

Report and Recommendations

Joint Administrative Office/Department of Justice
Working Group on Electronic Technology in the
Criminal Justice System

2003

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I. Background and Charter of the Working Group

As a by-product of the *Report on Costs and Recommendations for the Control of Costs of the Defender Services Program*, transmitted to Congress in January 1998, the Director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States created the Administrative Office of the United States Courts/Department of Justice Joint Working Group on Electronic Technology in the Criminal Justice System (“the Working Group”). The Working Group was charged with examining the use of electronic technology in the federal criminal justice system and its effect on the cost of evidence collection, analysis, and presentation. The formation of this unique “tripartisan” Working Group¹ – with representatives of the AOUSC, the Department of Justice (DOJ), and both the public and private criminal defense bar – offered a means to explore ways in which technology might be used to promote the fair handling of electronic data² in a cost-effective manner. The Working Group, which held its first meeting in June 1999, has analyzed how cooperation and coordination among participants may improve the criminal justice system while controlling costs and increasing efficiency in the context of an adversarial system and within the constraints of doctrines such as attorney work product and other privileges or ethical limitations.

II. Mission Statement

The Working Group began by developing a mission statement.

Mission:

To advance the fair administration of justice in the exchange and use of electronic data in a cooperative and cost-effective manner for all parties when required by the rules, when consistent with local custom and practice (compatible with privilege), or mandated by court order.

¹ The Working Group is made up of Administrative Office staff, Federal Defender Organization attorneys, a private criminal defense attorney representative, and Department of Justice (DOJ) representatives, including a federal prosecutor. Staff from the Federal Judicial Center and one member of the Committee on Defender Services of the United States Judicial Conference also were regular participants in Working Group meetings. Current membership of the Working Group is listed in Appendix 1.

² “Electronic data,” as used here, means information that was (a) received by a party in some other form and converted to computer-readable format, (b) originally received by a party in computer-readable format, or (c) created by a party in computer-readable format. It is intended to be an inclusive term.

III. Issues Identified

The Working Group sought input from federal judges, Criminal Chiefs of United States Attorney's Offices, Federal Defenders, and Criminal Justice Act panel attorneys through questionnaires and interviews. Though not constituting a scientific survey, these sources provided useful insight into the leading issues arising from the use of electronic data in criminal litigation. (The results of these efforts are described more fully in Appendix 2.) In addition, the Working Group consulted with a number of different organizations working in the area of electronic data and litigation, including the Courtroom 21 Project at the College of William and Mary's School of Law and the Federal Judicial Center.³ Based on the input of these groups and the Working Group's discussions, the following issues were identified:

A. *Electronic Data Is Pervasive*

Computers have become so commonplace that many cases now involve discovery of some computer-stored information. In fact, in a growing number of cases, relevant data exists only in electronic form. From the largest investigative and prosecutorial offices to the smallest criminal defense firms and solo practitioners, computers are used to cut costs, improve efficiency, enhance communication, store data, and improve capabilities in every aspect of practice. Indeed, the Government Paperwork Elimination Act⁴ requires that as much government business as possible be conducted by computer by October 21, 2003. Current initiatives to implement electronic case filing provide evidence of the federal judiciary's commitment to using computer-based technologies to improve the judicial process. Given the proliferation of computers, the use and involvement of computers and electronic data will only increase. Kenneth J. Withers, a Research Associate at the Federal Judicial Center who participated in a number of the Working Group's meetings, has noted that:

- According to a University of California study, 93% of all information generated during 1999 was generated in digital form, on computers. Only 7% of information originated in other media, such as paper.
- Nearly all conventional documents are word-processed.
- Nearly all business activities are now computerized.
- E-mail traffic has surpassed telephone and postal communications.
- Just as legitimate activities are conducted on computers, so are illegitimate activities. Securities fraud, drug dealing, pornography distribution, illicit firearms sales – a whole panoply of bad acts – are conducted using computers and computer-mediated communications.

³ Early in 2001, at the request of the Federal Judicial Center, members of the Working Group reviewed a draft of *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, a joint publication of the Center and the National Institute of Trial Advocacy. The handbook was published later in the year and distributed to all federal judges and clerks, as well as to federal defender offices. This seminal publication is a valuable reference for those concerned with matters addressed in this report.

