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When legal meets technology: Exploring the future of eDiscovery

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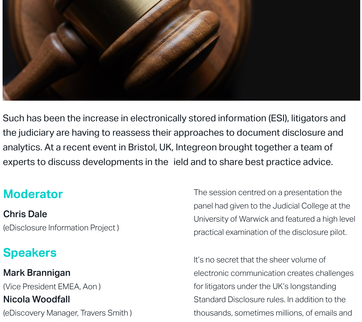

Such has been the increase in electronically stored information (ESI), litigators and the judiciary are having to reassess their approaches to document disclosure and analytics. At a recent event in Bristol, UK, Integreon brought together a team of experts to discuss developments in the field and to share best practice advice.

Moderator

Chris Dale
(eDisclosure Information Project)

Speakers

Mark Brannigan
(Vice President EMEA, Aon)
Nicola Woodfall
(eDiscovery Manager, Travers Smith)
Emily Wyllie-Ballard
(eDiscovery Manager, RPC)
Vince Neicho
(Vice President of Legal Services, Integreon)
Clare Chalkley
(Vice President – Legal Services, Integreon)

The session centred on a presentation the panel had given to the Judicial College at the University of Warwick and featured a high level practical examination of the disclosure pilot.

It's no secret that the sheer volume of electronic communication creates challenges for litigators under the UK's longstanding Standard Disclosure rules. In addition to the thousands, sometimes millions, of emails and e-files that can be typical in disclosure, there is a potentially greater source of evidence to be found in text messages, WhatsApp communications, social media, audio files and various chat platforms. Many of these are not stored centrally – if at all – or easy to retrieve, search or review.

Every Minute

156 Million Emails
16 Million Text Messages
15,000 GIFs Via Facebook Messenger
+154,000 Skype Calls

Source: Forbes.com

Technology and storage formats are constantly evolving, posing an increasingly complicated problem for legal teams when it comes to identifying, collecting and analysing data for evidence, some of which may be held in archive or older, perhaps obsolete file formats. The problem used to be that we added our personal data to our corporate systems, but now we have reversed the issue. As we increasingly take our working lives home with us, personal email accounts, personal devices and mobile phones also need to be considered, and with that multijurisdictional privacy considerations.

Social media is a potentially rich source of evidence, but one that is often ignored. As moderator Chris Dale pointed out to attendees in his introduction to the Bristol event, there have been a number of high profile cases recently that hinged on video or photographic evidence to show, for example, that a claimant was fit and healthy on holiday at the time of a purported injury, or that a sequence of events unfolded in a certain way. ***"Legal teams are advised to consider all possible evidence sources,"*** he advised, including an individual's own social media accounts.

Where legal meets technology

With the sheer volume of ESI to potentially consider, gather and analyse, and the costs associated with disclosure spiralling, it is clear that litigators require a new framework in which to work. This should be one which allows disclosure obligations to be met whilst offering alternative, and hopefully more time and cost efficient methods of doing so. The Disclosure Pilot Scheme, currently running in the Business and Property Courts of England and Wales builds upon the previous Practice Direction, PD31B, and attempts to address this.

The panel discussed the Scheme's new requirements (and reinforcement of the existing requirements) and how they might play out in practice. They examined, for example, how it bolsters the requirement for litigators to give careful consideration to the use of technology to expedite and reduce the cost of disclosure exercises. In almost all cases, parties will be expected to use technology, ranging from e-mail threading, through to predictive coding (where appropriate).

During the seminar, Mark Brannigan, Vice President EMEA at Aon, demonstrated the capabilities of a leading eDiscovery technology and, in particular, how it could be used to identify and analyse the relevant evidence, while "avoiding all the junk". He spoke too of the need to rethink when such technologies are applied, setting the case for utilising technology pre-action to help determine the scope of the investigation, as well as to identify relevant facts once the disclosure process is underway.

"Don't get wrapped up in technology; it doesn't matter how it works, just that it does," was the advice of Integreon's Vince Neicho to legal professionals and the judiciary. While it is the legal team's duty to inform a judge what technology is available to investigate the data, he also recommended having a technical expert, such as your IT professional or an eDiscovery expert, in court to answer any questions. "For example, an explanation of the different terminology or systems will likely be required."

