



Legal Technology Insider Special Report on E-Disclosure

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WINNING THE CASE: A PROACTIVE APPROACH TO LITIGATION SUPPORT

By Charles Christian, Editor, Legal Technology Insider Newsletter

As a litigation lawyer said to me recently: “E-disclosure is coming. It may not be the tidal wave we have seen in the United States but the waters are definitely rising...”

And the waters are also rising in the High Court where the Civil Procedure Rules have now been amended by the introduction of a new supplement to the practice direction for Part 31 (effective from 1st October 2005). Although this broadly mirrors the earlier Commercial Court Guide—it confirms the definition of a document to include email and other electronic communications, wordprocessed documents, databases and metadata; requires parties to discuss searches for and preservation of electronic documents prior to the first case management conference, including the format for producing for inspection; and sets out what constitutes a reasonable search of electronic sources for standard disclosure—it does omit the statement in the Commercial Court Guide that ‘in most cases metadata is unlikely to be relevant’.

However before we all start getting too carried away about the implications of e-discovery and metadata in terms of the sexy technology needed to process it (we are now all familiar with those horror stories about the printed-out contents of even a modest number of Outlook email boxes (technically 18 files) translating into hundreds of boxes of paper-based information) what I think is a more pertinent question is how the advent of electronic evidence is going to impact upon the litigation strategies of law firms and inhouse legal departments.

Because of the nature of litigation, with the vast majority of cases settling long before they reach court, the overall approach to litigation support technology services has tended to be reactive, with the whole thing seen as a distress purchase. In otherwords: it is something you only invest in at the last possible moment, when it is unavoidable and you have no other options. But, e-disclosure changes all this.

For example, whereas with ‘traditional’ paper-based litigation you would be unlikely to recover all your costs if you invested heavily in support technology at an early stage in a case that subsequently settled, with electronic evidence the costs boot is firmly on the other foot and trying to process large volumes of digital documents by traditional methods (in otherwords printing them out and reviewing them manually) is actually more expensive—and certainly much slower—than using e-discovery software. And the courts know this too. So, far from being a reactive, distress purchase, litigation support technology in the digital age starts to become a pro-active, must-have technology.

However this is only the start of a strategic paradigm shift. Because the digital documents, that could at some subsequent point in the future become germane to litigation, already exist in an electronic, e-disclosure system-friendly format, it becomes possible for both inhouse counsel and law firms to be more pro-active in terms of ensuring their organisations and (in the case of law firms) clients are better geared up to face the risk of litigation.

For example, inhouse counsel could work with their IT departments and CIOs to create corporate document management, retention and disposal policies for digital documents (including email messages and attachments) that will comply with current regulatory and procedural requirements, so any subsequent e-disclosure process can focus on organising information, rather than trying to locate copies of lost or arbitrarily deleted documents. Similarly, law firms could advise their clients on the need for such compliance policies and how to implement them, rather than spend their time having to explain to a court why particular documents are unavailable. In both instances we are seeing the emphasis change, to use the old Richard Susskind analogy, from the role of the lawyer being to pick up the pieces at the bottom cliff, to providing a safety barrier at the top to stop anyone falling off in the first place.

However there is a second aspect to be considered, namely the relationship between the lawyer and the provider of litigation support technology.

To-date law firms have tended to use a mixture of inhouse systems supplemented by litigation support bureaux selected, often at short notice, on an ad-hoc, the most-competitive priced service wins basis. But with e-disclosure raising a range of technical issues (and constantly evolving issues at that—the rise of instant messaging and proliferation of remote devices like the BlackBerry being two of the more recent) far more complex than those associated with traditional discovery, serious consideration must be given to whether a firm’s own resources should now focus on supporting the litigation process, while all technology issues, including the selection and deployment of any e-disclosure systems, are outsourced to a service provider that can deliver an appropriate best-of-breed solution on a managed basis.

And, here too, there needs to be a far greater emphasis on building a pro-active relationship with any service supplier, so a firm is better placed to know not only what technology options are available but in turn how these can be leveraged to the greatest benefit of their clients. E-disclosure then is not just a matter of coming to grips with metadata, it is also a potential tipping point to spur a far more pro-active approach to all aspects of the litigation process.

