TeCSA Training Day
eDisclosure in Practice
1 November 2013

On 1 November 2013 TeCSA hosted a day of training for lawyers on electronic disclosure in practice which took place in the impressive auditorium of Berwin Leighton Paisner's offices in London with some one hundred attendees. The training centred on the new "eDisclosure Protocol" developed by representatives of TeCSA, TECBAR and the Society for Computers and the Law. The protocol has been approved by the judges of the Technology and Construction Court for use by parties from 1 January 2014.

The programme of training followed the structure and format of the protocol from the first stages of thinking about electronic disclosure through to inspection at the end.

The day commenced with a welcome from Simon Toulson, the Chairman of TeCSA and senior partner of Fenwick Elliott, followed by talks by Steven Williams, Chair of TeCSA's eDisclosure sub-committee and Partner at Nabarro LLP; Andrew Haslam of Allvision litigation support consultancy; Mike Taylor of i-Lit Limited and electronic disclosure consultant; and Marie-Claire O'Hara, a member of the sub-committee that drafted the Protocol and senior associate at Nabarro LLP.

In addition, there was a panel of lawyers who also presented on disclosure issues and provided an insight into disclosure through their on hands-on experience: James Morris, a senior associate at Mayer Brown; Karen Sanderson, an associate at CMS Cameron McKenna; Sara Paradisi, an associate at Berwin Leighton Paisner; Julian Brooksbank, an associate at Pinsent Masons and Martha Mordecai, a senior assistant at Speechly Bircham.

The whole day was ably chaired and overseen by the well-known edisclosure guru Chris Dale and, behinds the scenes, was organised by Caroline Cummins, a TeCSA committee member and former Chairwoman of TeCSA with assistance from Lisa Kingston, a professional support lawyer and Stacy Sinclair, an assistant solicitor, both of Fenwick Elliott.

Finally, the keynote speech of the day was given by Mr Justice Edwards-Stuart, the judge in charge of the Technology and Construction Court.

Summary of the Day's Discussions

The TeCSA E-Disclosure Training Day commenced with a warm welcome from Simon Tolson, Chairman of TeCSA. He highlighted the growth in technology over the past decade and the effect this has had on disclosure. He also introduced the new TeCSA / SCL / TECBAR e-Disclosure Protocol and accompanying mission statement and guidelines, which were developed to assist the legal profession with their disclosure obligations, particularly in light of the recent Jackson Reforms.

When you should start thinking about e-Disclosure — Steven Williams

Steven Williams discussed the initial steps of the e-disclosure process leading up to the first Case Management Conference (CMC) and the assistance which the Protocol gives to practitioners during this time. He highlighted that it is often important to start thinking about these issues as soon as possible, even as early as the Pre-Action Protocol meeting.

Questions/comments from the audience and panel

- During this session, the audience asked whether it is possible that discussing the disclosure process might distract from focusing on settling the matter at the pre-action stage. In response, the panel noted that there is a balance to be struck but parties must also turn their mind to costs etc in order to make an informed settlement. It could be as simple as, if the PAP meeting fails, getting an agreement to exchange Electronic Document Questionnaires (EDQs) and commence a dialogue. E-disclosure is likely to be one of the most expensive parts of the litigation process and, like any good construction project, it's better to embark on the project with a budget.

- The audience also asked about how one should compare e-disclosure providers as it is often hard to compare different pricing structures. In response, it was suggested that it might be worthwhile for solicitors to get together to agree a template document to take to providers so that price quotes can be made comparable. It is becoming more prominent in the US for Providers to use templates given by clients/lawyers rather than their own.
- The panel also highlighted the usefulness of building a relationship with a Provider (or several of them). This can be helpful in the budgeting stage too as they can give you advice on how to go about budgeting for disclosure.
- The accuracy of a Provider's quote will depend upon the level of information you can provide them – another reason to start considering e-disclosure early on.

Identification of Sources of Documents **Mike Taylor**

Mike Taylor discussed the different sources of documents which need to be considered by the legal team, client and Provider (if one has been appointed). Once a substantive list of custodians and document sources have been compiled, it is then possible to assess which are likely to contain relevant documents that need to be collected.

Questions/comments from the audience and panel

- It was noted by the panel that there are a number of interview questions on the EDRM website which can be used to assist at the identification/scoping stage if a solicitor does not have a Provider or in-house litigation support to assist.
- A point was made that it can often be hard to capture all of the custodians at the start of the process. Some possible ways to ensure all custodians are considered are to look at company or project organisation charts (if they exist) or to check if there are any recipients which known custodians commonly email or correspond with.
- Finally, there was some discussion as to whether the budget for the first CMC is focused on standard disclosure. It was accepted that this is likely the case because it is what the profession and the Providers are used to – if people are going to be held to a cost budget, it will be more common to stick with processes they are familiar with and can therefore more accurately budget against.

