

Technology as a component in Lord Justice Jackson's Recommendations

Senior Master Whitaker

Chris Dale

The e-Disclosure Information Project

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e-Disclosure Information Project

- Sponsored but supplier agnostic
- Originated in Birmingham
- E&W and international reach
- Writing, speaking, consultancy

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Scope

England & Wales
Australia
Canada
Hong Kong
Scotland
Singapore
US
Brussels / EU

e-Discovery / e-Disclosure
Court Rules
Regulatory investigations
Costs
Litigation technology
Data Protection / Privacy
Practice development
Proportionality
Marketing
Justice

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Agenda

- The proposed new PD and ESI Questionnaire
- The Jackson Report
 - Education and training
 - Procedure – endorsement for the PD
 - Proposed Rule 31.5A
 - Seeing the technology solutions
- Some cases

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CPR Obligations

Standard disclosure – what documents are to be disclosed

31.6 Standard disclosure requires a party to disclose only –

- the documents on which he relies, and
- the documents which –
 - adversely affect his own case, See also Part 31
 - adversely affect another party's case, i
 - support another party's case, and
 - the documents which he is required to disclose

PRACTICE DIRECTION – DISCLOSURE AND INSPECTION
THIS PRACTICE DIRECTION SUPPLEMENTS CPR PART 31

Duty of search

31.7 (1) When giving standard disclosure, a party to these proceedings taking within rule 31.6(b) or (c) (2) The factors relevant to deciding the proportionality (a) the number of documents involved;

Contents of this Practice Direction

GENERAL
THE SEARCH
ELECTRONIC DISCLOSURE

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Before:
MR JUSTICE MORGAN

Between:
1) DIGICEL (ST. LUCIA) LIMITED (A company registered under the laws of St Lucia)

Royal Courts of Justice
Strand, London, WC2A 2LL
23/10/2008

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CPR eDisclosure

Practice Direction to Part 31

2A.1 electronic documents, backups and metadata
2A.2 parties should discuss sources before the first CMC
2A.3 parties should co-operate as to the format for exchange
2A.4 examples of factors relevant to the 31.7 duty of search
2A.5 searching electronic sources e.g. by keyword searches
4.2 define in Disclosure Statement limits on scope of search

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e-Discovery Information Project **CPR Discretion**

The overriding objective

- 1.1 Dealing justly
- 1.3 Parties' duty to help further the overriding objective
- 1.4 Active management of cases includes using technology

Case management powers

- 3.1(1) power to make any order "for the purpose of managing the case and furthering the overriding objective"
- 3.4(2)(c) power to strike out if "there has been a failure to comply with a rule, practice direction or court order"

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e-Discovery Information Project **E-Disclosure PD and EQ**

Senior Master Whitaker's Working Party

- E-Disclosure Practice Direction
- E-Disclosure Questionnaire

Questionnaire - obligation to list sources (not just "should discuss")

Agree date ranges, custodians, inclusions and exclusions

Exchange in native format unless not reasonably practicable

Includes statement as to what is expected from others

Statement of truth signed by solicitor or client

The basis for informed discussion with opponents and judge

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e-Discovery Information Project **PD and Questionnaire**


The ESI Questionnaire requires the parties to provide information about any documents which they hold in electronic form and which are to be disclosed in the proceedings, along with details of their electronic storage systems. They are also asked to detail any issues that may arise about the accessibility of such documents. The Answers to the ESI Questionnaire must be supported by a statement of truth.

In my view, the substance of this practice direction is excellent and it makes appropriate provision for e-disclosure. On the assumption that this practice direction will be approved in substantially its present form by the Rule Committee, I do not make any recommendation for procedural reform in relation to e-disclosure.

Jackson Final Report Paras 2.4 and 2.5 on page 365

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e-Discovery Information Project **Jackson Report**



REVIEW OF CIVIL LITIGATION COSTS

PART 8: CONTROLLING THE COSTS OF LITIGATION

CHAPTER 4.0. E-DISCLOSURE

1. INTRODUCTION

1.1 Disclosure and the electronic age. In larger actions, disclosure of documents is one of the principal drivers of costs. It is not only the initial disclosure exercise which can be massively expensive, but also the sequelae. Witnesses, experts, solicitors and counsel all feel the need to read the documents disclosed on both sides

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e-Discovery Information Project **Jackson**

Preliminary Report

- Separate e-Disclosure heading indicates importance
- International parallels considered
- Appendix devoted to costs analysis
- Emphasis on high costs of review stage if scope not managed
- Discussion of options for scope of disclosure
- Criticism of lack of judicial management

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e-Discovery Information Project **Jackson – E-Disclosure**

E-disclosure is inevitable in many cases. The first point which needs to be made about e-disclosure is that it is inevitable in cases where the parties hold the relevant material electronically. For the parties to print all the material out and then exchange it in hard copy would often be impracticable. With all but the smallest volumes of material, that course would not be cost effective. Thus in cases where edisclosure is a consideration, it is often a practical necessity rather than an optional course.

