

# ELECTRONIC EVIDENCE A CONVERSATION WITH

## PART III

High-tech lawyer Michael Arkfeld wrote the book on e-evidence. Here, he gives us his take on how it will affect court reporters.

When it comes to electronic discovery, Michael Arkfeld wrote the book. His *Electronic Discovery and Evidence* and *The Digital Practice of Law* serve as comprehensive and authoritative texts in the legal profession by exploring how the explosive growth of electronic communications is affecting the practice of law. As a practicing attorney specializing in civil tort litigation, Arkfeld's practice includes multimillion-dollar cases.

Since 1985, Michael has extensively incorporated personal computers in his legal practice. He lectures frequently, throughout North America and internationally, on the effect of technology on the practice of law and on discovery and admission of electronic evidence. His Web site on the Digital Practice of Law<sup>1</sup> provides extensive information regarding all aspects of electronic discovery, and his *Electronic Discovery and Digital Practice E-Newsletter*<sup>2</sup> contains litigation technology-related columns, tips, and ideas.

I had the chance to interview him about his thoughts on the reporter's role in the changing environment of legal technology, and here I share what I learned with you.

### What do you envision as the reporter's role in handling electronic exhibits?

The court reporter will have a significant role in handling electronic exhibits. For example, if the attorney has an e-mail he wishes to show a witness and the e-mail's metadata is important, both the metadata and the e-mail itself will need to be printed out for marking and presentation to the witness if a paper format is being used. Court reporters will have to become familiar with *meta-*

*data*, *ISP*, and other electronic discovery terms because they will be commonly used in depositions.

Another example is this: If, during a deposition, an attorney searches the volumes of electronic discovery on his computer and finds relevant data such as e-mails, how does he present the electronic information to the witness? He may decide to show the actual e-mail to the witness through an LCD projector. In that case, the court reporter will need to immediately save or preserve the electronic exhibit by converting it to PDF or TIFF format and then printing it out or copying it to a disk. Then the court reporter can physically mark the exhibit.

Another issue concerns linking paper exhibits to electronic transcripts. I gave a presentation a couple of weeks ago, and the same issue came up that has always come up for the past 15 years. A lot of attorneys are saying, "Well, we have paper exhibits, but they're not linked in the deposition to where the witness talked about them."

The electronic deposition transcript that a reporter gives to the attorney should have the exhibits scanned and linked to the testimony where they are referenced. Most court reporters do not offer this service, and you've got such a significant group of attorneys now that have to start using litigation support software — because of the growth of electronic discovery — that this service should become commonplace. It is a needed service for the attorney because of the necessity of linking paper exhibits and electronic information, such as electronic discovery, e-mails, word processing documents, spreadsheets, and so forth. Attorneys will be increasing their use of litigation support products, and they're going to start using depositions in electronic format much more often. Therefore, the court reporter should be offering this service immediately.

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# AND THE COURT REPORTER: AN EXPERT

BY NANCY J. HOPP

Getting the exhibits, scanning them in, and linking them to the places in the transcript where the witness talks about them — I still don't see that occurring much in your profession. If reporters will advertise this service, I think it will give them a tremendous economic advantage, a commercial advantage, an advantage in getting new clients — because attorneys get excited about it when you show them that capability.

### How widespread are these technological changes in the field of law?

I think we're moving into a virtual justice system now because of electronic discovery. I'm making a presentation for the National Center for State Courts in December in Las Vegas, and the message they want me to present is how the courts and the lawyers can work together using common scheduling systems, intranets, extranets. So you're seeing all prongs of the justice system move up the ladder at the same time, and court reporters have to be part of this transition. Such a transition may include virtual depositions, realtime reporting, or providing voice or text links to other experts or attorneys throughout the country during a deposition using voice over a regular telephone line.

### How can reporters best serve their clients, technologically speaking?

I would suggest two ideas: One idea, as I discussed, is to link exhibits with the transcripts. That would be great.

A second idea is to provide broadband access during a deposition for realtime reporting or for transmitting the audio portion of the deposition. I know realtime reporting can be very expensive, but one alternative — if they're not doing realtime — is to offer the ability for others to participate remotely using a speaker phone or over the Internet. Another person — for example, an expert witness or co-counsel in a different city — can attend remotely, which is relatively inexpensive. I could be in contact with my expert in Kansas while I'm

taking a deposition in Phoenix, and he can e-mail me regarding something he hears the other expert say.

This technology is not going to take the profession by storm, yours or ours, because it's an ongoing educational process. But the problem is that, for lawyers, it's unethical, it's malpractice, and you can get sanctioned by the court now for not preserving or discovering evidence electronically. So the bar is raised several notches for lawyers to implement technology solutions, compared to traditional litigation support technologies.

With litigation support, you had some people saying, "You should do this for your clients because it makes you more efficient."

But a lot of lawyers said, "Hey, it's a billable hour. I don't want to be more efficient."

Now there's a court decision from Illinois<sup>3</sup> that says it's unethical not to preserve electronic data from your client for disclosure to the other party. Now it's going to be malpractice when you don't discover e-mail in a case that may benefit your client. And the courts are sanctioning attorneys — outside counsel, inside counsel, and others — for failing to preserve electronic information. So that's the reason they're going to get this big push now — because their license is on the line.

Previously they could say, "I'm not going to use litigation support software, because it's too efficient," or "I don't want to deal with it." Now they don't have a choice, because of the volume of electronic information. So that is what's going to be pushing litigation-support software.

How soon is eDiscovery in litigation going to happen? I thought litigation support would take off, but it did not. However, now, because of the ethical issues, more and more people are talking about and writing about the use of litigation-support software to handle electronic evidence. There are probably 10 to 20 seminars a week concerning electronic discovery going on throughout the country.

So, from a court reporting perspective, the profession will have to adapt to

the use of electronic information during depositions and offer electronic transcripts with scanned and linked exhibits.

### Can you share with us some ways in which reporters can stay abreast of changes in litigation-related technology?

The American Bar Association Tech-Show in Chicago is a really good place to keep up with the latest developments. I've written two books, and others are available. Also, many litigation support software vendors provide technology presentations across the country, and attending those types of conferences or presentations will definitely keep reporters abreast of the latest developments.

### These innovations represent a change that may prove daunting for many reporters. Any words of advice?

We have the same problem with attorneys. As a matter of fact, when I give presentations to attorneys, the first topic I always talk about is change and how difficult it is, so we're running into the same thing in both professions. But just as with attorneys, I think court reporters need to adopt the new technologies being offered so they can transition with the rest of the justice system as it moves into this electronic new world.

You've already got a lot of people out there who are using litigation support software, thinking about it, or having to use it because of electronic information. The attorneys are going to look to other people for education and technology services. It could be a court reporting firm providing this service, and it would be a wonderful marketing tool for your profession as we transition into this electronic information age. ■

#### FOOTNOTES

- 1 <http://www.arkfeld.com>
- 2 <http://www.arkfeld.com/newsletter/index.htm>
- 3 *Danis v. USN Communications, Inc.*, 2000 WL 1694325 (N.D. Ill. Oct. 20, 2000).