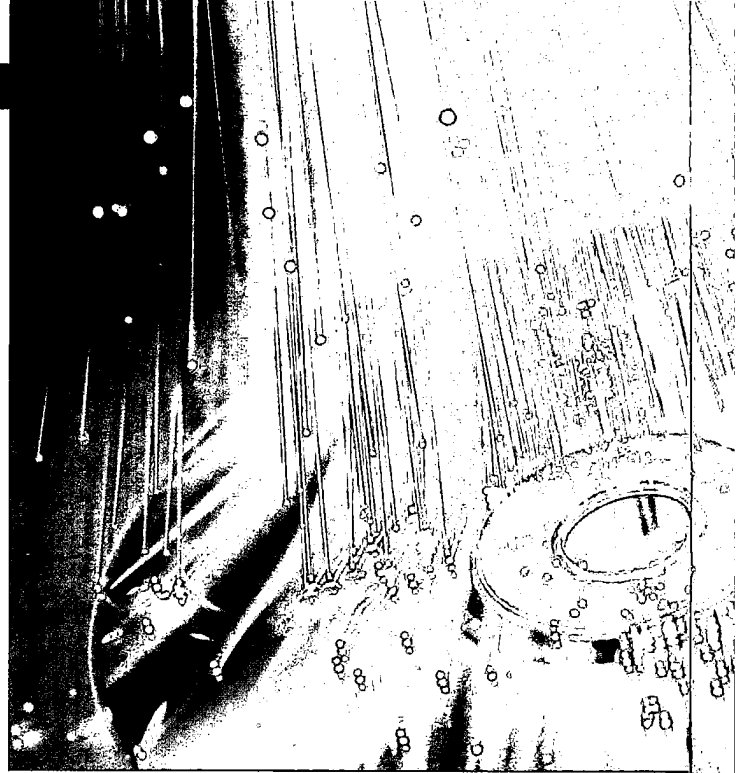


## Cover story

# VOYAGE OF DISCOVERY

Litigation lawyers are dealing with a growing mountain of electronic data, and need to make quick decisions about what will be relevant. In-house or external e-discovery solutions can save valuable time, money...and clients.

By Richard Brent



The speed and style in which information is stored and transported has changed beyond recognition in the internet age. Most written correspondence in the business world now takes place by e-mail, files are transported to multiple parties as electronic attachments, (themselves containing unseen and potentially risky metadata), and the internet has expanded to embrace concepts such as networking and content-sharing sites. While general information has never been more widely available to anyone, working anywhere in the world, a specific piece of information is, inevitably, much harder to pin down.

If there were any doubt as to the potential risk posed by our paperless, digital age, one need only recall one of the biggest shock stories of last Autumn in the UK – the fact that HM Customs and Revenue was able to misplace the personal information, including bank account details, dates of birth and addresses, of over seven million families claiming child benefits. The data was being transported on just two compact discs, which, it emerged, were shipped by a junior official without following the appropriate procedures.

## Deluge of data

The abundance of information stored in digital form has put huge pressure on the

legal profession too; notably in litigation, where millions of 'pages' need to be sifted and analysed prior to a case – the lawyers on both sides deciding what will be relevant and what is not. Fortunately, however, while the tireless march of technology has led to a data deluge, technology can also be part of the answer in the form of an e-disclosure strategy, otherwise known as e-discovery.

Vince Neicho is litigation support specialist at the London office of Allen & Overy LLP. Responsible for document management across the firm's litigation department, he recently flew to the firm's Hong Kong office to advise two major client banks in planning an e-disclosure exercise. He explains that the extent of any 'e-explosion' on court proceedings is still in a transitional period. "With the usual time-lag between dispute and the initiating of proceedings, we have only recently encountered substantial amounts of source material from the true electronic revolution. Given the phenomenal increase in the use of e-mail, and new technologies such as instant messaging, we can expect an exponential increase in the volume of information to be considered in future cases," he says.

In the absence of a leading case on the topic in England and Wales, however, he explains, the main challenge will involve

anticipating what the courts actually require and balancing the need for proportionality in cases.

"I am confident our courts here will retain a measured approach to disclosure and e-disclosure, rather than blindly follow the e-disclosure explosion that has occurred in the US," he adds.

## Getting in early

At the same time, however, new amendments to the Federal Rules of Civil Procedure (FRCP) in 2006 in the US placed a greater emphasis on the timely, or 'early', disclosure of data there, as well as demanding a greater understanding of the costs involved and how to manage them. In the revised FRCP, getting to grips with electronically-stored data, including instant messaging (IM) 'chats' is established as a key priority for a litigator from the outset of a case.

