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# Managing Litigation in Patent Cases to Reduce Cost

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Given the current economic downturn, it is hardly surprising that clients are demanding value, in addition to expertise, in all phases of patent litigation. This is not exactly a new requirement, only now they really mean it. See, for example, the *Association of Corporate Counsel Value Challenge*, which seeks to reconnect value to costs for legal services. Company lawyers are taking an increasingly active role in reviewing the operations of their existing law firms and potential new ones to reduce the cost. As the era of “hourly billing” draws to a close, or is more closely scrutinized, and litigation budgets and alternative fees arrangements become the norm, the financial interests of the client and the law firm merge as never before. The ultimate strategic challenge remains how to get from “here” to “there” within the existing constraints of time and money.<sup>1</sup> Only now, it also may be the firm’s money that is at risk if costs are not controlled.

The astronomical cost of managing Electronically Stored Information (ESI) in e-discovery also requires law firms to search even more diligently to reduce expenses in other areas.<sup>2</sup> While business schools devote serious time and attention to teaching, researching and publishing cost-reducing techniques, law schools devote almost no resources to this area. Similarly, businesses’ use of internal systems to carefully monitor and reduce cost have no corresponding systems at most law firms. This is about to change. Companies are increasingly requiring law firms to describe the *methods* by which they will add value and will reject the often *ad hoc* systems employed by individual partners and insist that firms use time-tested, efficient processes, regardless of the partners and associates assigned to the matter.

There are numerous major projects the trial team must accomplish prior to trial. Some of these projects involve data collection and organization, including: identifying key issues for discovery and trial; interviewing persons with information; conducting legal research;

and reviewing documents, mostly consisting of ESI. This information must then be integrated to: prepare for and take depositions; prepare client witnesses for depositions and trial; develop a cohesive story; prepare for claim construction proceedings; prepare motions for summary judgment, and other pre-trial filings; designate trial exhibits; develop direct and cross-examination outlines; designate deposition testimony for use at trial; and prepare Proposed Findings of Fact (judge trials). This article focuses on the opportunity ESI provides to law firms to reduce costs for these various projects in the post e-discovery phase of the patent case through Electronic Case Management (ECM), an issues-driven system using computer technology to facilitate the organization of information and the ultimate case presentation.

## Electronic Case Management

This article reviews three types of software aimed at reducing costs within the overall ECM system: (1) Communication Software, (2) Trial Team Software, and (3) Trial Presentation Software.

## Reducing Communication Costs

Communication Software can provide an efficient system for keeping the client and trial team members informed of case developments. Repeated team meetings, billed by each member on an hourly basis, can be enormously expensive for the client. In-house counsel may also want to review deposition and motion schedules, track various projects, or review case documents at their convenience without an endless exchange of emails or telephone calls. If the case has been taken, for example, on a flat fee basis or with a fee cap, the law firm also has an incentive to reduce charges for routine correspondence.

There are any number of available Communications Software programs that allow teams to work together, collaborate on and publish documents, store pleadings, maintain task lists, implement workflows, and share information through the use of wikis and blogs. Web-based systems can increase speed and efficiency, especially among different geographic offices. For example, when a task is assigned to a particular team member, both the person assigning the task and the person to whom the

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task is delegated ought to receive an email notifying them that the task has been submitted, what the deadline is, and who is responsible for completing the task. It is accessible to all members of the litigation team in different offices and clients can be given direct access. This further minimizes the need for intra-office conferences.

Communications Software also can assist in one of the most vexing problems for law firms: the efficient collection and organization of correspondence for an individual case, primarily emails and attachments, initially stored on both local PC hard drives as well as enterprise software. Unless these emails are properly centralized and organized there will be significant costs incurred locating individual emails or reconstructing the communications flow. While this may result in numerous copies of the same correspondence, at least it will be in one place. If necessary, the software can reduce the volume of emails through a de-duplication process. This software must also mesh with the firm's overall document management programs and enable users to organize documents through the use of folder structures, tailored workspaces, and metadata.

As with many of these systems, law firms must decide, for both cost and efficiency reasons, what systems to use and encourage/require all lawyers to use them. This requirement of firm-wide use and acceptance is often not easy to accomplish. However, it makes little sense for firms to invest in these systems and develop training programs and then not take full advantage of them. Those firms that develop and share these systems with their clients will have a far easier time marketing their expertise to provide the most cost-efficient solutions.

