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Discovery from the European Perspective

By Nigel Murray



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On a recent discovery project in France, we wanted to use the weekend to expedite our task. No go. French law mandates adherence to the 35-hour work week. We were not allowed into the client's offices because no employee had enough hours available to supervise us.

Just as work customs and laws are different, regulations governing electronic discovery are not the same in Europe as in the U.S.—and they vary from nation to nation and state to state within the European Union. Over the last couple of years, I have seen in Europe a dramatic increase in primarily U.S.-based international disputes. Regulatory matters can have international considerations, such as SEC and DOJ inquiries involving subsidiaries or even parent companies based in Europe. Cases include money laundering inquiries and, more recently, investigations regarding the Foreign Corrupt Practices Act. U.S. law firms and corporations faced with international matters should understand what is going on in the U.K. and the European Union, in terms of eDiscovery.

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In the U.K., discovery is called disclosure. It is a “push” rather than a “pull” system. The lawyer for a party is legally an officer of the court. As such, the lawyer must hand over to the other party all documents that directly support both their client’s position and the other party’s position. Each party discloses to the other the relevant documents in the case. In the U.S., the giving party must respond to a request—often with no real idea as to the scope and size of the request.

Overall, a major difference between the English and U.S. legal systems regarding litigation is that the loser pays both party’s costs—all of them, unless it has been agreed beforehand that some elements will be shared (for example, setting up an electronic courtroom).

I would note two other differences. First, in the U.K. we have no juries in civil litigation, only in criminal cases. Accordingly, the use of technology has been slow to evolve in civil courts; this is changing for the better. Second, insurance-funded class action disputes are rare (though they are starting to pick up). I was involved in one in the mid-1990s—the first and only tobacco litigation held in the U.K. The claimants lost, which caused quite a bit of suffering because they personally had to pay the tobacco companies’ legal costs. This successfully put people off class actions.

In a U.S.-based matter (litigation or regulatory) involving data based in Europe, four key questions need to be addressed:

- How do I identify what needs to be collected? Once I do, what must I do before starting a collection?
- Can I collect, and if so, how and where?
- Can I process, and if so, where?
- What can be shipped for review—or must the review occur onsite, within the country, within another EU country or within an outside country that is deemed to provide adequate protection (Canada, for example)?

Each matter must be addressed on an individual basis, taking into account the type of case, the country, the client, the type of data to be collected and the local laws. Collecting data in the EU should be approached with great caution, because the person doing it could end up in jail.

Working methods can affect your eDiscovery project abroad. The average European does not work like Americans. We like our holidays, and the idea of working on a 24-hour basis is alien to some. In France, as you read above, the 35-hour work week is strictly enforced.

Nigel Murray is the founder and managing director of TRILANTIC, a European-based legal support company focused on the eDisclosure / eDiscovery market. Nigel began his career in legal technology as a litigation support manager at a major London international law firm. He then started the first British litigation support company in 1993 – Bowhawk, working on massive cases of the 90’s - tobacco, BCCI etc. From there, Nigel brought the electronic side of litigation support into an existing document management company by way of a merger.

Having worked on the first U.K. eDisclosure matter in 2001, Nigel has been at the forefront of the development of the industry within the major law firms in the U.K. Nigel launched TRILANTIC in September of 2005 and speaks regularly on all aspects of eDiscovery in the U.S, the U.K. and mainland Europe. Nigel can be reached at nigel.murray@trilantic.co.uk.