

A Guide to Effective E-Disclosure for the Legal Profession

By Michael Taylor

Contents

- Executive summary** V
- About the Author** VII
- Acknowledgements** IX
- Chapter 1: The Civil Procedure Rules 1998**..... 1
 - The Civil Procedure Rules 1998 1
 - The Practice Direction to Part 31 of the CPR 1
- Chapter 2: The phases of an electronic disclosure exercise** 11
 - Information management 12
 - Identification..... 12
 - Preservation 15
 - Collection 17
 - Processing 19
 - AND 23
 - OR 23
 - NOT 23
 - Review 24
 - Analysis..... 26
 - Production..... 27
 - Presentation..... 31
- Chapter 3: The disclosure protocol** 33
 - The matter surrounding the issues 34
 - The parties’ client’s document retention policies 34
 - The individuals considered appropriate to be subject to disclosure..... 34
 - Access to electronic document storage media 34
 - The techniques used by the party to search the media identified 34
 - The format of the list intended to be exchanged by parties 35
 - How parties intend to provide documents for inspection..... 36
- Chapter 4: External service provider selection**..... 39
 - External service provider’s capabilities 40
 - The size and experience of the external service provider 40
 - The external service provider’s charging methodology 41
 - The external service provider’s working assumptions 42
 - Filtration rates..... 43

Chapter 5: The in-house review tool versus the hosted review tool 45
 The in-house review tool45
 The hosted review tool 46

Chapter 6: Foreign-language and deleted documentation..... 49
 Foreign-language documentation.....49
 Deleted documentation 51

Chapter 7: Conclusions..... 57
 IT education for lawyers..... 57
 Improve communication with IT professionals..... 57
 Learn from experience 58
 Adopt a firm-wide electronic document disclosure strategy 58
 Embrace new technologies and keep abreast of developments..... 58
 Haggle 58
 If unsure, seek external help 59

Index 61

Executive summary

THE DISCLOSURE of electronic documentation continues to be a thorn in the side of most litigators; those without access to a specialist litigation support function find themselves at a particular disadvantage.

Competitive, forward-thinking firms recognise that the issues surrounding the disclosure of electronic documentation are not going to go away; in fact, they are only going to become more important as the prevalence of electronically-stored documentation grows and the costs associated with its retrieval, filtering and review continue to fall.

Preparing for an electronic document disclosure exercise at an early stage and from a position of knowledge is essential to ensure that the process is managed in a cost-effective manner, with high-quality results, and with no unexpected and expensive surprises.

This report is aimed at partners and associates who wish to formalise their firm's approach to the disclosure of electronic documentation in order to see internal improvements in review quality, as well as increased efficiencies surrounding the instruction and use of external service providers.

Knowing the obligations imposed on litigators by the Practice Direction to rule 31 of the Civil Procedure Rules 1998 is the first step to becoming familiar with the intricacies of the disclosure of electronic documentation, and Chapter 1 provides that context with a detailed review of the various elements to that Practice Direction.

As the disclosure of electronic documents has matured over the past 10 years, a recognised series of steps has been adopted by the industry. Chapter 2 looks at each of these

steps in turn and the best strategy to employ at each stage, from the collection of electronic documentation to providing it for inspection – each phase is analysed in detail.

Chapter 3 examines the growing use of the disclosure protocol, its purpose and how it is best used to exploit tactical advantage, particularly when faced with unwitting opposition (those who are not as well informed on the issues as they should be).

Chapter 4 provides guidance when selecting an external service provider, and most importantly, explains why it is not enough to simply look at the bottom line when comparing quotes (even when cost is your prime motivator).

Chapter 5 examines how best to review documents, and particularly whether firms should buy-in to an in-house document review tool or rent one online for each different matter involving the disclosure of electronic documents.

Chapter 6 covers the intricacies surrounding 'deleted' documentation and documentation which is produced and stored in languages other than English.

Finally, the last chapter focuses on headline tips for how to achieve effective electronic disclosure whilst keeping a lid on costs.

About the Author

CALLED TO the Bar in 1998, Michael Taylor spent the first four years of his career working within government on two high-profile public inquiries: the 'Bristol Royal Infirmary Inquiry' (an inquiry into complex paediatric heart surgery) and the 'Shipman Inquiry' (an inquiry into the unlawful activities of Harold Shipman).

Michael went into private practice in Bristol before moving to a major legal technology service provider where it was his responsibility to advise clients as to suitable solutions to their e-disclosure requirements, as well as give educational seminars and lectures to lawyers and litigation support managers on the subjects of e-disclosure, paper disclosure and computer forensics. Michael has had articles published in many newspapers and periodicals, and is a regular conference speaker.

