LJN LAW JOURNAL NEWSLETTERS

e-Discovery LAW & STRATEGY™

Volume 2, Number 6 • October 2005 ALM

Depositions: The Impact Of Electronic Discovery

Technology Is Changing The Game

By Ramana Venkata

These are exciting times in the legal technology realm. Advanced electronic-discovery software can revolutionize depositions. For the first time, attorneys taking a deposition can have the entire document set at their fingertips in real time. They can understand the documents in a case more completely, and be more flexible following up unanticipated answers by investigating new lines of inquiry during the deposition itself.

Depositions, as we know, are among the most valuable types of discovery. Although many of the questions and answers in a deposition will be predictable, a savvy litigator is attuned to unexpected answers that might lead to different lines of questioning, and, with those, to new information. Depositions are worthwhile precisely because they are unscripted and unpredictable: The most valuable information is often the most unexpected and unanticipated.

And so, a valuable truth in the conference rooms and other locations where depositions are taken is that it's fortunate that depositions rarely, if ever, go exactly according to plan, even though conscientious attorneys prepare for them comprehensively — examining documents that reference or otherwise concern each deponent, and reviewing other deposition transcripts and evidence in the case to plan various inquiries about the claims and defenses at issue. They then narrow that wide swath of documents into a more manageable set that they will carry into the deposition, including an even narrower set that they intend to introduce as exhibits, depending on the testimony of the deponent. Prior to the deposition, they make several paper copies of each potential exhibit so that they are available to the witness, opposing counsel, the court reporter and the attorneys' own team attending the deposition.

Inevitably, though, something unexpected happens. Perhaps the deponent knows more than the deposing attorneys expected him or her to know, or is more talkative

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Seamlessly Mastering Large-Scale Discovery Requests

By Jennifer Wojciechowski

A law firm representing a Fortune 100 corporation had recently struck a deal to acquire one of its major industry competitors. Upon receiving the notice of the merger under the Hart-Scott-Rodino Antitrust Improvements Act, the Federal Trade Commission (FTC) issued a "Second Request," demanding corporate data from more than 11 geographic locations, including several sites in Europe, South America and Asia. The requested data, derived from a total of 315 employees in the acquiring corporation, had been generated on a wide array of operating systems, e-mail packages and software applications. In addition, the firm had over 100 boxes of paper documents that needed to be incorporated into the production set. The firm anticipated a final document production totaling more than 7 million pages. To add to the complexity of the request, the whole collection, review and production could take only 10 to 12 weeks.

Most attorneys find discovery projects of this volume and magnitude a formidable task — particularly when the stakes are high and production deadlines are tight. After all, many lawyers may not possess the technical prowess to understand the process and

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than anticipated. Perhaps the deposition reveals that the deponent worked closely with a key person in the case, or that the deponent participated in a key set of meetings. Perhaps the deponent will avoid answering questions directly; or worse, will purposely distort reality, thinking that the questioning attorney will not be able establish the true state of affairs within the confines of the deposition.

Electronic Documents Create New Opportunities

For an attorney taking a deposition, the benefits of being able to access the entire universe of case documents electronically are clear: He or she has available a vast repository of documents (electronic and paper documents that are scanned and interpreted by optical character recognition technology) with which to refresh a deponent's recollection. Different versions of electronic documents will frequently be saved and turned over in response to document requests — potential gold for a litigator taking a deposition.

e-Mail is especially valuable in this context. Thanks to e-mail, casual conversations that previously would not have been recorded are now preserved and can be used as exhibits. e-Mail archives contain countless individual conversations. Even more valuable are the patterns of communication between different people that have been preserved. e-Mail messages can demonstrate relationships between people that may not be apparent from a formal organizational chart.

Because attorneys have access to so many more documents (including e-mail messages), in theory they should be able to introduce more exhibits directly relating to the deponent's specific knowledge about a particular person, document or meeting. In practice, however, these additional documents are valuable only if a litigator can quickly locate them in real time. If an attorney does not have the tools to effectively examine a voluminous document collection, then he or she could lose the chance to question a deponent about an important document.

At the same time, the large number of documents turned over in today's cases makes it even more difficult to anticipate every document that may be relevant to a deposition. With so many more documents available, then, it becomes more likely that a previously unexamined document will become important based on the deponent's responses. In the past, the attorney's hands were often tied if the deponent mentioned a document that the attorney did not have with her at the deposition.

