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Chris Dale Lawyer Support
Comment on eDisclosure and other IT matters

[Trilantic panel explores international e-Discovery initiatives at LegalTech](#)

Not much changes at LegalTech from year to year. Sure, the trends come and go – “the move to the left”, Twitter, and “Please look at my CV” being this year’s big things – but for the most part, the same booths, the same faces and the same routines turn up every year.

One discernible change, however, is the interest in what is happening in other jurisdictions. “Abroad” does not rank high in US consciousness. We mocked George Bush when he asked a Welsh singer which state Wales was in, but most Americans, I think, would just wonder why anyone would care which state Wales is in. Sarah Palin thought Africa was a country, but no-one seemed seriously to question whether her foreign experience - a fly-by of some US bases, a refuelling stop in Ireland and a holiday in Mexico - was adequate for a vice-presidential candidate. In the e-discovery world, most Americans see Europe as a cross between a modest museum and a commercial colony full of obstructive civil servants obsessed with data privacy. For years, the value of the dollar and a terror of terror kept them all at home.

You do not see this until you go to the US. Most of the Americans I know well have a well-rounded world view but that, I now realise, is because I meet most of them outside the US – they self-classify themselves as people who know of the world outside America because that is where I come across them. The insular ones – including, unfortunately, those who make political and commercial policy – stay at home. This matters because the US is still the commercial powerhouse of the world – no-one in America cares, frankly, what Gordon Brown thinks about America, but it does matter what America knows, or thinks it knows, about the rest of the world.

The point was illustrated by an eccentric map - the world from a US perspective - shown at the beginning of [Trilantic's](#) LegalTech session called **A shrinking world – international initiatives in e-Discovery**. I will spare you the details and stick – as we did in the session – to my narrow e-discovery brief, content to have made the point that the view of and from the US matters. When I first went to LegalTech (this was my third) there was little interest in developments outside America. Until this year, Trilantic’s sessions were the only ones to pay attention to what is happening beyond America’s

borders. This year ours was not the only session to consider UK, Australian and Canadian developments.



Jo Sherman, Chris Dale, Nigel Murray, George Socha, Owen Bourke

The moderator was **George Socha** and the panel comprised former Magistrate Judge **Ronald Hedges**, **Jo Sherman** and me. Ron Hedges, in addition to his erstwhile status as a judge with strong e-discovery credentials, is on the Advisory Board for the [Sedona Conference](#) and has been active and influential in Sedona Canada. Jo Sherman is Adviser to the Australian Courts in relation to their new eDiscovery Practice Note as well as CEO of [eDiscovery Tools](#). I am a member of **Senior Master Whitaker's** drafting committee, which is producing a Technology Questionnaire for use in UK civil proceedings and an e-disclosure Practice Note, and have taken part on conferences in both Australia and the US as well as the UK.

Jo Sherman told us about the new Australian [Federal Court Practice Note 17](#) which had come into effect the previous week. Its importance lies not so much in the detail (which I leave you to read for yourself) as in the expressed purpose “to encourage and facilitate the effective use of technology in proceedings before the Court by ... setting out the Court’s expectations of how technology should be used in the conduct of proceedings before it”. It is “to be applied in a manner that gives effect to the overarching purpose of the Federal Court’s Individual Docket System, which is: the just resolution of disputes as quickly, inexpensively and efficiently as possible” for which purpose “the Court expects the parties and their representatives to cooperate with and assist the Court in fulfilling the overarching purpose and, in particular, in identifying documents relevant to the dispute as early as possible and dealing with those documents in the most efficient way practicable”.

Just common sense, you would say – no-one would argue with that as a prudent basis on which to approach the problems of costs generally and of handling electronic disclosure specifically. Just such common sense is beginning to emerge from some US courts and those in the other countries.

The [Sedona Canada Principles](#), adopted in some Canadian Provinces and generally accepted as a sensible basis for approaching the problem, use language which is little different in broad terms but which vary as to detail. They include an express obligation to “meet and confer” (the FRCP terminology) to discuss the identification, collection etc of electronically stored information. The Australian Practice Note does the same, where the present UK Practice Direction has a rather vague (and accordingly ignored) obligation to “discuss”. The Sedona Canada Principles specifically invoke proportionality as a guiding concept where the Australian rules do not, although the whole tenor of the rules implies it. Canadian Provincial rules or draft rules (Ottawa, for example) refer in terms to the obligation to produce a “discovery plan” with potential costs implications for those who do not.

We did not attempt in our panel session to dissect such distinctions, nor do I do it here. The reason why I am interested in other jurisdictions is that we are, as I said above, undertaking an exercise in England & Wales which gives the opportunity to reshape the practice of handling electronic disclosure. It would be foolish to do so without an appraisal of what works and does not work in other jurisdictions, and to find out what causes dissent and what invites consensus in other places. **Vince Neicho** of Allen & Overy, a fellow-member of Master Whitaker’s drafting group, was there, as were **Geoffrey Lambert** and **Owen Bourke** of [KordaMentha](#) in Melbourne. Their purpose, I imagine, was much the same as mine - you really need a mixture of skills as well as a variety of jurisdictional backgrounds to dissect the issues. Between those of us on the panel and those who spoke from the floor (which included Vince and Geoffrey) we had the broad spread of interests and experience to get some discussion going.



Jo Sherman, Chris Dale, Owen Bourke

I suggested that there were three potentially binding forces around the world – the problems were the same everywhere, the rule-makers (drafters and case management judges) could capitalise on their shared experiences if we can get them introduced to each other, and there are a handful of suppliers with a global presence who were applying the same technology to the problems in each jurisdiction. It is very much part of my role to keep these discussions going - to keep in touch with people like Jo Sherman and Ron Hedges and to maximise the international potential, in information terms, of the suppliers with whom I have good contacts – all but one of the legal technology suppliers with world-wide reach are also sponsors of the [e-Disclosure Information Project](#)

We have to some extent operated in silos hitherto, with thoughtful people in each jurisdiction being thoughtful on their own. Although the [Sedona Conference](#) is known of everywhere, its main thrust outside North America has been on data protection and privacy issues - there is a Sedona meeting in Barcelona this June on these topics, for example. They are important issues, but one of my ambitions is to get US involvement in e-discovery discussions in parallel with other jurisdictions and not just in the cross-border aspects, on which US lawyers tend to be obsessive to non-US eyes. There is good reason for this – from a US perspective – since privacy and data protection raise issues which severely limit the ability of US parties and courts to gain access to data. I am more interested in the commonality between the problems which we each face within our own jurisdictions and in pooling ideas on how to tackle them.

That implies no lack of interest in cross-border issues on my part, merely a different focus. [Trilantic](#), the sponsors of this international session, are closely focussed on data protection issues, and their web site includes the best set of resources there is on the [EU Data Protection Rules of the EU](#) and its member states.

My thanks to Trilantic for the opportunity to speak about the various parallel initiatives in company with some of the best thinkers on the subject.





Jo Sherman, Chris Dale, Owen Bourke, Nigel Murray, Geoffrey Lambert

Thanks to David Mattera of Trilantic for taking the photographs