

LITIGATION MANAGEMENT

ALM

Digital sorting systems prove useful

'WatchDogs' examine and catalog a network's electronic documents.

By Karen Unger

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HE IS A SENIOR vice president in charge of regulatory affairs, paid a very impressive salary and has a very notable stock package. His wide-ranging duties are extremely important to his company. In addition to his primary duties, during the past two years he has added highly specialized tasks required by his chief executive officer. On his computer monitor is a small square of paper, listing specific topics.

For any e-mail or document connected with any of these topics, he initiates a specialized task. He drags the e-mail or document into a specialized folder on his hard drive named for each category of topic. Once a day, he reviews those documents and sends them to the records retention manager. His special assignment is to become a "topic categorization expert."

He spent years getting an MBA degree and climbing to the top of his trade to become—a file clerk.

The new regulatory and litigation climate arrives together with a rapidly changing definition of "what is a document." This presents a unique set of challenges and opportunities for today's corporations and their attorneys. These challenges can be minimized by state-of-the-art document-management technologies. This is especially critical in companies that anticipate litigation in the natural course of business.

Requirements introduced by the

Karen Unger is founder and chief executive officer of American Document Management, based in Fort Lauderdale, Fla.

Sarbanes-Oxley and the Health Insurance Portability and Accountability acts and by the Securities and Exchange Commission, the National Association of Securities Dealers and other regulatory agencies deal with corporate documents in ways never before encountered. At the same time, the definition of "document" has changed radically in scope.

A "document" today is no longer a sheet of paper with a logo at the top and a signature at the bottom. The modern document is also an e-mail, all its attachments, and any document created on computers. Instant messages are considered correspondence. Voice mail is stored on hard drives and is considered part of corporate record-keeping. Video clips from television press conferences have been used in court. Of all the records available, up to 90% are now electronic and approximately 30% of all corporate information is not available on paper, but only electronically.

Electronic documents are easily copied, printed, shared, changed and forwarded to multiple individuals. According to the Radicati Group Inc., the average user sends 34 e-mails each day, and receives 99 e-mails. See Radicati Group Inc., "Email Archiving Corporate Survey, 2004-2005" (October 2004), at www.radicati.com/reports/single.shtml. In 2003, there were approximately 105 million e-mail users. That adds up to at least 13.9 billion e-mails annually.

A company with 100 employees who send or receive only 25 e-mails each day will have 625,000 e-mails in the course of

one year. Backup systems create a copy of what is backed up. If the e-mail system is only backed up on a monthly basis, this results in 7.5 million documents. Most e-mail systems are backed up weekly or daily.

So it is imperative to know what documents have passed through an organization. It is also important to categorize these documents according to relevance and importance. For example, last year's statistical analysis of marketing policies is more important than the company's soccer team schedule. Thus, the marketing document should be retained when the soccer schedule should probably be discarded.

A frightening situation has developed in American business. Most organizations feel that e-documents (both e-mail and electronically generated documents) are important documents, and have the chance of affecting future litigation. However, in a recent study by Cohasset Associates, 47% did not include electronic records in their records-retention policies and procedures. Almost 60% did not have a formal e-mail retention policy. Worse yet, when litigation is anticipated, the litigation hold notice did not include e-mail or electronic documents in 65% of organizations surveyed. See online presentation by Laura M. Kibbe, Pfizer Inc., entitled "Making Friends and Influencing People Through Effective Records Management," Feb. 16, 2005, available at www.fiosinc.com/events/webcast_archive.html. Since some documents are only available electronically, this is a disaster waiting to happen.

Many organizations rely on human intervention to determine which

e-documents should be retained. Individuals get busy with other tasks. They may put them in the wrong place, in only one category or forget to save them altogether. This policy is, at best, risky. It also has the potential of being considered negligent during litigation.

Planning and technology

What is the answer? Organizational planning and policy development combined with electronic—not human—guardianship.

First of all, every organization should have a formal records retention plan. Even small companies need to know the basics. Larger companies and firms should have a clear understanding of what documents should be kept and for how long. The retention plan should take into consideration the specific organization's business needs, industry requirements and departmental specifics. Retention plans should be evaluated and updated at least once a year.

Retention plans should always outline the period that key documents should be kept—and when they may be destroyed. Document destruction should always take place within the scope of the retention program. Different document categories have different retention periods. Personnel documents are retained for a different period of time than tax documents. Medical records are required to be kept much longer than marketing documents.

Records retention plans should clearly outline the process to be followed when litigation is expected. At that point, all document destruction must cease.

Even with a clear records retention plan, however, the tasks of categorization, destruction and halting destruction can be daunting. With a paper repository, sorting through documents can be a full-time job. Now that 70% of all documents are electronic, not paper, this means all e-documents must be reviewed also. The document population (both paper and electronic) is growing exponentially each year.

The real key to managing the ever-increasing deluge of documents remains in the tools utilized to do this task. The best tools are those that helped create the documents in the first place—computers.

Electronic review

Using computers to evaluate documents is much more accurate and timely than human review. Internet search engines prove this. They allow users to find information from millions of locations in milliseconds.

Basically, applying the same technology in reverse is used to assist in archiving corporate documents automatically. Instead of using the system to find documents, the technology is used to classify and cross-reference them. It is also used to tag documents for destruction according to the retention schedule.

For purposes of this discussion, the term "WatchDog" is used to describe a system that examines all electronic documents on a network and catalogs them according to business retention rules.

In essence, a WatchDog server sits quietly behind the scenes on an organization's network. This server is a combination of hardware and software. It examines all electronic traffic on a network for key words, phrases and combinations. Based on business rules defined by the formal retention plan, each e-mail, document and attachment is categorized.