Using Electronic-Discovery Software in Depositions

If the attorney taking the deposition, the second chair or a paralegal could access the entire document set on a laptop computer during the deposition, then that person would be well positioned to react quickly to unexpected turns in a deponent's testimony. When an attorney uncovers a formerly unknown, but potentially interesting, fact pattern from a deponent, he or she naturally follows up on that set of facts. Ideally, of course, the attorney would be in an even stronger position if he or she could show the deponent an exhibit pertinent to the new series of questions.

But locating the relevant exhibit on the fly is difficult. For example:

- If the deponent mentions that he was familiar with a certain witness in the case, then the attorney will want to be able to examine all e-mails between the deponent and the witness.
- If the deponent mentions someone whose name has not appeared in the deposition preparations, then the attorney will want to examine memos that person wrote, or e-mail communications involving that person to see whether this person is someone who might help the case yet has been overlooked.
- If the deponent is surprisingly knowledgeable about a disputed

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e- Discovery Law & Strategy
POSTMASTER: Send address changes to:
ALM
1617 JFK Blvd., Suite 1750, Philadelphia, PA 19103
Annual Subscription: $399

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, Pa 19103
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Digital Dictation Is Simplifying How Lawyers Work

By John Methfessel

For lawyers who dictate their work to tape cassettes, dictation has many frustrations. Once the lawyer has finished dictating, the words are fixed in place. You cannot move words around on the tape or drop in new paragraphs.

With the advent of e-discovery, it's impossible to combine today's state of the art e-discovery solutions with yesterday's analog-dictation technology. Having a foot in both worlds is at best inefficient, and at worst can lead to misplaced data or work.

But the dawn of digital dictation has eliminated lawyers' worst frustrations of dictating to tape cassettes. With this new technology, lawyers can treat spoken words like any other digital data, inputting it to a desktop or other computer via a microphone and manipulating it in a digital voice-software file. Lawyers can then move spoken text around, and insert spoken or printed text as well as charts, spreadsheets, photographs and videos and transmit their work to a typist or save it to an audio file for clear and accurate translation into a printed document — or an e-document to be shared digitally or projected for viewing in the appropriate settings.

In the e-discovery setting, teams of attorneys can gather electronic evidence, as well as dictate and comment on it, using digital dictation systems that integrate directly into the e-discovery tool suite. This material is inadmissable as work product, and is helpful to the discovery team in locating, annotating and keeping track of evidence gathered. Digital dictation might also contribute to e-discovery for plaintiffs' or defendants' attorneys by providing an easily identified, transferable and indisputably accurate record of meetings or other settings in which evidence may be salient. This recording and verification function that digital dictation could provide is more than ever important with the deepening of compliance and record-keeping requirements, with such regulatory mechanisms as the Sarbanes-Oxley Act.

Because of its technical advantages, digital dictation seems certain to displace analog-tape dictation, just as DVDs are displacing VHS tapes. How quickly firms go digital will likely turn on a number of factors, the most important being return on investment (ROI) and return on equity.

Experience with the new technology indicates that larger firms tend to gain a quicker ROI from switching to digital dictation than smaller practices do. That said, a number of mid-size and smaller firms have made the switch and gained a substantial ROI. The size and immediacy of the ROI depends on a variety of factors, including the number of lawyers who dictate their work and the firm's ability to cut typing costs — either by centralizing or outsourcing transcription.

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U.S. Judicial Conference Approves FRCP e-Discovery Amendments

On September 20, the panel of federal judges that sets policy for U.S. Courts approved amendments to the Federal Rules of Civil Procedure that address electronic evidence.

The Judicial Conference of the United States forwarded the rule changes, which were on its consent calendar, to the Supreme Court without discussion or question, a federal courts spokeswoman told *e-Discovery Law & Strategy*.

The Supreme Court has until May 1 to approve the changes. A spokesman for the federal courts said the High Court would probably approve the amendments in mid-April. After the Supreme Court's approval, the modified rules would take effect Dec. 1, 2006, unless Congress intervenes with statutory changes.

Approved amendments of rules pertaining to electronic discovery listed were:

- 16;
- 26(a);
- 26(b)(2);
- 26(b)(5);
- 26(f);
- 33;
- 34;
- 37(f);
- 45;
- 50; and
- Form 35.

