

**ELEVENTH ANNUAL
SOUTHERN SURETY AND FIDELITY CLAIMS
CONFERENCE**

“e” LITIGATION

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I. BACKGROUND

When this conference started eleven years ago, we all knew what computers were, but we did not know a great deal about them. Since that time, we have experienced an explosion in all forms of the technology dealing with electronic data storage, retrieval and searching systems, and transmissions. Digital technology now permeates every nook and cranny of our personal and professional lives from the moment we first begin receiving and processing information from external sources in the morning until the last electronic appliance is turned off in the evening.

Those of us involved in litigation and claims resolution find it everywhere we turn. It would not be possible to do justice to the topic if we devoted an entire program to the subject, so in this paper, I am going to simply touch on a few of the high points you might find helpful.

II. SEARCHING AVAILABLE RESOURCES

One issue that comes up at every step of the litigation process, beginning with the gathering of the facts of the case through the use of experts at trial, is the use of technology to search for information helpful to your position in the case. With the powerful search engines available today, and the geometric growth of websites, just about anything you want is a double click away.

Whether you are looking for trade associations, codes and standards, recent developments in the law, expert witness or consultants, all you need to do is to spend some time searching on the Internet. Here is a sampling of what you can find:

ORGANIZATIONS

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| Surety Association of American | http://www.surety.org |
| Surety Information Office | http://www.sio.org |
| American Surety Association | http://www.americansurety.org |
| American Insurance Association | http://www.aiadc.org |
| American Institute of Civil Engineers | http://www.asce.org |
| American Society of Mechanical Engineers | http://www.asme.org |
| American Society of Highway Engineers | http://www.highwayengineers.org |
| Associated General Contractors | http://www.agc.org |
| Design-Build Institute of America | http://www.dbia.org |

EXPERT WITNESSES

Expert Witnesses <http://www.claims.com>
<http://www.experts.com>
<http://www.forcon.com>

CODES AND STANDARDS

Southern Building Code Congress International <http://www.sbcci.org>
American Society for Testing and Materials <http://www.astm.org>
American National Standards Institute <http://web.ansi.org>

SUBSTANTIVE LAW

Construction Law Review <http://www.constructlaw.com>
Lien Laws <http://www.e-architect.com>

BACKGROUND ON OPPOSING PARTIES, LAWYERS OR WITNESSES

Good sites for finding out about lawyers:

<http://www.hwhlaw.com>
<http://www.martindale.com>
<http://www.lawoffice.com>
<http://www.weblocator.com>

For information on individuals:

Lexis-Nexis <http://Lexis-Nexis.com>
<http://www.dogpile.com>
People Search <http://www.w3com/psearch.com>
The Ultimates <http://www.theultimates.com>

When searching for companies or personal websites, some search engines to consider are:

<http://www.yahoo.com>

<http://www.altavista.com>

Examples of the types of information you can get from these resources are:

"The Miller Act: Description and Statute"

"Surety Companies – What they are and how to find out about them."

"Why do contractors fail?"

"Surety Bonds: Managing the Risk of Contractor Default"

American Surety Association Newsletter and Articles

The list of helpful websites continues to grow, and within a few short years even this abbreviated listing will be outdated.

III. DOCUMENT DISCOVERY

Without a doubt, the largest impact of the new cyber age in litigation has come in the area of what we formally called document discovery. The day of storing most of a company's information on paper is rapidly sunseting. Now most information is stored on electronic databases. Paper is becoming an endangered species as businesses continue to move toward paper-free workplaces.

The legal profession has shown its willingness, although belatedly, to rise to the challenge. Lawyers seeking discovery from opposing parties are now generally more interested in understanding the computer and software systems of its adversary, rather than searching through dusty boxes of old paper records.

The Federal Rules of Civil Procedure now make all relevant "data compilations" one of the classes of information that must be disclosed at the beginning of the case even if the other party does not ask for it. In this regard, Fed.R.Civ.P. 26(a)(1) provides in pertinent part:

Initial Disclosures. Except to the extent otherwise stipulated or directed by order or Local Rule, a party shall, without awaiting a discovery request, provide to the other parties: . . .

