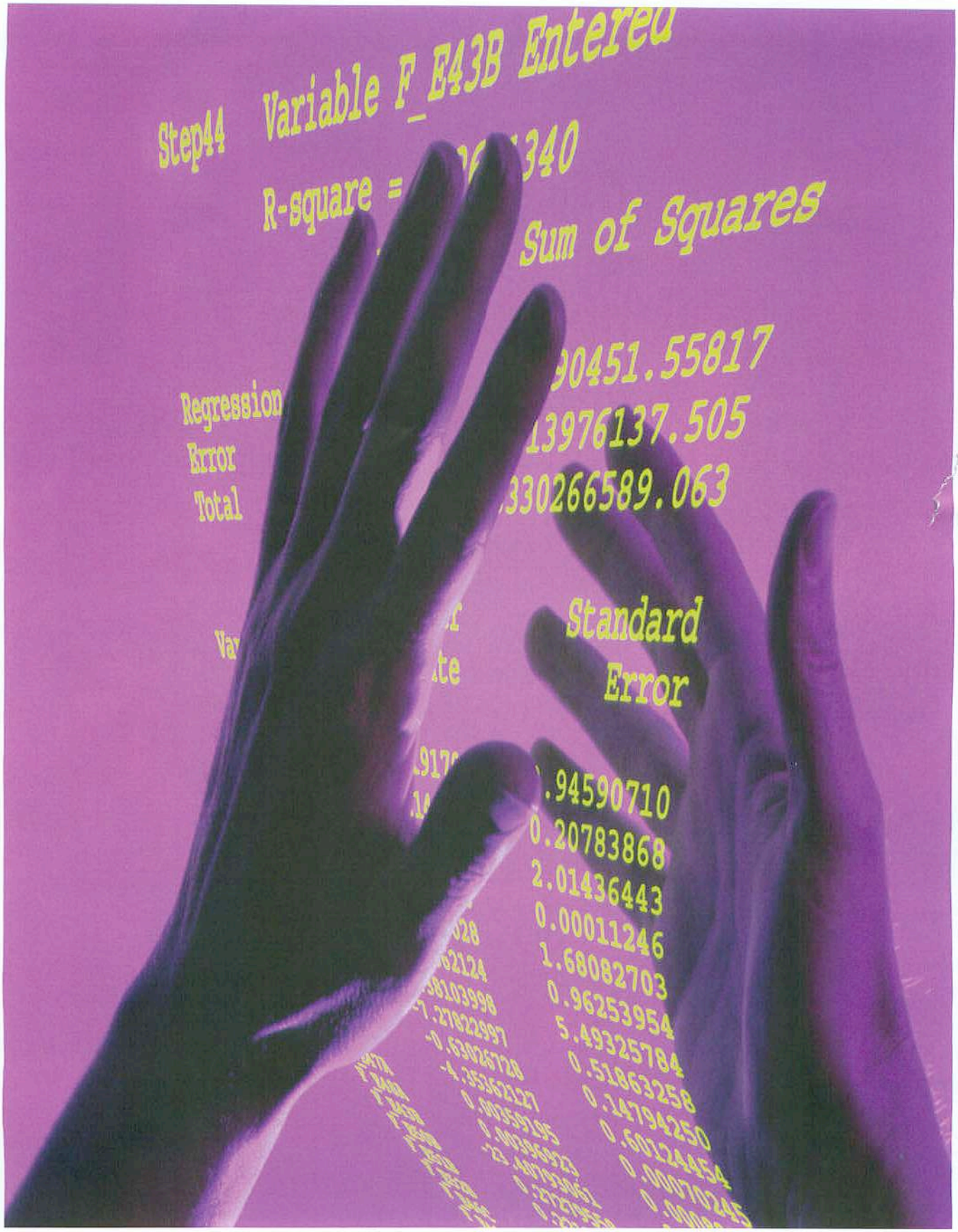


PHOTO: MICHEL TCHEREVKOFF

Paper Chase

Unraveling the joys of e-discovery

by Josh Brodesky

For Sacramento attorney Grace Bergen, there isn't a case that comes her way that electronic discovery doesn't shape.

The brave new world of the digital age rears its pixilated head in many forms: deleted emails preserved in the nooks and crannies of hard drives, text and instant messages, servers, draft documents and even the hard drives of photocopiers.

"It's even used in personal lawsuits, for individuals," says Bergen, an attorney with the firm of Greenberg Traurig LLP. "The biggest problem — the lack of education about it — is staggering."

Across the country, attorneys like Bergen are grappling with the rise of electronic discovery, or digital information used as evidence. It's rapidly changing how litigation is handled, often raising attorney costs and pushing smaller cases to arbitration and mediation.