The changes, under discussion in legal circles for several years because of developments in technology used in evidence storage, discovery and presentation, come after extensive public comment, including two hearings this year.

The amendments concern the definition, identification, disclosure, interrogatories pertaining to, format and other aspects of evidence in electronic form.

Chief judges of U.S. circuits, and the Court of International Trade, compose the U.S. Judicial Conference. Normally, the Chief Justice presides, but Associate Justice John Paul Stevens is overseeing the conference since Chief Justice William Rehnquist died last month.

For more on the amendments, see these articles in *e-Discovery Law & Strategy*:

- "Better Late Than Never — Proposed Amendments to Rules of Civil Procedure Address e-Discovery" (October 2004);
- "Civil Rules Committee Approves e-Discovery Changes, In Principle" (May 2005); and
- "Inside The Rules — A Practical Approach To The Proposed FRCP Rules Concerning e-Discovery" (August 2005).

— *Michael Lear-Olimpi*

Discovery Requests

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may feel uncertain about the best method for collecting, reviewing and producing volumes of electronic data. Adding to this daunting task is the requirement of addressing issues such as the handling of privileged information, e-mail and attachment production, metadata issues, and a host of other concerns. Whether practicing in a corporate environment or running a litigation practice, modern lawyers must prepare to handle discovery projects of all scopes and sizes. Failing to understand the special technical considerations involved with a large electronic-discovery project could leave a law firm and its client in hot water. After all, case law and newspaper headlines prove that courts and regulatory agencies expect practitioners and corporations to become technologically savvy or face sanctions in the form of hefty monetary fines or awards, adverse-inference instructions or even default judgments.

When faced with a massive discovery request — in litigation or a regulatory investigation — what steps should a law firm and its client take to make certain that all relevant documents are collected in a timely, precise and cost-effective manner? How can the firm guarantee a seamless discovery project without halting or disrupting the company's normal business processes? This article will offer strategies and ideas for legal professionals faced with a large-scale discovery project encompassing electronic and paper documents.

Craft a Tailored Management Plan

When faced with a voluminous document request, a company must develop an initial response plan for managing paper documents and electronic data. Initially, the corporation should:

1. Halt any document-destruction policies in place.
2. Distribute a document-preservation letter to employees, the opposing party and any relevant third parties.
3. Assemble an electronic-discovery response team (made up of IT staff, in-house and outside counsel, and outside experts).
4. Create an inventory of hardware and software, identifying relevant geographical locations for each piece of media.
5. Formulate a list of "key players" (individuals likely to possess responsive documents).
6. Define relevant time periods for documents subject to the document request.
7. Consult with the opposing party or regulatory agency to define the discovery scope (includes identifying key words, relevant file types, and production requirements).
8. Determine the best method of document review and production.
9. Address how to handle inadvertent disclosure of privileged documents.
10. Engage the assistance of an electronic-evidence expert with experience working on high-volume discovery projects.

Develop a Plan and Timeline for Collecting Relevant Data

Large-scale data collection — the gathering of electronic media for discovery — can be overwhelming due to staggering amounts of digital information stored in myriad locations, including desktops, laptops, hard drives, PDAs, BlackBerries, USB drives, CDs and backup tapes. As the initial step in the electronic-discovery process, data collection is crucial. A single error can create significant issues for the law firm and for the client, and could lead to subsequent and compounding issues throughout other phases of the discovery process. Clearly defining the collection scope and priority of key players will avoid creating unnecessary delays and increased costs down the road. The components of a solid plan should incorporate:

- The relevant information sought;
- Potential data locations and key players;
- Internal and external contact information;
- Procedural guidelines;
- Documented chain-of-custody instructions;
- An inventory of forensic tools; and
- A summary of anticipated business-continuity issues.

