

# Transitioning to a *Digital Law Practice*

Advances in legal technology are leading the way toward more efficient, practical litigation practices in the law office.

By Michael R. Arkfeld

**A** traditional “trial” attorney with whom I am acquainted recently commented that he had not been to trial for more than 12 years. He handles cases the old-fashioned way by using legal pads, pens, pencils, notebooks, folders, file cabinets, expandos and other manual litigation tools. As he reviews documents, he writes in a case or trial notebook relevant information in a legal, witness, issue or chronology section. When an issue changes, he manually copies information into a new issue section. With depositions, he color codes issues with colored paperclips or with sticky notes for particular issues. If one drops out, he is faced with going through the whole deposition to locate the spot where it came from.

He said the reason he was not going to trial was because the cases he handles would get active every six months or so and then lie dormant for three to six months until the next wave of depositions, motions or other discovery occurred. During the active times he would try to organize the case materials, record his insights, work product and strategies, but the fine points would diminish over this period of time and it was difficult and time-consuming to refresh his recollection, recopy information in his trial notebook and become current with the case. After a while his billable time would increase as would opposing counsel’s time, and they would end up settling primarily because of the difficulty of rehandling and retooling their cases for trial. This manual approach to handling cases is obsolete and does a disservice to clients.

A much more efficient way of handling the pretrial and trial aspects of litigation is by adopting digital or electronic methods of organizing, analyzing and presenting your court cases. The primary benefits of converting and controlling information digitally are:

- **Storage capacity** — Computers can store a voluminous amount of facts and law. One CD-ROM disk (640 mg) can hold 300,000 pages of full-text information or 15,000 document imaged pages.
- **Search, retrieve and review** — Documents, depositions, trial transcripts, case law and other case materials can be searched and information retrieved in seconds.
- **Organization** — Legal and factual

information can be coded and organized for witness, chronological and legal issue reports. This information easily can be reorganized as the issues and factual information in your case changes.

- **Analyze** — Factual and legal information can be grouped for case analysis. This gives the ability to trace different witnesses’ involvement with a set of documents or events, and can instantly review the different witnesses’ accounts of an accident or commercial transaction that pertains to a specific legal or factual issue.
- **Collaboration** — Digital information easily can be shared in a group-computing environment where participants are located anywhere in the world.
- **Portability** — Document images, depositions and case materials can be taken with you or provided to co-counsel quickly, at a low cost.
- **Presentation** — Exhibits involving graphs or documents can be presented effectively to jurors and changed on the fly as your case progresses. Significant time can be saved presenting your case in a digital format.

Having this information in your computer puts you in the center of your case where documents, data and your strategies are equally accessible to your critical litigation thinking. Litigation support software is an adjunct and supports your litigation thinking process. You

easily can postulate, consider and theorize on the facts and documents that are instantly available to you at the touch of a key. It becomes a great equalizer for the smaller firms because the information is readily at your fingertips.

However, the transition to using electronic tools isn’t as simple as buying software off the shelf. The truth is your litigation experience and skills are organization and process oriented, and must be applied to the software you use. The focus of this article is to suggest and describe the process of using electronic tools to process your litigation case.

### **Initial Meeting With Client**

At this meeting, the general description of the case is discussed. Certain events, witnesses and document information are collected to begin to understand the case. The client is interviewed if he or she is a part of the case or have a general understanding of the matter. The nature and size of the case in terms of size of the document population, number of depositions to take and so forth, is discussed. A preliminary course of conduct is decided on, and the necessary resources and budget to handle the case are discussed. Other factors to consider include the time constraints of litigation, number and location of parties involved, location of co-counsel, possibility of early settlement and hardware and software requirements. These considerations often will dictate the selection of different technologies.



# Definitions

**Database** is simply a collection of mutually related data or information stored in computer record fields. They are organized collections of information similar to index cards, phone books, manual trial notebooks or file cabinets of documents.

**Full-text Documents** are those documents that have the “complete text” or “full text” of a document stored in a computer file. These documents can be word or phrase searched, and you instantly can access the exact location of the words in the full-text documents. Examples of full-text documents include depositions and trial transcripts. However, essentially any document produced in a word processor is a “full-text” document.