Final Report Para 2.1, page 365

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Final Report

Only one eDisclosure recommendation - substantial CPD training for lawyers and judges
 New Rule 31.5A with "menu option" – no default position
 Express intent to force proper consideration by parties and judge
 Codifies what the present rules require anyway
 Endorsement for new Practice Direction and Questionnaire
 Value of technology demonstrations for judges

- an order dispensing with disclosure
- an order that a party disclose the documents on which it relies, and any specific disclosure it requires;
- an order for issue by issue disclosure on the material issues;
- an order that a party give standard disclosure;
- an order for disclosure which may (i) enable a party to advance his own case or to damage that of the other party or (ii) lead to a train of enquiry with either of those possible consequences
- any other order in relation to disclosure that, having regard to the overriding objective, the court considers appropriate.

I recommend that e-disclosure as a topic should form a substantial part of (a) Continuing Professional Development ("CPD") for solicitors and barristers who will have to deal with e-disclosure in practice and (b) the training of judges who will have to deal with e-disclosure on the bench. Service providers will have a part to play in such CPD or training. Indeed they will have a commercial interest in contributing to the process.

Final Report Para 2.1, page 365

I am bound to say that the systems ... are extremely impressive. I am sure that it would assist other members of the judiciary to know what technological help is available to the parties, to enable them to manage the disclosure process.

Final Report Para 2.2 Page 365

- Identification, collection
- Culling, filtering
- De-duplication
- Near-duplicates
- Clustering
- Keywords
- E-mail threads
- Concept searches
- Relevance

Digicel (St Lucia) v Cable & Wireless
 [2008] EWHC 2522 (Ch) (23 October 2008)

Earles v Barclays Bank Plc
 [2009] EWHC 2500 (Mercantile) (08 October 2009)

Goodale v The Ministry of Justice
 [2009] EWHC B41 (QB) (05 November 2009)

Shoemith, R (on the application of) v OFSTED & Ors
 [2009] EWHC B35 (Admin) (10 November 2009)

Al-Sweady & Ors, R (on the application of) v Secretary of State for Defence
 [2009] EWHC 2387 (Admin) (02 October 2009)

Earles v Barclays Bank

Since 2000 most key contemporaneous commercial documents are contained in Electronically Stored Information ["ESI"] – today over 90% of communications are recorded in that form – phone records, texts, e-mail, bank records etc. ESI are "documents" under the Civil Procedure Rules: ...

The abundance of this ESI in cyberspace means that potential litigants, in particular organisations such as Banks at the current time, need to anticipate having to give disclosure of specifically relevant electronic documentation and the means of doing so efficiently and effectively. [Para 21]

EDIP e-Disclosure Information Project **UK Cases**

Earles v Barclays Bank

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 appear 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 [Para 41]

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EDIP e-Disclosure Information Project **UK Cases**

Earles v Barclays Bank

It might be contended 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 practice them; it is gross incompetence not to. [Para 71]

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EDIP e-Disclosure Information Project **UK Cases**

Goodale v Ministry of Justice

At the moment we are just staring into open space as to what the volume of the documents produced by a search is going to be. this is a prime candidate for the application of software that providers now have, which can de-duplicate that material and render it down to a more sensible size and search it by computer to produce a manageable corpus for human review – which is of course the most expensive part of the exercise. Indeed, when it comes to review, I am aware of software that will effectively score each document as to its likely relevance and which will enable a prioritisation of categories within the entire document set.

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EDIP e-Disclosure Information Project **Jackson – next steps**

Will any of it happen?

- PD and ESIQ sent off to a sub-committee
- Overlap between draft Rule 31.5A and Whitaker PD and ESIQ
- Jackson confident but will he stay with it?
- Doubts about judicial training and judicial time
- Much more interest than a year ago
- The rules and the cases exist, new PD or not
- Opportunities regardless of Rule Committee
- Jackson not binding but persuasive as to what is right

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