

A PAPERLESS OFFICE IS WITHIN REACH

(Originally printed ABTL Report, Volume XXX No. 3 (Summer 2008))

<http://abtl.org/report/la/abtlavolxxxno3.pdf>

By: William K. Mills, Parker Mills LLP

Contact: mills@pmmlaw.com/<http://www.pmmlaw.com>

Attorneys are drowning in paper. They have been forever, and over the past several years, as conservation and the environment become increasingly important issues, more and more lawyers have dabbled with the idea of a practice without paper. Others still cling to the notion that a paperless law office is impossible. Yet, technological advancements have brought a paperless office to our fingertips. It's also hard to argue that attorneys that take advantage of electronic document creation, storage and transmission to eliminate paper won't be more efficient, more effective and more competitive. The ability to maintain such a "green" working environment, eco-workflow, is here now.

Attorneys practicing in Federal Court certainly have been exposed to electronic filing over the past several years. A Federal Court in Ohio developed Case Management Electronic Case Filing (CM/ECF) system in 1997 to help deal with massive amounts of paper involved with huge asbestos cases. Though an initial concern was eliminating paper storage space, the benefits of storing documents electronically was matched by the ease and speed of accessing documents electronically by judges, clerks and lawyers within the courts,¹ and the public, including lawyers and law firms.²

The CM/ECF system was implemented nationally in pilot programs in bankruptcy courts in 2001,

¹ To the consternation of court staff, the new system also has apparently permitted the court to lay off substantial numbers of clerks and permitted docketing responsibility to be pushed up to deputy AUSAs.

² See, Tanya White Cromwell, "Electronic case filing saves space, time, improves access to documents," Kansas City Business Journal, Feb. 28, 2003.

district courts in 2002 and appellate courts in 2004. The CM/ECF system permits the electronic filing of all but a shortlist of documents, and provide for automated notice and service to counsel on court filings.

The system has been favorably accepted as it has been rolled out across the country, and as attorneys come to the inevitable realization that so much more can be transmitted, received, stored and communicated faster, easier and better without paper. But, when electronic filing became mandatory in California's Central District this past January,³ it signaled to Los Angeles attorneys an important opportunity for those practicing in both state and Federal Courts that the time has come to make a major shift in their manner of practice. Like it or not that change is paperless.

Beginning somewhere around the time that most attorneys got their first personal computer, they entered this new electronic age at varying paces and with differential levels of commitment. But now that even the courts (with state court still sporadically experimenting and hopefully soon to follow) are going paperless, there is no better time to reach out and embrace eco-workflow and the paperless revolution.

JUST SAY NO – TO PAPER!

The primary obstacle to a paperless office is an attorney's fixation with paper. Resembling a cat's fascination with a ball of string, attorneys claim the need to hold it, write on it, and they insist that they absolutely need it to properly review their work. But, consider the amount of paper that passes

³ Pursuant to Federal Rules of Civil Procedure 5(d)(2)(3) and 83, the Central District implemented the automated Case Management/Electronic Case Filing system (CM/ECF), effective January 1, 2008.

through an attorney's hands each day – notices, faxes, letters, contracts, memos, receipts, reports, notes, etc. Attorneys assume that there is not much that can be done about incoming mail, or outgoing mail and the endless growing mounds of paper – or is there? Of course there is! Each attorney controls the amount and type of paper that exists and that is used within her workplace, whether she realizes it or not. If she has, uses or even receives paper it is her choice to do so. The need to hold on to paper is purely emotional and the ability to “go paperless” requires releasing that emotional bond.

Attorneys use any number of excuses to rationalize their need to hold on to paper. Yet, their excuses fail miserably when exposed to the bright light of day:

“THE IRS MADE ME DO IT”

Attorneys hold on to paper based on the common misconception that, “**I have to retain client documents for 7 years.**” Maybe its six years, five years or three years, but regardless, they do it because somewhere someone (probably a tax consultant advising taxpayers on the risks related to carrying their burden of proof in an audit context, but certainly not someone advising attorneys about keeping non-original paper client documents), said it was important for “IRS audit purposes.” Attorneys never bother to do any research to verify, or consider whether the paper documents to which they apply that particular standard would have any relevance to a tax audit, pending or imagined. Nevertheless, they retain **paper** rather than just electronic copies, incurring monthly and annual storage fees for years until they run out of money or space or finally decide that because they haven't thought about their former client or its papers since the papers were entombed, just maybe they really weren't important in the first place. The truth is, **there are few laws, including IRS Regulations, which require retention of paper documents.**⁴ Moreover, generally, attorneys do not intend to take

