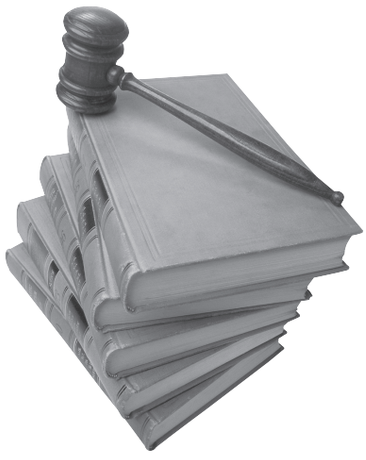
The decline of paper

Ian Pease concludes his two-part study of the effects of technology on document disclosure, and the latest tools for dealing with it

Ian Pease is a partner at Davies Arnold Cooper specialising in construction and engineering law

In the first article (see *PLJ*226, p8, 'The disease and its cure') I highlighted that the cooperative approach to e-disclosure that is enshrined in CPR 31 and its practice direction is apparently not being adhered to by the profession, resulting in costs being wasted. Perhaps with a view to making the process of e-disclosure more systematic the latest proposal from the courts is for an 'e-disclosure technology questionnaire' that each of the parties has to fill in and update. The present thinking is that this form should be available to the court at the time of the first case management conference (CMC). In this way the court will establish a standard agenda item covering how e-disclosure is to be dealt with. If this happens then parties will no longer be able to ignore the CPR, and the court, with its case management hat on, will be overseeing their actions.

The questionnaire is detailed and will call for a good deal of research before it can be completed. Each party will also have to think about the case generally: which persons within their client's organisation will have compiled documents, over what period and of what types?



The cart and the horse

Of course this raises the question: should not all this information be readily to hand because, by the time of the CMC, the case being put forward by the claimant will have been investigated by its solicitors? The answer to that question must be 'yes', but one suspects that in reality only a very small proportion of the relevant documents will, by that stage, have been examined. If that is right therein lies a systemic problem that the question of e-disclosure is bringing into sharp relief. Let's scroll back to day zero of the file.

Back to the drawing board

Litigation is a bit like a game of chess: what you move depends on where all the pieces are on the board. Now imagine making those moves without knowing where all your pieces are; imagine playing blind, with your back to the board. That is a reasonably accurate analogy for advising a client without having seen and considered all their electronic documentation. From my experience it is now often the case that over 90% of the relevant documentation will be in the form of electronic documents. You wouldn't want to begin without having reviewed those, in case there are any skeletons in the cupboard.

Viewed in this light the problem of electronic disclosure may be a problem with the investigation of the case generally. If you have not investigated the documents *ab initio* then coping with them on disclosure may be the least of your problems: you may already be beyond the point of no return in a case that has started down the wrong track.

So let's start again from the very beginning: you've just had a client consult you with a particular legal problem, and it looks as though proceedings may have to be instituted. What do you do in relation to the documents? It is generally said that there is an obligation to preserve the relevant documents once litigation is imminent. In this regard see the discussion of the matter in the Cresswell Report (*'Electronic Disclosure' – a report of a working party chaired by the Honourable Mr Justice Cresswell, dated 6 October 2004*):

> 2.32 It is clear that a party has an obligation not to destroy documents which are relevant. What is not so

clear is when that obligation arises and the scope of relevance for that purpose. Relevance no doubt covers documents which would be disclosable under standard disclosure. In principle the obligation should extend not only to documents which fall within standard disclosure but also to any other documents which may be materially relevant to any of the issues in the litigation and the subject of an application for specific disclosure.

2.33 As to when the obligation not to destroy documents arises, the situation at the extremes is fairly easy to state. Before any litigation is contemplated there are no disclosure obligations requiring a person to retain documents or data. Once an order for disclosure has been made, a party must preserve the documents ordered to be disclosed. It is a contempt of court intentionally to destroy documents the subject of a disclosure order.

2.34 There is much to be said for the view that an obligation to preserve relevant documents arises *once litigation is contemplated or has commenced* [emphasis added], which is the same as the well-known and easily understood test for litigation privilege. In *Rockwell Machine v Barrus* [1968] at 694, Megarry J was of the view that an obligation to preserve relevant documents arose not later than when the proceedings commenced, in stating:

> 'It seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width, but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it.'

The electronic discovery reference model (EDRM)

Preservation

The Catch 22 here is how to preserve the relevant documents before reading the entire population and deciding their relevance. And how is this to be done at a stage when litigation is merely 'contemplated'? The answer, of course, is to be very conservative and to issue to the client's organisation with a general prohibition against destroying documents. Better still, in the days when you could isolate the general corpus of documents, to take them into protective custody.

