Jackson joins the IT crowd

Julian Parker believes e-disclosure has been placed on centre stage by Lord Justice Jackson

In 2006 a very IT literate barrister colleague who was working with computer forensics experts organised a talk from them to an assembly of judges. They were increasingly seeing cases involving potentially large amounts of technical and digital information. The barrister was concerned that too often the parties in court would "fudge" the issue of electronic data and what their clients would be able to produce for the court, variously asserting technical difficulties or the sheer unmanageable quantity or nature of their client's data as excuses for not producing all or even any of it. The host and prime organiser—a certain Lord Justice Jackson.

It has been interesting to see over the subsequent years how he has taken this subject on and given it some direction in the wider context of civil litigation.

Uncertainty

To date the place of digital, or Electronically Stored Information (ESI) in the litigation process has been somewhat uncertain and has depended, in large part, on the nature of the case and the experience of the lawyers and their clients in such matters. The disciplines brought to bear in e-disclosure are known to the firms who handle large, multi-jurisdictional litigation and, in particular, litigation originating from the US, but is often unknown or little used in smaller cases, and sometimes a complete mystery to lawyers and clients alike.

The most important statement Lord Justice Jackson makes can be found in Chapter 37 on disclosure, subheading "E-Disclosure", where he makes the crucial comment that "e-disclosure is inevitable in cases where the parties hold the relevant material electronically." This recognises a reality of the modern workplace and in effect, forces the issue of whether or not e-disclosure is relevant and necessary on a case-by-case basis.

Experience dictates that in all but the very smallest of enterprises, material is held electronically, and the volume of data collected by a business in its normal course of activities is vastly greater than could be printed out and filed. The ease of replication and the availability of mass data storage has made this possible, and brought with it its own issues in relation to litigation and disclosure. Jackson faces this squarely and correctly in his final report and serves to remind litigants and their advisers of the realities of the world they live in.

Help at hand

The report goes on to assure all concerned that help is at hand. He has seen, at first hand, technologies designed to assist exactly this process, and recommends that the judiciary familiarises itself with such technologies.

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The point of these technologies is to "whittle down as far as possible the potentially relevant documents which will be sent to lawyers for review and to enable lawyers to search and organise the documents sent to them". These technologies have already been highly successful in assisting litigation in the US and originating from the US, where the truly mind-boggling amounts of information captured and processed could never have been reviewed without them.

Jackson not only urges the judiciary to familiarise itself with such tools, but takes the natural and crucial step of recommending that "e-disclosure as a topic should form a substantial part of Continuing Professional Development (CPD) for solicitors and barristers who will have to deal with e-disclosure in practice and the training of judges who will have to deal with e-disclosure on the bench". He then points out the service providers will have a part to play in such training. The message is clear—e-disclosure is here to stay and everyone needs to know how to use it—there is to be no excuse for ignorance on the subject.

Costs

So how might this affect costs? At first glance costs would appear to be on the increase as the reality of having to undertake e-disclosure would seem to predicate more specialist costs to be borne by each side. In reality this should not be the case. The technologies employed in e-disclosure ultimately limit and reduce costs—using machines to undertake the long and laborious task of reading endless emails and other documents, freeing up the legal advisers to spend quality time reviewing those that appear important.

Jackson further outlines proposals for Case Management Conferences which will force e-disclosure issues into the open very early (as in the US system), and will require an explanation of each party's ESI, and how it will be examined by a "reasonable search", bearing in mind "the overriding principle of proportionality". Such a common-sense attitude combined with the phenomenal technology that now exists to process, search and produce ESI, should lead to a level and proportionate playing field in this area, and ultimately a much better understanding of the likely costs on a case-by-case basis.

One thing appears certain, there will be no avoiding e-disclosure in the future —but be not afraid! Exposure to it and training in it will enable litigators to become familiar and comfortable with it, and to gain incredible benefit from it, both in terms of the quality of the information it can provide and the ultimate streamlining of the disclosure process it will allow, freeing up lawyers to apply their expertise where it adds most value to their clients. NLJ

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