**Imaging** is a technology that stores documents as electronic photographs in a computer system. These digitized computer files of documents are known as images. Images can't be searched.

**OCR (Optical Character Recognition)** is software that can convert the letters or numbers that appear on a page to a bit mapped image and then into computer readable text known as ASCII. These words can then be searched using full-text software.

**Real-time Transcription** is the capability of the court reporter to use a computer-assisted stenograph machine to have the testimony of a witness appear on a computer monitor within seconds from the time the words are spoken.

## Case Commencement

The commencement of a case provides an important opportunity to plan your case strategy before the case takes on a life of its own.

Whether you are answering a complaint or filing the lawsuit, the beginning of a lawsuit initiates a host of deadlines, discovery analysis and disclosure, and whether you need to share the information with co-counsel. Some states, such as Arizona, have mandatory disclosure rules and fast track court dates that increase the pressure to efficiently plan your case with other members of your litigation team.

When you decide to automate the litigation, the team has to understand, accept and commit to the use of the technology; otherwise, it will not be successful. The benefits of automating should be shown to them to assist in their assignments, as well as the overall objectives of the case.

For example, you can show them the benefits of creating document abstracts showing the connection of a witness to all the documents in a case and the ability to retrieve that document list immediately for a deposition. The goal of electronically converting and enhancing case material is to provide these and other reports and compilations quickly, and with lower cost:

- Witness kits
- Issue binders
- Chronological reports
- Factual pattern reports
- Deposition exhibit reports

- Trial exhibit reports
- Subject files
- Correspondence
- Follow-up reports
- Opening statement outlines
- Direct and cross examination outlines
- Closing argument outline.

## Select Case Management Software

Both case management and litigation support software should be set up for your cases. The case management software plan will generally handle the non-litigation information, such as billing, docketing, timekeeping, contacts and so forth.

The litigation support software will contain the litigation information, such as document abstracts, deposition transcripts, legal issues and witness information. Both are essential to the effective control of your case.

## Select Litigation Support Software

A digital trial notebook or litigation support software should duplicate electronically the primary function and workflow of how you handle litigation. It should be your electronic legal assistant designed to provide direct access to the correspondence, pleadings, interrogatories, electronic information, documents, facts, law and so forth. It should be a customizable system that lawyers immediately recognize and can identify as the approach they use when preparing a case.

Before discussing the workflow in a case using electronic tools, it's important to understand standalone and integrated litigation software programs. Fifteen years ago, litigation support programs were generally standalone applications. They consisted of a standalone database or a full-text search and retrieval system, and were not integrated with other programs. It was difficult to manage your case because of the different command structures and functionality of these unrelated software programs. However, in the last several years we have seen new modules added to existing litigation support packages or different vendor application packages integrating with each other to assist in the electronic management and analysis of your cases.

The integration of different software applications — word processing, databases, imaging, spreadsheets, full text and so on — that enable one to link

and share case information is vitally important. There are many tasks you have to perform as you prepare your case. These tasks include an overall plan, document indexes, witness depositions and indexes, correspondence and deposition management, electronic information control, interrogatory control, production of documents control, admissions, pretrial orders, substantive motion preparation, opening statements, closing arguments and so on.

If you are integrating different software applications, be sure they can handle these tasks.

There are integrated litigation support programs that combine some or all of the following modules in the same software program: transcript management (full text), document control (databases), case plan organizer (outliner), document pictures (images) and so forth. Some allow for simultaneous searching of all information collected together. Other programs combine some of these modules and integrate with third-party vendor products.

### Case Litigation Workflow

One of the difficult transitional areas for legal professionals is the reassignment of workflow processes as we change from a "paper" to a "paperless" case system. Digital control of case information presents new methods and skills that are obviously not present in a paper or analog system. A paper system requires documents, folders, expandos, filing cabinets and so forth. A "paperless" system requires ASCII disks, OCR software, a scanner, database design and so forth. Instead of filing a deposition, it's now necessary to "load" a deposition into a computer.

### Secure Data

It's important to be able to assign different security levels to the different personnel who might have access to the computer. Confidential client information and data integrity could be compromised if you don't, precluding access to unauthorized users.

### Setup Case Organizer and Issue and Name Codes

After obtaining initial case material from your client, you should begin working on the issue codes, name codes for individuals involved in the case, To-Do lists, database design, chronology

event lists, Internet resource links and other case organizer tasks.

