BANISH THE PAPER BLIZZARD

by Nathan Chaney[1]

I.   INTRODUCTION

Since beginning the practice of law five years ago, I have studied the problem of paper overflow from the perspective of an attorney in a document-driven practice who happens to have almost two decades of work experience with computer networking and administration. With the patient support of a willing mentor, I have tried and discarded many options while navigating our firm to a workable paperless solution that provides the benefits we need at a cost we can afford. The purpose of this presentation is to provide you with insight on what I believe to be a better way to practice law. I hope to help you establish a framework upon which you may build a less paper-reliant practice. For most law firms, effective paper management necessitates a change in philosophy about when paper is truly necessary. I hope this course encourages you to commit to such a change, as I believe it will improve your practice and ultimately your quality of life.

II.   WHAT IS A PAPERLESS OFFICE?

A.   MOST LAW PRACTICES WILL NEVER BE TRULY "PAPERLESS."

Too much of the practice of law involves creating, revising, filing, and storing paper copies of important documents for the profession to eliminate the need for paper. However, as a profession we can choose to think intelligently about how technology can work for us. We all use computers now to perform work that was done on typewriters in the secretary pool years ago. The next logical step is to use computers to perform work that has traditionally belonged in the filing room. This is what I mean when I use the term "paperless" office.

B.   THE TERM PAPERLESS OFFICE MOST ACCURATELY MEANS INTELLIGENTLY TRADING PHYSICAL STORAGE SPACE FOR VIRTUAL STORAGE SPACE.

Think for a moment about how many bankers' boxes are in your office. I suspect the number is in the hundreds, if not the thousands. What benefit do all those boxes provide you? How often do you rummage through one of those boxes? Is there a better way?

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A paperless office relies upon computers with high data capacity rather than offices or warehouses with vast physical space. I imagine my firm's hard drive array currently holds on the order of several thousand banker's boxes worth of documents, all in a redundant package that costs less than $1,000. How much would I have to pay to copy 1,000 boxes of documents and keep each set of boxes in separate climate-controlled storage? I suspect the cost would easily exceed $1,000 within a matter of just a few months.

III. WHY WOULD ANY ATTORNEY WANT TO MINIMIZE PAPER USAGE?

A. PROS

1. Electronic files don't gather dust.

2. Moving to electronic files means that your risk of total loss of all files is shifted to a different kind of risk of loss.

Each lawyer fears a fire most because of the catastrophe that her practice would be if her files burned. A busted pipe near the filing room isn't too far behind. I don't know anyone who maintains one set of physical documents at her office and another duplicate set offsite. How would you recreate your files if your office burned down while you were in this CLE?

The benefit of using virtual storage space is that your files can be easily duplicated several times at multiple locations. Should one location be compromised, your data can be retrieved from another location quickly and easily. One can hardly listen to talk radio anymore without hearing several advertisements an hour for automated online data backup systems. Regardless of who you are and whether you have a paperless office, you should already be backing up your important data (such as email) on a daily basis. Backups are not something you usually think about until you need it, and by then it is too late.

3. Document retention policies are at best irrelevant and at worst easier to implement.

With virtual storage space as inexpensive as it is, many firms will choose to archive old client records rather than deleting them. In my trademark prosecution practice, clients can renew their trademark registrations indefinitely by filing appropriate affidavits every ten (10) years. If litigation ever arises over the trademark, even fifty (50) years later, the trademark application file could very well be relevant.

Most lawyers I know look back to similar cases as a starting point for research and drafting pleadings or other documents. If those documents are in a folder among hundreds in a box among thousands at a warehouse across town, the mere existence of those documents provides little benefit to the lawyer needing them. If, however, those records have been archived electronically, they can be retrieved rather quickly.

Even if you do decide to implement a retention policy and discard documents older than a certain age, a paperless office makes it easier to determine which files have had no activity within the specified time period. Sorting files by date is much easier than peering into a stack of boxes for expiration dates written on the boxes.

4. Documents are accessible.

I alluded to this in the previous section, but when documents are in digital form they can be searched quickly. The digitization solution best for lawyers stores an exact image of the document along with the text of the document that has been interpreted into English by a computer. Depending on your digitization solution and computer systems you use, the documents can be indexed in various ways to make keyword searching a reality. Would you use a keyword search on your own documents similar to the way Lexis and Westlaw allow you to search cases and other records? I certainly do.