The problem, in its most basic form, is one of volume and its associated costs. Before the Internet was commonplace, a document-heavy lawsuit might produce enough paper to fill a warehouse. These days, the same might be said for a laptop's hard drive.

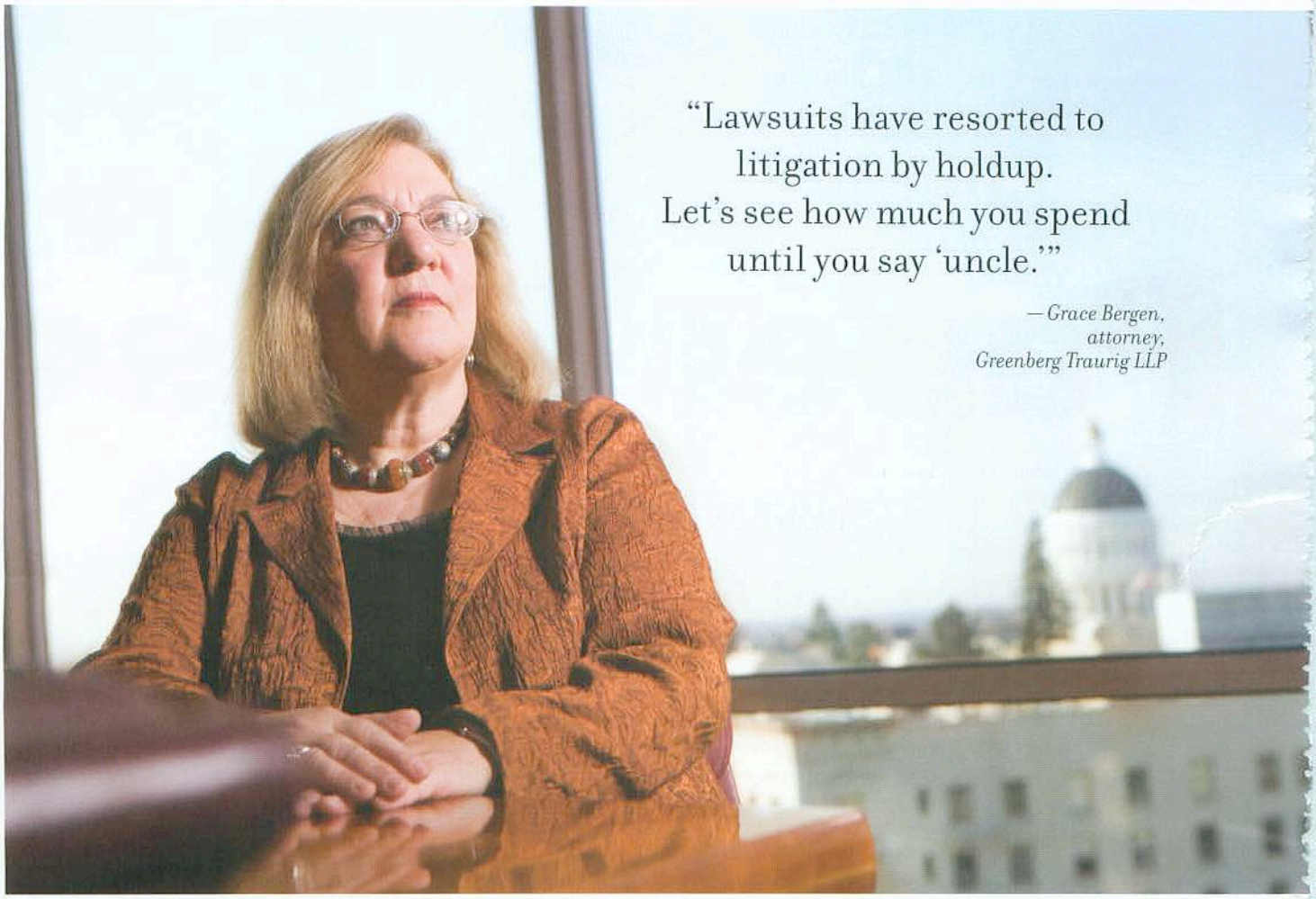
Dealing with such a virtual mountain of information is costly and time-consuming. To help move cases along and keep costs down, the federal court system adopted amendments to the Federal Rules of Civil Procedure in December 2006.

Among other provisions, the new rules require that within the first months of litigation the two sides meet and discuss what electronic information is available and how it can be accessed.

