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PRACTICE TIP

Are You Blawging, or Flawging?

By Josh King

Lots of attorneys are being told that they need to start blogging (or "blawging", as many attorneys refer to it). From a marketing perspective, this advice makes a lot of sense. There's an old advertising adage, credited to David Ogilvy from the pre-"Mad Man" days of advertising, that when it comes to big-ticket purchases, "long copy sells."

The idea is that anyone who is considering spending a lot of money on something — be it a luxury car, a private plane or legal services — is going to be far more influenced by having a ton of information than they are by being presented with nothing more than a pithy tag line or a series of evocative images.

So, the thinking goes, attorneys who blog can create this "long copy": a wall of content about them, their practice, their approach to the law and legal problems.

And here's the thing — that's absolutely right. Attorneys who blog *can* reap this benefit. They can also engage with a wider circle of other attorneys, have a more satisfying professional life, and become better lawyers — all via the process of regularly grappling with legal issues through their blog.

continued on page 6

The Myths of Legal Hold Notification

By Mikki Tomlinson

Organizations face serious repercussions in the form of both costly sanctions and adverse inferences for inadequate or failed legal hold procedures (see the sidebar on page 5 for examples of such cases). The most basic preservation task however, issuing legal hold notifications, seemingly remains a mystery to a surprising portion of corporate defendants. Too often, organizations, and their counsel, do not view the legal hold notification (LHN) process as a manageable business process. Many simply do not understand the requirements of a solid LHN program nor the options for managing it.

It is not just serial litigants at risk of having sub-optimal LHN programs; most other organizations have rarely felt compelled to implement legal hold programs, leaving them vulnerable to sanctions, adverse inferences, and other negative e-discovery consequences.

The immaturity surrounding LHN management is caused by a mythology, if you will, or several misconceptions about the process. What are these myths and how can corporations and law firms get past them?

Myth #1

LHN software is designed for large, serial litigant organizations.

In reviewing the evolution of LHN products, it is easy to understand how this myth came about. The early-to-market providers (2006-2007 era) are best suited for organizations with a steady stream of bet-the-company litigation and/or that operate in highly regulated industries. These products also offer functionality both beyond and connected to the LHN function. However, there are a number of point solution products on the market today that do not require heavy human or financial resources. Some of these can meet the demands of both large and small enterprises with both large and small litigation profiles. There are also broader information governance products, as well as products and services that address other parts of the e-discovery lifecycle that now include LHN modules and features.

continued on page 2

In This Issue

LHN Myths

continued from page 1

Myth #2

LHN software is not affordable.

Whether an organization is an active, full-time litigant, a company with a low stakes litigation profile, or a law firm seeking to provide LHN management on behalf of clients, there are solutions available of the appropriate scale that will assist in creating defensible, repeatable processes and deliver a return on investment.

Myth #3

Managing LHN with spreadsheets and e-mail works great.

While it is true that LHN *can* be managed with spreadsheets, e-mail, and other manual solutions, in order to be successful, manually managed LHN programs must be highly structured and organized, and require a considerable commitment of human resources. Solutions designed for automated LHN workflow are superior to manual programs by reducing the risk of human error or human resource turnover, increasing efficiency, and improving automation, reporting and auditing capabilities. My experience in auditing manual LHN programs have consistently found human errors and discrepancies.

Myth #4

The mechanics of managing LHN are only owned by corporations, not law firms.

Many organizations actively involved in litigation on a day-to-day basis manage their own LHN processes. However, these organizations represent only a portion of litigants and often represent the serial-litigation population. Organizations with less litigation management maturity can benefit by a partnership with their law firms as legal hold managers. Law firms that manage LHN for clients that do not fit the "manage in-house" model provide a significant value-add in legal services and are too often overlooked as customers for LHN solutions.

LHN Solutions

Once organizations get past the mythology of LHN, the challenge will be to identify the best solution from a crowded, confusing marketplace. eDJ Group has identified 17 LHN solutions on the market to date:

1. AccessData
2. BIA
3. Bridgeway
4. Cicayda
5. Exterro
6. Guidance Software
7. HP/Autonomy
8. IBM
9. kCura
10. Mitratech
11. Symantec
12. Thomson
13. X1
14. Xerox Litigation Services
15. Zapproved
16. ZL Technologies
17. ZyLAB

These solutions range from standalone point products to tools built into broader product portfolios (information governance, enterprise archive, matter management, ECA and review applications), and are sourced in a variety of ways (hosted, on-premise, cloud or hybrid).