⁴ Pub. L. No. 105-277 ss. 1701-1710, 1998, codified as 44 USCA § 2504 n, West Supp. 1999.

See, Kenneth J. Withers, *Electronic Discovery: The Challenges and Opportunities of Electronic Evidence*, Presentation to Federal Judicial Center, National Workshop for Magistrate Judges, July 23-25, 2001, <<http://www.kenwithers.com/articles/sandiego/>>, at slide02.html-slide03.html.

B. Emerging Issues

While federal criminal justice participants report that the use of evidence in an electronic form is not yet pervasive in federal criminal litigation, they identified a number of significant issues that have arisen when such evidence has been employed.

Lack of Resources

Prosecutors, defense counsel, and judges all cited a lack of adequate resources to address electronic data issues, including insufficient funds to purchase appropriate hardware and software and a lack of adequately trained systems support personnel. Insufficient resources were also reported to have produced disparities among parties where, for example, either co-defendants or the prosecution and defense have differing levels of technical resources.

Lack of Training

Everyone involved in the investigation, preparation and litigation of criminal cases increasingly encounters new technologies in the midst of their ongoing work. All parties identified a need for training to make the most efficient use of available electronic technology.

Jurisprudential Issues

While other groups⁵ are considering a variety of jurisprudential issues raised by electronic data, the Working Group focused on what electronic information is discoverable and who bears the cost for the discovery. These discovery questions, which also affect courtroom presentation, appear to be arising with increasing frequency under circumstances where one party to the litigation has used electronic tools to convert, organize, or index large quantities of documents. For example, substantive legal issues may be implicated when electronic evidence, by its very organization, may reveal trial strategies or attorney work product.

Cost Factors

National policy makers with budgetary responsibilities representing each of the constituent groups should address issues of cost-sharing and the potential budgetary impact of the necessary use of electronic technology in criminal litigation. Costs may be larger than initially presumed. The budgetary impact should include not only the cost of producing information in an electronic form, but also of interpreting, organizing, and disclosing

⁵ Many groups are actively pursuing justice system electronic data issues. A partial list of those entities is included at Appendix 3.

electronic information, using electronic technology to make courtroom presentations, and providing training on all of these matters.

IV. Recommendations

Criminal cases arise from the business of everyday life. With growing frequency, that business is conducted digitally. As a result, participants in the criminal justice system increasingly use data either conveyed to them in, or converted to, an electronic format. As law enforcement agencies, prosecutors, defense lawyers, and courts invest in new technology to process this information, additional costs will be incurred. The ability of all participants in the criminal justice system to address the issues presented by these new technologies will greatly impact that system's fairness and efficiency.

A. General

1. The AOUSC, Department of Justice, and Federal Defenders should maintain a working group to monitor, discuss and make recommendations regarding electronic information issues. The Working Group concluded that promoting awareness of new technology capabilities and the issues they generate will help criminal justice participants make more effective and efficient use of these tools⁶.

2. Investigative agencies must be brought into the planning process. Their efforts often drive the acquisition and use of electronic information. Moreover, in order to resolve discovery policy issues, care must be taken to accommodate potential legitimate agency concerns about the security of agency investigative techniques.

3. The judiciary should urge formation of local working groups in federal judicial districts that include federal prosecutors, defense lawyers, and judges to consider how best to address emerging uses of electronic data and technology that may impact criminal prosecutions in their district.

4. The impact on juries of electronic technology, including how electronic information can best be provided to jurors during deliberations, should be studied.

5. The need, feasibility and usefulness of trial-specific document repositories on secure Web sites to facilitate access to digital discovery should be examined.

6. The National Institute of Trial Advocacy should be asked to assist the bench and bar with training by providing curricula for CLE training regarding electronic technology in criminal litigation.

