

## **E-Disclosure: Practicalities and Pitfalls**

**Michael Wheeler**

## Introduction

*“A computer once beat me at chess but it was no match for me at kick-boxing”<sup>1</sup>*

1. As Jackson LJ said in his review of civil litigation costs *“In larger actions, disclosure of documents is one of the principal drivers of costs... the arrival of the electronic age has multiplied all these problems”*.
2. The need to deal with Electronically Stored Information (“ESI”) in litigation is increasingly important and its impact becoming more widespread. It is now rare for any case to be determined without reference to electronic documents, whether they are e-mails, digital photographs or simply letters prepared on word-processing software.
3. The reason for this is obvious: the way in which people and businesses produce, store and deal with their information has changed out of all recognition over the past 20 years. Parties are likely to have produced most of their documents on computers and are likely to have saved those documents on to hard-drives or other storage media<sup>2</sup>. Recordings are now made on digital devices and downloaded to computers and photographs taken on digital cameras. E-mail has replaced “snail mail”, sat nav has replaced maps, everyone has a mobile phone and, if the Daily Mail is to be believed, social networking sites are replacing real friends. Further, we now live in an age where printing documents is discouraged on environmental grounds<sup>3</sup>.
4. So prevalent is the storage of ESI on computers and other electronic storage devices that systems have to be put in place to back-up those devices in case of failure; there is no presumption that a paper copy has ever existed<sup>4</sup> and the default position of business is that documents will usually be archived electronically.

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<sup>1</sup> Emo Phillips, comedian.

<sup>2</sup> Research undertaken at UC Berkley estimated that 90% of documents were created and stored electronically in 2003. That figure can only have increased.

<sup>3</sup> The irony of handing out dozens of printed copies of seminar papers has not escaped us.

<sup>4</sup> UC Berkley’s research suggested that, dependent on the organisation, between 35% and 70% of all documents created were never converted to “hard copy”

5. A further problem of ESI is that it clings to existence tenaciously. Anyone who has tried to delete files from a computer (or even worse, to delete an entry on a web-page) may be aware that it is exceedingly difficult to delete electronic information in a permanent way; whereas historically the destruction of a document prevented its inspection, no such guarantees exist in relation to deleted ESI. There are now several companies who specialise in recovering electronic data and they are able to perform remarkable (if a little scary) feats of information recovery.
6. Accordingly, litigants are now forced to consider a much more onerous search for documents than they might have envisaged. Questions include: where must they search? For what? Which computers, servers and back-ups must be searched in addition to paper sources? Do they need to search mobile telephones, PDAs and Sat Navs? Do they need to restore “deleted” information? Do they need to disclose Facebook status updates and Tweets?
7. Litigants are also faced with the question of how to carry out a reasonable search of what could be (and often is) an astonishing quantity of information. Can they limit their search to a date range? To certain people, types of document, types of issue? Can they limit their search to documents with certain keywords? If so, how do litigants and the Courts balance the basic need for disclosure of relevant documents with the need for a reasonable and proportionate search and with the obvious fact that any limits on the search carried out will probably exclude some relevant documents and may exclude many.
8. One of the key problems with E-disclosure is that most parties not only fail to consider these issues but also that they would not know how to deal with them even if they did. Accordingly, one of our roles as litigators is to guide parties through this complex process from the very earliest stages of a dispute.
9. To help us in this task, we have a new Practice Direction (PD31B) finally implemented after a long consultation process chaired by the Senior Master. The new Practice Direction applies to proceedings started on or after 1 October 2010, with Paragraphs 2A.2 to 2A.5 of Practice Direction 31A continuing to apply to proceedings started before that date. Practice Direction 31B, is

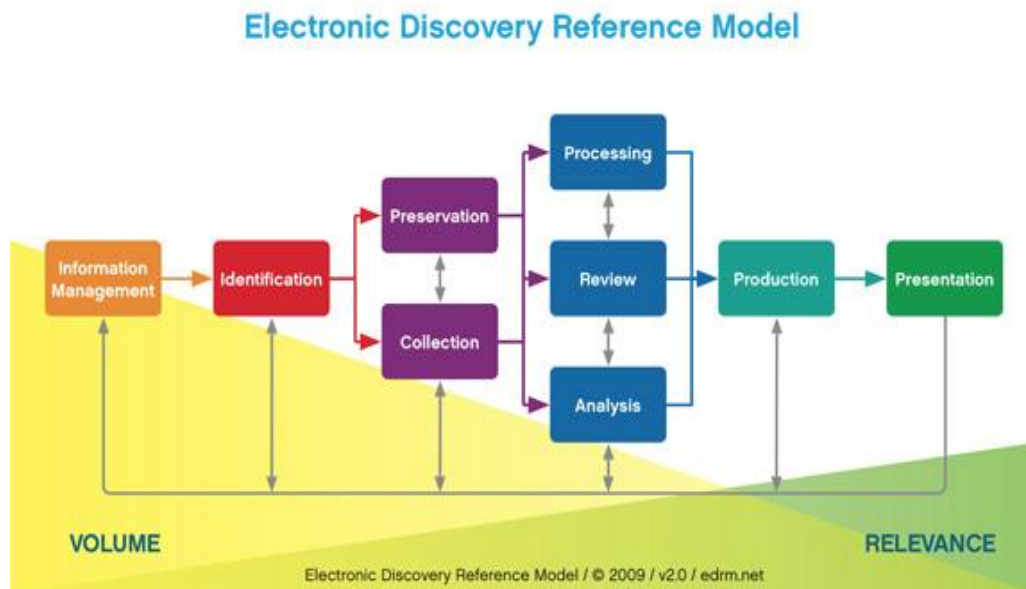
designed to 'encourage and assist' parties to litigation to reach agreement in relation to the disclosure of ESI.

10. Many commentators have suggested that the new rules add little to the law developed by the Courts; however, it is clear that the new obligations are much more explicit and potentially burdensome. Further, the new rules create potential problems for clients and their advisers. The purpose of this paper is to see how the rules can be applied in practice and to examine ways to engage practically and pragmatically with e-disclosure. We will also examine some of the "pitfalls" that await the unwary.

## The Process of E-disclosure

*"Success depends upon previous preparation, and without such preparation there is sure to be failure"<sup>5</sup>*

11. Most e-disclosure systems work on the basis of procedures largely in line with the Electronic Discovery Reference Model ("EDRM"), which divides the process of e-disclosure into distinct stages.