Market Landscape

Corporations and law firms alike are consumers of LHN products. Corporations dominate the consumer market by far, though the number of law firms handling LHN management on behalf of clients is increasing — albeit slowly. It should be noted that references to law firm consumers herein are related to law firms handling the LHN function on behalf of their clients rather than for their own organization's LHN processes.

According to the eDJ Legal Hold Notification Summer 2013 survey

continued on page 5

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The Evolution of Litigation Management Technology

By Matthew Gillis

For decades, litigation was typically associated with large paper files piled on conference tables and oversized boxes being wheeled into courtrooms. The closest thing to technology that many people ever connected to litigation was a Dictaphone used to narrate notes for transcription.

Of course, all of that started to change in the late 1980s with the rise of personal computers and the use of more sophisticated information systems, both inside large corporations and at the law firms they hired to handle litigation matters. Then, in the 1990s, we saw the real birth of a new industry that would develop innovative technologies to improve the way that litigation is managed in the U.S.

Let's take a look back at the past 15 years (1998-2013) and reflect on the evolution of litigation management technology in four crucial areas.

The Explosion of Electronic Data Discovery

With the gradual shift from a paper-centric workplace to an electronic one, it's always been understood that one of the most expensive aspects of managing complex commercial litigation is the electronic discovery phase of the case. But in 2006, the U.S. Supreme Court's amendments to the Federal Rules of Civil Procedure created a category for electronic records that, for the first time, explicitly named e-mails and instant message chats as likely records to be archived and produced when relevant.

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In the landmark *Zubulake v. UBS Warburg* case, the plaintiff claimed that the evidence needed to prove its case existed in e-mails stored on UBS servers. Since the e-mails requested were either never found or destroyed, the U.S. District Court for the Southern District of New York found that it was more likely that they existed than not and directed that all potential discovery evidence — including e-mails — be preserved by the company. This resulted in significant sanctions against UBS and served as the "shot across the bow" that accelerated the growth of the electronic discovery services market.

Technology now streamlines the electronic discovery process for cases of all sizes. It routinely assists corporations and law firms with identification, preservation, collection, processing, review and production. We in the legal technology industry have developed amazing software tools to do complex functions such as predictive coding, early data analysis and large-scale filtering of irrelevant documents. And we're now finding powerful ways to host litigation data — as well as large enterprise applications — in the cloud, reducing the strain on corporate and law firm computer networks.

Emergence of Case Analysis And Assessment Tools

As jury consultants throughout the 1980s and 1990s, Greg Krehel and Bob Wiss noticed that their clients — litigators at some of the nation's largest and most powerful law firms — were using a surprisingly inefficient system for managing their cases, namely stacks of legal pads and briefcases stuffed with scratched notes. An idea quickly took shape: CaseMap, a new software product that would help litigation teams bring together the relevant facts, documents, cast of characters and issues of each case into one electronic case file. CaseMap would go on to be a huge hit by fundamentally transforming the way that litigators work up their cases, win dozens of industry awards, and ultimately be acquired by LexisNexis, which has continued to invest in the software to expand its functionality, extending it into transcript management (TextMap) and document management (DocManager).

"We had the first idea for CaseMap in the early 1990s and, after a long gestation period, brought it to market in 1998," says Wiss. "CaseMap really created a new category of litigation software within the legal technology industry."

"The number one thing I've seen change in our industry over the past 15 years has been the steady integration of different software tools," says Krehel. "We've seen a shifting landscape from lots of independent products that played niche roles in the litigation process to these robust software offerings that all talk to each other."

The Move to the Cloud

As litigation software tools became increasingly complex, they started to require sizable infrastructure investments to simply host the applications themselves. Moreover, in order to maintain these sophisticated tools, corporate legal departments and law firms were making additional investments in personnel with the necessary technical skills to manage these systems.

