



KordaMentha picks EnCase from Guidance Software for Australian eDiscovery

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Like sport and so much else, the idea of proving a legal case by discovery of documents is an old English concept which was adopted wherever the English had a hand in establishing a system of law. America kept it when it dumped our tea, our taxes and our King. Australia adopted it with the same enthusiasm as it adopted cricket. A couple of weeks ago, Hong Kong was host to both the Rugby Sevens and our **Senior Master Whitaker** talking about UK disclosure developments. Discovery is central to Canadian litigation, and Master Whitaker is due to speak about it in Singapore later in the year.

Three things unite all these countries apart from their common law heritage. The problems raised by electronic disclosure are the same everywhere; those of us involved in developing rules and best practices around the world all speak to each other; and there is a handful of suppliers whose applications are used wherever electronic data must be collected and handled for litigation or for regulatory investigation. The resulting cross-fertilisation has obvious benefits – what works in one place will probably work in another, and if an approach tried in one country is seen to have failed, then it is as well to know about it before another jurisdiction goes down the same track. The things I talk about in Birmingham or Bristol are informed by what I learn in Sydney or New York, and it would perhaps surprise UK judges and lawyers to know how much interest there is in those places in what happens in the UK.

Most e-discovery applications are American – inevitably perhaps when Americans leads the world in both computer technology and the tendency to take each other to court. Australia, though, has given more to this market than one might think. **Ringtail**, now owned by **FTI Technology**, emanated from Australia. **DocuMatrix**, the review application owned by **Epiq Systems**, sprang from Melbourne's John Lord. Australia also has a vigorous litigation tradition and the same concerns about costs and delay as have arisen in the UK, the US and Canada. Australia is the most recent country to have introduced new rules specifically relating to electronic discovery – Practice Note 17 on the use of technology in the management of discovery and the conduct of litigation – which has been watched with interest by those of us working on a UK Practice Direction.

Litigation support may be a billion dollar business, but it quite a small world in terms of the people and businesses engaged in it, which is why you find me in the UK being quoted in a **Guidance Software** press release about the supply of software by a US company to an Australian eDiscovery business. The software is Guidance's **EnCase eDiscovery** and the user is **KordaMentha**, the large (and fast-growing) corporate recovery and business restructuring company. KordaMentha has a strong forensic and eDiscovery arm both as support for its own insolvency and investigations work and as a free-standing service for law firms, corporates and government agencies, not just in Australia but across the rest of the Asia-Pacific region.

The function of EnCase eDiscovery is the identification, preservation, collection and processing of large quantities of electronic information. It lends itself well not just to the defensible preparation for litigation or regulation, but to the often urgent need of a liquidator,

receiver or administrator to find out quickly what a company has in data terms. Data collection is often thought of as merely a technical exercise – send in some guys with a black box and get them to pull all the data. Technical skill is certainly a pre-requisite for doing the job properly, but it is becoming increasingly necessary to know and to comply with rules and court-led requirements. The US leads the world in this area – when you can have your case dismissed and be sanctioned for using the wrong methodology, it sharpens the mind somewhat. The UK Digicel case shows that UK courts are becoming more interested, with a focus on compliance with the rules to ensure a balance between speed and cost on the one hand and a proper scoping and collection exercise on the other – the components of proportionality. Australia has been moving in the same direction.

In all these countries, parties often fall down on purely technical errors – a botched collection or the omission of key sources. Increasingly, however, the courts are concerned with wider matters. A discovery exercise may be perfect in purely technical terms yet offend the rules or the policy which dictates what is required for justice. In the UK this is expressed as the “overriding objective”; the Australian rules are subject to the “overarching purpose”; the US Federal Rules of Civil Procedure talk of the “just, speedy, and inexpensive determination of every action”. Case law, as well as rules, dictate what these terms mean when applied to discovery / disclosure, and it is not easy to keep up with developments in this area.

What it comes down to is that using the right software application may be a pre-requisite for getting it right but it is not the whole answer. The technical skills must be supported by an understanding of the legal context and an ability to manage the project – it is the latter which makes a discovery exercise commercially viable or not, and it is the absence of project management skills which sinks many discovery exercises. That is what KordaMentha brings to the task, using EnCase as an efficient tool for the mechanics.

How do I, in my ivory tower in Oxford, know what is going on in the even more remote Melbourne? I do not, as you have probably gathered, regurgitate press releases about people I do not know. I obviously know about Guidance – it was one of the first sponsors of the e-Disclosure Information Project, I went to Pasadena last year to meet the senior management, and I am in touch most weeks with someone from Guidance. How do I know about KordaMentha?

I met **Geoffrey Lambert**, KordaMentha’s Director of eDiscovery, in February 2007. It was my first intimation that litigation support developments in the UK are of interest in Australia - Geoffrey proved to be a reader of my web site and hailed me much as Henry Morton Stanley greeted Dr Livingstone, although the setting was a stretch limo in New York rather than a clearing in the African jungle. Our host was **Jo Sherman**, CEO of **eDiscovery Tools** and the guiding force behind the new Practice Note 17. Geoffrey turned up here in Oxford a few months later, and I have since spent hours with him and his colleague **Owen Bourke** here, in Sydney and in New York.

What we have in common is the perception that a successful e-disclosure practice stands on the three legs referred to above – technical excellence, a sound grasp of the rules, and project management skills, with an overlay of commercial sense and a desire to win. What KordaMentha gave Geoffrey and Owen, so far as I could see, was carte blanche to do whatever they thought necessary to build an e-discovery practice, an apparently endless supply of work, and the resources to develop new business. It seems to be working.

I began this article by referring to three forces which bind together the common law jurisdictions – shared problems, similar rules and a few big suppliers. It is not, I think, a coincidence that I first met **Victor Limongelli**, CEO of Guidance Software, when he gave a talk in London devoted almost exclusively to the supremacy of the rules, and that my first meeting with Geoffrey Lambert of KordaMentha was on the introduction of one of the leading lights in the development of the Australian rules, as Jo Sherman is. There is a relationship between the rules (and the courts’ increasingly demanding exercise of them) and the available technology: the courts expect more and more of the parties as technology improves, and the technology suppliers deliver faster and better ways of meeting the courts’

requirements. A pairing of Guidance Software's EnCase eDiscovery and KordaMentha's skills seems a good match

The story is important to me for more than the fact that I know everyone involved. Australia bulks large in the area I cover – it has taken a big step forward with its new Practice Note; it shares the problems of costly litigation; and several of the suppliers who sponsor the e-Disclosure Information Project have important interests there. What plays in Australia plays also in the UK, the US, Canada and wherever companies must capture and handle data for litigation, regulatory or investigative purpose.

The **e-Disclosure Information Project** is run by **Chris Dale**. It disseminates information about electronic disclosure to practitioners, judges, suppliers and corporations.

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