- (B) A copy of, or a description by category and location of, all documents, **data compilations**, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings . . . (emphasis added).

The comments to the Rule indicate that “data compilations” mean all “computerized data and other electronically-recorded information”. While the less forward thinking state court rules of procedure generally require the opposing party to at least request the information, the result is the same – if the opposing party asks for relevant electronically stored data, they are going to get it.

A secondary front on which discovery battles in this area have been fought concerns the question of what information has to be given to the opposing party making the appropriate discovery request. Certainly any printouts of computer-stored data – i.e., hard copies – must be surrendered. It is also clear that a party will be required to print out, or put on a disk, any electronically stored data that has not previously been printed out. But, what happens when the information stored on the computer is in a format that is unintelligible to the adversary making the request? Providing that the party requesting the information is willing to pay it, the courts will frequently require the party possessing the information to translate its data into a readable and usable form. See, e.g., National Union Electrical Corp. v. Matsushita, 494 F. Supp. 1257 (E.D. Penn. 1980).

A question of some currency over the last few years has been whether a requesting party may go further still, and require its adversary to turn over its computers for inspection by an expert. The purpose of such an inspection is to permit the expert to run searches on the computer to discover relevant information that has not been provided in response to discovery requests. While most courts will typically require some preliminary showing of need by the requesting party,¹ or some reason for lack of confidence that the opponent is providing full responses,² courts are not reluctant in appropriate cases to make a party surrender its hard drive for inspection.³

One of the issues that most frequently comes up is the search for electronically stored information, such as e-mails, that have been deleted by the sender or recipient. This has caused no end of problems. In the old days, when all a person had to worry about was documents, this was an easy matter to deal with. Once he or she was finished with a document, it could simply be thrown away. If the document was thrown away, it no longer existed, and therefore was no longer capable of being produced in response to a discovery request. Too often, people today continue to believe the same concept applies to computers – once deleted, the information no longer exists. This belief is no doubt engendered by the software companies who frequently have icons of trash cans on the computer screen [the place to click for deletion of e-mails].

¹ “[A] particularized likelihood of discovering appropriate information” showing was required in Fennell v. First Stop Designs Ltd., 83 F.3d 526 (1st Cir. 1996).

² Evidence that a party “cleaned up” its hard drive after seeing the complaint may open the door to discovery of an entire hard drive. Gates Rubber Co. v. Bondo Chemical Industries, Ltd., 167 F.R.D. 90 (D. Colo. 1996).

³ In many cases the courts will not allow unrestricted access to all programs and all directories. See, e.g. Strasser v. Yolamanchi, 669 So. 2d 1142 (Fla. 4th DCA 1996), where the court required that the discovery order permitting access to the opponent's computer “must define parameters of time, scope, and must place sufficient access restrictions to prevent compromising patient confidentiality and to prevent harm to defendant's computer and databases”.

Unfortunately, computers are not that easy to deal with. While our common understanding of the word "delete" means to "erase" or "remove" something, this is not the translation in "computerese". When an item is deleted on a computer, it simply means that new information inputted into the computer can be overwritten on the space on the hard drive that is occupied by the "deleted" material. As a consequence, the "deleted" entry may never be removed from the hard drive, or may only be partially removed, as in cases where the "deleted" information is only partially overwritten by a shorter data entry. Grasping this reality, lawyers push very hard, particularly in bigger cases that can justify the cost, to examine the hard drive of their adversary's computer to find these "deleted" files.

The evidence that has been gathered from e-mails, both those deleted and not, has been both compelling and decisive in a number of recent cases. Illustrative of their impact, consider:

- A. The devastating use of Bill Gates' own e-mails in the ongoing antitrust action against Microsoft;
- B. The e-mail of Officer Lawrence Powell, one of those charged with beating Rodney King, who shortly after the incident e-mailed a friend "OOPS, I haven't beaten anyone so bad in a long time."; and
- C. The Chevron Corporation that recently paid a multimillion dollar settlement to several female employees that were suing the company for sexual harassment, and cited as one of their key pieces of evidence an e-mail that was circulated throughout the company entitled "25 reasons beer is better than women", which, needless to say, was crude and disparaging of women.

