

UK E-DISCLOSURE RISKS ARE CALCULABLE AND CONTAINABLE

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Those who sell e-disclosure/ediscovery software and services do so largely by reference to messages about risk avoidance. The word "defensible" features prominently in any marketing material, and the primary focus is on avoidance - avoiding sanctions, avoiding adverse costs orders, and avoiding negligence claims based on failure to find that apparently ubiquitous "smoking gun". Since the biggest market for litigation software and services is the US, where court sanctions and malpractice suits are an ever-present threat, this focus on the fear of failure is perhaps understandable.



In the UK context, this defensiveness tends to obscure more positive reasons for investing in the skills and the technology for the proper handling of electronic documents in litigation. It is not that we lack pressure to be competent at it - recent cases plus the new e-disclosure practice direction and questionnaire certainly emphasise the risks inherent in engaging in litigation - but the more positive reasons for acquiring the skills are easily overlooked. In this article, I will run quickly through the risks, but my primary aim is to encourage a more positive way of looking at electronic documents as a component in litigation.

We do not have sanctions in the UK in the sense which is rightly feared in the US. Financial penalties are largely limited to reimbursement of opponents' costs - it is no small thing to have to pay indemnity costs but these are at least capped and directly related to expense properly incurred by the other side; in US terms, an adverse inference seems often to spell the end of your case, whereas in the UK it generally implies no more than a weighting when the judge comes to balance all the factors before him.

Adverse costs orders can hurt, however, and we are seeing more of them. The [judgment of HHJ Simon Brown QC in Earles v Barclays Bank](#) caught attention mainly for the fact that the successful defendant was denied a large proportion of its costs because of its conduct of electronic disclosure. Two factors tend to escape notice in any short summary of this case: the first is that the penalty reflected time and costs actually wasted, not merely the technical breach of the rules; the other, and much more significant point, is the warning in the judgment that companies who might reasonably expect litigation must have in place the systems and processes for handling electronic documents which are needed to be ready for it.

In [Al Sweady v the Ministry of Defence](#), the claimants sought £2 million indemnity costs largely because of the defendants' handling of their electronic disclosure; they were awarded £1 million. This was not necessarily the worst downside for the defendants, who were forced to abandon their defence, not for any lack of merit but because they were unable to give proper disclosure. There is another factor also: the lawyers and clients involved in these cases will be less than thrilled that their names (including the names of individuals) are for ever preserved in case reports used to illustrate incompetence.

The new ediscovery practice direction and electronic documents questionnaire has caused considerable apprehension on two grounds; some fear that it will unnecessarily increase costs; others are simply nervous that they will be caught out on a subject which they do not understand. Neither fear is entirely groundless; both are easily met. The first point to grasp is that the questionnaire (and, indeed, most of the practice direction) applies only in limited circumstances - multi-track cases and

those where the court, on examination, considers it appropriate. Like everything else in the rules, what is "appropriate" depends on proportionality and the other factors in the overriding objective. If your case involves large quantities of electronic documents, it is hard to argue that they should not be properly managed, and management necessarily requires the sharing of information about the sources of documents.

As to understanding the subject - well, the disclosure of documents is a fundamental requirement in litigation, and most of those documents are now electronic. It is hard to sympathise with a lawyer who cannot get his or her mind round something so fundamental to the production of the evidence needed for a case. The rules are not difficult to understand and there is a thriving and competitive market of service providers able to help. The risk lies in not being equipped to assess the risk or to make proportionate decisions about the balance between cost and evidential value.

The obverse of risk is opportunity. Electronic documents may exist in far greater volumes than their paper predecessors, but the technology exists to cull, refine and filter electronic documents in ways which were impossible with paper ones. It is no longer necessary to field large teams of expensive lawyers to manage a large review when much of the task can be undertaken by the proper use of technology. The result, for those willing to embrace it, is that smaller firms can take on bigger litigation, and bigger opponents, than they used to be able to. The proclaimed ability to handle disclosure cost-effectively is a marketing opportunity, particularly when so many firms continue to manage litigation in the old way. A new set of skills is involved here, and it is available to anyone willing to understand the rules and technology and to learn how to use them together. Senior Master Whitaker's judgment in [Goodale v The Ministry of Justice](#) provides a template for the proper management of this aspect of litigation. It makes no new law; its principles are easily understood, and apply in almost any case with any appreciable volume of electronic documents; technology of the kind referred to in the judgment is readily available from easily-identified suppliers.

There are certainly risks here, but they are risks which are both measurable and containable. The main risk, as I put it above, is not being equipped to assess the risk; the cure is a little education of the kind urged by Lord Justice Jackson, the skills are fundamental to a modern litigator and not difficult to acquire; the tools lie a phone call away.

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