

Technology as a tactical weapon in litigation

By Kylie Peterson.*



In every litigation, the litigator sets out to obtain the best possible result for his or her client. In examining the available evidence, this sets two fundamental objectives:

1. to comply with the procedural obligations of the jurisdiction; and
2. to fully understand and expertly manage the evidence. This concept encompasses finding the smoking gun, the needle in the proverbial haystack, the ideas that change the case framework in such a way that will clearly favour the litigator's case and identifying any gaps and inconsistencies in evidence.

Lawyers have always adopted aids to assist in their achievement of these outcomes. Traditionally, these have included hand-written file notes, post-it notes and word-processed lists, memos and chronologies. Towards the end of the 20th century, a limited number of lawyers involved in a limited number of matters also began to look to computer technology – specifically to the litigation support database – to achieve procedural compliance and superior evidence management.

Traditional process has essentially relied on the memory and intuition of Counsel and other legal practitioners to identify key documents and inconsistencies. Early technologies sought to extend the practitioners' capacity to remember but did not change this basic paradigm.

This article examines the changing face and role of the litigation support database from a library repository of materials to an overtly tactical weapon designed to play a central role in the success of the litigator, a technology which directly supports shared thinking and ideas and actively identifies evidentiary problems.

THE LITIGATION SUPPORT DATABASE – AN EXPLANATION

A database is a repository of information in computer readable form. Information may be stored as full text or in structured fields. At a basic level, the key functions of the database are to:

- Store and organise information; and
- Enable retrieval and analysis of that information.

A litigation support database is a database specifically designed to undertake these functions in preparation

for litigation. In management of hard copy materials, typically, litigation support databases have been used in association with the following processes to constitute a discipline known as litigation support or electronic matter management:

1. Labelling of client documents with a unique document identifier
2. Scanning of those documents to image format
3. Capture of pertinent objective and subjective data and information about those documents to structured fields within a database. This information would include data such as document type, document date, document author, discoverability status, privilege basis and assignment of a document to a particular legal or factual issue or to a document group (eg brief to counsel, annexure to witness statement, supplementary disclosure list).
4. Often times, application of Optical Character Recognition processes over the scanned image set to enable free text searching over the entire content of the evidence collection.

In the past five or so years, these processes have been modified to also accommodate natively electronic evidentiary materials (such as emails, word-processed documents, spreadsheets, and accounting and customer databases). Copies of these natively electronic materials can be accessed from the litigation support database together with electronically extracted metadata (such as the original author, creation date, document title, formulae, hidden notes and editing information about the materials) and programmatically and manually extracted data (such as author, recipient, document type, document date and document description).

EARLY GENERATION LITIGATION SUPPORT DATABASES

Litigation support databases of the 1980s and 1990s were essentially the preserve of a handful of lawyers involved in very large document intensive or very complex litigation or Inquiries (such as the Estate Mortgage litigation and the Inquiry into the collapse

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of the State Bank of South Australia). Primarily, these databases were developed and utilised to marshal vast evidence collections in circumstances where the sheer quantity of paper made it almost impossible to sift through and analyse relevant materials using traditional, paper-based mechanisms. These early databases were custom built, expensive, technically onerous to support and maintain, and functionally simplistic.

The ascendancy of the personal computer and the possibilities presented by the internet created an environment conducive to wider adoption of litigation support software. This second generation software had its roots in the early databases. The technology supporting it made it more accessible and decidedly more affordable than its predecessors, but the core purpose of the technology remained static: to provide a library repository of materials to enable more efficient compliance with procedural requirements and more effective management and retrieval of evidentiary materials. Because the most apparent benefits of the technology remained dependent on very large evidence collections, the technology failed, and has essentially continued to fail, to permeate beyond the large firm/large case scenario.

To the extent that litigation support software has been adopted, both in Australia and internationally, it has been the adoption of this second generation software. While the functionality has become slicker and more sophisticated with each new version released in the past decade, development has been evolutionary rather than revolutionary and has not challenged the assumption that the core role of the software is that of a library.