For those legal teams who have typically avoided such technologies and are feeling overwhelmed by the new requirements, Emily Wyllie-Ballard, eDiscovery Manager at international commercial law firm RPC, also offered as advice: ***"These technologies are like a Swiss army knife: if you open all the tools, you can't use it efficiently; you need to know which to use when."*** Fortunately, that can come quickly with use. Reporting functionality (e.g. through graphis) also makes the findings easier for courts to digest.

An end to posturing and delay?

It might be tempting for legal professionals to delay the disclosure process due to the up-front expense and time-consuming nature of the work, the technological requirements or due to the expectation that the case may settle. Drawing on her experiences heading up the eDiscovery and Case Management team at Clifford Chance, Integreon's Clare Chalkley highlighted how a lack of early engagement can put teams on the back foot and increase the risk of error; instead, emphasising the need to be prepared: ***"You need to address as soon as possible, how you collect data, from which sources and from where. Given that such data is now also typically stored or transmitted globally, you need to be aware of potential data privacy and movement issues too."*** This will be more important than ever given the introduction of the pilot scheme.

The panel acknowledged unfortunate practices whereby, eDiscovery is often seized upon by litigators as an opportunity to manoeuvre; for example, buying time with arguments over which specific technology should be used. Would the pilot reduce that tactical posturing by making the process more consistent? Nicola Woodfall, eDiscovery Manager at city law firm Travers Smith, suggested that this would be the case; in particular, the requirement that legal teams needed to be clear and consistent in the ways in which they manage client data during such exercises, and that it be reasonable in cost and proportionate to the matter at hand.

"Fault-finding exercises will certainly need to end," agreed Vince, advising legal teams to "concentrate on the content, rather than the process", and to "be constructive, by seeking clarification, rather than pointing fingers". He added: ***"If you're going to challenge omissions, challenge the ones that matter. Legal teams should consider alternative methods of proving or clarifying a point on which documents are missing or vague; for example, via a Notice to Admit Facts. Fishing expeditions are also to be frowned upon. Requests should be framed narrowly: "Don't ask for the kitchen sink!"***

The panel repeated the list of judicial case management do's and don'ts that they presented to the judges at the Judicial College. ***"There's nothing more sure to run up costs than telling legal teams to 'go sort it out', or 'just hand it over anyway',"*** commented Vince.

E icient case management

Of course, there is no such thing as one size fits all; instead, litigators need to put budgets and timelines in places that befit the matter, which as Emily pointed out, is the essence of good case management. Here, the Disclosure Review Document (DRD), set up as part of Practice Direction 51u, will play a key role. Nicola recommended undertaking a thorough ID exercise to put yourself on the front foot, as "you can also adapt your strategy if you can establish early on the strength of the case and thus likely chances of success".

The scope of the disclosure and cost estimates are to be specified as part of that DRD, which should also include an explanation of what technology you're using – or why you are choosing not to. Discussing potential pitfalls, confusion and tips, the panel emphasised the need to plan efficiently and to keep an accurate record of searches used to locate documents. Any searches carried out in the fact-gathering stage may have to be revealed in the disclosure process; including their scope and construction and, perhaps, the reasoning behind them.

The experts also advised on the completion of the DRD, including the need to avoid boilerplate answers, avoid being over-prescriptive or over-reliant on keywords, and obtain all the information from your client in any event.

Cost saving beyond technology

The wording of the pilot focuses on the requirement to use technology to save costs. This can also aid in levelling the playing field for smaller firms. However, as the panel pointed out, there are other effective ways to reduce costs and level the playing field. Parties need to properly evaluate the well-established principle of 'People, process, technology'. For example, outsourced document review, offered by alternative legal service providers (ALSPs) such as Integreon, represents a significant time and cost-saving opportunity. It gives firms access to specialist resources, while focusing lawyer effort on what they do best. As Clare noted: ***"Lawyers don't typically enjoy document review."***

"Clients also don't want to pay lawyers to review documents," added Vince. "Outsourced document review enables responsive and intelligent resourcing; for example, on a first pass review of the document set. The law firm is still in control of the process, but onshore or offshore teams do the heavy lifting and the analytics. Typically, accuracy of review can also benefit from the focus of reviewers, who are not distracted by non-review tasks."

Integreon is excited to be bringing its expertise to bear on these important subjects, and the members of this panel have signalled their agreement to re-run this and similar sessions. Watch this space!