

Safeguarding Your Data/Post-Katrina Measures

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A. Introduction

When I realized that, this time, the local news reporters' hurricane fear-mongering actually made sense it was too late to get out of town. It should have hit me early Sunday morning when my friend, a writer for a local paper, told me he was evacuating. "You're not going to stay in town to cover the hurricane?" I asked.

"No way. I don't want to be rescued off of a rooftop," he replied. "I've read the studies and I know what a Category 5 storm will do to this city when it hits," pausing for a few seconds before adding: "Plus, my ex-wife's name was Katrina." I'd heard about the studies too, albeit from local news reporters who made reference to them in the usual high-pitched way. So I was inured to the real threat of a serious storm and didn't really believe that the entire city of New Orleans would be covered with 10 feet of water. By Sunday afternoon I was starting to get the sense that it might be really bad, but then the highways were jammed and I was too tired to drive by myself. So I stayed in my father's condominium building, figuring that I'd certainly be safe on the 10th floor of a well constructed building with storm shutters on the windows.

The hurricane named after Alan's ex-wife rolled in on a Monday morning and by 3 pm that afternoon the winds receded into stillness and the sky brightened, and it was possible to emerge from my cocoon of safety and survey the damage. Walking around (driving was almost impossible), I was shocked at the aftermath. The charming tree-lined neighborhoods had lost their lush green canopy. The streets were carpeted with broken tree limbs and power lines were strewn like spaghetti, completely devoid of life. But, bad as the initial damage looked, it was better than what was soon to follow.

Once the levee walls gave way and the flood waters gushed into the city, it was clear that a crude state of nature was replacing what was once a smoothly functioning Southern city. While people around the country looked at TV images in horror, I drove out of the city with a friend and tried to figure out where to settle. A week after Katrina struck I found myself in Houston, amidst endless hospitality from friends, but mostly from complete strangers. The people I met showed me compassion that I simply cannot adequately describe. I spent those first few weeks in Texas pondering a lot of things.

Katrina taught me a lot, about both the monumental and the mundane. In a big disaster it's easy to focus on the monumental failures and problems. I'd like to focus here on the mundane. For, I've learned that in preparing for a monumental disaster, it's really the mundane things that matter most. The mundane things are the ones you can actually control or have some influence over. I wish I could tell you that I had a great plan and that's why I was able to keep my law practice up and running. The truth is I was lucky. The next time I plan to be smart.

B. The Duty to Preserve and Protect

Let's start with a mundane, and virtually self-evident, proposition. Lawyers have a duty to keep their clients' data secure. This is true of data that is in paper form, as well as data in computers.¹ One legal author has discussed the special ethical problems that can arise for attorneys who use laptops that contain client confidences, particularly the problem of lost or stolen laptops.² The proliferation of electronic data creates new worries for attorneys at the same time it creates new opportunities. But the real problem, in many cases, is really the limitations created by paper.

Having lived through the nightmare of Katrina, and having seen how it affected the legal system in Louisiana, I am convinced that many of the most devastating problems were caused by the damage to paper files. Many property records in Orleans Parish were flooded and had to be frozen and sent off to be scanned and then turned into electronic data. One has to believe the cost of converting those important papers *after* Katrina was substantially more than what it would have cost to scan them methodically in the years before Katrina. The technology was certainly available. Perhaps it was a lack of funds that kept the papers from being scanned, or perhaps it was a lack of initiative. Either way, we know the consequence.

And we also know the tremendous disruption endured by solo and small firm attorneys whose client files were flooded. In many cases, the files are simply gone. The attorney, even if he or she continues practicing, simply lacks the financial ability to hire experts to restore the documents. So, a good question to ask, in the wake of

¹ Emilio Jaksetic, *Computer Security and Responsibility*, Legal Ethics.com (<http://www.legalethics.com/articles.law?auth=jaks.txt>) (author is an Administrative Law Judge with the Department of Defense).

² *Id.*

Katrina, is what obligation does an attorney have to maintain data –both his own and that of his clients? And, even if the attorney has no specific ethical obligation to maintain such data, shouldn't he or she attempt to safeguard that data anyway?

C. How much does it cost to safeguard paper?

Most attorneys are largely ignorant of the cost of dealing with paper. For many years, there was no alternative to paper files so there was no issue to deal with. Now the issue has come up, but most attorneys don't have a clear idea of how to convert their paper into electronic data. Hence, they aren't interested in the inefficiencies that inhere in a paper based world. Here is a quick, and enlightening, frame of reference.

Most laptop computers weigh about 5 or 6 pounds, and they usually come with a hard drive capacity of at least 60 gigabytes. Let's assume that roughly 40 gigs of that capacity is available for storage of electronic files. How much paper could be stored in 40 gigs if the paper was scanned, or 'digitized' (to use the parlance of techies)? A lot. But first let's figure out, in general terms, the cost of dealing with paper.

Lawyers are used to dealing with so-called "banker's boxes" of paper. These are the small boxes that hold about 2,000 sheets of paper. A banker's box with 2,000 sheets of paper weighs 20 lbs. Stop and think about that, and ponder the implications. The box weighs 20 lbs!

To make a duplicate copy of the paper in that box would cost about \$100.00, and take at least 10 minutes to copy. Making a duplicate copy of a computer image file that represents the 2,000 pages would cost absolutely nothing. As in, zero. Making a duplicate copy would also take only a few seconds. So, even if all you did with your laptop was put one banker's box of scanned paper in the hard drive you'd already be ahead in terms of weight, space and the ability to copy. (Note: we haven't even started talking about retrieval time and search capability, where electronic information takes a quantum ahead).

