



# Ediscovery

## navigating the digital maze

Not unlike explorers, lawyers also experience challenges in making their discoveries and within a decade, firms have increasingly shunned paper-based discovery methods in favour of electronic aids. *ALB* finds that ediscovery systems are capable of a lot more than just searching through documents



**D**iscovery can arguably represent a significant part of a legal matter and only 10 years ago, a large discovery was considered to involve tens of thousands of documents. Nowadays, however, a major one is considered to amount in the hundreds of thousands.

According to Elaw founder and executive director Allison Stanfield, ediscovery is changing rapidly and these days, an enormous amount of electronic data is created – in e-mails particularly. “There are a lot more electronic documents in their native format that are required to be discovered and presented at trial, and this is what is causing a lot of issues for lawyers and their clients,” she says.

In fact, the federal court just released a practice note which essentially mandates the use of electronic discovery, and this will create a greater need for firms to enlist the services of experts in the field. According to Stanfield – whose company provided services for the HIH and Building and Construction Industries Royal Commissions – the team at elaw has some of the most in-depth experience in ediscovery solutions in Australia.

Traditionally, firms would undertake paper-based discovery and this would involve allocating staff to search filing cabinets. These days, however, firms are often dealing directly with client in-house counsel and IT departments to collect documents from their computer systems. “On one hand it’s making life easier, but on the other, there’s a lot more evidence to go through when a party is involved in litigation because 100% of all documents are created in electronic format,” she adds.

Allens Arthur Robinson director of applied legal technology Beth Patterson agrees. “We helped our clients prepare for ediscovery proactively by utilising technology that searches out and collects data on their IT systems. We use data maps, which allow them to know quickly where documents are, in the event of litigation,” she says.

#### Popular ediscovery software

Allens uses Ringtail’s Legal 2005, among others, for ediscovery, processing electronic data and reviewing. Patterson says that more efficient document review by lawyers is one of its benefits. Apparently the software has saved

the firm countless hours that would otherwise be spent sifting through client e-mails and other documents received over a period of many years, by filtering out irrelevant data. It also uses a concept search process, that involves looking for relevancy rather than just keywords.

Lee Trevena of Synetek Systems says the average managing partner spends 90 minutes per week just managing e-mail. However, firms can reduce this by using Synetek’s Mailrevive, which automatically indexes e-mails both sent and received, without requiring a lawyer to use folders.



Lee Trevena,  
Synetek Systems

“You simply look through e-mails with the search and discovery tool and, if security is enabled, it eliminates SPAM. With Mailrevive, all e-mails are centralised and, no matter how many there are, you can recover them from one location – it just takes a few minutes,” he says.

Hesketh Henry partner Christina Bryant agrees that concept search processes can save a significant amount of time. She points out that a search would typically take only a few seconds on the firm’s iManage system, while searching through shelves could take several minutes.

Bryant says the concept search process works by linking documents with certain search criteria, such as date, document type, topics, sender or recipient. Related documents can also be linked. “The ability to file and manage documents electronically reduces the time and resources required for large litigation files, enabling relatively smaller firms to handle bigger litigation cases,” she said.

Guidance Software assistant general counsel Albert Barsocchini believes the keyword search is still the most effective and transparent process for discovery and culling – while advanced

#### ▶ SAVE COUNTLESS HOURS WITH SYNETEK’S MAILREVIVE

Most managing partners spend about 90 minutes per week just reading and managing e-mails, but firms can reduce this by using Synetek’s Mailrevive. It automatically indexes e-mails – sent and received – without requiring a lawyer to use folders. One simply searches with the program’s discovery tool, which is capable of collecting messages from multiple workstations from a centralised location. It also eliminates SPAM.

Using Mailrevive can bring significant savings when compared to outsourced e-mail discovery, which can cost firms up to A\$50,000 per gigabyte. Mailrevive, however, is considerably cheaper and can be leased for monthly fee starting at A\$5 per user, which – for most large firms – would cost about A\$500 per month.

search methods may create more hits, they are most helpful when dealing with large document populations and very broad terms or clauses. “In litigation or other matters where there are broad terms, advanced search technology should be considered. But usually, you do as much culling as possible using keywords and then use the advanced search,” he says.



Christina Bryant,  
Hesketh Henry

#### A whole lot more than pure discovery

Bryant believes that ediscovery software should not only be capable of searching for documents, it should also be able to manage them for lawyers, clients or witnesses, and prevent duplication. “One problem is the frequent copies in e-mail communications, when chains of correspondence increase the volume of documents requiring discovery,” she adds.

