Golden Gate University Law Review

Volume 22
Issue 2 *Notes and Comments*

Article 4

January 1992

Catching up with the Present: A Proposal for Document Delivery in the Legal Profession

William A. Fenwick

Robert R. Sachs

ESSAY

CATCHING UP WITH THE PRESENT: A PROPOSAL FOR DOCUMENT DELIVERY IN THE LEGAL PROFESSION

BY WILLIAM A. FENWICK, ROBERT R. SACHS*

I. THE GAP BETWEEN CURRENT TECHNOLOGY AND LEGAL PRACTICE

The high technology law practice tracks the incredible pace of development in the computer industry. High tech practitioners are often instrumental in bringing new technologies to market, ensuring their protection from infringement, and structuring the relations and obligations that bring new products to the consumer. As advocates, they push for greater protection of emergent fields, either through new legislation or clearer definitions of existing law. And for all that computer law practitioners depend on technology for the lifeblood of their practice, there are numerous possibilities for increased efficiency based on this technology that are overlooked. In this article we propose a new protocol for exchanging information between law firms, one that will improve the practice of law as a whole by reducing the barriers to accessing information, increasing the efficiency of manipulating information, and ultimately, reducing the excessive costs faced by clients.

To be sure, most law firms have recognized the efficiency and practicality of automated systems in the firm. From the mega-firm down to the solo practitioner, computers—mainframes, minis, and PCs—have become critical to legal practice. Some of this technology is designed to increase access to information: Westlaw, Lexis and other databases are crucial legal tools. In addition, new and powerful uses for computers in the law firm are continually being developed, such as case

* Fenwick & West
Palo Alto, California

management software, document databases, and animated demonstrative graphics. And while a commitment to technology requires significant investments, both monetarily and in human terms, there is no question that such investments are worthwhile because the overall quality of service to the client is increased. But the gains achieved thus far have been internalized to the individual firm, and overlook the substantial benefits that the legal profession as a whole can reap. The bar needs to explore ways to use computer technology to augment not just individual practices, but the efficiency of the overall lawyering process.

This need to increase efficiency, and hence to lower costs, has become readily apparent in litigation practice. There has been a litigation explosion over the past decade; this proliferation in litigation, coupled with changes in litigation practice, have dramatically escalated the costs of dispute resolution. An exaggerated flow of documents inundates the litigator—motions, counter-motions, depositions, voluminous interrogatories, and document productions. And while there have been significant attempts to increase the speed and reduce the cost of litigation—the Biden Bill, fast-track rules, and an emphasis on ADR—there is still a veritable mountain of information that must be reviewed, analyzed, organized, and retrieved in every case.

It is precisely these abilities at which computer technology excels. Computer databases greatly simplify the task of organizing and retrieving documents, depositions, or other discovery matters. But the key impediment to using computers to store and retrieve information is getting the information into the system in the first place. Even with the recent dramatic advances in input technologies, entering data remains the most expensive and time-consuming step in creating and accessing computer-based information. Documents must either be scanned in and then "cleaned," or worse, they must be keyed in manually.

In the litigation context, these procedures are often redundant, and hence unnecessarily costly to the client. For example, federal courts require that answers or objections to interrogatories, requests for admission, requests for production, or statements of material facts, include a verbatim recital of the original interrogatory, etc. This mandates re-keying text into

a new document that was originally keyed in at the opposing counsel's office once before. This re-keying is expensive, and error prone, but nevertheless necessary given current practice.

Similarly, it is often essential to review other pleadings and correspondence between the parties to locate references to arguments, to confirm prior representations or agreements, to locate critical information, or to establish a record for various motions. Where a party only has hardcopy of the opponent's pleadings or correspondence, he must provide appropriate instructions to paralegals or junior associates, who may then spend hours completing the task, which in turn must be reviewed by the attorney in charge. Some attorneys have automated this process by scanning into computer files important pleadings, correspondence and other documents. This makes it possible to retrieve and review relevant documents in a matter of minutes, not hours, but there is still the significant cost of entering the information.

These are but two examples of increased costs due to lost efficiencies. There is a way to eliminate these and other costly efforts by encouraging attorneys to exchange computer generated documents, as easily as they might exchange hardcopy.

II. CLOSING THE GAP: DOCUMENT DELIVERY IN THE MODERN LAW FIRM

As the foregoing discussion suggests, the underlying purpose of the "Proclamation of a New Protocol for Document Delivery" is to reduce the costs of dispute resolution by increasing the efficiency of the dispute resolution process. In addition to reduced costs, the protocol will engender better lawyering, thus producing a double benefit for the client. The Proclamation is reproduced after the body of this article.

The protocol required by the Proclamation is straightforward in principle and application. It requires participating firms to send "magnetic copies" along with any document they send or serve on a participating opposing party. These magnetic copies can be sent along with the original document, or transmitted electronically, anytime a party sends correspondence to, or serves a pleading on, the opposing party. Think of it as providing extra copies of a document, simply in another format.

III. THE DETAILS OF DOCUMENT DELIVERY

First, the protocol applies only to documents created by a law firm on its computerized word processing system for any purpose of the formal dispute resolution process. Pleadings, settlement offers, position papers, and routine correspondence, would fall within the scope of the protocol, but not documents created by clients, such as files produced in discovery, or documents created by others, including expert witnesses (if the documents were created on a witness's own computer system).

Second, the obligations of the protocol apply only between signatories: where opposing counsel, and their co-counsels, have all agreed to the protocol. It does not require a firm who is a signatory to send magnetic copies to a firm who is not a signatory. A signatory firm in these cases could suggest to a non-signing opponent that the latter at least participate in the protocol for the given case, and it may suggest that the opponent sign the Proclamation as a matter of firm practice.

