

## Tip of the Month



### **E-Discovery in England and Wales**

#### **Scenario**

A New York-based manufacturer is informed that a French customer is suing the manufacturer's London-based subsidiary in the Commercial Court in London. The US parent is unfamiliar with litigation in England and, in particular, the e-disclosure regime.

#### **Disclosure Obligations in England**

*Are the disclosure obligations in the United States and England similar?* US and English disclosure rules are, indeed, broadly similar, so a US litigant will encounter familiar principles. The English rules require a party to disclose documents that support or adversely affect either its case or the other party's case. There is a potentially significant difference between the two regimes, however. Under the English rules, in normal circumstances, the parties do not disclose documents that may lead to a chain of enquiry that might result in the disclosure of relevant documents. The English court might make such an order for this broader disclosure if requested in appropriate cases, but these are likely to be made only in appropriately large or complex cases, and the burden is on the party seeking that broader disclosure to show that it is proportionate in all the circumstances of the case. Also, under a new menu option regime whereby the English court has available a range of disclosure options of varying scope, the court will be amenable to restricting disclosure in appropriate cases (for instance by limiting it to specific identified issues).

*Do the English rules require disclosure of electronic documents?* The English rules do require disclosure of electronic documents, and they define that term as broadly as it is defined in the United States. Consequently, every category of electronic document from email and instant messages to texts and audio files (and, in appropriate cases, social media content) is potentially disclosable.

*Do the parties have to identify their sources of electronic documents and discuss with the other side what e-disclosure they propose to give?* The English rules require parties to exchange information as to the categories of relevant electronic documents that they have, where those documents are located, how they are stored and the broad range of costs likely to be involved in giving this disclosure. Parties are also obliged to discuss and agree if possible where they propose to search, what they propose to disclose and how they propose to do that.

*Does an English subsidiary have to disclose relevant documents held by other group companies?*

An English subsidiary is only obliged to disclose documents within its control (documents that it physically possesses, or that it has a right to possess, inspect or copy). The English rules recognize the legal distinction between group companies (in particular parent and subsidiary companies) for these purposes. If the above scenario were reversed, and the parent company

was based in England and was being sued, the party seeking disclosure would need to demonstrate that the parent company had presently enforceable legal rights to gain possession of, or to inspect or copy, its New York subsidiary's documents.

*Can documents in England be sent to the United States to be reviewed there?* EU rules strictly limit the processing and transfer of personal data to countries that are not recognized as having equivalent data protection laws—this includes the United States. The definition of “personal data” is broad. Consequently, English law advice will be required as to the effect of UK data protection laws on the extent to which the English subsidiary's documents can be transferred for that purpose.

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