Illustration: Neil Webb

Managing electronic disclosure

In this two-part article, Mark Huleatt-James and Richard Lewis identify the challenges facing companies as they attempt to manage disclosure exercises dealing predominantly with electronic material and provide practical guidance for in-house counsel in preparing for and overseeing the electronic disclosure process.

As the digital revolution has changed the way companies do business, it is also having an impact on the legal process. Notably, electronic documents (or e-documents) are now supplanting hard copy as the documentary foundation of court proceedings. There has been much press focus on the burden for companies of electronic disclosure (e-disclosure) in common law jurisdictions, such as England and Wales and the US, with articles describing the huge scale of e-disclosure exercises, and the associated cost and disruption.

While e-disclosure exercises are undoubtedly complex and create their own set of issues for in-house lawyers and others, there are ways of reducing the associated risks. In fact, if managed effectively, e-disclosure can be a cost, and time, effective means of supporting litigation.

This two-part article identifies the challenges facing companies as they attempt to manage disclosure exercises dealing predominantly with electronic material and provides practical guidance

for in-house counsel in preparing for and overseeing the electronic disclosure process. Part I covers:

- The role of disclosure in England and Wales.
- The approach to disclosure in other jurisdictions.
- The extent to which disclosure obligations cover electronic documents.
- Compliance with electronic disclosure obligations.
- Sanctions for non-compliance.

The article draws primarily on the position under English law (and, to a lesser extent, US law), but includes a summary table comparing the English position with that of other major jurisdictions (*see comparative table, Disclosure obligations in Europe and the US*).

Part II will take a more in-depth look at the practical side of conducting an electronic disclosure exercise, including preparation and planning, and managing the exercise itself.

Role of disclosure in England and Wales

Disclosure, or discovery as it was formerly known, has undergone significant changes in recent times in England and Wales due both to procedural reforms (notably, the Woolf reforms) and the considerable commercial shift away from paper towards electronic data sources and storage. Although the Woolf reforms have to some extent achieved their objectives and reduced the scale of disclosure obligations placed on parties to litigation, the increase in sheer numbers of documents created by companies threatens to increase vastly the size and complexity of future disclosure exercises.

Despite the recent changes reflected in the Civil Procedure Rules (CPR), disclosure remains one of the cornerstones of litigation in England and Wales, not to mention one of its most expensive aspects. Standard disclosure, which is routinely ordered in English litigation, compels a party to disclose materials:

- On which it intends to rely.
- That adversely affect its own case.
- That adversely affect another party's case.
- That support another party's case.

Although disclosure is usually one of the most costly elements of litigation, it allows both the parties and, more importantly, the court to inspect and analyse material relevant to the proceedings. The size and cost of the disclosure exercise are, however, limited by the fact that parties are only required to undertake a reasonable search for disclosable documents. The principle of a reasonable search is of particular importance in relation to electronic disclosure (*see below, Reasonable search*).

Differences in approach between jurisdictions

In contrast to England and Wales and other common law systems, civil law jurisdictions around the world impose few, if any, disclosure obligations on parties to litigation (*see comparative table, Disclosure obligations in Europe and the US*). Under Italian procedural law, for example, each party must prove the facts it alleges and it is not up to a party to help an opponent prove its case. From this starting point, most civil law systems developed so as to exclude a comprehensive disclosure process from their procedural law. Parties are therefore generally only required to produce those documents on which they intend to rely.

The scope of discovery in the US extends to any material relevant to the subject matter of the action and also to any material or information that "appears reasonably calculated to lead to discovery of admissible evidence". (This is similar to the English position before the CPR, when parties to English litigation were required to produce all background materials and any documents, leading to a "train of enquiry", in addition to all documents supportive of or adverse to each party's case.) This means that the obligations currently placed on US litigants are more onerous than those on post-CPR English litigants (although, in practice, background materials are still routinely disclosed in English litigation).

Another practical difference between the English and US approaches can be found with regard to the use of documents disclosed during litigation. In English litigation, disclosed documents are provided on the basis of an implied undertaking that they will not be used for any other purpose. However, where documents are produced in US litigation the recipient party is free to use the documents in any way it sees fit, subject to a protective order (which will usually only be made over documents containing trade secret information) (*see comparative table, Disclosure obligations in Europe and the US*).

