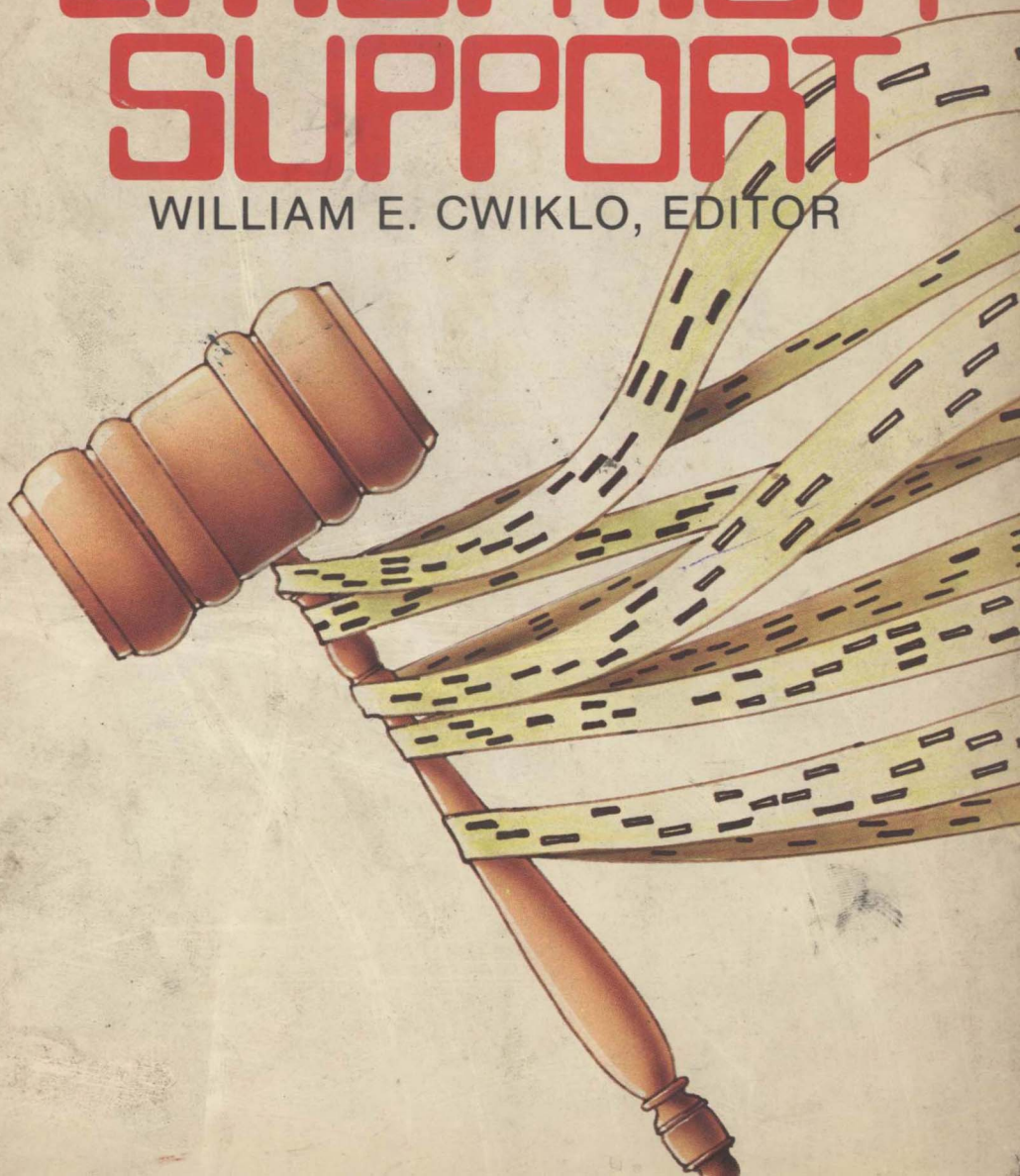


COMPUTERS IN LITIGATION SUPPORT

WILLIAM E. CWWKLO, EDITOR



Computers in Litigation Support

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COMPUTERS IN LITIGATION SUPPORT

