

LAWPRO®

A publication to help lawyers

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September 2005

e-Discovery



E-data is different
U.S. & Canadian jurisprudence
Cost issues
Making e-Discovery requests
E-data use/presentation
PLUS:
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The season for a fresh start

No matter how many years we've put between ourselves and our school days, many of us associate September with new beginnings, new opportunities, and new challenges.

For litigators, corporate lawyers and anyone else who deals with electronic records and information, e-Discovery is just such a challenge. And as the articles in this issue of LawPRO Magazine make clear, the implications of e-Discovery are significant.

Consider just these basic facts: E-mail has become a primary communications tool for all of us. We create and store electronic information in many different places: on home and office computers; on laptops we take to the cottage; on backup tapes, cell phones, PDAs, and memory sticks. Any one of those "bits" of data stored in any one of these places has the potential to be the pivotal evidence in a litigation matter, and subject to discovery – and it may be your responsibility to not only know to ask for it, but to also ensure it does not

get missed, destroyed or in some way corrupted. A failure to do these things could result in a claim of spoliation, the exclusion of critical evidence, or an adverse inference, any of which could affect the outcome of a matter.

This issue of our magazine is designed to help introduce you to the many and far-reaching implications of electronic discovery for you and your law practice. It is not intended to be the definitive text. Instead, our objective is to encourage you to familiarize yourself with the topic, assess how it will affect you and your clients, and seek opportunities to educate yourself in more depth about e-Discovery.

A handwritten signature in blue ink, appearing to read "Michelle L.M. Strom". The signature is stylized and includes a large, circular flourish at the end.

Michelle L.M. Strom
President and CEO

e-Discovery

a significant issue for all cases



By the Hon. Mr. Justice Colin Campbell
Chair, Discovery Task Force

When the Discovery Task Force delivered its report in late 2003, it was aware of the growing importance of what is now known as electronic discovery.

The Rules of Civil Procedure in Ontario provide in Rule 1.03 that a document includes information in electronic form.

In 2004, a sub-committee of the Discovery Task Force was formed to consider issues relating to electronic documentation and discovery, as it was recognized that e-issues presented challenges not previously encountered in the discovery process.

As e-issues began to appear, it was believed that they applied almost exclusively to multi-party, large document cases. What has become apparent with the short passage of time is that e-issues are significant for even the most standard of cases. This has been seen in employment/trade secret cases most prominently.

There are several reasons that e-issues require a somewhat different approach from the discovery of paper documents:

1. The sheer volume that is produced on a daily basis when text messaging (e-mails) are involved was previously unimaginable.
2. Some electronic documentation thought to be destroyed in the ordinary course can be revived by a search of hard drive and/or back-up tapes, often at considerable cost.
3. E-documentation will often contain a mixture of business and private communication within the same documentation.
4. Storage of a large volume of e-documentation can be costly. Without a recognized protocol, claims of spoliation can arise.
5. Protection of privacy has become more prominent and this requires the periodic removal of personal information from databases.

These issues extend beyond those involving litigators and litigation to many aspects of the operations of business and government. The Discovery Task Force (DTF) concluded that changes to the *Rules of Civil Procedure* would not be an appropriate mechanism to address all of these issues. The DTF Report recommended the development of best practice/guidelines in various areas of litigation practice. The most prominent of these are guidelines for the retention, disclosure, production and discovery of electronic communications.

e-Discovery has been recognized in other jurisdictions as an issue requiring consideration. Of these, the United States, the United Kingdom and Australia are the most prominent. One interested U.S. group, the "Sedona Conference," has promulgated e-Discovery principles and is in the process of developing guidelines.

The Discovery Task Force has co-operated with this Sedona group and expects to post the first draft of the e-Discovery Guidelines on the Ontario Courts Web site in mid-fall. These Guidelines are intended to help members of the Ontario bar deal with e-Discovery issues. They also will be on the agenda at a full-day CLE program on November 28, 2005, sponsored by the Ontario Bar Association and The Advocates' Society.

In the interim, LawPRO has dedicated this issue of its risk/practice management publication to the issue of e-Discovery. The articles on the following pages – all contributed by expert members of the Task Force – will help familiarize the bar with e-Discovery and the implications of electronic documents and discovery for their law practices.

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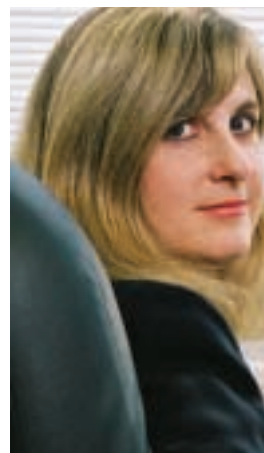
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Why electronic documents are different

For litigators and non-litigators, discovery and document production are familiar parts of the litigation process. Formal court rules, the law of evidence and informal practices – all of which evolved in a paper-based world – direct and govern how a discovery proceeds.

But, the world has changed.

In just the last decade, personal computers, e-mail and the Internet have transformed how the world functions and communicates. By some estimates, up to 95 per cent of all new information is created in an electronic format, the majority of which is never printed. Most people are now very comfortable with creating and sharing electronic documents, and use e-mail as a primary communications tool.

These electronic documents and e-mails are sometimes relevant in legal disputes, and in many cases, are pivotal evidence. The courts recognize this, and electronic data is producible on discovery, both under the *Ontario Rules of Civil Procedure* and the Federal Court Rules.

What are "electronic documents"?

In the *Ontario Rules*, a "document" is defined broadly as including "data and information recorded or stored by means of any device." Thus, a document includes wordprocessing files, e-mail messages, Web pages, information stored in databases, and virtually anything else stored in any electronic device, including cell phones, Blackberries, PDAs, voicemail systems, instant messaging clients, iPods, TiVos, digital copiers, and even printers (some multi-function printer/scanner/fax machines have hard drives in them).

Electronic information can also be found on a variety of media, including magnetic disks (such as computer or laptop hard drives, floppy disks, or zip drives), optical disks (such as DVDs or CDs), magnetic tapes (most commonly backup tapes) and USB memory sticks.

In a number of obvious, and sometimes not so obvious ways, electronic documents are profoundly different from their paper counterparts: Members of the legal profession, including lawyers and judges, need to understand how electronic documents are different, and how these differences affect the preservation, collection and disclosure of information from electronic sources, now commonly known as "electronic discovery."

Vast accumulations of electronic data

In today's world, electronic documents vastly outnumber paper documents, and are being created at rates far greater than paper documents ever were. As a result, the amount of information potentially available for discovery has increased exponentially.

Consider the example of e-mail. In all of 2004, Canada Post handled 10.9 billion pieces of mail. In North America today, billions of e-mails are sent every day.

Hard drives are much larger than they were just a few years ago, and can hold massive amounts of information. Today a typical desktop computer has a 40 gigabyte hard drive, which can potentially hold about four million pages of information. A typical network server might have an 80GB hard drive, which could potentially hold eight million pages of information, and the backup tapes for that server would likely be the same size and hold a similar number of pages.

With typical e-mail usage and large hard drives, even a small business with only a dozen computers can have significant amounts of electronic information. Medium or large businesses have unimaginable amounts as they may have dozens of servers, hundreds or thousands of desktop computers, and boxes full of

backup tapes. Try to fathom the amount of electronic information generated by the Ontario government.

Just using a computer creates more electronic information. In various ways, Windows will track and keep a list of the documents you opened or accessed, the network servers you connected to, the Web sites you visited, and more. Some of this information is lost each time you turn your computer off, but some of it will remain indefinitely in various files on your computer hard drive.

Data can easily replicate itself

One reason electronic documents are so widespread is because they are more easily replicated than paper documents. On a large scale, electronic information is replicated by users, and in various automated ways, all without any degradation of the data.

Consider the e-mail example again. E-mail users frequently send the same e-mail to multiple recipients, often with attachments. Some of those recipients may reply to that message, or forward it to others, and so on. Many e-mail systems automatically keep information about sent and received messages, sometimes including actual copies of messages. In many business environments, copies of data on servers, including e-mail logs and actual messages, are backed up on a daily basis. Most businesses don't keep all their backup tapes because they rotate them, but many keep month-end, quarter-end or year-end tapes going back several years. Thus, identical copies of a widely distributed e-mail could be found in many different places.

The auto-recover or auto-save feature found in many software programs, including Word and WordPerfect, can also replicate data. This feature is designed to prevent data loss by automatically creating a complete and identical backup copy of any currently open document at a regular specified interval, often every few minutes. This data – called replicant data – is stored on the hard drive as separate documents, which are supposed to be deleted when programs are closed. Because they are often not deleted, they can provide copies of documents long since changed or deleted.

Deleted does not mean deleted

Electronic documents tend to be much more difficult to dispose of than paper documents. If you delete a file from your hard drive, and take the extra step of deleting it from your Recycle Bin, the common assumption is that the file is gone.

