

LAWYERS AND THEIR DOCUMENTS

M. Sean Fosmire

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The law and the work that lawyers do has always focused on the use of language and the recording of that language in documents. If we begin with this formulation, we can see how the better use of electronic documents can further revolutionize the practice of law in the next few years.

Lawyers have always had a deep and sometimes mystical relationship with documents. Everything that a lawyer thinks or says is reduced to writing somehow – a letter to an opponent, a memorandum, a note written to a colleague, a report to a client, or a transcript made by a court reporter taking down the lawyer's words as spoken to the jury.

The mystical relationship applies to the "sacred" documents, those which must be in writing, signed, and in someone's possession, like contracts, wills, trust documents, and deeds. For those special documents, seals and incantations were previously used, and these documents still tend to incorporate a lot of legal formalistic language, reflecting their special status.

Courts, too, generate their orders and their opinions in the form of documents, which eventually find their way to the law office, most often with the payment of a fee to those who repackage them for lawyers – slip opinions, advance sheets, and of course state and regional case reporters as well as to secondary sources serving as guides to those cases, all occupying miles of shelf space.

The third major source of paper documents are legislative and regulatory bodies, which have produced another collection of books of primary sources and secondary sources helping the lawyer to handle all of it.

Until computers came into use in the law office, all of these materials were always produced and used solely in paper format. A letter would be typed, edited, signed, and sent by a lawyer. The recipient would read it, perhaps respond to it or take some action, and then file it away. Once the case or the transaction was done, it would be archived with thousands of others like it, first in short-term and then in long-term document repositories.

The advent of PCs in the law office at first made some changes in limited areas. The use of word processing meant that repetitive or "form" documents, such as discovery requests, no longer had to be tediously retyped every time they were used for a new lawsuit. Drafts of memorandums, pleadings, motions, and briefs could be generated and then edited, with only the changes being redone before a new draft could be printed for further review (and further changes).

Still, the law practice has largely remained centered on paper documents. Everything that the lawyer generated in a case is committed to paper, sent by mail, and filed away in redweld folders and bankers' boxes. The maxim "if it isn't documented, it didn't happen" always seems to hold the implication that the record that it did happen has to be on a piece of paper somewhere – and has to be retrievable when needed.

Evolution continued apace. During the 1980s and 1990s, lawyers learned to use and rely on electronic archives of statutes and case law for conducting their legal research. Despite some holdouts, a few of whom are still among us, most lawyers now use either Westlaw or Lexis, or collections of case reports on CD ROMs, to find

case law and statutory authorities. When they find what they are looking for, however, most lawyers still print out the opinion or the statute in question, and file it in a folder with other similar paper. When they want to cite the court's attention to the case, they will very often provide a paper copy of the opinion to the court and to the opposition.

Evolution gave way to revolution. In the last five years, the electronic revolution has accelerated the pace of a major change in emphasis in all aspects of business and of legal work. Widespread use of e-mail and of the World Wide Web are the two most prominent examples of how lawyers have adapted to electronic means of communication. There are other changes, perhaps less conspicuous but still very significant:

- Courts are now routinely posting copies of their issued opinions on their web sites.
- Regulatory agencies provide web access to full-text and searchable databases of their regulations.
- Federal and State legislatures likewise provide full-text and searchable databases of their enactments and the supporting materials.
- Many secondary source publishers will now make their materials available on secure web sites, limited to licensed users.
- Many also routinely include a compilation of materials and forms on a CD, bundled with the paper copy of their publication.
- Some publishers of periodicals are doing the same with each new issue.
- Newspapers and magazines provide some or all of their content online, either for free or to those who are willing to pay for this access.
- A number of compilations of news and other source materials are available online as paid subscription services.

Today, the practicing lawyer has the opportunity that he never had before to collect and maintain a large portion of his materials in electronic format, either in addition to or (we are coming to realize) in lieu of keeping it in paper format.

In this article, I advocate for a much wider use of electronic documents by lawyers and courts. In my view, pleadings, motions, and briefs should be submitted to the courts in electronic format, and should be sent to opposing counsel and to clients in electronic format as well.

FROM ELECTRONS TO PAPER AND BACK AGAIN

Some lawyers scan most or all paper documents items received on a daily basis so that they can be used as electronic documents. This is a very inefficient way to work by comparison to a system under which documents are sent from lawyer to lawyer by e-mail, and incorporated into the recipient's system, in their original format.

Consider a 30-page brief authored by an appellate lawyer. If his opponent receives it in the mail and scans it into his system because he wants to be able to handle it electronically, the result (using a rule of thumb of 100 kilobytes per page) is an image file which is 3.0 MB in size. If Optical Character Recognition (OCR) is used, there is a certainty of some loss of integrity, since even the best OCR package produces only 98% accurate electronic text from a crisp and clean paper original. From a less than crisp original, the accuracy rate may be as low as 80-90%.

By contrast, that 30-page document as it sits on the hard drive of the lawyer who authored it is probably less than 300 kilobytes in size – less than 10% of the size of the imaged paper document. If the electronic

document is sent to the other lawyer by e-mail, its accuracy is of course 100% – so long as it has not been improperly manipulated, the recipient can be certain that the original remains faithful to the words used by the originating lawyer.

A document which has been committed to paper, sent by mail, scanned, and thereby converted back to digital format results in a bloated file which may be a good to poor replica of the original electronic file. Using a digital scanner to convert paper to an electronic file is a necessary evil for documents which are encountered in paper format, but it is a grossly inefficient process, a poor second best for documents which are readily available in their native format.

As an alternative to continuing our paper-centric ways, I believe that lawyers and courts should consider a paper rendition of any document (other than the “sacred” ones) as *a temporary and disposable replica* of the electronic document, and should look to the electronic document as the original and the definitive version, to be distributed and shared in that format with all other participants in the process.

A key point to keep in mind is that *all legal and business documents now start out in electronic format*. Perhaps 95% of documents produced by lawyers are generated in word processors, and the rest are a mix of spreadsheets, HTML pages, and other items. For every page of every item that appeared in your inbox today, it invariably started out as an electronic file before it was committed to paper.

The electronic document can be used in ways that are unavailable with paper documents or with scanned images of those documents. Word searches can help to quickly locate key words and phrases within the text. The text may be associated with key words and categories if used in conjunction with information management software with database capabilities. The text may be copied and pasted into other documents, an important function when preparing briefs which quote from decided cases. The text may be fed into various forms of "text crunching" software, for more sophisticated use and analysis. (A familiar example is the software which allows court reporters to produce key word indexes, pointing to page and line numbers, for deposition transcripts.)

Considerations of efficiency, saving labor, saving hard disk space, ensuring accuracy, and enhancing the usefulness of text and documents all militate in favor of keeping and exchanging litigation documents in electronic format. Whether it is the submission of a brief to the court, the exchange of interrogatories and answers among lawyers, or the submission of reports to the client, the exchange of electronic documents in their native format will most often be the most efficient and cost-effective way to proceed.

The concept of maintaining and exchanging documents in electronic format means that:

- Deposition transcripts will be produced and stored on disk rather than as paper transcripts.
- Trial transcripts will be submitted to appeal courts in electronic format.
- Interrogatories and document requests and the answers submitted will be primarily in electronic format.
- Pleadings, motions, and briefs will be submitted to courts at all levels under an electronic filing system. The days of filing five identical copies of an appeal brief will be gone. One electronic file would be sent and would be disseminated by the court when and where needed.
- Every actor in the process – clients, lawyers, and courts – will save a tremendous amount of space and money by no longer having to keep thousands of lineal feet of paper on file in their offices and in warehouses.