

Disclosure Pilot Scheme Announced for the Business & Property Courts of England and Wales

The Civil Procedure Rule Committee has given its final approval for a two-year Disclosure Pilot Scheme to commence in the Business & Property Courts on 1 January 2019 (subject to Ministerial approval). The Disclosure Pilot will not apply to cases in which an order for Disclosure has been made before that date, unless such orders are varied or set aside.

In advance of the anticipated commencement of the Pilot on 1 January 2019, the CPRC has published a draft new Practice Direction and draft Disclosure Review Document which contain some significant changes to the current regime, including introducing the new concept of a menu of graduated models of disclosure.

The introduction of the Pilot follows proposals by a working group set up in 2016 in response to concerns expressed by Court users, notably the GC100, about the cost and volume of Disclosure, and a consultation process involving regular Court users. As the working group concluded after its first meeting, *“it could not seriously be disputed that standard disclosure often produces large amounts of wholly irrelevant documents, leading to a considerable waste of time and costs”*.

Despite the range of alternative Disclosure orders introduced by the Jackson amendments of 2013, Standard Disclosure has remained, effectively, the default option for Disclosure. That will no longer be the case. The Pilot aims to encourage parties to agree a proportionate and efficient approach to disclosure in each case, focusing only on those issues where such factual evidence is necessary to determine the issue.

In summary, the key changes in the new Practice Direction are:

- A duty to disclose known adverse documents applies in all cases.
- Subject to certain exceptions, parties must provide “Initial Disclosure” (termed “Basic Disclosure” at the consultation stage and summarised below) with their statements of case.
- Parties must inform each other whether they will be seeking “Extended Disclosure” and, if so, in relation to which issues in the case at an early stage.
- Parties must actively cooperate with each other and file a joint Disclosure Review Document (“**DRD**”) ahead of the first Case Management Conference (“**CMC**”). Each party’s solicitors will need to submit a Certificate of Compliance with the DRD.
- There are five Models of Extended Disclosure which range from no disclosure beyond known adverse documents to disclosure leading to a train of enquiry, which some will recognise as the pre-CPR *Peruvian Guano* test for discovery.
- In almost all cases, “Narrative Documents” (documents relevant to the background or context of facts or material events but not relating directly to the issues for disclosure) should no longer be disclosed.
- There is an express duty to take reasonable steps to avoid disclosing irrelevant documents (introduced in response to allegations of “document dumping” in some cases).
- The Court should be proactive in directing the appropriate Model(s) and should not accept the Model proposed by the parties without question.
- A Disclosure Guidance Hearing is available if required. The Practice Direction envisages representations being made by the solicitors responsible for the Disclosure exercise.
- Solicitors will need to obtain written confirmation from their client that the client has taken the steps required to preserve relevant documents, including the issuing of document retention notices to current and former employees.

Known Adverse Documents

Parties will be under an obligation to disclose known adverse documents in all cases, even where no other order for Disclosure is made.

“Known adverse documents” are documents (other than privileged documents) that a party is actually aware of (without undertaking any further search for documents than it has already undertaken or caused to be undertaken); and that both (a) are or were previously within its control, and (b) are adverse.

A company or organisation is “aware” of the document if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation.

Thus parties will need to make enquiries of individuals involved in the events which are the subject matter of the litigation to ascertain whether such adverse documents exist. Of course, in complex commercial cases where the events may have taken place some time ago and a large volume of documentation is involved, individuals are unlikely to be able to recall specific documents even if they were willing to do so. However, in such cases it remains likely that the Court would order some degree of Extended Disclosure, often Model D (see below).

Initial 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 Initial Disclosure stage, to carry out a search for documents other than the search each party will have carried out for the purpose of bringing the claim or investigating a defence.

Initial 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 Initial Disclosure would involve any party providing more than the larger of 1000 pages or 200 documents.

Disclosure Review Document

The DRD, which will replace the existing Electronic Disclosure Questionnaire, is an important new multi-purpose document which the parties are required to complete, seek to agree following the close of pleadings and 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. In particular, the DRD will:

- List the Issues for Disclosure in the case (that is, the key issues in dispute which the Court will need to determine with some reference to contemporaneous documents);
- Exchange proposals for Extended Disclosure and which Model should apply to which issue (see below); and
- Share information regarding the storage of documents and how they might be searched and reviewed.

Extended Disclosure

A party wishing to seek disclosure of documents in addition to, or as an alternative to, Initial Disclosure, must request Extended Disclosure within 28 days of the final statement of case.

In advance of the first CMC (at which the Court will consider which of the five Extended Disclosure models will apply to each of the issues in the case), the parties must discuss and seek to agree the draft List of Issues for Disclosure. This may not include all the issues in the case, as some issues may not require further factual evidence in order to be determined by the Court.

The Models for Extended Disclosure are:

Model A – Disclosure confined to known adverse documents

Model B – Limited Disclosure. Model B applies the same test as for Initial Disclosure but there is no page or document limit. The disclosing party is not obliged to undertake a further 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. Model D is the most similar to 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. However, Narrative Documents will not normally be discloseable (unless ordered otherwise). When considering the scope of searches, it will be necessary to consider by what means Narrative Documents are to be excluded in a reasonable and proportionate way.

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

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

The stated objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. There will also 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.

Privileged Documents

Where documents are withheld as privileged, an explanation will need to be given in the Disclosure Certificate as to the grounds on which privilege is asserted. In the revised proposal, the requirement set out in the November 2017 proposal that such explanation be made with “*reasonable precision*” has been removed. The continued ability under the new rules to claim privilege, absent a contrary order from the Court, in a form that treats privileged documents as a class, has also been clarified, and expressly made subject to the claiming party’s legal representatives’ compliance with their duty to satisfy themselves that the claim to privilege is properly made.

Current rule 31.20 has been amplified: where a party is told, or has reason to suspect, that a document has been produced to it inadvertently, that party shall not read the document and shall promptly notify the party who produced it to him. If that party confirms that the document was produced inadvertently, the receiving party shall, unless on application the Court otherwise orders, either return it or destroy it, as directed by the producing party, without reading it.

What stays the same?

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

Where and when will the Pilot apply?

Subject to Ministerial approval, the Pilot will apply to new and existing proceedings in the Business & Property Courts both in the Rolls Building, and in the centres of Bristol, Birmingham, Cardiff, Leeds, Liverpool, Manchester and Newcastle for a two-year period, commencing on 1 January 2019. If the Pilot is successful, it is expected to lead to a wider reform of Disclosure, which is anticipated to include a revision to the current CPR Part 31 to reflect the terms of the draft Practice Direction and a wider application beyond the Business & Property Courts.

Further presentations by the DWG

Prior to the launch in January, the Disclosure Working Group plan to run a series of further presentations to help familiarise Court users with the new requirements.

If you have any questions or comments in relation to the above, please contact Susan Rosser, James Whitaker, Kate Wilson or Susan Knox, or your usual Mayer Brown contact.

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