Extent to which disclosure obligations cover electronic documents

Generally, electronic documents are treated in the same way as hard copy documents in most jurisdictions, although, significantly, this is not the case in Germany, where electronic documents are covered by slightly different rules (*see comparative table, Disclosure obligations in Europe and the US*). Under the English rules on disclosure and inspection of documents, a document is defined as "anything in which information of any description is recorded" (*CPR, Part 31*). This definition includes "electronic documents, including e-mail and other electronic communications, word processed documents and databases" (*Practice Direction 31, para. 2A.1*).

However, there are a number of complications that make the organisation and management of electronic disclosure exercises more difficult than those dealing with paper alone, in particular:

- The identification and retention of electronic documents.
- Where such documents are located.
- In whose possession and control such documents might be.

These are in addition to the significant increase in the scale of a disclosure exercise caused by electronic documents (*see below, Size and scale*).

The importance of the issue of electronic disclosure in England and Wales is reflected by the fact that it was addressed by a Commercial Court (Cresswell) working party in 2004. Its report was the catalyst for amendments to the Practice Direction to Part 31 of the CPR (PD31), which came into force on 1 October 2005. PD31 seeks to ensure that the rules relating to disclosure contained in the CPR remain relevant in an age when disclosure of electronic documents is becoming the norm.

Size and scale

The ease with which electronic documents (especially e-mails) are produced, coupled with the informality with which people do so, has led to a significant expansion in the scale of disclosure exercises. The average employee now sends or receives over 25 e-mail messages each day, compared with the handful of letters sent or received during a working day 20 years ago. As a result, when a company is forced to give disclosure, its search for relevant documents will cover far more documents than would have been the case previously (*see box, Nature and volume of electronic documents*).

Reasonable search

In England and Wales, a party giving disclosure is required to undertake a reasonable search for disclosable documents. Reasonableness is judged by reference to a number of factors, including:

- The number of documents involved.
- The nature and complexity of the proceedings.
- The ease and expense of retrieval of any particular document.
- The significance of any document that is likely to be located during the search.

This rule is applied in the context of the overriding objectives of the CPR: to ensure that parties are on an equal footing, to save expense, to allot resources appropriately, to deal with cases expeditiously, fairly, and in particular proportionately.

Both the first and third bullet points above have significant ramifications in the field of electronic disclosure. As discussed above, the number of documents involved in an electronic disclosure exercise is likely to be significantly greater than that involved in a hard copy exercise, meaning that a more limited search might be considered reasonable for disclosure of electronic documents. PD31 acknowledges, for example, that it may be reasonable to search for relevant electronic documents using keyword searches rather than reviewing the entirety of each and every document. This is reflected in the standard form disclosure statement which requires a party to specify any limitations it placed on the search.

The effort and cost involved in conducting electronic disclosure vary greatly depending on the form in which documents are stored. This will have a significant impact on what extent of search is considered to be reasonable. The following factors should be considered (*PD31*):

- The accessibility of electronic documents, including e-mail communications on computer systems, servers and back-up systems.
- The location of relevant electronic documents, data, computer systems, servers and back-up systems.
- The likelihood of recovering any electronic documents.
- The cost of recovering any electronic documents.
- The cost of disclosing and providing inspection of any relevant electronic documents.
- The likelihood that any electronic documents will be materially altered in the course of recovery, disclosure or inspection.
- The significance of any document likely to be located during the search.

What constitutes a reasonable search will depend on the individual circumstances of each case. Usually it will be sufficient to disclose only live or active data. However, there will be a significant number of higher value, more complex cases in which courts are likely to order the disclosure of back-up sources, especially where a party can demonstrate that the information likely to be obtained justifies the costs of retrieval. It is also likely that a court will make such an order where one party can show that the other party has or may have deleted certain important live data (*see below, Preservation of information and Destruction of information*).

The US Supreme Court has recently approved amendments to the Federal Rules of Civil Procedure, which will become effective on 1 December 2006. These amendments have a similar purpose to those implemented in England and Wales, in that they seek to ensure that US discovery rules remain relevant in the electronic age. However, obligations on US litigants are likely to remain more onerous than those in England and Wales.

The amendments establish a two-tier system for the discovery of electronic documents in the US:

- The first tier deals with reasonably accessible electronic information and requires litigants to produce all information that is relevant but not privileged.
- The second tier deals with non-reasonably accessible electronic information (such as data collected on back-up tapes) and requires that a party identifies sources of potentially relevant information that it is neither searching nor producing.

