

THE PAPER CHASE

Subrogating in a Paperless World

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Twenty years ago I was helping clients organize and implement recovery programs on a national basis. Even back then, I was constantly hearing about the imminence of the paperless insurance company. I still hear it today - and for good reason. The potential benefits of a truly "paperless" office are myriad - but so are its complications and potential drawbacks. As technology races to catch up with the perceived nirvana of a completely paperless industry, subrogating carriers remain an easy target for document production-happy plaintiffs and defense lawyers who, with the click of the keyboard, can request the production of volumes of paper relating to claims, underwriting and medical files.

What Does "Paperless" Mean?

Most insurance companies still store all of their records and documents in standard metal filing cabinets. When they fill up, they either need to buy more cabinets or take older records out and file them away in boxes. Additional space is rented "off site" just to store old claims, underwriting, or other files. Access to records, documents, information and reports can be awkward, at best. Millions of dollars are spent on paper and the archiving of paper documents. A proliferation of document imaging services (outsourcing) and turn-key solutions (insourcing) give us the ability to convert original "source" paper documents into electronic images and then reproduce an entire filing cabinet full of claim file documents with a click of a

mouse. Recording the images is the easy part. Each document is passed through a scanner, which transfers the image onto a computer. This image is then compressed, indexed and transferred to another medium such as a compact disk, optical disk, hard drive, etc., for storage.

The retrieval of a document, however, produces more challenges. Most indexing of electronically stored documents are accomplished by "tagging" a document with customizable fields and/or transforming it to an Optical Character Recognition (OCR) format where each word on the document is placed into a master index allowing a search of the documents by any key word, date, account number, etc. The retrieved document is an exact representation of the original scanned document and is totally unalterable, thereby preserving the integrity of the document. All of these scanned and indexed documents are combined with the company's electronic claim file, payment logs, activity logs, e-mail records and the like and comprise an entirely electronic file which can be managed, retrieved, organized and utilized much more efficiently and cost-effectively than its counterpart paper file can.

Benefits of Going Paperless

It is almost insulting to the reader to list the litany of advantages to a paperless office. For starters, you can have documents on disks for the same cost as a new medium quality file cabinet. One CD can hold up to one full filing cabinet (15,000 documents) - the storage space saved can be enormous. The speed of retrieval is greatly enhanced, there is no

more moving of heavy boxes, no refiling of documents, no searching for lost documents and the number of people needed to "file paper" is reduced to almost nothing. There are also no lost documents and a duplicate CD can act as a backup and can be stored off site in the event of a fire or other disaster. It is no longer necessary to print multiple copies and copies can be faxed directly from the computer. Unused storage space can be used for productive income-producing activities and all of your data can be organized into one location. Your records management personnel can now spend their time managing records instead of pushing dollies loaded with cumbersome boxes of paper.

Unlike archived paper records, your paperless file is in an electronic format and will not deteriorate over time. What is more, all of the current paperless technology can be taken advantage of by using the insurance company's existing computers and networks. Depending on whether a company uses insourced or outsourced document imaging services, the training time necessary per employee can be less than one-half hour. With so many things going for it, it is easy to see why the "paperless" insurance company has been described as "imminent" for the last twenty years. But there is more to a paperless insurance company than simply making the paper disappear.

Electronic Records as Evidence

Claims and subrogation departments are concerned with litigation. If they cannot get a document into evidence, it isn't much good. Therefore, anyone intent on

offering electronic documentation into evidence in court must be certain to fully document all steps taken in acquiring that evidence - such as how the file was found, what tools were used to locate it, where it was found and how it was transferred to its current format. There is no guarantee that your lawyer will not confront problems in attempting to admit the evidence at trial.