⁴ For example, Revenue Procedures to IRC section 6001, *et. seq.*

937848_2

indefinite responsibility for warehousing paper, even if some unthinking minion identified the paper as “original client documents,” and shouldn't without assuring that they are adequately compensated for accepting that risk.⁵

Attorneys also hold on to paper based on the equal misconception that, “**I have to keep original signed documents.**” Based on some other vague notion arising from unverified anecdotal assumptions attorneys rationalize keeping paper original documents. But, many businesses don't have any paper *original documents*. The truth is – **most documents that are assumed to be originals are actually copies.** Applications, contracts, deeds, and similar legal documents most often are delivered to, or filed or recorded with the responsible company or agency. Copies that are maintained in an attorney's files, even certified *copies*, are merely copies. Unless there is some specific legal requirement, and there are a few,⁶ there is no need to keep signed original paper documents.

Another reason attorneys hold on to paper and permit it to pervade their workplaces is the unsupported presumption that “**I have to keep**

⁵ Every attorney should maintain a formal document retention policy and system, about which they should inform clients, and, to the extent potentially inconsistent with the retainer agreement or fiduciary duties, obtain the clients' consent. The policy should be tailored to accommodate electronic data and paper files.

⁶ For example, California *Code of Civil Procedure* section 2030.280, which governs retention of original interrogatory responses and is mirrored in provisions governing requests for admissions (§2033.20), and inspection demands (§2031.290), provides in relevant part:

- (b) The propounding party shall retain both the original of the interrogatories, with the original proof of service affixed to them, and the original of the sworn response until six months after final disposition of the action.

paper copies of important documents.” With technological advances, a copy is a copy, whether made from paper or from a digital source. The truth is, **no one needs to keep paper copies**; they simply choose to do so. In fact, because a digital copy can retain all of the characteristics of the document originally scanned, the digital copy is actually much better than the “original.” Without reflecting on the implications of counterfeiting or unlicensed copying (visions of Andy Warhol’s soup can prints), digital copies can be printed in color or on any paper in any manner and can be made to substantially resemble the document originally scanned. That flexibility, along with the ease of transmission, storage, retrieval and presentation (digital copies can be easily re-sized so that they are more legible than the original document), is making paper copies obsolete.

“DENIAL IS NOT A RIVER IN EGYPT”

Finally, even with the advent of rapidly changing technology, many attorneys cling to paper because they wrongly believe that **“stuff on paper makes me faster, smarter and more efficient.”** That reliance is based in part on fear. Attorneys fear, the technology, fear their own learning curve and ultimately fear making a mistake or looking less than proficient as they attempt to incorporate newer systems, processes and procedures into their business. The resistance to adopting eco-workflow principles, discussed below, whether based in fear or mere discomfort prevents attorneys from making an easy and logical progression to a paperless workplace.

The truth is: **having stuff on paper is slower, dumber and less efficient.** Despite conservation efforts, using paper has substantial and avoidable environmental consequences too many to mention. Yet, the amazing speed and efficiency of reasonably available technology is a few key strokes away; Google finds a favorite restaurant faster than thumbing through the old fashioned Yellow Pages. Moreover, most attorneys still can’t seem to put down the paper, though growing accustomed to using Adobe®, various Microsoft products like

Word®, and Outlook® to create, transmit and manage their electronic communications. And, those who do are beginning to see how much easier those advancements have made their lives. Most importantly those same technological advances permit solo attorneys and small firms to compete effectively with large firms. Thus, any assertion that paper is somehow better merely demonstrates an illogical and emotional refusal to accept the reality of the present, and a blind denial of the inevitability of our not-too-distant paperless future.

A CASE STUDY

Based on the lack of progress most law firms and attorneys have made down their path to a paperless office, it is abundantly clear that “going paperless” and installing some form of eco-workflow requires more than mere lip service. Even after buying a few scanners, deploying e-mail, or printing double sided on recycled paper, attorneys still have a fair distance to travel. One California law firm’s experience with the Central District’s CM/ECF system provides an interesting example:

ABC Firm (so named to protect the innocent), has 10 lawyers in a single office. It practices substantially in Federal Courts throughout California, and has been aware of and involved in electronic filings with various district and bankruptcy courts for several years. ABC Firm has several networked multi-function business machines and regularly scans, e-mails, and prints double sided on recycled paper. It also considers itself substantially paperless.