Advising a client without having seen and considered all their electronic documentation is like playing chess with your back to the board.

Although this procedure just about works in relation to hard-copy documents, it appears much more difficult to operate in relation to electronic documents. The first thing to recognise is that the senior manager

who consults you may not know where the documents are either, and so you will have to do a fair amount of detective work to track them down. In particular, you will have to become conversant with how the company uses its IT systems, where and how it saves its data, and how that data gets destroyed and archived. But of course all this may take some time, and it must be assumed that the normal processes of creation, duplication and destruction of documents are continuing, perhaps particularly affecting the ones in which you are interested. The solution may well be to take a forensic copy (akin to a backup) of the client's entire system, so as to preserve the documents. This is step one in any e-disclosure process: the preservation of the document set.

Identification

Next comes stage two: the identification of the particular documents that interest you. The place to start is with the project or contract that is in issue. Some of the pertinent questions will be who was involved, between what dates, and what e-resources did they have at their disposal? This will mean talking not only to the individuals concerned but also to the company's IT department to understand their systems (not only the WP, e-mail and voicemail but also any databases that the company may use). It will be a good idea to take copious written notes of all these interviews, because not only will these details be needed for the technology questionnaire but eventually also for the disclosure statement.

Collection

Once the document set has been honed down, a decision can be made as to which particular elements can be collected together for the next stage in the process. Stage three is the collection stage. The most important thing to understand at this stage is the easily corruptible nature of the documents. The collection has to be undertaken carefully so that the metadata, resident in the documents, is preserved intact and not changed. This data may be (or become) extremely relevant to the case. Hence I would suggest that any collection is done by a specialist who is conversant with these matters.

Review and search

At this point the process may divide, depending on the type of legal proceedings you find yourself in, and on your choice of software.

The more traditional method is to use a litigation support database to review the documents for relevance prior to disclosure. This process will invariably start with the selected documents (from hard drives, server directories and e-mail accounts) being placed into a filtering pool. Then the selected keyword searches are run against that data-set, and the resulting documents are placed on the database for further review. This system will be particularly appropriate for a situation in which your client has to give disclosure of documents. However, it may not be advisable where there is no such obligation, and there is merely the need to review the population of documents and select those that present your client's actions in a favourable light – regulatory actions fall into this category.

The latest search technologies now return a result where the original word is absent but the concept is still present.

How is one to find the proverbial needle in the hay stack? The answer lies in the quality of the searching. The simplest form of search merely looks for an exact match for your search string, but of course this can return both false positives (where the string is very common) and may miss many documents that would be of interest and relevant (particularly where the documents' creators express themselves in different terms). It must be said that this is also an innate problem with the keyword searching that is officially sanctioned by the CPR.

However, searching has now come a long way from simple search strings of letters. We know that a Google search will rank its results by popularity, but this is of little use for the data sets that lawyers will be reviewing, for it will inevitably miss the needle. The latest search technologies claim to have passed beyond merely running a thesaurus alongside the original search term, and can now return a result where the original word is absent but the concept is still present.

Even if these claims are justified they leave the litigator in the position of having to justify their selections, be that in the disclosure statement or before the court on a specific disclosure application. I would therefore suggest that where there is a disclosure obligation these search tools are used to prioritise the review process rather than to supplant the need for human input.

Production

The last stage of the EDRM is the production of the relevant documents on disclosure. Whereas this used to be a two-stage process (disclosure via the list and later inspection of the documents), the advent of e-disclosure has turned it into an export of all the relevant documents (plus their agreed field card and metadata) to the other parties' database in an agreed format.

Looking to the future

What began with Gutenberg and was hastened by Xerox is continuing with Microsoft. The information overload continues apace, but cometh the need cometh the solution: new technologies and algorithms are helping the practitioner cope.

However, this is not just about technology: processes and procedures also need adapting to this new age. Later in the year the Civil Justice Review of Costs under Jackson LJ will report. Disclosure will be under the spotlight. The courts, via such cases as *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2008], have emphasised the importance of cooperation between the parties. I suggest that this could be taken further (and costs saved) if the courts started to insist that the parties subscribe to a common litigation support database to hold their documents, facilitating and streamlining the process of disclosure. ■

Digicel (St Lucia) Ltd v Cable and Wireless plc [2008] EWHC 2522 (Ch)

Rockwell Machine v Barrus [1968] 1 WLR 693