Litigation Readiness V2.0
The "~~Better~~ Improved fence at the top of the cliff"

In February of this year I reported from New York on the various trends emerging from LegalTech 2011. One of the areas was the increasing adoption of Early Case (or Data) Assessment (ECA) technologies by businesses and their in-house counsel so as to be better prepared for litigation. In some cases this is coupled with the use of predictive coding to "jump start" the disclosure process. It seemed to me, in true web based tradition, that what we are seeing is the next generation of litigation readiness, or version 2.0, hence the title of this white paper. What the rest of this document will do is quickly revisit the core elements of litigation readiness and then explore how technology is helping to overcome the very issues that technology caused in the first place. It will focus on the possible implications for the UK, both in terms of clients and the law firms themselves.

First a brief recap of the main issues.

In order to understand where the requirement for Litigation Readiness springs from, it is necessary to understand the three main challenges surrounding Electronically Stored Information (ESI). First, and foremost, is the sheer volume of material that has to be dealt with. There are any number of statistics bandied around, from the number of emails sent each day (with 90 billion being the latest estimate), through to the claim that 90% of corporate data exists in electronic form with only 30% of that information ever printed out, ending up with a Microsoft study that estimated a business user sends/receives about 50 emails per working day, roughly 12,000 messages a year. This information is held within emails, electronic files (efiles) such as Word, PowerPoint or Excel documents, and more ephemeral locations like the various social networks of Facebook, Twitter and LinkedIn as well as Instant Messaging systems and phone text messages. Not only is there a proliferation of formats of data, the physical location of ESI has ballooned beyond the original sites of PC's and servers, into flash drives, backups, distributed storage, business continuity solutions and "The Cloud". Like Topsy, it just keeps on growing.

The second issue is that of Metadata, the "data about the data" that is stored within the various document formats. In the majority of cases, this information is incidental (though it should always be preserved when the ESI is collected), but in certain circumstances, particularly in fraud and other cases where establishing a time line of events is critical, metadata can be crucial. Capturing and preserving metadata is a key element of ESI handling.

Finally the sheer size and complexity of ESI, very often leads to a situation were Donald Rumsfeld's quotation of "known unknowns" come to mind. The known questions with unknown answers include; "where is all the information", "how do I produce it all" and "what is a reasonable effort". Grappling with these issues can cause many a lawyer to worry about the fundamental question in disclosure, "have we produced what we need to?".

Various legal systems around the world have amended their procedural rules to explicitly handle the issues surrounding Electronic Data Disclosure/Discovery (EDD). The English and Welsh Civil Procedure rules were first altered in October 2005, the US Federal Rules in December 2006, and Australian procedures in the first part of 2007. The English and Welsh rules were updated in October 2010 and an associated EDD Collection questionnaire attached to them. As we have established already, the increased complexity, inter-

dependency and digital only existence of data, coupled with the volumes that have to be processed, form the background to the concepts of Litigation Readiness.

Though the UK does not have the litigation culture, punitive damages and depositions which characterise the US system, the consequences of making mistakes in EDD can still have a significant impact upon the ability of a law firm to successfully drive a case through to the result they are after. In the following analysis elements of the white paper, the reasons behind some of the US “scare” stories of EDD disasters will be explored, as one thing that is common, is the ability of people to make mistakes, misunderstand each other and generally create havoc with a litigation lawyer’s carefully prepared case.

First we need to establish the “what” and “why” of litigation readiness. The common analogy is that, if litigation support and EDD are the ambulance at the bottom of the cliff, then litigation readiness is the fence at the top that stops you falling over. As we will see during the remainder of the article, litigation readiness is inexorably bound up with a sound Records Management policy, and this in itself is a good efficient business practice. Indeed for some firms in the financial sectors, the demands of Sarbanes Oxley, the Financial Services Act, Basel 2 and MiFID, make a sound records management strategy an essential element of their business. Increasingly, the way in which a business handles electronic data has a value in its own right and that value is being assessed in Merger and Acquisition situations. The demands of the forthcoming Bribery Act will only increase the pressure for organisations to have a good grasp on the control and management of their ESI.

As well as the regulatory and compliance drivers, there are increased risks for firms involved in global transactions and a poor or badly prepared response to litigation can result in significant brand tarnishment, or even the destruction of the company. On a more pragmatic level, there is a good business case for controlling the spiralling costs of EDD, and let us not forget, a key element of the rules changes in both the US and England, is the requirement for lawyers to specifically address the challenges of EDD.

In a minute I will revisit the key elements of litigation readiness that remain the same whatever "version" we are arbitrarily assigning to the analysis process, however first of all I want to look at the technologies that I am arguing make it version 2.0. These are the use of ECA tools and the accompanying deployment of predictive coding. The ECA tools are now firmly designed to exist behind the corporate firewall. Their underpinning approach is that they index a firm's ESI and hold the information within their systems allowing the data to be "sliced and diced" with functionality that varies from product to product, but essentially offers similar tools. These are two main technological advances, clustering techniques and legal hold.