Collection – Getting Started **Andrew Haslam and Marie-Claire O'Hara**

Andrew Haslam started this session with a discussion about factors to take into account as to whether you need a Provider and, if you elect not to engage one, what other resources are available to guide you through the process. Marie-Claire O'Hara then continued the discussion by looking at how a law firm might go about choosing a Provider.

Questions/comments from the audience and panel

- There was a discussion about whether it would be possible or desirable for the Court to order both parties to use a common Provider or the same software (eg Relativity) in order to reduce costs. The panel felt that this could be quite difficult – particularly an order in relation to using common software like Relativity, as there are several different versions in the market. Further, not all Providers use Relativity and a party may already have engaged a Provider that does not, and also there are a number of different software packages which may suit some parties better. In terms of a common Provider, it depends upon the level of trust that parties have in this and their Provider.
- Another question arose to whether it was possible to change Providers if, partway through the process, you didn't like the service you were getting from your current Provider. It is easier to change Providers after collection or early case assessment stage but after that, can become complicated. Changing horses mid-stream will always cost and be difficult though.

The first Case Management Conference **Steven Williams and Marie-Claire O'Hara**

Steven gave a more in depth view on the documents to be prepared in advance of the first CMC, such as the Disclosure Report, EDQ and budget. Marie-Claire also referred to the relevant CPR rules on the

requirements for budgets and considerations to take into account when preparing a budget for disclosure (assuming a budget is required).

Questions/comments from the audience and panel

- It was noted that Form H was revised in July 2013 so check you are using the correct version. Further, the copy of Form H on the Ministry of Justice website contains incorrect formulae.
- The audience asked whether it was possible to refrain from filing a budget in some circumstances - in the only case discussed, the claimant had not filed a budget because the other party had refused to engage at all (and it wasn't clear if they would be defending the claim) so it was impossible to formulate a proper budget. However, the claimant had discussed this with the Court before the CMC.
- Several war stories and cases were referred to – for example a review of 350,000 documents is not classed as "exceptional" so the Court may be reluctant to grant extensions of time. In one experience from the audience, the budget was only approved up to the stage before disclosure because the parties did not realistically think they could complete the budget for further steps at that stage. In another case, the Court allowed for a delayed filing of the budgets – they were exchanged after the pleading had reached a stage where the issues were known.

Collection – the details **Mike Taylor**

In this session, Mike talked about the actual process of extracting a client's data – who should do it and what risks can be involved if it is not collected properly. He also mentioned some considerations to take into account when choosing your Provider, such as whether they charge by unit or hourly rate.

Questions/comments from the audience and panel

- A question was raised as to whether one should check that the data has been correctly extracted before the Provider starts to process it. Good Providers should do this automatically but once the data has been incorrectly collected, the only option is to re-do the process.
- There was also some discussion regarding issues with data stored with cloud companies. This can be a problem to access and retrieve so needs to be carefully considered.
- If there is an international element to the collection, it is best to get a Provider on board as some countries have significant data protection laws (e.g. France and Germany).
- In some smaller cases, it may be appropriate to dispense with a Provider or forensic team extracting the data. However, it is always necessary to ensure that the metadata is properly preserved in the extraction.
- It is also important to engage early with the client. In one person's experience, the client had independently engaged a Provider early on to collate documents but they had selected a limited pool of documents (having not discussed it with their lawyers) and had to re-do a lot of the process.
- The panel also considered whether deleted documents can be properly restored. Whilst a lot of it can, there is no guarantee and, even if a document is restored, it may not be fully recovered. The time and effort involved should be weighed against the significance of the documents.

Processing and Reducing **Sara Paradisi and Andrew Haslam**

Sara gave pointers on some of the ways in which the pool of documents for review can be reduced, such as de-duplication, key word filtering and date ranges, as well as providing a list of “best practice” guidelines for dealing with e-disclosure. Andrew then talked about different technological tools that can also be used to help remove irrelevant documents and assess the volume/types of documents for review.

Questions/comments from the audience and panel

- There was a brief discussion on the effectiveness of de-duplication as often a document is attached to a number of different emails so cannot be removed. In one situation, standalone documents were removed if there was a copy attached to an email. However, this led to problems where the parent email was designated privileged and the attachment also marked as such, whereas the standalone version would have been disclosable.

