



When E-Mail EXPLODES

BY KEN WITHERS

The volume of electronic communication such as e-mail threatens to overwhelm the legal system, in far-reaching financial and social effects as well as in quantity

Last June, National Public Radio's *Morning Edition* featured a special series of reports on the social burdens of e-mail.¹ Ari Shapiro, NPR's Washington, D.C.-based legal correspondent, called me to get examples of legal liability associated with e-mail, which I was happy to provide. Today, e-mail files have become a favorite target for lawyers and government investigators hunting for the proverbial "smoking gun" in more routine and far less high-profile litigation. But when Mr. Shapiro asked me in an interview aired on June 18, 2008, what I

thought the greatest impact of e-mail was on the civil justice system and the legal profession, I didn't dwell on the potential legal liability that the content of any particular e-mail message might carry. My concern was the vast resources that must be spent to locate, preserve and review e-mail for production because, as NPR reports, "Daily e-mail volume is now at 210 billion a day worldwide and increasing."² The central problem with e-mail, as I see it, is not the smoking gun. It is the smoke.

"Today, a young person graduating from

law school and joining a large firm in one of our major cities can look forward to perhaps three or four years of doing nothing but sitting in front of a computer screen reviewing e-mail and other electronic documents for litigation," I said.³ This vision of purgatory created something of a stir, including an e-mail (appropriately enough) from a law-firm recruiter who blamed me—with tongue in cheek, I hope—for destroying the morale of her summer clerks. But I am not the first person to note that the ascendancy of e-discovery coincides with reports of a decline in civility and self-esteem in the legal profession.⁴

Jason Baron and George Paul paint a vivid picture of what this information explosion means in the context of litigation: "Probably close to 100 billion e-mails are sent daily, with approximately 30 billion

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e-mails created or received by federal government agencies each year. [...]

"Take then, for example, litigation in which the universe subject to search stands at one billion e-mail records, at least 25 percent of which have one or more attachments of varying length (one to 300 pages). Generously assume further that a model 'review-

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er' (junior lawyer, legal assistant or contract professional) is able to review an average of 50 e-mails, including attachments, per hour. Without employing any automated computer process to generate potentially responsive documents, the review effort for this litigation would take 100 people, working 10 hours a day, seven days a week, 52 weeks a year, more than 54 years to complete. And the cost of such a review, at an assumed average billing of \$100/hour, would be \$2 billion. Even, however, if present-day search methods [...] are used to initially reduce the e-mail universe to 1 percent of its size (i.e., 10 million documents out of one billion), the case would still cost \$20 million for a first-pass review conducted by 100 people over 28 weeks, without accounting for any additional privilege review."⁵

While simply "doing the math," as Baron and Paul have, results in scenarios that sound absurd, recent reported cases bear out their numbers. For example, all parties in the ongoing Intel microprocessor antitrust litigation agree that it may be the "largest electronic production in history" with Intel's production of "somewhere in the neighborhood of a pile 137 miles high."⁶ Closer to home, in *Qualcomm Inc. v. Broadcom Corp.*, Qualcomm's supplemental post-trial production last summer of 21 employees' e-mails responsive to one particular issue resulted in 46,000 messages, totaling 300,000 printed pages.⁷

The legal profession is ill-equipped to handle this information explosion. Traditional document-review practices completely break down under the weight of volume and the pressures of deadlines and budget. But the consequences go far beyond missed deadlines and budget overruns, as bad as those may be. The information explosion threatens the legal profession and the administration of justice itself.

Earlier this year, United States Magistrate Judge Louisa Porter addressed a two-day meeting of 150 lawyers, legal assistants and a sprinkling of state and federal judges

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in San Diego. In her keynote address, Judge Porter remarked on the changes in legal culture that have given rise to the "litigators," a class of trial lawyers who seldom, if ever, actually try cases.⁸ They conduct discovery and related pre-trial activities in the more than 90 percent of cases that never reach the courtroom on the merits. They seldom communicate with opposing counsel, except by court filings or correspondence "obviously written

to attempt to impress a judge later." As the volume of e-discovery increases and trench-warfare mentality takes over, these litigators lose touch with the goals of the litigation, the long-term interests of clients and even with each other.

