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GUN  
is ONES AND  
ZEROS.”**

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**Editor**  
Richard Brent  
rbrent@ark-group.com

**Head of editorial**  
Kate Clifton  
kclifton@ark-group.com

**Production editor**  
Brad Davison  
bdavison@arkgroupasia.com

**Head of production**  
Danielle Filardi  
dffilardi@ark-group.com

**Advertising sales**  
John Kearns  
jkearns@ark-group.com

**Subscription sales**  
Benjamin-Tam Fletcher  
bfletcher@ark-group.com

**Publishing director**  
Lucy Brazier  
lbrazier@ark-group.com



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**Head office**  
Ark Group Ltd  
Paulton House, 8 Shepherdess Walk  
London, N1 7LB, UK  
Tel +44 (0)20 7549 2555  
Fax +44 (0)20 7324 2373  
E-mail: info@ark-group.com  
www.ark-group.com

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EDITOR'S FOREWORD

A number of the litigators I was fortunate enough to speak to for this report informed me that there has not been quite as great a determination to pursue cases through the courts as might have been expected given the extent of this economic downturn. Just as funding is notoriously hard to come by for struggling businesses and homeowners, so too some are apparently finding liquidity a little problematic within the legal system.

The past year and a half, of course, has seen widespread predictions that the practices to flourish in the 2009 recession would be restructuring, bankruptcy, insolvency and litigation. Corporate's (and indeed many consumers') losses would be litigation's gain, as these 'counter-cyclical' practices benefited from a downturn's typical business trends.

Certainly, we have seen a string of high-profile fraud cases hitting the headlines. As white-collar crime goes, it is difficult to envisage a more remarkable endeavour than Bernard Madoff's multi-layered 'Ponzi' scheme, now estimated to have been worth some US\$50bn. Madoff admitted all 11 charges against him in March 2009, including four counts of fraud and three of money laundering, and the authorities are now busy unravelling the full details of the network the former NasDaq chairman successfully spun out since the 1990s. The exposure of similar crimes, if not on such a scale, are expected with an increased willingness to 'whistleblow'.

Then there is corruption and bribery. Law firm Lovells recently formed a cross-border task force to focus on this area, bringing together expertise from a broad range of industries. Citing the December 2008 €1bn fine of Siemens and a possible new Bribery Bill destined for the UK, Lovells also launched a new client website and booklet titled: 'Dealing with Bribery and Corruption'. "We expect more allegations of bribery and corruption to come to light as the recession bites," explained the project's co-ordinator, dispute resolution partner Jeremy Cole.

As for commercial litigation, in spite of the sensitive relationships between law firms and some of their largest clients, it seems unlikely recent banking woes will slip quietly out of either the headlines or collective memory. In any event, all law firms, many of whom are suffering significantly in this recession, will want to ensure management, resources and infrastructure in place is such that all litigation work that does find its way to their doors is dealt with in as efficient and cost-effective a manner as possible.

**Richard Brent**  
Editor



# Information – the new trade war?

By **Jonathan Armstrong**, partner, Eversheds

January is always a time to take stock of the year just gone and make predictions for the year ahead. For most of us we were happier than usual to say farewell to 2008 – the tougher task was to predict the big compliance issues of 2009. We looked at issues caused by the global financial plight and some of the side effects, including the increasing extra-territorial reach of the US authorities, the perceived sprawl of e-discovery to European soil and greater opposition to both of these developments by European data-protection authorities. In all of these areas Europeans generally see the US as wanting too much information – litigation techniques like wide discovery and litigation holds are simply too rich for the European palate. At the same time the US authorities have been ever-anxious to regulate US corporations (and others doing business with the US) in all of their activities around the world. Companies both here and abroad – and their lawyers – are likely to get caught in this perfect storm.

The end of 2008 had seen a telling example with the announcement of the conclusion of the Securities and Exchange Commission (SEC) investigation

into allegations of bribery at German company Siemens. The US investigation and Siemens's internal investigation of its business practices began in November 2006, when raids by German prosecutors prompted Siemens to talk to the US authorities about potential violations of US anti-bribery laws. The US authorities said that the internal investigation was of “unprecedented scope”. Reports suggest that over 300 lawyers, accountants, and support staff spent 1.5m billable hours on the internal investigation alone. As well as collecting and sharing vast amounts of documentation with the US authorities, Siemens agreed to pay them \$800m. Siemens's fines, in a related settlement with the authorities in Germany, stand at €596m, bringing the total cost to date of resolving the corruption-related charges to around \$1.6bn.

February saw a further illustration of the trend as shares in the Swiss bank UBS fell to an all-time low when it was forced by US tax authorities to pay a \$780m fine and disclose the identity of around 300 of its US clients. Separate civil proceedings were issued in Miami seeking disclosure of details of the business done by between 45 and 60 Swiss-based

bankers, who, it is alleged, had travelled to the US around 3,800 times with encrypted laptops. The US authorities suggest that 52,000 US-based customers could be involved. In Switzerland this was headline news, with calls for the UBS chairman (himself a lawyer) to resign.