## **Reducing Pre-Trial Case Organization Costs**

One of the important tasks of any team leader is to work with the team to establish the organizational structure and information management practices. This should include a written document containing basic organizational elements so that all team members are aware of how information will be managed, organized, analyzed, and distributed. For example, policies should be established for the organization of deposition transcripts, who will review it, how will it be analyzed and how the testimony will be integrated with the other case information.

Information integration in litigation is a dynamic, not static, process. Information is not created, received, or stored at a single point in time. It arrives constantly from multiple sources and must be integrated with existing information. This knowledge must be communicated from and to the client, opposing counsel, the court and among members of the trial team. This becomes increasingly significant as large corporations look to consolidate matters in one "national counsel" where cases are pending

in multiple jurisdictions and the trial team may need to include local counsel in any organizational structure. This enhances the need for cost-effective, active collaboration between the client, national law firm (including partners, associates, and paralegals) and local counsel.

The predominance of ESI, and newly developed litigation software, however, provides law firms with the opportunity to better organize, preserve, and access information at lower cost. Lawyers' factual and legal analysis created on the ubiquitous "legal pad" or individual memoranda can be captured, preserved, and combined with other information in an easily retrievable central location. This reduces the need for the often duplicative and expensive process of reviewing important data and constantly integrating and updating the results to provide legal and factual memoranda, deposition summaries, and witness sheets for trial team members. This reduces the need for numerous trial team meetings to insure that everyone is "on the same page" and eliminates the need for paralegals to continually locate and assemble documents according to the individual dictates of every attorney on the team, often on an expedited basis.

The first step, the selection of the software and hardware and any necessary training for attorneys, must be done at the beginning of the case. It cannot wait until the e-discovery issues are resolved. The e-discovery process is interwoven with the case development by the Federal Rules. Questions such as the format for exchanging ESI must be discussed at the initial Rule 26(f) conference. Federal Rule 26 (a)(1)(ii) requires parties to exchange information that they intend to rely upon at trial before the more formal document requests are served. It is incumbent upon counsel to identify the basic issues in the case and collect important information even before the e-discovery exchange takes place. In addition, the format for the exchange of ESI should also take into consideration the needs of the software for the ultimate management of the entire case. Thus, case management procedures should be in place before e-discovery begins.

The decision as to what software to use for case management and how it will be used cannot be made by the junior associate on the team. It should be a firm-wide process developed with the assistance of the firm's IT, Litigation Support and Case Management departments, and approved by firm management. Firms should avoid the use of different systems to reduce training and support costs. This is often easier said than done, since once lawyers become familiar with one system, they are reluctant to learn the requirements of different software, regardless of the advantages. The basic theme always to be addressed is not "what the software can do" but "can the software help me accomplish what I need it to do?" The software should be cost effective and simple enough for all members of the trial team to use. The software

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should approximate how lawyers organized their information during the pre-computer era to create and compile lists of issues, important facts, chronologies, and key witnesses. The resulting database should provide easy access to the supporting documentation, be capable of being modified by all of the attorneys, integrate seamlessly with companion software, and be sufficiently flexible to incorporate additional facts and issues as the case progresses. Source data should be instantly available when working in the office, at home, or traveling thus reducing the need to copy and ship boxes and binders of documents.

A word of caution which applies to almost all litigation software: they have many more features than a practicing attorney could possibly understand or use. This often overwhelms lawyers who are willing to devote some time to learn the procedures—but not the rest of their lives. The software should not include features that only a technology geek would want. Nonetheless, the greatest barrier to using currently available technology to reduce cost and raise efficiency is the unwillingness of attorneys, at all levels, to devote the time necessary to learn and incorporate these systems into their daily litigation activities. This is made even more difficult as software developers seek to “improve” the product, roll out new versions, and require lawyers to learn new techniques even when they are completely satisfied with the existing software.

The main point is that unless all team members understand and believe that the process will allow them to better accomplish their individual goals, they will be reluctant to use it and will revert to older techniques and habits. This is especially true of busy trial lawyers and associates under the pressure of billable hour requirements. Compounding the problem is the almost total lack of courses devoted to this process in law schools.

There generally are three categories of information that litigation attorneys must contend with: (1) information that is “relevant;” (2) information that is “important;” and (3) information that is “essential” to the successful prosecution or defense of the case. Information that is “relevant” is the subject of e-discovery and the various collection, search, storage, and retrieval case assessment software associated with it. While most documents are now stored in an electronic format, any remaining hard copies should be converted for entry into a database. Once the ESI is loaded into the electronic database, the next step is to develop a system of retrieving the ESI in some systematic way and to segregate only “important” information. Once this is done, the ESI can be transferred to a next step database for review and analysis by the trial team using Trial Team Software.

