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Document retention is a key issue for legal departments. With 70% of all data now stored electronically, lawyers need to have easy access to their clients' electronic documents, says Tom Hopkinson

The e-haystack

Lawyers and companies today are faced with a new world of electronic evidence. The way in which we communicate, conduct business and store information has changed fundamentally over recent years. Research in the US estimates that 2.8 billion e-mails are sent every day with predictions that this will grow by 150% annually. More than 90% of all documents are created, viewed and stored electronically and over 70% of these electronic documents are never printed to paper. In any litigation context, these documents — e-mail, word processing, spreadsheets, presentations — are potentially disclosable.

Lawyers acting for today's 21st century companies need, in order to be properly effective, to know where their client's electronic documents reside and how easily these can be collected, filtered for relevancy and used in litigation. To fail to do so risks vital evidence being overlooked.

In the US, the disclosure of electronic documents is becoming, or has already become, standard procedure. In recent years, a number of high profile corporate scandals have been memorialised in the disclosure of e-mail communications. In addition, a substantial body of case law has developed on all aspects of electronic discovery procedures, most notably the 'headline' case in 2003 of *Zubulake v UBS Warburg*.

In contrast, while electronic disclosure has not yet become a feature of English law, recent events such as the Hutton inquiry and the Commercial Litigators' Forum's Electronic Disclosure paper suggest that lawyers in this country are beginning to see the importance of using electronic documents in litigation.

How are US lawyers using technology to collect and filter documents for responsiveness and privilege? Can this technology apply in a similar way in the UK? Crucially, can technology make litigation more cost-effective and efficient?

Throughout the electronic disclosure process, it should be remembered that the starting point will be a universe of data, the vast majority of which will be irrelevant. The key is to cull, intelligently and with the use of technology, the data into a manageable set of potentially relevant documents for further review by the legal team.

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Under Part 31 of the Civil Procedure Rules, a party must conduct a reasonable search for relevant documents. With electronic documents, it may be unreasonable to search through every hard drive, server and back-up tape of the client's, if the quantum of the claim is out of proportion to the cost of doing so. If the need is appropriate, however, lawyers should be familiar with and able to investigate their client's entire electronic files.

Broadly speaking, this will first require knowledge of the number, types and locations of computers and other hardware currently and no longer in use; past and present operating systems and application software; back-up rotation schedules and archiving procedures; and the identities of current and former personnel with access to network administration, back-up, archiving or other system operations during the relevant period.

Once the potentially relevant data has been located, the second stage is to use technology to collect, and where necessary restore, the data from its various sources — floppy disks, hard drives, servers and back-up tapes. The third stage is for the data to be converted to a common format for filtering and review. This can include:

- Custodian filtering — Identify key custodians (industry speak for witnesses) that may be relevant to the case and isolate the files associated with those individuals for review.
- Time and date filtering — Allows the reviewer to target relevant time periods and to isolate those files for further review.
- Keyword searching — Keyword and term searching is then applied across the entire document universe.
- Privilege searching — Further keyword searching can be used to identify potentially privileged documents. Individuals with access to privileged information are identified, such as in-house counsel, and are combined with further keyword searches, such as the words 'privileged', 'confidential' or the name of the relevant project/matter. This review can help prevent the inadvertent disclosure of privileged documents.
- Concept searching — Sophisticated technology is used to search for the meaning behind word patterns and occurrences. With concept searching, the reviewer will find documents relating to the issues in their cases because the search is not limited to the individual keyword searches.
- De-duplication — The ease with which electronic documents can be copied and distributed, and the frequency with which they are backed up (i.e. daily, weekly and monthly), means that a significant percentage of potentially relevant documents will



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be exact duplicates. De-duplication involves identifying documents that are exact duplicates of one another and eliminating those duplicates from the review set. De-duplication can decrease the number of documents to be reviewed by up to 90%.

When carried out properly, there are some clear advantages of electronic over paper-based disclosure. According to the judge in the *Zubulake* case: "Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks and the production can be made in electronic form obviating the need for mass photocopying."

Put another way, it would take a legal team months to search through a warehouse full of millions of pages of paper documents in order to find the handful of relevant documents. Searching through millions of pages of electronic documents could be concluded in minutes.

With 70% of all data now created and

stored in electronic format, gone are the days when lawyers were likely to find evidence by looking only through boxes of paper. Instead, lawyers must also look for evidence inside their clients' hard drives and IT systems. Those who ignore this risk overlooking vital evidence. Those who take the time to learn how to find and how to use electronic evidence stand to become more effective litigators.

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