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Ahead of the game

Rules governing electronic disclosure are increasing by the day and legal departments have to constantly keep abreast of the changes or risk the consequences. **Martin Carey** reports.

Today, a thorough knowledge of the relevant disclosure rules and guidelines relating to electronic information is necessary to understanding the issues involved in the preservation and production of digital evidence. In this area recently, the UK electronic disclosure arena has seen significant evolution — including reports relating to the handling of electronic information as published by the Working Party chaired by Mr Justice Cresswell, the Commercial Litigators' Forum and the Litigation Support Technology group (LiST) group. These best practice guidelines make substantial progress in the UK, as litigators, litigation support, IT staff and corporations strive to gain control of the electronic-explosion.

The Cresswell Report

In October 2004, a Commercial Court Working Party, chaired by Mr Justice Cresswell, produced a key report on electronic disclosure. Its goal was making changes to the Commercial Court Guide by the Commercial and Admiralty Courts. The Guide seeks to clarify the definition of a 'document' by including e-mails, word processing documents, databases, documents stored on servers and back-up systems and metadata. The guide also requires parties to exchange information about their electronic systems and the steps they took to search for electronic documents before the first Case Management Conference.

In addition, the guide clarifies the factors courts will examine in deciding the reasonableness of an electronic document search. It recommends that the disclosure statement clearly articulates the extent to which a search has/has not been carried out to locate electronically held data.

Janet Lambert is a partner at Barlow Lyde & Gilbert and a member of the Commercial Court Working Party on e-disclosure. She notes: "The revised Commercial Court Guide encourages parties to co-operate in relation to e-disclosure. However, this may not stop disputes arising, and the first reported case on e-disclosure may not be far away."

In the light of this report, potential parties to litigation will need to consider carefully how they manage and store their electronic documents and the extent of any search they carry out for disclosure purposes.

Commercial Litigators Forum

The Commercial Litigators' Forum (CLF) was established in 2002 by a group of representatives from a range of major law firms to encourage the informal discussion of litigation-related issues impacting the legal profession. In October 2003, the CLF issued the Electronic Disclosure Guidelines, a consultation paper addressing electronic disclosure issues. The paper was updated in October 2004 with additional discussion items.

Mark Humphries, head of advocacy at Linklaters in London and one of the three co-authors of the CLF Guidelines, says: "We embarked on this initiative because of the need for clarification. The Civil Procedure Rules in the UK give us little practical guidance on how to search for, disclose and inspect electronic documents." #

The guidelines first examine the problems of scope and size presented by electronic documents in commercial litigation. After discussing the definition of a document similar to that of the Cresswell report, the CLF guidelines propose four classifications of data:

- Active — data directly accessible on a computer.

- Replicant — automatic temporary files created by a computer.
- Back-up — data saved on tape for business recovery purposes.
- Residual — data that has been 'deleted' but is still recoverable from the machine.

The topics of searching and exchanging electronic documents are also evaluated with the crucial topic of proportionality being addressed. The appendix section includes very valuable 'Technology Questionnaires' to assist parties and counsel in evaluating the organisation's electronic storage architecture, and in identifying media which may contain relevant information.

The LiST group

LiST is comprised of litigation support technology professionals from major UK law firms and the government's Court Service. The group states that: "LiST is a think-tank of litigation support specialists whose aim is to encourage and develop co-operation and uniformity of approach to the use of technology in civil and criminal litigation and dispute resolution."

In March 2005, LiST published a second draft of its Practice Direction — Use of IT in Civil Proceedings. The draft version covers a variety of e-disclosure topics including pre-trial case management conferences, the disclosure of electronic data, the use of courtroom presentation systems and related trial technology, and provisions for allocating costs. The Direction encourages parties to reach agreement on the use of technology for document disclosure purposes — including the basis of charging for, or sharing the cost of, the provision of electronic copies of disclosure documents. Also examined is the exchange of disclosure data in an agreed electronic format using, where appropriate, agreed fields.

In case of difficulty or disagreement, the Direction mandates referral to the court for directions as soon as the first case management conference, if possible. It also allows parties to request a document — already provided in hard copy — in electronic format if that party pays reasonable costs.

The Future

With the ever-growing recognition of modern technology trends, the legal industry is being compelled to develop more substantial, up-to-date standards for handling digital data. As we seek to develop solid practices for digital data handling, these three reports are breaking new ground. Commonalities among the reports include the following significant points:

- the definition of a document for litigation purposes includes electronically created and stored information;
- early discussion between the parties regarding technical and legal issues relating to electronic document disclosure is essential; and
- litigators should consider technology tools for gathering potentially relevant data, searching and reviewing the document set, producing disclosure documents to the opposing party, and/or presenting evidence in court.

However, the pioneering work of the Cresswell Working Party, the Commercial Litigators' Forum and the LiST group is just the initial stage for the UK. If developments in electronic disclosure in the US are any indication as to what may lie ahead for the UK, much reform is in store. In the weeks and months ahead, the UK judiciary, law firms and their clients, and technology experts will continue to develop e-disclosure best practices, particularly on the topics of proportionality and costs.

The legal community must now decide how to keep up with these increasing changes, or risk being swept away by them. Legal teams need to have electronic disclosure resources at their disposal, ready for rapid deployment with a combined knowledge base of legal and technical staff, and the right technological solutions to address the issues they will face.

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