12. The stages can be summarised as follows:

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<sup>5</sup> Confucius, philosopher

- a. Information Management is the first stage in the EDRM and is the organisation of the relevant information so that the relevant categories of document can be located easily. This is partially achieved by having an underlying organised system of document storage but should be one of the early issues addressed whenever lawyers are appointed in relation to a matter which is becoming contentious.
  - b. The identification stage is the precursor to disclosure. It involves the identification of the documents, sources of documents and categories of document that must be searched. Often this cannot be achieved without significant input from the client and input from electronic disclosure service providers is useful.
  - c. Preservation of documents is an important factor (see below) and systems should be put in place as soon as a matter becomes litigious to ensure that ESI is preserved. This can also involve denying access to documents until such time as the metadata can be harvested. Collection of documents is the process of actually removing the ESI from the various sources.
  - d. Processing is the loading of data on to a system where it can be reviewed. This is also the stage where various techniques are applied to reduce the initial harvest of ESI to something more manageable. De-duplication, keyword searches, clustering and concept searches etc are applied at this stage. The output of that process is then reviewed by the legal teams.
  - e. Production involves the form in which disclosure is given. This can be carried out by printing the information (dependent on volume), or providing it electronically, by disc or hard-drive.
  - f. Presentation is the manner in which the documents are presented to the Court or tribunal.
13. The topics covered in this paper will largely follow that chronological process and examine some of the legal issues that arise at each stage.

## The Duty of Standard Disclosure

*“Seldom, very seldom, does complete truth belong to any human disclosure; seldom can it happen that something is not a little disguised, or a little mistaken.”*<sup>6</sup>

14. Before embarking on that discussion, it is useful to remind ourselves of the standard that parties are required to meet. The mere fact that an electronic disclosure exercise must be undertaken does not expand the duty of disclosure any wider than the ordinary duty of standard disclosure. This point was summed up by Morgan J in *Digicel (St Lucia Ltd) v Cable & Wireless Plc* [2009] 2 All E.R. 1094, when he said:

*“...it must be remembered that what is generally required by an order for standard disclosure is a “reasonable search” for relevant documents. Thus the rules do not require that no stone be left unturned. This may mean that a relevant document, even a “smoking gun” is not found”*

15. These comments were cited with approval by Paul Girolami QC, sitting as a Deputy Judge of the Chancery Division in *Abela v Hammond Suddards* (Unrep 2 December 2008 ChD). The balance required in achieving a “reasonable” search of ESI is the cornerstone of the Court’s approach to e-disclosure.

## What is a “Document”?

*“Don’t put my name on it. These are simply documents I make”*<sup>7</sup>

16. One might think that it is easy to identify a “document”, whether electronic or not. There is something so natural about considering correspondence, photographs, plans and the like “documents” that it does not much matter to the casual observer whether such items are kept or created in hard copy or electronically. Thus it comes as no surprise that e-mails, digital photographs and word-processed documents are considered “documents” for the purpose of proceedings.

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<sup>6</sup> Jane Austen, author

<sup>7</sup> Man Ray, photographer and artist

17. It is always useful, however, to bear in mind that the definition of “document” in CPR Part 31 is extremely wide and essentially encompasses anything in which information of any description is recorded <sup>8</sup>. Before grappling with modern electronic information, the Court had already concluded that “documents” could include: audio recordings <sup>9</sup>, film and video recordings <sup>10</sup> and inscriptions on a wall <sup>11</sup>. Against that background it is easy to see the potential that almost all ESI that can be retrieved could be classed as a “document”. The categories of “document” are not closed and as technology advances it is likely that the concept will expand to include many new forms of data storage and retrieval.

18. For the time being, a useful starting point when seeking to identify “documents” is to have regard to Paragraph 2A of the Practice Direction to Part 31, which provides that the definition of “document” extends to:

*“electronic documents including e-mails, electronic communications, word-processed documents, databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been “deleted”. It also extends to additional information stored and associated with electronic documents known as metadata”*

19. It is immediately apparent that the definition of “electronic document” under the new practice direction <sup>12</sup> is very similar but gives further examples of potential sources of ESI:

*‘Electronic Document’ means any document held in electronic form. It includes, for example, e-mail and other electronic communications such as text messages and voicemail, word-processed documents and databases, and documents stored on portable devices such as memory sticks and mobile phones. In addition to documents that are readily accessible from computer systems and other electronic devices and media, it includes documents that are stored on servers and back-up systems and*

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<sup>8</sup> CPR 31.4

<sup>9</sup> *Grant v Southwestern & Country Properties Ltd* [1975] Ch 185

<sup>10</sup> *Senior v Holdsworth* [1976] QB 23 and *Garcin v Amerindo Investment Advisors Ltd* [1991] 4 All ER 655

<sup>11</sup> *Ruscoe v Grounsell* (1903) 20 TLR 5

<sup>12</sup> CPR PD 31B para 5(1)

*documents that have been deleted. It also includes Metadata and other embedded data which is not typically visible on screen or a print out*

## Metadata

20. Metadata is essentially data about data. In the context of electronic documents, it tends to mean the electronically archived data associated with any particular file, which describes its definition, structure and organisation. For example, the metadata in a digital photograph might include details such as the image size and resolution, the colour depth, when and by whom the image was created, the camera that captured the image, whether the image has been manipulated, when and for how long.
21. If you want to see metadata in action, most word-processors have an option called “properties”, which lets you view the metadata for a particular document. Try it when you get back to the office; you might be surprised (and not a little concerned) to see just how much data is available about the documents you produce.
22. It is clear, from the practice direction, that metadata is a “document” for the purposes of disclosure; however, it is unlikely that providing metadata will commonly form part of a party’s obligation of standard disclosure. Unless there is an issue in the case as to the provenance or creation of a document, the information stored in metadata is unlikely to be germane.
23. Where the provenance of documents is called into question and in cases where it is alleged that certain documents have been manipulated, orders for the disclosure of metadata are becoming increasingly common.
24. In Hellard v Money [2008] EWHC 2275 (Ch), metadata was ordered to be disclosed when it was alleged that a crucial meeting minute was not in fact contemporaneous and had been fabricated many years later. The metadata revealed that the meeting minute, which had been relied on as a record of a meeting on 1 October 2001 had not in fact been created until September 2005.

25. The corollary of the fact that metadata can be used to undermine another party's documents is that it can be used to support a party's documents. Many of us have experience of cases where a seemingly crucial document is rendered impotent by a lack of information on its face. Take, for example, a copy letter neither signed nor dated nor on headed paper because it has been printed from the client's computer archive. The other side argues that the letter was never sent. A witness' recollection that the document was printed and posted may well be supported by metadata showing (i) when the document was created and (ii) when it has been printed in the past.

26. The new Practice Direction imposes a requirement for:

*"A party requesting disclosure of additional Metadata or forensic image copies of disclosed documents (for example in relation to a dispute concerning authenticity) must demonstrate that the relevance and materiality of the requested Metadata justify the cost and burden of producing that Metadata."*

27. A cautionary note about metadata: it is the metadata within a document that stores, for example, tracked changes. It is possible, with some software packages, to recover previous drafts of documents and to see who has suggested certain amendments and corrections. The potential complications that this can cause are numerous and stark.

