

Econtent and the Law Practice

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Before the advent of econtent, the process would have started with a paper memo and then required searching through boxes and boxes of paper documents to pull the relevant information together along with any appropriate legal information, like applicable case law.

As the profession increasingly moves to electronic documentation, the same objectives apply, but today an attorney working on a case typically sends a junior associate or paralegal an electronic memo directing him to search for all documentation relevant to a given case. The objective remains the same, but now the associate needs to search not only through the corporate electronic files—as well as any paper files that haven't been converted to a digital format—but also through econtent that resides on hard drives and email systems that are on any number of desktops, removable media, and file servers. This means that law firms need methods of archiving and tracking all of this digital material, as well as the ability to append other information to it as necessary.

As before, relevant case law also must be associated with case files, and again, this increasingly is done via econtent rather than through volumes of printed law books. LexisNexis tools, for example, enable attorneys and their associates to conduct searches simultaneously via its Total Search product, which examines internal econtent as well as existing pleadings, depositions, memos, deal documents and motions, cases, codes, news and businesses sources, as well as Shepard's Citations, which documents legal proceedings, including the latest rulings, amendments, and opinions.

Joe Swimmer, a former practicing attorney and director of LexisNexis Total Search who has witnessed first-hand the growth of econtent within the legal profession, says econtent usage is expanding rapidly as the profession increasingly shifts to digital documentation and away from paper. "You have to have validation that the statute cited is still good law," Swimmer says. "Even if the law is still valid, the attorney may need legal opinions that question certain sections of the law." Undoubtedly, the ability to keep up-to-date via digital content makes this process easier and more organized, but as many law firms are still transitioning from traditional paper-driven processes to digital ones, many challenges remain.

Ediscovery on the Rise

The need for such information often is driven by "ediscovery" requests by opposing sides in a court case. Discovery is a formal investigation—governed by court rules—that is conducted before trial. Discovery allows one party to question other parties, and sometimes witnesses. It also allows one party to force the others to produce requested documents or other physical evidence.

"The hottest areas in legal seminars are document management and ediscovery," according to Charlene Brownlee, senior counsel and practice leader of the records management solutions practice group at the international law firm Fulbright & Jaworski. "Outlook/Lotus Notes is not a records management system," she says, emphasizing that companies must define what records are before they begin to properly manage them.

Two-thirds of companies are tracking their electronic communications as a result of Sarbanes-Oxley regulation and subsequent court actions taken against firms that have purposefully or unwittingly destroyed email and related edocuments, according to Brownlee.

Yet there are still plenty of companies and law firms that have yet to install a full electronic discovery system, says Brad Harris, director of product manager for Fios, Inc., a company that provides ediscovery services. He says that these systems need to identify not only the relevant edocumentation, but also the chain of custody, a record of edocumentation viewers, and prevent inadvertent destruction. Negligent destruction of edocuments, particularly emails, can draw stiff penalties from the courts.

"Typically, companies have had a 'fire, ready, aim'-type of approach to ediscovery," Harris says. "That leads to a messy fire-fight when you have to locate something. By having an automated system in place, you know better where relevant documentation might reside." The need for such systems has grown so much that some firms, including Fulbright, have dedicated divisions that specialize in this part of the legal profession. There are also a growing number of private companies that specialize in ediscovery that work directly for corporations, under contract to law firms, or both.

Fulbright & Jaworski was one of 29 legal organizations to launch the Electronic Discovery Reference Model Project in mid-June. Formed to address inconsistencies in the electronic discovery market, the project's primary goal is to place a documented reference model in the public domain by May 25, 2006. The Electronic Discovery Reference Model (EDRM) will be designed to provide a common, flexible, and extensible framework for the development, selection, evaluation, and use of electronic discovery products and services.

Search and Destroy?

The terabytes upon terabytes of data located in emails, hard drives, and on the increasing types of removable media including floppies, flash drives, and even iPods, have produced a data environment in which companies can enter litigation with "mutually assured destruction" if each side insists on obtaining all electronic data from the other side, according to Ian Ballon, partner at Manatt, Phelps & Phillips and author of E-Commerce and Internet Law.

Therefore, firms of similar size tend to go into litigation in a spirit of détente in terms of ediscovery. One side typically won't go overboard in seeking econtent, knowing that doing so will bring retaliation from the other side, Ballon says. However, if one side is much larger, or if it's a case of a consumer or class-action plaintiff that has little or nothing in the way of electronic records that can be sought, then there still can be lopsided ediscovery requests. However, the legal system may reign in these requests on a case-by-case basis, according to Ballon. "The judge may limit the amount of ediscovery or may shift some or all of the cost of ediscovery to the requesting party."

