

TRIAL PREPARATION FROM START TO FINISH
EFFECTIVE USE OF EVIDENCE

By Steven E Clark, Clark Firm PLLC

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A. Choosing Your Technological Direction

The initial question is what technology/software is available for you to use.

Adobe Acrobat is probably the easiest tool to use in creating, organizing and producing pdf files

Dropbox is a good way to provide links of file folders and documents that are stored electronically

Excel spreadsheets are useful to create lists by columns and rows of file folders and documents

Paper files: less popular but still important to maintain, particularly if it represents a native file.

What are native files?

Native files are files that are in their original format when created.

Examples include Word documents, text messages, message apps (WhatsApp), html, email, social media (Facebook), ESI (Electronically Stored Information)

One of the important decisions is the format in which the files and documents are going to be both maintained and produced.

Federal court litigation: important to know how files are kept by the client, any document retention and destruction policies, how the company creates and stores documents and information, who is in charge of IT

There is a duty of counsel to issue a "litigation hold" letter when there is a reasonable anticipation of litigation. This includes preservation of documentation, and suspension of any document destruction, which must be communicated throughout the company

Meet and Confer under Rule 26, FRCP: Counsel are required to meet and confer to discuss many of these issues prior to a scheduling order being entered by the court, which may be issued with or without a scheduling conference

The meet and confer conference is an important time to discuss any ESI that may be involved in the case. The assigned judge will expect counsel to be familiar with ESI and advise it of any issues regarding its use and production in discovery

Use of Artificial Automated Intelligence (AI) to sort, search and organize documents, especially large volume ESI and in day to day law practice

One beneficial use of AI robotics is that it may be more cost effective, particularly if there is a large amount of ESI to review, organize, and produce

Today's legal professionals are being buried beneath an avalanche of data. Total incoming cases in US state courts amounted to 84.2 million in 2016 alone. Consider that US businesses use about 21 million tons of paper every year.

Sometimes a single lawsuit can produce mind-boggling quantities of data. The larger cases can encompass 100 terabytes of data, equivalent to 8.5 billion pages, or about 8.5 million trees, if those pages were printed out.

In many cases, its no longer practical from a time or cost perspective for a lawyer – or even an entire legal team – to sift through all the available information. Increasingly, the only way to navigate this sea of data is to utilize artificial intelligence engines that can ingest all kinds of content, from printed text to recorded phone calls.

This approach not only makes it feasible to process every bit of information in a major case, it also allows a legal group to focus on more critical tasks while producing a quality of work that would not have been possible previously.

Artificial intelligence can scan content to monitor and help maintain compliance in various forms of communications. Even when using eDiscovery software to hasten the process of managing textual data, it still can take thousands of hours to weed through audio and video files.

AI technology can transform every second or frame of audio or video content into a format that can be searched and analyzed for words, phrases, faces, sentiment and voice identification. It then can take that unstructured data and produce an index, or structure, within a matter of minutes.

RPA (Robotic Process Automation): Automated Digital Worker

- Automates the acquisition and integration into a business process of information from websites, portals and other hard-to-reach data sources.
- Removes Human “Swivel Chair” Integration
- Completes tasks that take hours/days in minutes

- Achieves close to 100% Accuracy

The purpose of RPA (Digital Workforce) is to help law firms:

- Create efficiencies
- Do more work with fewer people
- Save costs

Every firm regularly performs many necessary but routine tasks that are accomplished simply by following a set of prescribed rules. These kinds of tasks are excellent candidates for RPA.

Robotic Process Automation

- RPA is software that automates manual processes and tasks with minimal business impact
- Ideal for repetitive, rules-driven business processes that span several non-integrated IT systems
- Local firms have automated invoice processing use case in the services area (law firms, accounting firms, etc.)

The RPA tool completes an invoice activity in milliseconds which usually takes a user around 15-20 mins if done manually.

Law Firm Use Case: Invoicing

It's a necessary part of business at every firm. The process is incredibly routine. For example, invoicing process involves:

1. Hiring a person (who is paid a decent salary) to do the processing work
2. Access the system each day, find the current bills
3. Convert or print as PDF
4. Send them to the proper recipients
5. Follow-up for unpaid bills
6. Send reminder of overdue bills, etc.

As the volume of invoices increases, firms usually:

1. Hire additional staff to help process them
2. Outsource them
3. Receive reports and validate for accuracy

Law Firm Use Case: Invoicing Using Robots

In the case of invoicing:

Automating the process cuts out half the manual work and frees up hours of invaluable time that employees can instead devote to high-value work.

In the case of ESI:

Automating the process cuts half the manual work and has the documents available for production much quicker and cheaper than if done by humans.