ONSITE VS ON-DEMAND LITIGATION SUPPORT: THE PROS AND CONS OF EACH SOLUTION

By Brian Bennett, Legal Consultant, ZANTAZ

October has become Electronic Disclosure month.

In October 2004, a Working Party of the Commercial Court issued its paper entitled Electronic Disclosure to give the court direction and recommendations on dealing with electronic data discovery. The Working Party's paper followed a comprehensive review of electronic disclosure issues by three members of the Commercial Litigators Forum.

The following October, the Civil Procedures Rules were modified based on the recommendations made by the Commercial Court's Working Party, broadening the scope to all High Courts. The rules expanded the scope of the disclosure statement, requiring both sides of the litigation to provide more detailed information on what was searched and, importantly, what could not be searched. So, for example, Exchange mailboxes were searched, but PDAs were not. The list of technologies that must be considered has grown significantly to include everything from back up tapes to mobile phones.

Before the reports were written in 2004, and the Rules were modified, there was little direction and no precedent for electronic disclosure within the United Kingdom.

But now, electronic disclosure, as a major function of litigation support, is growing rapidly. "A majority of what we turn over now is electronic," says Donald Macdonald of Slaughter and May. "Lawyers are now really thinking about electronic disclosure and how it impacts the litigation."

Law firms must guide their clients on electronic disclosure and must be ready to accept ever-growing volumes of data that will incur. "We are seeing volumes increase," says Janet Lambert, Solicitor at Barlow, Lyde & Gilbert and one of three authors of the Working Party report. "In the Commercial Court some Judges are seeing correspondences between parties regarding electronic disclosure at Case Management Conferences, and are beginning to tackle these issues."

It is not just rules that are forcing change in firms. Competition has grown from US firms, which have embraced electronic disclosure for five years now. They have experienced real success with their UK-based operations by ensuring global or European-based clients that they are best equipped to handle complicated technology-based disclosure. "Our global clients are regularly facing documentary issues in substantial disputes involving litigation and arbitration, and they need to be assured that we can properly handle large-scale electronic disclosure requests", said Gautam Bhattacharyya, partner at Richards Butler.

In fact, many global clients—not to mention smaller clients—need direction from their lawyers in addressing those requests. Gartner, a leading IT research and analyst firm, just published its first note on the electronic disclosure market, informing its clients that they must get a grip on retention and disclosure of electronic data.

"It is only now, in the current regulatory and legal environment, that companies are beginning to examine and understand the processes they use to gather and examine electronic evidence. Most are not happy with the answers they are finding regarding what is going on inside their own enterprises," writes Debra Logan, senior analyst. Those companies are anxious for guidance from their firms on the information retention requirements of such regulations as the Data Protection Act, Freedom of Information Act, Basel II and Sarbanes Oxley, and on the complementary disclosure issues.

Indeed the changes in the CPR put the onus on fee earners to guide their clients on what is disclosed. Logan adds, "I expect firms that have not yet put their electronic disclosure processes and team in place will do so this year."

When evaluating whether to bring litigation support in-house or whether to work with a partner for on-demand services, the law firm's IT team needs to consider the implications to the firm and its IT network.

Check list for implementing an in-house team:

- Ensure security of network
- Use a robust, proven and scalable software
- Develop a training program for internal litigation support team

Check list for using a hosted litigation support solution:

- Conduct research to find a partner with solid local experience and support
- Make sure you receive 24/7, global support
- Investigate the security of the data
- Where is it stored?
- What is the disaster recovery plan?

The only remaining question is how. Some firms have chosen to bring electronic disclosure in-house along with other key litigation support functions. Others have built their expertise through a hosted partner that can provide a wide range of litigation support services.

There are benefits and disadvantages to either approach—and robust technologies that support both. Firms should make their decisions based on business values rather than technology limitations or requirements.

Building Litigation Support Expertise Onsite

Building litigation support onsite requires an internal IT team and a capital expenditure in technologies. Typically, these internal teams will handle broad litigation support requirements, such as electronic disclosure, but will still outsource some services, such as forensics and scanning and coding.

