

May I shred my scanned paper files?

By James W. Martin

So, you scanned all the papers in those client files of yours, converting them into electronic files on your computer, and now you wonder if you can shred all that paper.

You think of the savings in office space and closed box storage fees. But, the lawyer in you quickly points out your files are the best evidence of the work you did and are the business records you maintained contemporaneously with doing the work. If you ever needed to defend your work in court, would the electronic files be admissible?

Definition of Writing

The lawyer in me began research in the Florida Statutes and found that the Florida Legislature got to the digital age before I did:

"1.01 Definitions. In construing these statutes and each and every word, phrase, or part hereof, where the context will permit... [t]he word 'writing' includes handwriting, printing, typewriting, and all other methods and means of forming letters and characters upon paper, stone, wood, or other materials. The word 'writing' also includes information which is created or stored in any electronic medium and is retrievable in perceivable form." F.S. §1.01(4).

Well, that must mean whatever is stored on my computer is a "writing" as long as I can print it out. That's a pretty handy definition. I'll have to remember that one. Wherever the word "writing" appears in the Florida Statutes, replace it with the phrase "computer file."

Florida Evidence Code

But, does the Florida Evidence Code agree? Yes, the best evidence rule says: "If data are stored in a computer or similar device, any printout or other output readable by sight and shown to reflect the data accurately is an 'original.'" F.S.

§90.951(3). And the hearsay rule provides for this business records exception: "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term 'business' as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." F.S. §90.803(6)(a).

Case Law

Even though these statutes quite clearly state that my printable computer files are writings and originals, the lawyer in me asks if there is any case law construing these statutes to the contrary. A quick Westlaw search of Florida Statutes Annotated and Florida Cases finds none, but unearthed proof that the courts are living in the same electronic world as the rest of us:

"Today, instead of filing cabinets filled with paper documents, computers store bytes of information in an 'electronic filing cabinet.' Information from that cabinet can be extracted, just as one would look in the filing cabinet for the correct file containing the information being sought." *Menke v. Broward County School Board*, 916 So. 2d 8 (Fla. 4th DCA 2005), denying "unfettered access" to computer files in discovery.

"This is an exceedingly important issue

which should be confronted by this court. Businesses as well as individuals must have regular record and property disposition policies. Obviously, storage space, both in warehouses and in computers, have finite limits." *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005), concurring opinion ruling there is no independent cause of action for spoliation of evidence.

EPA

So what does Google say about this? I enter this search: Are files scanned to electronic computer files admissible as evidence? The first hit is EPA's Office of Solid Waste's Interpretation and Findings Regarding Safety-Kleen Corp.'s Automated Manifest Record Storage System" (www.epa.gov/epaoswer/hazwaste/gener/manifest/enclose.htm) in which the EPA found that it was "satisfied that Safety-Kleen's image file storage system meets current RCRA requirements for retention of copies bearing the handwritten signatures of waste handlers." The federal environmental law known as RCRA required that "signed" manifest copies be retained and bear the handwritten signatures of the waste generator. The EPA said: "The key regulatory compliance issue presented by Safety-Kleen's system is whether the electronically stored image files are created and maintained in such a manner that they qualify as 'copies' bearing the necessary 'handwritten' signatures. We conclude that the image files meet this standard, because:

"1. The handwritten signatures from the hard copy records are captured by the scanner, incorporated into the stored image files, and reproduced accurately in the output generated by the computer system. Safety-Kleen demonstrated to EPA that the output displays signatures that look no different than the signatures that initially appeared on the scanned hard copies, and the reproduced manifest copies (and signatures) are of the same or better quality than those which are produced by photocopy machines or fax machines. Significantly, this system does not attempt to substitute 'digital signatures,' PIN Numbers, or other electronic surrogates for the original handwritten signatures.

"2. The image files appear to meet the standards included in the Federal Rules of Evidence for the admission of copies and computer generated records into evidence in judicial proceedings brought in the federal

courts. We believe that the law of evidence provides the proper standard for determining whether these electronic documents (the image files and any printouts generated by the system) are acceptable 'copies' within the meaning of our manifest retention regulations. The regulations require these manifest copies to be retained in order that they may be inspected by RCRA inspectors, and in a proper case, admitted in evidence in RCRA enforcement proceedings or other proceedings (e.g., CERCLA liability) where the information on the manifests may be considered relevant. Thus, their acceptability as inspectable records and possible evidence should be evaluated according to the law of evidence on the admissibility of computer generated records."

IRS

Well, if it's good enough for the EPA, it's probably good enough for a lot of other government agencies. What does IRS say? It recognizes "electronic storage systems" as the records required to be maintained by the Internal Revenue Code.

It even issued guidance in the form of Rev. Proc. 97-22, which goes into great detail concerning the components the system must include, such as "ensure an accurate and complete transfer of the hardcopy or computerized books and records to an electronic storage media, . . . index, store, preserve, retrieve, and reproduce the electronically stored books and records, . . . include reasonable controls to ensure the integrity, accuracy, and reliability of the electronic storage system; . . . reasonable controls to prevent and detect the unauthorized creation of, addition to, alteration of, deletion of, or deterioration of electronically stored books and records . . ."

So, if a soul was brave enough, one could even scan digital images of items of income, deduction, and other tax records then shred all that paper, too. If one were brave enough. I think I would scan and shred the EPA waste manifests first, though.

James W. Martin is a probate, real estate, and corporate lawyer in St. Petersburg, who has written for The Florida Bar Journal & News, ALI-ABA Practical Lawyer, and West Publishing, and has more information on his Web site, www.jamesmartinpa.com.

