The New Practice Direction and E-Disclosure

Best Practices for Complying Proportionately
## The New Practice Direction and E-Disclosure

### Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Executive Summary</td>
<td>1</td>
</tr>
<tr>
<td>The E-Disclosure Information Project</td>
<td>1</td>
</tr>
<tr>
<td>Clearwell Systems Inc.</td>
<td>1</td>
</tr>
<tr>
<td>Disclaimer</td>
<td>1</td>
</tr>
<tr>
<td>Purpose of This Paper</td>
<td>2</td>
</tr>
<tr>
<td>The Practice Direction 31B - Disclosure of Electronic Documents</td>
<td>2</td>
</tr>
<tr>
<td>The Practice Direction (PD)</td>
<td>2</td>
</tr>
<tr>
<td>The Electronic Documents Questionnaire</td>
<td>3</td>
</tr>
<tr>
<td>What the Courts Say</td>
<td>4</td>
</tr>
<tr>
<td>Cases Which Went Wrong</td>
<td>4</td>
</tr>
<tr>
<td>Goodale v Ministry of Justice - Saved by Judicial Intervention</td>
<td>5</td>
</tr>
<tr>
<td>What is Required - a Summary</td>
<td>5</td>
</tr>
<tr>
<td>How Clearwell Systems Helps</td>
<td>6</td>
</tr>
<tr>
<td>Summary</td>
<td>6</td>
</tr>
<tr>
<td>Appendix 1</td>
<td>7</td>
</tr>
</tbody>
</table>
Introduction

Executive Summary

This is one of a series of white papers written by Chris Dale of the UK-based e-Disclosure Information Project. Its purpose is to show that developments in the management of electronic disclosure in the courts of England & Wales, and in particular the E-Disclosure Practice Direction and the judgment in Goodale v Ministry of Justice, map well to the capabilities of modern litigation processing applications like Clearwell. The informed, selective and iterative approach which the courts now encourage requires an early grasp of the potentially disclosable data and the ability to get quickly to what matters. That is the primary function of Clearwell.

The E-Disclosure Information Project

The e-Disclosure Information Project disseminates information for those with an interest in electronic disclosure in the UK courts, including judges, practitioners, suppliers and corporate clients. Its aim is the reduction of the expense of litigation. It is run by Chris Dale, a former commercial litigation solicitor and adviser on all aspects of electronic disclosure, including the court rules, the practical issues which arise and the solutions which exist to tackle them.

The main expectations of such a project are that it is knowledgeable, independent and objective. It has no client and can exist only if it is funded by sponsorship. The sponsors have in common that they are interested in and knowledgeable about aspects of e-Disclosure wider than their own commercial advantage, and that they are willing to pool resources in this indirect way to raise understanding of the issues. Clearwell is a sponsor of the Project.

Clearwell Systems Inc.

Clearwell Systems is addressing the way enterprises, government departments, and law firms perform e-disclosure in response to litigation, regulatory inquiries, and internal investigations. The Clearwell E-Disclosure Platform streamlines end-to-end e-disclosure, providing a single product for identification, collection, processing, analysis, review, and production. Leading organisations such as BP, Clear Channel Communications, Cisco, DLA Piper, Johnson & Johnson, Microsoft, NBC Universal, and Toyota are using Clearwell to streamline collections, accelerate early case assessments, intelligently cull-down data, increase reviewer productivity, and ensure the defensibility of their e-disclosure process. Consistently ranked as a leader in independent e-disclosure industry surveys and reports, Clearwell Systems is an active participant in the Electronic Discovery Reference Model (EDRM) Project, The Sedona Conference, the e-Disclosure Information Project, and the Text Retrieval Conference (TREC). For more information, visit www.clearwellsystems.com.

Disclaimer

This white paper is written by Chris Dale in conjunction with Clearwell as an informational resource only. It is not intended to be relied upon as a source of legal or technical advice.
Purpose of This Paper
The disclosure of electronic documents for litigation in England and Wales is not optional. It has been treated as such in many cases, with the parties simply asserting that it is not proportionate to preserve, collect, review and disclose them. The alternative approach, equally pernicious, has parties disclosing vast but unselective volumes in purported compliance with their obligations under Part 31 CPR. Judges have not exerted the powers of active management given to them by the rules and receive no training aimed at equipping them to do so.