The new rules, albeit somewhat vague, also stop the purging of documents and allow for sanctions if a party is intentionally destroying evidence. But they also leave room for the accidental destruction of e-discovery when organizations do routine system purges.

State court systems have been following suit, with rules first popping up in Idaho and New Jersey. Several others are on track to adopt rules this year.

California is among those considering new rules. A judicial committee has proposed legislation based on other states' rules and the recommendations from the National Conference of Commissioners on Uniform State Laws.



A few years ago, California looked at adopting e-discovery rules, but officials decided to wait and see how other states handled the matter, says Patrick O'Donnell, supervising attorney in the Office of the General Counsel.

"The benefit of waiting is that we now have a scheme that is fairly comprehensive," O'Donnell says.

Fred Galves, a professor at the McGeorge School of Law, says California's delay was in part because of "technophobia" in many leading attorneys and judges.

There was also a sense that electronic discovery was no different than traditional paper discovery, just in a different form.

"The rules of discovery are still the rules of discovery. It doesn't matter if information is stored on paper or electronically. The important thing is, are you entitled to certain kinds of information or not? But the form that it's in shouldn't matter," says Galves, summarizing the industry's take on e-discovery.

"But there are so many things that are fundamentally different because it's stored electronically," he says. "It's overly simplistic to just say, 'Information is information. It doesn't matter how it is produced.'"

E-discovery can help attorneys piece together drafts of documents, timelines, authors and receivers, all forms of information unavailable in traditional paper.

As such, many attorneys now see the new federal rules and the corresponding state rules as necessary guides for dealing with electronic documents in court systems accustomed to paper. It brings uniformity to the rules of discovery and which sanctions can be levied if electronic information is destroyed.

Whether rules are in place, there is no doubt e-discovery has become an integral thread in the fabric of the law. For M. Taylor Florence, chairman of the board for Bullivant Houser Bailey PC, every discovery request now calls for at least email.

And conversely, the firm keeps "a swat team" of attorneys and information technology managers who work with corporate clients to handle electronic information and prepare for litigation.

"We have put together a team of litigators in our firm as well as in-house IT experts to partner with the in-house attorneys at our corporate clients," Florence says.

Part of that partnership is to develop a plan to retain documents, as well as to ensure an understanding of where information might be saved and how to access it, if need be.

PHOTO: JAYSON CARPENTER

Then, attention is turned to email, arguably the most popular and uncontrolled form of electronic evidence.

"If you have to pick one thing to really focus on and control, email would be it," Florence says. "Different email can be archived and stored on lots of different computers throughout the company."

But electronic evidence can surface in ways much deeper and more sophisticated than email. It's common for attorneys, like Florence, to rely on what's known as metadata to make a case.

Metadata is essentially hidden information coded in a document. Revisions, date and time of creation and the document's originator are all considered metadata; and all can be used to piece together a timeline to show who knew what, when, and how a document changed.

"You can see the changes or the way the document evolved or morphed over time," Florence says.

While electronic discovery has become vital to making a case or a defense, it is also rife with thorny ethical challenges. This is where attorneys say the new rules — state or federal — can help navigate.

Producing e-discovery is a costly endeavor and not typically paid for by the requesting party.

As such, there are times when e-discovery is used as a weapon because attorneys will make overly broad requests where the cost of production might exceed the cost of damages, thereby forcing a settlement.

"I believe lawsuits have resorted to litigation by holdup," Bergen says. "Let's see how much you spend until you say 'uncle.'"

To help defuse such requests, the federal rules require the two sides to meet and confer about e-discovery within the first few months of litigation.

"This is a difficult pill for a lot of lawyers to swallow because they are used to zealous advocacy. Both sides have to recognize that this is not the be-all, end-all of their case," says Ken Withers, director of judicial education and content at The Sedona Conference, an Arizona-based nonprofit group that has led the way in developing best practices in the handling of e-discovery.

The meeting, ideally, will save both sides time and money because it brings consensus to what information is available and the costs that might be associated with producing it.

Another common dilemma in the e-discovery age is what to do with privileged information that is accidentally provided to the other side in a document request.

"We have the power to delve into people's computers, and computers are far more like people's brains," Withers says. "There is information that is irrelevant to the facts of the case, but impossible to tease out until you look at it."

Teasing out privileged information is difficult, and not surprisingly, there is no uniformity between various court systems as to what happens to the information if it is accidentally released. Some states require it to be returned to the producing party; others say it is fair game.

Federal rules state inadvertent disclosure may be returned to the producing party.