Legal

UM Endowment: The University of

Well, that must mean whatever is stored on my computer is a "writing" as long as I can print it out. That's a pretty handy definition. I'll have to remember that one. Wherever the word "writing" appears in the Florida Statutes, replace it with the phrase "computer file."

Florida Evidence Code

But, does the Florida Evidence Code agree? Yes, the best evidence rule says: "If data are stored in a computer or similar device, any printout or other output readable by sight and shown to reflect the data accurately is an 'original.'" F.S.

Legal Roundup:

Broward Jurisprudence: The Anti-Defamation League recently recognized Leonard Robbins with its Broward ADL Jurisprudence Award and Judge J. Leonard Fleet with the Broward ADL Distinguished Public Service Award for their "passion for excellence, high ethical and professional standards, dynamic leadership and social responsibility."

Gonzalez Honored: Rafael Gonzalez of Lithia was recently awarded the United States President's Volunteer Service Award. The award is issued by the President's Council on Service and Civic Participation on behalf of the president to recognize "the best in American spirit, and to encourage all Americans to improve their communities through volunteer service and civic participation."



GONZALEZ

The award was presented to Gonzalez as a result of his work with Brandon Academy students' celebration of Law Day over the last five years. Since 2002, Gonzalez has been helping Brandon Academy students celebrate Law Day by putting on mock legislative sessions and trials depicting all components of our American judicial system.

Holiday Bookfest: The South County Holiday Bookfest to benefit Palm Beach Legal Aid is set for December 8 at Barnes & Noble at 1400 Glades Rd. in Boca Raton from 7 a.m. to 3 p.m. Participants are also asked to donate a gift for the Legal Aid Pro Bono Auction. A private shopping event, (store closed to the public) hosted by the South County Florida Association of Women Lawyers and the South County Bar is set for 7-9 a.m. and a networking luncheon is slated for noon. RSVP to (561) 655-8944, ext. 350.

www.FloridaBar.org

utes to the contrary. A quick westlaw search of Florida Statutes Annotated and Florida Cases finds none, but unearths proof the courts are living in the same electronic world as the rest of us:

"Today, instead of filing cabinets with paper documents, computers store bytes of information in an 'electronic cabinet.' Information from that cabinet can be extracted, just as one would look in a filing cabinet for the correct file containing the information being sought." *Men Broward County School Board*, 916 So. 2d 8 (Fla. 4th DCA 2005), denying "unfettered access" to computer files in discovery.

"This is an exceedingly important

UM Endowment: The University of Miami School of Law has announced the creation of an endowment by Anne and Charles Papy III to name the Moot Court Board in honor of their father, Charles Cay Papy. It will be named the "Charles Cay Papy Moot Court Board." A practitioner in the field of insurance litigation, Papy has tried over 800 jury trials in his career. "This wonderful gift in the name of an outstanding lawyer," said UM School of Law Dean Lynn Lynch. "It will be utilized to help support many student competitions run by the Moot Court Board." Established by the Society of Bar & Gavel over 50 years ago, the Moot Court Board is an honorary organization whose purpose is to foster excellence in written and oral advocacy in the classroom, in competitions, and in the workplace.

Carrollwood Bar Donates Food: Carrollwood Community Bar Association will be donating 22 Thanksgiving food packages from SHARE to Amvets, a charitable organization that assists local veterans. Carrollwood Community Bar also will hold its annual meeting at Emerald Greens on December 14 at 6 p.m. There will be a dinner immediately following. Guest list welcome.

Nuts & Bolts of Divorce: The Annual Nuts & Bolts of Divorce, presented by the Dade County Bar's Family Courts Committee, Young Lawyers Section, and the Put Something Back program, is set for December 8 at the Dade County Courthouse, with registration beginning at 12:30 p.m. The faculty includes Judge Joel H. Brown, Judge Ellen Leesfield, General Magistrate Thomas A. Tilson, and lawyers Maurice J. Kutner and Nancy Hass. Attendance is free for those who agree to accept at least one pro bono family law case from Put Something Back; otherwise, the cost is \$80. For more information contact Karen Ladis at kladis@dadelegalaid.org.

World of Thanks: Community Legal Services of Mid-Florida recently held its "World of Thanks" staff retreat in Oviedo, where President Amy Goodblatt presented the CLSMF Employee of the Year Award to paralegal Lena Smith for her "deep commitment and dedication to her clients, her involvement with community groups, and her pleasant and enthusiastic work style."

The key regulatory compliance issues pre- concerning the components the system must

... Legal Aid, the Dade County Bar Young Lawyers Section, and Real Property Committee, was recently held at the Dade County Courthouse and explored topics such as real estate closings, landlord/tenant issues, predatory lending, ethics, and litigation. More than 68 attorneys attended, and most agreed to take a pro bono case in lieu of an admission fee. The speakers included, from the left, Ana Camacho, Barbara Lanshe, Alain Lecusay, Oscar Sanchez, Aida Lanela, Carlos Ruga, and Barnaby Min.

ORANGE COUNTY JUDGE Antoinette Plogstedt and Orlando Commissioner Phil Diamond participated in Florida's attempt to break the record for the largest number of people to read the same piece of literature aloud, simultaneously, in multiple locations, according to Guinness World Records. Judge Plogstedt and Diamond, a lawyer, certified the results of a middle school in Orlando. From 11-11:30 a.m. on September 28, tens of thousands of sixth, seventh, and eighth graders in Florida schools and libraries, watched a live public Web cast from Disney's MGM Studios. During the program, Gov. Jeb Bush led a statewide read-aloud using an excerpt from the book *Peter and the Starcatchers*.