### Data dilemmas

These incidents come amid European developments to try and curb 'le fishing expedition' in Europe. The French authorities have looked to legislate against French documents being used in foreign proceedings since 1968. In 2007 the French Supreme Court upheld the criminal conviction of a French lawyer for violating a Penal Law which provides that:

"Subject to international treaties or agreements and laws and regulations in force, it is forbidden for any person to request, seek or communicate in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial nature leading to the constitution of evidence with a view to foreign judicial or administrative procedures or in the context of such procedures."

The lawyer was fined €10,000. In January 2008 the French data protection authority, CNIL, said it would look again at measures to stop the reach of US authorities and courts into France. CNIL set up a committee led by CNIL Commissioner and Judge at the Cour de Cassation, Bernard Peyrat, who in June 2008 described the issue as one which "involves substantial challenges linked to both an 'economic war' and a 'war between legal cultures'". Significantly the leader of the CNIL, Alex Türk, said he would use his chairmanship of the Article 29 working party (known as 'WP29', a pan-EU body looking at data-protection issues) to put his campaign on the agenda for all of Europe.

It is clear then, that the US authorities have been more willing than ever to reach outside of the US in their investigations. In 2008 the SEC made 550 requests to its foreign equivalents for assistance in its investigations, including asking for telephone and e-mail logs. US authorities also helped train their foreign counterparts in their investigatory techniques. Many US corporations in particular find themselves caught by this apparent conflict. They can ignore

their own authorities and face sanction at home, or they can comply with requests to export information from Europe, override the rights of European employees or third parties, and face criminal sanction in Europe. In areas like internal investigations there is the added complication of aggressive subjects, who will try and enforce their privacy rights to suspend, compromise or limit an investigation against them.

In February Mr. Türk also led WP29 into action, publishing its opinion dealing only with the civil litigation aspects of the problem. Many will feel that, like similar WP29 pronouncements on Sarbanes-Oxley Act (SOX) helplines, the report is better at specifying the problems than proposing any solutions. WP29 reaffirmed its position that compliance with US laws is not in itself enough to override the data-protection rights of individuals. It supported the French position that procedures are in place to help with foreign disclosure, notably provisions of the Hague Conventions, and recommended that American courts consider requiring litigants to use the procedures of the Hague Conventions if available, and build in sufficient time in the litigation schedule for them to do so.

In both civil and regulatory cases the data-protection implications are many and varied. When conducting an internal investigation, for example, those involved must only use data which has been obtained 'fairly and lawfully' – in many cases this will include the corporation concerned having the consent of employees to collect their data. The investigation will need to be proportionate to the wrong, so for example the 'borrowing' of pens from meeting rooms is unlikely to justify a wholesale trawl of every employee's e-mail. WP29 said that in civil proceedings, litigants must limit the discovery of personal data to that which is objectively relevant to the issues being litigated. Care will also need to be taken to avoid the use of sensitive data, and this will make investigations involving issues like sexual liaisons, trade union membership, health and suspicion of prior misdemeanours harder to run in Europe. Investigators or data collectors always need to be mindful of the fact they may have to answer to employees, former employees and third parties for what they have done with their data and who they have shared it with. Broad document-freezing

policies or litigation-hold orders are also likely to cause issues. The WP29 opinion, for example, says: “[Data] controllers in the European Union have no legal ground to store personal data at random for an unlimited period of time because of the possibility of litigation in the United States ...”

In addition to data-protection legislation, other laws could come into play, including legislation aimed at preventing hacking and preserving the secrecy of communications. This category of law often carries heavier criminal sanctions than data-protection legislation. Improperly collected evidence could be inadmissible in any subsequent proceedings and, in extreme cases, could land the collector with a criminal conviction.

### E-discovery and Europe

In the US a whole industry has built itself up around e-discovery and internal investigations. Rarely is a legal conference held without backing from vendors of litigation-support services. As in any profession, however, their experience and knowledge of the issues in Europe is variable. If outside providers are used, proper due diligence will need to be done into their experience of assisting with investigations in Europe and their ability to do work here to avoid issues around transferring data to the US. This will include assessing the vendor’s own compliance, the qualifications of its staff and their technical ability. For example, do they have the facility to partition data, secure it and set specific access rights tailored to individuals who need to see the data? Due diligence is also likely to include questions on their understanding of the new BS 10008:2008 published in November 2008. This standard deals with the evidential weight and legal admissibility of electronic information. It seeks to lay down a process for managing the authenticity, integrity and availability of electronic evidence. This due diligence must be done before data collection starts, and compliance should be regularly audited throughout the process.