The issue and name codes permit you to control and connect the legal and factual information in your case. At the heart of your case are the causes of action, legal issues and factual propositions that you must ultimately prove to prevail. The development of your legal cause of action, legal element, factual proposition, witness and other coding or organization scheme is central to the creation of your electronic trial notebook. This organization methodology forms the foundation for your case and is the glue that binds all of your factual and legal information together.

### Digitize Client Materials

All full-text ASCII case material should be loaded into the computer. This should include any digital full-text material such as pleadings as well as initial interview of the client and employees. Enhancements in the form of issue codes, name codes, note tags, document summaries or event summaries can be completed and added to the full-text materials. Initial design of the case database and document bibliographic indexing should be discussed. Consideration should be given again to which issue fields and other subjective coding fields will be added to the database or full-text indexing software. Standardization of legal and nonlegal terms should be decided on to assist in the search for individuals or documents.

### Document Database, Coding and Imaging

Documents have always presented accessibility and retrieval problems. Many three-ring notebooks are put together to assist in the location and indexing of case information. They are routinely pulled apart to copy a document for witness review, preparation for a summary judgment, or as an exhibit for a deposition or trial. Often, the original is lost or a fourth or fifth generation copy becomes illegible. If more than one legal professional is working on the

case, the document needed always seems to be checked out. Small armies of lawyers, associates and legal assistants have been put together to accommodate some of these large cases. From a revenue perspective, large paper cases generate mini-fortunes for firms that bill by the hour and use the manual method of organizing their cases. Manually controlling case information requires a significant amount of personnel time and has proven to be costly.

To save time and money and to gain control of your documents, build a document database. After screening your documents, the design and building of the document database is an important step. Pre-designed databases are included in many software programs. Remember the final results of what data is entered are reflected in the reports generated. Control over the design and entry of information for your final reports is critical to a successful database application. For the design of a database to be successful, one should be able to locate key document data, documents that pertain to particular issues and witnesses, and any other data important to the theories of your case.

After creating the document database one key method of organizing and controlling the document information in your case is coding or abstracting the information. Coding or abstracting means the determination and transfer of designated classes of information from



each document onto a computer form that is designed for entering the selected information into the litigation support system. If you intend to image your documents, indexing them is required because an image of a document can't be searched and must be linked to a document database record. However, if the document had been converted to machine-readable text using OCR, then the document could be word searched. A document type lookup table should be prepared to code documents that are the same general category.

The extent of indexing or coding depends on the usefulness of a document. This also will determine whether certain documents should be converted to full text. The document also should be OCR'd, if very useful.

There are two primary coding methods – bibliographic or objective coding and subjective coding.

In computer document control terminology, objective coding is coding that easily can be obtained from the face of a document. It doesn't require any subjective reasoning or thought process. Objective coding merely

requires the recognition of certain fields of information, such as the author, date, addressee, and the like. Subjective coding of a document involves determining the document's relevance to particular legal or factual issues and summarizing the document. This includes an understanding of the legal issues of the case and the application of those issues to the facts of the case.

Relevant documents should be coded. As new case material is accumulated, it should be added to the existing document database. At this point, you must determine if you should code the documents in-house or outsource them to a service bureau. Bibliographic indexing and imaging can be outsourced to a service bureau.

This coding process begins the creation of a base to begin running reports of what documents are linked to legal issues and individuals connected to the case. From this factual foundation, you can then move to case analysis by creating timelines and chronologies of your facts. You also need to code and determine if the fact is disputed and whether the fact is favorable, unfavorable or neutral to your side.

### Develop Visual Aids

Preliminary visual aids should be developed to reflect the themes of your case. They can be invaluable in explaining your position to your client, witnesses and for any pretrial proceedings with the court.

You can use timelines during a hearing or trial. You can save the files in a JPEG format, bitmap format and Windows metafiles that you can import into your word processor, e-mail to others or print on hard copy. Diagram flowcharts and clip art also can be used to support your case visually.

### Obtain Nonparty Statements and Documents

During the initial investigative stage, you should obtain

statements or conduct interviews of nonparty individuals. Also, obtain any relevant documents from these parties. Load these documents into the computer and issue and name code these documents.