FOR MY PARENTS

PREFACE

This collection of articles was gathered out of a personal desire to find and to read all of the important papers which have been published about the use of computers in litigation support. Colleagues frequently mentioned useful articles that they had either read or written, but they were often unsure of when and where the papers were published. A routine bibliographic search in the *Index To Legal Periodicals* produced a long list of potentially interesting citations but it did not describe the depth of treatment nor, of course, provide the text of the article itself. Tracking down the actual articles was both time-consuming and frequently frustrating. During the course of my research, I collected copies of the articles which treated the subject matter credibly. Following many expressions of interest in this collection, I am making it available to the legal community in this book.

Since many of the articles cover a range of topics, it was not possible to organize them by subject area. For this reason, and also because I feel that the articles themselves document the development of the field, they are arranged chronologically by publication date. The first article, "Machine Data Processing Systems for the Trial Lawyer," by Roy N. Freed was published in 1960 in *The Practical Lawyer*. While advances in data processing technology have replaced the data processing tools Mr. Freed discusses, the basic concepts of a systems approach to information processing and its applications to litigation support are as pertinent today as they were 19 years ago.

Although this book brings together the major articles written and published in legal periodicals between 1960 and 1978, it is not meant to be a text on how to design and operate a computerized litigation

support system. There are differences in opinion, perspective, and in level of treatment of subject in these articles. Several brief articles, of an introductory nature, have been included because they are useful in explaining the concepts to the uninitiated. A certain amount of redundancy also exists among the articles since they are presented in a complete and unabridged form. To assist the reader in finding discussions of specific topics an index is provided. The topics treated include discussions of the nature of computerized litigation systems, how they work, and what they may cost; criteria for deciding whether or not a system is needed; how to choose a consultant or vendor; the differences between a manual and a computerized litigation support system; and the role of paralegals and nonlawyers in litigation support.

I wish to thank several of my colleagues at Informatics Inc., and elsewhere, for their assistance with this book: First, Robert S. McCormick, for his continued support and encouragement of this project; Jeff D. Emerson and Pat Emerson who were instrumental in bringing this book to publication; Steven E. Rosen, Stephen Gershenson, Patricia Bonner and J. Richard Norton, from whose advice this book has profited; and John D. Rome, a pioneer in the field and co-author of two of the articles contained herein, whose personal interest and infectious enthusiasm were responsible for bringing me into this stimulating and challenging field in the first place. I also wish to thank the authors of the articles selected for putting their thoughts into print, and the publishers of the articles for granting me permission to use their material, in particular, the Section of Science and Technology and the Section of Insurance, Negligence, and Compensation Law of the American Bar Association.

William E. Cwiklo
Arlington, Virginia

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John D. Rome*

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INTRODUCTION

It is the purpose of this collection of articles to trace and reflect the origin, evolution, and future of the use of computers in litigation support, and the fascinating new industry that has developed with this application.

The Origin

Litigation support, of course, is as old as the practice of law itself. Classically defined, it refers simply to the process of preparing a case for trial. The techniques and goals are also well known. First, become familiar with the location, content and relevance of every document in the case. Second, do so better than the adversary—and win.

Until the advent of truly large-scale cases, litigation support was accomplished by the lawyer himself diligently perusing the documents and formulating his case. When larger lawsuits became more frequent, litigation support was a phrase known to connote a room full of law students, or even newly admitted lawyers, feverishly annotating 3 x 5 cards. Later, as the computer revolution swept all industries, it was a natural application of the inherent processing speed of computing machinery that the 3 x 5 cards would be “computerized.” That word became synonymous with the process of loading all of the contents of the 3 x 5 cards into the computer’s memory, and then using information search and retrieval techniques to locate the pertinent documents.

When this technique was first used, it was immediately, utterly and devastatingly effective: causing Clarence Darrow’s ploy of reinforcing cigar ashes with a paper clip to pale in comparison. Mr.

Darrow's ash simply held the jury spellbound—causing them to ignore the facts. The computerized advocate forced the opposition to face the facts!