Nothing could be further from the truth.

In fact, when you delete a document on a hard drive, you are only erasing the pointers to the location of the file data on the hard drive. The actual data itself remains on the hard drive, completely untouched.

This data, called residual data, is invisible to Windows and the computer user. Yet often one-third or more of the physical space on a hard drive contains information from deleted files; this information will be "deleted" only when the computer recycles the space by placing new information in it – weeks, months or even years after it was first created. Deleted files (or at least portions of them) therefore can be recovered long after they supposedly have been deleted – although to do so requires specialized software tools and assistance from an IT person or forensics expert.

To completely erase deleted files you must use specialized software that "scrubs" the hard drive.

And remember, you may not have to go to the trouble of trying to recover deleted documents if they were on a server hard drive, as you may be able to find them on one or more backup tapes or as attachments to e-mail messages in Sent e-mail folders.

Increasingly, e-mail messages are the pivotal evidence in a matter, and they are almost impossible to delete after they have been sent. Let's say you send an e-mail, delete it from your Sent folder, and ask the recipient to delete it when they receive it. It's gone, right? Absolutely not.

Electronic footprints from that message can exist in several places, and actual copies of the message are potentially available in at least a few locations. The moral of the story: Don't say anything in an e-mail that you would ever want your mother, children or boss to read on the front page of the newspaper. E-mails are often out there somewhere – all you have to do is find them.

Metadata – friend or enemy?

Metadata can be simply described as "data about data." Think of it as a hidden level of extra information that is automatically created and embedded in a computer file. Most software programs, including Word and WordPerfect, have metadata in their files. Metadata can be necessary for the operation of the software, or in some cases, is simply intended to be helpful to computer users – even though most don't even know it is there.

Parties exchanging documents electronically as part of a discovery (and lawyers sending e-mail attachments to clients or opposing counsel) need to appreciate that electronic document files include both the information you see on the screen, and metadata, which you don't see. This metadata is often sensitive or confidential information that can be damaging or embarrassing if seen by the wrong eyes. It can make or break your case.

Among many other things, metadata can include the following types of information:

- the date the file was created;
- the name of the person who created the file;
- the names of people who edited a file, and the date and time they did so;
- document revisions, including deleted text that is no longer visible on the screen;
- the name of the computer the file was created on; or
- the name of the hard drive the document was saved on.

E-mail messages can be divided into two parts: the body, and header – which is metadata. The body contains the part of the message you see on the screen (To, From, the subject line, and the contents of the message). The header, which you never see, has a large amount of metadata which details, step-by-step, the entire route the e-mail took as it crossed the Internet. This information can be useful in verifying who saw an e-mail or where it was sent.

Although some metadata can be viewed within the program that has created a file (in Word or WordPerfect documents click on File, then Properties, and review the information in the Properties dialog box), in most circumstances it can only be seen with specialized software.

For more information on metadata see the **Dangers of metadata** article from the June 2004 issue of LawPRO Magazine (www.practicepro.ca/metadata).

In most cases, metadata will have no material or evidentiary value, as it will not matter when a document was printed, or who typed revisions, or when edits were made before the document was circulated. However, in some cases metadata may help authenticate a document, or establish facts material to a dispute such as when a file was created or accessed, or when an e-mail message was sent. Understanding when metadata needs to be preserved and produced represents one of the biggest challenges in electronic discovery and document production. It can be very expensive and time-consuming to capture and preserve metadata; as well, at an early stage of a matter, it is often not clear if metadata will be relevant, and if so, what steps a lawyer and client should take to prevent metadata from being lost or destroyed.

Dynamic and changeable content

Electronic documents and data (and their associated metadata) are dynamic and can change over time, even without human intervention. Consider for example, information in a database, or Web pages that are built with information from a database. Unlike paper documents, many electronic documents and databases are never in a fixed and final form, and there isn't always a copy that shows exactly what the data looked like at any given point in the past.

Moreover, the act of merely accessing or moving electronic data can change and even destroy it. For example, several hundred files are accessed and changed when you simply boot up a computer, and potentially relevant files may be over-written. Moving a wordprocessing file from one hard drive to another can change a number of attributes in the file. Opening and reading an e-mail message can change metadata information for that message, and in some cases, could potentially over-write metadata that might be helpful on the matter in question. It is not uncommon for internal IT staff to destroy potentially helpful metadata when they are dispatched to find information relevant to a potential or pending litigation matter. For this reason, it can be helpful to have a forensics expert assist in preserving and collecting electronic data. They will use special tools to make a true image of all data on hard drives, including deleted data. This will properly preserve all available data for a thorough forensic analysis, if required.

The dynamic nature of electronic documents also makes them much easier to change than paper documents. It is easy to "spoo" or fake the sender's name on an e-mail. Spammers do it all the time. Documents in electronic form can be modified in numerous ways that are sometimes difficult to detect, even with computer forensic techniques. In some cases metadata can assist in verifying the authenticity of an electronic document.

Environment dependence

In many cases electronic data will be meaningless when separated from its original or native software environment. For example, consider data within a database that includes custom reports to organize and present summaries of the data. If the raw data is produced, it might appear as a long list of undefined information and numbers. To make sense of the data, the viewer needs the native software to access and manipulate the data. In some cases,

E-Discovery resources

PRACTICEPRO RESOURCES

practicePRO has posted a number of additional resources to help you learn more about electronic discovery. At www.practicepro.ca/ediscovery you'll find:

ELECTRONIC DISCOVERY – A READING LIST

Peg Duncan, Director, Business Opportunities and Emerging Technologies in the Information Management Branch of the Federal Department of Justice has prepared a list of some of the best Web sites and online articles on various ED issues.

ED request letter (sample)

A sample letter based on the annotated discovery request letter provided by Martin Felsky and Peg Duncan and featured in the September 2005 issue of LAWPRO Magazine.

ADDITIONAL RESOURCES

ELECTRONIC DISCOVERY GUIDELINES

A first draft of the Electronic Discovery Guidelines prepared by the Electronic Discovery Sub-committee of the Discovery Task Force will be posted on the Ontario Courts Web site in mid-fall (www.ontariocourts.on.ca/)

Electronic Discovery and The New ED Guidelines – A Roadmap for Dealing with Electronic Information

An ED CLE program, jointly put on by the Ontario Bar Association and The Advocates Society on Monday, November 28, 2005, from 9 a.m. to 4:30 p.m. at the OBA Conference Centre in Toronto. For program information and to register, go to www.softconference.com/oba

the courts have recognized a duty to produce electronic evidence in a form and manner that is usable by the party receiving it.

Technology obsolescence

The frequent obsolescence of computer systems due to changing technology can create many issues for recovering electronic documents that are no longer in active data sources, that is, data sources that are in regular use every day and easy to access. Over the course of many years, a business may use different e-mail systems or different backup hardware and software. Organizations often find themselves with boxes of backup tapes they can't read, or data on backup tapes that can't be opened as there is no software or hardware available to access this old or legacy data. Keep in mind that if you keep data, you face the potential obligation to produce it, regardless of the time or expense required to do so. A good document retention policy that ensures the destruction of legacy data can help to reduce the exposure to crippling and costly productions in the event of litigation.

Who really had access to the document?

It can be more difficult to determine the providence of electronic documents than paper documents. Electronic files are often stored in shared network folders that multiple users can access. As well, the increased use of collaborative software allows the group editing of electronic documents, which makes it more difficult to determine authorship.

Searching & finding needles in many haystacks

While an employee's paper documents will often be consolidated in a handful of boxes or filing cabinets, the same employee's electronic documents can reside in numerous obvious locations, such as the work desktop, laptop computers, network servers, floppy disks, and backup tapes. They may also be found in not-so-obvious locations such as home and cottage computers, and

personal or browser-based e-mail accounts. To some degree, lawyers will need to assist clients in identifying what must be preserved, collected and produced, and they will have to question the opposing party to ensure everything that should have been produced was produced.

On the plus side, some forms of electronic data and electronic media can be searched far more quickly and accurately than paper versions. With a well-developed search strategy, you can narrow the scope of your search and find the small amount of relevant data within vast collections of electronic data. Search strategies involve identifying specific search terms that will target relevant data, and setting other parameters that will limit and filter search results.

For example, you might want to look at e-mail messages sent to or received by a particular person in a narrow time frame which contain a certain term.

A good search strategy will comb through large amounts of data and give you a collection of documents that is smaller and more manageable in size. Specialized electronic evidence tools can also de-dupe search results to remove extra, identical copies of documents or e-mail messages.

e-Discovery in an electronic world

The differences between electronic documents and paper documents make it clear that discovery can be different in the electronic and paper worlds. To meet their obligations to assist clients in preserving, collecting and producing all relevant data, and to have the ability to ask appropriate questions to ferret out and find relevant electronic data from the opposing side, lawyers need to better understand what electronic documents and data are, and where they can be found.