A variety of reports should then be generated to provide an analysis of the case up to this time. You should run a chronology of events, timeline, important words and phrases, issue codes and specific time-limited chronology reports, and analyze this information to assess the strengths and weaknesses of your client's case.

### Locate Experts to Assist Your Case

If needed, begin locating experts to assist with your case. There are a number of Internet expert witness locator services available if you need assistance in locating experts.

In the abstracting and coding phase, above one of your fields should be designated as an "expert document disclosure" field so as you review documents, you can code them for later retrieval and printing to give to your expert for review.

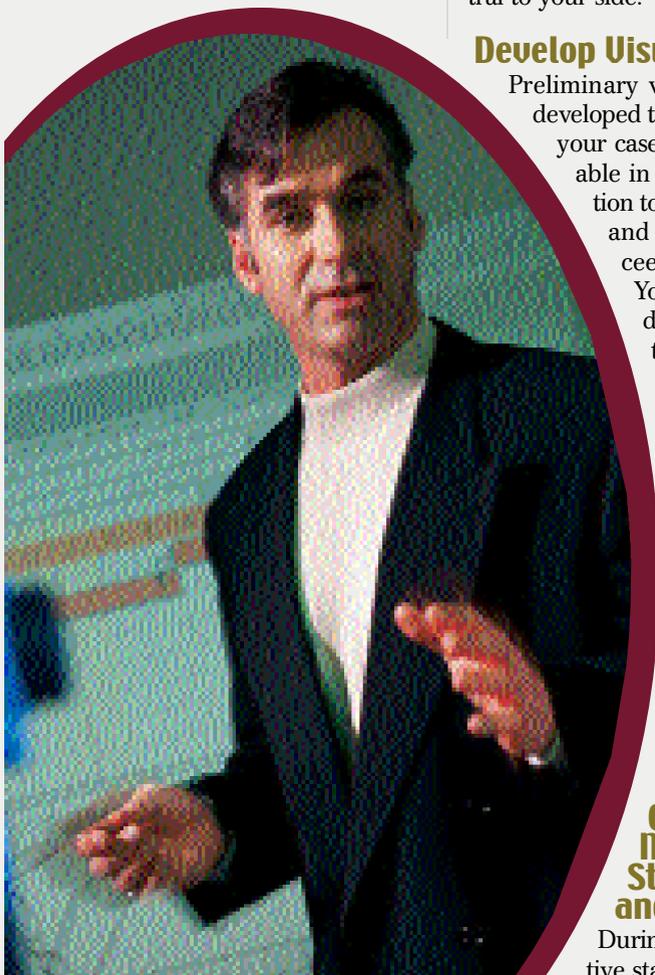
During your initial consultation ask them to assist in what type of discovery and what questions to ask witnesses in the case. Create outlines in your case organizer or outliner of what questions to ask witnesses.

### Disclose Discovery to Opposing Party

Disclose discovery to opposing counsel by paper or digitally using CD-ROM or DVD. As you were coding the documents in the step above, one of your fields should be whether the material is confidential and privileged. Then as you create reports or batch print images of the documents, you can be assured you will not disclose privileged materials. Also, this will assist in tracking production of documents to the opposing side with the tracking of document request dates, and disclosure completion can be entered in your organizer or outliner.

### Obtain Discovery From Opposing Party

Using requests for production, interrogatories and request for admissions, obtain case information from the other side and try to narrow down the legal issues and defenses in the case. Don't forget to request the electronic discovery in the form of e-mails, and other



electronic formats. Load the information from the other side using document databases, imaging and OCRing important documents. Use your full-text search engine to locate and code important electronic discovery information.

The legal and factual issues should be reformulated after reviewing the opposing party's case materials. Special attention should be paid to your client's and opposing party's strengths and weaknesses, legal theories, damage components and other information.

## Prepare for Depositions

In setting up the depositions, prepare witness kits from your existing database. Prior to the deposition, run database reports on the witness for author, recipient, person mentioned, copied and so forth. If coded, sort by date, name and analyze for patterns. Tag documents and print if imaged or pull the documents. Prepare an outline of questions, dates, and what a deposition entails for the witness. Consider the need for video if the witness will not be present, or you might wish to impeach him by using the video deposition. Determine if real-time transcription should be used for the depositions. Some real-time services allow you to send real-time audio, text and video of a witness to your expert witness or others anywhere in the world using a regular phone line.

