



The Tao of e-data use and presentation

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[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.

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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.)