In a paperless office, documents are also accessible in another sense because you can remotely access your files. You truly can work from anywhere. For example, as I am typing these CLE materials, I am sitting in my father's law office in Arkadelphia. I've written some materials before that I wanted to incorporate into this outline, and I needed to look at some research I've previously done that resides on my office computer in Fayetteville. Rather than calling my assistant to fax the documents to me or retype and email them, I simply clicked a button and looked at the documents in the same way I would have had I been sitting at my desk.

5. You can do things with electronic data that simply can't be accurately or easily done with paper documents.

Electronic documents are simply more flexible than their paper counterparts, particularly where the documents where originally created in an electronic format, rather than being converted from paper to digital. When documents originate in electronic format, you don't have to worry about the conversion software making errors translating the written words to electronic text. As a general rule, I always ask for subpoenaed documents and other discovery in digital format because it is easier to handle. Furthermore, electronic production is often less costly for all parties involved.

There are many reasons electronic documents are preferable to paper ones. An example should suffice to demonstrate my point. In a recent trademark infringement lawsuit, I represented a trademark owner on two theories of trademark infringement. One of the two theories was challenged on the basis that my client had not penetrated the market sufficiently in the southeast United States (Texas to Virginia) to receive damages for infringement of an unregistered trademark. Because the infringer was also my client's exclusive U.S. distributor, to prove market penetration, I needed to present evidence on the extent of the infringers' advertising.

During discovery, I subpoenaed the primary phone line for the infringers, which was the telephone number used in all advertising placed on websites and in trade journals. The phone company responded with a CD-ROM containing an electronic document. I was able to request, receive, and extract the phone number, date, and time of over 31,000 phone calls in a few short hours.

I plotted the infringers' phone calls on a map, as follows:
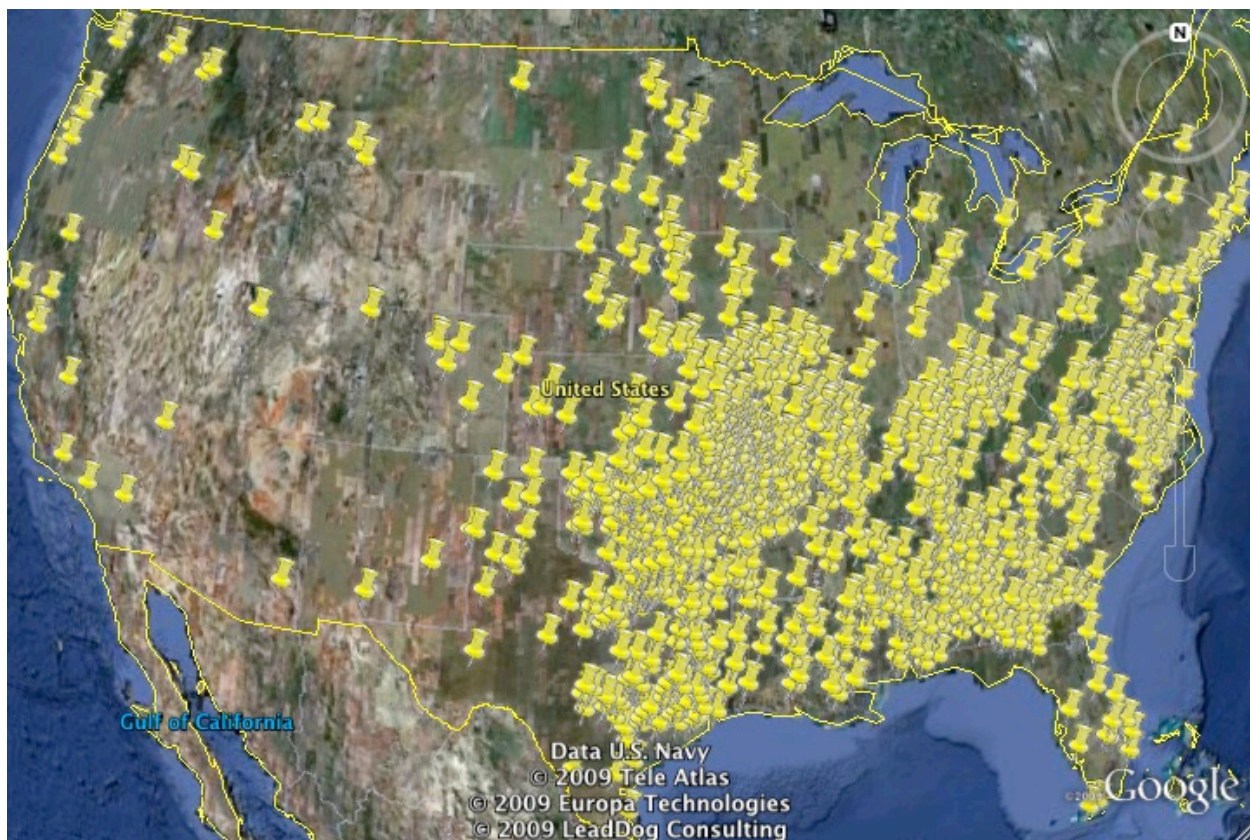
As the saying goes, "a picture is worth 1,000 words."[2] The map assisted us in prevailing on our argument against the infringers' market penetration defense. Had the phone records not been produced electronically, my client would not have been able to present such a succinct and powerful summary of his position.