The benefits of onsite litigation support are compelling. The firm with an in-house litigation support infrastructure has more than just a room of hardware and software—it has in-house expertise and knowledge that can ensure control in large cases, provide added value to clients, and enhance the firm's reputation for top notch litigation.

Gautam Bhattacharyya, a partner at Richards Butler, which deployed an internal litigation support system last year, explains: “What good is a practitioner who, when you need him to do something, needs to hire the facilities to enable him to do so? Wouldn't a truly client-focused practitioner have his own facilities?”

The in-house solution increases the efficiency in the litigation support process, providing strong return-on-investment on the software and ultimately benefiting the paying client. For example, staff working on more than one of the cases in disclosure does not need to retrain on other systems. They are able to start reviews immediately and move between cases quickly. This enables the firm to deploy staff strategically and expedite the initiation process, providing real value to clients.

Richards Butler has realised great benefit from its in-house implementation. Dealing with large, complex and global litigation, the firm has witnessed the amount of electronic documents increase significantly over the past five years. But prior to implementing its own in-house e-disclosure team, the firm's lawyers found they had to learn different systems for each case and there was no continuity in the technology between cases.

“We recognised the need to run the process with our own state-of-the-art litigation support system and to increase our expertise in electronic disclosure,” said Lee Hanley, IT Director at Richards Butler.

Hanley leads a team of 16 at Richards Butler. When Hanley and Battacharyya made the strategic decision to bring litigation support in-house, Hanley conducted an exhaustive search for the right technology. The search included clear and concise criteria—such as a robust system that would integrate well with other internal processes and technologies—and interviews with other law firms. Once the choice was made, the internal team worked with the technology provider to install the disclosure management

system within four weeks. The first case was live within a month and currently there are three cases on the system; a further case, involving a claim of £70 million, will be added imminently.

“We now have the ability to scale internally and the confidence that we can add the new case without glitches in any of the cases running on the system,” said Hanley. “We are now managing the litigation support and eDisclosure for all of these major cases.”

Importantly, Hanley's IT team, with the support of the technology provider, has trained 40 lawyers and internal staff and plans on training many more, greatly increasing the firm's expertise in e-disclosure.

Macdonald of Slaughter and May agrees that an internal system can provide strong benefits. “If all the components are in place, you can cut out training time—the legal team is trained on the system once and does not need to know other systems from vendors or other firms. We've had overall better performance with our in-house system,” said Macdonald.

The competitive advantage does not end with better organisation for each case. The knowledge gained by the firm's lawyers and IT staff working with electronic disclosure every day can be repackaged to provide valuable proactive advice to clients. That may entail advising clients on the requirements of litigation holds. Firms can even consider giving clients complete audits of their document retention policies, a process that can be carried out by an experienced team at the firm and the firm's litigation support technology provider.

“Litigation readiness is an emerging opportunity for litigation departments,” says Browning Marean, a partner at DLA Piper in the US who has spoken frequently on the need to look up stream at clients' information retention procedures. “If you can help your client get their information in order, you provide real value that resonates during disclosure requests but also can improve knowledge management and overall organisational processes.”

The benefits of an in-house team and technology implementation should be weighed against potential problems. One of the major concerns should be the security of the firm's network. When data is flowing into the firm from the client, opposing counsel and third-party sources, the firm's technology network is put at greater risk of security breaches.

Another consideration should be the capital outlay required to build internal expertise. While the implementation of a system can occur quickly, it does require a significant investment in the technology, the staff and the ongoing support. Since the system is internal and is used by staff just as email is, it is more difficult to recharge clients and reclaim the initial investment. However, some firms, such as DLA Piper in the US, are currently working with their technology providers to devise ways to address those issues.

Who should bring their litigation support needs in house? In-house litigation support services give a firm control of key functions, such as electronic disclosure. Lawyers within the firm can become experts on the technology system, allowing them to work from case to case effortlessly and swiftly. As experts they also are positioned to proactively advise clients on litigation readiness.

Working with an Expert On-Demand

On-demand services assign the management and processes of the business function—in this case litigation support—to an external service provider. With on-demand, or hosted, litigation support, a third party manages the gathering, processing, culling and preparing of the data for review and presentation.

