127th UPDATE – PRACTICE DIRECTION AMENDMENTS

The amendments to the Practice Directions supplementing the Civil Procedure Rules 1998 are made by the Master of the Rolls under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by Chris Philp MP, Parliamentary Under-Secretary of State for Justice, by the authority of the Lord Chancellor.

The amendments to the existing Practice Directions come into force as follows, subject to the transitional provision made in this update—	
Amendment of 107th Update – Transitional Provision	The day after the day on which this Update is approved
Practice Direction 1A – Participation of Vulnerable Parties or Witnesses	6 April 2021
Practice Direction 2E – Jurisdiction of the County Court That May be Exercised by a Legal Adviser	6 April 2021
Practice Direction 2F – Court Sittings	6 April 2021
Practice Direction 3E – Costs Management	6 April 2021
Practice Direction 6B – Service out of the Jurisdiction	6 April 2021
Practice Direction 27 – Small Claims Track	6 April 2021
Practice Direction 45 – Fixed Costs	6 April 2021
Practice Direction 47 – Procedure for Assessment of Costs and Default Provisions	6 April 2021
Practice Direction 51A – Transitional Arrangements	6 April 2021
Practice Direction 51O – Electronic Working Pilot Scheme	6 April 2021
Practice Direction 51U – Disclosure Pilot for the Business and Property Courts	6 April 2021
Practice Direction 51X - New Statement of Costs for Summary Assessment Pilot	30 March 2021
Practice Direction 55C – Coronavirus: Temporary Provision in Relation to Possession Proceedings	The day after the day on which this

	Update is approved
Practice Direction 57AC – Trial Witness Statements in the Business and Property Courts	6 April 2021
Practice Direction 70 – Enforcement of Judgments and Orders	6 April 2021
Practice Direction 70B – Debt Respite Scheme Under the Financial Guidance and Claims Act 2018	6 April 2021
Practice Direction 71 – Orders to Obtain Information from Judgment Debtors	6 April 2021
Practice Direction – (CA: Admiralty Appeals: Assessors), [1965] 1 W.L.R. 853 (1965)	6 April 2021

The Right Honourable Sir Geoffrey Vos
Master of the Rolls and Head of Civil Justice:

Signed by authority of the Lord Chancellor:

Chris Philp MP

Parliamentary Under-Secretary of State for Justice

Ministry of Justice

Date: 28th January 2021

TRANSITIONAL PROVISION

1) The amendments made to Practice Direction 70 – Enforcement of Judgments and Orders and Practice Direction 71 – Orders to Obtain Information from Judgment Debtors do not apply to applications—
    i) in relation to contempt of court; or
    ii) in relation to a writ of sequestration,

that are made before 6 April 2021.

AMENDMENT OF 107th UPDATE – TRANSITIONAL PROVISION

1) Before the paragraphs in the 107th Update headed "TRANSITIONAL PROVISION", insert—

"**TRANSITIONAL PROVISION – GENERAL**

(1) Subject to the provision made for competition, etc., matters, in relation to any case where any of paragraphs (1)(a), (2)(a) and (d) and (3)(d), (e) and (f) of the withdrawal agreement applies, the provisions of any practice direction applicable in relation to that case apply on and after IP completion day as if the changes made by this Update had not been made.

(2) "Withdrawal agreement" and "IP completion day" have the same meaning as in the European Union (Withdrawal Agreement) Act 2020 (see section 39 of that Act)."

2) In the paragraphs headed "TRANSITIONAL PROVISION", for the heading substitute "TRANSITIONAL PROVISION – COMPETITION, ETC. MATTERS".

PRACTICE DIRECTION 1A – PARTICIPATION OF VULNERABLE PARTIES OR WITNESSES

1) Before Practice Direction 2A, insert Practice Direction 1A as set out in Schedule 1 to this Update.

PRACTICE DIRECTION 2E – JURISDICTION OF THE COUNTY COURT THAT MAY BE EXERCISED BY A LEGAL ADVISER

1) In the table which forms the Schedule to Practice Direction 2E, in item 3 in the first column, for "6.15(2)" substitute "6.15(1)".

PRACTICE DIRECTION 2F – COURT SITTINGS

1) In paragraph 2.2, for "paragraph 3.1" substitute "paragraph 2.1".
2) In paragraph 2.3(2), for "paragraph 3.5" substitute "paragraph 2.5(1)".

PRACTICE DIRECTION 3E – COSTS MANAGEMENT

1) In paragraph 4(b), for "budgeted costs" substitute "total costs (incurred and estimated)".

2) In paragraph 10(a), for “interlocutory” substitute “interim”.
3) In the table below paragraph 10, in the section for “Disclosure”, in the second bullet in the final column, for “third party” substitute “non-party”.

PRACTICE DIRECTION 6B – SERVICE OUT OF THE JURISDICTION

1) In paragraph 3.1(6)—
   a) at the end of sub-paragraph (b) insert “or”;
   b) at the end of sub-paragraph (b), for “; or” substitute a full stop; and
   c) omit sub-paragraph (d).

PRACTICE DIRECTION 27 – SMALL CLAIMS TRACK

1) In paragraph 7.3, for “27.14(3)(c) (loss of earnings) and (d)” substitute “27.14(3)(e) (loss of earnings) and (f)”.
2) In Appendix C, for “limit of £200” substitute “limit of £750”.

PRACTICE DIRECTION 45 – FIXED COSTS

1) In paragraph 2A.1(a), for “£90” substitute “£95”.

PRACTICE DIRECTION 47 – PROCEDURE FOR ASSESSMENT OF COSTS AND DEFAULT PROVISIONS

1) For paragraph 19 substitute—

“**19.** Where an offer to settle is made, whether under Part 36 or otherwise, it should specify whether or not it is intended to be inclusive of the cost of preparation of the bill and VAT. An offer which is made otherwise than under Part 36 should specify whether or not it is intended to be inclusive of interest. Unless the offer states otherwise it will be treated as being inclusive of all of these.

(A Part 36 offer is treated as inclusive of interest: see CPR 36.5(4).)"

PRACTICE DIRECTION 51A – TRANSITIONAL ARRANGEMENTS

1) Omit Practice Direction 51A.

PRACTICE DIRECTION 51O – ELECTRONIC WORKING PILOT SCHEME

1) In paragraph 1.1(1)(a), for "2021" substitute "2022".

