

Draft Report and Recommendations December, 2002

Joint Administrative Office/Department Of Justice Working Group on Electronic Technology in the Criminal Justice System

I. Background and Charter of the Working Group

As a by-product of the *Report on Costs and Recommendations for the Control of Costs of the Defender Services Program*, transmitted to Congress in January 1998, the Director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States created the Administrative Office of the United States Courts/Department of Justice Joint Working Group on Electronic Technology in the Criminal Justice System (“the Working Group”). The Working Group was charged with examining the use of electronic technology in the federal criminal justice system and its effect on the cost of evidence collection, analysis, and presentation. The formation of this unique “tripartisan” Working Group¹ – with representatives of the AOUSC, the Department of Justice (DOJ), and both the public and private criminal defense bar – offered a means to explore ways in which technology might be used to promote the fair handling of electronic data² in a cost-effective manner. The Working Group, which held its first meeting in June 1999, has analyzed how cooperation and coordination among participants may improve the criminal justice system while controlling costs and increasing efficiency in the context of an adversarial system and within the constraints of doctrines such as attorney work product and other privileges or ethical limitations.

II. Mission Statement

The Working Group began by developing a mission statement.

Mission:

To advance the fair administration of justice in the exchange and use of electronic data in a cooperative and cost-effective manner for all parties when

¹ The Working Group is made up of Administrative Office staff, Federal Defender Organization attorneys, a private criminal defense attorney representative, and Department of Justice (DOJ) representatives, including a federal prosecutor. Staff from the Federal Judicial Center and one member of the Committee on Defender Services of the United States Judicial Conference also were regular participants in Working Group meetings. Current membership of the Working Group is listed in Appendix 1.

² “Electronic data,” as used here, means information that was (a) received by a party in some other form and converted to computer-readable format, (b) originally received by a party in computer-readable format, or (c) created by a party in computer-readable format. It is intended to be an inclusive term.

required by the rules, when consistent with local custom and practice (compatible with privilege), or mandated by court order.

III. Issues Identified

The Working Group sought input from federal judges, Criminal Chiefs of United States Attorney's Offices, Federal Defenders, and Criminal Justice Act panel attorneys through questionnaires and interviews. Though not constituting a scientific survey, these sources provided useful insight into the leading issues arising from the use of electronic data in criminal litigation. (The results of these efforts are described more fully in Appendix 2.) In addition, the Working Group consulted with a number of different organizations working in the area of electronic data and litigation, including the Courtroom 21 Project at the College of William and Mary's School of Law and the Federal Judicial Center.³ Based on the input of these groups and the Working Group's discussions, the following issues were identified:

A. Electronic Data Is Pervasive

Computers have become so commonplace that many cases now involve discovery of some computer-stored information. In fact, in a growing number of cases, relevant data exists only in electronic form. From the largest investigative and prosecutorial offices to the smallest criminal defense firms and solo practitioners, computers are used to cut costs, improve efficiency, enhance communication, store data, and improve capabilities in every aspect of practice. Indeed, the Government Paperwork Elimination Act⁴ requires that as much government business as possible be conducted by computer by October 21, 2003. Current initiatives to implement electronic case filing provide evidence of the federal judiciary's commitment to using computer-based technologies to improve the judicial process. Given the proliferation of computers, the use and involvement of computers and electronic data will only increase. Kenneth J. Withers, a Research Associate at the Federal Judicial Center who participated in a number of the Working Group's meetings, has noted that:

- According to a University of California study, 93% of all information generated during 1999 was generated in digital form, on computers. Only 7% of information originated in other media, such as paper.
- Nearly all conventional documents are word-processed.
- Nearly all business activities are now computerized.

³ Early in 2001, at the request of the Federal Judicial Center, members of the Working Group reviewed a draft of *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, a joint publication of the Center and the National Institute of Trial Advocacy. The handbook was published later in the year and distributed to all federal judges and clerks, as well as to federal defender offices. This seminal publication is a valuable reference for those concerned with matters addressed in this report.

⁴ Pub. L. No. 105-277 ss. 1701-1710, 1998, codified as 44 USCA § 2504 n, West Supp. 1999.

- E-mail traffic has surpassed telephone and postal communications.
- Just as legitimate activities are conducted on computers, so are illegitimate activities. Securities fraud, drug dealing, pornography distribution, illicit firearms sales – a whole panoply of bad acts – are conducted using computers and computer-mediated communications.