This stress on infrastructure and demand for rising capital investments has led our industry on a gradual move to the cloud. With cloud computing, the end-user no longer needs to worry about crucial logistical issues like back-up, performance or security protocols. The cloud provides the means through which everything previously operated on a PC or computer network can be delivered to users when needed.

For law firms in particular, there have been two primary options that have emerged. The Private Cloud option — which refers to the

continued on page 4

Litigation Tech

continued from page 3

dedicated hosting of the law firm's litigation data and software applications at a specific server facility — provides law firms with more control over where their data resides and greater access to the physical hardware hosting that highly sensitive data, as well as service level agreements that spell out server availability, server administration, data back-up and storage procedures. The Public Cloud — which involves the hosting of the law firm's electronic information with a service that is available to the general public over the Internet — offers a less expensive option that can be set up almost instantly by the end user. As the years have marched on, law firm CIOs have grown more comfortable with the Private Cloud option since they believe it provides greater data security.

The move to the cloud has enabled law firms to take advantage of new technology and have easy access to both their applications and data without having to invest valuable capital in hardware or personnel.

Rise of 'Big Data'

It seems the new frontier for litigation management technologies right now is the world of Big Data management. One promising application for Big Data analysis is in electronic discovery, where fast, high-performing data analytics can substantially reduce the time and cost of preparing for a case. In fact, at the root of any e-discovery project or process is the ability to identify, collect, index and analyze huge volumes of unstructured data.

As many legal IT professionals are discovering, new analytics tools and early data assessment technology innovations are making e-discovery software smarter, which can only help law firms and their clients to better manage risks associated with failing to produce all relevant documents in a lawsuit or investigation.

For example, early data assessment tools can help reduce e-discovery costs by first culling non-responsive and duplicate files, then further refining the document set by searching text and metadata to locate relevant files. This process not only reduces the amount of files that need to be processed, it also allows users to begin the review process sooner with fewer files for attorneys to review, providing considerable cost savings. Other tools will index, filter and search data at the source, which significantly reduces the volume of data before moving to processing and ultimately document review. These Big Data workflow solutions enable litigation teams to quickly get a snapshot, capture an entire document set, assess the contents, and then eliminate irrelevant, duplicate and non-responsive documents prior to the more costly and time-consuming review and processing phases of e-discovery.

The whirlwind pace of innovation over the past 15 years has taken us to a place few experts in our industry could have predicted at the turn of the century. The evolution of litigation management technologies has allowed corporate law departments and outside counsel to get things done faster, more accurately and with less risk.

What's Next

Where are we headed in the next 15 years? In my view, there are three major trends to watch out for in the next decade:

Trend 1: Enhanced Document Analytics

We're seeing a movement toward enhanced analytics of documents at a textual level, which enables logical grouping of documents and faster decision-making regarding responsiveness by legal professionals. The ability to "index in place" and apply technology to extrapolate from a small data set to determine responsiveness across a much larger data set will become the norm in the next few years. Lawyers will bring their expertise to the case strategy by feeding search terms into the technology in order to look at a large corpus of documents and return a small subset that is most relevant for final review and production.

Trend 2: Leveraging Litigation Technology For Risk Management

In the next five to 10 years, I expect that the creators of data — large corporations — will seek to apply technology to look across their Big Data troves to find trends that will drive future risk management strategies. For example, what we can learn to improve fraud detection, how we can spot increased communications between individuals who do not normally interact, etc. The upshot of this will be to drive more focus on early organization and culling of large data sets by leveraging the power of technology in the document review cycle.

Trend 3: e-Discovery Comes to Small Law

For lawyers in smaller law practices, I expect to see the advent of electronic discovery in their offices where it was not previously cost-effective. Matrimonial cases, workers' compensation cases, insurance defense cases and other plaintiffs matters that were previously not appropriate for full-scale e-discovery will soon be driving the need for lawyers to obtain cost-effective software tools to handle smaller volumes of data and intermittent usage. These tools will need to be easy-to-use, inexpensive to purchase and maintain, and likely will serve multiple purposes, *e.g.*, case analysis and document review/production.