It is clear that these issues will come under increased focus this year as the pressure on regulators increases, and ever more US litigation touches on Europe. Some lawyers in Europe have pushed for increased e-discovery in Europe – in the main, for the increased access to justice they say it provides rather than the spectacular fees large cases

can generate. Lawyers practising litigation in Europe would be wise to work out a procedure now with their clients for responding to the need to collect personal data for any purpose. Issues they will need to address include:

- The need to limit the scope of investigations/discovery;
- The need to keep investigations in-country where possible;
- Restricting circulation – corporations need to get out of the habit of unintelligently copying people in ‘for information only’, especially where those people are in a different jurisdiction. In discovery consideration should also be given to applying to the US courts for a protective order. With investigations and regulatory enquiries consideration should be given to seeking to agree the scope of an investigation and steps like anonymisation of data with regulators;
- Arrangements in each relevant jurisdiction with outside counsel who could direct an investigation;
- Managing employee expectations before an incident – this could include sending a reminder to employees that their e-mails could be read where legally permitted;
- Doing due diligence on suppliers; and,
- Checking data-protection registrations.

The need for law firms to know the local culture in those countries where data is collected, as well as local law, will become ever more important. Data-collection procedures will have to be tailored to suit each occasion to try to ensure both compliance with local law and the expectations of the US court or regulator. Litigation teams will need to include data-privacy specialists in all aspects of the investigation and may even need to include independent counsel to lay down ground rules on behalf of those being investigated.

It seems clear that in 2009, neither the perceived wider spread of the US legal system, nor the opposition to that spread in Europe will decrease. If Judge Peyrat is correct when he speaks of a war between legal cultures we can be sure that the battle has only just begun. Managing PARTNER

Jonathan Armstrong is a partner at Eversheds. He can be contacted at: [jonathanarmstrong@eversheds.com](mailto:jonathanarmstrong@eversheds.com)

# Voyage of discovery

The route to electronic data discovery in six easy steps...

By **Reza Alexander**, **Lee Gluyas** and **Emma Hogwood**, DLA Piper UK LLP

**N**o matter what your level of experience working with electronic documents, balancing time, risk and cost in the conduct of electronic data discovery (EDD) continues to be one of the greatest challenges faced today in litigation or a regulatory investigation.

Technological advances, proliferation of electronic data, compliance regulations and current economic conditions all serve to increase both the importance and complexity of meeting this balance.

Although this balancing conundrum will never go away, it can be addressed effectively by following a robust readiness plan coupled with a number of systematic 'tried and tested' steps.

What is important to appreciate is that, although the storage media may have changed, the actual electronic discovery process need not be any different to the traditional methods used in paper disclosure.

Typically, an EDD project can be broken down into the following six distinct steps:

## Data preservation

At the first sign of anticipated litigation, a regulatory investigation or a request for production of documentation, immediate steps must be taken to preserve all relevant data and suspend all routine data-destruction policies. Steps must also be taken to ensure that the message is communicated organisation-wide – ensuring that no potentially responsive

data is destroyed or altered in any way. This is easier said than done, especially in larger organisations, but nevertheless it is important to impart, and be seen to have implemented, effectively.

A step-by-step process, guided by a structured questionnaire, should address issues including: why preservation is contemplated; what obligations may have automatically been imposed; what steps should be taken immediately to comply; which areas of the organisation have to comply; and, which key personnel, and what categories of data, may be affected.

## Data collection

For any electronic disclosure or regulatory investigation project to be effective, the data-collection process must be at the forefront of the project cycle, as it will ultimately define and determine the review strategies based on the amount and type of data gathered. The key issue is to find out what relevant data is available and where it is stored.

However, faced with a multitude of data-storage methodology, storage resources, levels of technical expertise and fluctuating IT resources to assist with the data collection, this first step can often be the most challenging.

Daunting as it may seem, the process of gathering the relevant data can be successful, as long as a systematic checklist is prepared. This can easily be completed by identifying and enlisting the assistance of key IT personnel within the organisation

whose data is being gathered, along with the acquisition or sight of the most up-to-date map of an organisation's IT network infrastructure.

The checklist should be as detailed as possible, allowing the user to obtain a clear understanding of the organisation's: IT infrastructure; applications; backup protocols; document-retention policies; mail-server data; file-server data; data about workstations; laptops; alternate forms of data storage (such as smart phones, personal home computers, memory sticks, portable hard drives, CDs and DVDs); traditional sources of data (such as hard-copy data); and, of course, the physical locations of the data.

However, no matter how similar the basic steps of data harvesting are for electronic data and hard-copy documentation, one must never underestimate the voluminous and more complex nature of electronic data. Although it is possible to enlist the assistance of your client's IT department and expertise to collect the relevant data in the majority of cases, it would generally be advisable to instruct neutral third-party electronic-evidence collection specialists to collect the data using the appropriate industry-standard procedures, especially in criminal and white-collar fraud investigations.

