

Exchange, Inspection & Court Presentation

1. INTRODUCTION

1.1 Exchange and Inspection is the last stage of the e-disclosure model discussed in this training session and, as such, it is often neglected until the end of the process. However, this stage is closely interlinked with each of the preceding stages so careful early planning is required to make sure it runs smoothly and without untimely resistance from your opponent. In addition, the Exchange and Inspection stage represents an opportunity to check that your opponent has carried out an adequate disclosure process.

1.2 This stage can be broken down into three phases:

1.2.1 Data Delivery;

1.2.2 Analysis of Opponent's Data; and

1.2.3 Disclosure Applications.

2. DATA DELIVERY

2.1 The parties should seek to agree a disclosure protocol as early as possible. This protocol should cover both the format and delivery mechanism of production.

2.2 In terms of format:

2.2.1 Typical disclosure will comprise emails along with their attachments (Word, Excel, Powerpoint) and some pdfs. Construction also often include a variety of technical documents (Auto CAD, for example).

2.2.2 Technical details concerning production formats are often handled by the litigation support provider. Work closely with your provider to establish the most appropriate format(s).

2.2.3 Production can be effected using the following format options, listed in order of decreasing availability of metadata and ability to search:

(a) Native;

(b) Near native;

(c) Image (near paper); and

(d) Paper.

- 2.3 In terms of delivery mechanism you should seek to agree the following:
- 2.3.1 dates for exchange and contents of lists of documents for disclosure;
 - 2.3.2 date and appropriate media for exchange of load file thereafter; and
 - 2.3.3 a mechanism to govern discovery of corrupted or virus infected data in the exchanged data.
- 2.4 In some circumstances it may be appropriate to agree to the rolling production of data. This production option might be negotiated in circumstances in which there are large volumes of data to be reviewed and produced in a short timeframe.
- 2.5 If disclosure is to take place in stages, the parties need to explain what each stage of disclosure will comprise (in terms of document type or category, or particular custodians or origin). Further, if disclosure requires an update, the parties should agree when the update or updates should take place and what updates are required (i.e. will only certain custodians or document types suffice or will each refresh have to be as wide as the original extraction?).
- 2.6 It is recommended that the parties agree a mechanism that deals with inadvertent disclosure of privileged material such that the receiving party shall promptly return or destroy the specified document and shall refrain from using or referring to it. The concept is one borrowed from the United States and can take the form of "claw-back" or "non-waiver" agreements. Such agreements are contemplated by the CPR (PD 31B.9(3)(f)) and are identified as an issue to be discussed by the parties prior to the first Case Management Conference .
- 2.7 It should be noted that there has been uncertainty regarding the enforceability of such agreements. However in the eDisclosure Protocol it is expressly stated that the part of the protocol which contains the clawback provisions is intended to give rise to a contractually binding legal agreement between the parties. It is therefore strongly arguable that the Courts shall enforce these provisions if material has been inadvertently disclosed during the e-disclosure process.

3. ANALYSIS OF OPPONENT'S DATA

- 3.1 Be prepared to review your opponent's data when it arrives. Arrange appropriate levels of resources, including access to clients and experts.
- 3.2 Analyse data for content and for indications of inadequate disclosure for example:
- 3.2.1 failure to comply with agreed protocol;
 - 3.2.2 high proportion of duplicate data;
 - 3.2.3 high proportion of irrelevant material; and
 - 3.2.4 missing documents.

4. DISCLOSURE APPLICATIONS AND WASTED COSTS ORDERS

- 4.1 In the event that your opponent's disclosure is inadequate apply to the court for an order that the opposition should, for example:

- 4.1.1 provide disclosure list in agreed form;
 - 4.1.2 provide copies of missing documents;
 - 4.1.3 provide specific disclosure; and
 - 4.1.4 carry out additional disclosure exercise and provide inspection as necessary, e.g. in relation to additional custodians.
- 4.2 In certain circumstances it may be appropriate to apply for a wasted costs order:
- 4.2.1 *Digicel v Cable & Wireless [2008] EWHC 2522 (23 October 2008) (ChD)*
 - (a) Defendants were ordered to re-do their e-disclosure exercise at significant extra cost.
 - 4.2.2 *Earles v Barclays Bank [2009] EWHC 2500 Mercantile (8 October 2009)*
 - (a) adverse costs consequences for the bank despite the fact that it ultimately won the case. The judge observed that it was 'gross incompetence' for any lawyer practising under the CPR not to know the rules on e-disclosure.
 - 4.2.3 *West African Gas Pipeline Company Limited v Willbros Global Holdings Inc [2012] EWHC 396 (TCC)*
 - (a) adverse cost consequences for failure to assemble a consistent and complete set of electronic data for electronic disclosure and ensure that the documents are properly reviewed and duplicates eliminated.

5. PRESENTATION

- 5.1 Should your case make it through to the courtroom there are two main options open to you. We are discounting your involvement in public enquiries such as the Leveson or Diana investigations, that come with their own IT infrastructure. The two choices for electronic assistance available are some form of PDF bundling software, or "cloud based" presentation systems.
- 5.1.1 "PDF bundling" is the term given to the process whereby all documents to be used in court are converted into PDF format, and then electronic "links" created between the various documents, normally from the main index to support documents and back again. A number of vendors will provide this service or you can carry out the bundling yourself.

The bundling software used in the presentation comes from a firm called Zylpha.
 - 5.1.2 Presentation software enables both "sides" to share the documentation, with strict ethical (and physical) walls preventing each side from seeing each other's coding. You can start generating the courtroom bundle, long before the case comes to trial, and add material throughout the pre and actual trial period, all without having to re-number physical pages.

The software in the presentation is Opus 2's Magnum product.