E-disclosure: self-help

A draft practice direction on the use of technology in civil proceedings provides welcome guidance, but can practitioners find the solutions to common e-disclosure problems in the documents themselves, asks Jonathan Brewer

- how electronic disclosure solutions can save time and money
- meta-data: the not-so-secret life of documents

Under its remit of helping practitioners deal with the impact of technology on litigation, the Litigation Support Technology Group (LiST) published a draft practice direction for the use of technology in civil proceedings, published in March 2005, addressing electronic disclosure. This follows the Commercial Court Guide, which was amended in November 2004 to provide guidance on the issue.

Practitioner fears

Certainly, there are real issues associated with the growing use of technology. The large number of electronic documents used and created by business threatens to increase the volume of documentary evidence considered and the costs incurred in the civil disclosure process. Electronic disclosure initiatives—such as those by LiST and the Commercial Litigators’ Forum, as well as judicial consideration of the issue by the Cresswell Committee—are therefore to be welcomed.

The principles of relevance and proportionality that have served the litigation process so well will continue to apply and help limit the risk of large increases in volume and costs. The latest draft LiST practice direction takes a further positive step in seeking to manage electronic disclosure sensibly. It starts with measures designed to encourage parties to discuss—with each other and the court—how electronic documents may be in issue, and how they are going to deal with those documents in disclosure.

The draft LiST practice direction also encourages parties to agree to “the exchange of disclosure data in an agreed electronic format using (where appropriate) agreed fields”.

The use of the terminology “fields” refers to the tags that have traditionally been applied to the images of paper documents scanned onto hard drives or CD-Rom. Without coding fields such as date, author and type of document—and tagging those fields to the images—the images cannot be searched at all, and are no more useful than print. Optical character recognition (OCR) can be used to translate images of text into searchable code, but it costs extra and is only about 85% accurate.

The reference to “agreed fields” implies that imaging electronic documents and then coding fields to provide certain search functionality will be the normal method of dealing with electronic disclosure. Such an approach mimics the ‘scan and code’ approach to paper documents outlined above and, where a relatively small number of electronic documents are in issue, is an approach that may still have a place.

However, why image and code an electronic document when all the relevant information is already held within the document? Electronic documents are fundamentally different to paper, and are best dealt with in a different way. A focused approach may provide the answer to some of the fears associated with e-disclosure.

A focused e-disclosure approach

Electronic disclosure solutions designed specifically for electronic documents have been available in the US for some years and are, judging by announcements in the legal press, increasingly available in the UK. The key features are as follows:

- Such solutions import electronic documents from a client’s storage media into searchable databases.
- Crucially, rather than take an image of the electronic document, the systems capture all layers of information held within the document itself, and use that information to facilitate a quick, simple and efficient review, usually online.
- By capturing all of the properties of the document, there is no need to code, either in terms of fields or OCR, and the original document is (in some solutions) retained untouched for evidence if required.

Harness the power

Harnessing the power of an electronic document can help practitioners and their clients meet the overriding objectives of the CPR more effectively:

- The ability to perform sophisticated searches enables a reviewer to search large numbers of documents quickly and efficiently, identifying documents for relevance, privilege, specific issues, etc. While the electronic age will, as commentators have suggested, increase the volume of documentation to be reviewed, their electronic state makes new, effective methods of review possible.
- US experience suggests that there is a significant time-saving to be had when compared to reviewing paper or scanned images through limited functionality image-based databases. This begs the question: why should a client pay for eight hours’ review time when an electronic solution may reduce that review time to one hour? Not only can a smart approach save the parties money, but it can mean the case is dealt with expeditiously.
- Practitioners that are, at this point, assuming that such solutions are bound to be disproportionately expensive, should note that per-page fees available for electronic disclosure solutions in the US are significantly less than the average photocopying rates charged by the UK legal profession.
- Most e-disclosure solutions enable review through an internet connection and common software such as Adobe Acrobat. Parties and their lawyers do not need to make any capital investment and are, consequently, more likely to be on an equal footing.
- Relevant documents can be exported to a range of hard or soft formats, meaning practitioners’ own document management systems may continue to be used; documents may also be produced in formats that are compatible with the trial presentation systems that the LiST practice direction, for example, also deals with.
- Online repositories of electronic documents can also facilitate joined-up working between all of the players in litigation, again helping deal with cases expeditiously. The SFO, for example, is reported to be seeking to address some of its well-publicised problems by plac-
ing evidence in an online repository for all parties to use.

