

TRILANTIC

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Chris Dale Lawyer Support
Comment on eDisclosure and other IT matters

[Birmingham barristers see e-disclosure applications](#)

A seminar in Birmingham allowed an audience of lawyers to see some of the applications used to handle electronic disclosure topped and tailed by some explanation of the litigation context. It was not just a trade show but a visual way to convey that the solutions are gaining on the problem

The [e-Disclosure Information Project](#) originated in Birmingham when **Mark Surguy** of Pinsent Masons introduced me last summer to **HHJ Simon Brown QC**, a designated Mercantile Judge at the Birmingham Civil Justice Centre. We brought it back there at the beginning of October when **Edward Pepperall**, a commercial barrister at [St Philips Chambers](#), invited us to give a reprise of a talk he had heard us give to solicitors a few months ago.

Ed Pepperall's reasoning was that barristers are increasingly getting involved in the procedural aspects of Case Management Conferences. Birmingham may be ahead of other places because the judges there are known to practice the "active management" which the overriding objective requires and in which the parties are expected to take their part. The Commercial Court Guide, on which the Mercantile Court Guides are based, emphasises that the CMC is not just the old summons for directions. Judge Brown says of the CMC that is a "business meeting".

If barristers are engaged at the CMC then they need to be aware – preferably well before they go in, and not just in the corridor outside - what the court will expect them to cover. Hands up all those who know about the obligation to discuss electronic sources of documents in [Paragraph 2A.2 of the Practice Direction to Part 31 CPR](#). I thought not. What about [Digicel \(St Lucia\) v Cable & Wireless](#)? We did not mention that, because it had not been heard then. It has now, and we can expect many more orders requiring parties to discuss their sources and to take difficulties or disagreements to the judge.

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When the invitation appeared, Judge Brown suggested that the barristers might prefer to see and hear about some of the applications and services which exist to address the problems raised by e-disclosure. Barristers can read the rules for themselves. Chambers of the size of St Philips could easily persuade any number of suppliers to come and visit them, but to get several of them to come along at once and to have them address a consistent theme is rather harder, especially if you don't know their names.

Knowing peoples' names is what my business is about, and I undertook to devise a theme and to invite suppliers to illustrate it. St Philips' Chambers provided the guest list, the venue and the refreshments.

The theme was data and how it is collected and how it can be passed from application to application using the strengths of each one, right through to trial, without compromising decisions as to the next stage. I should make it clear here, as we did on the day, that not every case warrants or needs the attentions of multiple suppliers. Clients often do their own collections. If we blurred the processing stage, that is because it can lie in more than one hand, means different things in different contexts, and does not lend itself to visual display. Few cases end in a trial, so the presentation stage was rarely required. The aim of the session was not necessarily to describe a typical fluid process but to explain the components.

Ed Pepperall welcomed the audience – he has a nice line in practical examples which I heard more fully explained at a later event and which I will report on then. I gave a brief introduction. I explained the purpose of the e-Disclosure Information Project, and its role in identifying the common interest shared by judges, practitioners, suppliers and clients in the efficient conduct of litigation. Judges, however alert to their active management role, had no opportunity to find out about the problems raised by electronic documents or the solutions. It was outside the direct experience of most of them as barristers, and appeared on no judicial syllabus; the technology changed all the time; the relevant parts of the CPR, though well-made to address the problems, were not widely known.

I was, I said, uninhibited about emphasising the role of suppliers in spreading knowledge about e-disclosure. This was partly because suppliers were the only people who actually knew about it, and to have excluded suppliers from involvement in discussions about the rules and the practice was folly. That was how we had rules made as recently as 1999 which contained only a single line reference – a gesture in the overriding objective – to the use of technology in case management.