Conclusion

It's been an exciting ride over the past 15 years for those of us in the litigation management technology business. The next 15 should be just as fun.

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LHN Myths

continued from page 2

(*see*, http://edjgroupinc.com/research), 37.2% of respondents use commercially available tools designed for legal hold notification, while 38.1% use commercially available tools not designed for legal hold notification (*e.g.*, spreadsheets and e-mail). Of those not using LHN tools, 17.7% plan to purchase a tool within the next 12 months. Only 10.6% indicated they have little to no codified legal hold notification process.

Corporations

Corporate entities have a plethora of buying options for LHN solutions. There are hosted and on-premise solutions, as well as LHN tools embedded or added on to other products. In determining which is best, an organization must take into consideration its litigation profile, corporate culture and infrastructure, then align those with long-term business goals.

There is no one-size-fits-all (or even most) LHN model. "Best practices," when it comes to corporate legal hold and discovery response procedures, are unique to each organization and largely determined by cultural nuances.

Law Firms

Law firms have largely been lost in the LHN market. As previously mentioned, law firms are target customers for LHN solutions to address litigation aimed both directly at the firm and at firms' clients. However, more and more firms are coming to understand the value-add in assisting clients with the mechanics of managing LHN. They also recognize the risks posed by clients with immature or non-existent preservation processes. Additionally, a handful of service providers have recognized that the law firm consumer should not be forgotten. I believe that law firms are an emerging and important customer base for LHN solutions.

It is most appropriate for full time litigants to manage the LHN process internally. In-house legal departments are more familiar with their corporate environment and culture. In-house LHN systems can be more economical than having retained counsel manage the mechanics.

It is a different story for the rest of the litigants out there. Law firms are in a prime position to assist clients that have only a handful of cases in any given year or those opting for the outsourced general counsel model. Retained counsel understand the risks and requirements around legal hold and advise their clients accordingly. But law firms have traditionally relied on clients to administer the process around the advice given or are handling it the same way as corporations that don't have LHN software — with spreadsheets and e-mail. Spreadsheets and e-mail have proven to be complex and clunky solutions for LHN, especially considering the availability of LHN tools available. Further, while law firms understand the risk and requirements, they often do not have a good grasp on client data and systems. Managing client LHN closes that gap.

Not all solutions are suited for the law firm environment (*e.g.*, security not designed for use on a client-by-client basis; embedded in products intended for up-stream functions such as information governance). However, there are appropriate options for law firms, including both on-premise and hosted solutions.

What to Look for in LHN Tools

At a minimum, LHN tools should:

- Issue legal hold notice with customized language via e-mail;
- Provide a customizable questionnaire/virtual interview; and
- Track custodian acknowledgement and response activity.

Additional functionalities that bring a higher value of return to clients demonstrate product maturity include:

- Flexible reminder and escalation features, including aggregate reminders, controlled by legal hold administrators;

continued on page 6

Cases with Sanctions for Failed Hold Procedure

Recent case law provides ample evidence of negative consequences for both Defendants and Plaintiffs, alike, because of immature or non-existent preservation methods.

- *Branhaven LLC v. Beeftek, Inc.*, 2013 WL 388429 (D. Md. Jan. 4, 2013). Defendant sanctioned for inadequate legal hold and improper certification under FRCP Rule 26(g).
- *Carrillo v. Schneider Logistics, Inc.*, 2012 WL 4791614 (C.D. Cal. Oct. 5, 2012). Defendant sanctioned for inadequate legal hold.
- *Day v. LSI Corp.*, 2012 WL 6674434 (D. Ariz. Dec. 20, 2012). Defendant sanctioned for insufficient legal hold.
- *EEOC v. JP Morgan Chase Bank N.A.*, 2013 WL 765593 (S.D. Ohio Feb. 28, 2013). Defendant sanctioned for failing to preserve database data subject to purge after expiration of retention period.
- *EEOC v. New Breed Logistics*, 2012 WL 4361449 (W.D. Tenn. Sep. 25, 2012). Defendant sanctioned for failure to issue timely legal hold resulting in destruction of data.
- *E.E.O.C. v. Ventura Corp. Ltd.*, 2013 WL 550550 (D.P.R. Feb. 12, 2013). Defendant sanctioned for failure to preserve data lost as a result of system data migration and restructure.
- *Peerless Industries, Inc. v. Crimson Av. LLC*, 2013 WL 85378 (N.D. Ill. Jan. 8, 2013). Defendant sanctioned for failure to issue legal hold to third party that was under the control of Defendant.
- *Scentsy Inc. v. B.R. Chase LLC*, 2012 WL 4523112 (D. Idaho Oct. 2, 2012). Defendant sanctioned for failure to implement proper legal hold.