Conduct Detailed IT Information Conferences

When a large discovery project surfaces, counsel will find the IT department a valuable resource for identifying records-retention practices, hardware and software conventions, and data-accessibility requirements. Coun-sel can use information gleaned from these interviews to identify relevant electronic data sources and eliminate otherwise over- or under-inclusive data collection and preservation. Counsel will also obtain a solid grasp on what is actually being practiced in the corporation. After all, merely reviewing IT protocol may not reveal how employees are actually saving and storing information on a daily basis. In interviewing IT personnel, counsel will learn about external data sources (such as personal computers used for remote access to the network) and other sources of hidden data that might become of crucial importance. During the meeting, counsel should inquire about the ability of users to save data locally (as opposed to on the network) and about legacy, nonstandard or outdated data-archive systems — or combinations of these factors — that can delay a discovery response because of the need for some type of secondary conversion or specialty program to interpret the information.

Prioritize the Data

Once a litigation hold is in place, counsel must immediately and clearly inform IT about the scope of the information to be protected and the priority of individuals in the corporation likely possessing discoverable data. This is vital in a situation where data volume may already be overwhelming. Many companies use at least five or six backup tapes daily,

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set of facts, then the attorney will want to show that witness documents about that issue to learn more.

By uncovering these documents during the deposition in real time, the attorney can capitalize on an emerging line of questioning. But perhaps even more important, the mere presence of the technology in the deposition setting could serve as a significant intimidation factor, keeping in check the deponent who otherwise would be inclined to play fast and loose with the underlying facts in the case.

e-Discovery software can help attorneys taking the deposition find these key documents. Three technologies in particular can be useful: Boolean search, automatic concept organization and e-mail analytics.

Boolean search. With Boolean search capability (searching the full text as well as metadata of a document in any combination), attorneys can immediately look for and find all documents that contain specific keywords or phrases. Advances in search technology, sometimes referred to as "conceptual search," expand these capabilities by enabling attorneys to retrieve not only documents containing specific keywords, but related terms, too. And because search technology is term-based, it is designed to quickly retrieve documents that contain specific words. Whether these documents are relevant is another question.

Concept organization. New e-discovery solutions, such as the Stratify Legal Discovery service, automatically organize all documents in a case based on an analysis of the documents' content. Organizing documents by subject matter, or concepts, provides an intuitive overview of large, complex collections and can enhance the attorney's grasp of the matter from its inception. Discovery solutions that use this approach can automatically recognize meaningful concepts that describe documents in the collection, organize the concepts into a hierarchy based on their interrelationships, and then sort documents into relevant concept folders.

Attorneys can take advantage of this conceptual document organization to more effectively prepare for a deposition by focusing attention on the areas they are most likely to encounter. If the deposition starts to expand into new or different areas, then the attorney, second chair or paralegal can quickly examine documents relevant to the new topic and ascertain whether any of them should be printed and used as exhibits.

The combination of concept organization and search is ideally suited to create order out of electronic chaos. For example, the results of a Boolean search can be automatically grouped so that results that match different meanings of the search terms are bucketed into different concept folders. Litigators can also search within a select set of concepts to quickly locate the documents containing the search term and that are relevant to the specific issue at hand. They can then focus immediately on the most important documents based on the concept-folder organization of the search results. They can also navigate back and forth from the search buckets to the full concept folders and easily access closely related documents that weren't exact search hits.

e-Mail analytics. e-Mail analytics is perhaps the most powerful discovery capability for attorneys taking depositions. The method provides a graphical representation of e-mail relationships, called an e-mail map, that enables attorneys to examine the message network among key individuals using the "six degrees of separation" metaphor. Attorneys can easily call up and examine all the direct messages between any two people, as well as those that passed through indirect, intermediary correspondents. Identifying these communication patterns and relationships is critical to developing new lines of questioning. It is, however, extraordinarily difficult to identify these indirect relationships using traditional Boolean search technology. And often messages within these indirect relationships reveal the so-called and so-aptly name "smoking gun."

Litigators can immediately analyze the e-mail messages and relationships contained in an e-mail map using specific e-mail threads, concepts or date ranges to focus on documents critical to an emerging line of questioning. If a deponent mentions an obscure individual during her deposition, for example, then the attorney can use e-mail analytics to quickly examine the deponent's communication patterns with the newly identified individual, including those involving intermediary correspondents that may be of interest. Perhaps the attorney will find that the deponent exchanged several e-mails with this person that were overlooked previously because no one knew the other person's importance in the matter being explored. The attorney can then quickly analyze the message pathways based on pertinent concepts, threads or date ranges to focus on the most critical messages, and immediately print copies of these messages and attachments, and then introduce them as exhibits.