The common theme running through recent cases is the lack of information - information collected by the giving party as to its own documents, information exchanged with opponents, and information available to the court. The result at a simple level is unnecessary expense; more seriously, parties have suffered adverse costs orders, reputational damage and, in some cases, have actually lost the case because of disclosure failures.

There is a middle course which, on the one hand, identifies everything which is potentially disclosable and, on the other, enables sensible decisions to be made, and be made transparently, as to what is actually disclosed. A new Practice Direction 31B - Disclosure of Electronic Documents, provides the framework of rules. The proper use of technology such as that provided by Clearwell Systems enables compliance with the rules in the “proportionate and cost-effective manner” which the Practice Direction requires.

This paper explains briefly what the obligations are, if properly construed, and shows how the world’s technology can be used to meet them.

The Practice Direction 31B - Disclosure of Electronic Documents
The Practice Direction (PD)
This took effect on 1 October 2010 and applies only to multi-track cases. Its general principles, set out in paragraph 6, include broad and fairly obvious obligations about efficient management to minimise cost, giving effect to the overriding objective and the “excessive burden in time and cost” incurred by disclosure of relevant material. The PD also includes the express statement that “technology should be used in order to ensure that document management activities are undertaken efficiently and effectively”.

Paragraphs 8 and 9 are headed “Discussions between the parties before the first case management conference in relation to the use of technology and disclosure”. Where the Practice Direction of 2005 said merely that the parties “should” discuss the disclosure of electronic documents, the 2010 Practice Direction says unequivocally that they “must” have such discussions, and sets out what should be discussed. The required subjects include four key considerations that provide a framework for proportionate and cost effective e-disclosure:

---

1. Categories of documents and the systems and media on which they are held
2. Scope of a reasonable search, tools and techniques whose use should be considered
3. Data sampling to determine the relevancy of the search results
4. Use of a staged approach to giving disclosure

Some of these things, along with other matters, are covered in the Electronic Documents Questionnaire which is discussed in the next section of this paper. As the opening paragraph of that section makes clear, however, the questionnaire is required only in specific circumstances. The Practice Direction requirements to discuss the points listed above apply in every case to which the Practice Direction applies, that is, to all multi-track cases.

Two cases which are referred to below provide real life examples of the value of these discussions. The Digicel case, relevant specifically in the context of agreement on keywords, illustrates the value of having these discussions in advance of formal disclosure. If you wait until both parties have given disclosure, then one of two broad possibilities arises: the result may omit something which your opponents consider essential, in which case it may be necessary to redo work which has already been done; it is equally wasteful if you disclose material which might have been omitted or deferred thanks to agreement on, for example, narrower date ranges, fewer custodians or a more limited scope of search.

It is relatively easy to understand that using more, fewer or just different keywords may make a radical difference to the number of documents to be reviewed for exchange. More sophisticated techniques, however, raise the same issues - if you intend to discard whole classes of documents by using the advanced technology which your own choice of tool gives you, then your opponents are likely to challenge your approach; it is better to have the debate in advance to head off the costs both of redoing the work and of fighting about it.

The reference to a “staged approach” is equally important. Its opposite is the idea that you collect and process everything in one go, giving your own side, as well as your opponents, a mountain to climb. The reality is that cases turn on very few documents, generally those from easily identifiable key custodians. Master Whitaker’s judgment in Goodale v Ministry of Justice (referred to below) positively encourages staged disclosure, starting with the custodians, the date range and the sources which are most likely to yield the important documents. Assuming (as Master Whitaker did expressly in Goodale) that steps have been taken to preserve everything else which is potentially relevant, nothing is lost, and a great deal may be saved, if both parties focus their attentions on these most obvious sources. It is very often possible to decide or, indeed, to settle, a case on the strength of this intelligently selective approach. Technology such as that provided by Clearwell helps you identify, and subsequently to discuss, these priority areas.
The Electronic Documents Questionnaire

The Practice Direction provides a form of Questionnaire designed to provide this information in a structured way, either because the parties may find it helpful or where they have failed to reach an agreement or have reached an agreement which the court considers “inappropriate or insufficient”.