LHN Myths

continued from page 5

- Custodian dashboard/portal; and
- Integration with enterprise systems for custodian contact information.

Moving LHN Programs Forward

LHN tools mitigate risk and deliver significantly greater efficiency over managing LHN with spreadsheets and e-mail. Whether you are an organization or a law firm, large or small, there is a product on the market that will meet your needs.

- Recognize that LHN tools greatly increase efficiency and mitigate risk. Using tools designed to specifically manage LHN can protect against the risk of sanctions and make legal hold a more repeatable (and improvable) process.
- Develop business requirements and goals around the LHN function prior to tool selection. Because there are so many buying options and categories of LHN products, selection quickly becomes confusing. Knowing your business requirements and goals in advance allows you to narrow the toolsets that will be most appropriate for your organization.
- Know that LHN tools don't have to break the bank! There are several point solutions available that are very reasonably priced (*e.g.*, one charges $5 per legal hold per month). Additionally, many service providers and enterprise applications that go beyond LHN functionality include LHN tools as part of the package and at no additional cost.
- Law firms need to recognize that managing LHN for clients is a value-add. Clients with outsourced GC models, or that are low-volume or one-off litigants are prime candidates for the value-add service of efficiently and thoroughly managing the LHN process.

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Blawging

continued from page 1

But that's only if they love to write, and love to engage with others through their writing. And therein lies the key difference between "blawging" and "flawging."

The Increasingly Blurry Line Between 'Blogs' and 'Websites'

The "long copy sells" concept has been met with an unfortunate fellow traveler in recent years: the idea that attorneys need to create a lot of "fresh content" for search engines in order to rank as highly as possible in Internet search results. This has created a rash of sites that are called "blogs." They may facially resemble the real thing, but they are simply husks filled in with ghost-written articles, marketing pitches, content scraped from other blogs and keyword-stuffed pieces designed for no human reader. These "blogs" don't have a community of commenters, they aren't advancing the discussion in an area of law, and they do nothing to make their putative authors better and more engaged attorneys. They're marketing vehicles, pure and simple.

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And frankly, they're inartful ones at that.

A polished website can market an attorney or firm and provide enough background material — articles, whitepapers, FAQs, etc — to help build enough content to satisfy any potential client looking for more detail before making the hiring decision. It's not necessary to do this under the label of a "blog." Doing so without the drive to write and engage simply looks cheap and foolish. Few will confuse the authentic voice of a blog author with ersatz recycled material spewed out via a flawging site.

Ethics Issues

For attorneys, there's also more at stake than the relative lack of efficacy of a flawging site. The more a "blog" pretends to be something it is not, the more the attorney behind it risks running afoul of the rules of professional conduct. Lots of people argue both sides of this issue in generalities, but let's get into some specifics.

"Blogs aren't subject to the attorney advertising rules."

That's correct; if what you've got is actually a blog. A site run by an attorney, offering thoughts and analysis on legal subjects, administration of justice, public policy, etc. is not "commercial speech" and will not be subject to the attorney advertising rules. This is true even if the attorney has a business development motive in operating the blog. The entire first amendment framework of American media depends on economic motive alone not being sufficient to render a communication "commercial speech."

Problems start to arise when the blog begins to stray from its true nature. No one would seriously entertain the notion that a law firm could slap the label "blog" on its website and suddenly be immune from the attorney advertising rules. Yet that's largely what many flawging lawyers have done by setting up "blogs" that look like marketing websites in every respect save the name.