CONCLUSION

New electronic-discovery capabilities can dramatically change how litigators approach depositions. Attorneys who adopt new electronic-discovery technology will reap the benefits of using Boolean search capabilities, concept organization, and e-mail analytics inside the deposition setting, and not just as part of the preparatory phase. With real-time access to large collections of documents, e-mails and attachments, attorneys can rigorously pursue lines of questioning far afield of their original deposition outline. Emerging facts can be quickly corroborated or contradicted, conceptually relevant documents can be efficiently identified to shed light on the deponent's testimony and refresh her recollection, and e-mail relationships can be explored in real time to take advantage of unexpected testimony. These new techniques can give attorneys more flexibility in their approach and confidence in following new leads, because they'll know that they have the ability to locate potential exhibits buried in the document set during the actual deposition.

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and the e-mail messages are interspersed with the network programs, the accounting data and other corporate infrastructure, such as the global address book. By prioritizing the data, companies can save thousands of dollars by collecting and processing the highest-priority individuals first when responding to production requests. In many cases, this may eliminate the need to copy and review tapes that contain merely the office word-processing and accounting programs. Ultimately, the parties may determine that it is unnecessary to process "non-priority data," potentially saving processing, conversion and hosting costs, along with hours of attorney review time of non-responsive documents.

USE BACKUP TAPE DATA SAMPLING TO NARROW DATA SET

Processing backup tapes involves putting data stored on a tape into a format counsel can reasonably use. This process can lead to a considerable amount of the expense associated with electronic discovery and delay the data-production course. When a colossal amount of data exists, attorneys may want to process only a sample of the data. Starting with a sample of the data may reveal that relevant documents do not exist for a particular period, making it unnecessary to actually process or review the entire data set associated with that time. If a data sample does not provide the anticipated result, then the opposing party may settle for a dismissal of the action or agree on the next group of data to be processed. By using data sampling, companies may save thousands, or hundreds of thousands, of dollars, depending on the project size.

WINNOW DOWN DOCUMENT POOL WITH FILTERING TECHNOLOGY

Obviously, not every discoverable electronic document is responsive or relevant to a discovery request, and filtering the data before the electronic review process begins is the best course of action in a large discovery project. When vast amounts of data must be searched, engage the assistance of an expert. e-Discovery experts can use discovery-filtering engines to scan the data set, separating and purging non-responsive documents, jokes, recipes and spam from potentially responsive files and e-mails. Automated data-filtering technology — filtering by custodian, time and date, file size, keyword or duplication — typically narrows the document universe by 75% before the litigation team ever touches the review set. Employing data filtering is one of the best ways to reduce volumes of data to a more manageable document-review set.

PARTNER WITH AN EXPERT WHO CAN HANDLE LARGE-SCALE PROJECTS

While IT departments may be able to handle smaller discovery projects, a project involving a considerable amount of data is best left to the experts. Choose an expert who has experience handling a large, comprehensive electronic-data request, and who is specially trained to understand the various technical arrangements of the company's IT systems. You also want an expert who has experience working with the company's hardware and software platforms. A qualified large-scale discovery expert should also maintain libraries of out-of-date software so that any data created on antiquated systems is easily restorable. And the expert should maintain its own high-speed systems to provide the fastest and most accurate collection, filtering and conversion processes. The expert should also have experience protecting the evidentiary integrity of data throughout the gathering, sorting and production processes. Because large-scale projects often have specific production requirements, an expert should also be able to offer multiple output options for legal-document review, including printed documents, litigation-support software, native-file review and online document repositories. In a case involving sensitive production timelines, it is crucial that an expert be able to meet the logistical demands of data gathering and production. An expert with a solid track record of meeting tight discovery deadlines involving large amounts of data will likely be able to deliver the necessary project requirements on time.

INTEGRATE PAPER, E–DOCS FOR REVIEW IN AN ONLINE REPOSITORY TOOL

In the past, law firms split outsourced discovery work between different paper- and electronic-discovery experts. Technology now allows a law firm to select one specialized expert who offers electronic-discovery and paper-discovery services. By selecting a single expert, the law firm and its client will likely realize many administrative and time-saving advantages. In addition, an expert who can offer the law firm the ability to review paper and electronic documents together in an online repository will provide the firm with cost-savings while reducing the amount of time required for review. Electronic-document review saves time and money because reviewers can search, categorize and produce documents in an electronic format. After narrowing the universe of data, reviewers can then print various collections, convert them into local litigation-support database-load files, or save them natively. By integrating paper and electronic documents during the discovery process, law firms likely will reduce the amount of time, effort and cost spent on document review and production.