THIRD GENERATION: A NEW APPROACH

In recent months, a new approach to the function of litigation support technology has emerged. This new approach has been taken by Systematics with the latest release of its System@Law Signature software. The software makes the evidence library functionality secondary to the tactical, case winning functions.

According to Systematics General Manager Ian Chivers, the substantial change of focus came during the course of a long-running and very large matter.

Mr Chivers said that it became apparent that litigation support technology had sold itself short:

“Once discovery had been made, one of the lawyers on the team made the comment that since we’d finished discovery, the database had done its job,” Mr Chivers said.

“Although I appreciated the central role the database had played in effecting discovery in proceedings as complex as these, to my mind, this approach totally

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discounted the tactical value that Signature had evolved to offer in terms of assisting the lawyers to generate a successful outcome. It highlighted to me that litigation support software developers had failed to realise the very valuable potential of the software environment as a tactical weapon.

“Although I believe that Signature has always had a much more tactical focus than its competitors, it was clear that to provide real advantage to the lawyers who used our technology, we needed to have our development efforts focus on functionality that gave lawyers competitive edge in forensic analysis and to communicate that focus to the market.”

Feedback about Signature’s extended tactical focus has been highly favourable.

“We’re being told by both lawyers and litigation support professionals that this is a significant leap forward that provides practitioners with real competitive advantage in all types of litigation, and that it puts this product in a class of its own. It will be interesting to see if our competitors follow suit and change the focus of their future product development,” Mr Chivers said.

“I guess the advantage Systematics has in this regard is that we’re an Australian company focused on the needs of Australian lawyers, and these needs don’t have to be prioritised against the competing needs of the much larger and quite different American or European markets.”

The result is a new third generation of litigation support, which is best described with reference to a sample of its functionality:

RELATED DOCUMENTS MANAGEMENT

A number of different document relationships occur in evidence collections that are the key to identifying gaps and inconsistencies in evidence. Traditionally, these relationships have been limited to host and attachment and original and copy relationships. Third generation litigation support software enables the classification and identification of a raft of document relationships to significantly aid evidentiary analysis. These include:

(a) Evidentiary chains

Documents often form part of a chain of related documents. For example, Letter B may refer to an earlier Letter A and also to a forthcoming Meeting C. Letter A, Letter B and the Minutes of Meeting C are characterised as being documents in a chain. Identification of evidentiary chains enables lawyers to uncover evidence that is referenced but omitted and also evidence that appears in unexpected hands.

“Identifying evidentiary gaps is obviously very significant, both materially and tactically,” explains Darwin-based lawyer Jim Noonan.

“This function is very valuable in its ability to pinpoint areas of vulnerability, to assist in further enquiries of clients to produce evidence that analysis suggests they should have in their possession and to put pressure on the opposing party to discover omitted evidence.”

(b) Replica and reference relationships

Commonly, an evidence collection contains multiple copies of the ‘same’ document. Third generation litigation support software allows for a single version to be treated as the master or reference version and for other versions to be classified as replica versions. Critically, the classification ensures that all members of the legal team attach legal analysis and commentary to the single reference version so that everyone is aware of the analytical efforts of others on the team.

“The danger of not adopting this type of approach is that different individuals on the team attach commentary and other analytical efforts to different versions of essentially the same document, without having notice of, or the advantage of, other team members’ efforts,” Mr Noonan said.

“This system ensures that ideas and intelligence are focused and shared at the earliest possible opportunity.”

The classification also significantly reduces wasted time as search results can be specified to return only the reference version, rather than all versions of the same document. Replica versions are not withdrawn from access; they remain in the database. Significant variants are highlighted and the various replica versions can be accessed at any time via hyperlinks from the reference version.

(c) Parallel relationships

If the database contains multiple records of a single event (such as notes or minutes taken by multiple attendees of a single meeting), those documents are described as parallel records. Identification of parallel records highlights contradictory evidence and divergent accounts of evidence created by various participants to a single event.