To this end, EnCase ediscovery developed by Guidance Software offers an entire package for searching, identifying, preserving, collecting and processing data. Barsocchini says

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**CHRISTINA BRYANT, HESKETH HENRY**

the program is useful for searching desktops, file shares and e-mail servers in different locations, minimising travel time, business disruption and manpower.

"From a central location on the network you can automatically search the enterprise and collect responsive documents with just one person. Depending on the keywords used and network traffic, we can collect e-mails from up to 50 workstations and process them in a matter of days," he states.

Patterson agrees that electronic de-duplication is generally accepted in the market and Allens utilises the MD#5 method to cull duplicates quickly and cost-effectively.

A relatively new area that firms are exploring is near-de-duplication technology that affords grouping of similar documents – such as different versions of contracts – for lawyer review.

Mailrevive is also capable of de-duplication and can encrypt and archive e-mails automatically. It uses a relational search process called Deeplink, which allows for search by keyword, date, body text, attachments and file type. "Once you have found a particular record, you can do a search for similar or a related search in the repository. You can package them up and export them into a file format ready for case-management software such as Ringtail and a range of ediscovery software," says Trevena.

It also provides backup and access to the mail server, even if the network is down. The lawyer simply logs in to



Beth Patterson,  
AAR

**"We helped our clients prepare for ediscovery proactively by utilising technology that searches out and collects data on their IT systems. We use data maps, which allow them to know quickly where documents are in the event of litigation"**

**BETH PATTERSON, ALLENS ARTHUR ROBINSON**

#### ► DISCOVER, COLLECT AND PROCESS WITH ENCASE EDISCOVERY

Firms are realising the need for ediscovery software to be versatile and Guidance Software has developed a complete investigative infrastructure. EnCase eDiscovery offers a complete package for data collection, processing, internal investigation, data audit and security or regulatory inquiries. Albert Barsocchini says one of the program's strengths is how it can manage internal investigations and ediscovery centrally in the large corporate environment with multiple locations, minimising travel time, business disruption and manpower.

The automated process allows large-scale collections to be executed from workstations, file shares and e-mail servers in days instead of weeks. Depending on the keywords used and network traffic, Guidance staff can collect e-mails from up to 50 workstations and process them in a matter of days.

Most outsourced ediscovery collections and processing can cost firms at least A\$8,000 per custodian. For typical cases involving 50 custodians this can cost as much as A\$400,000. However, with EnCase, it would be up to 80% cheaper costing about A\$1,500 per custodian or A\$75,000 for a 50-custodian collection and processing. Firms that do not want to buy the software can opt for the 'pay-per-use' option, which tracks usage and allows firms to charge costs back to clients.

Mailrevive to read and send e-mails. The messages are then delivered once the server is back online.

#### Improving efficiency, addressing chain of custody

An area in which Allens has improved efficiency is providing courts with documents related to a discovery by electronic means. In other words, instead of filling a room with printed documents and inviting parties to review them, lawyers simply exchange discoveries on DVD.

This is particularly useful following the Australian Federal Court's new practice note 17, Patterson says, which allows courts to take a more active role in discovery. "The proposal is that parties need to complete a pre-discovery checklist and agree on it upfront. It's a balance of flexibility; the courts will prescribe more around this area, to reduce costs," she adds.

However, issues can arise from receipt of documents in digital format. She gave an example of correspondence received from another party in which macros in the documents had automatically updated the original dates to the date of download.

Patterson says electronic documents are open to the possibility of change, depending on how they are copied.

Nevertheless, there are methods to prove custody in a forensic way, some of which involve Acrobat pdfs or single-paged tif images.

Bryant says the digital format alone involves a range of new issues such as metadata, which was not a concern in paper-based discovery. This is because electronic documents also include metadata, such as creation dates, edit dates and versions, which may be very important in the context of a particular dispute but increase the overall volume of discovery.

Matching electronic documents to the document number in a party's list is another difficulty as, unlike paper documents, the files are not manually stamped with the document number. So a new method of identification must be devised instead.

For some of these reasons, many New Zealand lawyers still prefer to do paper-based discovery, says Bryant. There is often a reluctance to store them electronically and read them on-screen. However, this should gradually change because programs are becoming more user-friendly and search functions are improving.