While delivering a large-scale production response can be a weighty demand, law firms and their clients can use technology to achieve their production specifications and deadlines. By carefully and strategically mapping out a discovery-response strategy, a company can avoid costly results — such as sanctions for spoliation or non-production — down the road.

Incorporating filtering techniques, data-sampling and online repository review into a discovery plan of attack will also help save on review and production costs, and help to ensure that data is produced in a timely and efficient manner.

Staying up-to-speed on the methods available for handling massive discovery projects will put counsel in the best position to meet demanding discovery requests with little or no interruption to their clients.

e-Discovery DOCKET SHEET

Court Finds Defendant Acted in Bad Faith By Failing to Halt e-Mail Destruction Policy

In an employment-discrimination case, the plaintiff filed a motion for sanctions against the defendants for failing to preserve electronic documents and for spoliating e-mail evidence. Citing *Zubulake*, the court addressed the defendants' duty to preserve e-mails and other relevant documents. The evidence showed that the defendants were on notice of the lawsuit long before they halted their data-destruction policy. In fact, the defendants admitted that they never issued a company-wide instruction regarding suspension of their data-destruction policy and that they did not save the plaintiff's e-mails relating to the harassment incidents or his termination. Based on this evidence, the court granted the plaintiff's motion for sanctions and issued an adverse-inference jury instruction relating to spoliation of the e-mails. The court declared that the defendants acted in bad faith by failing to suspend their e-mail and data-destruction policy, and by failing to preserve essential personnel documents to comply with their preservation obligations. *Broccoli v. Echostar Communications Corp.,* 2005 WL 1863176 (D. Md. Aug. 4, 2005).

Attorney-Client Privilege Applies to e-Documents Protected by Password

In an appeal from a rape conviction, the defendant argued, *inter alia,* that password-protected documents contained on his employer-issued laptop in a folder marked "Attorney" were protected by the attorney-client privilege. The trial court had previously determined that these documents were not subject to the attorney-client privilege because the defendant had no reasonable expectation of privacy in documents on an employer-issued laptop computer. On appeal, the state argued that the defendant did not have a reasonable expectation of privacy based on the terms of an employment agreement in which the defendant acknowledged he had no expectation of privacy for any company-owned property. The appellate court reversed the trial court's holding and found that the defendant "made substantial efforts to protect the documents from disclosure by password-protecting them and segregating them in a clearly marked and designated folder." *People v. Jiang*, 31 Cal.Rptr.3d 227 (Cal Ct. App. 2005).

Court Denies Plaintiff's Request to Search Defendant's Laptop

In a medical-malpractice lawsuit, the plaintiff moved for a new trial after the jury found in favor of the defendant. The plaintiff alleged that the court erroneously denied a request for an expert examination of the defendant's computer. In particular, the plaintiff sought to discover whether the date that photographs of her face were taken could be retrieved from the defendant's hard drive. The original photographs were lost during a computer-system conversion; however, the defendant was able to recover some of the photos with the assistance of a data-recovery service. The recovered photos displayed only the dates on which the photos were imported into the new system, and not the dates on which they were originally taken. Despite this, the plaintiff asserted that the defendant's computer consultant testified in a deposition that the original dates were retrievable. The court determined that the expert actually stated that it would be impossible to print any of the photographs with dates indicating when they were originally taken. In denying the motion for a new trial, the court concluded that the plaintiff was not prejudiced by being prohibited from presenting the import-date information to the jury and added that the court was well within its bounds to prevent further discovery of the computer system, given that the plaintiff's request was made a year and a half after the discovery period closed. *Wild v. Alster*, 377 F.Supp.2d 186 (D.D.C. 2005).

