TOM INGRAM & ASSOCIATES, Inc.

High Impact Projects

A Newsletter About Solutions and Creating Exceptional Value.

Holding the Bad Guys Accountable:

How We Won a $5 Million Fraud Settlement[i]

Email, Electronic Documents Play Pivotal Roll

Punching Through the Bluster, Delay and Red Herrings of the Other Side

Intangible Nature of Financial Services Business Makes the Job More Difficult

Tips for Navigating the Maze of Electronic Documents

By Tom Ingram, PMP

Imagine that you are a Compliance Officer and attorney for a mid-size financial services firm. Your company has paid millions of dollars to a consulting firm to develop a new software system. The consulting company never delivered the promised system, and your company terminated their contract.

It is now time to recover damages, and you are wondering where to start. You have a substantial amount of paper evidence, which you can handle easily enough. The more difficult issue is how to handle the electronic evidence. You have some 120 backup tapes, dozens of CDs and half a dozen computers that have been quarantined. What do you do next?

I recently helped a client recover approximately $5 million in settlement of a fraud case. The other side blustered and delayed for years, but thirty days before trial they caved in and settled. One reason they agreed to settle was that we had an outstanding command of the electronic evidence in the case – and they had next to nothing.

Of course, we had to give them everything we had during discovery, but they were so far behind us that they never caught up. Most importantly, because we knew we had strong evidence, my client chose to spend the money to press the matter to conclusion. The client often considered giving up, but the strength of the body of evidence compelled them to press on.

This case study is intended to give you some insight into what worked for us – and what we could have done better – in case you are ever faced with a similar situation.

The smoking guns: It turned out that a couple of critical pieces of evidence made the difference between achieving a minor settlement and a major settlement. In my position as the behind-the-scenes expert witness, I helped the attorneys with the right "requests for discovery" to be submitted to the other side. I thought it quite likely that the opponent had conducted some type of internal review after the project to understand what went wrong. I wrote a request for all such documents, and we struck gold. We found a memo by the opponent's personnel that admitted to nearly every allegation we were making.

The second smoking gun was more of a challenge. Our intensive efforts in managing the electronic evidence resulted in discovering a spreadsheet on the computer that had belonged to the consulting firm's project manager. This spreadsheet was an internal report to the project manager's superiors that acknowledged that the project would take far longer than the client had been told. We were able to conclusively prove that the project manager was lying because he had given the client a report claiming early completion AFTER he had sent the notice of late completion to his superiors! Further, in investigating some hidden data inside the electronic spreadsheet, we were able to prove that the project manager was the author of this “smoking gun.”

A pivotal moment in the case came when I had the privilege of showing this second smoking gun to the CEO of my client firm. He was “beyond furious” at this point. What I saw in that one moment was the

resolve in his eyes to carry this case forward to a just outcome – no matter what. This is significant because, as one of our attorneys liked to phrase it, "big-time litigation is not for the faint of heart." In that moment, the CEO made the decision to commit every resource needed to win this case (which could easily have run into millions of dollars of legal costs.)

Assuming control of the universe of electronic documents: One of the first things that we did was to take steps to inventory and identify every piece of magnetic storage media that could potentially hold evidence. It is important to remember that backups are often made either daily or weekly. The problem is that each backup tape probably contained 98 percent redundant data and only 2 percent new evidence that might be germane to the case. Our IT people helped us set up a master database to identify each unique electronic document and discard any duplicates. This allowed us to have a single database of all of electronic documents that could either contain evidence or be subject to disclosure to the other side.

In this case, we had to restore some 200 individual pieces of electronic media in order to compile the database. The effort to do this was substantial and fairly costly – but the result was invaluable. We had rapid and controlled access to any piece of electronic evidence. We knew what was there and what was not there – and this gave us a substantial edge over the opponents.

Of course, we had to produce all of this evidence to the other side during discovery, so the other side had the same access. Our advantage was that we were confident in the strength and depth of the evidence supporting our case and were also confident that the other side would find little or no evidence to damage our case among the electronic documents.