⁶ In this regard, the Working Group identified several goals that merit continued attention:
(1) identify data that must be used for differing purposes (investigation, case preparation, disclosure obligations, courtroom presentation and deliberations, archives);
(2) catalogue policies that promote the exchange of data in usable formats and for various uses by diverse actors (investigative agents, court, defense counsel, prosecutor, and jury); and
(3) recognize judicial practices that promote the effective exchange of data in usable formats, and recommend appropriate application of, and if needed, changes to, rules of procedure and evidence.

Efforts to accomplish these goals should be ongoing as participants in the process gain more experience in these areas.

7. Private “panel” attorneys providing CJA representation typically do not have the automation and litigation support resources or training available to them that are available to attorneys in U.S. Attorney and Federal Defender offices.⁷ Entities responsible for providing training and support services to panel attorneys should address this disparity.

8. Each district court (or each division in larger districts) should consider promoting and providing training on trial presentation equipment and methods not only to court personnel, but to the attorneys in the criminal justice system.

9. The national policy makers from each of the constituent groups should investigate and promote methods for providing training in electronic technology to users for all stages of the criminal justice process.

10. Consideration should be given to providing joint training for prosecutors and defense counsel at a local or regional level that addresses local issues, procedures, and practices governing the exchange, use, and presentation of electronic data in local courts and circuits.

11. Blanket rules that require digitization or electronic presentation in all cases should be avoided. Many smaller cases simply do not require this effort. Likewise, requiring a party in document-intensive cases to digitize extraneous material can be a waste of human and monetary resources.

12. Efforts should focus upon identifying required software and hardware capabilities rather than specifying use of particular software (or hardware). In an environment of accelerating change, standardization would blunt innovation and creativity on the part of designers, investigators and trial lawyers. However, the Working Group strongly believes that digitizing information in a format readable by all parties, and with commercial, non-proprietary software, is preferred for ease of discovery and use at trial.

B. Discovery Stage

1. As early in the process as possible, parties should evaluate whether digitization is appropriate, considering the costs and benefits for case presentation, enhanced comprehension by the fact-finder, and individual advocacy and trial strategy.⁸ In this regard, government investigative agencies, United States Attorney’s Offices, and defense attorneys should consider the desirability of: (a) generating information in electronic form; (b) using software which is commercially available; and (c) collecting, collating, and indexing information in a manner that would, if

⁷ A revised Criminal Justice Act (CJA) guideline (paragraph 3.16 of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures*), approved by the Judicial Conference of the United States in March 2001, recognizes that providing an adequate defense case may require CJA panel attorneys to utilize computer hardware or software not typically available in a law office. In such cases, following procedures outlined in paragraph 3.16, counsel may apply to the court for authorization of CJA funds for the acquisition of such property, as well as for the utilization of computer systems or automation litigation support personnel or experts.

⁸ Law enforcement-investigative agencies also are part of this process and will be making decisions during the investigative stage that should involve an evaluation of whether digitization is appropriate in light of how the information they are gathering or generating will later be used by the prosecution and defense during discovery and as part of courtroom presentations. An example would be the use of digital technologies to record voice communications. See Recommendation A.2 above.

desirable or necessary, facilitate the removal of attorney work product or other privileged information from the electronic data.

2. Absent significant justification, during the discovery process there should be no degradation of electronic data from the state in which that information is originally received by a party. For example, to the extent that a party gets discoverable information from a third party in electronic form, the party should produce the information in that same form when requested to do so.

3. To the extent a party converts discoverable information into an electronic form, or manipulates or organizes discoverable information that is in an electronic form, two important interests may become implicated: (a) a “sweat equity” interest and (b) a “value added” interest.

a. “Sweat Equity”

(i) A “sweat equity” interest exists when the work performed by the party does not implicate the work product or other privilege. Where the opposing party would have to perform the same or similar work to make use of the discoverable information, a cost savings may be achieved if the work product is shared with opposing party. On the other hand, simply making the work product available to the opposing party may not be fair, since both valuable trial preparation time and significant fiscal resources may have been expended in creating the work product.

(ii) For example, the government may have spent time and money converting discoverable paper documents into an electronic format and creating a basic index of the documents by entering them into an electronic data base. In this circumstance, requiring a defendant to independently convert the same paper documents into an electronic format and then enter those documents into a comparable electronic data base might not only be wasteful and inefficient, but also could lead to difficulties at a trial or hearing if the parties have used different electronic formats for the documents they seek to exchange or present to a judge or jury electronically.