Judge Porter compared this litigation culture to the Yanomamo people of the Brazilian and Venezuelan Amazon region, who had virtually no contact with the outside world until they were studied by anthropologists in the 1960s. The Yanomamo culture existed for thousands of years and was characterized by ritualized violence be-

tween competing villages. The violence escalated in four predictable levels.

First would be a confrontation between two men of different villages, at a distance, consisting of posturing and shouting accusations and threats. The second stage involved brandishing of 10- to 12-foot-long poles by the opposing sides, which were pounded on the ground and used to make threatening advances and gestures. The third level involved the two combat-

ants using the poles to ritualistically bash each other over the head, resulting in severe injuries that were both badges of honor and grounds for further animosity against the opposing village.

The fourth, and thankfully rarest, stage of violence involved the villages themselves. One village would invite visitors of the opposing village to a "feast" at which the hosts would ply the visitors for several days with an overabundance of food, the local brew and a hypnotic drug called *topo*. Once the visitors were sufficiently coma-

tose, the hosts would slaughter them.

Judge Porter posed the obvious questions: How could this be ritualistic? How could the fourth level of violence occur more than once, if everyone knew the outcome? Why were the Yanomamo not possessed of any other form of conflict resolution? And what does this have to do with our litigation culture? She analogized the levels of violence with the familiar rituals of litigation. First the lawyers stand at a distance and shout threats, then they pound the ground with pleadings and mo-

tions, then engage in head-bashing at discovery conferences and finally threaten trial, where they hope to feed each other information until one or the other succumbs. There ought to be a better way.

Judge Porter's message echoed comments made a year earlier by U.S. Supreme Court Justice Stephen Breyer. On March 27, 2007, a panel discussion on the impact of e-discovery, moderated by Harvard Law School professor Arthur Miller, was held at Georgetown University Law Center in Washington, D.C. Justice Breyer, after hearing from lawyers and businesspeople about the costs of e-discovery attributable to the "data deluge," lamented, "If it really costs millions . . . then you're going to drive out of the litigation system a lot of people who ought to be there. They'll go arbitration . . . They will go somewhere where they will write their own discovery rules, and I think that is unfortunate in many ways."

Panelist Richard Braman, executive director of nonprofit The Sedona Conference⁹, noted that law school needs to teach cooperative practices. "Students need to be told that there's a time for adversarialness," he said. "That's [in] the courtroom. And there's a time when you need to cooperate and collaborate with your adversary to get the facts on the table about which you're going to litigate."⁹

Although several other panel members dismissed this concept as "utopian," Braman pressed his case by drafting a "Cooperation Proclamation." He circulated an initial draft to several state and federal judges and members of a working group on electronic document retention and production, some of the most experienced and tested lawyers in the electronic discovery arena, during spring 2008. "I want to challenge those at the Data Deluge Summit who dismissed the idea as utopian," Braman said, "and push for change where change is needed to keep the civil justice system functioning."

Braman's idea has resonated with judges, many of whom have publicly endorsed the proclamation, including Judge Porter.¹⁰ But the proclamation goes beyond simply exhorting lawyers to cooperate. It proposes the creation of "toolkits"—resource libraries of forms, checklists, best practices, model case-management orders

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and training materials—created by and for the major stakeholders in litigation: in-house counsel, requesting attorneys, responding attorneys and judges. It also proposes the creation of a network of trained volunteer e-discovery mediators available pro bono or at low cost to litigants in state and federal courthouses across the country.