PRACTICE DIRECTION 51U – DISCLOSURE PILOT FOR THE BUSINESS AND PROPERTY COURTS

1) For Practice Direction 51U, and Appendix 1 and Appendix 2 to that Practice Direction, substitute the amended Practice Direction 51U, Appendix 1, Appendix 2 and Explanatory Notes to Appendix 2 as set out in Schedule 2 to this Update.

PRACTICE DIRECTION 51X – NEW STATEMENT OF COSTS FOR SUMMARY ASSESSMENT PILOT

1) In paragraph 2(a), for "2021" substitute "2022".

PRACTICE DIRECTION 55C – CORONAVIRUS: TEMPORARY PROVISION IN RELATION TO POSSESSION PROCEEDINGS

1) In paragraph 1.1, for "28 March 2021" substitute "30 July 2021".
2) In paragraph 2.6, for "29 January 2021" substitute "30 April 2021".
3) In paragraph 5.3, for "29 January 2021" substitute "30 April 2021".

PRACTICE DIRECTION 57AC – TRIAL WITNESS STATEMENTS IN THE BUSINESS AND PROPERTY COURTS

1) After Practice Direction 57AB, insert Practice Direction 57AC as set out in Schedule 3 to this Update.

PRACTICE DIRECTION 70 – ENFORCEMENT OF JUDGMENTS AND ORDERS

1) For paragraph 1.2 substitute –

> "1.2 In addition the court may make the following orders against a judgment debtor –
>
> (1) an order in contempt proceedings under Part 81, but only if the debtor is found in contempt of court; and
>
> (2) in the High Court, a writ of sequestration in an application under Part 83."

PRACTICE DIRECTION 70B – DEBT RESPITE SCHEME UNDER THE FINANCIAL GUIDANCE AND CLAIMS ACT 2018

1) After Practice Direction 70A, insert Practice Direction 70B as set out in Schedule 4 to this Update.

PRACTICE DIRECTION 71 – ORDERS TO OBTAIN INFORMATION FROM JUDGMENT DEBTORS

1) In the table of contents, for the entries for paragraphs 7.1 and 8.1 substitute –

"

Suspended order punishing a person for non-compliance- rules 71.8(2) and (3)(a)	7.1
Breach of terms on which order is suspended – rule 71.8(3)(b)	8.1

”.

2) For paragraphs 7.1 and 7.2 substitute –

“**Suspended order punishing a person for non-compliance- rules 71.8(2) and (3)(a)**

7.1 An order punishing a person for non-compliance with an order to attend court will be suspended provided the person subsequently attends as required by that order, either before a judge or, if the judge making the suspended order so directs, before a court officer.

7.2 Rule 71.3 and paragraph 3 of this practice direction (service of order) and rule 71.5(1)(a) and (2) (affidavit of service), apply with the necessary changes to such an order.”.

3) For paragraphs 8.1 to 8.6 substitute –

“**Breach of terms on which order is suspended – rule 71.8(3)(b)**

8.1 If—

(1) the judgment debtor fails to attend court at the time and place specified in a suspended order punishing them for non-compliance; and

(2) it appears to the judge or court officer that the judgment debtor has been duly served with the order,

the judge or court officer will certify in writing the debtor’s failure to attend.

8.2 If the judgment debtor fails to comply with any other term on which the order was suspended, the judge or court officer will certify in writing the non-compliance and set out details of it.

8.3 A warrant to bring the judgment debtor before a judge may be issued on the basis of a certificate under paragraph 8.1 or 8.2.

8.4 The hearing under rule 71.8(3)(b) may take place before a Master or District Judge.

8.5 At the hearing the judge will discharge the order imposing punishment unless satisfied beyond reasonable doubt that—

(1) the judgment debtor has failed to comply with—

(a) the original order to attend court; and

(b) the terms on which the order imposing punishment was suspended; and

(2) both orders have been duly served on the judgment debtor.

8.6 If the judge decides that the order imposing punishment should not be discharged, it will be enforceable immediately. Rules 81.9 and 81.10 make provision for enforcement of orders punishing a person for contempt of court.".

PRACTICE DIRECTION – (CA: ADMIRALTY APPEALS: ASSESSORS) [1965] 1 W.L.R. 853 (1965)

1) The Practice Direction – (CA: Admiralty Appeals: Assessors) [1965] 1 W.L.R. 853 (1965) is revoked.

SCHEDULE 1

PRACTICE DIRECTION 1A – PARTICIPATION OF VULNERABLE PARTIES OR WITNESSES

This practice direction supplements CPR Part 1

1. The overriding objective requires that, in order to deal with a case justly, the court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence. The parties are required to help the court to further the overriding objective at all stages of civil proceedings.

2. Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case.

3. A person should be considered as vulnerable when a factor – which could be personal or situational, permanent or temporary – may adversely affect their participation in proceedings or the giving of evidence.

4. Factors which may cause vulnerability in a party or witness include (but are not limited to)—

i. Age, immaturity or lack of understanding;
ii. Communication or language difficulties (including literacy);
iii. Physical disability or impairment, or health condition;
iv. Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties);
v. The impact on them of the subject matter of, or facts relevant to, the case (an example being having witnessed a traumatic event relating to the case);
vi. Their relationship with a party or witness (examples being sexual assault, domestic abuse or intimidation (actual or perceived));
vii. Social, domestic or cultural circumstances.

5. When considering whether a factor may adversely affect the ability of a party or witness to participate in proceedings and/or give evidence, the court should consider their ability to—

(a) understand the proceedings and their role in them;
(b) express themselves throughout the proceedings;
(c) put their evidence before the court;
(d) respond to or comply with any request of the court, or do so in a timely manner;
(e) instruct their representative/s (if any) before, during and after the hearing; and
(f) attend any hearing.

6. The Court, with the assistance of the parties, should try to identify vulnerability of parties or witnesses at the earliest possible stage of proceedings and to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result.

7. If the court decides that a party's or witness's ability to participate fully and/or give best evidence is likely to be diminished by reason of vulnerability, the court may identify the nature of the vulnerability in an order and may order appropriate provisions to be made to further the overriding objective.

8. Subject to the nature of any vulnerability having been identified and appropriate provisions having been made, the court should consider ordering "ground rules" before a vulnerable witness is to give evidence, to determine what directions are necessary in relation to the nature and extent of that evidence, the conduct of the advocates and/or the parties in respect of the evidence of that person, and/or any necessary support to be put in place for that person.

SCHEDULE 2

PRACTICE DIRECTION 51U - DISCLOSURE PILOT FOR THE BUSINESS AND PROPERTY COURTS

1. General

1.1 This Practice Direction is made under rule 51.2 and provides a pilot scheme for disclosure in the Business and Property Courts. Section I provides a new scheme for disclosure.