## Databases

28. In a pre-CPR case, Derby v Weldon [1991] 1 WLR 652, Vinelott J held that:

*"the database of a computer, so far as it contained information capable of being retrieved and converted into readable form, and whether stored in the computer itself or in back-up files, was a document."*

29. That position has been confirmed in Marlton v Tektronix UK Holdings Plc [2003] Info TLR 258 as follows (citing the then current edition of the White Book):

*"A computer database which forms part of the business records of a company is, in so far as it contains information capable of being received and converted into*

*readable form, a document for the purposes of CPR 31.4 and is therefore susceptible to disclosure — and attention in that notice is drawn also to the proposition that — word-processing files in computers are within the definition of documents for the purpose of an order preserving documents in connection with the proceedings.”*

30. The mere fact that special equipment or software would be needed in order to retrieve, decipher, translate or decode information from a source does not prevent that source from amounting to a “document”<sup>13</sup>.

### Other sources

31. The boundaries of e-disclosure are not closed and litigators will need to explore all options with their clients when assessing the potential sources of disclosable documents. As long ago as 2004, Cresswell LJ in his report on e-disclosure stated that MSN instant messages were likely to be disclosable. Further, anecdotal evidence suggests that Facebook entries and Tweets are beginning to be deployed in English Courts. In one case a Facebook status update was apparently used to great effect in an RTA when a driver’s first instinct was to post details of the accident from his mobile phone. Facebook, of course, recorded the date and time of this message. Unfortunately for the hapless Facebooker one of his “friends” also knew the other party in the collision.
32. Certainly, Facebook, LinkedIn and Twitter have been deployed in US litigation and there seems little doubt that the contents of messages on social networking sites would be disclosable, particularly in light of the wording of the new Practice Direction<sup>14</sup>.
33. Further, in Noble Resources SA v Gross [2009] EWHC 1435 (Comm) text messages and message fragments were disclosed from mobile phones and Blackberries.

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<sup>13</sup> See, for example, Grant v Southwestern & County Properties [1975] Ch 185 (tape recordings) and Victor Chandler International Ltd v Commissioners of Customs & Excise [2000] 1 WLR 1296 (electronic teletext advertisements)

<sup>14</sup> *documents that are readily accessible from computer systems*

## The New Practice Direction

*“People think computers will keep them from making mistakes. They’re wrong. With computers you make mistakes faster”*<sup>15</sup>

34. Practice Direction 31B, which supplements CPR Part 31, applies only to multi-track proceedings (unless the Court orders otherwise) commenced on or after 1 October 2010. The purpose of the new Practice Direction is stated to be:

*“to encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents”*<sup>16</sup>.

35. The Practice Direction opens by setting out five “General Principles” which should be applied. It is likely that significant divergence from these principles will, unless there is a good reason, sound in costs. The principles are all commonsense and can be summarised as:

- a. manage electronic documents efficiently in order to minimise costs;
- b. use technology to ensure efficient and effective document management;
- c. disclosure regimes should give effect to the overriding objective;
- d. parties should give inspection of electronic documents in a form “which allows the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure”<sup>17</sup>; and

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<sup>15</sup> Adam Osborne: author, publisher and computer pioneer.

<sup>16</sup> CPR PD31B para 2

<sup>17</sup> You might be surprised how often parties rush off, compile their e-disclosure and exchange only to find that the systems being used are wholly different and incompatible. It is likely that failure to liaise and ensure compatibility will result in costs being disallowed or adverse orders made.

- e. disclosure of electronic documents which are of no relevance to the proceedings may place an excessive burden in time and cost on the party to whom disclosure is given <sup>18</sup>.
36. The Practice Direction then goes on to give more specific guidance on the various stages of the EDRM, covering document preservation, co-operation between the parties, disclosure methods and the presentation of the disclosure generated. We will examine some of these ideas in more depth below.

## Preparation for Disclosure and Preservation of Documents

*“If I had six hours to chop down a tree, I’d spend the first hour sharpening the Axe”* <sup>19</sup>

37. In *Earles v Barclays Bank Plc* [2009] EWHC 2500 (Merc), the Court confirmed that there is no duty in English law to preserve documents before the commencement of proceedings <sup>20</sup>; however the Court accepted that if there was evidence of “deliberate spoliation” then adverse inferences may be drawn <sup>21</sup>.
38. Conversely, there is an active duty to preserve documents once proceedings are afoot and adverse inferences will more readily be drawn <sup>22</sup>.
39. The new Practice Direction arguably changes the landscape in relation to preservation of documents. Paragraph 7 of PD31B provides that (emphasis added):

*“As soon as litigation is contemplated, the parties’ legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be*

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<sup>18</sup> This is probably the most significant costs risk under the new regime; the use of keyword and other types of search technique can be extremely effective at identifying a corpus of relevant documents but poorly structured searches can lead to the generation of voluminous irrelevant material. See also *Vector Investments v Williams* [2009] EWHC 3601 (TCC) referred to below.

<sup>19</sup> Abraham Lincoln, former US President

<sup>20</sup> per HHJ Simon Brown QC at [28], see also *Douglas v Hello! Ltd* [2003] 1 All ER 1087.

<sup>21</sup> There is Australian first instance authority which makes a compelling case that the duty to preserve documents should extend to the time when litigation was reasonably contemplated (see *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73; however on appeal ([2002] VSCA 197) that reasoning was overturned and it was held that the Court should only be concerned with pre-issue destruction of documents if there was an attempt to pervert the course of justice.

<sup>22</sup> See for example, *Infabrics Ltd v Jaytex Ltd* [1985] FSR 75.

*preserved include Electronic Documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business.”*

40. That provision is (obviously) untested, however, it is tolerably clear that if you as litigators are under a duty to notify your client of the need to preserve documents then:
  - a. there is a much greater possibility that adverse inferences will be drawn where documents are destroyed pre-issue; and
  - b. you must ensure that clients are notified of their duties and that those duties extend to either implementing any “document hold” policy or to suspending any routine document destruction policy. A sensible first step towards satisfying this duty may well be to include an express explanation in your dispute resolution retainer letters and, potentially, to compile a standard form guide to document retention explaining what steps a client should take to preserve documents.
41. The preservation of ESI is more complicated than the preservation of ordinary documents, partly due to the nature of ESI and its associated metadata. Metadata can be altered or destroyed by doing simple tasks with documents such as opening or printing them. If a case relies on evidence of provenance, careless handling of ESI can destroy metadata useful to a party’s case<sup>23</sup>.
42. On a practical level, it is essential to put in place a strategy for the identification of sources of ESI and for document preservation. In order to achieve this it is necessary to communicate with the right people within a party’s organisation to ensure that this happens. In particular:
  - a. remember that it is the Company Secretary who has the legal obligations in relation to the retention and disposal of documents. The Company Secretary should be the first port of call for the preservation of documents and a “litigation hold” should be sent out to all relevant employees.

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<sup>23</sup> A note of caution to this effect is now included in the new Practice Direction

- b. The head of IT should be brought in to any discussions in order to identify sources of ESI for the purposes of the disclosure exercise and to isolate any sources that are susceptible to easy or accidental destruction.
- c. Bear in mind that investment in the early stage of document identification can lead to significant cost savings in the long-run.
- d. It is often useful to involve an e-disclosure company in these discussions at an early stage<sup>24</sup>.