Although the idea of cooperative discovery might seem utopian to some lawyers and legal scholars, it is not outside the mainstream of discovery reform efforts of the past two decades. Starting with the amendments to the Federal Rules of Civil

Procedure in 1993 and continuing through the 2000 and 2006 amendments, emphasis has been placed on reducing the opportunities for gamesmanship and contention in the discovery process. Rule 26(a)(1), first introduced in 1993 and made uniform throughout the federal court system in 2000, requires proactive “initial disclosure” of core information by all parties, without a formal request from opposing parties. This rule was amended in 2006 to explicitly include reference to “electronically stored information.” Also in 1993, Rule 26(f) was amended to mandate a conference of the parties to frame a dis-

covery plan before formal discovery could begin. Like Rule 26(a)(1), this rule was made uniform in 2000 and amended to include explicit reference to “electronically stored information” in 2006.

While mandatory initial disclosure and the “meet and confer” requirement can be useful mechanisms for expediting discovery, reducing costs and avoiding conflict, many lawyers and judges—and many clients, who pay the bills—would like to go further. Looking at the examples of arbitration and mediation, with streamlined processes, flexible rules and informal methods of dispute resolution, they question why discovery should be an adversarial, rules-based process at all. If the goal of discovery is to uncover facts to be used during settlement conferences or at trial, why not cooperate in the discovery process and utilize advocacy and persuasion skills to argue the interpretation of the facts and the application of the facts to the law? Doesn’t an attorney’s duty of advocacy and loyalty to the client include getting the best result at reasonable cost, within a reasonable timeframe, with respect to the court, opposing counsel and the civil jus-

tice system? How can we move beyond the culture of adversarial discovery?

We owe it to those recent law school graduates facing document-review purgatory to find a better way. By cooperating with opposing counsel to focus the scope of discovery, by agreeing to use cutting-edge technologies to automate discovery processes, by instituting quality-oriented project-management practices and by encouraging transparency and regular communication between opposing counsel (as well as between in-house and outside counsel), we can break the cycle of ritual discovery combat and restore some measure of respect for, and integrity to, the civil justice system. ↵

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1 National Public Radio, *Morning Edition*, "The E-Mail Age," June 15-21, 2008, available at npr.org/templates/story/story.php?storyId=91617078 (visited August 24, 2008).

2 Yuki Noguchi, "Make It Stop! Crushed by Too Many E-Mails," National Public Radio Morning Edition, June 16, 2008, available at npr.org/templates/story/story.php?storyId=91366853 (visited August 24, 2008).

3 Ari Shapiro, "E-Mail, the Workplace and the Electronic Paper Trail," National Public Radio, *Morning Edition*, June 18, 2008, available at npr.org/templates/story/story.php?storyId=91363363 (visited August 24, 2008).

4 Stephanie Francis Ward, "Pulse of the Legal Profession: 800 lawyers reveal what they think about their lives, their careers and the state of the profession," *ABA Journal*, October 2007, available at abajournal.com/magazine/pulse_of_the_legal_profession/ (visited August 24, 2008).

5 George L. Paul and Jason R. Baron, "Information Inflation: Can the Legal System Adapt?" 13 *Richmond Journal of Law & Technology* 10 (2007).

6 *In re Intel Corp. Microprocessor Antitrust Litig.*, 2008 WL 2310288 (D. Del. June 4, 2008).

7 *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

8 To encourage open and candid discussion, The Sedona Conference® rules ("What is said in Sedona stays in Sedona") prohibit reporters and bloggers from quoting panelists and participants directly. However, Judge Porter provided me with a copy of her speaking notes and permission to paraphrase them, for which I am very grateful.

9 John Bace, "Cost of E-Discovery Threatens to Skew the Justice System," Gartner RAS Core Research Note G00148170, April 30, 2007, available at h5technologies.com/pdf/gartner0607.pdf (visited September 1, 2008).

10 See "The Sedona Conference® Cooperation Proclamation," thesedonaconference.org/dltForm?did=Cooperation_Proclamation.pdf (visited October 17, 2008).