Whilst the outsourcing of a firm's computer network or its help desk has become common practice, some firms have remained sceptical about outsourcing the core functions of disclosure and review. But the advantages of on-demand services are numerous. Chief among them is the reduction in capital expenditure. Firms know they must handle e-disclosure; by outsourcing they can do so without a large investment. A specialist in litigation support can provide the service cost effectively with the costs spread over a period of time.

Another advantage is the ability to quickly and efficiently scale for large, multi-party, and even global, cases. In the past, a firm dealt with one medium through the disclosure process—that of paper. But electronic collection requires extracting, processing and validating files from many different mediums and systems. It is a much more in-depth process that allows for advanced data mining, but is likewise more complicated, requiring a specialised skill set.

Smaller firms, in particular, cannot maintain that practice support internally. Hosted services can put smaller firms on the same playing field as larger firms, allowing them to keep the pace with the growing volumes of documents and ensure clients that they can handle the big cases. With an experienced technology partner, any firm can proactively tackle electronic disclosure.

Equally important is the ability to scale-down when the big case is complete. Some firms do not want the added responsibility of an in-house team when they are not handling a major case—with hosted services they can remain “people light.”

Some consider the security of their systems when choosing to outsource. With hosted services, the firm's own network is preserved from harm because the large volumes of files are maintained off-site by the vendor. Yet on-demand allows the firm to reap the benefits of technological advances quickly—a weighty consideration in a field that is evolving rapidly.

Of course, outsourcing does impact the level of control a firm maintains. When a firm manages litigation support internally, it can control the entire disclosure process, even when other major firms are involved. When outsourcing, there is less ability to run the show. Similarly, the firm must ensure it works with an experienced technology provider who can assist in offering clients value added services. In fact, some firms are beginning to work with their on-demand partners to give clients an assessment of their litigation readiness.

Who should use a hosted service for their litigation support needs? It is an excellent choice for a firm embroiled in a large, multi-party lawsuit that does not want to worry about the technological issues surrounding disclosure or the negative impact the case may have on the firm's network. For smaller firms, a strong on-demand provider can give the firm the power to tackle large cases and compete effectively.

Regardless of the delivery mechanism, every firm in the UK must determine its approach for providing litigation support expertise. Whether in-house or on-demand, or both, litigation support services should be proactive—not just put in place for one case. That allows the firm to provide added value to the client, even if the services are hosted. Finally, a consensus should be reached within the firm—especially between the partner in charge and the litigation support manager—on the right approach. Only then will the chosen path be navigable.

Whatever this October brings in revised rules or new guidelines, law firms that have proactively addressed litigation support, either in-house or with a hosting partner, will be well prepared to make the adjustments required.

FURTHER UP THE STREAM: ADVISING CLIENTS ON LITIGATION READINESS

By Browning Marean, Partner, DLA Piper Rudnick Gray Cary and David Baskin, Director of E-Discovery Management, ZANTAZ

Meaningful electronic disclosure capabilities, whether in-house or through a hosted partner, are the bare minimum for doing business today. The key: turning those skills into added value for clients.

In fact, once a firm has resolved how to address litigation support, it is entirely possible to gain competitive advantage with those skills. By using the technology to give proactive advice to in-house counsel, the outside firm can suddenly add value far beyond the technological handling of the actual legal event.

What many in-house counsel departments need is advice on preparing their companies—and the vast information stores within the companies—for possible litigation. That is, litigation readiness. Why? Because the costs associated with antiquated or haphazard records retention policies and bloated email stores can be crippling. Indeed, the recent changes in the Civil Procedures Rules require a deep exploration into a company's electronic information during a disclosure request. With more than 14 megabytes of email sent and received by every user every day, that can be a high order.

A litigation readiness audit does just that.

The audit examines the client's processes for retaining and restoring documents. It includes a review of procedures and interviews with the client's IT staff. The resulting report gives the client tangible advice on preparing for possible litigation. If the recommendations are implemented, the audit can provide other benefits as well:

- It can boost knowledge management. When someone walks out the door and an email mailbox is unused, a lot of knowledge walks out as well. The audit may identify caches of knowledge that the company will want to preserve as corporate knowledge long beyond compliance requirements.
- It can relieve the time pressures associated with litigation or regulatory investigations. Some requests, especially those originating in the US, require documents be provided in a matter of days. Mistakes are easily made in such charged situations; having ready-to-go records alleviates the stress.
- Even if litigation is not reasonably anticipated, an audit is a chance to clean house. Does the IT department really need to keep all those Y2K backup tapes? Probably not.