The "best evidence rule" in most jurisdictions states a preference for the original documents, although it does not foreclose the use of secondary evidence if a proper foundation has been laid. One must ensure that the produced electronic document is actually what it purports to be. Two major uniform laws have established the admissibility of duplicate records into evidence in the United States, regardless of whether the original records have been destroyed in the regular course of business. The "Uniform Photographic Copies of Business and Public Records as Evidence Act" (UPA), 28 U.S.C. 1732, has been adopted by the United States federal government in 41 states. This law permits duplicate records to be admissible into evidence as the original itself in any judicial or administrative proceeding, provided that they were prepared by a "process which accurately reproduces . . . the original." Optical Disk Systems meet the requirement of this law, which also permits the original records to be destroyed after reproduction and states that the duplicate record can also be used in any administrative/regulatory proceeding. This statute reads as follows:

§ 1732. Record made in the regular course of business; photographic copies.

"If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation of combination thereof, of any act, transaction, occurrence, or event and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such

reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence."

A second major uniform law, entitled "the Uniform Rules of Evidence", has also been adopted by the United States Federal Courts in 34 of our 50 states. These rules allow a copy to be admissible in evidence "to the same extent as an original" and defines a duplicate as a counterpart produced by any technique "which accurately reproduces the original".

Spoliation of Electronic Records/Evidence

Most of the literature on the discovery of electronic documents and records focuses on the issue of "mutability". The ease at which an electronic record can be altered or destroyed is of paramount importance in the legal world. Electronic discovery is here to stay. Whether paperless or drowning in paper, an insurance company is going to be faced with litigation discovery requests seeking production of computerized electronic business records and documents. We had better get used to it. Digital documents are easier and cheaper to copy and distribute than documents committed to paper and since these digital documents take up virtually no space, little effort is made to destroy them when they are no longer needed. Most literature on electronic discovery focuses on the virtual "indestructibility" of electronic records - something which is beyond the scope of this article. Active files on computers, especially shared data on network servers, are in a constant state of flux and are subject to being edited, opened, closed, added to, subtracted from, or deleted. They are subject to manipulation in ways that paper files never could be. Certain word-processed documents or e-mail messages may become permanent once completed, but financial records, customer databases

and other data compilations are dynamic. Many computer network administrators routinely create back ups of network data. Some keep these backups forever, but others will do exactly what they should do - overwrite them in the normal course of business with more current data. This systematic churning of data means that when a third party action is filed or when a matter is referred to subrogation counsel for litigation, the information system should and must be frozen in time to preserve the discoverable evidence. Creating a permanent backup of a file from the moment a file becomes the subject of litigation is easy and inexpensive. Subrogation lawyers should instruct their clients to preserve data, yet they will often disagree over the procedure and/or process. Especially in large decentralized organizations, evidence may be disappearing.

Insurance companies who have gone or wish to go "paperless" will be well advised to develop a protocol for the preservation of data. Ironically, professional records managers within many insurance companies began to disappear at the same time that virtual documentation came into vogue. This irony dictates that sound document management techniques be applied to the ever expanding mass of electronic data and communications. As electronic discovery proliferates, the insurance world will look to new Information Systems (IS) or Information Technology (IT) departments for technological solutions. Because of the rapid succession of technological advances and electronic imaging software, the hiring and retention of quality IS and IT department personnel has lagged, but should be the focus of much attention in the coming years.

Producing the Smoking Gun

E-mail and other new forms of computer-mediated communication such as the world wide web, chat rooms, bulletin boards and voice mail can present a legal nightmare for insurance companies. Discovery of e-mail is almost synonymous with electronic discovery. The volume and character of e-mail make it a prime target for discovery within insurance companies. Because e-mail is considered the window into the insurance company's soul, it is a highly sensitive area for discovery, that can also be the source of

many "smoking guns". All too often, claims and subrogation professionals are quick to "document" the negligence of their insured or their insured's employee, perhaps subconsciously thinking that it will thereby prevent them from having to take on yet another subrogation task. Most employees consider e-mail to be private and transitory, which is in direct contravention of the reality that e-mail is both a permanent and discoverable corporate record.