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**Spoliation,
preservation
and other
"gotchas:"**

**The U.S. & Canadian
jurisprudence**

With the explosion of e-mails, and other forms of electronic evidence, the preservation or failure to preserve electronic evidence is becoming a focus of litigation in the United States and Canada. However, while the recent U.S. decisions of *Zubulake v. UBS Warburg, LLC*, No. 2 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) [*Zubulake V*] and *Coleman v. Morgan Stanley*, 2005 WL 679071 (Fla. Cir. Ct. March 1, 2005), [*Morgan Stanley*] have attracted tremendous attention from U.S. corporations, in-house counsel and the broader legal and business communities, there remains limited jurisprudence in Canada. In Canada, judicial reasoning exploring the obligations of parties to produce electronic evidence remains in its infancy. Consequently, the Canadian courts have been looking to U.S. jurisprudence for guidance in developing our own case law on e-discovery issues.

e-Discovery in the United States

The two American cases which are highlighted illustrate the myriad of problems that companies are experiencing with e-Discovery. Both had interlocutory decisions dealing with the destruction of electronic evidence and final judgments were released in both cases in May 2005. The results were staggering by Canadian and U.S. standards.

• ZUBULAKE V. UBS WARBURG (ZUBULAKE V):

The *Zubulake* case became widely known for its five interim rulings on electronic discovery issues, in particular with respect to the focus on the scope of production due to the volume of electronic evidence, cost-sharing, and most importantly, the ruling relating to UBS Warburg's destruction of relevant e-mails and its failure to ensure that all relevant electronic evidence was preserved. A federal jury awarded Laura Zubulake with US \$29 million in damages for her claim of gender discrimination against her former employer UBS Warburg. More than two-thirds (US \$20 million) of that amount was awarded as punitive damages.

• COLEMAN (PARENT) HOLDINGS, INC. V. MORGAN STANLEY Co., INC.:

After suing Morgan Stanley for fraud and conspiracy in connection with Coleman's sale of stock in Coleman Inc. to Sunbeam Corporation in return for Sunbeam stock, Coleman sought access to Morgan Stanley's internal files including e-mails. 1,300 pages of e-mails and subsequently certified compliance with the order to produce, Morgan Stanley failed to make Coleman aware of additional backup tapes and potentially relevant material. As a result of a finding by the court that Morgan Stanley acted in bad faith, and failed knowingly and deliberately in its duty to preserve and produce e-mails, a jury awarded the plaintiff, Coleman US \$604 million in compensatory damages and US \$850 million in punitive damages. Morgan Stanley is appealing.

e-Discovery in Canada

The *Rules of Civil Procedure* in Ontario and the relevant cases provide that the obligation to produce all documents relating to any matters in issue extends to electronic evidence. While there have been few cases in Canada to provide guidance on electronic discovery, the cases of *CIBC World Markets Inc. v. Genuity Capital Markets*, [2005] O.J. No. 614 (Ont. S.C.J.) [*Genuity*] and *Portus Alternative Asset Management Inc. et. al., Re* (2005), 28 O.S.C.B. 2670 (O.S.C.) [*Portus*] suggest that production obligations are very broad and may entitle an opposing party to image and store the contents of a party's Blackberries, computers, and other similar electronic devices of "every nature and kind" that they may have in their "possession, power, ownership, use or control, directly and indirectly." This broad order could include such devices regardless of whether they were located at the office premises or private homes, and regardless of whether these devices were owned or used by other individuals such as spouses or children.

In addition, counsel for both parties could be required to communicate with all independent service providers with whom the parties had contracted for service to ensure that any relevant deleted documents would be preserved and included in the affidavit of documents.

THE OBLIGATION TO PRESERVE ELECTRONIC EVIDENCE

In the United States, the obligation to preserve has been held to be an ongoing obligation which arises as soon as litigation is reasonably anticipated. It is reasonable to assume that this obligation is similar in Canada. The *Zubulake* case has proven integral in establishing in the U.S. that a party's discovery obligations do not end with the implementation of a litigation hold. Rather, preservation must be a joint effort between both the party and their counsel. While a party must be the one to institute a litigation hold, counsel must oversee, and take affirmative steps to ensure compliance. This compliance includes the obligation on both the party and its counsel to make certain that all sources of potentially relevant information are identified and placed on hold. Both the party and counsel must be in communication with the company's information technology department, and in some cases, counsel should run a system-wide key word search to ensure relevant information is preserved.

Another key factor is that it is not only the party against whom spoliation is alleged who has an obligation to preserve electronic evidence. If a party is determined to seek sanctions against another for spoliation, it must be able to come to court with clean hands and be willing to produce its own electronic documents to the court.

SPOILIATION OF ELECTRONIC EVIDENCE

As can be seen by the *Zubulake* decision, sanctions for the intentional deletion of relevant evidence can be severe. In that

decision, Justice Scheindlin held that a party seeking sanctions for spoliation must establish:

1. the party had an obligation to preserve the evidence;
2. the records were destroyed with a "culpable" state of mind (this includes ordinary negligence); and
3. that the destroyed evidence was relevant.

In 2000, the decision of the Ontario Court of Appeal in *Spasic v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (Ont. C.A.) established that spoliation can be an independent tort. Since that time there has not been a case which precisely defines what constitutes spoliation of electronic evidence in Ontario. However, the *Genuity* and *Portus* orders suggest that the court has taken a broad approach to what actions may constitute spoliation. In certain circumstances, the courts may be prepared to provide the moving party with broad powers of investigation and protection, including Anton Piller orders if it is feared that relevant information may be destroyed.

PRESERVATION LETTERS

In all cases where parties expect the opposing party will have electronic evidence, it is wise to send a preservation letter early in the process, notifying opposing counsel of the need for the electronic evidence to be immediately preserved. Absent such a letter, opposing parties may argue that they were not aware that backup tapes were being deleted or that e-mails were being regularly deleted through an automated process. The volatility of electronic evidence must be considered. Due to the ease with which parties can delete relevant information, everybody must be on notice as to exactly what must be preserved to comply with their obligations pursuant to the *Rules of Civil Procedure*.

Most of our cases will involve some form of electronic evidence. Our clients are communicating via e-mail, wordprocessing documents, fax machines and through voicemail. All of these are potential sources of electronic evidence. Over the next few years we can expect that the Canadian courts will be faced with some of the issues that have been the subject of the U.S. proceedings.

Susan Wortzman is an associate with Lerner LLP in Toronto.

The issue of costs

The costs associated with electronic discovery can be astounding due to the volume of electronic information available. For unprepared litigants, the cost to preserve, search and quickly produce electronic evidence can be prohibitive.

The court has discretion to manage and monitor the costs resulting from discovery requests, and to give interim orders concerning costs.¹ In general, a party bears its own cost of reviewing and editing its own documents, whereas the requesting party bears the cost of copying the information: See Rule 1.03(1) and 30.04 (7) of the *Rules of Civil Procedure*.

However, case law and cost allocations specific to electronic documentary discovery occasionally deviate from these general rules by shifting the cost of production and reproduction of electronic documents to the party making the request.

The mere fact that electronic discovery is at issue should not change the rule that the producing party presumptively pays for the production. Cost shifting should be considered only when electronic discovery imposes an undue burden or expense on the producing party. This question usually turns on whether the electronic information is kept in an accessible or inaccessible

format, which in turn depends on the type of media used to store the information. Data stored online or near line, on optical disks, or on magnetic tape are usually accessible; backup tapes and fragmented data are usually not.

There is little Canadian jurisprudence on this issue. Foundation for this principle is set out in the Rule 1.03(1) of the *Rules of Civil Procedure* which provides that the Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

American jurisprudence however, has examined this issue in greater detail. An eight-factor test was set out in *Rowe Entertainment v. the William Morris Agency* 205 F.R.D. 421 (S.D.N.Y. 2002), affirmed 2002 WL 975713 (S.D.N.Y. May 9, 2002) ("Rowe"), which was in turn modified by the court in *Zubulake v. UBS Warburg LL* 2003 W.L. 21087884 (S.D.N.Y. May 13, 2003) ("Zubulake").

¹ Section 131(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43; *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Gen. Div.); *B.C. Building Corp. v. BT & NPLC* (1995), C.P.C. (3rd) 313 (B.C.S.C.); *Dulong v. Consumer Packaging Inc.*, (2000) O.J. 161 (Q.L.) (January 21, 2000, Ontario Master)

The following are the factors that have been considered in determining whether or not the cost of electronic discovery and production should be shifted to the requesting party:

1. the extent to which the request is specifically tailored to discover relevant information (no more “any and all”);
2. the availability of such information from other sources (know where to look);
3. the total cost of production, compared to the amount in controversy;
4. the total cost of production, compared to the resources available to each party (costs can be much higher than in the paper world, if experts are involved and legacy and backup systems must be accessed);
5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation (which will rarely play a part in the analysis, but if it does it is the most important factor); and
7. the relative benefits to the parties of obtaining the information (the least important).