Above all, it is essential to maintain the integrity of the data, and ensure that a complete chain of custody for harvested data is maintained, including

a detailed log of every step undertaken to ensure an accurate and legally-defensible position.

### Data processing

Once the potentially relevant data has been identified, whether it be forensic images of hard drives, live data from mail and file servers, or even data from back-up tapes or CDs and DVDs from disparate locations, it may span Gigabytes, Terabytes or even Petabytes of data, meaning that reviewing the data may be impossible, or at best disproportionate, given the time and resources available.

Depending on how, and what type of data, may have been harvested, adhering to the structured data-culling steps outlined below should assist in reducing the harvested data by as much as 60 to 70 per cent, with consequential advantages of lower volumes of data to review, and thus lower overall costs.

1. **Eliminate operating system files.** A large percentage of files on a personal computer (sometimes up to 95 per cent) are program executable files, library files, compressed files used to install applications, and operating system files. The extraction of such operating system files is a common and widely-accepted first cut method of reducing the bulk of the collected data, and most experienced EDD vendors and processing bureaux should be able to assist and advise on this fairly routine and automated process;
2. **De-duplication.** The next most effective and popular objective method of data culling is the process of data de-duplication, which is a process where electronic algorithms are run on the data to identify exact

duplicates of documents by comparing the unique digital fingerprint of each document;

3. **Date filtering.** This step allows data to be eliminated if it falls outside responsive date ranges;
4. **Types and sources of data.** In appropriate cases – and with caution – certain documents, file servers or back-up tapes can be safely eliminated if they have originated from a non-responsive department, region or division of an organisation;
5. **Key players.** Key custodians of data should be identified at the outset, agreed with the opposing party and, if possible, their respective data prioritised and gathered at an early stage. It would equally be advisable to agree a list of the non-responsive players with the opposing party, allowing more efficient and subjective culling of the data;
6. **Key word/key term searching.** Filtering data with the aid of key word and key term searching is an effective means of eliminating data, and enables both parties to concentrate on the relevant and key information quickly. However, care must be taken to select exacting key terms, to ensure that potentially-responsive data isn't inadvertently eliminated. Active involvement of both parties in the choice of universal key words and terms must be at the forefront of every project as early as possible. Recent authorities and protocols such as the widely reported UK High Court case of *Digicel v Cable & Wireless* [2008] EWHC 2522, and internationally promoted Cooperation Proclamation by the Sedona Conference encourage a culture of greater collaboration

between the parties, which will ultimately save on time and costs; and

7. **Document types.** Filtering data by identifying, eliminating or prioritising certain document types and files is another effective and subjective means of data culling. For example, AutoCAD drawings and communications between key personnel may be the most important aspects of an engineering claim, and these, as well as e-mails, their attachments, and MS Word or equivalent document types, should be the first line of attack.

Although the above list is not an exhaustive one, these steps provide flexibility and an efficient way of reducing and prioritising the data population at the production stage.

### Data production

The ultimate goal of any disclosure or document-production project is to identify and produce documents that are relevant to the matter in hand, subject to any issues of client privilege.

Copies of the culled data can be loaded, if required, onto a review team's servers, allowing it to open and review copies of native files on their desktops, using a combination of search engines and third-party software native-file viewers. This, in effect, would be true native-file review, but it can be a slow and labourious process and only workable with small data sets.

Another approach is to instruct specialist vendors, or imaging bureaux, to process the culled data, ready for upload to an appropriate electronic document-review platform.

A further cost-effective solution would be the adoption of a software-as-a-service (SaaS) review type platform, which will not only allow

legal teams or corporations of any size to have access to the most sophisticated electronic document-processing and review solutions, but will also provide control and certainty over costs with the added ability to scale up in case the volume of data expands or becomes more complex.

These specialist organisations and services will typically extract text and full metadata from these files to populate a multitude of fields automatically, such as dates, author, recipient and document title, and provide exact electronic images of the data, with the option to keep the original native files with the data. In addition, each document is also uniquely numbered electronically.

Needless to say, it is always good practice to meet and confer with the opposing side as early and as often as possible to clarify, determine and agree the following:

- **Production format.** Paper, electronic data or both. If electronic, decide whether they are to be native files and/or images and whether to use extracted text;
- **Shared repository.** It may sometimes be advantageous for parties to share a web-based repository for all parties' disclosure documentation, which will simplify the production format;
- **Metadata fields;**
- **Production nuances.** Agree, in exacting terms, details such as the required load-file formats for each disclosing party, document numbering conventions, field names to be disclosed and their exact order; and,
- **Clarify delivery deadlines.**

However, regardless of the format in which the data is produced or

agreed to be produced, it is essential that the original native files are preserved, allowing the option to produce further copies from the unaltered file.