The requesting party can file a motion to compel production of second-tier data if it thinks that the likelihood of locating important information justifies the burden of producing it. Even where the responding party can show that the requested data is not reasonably accessible, the court may still make an order for production if the requesting party is successful in showing good cause for discovery.

Possession and control

In respect of paper documents, physical possession is usually (but not always) the principal determinant of what may have to be disclosed. However, the position is more complex in the context of electronic data, particularly in respect of shared databases.

In England and Wales, a party has control over a document if either (*CPR 31.8*):

- It has physical possession of the document.

Comparative table: Disclosure obligations in Europe and the US

	Disclosure obligations?	Scope of disclosure obligations?	Are electronic documents covered?	Differences in approach between electronic and hard copy documents?
England and Wales	Yes, generally disclosure will be ordered in every action.	Must undertake a reasonable search to locate and disclose: ■ Documents on which you rely. ■ Documents adverse to your case. ■ Documents that support another party's case. ■ Documents adverse to another party's case. Any such documents must be disclosed unless they attract legal privilege.	Yes	Few differences in principle, although the size and nature of what constitutes a reasonable search will differ for electronic documents.
United States	Yes, generally discovery will be ordered in every action.	Parties may obtain discovery of "any matter... relevant to a claim or defense [sic] of any party" unless such a document attracts legal privilege.	Yes	Distinction made between "accessible" and "inaccessible" (usually back-up) data in respect of e-discovery.
France	No general disclosure obligations, although a court may order the disclosure of specific relevant documents at the request of a party.	Request must be sufficiently precise to allow the document to be identified and disclosure will not be ordered if the document is covered by professional secrecy or confidentiality.	Yes	No distinction is made between hard copy and electronic documents.
Germany	No general disclosure obligations, although a court may at its discretion request documents, records, objects or files from the parties.	The court may order disclosure of a document referred to in one party's pleadings and may order that a party disclose files insofar as they contain documents relevant to the proceedings. A party may not, however, request that the court make such an order and these powers are seldom used since they conflict with traditional German litigation principles.	Yes	Electronic documents are treated as "'objects" for discovery purposes, so are governed by slightly different rules. The major difference is that a party can request that the court make an order for discovery of an object, but cannot do so for a document.
Spain	No general disclosure obligations, although a court may order the disclosure of specific documents.	The requesting party must provide a copy of the requested document or give a full description of it. Disclosure will not be ordered in respect of a document received in the context of a lawyer's professional relationship with his client.	Yes	No distinction is made between hard copy and electronic documents.
Italy	No general disclosure obligations, although a court may order the disclosure of specific documents.	The requesting party must: ■ Identify the document precisely. ■ Show that it is in the other party's possession. ■ Demonstrate its importance to the case. ■ Show that there is no serious prejudice in disclosing it.	Yes	No difference in approach between electronic and hard copy documents, although the evidential weight of electronic documents can vary depending on whether the document in question has an electronic or digital signature.

Sanctions for failure to comply?	Differences in sanctions for electronic and hard copy documents?	Specific obligations for in-house counsel?	Blocking statutes? (i.e. statutes preventing the use of documents in foreign proceedings).	Can scanned images be used as evidence?
Sanctions may include: ■ Strike out. ■ Costs awards. ■ Evidential prejudice. ■ Contempt of court.	None	Obligations to ensure relevant documents are preserved arise as soon as litigation is reasonably in prospect.	Protection of Trading Interests Act 1980 - blocking discovery in foreign multiple damages proceedings.	Yes
Sanctions may include: ■ Punitive damages. ■ Spoliation. ■ Adverse inferences.	None	Document retention: duty to implement transparent records management and destruction policies. Document preservation: obligations to identify and ensure the continued retention of documents to meet discovery obligations.	No	Best evidence rule states that original must be used unless excused. In practice, however, a copy or scanned image will carry equal weight.
The court may: ■ Accompany an order for disclosure with a daily penalty for any delay in its production. ■ Draw adverse inferences from a refusal to produce documents.	None	No express obligations but, generally, the courts expect companies to retain documents likely to become the subject of litigation and may draw inferences from a failure to do so. As such it is advisable that any document destruction policy is as transparent as possible.	Yes, although it does not appear ever to have been used. In addition, the blocking statute cannot be used in respect of a request made by either an EU country or a signatory to the Hague Convention.	Preference is theoretically given to original documents, although in practice imaged copies can be used in evidence. Only when a document's authenticity is challenged will the original be required.
Failure to comply with an order for disclosure may result in the court drawing adverse inferences.	None	No express obligations, although a failure to produce an ordered document due to its destruction may result in the court drawing adverse inferences.	No	An image of a public document has the same evidential value as that of the original. An image of a private document, however, will not have the same weight as the original, unless the opposing party does not contest its authenticity. The court has a wide discretion to decide what weight should be given to such images.
If a party refuses to produce an ordered document, the court may: ■ Draw adverse inferences. ■ Proceed against the party for contempt of court.	None	None, although if a requested document has been destroyed, a court may accept the requesting party's description of its contents as fact if reasonable to do so.	No, although Spanish courts will not accept letters of request relating to pre-trial disclosure in common law countries.	Yes, a scanned image will have the same weight as the original unless the image's authenticity is challenged.
Failure to comply with an order for disclosure may result in the court drawing adverse inferences.	None	None. In exceptional circumstances, a court may order an investigation of documents in a company's possession. This is, however, very rare.	No, although an Italian court will not honour a foreign discovery application if it breaches the principles of the Italian legal system.	Yes, a scanned image will have the same weight as the original unless the image's authenticity is challenged.