Every e-mail and every sent or received document is examined by the WatchDog system for applicable content. If the content reflects key words, is sent by or to key individuals or has something to do with specific topics, it is flagged for inclusion in the archive. If no terms are present that match the archive rules, the document is left unflagged, or is flagged as a nonrelevant document. In some cases, the WatchDog system may be unclear about relevancy. In

that case, the document in question will be flagged for human review as questionable.

The key to this system is indexing the documents. Depending on the system chosen, this is done by one of two methods. The first method creates a word list of every single occurrence of every single word in the collection. In this article, the word "WatchDog" appears 16 times. It would appear 16 times in the word list.

The second method employs pointers to find each occurrence of the word, but only stores each unique word one time. The word "WatchDog" would only appear one time in a word list, but would point to the 16 occurrences. It doesn't really matter which methodology to find a word is used, as long as it is fast, efficient and delivers the information correctly.

In theory, the WatchDog is a very simple system. It employs the reverse of a Google search. In reality, it can be much more challenging.

As with any technological development, a WatchDog system has many issues that must be addressed during implementation.

■ *Document volume.* The sheer volume of documents received and sent each day is huge. Decision-making must be done quickly, on the fly. This requires very powerful machines and extremely intelligent software.

■ *Customization.* There are a number of systems available that do all or part of the WatchDog process.

Most of these have been developed as retrieval, rather than cross-referencing, systems and will require some adaptation. All require either new expertise within the technology staff or partnerships with service providers.

■ *Business rules.* What is important to this organization? What is important today v. yesterday or tomorrow? What is important from a regulatory v. a business standpoint? What affects the industry? Are there any geographic issues that must be tracked? What about political issues

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that impact the organization?

Each organization has its own set of circumstances that turn into business retention policies. These business rules are derived from the retention plan, but must be adapted to the specific monitoring system. Both the retention plan and the WatchDog business rules must include contingency rules for litigation. These rules may be either proactive, reactive or a combination of both.

These rules include lists of employees, identification of key people and key terms (product names, client names, vendor names, issues, industry terms, human resources terms, marketing terms). Because of the volume of relevant issues, it is sometimes easier to discard the “not” relevant documents than find and keep the pertinent ones.

■ *Indexing schedule.* Documents must be indexed in order to be found. This occurs on a regular, sometimes daily or more frequent basis. When documents are moved or deleted, an archive version must be preserved and made part of the indexed archive for future use. Procedures must be developed to ensure this happens.

■ *Methodology.* Depending on which system is utilized, the WatchDog will preserve either an exact copy (an “image” in technology terms) of the electronic document or a “pointer” to the location of the stored document. Both methods have pros and cons. Making an image copy requires twice the storage capability. The pointer method requires the system to track when any document is moved. Both these issues should be investigated closely when deciding which software to employ.

■ *Instant messaging.* Instant messaging is a widely used method of modern communication. It is easy to use, instant and convenient. It is also hard to control. Very few organizations can track these messages. Just recently have applications been developed to manage instant messages. Instant messages are considered

discoverable, and must be a part of the records archive.

■ *Document czar.* Retention and WatchDog rules must be periodically updated. These updates may be monthly, weekly or even daily. Document review of questionable documents is required.

It is most efficient to appoint one individual to manage the business rules and updates. This person should be familiar with the firm goals and accustomed to managing documents for legal purposes. A paralegal, a records-management professional or a certified medical-records manager are all excellent candidates for this job. The position is an important part of the litigation process and should be held accountable for managing the update process.

Reasons for the system

A WatchDog system is complex. It is “filing” and is considered a boring topic. So why should anyone go to the trouble to implement it? There are two very important reasons:

■ *Compliance.* With today’s governmental requirements, ensuring that important records are retained is even more important than ever. Organizations are under many mandates to preserve key documents. Not doing so has serious consequences to corporate staff.

■ *Cost containment.* Litigation costs are rising. Having employees function as electronic file clerks is inefficient and costly. Anything repetitive can be done better by computers. Turning expensive human filing tasks over to computers reduces costs while increasing efficiency—and reducing the litigation costs of culling through millions of documents.

There are several choices in available technology to solve electronic document filing-for-retention needs. Users must answer certain questions prior to choosing one of them.

■ *In-house or outsource?* Some systems

are only available as an outsourced option. Others are available for installation on the internal network. These systems may be owned by the company, or be part of a service offering by a document-management company.

■ *Archive only the e-mail and attachments or all electronic documents?* Many systems are available for archiving e-mail. Others can be adapted for all documents on a network, including scanned paper documents.

■ *What type of e-mail system is in place?* Organizations that utilize Lotus Notes and Groupwise will have more difficult installations than those that use Outlook or Exchange for their e-mail. Other e-mail systems offer specific challenges. It is wise to choose a WatchDog system that successfully integrates with the specific e-mail system required.

Among the systems that offer full or partial solutions for document retention purposes are Fortiva at www.fortiva.com; Global Relay at www.globalrelay.com; iLumin at www.ilumin.com; IMR at www.imrgold.com; and Verity at www.verity.com

These applications may require customization in order to perform as a true WatchDog solution.

Regulatory compliance requirements necessitate organized document-management and records-retention plans. Handling the ever-increasing volume of paper and electronic documents is daunting, and should never be done manually. Electronic tools to examine and categorize all documents on a network are powerful and offer cost savings as well as increased efficiency. Having a personal “WatchDog” provides a safe and more effective method of ensuring document compliance—before, during and after litigation. ■

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One issue is whether to save an exact copy or a ‘pointer.’