One obstacle to effective case management is counsel’s reluctance to include only the truly important case information in any Trial Team Software database. There is always the risk that some piece of information will be

overlooked, and it is the abiding fear of counsel that they will be blamed if this occurs. This is the same problem that companies deal with all of the time. The question is how to reconcile the cost of missing some piece of important information, as compared to the cost of creating a Trial Team database that does not include only important information. As with most issues, this is something that must be discussed with the client along with an informed presentation of the costs of various alternatives.

Once the documents have been categorized in the case assessment software and relatively unimportant information screened out, the important documents can be imported into the Trial Team Software. A number of the available software packages use a series of rational, interrelated spreadsheets, or databases, to organize, among other subjects, facts, documents, witnesses and issues. Within each of the databases there is a choice of fields such as date, description, etc. This is similar to an Excel spreadsheet format. Many of these fields can be searched by key words. Thus, all information referring to a particular person entered into one of these fields can be retrieved easily. It is important that the software allows multiple users to access the various databases in order to add information as the case progresses. The software should also permit users to store the database on a computer hard drive or CD, given access to the data when the users are out of the office and synchronize any entries with the master database when they return to the office. This greatly simplifies the need to constantly circulate summaries and memoranda to each member of the trial team as new information becomes available.

## Information Input

Virtually every case starts with an initial analysis of the issues, potential witnesses, and currently available documents and facts. One of the more effective methods of obtaining and organizing these thoughts is through brainstorming sessions. From there, counsel learns additional facts, does legal research, identifies additional witnesses, and collects documents (in whatever format) to support the overall legal strategy. ECM can help attorneys structure the preparation of the case in a unified format and in a logical progression.

## The Issues List

The Issues List is an important piece of organizational information since lawyers need to categorize factual and documentary information on an issue-by-issue basis. This list must be well thought out and limited to broad general categories. Too many issues lead to confusion. Unless each team member understands what the issue really means, there is a risk that the information applicable to one really important issue will be misidentified,



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and different attorneys may add an issue or sub-issue that has already been included in the list.

## Persons

Certainly one of the most important pieces of information developed through the pre-trial investigation is a listing of persons who have, or may have, information relevant to the dispute. This occurs continuously through initial brainstorming sessions, discussions with the client, review of documents and depositions. Again, a listing of persons is simply a centrally located resource for the trial team. As individual potential witnesses are interviewed, this list can be used for refreshing recollection of past events, as a glossary for special terms unique to the litigation, and, of course, as a basis for witness lists at trial. The software should be able to link the user to the actual additional background concerning the individual as articles, bios, etc. This approach is especially useful for new members of the team and does not require them to review numerous documents simply to get a feel for the key players.

One other question to be addressed is whether supporting personnel, such as secretaries and personal assistants, should be involved in the data entry process and trained on the system. The answer should be yes. The personnel database, in addition to general information such as the individual employee's role in the case, can contain information such as email, gender, addresses, phone numbers, deposition date, etc. which should be entered by staff. The information often needs to be collected and available but not necessarily put into individual visual fields.

## Documents/ESI

It is important very early in the case for the attorneys to understand and agree to where the documents will be stored so that all of the important information is in one place and, if possible, in one format, so that they can be accessible to everyone and can be stored on every computer's hard drive for easy access out of the office. For example, when attorneys receive a document attached to an email, they often store the document on their hard drive without transferring to a commonly accessible storage facility, usually a drive on the firm's server. This must be avoided.

The Trial Team Software should present and update the listing of documents in chronological order and allow the user to access the document easily. The software should allow the user to sort the documents by issue and by person in chronological order. The user should also be able to identify or "check" documents to be used at a deposition so that they can easily be segregated and printed out. Should the attorney decide to organize the deposition on a chronological basis, the software allows the facts and documents to be easily organized chronologically. A separate field can be created for the

deposition of "X" and this list provided to a secretary or clerk who can then print out the documents for use at the deposition directly from the database. Because the attorney easily can access the actual documents, view them on the computer screen, or print them out individually, this greatly simplifies deposition preparation and eliminates the expense of having paralegals create huge binders of potentially useful documents or going to the files to retrieve individual documents for attorney review.

