
AN OVERVIEW OF THE NEW DISCLOSURE PILOT SCHEME NOW OPERATING IN THE COMMERCIAL COURT

Introduction

1. From 1st January 2019 any party commencing or continuing¹ proceedings in the Commercial Court² will have to be aware of the Disclosure Pilot Scheme (“**the Scheme**”). The Scheme will run for a period of two years and will continue on a formal footing thereafter if deemed a success.

The New Practice Direction

2. The new disclosure regime is set down in a draft Practice Direction (“**PD**”), a copy of which can be found [here](#). The PD replaces the rules governing disclosure in CPR Part 31, and those in the supporting Practice Directions A and B³.

The Principal Changes

(i) The disclosure duties of parties and lawyers

3. The disclosure duties that the parties and their lawyers owe to the Court are now expressly set out⁴.
4. The duties of the parties and their lawyers regarding the preservation of documents are particularly important (see para 5 below), as is the fact that any failure to comply with the disclosure duties laid down in the PD may be sanctioned. Sanctions can include the adjournment of hearings and adverse costs orders⁵.

¹ Existing disclosure orders will not, however, be disturbed.

² The Scheme does not apply in the Admiralty Court (PD para 1.4(4)). Cases operating under the Short and Flexible Trials Schemes are also exempt (PD para 1.4(5)).

³ Save to the extent that the rules contained therein are reproduced in the PD: see para 1.9 of the PD and the specific provisions of CPR Part 31 that are maintained in Section II of the PD (pre-action disclosure, third party disclosure orders, etc).

⁴ PD paras 3.1 - 3.4.

⁵ PD para 20.2.

(ii) *Document preservation*

5. Document preservation is taken extremely seriously under the Scheme:
- 5.1. **The duty to preserve documents kicks-in early.** A person who knows that they “*may become*” a party to proceedings is under a duty to the Court to take reasonable steps to preserve documents that “*may be relevant to any issue in the proceedings*”⁶.
- 5.2. **Compliance with the duty to preserve requires proactivity by a party.** The PD makes plain that parties are required to: suspend relevant document deletion/destruction; send written notifications regarding preservation of relevant documents to current and former employees; and take reasonable steps to stop third parties from deleting/destroying relevant documents⁷.
- 5.3. **Legal representatives must also be proactive.** Within a reasonable period from the date of instruction lawyers must:
- 5.3.1. notify their clients of their obligations to preserve documents, as contained in the PD; and
- 5.3.2. obtain written confirmation from their clients that they have taken the preservation steps required in paras 4.2 and 4.3 of the PD⁸.
- 5.4. **A new confirmation at the time of serving pleadings.** When serving particulars of claim or a defence, the serving party must provide a written confirmation that the steps required by the PD as regards the preservation of documents have been complied with⁹.

⁶ PD para 3.1(1). The duties of parties and their lawyers as regards the preservation of documents is supplemented in PD para 4.

⁷ PD para 4.2.

⁸ PD para 4.4.

⁹ PD para 4.5. It is unclear whether the written confirmation should be contained within the pleading or served separately.

(iii) Initial Disclosure

6. Perhaps the most striking change is that parties will normally be required to provide disclosure – known as Initial Disclosure – with their statements of case.
7. Initial Disclosure is by list with copies attached¹⁰. It must consist of the key documents that are relied upon (expressly or otherwise) by the disclosing party and the key documents that are necessary for the other parties to understand the case they must meet¹¹.
8. The main features of the Initial Disclosure regime are as follows:
 - 8.1. It is not mandatory to make (further) searches for the purposes of giving Initial Disclosure¹². However, any searches previously made should briefly be described in the Initial Disclosure List of Documents¹³.
 - 8.2. Initial Disclosure should comprise of no more than 200 documents or 1,000 pages of material. It should not include documents already supplied or known to be in the possession of the other party¹⁴.
 - 8.3. Initial Disclosure may be dispensed with only where:
 - 8.3.1. the parties agree¹⁵;
 - 8.3.2. the Court orders it is not required¹⁶;

¹⁰ The Initial Disclosure List of Documents: PD para 5.1. Both the List and the copies are to be given electronically, but only the List must be filed (para 5.5).

