Are you Ready?

During LegalTech 2009, Legal Inc hosted a panel discussion on how preparing for, and meeting the demands of, electronic disclosure can be scaled for large, mid-sized and even small organisations. This article summarises the debate and captures the key points that emerged from the interaction with the audience.

The overall analogy used was that if litigation support is the ambulance at the bottom of a cliff, then litigation readiness is the fence at the top. This proposition was given added emphasis by two additional trends that had emerged from the 2008 conference, and were gaining even more ground in 2009. First, large (and not so large) organisations are taking back responsibility for their own data. They are implementing solutions which let them store, index and search all their electronically stored information (ESI) so that they can meet the triple demands of knowledge management, litigation readiness and regulatory compliance. Second, there is an increased use of analytics software for the purposes of early case assessment (ECA). Tools such as Clearwell, Attenex or Nuix are being used to shift and collate ESI, to gain both an understanding of the case and cut down on the volumes of information that are the fed into the cost per gigabyte litigation support "sausage machine".

Finally, a number of factors were combining to give impetus to this area on the UK side of the Atlantic. Three years on from the changes to Civil Procedure Rules explicitly covering electronic data disclosure (EDD), case law had finally appeared in a burst Digicel, Hedrich and Abela. Senior Master Whitaker has a committee which should be producing a Practice Direction and Technology Questionnaire within a month or so, which will lead practitioners through the steps needed to handle EDD. Finally there is an increasing awareness amongst the Judiciary of what should be happening in this part of disclosure. All of these elements combined to sound the death knell on the "I won't if you won't" approach to EDD that so many UK lawyers have adopted until now.

If there is going to be an increase in the amount of ESI being processed for disclosure, then what lessons can be learnt from three years of experience in the US and larger corporate?

The fundamental point articulated by all panellists was that it was vital to get a good understanding of the EDD issues. Parties should follow CPR and go into the first case management conference with a proportionate approach sorted out, or get the judge to rule if needed. You should treat this area like any other requiring expert advice and if you don't understand the topic get the appropriate individual(s) in. This was the key message of the Hedrich case, were a solicitor narrowly beat off a wasted costs order for his disclosure failures.

There is an increasing emergence of products allow you to capture search terms to show what you had and (most importantly) had not searched, and a resurgence in the understanding and knowledge of search techniques so as to get best value out of ECA. All of these will assuming increasing importance as you wade deeper into the EDD waters.

Costs, though significant, are falling as the marketplace matures and suppliers merge and processes become more efficient. There is increasing use of off-shore resources which can also drive the cost/GB down. What this does mean, is that so called

smaller firms by understanding and adopting this technology, can take on their larger brethren on a level playing field.

The panel concluded by articulating the top ten tips for reducing the risks and complexities of electronic disclosure. See here [Insert link to top 10 tips] for the results.