In ediscovery, companies and law firms need to quickly identify any structured and unstructured data relevant to a case, says Mike Kinnaman, VP of marketing for Attenex Corp. So the company's Attenex Patterns software uses a linguistic engine on the back end to search electronic media for nouns and noun phrases. This enables Attenex customers to group together similar documents and to eliminate redundant ones, Kinnaman says.

"Each individual in a lawsuit can have as much as 2 gigabytes of documents," Kinnaman says. "So if you have five people involved, that's 10 gigabytes of information. That can be very costly." Typically, law firms have handled such issues by "throwing more bodies at it," but they are starting to catch up to other industries in using automated systems to managing these documents.

As Steve Lilley, SVP of ediscovery for iLumin Software Services, Inc., a digital archiving software company points out, "digital data is growing at 20% per year, so sometimes the value of the litigation is less than the cost of producing the documentation."

Only 5 to 20% of that documentation typically is needed for a case, Kinnaman adds. So edocumentation systems need to show the user where to find relevant content. Keyword searches aren't enough, Kinnaman adds, because they will still leave the user with mountains of data to sift through. By using noun and noun phrases to search instead, firms can better limit the amount of econtent they will actually review.

An effective content management system needs to capture all metadata as well as all content that appears on computers, removable media, laptops, servers, etc., Fios' Harris adds. A document management system has to do more than just manage econtent such as email, attachments, graphics, etc., that originate as electronic documents, Kinnaman says. The system needs to allow storage and search of econtent in its native format as well.

"In the last five years, there's been an evolution of document management systems," adds Paul Neale, EVP of DOAR Litigation Consulting. This is in part because older document management systems weren't designed to handle email.

Size Matters

Beyond the technology to accomplish the management and discovery of digital documents, law firms and their clients must also have policies for documentation retention. Whereas accounting and financial services companies have some strict regulatory definitions of how long documents must be maintained, the legal profession itself doesn't have similar rules, so that determination needs to be made on a case-by-case basis, says Neale.

Installing records automation isn't enough by itself, Fulbright & Jaworski's Brownlee agrees. She advises law firms and other companies to consider the nature of their business, the scope of federal and state document retention laws they must comply with, and what the company would need to do in the event of litigation. "The system can't rely on email management by a person sitting behind a desk," Brownlee says.

Fulbright designs retention policies for companies on an enterprise-by-enterprise basis. In the future, Brownlee expects firms to have a senior level executive in charge of records retention policies.

The better the retention policy, the more efficient the retrieval of appropriate edocumentation. Efficient retrieval is essential or can

cost an organization millions of dollars in searching for materials that may have been sent weeks, months, and even years ago, says Lesley Taufer, president of tech consultancy Boulder Corp.

Thus, companies need to have an automated system to date-stamp email and to automatically destroy it after a certain period of time—determined by each individual firm. "You need to advise clients, including law firms, on how to structure document retention policies," Neale says. "You'd be surprised to learn how many don't have a policy." Lilley from iLumin recommends that those policies include rules-based definitions of how to capture information from different sources and what to do with it upon receipt. Controlled access is another important element for these systems.

Of those law firms and companies that do have a document retention policy, the majority concentrate more on document retention than deletion, according to Neale. "As storage costs have come down, the inclination is just to buy more storage. They have a right to be concerned about improper destruction of documents."

The information may come in from various members of the legal team and other sources, meaning several different copies of the same file. So Neale recommends a system that identifies unique documents and eliminates duplicate material. "You don't need 5,000 copies of the same thing; you need only one," Neale says. "You need a system that streamlines information as it comes in. Every document needs to have a 'fingerprint' that makes it wholly unique." That tag should include information about the document including the desired retention period.

Paper Chase

Despite the move to email and attachments by law firms and their clients, there's still a proliferation of paper that needs to be incorporated into digital content management and storage systems. "The legal industry is still generating tons of paper," says David Wilner, president of Rhino Imaging LLC. Therefore, there are an increasing number of companies that offer digital archiving services, which scan documentation into digital formats for law firms and their clients.