Get a copy of the deposition on disk with the exhibits linked to the specific testimony from the court reporter. After taking the depositions review, annotate and generate name and case issue and chronology reports on the key elements of the case. Formulate follow-up questions for witnesses and prepare deposition digests to support pretrial motions. Chronology of key testimony and documents and key deposition excerpts should be prepared for analysis. Flag areas where a witness has changed his or her testimony or position on issues or events.

## Settlement or Motions for Summary Judgment

After the first set of depositions, evaluate the strength and weaknesses of your case again for your prospects in trial or to pursue settlement. Run database and full-text reports by cause of actions, legal elements and supporting evidence. For example, if you print out a set of facts that are favorable and unfavorable, then you can discuss the facts with your clients and co-counsel to determine the

probability of success at trial or for use during settlement negotiations. Also, software can be used to prepare a motion for summary judgment.

As you enter your facts, you can mark them as undisputed, then you can print out an issue-oriented report for the court showing the undisputed facts supporting your motion for summary judgment.

## Prepare an Exhibits List

One of the fields in your database should be labeled "Exhibit" and checked in order to run a report and even batch print a copy of all the exhibits you intend to use at trial. These fields and images also can be exported to a trial presentation program to display electronically in the courtroom.

## Prepare Multimedia Aids

One of the most effective and important methods of persuading the factfinder is through the use of multimedia aids. Seeing and hearing is believing. Our society, including judges, expects to be entertained and taught through multimedia. The preparation of multimedia visual presentations can be calculated to be persuasive of a particular position and to assist in convincing the trier of fact to reach a decision in your client's favor. Visual aids summarize, supplement and assist in conveying your message to the trier of fact.

Consider using prior recorded video testimony at trial. The videotape can be synchronized with the words of the deponent. In trial an attorney can simply search for a relevant name, date or phrase in a video via a computer, and the computer automatically will go to the section of the video where the words were spoken.

## Trial Presentation

Consider using a trial presentation program to present your case to the judge or jury.

Using a paperless digital presentation system results in several benefits:

- Increases juror understanding, and the trier of fact remains focused on the case — The trier of fact wants to learn and be involved in the presentation of the case. The trier of fact wants a visual presentation, which brings a case to life. It provides variety, keeps jurors interested, and increases their understanding of the factual and legal issues in a case.

- Controlling the flow of your case — Presenting digitally allows you to control the pace and flow of your case. You have the ability to rapidly present successive documents to a witness during examination and not be interrupted with paper shuffling.
- Simplifying complex issues — Demonstrative evidence can simplify voluminous and confusing facts for the benefit of a jury. The old adage "a picture is worth a thousand words" definitely applies in all of your legal proceedings.
- Cost and Timesavings — One of the constant complaints by juries and judges is the wasted time in the courtroom as lawyers try to present their case. They are upset that exhibits are misplaced, the time it takes to publish and read documents, and any other delay that keeps them away from their family and jobs. The judge and jurors want an efficient and fair trial. And the use of technology in the courtroom can save a significant amount of time in trial. Using a paperless approach to present a case to a jury saves 20 percent to 50 percent of the time in trial.
- Changing demonstrative evidence — You can change your presentation on the fly. As the facts are presented, charts and other graphics can be changed in the courtroom to reflect actual testimony.

The hardware needed to present a case can range from the simple use of a computer, screen and LCD (liquid crystal display) projector you rent or a more elaborate system with multiple monitors.

Also, the visual or Elmo presenter is an extremely popular medium for in-court presentation. It consists of a video camera attached to a metal arm pointed downward to project images onto a color monitor or a LCD projector.

Anything — objects, x-rays, paper, photographs — can be placed beneath the camera for projection onto monitors in the courtroom for the benefit of the jurors and counsel alike.