Litigation readiness is a new, but likely to become growing practice in the field of electronic disclosure that reduces litigation risk. In a recent report, IDC writes: "Litigation readiness is ultimately about keeping your house in order before an imminent risk strikes. In other words, a systematic approach to electronic discovery has a high payoff by eliminating the fire drills and easing the pain that comes along with legal discovery."

Co-ordinated Effort: General Counsel and IT

Much of the pain revolves around the communications, or lack thereof, between general counsel and the IT department and the reactive approach to disclosure.

The general counsel focuses on the need for disclosure requests to be treated quickly and thoroughly. A company that operates a smooth electronic disclosure process can have the upper hand in a litigation matter, demanding the same level of disclosure from the opposing party. On the other hand, a company that struggles with electronic disclosure exposes itself to queries regarding its retention procedures and records management systems. The high stakes of disclosure demand a well-constructed process internally.

Yet the electronic disclosure process is often initiated when litigation is expected and time is restricted. This reactive approach puts an undue burden on the IT department. The IT team is faced with information pockets, from databases to email, throughout the company that often are not centralised. Displaying a coordinated and timely approach to the request is impossible when the information cannot be found. In fact, according to a survey by Vanson Bourne of IT Directors of UK-based companies, 47 percent of IT Directors would not be able to retrieve an email more than three years old. Even in the US, Osterman Research found that 45 percent of organisations do not have policies or systems in place to prevent users from deleting important email.

General counsel must work more closely and proactively with the CIO and the IT department to ensure a tight, efficient disclosure process. That means understanding where information resides, what policies of information retention exist and how quickly and efficiently information can be produced.

A Valued Partner: The Firm's Role

This is where the general counsel's firm can play a key role. As outside law firms build their expertise regarding growing regulations—such as retention requirements in the Data Protection Act and Sarbanes-Oxley—the firm can properly guide a client's information retention procedures and electronic disclosure process.

Indeed, the issues surrounding electronic disclosure are of relatively recent vintage and there are many new developments in the law. Outside law firms are exposed to many varied cases and evolving practices. As a result, their contributions can be significant.

The litigation readiness audit is one way the outside firm can add value for the client. It goes without saying that the recommendations should integrate with the firm's electronic disclosure processes and, if the system is hosted, with the provider of the electronic disclosure system. But it's also important that the recommendations consider information retention and disclosure together. Retention and disclosure are intimately linked—disclosure cannot be effective without

a robust information retention procedure. Likewise, the records retention program should not compromise the disclosure process by deleting documents that are under litigation hold.

Preparing a Litigation Readiness Audit

A litigation readiness audit should be performed with experts who understand the technologies involved, both in information retention and electronic disclosure. In most cases, the technology expert should be a third party who can ask the appropriate questions about where information resides and how long it is retained. If the firm has a hosting partner for electronic disclosure, it may be that partner that conducts the audit. Other technology partners, such as the client's records management or enterprise content management provider, should be consulted during the audit process. But in all cases, the final report should be resident at the law firm, not at the company, to protect the client/solicitor privilege.

The audit should be limited to electronic information, which is the main pain point within an organisation. It should evaluate the company's ability to:

- INVENTORY
- LOCATE
- CONTROL DELETION WHEN NECESSARY
- SEARCH
- PRODUCE

Under each of the five evaluations, the audit should consider whether processes are consistent and reproducible. In most cases consistency requires ongoing communication between the legal and IT departments, and a review of that relationship should be an integral part of the audit findings.

Audit Structure

A successful audit requires the following ingredients:

An **internal 'sponsor'** should be obtained to shepherd the audit through the company. The sponsor should assign an internal committee that includes members from the legal and IT departments. The role of the internal committee is to facilitate the gathering of information for the audit.