Prior to any order being made shifting costs, tangible evidence of what evidence backup tapes (or other inaccessible sources of data) might have to offer, in the form of a sample, may provide the court with sufficient evidence to determine the extent to which such electronic evidence is available from the particular electronic source at issue. The results of any such search conducted by way of a sample, as well as the time and money spent, can be produced to the court in an affidavit provided by the producing party.

Only the cost of restoration and searching should be taken into account in any cost-shifting analysis. The responding party should always bear the cost of reviewing and producing electronic data once it has been converted into an accessible form.

Although the electronic means of communicating and recording transactions has led to various efficiencies and lowered costs in some industries, it has also given rise to a whole new set of costs: Key are the administrative costs associated with developing a proper records management and retention program designed to assist in the retrieval of documentation required for day-to-day business, as well as those documents that may be subject to production in court proceedings!

Karen Groulx is an associate with Pallett Valo, LLP in Mississauga.



Karen Groulx

Making and responding to electronic discovery requests

By Martin Felsky and Peg Duncan

One of the significant impacts of electronic discovery on litigation is the way in which it reconfigures the adversarial nature of the discovery process. When parties are producing paper to each other, they rarely need to collaborate on their methods of collecting, reviewing and producing client documents. Requests and responses for paper discovery are generally created in an atmosphere of strict competition, unless some overture for joint productions is warranted.

In the world of electronic discovery however, it is rarely beneficial for a party to go its own way and draft an affidavit without any dialogue. The volume of information and the cost of e-Discovery, the lack of guidance from Canadian jurisprudence, not to mention the critical need for compatibility and standardization in the way electronic evidence is produced, have all demanded a new level of co-operation between counsel.

One of the outcomes of these changes is that counsel are starting to exchange discovery requests, and then meet, either on their own, with their respective clients,

and even with the case management judge or master. These processes – the discovery request and the “meet and confer” – are based on the American model, in which parties are only required under the Rules to produce documents on which they intend to rely, and documents which are specifically requested by the other side.

What follows is an edited, annotated discovery request letter from plaintiff’s counsel to defendant’s counsel in a contract dispute.



Peg Duncan

Dear Sirs:

Re: Linobyte Inc.

At our recent case management meeting, Justice Vernon directed the Parties to provide each other with proposed protocols for the discovery of electronic documents.

[Planning for e-Discovery at the earliest possible phase is a hallmark of a successful exchange of documents.]

We have advised the Court that our Client (“LINOBYTE”) believes it can meet a deadline of DATE. To comply with the court’s direction and to facilitate timely production we are pleased to provide you with LINOBYTE’s proposed protocol.

[Given the newness, volume and potential difficulty associated with e-Discovery, some defendants may find a fruitful source of added delay. Effective advocacy, an understanding of e-Discovery concepts, and basic litigation readiness ensures against unwarranted delays.]

LINOBYTE’s Information Technology and Records units have been consulted in the development of this plan and we believe our proposal to be both reasonable and practicable.

[Involving the client’s IT and Records units is essential for the identification and collection of the information in the client’s possession. If the client has little experience with litigation involving electronic sources of information, it is useful to retain an experienced e-Discovery advisor to help manage this

increasingly technical and strategically important area of practice. With experts on both sides or with one independent advisor appointed by the court, the lawyers can focus on law and strategy, leaving the technical issues to the experts.]

This proposal deals with the identification, preservation, restoration, processing, review and production of e-mail, e-mail attachments, and other electronic documents such as word processing, spreadsheet, PowerPoint, html, and text files.

[Most lawyers handling e-Discovery are concerned at first with e-mail, spreadsheets and word processing documents. However, a growing area and a major aspect of e-Discovery is structured data – in other words, accounting applications, customer databases, enterprise resource programs that may contain millions of records not easily converted to a “document.”]

While each party must ensure it has conducted its own search for producible documents, we believe it will benefit both parties to attempt to reach agreement, or obtain Court direction, on several critical issues, including:

- the preservation of relevant information;
- the designation of key custodians and their readily identifiable electronic documents;
- the identification of shared server folders to which the designated custodians had access;

[See following.]

- the acceptable scope for the collection of electronic files;
- record culling procedures, including de-duplication, key word search strategies, the determination of relevant date ranges, procedures for dealing with private records, etc.;
- the identification of and agreement as to producible metadata (information available related to e-mails (such as date sent, date received, subject) and other electronic files (such as file name, file type, date last modified); and
- the form of production.

We believe all these items can be resolved at the next case management meeting. We look forward to receipt of your proposed protocol as soon as possible.

[Eventually those who use e-Discovery as a weapon might find their own weapon pointed at them. Even if one party has the preponderance of evidence, the receiving party will still have to go to the trouble of organizing and reviewing all the data. When making an e-Discovery request, it is usually in everyone's interest to maintain an approach that is reasonable and proportional to the matters in dispute.]

PLAINTIFF'S PROPOSAL

LINOBYTE's electronic documents are of two types:

- (1) files that are known to be linked to a designated custodian, because they have been saved in designated user directories on servers, on individual's hard drives, home and laptop computers or other personal storage devices or labeled media ("Identifiable Data");
- (2) files that cannot readily be linked to a particular custodian ("Unidentifiable Data"). For example, LINOBYTE servers contain shared folders accessed by hundreds of users including the designated custodians. These folders are organized by project, not by custodian.

A. IDENTIFICATION PHASE

Identifiable data

LINOBYTE proposes that the parties exchange, by next week, lists of employees and former employees who would be likely to have relevant electronic documents.

LINOBYTE's Identifiable Data is currently located on:

- two active Microsoft Exchange e-mail servers;

[In this context, "active" means currently available to and being used by employees of the company.]

- user "Home Drives", which are folders located on one of several servers allocated specifically to a user for their personal files. Home Drives will often include e-mail archived by the user and saved in a Microsoft Outlook "PST" file;

["Home" or personal server drives are readily identifiable by sur-name or employee number, for example, F:\users\j.smith.]

- tapes containing disaster/recovery backups of e-mail servers and Home Drives. LINOBYTE has monthly backup tapes of these e-mail servers, on the current technology used by LINOBYTE, available back to January 1, 2003. LINOBYTE also has approximately 275 backup tapes on obsolete technology, and which may contain backups of its e-mail servers from March 1998.

[In this case Linobyte has backup tapes that it claims are "not readily accessible." While an e-Discovery service bureau could be retained to restore the data from the drives, the expense could be unnecessary if the bulk of the relevant material is to be found on the active server or in e-mail archive files. Although pricing changes and varies according to many factors, expect to pay anywhere from \$450 to \$3,000 per tape just to restore data.]

- CD-ROMs containing archives of e-mail and Home Drives for some former LINOBYTE users burned upon their departure from LINOBYTE;
- personal computers, home computers, laptops, handhelds, or other electronic storage devices. LINOBYTE expects that there will be few, if any, relevant records in these locations.

[The prospect of capturing hard drives from employees' home computers is not attractive, mainly given the privacy concerns of those involved. If a party is certain that there is unique and relevant data on home computers, it may be worth considering retaining an independent third party to perform the extraction and review.]

LINOBYTE currently estimates that it has approximately 60 GB of reviewable electronic documents. A substantial portion of this data would not be relevant to this litigation and would contain many duplicate files. A substantial portion of this data would consist of large Microsoft Excel spreadsheets.

[Spreadsheets are in fact databases, not text documents, and often present challenges not only for production but for review. Opening thousands of spreadsheets in Excel and reading all the tabbed worksheets is very cumbersome. Converting to TIFF often introduces formatting inconsistencies and creates very large files, because any cell with any content – for example highlighting, or a hidden formula – must be "printed" to image format for the sake of completeness. In this letter, the author is providing a warning that the parties must come to grips with how to produce large spreadsheets containing only a small fragment of relevant data.]

Unidentifiable data

LINOBYTE estimates that there are approximately 260GB of reviewable Unidentifiable Data. We propose using agreed-upon search terms to assist in the review process.

[A collection of 260GB of reviewable data is not insignificant. Printed out, on average 260GB would translate into 15 million pages or 5,000 tightly packed bankers' boxes of documents. Only with the aid of effective culling and review techniques can the plaintiff here assure the defendant that production deadlines can be met.]



B. PRESERVATION

LINOBYTE has already put the following in place to preserve relevant information:

- (a) The CEO of LINOBYTE has instructed the IT and Records departments to cease automatic destruction of records until the company can isolate and copy the relevant material.
- (b) In addition, a letter has been sent to key custodians, including their assistants, directing them not to delete any e-mail or documents in their personal accounts or on the “shared drives.”
- (c) LINOBYTE will capture an image of all drives, such as those on personal computers, laptops, home computers or other storage devices, containing potentially producible files.