## Obtain Permission to Use Presentation Technology

It's imperative you disclose to the court within a reasonable time before the proceedings of your intention to use technology in the legal proceeding. Many judges have expressed displeasure with

# Michael Arkfeld's Top Picks for Case and Litigation Software

**Case Management:** Amicus Attorney ([www.amicusattorney.com](http://www.amicusattorney.com)), from Gavel & Gown Software Inc. It combines a calendar, contacts, files, timekeeper, library, To-Do lists, communication center, document generator and other features. It easily synchronizes with Microsoft Outlook, Worldox and HotDocs and is designed for an attorney's work requirements.

**Litigation Support:** Summation ([www.summation.com](http://www.summation.com)). It has an integrated database, full-text, imaging, real-time, case organizer, OCR (optical character recognition) and Internet document depository modules with many features. This grandfather of litigation support software provides a powerful solution to manage the electronic and paper information in your cases.

CaseMap, TimeMap, NoteMap and TextMap from CaseSoft ([www.casesoft.com](http://www.casesoft.com)), a division of DecisionQuest. These modules provide a case database organizer and analyzer, timeline graphical tool, full-text and outliner modules. CaseSoft integrates with many other third-party products.

**Visual Aids:** TimeMap ([www.casesoft.com](http://www.casesoft.com)) from CaseSoft (reviewed in the April/May 2002 issue of *LAW OFFICE COMPUTING*). After entering the key facts and dates, TimeMap easily creates chronology timelines for use during hearings or trial. You can save the files in a JPEG format, bitmap format and Windows metafiles that you can import into your word processor, e-mail to others or print on hard copy. Data can be imported from CaseMap, Summation and other litigation support products.

Visio ([www.visio.com](http://www.visio.com)) by Microsoft (reviewed in the April/May 2002 issue of *LAW OFFICE COMPUTING*). This program can be used to diagram flowcharts, automobile accidents, decision trees and more.

**Real-time Depositions:** DepoCast ([www.legalspan.com](http://www.legalspan.com) and [www.depocast.com](http://www.depocast.com)) by LegalSpan. DepoCast allows you to send real-time audio, text and video of a witness during a deposition or trial to your expert witness or others anywhere in the world using a regular phone line. They can communicate back to you using a built-in instant e-mail messaging module.

**Trial Presentation:** TrialDirector ([www.indatacorp.com](http://www.indatacorp.com)) from inData Corp. This program allows you to display document images, photos, video and PowerPoint presentations to the judge or jury. It also provides many different markup tools to focus the factfinder on the critical parts of your documents, photos, etc.

**LCD Projectors:** MediaStar 311 by Toshiba ([www.toshiba.com](http://www.toshiba.com)). This LCD projector is integrated with a built-in visual presenter or document camera that displays three-dimensional objects, documents, photographs, graphs and video for multimedia presentations. It also has the traditional features of a LCD projector.

using technology, even the addition of a single extension cord because it changes the appearance of their courtroom. Obtaining the court's consent to use technology can be done informally or formally.

Many practitioners routinely file "notices" to the court that they wish to use certain technology in the courtroom. Others raise the issue in pre-trial conferences. Whether one wishes to bring a single laptop computer or a complete "paperless" presentation system, one must still obtain the consent of the court.

Some tips on using computers in the courtroom at counsel's table:

- The computer must be unobtrusive and small;
- Bring extra charged batteries;
- Bring a substitute computer with the same programs and legal and factual material on both computers;
- Have your case material backed up on tape, Zip or regular disks;
- Print a copy of your trial outline, witness notes, etc.;
- Bring extra printer toner cartridges;
- Print transparencies of documents, charts and graphs for use with an overhead projector;
- Make sure your keyboard is quiet;
- Turn off the computer's sound.

Digital technology is transforming the manual practice of law into "The Digital Practice of Law." It can free you from the paper shuffle. It can assist you in digging out facts quickly and efficiently. It will give you control of the facts and law of your case and the time to analyze those facts to assess the strengths and weaknesses of your case. It will allow you to settle from a position of strength and not out of necessity because everything is in a paper or analog format. It can assist you in each phase of the trial, and it can free you to use your considerable skills as a trained trial attorney, making your job much easier. **E:1**

## ABOUT THE AUTHOR

MICHAEL R. ARKFELD is an assistant U.S. attorney in Phoenix. He is the author of "The Digital Practice of Law" (Fifth edition), and a frequent speaker and columnist on the practice of law. He can be reached at [Michael@Arkfeld.com](mailto:Michael@Arkfeld.com).