UNDATED DATE SUGGESTING

Evidence collections typically contain important, genuinely undated documents for which estimated dates can be derived through the application of dating routines. Third generation litigation support software contains a number of these routines which look at context and other document relationships to suggest the adoption of the date of the preceding or succeeding documents, the dates of related documents or date ranges in accordance with the dating patterns of other documents in a folder.

“In this instance, the software is serving the lawyer in

providing assistance for what is otherwise a mundane and laborious task. Rather than the lawyer having to individually review each undated document and input the estimated date based on very simple logic, the software presents the lawyer with estimated dates based on the most applicable logic and the lawyer is only required to input dates where exceptions apply or where an affected document is classified as being of critical importance, thus warranting close scrutiny,” Mr Chivers said.

ALIAS AND GROUPINGS

A third generation function which expands upon an existing function is the use of aliases for individuals’ names and the grouping of organisations according to hierarchies.

“Typically, individuals are referred to and described in a variety of ways; their names are inadvertently subjected to various permutations. Signature provides for an alias function that enables the grouping of related names to a central alias for the benefit of your own team’s analysis; however, in accordance with the rules of civil procedure and, to maintain tactical advantage, the benefit of this grouping is not passed on to the opposition,” Mr Chivers said.

Similarly, where a matter involves organisations from various levels of government or companies from a related structure, the software enables grouping within hierarchies to facilitate ease of searching across the database without sanitising data in such a way as would compromise procedural compliance or pass on advantage to the other party’s legal representatives.

SELECTABLE DISCLOSURE FRAMEWORKS

“Australian Courts obviously prescribe certain discovery obligations that result in a sufficient description of materials to be disclosed, but do not prescribe the order in which materials are to appear in a discovery list,” explains Mr Chivers.

“In some situations there will be advantage gained for one or both parties if, for example, the materials are described in the order in which they appeared in a hardcopy file. In other circumstances, it might be advantageous to describe them according to document bundles, date order or, in the terms of most rules, any other convenient order.”

Signature provides a range of flexible disclosure frameworks to enable control of these outcomes in a way that best suits the disclosing party.

ITEMS OF INTEREST - COLLABORATION

Since the technology’s earliest iterations, advocates of litigation support databases have made much of the new collaborative possibilities offered to networked users. Obviously, the internet delivered the innovative

option of allowing multiple, geographically disparate members of the same legal team, their clients and expert witnesses to access and to contribute forensically to a single set of party evidence and data.

“While there is no doubt that real collaborative access has been available for as long as there have been internet-enabled applications, until now, none of the applications have provided tools to maximise the value of that collaboration,” Mr Chivers said.

“Furthermore, they’ve not addressed the issue that although all members of the team might be interested in keeping abreast of critical developments in forensic analysis, some members of the team may not be regularly working with the materials. A senior partner, or client for that matter, may want to be kept in the loop of important information but may not want to be an active participant in the management of the materials.”

Signature addresses this need by its Items of Special Interest function. The function enables users to identify their interest in a particular item or items, or to subscribe others, to receive alerts of any use or alterations made to evidentiary items which are of special interest.

“For example, any changes in coding, or commentary added, to documents that have been categorised as being critically important should logically be notified to all legal professional members of the team,” Mr Chivers said.

“Signature provides that notification automatically on a daily basis via email. It’s then up to the individual team member to take the issue further, by accessing the database and reviewing the critical document in detail, should they wish to.”

The supervising legal practitioner is kept fully informed effortlessly and is consequently positioned to redirect effort as new ideas emerge.

MORE THAN THE EMPEROR’S NEW CLOTHES

It is not an overstatement to suggest that third generation litigation support software represents a paradigm shift in the role litigation support software plays in the management of litigation. Rather than focusing on procedural compliance and the management of materials from a library perspective, it is designed to be used as an overtly tactical weapon designed to play a central role in the success of the litigator. Importantly, it delivers this potential to a broad spectrum of matters, not just litigation involving voluminous evidentiary sets or other complexities. In short, if you are litigator, it is a tactical tool that might just become the most valuable weapon in your case preparation arsenal.