### Data review

The data review is one of the most time-consuming and potentially expensive processes, as it requires the dedication and attention of a team of reviewers – to review, organise, annotate and cull the data for privilege and relevance in preparation for disclosure or in response to a regulatory investigation. When faced with tight disclosure deadlines, stringent document-review techniques and quality checks become even more significant.

As daunting as this may seem, especially with the voluminous nature of electronic data, the process can be streamlined by using data-sampling techniques, targeted initial reviews on key players and the use of sophisticated search and review tools.

The most effective method is to ensure that the data is in a shared web-based or LAN-based electronic repository, which would allow all reviewers, regardless of physical location, to undertake the review process and produce relevant documents for disclosure. This would not only ensure the integrity of the original data, but will also reduce the time and resources allocated to the search and review process.

There is a growing and fast-evolving industry of intelligent (often called concept and meaning-based) searching tools, which use advanced linguistic algorithms, clustering and bayesian technologies to allow a reviewer to find, review and produce electronic documents that are conceptually related to an initial search query, legal or technical term.

When used correctly, this type of technology allows the review team to focus on the information pertinent to the case while reducing irrelevant documents and information.

### Disclosure

Once the documents are reviewed, the relevant non-privileged data must be produced in the agreed form for delivery to the opposing party or requesting authority.

At this stage, it is common for there to be some level of manual intervention for the successful processing of the data.

A decision may also have to be made to supply the disclosed set of documents with sequential pagination, showing no gaps for the removed privileged or irrelevant documents.

Finally, depending on the volume of the data in question, the disclosure set is either burnt onto CDs/DVDs, loaded onto portable hard drives or even printed to paper for delivery to the opposing party.

In summary, while the general process has not changed, the volume, complexity, means of review, and myriad available tools, storage and production methods have created new, complex and challenging obligations. Managing this complexity requires an understanding of what is an acceptable risk in relation to the time and financial resources available. Managing PARTNER

Lee Gluyas is a partner in the litigation and regulatory group of DLA Piper's London office. Emma Hogwood is a solicitor in the same group, and Reza Alexander is the litigation and practice support manager for DLA Piper UK LLP and serves as a member of DLA Piper's Electronic Discovery Readiness and Response Group.

# The data game

*Managing Partner* asked four litigation and investigation experts how the pressures on their practices have changed in recent years.

**Richard Brent [RB]:** Broadly speaking, have you observed any particular trends in litigation in general, and your own individual practices, in recent years?

**Jeffrey Jacobson [JJ]:** In my practice there has certainly been a greater trend towards the internationalisation of investigative work. For example, this has required us to think about formalising our international investigations practice, and we launched our International Corporate Investigations and Defence practice just last week in response to what we've been seeing, which is a greater trend in cooperation between the US and European authorities. There cases often involve European companies listed in the US and facing US-based investigations, but where all the documents, data and witnesses reside outside of the country.

**Stephen Brown [SB]:** I agree. Going back over the last decade, there is greater cooperation between authorities. One sees that reflected in England, for instance, in the kind of legislation that has been passed. The Office of Fair Trading can now carry out an investigation on behalf of the European Commission or another national competition authority. You can no longer be national-centric when representing clients' interests, because there is such a significant international component in the way the different rules and regulations overlap and the different regulators work with each other. I imagine everyone will have some internationalisation of their practice – and as a result of that, an additional layer of complexity.

**Oliver Armas [OA]:** I also think what we're seeing right now, especially with respect to investigative work, is a little different to what we've seen in recent years. Whether it's the Financial Services Authority (FSA) or other regulators piggybacking on what the Department of Justice and Securities and Exchange Commission (SEC) are doing in the US, we're really seeing local investigations that started in the US now have a significant non-US component to them. While this type of approach is not necessarily new, the intensity of it is newer, and there are so many relevant issues, from data privacy to labour law you have to take into consideration. The greater trend towards

internationalisation now requires practitioners to really think locally in terms of how they deliver client services.

**Richard Dean [RD]:** There are now additional local laws that relate to whether you'll have to make disclosures. In our practice we're seeing a tremendous pressure from clients to figure out how to source a good deal of investigative work in our local offices. Fortunately we've got dozens of offices, but we're now under pressure to build up resources in some places. We've just picked a case up in Malaysia, and they want our local office to be able to handle the brunt of the work.

**RB: How are those changes reflected in the way your practices are being structured and managed?**

**SB:** We have offices in many countries, but that doesn't automatically mean everybody works in the same way, has the same practice, or provides the same sort of service. I think it's important that law firms make sure people are going to have to behave in a joined-up way; and that they are trained and know one another well enough to work in a joined-up way. For example, if you've got an issue that has arisen in France but the first port of call is a partner in London, you still know who to call and are sure they'll respond in the right way. The other thing is the know-how and technology you need. Some things decided in one country can have a serious knock-on effect elsewhere.

