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# The Disclosure Pilot Scheme

## Introduction

The Civil Procedure Rule Committee has approved a new Practice Direction which sets down rules for a mandatory disclosure pilot scheme. It will run for two years in the Business and Property Courts in England and Wales, starting on 1 January 2019. This guide provides a general introduction to the changes, highlights the main points you need to know, and offers some practical tips.

## What is disclosure?

Disclosure is the process whereby the parties to a dispute formally state to one another which documents they hold that are relevant to the proceedings, and provide copies of those documents which are not privileged.

The idea is that the court is able to determine the case with all the relevant information before it. Disclosure can also promote settlement as the parties become more aware of the relative strength of their cases. Failure to preserve documents at the outset or to give full disclosure can result in strict penalties from the court.

## The current regime

The "standard disclosure" regime was brought in with the Civil Procedure Rules in 1999 and is explained fully in our separate guide, "Disclosure: avoiding the pitfalls". Standard disclosure requires a party to undertake searches for, and to disclose, documents upon which they rely or which are adverse to its case or another party's case.

Whilst changes have been made in the intervening period, with the result that "standard disclosure" is now one of a menu of disclosure options, it remains in effect the default option and other options are seldom utilised if at all.

## Why is the disclosure process changing?

Concerns had been raised over the spiralling costs, complexity and scale of undertaking standard disclosure, especially given the prevalence and volume of electronic documents. It was felt that our system needed to be reformed to bring it up to date and to be able to maintain its position alongside rival jurisdictions. As a result, the system was reviewed and a new pilot scheme has been introduced. The Disclosure Pilot Scheme ("DPS") applies to cases in the Business and Property Courts only (i.e. the Chancery Division, the Commercial Court and the Technology and Construction Court) and will last for two years from 1 January 2019. The DPS will not run elsewhere, so it will not apply in the Queen's Bench Division or the County Courts.

The changes are designed to usher in a change in culture around disclosure. The first principle of the new scheme is about disclosure's role in "achieving the fair resolution of civil proceedings". The court expects parties to cooperate with each other and assist the court in determining the scope of disclosure.

## Key terms

The disclosure pilot scheme redefines terms and introduces a couple of key concepts:

- A "**document**" includes any record of any description containing information. It may take any form, from paper to electronic and beyond. It includes data held on computers, mobile phones and memory sticks, e-mails, texts and social media, and voicemail and audio or visual recordings. Metadata and other embedded data are also included in the definition.
- "**Adverse documents**" which are known to the parties must be disclosed. An adverse document is one that contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party. An adverse document will be "known" to a party if the party is actually aware – without any further search beyond that conducted for the purposes of obtaining advice on its claim or preparing its statement of case – that the document is or was within its control, and that it is adverse. This includes the awareness of any person within the organisation who has responsibility either for the circumstances which are the subject of the case, or for the conduct of proceedings. It could include the awareness of someone who has left the organisation.

## Disclosure duties on the parties

The DPS sets out a number of express disclosure duties on both parties and their lawyers. The duties in large part either replicate duties under the current regime or reflect current best practice, but the DPS helpfully sets these duties out clearly in one place.

There are six duties for parties which continue throughout the case:

- Preserve documents that may be relevant to issues in the proceedings
- Disclose known adverse documents, unless they are privileged
- Comply with any court order for disclosure
- Undertake a search in a responsible and conscientious manner
- Act honestly in both giving disclosure and reviewing documents disclosed by the other party
- Use reasonable efforts to avoid providing documents that are not relevant to the other party

## Disclosure duties on legal representatives

The duties on legal representatives also arise at an early stage, and apply where the lawyer: (a) has conduct of litigation on behalf of a party where proceedings have been commenced; or (b) where they are instructed with a view to the conduct of litigation where the client knows it may become a party to proceedings that have been or may be commenced. There are five duties:

- Take reasonable steps to preserve documents within the lawyer's control
- Take reasonable steps to advise and assist their client to comply with its duties
- Liaise and cooperate with legal representatives of other parties
- Act honestly in relation to the disclosure process
- Undertake a review to ensure any claim for privilege is properly made and its basis sufficiently explained

## Preservation of documents

There are specific provisions in the DPS that spell out what is required of a party to ensure that it complies with its duty to preserve documents. The rules require the suspension of any relevant document destruction process. Where appropriate, copies should be made and stored.

A written notification must be sent to all relevant employees and former employees who may have relevant documents in their control, informing them of the obligation to preserve documents. There is also an obligation to take reasonable steps to stop agents or third parties who may hold relevant documents destroying or deleting them.

Legal representatives must notify their clients of these obligations and the need to preserve documents. They must also obtain written confirmation from the client that the necessary steps to preserve documents and inform employees have been taken.

## The two-stage process

The process of giving disclosure is separated into two different stages.