1.2 The Commencement Date is 1 January 2019. The pilot applies from the Commencement Date for three years to existing and new proceedings in the Business and Property Courts of England and Wales and the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle. For the avoidance of doubt, it does not apply in the County Court although this may be reviewed in the course of the pilot.

1.3 The pilot shall not disturb an order for disclosure made before the Commencement Date or before the transfer of proceedings into a Business and Property Court, unless that order is varied or set aside. If proceedings are transferred out of one of the Business and Property Courts into a court that is not one of the Business and Property Courts, any order for disclosure made under the pilot will stand unless and until any other order is made by the transferee court.

1.4 The pilot shall not, unless otherwise ordered, apply to proceedings which are—

(1) a Competition claim as defined in Practice Direction 31C;

(2) a Public Procurement claim;

(3) within the Intellectual Property and Enterprise Court;

(4) within the Admiralty Court;

(5) within the Shorter and Flexible Trials Schemes; or

(6) within a fixed costs regime or a capped costs regime.

1.5 In the Patents Court, PD63 paragraphs 6.1 to 6.3 will continue to apply under the pilot with the following modification: unless the court expressly orders otherwise, no provision in this practice direction nor any disclosure order made under this pilot will take effect as requiring disclosure wider than is provided for in PD 63 paragraph 6.1.

1.6 The pilot will continue to apply after the end of the three year period to any proceedings to which it applied at that point.

1.7 For the purposes of the pilot, where the provisions of this Practice Direction conflict with other provisions of the rules or other Practice Directions, this Practice Direction shall take precedence.

1.8 Terms in Section I of this Practice Direction shall have the meaning given to them in the schedule of definitions at Appendix 1.

1.9 Save for those provisions of CPR Part 31 that are set out in Section II, and the related provisions of Practice Directions 31A and 31B, CPR Part 31 and Practice Directions 31A and 31B shall not apply to any proceedings falling within the pilot.

1.10 Save that references in Section II to an Electronic Documents Questionnaire should be treated as references to the Disclosure Review Document, nothing in this Practice Direction is intended to change the application or working of those provisions of CPR Part 31 that are set out in Section II and the related provisions of Practice Directions 31A and 31B, and CPR Part 31 as a whole should still be used to interpret those provisions.

SECTION I

2. Principles, “document”, “adverse” and “known adverse documents”

2.1 Disclosure is important in achieving the fair resolution of civil proceedings. It involves identifying and making available documents that are relevant to the issues in the proceedings.

2.2 For the purpose of disclosure, the term “document” includes any record of any description containing information. The term is further defined below.

2.3 The court expects the parties (and their representatives) to cooperate with each other and to assist the court so that the scope of disclosure, if any, that is required in proceedings can be agreed or determined by the court in the most efficient way possible.

2.4 The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in paragraph 7.3).

2.5 A "document" may take any form including but not limited to paper or electronic; it may be held by computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings.

2.6 In addition to information that is readily accessible from computer systems and other electronic devices and media, the term "document" extends to information that is stored on servers and back-up systems and electronic information that has been 'deleted'. It also extends to metadata, and other embedded data which is not typically visible on screen or a print out.

2.7 Disclosure extends to "adverse" documents. A document is "adverse" if it or any information it contains 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 on an issue in dispute.

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

2.9 For this purpose a company or organisation is "aware" 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.

3. Duties in relation to disclosure

3.1 A person who knows that it is or may become a party to proceedings that have been commenced or who knows that it may become a party to proceedings that may be commenced is under the following duties ("the Disclosure Duties") to the court—

(1) to take reasonable steps to preserve documents in its control that may be relevant to any issue in the proceedings;

(2) once proceedings have commenced against it or by it , to disclose, regardless of any order for disclosure made, known adverse documents, unless they are privileged. The latest time(s) for disclosing known adverse documents are those set out in paragraphs 9.1 to 9.3);

(3) to comply with any order for disclosure made by the court;

(4) to undertake any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search;

(5) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and

(6) to use reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure in the proceedings.

3.2 Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, are under the following duties to the court—

(1) to take reasonable steps to preserve documents within their control that may be relevant to any issue in the proceedings;

(2) to take reasonable steps to advise and assist the party to comply with its Disclosure Duties;

(3) to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology;

(4) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and

(5) to undertake a review to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained.

3.3 The duties under paragraph 3.1 and 3.2 above are continuing duties that last until the conclusion of the proceedings (including any appeal) or until it is clear there will be no proceedings.

3.4 Where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any further order that the court may make.

4. Preservation of documents

4.1 Documents to be preserved in accordance with the duties under paragraph 3.1(1) and 3.2(1) above include documents which might otherwise be deleted or destroyed in accordance with a document retention policy or in the ordinary course of business. Preservation includes, in suitable cases, making copies of sources and documents and storing them.

4.2 The duty under paragraph 3.1(1) and 3.2(1) includes—

(1) an obligation to suspend relevant document deletion or destruction processes for the duration of the proceedings;

(2) in accordance with paragraph 4.3 below, an obligation to send a written notification in any form to relevant employees and former employees of the party where there are reasonable grounds for believing that the employee or former employee may be in possession of disclosable documents which are not also in the party's possession; and

(3) an obligation to take reasonable steps so that agents or third parties who may hold documents on the party's behalf do not delete or destroy documents that may be relevant to an issue in the proceedings.

4.3 A written notification under paragraph 4.2 above should—

(1) identify the documents or classes of documents to be preserved; and

(2) notify the recipient that they should not delete or destroy those documents and should take reasonable steps to preserve them.

4.4 Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, must within a reasonable period of being instructed—

(1) notify their client of the need to preserve documents and of their obligations under paragraph 3.1 above; and

(2) obtain written confirmation from their client or an appropriate representative of their client that their client has taken the steps required under paragraphs 4.2 and 4.3 above.

4.5 Each party must confirm in writing (and may do so by their legal representative) when serving their particulars of claim or defence (as appropriate), that steps have been taken to preserve relevant documents in accordance with the duties under paragraph 3.1(1) and 3.2(1) above, and as required by paragraph 4.1 to 4.4 above.