Deletion of computer files often does not destroy the file, but merely marks the disk space the file occupies for overwriting if needed. Given the ever-expanding memory capacity of today's computers and the fact that a particular file may be found in many places on a hard drive, a chance that a "deleted" file would actually be entirely overwritten is very slight. Computer networks also automatically generate an abundance of evidence on their own activities and often include information about who had access to what data or equipment at any given time and which documents were distrusted to whom. All of these, as you might imagine, can be catastrophic in many litigation scenarios. Such "ghost data" is not always the byproduct of having gone "paperless". It even exists today, the litigation world is simply "catching up" with the fact that much of this information is out there for the taking.

Breaking the Mold

Despite the daunting challenge of going paperless, some insurance companies are breaking the mold. Acuity Insurance Company in Sheboygan, Wisconsin is an example. Its claims department has been paperless since October of 2001, followed shortly thereafter by the underwriting department. All of its incoming mail goes to a scanning/imaging unit which utilizes high speed scanning to reduce all documents to electronic form. The scanned documents go to an indexer, whose responsibility it is to index all incoming documents with the use of a number of entry fields. These documents include bills, invoices, correspondence, medical records and the like. Using an IBM Content Manager program, the indexer then e-mails the intended recipient of the document, which then shows up on the recipient's daily "to do list", notifying him or her as to the identity of the document. The recipient can then click on the entry and a reproduction of

the document appears on a display monitor. Brian Peacock, General Manager of Workers' Compensation Claims with Acuity Insurance Company, believes the move toward being paperless has been a success.

"It is easier to relay information, especially from a subrogation perspective," Brian explains. "With a click of a button, you can e-mail documents to multiple recipients and save on mail, postage and time in the process." Brian explains that Acuity isn't exactly walking a tightrope without a net, however. Acuity keeps a hard copy of all documents until one year after a statute of limitation runs. During that time, the hard copies are stored in a support facility located nearby. When a file closes, it is shipped to the support facility for storage. The file remains on site at Acuity's main offices as long as the file is opened.

"Overall, the move toward paperless has been a positive thing," Brian says. "I think we unnecessarily get attached to a piece of paper."

Is the Paperless Office a Myth?

In spite of its many advantages, the 21st century has revealed an amazingly small number of insurance companies who are truly "paperless". The jury is still out as to whether those companies who have attempted to go paperless have an advantage over those who have not. The growth of the information age, rapid and uncontrolled changes in technology, increasing interference of government in business practices and other reasons have all contributed to the development of a truly "paperless" insurance company. When insurance professionals create electronic information, the natural inclination is to hope that they never have to use it. Therefore, very little care has historically been given in how or where it is stored. This creates problems with the ability to retrieve electronic information. Without a focus on retrieveability, companies have defaulted to creating multiple environments to manage disparate data sources. They then wonder why their use of paper has gone up rather than down.

One obstacle to a truly paperless existence is the fact that over the past ten years, there has been increasing legislation intervention in our industry. This means that insurance companies, as all businesses, are more likely to have to

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account to an outside agency or be subject to the scrutiny of others in the future. The more this occurs, the less likely they are to change the way in which they generate, use or store information. The paper document is, by most government standards, still the format of legal choice. We are all hesitant to entrust sensitive, candid and mission-critical information to completely non-paper form for fear that we will lose it or that it falls into the wrong hands. Paper has been our crutch for hundreds of years and continues yet to be so. Another reason that a paperless society may still be years away is one of adaptability. Technology is merely a tool - the functional equivalent of a hammer. Yet it has been looked upon as a magic solution for document and information management for years. As technology changes, you need to go back to everything that you have done in the past and make sure that you can still find it and retrieve it intact.

Despite the inroads in document and information management over the past decade, paper is still the only known medium which provides organizations with the comfortable ability to adapt their business practices to a rapidly changing environment without sacrificing the need to retrieve records when necessary. While the insurance industry has made a significant attempt to reduce the amount of paper within its walls, our competitive nature, our requirement to comply and be responsible to outside agencies and the fact that we are still not totally comfortable with the reliability of the technology, has led to a half life of paper unrivaled by that of even plutonium. While we continue to drive down the consumption of paper - at least as a percentage - we are faced with the prospect that the use of paper as a medium for information and record retention, may never completely disappear. As some have said, "we will see the paperless office as soon as we see the paperless toilet," but that won't stop us from trying.