Robotic Automation of ESI: Example: To Process 1 GB of Email Files

- Robot can read the emails in Outlook or Gmail
- Use the rules to search “keywords” provided by the court
- Highlight Keywords and Print them as PDF
- Name the files based on Date, Subject, Keyword
- Remove duplicate files
- Convert to court producible format

The RPA tool completes an ESI activity on 12 GB of Emails (32 Keywords) in 24-48 hours (with 100% accuracy) which usually takes a user around 30-45 days if done manually

B. The Power of the Exhibit List

The exhibit list is the roadmap by which evidence will be presented at trial

The process to create an exhibit list begins with the identification of key documents

To be able to identify key documents, one must have an early understanding of the claims and defenses of the parties to the case

This should be a collaborative process between counsel and the litigation staff (paralegal, legal secretary in small firms)

Counsel should identify early on the key issues in the case

Once issues are identified, then documents can be organized as key and relevant documents supporting or undermining claims and defenses in the case, what are rebuttal documents, what is privileged, what documents should be produced in discovery, and what should be held back from production

Both state and federal courts require a privilege log be created if documents are withheld on the basis of privilege or work product of counsel

The initial exhibit list may be large. Over time as the case progresses, the list should start to shrink and by the time that pretrial filings are due before trial, a trial exhibit list should be created, which can be further refined and narrowed during trial preparation and the trial itself

Once the exhibit list is created, witness files can include documents that will be used with that witness

The same analysis and process holds true in preparing for depositions

C. Preparing Documents and Demonstratives

I generally prefer that documents be initially organized chronologically by date since it helps organize and tell the story from the beginning to end.

The documents then need to be organized according to the issues they apply to, or the witnesses that will be used in examination, either in deposition or at hearings or at trial.

If they are going to be used at trial or in an evidentiary hearing (like a hearing on a temporary injunction), then they need to be exhibit labeled.

Again, the identification of potentially privileged and work product documents needs to be determined, and those documents segregated so they are not included in a document production.

A privilege log will need to be prepared which provides a summary description of the document or its contents so that the judge may make a decision whether it is producible or not.

Also, the issue of confidential information needs to be addressed. Confidential information can be discoverable, but usually it is governed by an agreed protective order presented to the court for entry which identifies who may have access to it (attorney's eyes only, including staff, client, opposing party, expert witnesses). The documents need to be stamped or otherwise labeled as confidential.

If there is health-related information, or consumer financial information, then privacy concerns need to be addressed under HIPAA or consumer regulation laws, which may require redaction of certain information

For document organization and production, usually the documents will need to be bates numbered prior to production in discovery.

Use of documents at trial or in hearings:

It is important to find out what equipment is available in the courtroom to display or depict documents, pictures, video, etc. While the Dallas state district courts generally have projection devices to put documents on to display, many federal courts do not, and it is up to the party to bring the necessary equipment to display documents, etc.

Exhibit notebooks & Trial notebooks:

These are very useful at trial if organized properly.

Demonstrative evidence: this is generally an aid to use for the judge or jury, and generally is not admissible in evidence.

It can include coordinated text with video, blowups, charts, diagrams, damages chart, or anything else that may be useful in presenting visual aids to the jury.

Statistics show that most people (think jurors) retain information most often through a combination of visual and written or spoken information.

Generally demonstrative evidence must be included either on an exhibit list or shown or provided to opposing counsel in advance of trial and to the court before it can be presented to the jury.

D. Troubleshooting Problems with Evidence

The most important rule to keep in mind is that if you are going to offer evidence at trial, it must be timely produced or supplemented (ie., 30-day supplementation rules) to the opposing party.

In order to get information or documents into evidence, there are a few basic rules to understand:

There must be a sponsoring witness, or the document must be self-authenticating (proved up as an official record, etc.). Rule 902 of the Texas Rules of Evidence requires that an affidavit from a custodian of the records and the accompanying records be served at least 14 days before trial to self-authenticate business records. The rule sets forth the language for the affidavit by the custodian of records.

A predicate must be laid with the witness to admit the document or information into evidence.

Eg., business record predicate: Was it created at or near the time of the act recorded, has it been maintained and kept in the ordinary course of business, are you the custodian of such records, is exhibit___a true and correct copy of the original record?

Photographs: does this fairly and accurately depict the actual image that was photographed?

Out of court statements offered for the truth of the matter asserted are generally hearsay, and in order for it to be admissible, an exception to the hearsay rule must be identified to the court, such as business or medical record, governmental record, admission of a party opponent, etc.

Documents containing hearsay may also be admissible if it is not being offered for establishing the truth of the out of court statement.

The information or document must also be relevant to the issues in the case.

Information from a public agency or government entity may be admissible as an official record.

Information that is not relevant, or although relevant, is prejudicial or potentially inflammatory is not generally admissible.

Summaries of information or documents may be admissible so long as the proper predicate is established and the underlying records forming the summary are available to inspect at trial.

QUESTIONS???