## Co-Operation in E-disclosure

*“Now join your hands, and with your hands your hearts.”*<sup>25</sup>

*“I’ll show you mine if you show me yours”*<sup>26</sup>

43. Whilst it may not be the default position of litigators to seek to co-operate with their opponents, co-operation is the key to any successful e-disclosure operation. Further, the requirement to co-operate is enshrined in the old Practice Direction and parties fail to abide by it at their peril. In particular, parties are required to:

*“discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies”.*

44. There is no finer example of the potential pitfall of non-cooperation than the case of *Digicel v Cable & Wireless Plc*. The principles set out in the judgment of Morgan J encompass many of the practical aspects of the law relating to

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<sup>24</sup> See Joanna Ford’s top ten tips for selecting an e-disclosure provider  
[http://www.crippslink.com/index.php?option=com\\_content&view=article&id=1005:10-top-tips-for-choosing-an-edisclosure-provider&catid=26:cdr-publications&Itemid=508](http://www.crippslink.com/index.php?option=com_content&view=article&id=1005:10-top-tips-for-choosing-an-edisclosure-provider&catid=26:cdr-publications&Itemid=508)

<sup>25</sup> William Shakespeare, playwright

<sup>26</sup> Anon

electronic disclosure and the judgment is an extremely useful summary of the law to date and is essential reading before embarking on any e-disclosure exercise.

45. Essentially, the Claimants in *Digice!* operated mobile telephone networks in various Caribbean jurisdictions. The Defendants were essentially the incumbent telecoms operators. During the period 2001 – 2006, the telecoms markets in each of the relevant jurisdictions were liberalised and the Defendants were required to surrender their exclusive licences. The Claimants sought to establish mobile phone businesses in each jurisdiction and needed to “interconnect” to the Defendants’ established telecoms networks. Such interconnection was provided for in various local statutes.
46. The root of the case was that the Claimants alleged that the Defendants had deliberately delayed interconnection in breach of the various statutory duties but more significantly that the Defendants had done so in a co-ordinated manner amounting to a conspiracy to injure the Claimants by unlawful means. The pleadings in the case were, unsurprisingly, lengthy running to well over 1600 pages and the list of issues in dispute was, again unsurprisingly, immense.
47. The Defendants produced over 1 million e-documents to their solicitors, which were de-duplicated to around 625,000 documents. A key-word search narrowed these to 197,000 documents, which were reviewed by hand to 5,212 documents. Those documents filled 83 lever arch files and the process cost upwards of £2m. The Claimants on the other hand had produced 860 lever arch files of disclosure.
48. There had been no discussion of e-disclosure at the first CMC where the standard disclosure order was made and the parties had not liaised as to how to carry out the disclosure exercise. When the matter came before Morgan J, the unilateral decisions that had been made by the Defendants’ legal team came under scrutiny.

49. The Court held that the Defendants had failed to carry out a proper search and considered whether to order further searches to be undertaken<sup>27</sup>. Ultimately he decided that a further 8 keywords should have been part of the Defendants' search and that a further 14 e-mail addresses should have been searched. As a result, much of the work that had been undertaken by the Defendants would have to be repeated<sup>28</sup>.
50. The principal point, to emerge from *Digice!* is that co-operation between the parties is critical to any pragmatic approach to e-disclosure. In particular, Morgan J emphasised:
- “something... which the parties in the present case disregarded. Paragraph 2A.2 of the Practice Direction states that the parties should at an early stage in the litigation discuss issues that may arise regarding searches for electronic documents. Paragraph 2A.5 of the PD states that where key word searches are used they should be agreed as far as possible between the parties. Neither side paid attention to this advice.”*
51. Further, Ramsay J considered the duty to co-operate in *Vector Investments v Williams* [2009] EWHC 3601 (TCC) and concluded that it was appropriate to make a reduced costs order. In that case, over 800 lever arch files of disclosure were given by the Claimant whilst the trial bundle was 70 files. The Court highlighted the fact that discussion as to appropriate disclosure could have limited the duplication and irrelevant material ultimately disclosed.
52. In *Earles v Barclays Bank Plc*, the failure of the Defendant to enter into discussions in relation to ESI was heavily criticised and appears to have played a significant (but not exclusive) part in the Judge's decision to reduce the successful Defendant's costs by 75%.
53. Ultimately, the objective of co-operation in e-disclosure is to resolve issues between the parties and to avoid costly satellite litigation on disclosure.

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<sup>27</sup> Morgan J accepted that the Court would not necessarily order further searches if such searches would be disproportionate in cost compared to their likelihood of locating further relevant documents.

<sup>28</sup> The new Practice Direction (paragraph 19) grants an express power for the Court to order further searches if parties go off on frolics of their own and carry out inadequate searches without agreement or approval.

Reference of disclosure issues for determination by the Court should be the last resort not the first step.

54. Having said that, compliance with the Practice Direction and reasonable co-operation beforehand remains essential even if matters are to be referred to the Court. In *Digicel*, *Abela* and *Goodale*, the Court was called upon to determine disclosure issues but in none of those cases did the Court have sufficient information to do so. This resulted in a fairly onerous and costly protocol being imposed in *Digicel* and future hearings being envisaged in both *Abela* and *Goodale*. Thus the lack of co-operation meant that the even the directions in relation to disclosure could not be dealt with in an efficient and cost-effective manner.

### Impact of the New Practice Direction

55. These concepts of co-operation have been expanded under the new system and two new obligations are imposed:
- a. Under PD31B paragraph 8, the parties and their legal advisers must before the first CMC “*discuss the use of technology in the management of Electronic Documents and the conduct of proceedings*”. That obligation extends not only to the preparation of lists and disclosure but also to “presenting documents and other material to the court at trial”;
  - b. Paragraph 9 sets out the more familiar requirement to discuss the electronic disclosure exercise itself. It reminds us that in complex cases the need to begin disclosure discussions may arise before issue (for example during any relevant pre-action protocol). There is then a checklist of fifteen points that discussions “should include”.