If the formal purpose of the questionnaire is to exchange information, it has a value simply as a checklist of answers to be considered by the party giving the documents. Some of the questions are not technical but require focus on date ranges and the identities of the custodians who are likely to be relevant. Others involve the questions which ought to be asked of any client and its IT department in any event - what servers they have and where they are, what other devices were in use, what mail system existed and what file types and databases were used.

There is a section on proposed keywords and other types of automated searches, including the software, processes and methods to be used. This section aims to head off any repeat of Digicel v Cable & Wireless\(^2\) where the defendant was made to redo searches when the claimant challenged them after the event.

The Questionnaire provides for identification of potential problems which might raise questions about the reasonableness of a search - again, these things are better discussed and agreed in advance, with the help of the court if necessary. If the parties have a document retention policy, they should say so and confirm that document destruction processes have been halted.

Lastly, the Questionnaire provides opportunity for the party completing it to say what he expects from the other side under the same headings. There are obvious benefits in being able to assess what volume of material might come in from opponents and, indeed, to have the opportunity to influence that.

The Questionnaire includes a statement of truth; its answers may be modified, and the court may order (or the parties decide) that only part of the Questionnaire is to be completed.

The purpose and effect of the Questionnaires is clear: once they are exchanged, both parties can get the measure of the scale and potential difficulties of dealing with electronic disclosure. Having this knowledge is a prerequisite for an informed discussion as to what is actually required for the case to proceed in a proportionate and cost-effective manner.

\(^2\)http://www.bailii.org/ew/cases/EWHC/Ch/2008/2522.html
\(^3\)http://www.bailii.org/ew/cases/EWHC/Mercantile/2009/2500.html
\(^4\)http://www.bailii.org/ew/cases/EWHC/Admin/2008/2387.html
\(^5\)http://www.bailii.org/ew/cases/EWHC/Admin/2010/852.html
What the Courts Say

Cases Which Went Wrong

The needs of such informed discussions are emphasised by a series of cases over the last few months. Digicel v Cable & Wireless has already been mentioned. In Earles v Barclays Bank\(^3\) the defendant failed to produce documents bearing on a simple and central issue. It is not clear whether the documents no longer existed or whether the defendant had simply failed to look for them. The claim was defeated, but the defendant was penalised in costs. In Al Sweady v the Secretary of State for Defence\(^4\), the defendant denied having further disclosable documents, but then realised that it had more documents than it could deal with; it was ordered to pay costs of £1 million, had to concede the claim, and was severely criticised. In Shoesmith v Haringey, OFSTED and the Secretary of State for Education\(^5\), OFSTED discovered relevant documents after closing speeches but before judgment, in clearly-marked e-mail and documents folders; judgment had to be deferred, at considerable cost to all parties. In a criminal prosecution brought by the Office of Fair Trading against BA and Virgin, the OFT gained access to a corrupted file in mid-trial; they were unable to comply with the court’s deadline for disclosure of the file’s contents, and withdrew the prosecution.

This brief summary is sufficient to illustrate that the implications of badly planned disclosure go beyond mere expense and into losing the case and facing serious reputational damage. They also, inevitably, involve breach of professional standards and apparent lack of candour.

Goodale v Ministry of Justice - Saved by Judicial Intervention

Goodale v the Ministry of Justice came before Senior Master Whitaker for directions. The MoJ had declined to give disclosure of electronic documents, simply asserting that it was disproportionate to do so. Master Whitaker required a focus on only custodians whose documents were likely to be important. He also drew attention to the importance of using technology to cut down on volumes of disclosable material, saying this at paragraph 27 of his judgment:

\textit{At the moment we are just staring into open space as to what the volume of the documents produced by a search is going to be. I suspect that in the long run this crude search will not throw up more than a few hundred thousand documents. If that is the case, then this is a prime candidate for the application of software that providers now have, which can de-duplicate that material and render it down to a more sensible size and search it by computer to produce a manageable corpus for human review – which is of course the most expensive part of the exercise.}