- **Initial Disclosure** takes place at the stage that a party files and serves its Particulars of Claim or Defence. It is intended to be a light-touch first step, with a cap of 1,000 pages or 200 documents (whichever is the larger). There is no requirement to undertake a search beyond any already undertaken. Initial Disclosure captures the key documents a party has relied upon in preparing its statement of case, and the key documents required to enable the other party to understand the claim or defence they have to meet. A list of the documents must be served with copies of the documents in electronic format (unless otherwise ordered or agreed). There are certain exceptions when Initial Disclosure will not be necessary.
- **Extended Disclosure** must be considered after the Initial Disclosure stage. After reviewing the documents already disclosed, within 28 days the parties must state if they believe further disclosure is required. Extended Disclosure will only be ordered where it is appropriate to fairly resolve an issue in the case. Extended Disclosure will usually take the form of one of the Disclosure Models, explained below.

## The Disclosure Review Document

If the parties decide that Extended Disclosure is necessary, a request must be made to the court using a joint Disclosure Review Document ("DRD"). The DRD sets out:

- A list of "Issues for Disclosure" in the case
- Proposals for Extended Disclosure, including which Disclosure Model is sought
- Information about how documents are stored and how they might be searched and reviewed.

Issues for Disclosure are those key issues in dispute, which the parties consider will need to be determined by the court by reference to contemporaneous documents for there to be a fair resolution of the proceedings. The list should not extend to every issue arising in the statements of case. The claimant takes the lead on preparing the list of issues, and should seek to ensure the draft list is fair and balanced. The defendant may suggest other issues and alternative wording. The parties should seek to agree the issues between themselves.

## The five models for disclosure

In the DRD, the parties should identify the particular "Model of Disclosure" they wish to apply to each issue. It could be that a different Model is applied to the claimant and the defendant for a particular issue. In deciding on a Model for disclosure, the parties and the court should bear in mind that the objective is to limit the searches required and the volume of documents disclosed. The Models should not be used in a way that increases cost through undue complexity. These are the five models, all of which incorporate an ongoing duty to disclose known adverse documents:

- **Model A**: Disclosure of known adverse documents only. With this model, a DRD will not be required.
- **Model B**: Limited disclosure. This requires the disclosure of documents that meet the test of Initial Disclosure (this time with no limit on quantity), plus known adverse documents. Parties are under no obligation to undertake a search beyond any already conducted. But where a search does take place, the continuing duty to disclose applicable documents applies.
- **Model C**: Request-led, search-based disclosure. Parties may make requests in the DRD for the disclosure of particular documents or a narrow class of documents relating to a particular Issue for Disclosure.
- **Model D**: Narrow search-based disclosure, with or without "Narrative Documents". Under this model, each party must undertake a reasonable and proportionate search in relation to the applicable Issues for Disclosure (this model is the closest to the current "standard disclosure" test). A Narrative Document is one which is relevant only to the background or context of material facts or events, but not directly relevant to the Issues for Disclosure.

- **Model E**: Wide search-based disclosure. This is the widest model. Parties must disclose documents which are likely to support or adversely affect their claim/defence, or that of another party, in relation to one or more Issues for Disclosure, or which may lead to a train of enquiry which may result in the identification of other documents for disclosure. Narrative documents must also be disclosed. Model E will only be ordered in an exceptional case.

## Complying with an order for Extended Disclosure

If Extended Disclosure is ordered, it is complied with by serving an Extended List of Documents, copies of the documents in electronic format (in a way that preserves metadata) and a Disclosure Certificate. The Disclosure Certificate requires a party to sign a statement of truth, stating that they are aware of their disclosure duties, and that those duties have been complied with. The certificate also records the search methodology and any limitation.

The electronic documents should be provided in a form which allows the receiving party the same ability to access, search, review and display them. OCR versions of electronic documents should be searchable and a party should not disclose duplicates.

## Practical points

It is necessary to start thinking about disclosure as soon as a dispute arises. The following points are worth considering:

- At an early stage, discuss with a lawyer how electronic documents are held. It may be necessary to engage a document management service provider, and to obtain IT forensic advice to assist with the disclosure process.
- Stop all document destruction as soon as litigation becomes a possibility and ensure all employees comply with your document retention policy, should you have one.
- Designate an appropriate person to have overall control of the process within your organisation.
- Prepare a list of all individuals (employees, former employees, other third parties) who may hold relevant documents.
- Send preservation notices to all relevant individuals as soon as possible and make sure they sign to confirm they have taken the necessary steps.
- Keep full notes of any searches made to locate relevant documents.
- Consider the costs of collection, processing, search, review and production as early as possible and obtain forensic advice where appropriate. The parties are required to provide an estimate of the likely cost of giving the disclosure proposed in the DRD and the likely volume of documents, so the court can assess reasonableness and proportionality.

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