[Although a party will not necessarily process all backup tapes, laptop computers, CDs or other materials in the course of the discovery, it is important to put in place a plan to prevent destruction of relevant information. All sources must then be reviewed to see if they might contain relevant material, and, if not, they can be released back into production.

There are costs associated with preservation. Most IT departments rotate their disaster/recovery backup tapes, with the older tapes being returned to the pool. If the first preservation order requires a suspension of tape rotation, the IT department must purchase additional tapes to replace those removed from the pool. Identifying which servers might have contained relevant material reduces the cost of preservation.

For “active data” on desktop computers in regular use, there must be clear direction to custodians about the obligation to preserve the information. Some companies have a policy of deleting e-mail older than six months, or have restricted e-mail inbox sizes. Deletion practices have to be suspended until copies are made of the mailboxes and accounts of key custodians.]

C. COLLECTION PHASE

LINOBYTE proposes to collect Identifiable Data for further processing as follows:

- (a) for existing relevant custodians, LINOBYTE intends to copy all Identifiable Data from the active servers and desktops. The e-mail archive folders containing older e-mail will also be included.
- (b) for custodians who are former employees, LINOBYTE will, where available, restore the CD-ROMs containing the archive of their e-mail and Home Drives taken at the time of their departure;
- (c) although LINOBYTE will preserve the relevant backup tapes from e-mail and file servers, LINOBYTE believes the complete record is available from the active servers.

[LINOBYTE must be able to demonstrate that the record is complete. If there have been restrictions on e-mail inbox sizes, or a policy requiring deletion of older e-mails, the opponents would have grounds for insisting on recovery of information from backup

tapes. Moreover, as the plaintiff in this action, LINOBYTE might be better advised to offer up those backup tapes if it has any reason to believe that the defendant's tapes will have relevant information not otherwise available.]

LINOBYTE's active Unidentifiable Data will be copied using ordinary file copy tools so that it can be further culled and reviewed.

[One way of connecting unidentifiable data with certain custodians is to use their surnames as a search term. It is not perfect but it provides a reasonable first phase in any review process and may be sufficient if the parties agree.]

D. CULLING PHASE

LINOBYTE proposes that, by next month, the parties exchange proposed key word search queries that will then be applied to the Identifiable and Unidentifiable Data of both parties.

LINOBYTE intends to further cull the records produced in the following ways:

- by limiting records related to each custodian to time periods in which that custodian was performing functions that are relevant to the litigation;

[Date range culling must be done by agreed-upon date fields, which are different for e-mail and non-e-mail files.]

- by excluding from searching, review and processing non-document and non-user files, such as program and system files; and

[A list of known executables is publicly available and may be compared with program files in hard drives if thought necessary, especially in forensic situations.]

- by "de-duplicating" files across the entire collection, flagging duplicates with a page marker and a cross-reference to the "original."

[De-duplication is not always recommended on certain types of collections. Although de-duping large collections of restored data saves time and money, lawyers should carefully consider whether or not to de-dupe every e-Discovery as a matter of course. Some lawyers now prefer to have access to the complete database for production purposes. For example, say Custodian A has an e-mail with an attachment and Custodian B received the same attachment. You have decided to produce all documents from Custodian B. But instead of the attachment, you now have a record that says "this is a duplicate" and it refers to a document belonging to Custodian A, whose documents are not being produced. Furthermore, if you divide collections into separate databases, full text searches will miss "duplicates" if the original is located elsewhere.]

E. EXTRACTION AND INDEXING OF DATABASE

In this phase, LINOBYTE's third party expert will extract full text data of all culled files into a review application, together with available and agreed-to metadata, to facilitate the review process. LINOBYTE proposes that the parties exchange by next month proposed lists of metadata to be produced.

[After all the culling is done, the responsive documents (together with non-responsive attachments) are processed into a litigation support review application for relevance and privilege review. At this point the processing usually includes extraction of metadata, searchable full text, Bates numbering, and an image of the document in TIFF format.]

F. REVIEW PHASE

Once the database is created, it will be reviewed by counsel for relevance and privilege. Based on LINOBYTE's estimates of the amount of data involved, we believe this review can be completed in three months.

[Given the size of many e-Discovery databases and the fact that multiple reviewers often require access from different locations, Web-enabled hosted review systems are very popular. The service bureau performing the e-Discovery processing hosts the database while reviewers use their Internet browser to establish a secure connection.]

G. PRODUCTION AND EXCHANGE PHASE

LINOBYTE proposes that its relevant and non-privileged electronic documents be produced in single-page TIFF format, except that producible Excel spreadsheets may be provided in native format. Producible metadata and images will be provided in tab-delimited or similar text format, as agreed by the parties. LINOBYTE proposes that, by DATE, the parties use their best efforts to reach agreement as to the form of production.

[Agreement between the parties is important to avoid waste and expense. Using a vendor-neutral format for production allows the opponents to use the software of their choice. Even if both sides use the same litigation software, it is better to export/import the information than to provide a copy of the litigation support database, to avoid the risk of inadvertent disclosure.]

LINOBYTE is willing to discuss the possibility that the parties may agree to provide each other with access to producible documents via a secure Web repository, in which case the costs of hosting might be shared.

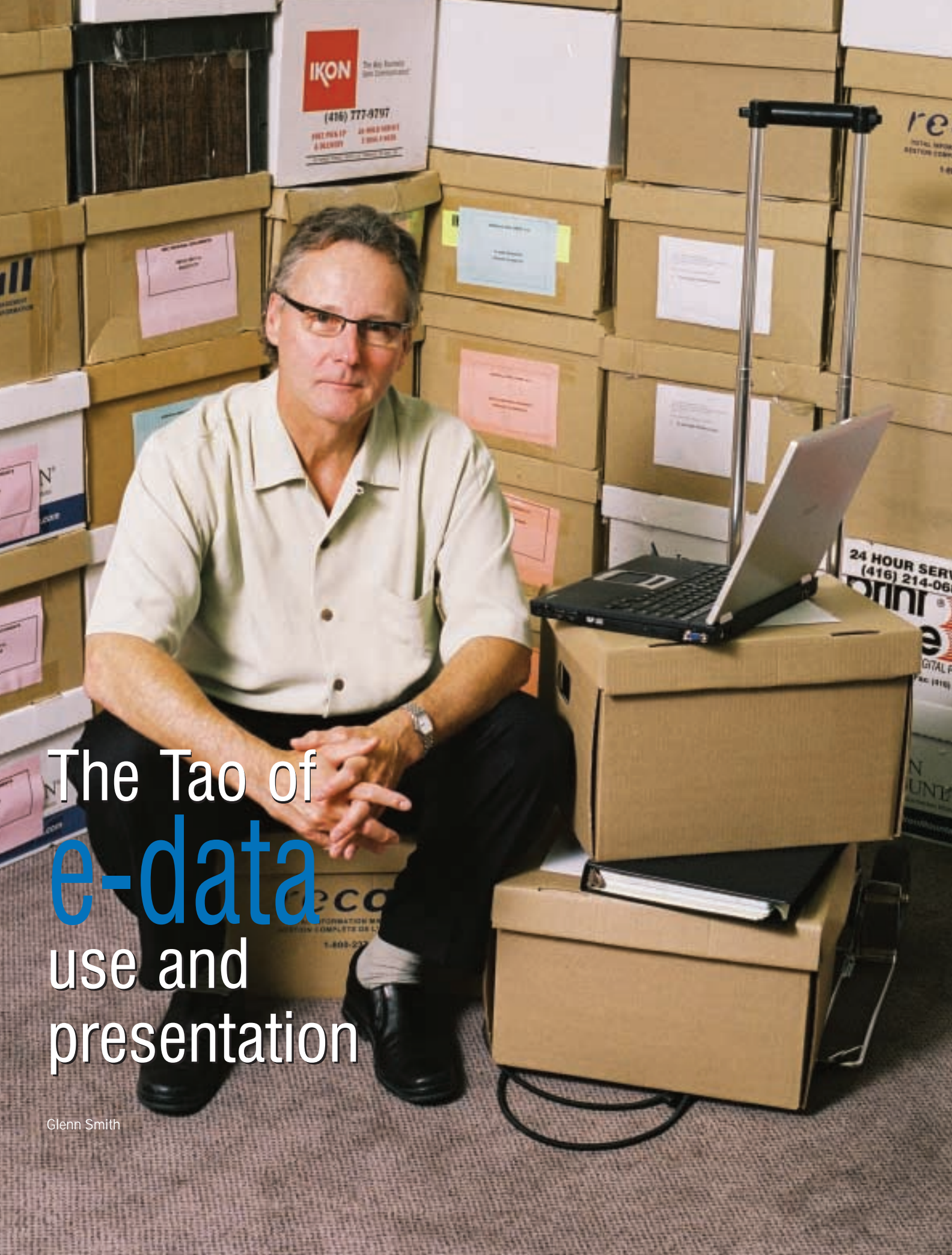
[Production does not have to involve the physical exchange of CD-ROMs, DVDs or hard drives. Parties and their counsel can be provided with a password to a specially prepared, hosted database. Users rights can be restricted as desired.]