He concluded by saying that if the parties needed to come back for further directions, the defendants “must also complete the questionnaire in the schedule below as a means of providing the claimant and the court with the necessary information in a structured manner”. The questionnaire was not then part of the rules; Master Whitaker was illustrating that it lay within his discretion to require the provision of the information which he needed to take a proportionate decision about disclosure.
What is Required - a Summary

If you take together the outcome of the cases mentioned above, the requirements of the Practice Direction, and the model for case management provided by the Goodale decision, you see a requirement (and it is a requirement of competence and proportionality as well as a formal requirement of the rules) that parties to litigation assemble and exchange sufficient information before the case management conference to enable themselves, their opponents and the court to make the “proportionate and cost-effective” decisions needed to control electronic disclosure. A part of achieving this goal are the four main considerations laid out in the Practice Direction and summarised above.

Before you can make decisions about narrowing the scope of disclosure, you must know what you have got, be able to evaluate which of it is worth picking out for full review, and be equipped to debate value against cost with opponents. The next section of this paper considers how this might be done as a matter of best practice using Clearwell Systems’ software.

How Clearwell Systems Helps

The Clearwell E-Disclosure Platform was originally designed for US litigation, and internal and regulatory investigations. There are many differences between US and UK litigation, but the broad principles are the same. The reason for referring at all to its origins is that the US Federal Rules of Civil Procedure permit the imposition of sanctions for failure to produce documents which should have been produced. We do not have sanctions in the UK, but the defensive technology which sanctions breeds is heavily focused on finding everything and proving what you have done. We can make good use of that to meet the objectives of proportionality and transparency. There is more scope within the UK rules to disclose the existence of sources without necessarily giving full disclosure of their contents; what is required is the ability to make informed selections as early as possible stage.

An application like Clearwell’s has a mass of functions and reports. It is helpful to pick out those which bear directly on the obligations – and the benefits – of completing and exchanging the Questionnaire and on adopting the approach used by Master Whitaker in Goodale. Examples of these are shown in the appendix to this paper. More detail can also be found on Clearwell’s web site at www.clearwellsystems.com that contains detailed explanations and papers which make it otiose to set them out here.

Summary

Case management must itself be proportionate, and so must the resources, technical or otherwise, applied to the management of electronic documents. The cases show that significant costs (and sometimes more than costs) can follow from a failure to get one’s arms around the potentially disclosable documents early in the case. Completion of the Questionnaire does not necessarily require lengthy research or deep technical knowledge. A certain minimal level of understanding is required, however, which, once obtained, makes it easier to assess for every case what is worth doing and what is not.
The same is true of the use of technology such as that provided by Clearwell. It offers a very wide range of functions but their use and their benefits are easily understood, and an intelligent user can start getting value from it in under an hour. “Value”, in this context, means covering ground more quickly, and therefore more cheaply, than is possible by other means; the examples given in this paper are all of faster and more efficient ways of acquiring information, discarding irrelevant material, and getting to what matters.

This is required by the Practice Direction for those cases with any significant quantity of electronic documents. Any case, however, requires that you can make an early assessment of the scale, of the contents, and of the prospective costs. One needs to be acquainted with what this technology offers, what it costs and what it can save, as part of the standard skill set of a litigation lawyer.

The same is true of the court rules. The true message from Goodale is that its principles - of a selective and iterative approach - can be adopted by parties between themselves without waiting for the court to order it. To be able to run arguments about proportionality efficiently and effectively, you need to know early in the case what documents you have and which of them have real value. That is the function of Clearwell’s software.

**Appendix 1**

The rules require that parties discuss the types of documents that exist and the systems on which they are stored. To facilitate the process of preparing for these discussions, Clearwell provides an interactive map of all data sources and custodians across the organisation (Figure 1). Users can browse data locations using intuitive filters, or perform searches for departments, sources, or custodians. The results can be exported as a report and brought to meetings with the other parties. The Clearwell Data Map therefore provides an automatic approach to cataloguing data sources across the organisations, and eliminates the need to take a manual inventory of data locations for each case.