**JJ:** First you have to know the law of the country, which often requires you to get good local advice. You also need the local infrastructure in place to show the client you can get the work done economically and well, or you need to demonstrate you have a plan for doing that without the infrastructure in place.

If we find ourselves in a place where we don't have an office, I would rather we bring the best trained person to the country, while managing the costs, rather than trying to train someone who has the geographic advantage of being global but may not be the most experienced person to handle the case.

**OA:** I wholeheartedly agree with that point. Firms that have the right manpower in all locations where investigations may be active are rare. You have to be able to assemble

the best team. If it's possible to do that within your firm, that's obviously great, but if you cannot, as long as you can control and co-ordinate and act with your local counterpart in a joined-up way, that's what clients are looking for. The constant is you have to be able to control costs for them. That is always the number one concern, because these investigations get so incredibly complex and expensive.

**RD:** We've made a concerted effort, particularly in difficult locations, Moscow for example, to train a group of our lawyers so they are capable of reviewing documentation and conducting interviews – and so that they know the local law very well. With 100 lawyers, in Moscow we have economies of scale for training of course. Obviously there are other places, where we don't feel we have exactly the right people, where we would use local firms.

**RB: How much of a challenge are the language differences in the multi-jurisdictional cases you pursue?**

**JJ:** In my firm – which is 800 lawyers – we have talents in multiple languages. However, when you get into an investigation that is large and multinational, you are likely to need to hire local multilingual talent for document review. The challenge is to find and train people on the ground. If you find the right people, you have the ability to deliver top-quality services at lower cost.

**OA:** Finding the right talent locally to deal with language issues is pretty key, especially in investigative work involving fraud. The language used, often local dialects and local slang, is so relevant to provide the service the client needs. As many languages as we as a global law firm speak, sometimes you need that local talent to assist you.

**RD:** One of my partners in São Paulo was recounting a story in which we were hired by an American law firm to help with an investigation. The American lawyer was conducting an interview with a key witness. He began asking questions as to whether the witness had paid a bribe or made an improper payment, but the witness was denying it all. Then my partner asked whether the witness had had a coffee with the government official. He said: "yes". My partner asked: "Well, how much was the coffee?" He said: "5,000 dollars". In Portuguese, in that culture, a 'cup of coffee' is a euphemism for a bribe. Unless you have a local lawyer who understands that, by conducting something entirely in English you risk missing the point altogether.

**RB: How well are international law firms and their lawyers equipped to handle the technology demands of international litigation workloads?**

**SB:** At Jones Day in London we use external providers. In London law firms, it is probably the case that more and more are outsourcing that kind of work – not least, because it's expensive and there are constantly changes in the technology. People are making decisions about how, and whether, they buy or rent their IT. That said, I don't think that's because the lawyers struggle with the technology.

What, as a whole, lawyers are struggling with is the fact that there is so much electronic documentation now. You can have millions of documents, and there have to be sensible ways of dealing with that.

**RD:** What we're also seeing is an increasing need to be dealing with the client's own IT department, both to understand the sort of resources that they have and to understand what their records-retention policies are like. There can be a lot of surprises surrounding how data is kept, discarded and deleted.

**JJ:** Clients may have the ability to do data collection on their own, but self-collection may not be appropriate when forensic defensibility of the collection will be required. If the client will need external assistance, you need to find the right local vendor who can go to all the places the client has data. After collection comes processing, but that is something very few firms do in-house, because it requires the high-powered equipment that only vendors usually possess, and it often doesn't make economic sense for firms to invest in that kind of technology. However, once the data has been culled down by a vendor to the key materials, if the database is of reasonable size we usually try to bring it in-house. We've recently invested considerably in technology in our London office to be able to manage large litigation databases.

There still aren't many vendors with the capacity to handle a large European investigation. If you're talking about collecting many terabytes of data and relying on a vendor to create a stable database through which you can quickly and accurately programme and run fairly complicated searches, not many vendors worldwide have those capabilities. Then, even if a vendor has some European capability, if it has to rely on US-based equipment to perform maintenance of European databases, and if that means the European data may transit the Atlantic too, you risk running afoul of EU data-protection laws. That constrains our choices even more.

**RB: What impact are you finding the recession is having on your practices?**

**OA:** Had you asked me six months ago, I would definitely have expected the US litigation caseload to have been a lot larger than that we currently see. Relative to the size of

the financial crisis we find ourselves in, there are a lot of people sitting on the sidelines, unwilling to pull the trigger. Sometimes there is even unwillingness to pull the trigger on bankruptcy, where it's becoming increasingly difficult to find debtor-in-possession financing. On the other hand, there is now more entrepreneurial private funding of litigation. In the UK that has been big for a long time, and now it's hopping over here to the US. That may create some more liquidity and opportunities.