One instructive example is the case of Richmond, VA, criminal defense attorney Horace Hunter. Hunter's "blog" was actually a closer case than many flawging websites, as it at least featured posts that Hunter had written himself, involving real matters and topics relating to Hunter's cases in the Richmond courts (the fact that they involved writing about clients is a separate issue entirely). Yet Hunter was disciplined by the Virginia Bar for not including a mandatory advertising disclaimer on his blog, and this decision was upheld by the Virginia Supreme Court. In its decision, the court found dispositive the following facets of Hunter's blog:

continued on page 8

Case Study

Solomon Ward Cuts through the Noise with AccessData Technology

By William N. Kammer

San Diego's Solomon Ward Seidenwurm & Smith, LLP provides legal services to a diverse business clientele. We handle massive cases by utilizing technology when appropriate.

Using AccessData's interoperable e-discovery, mobile device discovery and forensic analysis applications, we collect from nearly any data source and cull case data for highly targeted review. This platform addresses all phases of the e-discovery life cycle and with these tools in place, we offer effective and expedient e-discovery services to our clients while passing the resultant cost savings on to them.

A Business Problem and a Technology Solution

Until we acquired AccessData's e-discovery technology, Summation Pro, in May 2012, we used a combination of "best of breed" tools to address e-discovery. For processing, we used AccessData legacy product Discovery Cracker and, for review and production, Summation iBlaze. Like most firms, we found that a lot of our time was spent transferring data between these two platforms.

Senior litigation paralegal and litigation support analyst, Laney Schatz, manages our firm's e-discovery workflow. She knew that we needed a faster and more efficient solution to cut through the huge amounts of data that were, in her words, "just noise." Despite her experience with a number of competing e-discovery tools, Schatz was intrigued by AccessData's promise of a new Web-based product that could handle the workflow from processing to production.

We agreed to sign on for the initial release of Summation Pro and, in many ways, were alpha testers. We worked closely with AccessData to accomplish the early install. During those early weeks, our team was in regular contact with AccessData and provided it with a steady stream of feedback and feature requests ranging from requests for additional filtering capabilities to assistance with implementation of our new workflow.

Evolution of the Workflow

We don't consider our e-discovery practice a profit center, so we have not kept statistics to demonstrate exactly how much we have saved. However, we know that by utilizing the platform's ECA tools, its predictive coding engine and its filters, we can now easily and defensibly cull irrelevant data prior to human review. By reducing the amount of documents that we have to review at the beginning of discovery, we can move quickly to target those documents most likely to reveal relevant information. This allows us to respond quickly to discovery requests and to begin building our case with fewer billable hours, leading our clients to the settlement table in less time, saving them time and money.

In addition, once those documents reach the human review stage, Summation Pro continues to assist us with e-mail clustering tools, near duplicate identification, fuzzy searching and an array of prepopulated review filters. Schatz uses the visual analytic tools to analyze social relationships, file-type distributions across the universe and patterns of e-mail activity. These tools function like mind maps on the data, creating graphical representations that guide her review strategy. By revealing anomalies and unexpected connections, the tools help her target potential hot spots in the collection. She then assigns these documents a high priority for further review.

Early Stage Processing, Review and Production

Recently, a client handed us almost a terabyte of data on 14 hard drives produced by 14 custodians. All of the drives contained PSTs, documents, and innumerable file types. We had to import, review and process that data into rolling productions for opposing counsel prior to the imminent start of depositions. Using Summation Pro, we were able to import the data in its native format and to begin reviewing it without having to export and then reload the data into a separate review tool. The entire process took only 18 hours when our previous method would have taken at least a week. This saved a tremendous amount of time and allowed us to begin filtering and screening the data, using facets, and excluding unwanted file extensions and irrelevant domain names.

Visual Analytics Lead to Targeted Discoveries

In several other cases since our install, Summation's analysis tools have led us to relevant information much faster than our previous methods would have. For instance, with Summation's e-mail visualization tools you can choose from a variety of graphical formats to construct a timeline that illustrates relationships within your collected e-mails based on metadata. We can easily identify the frequency of communication between two parties over a range of time and zoom in on a range where the frequency increased. This allows us to return to the document list and focus on only the messages in that period.