So there is little wonder why lawyers like to key on the opposing party's e-mails. The problem with e-mails, of course, is that it has taken the place of casual, face-to-face conversations in the privacy of an office or around the water cooler. We use e-mails to pass along office gossip and jokes, sometimes ones that others, depending upon their gender, ethnicity or sensitivity, might find repulsive. It is also frequently treated like a chain letter, and passed along to countless others. Many times, one or more of the recipients does not exercise appropriate judgment and passes it to someone who is offended. Other times, the e-mail sits stored in a hard drive like a fossil waiting to be discovered by the prying eyes of a lawyer. In either case, the e-mail ultimately becomes an incriminating piece of evidence against the company.

How can a company guard against its employees being so "dumb" in their use of e-mails, particularly when the world's richest man and savviest software guru, Bill Gates, is being hung as we speak with his own e-mails? That is a difficult question to answer, but a few suggestions are:

1. Train employees in the proper use of e-mails -- they are for business purposes only, and messages should always be phrased professionally and avoid personal opinions and attacks.

2. Place a warning on the computer screen⁴, which will give it a little more formality and serve as a reminder to the employee of the warnings he or she has been previously given.
3. Another useful "test" to ask employees to follow in sending e-mails is for them to imagine having to read the e-mail on a witness stand in open court to the judge and jury. While this test presupposes sound judgment and common sense on the part of the e-mailer, qualities frequently lacking in chronic offenders, it does at least cut down on the incriminating transmissions.

Another method of dealing with troublesome e-mails is to establish a reasonable, but short, retention period for e-mails and other electronic communications. E-mails, in particular, can normally be discarded after several weeks. There are legitimate business purposes for this, such as avoiding the unneeded use of storage capacity in the computer system. As discussed above, however, simply deleting an e-mail from the system does not mean that it is gone forever. It has to be "purged" from the system. Depending upon your network system, this can be easy or hard. Many of the latest network systems have automatic purge features that purge files that have been deleted for a set period of time. Purging, alone, does not good unless the company also has a policy of getting rid of its daily, weekly, or monthly backups. Finally, stand-alone computers, such as laptops and personal computers at home, are also subject to discovery, so the same considerations apply.

There have been a number of articles written on retention policies in the computer age⁵. Whatever retention policy is established, it should be reasonable and defensible based upon objective business reasons for the particular company.

One caveat, regardless of what record retention period is ultimately utilized, is the "you're on notice" exception. When an insurer is put on notice that a claim is coming, and this may well happen before suit is actually filed, the company should immediately suspend its retention policy and purge features on its computer system for any documents that are remotely relevant to the claim. If the company does not, and it is later discovered that the company destroyed relevant evidence, nothing good is going to happen. A list of potential consequences is:

The court might punish the company by allowing a spoliation claim which could result in the adverse party successfully striking the company's defenses;

1. The jury might punish the company with a "message" in its verdict that it thinks the company was deliberately destroying evidence; or

⁴ An example of a warning is: "You have accessed the electronic mail network of Old Reliable Surety. This network is to be used for business purposes only and not for personal use. Offensive, demeaning or disruptive messages are prohibited. Electronic communication should be treated with the same care as any other communication. Anyone who misuses company resources is subject to discipline, including immediate discharge."

⁵ See, for example, Jill Hertz Ashman, *Slackers, Hackers and Harassers Beware: E-mail Intensive Litigation Prompts Corporate Reforms*, LITIGATION NEWS, January, 1999; John Araneo, *Pandores' (E-mail) Box: E-mail monitoring in the workplace*, 14 Hofstra Lab. L.J. 339, 362 (1996).

2. In the worst-case scenario, state or federal authorities may seek criminal charges against the company, and possibly the individuals involved, for destruction of evidence.