See, Kenneth J. Withers, *Electronic Discovery: The Challenges and Opportunities of Electronic Evidence*, Presentation to Federal Judicial Center, National Workshop for Magistrate Judges, July 23-25, 2001, <<http://www.kenwithers.com/articles/sandiego/>>, at slide02.html - slide03.html.

B. Emerging Issues

While federal criminal justice participants report that the use of evidence in an electronic form is not yet pervasive in federal criminal litigation, they identified a number of significant issues that have arisen when such evidence has been employed.

Lack of Resources

Prosecutors, defense counsel, and judges all cited a lack of adequate resources to address electronic data issues, including insufficient funds to purchase appropriate hardware and software and a lack of adequately trained systems support personnel. Insufficient resources were also reported to have produced disparities among parties where, for example, either co-defendants or the prosecution and defense have differing levels of technical resources.

Lack of Training

Everyone involved in the investigation, preparation and litigation of criminal cases increasingly encounters new technologies in the midst of their ongoing work. All parties identified a need for training to make the most efficient use of available electronic technology.

Jurisprudential Issues

While other groups⁵ are considering a variety of jurisprudential issues raised by electronic data, the Working Group focused on what electronic information is discoverable and who bears the cost for the discovery. These discovery questions, which also affect courtroom presentation, appear to be arising with increasing frequency under circumstances where one party to the litigation has used electronic tools to convert, organize, or index large quantities of documents. For example, substantive legal issues

⁵ Many groups are actively pursuing justice system electronic data issues. A partial list of those entities is included at Appendix 3.

may be implicated when electronic evidence, by its very organization, may reveal trial strategies or attorney work product.

Cost Factors

National policy makers with budgetary responsibilities representing each of the constituent groups should address issues of cost-sharing and the potential budgetary impact of the necessary use of electronic technology in criminal litigation. Costs may be larger than initially presumed. The budgetary impact should include not only the cost of producing information in an electronic form, but also of interpreting, organizing, and disclosing electronic information, using electronic technology to make courtroom presentations, and providing training on all of these matters.

IV. RECOMMENDATIONS

Criminal cases arise from the business of everyday life. With growing frequency, that business is conducted digitally. As a result, participants in the criminal justice system increasingly use data either conveyed to them in, or converted to, an electronic format. As law enforcement agencies, prosecutors, defense lawyers, and courts invest in new technology to process this information, additional costs will be incurred. The ability of all participants in the criminal justice system to address the issues presented by these new technologies will greatly impact that system's fairness and efficiency.

A. GENERAL

1. The AOUSC, Department of Justice, and Federal Defenders should maintain a working group to monitor, discuss and make recommendations regarding electronic information issues. The Working Group concluded that promoting awareness of new technology capabilities and the issues they generate will help criminal justice participants make more effective and efficient use of these tools⁶.

⁶ In this regard, the Working Group identified several goals that merit continued attention:

(1) *identify data that must be used for differing purposes (investigation, case preparation, disclosure obligations, courtroom presentation and deliberations, archives);*

(2) *catalogue policies that promote the exchange of data in usable formats and for various uses by diverse actors (investigative agents, court, defense counsel, prosecutor, and jury); and*

(3) *recognize judicial practices that promote the effective exchange of data in usable formats, and recommend appropriate application of, and if needed, changes to, rules of procedure and evidence.*

Efforts to accomplish these goals should be ongoing as participants in the process gain more experience in these areas.

2. Investigative agencies must be brought into the planning process. Their efforts often drive the acquisition and use of electronic information. Moreover, in order to resolve discovery policy issues, care must be taken to accommodate potential legitimate agency concerns about the security of agency investigative techniques.

3. The judiciary should urge formation of local working groups in federal judicial districts that include federal prosecutors, defense lawyers, and judges to consider how best to address emerging uses of electronic data and technology that may impact criminal prosecutions in their district.

4. The impact on juries of electronic technology, including how electronic information can best be provided to jurors during deliberations, should be studied.

5. The need, feasibility and usefulness of trial-specific document repositories on secure Web sites to facilitate access to digital discovery should be examined.

6. The National Institute of Trial Advocacy should be asked to assist the bench and bar with training by providing curricula for CLE training regarding electronic technology in criminal litigation.

7. Private “panel” attorneys providing CJA representation typically do not have the automation and litigation support resources or training available to them that are available to attorneys in U.S. Attorney and Federal Defender offices.⁷ Entities responsible for providing training and support services to panel attorneys should address this disparity.

8. Each district court (or each division in larger districts) should consider promoting and providing training on trial presentation equipment and methods not only to court personnel, but to the attorneys in the criminal justice system.

9. The national policy makers from each of the constituent groups should investigate and promote methods for providing training in electronic technology to users for all stages of the criminal justice process.