ABC Firm has assigned one of its partners, Attorney Jones, who is apparently ABC Firm’s most computer savvy attorney, as the designated CM/ECF User (as defined in Central District CM/ECF Rules contained in General Order 08-02), and recipient of the various communications emanating from the CM/ECF system, including the Notices of Electronic Filing (NEF), a notice automatically generated by the CM/ECF system at the time a document is electronically filed. He timely took the training, passed the test and

received his user name and password in compliance with General Order 08-02 and is the only member of ABC Firm who has done so. When a document is filed with the Court on one of the many cases ABC Firm handles, ABC Firm succumbs to 12 missteps preventing its transition to a truly paperless office:

1. Attorney Jones e-mails to his secretary each NEF;

2. The secretary reads the NEF or forwards the forwarded NEF email to the secretary of the attorney who actually handles the case (but there is no centralized case management system and no centralized contacts, so it's often time consuming for the secretary to determine what effect a document e-filed by another party has on whatever party is actually represented by ABC Firm);

3. The secretary of the handling attorney places relevant information from the filed document (which she is required to review to obtain, thus using ABC Firm's one free download), into the ABC Firm calendar item;

4. The secretary then again forwards the forwarded NEF to ABC Firm's internal office services department;

5. ABC Firm's office services personnel clicks on the link in the forwarded District Court email and **prints a hard copy** of the e-filed document (but he or she likely receives a notification that the free download has been used and that a copy can only be printed using ABC Firm's PACER account, for which there is an \$0.8 per page printing fee);

6. ABC Firm's office services personnel **photocopies** as many copies as are needed to distribute to those attorneys working on the matter (it is often time consuming to determine who gets copies without a procedure set up in advance, a case manager or shared contacts system indicating the proper recipients of such documents);

7. ABC Firm's office services personnel **scans to portable document format (pdf)** the hard copy of the CM/ECF filed document which has been printed from PACER, and profiles the pdf into ABC Firm's document management system (DMS);

8. ABC Firm's office services personnel then emails the pdf of the recently scanned CM/ECF filed document to all attorneys, paralegals or secretaries within the practice area or group most likely involved on the case (but he usually guesses because he does not have the information in any handy form);

9. Each of the recipients open the pdf and some get confused, and many of them again profile the pdf or the e-mail transmitting the pdf back in to ABC Firm's DMS, causing further confusion and unnecessary duplications of the pdfs (no one can say which of the various pdfs, documents or copies of both should be saved or where);

10. Copies of the pdf are often printed again so that they can be mailed to clients or insurance adjusters, copies of which are also then profiled into ABC Firm's DMS or saved in paper form as "Chron Files," as some of ABC Firm partners are distrusting of district website rules, and ABC Firm's procedures;

11. Calendar related items from NEF emails are placed by the secretary on ABC Firm's master calendar, which are integrated to Outlook calendars of only the two or three attorneys at ABC Firm who consider themselves to be sufficiently "techie" not to be intimidated by the entire process;

12. All of ABC Firm's attorneys meet once weekly to review **paper printouts** of the ABC Firm's master calendar to determine who is responsible for actually performing the appearance or completing the documents as a result of the CM/ECF filing related event.

If it is not already obvious, ABC Firm attorneys have no confidence in their system, because they have difficulty finding everything, and they fear many appearances and deadlines will be missed. But, in addition, the repeated printing and scanning of those printed copies back into the ABC Firm DMS, and the undisciplined and disorganized forwarding, saving and re-saving of e-mail, hopelessly converts a potentially efficient system into an anemic incompletely implemented replacement for even an old style paper system. It also necessitates the continued use by ABC Firm of paper files, because no one has any idea which of the numerous copies printed in the lifecycle of a CM/ECF document should actually be saved or recycled, so all of them are kept – IN PAPER FILES.

An eco-workflow approach involves many fewer steps, but begins with each attorney at ABC Firm taking the training and taking responsibility for CM/ECF filings, and related docketing and assignment of work on their own cases. The responsible attorney should take mental note of the NEF in his mailbox, **but is required to do nothing**, since the notice should be automatically forwarded⁷ to his secretary or paralegal, which has instructions to save the document to the ABC Firm’s DMS and enter relevant dates to the master calendar. The responsible attorney would then review the document from the location it has been saved to, and thoughtfully determine who else should review it and whether copies are required to be printed; copies can be made in a paperless office, but they should be made with due consideration and an affirmative decision as to whether any copies are necessary or appropriate. The NEF e-mail is saved once, as is the document itself. No unnecessary copies are made, AND NO PAPER COPIES ARE RETAINED,⁸ but coordination, communication and

⁷ An easily accessible feature in Outlook®.