The Trial Team Software Database can be loaded into a computer hard drive or CD for use during a deposition, interview, brainstorming session or while working from home. This reduces the cost of copying huge volumes of paper documents. In most firms, the database can be accessed through the firm intranet. If a printer is available they can be copied for unexpected developments at a deposition or trial. There is absolutely no need to incur the costs of preparing numerous binders, and copies of binders containing documents other than as may be needed for the actual deposition or trial.

## Facts

Facts can be entered by each member of the trial team as each piece of information is developed during trial preparation. These facts can come from documents, interviews, depositions, memoranda or any other source. The database should have a place in a source field to state where the information came from, *i.e.*, document, interview, etc. and who made the entry. With this information, a team member can approach the individual who entered the information to get additional background and/or verify that the information is factually accurate. Since the database is completely interactive, every team member can add facts that they believe are important to the database, and these facts are automatically put into chronological sequence. Again, with minimal cost all members of the trial team have access to information deemed important by any member of the trial team.

## Transcripts

In most cases, after documents, the next largest body of information is contained in deposition testimony. Most depositions are now supplied to counsel in hard copy and in an ASCII (American Standard Code for Information Interchange) electronic format. The post-review of the deposition for important information should most efficiently be done by the attorney taking the deposition, or at the very least by an attorney who was present. In many cases, however, once the deposition has been taken it is assigned to a paralegal or litigation associate to prepare a summary memorandum. This can be an inefficient process. The main weakness is that it does not integrate the information contained in the deposition with the information already collected. The critical

deposition segments that, for example, can be used in cross-examination, are not readily identified.

Electronic transcript viewer software allows the user to view and annotate the testimony and transfer the segment, with any comment, to the Trial Team Software Database allowing it to be integrated with the previously developed information and categorized by issue, person, etc.

The attorney can pull up the specific testimony. If the attorney is preparing a witness sheet either for direct or cross examination, the actual testimony can be easily copied and pasted into the witness sheet for reference.

Exhibit 1 is an illustration from one type of Trial Team Software integrating information from a deposition, witness interview, and document. This screen includes factual deposition references and documents. Since the entries are linked to the source of the information there is no need to call an assistant to search the file, retrieve the information, and add it to a hard copy attorney notebook. The same documents are available to all attorneys on the matter. The data can be easily broken down by issue, witness and many additional categories. There can also be a column in the document portion of the database where the attorneys can indicate their evaluation of potential witnesses. Documents referring to, referencing, or mentioning a particular witness or subject matter can also be segregated and, in preparation for depositions and interviews, identified at a substantially reduced cost.

## Legal Research

Another key area of possible cost reduction has to do with the organization and retrieval of legal research. Many law schools in their initial legal writing course are using Trial Team Software in the first year because it can help them file their cases and organize the legal research expeditiously. For example, if the lawyer locates an important series of cases, the first step often is to copy the case,

highlight significant passages and put them in an indexed notebook. The end result is a series of notebooks, copied to all of the attorneys who may be interested. Obviously, this is costly and wasteful. The Trial Team Software database makes the case easily accessible, culls the research by issue, copies the important passages into the database, and permits a much more efficient knowledge transfer and basic resource for brief and memo writing. The key passages can be easily copied into the memo or brief. Exhibit 2 illustrates a spreadsheet with this information.

Law firms also must consider the efficient use of central repositories of information that can assist lawyers and professionals locate forms, legal memoranda and other case documents by subject matter. This is often grouped under the general category of knowledge management search systems. Cost reductions from this organizational approach are obvious and law firms have been struggling for an effective solution to this problem for decades. There are a number of these systems currently available which combine topical searching—by substantive area, document type and objective, practice area or transaction type—with full text searching. These programs can also create searchable databases for information generated in individual cases and general information that can be useful across many different cases. The Web based systems can also be customized for client access via an extranet.

## Output

With the Trial Team Software Database established, counsel can focus on the specific pre-trial tasks in a more efficient, cost-effective manner.

