



Précis Paper

e-Litigation

An interesting discussion about the emergence of e-Litigation and how Australian courts are setting standards to guide the use of specialised programs in case preparation and during the trial stage.

Discussion Includes

- e-Discovery
- The Technology
- Predictive Coding
- Costs
- Relationship with the Evidence Act
- The Future of e-Discovery

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1. In this edition of BenchTV, Dr Allison Stanfield (Principal Lawyer and Founder – SG Legal, Sydney) and Mr Jeff Jarrett (Director of Consulting – Sky Discovery, Sydney) discuss the ongoing development of e-Litigation and the implications it is having for courts and practitioners.

e-Discovery

2. New technology and specialised software are being utilised in the preparation and hearing of civil litigation. A commonly used example employed by litigators of large-scale matters, is the use of technology-assisted discovery review processes, specifically the use of predictive coding.
3. The Supreme Court of Victoria and the Federal Court of Australia have published updated Practice Notes (SC GEN 5 of 2017 - *Technology in Civil Litigation* and GPN-TECH of 2016 - *Technology and the Court* respectively), which regulate the discovery, management, filing, and presentation of electronic evidence in commercial matters. The Courts are implementing Practice Notes that are practical, have relevance, actually set out the way in which discovery is done in practice, and facilitate appearing in Court using electronic material. The Practice Notes aim to promote the effective use of developing technology in the preparation and hearing of civil litigation in an effort to reduce both the time involved with manual discovery and the subsequent costs for litigants. Discovery can cost probably the largest proportion of a litigation (bar going to trial).
4. Compared to the US, in Australia we are beginning to see more rigidly defined standards on exchange in different fields and methods. The courts are really an ally to helping make this whole process more efficient by putting these standards into place to help guide law firms, and software developers, using these kind of tools and ultimately making it much faster and cost effective process. For example, the Practice Notes guide the industry practice in that there is no point spending a lot of money objectively coding hardcopy documents as exchanging metadata for hard copy is just too costly.
5. In the recent Victorian Supreme Court decision of *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors* (No. 1) [2016] VSC 734, Vickery J made orders that technology assisted review could be used. At [19], reference was made to *Pyrrho Investments Limited v MWB Property Limited* [2016] EWHC 256 (Ch) which was decided in the High Court of the United Kingdom. Initially, this case had involved some 17.6 million documents. This number was reduced to approximately 3.1 million by the use of de-duplication technology.

6. Similarly at [21], Vickery J made reference to *Irish Bank Resolution Corporation Ltd & Ors v Quinn & Ors* [2015] IEHC 175 which had been decided in the High Court of Ireland. The initial keyword search in that matter resulted in 1.7 million documents of potential relevance, and after de-duplication, that number was reduced to 680,809 documents.
7. These are examples of how caselaw and the judiciary are beginning to recognise that artificial intelligence and algorithms, as opposed to a manual review, work to enable lawyers to discover relevant documents quickly and easily.

Predictive Coding

8. This technology is employed to assist the discovery process by utilising a "machine learning algorithm" that distinguishes relevant from non-relevant documents. Known as a "smart search", this is achieved by a "subject matter expert", not necessarily a lawyer, who is familiar with the relevant industry-specific technical language and the information being sought and, accordingly, basing the coding on what material is relevant or not. These algorithms can analyse an entire database and look at every single word in every single email. Another use is with "Near Duplicates" where you have several drafts of a document that you may want to see all grouped together which may all be brought together into one place to be reviewed by the software. The program avoids any inevitable human error creeping into the process.
9. Ultimately the end goal is for the legal team to start reviewing documents, identifying that these documents are relevant, and then the software can go out and search the rest of the universe of documents and find other similar ones that are similarly relevant.
10. Predictive coding, therefore, avoids the need for manual review of a significant proportion of documents in the discovery process. Accordingly, it makes the discovery process more cost effective for litigators.

Relationship with the Evidence Acts

11. The uniform Evidence Acts contain provisions which facilitate the proof and admission of electronic and computer-produced evidence. For example, the rebuttable presumption contained in s 146 of the uniform Evidence Acts provides that, where a party tenders a document or thing that has been produced by a process or device:

If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.
12. For example, it would accordingly not be necessary to call evidence to provide that when text is formatted in a Word document, and the program is working properly, then the program was used to format that text.

13. Section 147 provides a similar rebuttable presumption that governs documents produced by processes, machines, and other devices in the course of business.
14. Issues may arise when new customised, specialised software being used in the discovery platform, generate output which may not meet these presumptions of reliability and accuracy. This is yet to be tested.

BIOGRAPHY

Dr Allison Stanfield

Principal Lawyer and Founder, SG Legal, Sydney

Allison has over 24 years' experience as a lawyer and in business. In addition to her business law expertise, Allison also provides a range of technology law advice to clients including drafting and negotiating software development and licensing agreements, web and domain hosting agreements and intellectual property agreements. Allison maintains a unique expertise in electronic evidence and is an expert in electronic contracts, electronic signatures and electronic discovery. In 2015, Allison completed her PhD in the authentication of electronic evidence. Allison has a list of publications, and also speaks regularly at conferences, seminars and on webinars. Prior to founding SG Legal, Allison founded and ran e.law, a niche legal technology company, and also worked in top-tier and mid-tier law firms and as Registrar of the Court of Appeal (Qld).

Jeff Jarrett

Director of Consulting, Sky Discovery, Sydney

Jeff is a Sydney based project manager and relativity consultant who qualified for his Relativity Certified Administrator (RCA) in May 2012. He has 13 years' experience in the industry, with a background including the US Department of Justice criminal fraud cases and private consulting to New York City area top law firms, as well as 7 years of experience servicing the Australian market. He has significant experience with large scale class action and construction litigation, as well as the application of predictive coding technology in discovery review.

BIBLIOGRAPHY

Cases

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McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No. 1) [2016] VSC 734

Monique da Silva Moore, et al., v. Publicis Groupe SA & MSL Group, No. 11 Civ. 1279 (ALC)(AJP) (S.D.N.Y. Feb. 24, 2012)

Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd [2015] QSC 119

Legislation

Electronic Transactions Act, 1999 (Cth)

Uniform Evidence Acts

Practice Notes

Supreme Court of Victoria, Practice Note SC GEN 5 - Technology in Civil Litigation, 30 January 2017.

Federal Court of Australia, Practice Note GPN-TECH - Technology and the Court, 25 October 2016.