⁸ Convenience paper copies of documents, though discouraged need not be eliminated, but clearly labeling the printed copy “COPY” or maintaining a default protocol that all paper is to be

937848_2

organization are critical to give the attorneys comfort that the DMS is accessible and efficient.⁹ Further, catering to those who refuse to accept their part within the developing eco-workflow is counterproductive. The transition to a paperless office requires that users intellectually, emotional and practically stick to their resolve to kick the paper habit.

ECO-WORKFLOW IS CONSISTENT WITH OVERALL CONSERVATION MOMENTUM

To review – Paper - bad, electronic data - good. Using electronic data, rather than paper permits attorneys to be more organized, working smarter and greener. The inability of attorneys to reach the goal of a paperless office is emotional and is not caused by any legal impediment. Federal Courts have lead the charge, creating an opportunity for attorneys to extend the CM/ECF system benefits to their own practices through eco-workflow techniques.

The transition of a law office through eco-workflow into a paperless office is easier than it may seem. However the transition requires a focus that joins in the growing trend toward affirmatively pursuing ecological sustainability. Eco-workflow and a paperless office embodies the conservation principles of reduce, reuse and recycle. Initiatives in cities like Los Angeles to create sustainable building programs¹⁰ should be expanded to include

recycled or some similar rules, helps keeps the paperless office paperless.

⁹ Integrated DMS software, a stable and secure computer environment, and properly qualified and well trained users are essential to realizing the potential of a paperless office.

¹⁰ In April 2008, the City of Los Angeles inaugurated its Green Building Program, requiring certain new large commercial and residential building projects to achieve a “Standard of Sustainability,” based on the intent of the Leadership in Energy and Environmental Design® (LEED®) Certified level. The Program also encourages builders of other new and rehab

the businesses that make those sustainable buildings their home.

Eco-workflow principles are quite simple:

1. Release the emotional and intellectual rationalization that paper is an essential part of business operations!
2. Communicate electronically, and make e-mail, AIM or text messaging the preferred method.
3. View, create and edit documents electronically.
4. Convert all non-essential paper documents to electronic documents.
5. Shred and **recycle** all non-essential paper documents.
6. Store documents and data electronically.¹¹

It's difficult for attorneys to eliminate paper if they permit themselves to believe that they have no control over "mail"¹² they receive. Clearly, in most law practices, internally generated paper can be controlled and eliminated. However, attorneys can also affirmatively encourage their colleagues, clients and others with whom they communicate, to eliminate paper by seeking agreements in advance that permit electronic service and notice beyond that

construction to meet a Standard of Excellence, based on achievement of LEED® Certified Silver Level or higher. The Program has the expressed goal of "reducing the environmental impact of buildings." See, <http://mayor.lacity.org/greenbuilding.htm>; and U.S. Green Building Council-L.A. Website - <http://www.usgbc-la.org/>

¹¹ Precautions for security and redundant backup and retrieval must be adopted.

¹² "Mail" is herein defined as communications received by the law firm from an outside source and could be in electronic, paper or other form.

937848_2

of the CM/ECF system rules. Those agreements may be tailored to assure that the attorneys have complied with any ethical requirements contained in the *Business & Professions Code*,¹³ the *Rules of Professional Conduct*,¹⁴ State Bar Rules and advisory opinions, or other state and federal rules and statutes, and in case law pertaining to document requests, retention, and disposal.

Taking an eco-workflow approach to eliminating paper starts with a change of mind, and the intelligent use of technology to better organize information, so that work can be performed more efficiently, economically, and greener. A paperless office is within reach, and attorneys can also eliminate paper by believing that paper is not better and asking themselves WHY PAPER?

About the author: William K. Mills is a graduate of Harvard College and UCLA Law School, and is a partner in the Los Angeles law firm of PARKER MILLS LLP, home of THE NO PAPER OFFICE™, and an MCLE provider certified by the State Bar of California. Mr. Mills specializes in complex business and professional liability litigation, as well as best practices and risk management consulting. Mr. Mills is also an associate member of the United States Green Building Council – L.A. For more information regarding Eco-Workflow and The No Paper Office™, please contact Mills@pmmlaw.com

¹³ See, §§ 6147(a) and 6148(a) require the attorney to provide a client a copy of the fully executed fee retainer agreement.

¹⁴ See, Rule 3-700, which requires attorneys to release client papers and property upon the client's request.