#### What firms can gain from ediscovery software

Ediscovery can reduce the amount of

#### ► DID YOU KNOW?

- Ten years ago, a large discovery involved tens of thousands of documents, but now a major discovery is in the hundreds of thousands
- The average managing partner spends 90 minutes per week just managing e-mail
- More than 80% of ediscovery documents are never printed
- Between 90–98% of discoveries are moving to electronic format
- A four-gigabyte USB flash drive is capable of storing 100,000 e-mails
- The Sasha Geltman survey estimates the global ediscovery market is currently worth US\$2.5bn, but could reach US\$4.6bn by 2020



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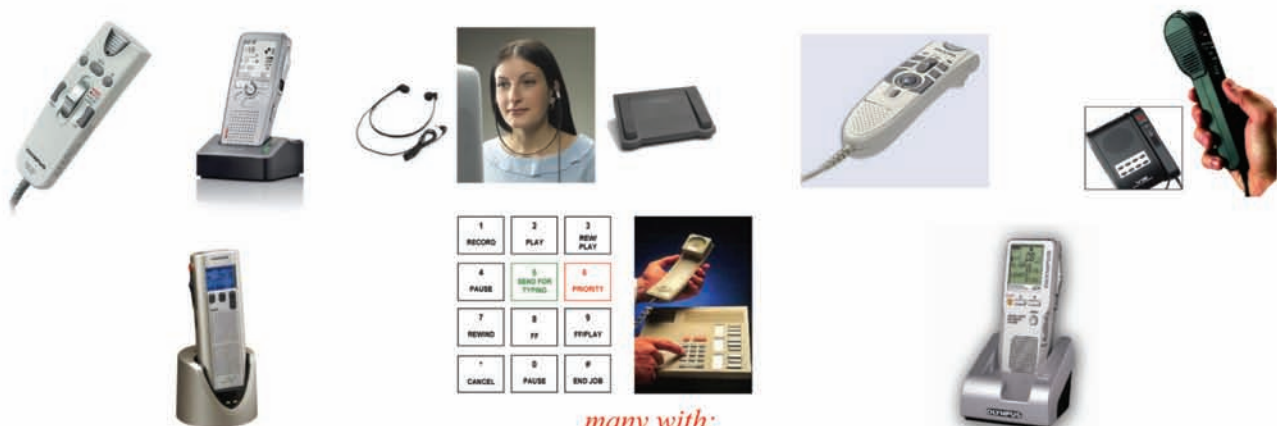
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### ► HOW TO MAKE THE MOST OF EDISCOVERY

- Some ediscovery software is not only capable of searching for documents, but also managing them and preventing duplication
- Keyword searches are still the most effective discovery method, while advanced search methods are most helpful when dealing with large document populations and very broad terms or clauses
- Firms can save countless hours spent sifting through e-mails by using e-mail-management software

storage space required. For example, a four gigabyte USB flash drive is capable of storing 100,000 e-mails. It can also minimise the number of staff required for routine work, such as searching for files.

Bryant agrees that electronic storage can reduce the amount of space required in an office, adding that it also enables lawyers to work remotely, which gives them greater flexibility.

"I can go home or overseas and access the database. I don't have to carry big

folders or bags – and that's important to me," she says.

Ediscovery systems can bring a firm significant long-term savings, as multiple types can be leased rather than bought outright, affording limitation of initial setup costs. To this end, Allens has leased multiple ediscovery programs.

"It's not like one size fits all," says Patterson. "That's why many of our lawyers opt for a pay-per-case charge, whereby they pay for the life of the case and the system is continuously updated and upgraded at no extra charge."

Barsocchini says most outsourced discovery collections and processing could cost upwards of A\$8,000 per custodian. Cases typically involving 50 custodians could cost as much as A\$400,000. However, by purchasing EnCase, the software usually pays for itself within one or two cases depending on the size, he adds.

"It offers an 80% saving on collection and processing costs. For firms that don't want to buy, we now offer a pay-per-use option, which tracks usage and

allows firms to charge costs back to clients. Generally speaking, a pay-per-use, staffed search for customers would cost about A\$1,500 per custodian or A\$75,000 for 50 custodians," he states.

Trevena, on the other hand, says outsourcing e-mail discovery can cost firms up to A\$50,000 per gigabyte, if collection and processing are included. But Mailrevive is considerably cheaper and can be leased for a monthly fee starting at A\$5 per user – about A\$500 per month for large firms.

Stanfield says Elaw has adopted a case-by-case approach. "Every job is different because the requirements for every case are too, so we offer solutions best-suited for that particular case with the most up-to-date technology"

Patterson believes that, in the long run, it is more cost-effective to buy the software, adding that ediscovery vendors will consolidate and so this trend is likely to continue. **ALB**



Albert Barsocchini,  
Guidance Software

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- > 27 countries
- > 12 terabytes
- > 15 million files processed

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