

PRESENTERS

Daniel Ayers, Elementary Solutions, Auckland

Daniel is owner and principal consultant of Elementary Solutions. He holds Honours and Masters degrees in computer science from the University of Canterbury and is currently engaged in Doctoral research in the field of computer forensics. Daniel has 27 years IT experience and 13 years experience giving expert evidence, including as a Crown expert in criminal trials. He has advised law firms and Crown agencies on electronic discovery issues, and has been responsible for many successful electronic discovery engagements – including several where millions of documents were handled.

Laura O'Gorman, Partner, Buddle Findlay, Auckland

Laura is a partner in the Auckland litigation and insolvency teams of Buddle Findlay, one of New Zealand's leading law firms. She has specialist expertise in Fair Trading and Commerce Act issues, judicial review, and advising receivers, liquidators and lenders. Laura has served on the ADLS Law & Technology Committee for the last three years and has a particular interest in technology issues. She is the author of the New Zealand chapter in *Electronic Evidence: Disclosure, Discovery and Admissibility* (2007 LexisNexis).

The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.

CONTENTS

1. INTRODUCTION	1
2. DEFINING “ELECTRONIC DOCUMENTS”	3
3. LEGAL OBLIGATIONS OF DISCOVERY	5
LAWYER’S OBLIGATIONS	5
DISCOVERY UNDER THE HIGH COURT RULES	5
SCOPE OF DISCOVERY ORDERS	7
EXPRESS TERMS TO AGREE SCOPE OF DISCOVERY	7
COSTS	8
4. GATHERING DOCUMENTS FROM THE CLIENT	11
LIKELY SOURCES OF ELECTRONIC DOCUMENTS.....	11
DATA SIZE AND DUPLICATION.....	12
Computer storage	12
<i>Hard disk storage</i>	12
<i>Examples</i>	12
<i>Duplication</i>	13
REQUIREMENT FOR A DISCOVERY STRATEGY	13
APPROACHES FOR DOCUMENT COLLECTION	14
<i>Print everything</i>	14
<i>Write documents to CD/DVD</i>	15
<i>Forensic cloning</i>	15
<i>Network-based forensics</i>	16
<i>Bulk electronic document collection</i>	17
<i>Scanning paper documents</i>	17
PRESERVING THE INTEGRITY OF ELECTRONIC DOCUMENTS	18
<i>Volatility & inadvertent changes</i>	18
<i>Methods for preserving integrity</i>	19
<i>Does the integrity of electronic documents matter?</i>	19
USE OF COMPUTER FORENSIC EXPERTS	20
<i>Types of expert engagements</i>	20
<i>Clarity of instructions</i>	21
FORENSIC DATA RECOVERY	21
<i>Extent of data recovery in electronic discovery</i>	22
5. MANAGING DATA FOR LOADING ELECTRONICALLY	23
PROCESS OVERVIEW.....	23
LITIGATION SUPPORT SOFTWARE	23
<i>Advantages of litigation support software</i>	23
<i>Disadvantages of litigation support software</i>	23
LOADING DOCUMENTS DIRECTLY INTO LITIGATION SUPPORT SOFTWARE	24
EXTERNAL SERVICE PROVIDERS	24
<i>Duplicate electronic documents</i>	24
<i>Encrypted and password protected documents</i>	25
<i>Culling</i>	25
<i>Loading into litigation support software</i>	26
6. ANALYSING FOR DISCOVERY	27
RELEVANCE	27
PRIVILEGE.....	27
<i>Solicitor/client privilege</i>	28
<i>Litigation privilege</i>	29
<i>Common interest and joint privilege</i>	29
<i>Without prejudice privilege</i>	30

CONFIDENTIALITY.....	30
7. PREPARING THE LIST	33
DATABASE FIELDS.....	33
CONSISTENCY	33
GLOBAL CHANGES	34
STAMPING DOCUMENTS FOR DISCOVERY.....	34
REDACTING.....	34
EXPORTING THE LIST.....	34
8. INSPECTION	37
TYPES OF ELECTRONIC DOCUMENTS.....	37
PETRIFICATION.....	37
REDACTION.....	38
ELECTRONIC INSPECTION AND PRODUCTION	38
9. COMPUTER GENERATED DOCUMENTS.....	39
RECORDS OF DOCUMENTS CREATED, ACCESSED AND PRINTED	39
RECORDS OF INTERNET WEBSITES ACCESSED	40
RECORDS OF PORTABLE MEDIA USE	40
10. WORKING WITH THE SOFTWARE.....	41
SHARING E-DOCUMENTS	41
SEARCHING	41
11. EXPERTS.....	43
ROLE.....	43
QUALIFICATIONS FOR INDEPENDENT AND COURT EXPERTS	43
INDEPENDENCE	44
COURT APPOINTED	44
12. PREPARING FOR TRIAL	47
ELECTRONIC BUNDLES	47
LOADING PLEADINGS AND BRIEFS	47
13. COURT HEARING.....	49
CONTEMPORANEOUS TRANSCRIPTS	49
AUTO-MARKING	49
COURTROOM SET-UP	49
14. ELECTRONIC EVIDENCE	51
BEST EVIDENCE.....	51
RELIABILITY	51
HEARSAY	52
OTHER CASE EXAMPLES OF ELECTRONIC EVIDENCE ISSUES.....	54
15. OTHER CONTEXTS.....	57
COMMERCE ACT, S 98 NOTICES.....	57
COPYRIGHT AND INTELLECTUAL PROPERTY	57
EMPLOYMENT	58
SEARCH ORDERS AND PRESERVING EVIDENCE.....	58
CRIMINAL	58
16. CONCLUSION	61
DOCUMENT MANAGEMENT	61
ADVANTAGES OF TECHNOLOGY	61