### The Checklist

56. The checklist under paragraph 9 includes the following:
- (1) *the categories of Electronic Documents within the parties' control, the computer systems, electronic devices and media on which any relevant documents may be held, storage systems and document retention policies;*
  - (2) *the scope of the reasonable search for Electronic Documents required by rule*

31.7;

- (3) *the tools and techniques (if any) which should be considered to reduce the burden and cost of disclosure of Electronic Documents, including –*
  - (a) *limiting disclosure of documents or certain categories of documents to particular date ranges, to particular custodians of documents, or to particular types of documents;*
  - (b) *the use of agreed Keyword Searches;*
  - (c) *the use of agreed software tools;*
  - (d) *the methods to be used to identify duplicate documents;*
  - (e) *the use of Data Sampling;*
  - (f) *the methods to be used to identify privileged documents and other non-disclosable documents, to redact documents (where redaction is appropriate), and for dealing with privileged or other documents which have been inadvertently disclosed; and*
  - (g) *the use of a staged approach to the disclosure of Electronic Documents;*
- (4) *the preservation of Electronic Documents, with a view to preventing loss of such documents before the trial;*
- (5) *the exchange of data relating to Electronic Documents in an agreed electronic format using agreed fields;*
- (6) *the formats in which Electronic Documents are to be provided on inspection and the methods to be used;*
- (7) *the basis of charging for or sharing the cost of the provision of Electronic Documents, and whether any arrangements for charging or sharing of costs are final or are subject to re-allocation in accordance with any order for costs subsequently made; and*
- (8) *whether it would be appropriate to use the services of a neutral electronic repository for storage of Electronic Documents.*

## The Questionnaire

57. Even before the amendments to the Practice Direction and the ESI questionnaire were granted approval from the Civil Procedure Rules Committee, the questionnaire itself was deployed in court proceedings. In the case of Goodale v Ministry of Justice [2009] EWHC B41 (QB), the Senior Master was faced with parties who had not engaged in any discussions and he ordered them to complete the ESI questionnaire.
58. The questionnaire is now incorporated into PD31B at paragraph 10. Essentially, the questionnaire will come in to play in one of three ways:
- a. the parties may agree to use the questionnaire as part of their discussions “*where the parties may find it helpful*”<sup>29</sup>; or
  - b. the Court may order the parties to complete the questionnaire where they have been unable to reach agreement<sup>30</sup>; or
  - c. the Court may order the parties to complete the questionnaire where the Court considers that the agreement between the parties is “*inappropriate or insufficient*”<sup>31</sup>.
59. The questionnaire is a court document and must be verified by a statement of truth<sup>32</sup>. The questionnaire should be signed by a person connected with and able to discuss the e-disclosure exercise. This is because Paragraph 16 requires that:
- “The person signing the Electronic Documents Questionnaire should attend the first case management conference, and any subsequent hearing at which disclosure is likely to be considered”.*
60. Parties must therefore give careful consideration to who, either in their organizations or from their solicitors, should be in control of the e-disclosure operation. Clearly if disclosure matters are raised and the relevant person is

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<sup>29</sup> Paragraph 10

<sup>30</sup> Paragraphs 15 and 17

<sup>31</sup> Paragraph 18

<sup>32</sup> Paragraph 11

not in attendance, the Court may elect to adjourn the hearing and adverse costs consequences may follow.

## Court Intervention

61. The relevance of the checklist and the questionnaire are made clear in paragraphs 14 to 16: the documents submitted to the court in advance of the first CMC “*should include a summary of the matters on which the parties agree in relation to the disclosure of electronic documents and a summary of the matters on which they disagree*”. As set out above, the Court may then substitute its own order or require the parties to go through the e-disclosure questionnaire<sup>33</sup>.

### **How to achieve a Reasonable and Proportionate Electronic Search?**

*“The good news about computers is that they do what you tell them to do. The bad news is that they do what you tell them to do”<sup>34</sup>*

62. It is now clear that the reasonable search for standard disclosure must encompass searching ESI. The cases cited above all concern whether the efforts made by one or both parties to search ESI complied with the obligation to carry out a reasonable search. In addition in *R v Secretary of State for Defence (Ex p Al-Sweady & Ors)* [2009] EWHC 2387 (Admin), the MoD was heavily criticised for failing to carry out a sufficient search of ESI and for failing to have an adequate system in place for the retrieval of documents.
63. The ease with which a party’s ESI can be searched will vary from party to party dependent upon its record keeping systems and methods of working. The two most practical methods of dealing with these issues are (i) to ensure proper liaison with the client to identify sources and types of data and (ii) to ensure early liaison with opponents to identify globally the sorts of data and information that will need to be exchanged.
64. Proportionality is a key element in standard disclosure; however, as the cases relating to the restoration of back-up tapes (see below) will show, unless a

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<sup>33</sup> CPD PD31B paras 15 and 18

<sup>34</sup> Ted Nelson, IT pioneer.

party objecting to disclosure can produce compelling evidence as to the scale, cost and complexity of the disclosure exercise involved, an argument that e-disclosure is disproportionate is likely to be frowned upon. In particular, the Courts have acknowledged that:

- a. Relevant documents can often be found quicker in electronic form than in paper form, provided that the sources have been properly identified at the outset.
  - b. The issues in a case often lend themselves to the easy identification of key date ranges and data custodians which allow for easy limits to be placed on the search.
  - c. Various search techniques such as de-duplication, keyword searching, cluster and concept searches can be used to whittle the documents down to a manageable corpus of documents for manual review.
65. It is worth mentioning the case of *Hands v Morrison Construction Services Ltd* [2006] EWHC 2018 (Ch) where an applicant for disclosure attempted to side-step the proportionality argument by proposing to meet the costs of the disclosure exercise itself. Briggs J still refused to make the order as the volume of documents sought remained disproportionate and the exercise would place undue burden on the disclosing party.
66. These principles are now enshrined in paragraphs 20 to 24 of the new Practice Direction. It is not necessary to set out the whole range of issues in these notes but the key elements include: the location of the electronic sources and the accessibility of the information on them<sup>35</sup>, the likelihood of locating relevant data, the cost of recovering the data, the cost of the disclosure and inspection exercise, the risk that documents will be altered during the disclosure process (by for example erasing or changing meta data).
67. Further, the process envisaged by the new Practice Direction is an iterative process and paragraph 23 specifically states that in some cases it may be

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<sup>35</sup> CPR PD31B para 24 states that disclosure will normally be limited to reasonably accessible data.

appropriate to adopt a staged procedure with limited categories of documents that can be expanded or reduced as appropriate.

## De-duplication

68. One of the side-effects of the growth of e-business is that e-mails get sent to several users, who in turn store, reply or forward those e-mails. The amount of duplicated information can be huge (one need only consider the Defendants' disclosure in Digice! where around 1.1M documents were reduced to 625,000 by de-duplication alone). Thus a system of de-duplication will be essential in all but the smallest e-disclosure exercises and it is useful for the parties to agree the extent of the de-duplication exercise at an early stage.

## Keyword / Automated searching

69. Once the documents have been located and de-duplicated, review of all of the documents generated will normally remain a mammoth task which would be either prohibitively expensive or physically impossible. The use of computer search techniques such as keyword searching allows large volumes of ESI to be reviewed in a cost-effective manner in order to generate a corpus of documents to be reviewed manually by the legal team.

70. Keyword searching is probably the best known and widely used search tool for ESI and involves searching the de-duplicated documents for certain search terms in much the same way as an internet search engine. The documents which do not contain the search terms are discarded from the disclosure exercise. This is very uncomfortable for most litigators who are only too aware that keyword searching is an imperfect tool that might discard a "smoking gun" document<sup>36</sup>.