B.   CONS

1.   Network security becomes even more important.

We are ethically obligated to keep documents and other materials in trust for our clients, and we must do so in a manner that protects the confidences of our clients.[3] When your entire practice is accessible over the Internet, it becomes important to keep your network security filters up to date.

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[2] This saying is codified in Ark. R. Evid. 1006 and Fed. R. Evid. 1006, which both state: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."

[3] Ark. R. Prof. Conduct 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent[.]").

In reality, every law practice that has a computer connected to the Internet should already be using up-to-date network security. Security breaches cost firms time, money, and headache. How much time have you or your office personnel lost because a computer was infected with spam, spyware, or a virus? Prevention really is the best cure.

2. Computers fail. Back them up.

The manufacturing process for computers is not perfect. Every single computer chip has hundreds of imperfections that affect the way it performs; manufacturers address this unavoidable problem by making the chip redundant so that each process the chip is designed to perform can be executed on different physical parts of the chip. However, the inherent imperfection in computer chips means that they fail. The only way to address the inevitable failure of a computer system, and the data associated with that system, is to back up information that you don't want to lose.

3. How will you incorporate legacy documents into a new system?

If you decide to commit to a new system, you must decide what to do with the paper documents you have now. Three options exist. First, you can fully incorporate old files into the new system by treating each individual document in the old file as if it was a newly-incoming document. This approach is time-intensive and detracts from your employees' day-to-day activities.

The second approach is to digitize the entire file in a single batch. Finding a document after using this approach is exactly the same as opening a box and browsing for the correct document. This is a good middle ground because the file is still more accessible than it would be if it were in a box, but you have to dig a little to find what you're seeking.

The third approach is to maintain current document retention protocols for your old documents, which can be phased out over time. This is an acceptable but archaic method that has been used for hundreds of years.

In deciding how to handle old files, you must perform a cost/benefit analysis for your particular situation.

4. Attorneys are resistant to change.

At a CLE recently, a sitting judge cracked a joke about having a hard time removing the green highlighter ink from his computer screen. Attorneys, especially older ones, distrust electronic recordkeeping because they have been trained to believe that the more paper involved in a file, the more money the file is worth. Most lawyers I know prefer to edit drafts of paper documents prior to making changes to word processing documents. Also, lawyers as a group like to make notes in margins of books and opposing parties' briefs for later reference.

I understand these arguments, and to an extent I still use some of these methods in my own practice. As I said earlier, no lawyer's office will be truly paperless, at least not in my lifetime. The fact that paper is more convenient in some aspects of your practice is acceptable and understandable. The purpose of implementing a paperless office is to eliminate unnecessary

and duplicative paper costs, rather than entirely eliminating the use of paper. I stated at the beginning of these materials that the purpose of a paperless office was to think intelligently about workflows and the use of paper. If using paper sometimes facilitates efficient work, then by all means use paper in that situation.

IV. WHO IN MY FIRM NEEDS TO BE INVOLVED WITH THE PAPERLESS OFFICE?

A. YOU ALREADY NEED AN EXPERT NETWORK ADMINISTRATOR.

In most law practices, computers are already used to a great extent for word processing, calendaring, correspondence, and other tasks. Have you insulated your practice from delays due to a server crashing in your office? How would you operate your practice if your computer systems were to suddenly crash? Who would you call? Having an answer in place to these questions is already imperative because so much of the modern practice of law relies upon computers.