10. Consideration should be given to providing joint training for prosecutors and defense counsel at a local or regional level that addresses local issues, procedures, and practices governing the exchange, use, and presentation of electronic data in local courts and circuits.

⁷ A revised Criminal Justice Act (CJA) guideline (paragraph 3.16 of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures*), approved by the Judicial Conference of the United States in March 2001, recognizes that providing an adequate defense case may require CJA panel attorneys to utilize computer hardware or software not typically available in a law office. In such cases, following procedures outlined in paragraph 3.16, counsel may apply to the court for authorization of CJA funds for the acquisition of such property, as well as for the utilization of computer systems or automation litigation support personnel or experts.

11. Blanket rules that require digitization or electronic presentation in all cases should be avoided. Many smaller cases simply do not require this effort. Likewise, requiring a party in document-intensive cases to digitize extraneous material can be a waste of human and monetary resources.

12. Efforts should focus upon identifying required software and hardware capabilities rather than specifying use of particular software (or hardware). In an environment of accelerating change, standardization would blunt innovation and creativity on the part of designers, investigators and trial lawyers. However, the Working Group strongly believes that digitizing information in a format readable by all parties, and with commercial, non-proprietary software, is preferred for ease of discovery and use at trial.

B. DISCOVERY STAGE

1. As early in the process as possible, parties should evaluate whether digitization is appropriate, considering the costs and benefits for case presentation, enhanced comprehension by the fact-finder, and individual advocacy and trial strategy.⁸ In this regard, government investigative agencies, United States Attorney's Offices, and defense attorneys should consider the desirability of: (a) generating information in electronic form; (b) using software which is commercially available; and (c) collecting, collating, and indexing information in a manner that would, if desirable or necessary, facilitate the removal of attorney work product or other privileged information from the electronic data.

2. Absent significant justification, during the discovery process there should be no degradation of electronic data from the state in which that information is originally received by a party. For example, to the extent that a party gets discoverable information from a third party in electronic form, the party should produce the information in that same form when requested to do so.

3. To the extent a party converts discoverable information into an electronic form, or manipulates or organizes discoverable information that is in an electronic form, two important interests may become implicated: (a) a "sweat equity" interest and (b) a "value added" interest.

a. "Sweat Equity"

(i) A "sweat equity" interest exists when the work performed by the party does not implicate the work product or other privilege. Where the opposing party would have to perform the same or similar work to make use of the discoverable information, a cost savings may be achieved if the work product is shared with opposing party. On the other

⁸ Law enforcement-investigative agencies also are part of this process and will be making decisions during the investigative stage that should involve an evaluation of whether digitization is appropriate in light of how the information they are gathering or generating will later be used by the prosecution and defense during discovery and as part of courtroom presentations. An example would be the use of digital technologies to record voice communications. See Recommendation A.2 above.

hand, simply making the work product available to the opposing party may not be fair, since both valuable trial preparation time and significant fiscal resources may have been expended in creating the work product.

(ii) For example, the government may have spent time and money converting discoverable paper documents into an electronic format and creating a basic index of the documents by entering them into an electronic data base. In this circumstance, requiring a defendant to independently convert the same paper documents into an electronic format and then enter those documents into a comparable electronic data base might not only be wasteful and inefficient, but also could lead to difficulties at a trial or hearing if the parties have used different electronic formats for the documents they seek to exchange or present to a judge or jury electronically.

(iii) Recommendations

(A) Absent significant justification, a party that converts discoverable information into an electronic form, or manipulates or organizes discoverable information that is in an electronic form, should make such products available to an opposing party, assuming that the work product or other privilege is not applicable to those products, and subject to any cost-sharing arrangements to which the parties may agree or the court may direct. In the example used above, the database and necessary software⁹ should be produced to the opposing party in discovery, subject to cost sharing arrangements.

(B) It may be difficult to allocate costs equitably, particularly when multiple parties with adverse interests are involved. In order to address both the trial preparation time required to perform the work and to help ensure that feasible cost-sharing arrangements are made, the parties should meet to discuss electronic information discovery issues as early in the case as possible.

b. “Value Added”

(i) A “value added” interest exists when the work performed by a party implicates the work product or other privilege.

(ii) In the example used above, the government converted discoverable paper documents into an electronic format and created a basic index of the documents by entering them into an electronic data base. Decisions made by the government in selecting documents for conversion, structuring the database, and choosing index topics, may reveal mental impressions, conclusions, or opinions about the documents such that

⁹ The use of commercially available software is encouraged. Such software is usually copyrighted, and the parties would have to insure that their use of the software is pursuant to an appropriate license. A party using software that is not commercially available should make that software available to an opposing party if it is legal and practical to do so.

disclosure of the documents selected for electronic conversion, the index, or both may implicate the work product or other privilege.

