

# TRILANTIC

Publication: **Chris Dale Lawyer Support**

Circulation: Web

Date: 2<sup>nd</sup> November 2007

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**Chris Dale** Lawyer Support  
Comment on eDisclosure and other IT matters

## T3 - Trial Tactics and Technology in London

**A mock eDiscovery hearing yesterday in front of real judges would have put UK litigation lawyers on notice of rough rides ahead if they are less than fully prepared to justify what has been done or not done to control the time and expense of Discovery. Where was the audience?**

I have never been to a legal technology conference where they have to hold the crowds back with ropes. That, however, was the scene which greeted me as I approached the New Connaught Rooms in London yesterday for ALM Events' show T3 Trial Tactics & Technology.

It turned out to be a double-booking – all those podgy girls in black tights and the skinny youths clutching musical instruments were there for the first auditions of Britain's Got Talent. Perhaps Simon Cowell or Ant and Dec would pop up and give their view on the talent on the next floor, where ALM had gathered a large crowd of experts from both sides of the Atlantic under the title *Confronting litigation and globalization of your data*.

A rather larger crowd than was in the audience as it turned out, which was a pity, because it was a good day. Well-rehearsed speakers covered topics important to anyone whose business or professional practice covers cross-border litigation or regulatory issues, anyone who needs to collect data in multiple jurisdictions, and anyone who wants to know what is coming in litigation Discovery - if we are not very careful.

Role-play makes a good variant on the standard pulpit-on-podium speech, and I enjoyed hearing Suzanne Rodway, Group Privacy Director at Barclays Bank, seeking US and EU advice on behalf of the wholly fictional Sparclays Bank. Jim Coulson of Huron Consulting warned of the US courts' assumption that "companies know where their electronically stored information is" – see my 12 September post [US courts' hard line on Discovery failures](#) on this subject. Heavy costs, damage to reputation, sanctions, adverse verdicts and instructions to juries may result, to say nothing of personal sanctions against advisers. Coulson took us over ground which, I suspect, would come as a surprise to many of those who are responsible for keeping a company's records under control – *will* come as a surprise, should I say, because the first high-profile UK case on Disclosure failures cannot be far away.

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If the US regime sounded bad, Eduardo Ustaran of Field Fisher Waterhouse made it clear that the EU provides hurdles which are just as daunting. Privacy and data protection are fiercely protected. Breaches invite fines which may not – yet – be as high as US courts hand out for Discovery defects, but are heading that way. We are all hoping not to be the one holding the ball when a US court orders Discovery on pain of heavy sanctions of documents which the EU protects, on pain of equally heavy sanctions. Nor is it just a corporation's pre-tax profits which are at risk – fancy a spell in the Scrubs anyone? (that's Wormwood Scrubs Prison, not a glamorous television hospital). Sanctions in both jurisdictions can get very personal indeed.

The next session was called *Conducting electronic discovery on a global basis*. Jonathan Maas of DLA Piper UK, George Rudoy of Shearman & Sterling in New York and James Zinn of Huron took us through some of the things to do, and not to do, when carrying out the orders of a court or a regulator to collect documents worldwide. There were two main words really – *prepare* and *inform*. Preparation includes being alert to local sensibilities and getting up to speed on what Jonathan Maas called the “social and cultural ethos” of the place, with local help to ensure, for example, that the purpose and the requirements were accurately translated. A workforce which thinks that you have come to identify candidates for redundancy is not likely to be very co-operative.

This sort of advice is worth having – the technical aspects of lifting data from an office largely involve having the right kit and technical skills you can be taught in a classroom. You only pick up the “social and cultural” nuances by doing it, and DLA and Shearmans have clearly done it. I have watched the Maas-Rudoy double-act on platforms (and in dining-rooms) on both sides of the Atlantic, and it has become an entertaining way of delivering some serious messages.

Robert Brown and Peter Garza of First Advantage gave us a more straight-up-and-down explanation of winning strategies for investigating electronic evidence, and then it was time for lunch.

Many conference organisers overlook the importance of the gaps between the sessions. Even those who expressly describe them as “networking opportunities” provide neither the time nor the context for useful discussion which, for me at least, is one of the main benefits of gathering people with a common interest together at these events. We had decent food, and the opportunity to wander between tables.

Particularly good, for me, was the chance to speak to Magistrate Judge John M Facciola of the US District Court for the District of Columbia. Those who read these columns will know that I am about to embark on eDisclosure training for judges, so I was intrigued to hear Judge Facciola describe their equivalent sessions as “fun”. His explanation will have to wait for another article, but there is clearly more to them than fun, judging by his performance in the mock eDiscovery trial which followed lunch.