First the data can be searched using all the latest analytical techniques of clustering and concept review. What does this mean? It means that the software will automatically group data into related topics without the use of keywords. You can even with some technologies "seed" the grouping process with selected documents relevant to the issues at hand, and then let the machine find the information most responsive to any forthcoming litigation. The "so what?" here is that it removes the need for endless debates on keywords, and identifies the volumes and locations of all the potentially relevant material. This stops in-house counsel from having to use their pre-prepared data maps and organograms to try to identify

where information might be held, and then devising keywords to try to identify potentially responsive material. "But what about keywords?" I might hear you say, what indeed. I quote Senior Master Stephen Whitaker from The Lawyer debate on eDisclosure in The Brewery during March 2011;

"Keywords? Keywords are rubbish, what people should be using is one of the various forms of "clustering" technology that are out there."

If you still do want to use a keyword list, then at the very least, the use of these clustering tools, will allow you to approach the initial Case Management Conference secure in the knowledge of just what the impact of a particular keyword will be, and empower you to argue for or against its inclusion on a list.

The second key advantage offered by these tools is the ability, once you have identified where potentially responsive data might be stored, to put it under a "legal hold", that is the computer systems themselves prevent anyone from deleting or altering the ESI identified as being potentially responsive. Though "legal hold" is a specifically US legal term, the concept of preserving ESI, once you have identified the need to do so, does resonate with the requirements of the English and Welsh legal system, as well as the American approach. One of the key themes from litigation readiness "version 1.0" was the need to initiate greater debate between the Legal and IT functions in an organisation, to ensure information was preserved. With the legal hold capability, the debate is still required, but the process of preserving information becomes a lot more automatic and a heck of a lot easier.

In terms of US adopted tools, the products from Access Data, Zylab and Tunnel Vision have all been mentioned as ones to watch.

For the moment, the focus for the UK is on the ECA tools that mainly operate outside the end client's environment. In practice this has tended to mean one of three products, Clearwell, Nuix or Digital Reef, with only the first two really having success over here. In my review of LegalTech I advanced an argument that, based on booth size and publicity, Clearwell was beating Nuix hands down, however the gathering of litigation support managers I was in at that point severely disagreed with me. It seems that lawyers prefer Clearwell to Nuix because of its interface and seemingly better functionality, Technology departments chose the speed and performance of Nuix, over what they consider to be its slightly flashier competitor. To complicate matters, the firm behind Digital Reef has just received some significant financial backing, so that might be poised to make further inroads into the UK as well. Expect to see an ECA demonstration coming your way soon. Which is good as you can also expect to see a stream of lawyers grappling with the overload that is electronic disclosure and asking for tools to sort out the mess.

The other part of the new technologies that I think puts us into version 2.0 of litigation readiness, is the use of "Predictive Coding". I am on slightly more shaky ground here as the coding stage is into the first part of the litigation response cycle, however I think the strategy of using predictive coding and the tactics employed in its deployment are a significant element of newer approach to litigation readiness.

The phrase "Predictive Coding" is shorthand for any process that uses computing power and software algorithms to try and carry out coding of electronic documents. On one level the machine can carry out objective coding and scan the document for the data it can "recognise" to give you the From, To, Title, Date kind of material. So far so good. Next you get the programs that will "search" the document and highlight the terms that it thinks means the document should be relevant and (starting to get very scary for lawyers now) even highly subjective calls such as Privilege.

First the caveats. It will only really work on fully electronic material, so don't think you can get the same results on the OCR of images of scanned documents. Second, most products require the user to "seed" the review work with appropriate documents that have been reviewed by a human (normally senior) lawyer, so it is not a silver bullet that will solve all your problems. Finally, no one is (yet) suggesting that the relevance and privilege reviews are totally done by the computer, the software puts forward documents that meet criteria and asks humans to validate its choices. What is significant is that the documents that are not selected, are never looked at. Yet this in itself, ties into the UK approach to proportionality. To paraphrase the UK approach, there might indeed be a slight chance that a "smoking gun" exists in the far reaches of the potentially disclosable material, however, it can be far too expensive to review everything and so that faint possibility must not be allowed to drive the review strategy.

In terms of what came out of the 2011 LegalTech review, Recommind's Axcelerate Review and Analysis software, as well Equivio Relevance were pointed out by some comentators. Stroz Friedberg have been quiet competitors in this field for a year or so, and Kroll used the show to launch their integrated predictive coding tools. FTI finally launched the latest version of Ringtail, having taken a good two years to integrate the Attenex technology into the engine of the software with both Early Case Assessment and predictive tools built into a very smooth interface. The Pure Discovery product was also singled out by a number of contributors as one to watch in the future.

Now these tools alone won't help resolve the issues, what is needed to support them?

