

## NEWS

### Brave New World – Court rules emphasise the need for early cooperation on Electronic Evidence

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In October 2010 new court rules came into effect which reinforced the importance the courts are placing on the disclosure of electronically stored evidence. In this article, [Michael Axe](#) assesses the effects of these new rules, and the dangers of ignoring them.

When the Civil Procedure Rules were first introduced in 1998, the relevance of Electronically Stored Information (ESI) was not at the forefront of anyone's minds. But as the way in which businesses operate has fundamentally changed over the course of the last decade, the Courts have had to develop new rules to deal with the avalanche of new technology that has become not only available, but commonplace.

The Courts have confirmed that electronic "documents" include not only the obvious examples of word-processing documents, spreadsheets and emails, but also SMS text messages, digital voicemails, instant messages, web-based applications, peer-to-peer files, electronic calendars and webpages, as well as "deleted" files and hidden metadata. Not only that, but the types of places that parties are expected to consider searching for relevant ESI has expanded from just desktop PCs and laptops, to smartphones, iPads/tablet computers, memory sticks, digital cameras, iPods/media players, servers and back-up archives.

If there is one key message which the Courts have been saying in relation to the disclosure of ESI, it's that parties can no longer afford to bury their heads in the sand and ignore the issue. As highlighted in our earlier [article](#), the Courts are not afraid to impose significant cost sanctions on a party that fails to comply with its obligations in relation to "e-disclosure".

#### The New Rules

In an effort to clarify precisely what those obligations are, on 1 October 2010 a new set of court rules (known as Practice Direction 31B of the Civil Procedure Rules) were published. These new rules make it clear that the following "General Principles" should be borne in mind whenever the disclosure of ESI is considered:

- the disclosure of ESI should be managed efficiently (using appropriate technology) in order to minimise the costs incurred
- e-disclosure should be provided in a way which allows the Court to deal with the case justly, proportionately and cost effectively
- ESI should be made available to the other side in a form which allows the other side the same ability to access/review/search the documents as the disclosing party
- the disclosure of ESI which is not relevant to the proceedings will only serve to waste the parties' time and money.

These General Principles highlight that the Courts consider that the proper management of the e-disclosure process should, in the long run, allow the parties to proceed on a more cost effective basis (even if the short term costs may be increased).

#### The key issues to consider

The rest of the new Practice Direction 31B sets out in more detail the issues which need to be addressed when dealing with the disclosure of ESI. Of these, the following are arguably the three most important issues for parties to be aware of:

- **Preservation** – parties must preserve disclosable ESI as *soon as litigation is contemplated*. Even the deletion of ESI in accordance with established document retention policies or in the ordinary course of business must cease. Many businesses are starting to include Document Preservation Systems as part of their risk management strategy, and these can also be used to preserve ESI for litigation purposes
- **Cooperation** – discussions must take place between the parties at the outset in relation to the use of technology to manage the e-disclosure process. These discussions should also address issues such as the categories of ESI to be searched/disclosed, the use of keyword searches and other filtering techniques, and the use of a "staged approach" to e-disclosure
- **Electronic Documents Questionnaire** – the new rules also introduce the "Electronic Documents Questionnaire", which can be used by the parties to exchange information regarding the extent of their own e-disclosure, as well as their expectations regarding the other side's e-disclosure. The Questionnaire is *not compulsory* at the moment (unless the Court orders the parties to complete it), although as the Questionnaire is designed to be a "checklist" of the issues that need to be considered and discussed, parties may find it useful to voluntarily exchange them in certain cases. If the parties do agree that it is appropriate to exchange Questionnaires (or the Court orders them to do so), then the person signing the

Questionnaire must also attend any Case Management Conferences at which e-disclosure issues are to be considered.

### The Future of E-Disclosure

The first decade of the 21<sup>st</sup> Century has arguably seen more changes in the way in which businesses use technology than any other period in recent history. Whereas it was once possible to satisfy the duty to the Court to carry out a reasonable search for disclosable documents by simply reviewing the contents of a couple of filing cabinets, that is clearly no longer the case.

And with the ever-decreasing cost of electronic storage, the problem is only likely to get worse. Today it can cost as little as £40 to install a 1 terabyte hard drive into a PC – but 1TB of data could represent approximately 20,000,000 pages of printed information!

Not only that, but with the increased use of “cloud computing” (and in particular “cloud storage” and other third-party hosted online back-up services), keeping a track of where all relevant ESI is held could become yet more complicated in the future.

Whatever the future may hold, what is clear is that the Courts are endeavouring to keep up with the technological advances, and they expect parties to proceedings to do the same or face serious costs consequences. Some commentators have noted ironically that this is in circumstances where the much vaunted upgrade of the Courts’ own technological facilities still remains rooted in the last century rather than this one.

For further information on this or any other issues relating to electronic disclosure, please contact [Michael Axe](#) by emailing [Michael](#) or by calling him on 08450 990045, or speak to your usual contact in the [Commercial Disputes Team](#).

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