5. Initial Disclosure

5.1 Save as provided below, and save in the case of a Part 7 claim form without particulars of claim or a Part 8 claim form, each party must provide to all other parties at the same time as its statement of case an Initial Disclosure List of Documents that lists and is accompanied by copies of—

(1) the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and

(2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

5.2 This form of disclosure is known as "Initial Disclosure".

5.3 Initial Disclosure is not required where—

(1) the parties have agreed to dispense with it (see paragraph 5.8 below);

(2) the court has ordered that it is not required (see paragraph 5.10 below); or

(3) a party concludes and states in writing, approaching the matter in good faith, that giving Initial Disclosure would involve it or any other party providing (after removing duplicates, and including documents referred to at paragraph 5.4(3)(a)) more than (about) whichever is the larger of 1000 pages or 200 documents (or such higher but reasonable figure as the parties may agree), at which point the requirement to give Initial Disclosure ceases for all parties for the purposes of the case.

Documents comprising media not in page form are not included in the calculation of the page or document limit at (3) but, where provided pursuant to a requirement to give Initial Disclosure, should be confined strictly to what is necessary to comply with paragraph 5.1 above.

5.4 A party giving Initial Disclosure—

(1) is under no obligation to undertake a search for documents beyond any search it has already undertaken or caused to be undertaken for the purposes of the proceedings (including in advance of the commencement of the proceedings);

(2) should briefly describe in its Initial Disclosure List of Documents any searches just mentioned;

(3) need not provide unless requested documents by way of Initial Disclosure if such documents—

(a) have already been provided to the other party, whether by disclosure before proceedings start (see CPR 31.16) or through pre-action correspondence or otherwise in the period following intimation of the proceedings (and including when giving Initial Disclosure with a statement of case that is being amended); or

(b) are known to be or have been in the other party's possession;

(4) need not disclose adverse documents.

5.5 Unless otherwise ordered, or agreed between the parties, copies of documents shall be provided in electronic form for the purpose of Initial Disclosure. The Initial Disclosure List of Documents should be filed but the documents must not be filed.

5.6 In proceedings where a statement of case is to be served on a defendant out of the jurisdiction Initial Disclosure is not required in respect of that defendant unless and until that defendant files an acknowledgement of service that does not contest the jurisdiction, or files a further acknowledgement of service under CPR 11(7)(b).

5.7 For the avoidance of doubt, Initial Disclosure does not require any document to be translated.

5.8 The parties may agree in writing, before or after the commencement of proceedings, to dispense with, or defer, Initial Disclosure. They may also agree to dispense with the requirement to produce an Initial Disclosure List of Documents. Each party should record its respective reasons for any agreement, so that those reasons may be available to the court, on request, at any case management conference. The court may set aside an agreement to dispense with or defer Initial Disclosure if it considers that Initial Disclosure is likely to provide significant benefits and the costs of providing Initial Disclosure are unlikely to be disproportionate to such benefits.

5.9 The court shall disregard any prior agreement to dispense with Initial Disclosure when considering whether to order Extended Disclosure.

5.10 A party may apply to the court for directions limiting or abrogating the obligation to provide Initial Disclosure. In particular, if a party is requested but does not agree to dispense with Initial Disclosure, the requesting party may apply to the court with notice to the other party for directions limiting or abrogating the obligation to provide Initial Disclosure if it considers compliance with the obligation will incur disproportionate cost or be unduly complex. Such an application must be made by application notice, supported by evidence where necessary, and, save in exceptional cases, will be dealt with without a hearing or at a short telephone hearing.

5.11 In an appropriate case the court may, on application, and whether or not Initial Disclosure has been given, require a party to disclose documents to another party where that is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply.

5.12 A complaint about Initial Disclosure shall be dealt with at the first case management conference unless, exceptionally and on application, the court considers that the issue should be resolved at an earlier hearing.

5.13 A significant failure to comply with the obligation to provide Initial Disclosure may be taken into account by the court when considering whether to make an order for Extended Disclosure and the terms of such an order. It may also result in an adverse order for costs.

5.14 For the avoidance of doubt, nothing in this paragraph affects the operation of paragraph 7.3 of Practice Direction 16.

6. Extended Disclosure

6.1 A party wishing to seek disclosure of documents in addition to, or as an alternative to, Initial Disclosure must request Extended Disclosure. No application notice is required. However, the parties will be expected to have completed the Disclosure Review Document pursuant to paragraphs 7 and following below.

6.2 The court will determine whether to order Extended Disclosure at the first case management conference or, if directed by the court, at another hearing convened for that purpose or without a hearing.

6.3 Save where otherwise provided, Extended Disclosure involves using Disclosure Models (see paragraph 8 below) after Issues for Disclosure have been identified (see paragraph 7 below). The court will only make an order for Extended Disclosure that is search-based (ie Models C, D and/or E) where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.

6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—

(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

6.5 A request for search-based Extended Disclosure (ie Models C, D and/or E) must specify which of the Disclosure Models listed in paragraph 8 below is proposed for each Issue for Disclosure defined in paragraph 7 below. It is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable and proportionate (as defined in paragraph 6.4). Where Disclosure Model D or E is proposed parties should be ready to explain to the court why Disclosure Model C is not sufficient.

6.6 The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that increases cost through undue complexity.

7. Identifying the Issues for Disclosure

7.1 Within 28 days of the final statement of case each party should state, in writing, whether or not it is likely to request search-based Extended Disclosure to include one or more of Models C, D or E (see paragraph 8 below) on one or more issues in the case. At this point it should not particularise the Model(s) or the issue(s) in the case.

7.2 Where one or more of the parties has indicated it is likely to request search-based Extended Disclosure (i.e. Models C, D and/or E), the claimant must within 42 days of the final statement of case, prepare and serve on the other parties a draft List of Issues for Disclosure unless the equivalent of such a list has already been agreed between the parties (for example, as part of a fuller list of issues). A List of Issues for Disclosure is not required if the parties are agreed that Extended Disclosure is to be confined to Models A and B. The List of Issues for Disclosure should be set out using Section 1A of the Disclosure Review Document (see further paragraph 10 below).

7.3 "Issues for Disclosure" means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission.

7.4 The claimant should seek to ensure that the draft List of Issues for Disclosure provides a fair and balanced summary of the key areas of dispute identified by the parties' statements of case and in respect of which it is likely that one or other of the parties will be seeking search-based Extended Disclosure.

7.5 In the event that a particular Issue for Disclosure has not been included in the List of Issues for Disclosure, or is described in a manner that is unacceptable to the defendant, using Section 1A of the Disclosure Review Document the defendant should provide the claimant with its proposed wording or alternative wording for inclusion in the draft List of Issues for Disclosure as soon as practicable but in any event no later than 14 days after service of the draft List of Issues for Disclosure.