71. Keyword searching is expressly provided for at paragraph 25 of the new Practice Direction and parties are reminded that "*The injudicious use of*

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<sup>36</sup> An American study at the "Text Retrieval Conference" (TREC) tested various search methods against a database of 7 million documents taken from an actual piece of large-scale American litigation. Whilst Keyword searching performed best out of all of the tested methods, it still returned only a fraction of the known relevant documents.

*Keyword Searches may result... in failure to find important documents... and/or may find excessive quantities of irrelevant documents”.*

72. Keyword searching can be enhanced by the use of Boolean operators “AND” “OR” “NOT” and with the use of Boolean type search modifiers such as the proximity operator “w/n” and the wildcard operator “\*”. These operators can create a more effective keyword searching process.
73. Keywords have to be chosen with great care and skill; too broad and the corpus of documents sent for manual review will be vast and largely irrelevant; too narrow and there is a real danger that too many relevant documents will be missed. Failure to search for sufficient keywords may also result in the Court ordering a further search (see *Digicel*) and the Court will always encourage parties to co-operate in the selection of keywords (see *Abela*).
74. Also, bear in mind that the “NOT” modifier can be used to remove considerable numbers of documents that are patently irrelevant. There is a story that in one case using the words *NOT “Paris Hilton”* cut out a huge swathe of e-mails around the time that a particular video was doing the rounds of e-mail in-boxes around the world.
75. Where disputes arise as to search terms, it is useful to prepare Scott-type schedules to assist the Court in determining the dispute. Columns should include (i) the keyword or search term contended for, (ii) the reason for seeking that word or term by reference to the pleadings or existing documents, (iii) the reason why the term is objected to, (iv) any reply and (v) the Judge’s notes / findings. This is also in keeping with the spirit of paragraph 14 which requires a summary of issues agreed and not agreed before the first CMC.
76. However, such disputes can be avoided if the parties adopt an iterative collaborative approach to identifying search terms (both because each side will have had input into the search terms themselves and also because in the case of agreed search terms, it ill-behoves a party to argue that the agreed search is not reasonable). Further, if an iterative process has been undertaken, it is likely that any disputes that arise will be limited to a few terms that cannot be agreed rather than a broad range of search terms.

## Other Search Methods

77. The Senior Master has described keyword searching as “*simple and slightly old-fashioned*”, which will come as something of a shock to those who have not yet grappled with e-disclosure in any format. The range of specialist software available to deal with e-disclosure is ever expanding and ever more complex. Modern search techniques allow, for example:
- a. topic clustering;
  - b. “fuzzy search” to detect near-miss spelling errors and the types of errors that can occur when scanning in OCR readable format;
  - c. near duplicate detection and deletion;
  - d. Relevance based searches and result grading such as keyword density, sorting by key field, hit highlighting, hit navigation, synonyms, key word in context (KWIC) and many more.
78. Legal teams should work closely with e-disclosure specialists to ensure that they not only have guidance and support in what they propose to do but also that they are aware of the current abilities of e-disclosure software and searches.

## **Back-up Documents and “Deleted” Documents**

*“No one ever confides a secret to one person only. No one destroys all copies of a document.”<sup>37</sup>*

79. Where documents are stored on a back-up server and are as readily accessible as they are on an ordinary computer, it is clear from the Practice Direction that such documents are disclosable.
80. However, many back-up systems either store information in a highly compressed format, that is not readily recoverable or readable, or even store

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<sup>37</sup> Renata Adler, author.

information on other media such as back-up tapes and back-up CDs / DVDs. Often the purpose of such back-ups is long-term data storage and the “original” documents as they existed on the party’s computers have long since been deleted.

81. The Practice Direction extends to “deleted” documents and to documents stored on “back-up systems”. Thus the documents are prima facie disclosable; however, the Court has sought to balance the need for disclosure with the obvious need for proportionality:
  - a. In *Digicel v Cable & Wireless Plc*, the Court considered arguments that the restoration of back-up tapes would be disproportionate (although the evidence in relation to difficulty and cost was “far from conclusive”). Morgan J held that failure to search the back up tapes was not a “reasonable search” but did not go so far as to order the restoration of all back-up tapes. Instead he ordered a regime for reasonable restoration with an initial meeting and then regular reports from the Defendants to the Claimants as to their progress.
  - b. In *Abela v Hammond Suddards*, Paul Girolami QC considered submissions on the proportionality of restoring back-up tapes and again was dissatisfied with the evidence presented as to the difficulties of such an exercise. The Deputy Judge ordered a further hearing after encouraging the parties to agree a search method.
  - c. In *Goodale v Ministry of Justice*, the Senior Master refused to order the full reconstruction of back-up tapes in circumstances where there was insufficient evidence as to either the cost and practicality of reconstruction or the likely benefit of it.
  - d. In *Noble Resources SA v Gross*, the Claimant appears to have disclosed over 10,000 SMS text messages recovered (i) from a back-up made of a Blackberry made by the Claimant’s IT department during routine maintenance and (ii) from a folder on a director’s laptop, created when he “synced” his mobile phone with his computer. It is not clear from the judgment whether the disclosure of these documents had been

specifically ordered or whether they were picked up as part of the larger e-disclosure exercise.

- e. HHJ Simon Brown QC was very critical of the failure to restore back-up documents in Earles v Barclays Bank Plc when he said:

*'The lack of disclosure by the Bank... cannot be ascribed to a lack of understanding of the duties of disclosure and how to procure retrieval of electronic "documents" by the Bank's first class legal teams... and document storage managers... an expert in information technology, either in house or a consultant, could easily have been instructed to retrieve ESI from various back up sources one would have thought but no such expert appears to have been instructed to do so. One expects a major high street Bank in this day and age of electronic records and communication with an in house litigation department to have an efficient and effective information management system in place to provide identification, preservation, collection, processing, review analysis and production of its ESI in the disclosure process in litigation and regulation.'*

- f. An example of a case where the Court has refused to order restoration of back-up tapes is Fiddes v Channel 4 TV Corporation [2010] EWCA Civ 516 where Tugendhat J refused to order restoration in a libel trial. His reasoning (which was upheld by the Court of Appeal) relied on the fact that the costs in the case had already reached disproportionate levels and against that background:

*"in an ideal world, the claimant should have disclosure of the e-mails sought but it is not an ideal world. In this case, it is a matter of speculation whether the search that he requests I order would produce anything relevant, and if it did, whether it would help the Claimant's case or undermine it."*

82. Clearly the same factors will apply in relation to "deleted" documents. In order to restore such documents, it is likely that an independent expert will need access to the sources of the ESI in order to reconstruct the data. This is likely

to be an expensive exercise but, should it prove necessary, is clearly within the remit of the Practice Direction.