(iii) Recommendations

(A) Absent significant justification, a party that converts discoverable information into an electronic form, or manipulates or organizes discoverable information that is in an electronic form, should make such products available to an opposing party, assuming that the work product or other privilege is not applicable to those products, and subject to any cost-sharing arrangements to which the parties may agree or the court may direct. In the example used above, the database and necessary software⁹ should be produced to the opposing party in discovery, subject to cost sharing arrangements.

(B) It may be difficult to allocate costs equitably, particularly when multiple parties with adverse interests are involved. In order to address both the trial preparation time required to perform the work and to help ensure that feasible

⁹ The use of commercially available software is encouraged. Such software is usually copyrighted, and the parties would have to insure that their use of the software is pursuant to an appropriate license. A party using software that is not commercially available should make that software available to an opposing party if it is legal and practical to do so.

cost-sharing arrangements are made, the parties should meet to discuss electronic information discovery issues as early in the case as possible.

b. “Value Added”

(i) A “value added” interest exists when the work performed by a party implicates the work product or other privilege.

(ii) In the example used above, the government converted discoverable paper documents into an electronic format and created a basic index of the documents by entering them into an electronic data base. Decisions made by the government in selecting documents for conversion, structuring the database, and choosing index topics, may reveal mental impressions, conclusions, or opinions about the documents such that disclosure of the documents selected for electronic conversion, the index, or both may implicate the work product or other privilege.

(iii) Recommendations

(A) Absent significant justification, a party that converts discoverable information into an electronic form, or manipulates or organizes discoverable information that is in an electronic form, should make every effort to do so in manner that makes it possible to make such products available to an opposing party – perhaps in a redacted or other form – without implicating the work product or other privilege.

(B) In the example used above, the parties might have met and reached an early agreement regarding (i) which documents would be converted to an electronic format, (ii) the elements of a basic database indexing those converted documents, and (iii) a cost-sharing arrangement for completing this work. Such an agreement could produce overall cost-savings without inhibiting the ability of any party to convert additional documents of its own choosing, or to further index or manipulate the data base once it was created. Alternatively, the government might have been able to produce a redacted database or take some other measures that would have avoided the need to have defense counsel simply receive the documents in paper form.

C. Pre-Trial Stage

1. Effective procedures must be developed for dealing with technological issues in the trial process. All counsel should conduct a “meet and confer” session after arraignment followed by prompt notice to the Court of the possibility of electronic presentation and related issues.

2. At “meet and confer” sessions the parties should discuss: format of evidence, discovery, cost, sharing software, electronic presentation, hardware, equipment operator(s), trial court sight lines, and use of electronic information in openings, closings and witness examinations.

3. The Court should be given notice as soon as possible of the proposed use of electronic evidence, the suggested manner of presentation, relevant agreements reached by the parties, and any unresolved issues.

4. Courts should conduct timely pretrial conferences to discuss and resolve issues involving electronic discovery and presentation.

5. The parties may wish to consider having their respective automation specialist(s), if any, available to assist the Court and answer any questions.

D. Trial Stage

1. Courtrooms should be appropriately equipped to allow parties and the court to have access to digital resources and to utilize them in presentation. The Judicial Conference has endorsed the use of technologies in the courtroom and, subject to the availability of funds and priorities set by its Committee on Automation and Technology, urged that (a) courtroom technologies—including video evidence presentation systems, videoconferencing systems, and electronic methods of taking the record—be considered as necessary and integral parts of courtrooms undergoing construction or major renovation; and (b) the same courtroom technologies be retrofitted into existing courtrooms or those undergoing tenant alternations as appropriate. In support of this initiative, the *Courtroom Technology Manual* (1999) provides technical standards for both the infrastructures and the systems.

