

ready and able?



Paul Doolan, executive director of Epiq Systems, warns that electronic evidence raises some unique challenges for litigators and that those who fail to prepare in advance may come unstuck

As economic clouds gather, the thoughts of many companies turn to litigation. Lawyers need to prepare for the critical role that electronic evidence will play.

As litigation increases, the importance of electronic evidence rises. Regulators' powers have increased in recent years and regulatory investigations have increased sharply. Managing electronic evidence efficiently is a critical skill for lawyers and failure to do so is becoming perilous for law firms and their clients.

Challenges

Coping with electronic evidence presents challenges in terms of volume and location. This is compounded by the absence of detailed guidance in the Civil Procedure Rules on handling electronic evidence. Although recent Practice Directions for CPR Part 31 have provided some guidance, the rules on best evidence for paper-based documents are of limited help in respect of electronic evidence.

As soon as litigation involving electronic evidence becomes apparent, identify what is likely to be relevant. The issues to address include: the information required; the individuals involved; and the

whereabouts of the information, e.g. on an e-mail server, in spreadsheets or in word-processed documents.

Consider whether to suspend policies or practices which might result in alteration of data after a certain date to protect you and your clients. This is especially important in regulatory investigations.

Experts

Once the scope of the task is established, consider how it will be collated and handled. Proper planning for e-disclosure at this stage is vital to the efficient management of the case. Too often, it is overlooked, delegated or simply dismissed as too difficult. Such mistakes must be avoided.

This is the time to assess the length of the project and the volume of documents involved. This is also the time to identify the need for experts, such as forensic and e-disclosure processing specialists, to help to identify and extract key evidence by exploiting the benefits that the latest technologies offer.

To reduce the volume of documents, it may be necessary to de-duplicate documents and run keyword searches to identify relevant material. Finding keywords is often a case of trial and error, and additional time

needs to be allowed for this process.

It should be decided whether to review the evidence in-house or employ external consultants. Most firms will be able to perform a preliminary examination of a certain quantity of electronic documents, but maintaining evidential integrity of the data in large volumes of documents will require specialist tools.

This is especially important if the 'metadata' (the 'invisible' record, among others, of when a document was created, handled and amended, and by whom) of the electronic documents is important, as well as their content.

Metadata can be irreversibly altered or destroyed by copying or extracting data incorrectly. It is important to employ systems and expertise to harvest and process electronic evidence in a non-invasive manner. This will ensure that electronic files, including data on file creation/modification dates, deleted and partially deleted files are maintained, and will expose any attempts to destroy documents.

This is also the time to involve the litigation support team, IT department or external experts who understand the technical issues, and to take advice on the process and where difficulties lie. The client should also be advised on the time and cost involved in the management of any electronic data.

Data management

If these steps have been followed, the firm should be confident that it can show the court that a proactive, diligent and systematic approach has been taken over handling electronic evidence.

However, it is common for law firms to underestimate the time and complexity of e-disclosure, leaving many of these matters to the last minute. This results in a last-minute scramble, which puts greater pressure on the review team and can create unpleasant surprises for clients, while also significantly increasing the risk of missing crucial evidence.

There is a real risk of spoliation if electronic evidence is not handled

correctly. What constitutes spoliation in the context of electronic evidence is so far untested in the United Kingdom courts, but case-law around this issue is developing in the US, and it can only be a matter of time before it is tested here.

Permanent feature

E-disclosure is a permanent feature of the litigation landscape. It is no longer sufficient for lawyers to consider that electronic evidence is an issue that is primarily the responsibility of the IT department.

It is the responsibility of lawyers to be aware of these issues also. Many of the better-prepared law firms have already appointed a member of the team to take charge of

managing electronic disclosure issues and technologies, and of maintaining contact with external experts.

While these roles still tend to be considered as a cost issue by many firms, if properly resourced, they can pay dividends. Having a specialist member of the team with the knowledge and skill to deal with large amounts of electronic evidence is often the most efficient way to cope with the challenges of e-disclosure, and those litigation teams that can best demonstrate their mastery of e-disclosure will be the ones that prosper in the electronic age.

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