At the start of any litigation readiness strategy, you need to understand where your data resides. This “motherhood and apple pie” statement of the obvious is infinitely more complex in today’s world of multi-national firms with literally world-wide infrastructures. Though the majority of the information you need will reside on user’s PCs, email and file servers and the Disaster Recovery infrastructure (back-up tapes, WAN, SAN, Archive solutions), there will be circumstances where you will need to explore the more obscure locations such as Social Networks, Instant Messaging, audio files, USB memory sticks, etc. The information audit will require documented interviews with key individuals, production of data maps and strategies for retrieving ESI from the various “silos” located around the organisation.

One you have an understanding of the universe you are operating within, it is then possible to reduce the amount of archival material, always making sure you follow a documented and “principled” approach, that is one signed off on by the firm’s lawyers. This is not in any way to suggest that you are getting rid of evidence or vital material, simply that if you identify you have stored information in a number of places, reduce the totality of what you have.

When litigation comes knocking on the door, and you haven't got rid of the numerous superfluous copies of the data, you might well end up having to review them, just to prove they are irrelevant, which can be a very costly exercise. In particular you want to obtain legal opinion and clear criteria on when to include (or not) backup tapes in litigation and how you communicate this to the opposition.

Essentially you are applying the business' records management policy to ESI, and having got rid of the superfluous archival material, you can then look at the paper and electronic equivalents and explore how you can reduce the number of copies of the same ESI file floating around within the organisation. Having devised and implemented a policy, you should also develop an audit protocol to revisit the process to ensure it is still being followed.

Having got the ESI "house" in order, you can start to plan for the day that litigation does arrive. The key aim here is to preserve the relevant information within your online environment so you can avoid having to go the backup tapes or business continuity solutions. As I heard at one conference from an evangelical Records Manager, "A backup tape is NOT an archive!". Attempting to use tapes as a means of re-building an ESI universe from the past, is a costly and time consuming exercise. If you preserve in a timely manner, you can avoid this option. Businesses should establish a "preserve now" team that has an identifiable process to follow. The whole approach needs to have senior management backing and come complete with a tested plan and auditable checklists for identifying relevant ESI and making best efforts to preserve it.

Having completed the first stage of your litigation readiness, it might then be appropriate to review the entirety of the litigation hold process and deepen the communication between the firm's legal and IT functions. The aim here is to streamline the procedures and scale of the litigation exercises. An element of this review can also be an examination of the level of services being provided by both outside counsel and litigation support vendors, with an extension of this kind of audit being the exploration of using "outsourced" services, such as legal review teams in India or South Africa.

This is litigation readiness at a strategic level, from the US what are we seeing emerging at a more tactical level? The main aim of the lawyers involved in litigation is to be the first to put a reasonable EDD plan in place, use it to gain an advantage in the "meet and confer" stages and then try to cost shift the bulk of expenditure over to the other side. In order to achieve this objective, lawyers are issuing litigation holds speedily, with a specific focus and as often as needed. Counsel, both external and in-house, are proactively involving IT throughout the EDD exercise and are paying particular attention to avoiding spoliation (evidence destruction, normally of metadata) via maintenance processes. Businesses are deploying the "preserve now" teams and saving information in its on-line form, thus obviating the expensive need to resort to restoring backup tapes. Preservation of metadata is a paramount concern and the overall approach is to collect the accessible data on a broad front and then cull downstream, once more case parameters are known. Where applicable, sampling techniques are used to reduce the volume of documents sent through to the review process, and increasing use is being made of the next generation of software tools with built in analytical functionality.

All of the above are built upon a solid records Management policy, with clearly defined policy, procedures and documentation. Once these structure are in place, then it becomes a lot easier to demonstrate that the IT policies for ESI align with, and enforce, Records Management polices. The theme of demonstration continues with defined processes for litigation hold, preservation procedures, technology audit, data mapping and production.

All very well and good, I might hear you say, but how do I get this to happen and what challenges might I face?

First and foremost is the significant challenge of obtaining management support, businesses (particularly law firms) tend to believe they are immune until an event occurs to prove otherwise. Records management policies and procedures are notoriously hard for firms to embrace and unless there is significant and forceful backing from senior management, you will be facing a long hard battle. Having obtained the go ahead, the next issue is to balance out the competing voices with incompatible requirements. The instinct of the lawyers is to keep everything “forever”, (which also fall inline with the US Sarbanes Oxley credo of retaining a wide spectrum of material for long periods. In the other corner is the more European, data protection inspired approach, of removing what you no longer need to hang on to. It is a bit of truism, but nevertheless applicable, to say that multi-national organisations might well find it impossible to be compliant with every last piece of regulation, and often they need to steer the “least worst” course through competing priorities.

In summary, it is fair to say that litigation readiness is not for everyone (particularly within the UK), but for some market sectors it is a significant topic that firms with a clear strategic vision of their future would do well to address. Technology has advanced to the point that it might be able to help pull us out fo the mess is created in the first place, but the key to addressing the issues is for better communication between the Legal and IT functions. Putting the electronic house in order is a good business practice anyway, but one day it might save you significant financial and commercial capital and ensure you don’t need that ambulance at the foot of the cliff.

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