Discovery requests: As mentioned above, one request for discovery that I wrote probably paid for my entire project fee several times over. This was not really a matter of luck – but rather thoroughness. The client paid me to write approximately 200 requests for discovery that specifically named every conceivable document, evaluation and report that I could imagine might exist on the other side.

Not only did we discover critical evidence from these requests, we nearly drove the other side crazy because we could demonstrate to the judge that these requests were standard reports and documents that are frequently produced in these types of situations. The other side would attempt to ignore our discovery requests, but we went back to them time and time again insisting that such documents existed and they had not conducted a thorough enough search.

This litigation effort took eight years and we were still squeezing documents out of the other side 90 days before trial. If you ever face a similar situation, some of the best money you could possibly spend would be for an industry expert who can identify documents, in excruciating specificity and detail, which your opponent should have in their possession.

The problems with tape backup and restore: Don't let me give you the idea that this management of electronic documents was a bed of roses. In fact, we were unable to recover documents from nearly 50 percent of the 120 backup tapes. Magnetic tape degrades over time, particularly if it is handled roughly. Equipment and systems change and are upgraded, which further complicates the task. Often, tapes are recorded on equipment that is out of alignment, and the tape becomes unrecoverable.

In the future, you will hear the term, "backward-read compatibility". This is a technical term intended to mean that documents are stored in a format that is independent of the machine on which they were created. This means that 10 or 20 years from now, a backup tape or CD created today could be read on the current generation of equipment.

We were lucky. As far as we know, the 50 percent of the magnetic tapes that we are unable to restore contained no evidence that would have had a material impact on the case. It could just as easily have been the reverse, and the crucial spreadsheet that we found could have been among the documents that were unrecoverable. If we had not had that one piece of evidence, I think it quite likely that my client would have settled for far less, or have abandoned the litigation. Backward-read compatibility is something you want to pay attention to.

Some mistakes to avoid: One of the client's well-meaning technicians inadvertently caused a serious problem with the email evidence. In his effort to quickly consolidate and backup the e-mails, he transferred them all to his own e-mail account and then backed them up and printed them. This inserted his name and a date and time stamp into the e-mails. This made them inadmissible because they had been modified after they were created. Luckily, we were able to recover the original emails without the

modification.

We chose to print a paper copy of every possible electronic document that could be printed. This resulted in approximately 150,000 pages of printed material – almost none of which produced material evidence. If I had it to do over again, I would suggest that we concentrate on printing only the e-mails, the word processing documents, the spreadsheets, the project plans and the PowerPoint presentations. This would have saved months of time and about $50,000 in costs.

The client did not enforce a document retention and deletion policy prior to the start of the litigation. Many people in corporations subscribe to the notion of "when in doubt, keep everything." Because my client had extensive records that reached back 8 to 15 years, the other side was able to hurt us and delay us with some troublesome requests for discovery.

From these discovery requests, the other side concocted a "red-herring" that caused us considerable grief. Their discovery efforts led to some embarrassing admissions by my client's personnel and probably contributed to my client's accepting a settlement rather than going to trial and "swinging for a big win." If my client had had an electronic and paper document deletion policy in place, much of this embarrassment might have been avoided.

Another mistake to avoid: Do not underestimate the difficulty of eradicating copies of embarrassing e-mails. I was amazed at how many copies of the sensitive documents continued to emerge during the four years of my involvement with this case. As late as 90 days before trial, the other side was still producing personal copies of sensitive e-mails that they had only "just discovered".

In establishing an effective electronic document retention and deletion policy, e-mail users need to be trained on how dangerous retaining personal copies of e-mails can be. Normally these e-mails can be deleted after three years – and the users need to be strongly encouraged to do so. At the end of this document you will find a link to an article that I wrote for the Journal of Internet Law in April 2004. This includes an extensive list of horror stories that show how devastating the occasional stray e-mail or memo can be.