Initially its success was thought of as a fluke or trick. As surely as the initial predictors of computer usage forecasted that “possibly as many as 50 computers might find commercial use in the United States” (this was thought as late as 1949), skeptics in the legal profession regarded the computer as an optional gadget—a luxury which, in any event, would certainly not have an impact upon their practice. The rest is history. Use of electronic data processing techniques is now widespread. Continuing improvements both to computer hardware and software has made this early “courtroom trick” standard operating procedure in today's large or complex case.

The Evolution

The litigation management industry is the result of the convergence of changing political, economic, and social environments, with rapidly developing technology. The trends leading to this development have included: (1) increased government regulation of the private sector, (2) a frenzied pace of mergers, acquisitions and divestitures which have reconfigured the economic landscape, and (3) the phenomenon referred to as the information and paper explosion.

The results in the legal area have been an increase in the number and complexity of lawsuits requiring attorneys to manage huge volumes of documents and information. The parallel technological developments were systems analysis, digital computers, communications networks, and a growing body of theory and practice associated with managing large volumes of records.

The establishment of governmental regulatory agencies such as the Federal Trade Commission, Securities Exchange Commission, and Environmental Protection Agency, among others, has spawned both mass information gathering (based on the requirements for reporting various specifics of business transactions, and their results, both in the marketplace and on the environment) and new types of litigations.

Large-scale data gathering has, in turn, necessitated developments in techniques for handling large volumes of documents and quantities of information. Parallel developments in the military and scientific communities have encouraged the evolution of a systems approach to information handling. Also, the Freedom of Information Act has stimulated the government's contribution to the profusion of information.

Introduction: Litigation Support as an Industry

As a result of the availability of large (and conveniently accessible) pools of information, new types of complex lawsuits such as those involving employment discrimination and environmental protection first became possible, and then almost commonplace. Class action law has stimulated the number of cases by making it economically feasible for individuals to pursue their legal remedies as a group, where formerly they simply could not afford to do so as individuals. These economic characteristics have increased the number of anti-trust and securities actions. The very bigness of everything today has given rise to relatively more frequent Multi-District Litigations.

Two basic tools have evolved to cope with all this data: systems analysis and computer technology. Systems analysis was applied with tremendous success to a number of complex military problems during World War II. After the war, the techniques were applied to a wide variety of problems including how to gather, store, and retrieve large volumes of documents and quantities of information.

Since the mid-1950s, advances in computer technology have put the enormous memory and processing power of these machines within easy reach. Early computers were large, expensive, and limited in their capabilities. These limitations were frequently referred to as "hardware constraints." The first computers were custom-built and wired to perform specific routines or tasks. Both the numbers of available machines and qualified personnel were extremely limited. Under these circumstances, whatever the theoretical powers of the early computers, they could not have been of much help in the field of litigation support, where time and cost factors were, and continue to be, critical.

By the early 1970s, this situation had changed dramatically. Advances in the use and character of hardware technology, paralleled by major improvements in computer programs (popularly called "software"), made computerized applications largely independent of the computer. Computers were no longer built to perform specific routines. General applications programs for large-scale document and information retrieval were commercially available from a number of qualified vendors. A large number of sophisticated computers were in general use throughout the country. Advances in communications technology made the power of the computer available nationwide. Whereas early computers could only be used by people in the same room as the computer, by the early 1970s it was possible to access a computer remotely by means of telecommunications networks. Time-sharing techniques allow more than one party to make use of the same computer—at tremendous savings. The combination of increased flexibility of applications, remote accessing, and time-sharing techniques made the large, sophisticated computer into a

utility-like resource that was readily available for a variety of uses, at reasonable prices.

The computer is unquestionably a lynchpin in the new science of document and information management. Whereas traditional information systems attempted to physically arrange materials by one preferred parameter (e.g., subject matter), today's new techniques employ similar storage arrangements, but with the significant new benefit of the computer's being used as a tool to index and track the location of specific documents by any element of their content. This, combined with the use of micrographics to store images of documents on films, essentially defines most of the basic components of modern document information retrieval systems.

