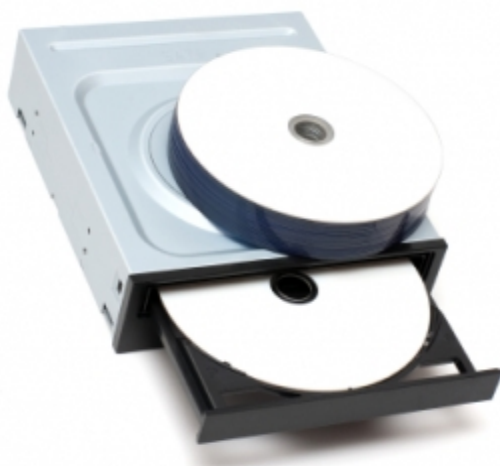




What Should be the Ordinary Course of Business: Using Litigation Support Software to Review Electronically Stored Information

By Joshua C. Gilliland, Esq
Professional Development Manager

The Defendants in *Valeo Elec. Sys. v. Cleveland Die & Mfg. Co.*, brought a motion to compel the Plaintiffs to organize their electronically stored information production into 28 specific categories to match the Defendants' discovery requests. The Defense motion was denied. *Valeo Elec. Sys. v. Cleveland Die & Mfg. Co.*, 2009 U.S. Dist. LEXIS 51421, 1-2 (E.D. Mich. June 17, 2009).



The Plaintiffs' Production

The Plaintiffs produced over 270,000 pages of documents as they were "kept in the usual course of business." *Valeo Elec. Sys.*, 2, citing Federal Rule of Civil Procedure Rule 34(b)(2)(E).

The production included "emails and other electronically stored information ("ESI") in the order that they were found on the hard drive of each document's custodian." *Valeo Elec. Sys.*, 2. The ESI production (rightly) maintained the parent-child relation between the email messages and the corresponding attachments. *Id.*

Paper documents were scanned to searchable PDFs, along with the

corresponding folder tables from where the documents were stored. *Id.*

The Plaintiff's ESI and documents were produced on 15 CD's. *Id.* Most CD's can hold nearly 700MB of data, so the total size of the production must have been approximately 10GB to 10.5.

The Plaintiffs' Indices and Spreadsheets

The Plaintiffs produced two indices to assist the Defendants in organizing the discovery production. *Valeo Elec. Sys.*, 2.

The first index was a 3 page table identifying the "custodian for each Bates range of documents and identifying certain specific documents." *Valeo Elec. Sys.*, 3.

The second was an Excel spreadsheet that identified the ESI as follows:

1. Document Bates range;
2. Directory and, where applicable, a file name identifying where it was stored;
3. Document name or title or "re:" line for emails containing such; and
4. Estimated date the document was created or modified. *Valeo Elec. Sys.*, 3.

The Court further described:

The many attachments in this spreadsheet follow immediately the document or email to which they relate, and again the Bates numbers parallel those in the three page index so the source or Valeo employee from whose computer the documents were obtained can be identified for each grouping of documents. *Valeo Elec. Sys.*, 3.

The Defendant's Motion to Compel

The Defendants engaged in what their associate attorneys must have thought was a Death March style review of the 15 CD's of discovery without using any litigation support software.



The Defendants complained they had to “manually open each and every electronic file on each of the [15] CDs produced.” *Valeo Elec. Sys.*, 4. Additionally, the Defendants had to “ope[n] and revie[w] each of the thousands of individual electronic files.” *Valeo Elec. Sys.*, 4. They also claimed the ESI was “innocuously” named to frustrate discovery review. *Valeo Elec. Sys.*, 4.

The Defendants wanted the Plaintiffs to organize their production to match the 28 categories from the Defendants’ discovery requests. *Valeo Elec. Sys.*, 4-5.

Form of Production under Federal Rule of Civil Procedure Rule 34

A party’s discovery obligations pursuant to Federal Rule of Civil Procedure Rule 34(b)(2)(E)(i), require them to “produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.” *Valeo Elec. Sys.*, 6. To put it bluntly, the producing party can produce the ESI in the “usual course of business” or label and

organize them. *Id.*

The Plaintiffs produced the ESI as it was kept in the usual course of business. This was the end of their discovery production obligations. *Valeo Elec. Sys.*, 6-8.



The Court described the Excel spreadsheet as the closest thing to a “magic decoder ring” the Defendants were going to get from the Plaintiffs. *Valeo Elec. Sys.*, 6-7.

This included relevant metadata in an index, Bates stamps by custodian and in an estimated chronological order. *Valeo Elec. Sys.*, 6-7.

The Court held the Plaintiffs met their discovery obligations and had no further duty to “organize” the production for the Defendants. *Valeo Elec. Sys.*, 7.