We look forward to your comments on this proposal before the next meeting.

Yours truly,
PLAINTIFF FIRM

Martin Felsky, Ph.D., J.D. is Chief Executive Officer with Toronto-based Commonwealth Legal Inc.

Peg Duncan is Director, Business Opportunities and Emerging Technologies, Information Management Branch, in the Department of Justice in Ottawa.



The Tao of e-data use and presentation

Glenn Smith

[Note: The purpose of this article is to outline the effective management of documents for trial and appeal presentations. While specific case management software programs are mentioned, this paper does not attempt to review the available software in the marketplace.]

Documentary discovery in Ontario is undergoing profound change. Advances in computer technology and software have fundamentally altered the lawyers' relationship with information (see *CIBC v. Genuity*)¹.

While this article is not about the *Rules of Civil Procedure* ("the Rules"), it is imperative to re-read Rule 30.02, which governs documentary discovery in Ontario. All readers of this article will realize their obligation to disclose "every **document** relating to any matter in issue in an action that is or has been in the possession, control, or power of a party to the action" and that the term "document", as used in Rule 30, includes "information recorded or stored by means of any device." Authors of the Rules defined "document" so broadly that it includes all manner of electronic data, which are also discoverable in the same manner as paper documents. This concept has been confirmed in *Prism Hospital Software Inc. v. Hospital Medical Records Institute*². While this is a British Columbia case, the same principle has been applied in Ontario, and somewhat more contentious courts in Ontario have also ordered parties to produce evidence to the opposing party in electronic format.³

Software to manage e-data

The first step is choosing software to assist you in managing electronic data (e-data). The key question which you must ask, before you begin to choose a software program to manage paper and electronic data, is not what the software program does, but rather which software meets your needs, as opposed to wants.

The software must accomplish four tasks:

- (i) it must be able to store and protect all documents;
- (ii) it must be then able to organize documents;
- (iii) it must be able to retrieve the documents efficiently for discovery, trial or appeal; and
- (iv) it must be able to present the data to the trier(s) of fact.

Your approach to electronic data management should be no different than the approach you take in a traditional paper case. It may be useful to visit how this may be accomplished.

In our office, at the onset of the litigation, counsel will review with the client where and what are the relevant or potentially relevant documents in the client's possession (or control). This conversation will be documented in a detailed follow-up letter setting out the document collection strategy and confirming that the client materials must be protected and produced in their original state.

An associate or law clerk will follow up with the client and attend at the client's offices to obtain all original documents. A cursory

review of the documents will be performed by an associate or law clerk with respect to relevancy. The original documents will then be sorted into relevant and non-relevant categories, and of all the original documents will be "bates labelled" (sequentially numbered). The original relevant documents will then be delivered to counsel, placed in a safe storage area, and kept intact. Only the documents classified as relevant are scanned (not copied). The scan not only creates an image, but also involves optical character recognition ("OCR") processing which allows software such as Summation to search for words or collections of words. The so-called "imaging" and "OCR ing" of documents replaces the stage of simply "copying." The extra cost is insignificant when contrasted with the storage, replication and sharing benefits that come from imaging documents.

In addition to producing and protecting the original documents, it is also necessary to produce any electronic data kept by the client **if relevant**. Most often, this will involve the production of e-mails. This usually involves having a third party review the client's network, laptops, voicemail, servers, and other information systems. This data must also be reviewed for relevancy and integrated into the existing electronic database, again using a third party vendor software. Doing a first level review for relevancy will save endless time and duplication at the onset of adding the electronic data to your database. Just as with physical documents, it is important to apply a unique control number to the electronic data and make sure that the vendor software allows you to identify where the electronic data came from.

At this stage, or at the earliest opportunity, counsel for all parties should discuss the use of computer software and document management. Often, counsel can agree on a common software program to be used for the exchange of productions. Summation is a document management system used by many southern Ontario litigation firms and some trial judges (note, I'm not advocating for it, one way or another), although there is a plethora of these types of systems available.

Even if you cannot agree on the choice of software to be used, counsel must still agree to the use of standard fields for coding electronic documents which can be used by all counsel. The coding of the electronic database allows documents to be retrieved and indexed in a logical way.

Objective and subjective coding

E-documents must be coded objectively and should, in addition, be coded subjectively. When a document is objectively coded, a law clerk or staff member establishes guidelines, including a particular number of fields, requiring little or no subjective interpretation. These fields can include the following: author, date, recipient, "Bates start doc number" and "Bates end doc number." The obvious power of coding is that it allows all of the documents to be searched according to a given parameter. For instance, if all the e-mails from Jane Smith were required, a simple search under the "author" field would examine the entire database and produce the documents authored by her. This coding is usually performed by outside staff.

Strategically, a decision has to be made whether there will be any subjective coding done which, as it implies, means that someone may summarize the document, or determine its relevance, whether it is privileged, or indeed assign an issue to it. This decision can be made after the document is objectively coded, provided that the right fields have been built into the program. For example, Summation allows the addition of issues, document summaries, or the so-called "hot doc tag" to be added after the objective coding.

Summation and other case management software such as Case Map are excellent at allowing counsel to use the electronic database to view the documents image, to "tag" documents with appropriate issues, or label them as "hot documents." While most software programs allow you to identify issues, it is an important strategic decision to determine how many issues will be imputed into the system. The more issues are added, the higher the probability of adding unnecessary complexity to the process. It is a mistake, in my opinion, to have long lists of issues as it becomes difficult, even with software, for different viewers to track the issues and consistently categorize documents. As well, under no circumstances should subjective coding be delegated to anyone other than the trial counsel.

The electronic database can be sorted chronologically, culling out privileged documents and producing a list by date, author, and recipient that is suitable for production by way of affidavit of documents. The privileged tags and summaries are not produced in this version, but are kept as privileged work product on counsel's database. The exchange of data allows counsel to then add all of the adverse parties' productions to their database and again subjectively code them, as the case may be.

Electronically storing documents obviously obviates the necessity to recall boxes from storage, re-file or otherwise having to handle large quantities of boxes of materials. Finding and copying documents can be done easily, without having to go through countless bankers' boxes. Documents can also be stored between all counsel on one server by using a special Summation program called *Case Vault* which allows non-privileged sharing online. Once the electronic documents are in the database, they can be accessed immediately in the office or accessed remotely from home or on the road. While attending clients' or other counsel's offices, documents can be accessed from your computer or on a CD-ROM.

Discovery

The Summation software, on its own, can be used to develop a chronology to assist in preparing for discovery and trial; Summation and Case Map used in conjunction can generate create time maps and chronologies. Post-discovery, Summation and other software programs allow seamless integration of the electronic discovery transcript into the database. From there, such programs allow the users to search the transcript, add notes, highlight the transcript, summarize it, and organize it by issue. The transcript can be searched for undertakings, and requests

for undertakings can be cut and pasted from the transcript itself. Answers to the undertakings can be exchanged electronically and linked back to the undertaking so that the transcript can be read with the answer to the undertaking immediately linked to it, without shuffling through thousands of pages of undertakings, wondering if they have been answered or not. Exhibit lists can also be created from the electronic database and transformed into notices to admit.

Trial preparation

With respect to trial preparation, consideration should be given to choosing case management software that allows you to find the needle in the haystack and organize the material effectively. The software should emulate the trial lawyer's usual trial preparation or organization. Software programs such as Case Map allow the trial lawyer to organize facts based on various theories from the exhibits and discovery transcripts. Case Map allows counsel to prepare a fact database allowing each fact to be linked back to the actual document (image) or statement made in the transcript. Both Summation and Case Map allow the facts to be developed in a chronological table demonstrating the facts that are linked to evidence and those which still require evidence and proof at trial.

The trial

The most difficult question now remains whether the trial will be conducted using electronic data or whether counsel will revert to hard copy paper data. Most trials are conducted without the use of electronic documents in the courtroom (see Justice B.T. Granger's article "Using litigation support software in the Courtroom," August 2004; www.practicepro.ca/ediscovery).

The most difficult hurdle in presenting e-data in a courtroom may be to convince the trial judge to actually use computers in the courtroom. To that end, you must schedule a meeting with the trial co-ordinator or the local administrative judge at the earliest opportunity. It is obviously too late to announce to the trial judge in your opening that the courtroom is unsuitable to display your electronic documents, or worse have the trial judge advise you of this fact. It may also be shocking to learn that the trial judge assigned to your case is a Luddite.