Although the technological developments in information storage and retrieval were only tangentially related to the problems that were developing in complex litigation, they nevertheless offered certain solutions to them. The possibilities of a systems approach, coupled with digitization of the data, for managing a large document population in a complex lawsuit, were identified as early as 1960 by Roy N. Freed, Esq., in his landmark article "Machine Data Processing Systems for the Trial Lawyer." However, because of the somewhat conservative bias in the legal profession, and real hardware constraints, it was not until a decade later that the theories and techniques proposed by Mr. Freed were used to any great extent. Entrepreneurialism and persistent salesmanship prevailed over resistance to change (facilitated, admittedly, by technology).

The Future

Predicting the future is, at best, an experience conducive to frustration. In the highly technical world of computer science, predictions are even more likely to be wrong. Undaunted, however, the authors will attempt to set forth certain trends which will undoubtedly have a major impact on the evolution of this still-new industry.

By analogy to the almost traumatic changes in, for example, the electronic calculator industry (which witnessed a 90%+ drop in price in less than a decade), it is almost certain that computing hardware considerations will evaporate as any kind of limiting factor: cost, capacity, performance, or otherwise. The other side of the equation, however, just as surely will reflect continuing increases in the costs of labor. The net effect of these two trends will hasten, if not mandate, the use of computerized techniques in legal information management.

The editors also foresee three other important factors giving rise to increased utilization of computers in assisting the practice of law.

Introduction: Litigation Support as an Industry

First, business records—the stuff of litigation support systems—are increasingly being maintained by clients' computerized data base management systems. Consequently, discovery in the future will more likely consist of retrieving information from opponents' computer systems, rather than from their warehouses. So gathered, the information will naturally be more readily processable by a lawyer's computers rather than his clerks, paralegals or junior associates.

Second, the cost of everything is rising at a rate such as to provoke widespread demands for limits and controls. On the ultimate scale of things, big litigation is economically nonproductive. Corporate executives are not fond of the dent which million dollar legal fees make on the bottom line of their profit and loss statements. Thus, the demand for efficiency will surely contribute to the legal profession's changeover to computer-based techniques.

Third, the era of personalized computing is upon us. People are used to having electronic digital watches. Four-year-old children now announce to their parents that they arose at 8:53—not the “about nine” of similarly aged children only a few years ago. Computers are now becoming commonplace. The personalized computer is finding its way to lawyers' desks, not only for litigation support, but also for word processing, accounting, modelling, estate planning, tax decision analysis, legal research and literally hundreds of other applications. And so go the ramifications of digital technology into the totality of our society.

Finally, increased attorney awareness, through law school courses, pre-law training, industry exposure and other sources, will undoubtedly engender both wider acceptance and use of the computer as an aid to the practice of law. As one noted author in the industry has already observed, “Perhaps lawyers will now confine the use of their adversarial techniques to efforts other than holding forth about advancing technology.”

In conclusion, probably all the editors can do to monitor the accuracy of their predictions for the future is simply to promise the release of subsequent editions of this book—possibly more appropriately to chronicle, rather than to forecast, events as they arise.

William E. Cwiklo
John D. Rome

Machine Data Processing Systems for the Trial Lawyer

Roy N. Freed

The lawyer who tries a “big case” should observe with envy the rational and efficient manner in which the businessman has harnessed machines for analyzing masses of data. Confronted with a mounting volume of “paper work” incidental to his primary activities, such as manufacturing, selling, or making loans, the businessman has needed little encouragement to replace manual clerical operations with the various types of machine data processing systems available. He does so to minimize labor costs, human errors and operation time and to achieve economies and improve service.

By contrast, the lawyer has failed thus far to utilize in his professional work (as distinguished from office management as such and from statistical analysis of voluminous data) administrative tools from which his business client has benefited economically for many years. The lawyer’s lethargy is indeed unfortunate, for it has deprived him of aids to his professional performance and of potential economies.

The lawyer, whose duties predominately concern “paper work,” performs many repetitive operations that are ostensibly more amenable to machine management than those of his business client. A significant portion of legal effort entails the accumulation (either directly or through others) of large bodies of information and the searching through those masses for specific items. The two categories of voluminous legal data most readily identified are the vast library

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