Review and Analysis **Mike Taylor and Andrew Haslam**

In this session, Andrew discussed a number of the tools that can be used to reduce the time to review documents or deal with more difficult documents – such as email threading, grouping near duplicates, audio translation, and language translation. Mike highlighted the three areas where problems tend to arise in the legal review – at client level; with the document set itself; and the review team.

Questions/comments from the audience and panel

- A question was raised as to the effectiveness of near duplication and what percentage of commonality should be selected. A lot of lawyers would not rely on it to remove documents from the review pool but it can be useful in grouping similar documents together for one reviewer to go through much faster. Parties may complain about the amount of duplication but there could be a good reason why it was included. It is best to agree an approach upfront – having an audit trail isn't enough.

Introductory debate on predictive coding and the role of lawyers

There was a lively debate on the usefulness and reliability of predictive coding. There were good arguments on both sides. Some considered it would be difficult to use predictive coding effectively in complicated construction cases where, typically, there are numerous issues some of which are particularly difficult to pin down, such as delay and disruption issues. If predictive coding could be applied to documents, it would assist in discarding documents found to be entirely irrelevant to the issues in the case, thereby dramatically reducing down the pool of documents that require further review or analysis.

Exchange and Inspection / Court presentation systems **Andrew Haslam, Julian Brooksbank, Martha Mordecai**

This session considered a number of points relating to the exchange of documents – such as the importance of agreeing the format of documents for disclosure and what you can do with the different formats. We also covered the claw-back provision relating to privileged/confidential documents in the Protocol and a summary of some of the recent cases on disclosure obligations. Finally, Andrew provided an update on the use of case presentation software such as Opus Magnum.

Questions/comments from the audience and panel

- One comment was raised about the listing of privileged documents. Whilst the systems these days can provide a full list of privileged documents, including their title, date and authors, the Protocol does not require this and it should be discussed and agreed by the parties. In some instances, the parties may wish to adopt an arbitration-style privilege log; in other instances, they may wish to simply refer to privileged documents generically without listing them individually.

A view from the Court on eDisclosure **Mr Justice Edwards-Stuart**

Mr Justice Edwards-Stuart discussed the role of the TCC judiciary in the development and implementation of the Protocol. The TCC Judges have been consulted about the Protocol during its development and has approved its use in the TCC from 1 January 2014. Mr Justice Edwards-Stuart explained that from 1 January 2014 the Court is likely to order the parties to adopt the Protocol in default of any agreement to the contrary by the parties but that, in some cases, a Protocol may simply not be appropriate.

His Lordship also pointed out that e-disclosure does not ordinarily produce a result that matches the menu options of CPR 31.5(7) but the selection of a menu option can inform the approach that is to be adopted in choosing the criteria and filters for the electronic searches. His Lordship also highlighted

the time and costs which can be saved by the use of filters to eliminate irrelevant documents and noted that applications for specific disclosure should focus on key custodians and periods of time (where the application might involve extensive manual searches). Mr Justice Edwards-Stuart also emphasised the importance of key words in including documents. He gave an example of a dispute in which one party proposed a very limited selection of keywords – he ordered a sample to be taken from 2 custodians and the results manually reviewed. In this, 36% of documents from one custodian and over 50% from the other were relevant documents but had not contained one of the proposed key words.

In looking to the future, His Lordship agreed that it may be useful to change the timing of the first CMC to allow the parties more time to discuss disclosure and cost budgets. He also noted that the TCC Guide is being revised and updated to reflect the recent Jackson reforms and matters such as the Protocol. Finally, he mentioned the possibility of establishing an e-disclosure working party to keep the court abreast of developments and provide feedback about how the directions being given by the Court operate in practice.

Questions/comments from the audience and panel

- Mr Justice Edwards-Stuart was asked about whether the TCC was considering removing the value based exemption whereby budgets are not mandatory in cases of over £2 million. He said that he was not able to say at present although the whole issue is currently being looked at across all of the Courts. He thought it seemed particularly wrong that there is currently a lack of uniformity in the Courts as to budgetary requirements but perhaps it is not surprising that budgets are required in many construction cases given that the industry itself is well used to budgets, programmes and plans.
- The audience also asked whether the Pre Action Protocol ("PAP") is still considered important. His Lordship acknowledged that initial support for the PAP had waned in some areas. Further, parties took different approaches to the process – some undertook it rigorously whilst others did it perfunctorily or even failed cooperate at all. In some cases the PAP may be a waste of time as the dispute has already been well rehearsed but in other cases it can lead to settlement. It needs to be left to the parties to what extent they engage but if a party refuses to engage and discuss issues early, such as disclosure, and turns up to the first CMC unprepared, this may have an impact on their cost budget. He added that he was unaware of any plans to abolish the PAP.