Moving Forward

After fully implementing Summation Pro, we decided to deepen our forensic analysis and to add mobile device review capabilities. We brought in two more AccessData products: Mobile Phone Examiner+ (MPE+) and Forensic Toolkit (FTK). MPE+, which we began using in March 2013, collects evidence found

continued on page 8

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AccessData

continued from page 7

on more than 7,000 models of smartphones and tablets and supports the review of extracted data either within MPE+ or alongside other case data within Summation. Because mobile devices are an incredibly rich, but often overlooked, source of electronic evidence, our ability to offer this service differentiates us from other firms.

FTK, AccessData's flagship forensic analysis tool, is the processing core that powers Summation and MPE+. It reviews every corner of a memory device and uncovers deleted files, cracks passwords and identifies duplicates. Like Summation and MPE+, it is quite intuitive, and our firm's familiarity with Summation lowered our learning curve. We use it as a supplement to our review process, to examine the authenticity of opposing productions and to reclaim previously unreachable data from our clients' machines.

CONCLUSION

Our adoption of these tools has streamlined our workflow. With Summation Pro, MPE+ and FTK, we can perform thorough collection, processing and advanced analysis without exporting and reimporting data at each step. Because each application utilizes the same database, we are able to maintain forensic integrity and reduce risk. In parallel, we have significantly accelerated the delivery of data to our attorneys and cost savings to our clients. Finally, and perhaps most important, with AccessData cutting through the irrelevant "noise" that used to demand our time and attention, our attorneys and paralegals are free to focus on substantive issues as they pursue the next evidentiary breakthrough.

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Blawging

continued from page 6

- Virtually every post predominantly described cases where Hunter got a favorable result for a client;
- Most posts mentioned the name of Hunter's firm (as well as his name);
- Hunter's blog was a page on his firm's marketing website (rather than a stand-alone site);
- The blog had the same look and feel as Hunter's marketing website; and
- The blog lacked any interactivity.

No single one of these factors is necessarily a problem, but in combination they led to the conclusion that what Hunter called a "blog" was more appropriately considered lawyer marketing, and thus subject to Virginia's attorney advertising rules.

Ghost-blogging

There is a growing field of providers offering "ghost blogging" services: professionally written posts for those too busy to regularly blog on their own.

I've already covered the ineffectiveness of using third-party content to get the relationship-building and becoming-a-better-lawyer benefits offered by writing an actual blog. But ghost-blogging also carries special ethical issues for attorneys.

There are two related ethics problems that arise from this behavior, the first having to do with Model Rule 8.4 and the second having to do with the advertising rules.

There's a crucial difference between ghost-blogging and other situations — like pleadings, articles and letters — where the labor of other writers may appear under a single lawyer's byline, and this difference can be summed up in a single phrase: the intent to deceive. An attorney using this method is effectively claiming someone else's words as their own in order to bolster the attorney's credibility. That's textbook deception, and it violates ABA Model Rule 8.4(c) (http://bit.ly/1bADl1B), which prohibits "dishonesty, fraud, deceit or misrepresentation."

Does adding a disclosure of the ghost-blogging to the fine print in the blog's terms of use solve the problem? No. While so doing may (or may not) address the issue of out-and-out deception, it also concedes the obvious: that the putative "blog" is really just a marketing vehicle cloaked in a put-on veneer of credibility, competence and engagement. Remember everything I wrote above about how a proper blog doesn't fall under the attorney advertising rules as it is not "commercial speech?" Well, that goes out the window if it turns out you're paying someone else to create all of that writing under your name in an effort to build your image. What you call a "blog" will be treated as the advertisement that it is — complete with the question of whether any disclaimer can truly cure the deception caused by an attorney claiming thoughts and expression written by others as his or her own.

CONCLUSION

Ultimately, flawging suffers the twin defects of being both ineffective and unethical. The good news is that real blogging remains a rewarding outlet for those attorneys who love to write. And what's more, the increasing sophistication of search engines like Google is rapidly cratering the effectiveness of hackneyed tactics like those used by the worst offenders amongst the flawging sites. So blog if you need to scratch the writing itch. Otherwise? Polish the content on your main website, make it ultra-useful for readers, but don't ever play it like it's something it is not.

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