Meta-data matters

The innate functionality of an electronic document is, in part, drawn from the meta-data that sits behind the text one sees on screen. Meta-data is the information that exists within every electronic document, chronicling its history including the author, creation date, who has read the document, file save locations and changes made. When effectively captured it forms, together with the text of the document, the raw material that makes sophisticated searches of vast amounts of electronic documentation possible.

It is therefore interesting to note that both the Commercial Court Guide and the draft LiST practice direction seek to limit the circumstances in which meta-data will be disclosed:

- The notes to the LiST draft practice direction state that “in most cases it is acceptable for documents to be disclosed without meta-data (Commercial Court Guide Section E3.1) and it would be disproportionate for parties to review their own meta-data before disclosure.”
- The Commercial Court Guide puts it thus: “[the definition of a document for the purposes of disclosure] also extends to additional information stored and associated with electronic documents known as meta-data. In most cases meta-data is unlikely to be relevant.”

The approach taken to producing documents with or without meta-data is rightly based on relevance. Canvassing of the profession indicates a perception that searching through vast tracts of meta-data will be costly and time consuming when the information found is rarely relevant to the issues. Certainly, most cases will turn upon what the documents say (ie text) rather than their history (ie meta-data). That said, it will sometimes be pertinent to know, for example, who saw which email or who was involved in a certain evolution of a CAD drawing.

Powerful tool

However, care should be taken not to throw the baby out with the bath water: meta-data is a potentially powerful tool for reducing disclosure volume and cost:

- Some of the electronic disclosure solutions referred to above capture meta-data as part of the process of capturing the document, ie at no extra cost. The search engines can also search the meta-data, so that where the history of a document may be relevant to the issues, a reviewer can efficiently consider that history.
- If disclosable electronic documents are produced to an opposing party without meta-data, then a fundamental part of the ability to search and review the documents will be lost:
  - The use of meta-data can quickly identify, say, all emails sent by one person or all documents within a certain date range. Reviewing disclosure documents without that functionality will be a more tortuous and costly process.
  - Meta-data also tracks relationships between documents; without meta-data the link between an email and, say, a text attachment can be lost. Losing the links between documents loses the context that is often so important to understanding a document’s significance in the action.
- How can it be justifiable to remove meta-data and provide a non-searchable or limited search document to a party, within the CPR imperative that cases be dealt with expeditiously and fairly? Some may worry that if one discloses meta-data to the other side, it will be abused. However:
  - If a party to whom disclosure is given uses the meta-data not only to aide their review but also to embark upon an unnecessary forensic search of the meta-data for irrelevant issues, is it not their costs they are primarily risking? The court’s general discretion as to costs under CPR 44.3 is often used to strip out costs associated with fruitless exercises.
  - If a party seeks to introduce an element of meta-data as an issue, are judicial case managers not able to decide whether it is or is not relevant and make orders accordingly?

The various working groups referred to in this article (see “Useful websites”, below) have taken a positive step towards ensuring that the difference of approach needed for electronic disclosure, compared to paper disclosure, is understood. The LiST working group welcomes comments on its proposals via its website. The more involvement that practitioners have in the discussion, the less likely that the potential solutions lying hidden within electronic documents themselves will be missed.

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Meta-data made simple

- Open up a Microsoft Word document and click on “File” then “Properties” to see just some of the meta-data captured, such as the date it was created and the number of revisions.
- Consider an email you sent this morning: meta-data will show it was you who created it, the time and date you created it, and the identities of all the people to whom you sent it—including those in the ‘BCC’ field. If you think the fact that you blind-copied a colleague will remain secret should the email become relevant in a dispute, then think again.
- Meta-data can maintain the links between emails and attachments, including which version of a document was attached. This might be vital in establishing the parties’ mutual intentions in a disputed contract.
- Will deleting a file on a computer ensure it cannot be traced for evidence? No. Meta-data can show that a file was deleted, and lead to its recovery.
- Meta-data added in evidence will not only demonstrate beyond doubt that emails containing indecent images were sent by a client’s employee, but also that the employee had, in fact, previously received an electronic version of the company’s email policy.

Practitioner participation

Electronic disclosure is a consequence of the way modern business is done, and is therefore an issue of which every litigator will need a reasonable grasp if they are to be able to represent their clients effectively in the years to come.

Useful websites

- www.listgroup.org
- www.commerciallitigatorsforum.com
- www.bmcourtsservice.gov.uk/cms/842.htm
- www.commerciallitigatorsforum.com
- www.listgroup.org
- www.bmcourtsservice.gov.uk/docs/electronic_disclosure1004.doc