¹¹ PD para 5.1.

¹² PD para 5.4(1).

¹³ PD para 5.4(2).

¹⁴ PD para 5.4(3).

¹⁵ PD para 5.3(1). See also para 5.8 and note that each party must record its reasons for the agreement so that they can be produced to the Court upon request at the CMC. It is open to the Court to set aside the agreement of the parties.

¹⁶ PD para 5.3(2). See also para 5.10. It seems that such an order will be made, when the Court deems it appropriate, on the application of one party seeking to dispense with initial disclosure where that is resisted by the other party.

8.3.3. when a party concludes in good faith and states in writing that initial disclosure would involve production of more than 200 documents or 1,000 pages of material (whichever is greater)¹⁷; and

8.3.4. where a party is to be served out of the jurisdiction, unless and until the party out of the jurisdiction files an acknowledgment of service that does not contest jurisdiction¹⁸.

8.4. Significant failures to comply with the Initial Disclosure regime can result in adverse costs orders¹⁹.

(iv) The Disclosure Review Document

9. If either party wishes more by way of disclosure than Initial Disclosure it must apply for Extended Disclosure. There is no presumption that any party is entitled to Extended Disclosure²⁰ but, where ordered, it will usually be in the form of one of the five Disclosure Models outlined in para 14 below.

10. Although a party seeking Extended Disclosure is not required to file an application notice²¹, a Disclosure Review Document (“**DRD**”) (a copy of which can be found [here](#)) must be completed²².

11. The DRD replaces the Electronic Disclosure Questionnaire (CPR PD 31B) and the Disclosure Report (CPR r. 31.5(3)), which were usually prepared at or about the time of the first CMC.

12. The DRD is intended to provide a framework for cooperation between the parties as to the form of disclosure that is appropriate for the case.

13. The 10 steps in the DRD regime are as follows:

¹⁷ PD para 5.3(3).

¹⁸ PD para 5.6.

¹⁹ PD para 5.13. Complaints about Initial Disclosure are to be resolved at the first CMC.

²⁰ PD para 8.2.

²¹ PD para 6.1.

²² Although perhaps only where Model C, D and/or E (i.e. a search-based Model) is sought: see para 4 of the DRD Explanatory Notes.

	Timing	Details
Step 1 ²³	Within 28 days of the final statement of case ²⁴ .	Each party must state in writing whether or not it is likely to request one or more of Models B, C, D or E ²⁵ .
Step 2	Within 42 days of the final statement of case.	If any of the parties has requested such a Model then the claimant must prepare and serve on the other parties a draft List of Issues for Disclosure ²⁶ .
Step 3	Within 14 days of service of the draft List of Issues for Disclosure.	The other parties must comment on the document to the extent that the issues are improperly framed or incomplete ²⁷ .
Step 4	In advance of the first CMC.	The parties must seek to agree the draft List of Issues for Disclosure ²⁸ .
Step 5	Within 28 days of completing Step 3.	Any party proposing Model C disclosure must complete and serve Section 1B of the DRD, which deals with disclosure requests ²⁹ .
Step 6	Within 14 days of receipt of Section 1B of the DRD.	The recipient must complete the “ <i>Response</i> ” column ³⁰ .
Step 7	Not later than 14 days before the CMC.	The parties must prepare drafts of Section 2 of the DRD, which covers much of the same ground as the old Electronic Disclosure Questionnaire ³¹ . It also requires parties to estimate the likely costs of the exercise.
Step 8	In advance of the first CMC.	The parties must seek to agree any outstanding issues about the scope of disclosure ³² .
Step 9	Not later than 5 days before the CMC.	A final single joint draft DRD should be filed by the Claimant ³³ .
Step 10	ASAP after completing Step 9.	Each party must file a signed Certificate of Compliance, a copy of which can be found here ³⁴ .