The "teaching point" here is that, as soon as the company has notice of a claim, it should have procedures in place that identify and suspend the destruction of any potentially relevant electronically-stored data.

II. CONFIDENTIALITY OF ELECTRONIC TRANSMISSIONS

As quickly as inventors develop a new means of electronic communications, other inventors will soon develop ways to intercept those communications. And so it goes in the digital age. When cordless phones, cellular phones, e-mails and fax machines were first introduced, we used them with the same expectations of privacy we expected when using the United States mail or the telephone. We are quickly learning this confidence was misplaced.

Ubiquitous in most homes and in a number of offices is the cordless phone, which broadcasts and receives signals in a manner similar to radios. Like normal radio signals, conversations on cordless phones are easily intercepted by a variety of scanners and monitors that can be cheaply purchased at most electronic stores. Anyone expecting privacy when using a cordless phone is, therefore, naïve at best.

The analog cellular telephone is only a short step above cordless phones in security, and conversations on them may be picked up by scanners. The advent of the digital cellular phone has added a more enhanced element of security since its broadcast signal cannot be understood without specialized equipment. In other words, based upon interception equipment that is presently commercially available, the digital telephone is secure except to the more sophisticated eavesdropper.

With respect to the security of computer systems, it pits the security industry against the hacker and "virus" transmitter. As we read in the newspapers on a regular basis, the seemingly most secure computer systems in the world are vulnerable to both the hacker and the virus.

While it is beyond the scope of this paper to treat this topic in any detail, it is important to understand the technology and precautions used when transmitting privileged or sensitive information can have important consequences. Otherwise privileged information, when transmitted over notoriously unsecured means of transmission, can result in the waiver of a privilege.⁶ It can also potentially subject outside or inside counsel to ethical sanctions.⁷

⁶ For example, some courts have held that users of cellular telephones have a right to expect their conversations will be private and secure. Schubert v. Metro Phone, Inc., 898 F.2d 401 (3d Cir. 1990) [Note: this decision was rendered in 1990 – would the court find the same weight today given the proliferation of interception devices?]. While another court has found that users of cordless phones do not have a reasonable basis for expecting privacy. In re Askin, 47 F.3d 100 (4th Cir. 1995).

Similarly, some courts have held that use of e-mails carry a reasonable expectation of privacy, e.g., United States v. Charbonneau, (S.D. Ohio 1997) ("e-mail is almost equivalent to sending a letter via the mail"), while other courts have indicated that e-mails might not be entitled to the same expectation of privacy unless the message is encrypted. American Civil Liberties Union v. Reno, 929 F.Supp. 824 (E.D. Penn. 1996).

III. JUROR PERSUASION AND USE OF ELECTRONIC TECHNOLOGY IN COURT

A. Persuasion of Judge and Juries

The object of any trial is to persuade the finder of fact to decide the case for your client. This is best done by persuading the finder that the position that you are advocating on behalf of your client comports with the jury's sense of fairness, while that of your adversary does not.

If the thousands of articles written about how to persuade juries were distilled to a single statement, perhaps it would be that the primary job of the trial lawyer is to understand the way the jurors think, and then select an approach best calculated to get the jurors of that mind set to accept your position. The focus of this section, however, is not to discuss the "case concept," "theory of the case," or "theme" approach to juror persuasion, but to observe the changing ways that jurors and judges think, act and talk in the computer age.

No one over 40 years of age can deny that the way we receive and process information has drastically changed. So has the way we talk, and a whole new computer lexicon has emerged. Ten years ago how many of us were using words like "multitasking," "bookmark" (when not referring to books), "user friendly," "e-mail it to me," "glitch" and "reboot."

Judges and jurors, like society at large, are hooked on the sound-byte – that brief, concise, pithy statement that capsulates a point. That is why lawyers with increasing frequency are using power-point presentations for opening and closing statements at trial to showcase the points they are advocating. For example, in the Microsoft antitrust trial, much of the government's opening statement consisted of short clips of the videotaped depositions of Microsoft officers, juxtaposed with incriminating e-mails. The perception created by these brief images, when effectively done, becomes reality to the finder of fact, and if the Microsoft trial taught us anything, it is that even a senior, seasoned judge is susceptible to this approach.