Rhino started business in an 800-square foot office in October of 2003. By early 2005, the company had moved into a 4,000-square foot space, with a business volume growing at about the same rate as the office size. Wilner sees an increasing numbers of competitors as well. Many law firms are going to third parties for these services because they don't have the personnel in house to handle the scanning.

But digital imaging for the legal profession is more than an exercise in making electronic copies, Wilner says. Some documents or parts of documents are confidential. Others are limited to senior partners or other specific people. So the document scanning and archiving system must allow companies to limit views of econtent, the legal term for which is redaction. By tagging econtent for court, not in court, confidential, etc., Rhino Imaging helps its clients have access to the content they need while protecting sensitive information. Date stamps are included with the scans to facilitate searches. Rhino Imaging customers can also highlight different information and attach electronic "sticky notes" to scanned documents. The company also offers electronic hosting. Customers can go online to search the scanned images, which are secured by a PIN and password.

Another form of paper that still fits into many legal workflows is faxes. Clients still fax over numerous documents, which can mean delays in getting the paper to the right person, misplaced documents, and other inefficiencies, according to Joseph Visci, owner and president of Visci & Associates, a law firm that includes a real estate and tax practice. Many of the company's clients have faxes, but don't have the ability to send interest rate sheets, tax documents, and other materials via email.

"It's a very paper-intensive business; we're moving mountains of documents each day," Visci says. That mountain of documents would be impossible to scale, Visci says, if the firm didn't employ an automated system to turn faxes into edocuments. In mid-2004, the firm installed FaxCore's network fax software, which tracks, manages, and delivers faxes in as JPEG, GIF, PDF, or TIFF files via Microsoft's .NET platform. This is much simpler and less labor-intensive than scanning the faxes as they come into the office, Visci says. "It's a seamless system; everything goes straight into the computer." From there Visci can add his own notes and forward the material electronically within his office or to other locations.

Lost Content

Sometimes the econtent focus of litigation is content that should be sitting on someone's hard drive (or archive) and isn't—or at least doesn't appear to be. For example, one of Ballon's clients at Manatt, Phelps & Phillips, the plaintiff in a trade secret case, sought an electronic document that showed that a president of a company knew about a trade secret violation committed by one of his salespeople against Ballon's client.

While the defendant produced documents printed from a laptop, Ballon negotiated for the laptop itself. Once the judge awarded Ballon that right, he turned the device over to a computer forensics expert who was able to recover an erased email between the salesperson and company president discussing the trade secret and Ballon's client, which helped win the case. "The courts are

starting to impose penalties on companies for the willful or negligent destruction of documents," Ballon says.

Therefore, a company's edocumentation policies also have to determine what to do with metadata, adds Harris. For example, turning off "document tracking" in Microsoft Word means one no longer sees the changes made in a document. But if the document is emailed as an attachment to another party who turns on document tracking, all of those changes reappear. Some of the draft information can be legally damaging.

Some of the issues pertaining to edocumentation regarding retention, management, etc., may eventually be decided by the courts. Until then, law firms and other companies will want to review their collection, retention, and retrieval practices to ensure they can locate what they need in the event of any litigation.

Automatic Filing

It's not just the content that law firms and their clients control that is becoming more digital for better management and retrieval. The courts themselves are also beginning to move into econtent.

The state of Michigan's Eastpointe's 38th District Court is one of the first to automate filing of court documents, says Paul Chan, VP of PureEdge Solutions, Inc. Citizens and attorneys use the system to file general civil complaints, answers, jury demands, and motions via the Michigan Supreme Court's eFiling Portal. Specific forms included in the first phase of the implementation for general civil cases are summons and complaint, jury demand, answer, and cover sheet (motion) court forms. Future phases of the e-forms program may include small-claims filings and landlord-tenant cases.

The PureEdge software employs open and court-specific standards of LegalXML, the legal community's standard version of XML. Chan says the LegalXML standard facilitates future integration of the digital forms with 41 different court case management systems. To date, the only incentive for law firms to file these forms electronically is to simplify the process for themselves. The state has yet to include any financial incentive for electronic filers.

The next phase is to incorporate electronic payments into the electronic filing system, says Chan, adding that several other states are looking at the software as well. Pursuit of electronic filing is often at the direction of the state CIO, according to Chan. "Some are more progressive than others."

So as the complex process of documenting, discovering, and conducting legal cases becomes increasingly digital, the storage, management, and even legal obligations surrounding that information become increasingly complex. However, many vendors are making a strong case for increased use of effective content and document management and workflows.

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