BUT CAN YOU FOLD AN EMAIL and Make An *Airplane?*

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By Brett Burney

If technology is supposed to revolutionize the world of litigation, then why are we still pushing around so much paper?

The prolific nature of computers has considerably impacted the practice of law over the last several years. On a practical level, this means that no one uses a typewriter anymore. On a vocational level, this requires an understanding of how clients and society interact through the digital medium, and then how those interactions affect our modern body of common law.

This principle is visibly evident in the world of civil litigation where the Federal Rules of Civil Procedure were recently amended to accommodate the ubiquity of electronically stored information. Now the Ohio Rules of Civil Procedure are following suit.

The world has obviously changed, and "the machines" have become an integral part of society. Hardly anyone handwrites a note when an email will do. BlackBerrys are everywhere. iPods hold thousands of digitized CDs. And mobile phones are used to send text messages instead of making actual phone calls. The amount of digital information we consume and store every day is incredible and there is no sign of it slowing down. People would rather hoard digital bits than throw them away, and that means more relevant info that's discoverable and obtainable.

Technology can be overwhelming and often unapproachable for many legal professionals. None of us went to law school to learn how to extract email off a server, or question a witness about the logs kept by their instant messaging application. But that's exactly the spot many litigators find themselves in today. We're all struggling to graft old habits into a new world, and trying to make sense out of the technical confusion we face every day.

Probably the biggest catalyst for electronic discovery is email. Recent studies estimate there are over 170 billion email messages sent every day. That's about 2 million every second. Of course, a huge percentage of those messages are spam or unwanted solicitations. But regardless of how much you use email in your law practice, it's undeniable that the rest of the world has embraced this medium as a de facto mode of communication.

So what does this mean for the legal world? Well, specifically in litigation, it means that email has become a chief source of relevant information. Whereas in the past you may have been able to deduce the terms of a contract by looking at a solitary signed agreement, you're now more likely to see an entire history of the contractual discussion exposed in numerous email messages. It's as if the entire dialogue has been recorded for your review—and, of course, for the opposing party as well.

Another factor involved with emails today is that people will say the darndest things. People have a cavalier attitude when writing emails, perhaps because they believe their words are anonymous while they're hidden behind a computer screen. In fact, the opposite is true – email and other electronically stored information hardly ever goes away. Digital information is not deleted when someone hits the delete button. Email survives the delete button because it can continue to exist on backups or in the recipient's Inbox. And since email is considered a "written word," it holds a lot of weight when it comes to denoting intention and purpose.

So how does this affect the practice of law today? Well, in civil litigation specifically, it means that email is one of the first places parties look for discoverable information. For your own clients, this means you must be familiar enough with their IT systems so that you can properly inform them about preserving email. For example, you might need to counsel your client to suspend a backup tape rotation, or stop an automatic purge on the employees' Inboxes.

For the opposing party, you need to know the precise questions to raise so you are requesting the documents you and your client are entitled too. For example, it's helpful to know if the opposing parties operate their own e-mail server or if they download messages from their Internet service provider. The answers to these questions can have a significant impact on how you draft your document request.

Some legal professionals are understandably nervous about this new, uncharted digital territory, but the adventure is inevitable. Navigating through an e-discovery project still uses the map of reasonableness, so a party is not required to produce more or less information just because it's in an electronic format. But the rules have undoubtedly been amended to accommodate the quirky and dynamic nature of digital data.

Those attorneys who have embraced the call of the digital wild are observing that the "old school" adversarial approaches to discovery are giving way to a more cooperative attitude on obtaining and reviewing digital information. Change is not easily digested in the legal profession, but the world will force us to adapt, one email at a time.

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