendor never received the privileged documents to begin with, no privileged documents could have been imaged and you can rest assured that none will be electronically numbered and produced.

But what if you are later ordered to produce some of the pulled documents in the original order? You've already pulled apart the client's original set and the original order is lost. Of course, you could make a copy set of the originals, but will the client be willing to pay both photocopying charges and scanning charges?

22. If there are a lot of duplicates among the privileged documents, will we need to de-dup the privilege log before producing it to opposing counsel and the court? What can we do to make sure that the same privileged document is not described in two or three different ways on the log?

23. If you are counting printouts of e-mails as privileged, responsive documents, will each message in an e-mail chain need to be logged as a separate privileged document?

24. How will we handle redactions? Will each individual redaction need to be stamped "Redacted" or will we only put the "Redacted" stamp once on each page on which redactions occur?

25. How will we tie produced redacted documents to their un-numbered privileged originals? Will the un-redacted originals need to be included on the privilege log?

26. Is there a protective order or confidentiality agreement in the case? Will we need to stamp selected documents "Confidential" or "Subject to Protective Order" or "For Attorneys' Eyes Only"? Will any vendors or temps working on the case need to sign acknowledgments of the protective order or confidentiality agreement?

### Online Guides to File Formats

<http://filext.com>

<http://www.jozy.nl/>

[http://www.webopedia.com/quick\\_ref/fileextensions.asp](http://www.webopedia.com/quick_ref/fileextensions.asp)

<http://whatis.techtarget.com/fileFormatA/0,289933,sid9,00.html>

CAUTION: Take particular care in working with MS-Outlook files. Sometimes such a file has unsent e-mail messages in its "Outbox" portion. Loading it directly into your computer may result in Outlook automatically sending these messages as if they were yours.

**REMEMBER:** Whenever you produce an electronic file in its original format you are giving opposing counsel more information than if you had produced a printout or TIFF image of the file.

27. Are exact duplicates of already-produced documents to be considered non-responsive? Sometimes, attorneys will decide that you only need to produce one copy of each document. Sometimes, the fact that a given document came from Morgan's files rather than Mitchell's files is considered important, and both copies will need to be produced.

28. Will file folder labels, spine labels on binders, and box labels be provided to opposing counsel or be withheld as non-responsive?

From the paralegal's point of view, the practice of Bates-labeling and copying file and box labels is very useful. Making an index of these produced pages gives you a sort of road-map to the collection. For example, if you are preparing for the deposition of scientist Andrew Jones, any documents produced from a folder entitled "Andrew Jones's working notes" would clearly be relevant, whether or not these documents mention Jones by name.

29. If opposing counsel will be visiting our office to review our documents, will they require a babysitter? What procedures will be followed? Will they tag the documents they want, or give us a list of the Bates ranges?

30. If we are using an expert witness, will we need to produce documents shown to the expert and communications to and from the expert?

31. Will we need to create a database or index from some of the produced documents? Which sections of the production will need to be indexed or coded? Do certain sections get higher priority?

32. What is the deadline or deadlines by which documents should be indexed or coded?

My usual rule of thumb for a large case is to assume that the attorney taking a deposition will need the witness file at least a week before the deposition itself and that it will take a week to create the witness file if all of the relevant documents have already been coded. This means that any collections of documents potentially relevant to Mr. Clark will need to be completely coded at least two weeks before Mr. Clark's deposition.

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**FOOTNOTES:**

<sup>1</sup> Occasionally attorneys will suggest Bates labeling all of the client originals before the actual review. I strongly advise against this unless all of the originals will be imaged and you can use your database application to create a hidden set of document Bates numbers that won't be shown to opposing counsel. Bates-labeling all of your paper originals before attorney review is a bad idea because it leaves you with an endless number of gaps to keep track of. Not only are these gaps a record-keeping nightmare, they give opposing counsel clues to what has been held back because of privilege or non-responsiveness.

<sup>2</sup> Cancelled checks should be copied so that the face of the check and the reverse appear on the same sheet of paper. Doing it this way makes it unambiguous which back-of-the-check stamps and handwritten marginalia belong with which check.