## Format of Disclosure

*“The length of this document defends it well against the risk of it being read”*<sup>38</sup>

83. It is to be hoped that in all but the smallest of cases, the days of providing hard-copy disclosure of e-documents will be a thing of the past. It is often far more effective (and cheap, and environmentally sound) to provide electronic disclosure, whether by way of an internet accessible resource, by the provision of hard-drives or (if you have to) by the provision of a number of CDs or DVDs.
84. Once again, co-operation is key. Parties who have carried out their disclosure exercises and compiled their disclosure databases independently can find themselves in a position where they are giving incompatible documents to each other. Further, parties sometimes make disclosure in a format which requires duplication of work already carried out by the disclosing party. Obviously such conduct is unhelpful and, whilst there is no direct authority on the subject, the Courts are likely to take a dim view of costly complications that could have been overcome with proper co-operation.
85. A very useful starting point is the data exchange protocol prepared by the Litigation Support Technology Group (“LiST”), which is available for downloading at <http://www.listgroup.org/publications.htm>.
86. Further, the parties have to agree whether to disclose all or certain information in its native format or whether to convert them to easily printable “image” files. For example, Outlook e-mail archives in PST format contain a great deal of metadata, whereas converting the e-mail messages to TIFF files (images of the e-mail) removes the meta data.
87. Some cases will benefit from preserving the context of a document, for example by preserving the folder structure of the data, or the file hierarchy (and

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<sup>38</sup> Winston Churchill, former Prime Minister

making disclosure in native format), rather than disclosing documents separately and not within their original folders.

88. However, when disclosure is actually undertaken, parties must also deal with the consequences of handling ESI and the methods used in undertaking the disclosure exercise. An important consideration will be to record any formatting or changes made to ESI during collection (this may have an impact on the metadata) and to record any methods of data recovery (particularly if there are algorithms designed to replace completely missing data). It is essential to be supported by an expert who can explain, if necessary, what has been done, why and in cases of metadata alteration or destruction, why such alteration was unavoidable.

## Costs Implications

*“If our soldiers are not overburdened with money, it is not because they have a distaste for riches; if their lives are not unduly long, it is not because they are disinclined to longevity”*<sup>39</sup>

89. Jackson LJ in his review of Civil Litigation Costs recognised that with all but the smallest volumes of information, requiring paper-disclosure of ESI would be prohibitively expensive.
90. However, with the adoption of effective e-disclosure measures, costs can be kept to a minimum. In Jackson LJ's review, he illustrated the current cost of e-disclosure in three examples:
  - a. The first example involved the search of eight Gb of emails in a case which was “time and cost sensitive”. The inboxes of five custodians were searched using keyword phrase and date parameters provided by the solicitors. Over 200,000 emails and attachments were processed and searches were performed. The result was three lever arch files of paper. The task was completed between 6pm and 9am the next day. The cost was £1,800 (£200 per Gb to process and search, 10p per page to print the documents).

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<sup>39</sup> Sun Tzu, general and strategist

- b. The second example was a search of the hard drives from the laptops of 5 individuals in a claim worth around £500,000. The irrelevant system files were discarded and the remaining documents processed. There were 2.5 million documents. The results were delivered on a laptop back to the solicitor who received training and support to operate the software used to manage the documents. The solicitor was able to identify potentially relevant documents within three hours of receiving the data. The entire exercise was completed within 48 hours and a fixed price of £8,000 was agreed, in order to reflect the low value of the claim. The fixed price included the provision of a laptop for review and the use of the document management software which included search tools.
  
  - c. The final example was a dispute worth about \$100 million which involved searching for all documents sent, received and created by 18 people in relation to a large project running over a two year period. The firm involved had 220 or so staff. There were 1.7 terabytes to process and search, representing 27 million documents. There were three rounds of searches which started with 220 keywords and phrases and resulted in 85,000 documents for review by experienced paralegals. Using the service provider's software and methods, the paralegals were able to perform a fast review to remove obviously irrelevant documents at the rate of 5,000 – 10,000 documents per person per day. The resulting 30,000 documents were loaded onto a litigation support database for detailed issue coding and review for privilege. The review throughput at this stage was about 500 documents per person per day. After elimination of "near duplicate" documents, the result was 12,000 documents for disclosure, mainly emails and attachments. The cost was £85,000 to process, search and cull the 1.7 terabytes of data; £2,500 per month to host the data in an online review database and £15,000 in additional services dealing with the paper documents.
91. Those examples appear to be "best case" scenarios but they are indicative of the fact that properly handled e-disclosure does not have to cost the earth.

## Sanctions

*"If people are good only because they fear punishment, and hope for reward, then we are a sorry lot indeed."*<sup>40</sup>

92. We have already seen that failure to undertake a proper search can lead to an order for a second search. Whilst the Judgment in *Digicel* did not consider the costs of that exercise, it can well be imagined that the party who failed to carry out a reasonable search will be forced to bear the "overlap" costs of having to perform further searches. In extreme cases, the failure to conduct a proper search can lead to a claim being struck out (see *Marine Rescue Technologies Ltd v Burchill* [2007] EWHC 1976) but it is likely that such circumstances would have to threaten the just disposal of the case and not be capable of compensation in costs.
93. We have also seen that in *Earle v Barclays Bank Plc*, the Court imposed a hefty reduction in the successful party's costs as a direct result of failure to co-operate or to carry out a reasonable search. In *Vector Investments v Williams*, Ramsay J also made a reduced costs order as a result of the parties' lack of co-operation.
94. Other "sanctions" can be imposed by rigid case management. The TCC has a great deal of experience dealing with "big document" cases and is known for managing cases on very tight timetables. In *Elliott Group v GECC UK* [2010] EWHC 499, Coulson J (no stranger to the difficulties of e-documents as he is a member of the MoJ e-working group) considered a request to adjourn a trial date on the basis that the Claimants had underestimated the e-disclosure task to be undertaken and held that in order to succeed in such requests a party would require a very strong case.
95. The failure to disclose and/or the destruction of documents, and in particular whether a case should be struck out as a result of such failure, is governed by the case of *Douglas v Hello! Ltd*. We have seen above that the Court is unlikely to strike a case out for destruction of documents pre-issue unless the destruction has been carried out in bad faith but the Court retains the full gamut of cost penalties.