**SB:** It's certainly the case we have seen a growth in the number of companies emerging offering third-party litigation funding. As a matter of public policy, it's broadly accepted that these arrangements are legal and enforceable in order to increase access to justice. These organisations are still relatively small though, so they tend to choose the cases that are clear-cut and which should be over relatively quickly. Therefore, we're probably still not seeing as much funding of complex, high-value, risky litigation. More claims are probably brought, but those claims might have a particular profile, if you like.

It might also be there that is a distinction to be drawn between regulatory investigations and private-law claims in the current economic climate. While the regulators will doubtless march on, the cost of litigation is inevitably becoming a very serious concern for parties to private litigation. In England, where we have cost shifting so the 'loser pays', there's a risk of ending up paying all the other side's costs as well. The way that is impacting currently is in a reticence among private litigators to bring claims - even in some areas where one would think there would be enthusiasm. An example would be follow-on actions in cartel claims. There's an increasing number of determinations that there has been an infringement, there's encouragement from regulators to private litigants to bring the actions, but still people are concerned about the costs.

**RB: How would you describe your individual strategies for cost management?**

**JJ:** First, you need to have a track record with a vendor and know the rates the vendor is proposing are fair. Second, you need to know what drives those charges and how to manage the flow of data in order to minimise the vendor's costs. For example, before adding another employee's data to a collection, we ask how likely that data is to add unique knowledge.

Finally, you must keep the client informed about expected costs. If the client is initially unwilling to pay for the process you think is necessary, you need to explain the

risks involved in changing the process and work with the client to set the right priorities.

**SB:** One thing you can do is to implement document-management processes with clients. There are things you can do in advance in any kind of dispute to make sure you have a good library of documents. It isn't always easy to persuade people to spend time and effort on that kind of thing, but obviously it can lead to savings later.

When it comes to an actual dispute, there are various rules in the English procedure that do enable parties to rationalise the disclosure exercise. The problem is that as soon as one party suggests limiting something, the other usually smells a rat. But I think there will be increased cooperation, albeit likely encouraged and enforced by the courts, to try and keep the parameters as reasonable as possible. Despite the attempt to rein in the scale of disclosure since the Woolf Reforms, in large-scale litigation at least it hasn't really happened.

**OA:** In the US we have broad discovery rules, and yes, that is a problem, given the fact that most data is stored electronically.

First, it's a problem if you have to start producing a lot of these documents. Second, it can become a problem if you end up holding back the production of certain documents, either because you never found them, or because you didn't do a diligent enough search.

It's when you have to redo something, or go back and search again, that costs become exponential. Then you have lost control. You have to get the experts involved early on and they have to help you develop a protocol.

**JJ:** The only thing I'd add is that even regulators and prosecutors may be willing to negotiate these issues. Government officials have experience in e-discovery issues too. If outside counsel has credibility with the government, and can demonstrate they know what they are talking about, have done their due diligence, and are not trying to hide anything, then government officials, whether American, European, or from elsewhere, will listen. ManagingPARTNER

Richard N. Dean is a partner in the Washington office of Baker & McKenzie LLP. He can be contacted at: richard.n.dean@bakernet.com. Stephen Brown is a partner in the London office of Jones Day. He can be contacted at: stephenbrown@jonesday.com. Jeffrey S. Jacobson is a partner in the litigation department of Debevoise & Plimpton LLP. He can be contacted at: jsjacobson@debevoise.com. Oliver Armas is a partner at Chadbourne & Parke LLP and he can be contacted at: oarmas@chadbournel.com

# Survey: disclosure demands

As the continuing recession leads litigation activity to take centre stage in the business world, *Managing Partner* asked a wide array of litigation partners and support managers how they cope with the pressure of demands for ever-escalating quantities of electronic data. By **Richard Brent**

The manner in which information is stored and transported has changed beyond recognition in the age of the internet. 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 online domain has expanded to embrace concepts such as networking and content-sharing sites, with usage growing rapidly.

## Deluge of data

There is something of an inevitable irony, however, in the fact that while an abundance of information has never before been more widely available to anyone, working anywhere in the world, and regardless of their professional role, a single specific piece of information has become much harder to isolate. Nowhere is this as evident, perhaps, as in the modern law firm's litigation department, where hundreds of thousands of documents routinely need to be sifted and analysed prior to and during a case – the lawyers on both sides deciding what will be relevant, what may be privileged, and what can be dismissed. Not only is the potential volume of this information quite mind-boggling to the man on the street, moreover, but in our global economy – a hugely complex network of relationships,

as highlighted by the apparently unmanageable unravelling of financial markets of the past year – that data in demand may be residing in places with significantly different business, political and cultural regimes, complicating both its acquisition and its use.

How well equipped are law firms for dealing with challenges such as these? In an attempt to answer this question, *Managing Partner* canvassed a random but targeted sample of UK litigation practice heads and support managers, asking how their data strategies were formulated and their operations streamlined? How could costs be kept to a minimum, while at the same time delivering tangible value and the best results for their clients in a complex investigation or a multi-faceted dispute?