7.6 In advance of the first case management conference, the parties must discuss and seek to agree the draft List of Issues for Disclosure. They should consider whether any draft Issue for Disclosure can be removed. For each Issue for Disclosure that is maintained, the parties should indicate at this point, using Section 1A of the Disclosure Review Document, which Model of Extended Disclosure is sought for each party. Where Model C Disclosure is contemplated the parties should discuss the requests that might apply for the purpose of that disclosure (see further paragraph 10.4 below).

7.7 The List of Issues for Disclosure may be revised or supplemented at any time prior to or following the case management conference, including as a result of statements of case or amended statements of case subsequently served or discussions between the parties in relation to the Disclosure Review Document.

7.8 If the parties are (subject to the court) agreed that there are preliminary issues suitable for determination before other issues in the case, or that the case should be divided into stages, the parties may apply to the court before any case management conference for an order for the trial of those issues or for trial in stages (and related directions), and they may agree in writing to limit the work towards disclosure required by this Practice Direction until that application has been heard.

7.9 In an appropriate case where the claimant is acting in person and a defendant is not the court may request the legal representatives of the defendant to lead on the preparation of the List of Issues for Disclosure.

8. The Extended Disclosure Models

8.1 Extended Disclosure may take the form of one or more of the Disclosure Models set out below.

8.2 There is no presumption that a party is entitled to Extended Disclosure, and in particular to Model D or Model E disclosure. No Model will apply without the approval of the court.

8.3 The court may order that Extended Disclosure be given using different Disclosure Models for different Issues for Disclosure in the case. In the interests of avoiding undue complexity the court will rarely require different Models for the same set of documents. The court may also order that Extended Disclosure be given by only one party, or that different Models are to apply to each party's Disclosure on a particular Issue for Disclosure.

Model A: Disclosure confined to known adverse documents

The court may order that the only disclosure required in relation to some or all of the Issues for Disclosure is of known adverse documents in accordance with the (continuing) duty under paragraph 3.1(2) above.

Model B: Limited Disclosure

(1) The court may order the parties to disclose (where and to the extent that they have not already done so by way of Initial Disclosure, and without limit as to quantity)—

(a) the key documents on which they have relied (expressly or otherwise) in support of the claims or defences advanced in their statement(s) of case; and

(b) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet;

and in addition to disclose known adverse documents in accordance with their (continuing) duty under paragraph 3.1(2) above.

(2) A party giving Model B Disclosure is under no obligation to undertake a search for documents beyond any search already conducted for the purposes of obtaining advice on its claim or defence or preparing its statement(s) of case. Where it does undertake a search however then the (continuing) duty under paragraph 3.1(2) will apply.

Model C: Request-led search-based disclosure

(1) The court may order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure, by reference to requests set out in or to be set out in Section 1B of the Disclosure Review Document or otherwise defined by the court.

(2) If the parties cannot agree that disclosure should be given, or the disclosure to be given, pursuant to a request, then the requesting party must raise the request at the case management conference. The court will determine whether the request is reasonable and proportionate and may either order the disclosing party to search for the documents requested, refuse the request, or order the disclosing party to search for a narrower class of documents than that requested. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document.

(3) For the avoidance of doubt, a party giving Model C Disclosure must still comply with the duty under paragraph 3.1(2) above to disclose known adverse documents; these will include any arising from the search directed by the court.

Model D: Narrow search-based disclosure, with or without Narrative Documents

(1) Under Model D, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure.

(2) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D disclosure has been ordered. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document.

(3) The order should specify whether a party giving Model D disclosure is to search for and disclose Narrative Documents. If the order does not so specify, Narrative Documents should not be disclosed.

(4) For the avoidance of doubt, a party giving Model D Disclosure must still comply with the duty under paragraph 3.1(2) above to disclose known adverse documents; these will include any arising from the search directed by the court.

Model E: Wide search-based disclosure

(1) Under Model E, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure (because those other documents are likely to support or adversely affect the party's own claim or defence or that of another party in relation to one or more of the Issues for Disclosure).

(2) Model E is only to be ordered in an exceptional case.

(3) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model E Disclosure has been ordered. The scope of the search will be determined by the court using the information provided in the Disclosure Review Document and is likely to be broader than that ordered for Model D Disclosure.

(4) Narrative Documents must also be searched for and disclosed, unless the court otherwise orders.

(5) For the avoidance of doubt, a party giving Model E Disclosure must still comply with the duty under paragraph 3.1(2) above to disclose known adverse documents; these will include any arising from the search directed by the court.

9. Other provisions concerning Disclosure Models

9.1 Where an order for Model B, C, D or E Extended Disclosure is made on one or more Issues for Disclosure, any known adverse documents to be disclosed in compliance with the duty under paragraph 3.1(2) above and not already disclosed must be disclosed at the time ordered for that Extended Disclosure.

9.2 In a case where no order for Model C, D or E Extended Disclosure is made in respect of a party on any Issue for Disclosure (so that the only disclosure has been Initial Disclosure or Model A and/or B Extended Disclosure) that party must within 60 days of the first case management conference provide a Disclosure Certificate certifying that all known adverse documents have been disclosed.

9.3 The provisions of paragraph 8 and this paragraph 9 do not affect the fact that the duty under paragraph 3.1(2) above is a continuing duty as provided by paragraph 3.3 above: if adverse documents in the control of a party come to its knowledge at a later date they must (unless privileged) be disclosed without delay.

9.4 The court may make an order for Extended Disclosure in stages.

9.5 When it is necessary to decide any question of what is reasonable and proportionate under a particular Disclosure Model, the court will consider all the circumstances of the case including the factors set out in paragraph 6.4 above and the overriding objective.

9.6 Where the Disclosure Model requires searches to be undertaken, the parties must discuss and seek to agree, and the court may give directions, on the following matters with a view to reducing the burden and cost of the disclosure exercise—

(1) that the scope of the searches which the disclosing parties are required to undertake be limited to—

(a) particular date ranges and custodians of documents;

(b) particular classes of documents and/or file types;

(c) specific document repositories and/or geographical locations;

(d) specific computer systems or electronic storage devices;

(e) documents responsive to specific keyword searches, or other automated searches (by reference, if appropriate, to individual custodians, creators, repositories, file types and/or date ranges, concepts);

(2) if Narrative Documents are to be excluded, how that is to be achieved in a reasonable and proportionate way;

(3) the use of—

(a) software or analytical tools, including technology assisted review software and techniques;

(b) coding strategies, including to reduce duplication.