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<sup>40</sup> Albert Einstein, physicist

96. Further, a note of caution to litigators, failure to conduct a proper e-disclosure exercise can expose you to the risk of wasted costs (see *Hedrich v Standard Bank London Ltd* [2008] EWCV Civ 905). The Court of Appeal in that case found that the solicitors' conduct did not justify a wasted costs order but the case makes interesting reading to see just how close they came. In an article by Chris Dale, he makes the valid point that regardless of the outcome "*Having the Court of Appeal say that you were not negligent is second-best to avoiding the suggestion altogether*".
97. Further, HHJ Simon Brown QC in *Earles v Barclays Bank Plc* was particularly scathing. In what may be set to become a mantra when criticising the conduct of e-disclosure, the learned judge stated that (emphasis added by the Judge):

*"It might be considered that CPR 31PD 2A and electronic disclosure are little known or practised outside the Admiralty and Commercial Court. If so, such myth needs to be swiftly dispelled when over 90% of business documentation is electronic in form. The Practice Direction is in the Civil Procedure Rules and those practising in civil courts are expected to know the rules and practise them; it is gross incompetence not to."*

## **Improperly Obtained Evidence**

*"Secret operations are essential in war; upon them the army relies to make its every move."*<sup>41</sup>

*"We're not going to have another Watergate in our lifetime. I'm sure."*<sup>42</sup>

98. The rise of ESI and the challenge of the Internet and new technologies expand the possibility for evidence to be improperly obtained. Information can be accessed remotely and investigators are increasingly skilled in accessing that information, even where it is supposed to be protected.
99. The qualities of ESI that make it useful to business also make it easy to copy and disseminate. Documents can be copied and removed easily, for example by e-mailing them to another address or simply by copying them on to a USB memory stick. Computer programs can also be tampered with (it is apparently

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<sup>41</sup> Sun Tzu, general and strategist

<sup>42</sup> Bob Woodward, Watergate reporter

easy to set up a rule in e-mail packages automatically to blind-copy a person into e-mail correspondence).

100. It is likely that we are going to have to grapple with these new avenues for obtaining information and we may be confronted with more situations where information has been obtained improperly. Thus it is worth remembering that improperly obtained evidence can still be admissible. It is, however, worth remembering that surreptitiously accessing Computer Material is a criminal offence under Section 1 of the Computer Misuse Act 1990, as was recently discussed by the Court of Appeal in the case of *Tchenguz v Imerman* [2010] EWCA Civ 908, in the context of ancillary relief proceedings.
101. Section 1(1) of the 1990 Act provides that it is an offence for a person to “cause ... a computer to perform any function with intent to secure access to any program or data held in any computer”, where “the access ... is unauthorised” and “he knows at the time ... that that is the case”. By virtue of section 17(2), securing access includes taking copies of any data, or moving any data “to any storage medium”, or using such data. Section 17(8) provides that an act is “unauthorised, if the person doing [it] ... is not [and does not have the authority of] a person who has responsibility for the computer and is entitled to determine whether the act may be done”.
102. In civil cases, the leading authority on the use of improperly obtained evidence is *Jones v University of Warwick* [2003] EWCA Civ 151, where crucial video evidence was filmed by an enquiry agent whilst trespassing on the Claimant’s property, having gained entry under false pretences. The Court emphasised the need to balance the reprehensible conduct in obtaining the evidence with the need to deal with cases justly. The current thinking appears to be that if the evidence is relevant and material then unless the conduct used to obtain the evidence is so outrageous that a claim or defence should be struck out then the evidence is likely to be admissible. However, the Court reserves the right to penalise any misconduct in costs.

## E-Disclosure in Arbitration

*“You have to learn the rules of the game. And then you have to play better than anyone else”*

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103. In May 2008 the International Centre for Dispute Resolution (“ICDR”) produced its Guidelines for Information Exchanges in International Arbitration and in October 2008 the Chartered Institute of Arbitrators published its “Protocol for E-Disclosure in Arbitration”. The ICDR Guidelines adopt a minimalist approach to their guidance, dealing with electronic documents in only 1 paragraph:

*“When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search.”*

104. By contrast, the CIArb Protocol provides detailed guidance but does make it clear that it is not intended to be applied in all arbitrations but only in those cases in which the time and cost burdens of giving disclosure of electronic documents may be an issue. It is intended to act more as a checklist for those who may be less familiar with the issues that may arise in e-disclosure than as a prescriptive document. The Protocol, like the Courts, emphasises the importance of early consultation on these issues between the parties and the potential cost consequences of a failure to do so.

## Practical Tips

*“And therefore those skilled in war bring the enemy to the field of battle and are not brought there by him”<sup>44</sup>*

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<sup>43</sup> Albert Einstein, physicist

<sup>44</sup> Sun Tzu, general and strategist

*“Each player must accept the cards life deals him or her: but once they are in hand, he or she alone must decide how to play the cards in order to win the game.”<sup>45</sup>*

105. Attempting to distil a series of practical tips from the volumes of information on e-disclosure is not a simple task; however, it is suggested that the following are a reasonable starting point:

- a. Remember that e-disclosure operates on the same principles as any other disclosure. If excluding a source or category of documents wouldn't feel right for paper disclosure, the odds are that it isn't right for e-disclosure either.
- b. Recognise that all but the simplest e-disclosure exercise requires the involvement of e-disclosure specialists. Many firms will have in-house specialists but for many the use of independent specialists is either necessary or expedient.
- c. Whilst many parties balk at the potential costs of bringing in independent specialists, experience shows that by far the most expensive stage of the disclosure exercise is the manual review of “relevant” documents. The use of specialists and specialist software can reduce this task to a manageable level and the cost savings are significant.
- d. Communicate with the right people at the client right from the start: make the Company Secretary and the Head of IT the first point of call and ensure that effective channels of communication are established for disclosure issues.
- e. Identify sources of ESI as early as possible and ensure that all forms of e-device are included. It is probably useful to have a template client e-disclosure questionnaire aimed at identifying working practices and ask each key data custodian if they use mobile phones, PDAs, Blackberries, iPhones, laptops etc.

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<sup>45</sup> Voltaire, author

- f. Early inter-partes discussion of e-disclosure issues is essential with a view to agreeing the way forward. In large cases, costs escalate very quickly. Jackson LJ has noted that many practitioners urge the need for the involvement of senior lawyers at an early stage.
- g. Agreeing an e-disclosure protocol with opponents should ensure that all parties are able effectively to get to grips with all other parties disclosure and that all parties are satisfied that a reasonable search has been carried out.

## The Future

*“Although personally I am quite content with existing explosives, I feel we must not stand in the path of improvement”<sup>46</sup>*

- 106. The obvious next step is to see how the new Practice Direction is interpreted and to iron out the kinks inherent in any new procedural regime. We believe that the Courts are likely to take a robust approach to continue the Senior Master’s commonsense approach and not to allow e-disclosure to become an expensive bottleneck in substantial litigation.
- 107. There is also a court “E-Working” group considering methods to integrate e-working into litigation generally. This may lead to the electronic submission of pleadings and court documents and may eventually lead to the adoption of electronic hearing bundles. Clearly any such move will need to be integrated with e-disclosure methods.
- 108. The challenges of E-disclosure are far from being fully understood. The next great advance in the information age, the move from home and office computers to a full suite of mobile devices (laptops, smart-phones, iPads etc) is in its infancy as are the various methods of dealing with them. Litigators must be alive to the potential sources of ESI and the various methods of accessing them.

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<sup>46</sup> Winston Churchill, former Prime Minister

109. Hopefully, the adoption of a system reliant on inter-partes co-operation will allow e-disclosure to move more quickly as parties will be quick to identify potential new sources of disclosure and to bring them to the court's attention.

**Michael Wheeler**

**Barrister, Hardwicke**