Nature and volume of electronic documents

- 22.2 billion business e-mails are sent globally every day.
- If the average employee sends or receives only 25 e-mails per day - in a firm of 100 employees that equates to more than half a million e-mails per year.
- An average network hard drive can conservatively hold 40 gigabytes of data - this could weigh 20 tonnes if printed.
- If the average employee produces 1 gigabyte of data each year - in a firm of 100 employees that equates to 50 tonnes of paper.
- 70% of company documents are never converted to hard copy format.
- Computer records now constitute 80% of the evidence used in corporate fraud trials. Each case of this type requires the analysis of around half a million e-mails.

- It has a right to possession of the document.
- It has a right to inspect or take copies of the document.

The right to inspect a document is likely to apply to a situation where one company has access rights to a database hosted by another company, since the company accessing the database has a right to inspect at least some, if not all, of the documents held on that database. Therefore, a company will have disclosure obligations relating not just to databases hosted by that company, but also relating to any and all databases to which it has access.

The above obligations are particularly important in relation to the way in which a group of companies deals with disclosure of documents in litigation to which one member of the group is a party. It has long been a source of comfort to large groups with a company that is party to English litigation that a company's documents will not usually include those of its parents or subsidiaries (following the decision of the House of Lords in *Lonrho v Shell*). As a result, it will not be under an obligation to disclose any documents other than its own. This is not the position in the US, where the courts are more likely to find that one group company has control over another group company's documents. US courts will generally find that a corporate entity has such control where it can obtain the other company's documents in the "ordinary course of business".

Electronic documents can, however, present significant problems even for large English corporate groups, many of which have mapped drives and shared servers used by other group companies. As is the case with databases, it is likely that a company's disclosure obligations will extend to documents held by its parents and subsidiaries if it has access to such documents by virtue of a shared server. This is an important point to bear in mind, especially given that the instinctive approach would be to take the position that such documents are not disclosable, since they belong to a different entity within the group.

Compliance with electronic disclosure obligations

As electronic disclosure assumes increasing importance in the litigation process, so the obligations on companies to ensure adequate maintenance of their electronic records intensify. These obligations are present to a greater or lesser extent whether litigation is in progress, reasonably in prospect or neither. Therefore, it is important for in-house counsel to be involved in ensuring that appropriate steps are taken to maintain electronic information (at least in accordance with the company's document management policy), even if there is little prospect of litigation.

Preservation of information

Given the way in which electronic data is treated on a day-to-day basis, ensuring its preservation is a matter of serious concern. For example, many company employees delete their e-mails on a daily basis in a way that they would never treat hard copy material, without realising the implications of their conduct should their area of work become the subject of litigation. In addition, many companies have automatic systems which delete or archive files after they have been stored for a certain amount of time. Although such practices may appear to streamline operations and increase efficiency, should these records require restoration from the hard drive or back-up tapes following an order for disclosure, the cost could be enormous.