²³ These Steps are referred to in the DRD Explanatory Note.

²⁴ Parties will therefore have to coordinate to ascertain whether Replies or Rejoinders will be served so that they know the date from which time runs.

²⁵ PD para 7.1.

²⁶ PD para 7.2. The table to be completed is found at Section 1A of the DRD.

²⁷ PD para 7.5.

²⁸ PD para 7.6.

²⁹ PD para 10.5.

³⁰ PD para 10.5.

³¹ PD para 10.6.

³² PD para 10.7.

³³ PD para 10.8.

(v) *The Disclosure Models*

14. Standard disclosure (CPR r. 31.6) is no longer a default option. The Scheme requires parties actively to engage in precisely what form of disclosure is required and to select one of the following five Models³⁵:
 - 14.1. **Model A:** no order for disclosure but known adverse documents must be disclosed.
 - 14.2. **Model B:** no new searches required but parties are required to disclose: (a) key documents on which they rely; (b) key documents to enable the other parties to understand the case they must meet; and (c) adverse documents.
 - 14.3. **Model C:** disclosure given by reference to requests for documents and classes of documents, with the Court determining any issues on the reasonableness of the requests at the CMC. There is still an obligation to disclose known adverse documents, whether specifically requested or not.
 - 14.4. **Model D:** narrow searches must be undertaken for documents that support or adversely affect the claims or defences of the parties. Narrative Documents, i.e. those documents relevant only to background or context³⁶, do not need to be disclosed.
 - 14.5. **Model E:** wide searches must be made for documents likely to support or adversely affect the claims or defences of the parties, and for train of inquiry documents. Such an order will only be appropriate in exceptional cases.
15. The Court will order the Model it considers to be reasonable and proportionate in all the circumstances³⁷.
16. Where no order for Model B, C, D or E disclosure is made the parties must complete a new form of Disclosure Certificate within 60 days of the first CMC, a copy of

³⁴ PD para 10.9.

³⁵ PD para 8.3.

³⁶ PD Appendix 1, para 1.11

³⁷ The PD lays down a number of factors against which the Court will judge reasonableness and proportionality: see para 6.4.

which can be found [here](#)³⁸. Otherwise, that Disclosure Certificate is to be served when Extended Disclosure is given³⁹.

17. A document disclosed late may not be relied upon without the agreement of the parties or the permission of the Court⁴⁰.

(vi) Costs budgets

18. Where costs budgets are required, i.e. for cases where the sums at stake are less than £10m (para D2.3 of the Admiralty & Commercial Courts Guide, 10th ed), the parties must comply with the time limits laid down in CPR r. 3.13. If, however, it is impractical to complete the disclosure section of the Precedent H form in time, it is possible to postpone completion of this section until after the CMC⁴¹.

(vii) Disclosure Guidance Hearings

19. Parties are now able to apply for a Disclosure Guidance Hearing (“**DGH**”) at which the Court will give informal guidance on issues related to disclosure prior to the CMC⁴². It is suggested that DGHs will be a means of overcoming any impasse reached by the parties.
20. The guidance given at the DGH is to be recorded in a short note to be approved by the Court⁴³ and the costs of DGHs are to be costs in the case⁴⁴.
21. The status of the guidance given by the Court at a DGH, particularly if disclosure issues remain at a subsequent CMC, is unclear.

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³⁸ PD para 9.2.

³⁹ PD para 12.1(1).

⁴⁰ PD para 12.5.

⁴¹ PD para 22.2. However, given the potentially draconian consequences for non-compliance with the deadline for a completion of costs budgets (CPR r. 3.14), parties contemplating postponement of part of their Precedent H form should proceed with caution.

⁴² PD para 11.

⁴³ PD para 11.4.

⁴⁴ PD para 11.5.