Michael set up i-Lit Limited as an independent legal IT consultancy that helps law firms and their clients appropriately scope electronic document disclosure exercises and only buy external services when it is absolutely necessary.

Acknowledgements

THANKS MUST go to Palmer Legal Technologies, which provided invaluable assistance on the subject of deleted documentation, and to the Electronic Discovery Reference Model (EDRM) Project for use of their process diagram.

Special thanks must go to my wife Jo and my daughter Matilda, who have been extremely supportive during the production of this report.

Chapter 1: The Civil Procedure Rules 1998

The Civil Procedure Rules 1998

Part 31 of the Civil Procedure Rules 1998¹ (CPR) sets out the rules for standard disclosure and document inspection in litigation (except claims made on the small claims track).

On the 1st October 2005, the Practice Direction to Part 31 of the CPR was amended. This discreetly-made amendment brought about a sea change in the way in which disclosure exercises in litigation are carried out. It catalysed a fledgling industry within the UK and brought a new perspective on the review and disclosure of documentation within litigation.

This chapter examines the Practice Direction to Part 31 of the CPR and how it has impacted litigation departments in the 30 months since its implementation.

The Practice Direction to Part 31 of the CPR

The Practice Directions to the various parts of the CPR aim to clarify the rules to ensure that parties seeking to rely on the rules have a full and proper understanding of their scope and meaning. The Practice Direction² to Part 31 CPR is no exception and its amendment makes it of particular importance when it comes to the effect Part 31 has when parties are considering the disclosure of electronic documents.

When properly used, the Practice Direction to Part 31 CPR gives a good platform on which to base a thorough, defensible and cost-effective electronic disclosure exercise.

Each part of the Practice Direction which is specific to electronic documentation will be looked at in turn. The first section, 2A.1, deals specifically with electronic documents.

Section 2A.1

Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including e-mail and other electronic communications, word-processed documents and 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. Rule 31.4 reads:

“‘document’ means anything in which information of any description is recorded.”

The very broad definition of a document in Rule 31.4 has therefore always included electronic documentation,³ but with the exception of a very few practices, the legal profession was broadly ignoring this definition prior to October 2005, with the vast majority of practitioners choosing to assume that the disclosure of electronic documentation would be disproportionate and unreasonable to undertake.

It is true to say that, in some cases, electronic documentation was being looked at but generally the methodology used to undertake that exercise simply reinforced the view that electronic documentation was expensive to retrieve, time consuming to review and comparatively unproductive.

Choosing to assume that the disclosure of electronic documentation would be disproportionate and unreasonable was so prevalent that the rules committee

found it necessary to spell out that electronic documents are included in the existing definition:

“This [definition of a document] extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases.”

By doing this, the Practice Direction specifically includes all forms of electronic documentation in the existing definition, and it is important to remember that all electronic communications are included: telephone calls, fax messages, text messages and instant messaging products, as well as MMS messages and any other form of electronic communication that may be introduced in the future.

Once the Practice Direction has dealt with what is included in the definition of a document, it goes on to refer to the location in which those documents are stored:

“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.”

This section then not only specifies that documents that are stored on “other electronic devices and media” are included in the definition, but also those stored on “servers and back-up systems” so there really is no hiding place for the electronic document, no matter what format it is in or where it is stored. It is, according to the Practice Direction to Part 31 CPR, fair game as far as being considered for disclosure is concerned.

Perhaps the most worrying part of this section, for parties involved in litigation, is the part that deals with documents that have been deleted, which says:

“the definition covers those documents ... that have been ‘deleted’.”

This element does seem onerous at first reading, but it must be borne in mind that deleting an electronic copy of a document is not the same as destroying (for whatever reason) a hard copy document (please see Chapter 7). The definition of a document does not stop there:

“It also extends to additional information stored and associated with electronic documents known as metadata.”

Metadata comes in two forms: internal metadata and external metadata. External metadata are the various pieces of data that are stored with documents that make it possible for the computer to find and open the file, so the ‘doc’ part of a Microsoft Office Word document name tells the computer that if the user tries to open that particular file, then it should be opened in Microsoft Office Word to enable its viewing in the correct software.

Internal metadata is the data that software gathers about documents to enable users to find out useful (and often not very useful) information about a document, for example: I am writing this chapter using Microsoft Office Word and I can tell you that the word ‘number’ is the 1,113th word in the document. Its utility is open to debate but it remains part of the metadata of the document, and so according to the Practice Direction Part 31 CPR, it forms part of the document and is therefore disclosable to opposing parties involved in litigation.

The overall effect of section 2A.1 is to make explicit that all parts of every type of electronic document, no matter where it is stored and whether in fact it has been deleted, should be considered for the purposes of standard disclosure.