## Chronologies/Timelines

One of the most helpful organizational tools for a particular matter is an overall factual chronology or a factual

**Exhibit 1**

Date & Time	Fact Text	Source(s)	Status +	Linked Issues
Fri 04/04/2003	With the help of her husband lawyer Quinlan prepares boilerplate broker agreement.	Quinlan Dep.	Undisputed	Roberta Quinlan, Quinlan Experience
Tue 06/15/2004	QuinlanR drafts a letter where she leaves out the amount	Quinlan Interview	Undisputed	Agreements between Parties
Sat 06/26/2004	Kane note re: Cliff Fuller, Gen'l Counsel NCW	NITA-00006	Disputed by: Opposition	Kane Deposition

**Exhibit 2**

Name	Jurisdiction +	Type +	Citation	Description	Notes	Linked Issues	Linked File
Jones v. Frank	DC Circuit	Case Law	232 F2d 252	Says there is no broker agreement unless in writing	This case supports our position	Agreements between Parties	C/Firm Server



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chronology by individual issue. Attorneys normally present matters to the jury in chronological fashion. An overall chronology created by thinking “globally” about a case is never as complete as one created working issue-by-issue. Taking an issue-driven approach to building a chronology helps lawyers understand the relationships between facts and issues and makes it easy to spot gaps in the available evidence. Trial Team Software easily allows the attorney to create a separate chronology looking solely at the facts relating to a specific issue. The attorneys can also enter into the database facts they wish they had or believe exist but have not yet established. This is consistent with the overall case analysis where the goal is to create a coherent story for the jury, without which juries will be left to fill in facts on their own, simply in order to complete the story line. This technique also is a useful method for determining what facts need to be obtained during the investigation and discovery process.

Some Trial Team Software comes with a companion product which takes the information from the fact section and places it in a chart form. This can be used at trial but, equally important, it can be used pre-trial to visually examine the actual relationship between various events. This often is more informative to the attorney than looking at a table.

The traditional document index is not a substitute for a factual chronology. A document index organizes knowledge by document rather than by fact. This approach ends up concealing facts rather than achieving the primary goal of a chronology—making case facts explicit. Important documents are frequently the source of *multiple* facts. If the document chronology lists the name of the document, its author, recipients, etc., the facts it contains are never made clear. Furthermore, including a summary of each document in the document index is not much of an improvement. The problem would still remain: facts that may have occurred over a span of years are trapped in a single summary.

## **Witness Preparation for Deposition/Trial**

The essence of pre-deposition witness preparation is first to determine what the client knows and does not know. In cases where the matters in dispute occurred in the distant past, this process must include methods to refresh the witnesses’ recollection. This is done through the presentation of ideas and documents to “jog” the witness’ memory. Thus, the attorney must know all of the available information to assist the witness and also locate areas of conflict with other witnesses and testimony that may be inconsistent with the written record. The Trial Team Software can generate reports to greatly simplify that process by identifying important documents that relate to individual witnesses in a chronological

sequence, as well as a written chronology of events. Once the discovery process has concluded and all of the important factual information has been transferred from depositions and incorporated into the database, the trial preparation process can proceed effectively with an integrated view of the evidence as it relates to the particular witness without an extensive repetitive review of all of discovery.

## **Adverse Depositions**

Attorneys approach deposition preparation in different ways. Trial Preparation Software allows for the collection of documents with relative ease depending on the approach. Almost every case demands an analysis of the individual facts and documents relating to a very specific issue and some attorneys look to structure the deposition on an issue basis. Some depositions proceed in a chronological sequence. The questioner will ask general questions and, as the deposition proceeds, become more focused to verify facts that are known, learn facts that are not known and test legal theories. For those attorneys who prepare detailed witness sheets with anticipated answers spelled out, information can be exported from the Trial Preparation Software into those witness sheets. It is also most useful to identify exhibits for these depositions by an exhibit number, such as PX 1, or DX 1 instead of by witness name. These entries can then be added to the Documents database in a “Deposition Exhibit” field as the transcript is reviewed and annotated and information is transferred into the Trial Team Software.

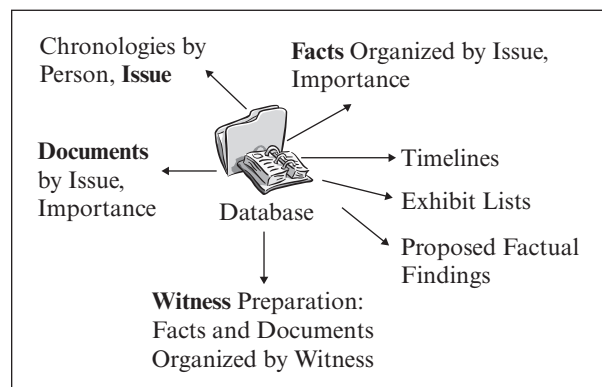
## **Motions for Summary Judgment/ Proposed Findings of Fact**

Counsel may file motions for summary judgment because they believe this will resolve one or more issues in the case. A central part of any such motion is a Statement of Agreed Facts. This document is almost always organized in numbered, chronological sequence. The facts database within Trial Preparation Software has fields entitled “Material” and “Status (Disputed/Undisputed).” This permits an attorney to easily sort on this basis and create an outline for the court filing. The sorted facts can be exported to a word processing document as an initial draft of the filed document. Even if no summary judgment is filed, a similar document, Proposed Findings of Fact, can be prepared in a judge trial.