Best Advice for a Law Firm: Invest in a Litigation Support System

These two indices may be the nearest thing approaching a “magic decoder ring” and defense counsel may consider it of no more help than the Rosetta Stone leaving him and his associates hours of work ahead to comb through what was previously undecipherable hieroglyphics on the 15 discs. ***Nonetheless, all ESI documents produced are searchable in Adobe and/or other commercially available litigation search programs.*** Following Plaintiff’s counsel’s demonstration on June 17, it is determined that this production, including the supplemental Excel spreadsheets provided on June 17 satisfies Valeo’s *Rule 34* burden and the parties’ agreement following the *Rule 26(f)* conference. *Valeo Elec. Sys.*, 7

The Defense attorneys in this case would serve their clients by investing in a litigation support software for reviewing electronically stored information. A brute force review across multiple CD’s is not cost effective in 2009.

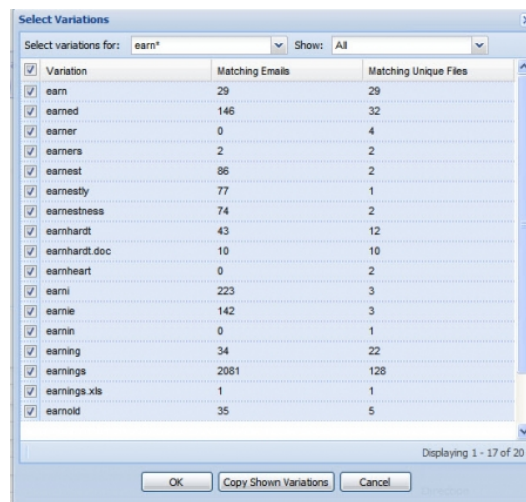
Not using a litigation support system such as CT Summation iBlaze, LexisNexis Concordance, or hosted services such as Kcura Relativity, plus many other fine products, to review electronically stored information is extremely wasteful in attorney time and money.

In the interest of full disclosure, I am an employee of [D4 LLC](#). We are business partners with [CT Summation](#), [LexisNexis](#), [Kcura](#), and [Clearwell Systems](#). I also worked for CT Summation for nearly 2.5 years and have over 5 years experience with the iBlaze product.

Search & Analyze with Technology

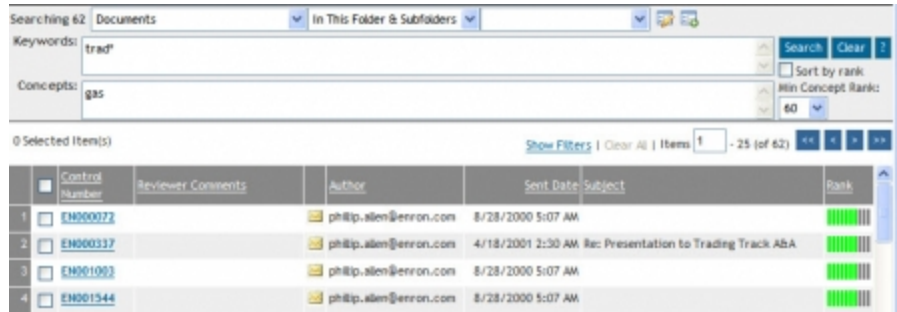
Attorney review should not be engulfed in a document quagmire of “opening” and “reviewing” the “thousands of individual electronic files” in a production.

Pre-Discovery tools can be used prior to document review to cull down a production to eliminate email from news agencies, email domains and other non-relevant sources. This technology allows attorneys to focus their search terms down to responsive ESI that can then be export for review.



Clearwell Systems Transparent Search Function

Almost all litigation support products index electronically stored information, allow for searching of native files, organizing, tagging for issues, analysis and everything else that goes into the current practice of law.



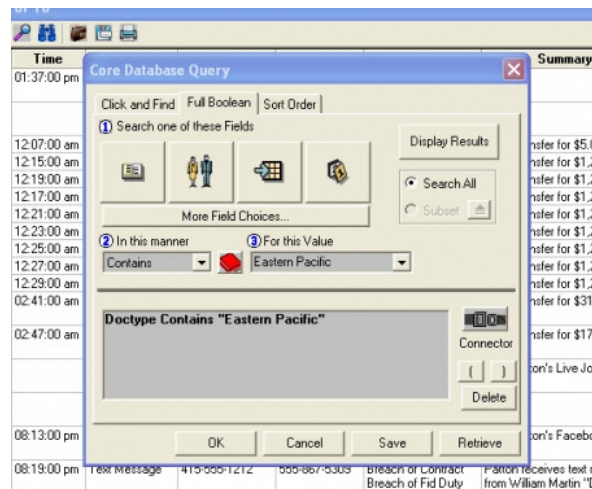
Search Results in Kcura Relativity

Document review also becomes more productive as extracted text from the native files populates the "Author," "Document Date" and other objective fields. Associates and paralegals no longer need to manually enter that information when the data can be extracted in ESI processing and used to auto-populate a review database.