## Be prepared

One of the clearest messages to emerge from the survey is the importance of being extremely well organised well in advance of any litigation itself, having the right procedures and people already in place, and briefing clients on what will be involved in a specific instance as early in the process as possible.

For example, one respondent explained that the scale of disclosure requirements was built into the firm's standard engagement letter from the outset.

“We make a point of telling the client well in advance of the procedural stage what is going to be involved because it is always a time-consuming and expensive part of the case. It's easier if you've told clients what to expect much earlier – especially for clients who are abroad and may have no idea of the scale and scope of documents that need to be collated,” they said.

“We will have envisaged requests at an early stage, and ensure the collation of the core documents prior to the action,” explained another. “We suggest a pre-action disclosure meeting and set out a structure for that, and requests are then subject to a strict internal timetable.”

Consistent communication and collaboration are of course key throughout the process, both with the clients affected by an investigation, and internally, across a network of lawyers and paralegals, in the interests of efficiency. One respondent explained his firm safeguarded the chain of custody in a complex investigation by first appointing the “right team leaders”, and with an overall partner then responsible for conducting regular “review spot checks”. Time pressures were met by ensuring “tight organisation, with teams split into issue-based subjects”, they continued.

“Team structures and the continuity of having the same people

working on matters,” was another’s solution to this dilemma.

More generally, clear lines of communication were widely seen as one of the most important assets when dealing with complex litigation involving multiple, and often international, parties. “Ensuring regular and productive phone calls or e-mails and focused requests for information,” outlined one. Asked how workflow was controlled in projects spanning multiple jurisdictions, another litigation partner frankly explained: “You don’t control it! Instead you are constantly available – you have your Blackberry and mobile phone with you at all times”. Regular telephone conferences

“As solicitors data security is our number one thing.”

and videoconferencing solutions were also singled out by many as possibilities for ensuring optimum cross-border communications.

“Old-fashioned communication,” remarked another. “The answer is really IT. You can have documents processed overnight in different countries, and you can make documents available over the internet, with multi-jurisdictional teams then working on the same documents.”

#### Automation limitations

Whether or not IT is indeed “the answer”, as this lawyer believed, respondents were certainly agreed that some of the document-review processes could be profitably and reliably outsourced to a third party. While the tireless march of technology has led to megabytes of data being dissected in droves, technology can also be part of the solution in the form of an e-disclosure strategy that

includes a key outsourced ‘litigation support’ component.

One firm outsourced foreign language reviews, for example, while many others used key search terms, as well as junior paralegals, to begin the process of sifting through many of the necessary documents. Finally, however, these need to be whittled down to a quantity that then requires an expert legal eye to ascertain relevance. Automated processes won’t be enough to do the job thoroughly, our respondents agreed. As one partner put it: “You can do word searches provided that the alphabet is the same. You can reduce the volume by having someone enter dates so you only look at relevant documents by

date. Ultimately, however, there’s not much substitute for actually looking at the documents. All you can do is reduce the volume of data you have to apply that judgment to.”

One respondent described the entire process as follows:

“First you have to work out what is rubbish and weed out duplicates. That can be automated. Then, from what’s left, you need to decide what is or isn’t important, and that’s the review process. You can’t automate something that is a subjective judgment, but there are tools that can help assess the potential relevance of documents, such as searching by key word. That can cut down the massive volumes of work the client presents you with, and other documents can be digitised.”

Another added: “It depends on the nature of the dispute and

scope of the disclosure exercise. Where required we use appropriate harvesting, processing and storage techniques to ensure the preservation, and importantly, the potential use of any metadata.

“In complex matters we use leading data-management tools to manage the review process, but these are still scrutinised by partners to ensure any tactical advantages presented in the review are fully exploited.”

#### Safe and sound

This, essentially, is the e-disclosure process. The main reason the law firms surveyed seek to outsource this sort of work is because it proves more cost effective than performing initial data collection and analysis in-house. However, others also cited safeguarding the chain of custody with litigation-support systems, difficulties with handling multi-lingual data and optimising the handling of metadata – that is, the data that can be hidden behind files and that describes the creation of the data itself.

A final priority, common to all legal work but clearly escalating when the volumes and potential sensitivity of data is so high, is security. As one partner put it: “As solicitors data security is our number one thing.”

Firms have systems in place for both hard and soft copy documents, explained another senior associate. “We have complex computer systems, and firewalls and security surrounding our network. One of the benefits of electronic work is that you have electronic access over the internet. You don’t need to send everything by courier as you would have done. You can even encrypt and set up private networks between yourself and the client so there is an extra level of security.” Managing PARTNER

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# “fluent in NINE LANGUAGES including C++”