The mock trial was the main event of the day. The Amendments to the Federal Rules of Civil Procedure were honed in part by such mock hearings – over here such things tend to be on substantive points of law rather than procedure. We are planning to include something like this as a later stage in our awareness-raising sessions with English judges, so I was interested to see a well-rehearsed example.

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Put as briefly as possible, the useful, if unlikely, context was that proceedings were on foot between a US buyer and a UK seller of machinery simultaneously in both jurisdictions. In the US proceedings, one party wanted the judge to strike out the case of the other because two back-up tapes had been destroyed. In default of that, he wanted an adverse inference direction to be given to the jury in respect of the lost tapes. In the UK proceedings, one party wanted orders for disclosure of documents older than those already disclosed, for production of backup tapes and for documents in native format as well as the tiffs which had already been produced.

Jay Brown and Mark Waite of Beirne, Maynard & Parsons LLP were the opposing counsel in the US court, presided over by Judge Facciola. Murray Rosen QC and Adam Johnson of Herbert Smith contested the English end under the eye of His Honour Judge Mackie QC of the London Mercantile Court.

I will leave you in suspense as to the outcome in each case, if only because the issues – the wider issues of principle, not just the immediate grounds of dispute – need a fuller airing than time or space allows here. The real point is that battles like these are going to assume ever greater significance as document populations grow. Both judges were very aware – in real life, not just in the fictional context – that the availability of cost-effective justice can turn on these pre-trial hearings because many cases simply cannot be fought economically if the scope of Discovery / Disclosure is not rigorously debated and controlled.

To the doubters, it will seem proof that we are headed down the US route to damnation-by-discovery if learned lawyers and judges must spend hours arguing over metadata and back-up tapes. That is the wrong message. The lesson is really the same as George Rudoy and Jonathan Maas gave as to the collection stage – prepare and inform. The time-consuming debates which were acted out were made necessary only because there had been inadequate preparation and insufficient inter-party discussion at earlier stages.

Those who drafted the FRCP amendments did not intend that eDiscovery should become such a battlefield of its own. The US lawyers I talk to express regret that the Discovery tail should wag the litigation dog in this way. Our remedy is not to ignore it as a regrettable feature of US litigation but to study closely what has happened there and make sure we take the best and avoid the worst.

The rise of eDiscovery as an issue, and as an expense, is not the product of a conspiracy between lawyers and service providers to keep the fees high, but an inevitable result of the rise in document populations. Judge Facciola attributed the fierce Discovery battles to the availability of sanctions; if you can deal your opponent a deadly blow before trial by attacking his Discovery then that is what you are bound to do – “bound” in more than one sense.

I will come back to this, because in it lies the key to making sure that we in the UK handle the growth of Disclosure in a way which recognises the scale of the problem whilst keeping it in its box. The mock Discovery trial deserved a wider audience.

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At this US-dominated event, it was good to see the venue plastered with stickers saying “Britain’s got talent”. Nigel Murray of TRILANTIC put his head round a door off a stairway and found himself at the back of the stage where the auditions were happening. We shall have to wait and see if that was enough to win him a place in the next round – a “Britain’s got talent” award would look good on the shelf beside TRILANTIC’s other awards.

There is more to this point than a journalistic link between two otherwise unrelated events. Nigel Murray and I were not the only members of the UK eDisclosure establishment in the audience. Andrew Haslam, Tom Hopkinson of KPMG and Craig Earnshaw of FTI were there. Nii Larnyoh of OutIndex blew in over lunch. Senior Master Whitaker, perhaps the only member of the UK judiciary to watch US developments closely, turned up. Any practitioner needing to get up to speed in this area could have picked up as much knowledge chatting with people like this as from the panel. Where were they all?

There is, I suspect, a feeling that only the likes of DLA Piper or Herbert Smith get involved in life-or-death eDisclosure battles, and that what happens in Transatlantic contract disputes is seen as being of marginal relevance to everyday domestic litigation. This would be a mistake. I have served my time in front of Masters and Judges on hearings which were “only” about procedure and found them suddenly becoming central to the whole case. On the strength of his performance yesterday, I would not like to find myself in front of HHJ Mackie QC with my arguments on Disclosure less than perfectly formed. He may not be able to send me to the Scrubs but, as he made clear, he can make immediate orders for costs, payable in 14 days, quite apart from any orders he makes to remedy Discovery defects. Try explaining that to the client (to say nothing of your department head).

If you want to discuss any of this, and particularly if you are squaring up to an opponent or a court on the technical, procedural or management aspects of eDisclosure, please do not hesitate to [contact me](#).