(4) prioritisation and workflows.

9.7 In making an order for Extended Disclosure, the court may include any provision that is appropriate including provision for all or any of the following—

(1) requiring the use of specified software or analytical tools;

(2) identifying the methods to be used to identify duplicate or near-duplicate documents and remove or reduce duplicate documents;

(3) requiring the use of data sampling;

(4) specifying the format in which documents are to be disclosed;

(5) identifying the methods that the court regards as sufficient to be used to identify privileged documents and other non-disclosable documents;

(6) the use of a staged approach to the disclosure of electronic documents;

(7) excluding certain classes of document from the disclosure ordered.

9.8 In considering Extended Disclosure as well as when complying with an order for Extended Disclosure the parties should have regard to the guidance set out in Section 3 of the Disclosure Review Document.

9.9 In an appropriate case, the court may order that the question of which party bears the costs of disclosure is to be given separate consideration at a later stage rather than the costs being treated automatically as costs in the case;

9.10 For the avoidance of doubt, Extended Disclosure does not require any document to be translated.

10. Completion of the Disclosure Review Document

10.1 The Disclosure Review Document is the document by which the parties must identify, discuss and seek to agree the scope of any Extended Disclosure sought of Model C, D or E, and provide that information in due course to the court.

10.2 In a complex case the format of the Disclosure Review Document may be modified as required in order that information is exchanged and in due course provided to the court in an efficient, convenient and helpful format. In cases where there is likely to be limited disclosure or the identification and retrieval of documents is straightforward, not every section of the Disclosure Review Document will need to be completed.

10.3 The parties' obligation to complete, seek to agree and update the Disclosure Review Document is ongoing. If a party fails to co-operate and constructively to engage in this process the other party or parties may apply to the court for an appropriate order at or separately from the case management conference, and the court may make any appropriate order including the dismissal of any application for Extended Disclosure and/or the adjournment of the case management conference with an adverse order for costs.

10.4 Any party proposing Model C Extended Disclosure must complete Section 1B of the Disclosure Review Document and provide it to the other parties no later than 28 days after the defendant has responded in accordance with paragraph 7.5 above to the claimant's draft List of Issues for Disclosure. Any party provided with a completed Section 1B in this way must respond within 14 days by completing the "response" column either agreeing to the request or giving concise reasons for not agreeing to the request.

10.5 Having agreed the List of Issues for Disclosure and exchanged proposals on Model(s) for Extended Disclosure, the parties should prepare and exchange drafts of Section 2 of the Disclosure Review Document (including costs estimates of different proposals, and where possible estimates of likely amount of documents involved) as soon as reasonably practicable and in any event not later than 14 days before the case management conference. Section 2 of the Disclosure Review Document should be completed only if any party is seeking an order for search-based Extended Disclosure (i.e. Models C, D and/or E).

10.6 The parties must seek to resolve any disputes over the scope of any Extended Disclosure sought in advance of the first case management conference. Any disputes which have not been resolved will normally be decided by the court at the first case management conference.

10.7 A finalised single joint Disclosure Review Document should be filed by the claimant not later than 5 days before the case management conference. Related correspondence and earlier drafts should not ordinarily be filed.

10.8 The parties must each file a signed Certificate of Compliance substantially in the form set out in Appendix 3 as soon as reasonably practicable after the claimant has filed the finalised single joint Disclosure Review Document but in any event in advance of the case management conference.

10.9 In an appropriate case where the claimant is acting in person and a defendant is not the court may request the legal representatives of the defendant to lead on the preparation and filing of the Disclosure Review Document.

11. Disclosure Guidance Hearings

11.1 The parties may seek guidance from the court by way of a short discussion with the court on any point concerning the operation of the pilot in a particular case, where—

(1) the parties have made real efforts to address the point between them;

(2) the point requires guidance rather than a ruling; and

(3) the point is suitable for the maximum hearing length and maximum time for pre-reading provided at paragraph 11.2.

11.2 A Disclosure Guidance Hearing may be fixed by issuing an application notice, before or after a case management conference. The application notice should contain a statement identifying the point and confirming the matters at (1) to (3) of paragraph 11.1 above. Evidence will not normally be required for a Disclosure Guidance Hearing and an early hearing will be offered where possible. The application will ordinarily have a maximum hearing length of 30 minutes and a maximum time of 30 minutes for pre-reading. However, where suitable the Court may decide to deal with the application on the documents and without an oral hearing. The Court may also direct a longer maximum hearing length or time for pre-reading , if required.

11.3 At a Disclosure Guidance Hearing the court will generally expect a legal representative with direct responsibility for the conduct of disclosure to be the person who participates on behalf of each party in the discussion.

11.4 The guidance given at a Disclosure Guidance Hearing will be recorded in a short note, to be approved by the court. Whilst the primary function of the Disclosure Guidance Hearing is to provide guidance (see paragraph 11.1(2) above), for the avoidance of doubt the court may, where appropriate, make an order at a Disclosure Guidance Hearing.

11.5 Unless otherwise ordered, the costs of a Disclosure Guidance Hearing are costs in the case and no order from the court to that effect is required.

12. Complying with an order for Extended Disclosure

12.1 An order for Extended Disclosure is complied with by undertaking the following steps—

(1) service of a Disclosure Certificate substantially in the form set out in Appendix 4 signed by the party giving disclosure, to include a statement supported by a statement of truth signed by the party or an appropriate person at the party that all known adverse documents have been disclosed;

(2) service of an Extended Disclosure List of Documents (unless dispensed with, by agreement or order); and

(3) production of the documents which are disclosed over which no claim is made to withhold production or (if the party cannot produce a particular document) compliance with paragraph 12.3.

12.2 The order for Extended Disclosure will not have been complied with until each step specified in paragraph 12.1 has taken place.

12.3 If a party cannot produce a particular document (because the document no longer exists, the party no longer has it in its possession or for any other reason) the disclosing party is required to describe each such document with reasonable precision and explain with reasonable precision the circumstances in which, and the date when, the document ceased to exist or left its possession or the other reason for non-production. If it is not possible to identify individual documents, the class of documents must be described with reasonable precision.

12.4 In the case of a company, firm, association or other organisation, or where the Disclosure Certificate is signed by a party on behalf of other parties, the certificate must—

(1) identify the person signing the Disclosure Certificate; and

(2) explain why she or he is considered to be an appropriate person to sign it.