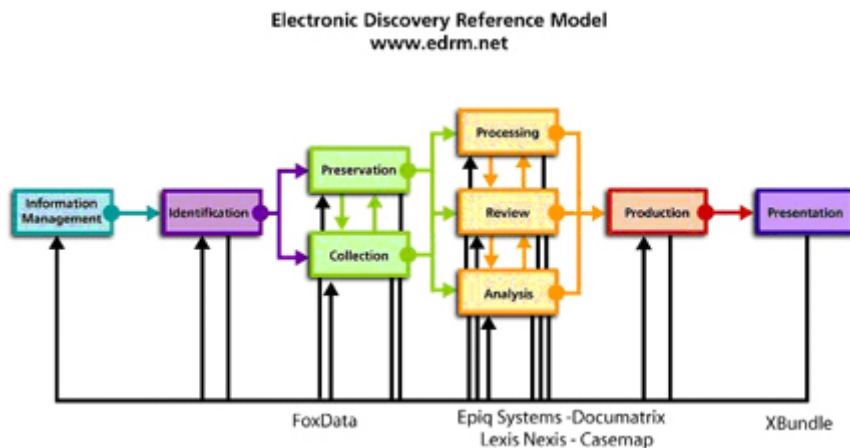
The suppliers are also the only source of funding for educational initiatives. In the US and Australia there is state funding for such things. Here there is none. [FoxData](#) had funded my time on the original education session for judges. They

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and the other sponsors between them represented not only a source of funding but an immensely useful resource covering every aspect of the document-handling from collection to trial.

The displays were introduced by **Nigel Murray** of [Trilantic](#). Trilantic are a general litigation services provider, giving consultancy and project management advice, doing or outsourcing the stages in the process, and hosting the end-result or passing it to another provider for hosting.

Not that you would have deduced much of that from Nigel Murray's introduction, which stuck rigorously to its brief of giving an overview. He used the [EDRM](#) (Electronic Discovery Reference Model) to give us a sense of the flow of documents data through the stages, with the names of the other speakers to show their place in the picture.



Data collection is the logical place to start a talk like this, and **Ian Manning** of [FoxData](#) told us a little of what is involved in pulling out the material likely to be required. Most of FoxData's work is international, urgent and to a very high evidential standard. The point which Ian made was that with those requirements as an everyday given, applying the same skills and experience to more local and less apparently demanding circumstances made for an efficient and economic service. The core task may be a deeply technical process, but the job as a whole requires an understanding of the context in which the data is to be used, and that context includes proportionality – the ratio of cost to value.

Next came **Mike Brown** of [Epiq Systems](#), who showed us [DocuMatrix](#) as an example of a litigation review application. Review applications are the most visual of the tools used in litigation support, and are also the closest in function to what lawyers themselves do as part of the disclosure process – they look at documents, make decisions about their status and importance and mark them with notes or put them into categories.

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Applications like this (and Mike Brown is always careful to talk about “applications like this” when he shows DocuMatrix) do all of that, so the lawyers can relate to what they see. What the lawyers cannot do is mark 9000 documents at once because they share some identifiable characteristic. Still less can they look a pile of documents and have their common characteristics identified for them which is, in essence, what conceptual search does, leaving the lawyers to decide whether that identification warrants further examination and, if so, by what level of fee earner with what degree of priority.

He was followed by **Matthew Grant** of [LexisNexis](#) who showed how [CaseMap](#) can be used to analyse the key data – not just documents, but people, facts, issues, dates and all the units of information which comprise the raw material of a case. There is no need to talk about “applications like this” when talking of CaseMap because there is no application like it. Most other applications in this space have a “Send to CaseMap” function which cuts down the data entry burden. The spreadsheet model is a familiar one. The ability to look at the case material from any perspective – a witness, an issue, the relevant law or whatever – lends itself well to what a lawyer, barristers as well as solicitors, must do in preparing for a case.