The vast majority of attorneys should hire network administrators (third party or in-house, depending on the firm's size) to handle configuration and troubleshooting of security and computer issues. Your network administrator will be the first (and perhaps last) person you need to contact to establish a paperless office. The participation of a network administrator is vital, as moving to a paperless office will require changes to your current setup.

Your network administrator will need a clear set of goals (like searchability of documents) and a budget for doing so. Take a list of reasons why you want to implement a paperless office and a list of consequences you wish to avoid to your network administrator. Your network administrator will make recommendations on hardware, software, and workflows needed to ensure a smoothly-running paperless office.

B. YOUR STAFF MUST UNDERGO A LEARNING CURVE.

Implementing a paperless office will require your staffers to change their day-to-day routines. For instance, your assistant responsible for filing will need to learn a new workflow in order to properly categorize documents within your electronic filing system. One of your assistants will need to be responsible for ensuring that all documents received by the firm electronically (such as documents filed electronically in federal court) are stored in the appropriate location.

As part of keeping the learning curve short for your employees, your network administrator will need to ensure that the process is easy enough for your employees to learn quickly and operate efficiently.

C. THE ATTORNEYS MUST BE COMMITTED TO OVERSEEING THE PROCESS.

The attorneys in your firm need to be patient and committed to making the paperless office work. There will be growing pains, such as mis-categorized and mis-filed documents. Attorneys need to be capable of recognizing and correcting these errors and instructing the staff on corrective measures. Attorneys should recognize that the purpose of a paperless office is to

reduce overall costs, improve efficiency, and increase productivity, which in turn makes the attorney's job easier.

V. I'M SOLD. HOW DO I IMPLEMENT MY OWN PAPERLESS OFFICE?

A. REDUNDANCY, REDUNDANCY, REDUNDANCY. DID I MENTION BACKUPS?

The most important factor to consider when implementing a paperless office is redundancy. Redundancy is important at many steps in the paperless office workflow. For instance, it is important to have multiple backups of your data across at least two locations to ensure against loss in a fire or other catastrophic event. Redundancy is also important with respect to ensuring that electronic documents are correctly entered into your system. Your network administrator will be able to identify a redundancy solution that works for you.

B. SECURITY

As stated above, a competent network administrator is already necessary to your practice in order to comply with ethical and practical requirements. In connection with implementing a paperless office, your network administrator should perform a security audit to confirm that your systems are secure.

C. EQUIPMENT AND WORKFLOWS

In implementing a paperless office, you will need to identify your current software and hardware configurations and evaluate whether you need to add additional scanning equipment, practice management software, or paper capture software. You will need equipment having enough monthly duty cycles to handle your firm's paper usage, and the software should be configurable to minimize user interaction beyond scanning, naming, and saving documents in the appropriate file. Your network administrator will be able to assist you with designing a hardware, software, and workflow configuration for implementing your own paperless office according to your specific needs.

The purpose of this course is not to peddle specific gadgets or software, which is why no recommendations about specific products are made in these materials. Rather, this course aims to teach the concepts underlying a framework upon which a less paper-reliant practice may be built. Modern practice management demands something very different than technological snake-oil requiring minimal user input from your practice. For most law firms, effective paper management necessitates a change in philosophy about when paper is truly necessary.

Depending on your current configuration, you will need to consider whether moving to a paperless office makes sense. When one considers the costs of time, maintenance, disposal, and environmental impact of printing thousands of reams of paper each year, it makes sense to minimize the use of paper when possible.

D. ONE LAST THING…

I would recommend that all litigation attorneys who have paperless offices take small laser printers to evidentiary hearings and trials. In our practice, we always prepare our

anticipated evidence for hearings and trials, but occasionally we need to submit a document that we don't have in paper. As a said earlier, sometimes paper is necessary, and a small printer helps tremendously in such a situation.

VI.   CONCLUSION

In our firm, being paperless unquestionably increases the efficiency of our attorneys. In most circumstances, we travel to Court with laptops instead of bankers' boxes. Our staff and our attorneys are comfortable with the system we have in place, which allows us to greatly reduce the amount of physical space (and cost) we dedicate to the storage of paper files. We believe our transition to a paperless office has been a success.

I want your transition to a paperless office to be a success as well. I hope this presentation has encouraged you to look differently at your current office configuration and has challenged you to question whether you are as efficient with managing your practice as you could be.