Nervous System: Oliver North and the Origin Story of Legal Technology

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With the aggressive pace of technological change and the onslaught of news regarding data breaches, cyber-attacks, and technological threats to privacy and security, it is easy to assume these are fundamentally new threats. The pace of technological change is slower than it feels, and many seemingly new categories of threats have been with us longer than we remember.

Nervous System is a monthly series that approaches issues of data privacy and cyber security from the context of history—to look to the past for clues about how to interpret the present and prepare for the future.

In November 1986, an internal leak to the press exposed a secret United States operation to funnel the proceeds of weapons sold to the Islamic Republic of Iran (in violation of an arms embargo) to fund the revolutionary Contras in Nicaragua (in contravention of Congress). As the press started to cover the scandal, Lieutenant Colonel Oliver North went to his computer at the National Security Council and started deleting emails pertaining to his role in the scheme. Over the course of a frantic weekend, he manually deleted around 750 emails.

North later said he did not believe emails were subject to the Presidential Records Act or the Freedom of Information Act. Given how new the use of email was at the time, he may have had good reason to think that. In fact, at the time, few civil litigators were routinely including email in their discovery requests, and the entire practice of what we now call e-Discovery was in its infancy.

The Federal Rules of Civil Procedure (FRCP) had been updated in 1970 in an effort to keep pace with changing technology. The term “document” in Rule 34 was expanded to explicitly include “electronic data compilations from which information can be obtained only with the use of detection devices”; and the term “evidence” was expanded to include “all electronically stored information on any medium and in any electronic format.”

At the time, big businesses infrequently called upon large data compilations for production. The computers that dominated American businesses in the 1970s were still large computing mainframes. The first computer of significance, the Electronic Numerical Integrator and Computer (ENIAC), was completed in 1946 and weighed thirty tons, occupied 2,000 square feet, and cost a half a million dollars to make. Programming it meant manually reconfiguring the connections between six thousand mechanical switches. Computers remained physically imposing, expensive items for decades, which limited their use.

In the mid-1970s, the arrival of microprocessors made it possible to replicate the computing power of an ENIAC in something the size of a shirt button. This opened the possibility of making a computer small and inexpensive enough to be feasible for an ordinary person to own for private use—a “personal computer,” like the IBM PC or the Apple II. Even small businesses could join the computer revolution, and consumers started buying computers for home use.
This had a profound effect on the degree to which electronic documents were being created and stored. Records that previously had been routinely maintained in paper form migrated increasingly to electronic repositories.

Those electronic records had characteristics that made traditional approaches to discovery painful. For one, the electronic records were volatile, easily changed simply by accessing them. They also contained complex metadata that existed outside the document’s content but provided essential and highly relevant context. Last, the relative ease with which users could generate electronic records encouraged them to be profligate, meaning that the sheer volume of records that might be involved in a given case gradually drifted upward over time. The pressures exerted by these trends took a toll on litigators.

“Necessity is the mother of invention,” as the saying goes.

In 1982, a pair of trial lawyers, David Rotman and Jon Sigerman, realized that while the personal computer might have been the source of their discovery pain, it also might offer a solution. They began to think of ways to leverage the power of their personal computers to organize their caseloads. Sigerman wanted a system that could collate the most essential evidence in a given case into a small, user-friendly concentration of excerpts from key documents and deposition transcripts. Rotman wanted an easily accessible indexed archive of the entirety of a case’s evidence.

Together, they founded the company CT Summation, whose software platform Summation is still in use today as one of oldest eDiscovery tools—if not the oldest. Summation combined Sigerman and Rotman’s ideas into a single system that organized a large repository of documents into an electronic workspace, within which a core subset of critical resources could be identified.

A second platform, Concordance, began when Jeff Lipsman founded Dataflight Software in 1986. Lipsman, a former proofreader and litigation support service provider, had grown accustomed to using IBM’s Storage and Information Retrieval System to manage litigation documents, but he found that system clunky and frustrating. Borrowing $3,000 from his parents, he bought a PC in 1984 and started to teach himself to write software code. Within two years, he had created the first version of Concordance.

Like Summation, Concordance used a “load file” to catalog the metadata for a larger repository of documents, along with pointers to copies of those documents. Each document was mapped to a fulltext index of its content, enabling text-based searching. The fulltext database management technology proved to be a valuable commodity outside of the litigation context, and Lipsman licensed the technology to other software companies for use in such applications as library management systems.

As valuable as tools like Summation and Concordance were in the 1980s to organize access to electronic records, many litigators still were reluctant to move beyond the familiar terrain of paper-based discovery. Many users were increasingly communicating with one another via email, but it remained common for trial lawyers to not even try collecting and reviewing email.

This changed, in dramatic fashion, in 1989, when the highly publicized trial of Oliver North began. North was charged with twelve counts of lying to Congress, and some of the most damaging evidence against him came from the very emails he had tried to delete. In fact, he had deleted them only from the local NSC computer, but copies were separately preserved by the White House’s email server.

The drama of North’s testimony being challenged by his own words was compelling. Suddenly, the old “gentlemen’s agreements” against producing emails started to fall apart, as trial lawyers realized the potential gold mines they had been letting go untapped.

Today, eDiscovery, the process of collecting electronically stored information and organizing it in a software-based review tool, is a central feature of litigation. Both Summation and Concordance remain in use, although their former prominence is now shared with other tools such as Relativity.

2020, the Court heard arguments on Van Buren v. United States, an appeal involving a former police sergeant’s conviction for using a law enforcement database to lookup license plate information for private reasons. The decision is pending.

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