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## The Era of Mega-Case Litigation

By Chris Kruse

The growth of electronic documents is astounding. According to an estimate by The Collaborative Electronic Notebook Systems Association in "Titanic 2020 — A Call to Action", the total number of electronic records in the world could double every minute in the next 10 years (Lysakowski & Leibowitz, 2000, pg. 6). According to Gretel Johnson of [www.infoworld.com](http://www.infoworld.com) in "You've Got Mail: 60 Billion a Day by 2006," information technology and telecommunications advisory firm IDC estimates that 31 billion person-to-person e-mails were sent each day in 2002, and that number is expected to increase to 60 billion per day by 2006 (Sept. 26, 2002).

The era of mega-case litigation has arrived. In the last 2 years,

**Chris Kruse** is President and Chief Executive Officer of CaseCentral, Inc. ([www.casecentral.com](http://www.casecentral.com)). Since founding CaseCentral in 1994, he has driven its development into a leader in electronic discovery and litigation management solutions. Contact him at [info@casecentral.com](mailto:info@casecentral.com); 800-714-2727.

mega-cases — those with more than 500,000 pages for review — have become commonplace according to leading law firms and litigation support vendors. Indeed, in high profile cases today, document collections can easily run over 50 million pages — roughly a terabyte of data, or the equivalent of about 20,000 Banker boxes. The rapid growth of electronic documents presents significant challenges for corporations and law firms involved in litigation. Dealing with the challenges of document reviews across multiple, related cases is also becoming increasingly important for many corporations.

At the same time, the digital age has delivered a host of new tools for plaintiff lawyers that make it easier to identify documents produced in prior cases. As a result, monitoring document production histories both within a case as well as between cases has become increasingly important for corporations and outside counsel to avoid production mistakes.

### SOLUTIONS FOR MEGA-CASES

As the average number of pages reviewed for litigation dis-

covery requests has grown, the tools used to review these documents have rapidly evolved. For large, complex cases, review methods evolved through three distinct approaches:

- Paper-based;
- Litigation support software-based; and
- Web-based.

The move to Web-based solutions over the past 5 years has been driven by a number of issues. One important factor is the need for highly scalable document repositories to deal with massive document collections. This presents a number of challenges, not the least of which is the need for massive storage capacity and effective tools for organizing and reviewing such large document collections. Paper-based reviews are simply not practical for such large document collections. Desktop software systems were not designed for such a massive task. Only the largest Web-based solution providers can supply the scalability and storage capacity to handle very large, complex cases.

A second factor that drives the

move to Web-based solutions is the need for simultaneous document access for large and/or dispersed review teams. Massive document collections require large teams to complete the review within an acceptable time frame. To shorten the review time, the size of the review team can be quickly and easily increased with a Web-based solution, unlike desktop software that may require the installation of new workstations, the purchase of new software licenses and the installation of additional networking equipment to support growth. In addition, joint defense groups or multi-district litigation can require the involvement of widely dispersed reviewers. Web-based solutions can provide anywhere, anytime access to any user with an Internet connection.

In general, Web-based solutions are the most effective approach when:

- The document review set is greater than 500,000 pages;
- There is a short turnaround requirement for large discovery or production requests;
- Review team members are geographically dispersed; or
- The litigation involves multiple parties such as multi-district litigation or joint defense groups.

Notably, the growing use of Web-based solutions provided by Application Service Providers (ASPs) in the legal industry mirrors the rapid growth of ASP solutions in many other industries and applications. For example, Salesforce.com has emerged as a leader in CRM technology, offering an ASP alternative to what was

previously the sole domain of desktop or enterprise application software. ASP solutions can generally offer many advantages over application software such as anytime, anywhere access and real-time product updates.

### **CONSIDERATIONS IN THE REVIEW PROCESS**

Two considerations are paramount with massive document collections. A viable solution must have the scalability and reliability to provide a sound review environment. The workflow also must be optimized for the review process.

System scalability and reliability for the online review of a large document collection is non-trivial. A simple Microsoft Access database may work for a small document collection, but massive amounts of data require robust database and network technologies. Redundant data centers, high availability networks and state-of-the-art network security are critical for success. Yet these types of basic network requirements generally require more capital investment than many of the smaller vendors in the industry can afford.