Appellate Court Says Instant Messages Properly Authenticated

The defendant appealed from an assault conviction, asserting that the trial court erred in admitting improperly authenticated computerized instant messages into evidence. The defendant argued that the messages should have been authenticated by either the source Internet service provider or by computer forensics-expert testimony. Rejecting this argument, the appellate court declared that the circumstantial evidence properly rendered the instant messages admissible. The court noted that the defendant's argument would require it to "create a whole new body of law just to deal with e-mails or instant messages." The court also stated that it found "no justification for constructing unique rules for admissibility of electronic communications such as instant messages." In this case, the instant messages were properly authenticated based on the following factual circumstances: the defendant referred to himself by name, his testimony mirrored some of the comments in the instant messages and he referenced one of the instant messages in a conversation with school authorities. *In re F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005).

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Dictation

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The greatest resistance to going digital will likely be found at firms where most of the lawyers don't dictate their work at all but do their own keyboarding. A recent study by Karat, Halverson, Horn and Karat gives ordinary analog dictation a definite edge over keyboarding in terms of ROI — and digital technology will certainly increase that advantage, especially for firms that outsource their transcription.

For many young lawyers, the obstacle to moving from keyboarding to dictating is the time and practice required to learn how to dictate efficiently. Fortunately, the flexibility of digital dictation makes it possible for firms to take halfway measures, with some lawyers going digital while others continue to keyboard. Again, ROI will generally be the arbiter.

When it comes to deciding whether to go digital, law firms can focus their sense of the likely ROI by comparing how a lawyer dictating to tape differs from one using digital dictation. Here are some key differences.

Inserting Reference Materials

For lawyers dictating to tape, inserting citations can be a problem. The lawyer can dictate the citations or simply tell the typist where to find them. Either approach takes time and increases the chance for errors.

With digital dictation, the lawyer can easily copy citations and other reference material, and paste them into the dictation. The typist is automatically alerted that there is embedded material and pastes the text into the final document. The lawyer can also embed charts, graphs, spreadsheets, documents, metadata templates, URLs and even videos into the dictation.

Editing Spoken Text

For lawyers dictating to tape, making changes and corrections can be difficult. A minor correction typically involves rewinding the tape to the spot of the mistake and recording over it. To save time, the lawyer will more likely insert changes at the end of the dictation with instructions to the typist on where to insert them. If the lawyer accidentally dictates over previous dictation, then that old dictation is lost.

With digital technology, making changes is easy. The lawyer simply goes to the spot where the change is indicated, and either makes the correction or adds the new material. Besides inserting new dictation, the lawyer can move dictated material from one location to another. If something is accidentally deleted, then the lawyer just taps the "undo" button and brings it back.

After lawyers using tape cassettes finish dictating, they send by messenger, or mail the cassette to a typist or typing pool. If the lawyer is on the road, though, getting the cassette to a typist can take days. If the typist is backed up, then the work can be sent to another typist, but it cannot be divided among different transcribers.

When the lawyer using digital dictation has finished dictating, a click transmits the dictation over the firm's computer network to a typist or typing pool. The typist can begin transcribing the work immediately, and very large jobs can be divided among two or more typists. Because the dictation is saved in an audio file, the lawyer can learn the status of the work in an instant, regardless of how large the firm is or where the transcription is taking place.

Security Concerns

Dictating to a tape cassette can be risky. The cassette can be lost, damaged or destroyed, and anyone who gets hold of the cassette has ready access to the lawyer's work. By contrast, digital dictation provides several layers of security. The dictation is saved to an audio file and can be backed up to an offsite location. If the firm's computer system goes down, the lawyer can instantly access the dictation at the offsite location via the Internet. To protect the dictation from snoops, access can be limited to people who have been given specific clearance.

Quality Control

Firms using analog dictation cannot readily monitor the performance of individual typists; and if they have several locations, they cannot easily consolidate transcription into a single typing pool or outsource the work.

With digital dictation, firms can track the work of all the typists and objectively measure their productivity and the quality of their work. Lawyers, office managers and administrators can instantly see all in-progress dictation across the entire organization, and can reassign work between typists to maximize efficiency and turnaround.

Digital dictation challenges law firms to rethink how they work. If the savings are there, then the choice is obvious. If there are reservations about the potential ROI, a firm may want to do some dry runs to see whether what looks good on paper will also look good in practice — or simply use the competing approaches in parallel until one proves its superiority.

To comment on this month's articles or suggest a story idea, contact Editor-in-Chief ***Michael Lear-Olimpi*** *at learolimpi@aol.com.*

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3038-2005