Problems with expert witnesses: As a practitioner with 23 years of experience in the computer field, I was staggered by the ineptness of the testifying expert witnesses on both sides. They were academics who were quite certain of their views and opinions, but who had never made their ideas work in the real world. I wrote dozens of questions for our attorneys that demonstrated how impractical and ineffective the expert witnesses' views were. We successfully impeached the testimony of the opponent's expert witness, but we were less successful in managing the testimony of our expert witness. This is a particularly difficult and troublesome topic – feel free to contact me if you would like to discuss it in more depth.

Problems with attorneys: The opponent started out with competent attorneys, but these competent attorneys withdrew for some reason. We speculate that the competent attorneys for the opponent saw how bad their case was and insisted that they settle. The opponent dismissed the competent attorneys and hired other attorneys.

Most tellingly, these other attorneys did a terrible job of preparing their witnesses for deposition. We extracted dozens and dozens of critical admissions from their witnesses that might have been avoided. It is my view that their attorneys saw an opportunity to earn fees by prolonging the case, engaging in delay, distraction, red herrings, etc. In the end, the opponent had to pay not only $5 million in settlement to my client, but all of these questionable attorneys' fees.

We cannot blame the opponent's attorneys entirely. The corporate culture of the software consulting firm that we sued was one of arrogance, bluster and denial. It is hardly surprising that their attorneys conducted themselves in a similar fashion.

Unfortunately, we also had problems with the attorneys on our side. The ego of one of these "big-time litigators" was a serious detriment. He refused to engage the details of the case. He made promise after promise to attend to details and almost never followed through. After his continued failure to perform in the best interests of the client, I ultimately went to the client and informed him of the facts. The client agreed with me and stopped paying the attorney.

The client ultimately replaced the attorney with a far more competent firm. We still had problems with one of the new attorneys failing to engage the details and preparations necessary for the case. In my view, the client caused some of these problems by insisting on a contingency arrangement where the law firm bore some risk and reward for the case.

This created a situation where the lead attorney had

pressure to spend his time with other clients who were paying full price. The end result was that the lead attorney was often pulling all-nighters and scrambling to catch up prior to depositions. Despite being a bright and decent fellow, I believe he was trying too hard to climb the corporate ladder in his law firm and please his bosses. He should have devoted fully 50 percent more time to the case than he did. The CEO of the client eventually told me that one of the reasons they chose to settle was that "our lawyers just weren't strong enough".

Special problems with e-mail: Unfortunately, e-mail is easy to delete when it shouldn't be deleted and hard to eradicate when it should be destroyed. Frequently, a junior level person in the IT department is entrusted with the back up, retention and deletion of e-mail. This is a significant mistake because this IT person, though well intended, will almost certainly be young, inexperienced, overworked and have no background in the critical issues of litigation, discovery, legal compliance, etc.

E-mails from multiple years ago are typically very hard to locate with any exactness or specificity. We spent literally hundreds of hours of attorney time poring over paper copies of e-mails that could easily have been handled through electronic searches if done correctly. Also keep in mind that the IT department, when in doubt, will retain backup copies of e-mails for forever.

If you want to reduce your exposure in this area, you need to take some proactive action. The link mentioned at the bottom of this case study has a number of additional papers and documents concerning the management of the special problems associated with e-mail.

Summary: The other side blustered, delayed, sowed confusion and threw out red herrings. They did manage to weaken our case and drag the litigation out for some eight years. In the end, however, my client prevailed through a combination of resolve, hard work and expertise. Our command of the universe of electronic documents in this case materially contributed to a favorable settlement. My hope is that this paper has presented some lessons to you to assist you in being prepared in the event you should ever face a similar situation.

More info on this topic can be found at TUhttp://www.tomingraminc.com/finservicesfirmhelp.htmUT

Need further information?

Call us if you have questions or would like more information. This case is written as a teaching tool and is not intended to fully describe exact details or dialog.

Feel free to duplicate and redistribute this article!

(provided you distribute it as a whole, with credit to Tom Ingram and Associates, Inc.)

See TUwww.tomingraminc.comUT for details or contact us at 972-394-5736.

TP[i]PT The actual settlement figure was not released due a non-disclosure agreement. I made this estimate of $5 million from surrounding facts and statements by the principals.