![Figure 1: Clearwell Data Map.](image)
At the early stages of a case, it’s important to understand the volume of data involved, because many downstream e-disclosure costs are dependent on the amount of data. Clearwell provides visibility into the composition of the data and the volume of data from the beginning of the case. The Pre-Processing Analytics chart in Figure 2 is an example of such a graphical representation that Clearwell provides, displaying the volume of data collected for the case, the amount of data would be removed by the filters, and the amount of data that will be processed and analysed once filters have been applied. Based on the final amount of data in the yellow bar at the right side of the chart, users gain an immediate understanding of data volumes and therefore the downstream costs associated with the case, allowing parties to make informed arguments for reasonableness and proportionality.

One aspect highlighted by courts in recent cases such as Goodale v MoJ is the importance of reducing the overall amount of data in the case to the documents that have possible value. When Clearwell processes documents, the application removes many irrelevant data including known operating system files, and duplicate files which often comprise a large percentage of electronic data that is collected as part of a case. The result is that Clearwell reduces a case to a more manageable size, enabling solicitors to focus on documents that have possible relevance to the case. Combined with
advanced analytics and culling of data, Clearwell can often reduce the amount of data for review by 90 per cent. The chart in Figure 3 is an example of a typical reduction in the amount of data in each step in the e-disclosure workflow from collection through production.

The new practice direction and recent cases highlight the challenge of developing search criteria that balance under and over-inclusiveness in their results. Even when careful preparation has been undertaken, parties frequently find that their search results return too many false positives, or fail to return a sufficient number of relevant documents. To address the issue of search accuracy, Clearwell’s Transparent Search provides a Search Preview of matching search variations prior to running the search (Figure 4). The keyword variations present in the documents, along with the counts for the number of emails and unique files that contain the keyword variation are presented in a list. Users may select the relevant variations, and exclude the irrelevant ones from the search criteria prior to executing the search.

![Figure 4: Search Preview.](image)

In the course of conducting searches to bring back electronic documents relevant to a case, both the practice direction and courts reference data sampling of search results to determine the effectiveness of the search criteria. Simply put, sampling takes the guesswork out of determining the likelihood of a search returning relevant data. Transparent Search also provides the ability to sample within search results using Search Filters by keyword combination, allowing users to drill down to the specific combinations of words and expressions that make up a larger query (Figure 5). The result is that users have the ability to fine tune search results, and filter out keyword combinations that do not produce relevant documents.
High profile e-disclosure cases have highlighted the importance of documenting the search process for the court to enable parties to make informed arguments for proportionality. Clearwell automatically records the details of each search, providing a complete record of the search methodology used during the case. Each search that is conducted has a corresponding Search Report which shows the criteria used during the search, the number and type of documents returned in the results, and the individual keyword variations that were included or excluded. These reports can then be exported and used in court or during keyword negotiations.

An important step in the e-disclosure process is producing documents in a format appropriate for sharing with another party or the court. Upon export, Clearwell provides flexibility to produce documents in multiple formats including the native format with all metadata preserved. The example in Figure 7 shows an exported document that includes bates numbering, custom headers and footers, and redaction of privileged information.
The capabilities listed above comprise an overview of some of the ways in which Clearwell’s application directly addresses requirements of the Rules and recent cases such as Goodale v MoJ from the identification and collection of data, to the final production of documents to the court. Software applications such as Clearwell’s enable parties to better prepare for the case management conference by understanding what evidence they have, and where it is located in their organisation. Moreover, these applications provide an avenue for conducting searches with transparency through scoping the search keywords and sampling results to confirm the effectiveness of the search. Applications such as Clearwell which cover the entire e-disclosure process also enable parties to conduct their process in an incremental or staged approach through a single interface. As a result, parties employing these tools and techniques are better able to conduct e-disclosure cost-effectively and proportionately.
About Symantec
Symantec is a global leader in providing security, storage, and systems management solutions to help consumers and organizations secure and manage their information-driven world. Our software and services protect against more risks at more points, more completely and efficiently, enabling confidence wherever information is used or stored. Headquartered in Mountain View, Calif., Symantec has operations in 40 countries. More information is available at www.symantec.com.