

## **The Advantages of Electronic Disclosure**

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\*Stretton and Burkill, co-chairs of the recent IQPC Information Retention, Management and Disclosure conference, offer the following insights as a result of speaker and delegate commentary as well as their professional experience.

Some of the many objectives of disclosure in commercial dispute resolution are to help reconstruct often complex factual events that led to a dispute, to identify the true issues, and to pave the way toward a settlement or trial. It is therefore simply no longer possible to rely on paper documents to tell the whole story in any but the truly exceptional cases. Technology has revolutionised business-to-business and personal communications, transactions and records management. It creates a trail of data that is increasingly difficult to control or dispose of, and is highly likely to contain documents which will either substantiate or disprove assertions in a dispute. By ignoring electronic data, parties run the risk of missing vital evidence and being in breach of the duty to ensure that the existence of all relevant documents are placed on the table. Getting to grips with electronic disclosure is now an opportunity, not a threat.

### **Competitive Advantages**

There is a common misconception that incorporating electronic evidence into a case will increase the complexity and costs of dispute resolution for both lawyers and their clients. There are, however, a growing number of U.K. lawyers using electronic evidence along with search and review technology in a pro-active way to gain a strategic advantage in their cases.

The amendments to the Practice Direction to CPR Rule 31 in October 2005 have provided more clarity on what should be included in standard disclosure. Although it only requires parties to 'consider' electronic evidence when carrying out the search for documents, a significant level of interest has developed in the area of electronic disclosure since the amendment. There are a growing number of lawyers who are combining their legal and technology knowledge on an increasing variety of investigations and cases. These early adapters are better able to identify risks early on in a case, distil the facts to uncover key issues rapidly, and avoid unnecessarily long drawn out legal battles.

The demand for practical training on electronic disclosure techniques and technologies appears not only to be due to lawyers' legal obligations, but also due to the real benefits of using technology to drive down the costs of document review as well as those of the entire case. Although there is little case law on electronic disclosure in the U.K., lawyers are using this time to explore and develop their own best practices.

The rise in international disputes and regulatory actions in multiple jurisdictions provides significant challenges for law firms and their clients. Silos of data retained in different jurisdictions in order to balance compliance, retention and privacy regulations with disclosure obligations may be at odds with a desire to rationalise an organisation's technical infrastructure. Lawyers should be able to help their clients navigate this regulatory minefield.

### **Old Fashioned 'Lawyering'**

U.K. lawyers are finding that electronic disclosure is not that different to paper disclosure. They still must think about where the key documents may be located and how best to get to the facts they contain. However, the key differences are that there are now more places to look and larger volumes to contend with. To deal with these challenges, lawyers are relying on the skills they have always used – interviewing witnesses, assistance from experts and practical experience.

The initial investigatory stage of a case is now increasingly where lawyers use their new skills in analysing electronic documents. Forensic experts can help in the assessment of clients' often complex IT infrastructures and enable a more focussed search to be carried out. In addition, these lawyers are able to identify with increasing precision the documents needed for the case, thereby laying the foundation for a subsequent review and disclosure exercise that is proportionate to the case.

Advanced technologies are also being used to filter the documents and search with higher levels of accuracy, further reducing the size of the document collection. Lawyers are, however, central to the process since it is they who need to identify the key issues in dispute as well as select the search technique that will uncover the most relevant documents in the case. While each case will require its own keyword strategy, lawyers are becoming well-versed in the art of drawing up proportionate and defensible keyword lists, and best practices in this area are evolving.

During case preparation, lawyers are also using new technologies, such as concept searching and topic review technology, to work their way through document collections and expand their thinking on the key issues and themes in a case. These new intelligent searching functions look for similarities in documents and group them together automatically without human intervention. This is proving useful to lawyers in the early stages of a case because it rapidly exposes issues and new lines of enquiry. Topic grouping also allows legal teams to prioritise key topics and focus their efforts on the more relevant documents. This drives down the cost of review and also helps with early risk assessment.

Lawyers are faced with a growing diversity of technology available to assist them in managing the evidence in their cases with greater efficiency and cost-effectiveness. Most lawyers are now aware of the standard electronic disclosure process which typically involves collection of data, filtering using a data processor, and delivery into a database for review. U.K. lawyers are now more likely to explore a variety of alternative methods to get to the key information quickly and save costs, such as the use of computer forensics techniques. As a result, they are demanding more flexibility from their experts to better control and manage their requirements.

### **Using Technology to Make Headway**

Although technology is responsible for the explosion of potentially relevant evidence, it also offers solutions to help lawyers control the volumes and costs. Add to that the increased speed and accuracy which comes with working in an electronic world, it is easy to understand why lawyers in the U.K. are using intuitive tools to assist in finding specific documents quickly, develop a better understanding of the evidence at hand, and identify potential risks further down the line.

Careful selection of data sources and targeted data collection by electronic evidence experts means that lawyers are frequently starting the disclosure process with data sets significantly smaller than the size they begin with at the initial identification stage. Lawyers are also using proven searching and filtering processes to further reduce their sets of evidence that they need to analyse in depth.

While many U.K. lawyers think electronic documents are difficult to handle, a growing number are making significant headway for their clients by using technology to get ahead in proceedings. They are able to prove that evidence has not been deleted, damaged or hidden, and are using technology to access the key information in a proportionate and defensible way. Having this critical information at their fingertips gives their client a strategic advantage and opportunities to reduce litigation costs.

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