12.5 A party may not without the permission of the court or agreement of the parties rely on any document in its control that it has not disclosed at the time required for Extended Disclosure (or within 60 days after the first case management conference in a case where there will be no Extended Disclosure). For the avoidance of doubt the party and its legal representatives remain under the duties under paragraph 3.1 (the Disclosure Duties) and 3.2 above.

12.6 Without prejudice to paragraph 11 and paragraphs 13 to 19, a party may apply to the court for an order giving directions about any aspect of search based disclosure under Models C, D and/or E including directions about the scope of searches, the manner in which searches are to be carried out and the use of technology.

13. Production of documents

13.1 Save where otherwise agreed or ordered, a party shall produce—

(1) disclosable electronic documents to the other parties by providing electronic copies in the documents' native format, in a manner which preserves metadata; and

(2) (save as provided by paragraph 5.5 above in the case of Initial Disclosure) disclosable hard copy documents by providing scanned versions or photocopied hard copies.

13.2 Electronic documents should generally be provided in the form which allows the party receiving the documents the same ability to access, search, review and display the documents (including metadata) as the party providing them.

13.3 A party should provide any available searchable OCR versions of electronic documents with the original, unless they have been redacted. If OCR versions are provided, they are provided on an "as is" basis, with no assurance to the other party that the OCR versions are complete or accurate.

13.4 A party should not disclose more than one copy of a document unless additional copies contain or bear modifications, obliterations or other markings or features which of themselves cause those additional copies to fall within a party's Initial or Extended Disclosure obligations.

14. Right to withhold production of documents (other than public interest immunity)

14.1 A person who wishes to claim a right or duty (other than on the basis of public interest immunity) to withhold disclosure or production of a document, or part of a document, or a class of documents which would otherwise fall within its obligations of Initial Disclosure or Extended Disclosure may exercise that right or duty without making an application to the court subject to—

(1) describing the document, part of a document or class of document; and

(2) explaining, in the Disclosure Certificate, the grounds upon which the right or duty is being exercised.

A claim to privilege may (unless the court otherwise orders) be made in a form that treats privileged documents as a class, provided always that paragraph 3.2(5) is complied with.

14.2 A party who wishes to challenge the exercise of a right or duty to withhold disclosure or production must apply to the court by application notice supported where necessary by a witness statement.

14.3 The court may inspect the document or samples of the class of documents if that is necessary to determine whether the claimed right or duty exists or the scope of that right or duty.

15. Confidentiality

If there are material concerns over the confidentiality of a document (whether the confidentiality benefits a party to the proceedings or a third party), the court may order disclosure to a limited class of persons, upon such terms and subject to such conditions as it thinks fit. The court may make further orders upon the request of a party, or on its own initiative, varying the class of persons, or varying the terms and conditions previously ordered, or removing any limitation on disclosure.

16. Redaction

16.1 A party may redact a part or parts of a document on the ground that the redacted data comprises data that is—

(1) irrelevant to any issue in the proceedings, and confidential; or

(2) privileged.

16.2 Any redaction must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process. A party wishing to challenge the redaction of data must apply to the court by application notice supported where necessary by a witness statement.

17. Failure adequately to comply with an order for Extended Disclosure

17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—

(1) serve a further, or revised, Disclosure Certificate;

(2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;

(3) provide a further or improved Extended Disclosure List of Documents;

(4) produce documents; or

(5) make a witness statement explaining any matter relating to disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).

17.3 An application for any order under paragraph 17.1 should normally be supported by a witness statement.

18. Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents

18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

18.3 An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.

18.4 The court's powers under this paragraph include, but are not limited to, making an order for disclosure in the form of Models A to E and requiring a party to make a witness statement explaining any matter relating to disclosure.

19. Restriction on use of a privileged document which has been inadvertently produced

19.1 Where a party inadvertently produces a privileged document, the party who has received the document may use it or its contents only with the permission of the court.

19.2 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.

20. Sanctions

20.1 Throughout disclosure the court retains its full powers of case management and the full range of sanctions available to it.

20.2 If a party has failed to comply with its obligations under this pilot including by—

(1) failing to comply with any procedural step required to be taken;

(2) failing to discharge its Disclosure Duties; or

(3) failing to cooperate with the other parties, including in the process of seeking to complete, agree and update the Disclosure Review Document,

the court may adjourn any hearing, make an adverse order for costs or order that any further disclosure by a party be conditional on any matter the court shall specify. This provision does not limit the court's power to deal with the failure as a contempt of court in an appropriate case.

21. Documents referred to in evidence

21.1 A party may at any time request a copy of a document which has not already been provided by way of disclosure but is mentioned in—

(1) a statement of case;

(2) a witness statement;

(3) a witness summary;

(4) an affidavit; or

(5) an expert's report.

21.2 Copies of documents mentioned in a statement of case, witness evidence or an expert's report and requested in writing should be provided by agreement unless the request is unreasonable or a right to withhold production is claimed.

21.3 A document is mentioned where it is referred to, cited in whole or in part or there is a direct allusion to it.

21.4 Subject to rule 35.10(4), the court may make an order requiring a document to be produced if it is satisfied such an order is reasonable and proportionate (as defined in paragraph 6.4).

22. Cost

22.1 The parties are required to provide an estimate of what they consider to be the likely costs of giving the disclosure proposed by them in the Disclosure Review Document, and the likely volume of documents involved, in order that a court may consider whether such proposals on disclosure are reasonable and proportionate (as defined in paragraph 6.4). These estimated costs may be used by the court in the cost budgeting process.

22.2 In cases where the cost budgeting scheme applies, if it is not practical to complete the disclosure section of Form H in relation to disclosure prior to the court making an order in relation to disclosure at the case management conference, the parties may notify the court that they have agreed to postpone completion of that section of Form H until after the case management conference. If they have agreed to postpone they must complete the disclosure section within such period as is ordered by the court after an order for disclosure has been made at the case management conference. Where possible the court will then consider (and if appropriate, approve) that part of the cost budget without an oral hearing.

23. False Disclosure Certificates

23.1 Proceedings for contempt of court may be brought against a person who signs, or causes to be signed by another person, a false Disclosure Certificate without an honest belief in its truth.

SECTION II

Disclosure before proceedings start

31.16.—(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to—

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must—

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents—

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may—

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection.

Orders for disclosure against a person not a party

31.17.—(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the proceedings or to save costs.

