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NEW CPR PRACTICE DIRECTION 31B

By Ed Sautter

On 1 October 2010, after a long gestation period, a new Practice Direction (31B) concerning the disclosure of electronically stored information (“ESI”) has finally emerged. It marks a significant further stage in the development of e-disclosure in the English Courts. The introduction in 2005 of paragraph 2A into the Practice Direction to CPR 31 established for the first time provisions specifically related to the disclosure of ESI. After some delay, there came a rush of cases (including *Digicel v Cable & Wireless* [2008] EWHC 2522 (Ch), *Earles v Barclays Bank* [2009] EWHC 2500 (QB) and *Goodale v Ministry of Justice* [2009] EWHC B41 (QB)) in which the Court considered parties’ obligations to preserve and disclose ESI under the 2005 provisions. Now the new Practice Direction (which applies, unless otherwise ordered, only to multi-track proceedings) and associated Questionnaire seeks to take e-disclosure to the next level.

While much of the wording of the old paragraph 2A is retained, there are a number of significant changes. The new Practice Direction is more prescriptive in its phraseology; it requires the parties and their legal representatives, before the first Case Management Conference, to discuss the disclosure of ESI (paragraph 9). It also requires the parties and their solicitors to discuss the use of technology in the management of ESI (paragraph 8) and obliges solicitors to notify their clients of the need to preserve

disclosable ESI (paragraph 7).

The Practice Direction also fleshes out in more detail than before the nature of the information to be exchanged by the parties, including the tools and techniques that might be used to reduce the burden and cost of e-disclosure, such as agreed software tools and data sampling. At the heart of the Practice Direction is the new Questionnaire which is designed to elicit from the parties a comprehensive statement as to the extent and location of relevant ESI and proposals for its disclosure. The Questionnaire is not compulsory but I anticipate arguments readily being made that the Questionnaire is the most appropriate template for the provision by the parties of the information that the Practice Direction requires them to exchange.

Further, the Court has the power under the Practice Direction to order use of all or part of the Questionnaire in the absence of agreement between the parties as to how they will provide disclosure of ESI. Significantly, the Court also has the power to set aside, of its own volition, what it regards as inadequate an agreement between parties in relation to the disclosure of ESI, and to require some or all of the Questionnaire to be completed. The Questionnaire itself (which includes a statement of truth), seeks information concerning sources of potentially relevant ESI in terms of custodians, types of data and the loc-



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ations where it is stored. Specific references to communications such as instant messaging, VOIP and text messaging indicate that parties are expected to take into account ongoing developments in electronic communications in determining type and sources of potentially disclosable ESI.

The Questionnaire also expects parties to consider, and to discuss, the methods of search that will best identify the ESI that is relevant to the issues in the litigation. If keyword searches are to be used, the search terms should be identified, and parties are encouraged to consider whether more sophisticated methods of search, such as concept searching or clustering, will in some cases be more effective. In this regard, the Practice Direction (paragraphs 25-27) observes that keyword searching will not always be sufficient. Further, the philosophy in the Practice Direction is that the conduct of e-disclosure should be proportionate and cost effective and that the disclosure of large amounts of irrelevant ESI is unacceptable (see for instance paragraph 6(5)).

The Practice Direction also provides more detailed guidance as to how ESI is to be listed and made available for inspection (paragraphs 31-36).

In conclusion, by mandating early detailed exchange of information concerning the identity of the ESI held by the parties and the searches to be carried out for it, the Practice Direction and Questionnaire aim to provide a sound basis for sensible discussion between the parties, leading to the proportionate and cost efficient disclosure of ESI. Compliance by the parties, and, where this is not forthcoming, the Courts' enforcement of these new provisions, should take e-disclosure forward to the next level.