A **standard questionnaire** should be developed and answered by the IT function leaders as well as department heads throughout the organisation. While some of the questions may seem simple, such as, "What electronic documents do you have (emails, IM, etc.), and where are they stored (hard drives, back up tapes, etc.)?" it is unlikely that the respondents will be able to answer fully. For example, the IT department may know exactly what's on back up tapes, but may not know what's on PCs.

It is through the questionnaire process that contradictions will arise. For example, the general counsel of one client who went through the audit said that they had a litigation hold procedure, but the IT

department said they freeze everything, regardless of relevance. As a result, when a request was made, it cost thousands to find the relevant information.

The next step is a **series of interviews** to validate the information obtained through the questionnaire. These interviews should include departments throughout the organisation, as well as regional heads if the company is global. There may also be increased scrutiny for key personnel who are often touched by litigation.

The final step is to produce a **report with recommendations** based on the initial five evaluations. The report should be in conjunction with the technology partner who can provide guidance on how to fix problems. Whilst results can be verbalised by the technology partner, who may have strong relationships with the client's IT department, the written report should reside with the outside firm to preserve its confidentiality.

Recommendations should include technologies that improve information retention in a way that makes electronic disclosure more efficient and cost effective. For example, reducing time of review—the biggest cost in the disclosure process—is a bottom-line benefit of a robust information retention technology. It is important to recommend a system, such as an email archiving system, that can do some of that work for the lawyer upfront—before it's even needed—such as de-duping and applying date ranges.

Not all clients will be ready for the intense scrutiny of the information retention processes. But those in highly regulated industries, such as the financial, pharma, tobacco and oil/gas sectors, have felt the heat of electronic disclosure and will welcome the review if they haven't already done so themselves. Others, such as those with global operations who deal with occasional litigation, may also be open to the scrutiny of the audit—especially given other benefits of robust information retention, such as knowledge management. Nonetheless, they will respect the firm for proactively pushing them to improve their processes and, ultimately, reducing the costs—and firm fees—associated with electronic disclosure.

This brings up the issue of audit costs. How does a firm and its technology expert charge for the audit? What internal costs at the company are associated with the audit? These are legitimate questions that are still being explored. The answers will vary based on the size of the company and other factors. The audit should ideally not be considered a one-time cost, but rather should be budgeted annually to ensure updates as new technologies become available. Even so, ongoing costs would be significantly less than the initial cost of the audit.

Litigation readiness may be in its infancy, but the opportunity for litigation departments is compelling. Using its electronic disclosure experiences, a firm can arm its clients in advance of litigation with a readiness audit, thereby saving their client legal costs and adding value far beyond litigation.

INTERVIEW WITH JANET LAMBERT

Partner at Barlow Lyde & Gilbert

In October 2004, a Working Party assigned by the Commercial Court issued a report entitled Electronic Disclosure. In the report the Working Party, chaired by The Honourable Mr Justice Cresswell, attempted to clarify the extent to which the Rules on disclosure should apply to electronic documents and the level to which the Court should help parties to resolve issues associated with disclosure of electronic documents.

In preparing its report, the Working Party reviewed the paper produced by three committee members of the Commercial Litigators Forum ("CLF"), which represents many of the top UK litigation practices. It also reviewed the Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production, produced by the Sedona Conference in January 2004, and a number of US and UK cases which indicated how the different Courts were addressing the problems of electronic disclosure.

Janet Lambert, a Partner at Barlow Lyde & Gilbert who specialises in insurance and reinsurance disputes, was one of four authors of the Commercial Court's Working Party Report and is a leading authority and speaker on electronic disclosure. Here she reflects on the changes which have occurred in the past year and anticipates what issues the Courts and solicitors will have to grapple with in the coming few years.

LTI: How was the Working Party's Report received by the Commercial Court and what has been the result?

JL: It was apparent from the CLF paper and the Working Party's research that more guidance from the Court was needed to deal with the problems of electronic disclosure. In our report, we investigated how the Commercial Court Guide and Civil Procedure Rules dealt with electronic documents and provided recommendations on changes to the Guide and Rules. Importantly, we attempted to balance the need for all relevant documents to be disclosed, including electronic documents, and the need for any search for electronic documents to be reasonable and proportionate.