2. Courts should offer general demonstrations and training on the use of the technology that is available in the courtroom as well as pre-trial access to the courtroom and its technology for practice and training. (Courts with courtroom technology installed often have training programs in place and allow for such access. The Federal Judicial Center presentation, “Developing Courtroom Technology Training Programs,” recorded July 12, 2001, explains how to develop training programs that enable court staff and attorneys to use technology in the courtroom for the presentation of evidence.)

3. Courtrooms also should be fitted to accommodate additional hardware supplied by the parties. If either party elects to use additional hardware with capabilities different from that already provided in the courtroom, that additional hardware should be made available upon request for use by the opposing party when doing so would not unfairly disadvantage the producing party. The producing party also should provide basic training on that hardware upon request, assuming that such training does not require any significant expenditure of time or money. The parties—and the court if necessary—should address these issues, including equitable allocation of costs, as early in the case as possible. Many of these issues are discussed in *Effective Use of Courtroom Technology: A Judge’s Guide to Pretrial and Trial* (Federal Judicial Center and National Institute for Trial Advocacy, 2001), which describes the substantive and procedural considerations that may arise when lawyers bring electronic equipment to the courtroom or use court-provided equipment for displaying or playing evidentiary exhibits or illustrative aids during trial.

3. Appropriate means must be taken to identify and preserve electronic evidence and presentations for the appellate record in an appropriate form.

V. Conclusion

Courts, the government, and the criminal defense bar must respond to the continued development of “newer, better, and faster” data collection, electronic information, courtroom presentation and other computer systems. Whatever impacts business and the human experience will, in all likelihood be adapted for the courtroom. Each component of the criminal justice system must prepare

to deal with these innovations. The Working Group concluded that promoting awareness of new technology capabilities, and identifying the issues that arise with their use, will advance the fair administration of justice by promoting more effective and efficient use of these tools. It is the hope of this Working Group that there will be continued communication among all participants in the criminal justice process, consistent with the recommendations it has offered.

Appendix 1

ADMINISTRATIVE OFFICE/DEPARTMENT OF JUSTICE JOINT WORKING GROUP ON ELECTRONIC TECHNOLOGY IN THE CRIMINAL JUSTICE SYSTEM

Roster

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Appendix 2

SUMMARIES OF INTERVIEWS AND QUESTIONNAIRES

In the spring and summer of 2000, members of the Working Group gathered information from a number of federal judges, federal defenders, Criminal Chiefs of United States Attorney's Offices, and Criminal Justice Act panel attorneys. Telephone interviews were conducted with the judges; questionnaires were used with the other groups. These interviews and questionnaires were not constructed or intended to be the basis for statistical inferences (respondents were not randomly selected) but rather to get useful input from the "front line" players in the federal criminal justice system. Brief summaries of the results follow.

JUDGES

In Spring of 2000, telephone interviews were conducted with ten United States district and magistrate judges. Most of the judges have courtrooms that are equipped to permit electronic presentation of evidence either on court-provided equipment or on portable equipment provided by counsel. The judges reported that currently a small percentage of their criminal cases involved electronic or digitized evidence. Of that portion, child pornography, commercial tax evasion and RICO were the most common cases that involved electronic or digitized evidence.

The judges recognized that some unique concerns related to search and seizure may arise. For example, in the case of a legitimate business accused of illegal activity, questions may arise regarding whether all of its computer equipment should be seized as opposed to the hard drives being downloaded. Otherwise, they did not feel that electronic or digitized evidence created any issues that cannot be addressed based upon current law and practices. The judges also disfavored implementing local or procedural rules regarding discovery of electronic evidence or presentation during trial.

Two prevalent concerns among the judges regarding electronic presentation of evidence were that evidence be presented in a manner and format that is useful to the jurors, and that there be equity of resources between prosecution and defense counsel. Most judges found that pretrial conferences early in the proceedings are a good way to address electronic evidence and presentation issues. Others rely on counsel to advise them if there are any problems. A consistent benefit of electronic presentation noted by the judges is that it reduces trial time and forces counsel to be very organized and efficient in their case presentation.