Many jurors are also used to receiving their information from T.V. or from a computer screen.⁸ As one commentator has observed:

⁷ Both outside and in-house counsel for insurance companies or sureties are required to observe the various ethical rules which govern their legal work. One of the most sacred rules governing the lawyer/client relationship is that a lawyer will protect the confidences of his client. The American Bar Association has promulgated Model Rules of Professional Conduct. Model Rule 1.6(a) provides that a "lawyer shall not reveal information relating to the representation of a client unless the client consents after consultant . . ." The Rule, requiring a lawyer to preserve the confidences of the client, is found in one form or another in all of the ethical codes for lawyers. See e.g. Rule 4-1.6 of the Rules Regulating the Florida Bar which is virtually identical to the ABA Model Rule.

As applied to electronic transmissions and conversations, the various Bar Associations around the country have expressed different views on the issue of whether an attorney may breach this ethical duty by communicating sensitive privileged information regarding his client over cordless phones, cellular phones, e-mail or other forms of electronic transmission. See an article by Mills and Rothberg "*Protecting Client Confidences In The Age Of Technology*," found in Volume 26, No. 2 of the ABA Journal publication of the section of litigation "LITIGATION" page 15, 19-21.

⁸ In conducting the voir dire of a panel of prospective jurors, it is sometimes wise to ask questions about their use of, and reliance upon, computers, particularly as a source of information.

Computers and the Internet have changed how and when people obtain information and what they do with it when they get it. People want to know what is coming, and they want to get it quickly; if they do not, they simply move onto something else As part of the general public, jurors are becoming more sophisticated about the ways they receive and process information in the courtroom. They are skeptical and do not always believe what they hear and read. Sometimes they do not even tune in. They are so accustomed to receiving their information from a T.V. screen or monitor that some commentators say putting a border around an Exhibit will increase comprehension by more than 25%; many believe that simply using T.V. monitors in the courtroom for some communications will increase both comprehension and retention.⁹

B. Electronic Equipment in the Courtroom

The modern courtroom in many courts around the country has been redesigned or rebuilt to accommodate the new technology. The new Federal courthouse in Tampa, for example, has electronic capabilities that only a handful of the area's attorneys are able to fully utilize.¹⁰ Computer imaged documents, power-point presentations, and individual video monitors for the judge and each juror are becoming a standard part of the new courtroom.

Real-time transcription of testimony, in which the court reporter's transcription is contemporaneously displayed on a monitor for the judge and each of the attorneys is now common practice. This allows the attorneys to make marginal notes about key testimony as it occurs, so it can be referred to as the attorney prepares for cross-examination or argument at a later time, and the playback of testimony so that the precise testimony of the witness, and not counsel's wishful recollection can be consulted before the judge makes a ruling on a particular point.

Judges now are also frequently insisting that jury instructions, memoranda of law and certain other filings be accompanied by a computer disk containing the information. And, although it is not the standard practice yet in this writer's jurisdiction of the Middle District of Florida, courts are receptive to receiving briefs on computer disks that permit the judge to instantly "link" to another document or testimony cited in support of the statement. Thus, the judge, by simply clicking on a citation to a deposition or exhibit can pull up the reference on the computer screen to ensure that it supports the proposition for which it is cited.

IV. CONCLUSION

The future is now. In this new cyberage, we either adapt and prosper, or go the way of the dinosaur.

⁹ Whitehead, "*Juror Persuasion: New Ideas, New Techniques*" 26 LITIGATION, Winter, 2000 p. 34.

¹⁰ One amusing irony is that the courtrooms are designed for the attorneys, judge and jurors to be viewing monitors, which display computer imaged evidence the attorneys will be producing. Yet, it takes a special order from the judge to allow the attorneys to bring their computers into the courtroom.