Third, for now the protocol applies only in any formal dispute resolution process—litigation, arbitration, mediation, mini-trial, etc. Conversely, while it does not currently apply to transactional work, nothing precludes signatories from employing the protocol to transactional work and the documents thus created, and it is anticipated that the use of the protocol will evolve in this direction. Clearly, there would be significant economies of labor gained from such a practice.

Finally, the documents are to be produced in two separate formats, the native format of the word processing system on which the document was created, and in the ASCII text format. Almost every word processing system currently in use by law firms can save and read a document in the ASCII format; many are also able to read the native formats of a variety of other programs. If a floppy diskette is used to deliver the magnetic copies, the floppy diskette should be of either the $3^1/_2$" or $5^1/_4$" form factor. The diskette should contain a typed label with the firm name, document names, dates of creation, and the word processing software used to create the documents.

The cost of employing the protocol is extremely low, especially in comparison to the economies of labor that it creates.

If diskettes are used, their cost is generally insignificant, and because the protocol is reciprocal, almost every diskette sent out will be replaced by one received. The only real "cost" of the protocol is the extra moments necessary to save the file to diskette, and the extra mailing costs and labor. These costs are also insignificant compared to the labor, attorney time and cost saved in reviewing these files, and drafting documents that incorporate existing text.

IV. BETTER SERVICE, BETTER LAWYERS

What the protocol amounts to is a further move to bring the legal profession into the present day, and prepare it for tomorrow. Already a vast amount of correspondence in the business world is done electronically, via email systems, fax modems, or teletype. Yet the law, and the litigation bar, still clings to the printed page. We are not proposing the elimination of the printed page in favor of electronic media. Rather, the protocol seeks to facilitate the bar, as a whole, in recognizing the power and efficacy of modern technology, and its ability to help serve clients more cost-effectively.

The protocol will encourage better lawyering at a reduced cost. It will reduce the time required to locate files, review and identify relevant information in the litigation process. It will substantially increase the ability to index and organize documents. It will certainly reduce the amount of re-keying of text in motions and other pleadings where verbatim reproduction of existing text is required. It will help reduce the time necessary to respond to client inquiries regarding the progress of a dispute or lawsuit.

The protocol will assist in expanding the market for legal services by making it possible for law firms of all sizes to increase efficiency and ultimately lower the cost of dispute resolution. As most firms already use personal computers, the protocol gives equal access to firms of all sizes to a shared set of information and documents. By reducing the amount of manual searches, data entry, or file review, firms can focus their resources on the substantive aspects of the representation. The protocol thus raises the caliber of the representation by both sides, and improves the ultimate result achieved in the dispute resolution process.

Finally, in this era of increased attention to the bottom line, and moves by many law firms to cut costs while improving services, the protocol is but another step in the drive for a better, more efficient practice. Increased efficiency contributes not just to good lawerying but to good business. Increasing productivity by reducing the time spent on low level tasks means more interesting work, lower overhead, and increased profitability over time. Attorneys and staff can concentrate on other, more important and valuable tasks.

One issue that is implicit to any discussion of technology that effects the way lawyers handle client information is the maintenance of confidentiality. Lawyers have a fiduciary duty to protect the confidentiality of client information, and this concern must be addressed when sending out magnetic copies on floppy diskettes that may have been previously used to store client information. Because merely deleting a file from a diskette's directory does not delete the file itself, it is important to take measures to ensure that confidential client files are not accidentally disbursed. This is easily done by using a utility program that "scrubs" the diskette before use, or by using a new diskette. These simple precautions will preserve client confidentiality and satisify the firm's duty to its clients.

It is clear that the protocol offers a classic prisoner's dilemma. A firm benefits from compliance only if other firms cooperate. However, as all lawyers rely on the cooperation of each other for so many other aspects of their practice, cooperation is nothing new. To suggest that a firm would not employ the protocal because it might advantage its opponents, is to take shallow refuge in hubris and conceit. In any event, the protocol is designed to apply only to signatory firms: to them alone applies the obligation, and to them alone, and their clients, flow the rewards. Those who choose to watch from the sidelines will soon find themselves lagging behind in a new standard of practice. One would hope that the spectator gallery empties soon.

V. PROCLAMATION*

PROCLAMATION OF A NEW PROTOCOL FOR DOCUMENT DELIVERY

STATEMENT OF PURPOSE:

The progress of technology forges constantly ahead of its applications in the work place. Such is the practice of law, where custom hobbles along behind both the pragmatic and the possible, far from the forefront of innovation. Today, many law firms use sophisticated word processing equipment to produce the bulk of their correspondence and pleadings. But many of the social and economic benefits of this technology, and the convenience that it offers, remain behind once the document leaves the office of its creator. It is the purpose of this proclamation to advance legal custom and practice in step with the possibilities of current technology, and ultimately, to improve the efficiency, speed, and enjoyment with which attorneys serve their clients.

IT IS HEREBY RESOLVED:

Where any signatory to this proclamation creates any documents on that signatory's computerized word processing system for the purpose of serving or sending those documents to any other signatory party in the course of resolving any dispute, then in addition to providing the other party such documents in paper form, that signatory will concurrently provide, at its own cost, a floppy diskette containing copies of the same documents in both (1) ASCII text formatted files, and (2) the word processing format of the original documents. Both the files and the word processing software used to create the files will be clearly marked on the floppy diskette label in the following format: Firm Name, File Names, Date of Documents, Word Processing Software, and Operating System. The floppy diskette may be of either the $3^1/_2$" or $5^1/_4$" size, depending on the size used by the creator's system.

Firm Name:

Address:

By:

---

* This page of the Golden Gate University Law Review may be freely copied.