"I think we are sort of in limbo on that point," Galves says. "Do we give

BEST PRACTICES FOR E-DISCOVERY

Electronic discovery is a brave new world where production can be expensive and time-consuming. Here are five tips to avoid the hassle:

1. **HAVE A PLAN.** Develop and implement a program to manage electronic files. If litigation should arise, it's known where the files are, how often documents are purged and how to access them.

2. **PRESERVE DATA.** Once there is even a remote chance of litigation, documents should be preserved to avoid sanctions and reduce the cost of production. Documents and data should be kept in their native form as the cost of conversion to PDFs can be expensive. If need be, a smaller number of documents can ultimately be converted rather than all of them.

3. **TALK WITH THE OTHER SIDE.** Come to agreements with opposing counsel about forms of production, timetables, the use of metadata and how to handle privileged documents.

4. **EMBRACE TECHNOLOGY.** It is now cheaper and faster to use software to identify and review documents rather than people.

5. **BE SPECIFIC.** Make document requests as narrow and refined as possible. A lot of time can be wasted on overly broad requests for information.

SOURCE: THE SEDONA CONFERENCE

everything back, or do we tell people to learn the new technology?" As attorneys become more accustomed to electronic discovery, he adds, courts will likely allow information mistakenly produced.

Finally, there is also the question of when a party is required to preserve electronic records. Federal rules state records should be preserved when a party could reasonably anticipate being sued.

Many attorneys say document preservation should begin when the possibility of a lawsuit is first thought, even if that possibility is remote.

With so many gray areas in the realm of e-discovery, it's not surprising that many states have different policies or, like California, have been slow to adopt new rules.

For example, while New Jersey was one of the first states to implement e-discovery rules, there are no requirements for the parties to meet and confer about electronic documents.

Withers says California's reluctance to adopt new rules is largely because its current discovery rules already address electronic documents.

"I think in California there is a view that sophisticated attorneys already know what they are doing," he says.

> "We are becoming a paperless society that is requiring litigation and law to mirror that."
>
> *— M. Taylor Florence, shareholder, Bullivant Houser Bailey PC*

Bergen, of Greenburg Traurig, agrees, but adds the rules would bring uniformity to the e-discovery age.

"I believe these issues are being handled in state court, but perhaps not with the uniform results that would be expected with more specific rules," she says. "The result of a lack of state rules may just be more uncertainty as to what electronic documents are discoverable and when sanctions for [destruction] of evidence will be imposed."

One of the most interesting offshoots of e-discovery is the booming business it has created for technical services, computer forensic experts and outside attorneys.

One would call it a cottage industry if it weren't for the fact the e-discovery business generated roughly $2.6 billion in 2007, according to a recent survey by Socha-Gelbmann, a consulting firm specializing in e-discovery.

"E-discovery seems like a thing that may be distant and separate from people's lives, but everyone has email. Everyone has electronic evidence," says Mark Reichenbach, who writes

About 20% of legal professionals say their companies have settled a lawsuit to avoid the cost of e-discovery.

SOURCE: FORTIVA

the e-discovery blog "On the Mark" for Metalincs based in San Jose.

Such firms use various types of search tools to tease out relevant documents from computer systems. These search tools can range from traditional keyword searches to much more complex methods that look at coding or even intuit concepts, making indirect links to a subject.

For example, these more complex searches would link a document to Sacramento because it might contain the words *Kings*, *capital* or *Governator* even though the document never explicitly names Sacramento.

Such computer forensics are necessary, Reichenbach says, primarily because of the sheer volume of documents. Although such data-mining services are expensive, they also are much cheaper and faster than hiring a team of attorneys or paralegals to review documents and much more accurate in finding relevant documents.

"It's an extraordinary burden to put on an organization," Reichenbach says.

Because of its burdensome cost, e-discovery is also changing the scope of litigation, as smaller cases are pushed to arbitration or mediation because the costs simply outweigh the prospect of going to court.

"Full-fledged, full-blown litigation in court is becoming the province of individuals and entities with significant means," says Florence of Bullivant. "We are seeing, and have been seeing over the past eight to 10 years, a real move toward mandatory arbitration. Most commercial agreements now contain mandatory arbitration agreements."

Bergen, who has led recent conferences in the Bay Area on how to handle e-discovery, says she expects more sanctions to be placed on companies that have purged documents.

The new federal rules allow for the routine purging of electronic documents, particularly in the case of large corporations or government agencies that produce tons of documents, simply as a recognition that organizations need to clear digital space to operate.

Bergen says she expects the courts to better define when purging is acceptable and when it is not, with an emphasis on the latter.

Says Florence: "The rules now are making it very clear what the obligations are that parties and lawyers need to comply with. We are becoming a paperless society that is really requiring litigation and law to mirror that."