Of course, in an ideal world effective document-management and information-retrieval procedures for e-disclosure will already be in place. However, according to Greg Wildisen, managing director of PinPoint Global: "Most law firms do not properly centralise this function, and as a result, the project management is left to lawyers. Whereas the position of technology counsel in the US is becoming more commonplace, this is not



evidenced in the UK as yet. E-disclosure is a combination of technology and services and requires a unique set of skills to deliver appropriate results, but these services often don't have a natural home in a law firm. The position is rarely given appropriate revenue recognition or reporting structure."

Craig Carpenter, vice president of marketing and business development at Recommend, agrees that law firms need to make some internal changes to their e-disclosure practices, including tackling the issue of training. "US law schools are notoriously slow to change their curricula, and with business and technology changing so quickly, the inevitable by-product is unprepared lawyers. Similarly, most law firms do not give their lawyers sufficient training in any of these areas as there is so much pressure on the billable hour." However, he adds that many of the top firms are finally getting serious about modernising their litigation practices, simply because they are starting to lose clients to their more advanced peers if they don't.

#### Closer collaboration

For Neicho, however, with the plethora of services on offer, there is no reason for any firm not being equipped to handle the escalating demands of e-discovery. "It is difficult to imagine any law firm does not

use computers for production of its own documents (Word, e-mail and so on.) It follows that each firm should expect to be able to manage those documents (and those of their client) in some way," he says. "Going forward, firms that are not in a position to offer guidance and advice on products and services available will find themselves at a distinct disadvantage."

One way firms can certainly offer better value to their clients is to collaborate and share expertise – something they understandably weren't so keen on doing in the past. Neicho is a founder member of the Litigation Support Technology Group (LiST), however, which has successfully brought firms together in such a way. "The courts currently encourage the parties to discuss and agree limitations on scope, and I believe that they should, and will, be more forceful in ensuring that this happens," he says. The trend towards greater collaboration over e-discovery is clearly encouraged by such a requirement.

LiST established an electronic data exchange (EDE) Working Group, bringing together representatives from a cluster of leading UK law firms to explore the extent to which firms could conceivably collaborate in terms of their e-discovery procedures. The conclusion was that an exchange 'Protocol' would make dealing with the mass of data significantly more efficient and cheaper for firms – a saving that can naturally then be passed on to clients.

Neicho describes the proposed Protocol as a "standard Esperanto" where firms only need two filters – "one to dump data and images into the Esperanto from their own system and another to reverse the process". The precise form of the Protocol is still being amended in the wake of public consultation, and will then be presented to the judiciary for its input, but Neicho says "early indications from the judiciary are encouraging". It will not be mandatory for members, and LiST decided there shouldn't be restrictions on how data is used internally by firms. "The Protocol was not built with any particular system in mind," he says.

Firms can collaborate with one another, invest in training, and work closely with their clients' IT departments, to make significant gains in the discovery process. At the same time, there is hardly a shortage of technology suppliers and external advisers to assist those who feel they lack the necessary internal expertise. Many are happily on hand with the latest answers to effective search and retrieval, and some degree of cynicism is only to be expected. "The rapid growth of e-discovery has inevitably attracted a large number of opportunistic individuals and vendors, which has resulted in increased scepticism," says Carpenter. "Continued hype will generate ever more attention and, and vendor reputation will quickly become the most important selection factor."

Wildisen adds: "Lawyers need to use solutions in line with the challenge. The key is not to over-complicate the matter or over-serve the client. Technology tools such as concept search can be used to cull large volumes of data, but a simple low-tech solution may be fine depending on the circumstances. Simple risk analysis at the outset will usually provide appropriate guidance."

#### Better behaviour

While the electronic revolution continues apace, however, Wildisen believes the main challenge for e-discovery practitioners in the UK is, in fact, the humble printing process. "The predominance of e-disclosure is not in the five terabyte jobs that adorn the various case studies, but rather the single CD ROM. What will the lawyers in the majority of law firms do with this? Send it to the print room with instructions to print it all out. There is no perception that this is even an e-disclosure exercise."

Regardless of the latest sophisticated search and analysis technology, a key driver of improvement in efficiency will always be behavioural change. Lawyers need to be encouraged to embrace technology, but this will only come with investment in improved communication and training, as well as the latest tools. ■