The question of how best companies should manage their electronic information and records has been the subject of much discussion in legal circles over the last few years. The Sedona Conference, a US think tank of academics, practitioners, judges and other experts, produced a set of guidelines in 2004 stressing the importance of information and records management in the electronic age. The guidelines make clear that this does not mean a company must retain all information and documents, but state that a company's legal requirements should be its major consideration when developing an information and records management policy. The Sedona Guidelines have been endorsed both by the US courts and by the 2004 Cresswell working party in England and Wales (*see above, Extent to which disclosure obligations cover electronic documents*).

Destruction of information

The steps that a company should take to preserve electronic data in an easily-retrievable form do not preclude it from setting up systems for the periodic deletion of documents. The Sedona Guidelines state that destruction of documents is an acceptable stage in the information life cycle and companies may delete electronic information when there is no continuing need to retain it. The guidelines also state that systematic deletion of electronic information is not synonymous with evidence spoliation or destruction (*see below, Spoliation*). This is consistent with the decision of the Victorian Appeal Court, in *British American Tobacco Australia Services Ltd v Cowell and McCabe*, which referred to there being a "right of any company to manage its own documents, whether by retaining them or destroying them". Importantly, however, the Sedona Guidelines state that suspension of these systematic deletion procedures may be necessary in certain situations (in other words, in response to threatened or anticipated litigation).

In-house counsel's obligations when no litigation is pending

In-house counsel can feel comfortable in advising that a destruction policy is acceptable but need to notify, and periodically remind, all employees of any destruction policy and inform them of any changes to it. In-house counsel should also consider what steps can be taken to avoid inadvertent destruction, for example, the mirroring of hard drives before deletion and reuse (when employees leave the company).

Any destruction policy should be halted as soon as there is a reasonable prospect of litigation, as the destruction of relevant information in these circumstances can attract court sanction. A central part of any preservation/destruction policy should be transparency, especially since the selective deletion of information without a reasoned explanation will be much harder to justify subsequently. In-house counsel should therefore ensure that an audit trail of information destruction (and storage) decisions is maintained to catalogue all policy decisions.

One common problem is that decisions on the deletion and archiving of electronic data are often taken by IT people alone, without the input of the legal department. It is crucial, even when no litigation is in prospect, that in-house counsel take an active role in ensuring they are consulted in respect of these decisions.

In-house counsel's obligations when litigation is reasonably in prospect

The strict obligations relating to document preservation and disclosure in England and Wales arise as soon as litigation is reasonably in prospect, rather than once proceedings have been issued. In order to ensure compliance with these obligations, the in-house counsel needs to acquaint himself with the personnel relevant to retention of information and, where resources allow, consider appointing a legal IT specialist, or even an entire team, to act as liaison with the legal department and implement necessary procedures. It is imperative that the in-house counsel maintains an active role in this regard and he should always be careful to notify, and then periodically remind, all employees of information preservation policies and keep them informed of any changes.

Information should be stored in such a way as to allow easy retrieval, so that the costs of disclosure and production are reduced in the potential litigation. Be aware, however, that electronically scanning paper documents or changing the format of electronically held information is "processing" under the Data Protection Act 1998 (DPA). This may mean that the company has obligations to comply with requests for documents under the DPA, which would not have been imposed had the documents remained in hard copy or unaltered. A more effective approach might be the electronic storage of documents in the format in which they were created (for example, Word or Excel) rather than converting them to uniform, scanned pdf or tiff files. The former enables easy access to metadata and will save the costs and the potential DPA implications of transferring documents to a different format.

All information formats should be considered in light of the enormously wide definition of "document" in the CPR, which includes metadata (data about data - such as when a document was last amended). In the US case of *Williams v Sprint/United Mgmt Co*, metadata was considered sufficiently integral to the process of electronic disclosure that guidelines were set out for retaining such information in the ordinary course of business. It is also likely that the definition of document extends to other forms of media, such as SMS text messages sent via mobile phone, personal organisers and other technologies.

One of the first things for in-house counsel to consider when litigation is in prospect is the issue of a hold order to ensure that no relevant documents are destroyed, deleted or archived. It may not be enough merely to issue an instruction requiring all employees to preserve relevant documents and data when a company faces litigation. A more proactive approach may be required. In the US case of *Zubulake v UBS Warburg (No. 5)*, it was held that in-house counsel had not gone far enough, despite issuing a hold order and even reissuing it a number of times. Judge Scheindlin set out guidelines governing what was required in this situation:

- Once issued, a hold order should be periodically reissued so that new employees are made aware of it and current employees are reminded.