CRIMINAL CHIEFS, U.S. ATTORNEY'S OFFICES

Also in the Spring of 2000, the Executive Office for United States Attorneys sent a questionnaire to the Criminal Chiefs in all 94 districts. The questionnaire, which was not mandatory, did not purport to be a scientific survey. Rather, its aim was to elicit issues that might be recurring in the area of electronic discovery in criminal cases. Approximately 30 criminal chiefs responded to the questionnaire and of those that responded, not all responded to every

question. Nonetheless, the responses provided some insight into current issues and trends in this area.

In general, districts reported that they do receive electronic information in their criminal cases. A significant portion reported that the figure has increased in the past five years and they expect further increases. Overwhelmingly, the electronic information appears most often in white collar and child pornography cases, with some electronic information appearing in narcotics and violent crime cases. Federal defenders and CJA attorneys appear as defense counsel in a significant percentage of cases where electronic information is received.

In addition to receipt of electronic information from law enforcement such as pen registers/trap and traces, Title III wiretaps, documents and Internet related files (e.g., chat logs; e-mails), the information often includes spreadsheets, databases, digital photos, graphics, statistical analyses, and flow charts. The responses demonstrated that increasingly information from sources other than law enforcement comes in electronic format. For example, a significant number of respondents indicated that they receive electronic information from telephone companies, financial institutions, victims, insurers, Western Union, and Internet service providers.

For the most part, attorneys responding considered the use and organization of electronic information beneficial and cost/effective but noted that such use requires different staffing patterns, specifically, more computer-literate staff. Easier search and retrieval capability was the most frequent reported basis for converting information to electronic format or entering the information into a particular database.

Some respondents indicated that they had not turned over digital discovery for reasons related to work product or other legal bases for refusing discovery. Some respondents noted that sometimes discovery is provided only in hard copy form for practical reasons like lack of resources or lack of the training and familiarity necessary to digitize hard copy documents.

It appeared from the responses that in several jurisdictions, facilities are provided in the United States Attorney's Office for the defense to review information where the defense needs assistance. A frequently expressed concern was that of requiring the Government to turn over work product or the "value added" to digital information where the very choices made in organizing the information might reveal work product or case strategy.

From a cost standpoint, several responding districts offered different solutions and most indicated a belief that costs of electronic discovery should be equitably shared. In most circumstances, it appeared that hardware is owned primarily by the court or the government. When the equipment is owned by the government, it is sometimes shared with the defense but more often not shared. When the court owns the equipment, all sides obtained equal access.

Overwhelmingly, those responding indicated that the lack of electronic courtrooms, trained automated litigation support staff and training for all personnel, attorney and support, contributed to reduced use of electronic courtroom presentation.

CJA PANEL ATTORNEYS

In a survey of a small number of CJA panel attorneys in the Spring of 2000, respondents indicated that they generally have not had much experience with courtroom presentations using electronic technology. They did not report much receipt of electronic evidence, but they predicted an increase over the next five years. They indicated that whether they receive such evidence depends in part on the kind of case (more often in white collar and child pornography cases than in narcotics cases) and the particular prosecutor. One respondent predicted that as defense attorneys' access to technology increases, the government will be more inclined to provide information in electronic form. They did not report extensive problems with receiving such evidence, i.e., when it is provided, it is usually in readable format; there were a couple reports, however, of not having the necessary software to read the data. Panel attorneys said they are not currently providing electronic evidence in reciprocal discovery; one commented that he/she lacked the resources to do so.

During the investigative and trial preparation stages, little use of technology was reported with the exception of website use, scanning of documents, and the creation of searchable indexes. Respondents saw some savings in time, e.g., in the time spent reproducing documents. One observed that in a multi-defendant case, discovery was centralized so each attorney did not have to do an initial review of all the material. Respondents indicated they are sharing electronic information and/or databases with counsel for codefendants, sometimes pursuant to a joint defense agreement.

All respondents said their offices were computerized and all had desktop computers; some indicated use of networks and/or laptops. They reported that the computers are used for word processing and billing, with some use of scanners, case management software, and data organization software, but little use of case presentation software. There is little or no sharing of hardware or software between defense attorneys and the prosecutors. Respondents reported a great variance in the equipment available in the courtroom. There was strong support for the provision of training, but also for making equipment available to panel attorneys. One active CJA practitioner, who is technologically savvy himself, emphasizes that the top priority should be on providing equipment; attorneys will learn how to use it if it is available.