Therefore, you must be prepared to use your advocacy skills with the trial judge, and be ready to demonstrate that the use of the electronic documents in the courtroom will secure the most expeditious and least expensive determination of the trial. This can be accomplished by demonstrating the reduced costs to the litigants, the reduction in time to locate and display exhibits and, in particular, the ability for the trial judge, witnesses and the jury to literally be on the same page at the same time.

As well, not all courtrooms lend themselves to electronic presentations. It is important to have access to the courtroom before the trial begins and determine what monitors are required (as well as other hardware, i.e. video splitters) and at which strategic

places in the courtroom, they should be located or whether a projection screen will do the task. Usually, monitors allow more people to view the exhibits than a projection screen, as the latter is difficult to position and poses significant lighting problems in most courtrooms. Two excellent programs to assist in presenting e-data at trial are: Trial Director and Sanction. Again, Justice Granger's paper provides an excellent checklist on how to present a case using electronic documents in the courtroom.

The tendering of exhibits was easily handled by Justice Granger in the 2002 case of *GasTOPS v. MXI*⁴. The electronic documents were displayed on individual monitors and, when admitted, were burned onto a CD-ROM daily and given to Justice Granger. Justice Granger was therefore able to add the exhibits to his database in Summation. He also used Summation during the trial to take notes. Finally, Justice Granger also allowed the witnesses' evidence to be taken in so-called "real time" court reporting software, which allowed him to also integrate evidence on a "real time basis" into his computer, avoiding the need to take copious notes of witnesses' evidence. The advantages are again obvious.

A case study

If the presentation of an electronic case seems too daunting, you may choose to present the e-data in a combination of hard and electronic media. This is in fact what I did in *Alie v. Bertrand*⁵ before the Court of Appeal. As I had not been trial counsel, I did not have the advantage of an electronic database to work from, and had to create one, a somewhat daunting task. A brief history of *Alie* will assist you in understanding how powerful and potentially cost-effective e-data management can be.

The action was commenced prior to the dawn of class action proceedings. The trial began on September 8, 1997, and continued until mid-December 1998. It involved 137 plaintiffs, three main defendants, and 30 insurers that were brought into the action as third parties due to their coverage position. Over the course of that period of time, 110 witnesses were called, 15 of which were experts, and 600 exhibits (approximately 21 bankers' boxes) were introduced. The litigation was mired down in paper; it was cumbersome and expensive.

In *Alie v. Bertrand*, I chose Adobe Acrobat as the format in which to prepare an electronic database. It is a good format because PDFs are easily readable on any computer by simply downloading the free version of Adobe Reader (now version 7.0). This is an

important consideration for both the bench and the bar, as there is no costly software to purchase.

The process of obtaining court approval for an electronic hearing in the Court of Appeal began by co-ordinating with John Kromkamp (Senior Legal Officer). Mr. Kromkamp will support technology when it can be demonstrated that it will ease the court's burden, expedite the trial and make the job of the Appellant Tribunal easier. Usually, you can demonstrate this in the same manner you demonstrated it to the trial judge.

In the *Alie* case, I prepared an issue chart to chart all of the issues raised by the 27 counsel (17 separate issues), and link those issues to the trial counsels' factum through Adobe. (The use of links in Adobe is one of its powerful features.) The issue chart allowed each judge to view all 27 counsels' factums by issue, and compare one to the other on their laptops in court. The factums were indexed in Adobe, which created an expansive index with dropdown menus for sub-pleadings and exhibits.

The factums were then electronically altered to allow each case referred to in the factum to be linked to a joint case book, and each exhibit in the factum to be linked directly to the actual exhibit. The Court of Appeal therefore could, in reviewing a factum on a laptop, bring up any exhibit and any case.

Cost efficiencies were created by preparing one electronic case brief and combining all counsels' authorities, so that the Court had only one joint case brief. Hard copies were made, but only three copies were required by the Court instead of the usual five. Using electronic data reduced the size of the case briefs to one banker's box from 15. Similarly, the exhibits were reduced from approximately 20 bankers' boxes to one box, contained on one CD-ROM. The costs and time savings, estimated at \$25,000 to \$50,000, were then proposed to the Court at the case management meeting and accepted by the presiding case management judge, Justice Labrosse. The requested 10-day hearing was reduced to four and a half days, principally because judges could pull exhibits and case law to the bench directly.

In Ontario, the management of documents using computer software will soon become the standard, to be followed by the use of trial presentation software and its acceptance by the bench and bar.

Glenn Smith is a partner with Lenczner Slaght Royce Smith Griffin LLP in Toronto.

¹ CIBC World Markets Inc. v. Genuity Capital Markets [2005] O.J. No. 614

² Prism Hospital Software Inc. v. Hospital Medical Records Institute [1992] 2 W.W.R. 15

³ Reichmann v. Toronto Life, 30 C.P.C. 280

⁴ GasTOPS Ltd. v. Forsyth, Brouse, Cass, Vandenburg and MxI Technologies Ltd. (Court File No. 98-CV-5929)

⁵ Alie v. Bertrand & Frere Construction Co., [2000] O.J. No. 4860 (Ont. S.C.J.)

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* Lawyers seeking TitlePLUS Commercial Coverage can act for both the borrower and lender provided they comply with the Rules of Professional Conduct, and provided the lawyer is using standard form mortgage documents provided by the financial institution advancing mortgage funds.

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The TitlePLUS program has introduced a current owner policy, which provides protection to consumers after they have closed a purchase.

TitlePLUS OwnerEXPRESS meets a growing demand among lawyers and consumers for this type of post-closing protection, says Kathleen Waters, vice president of the TitlePLUS program.

"The widespread reporting of real estate fraud is making homeowners and others increasingly nervous, and has them looking for insurance protection that they can fall back on if they discover a post-closing issue, such as a fraud on title."

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Policy applications will be processed on a dial-in basis at 1-800-410-1013 or 416-598-5899.

Vacant land coverage

Buyers and/or mortgagees of vacant land to be used for residential purposes can now secure TitlePLUS coverage for these types of property transactions. Based on the results of inquiries and searches by the lawyer, the policy can include a future use endorsement to validate that the client can use the vacant property as intended. Policy applications for these transactions are processed on titleplus.lawyerdonedeal.com.

™ OwnerEXPRESS is a trademark of Lawyers' Professional Indemnity Company.

Why "Dial-in"?

For certain types of properties or transactions, TitlePLUS underwriting needs to be so customized that it makes little sense to build an automated intake system via the Web. So, the TitlePLUS Department receives applications for commercial, farm, leasehold and current owner (OwnerEXPRESS™) coverage on a dial-in basis.

When you "dial-in", you may phone us at 1-800-410-1013. But you can also e-mail or fax us (titleplus@lawpro.ca or 1-800-286-7639). So long as you communicate with us somehow, we will contact you and start the process of learning about your transaction. In some cases (such as farm and commercial deals), the TitlePLUS underwriter will provide you with a customized list of requirements that you will fulfill and fax back when you are ready (before closing) to receive the policy commitment.



The Online COACHING CENTRE

Workshop: *emotional intelligence*
Module: *#22 – Creating a caring environment by...
 learning how to say thanks*

Coaching

Emotionally intelligent people create caring environments by being appreciative. They say thank you.

Giving thanks energizes others by noticing and recognizing good performance. Emotionally intelligent people are liberal with expressions of appreciation and they take the time to make it personal and appropriate.

People respond to sincere recognition and honest appreciation. Only highly self-directed people have enough internal resources to keep performing at optimal levels without feedback. Most people are dependent on responses they get from their superiors. Employees often leave jobs because they feel unappreciated even when the reverse is actually true.

Building a thank-you culture begins with three steps.

1. Give frequent and personal feedback:
 - Timely feedback feels more genuine to the receiver than formal recognition later on;
 - Make the recognition specific to the person and the task accomplished.
2. Express yourself:
 - If you notice something worth praising, don't be shy, express yourself;
 - Unexpressed positive thoughts are useless;
 - Start to make this a habit; it will soon begin to feel natural to praise.

3. Notice the response to your positive feedback:

- Appreciation energizes people and makes them eager to do more;
- The results of an appreciative environment are long lasting

Mentoring

Consider a group of people who you work with. You may be their leader or a colleague.

1. Feedback:
 - Do you agree that giving frequent and personal feedback will increase motivation?

- Have you seen evidence where timely appreciation increased morale or a delay hurt morale? Describe the situation.

2. Appreciation:

- Are you good at expressing appreciation?
- Why do you think that is?
- Are you ever inhibited about showing appreciation? When and why?
- Can you see an opportunity for you to show more appreciation? What is it?

3. Response:

- Have you ever noticed the way positive feedback increases motivation? Describe the situation.

About the OCC

The Online COACHING CENTRE (OCC) is LawPRO's innovative online education tool. It lets you quickly and easily enhance a variety of "soft skills" that not only help you survive and thrive, but also help reduce malpractice claims.

