

PRESENTERS

Gillian Coumbe, Barrister, Auckland

Gillian went to the Bar in 1994, following a number of years at Russell McVeagh. She practises in general commercial litigation, and has particular interests in public law/judicial review, competition law, gaming law/casino regulation, securities law, contract law, negligence, and equity/trusts. She has appeared in cases involving public interest issues such as *Lai v Chamberlains*, a test case about barristers' immunity now under appeal to the Supreme Court, and *Harley v McDonald*, a test case about the liability of barristers to pay costs personally. Gillian has previously presented a seminar paper about electronic discovery, and has also published an article on the topic. She is a member of the NZLS Civil Litigation Consultative Group.

Austin Forbes QC, Christchurch

Austin practises in the areas of commercial and general civil litigation. He is a former President of the New Zealand Law Society. Austin went to the Bar in 1990, prior to this he was a litigation partner in Duncan Cotterill, Christchurch. He has served on many committees including the Property Law and Equity Reform Committee and the NZLS's Civil Litigation and Tribunals Committee. He co-presented the NZLS seminar on *Property and Real Estate Litigation* (1990). In his spare time he enjoys reading the High Court Rules.

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

INTRODUCTION.....	1
1. DISCOVERY OF ELECTRONIC DOCUMENTS – Gillian Coumbe	3
Introduction	3
High Court Rules.....	5
<i>General discovery principles apply equally to e-discovery</i>	5
<i>To what extent do the High Court Rules address e-discovery?</i>	5
<i>Guidelines and rules in other jurisdictions</i>	7
Electronic disclosure raises unique issues	8
Managing the electronic discovery process: avoiding e-confusion	10
<i>Ascertain where the e-documents are located</i>	11
<i>Determine how extensive the search will need to be</i>	12
<i>Ensure that e-documents are preserved</i>	14
<i>Put the other party on notice to preserve documents</i>	17
<i>Find out about the other party’s computer system</i>	17
<i>Ensure that the e-documents are listed in the discovery affidavit in the normal way</i>	17
<i>Determine the preferred production format</i>	18
<i>Determine whether expert assistance will be required</i>	19
<i>Assess and advise on the likely costs</i>	19
<i>Most importantly – endeavour to reach agreement:</i>	20
Inaccessible documents	21
<i>Accessible and inaccessible data</i>	21
<i>Applications under r 300 for discovery of “inaccessible” e-documents</i>	22
<i>The recent Telecom / CallPlus e-discovery saga</i>	24
Documents must be discovered in readable and comprehensible format.....	25
Cost shifting	27
Access to the other party’s computer system	30
<i>When should direct access be permitted?</i>	33
<i>Need for detailed protocol for inspection</i>	34
<i>Where direct access is actually offered by the producing party as a ground for resisting production</i>	36
2. PRESERVING THE INTEGRITY OF THE DISCOVERY PROCESS – Gillian Coumbe	39
Introduction	39
The duties of counsel to the court.....	40
<i>Nature of the duties</i>	40
<i>Duty to court extends to monitoring the discovery process</i>	41
Ensuring that litigants fulfil their discovery obligations – the practical steps that should be taken by counsel	42
<i>Explain the obligation to make disclosure</i>	42
<i>Explain and monitor the duty to preserve documents</i>	44
<i>Advise of obligation to disclose documents no longer in control of client</i>	45
<i>Review documents to determine relevance / privilege</i>	45
<i>Review documents to determine confidentiality</i>	46
<i>Ensure all relevant documents are discovered</i>	47
<i>Resist pressure from the client to withhold documents</i>	48
<i>Avoid “over-discovery”</i>	50
<i>Advise client of continuing nature of discovery obligation</i>	50
<i>Implied undertaking</i>	50
<i>The role of the barrister</i>	51
Remedies for discovery default	51

<i>Sanctions against the parties</i>	52
<i>Sanctions against counsel</i>	54
<i>Tort of spoliation</i>	55
<i>Recent sanctions imposed for e-discovery abuse in the US</i>	56
<i>The British American Tobacco Australia Services Limited litigation</i>	58
3. CLAIMS TO PRIVILEGE AND OTHER CONSTRAINTS ON OBTAINING PRE-TRIAL INFORMATION – Austin Forbes QC	61
Preliminary comment.....	61
<i>Confidentiality</i>	61
<i>Interrogatories</i>	61
<i>Challenge to privilege or confidentiality claim</i>	61
<i>High Court Rules</i>	61
Privilege against self-incrimination.....	62
Lawyer-client legal professional privilege.....	62
<i>Preliminary comment</i>	62
<i>Scope of the privilege</i>	63
<i>No privilege if not for legal advice</i>	63
<i>Other professionals</i>	64
<i>Corporate lawyers and in-house counsel</i>	64
<i>Professional indemnity insurers</i>	65
<i>Trust account and similar records</i>	65
<i>Witness statements</i>	65
Litigation privilege.....	66
<i>Scope of the privilege</i>	66
Common or joint interest of privilege.....	66
Evidence Amendment Act (No 2) 1980.....	67
Without prejudice communications.....	67
<i>Scope of the privilege</i>	67
<i>Foreign lawyers</i>	68
<i>Communications outside the rule</i>	68
<i>Calderbank letter</i>	69
<i>Further comment</i>	69
Fraud or criminal purpose exception.....	69
Crown documents and public interest.....	69
<i>Section 27 Crown Proceedings Act 1950 and r 308</i>	69
<i>Public interest immunity</i>	70
<i>Inland Revenue Department</i>	70
Waiver of privilege.....	70
<i>The principle</i>	70
<i>Rationale</i>	71
<i>Reference to a privileged document</i>	71
<i>Partial or limited waiver</i>	72
<i>Inadvertent discovery or inspection</i>	72
<i>Disclosure to non-party</i>	72
<i>Lawyer sued by client</i>	72
<i>“Putting in issue” exception</i>	73
4. OTHER METHODS OF OBTAINING PRE-TRIAL INFORMATION APART FROM GENERAL DISCOVERY – Austin Forbes QC	75
Orders for particular discovery.....	75
<i>Order to discover particular documents before proceeding commenced</i>	75
<i>Further comment</i>	76
<i>Order for particular discovery against non-party after proceeding commenced</i>	76
Costs.....	76
<i>Further comment</i>	76

Witness statements	77
Interrogatories.....	77
Request for further particulars.....	78
<i>Interrogatories and particulars</i>	79
<i>Informal particulars</i>	79
<i>Damages</i>	79
<i>Further comment</i>	79
<i>Before or after discovery</i>	80
Notice to admit facts.....	80
Rule 509 application.....	80
<i>The rule</i>	80
<i>Preliminary comment</i>	81
<i>Application of the rule by the courts</i>	82
<i>Further comment</i>	83
Inspection and testing of property	83
Interim preservation of property and Anton Piller orders	84
<i>Anton Piller orders</i>	84
Official information.....	86
<i>Discovery</i>	86
Privacy Act 1993	87
Overseas discovery	87
<i>Letters of request</i>	87
<i>Australia</i>	87
<i>Direct applications</i>	87
APPENDIX 1: GLOSSARY OF E-DISCOVERY TERMS	89
APPENDIX 2: SEDONA PRINCIPLES	99
APPENDIX 3: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (US)	101
APPENDIX 4: AMENDMENT TO ABA CIVIL DISCOVERY STANDARDS.....	103
APPENDIX 5: CRESSWELL REPORT (UK) RECOMMENDATIONS.....	109