FEDERAL DEFENDERS

A survey responded to by approximately 20 percent of federal defenders showed a lack of uniformity among districts, although most indicated a need for increased training and awareness. In general, defenders reported that they received electronic information in a small percentage of cases; that percentage has increased in the last five years and they predicted it will continue to increase. One defender reported asking for wiretap intercepts in computer format instead of tape and receiving the response was that the government did not have the capability of producing it. Another commented that in cases involving converted data, it would be desirable to have an agreement between the AO and DOJ as to which database and presentation software will be used by the courts and the government. In one case, the defender office did not have the software needed to view and manipulate the data in the format it was being used by the government; the

commercial software used by the government cost about \$2,000. Reciprocal discovery in electronic format is not being provided at this time. There is some sharing of electronic data with counsel for codefendants, sometimes pursuant to a joint defense agreement. Acting as coordinating counsel in a 52-defendant RICO/gang case, one defender office was the driving force behind the conversion of thousands of pages of discovery materials into an electronic format, which was available to all attorneys in the case for pretrial preparation and use in the courtroom during trial.

One senior litigator commented that he or she had not used electronic information in enough cases and circumstances to hazard an opinion on whether it is cost effective, adding that the issue is complicated and heavily dependent on a myriad of factors. For instance, scanning and OCR (turning information on paper into both pictures for looking at and digital text for searching and manipulating) is labor-intensive, but once done the data is available to other parties and the court at very little incremental cost. For very large numbers of documents, the storage costs of electronic data are negligible compared to space rental and management fees. The litigator predicted that there will be more and more use of electronic information over time, making the cost of not using it unacceptable.

Defenders reported wide variations in the amount and type of equipment provided by the court. One computer systems analyst noted that many courtrooms don't have the requisite cabling, equipment, or electrical outlets to accommodate the use of electronic presentations at trial and that very few courtrooms have been designed with space for monitors, projectors, screens, and computers.

Appendix 3

OTHER WORKING GROUPS

1. Department of Justice/Electronic Litigation Files Program Office (ELF). This program was recently created within the Department of Justice to address issues and arrive at solutions for attorneys, systems and support staff who increasingly confront issues related to electronic case filing and electronic litigation files.

2. Federal Public Key Infrastructure Steering Committee (FPKI). The FPKI Steering Committee is tasked with providing Government-wide guidance and coordination of Federal activities necessary to implement a public key infrastructure. The FPKI Steering Committee coordinates, monitors, implements, and reports on the development of a public key infrastructure to support secure electronic commerce and electronic messaging as well as other Federal agency programs requiring the use public key cryptography.

3. Electronic Commerce Working Group (ECWG). The ECWG is a group of Department of Justice attorneys that regularly exchange information and address issues related to litigation and technology issues.

4. Case Management/Electronic Case Files Project. CM/ECF is the new electronic case management and electronic case files system for the federal courts. It provides federal courts enhanced and updated docket management and allows courts to maintain case documents in electronic form. It provides each court with the option of permitting case documents -- pleadings, motions, petitions -- to be filed with the court over the Internet. CM/ECF implementation in the bankruptcy courts has already started. District court implementation will start in 2002 and appellate court implementation in 2003. See: <http://www.uscourts.gov/cmecf/cmecf.html>

5. Judicial Conference Committee on Court Administration and Case Management, Subcommittee on Privacy and Public Access to Electronic Case Files. The subcommittee was formed in summer 1999 and made recommendations to the Judicial Conference in summer 2001. In September 2001, the Judicial Conference approved new policies on public access to electronic court records. See: http://www.uscourts.gov/Press_Releases/jc901a.pdf

6. Federal Rules of Procedure. New provisions of the Federal Rules of Procedure, which took effect December 1, 2001, expressly authorize the electronic exchange among parties of documents such as pleadings, motions and briefs when parties have consented in writing. The rules also permit courts to serve court orders electronically if parties consent. See: http://www.uscourts.gov/Press_Releases/elec.pdf