The OCC is entirely Web-based, allowing lawyers across Ontario to use it at a time and place convenient to them. It is organized into six workshops, each of which contains approximately 25 learning modules, such as the one profiled on this page. Modules encourage self-teaching and self-evaluation; answers you provide when working in the modules should be saved for review at a later time.

To access the OCC, go to www.practicepro.ca/occ

Docketing dos and don'ts

Are poor docketing habits letting time and money slip through your fingers? Read on to learn how you can become a docketing dynamo and capture more time.

Many of you will painfully recall doing hand-written dockets on time sheets (and unfortunately, some of you will still be using time sheets – I won't mention any names). Your staff person will have (or still has) equally painful memories of the mindless task of entering this information into your accounting system.

Time sheets are bad news. They are not very efficient as the same information is transcribed at least twice. There's also lots of opportunity for errors, and even missing information all together. Throw out your time sheets and go electronic.

Electronic dockets are a must

Today, there are many excellent time/billing and accounting software products that make it dead-easy for you to directly enter time dockets on your own computer. Most of the practice management software packages have similar functionality.

When you enter your own dockets, you save time by eliminating the double-entry by your staff person, and more importantly, the opportunity for transcription errors. Once entered on a computer, dockets can go directly into accounting programs, correspondence or accounts as is necessary. If you are the road warrior type, remember that you can create electronic dockets on your laptop or PDA. The efficiency, extra speed and greater accuracy of electronic dockets makes them a no-brainer.

Now that we have you in the world of electronic dockets, and even if you were already there, here are some other pointers for capturing more of your precious time.

Docket throughout the day

You get to the end of a crazy day. You've been running around all day, responding to and sending e-mails, talking with clients on the phone, and drafting umpteen letters and documents. Time to pat yourself on the back and check your total time for the day.

You add it up – only 4.3 hours! You ask yourself: "Where did all my time go?" You move to disaster recovery mode. Time to try and rebuild the day. What did I work on? What telephone calls did I make? How long were they? How much time did I spend drafting the agreement on the Smith file? How many times was I interrupted while working on that agreement. You review your sent folder to try and figure out what e-mails you read and/or sent that day.

Stop! Trying to create dockets for work done earlier in the day (much less in the more distant past) is very time-consuming, and not likely to be very accurate or complete.

It is universally recognized that lawyers who create dockets contemporaneously with completing the task end up capturing a significantly greater portion of the work they have done – some studies suggest a gain of 20 per cent or more. Docket your work as you go.

Most time and billing programs have a timer feature to help track how much time you have spent on any given task. It

works just like a stopwatch. Most lawyers grossly under-estimate the time they spend on individual tasks. Try timing your own tasks: You will be shocked by how much time you are missing.

If you get interrupted while working on one task, pause or close the docket for it, and create a new docket for the new task. Reopen the original docket when you return to the task.

At the end of the day, you should still review your dockets. Look for missed time, and make any necessary corrections or additions while things are still fresh in your mind.

Docket in detail

Many time and billing programs have standard billing descriptions, such as "conference with client", or "review of correspondence." While these standard descriptions are convenient, they don't

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include nearly enough detail. Having detailed dockets is critical as a record of the work you did on a file, and for communicating to the client what was done.

A detailed docket looks something like this: “telephone conference with client re details of weekend access problems.” Or, “drafting of correspondence to client confirming instructions to skip zoning search.”

It will take you mere seconds to add a bit of extra detail to your docket entries. The ROI on those few seconds will be massive. Detailed dockets will help you refresh your mind as to the work that was done on a matter, even if it was in the distant past. You will also find that they give clients much less opportunity to complain about their accounts. If you have to make a submission as to costs, sue a client for fees, or appear before an assessment

officer, detailed dockets will make proving your fees were reasonable a slam dunk, and they quite possibly could save your skin in a malpractice claim.

Docket every minute you spend on a file

Don't pre-judge and write off time spent on a file as unnecessary by not docketing it on the day it was done. Docket everything and wait until you final or interim bill the file, at which time you can properly judge all the factors that determine what should be billed on the matter.

Docket all administrative and other non-billable time

Unfortunately, not all your time is billable. Inevitably you must spend time on many non-billable tasks: marketing, administration, training, CLE and so on. To assess your performance and under-

stand where your time is going, you need to understand how much time you are spending on all your non-billable tasks, and what they are. You can't do this without a complete record of your time – so docket everything.

Slice and dice your numbers

Lastly, with a more complete record of your billable and non-billable time, you have a rich set of data that helps you understand where you are spending your time, and how you can realign your tasks to increase your billable hours.

Throw-out those time sheets and get e-docketing!

Dan Pinnington is director of practicePRO, LAWPRO's risk/practice management program. Dan can be reached at dan.pinnington@lawpro.ca

C A L E N D A R

Events calendar

September 7

Risk Management and Claims Prevention

Dan Pinnington, practicePRO
Aird & Berlis LLP, Toronto

September 12

Become a Roads Scholar – OBA CLE
TitlePLUS sponsoring
OBA, Toronto

September 20

The Annotated Agreement of Purchase and Sale for Residential Property Law – Law Society CLE

TitlePLUS sponsoring
Law Society, Toronto

September 21

Trusts & Estates dinner program
OBA

Solicitors' Negligence & Your Insurer: Reporting & Avoiding Claims

Deborah Petch, LAWPRO
OBA, Toronto

September 23

practicePRO Technology Breakfast
Living in a Paperless Office With Just One Filing Cabinet

Peter Henderson,
Kramer Henderson Melconian
LAWPRO, Toronto

September 26

Canadian Association of Paralegals
Annual Conference

Avoiding Malpractice and Liability Claims

Dan Pinnington, practicePRO
OBA, Toronto

September 29

OBA – Young Lawyer's Division Family Law Conference

Developing and Maintaining Positive Solicitor/Client Relationships

Yvonne Bernstein, LawPRO

OBA, Toronto

October 4

"Realtors Without Borders" Trade Show

TitlePLUS exhibiting

Hamilton Convention Centre, Hamilton

October 6

4th Annual Real Estate For Law Clerks

TitlePLUS sponsoring

Law Society, Toronto

October 12

Winnipeg Real Estate Board Trade Show

TitlePLUS exhibiting

Canad Inn Polo Park, Winnipeg

October 13

Insurance Brokers' Association of Saskatchewan Convention

TitlePLUS exhibiting

Radisson Hotel, Saskatoon

October 14

Pacific Legal Technology Conference

Dan Pinnington, practicePRO

TitlePLUS exhibiting

Vancouver Convention and Exhibition Centre, Vancouver

October 19

HLA 19th Annual Joint Insurance Seminar

Emerging Ethical Issues and Malpractice Claims

Kim Carpenter-Gunn, Waxman, Carpenter-Gunn

TitlePLUS sponsoring

Sheraton Hotel, Hamilton

October 19

Halton Symposium and Trade Show

TitlePLUS exhibiting

Oakville Conference Centre, Oakville

October 19-22

TLOMA Conference

TitlePLUS sponsoring

White Oaks Conference Resort and Spa, Niagara-on-the-Lake

October 20-21

Thunder Bay Law Association CLE

TitlePLUS sponsoring and exhibiting

Victoria Inn, Thunder Bay

October 26

Opening Your Law Practice – Law Society CLE

Technology Tips

Dan Pinnington, practicePRO

Law Society, Toronto

October 26

Charity Hot Spots – OBA CLE

Limits On LawPRO Coverage

Dan Pinnington, practicePRO

OBA, Toronto

November 1

12 Minute Civil Litigator – Law Society CLE

Avoiding Litigation Malpractice Claims

Dan Pinnington, practicePRO

Law Society, Toronto

November 1

The Bare "E" Essentials: Issues and Answers in Four Major Practice Areas – OBA CLE

Dan Pinnington, practicePRO

Holiday Inn, Barrie

November 2

CUPA Conference

TitlePLUS exhibiting

Royal York Hotel, Toronto

November 6

CIMBL Conference & Expo

TitlePLUS exhibiting

Metro Toronto Convention Centre, Toronto

November 16

The Six-Minute Real Estate Lawyer 2005

TitlePLUS sponsoring

Law Society, Toronto

November 16

Safeguarding Real Estate Transactions

TitlePLUS sponsoring

Law Society, Toronto

November 28

Electronic Discovery and the New ED Guidelines – OBA and The Advocates' Society CLE

Why electronic documents are different

Dan Pinnington, practicePRO

OBA, Toronto

November 29

Convenants Concerning the Use of Land: Review and Reconsideration

TitlePLUS sponsoring

OBA, Toronto

For more information on practicePRO events, contact Susan Carter at 416-596-4623 or 1 800 410-1013, or e-mail susan.carter@lawpro.ca.

For more information on TitlePLUS events, contact Marcia Brokenshire at 416-598-5882 or e-mail marcia.brokenshire@lawpro.ca.



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