## **Witness Lists, Exhibit Lists, Designation of Testimony**

Essentially, exhibit lists and witness lists can be created automatically in the Trial Team Software database by simply marking and sorting the database with these categories. The listing of helpful deposition testimony also simplifies the task of identifying deposition testimony of witnesses

### Exhibit 3



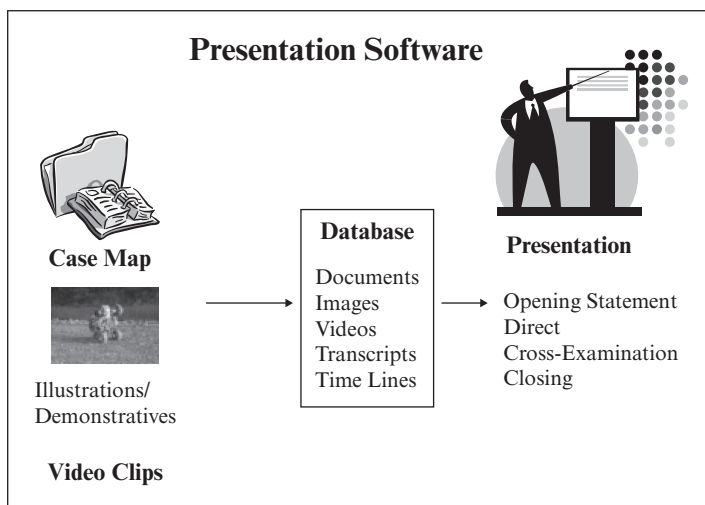
who are not available. The principle issue for the trial team is to cull down the entries to those that actually will be used at trial. Exhibit 3 illustrates the export of information from the Trial Preparation Software.

This description is not intended to be exhaustive. The best way to understand what these programs can do to reduce cost for the various individual projects, is first decide what the attorney wants and then review the software to make sure it can accomplish this function.

## Reducing Trial Presentation Organization Costs

Once the basic case strategy is agreed upon and the facts, documents, and witnesses necessary to implement that strategy at trial have been identified, the next question is to organize the information in a cost-effective manner for the actual trial. If the electronic case management process discussed above has been used properly, the next step is relatively straightforward. All of the documents and prior testimony is already in digital form in the Trial Preparation Software and can be loaded directly into one of the many available types of Trial Presentation Software. This software can accept different data formats and has separate storage capacity for documents (generally in .tif files), images (.jpg and .bmp files), videos and video clips, and transcripts (ACSII files and synchronized transcripts). While trials often have unexpected moments, some Trial Presentation Software can organize the materials the attorney intends to use by trial phase (e.g. opening and closing) and by individual witness, either for direct or cross-examination. As with all the current suites of litigation software, if the attorney

### Exhibit 4



is using the software for the first time, it is wise to have experienced IT assistance for complex litigation.

Most Trial Presentation Software has its own indexing and search capabilities. Thus one of its principal cost-saving advantages is that it allows attorneys to avoid the need for numerous boxes of documents organized, often at significant cost, for quick retrieval by the partner, associate or paralegal during trial. Attorneys undertake this organizational process so that during the trial they will not be “fumbling” for documents.

The principle advantage of Trial Presentation Software is not, however, organization of information. Rather it is the ease by which visual information can be presented at trial. The documents can be shown on a monitor or projection screen as the witness is testifying. Most types of Trial Presentation Software have a number of useful tools that allow, for example, text to be highlighted, photographs to be presented and annotated and videotape depositions to be played in individual segments. Individual documents for cross-examination are also easily located within the database. The Trial Preparation Software input and export process is illustrated in Exhibit 4.

In sum, electronic case management operated with basic computer hardware and software should be used in all types of litigation matters to improve efficiency and reduce costs. There will undoubtedly be important developments in this arena and the hope is that software developers will manage to find ways to make it even simpler and more efficient to use.

1. See Paul J. Zwier, *Legal Strategy* (NITA 2005).

2. See Michael Lynch, “E-Discovery, Streamlining the Process,” *N.Y.L.J.* (Oct. 27, 2008).

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