

Consultation opens on proposed reforms to litigation disclosure in England & Wales

The ability to obtain an order that a party disclose documents which are adverse to its case is one of the factors that makes litigation in this jurisdiction attractive. However, “Standard Disclosure” in the age of electronic data can add significantly to the time it takes for a case to come to trial, as well as to the cost of the litigation. Further, some practitioners consider that the current Disclosure regime operates in such a way that litigants risk being swamped with disclosed documents which are at best of marginal relevance. In response to these types of concerns, a working group chaired by Lady Justice Gloster was set up last year to consider proposals for reform of the Disclosure rules.

In November 2017, the judiciary published proposals for a new Disclosure rule. The deadline for comments on the proposals is 28 February 2018 and the intention is that the proposed scheme will be submitted to the Civil Procedure Rules Committee for review and approval in March/April 2018, with a two year pilot to commence in the Business & Property Courts as soon as possible after that.

The working group concluded that wholesale cultural change is required. They propose a completely new rule for Disclosure in the Business & Property Courts, replacing the existing rule and its two Practice Directions.

In summary, the key proposed changes are that:

- Standard Disclosure should no longer be the default.
- Subject to certain exceptions, parties should provide “Basic Disclosure” (summarised below) with their statements of case.
- Parties must inform each other whether they will be seeking “Extended Disclosure” on certain issues in the case.

- There are five Models of Extended Disclosure which range from no disclosure to disclosure leading to the train of inquiry that could produce relevant information, which some will recognise as the pre-CPR *Peruvian Guano* test for discovery.
- The Court should be proactive in directing the appropriate Model(s) and should not accept the Model proposed by the parties without question.
- The duties of the parties and their lawyers in relation to Disclosure are expressly set out in the new rule.
- Parties will be expressly required to take reasonable steps to preserve documents that may be relevant to the claim and to confirm in writing when serving their statement of case that they have done so.
- Parties will be under a duty to disclose, regardless of any order for disclosure made, documents they know to be or to have been in their control and adverse to their case on the claim, unless they are privileged.
- There will be an express duty on a party to refrain from providing documents to the other side that have no relevance to the issues for disclosure.
- Costs budgets for disclosure will be completed *after* an order for disclosure has been made (rather than before).

The existing provisions of CPR Part 31 on pre-action disclosure, disclosure of documents referred to in evidence, non-party disclosure and subsequent use of disclosed documents will remain unchanged.

Basic Disclosure

When serving its statement of case, each party must provide all other parties with a list and copies of the key documents relied on in support of its claim/ defence and the key documents that are necessary to enable the other parties to understand the case they have to meet.

There is no obligation, at the Basic Disclosure stage, to carry out a search for documents. However, the general duty in the proposed draft Practice Direction to disclose known adverse documents will still apply.

Basic Disclosure is not required where the parties agree to dispense with it (although the Court may set that agreement aside if it thinks fit); or where the Court makes an order that it is not required; or where giving Basic Disclosure would involve any party providing more than 500 pages. The working group accept that Basic Disclosure will often not be suitable in the largest cases.

Extended Disclosure

Where any party indicates that it will seek Extended Disclosure, the Claimant must draft “a fair and balanced summary of the key areas of dispute identified by the parties’ statements of case” in respect of which it is likely that one of the parties will be seeking Extended Disclosure (“Issues for Disclosure”). The parties are required to seek to agree this list. For each Issue for Disclosure, the parties should indicate which Model of Extended Disclosure is sought. The Models are:

Model A – No Order for disclosure.

Model B – Limited Disclosure. Model B applies the same test as for Basic Disclosure but there is no 500 page cap. This includes disclosing any documents adverse to its case which a party already knows exist. The disclosing party is not obliged to undertake a search for discloseable documents.

Model C – Request-led Search-based Disclosure. Requests can be made for particular documents or narrow classes of documents relating to a particular Issue for Disclosure. If the request cannot be agreed, it will be for the Court to decide at the CMC.

Model D – Narrow Search-based Disclosure, with or without Narrative Documents (i.e. documents relevant only to the background or context of material facts or events). Model D is effectively what we currently know as Standard Disclosure. Parties are required to carry out a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D is ordered.

Model E – Wide Search-based Disclosure. Model E is effectively Standard Disclosure including Narrative Documents plus disclosure of any documents which may lead to a train of inquiry. It will only be ordered in an exceptional case.

Different Disclosure Models may be ordered for different issues in the case.

Note that all five Models require the parties to disclose known documents which are adverse to their case regardless of the scope of the searches ordered.

In order to manage searching and reviewing with maximum efficiency, the proposed new rule expressly envisages amongst other things the use of keyword or other automated searches, technology-assisted review software and techniques, de-duplication, data sampling and staged disclosure where appropriate.

Disclosure Review Document

The Disclosure Review Document (“DRD”), which replaces the Electronic Documents Questionnaire, is an important new multi-purpose document which the parties are required to complete, seek to agree before the first CMC and keep up to date throughout the litigation. It is intended to provide a framework for the parties to co-operate and exchange information with a view to agreeing a proportionate approach to disclosure.

The parties must share with each other and the Court information about how documents are stored and how they might be searched and reviewed. They must also include estimates of the cost of using any Disclosure Model proposed by one or more of the parties.

The Disclosure Order

At the first CMC, the Court will consider the DRD and decide whether to order Extended Disclosure as requested by the parties. Any disputes about disclosure which the parties have been unable to resolve will be decided by the Court at the CMC. Parties may also request a Disclosure Guidance Hearing (lasting up to 30 minutes) before or after a CMC.

The Court is required to be proactive and will only order Extended Disclosure if it is persuaded that it is reasonable and proportionate to do so. It will take into account factors such as: the nature and complexity of the proceedings; the number of documents involved; the likelihood of documents existing that will have probative value; the parties' financial positions; and the need to ensure that the case is dealt with expeditiously, fairly and at proportionate cost.

Commentary

Practitioners and prospective litigants will welcome proposals that seek to reduce the burden of disclosure. However, it remains the case that in many large commercial cases a reasonably broad disclosure review exercise may still be appropriate, especially where there are complex factual issues or allegations of fraud. The new draft practice direction's envisaged use of targeted search methodologies and wider use of technology-assisted review will be key to managing the challenges of electronic data.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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