Workflow optimization takes many forms and requires a deep understanding of the review process. The optimization must take place on multiple levels including:

- The database structure;
- The document coding scheme; and
- The reviewer software interface.

Only vendors with deep litigation support experience and scalable, flexible platforms can

provide the customization necessary to optimize the review workflow on a case-by-case basis.

### **THE FUTURE OF MEGA-CASE SOLUTIONS**

Document collections will only increase in size in the future. Instant messaging and voice mail (particularly voice over IP solutions) are likely to add significantly to the average document collection size as these become targets for discovery requests. It is unclear whether the Sarbanes-Oxley Act applies to instant messaging. However, the New York Stock Exchange explicitly requests that its members archive their instant messaging conversations. Notably, some analysts are predicting that instant messaging will overtake e-mail as the top electronic communication method for business within a few years (*Digital Discovery & e-Evidence*, Vol. 3, No. 9, September 2003, p. 2). Likewise, with voice over IP, phone calls consist of Internet protocol data packets so phone messages simply become another form of electronic file, easily converted to reviewable formats.

As cases grow in size and scope, only the largest Web-based solutions providers will be able to deliver the scalability and reliability required for success. Smaller vendors will simply not have the resources required to deliver a robust solution. As a result, stratification in the market may occur with a few large vendors able to handle the most complex cases and a second tier of vendors who can only handle small and mid-size cases.

## MULTI-CASE SOLUTIONS

Many corporations and their law firms face a common challenge. Through opt-outs of class action lawsuits or because of repetitive, related cases such as insurance personal injury matters, companies frequently need to produce the same or a very similar document set for multiple cases. Today, it's common practice for these related cases to be handled completely independently for each separate jurisdiction or case, leading to unnecessary expenses, inconsistencies and errors. Often, law firms and their clients do not have the ability to create a production history for any set of documents, much less have a way to achieve efficiencies across related cases. In some situations, the solution can be as simple as creating one master document set and producing copies of that set as required for production. However, document sets are rarely identical, so more commonly the document sets vary from case to case.

Producing documents across multiple cases has many potential pitfalls without the right process or tools. It can be easy, for example, to erroneously code documents differently from case to case (*eg*, responsive vs. privileged) and thus produce a document in one case but not in a future, related case. Likewise, a document may simply be overlooked in a future case and thus not produced. The result can be costly sanctions.

Corporations that face repetitive, related litigation require a company-wide solution that spans all their cases, not just one or two. In

addition to enabling an effective document review, such a system needs to provide the tools to search across all cases and report inconsistencies in document coding. Furthermore, such a system must be able to search across all cases and create a production history report for each document in the repository.

An effective litigation management solution can provide significant, long-term cost savings. The document review for a prior case can form the basis for the review in a new, related case. Creating a copy of the document set and codings in a prior case can save the time and money involved in once again collecting the documents, having attorneys review the documents again, and verifying that the production in the current instance does not conflict with the productions in prior cases. Production histories for all the documents can be updated to reflect the work done in the new case.

## CONCLUSIONS

The digital age has spawned a variety of challenges as a result of the rapid growth of electronic documents. This rapid growth in the size of document collections has resulted in mega-cases, or cases that require the review of 500,000 or more document pages. Web-based review systems have emerged as the only effective solution for the review of very large document collections or for the coordination of dispersed or

large review teams. The most advanced online review systems are massively scalable, fully redundant and incorporate workflow optimization techniques to make the review process go as smoothly and quickly as possible.

The growth of repetitive and related litigation has resulted in new challenges for corporations, also. The need for care in producing documents across cases and the ability to track the production history of documents requires an enterprise-wide solution for managing litigation-related documents. In addition, the ability to leverage the document sets and reviews from a previous case using an effective company-wide litigation management solution can result in significant cost savings.

As the size and complexity of document collections have grown, a limited number of vendors have been able to develop the scale necessary to address these challenges. When evaluating solutions, key areas of concern should include the field proven scalability, network reliability, workflow optimization, and production tools of the available solutions. As important as the review tool, though, is the vendor. Important vendor considerations include their network infrastructure, financial stability, track record and reputation.



# CaseCentral

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CaseCentral, Inc.  
760 Market St.  
Suite 200  
San Francisco, CA 94102  
(800) 714-2727