Disclosure of electronic documents

Practice Direction targets cost of electronic disclosure

The new Practice Direction (PD 31B) on the disclosure of electronic documents will certainly focus in-house counsels' minds on their records management policies and litigation strategies, but this may be no bad thing as it will allow their organisations to take greater control of the costs of electronic disclosure.

The story so far

Parties involved in litigation in England and Wales must disclose only the documents on which they rely; or which support or adversely affect their own, or another party's, case (*Civil Procedure Rule (CPR) CPR 31.6*). The parties are obliged to carry out a "reasonable search" for disclosable documents (*CPR 31.7*). "Document" is defined as "anything in which information of any description is recorded" (*CPR 31.4*), which includes all electronic documents. Since 1 October 2005, disclosure of electronic documents has been covered by paragraph 2A of the Practice Direction to Part 31 of the CPR (paragraph 2A).

Two key decisions on electronic disclosure are *Digicel (St Lucia) & Ors v Cable & Wireless Plc & Ors ([2008] EWHC 2522 (Ch); www.practicallaw.com/0-384-1169*) and *Earles v Barclays Bank plc ([2009] EWHC 1*). In both cases, the judges commented on perceived shortcomings in complying with paragraph 2A's requirement to meet to discuss the scope of the reasonable search for electronic documents.

The new regime

On 1 October 2010, PD 31B replaced paragraph 2A. PD 31B formally applies only to multi-track claims (that is, claims that are not suitable for allocation to the small claims track or the fast track (*CPR 26.1(2)*) which were started on or after 1 October 2010. However, judges are given an express discretion to apply PD 31B in any case. As they are likely to do so if electronic documents form a significant part of disclosure, we expect that PD 31B will come to represent best practice for dealing with any electronic disclosure issues that might arise, even in cases where it does not formally apply.

A key change is that, as soon as litigation is contemplated, parties' legal representatives must notify their clients of the need to preserve disclosable electronic documents. PD 31B also sets out the points that parties should (where appropriate) discuss with each other before the first case management conference (CMC) (a hearing at which the judge will typically make the first order for directions in a case, setting down the timetable to trial) (*see box "Points for discussion"*).

PD 31B states that the primary source of disclosure is normally "reasonably accessible data" and that a party requesting the specific disclosure of electronic documents that are not reasonably accessible must demonstrate that the relevance and materiality of the documents justify the cost and burden of retrieving them.

To facilitate the required discussions, PD 31B appends an Electronic Documents Questionnaire (the questionnaire) that contains a statement of truth. The questionnaire is voluntary (unless its completion is ordered by the court) but, in the event that one is produced, PD 31B states that the person signing the statement of truth should attend any hearing at which disclosure is likely to be considered. Careful consideration will therefore need to be given to who is the appropriate person to sign the statement of truth; it will need to be someone with a suitable level of knowledge of the party's systems and electronic documents.

In addition, the parties will now need to inform the court before the first CMC as to whether they have reached agreement about electronic disclosure. If not, the parties are required to identify the issues that the court should address so that it can give directions (perhaps

Points for discussion

The following matters should usually be discussed before the first case management conference:

- The categories of electronic documents within the parties' control; the computer systems, electronic devices and media on which any relevant documents may be held; the storage systems that exist; and any document retention/destruction policies that might apply.
- The preservation of electronic documents.
- The scope of the reasonable search for electronic documents. Some non-exhaustive factors that may be relevant include: the number of documents involved; the ease and expense of retrieval of any particular document; the availability of the documents or contents of documents from other sources; and the significance of any document which is likely to be located.
- The tools and techniques (for example, filtering or searching) which should be considered to reduce the burden and cost of disclosing electronic documents.
- The exchange of electronic documents, including their format and what accompanying information will be provided.
- The basis for charging for, or sharing, the cost of the disclosure of electronic documents.

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requiring one or more of the parties to complete the questionnaire, if they have not already voluntarily done so).

Other points

Other points to note from PD 31B are as follows:

- It may be reasonable to search for electronic documents using keyword or other automated searches if a full review of each and every document would be unreasonable, but PD 31B warns against the injudicious use of such techniques.

- Save where otherwise agreed or ordered, electronic documents should be provided in their native format (in a way that preserves metadata relating to the creation of each document). Also, save where redactions have been applied, any available searchable OCR (optical character recognition) versions of documents should also be provided.

- If electronic documents are best accessed using technology which is not readily available to the party entitled to disclosure, and that party reasonably requires additional inspection facilities, the party making disclosure should co-operate in making available such reasonable additional inspection facilities as may be required.

Practical implications

It will be critical for in-house counsel to be aware of what is required as they, along with IT and records management personnel, are likely to be intrinsically involved in the steps required by PD 31B, and may end up signing the statement of truth in the questionnaire.

Organisations with an up-to-date, clear and enforced records management policy, and a litigation readiness policy, will be far better placed to comply with PD 31B and identify, preserve and collect their electronic documents in an efficient and cost-effective manner. The reduced volume of documents collected will in turn reduce the costs of the review and production of those documents.

By understanding its electronic documents at an early stage, a party will be able to conduct the required discussions with the other party, not just in relation to what they have and will produce, but also in terms of what documents are required from the other side.

Some have argued that PD 31B will increase the already heavy costs burden of disclosing electronic documents. Although it may be true that some more work may need to be done at an earlier stage, it should be borne in mind that it is the volume of electronic documents that is driving up costs: PD 31B did not create this situation, but it is part of a solution. Also, the PD 31B requirements are really just an amplification of those found in paragraph 2A, but in practice the latter was often ignored.

The investigation and discussion required by PD 31B will provide the foundations for determining (whether through agreement or a direction from the judge) the boundaries of a reasonable search for electronic documents. In this way, the overall costs of the review and disclosure of electronic documents (which are often a significant proportion of the overall costs in a case) can be controlled, and expensive disputes over disclosure can be limited to those areas which are unavoidable.

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