The Commercial Court adopted our recommendations for the Commercial Court Guide to be changed and the revised guidelines for electronic disclosure were published in November 2004. This was followed, in October 2005, by the publication of a revised Practice Direction supplementing Rule 31 of the CPR, which was applicable to all the High Courts. The Rules Committee in this Practice Direction also adopted the Working Party's recommended guidelines in relation to electronic disclosure, and also revised the disclosure statement to give more clarification as to the searches to be carried out by the parties for electronic documents and the media on which electronic documents are held.

LTI: What exactly were the recommendations that have now resulted in changes to the Civil Procedure Rules?

JL: We recommended that the Commercial Court Guide and the disclosure statement (in the Annex to the Practice Direction supplementing Part 31 and the corresponding Practice Form, N265) be amended to bring home to litigants and their advisers the need to search for documents held in electronic form when providing disclosure, and to make clear the extent to which a search had been carried out/not been carried out to locate electronically held data. Those changes have now occurred, providing practitioners with more support and guidance when requesting or disclosing documents in electronic form. So, for example, on the disclosure statement, the party must now provide details as to its document retention procedures and what portions of the electronic information repository have been searched (emails, databases, back-up tapes, etc.).

LTI: Why is the extent to which a search is carried out so important in electronic disclosure?

JL: To create a level playing field between the parties and to ensure that all relevant documents are disclosed and that the costs of disclosure do not become disproportionate. Due to the volume of electronic documents created, the lack of order in which they are retained and the different practices as to retention, destruction and management of electronic documents used by the litigants, guidance from the Courts as to the extent of the search to be carried out for electronic documents is to be welcomed.

Our Courts put much emphasis on testing the proportionality of a search for documents in relation to the costs involved and the size of the case. This is important in the context of electronic documents: For example, it could be argued in a particular case that it is disproportionate to search through the voicemail records. Interestingly, proportionality is not an accepted principle in the US Courts, which is perhaps one of the reasons why the US has more case law on electronic disclosure than the UK. But in our report, we were clear that the principles of reasonableness and proportionality in the Civil Procedure Rules should be maintained when dealing with electronic disclosure.

LTI: Since the changes to the Commercial Court Guide and the Practice Direction, has there been a ruling providing more clarity as to what is reasonable in electronic disclosure?

JL: No reported decision, but we should expect more clarity from the Courts on the proportionality of electronic disclosure in the not-too-distant future as practitioners apply the revised Guide and Practice Direction to their disputes.

LTI: The Working Party Report borrowed heavily from US precedents. Is there a developing case law in the UK that is helping to guide the Court and litigators?

JL: It's starting to happen. In the Commercial Court some Judges are seeing correspondence between parties regarding electronic disclosure at Case Management Conferences, and are beginning to tackle these issues. There have also been a number of conferences debating the issues relating to electronic disclosure and how far the proportionality principle can be applied. In a sense, the Working Party's Report and the changes to the Commercial Court Guide and the Rules were meant to pre-empt some of the issues that have occurred in the US.

LTi: What do you see on the horizon for electronic disclosure?

JL: There are still several issues that have not been addressed specifically. Certainly we will look for more clarity from the Courts on the extent of search and how proportionality applies. Another area for consideration is whether documents should be produced in electronic form—everything from how a Claim Form or a Summons is served on the other side to the technology used by the parties to exchange disclosed documents. There are rules governing production of documents, but the wide range of technology available—CD Rom, native format, etc.—gives rise to a variety of methods of production which the parties currently have to agree between themselves. The DCA is looking into these issues now.

LTi: Do you think there will be a change in the Rules addressing the production of documents?

JL: It depends upon the level of dispute in this area. Most parties currently resolve any differences between themselves. It is clearly important that technology is used when this is in the best interests of the parties and the Court and to reduce the costs of litigation, and that the parties exchange information and decide on a common platform to facilitate this. On the other hand, if a litigant has already invested in a litigation support system for the purposes of a case, that is possibly information which it should be entitled to keep confidential.

At the end of the day, we need to see how the continuing issues surrounding electronic disclosure progress. The aim of the Working Party was to create sufficient flexibility in the Commercial Court Guide and Rules so that the law can now develop case by case. However, the development of technology is such that there may need to be further changes to the Rules in the future.