- Once the hold order is issued, it is counsel's responsibility to identify all sources of potentially useful information within the company. In so doing, actual retention and storage policies should be understood.

- All key personnel should be interviewed to determine the location of relevant information they have. The hold order should be explained and emphasised at this point.

- All employees should be instructed to produce copies of relevant active files and ensure safe storage of back-up materials.

Foreign companies involved, or likely to be involved, in US proceedings should bear these guidelines in mind.

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English companies can, however, take some comfort from the governing principle under the CPR that disclosure should be proportionate. Onerous requirements in the US, as set out largely in *Zubulake*, are softened in England by the requirement only to conduct a reasonable search of relevant documents (*CPR 31.7*) and by the obligation to disclose information only where it is proportionate to do so (*CPR 31.3(2)*). The use of data sampling should be encouraged in order to keep electronic disclosure at a realistic level and reduce the cost and time involved. In *Zubulake*, only five of 95 potentially relevant back-up tapes were initially restored for this reason.

A relatively new concept, which is rapidly gathering support, is that of the parties discussing with each other issues in relation to the preservation of information. In England, this idea is reflected both in the Commercial Court guide and in the CPR, paragraph 2A.2 of PD31.

Sanctions

The English and US courts have a range sanctions available and may impose them on any party that fails to preserve information appropriately, whether deliberately or accidentally.

Strike out

An English court has the power to strike out a claim where it considers that a fair trial is no longer possible, although recent decisions suggest that such impossibility will not easily be established. Destruction of information, whether pre-action or during proceedings, must have been intended to pervert the course of justice or amount to contempt for there to be a strike out. Where a strike out is allowed in the future, it might be more likely, as suggested in *McCabe*, to be only certain paragraphs of the relevant statement of case.

However, the possibility of strike out should not be discounted altogether, as is demonstrated by the case of *Landauer Ltd v Comins & Co*, where key information was destroyed accidentally. It was held that, without it, witnesses could not accurately remember the fine details. The key point was the finding that the destruction of vital evidence made a fair trial impossible.

Evidential prejudice

Where documents are destroyed during the course of litigation, the court may order that omissions in evidence submitted should be taken as prejudicial. In the US case of *Coleman (Parent) Holdings, Inc. v Morgan Stanley & Co. Inc.*, the court allowed an adverse inference to be drawn, based on the non-disclosure of hundreds of back-up tapes, non-disclosure of errors in discovery up to that time, deliberate concealment of a historical e-mail archive and several other abuses. In *Zubulake (No.4)*, it had been held that where the plaintiff could not demonstrate that the missing evidence would support its claims, it was not appropriate for an adverse inference order to be made.

Costs awards

Where sufficient or timely disclosure is not provided, or where there is deliberate destruction of information, the court also has the power to make costs or, in the US, punitive damages orders. In May 2005, for example, Morgan Stanley was ordered to pay US$850 million (about EUR679 million) in punitive damages to Ronald Perelman in the *Coleman* case, because the bank's inability to provide relevant e-mail documentation effectively frustrated the plaintiff's case (this decision is being appealed). In *Zubulake*, the court ordered that UBS Warburg should meet the costs of the hearing for its deliberate deletion of e-mails, despite contrary court orders.

Contempt of court

Legal advisers risk being held in contempt of court for deliberately failing to preserve or destroying information. In the English case of *Alliance and Leicester Building Society v Ghahremani*, a solicitor was held to be in contempt for deliberately deleting incriminating information from a key document in breach of an order restraining him from any alteration of relevant documents. However, even in *Zubulake*, although the in-house counsel received considerable criticism from Judge Scheindlin, there was no personal sanction for his negligently falling short of the obligations to preserve information (as opposed to deliberate misconduct found in the *Ghahremani* case).

Spoliation

Spoliation is the destruction of evidence relevant to ongoing or reasonably foreseeable legal proceedings. It is recognised as a tort action in its own right in certain US states in which the victim of the destruction of information can proceed directly against the tortfeasor. In a 1991 Tennessee court decision, it was held that the remedies in such a case could include an inference that the missing information was prejudicial to the party that destroyed the evidence, and, in *Walters v. General Motors Corp.*, default judgment was given as an alternative remedy. Major factors in determining whether this alternative was appropriate included:

- The deliberate action of the spoliator in perverting the judicial process.

- Whether there was an alternative remedy available that would avoid substantial unfairness to the opposing party.

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