Last came **Robert Onslow** of [XLegal](#) showing a product which he has co-developed called [XBundle](#). XBundle mimics electronically what a barrister’s paper bundles do – you can turn to a page, annotate it with highlighter or yellow sticky, flag it to come back to, and so on. The pages may have come from an electronic source used for disclosure by either or both parties, or may have been scanned from paper or converted to PDF from Word or other files. One of Robert Onslow’s compelling arguments for this approach is that he can carry all his cases on his laptop and not have to lug paper files around with him

Judge Brown wound up the evening with an uncompromising warning that the courts would not tolerate cases which were not managed with maximum efficiency by the parties, particularly where the handling of documents is concerned. This does NOT mean that all cases must be handled electronically. What it means is that the court – his court at least – will want to know what electronic sources exist, what costs are likely to be incurred in retrieving and reviewing them, and what value the upshot will have in enabling a fact-finding judge to find the facts.

These are the core components of assessing proportionality. They are also elements which the CPR expressly enjoins parties and judges to consider, and are therefore not optional. What is optional (or, as the rules put it, “discretionary”) is what happens next. The upshot of such an evaluation may well be, and often is, that nothing is to be gained by requiring the parties to engage in electronic disclosure. That judgement cannot be made, by parties or the court, without the facts and the costs estimates.

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It cannot really be made without knowing what solutions exist to handle electronic documents. None of the applications described and shown at this event lend themselves to price-listing, but each of the speakers made it clear that their costs in general marched with the size of the case and were not, for a normal case, likely to be disproportionate to what had to be achieved.

Word reached me afterwards that one barrister had been heard to mutter that what he had seen was a commercial show. Most of the speakers were indeed businesses showing products which they were offering for sale. Barristers came somewhat late to the idea that one might promote one's services to potential clients, but they seem to have grasped the potential quite quickly (not least St Philips Chambers, from its high-profile opening through to its appearance as the only regional set short-listed for 'Set of the Year' at the Lawyer Awards 2008), and no-one seems to object nor suggests that the purity of the English legal system is damaged as a result.

[Trilantic](#), [FoxData](#), [DocuMatrix](#), [LexisNexis](#) and [XBundle](#) are representative of others offering similar applications and services. Each of them would be happy to stand scrutiny alongside rival products. The point of this event was not to showcase specific products (ask me, or follow the links from this page to see others), but to illustrate what types of services and products are available to handle an aspect of case management which has been the biggest single reason why clients have turned away from litigation.

Efficient document handling is not the unique preserve of solicitors. It is barristers, after all, who have to get involved in the detail of documents and, as I said above, increasingly to handle Case Management Conferences. They need to know what exists to do this cost-effectively, and if that means rubbing shoulders simultaneously with both vulgar commerce and brutish technology, then that is the way the 21st century has gone. Both branches of the profession do have options – they could avoid document-heavy litigation, or they could let the clients take the work in house. Before either of those circumstances happens by default, it is worth a peek at what the technology providers have to offer.

My thanks to **Nigel Murray**, **Ian Manning**, **Mike Brown**, **Matt Grant** and **Robert Onslow** for making the trek to Birmingham and for a seamless set of presentations, and to **Judge Brown** for his able conclusion. My thanks in particular to **Ed Pepperall** and **St Philips Chambers** for the invitation, for the technical arrangements, and for the generous hospitality at the event and after it.

As an afterthought, I wrote most of this a week later in Sydney. A speaker at the e-disclosure conference there referred to the "Birmingham initiative" as an example of a forward-thinking move to face up to the challenges of 21st century litigation. You can't go much further than that.

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The contact details of the participants are given below. I stress again that they are representative of others offering alternative solutions and, indeed, that there are areas not covered by a selection of speakers which was necessarily constrained by the limits of a two-hour session. The EDRM diagram above starts with the clients' information management, and if external lawyers are to be proactive in their advice to clients then they ought to be aware of the solutions which exist to make an organisation ready for litigation or regulatory investigations, not merely equipped to be reactive when a problem arises. We did not say much about processing, nor about the wide range of consultancy services which exist to supplement the lawyers' work. Nor does efficient use of technology consist only of document-handling - realtime transcription of court hearings is another obvious use of technology to save time and costs.

My primary objective here was to give a taster menu, to introduce some concepts visually, and to encourage lawyers to make contact with a range of suppliers offering services in this area. If you want some other names, or are interested in attending or organising a similar event, please [contact me](#).

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