Docid	Date	Time	Doctype	Author	Recip
MSA0000006	10/16/2007	01:37:00 pm	Email	Bank	Main Street Auto
ATA0000001			Contract	At Home Accounting	Main Street Auto
EPW0000001	10/15/2007	12:07:00 am	Wire Transfer	Eastern Pacific	Unkown
EPW0000002	10/15/2007	12:15:00 am	Wire Transfer	Eastern Pacific	Unkown
EPW0000003	10/15/2007	12:19:00 am	Wire Transfer	Eastern Pacific	Unkown

CT Summation iBlaze Database

An attorney using a litigation support system to review ESI can leverage a database populated by extracted text from ESI processing to search email by Sender, focus in by date range and review email messages and their attachments.



CT Summation iBlaze Search Feature

Modern Lawyers: iPhones, Requests for Metadata & Automated Review

In the iPhone Age technology in the law firm is a fact of life. Not using litigation support system to review electronically stored information is comparable to whining about using Lexis or Westlaw for online legal research. Or worse yet, a lawyer refusing to use a word processing program because they only know how to dictate. It might even violate an attorney's duty of competency to their client, due to the volume of ESI driving up costs by refusing to use the tools to make review cost effective.

Few attorneys can explain with a straight face to their client that they spent 7 hours looking for 10 emails on 15 CD's that could have been located in seconds with a name and date search in almost any litigation support software.

For example, I remember being a young associate digging through 40 boxes for hours to find ONE certificate of completion in a construction defect case. That time was cut off the bill to the client. Litigation support software eliminates that wasted time and allows lawyers to focus on their case, not an ocean of documents.

Cost Analysis of Litigation Support Software

Some may claim purchasing a litigation support software is cost prohibitive. Consider the following:

Partner Hourly Rate: \$250 to \$300

Associate Attorney's Hourly rate at an insurance defense firm: \$150 to \$200

Paralegal Hourly Rate at insurance defense firm: \$100

Cost of one CT Summation iBlaze mobile license: approximately \$2800

Cost of a CT Summation iBlaze 5 node license: approximately \$8000

Valeo Elec. Sys. v. Cleveland Die & Mfg. Co., had 270,000 pages of documents to review (the opinion is not clear as to the exact nature of the data). Assuming an associate can review one document a minute, they are reviewing 60 documents an hour and at least 480 in an 8 hour work day.

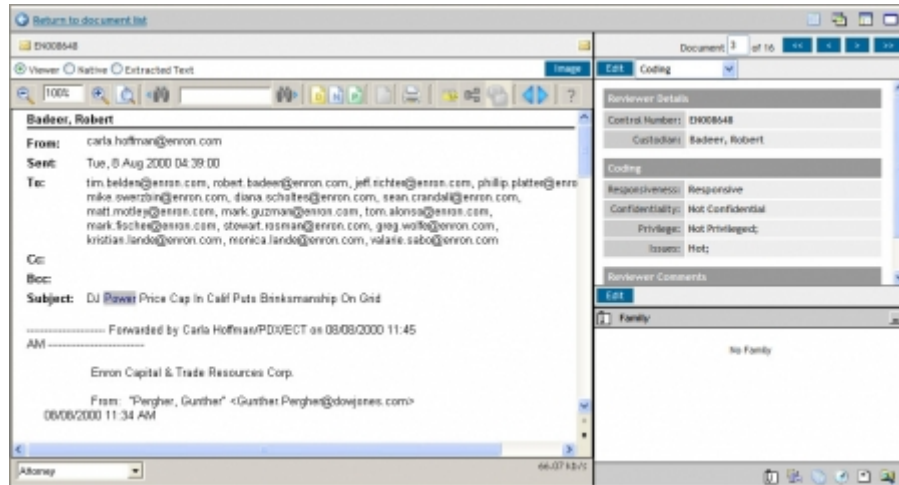
After 16 hours slogging through loose data on CD's (or 960 documents in two days), a firm has paid for one CT Summation license. After 5 associates have each worked 10 hours the firm has paid for a 5 node network system.

Associate and paralegal review outside of a litigation support software can result with review notes on Word files, yellow tablets or random Excel files. A law firm using a review software maintains all notes and issue tags in one database that is fully searchable by everyone using the program.

The \$20,000 Motion to Compel vs Using Litigation Support Software

Bringing a motion to compel in Federal Court costs anywhere from \$10,000 to \$30,000, depending on the nature of the dispute (form of production or search terms), attorneys' fees, and whether experts are needed for technical knowledge. All the costs of that motion would buy you a 10 to 20 node network system with most desktop litigation support systems.

A party can host 10.5GB of data (15 CD's worth of ESI) in a product like Kcura Relativity for approximately \$70 a Gigabyte per month and with three attorney reviewers for \$375 a month (total monthly cost estimate of \$1110) for 9 to 27months, depending on the data, number of reviewers and processing costs.



Document Review in Kcura Relativity

Final Thoughts

Not using a litigation support software or service to review electronically stored information is like using a typewriter instead of a computer. While I might be “Old School” when it comes to bow ties, law firms are best served by embracing technology to help control, organize and review discovery.