Obviously, you aren't going scan just so you can put one banker's box of paper in your computer. So the question is: how much paper *could* you put into a typical laptop?

In very rough terms, a 40 GB hard drive could hold the equivalent of 400,000 sheets of paper (or 200 banker's boxes). That amount of paper would weigh 4,000 lbs. Again stop to consider the staggering

implications. *Two tons of paper!!!* That's how much paper you could store on a measly 40 gig hard drive. If you get an *80 gig* hard drive you could store *four tons of paper!!!* Okay, let's stop focusing on weight. How much physical space would you need to store four tons of paper? A small aircraft hangar at least, right?

At this point it's strikingly obvious that paper is less efficient than digital data just in terms of transportability. But since the focus of this talk is on safe-guarding data, we need to talk about another a very important ramification: backup.

Let's say you *knew* that next year a terrible earthquake, fire, tornado, or hurricane was going to decimate the building where your office files are located. You need to figure out how to create a safe backup of data that you will store offsite. Are you going to make paper copies of your files and and arrange for offsite storage at a secure location? No, obviously not. It's too expensive and completely impractical. But you actually *could* backup the data if it was digital. So the real question is this: are you willing to start scanning your papers? If you scan your papers then you will experience an increase in efficiency, which is nice. And, let's not forget: you'll more easily be able to secure and protect your clients' data.

So, with all that in mind, are you going to start scanning? Come on, be honest. I know what you're thinking: You'd like to say 'yes' but something is holding you back.

D. It's hard to scan paper and it takes too long

Well, you're sort of right, but not as right as you think. It's not really that hard to scan paper, although it does require some planning. If you know nothing about scanning documents, and you want to convert large volumes of paper to electronic form, then you should certainly consult with people who have expertise. The planning and consulting will take time, no doubt about it. The process of scanning will take some time (although not as much as you think). The cost of scanning can be significant. And so, I'm sure that many of you will simply abandon the idea.

But, remember we've calculated the benefits, and we know it makes sense. And we have an obligation to our clients (if not to ourselves). Obviously, the answer isn't to give up just because scanning requires time and money.

E. Start slow and get comfortable

The way to approach the digitization of information is to take it a little bit at a time. Remember, the journey of a thousand miles begins with the first step. For litigators, the best way to get started is to pick a new case, one that just came into the office in the past month or two. Buy a scanner and start scanning all the pleadings and correspondence. Get comfortable with accessing the data in digital form. Soon you'll start to notice how often you are accessing the electronic 'document' just to get some quick bit of information. You'll have a sense of how much faster and reliable it is, and you'll start to have a visceral sense of the inefficiency of paper (sort of like a smoker who quits and then starts to notice that his clothes smell when he comes out of a bar).

For example, let's say you have all of your pleadings scanned. Then the other side files a motion for summary judgment. In a footnote they reference a claim they asserted in their amended complaint. You have a sneaking suspicion that they've mis-stated the nature of that claim. You'd like to see the amended complaint, *now*. (And, by the way, your secretary is at lunch). If you had to look for the paper copy it would take at least 10 minutes, but since you scanned the amended complaint you found in 10 seconds. You start drafting your response to the motion with a twinkle of satisfaction, knowing that you have the power to instantly find information to counter your opponent's ludicrous claims.

After a few epiphanies like this you will become more committed than ever to scanning the documents. But let's talk about one more example. Let's say your client has to produce documents responsive to a request from the opponent. Right off the bat you have the documents scanned. There are 10,000 pages of paper that you are going to produce, but first you have to have them bates-numbered. If you scan the documents you can bates-stamp them in about 30 seconds, and be sure that you haven't missed a single page. If you were bates-stamping paper it would take longer and there would be a greater chance of error.

So, how do you bates-stamp 10,000 pages electronically? What is involved with that task?

F. 10,000 pages = 5 banker's boxes

How long will it take to scan in 10,000 pages? A good estimate would be no more than 3 hours, even with a slow scanner. But, remember, there are people out there who will scan documents for you at somewhere in the neighborhood of .10 a page. If your client is able to pay the \$1,000 then it might make sense to hire a knowledgeable vendor to do this for you. On the other hand, a decent Fujitsu ScanSnap scanner can do 15 pages per minute (and even handles double-sided paper). It costs just over \$400 and comes with Adobe Acrobat Standard software, which is a software package that normally sells for \$270. A plug-in that lets you use Acrobat to electronically bates-stamp documents will cost you about \$180. Thus, about \$600 you could have the scanner and the software you need to do the job yourself. And, once have the documents in electronic form you can also do a conversion that lets you search for key words in the text of the documents (this is called OCR, or 'optical character recognition').

The bottom line is: you save time and money if your documents are in electronic form. The time to start learning how to scan is now. Pick a small case and learn as you go, and then keep learning. It won't take you long to see the light.

G. Conclusion

Taking care of your client files and data is a mundane affair, but if you do it right then you'll be a lot better off when a monumental disaster strikes. It's not only a good idea, it's something you have an obligation to do. Hopefully, I have demonstrated that it makes sense from a general practice management point of view too. Frankly, I think it's safe to say that if you learn how to manage data in electronic form, you'll be a better lawyer.