(iii) Recommendations

(A) Absent significant justification, a party that converts discoverable information into an electronic form, or manipulates or organizes discoverable information that is in an electronic form, should make every effort to do so in manner that makes it possible to make such products available to an opposing party – perhaps in a redacted or other form – without implicating the work product or other privilege.

(B) In the example used above, the parties might have met and reached an early agreement regarding (i) which documents would be converted to an electronic format, (ii) the elements of a basic database indexing those converted documents, and (iii) a cost-sharing arrangement for completing this work. Such an agreement could produce overall cost-savings without inhibiting the ability of any party to convert additional documents of its own choosing, or to further index or manipulate the data base once it was created. Alternatively, the government might have been able to produce a redacted database or take some other measures that would have avoided the need to have defense counsel simply receive the documents in paper form.

C. PRE-TRIAL STAGE

1. Effective procedures must be developed for dealing with technological issues in the trial process. All counsel should conduct a “meet and confer” session after arraignment followed by prompt notice to the Court of the possibility of electronic presentation and related issues.

2. At “meet and confer” sessions the parties should discuss: format of evidence, discovery, cost, sharing software, electronic presentation, hardware, equipment operator(s), trial court sight lines, and use of electronic information in openings, closings and witness examinations.

3. The Court should be given notice as soon as possible of the proposed use of electronic evidence, the suggested manner of presentation, relevant agreements reached by the parties, and any unresolved issues.

4. Courts should conduct timely pretrial conferences to discuss and resolve issues involving electronic discovery and presentation.

5. The parties may wish to consider having their respective automation specialist(s), if any, available to assist the Court and answer any questions.

D. TRIAL STAGE

1. Courtrooms should be appropriately equipped to allow parties and the court to have access to digital resources and to utilize them in presentation. The Judicial Conference has endorsed the use of technologies in the courtroom and, subject to the availability of funds and priorities set by its Committee on Automation and Technology, urged that (a) courtroom technologies—including video evidence presentation systems, videoconferencing systems, and electronic methods of taking the record—be considered as necessary and integral parts of courtrooms undergoing construction or major renovation; and (b) the same courtroom technologies be retrofitted into existing courtrooms or those undergoing tenant alternations as appropriate. In support of this initiative, the *Courtroom Technology Manual* (1999) provides technical standards for both the infrastructures and the systems.

2. Courts should offer general demonstrations and training on the use of the technology that is available in the courtroom as well as pre-trial access to the courtroom and its technology for practice and training. (Courts with courtroom technology installed often have training programs in place and allow for such access. The Federal Judicial Center presentation, “Developing Courtroom Technology Training Programs,” recorded July 12, 2001, explains how to develop training programs that enable court staff and attorneys to use technology in the courtroom for the presentation of evidence.)

3. Courtrooms also should be fitted to accommodate additional hardware supplied by the parties. If either party elects to use additional hardware with capabilities different from that already provided in the courtroom, that additional hardware should be made available upon request for use by the opposing party when doing so would not unfairly disadvantage the producing party. The producing party also should provide basic training on that hardware upon request, assuming that such training does not require any significant expenditure of time or money. The parties—and the court if necessary—should address these issues, including equitable allocation of costs, as early in the case as possible. Many of these issues are discussed in *Effective Use of Courtroom Technology: A Judge’s Guide to Pretrial and Trial* (Federal Judicial Center and National Institute for Trial Advocacy, 2001), which describes the substantive and procedural considerations that may arise when lawyers bring electronic equipment to the courtroom or use court-provided equipment for displaying or playing evidentiary exhibits or illustrative aids during trial.

3. Appropriate means must be taken to identify and preserve electronic evidence and presentations for the appellate record in an appropriate form.

V. CONCLUSION

Courts, the government, and the criminal defense bar must respond to the continued development of “newer, better, and faster” data collection, electronic information, courtroom presentation and other computer systems. Whatever impacts business and the human experience will, in all likelihood be adapted for the courtroom. Each component of the criminal justice system must prepare to deal with these innovations. The Working Group concluded that promoting awareness of new technology capabilities, and identifying the issues that arise with their use, will advance the fair administration of justice by promoting more effective and efficient use of these tools. It is the hope of this Working Group that there will be continued communication among all participants in the criminal justice process, consistent with the recommendations it has offered.