(4) An order under this rule must—

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require the respondent, when making disclosure, to specify any of those documents—

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may—

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and
(b) specify the time and place for disclosure and inspection.

Rules not to limit other powers of the court to order disclosure

31.18.—Rules 31.16 and 31.17 do not limit any other power which the court may have to order—

(a) disclosure before proceedings have started; and

(b) disclosure against a person who is not a party to proceedings.

Claim to withhold inspection or disclosure of a document (public interest immunity)

31.19.—(1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest.

(2) Unless the court orders otherwise, an order of the court under paragraph (1)—

(a) must not be served on any other person; and

(b) must not be open to inspection by any person.
…

(8) This Part does not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest.

Subsequent use of disclosed documents and completed Electronic Documents Questionnaires

31.22.—(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or(c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made—

(a) by a party; or

(b) by any person to whom the document belongs.

(4) For the purpose of this rule, an Electronic Documents Questionnaire which has been completed and served by another party pursuant to Practice Direction 31B is to be treated as if it is a document which has been disclosed.

Appendix 1 to Practice Direction 51U

Definitions for the purpose of Section I

1.1 “Control” in the context of disclosure includes documents: (a) which are or were in a party’s physical possession; (b) in respect of which a party has or has had a right to possession; or (c) in respect of which a party has or has had a right to inspect or take copies.

1.2 “Copy” means a facsimile of a document either in the same format as the document being copied or in a similar format that is readable by the recipient, and in all cases having identical content.

1.3 “Data Sampling” means the process of checking data by identifying and checking representative individual documents.

1.4 “Disclose” comprises a party stating that a document that is or was in its control has been identified or forms part of an identified class of documents and either producing a copy, or stating why a copy will not be produced.

1.5 “Disclosure Certificate” means a certificate that is substantially in the form set out in Appendix 3 and signed in accordance with the Practice Direction.

1.6 “Disclosure Review Document” means the Disclosure Review Document at Appendix 2 which is to be completed by the parties pursuant to the Practice Direction, in respect of any application for Extended Disclosure.

1.7 “Electronic Image” means an electronic representation of a paper document.

1.8 “Keyword Search” means a software-aided search for words across the text of an electronic document.

1.9 “List of Documents” means a list of documents in chronological order (or if appropriate classes of documents in chronological order), identifying each document with a clear description including the date and, where applicable any author, sender or recipient. Where appropriate the list must distinguish between documents which exist and those that no longer exist.

1.10 “Metadata” means data about data. In the case of an electronic document, metadata is typically embedded information about the document which is not readily accessible once the native electronic document has been converted into an electronic image or paper document. It may include (for example) the date and time of creation or modification of a word-processing file, or the author and the date and time of sending an e-mail. Metadata may be created automatically by a computer system or manually by a user.

1.11 “Narrative Document” means a document which is relevant only to the background or context of material facts or events, and not directly to the Issues for Disclosure; for the avoidance of doubt an adverse document (as defined at paragraph 2.6) is not to be treated as a Narrative Document

1.12 “Native Electronic Document” or “Native Format” means an electronic document stored in the original form in which it was created by a computer software program;

1.13 “Optical Character Recognition” (OCR) means the computer-facilitated recognition of printed or written text characters in an electronic image in which the text-based contents cannot be searched electronically.

1.14 “Technology Assisted Review” includes all forms of document review that may be undertaken or assisted by the use of technology, including but not limited to predictive coding and computer assisted review.

Appendix 2 to Practice Direction 51U

Disclosure Review Document

Section 1A: Issues for Disclosure and proposed Disclosure Models

Brief description of the Issue for Disclosure[2]			Issue agreed?		Proposed Model of Extended Disclosure (A – E)		Decision (for the court)
		Reference to statement of case	Yes	No (party not agreeing)	To be completed by claimant	To be completed by defendant	
	[Alternative proposed wording, if not agreed][1]						

1 If the wording of any Issue for Disclosure cannot be agreed, the alternative wording proposed should be included immediately under the claimant's formulation.

Brief description of the Issue for Disclosure[2]		Issue agreed?		Proposed Model of Extended Disclosure (A – E)		Decision (for the court)
	Reference to statement of case	Yes	No (party not agreeing)	To be completed by claimant	To be completed by defendant	

Brief description of the Issue for Disclosure[2]			Issue agreed?		Proposed Model of Extended Disclosure (A – E)		Decision (for the court)
		Reference to statement of case	Yes	No (party not agreeing)	To be completed by claimant	To be completed by defendant	

Section 1B: Model C requests for Disclosure

Claimant / Defendant (delete as appropriate)				
	Issue for Disclosure	**Request for document or narrow classes of documents relating to the Issue for Disclosure**	**Response**	**Decision (for the court)**
1.	**Issue [ ]:**			
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				

[Note: Parties should refer to the guidance on 'Completion of section 2 of the DRD' in the 'Explanatory notes for the DRD' when completing this section]

Section 2: Questionnaire

Claimant / Defendant (delete as appropriate)		
	Question	**Details**
1.	**Hard copy documents / files** Confirm whether hard copy documents (for example, notebooks, lever arch files, note pads, drawings/plans and handwritten notes) that are not originally electronic files should be included in the collection of documents which you propose to search. Please propose an approach for the production of hard copy documents: if they will be scanned and made searchable or if they will be disclosed and made available for inspection in hard copy only.	

2.	**Electronic files: data sources/locations** Please set out details on data sources to be considered at collection which you propose to search. Please include details of any sources that are unavailable but may host relevant documents or which may raise particular difficulties due to their location, format or any other reason. Examples of sources to be considered may include the following:	

	Question	Details
	(1) Document repositories and/or geographical locations (2) Computer systems or electronic storage devices (3) Mobile phones, tablets and other handheld devices (4) Document management systems (5) Email servers (6) Cloud based data storage (7) Webmail accounts e.g. Gmail, Hotmail etc (8) Back-up systems (9) Social media accounts (10) Third parties who may have relevant documents which are under your control (e.g. agents or advisers). If a data source is likely only to host documents relevant to particular Issues for Disclosure, this should be noted in this section.	

	Question	Details
3.	Please identify and provide details of any bespoke or licensed proprietary software in which relevant documents have been created or stored which may not be available to the other party but without which it is not possible to review the relevant data (e.g. Microsoft Project, Lotus Notes, Bloomberg Chat etc.).	

4.	**Custodians and date ranges** Please set out a list of custodians whose files you propose to search and the date range(s) within which you would propose to search for documents which are relevant to Issues for Disclosure for which any party seeks Extended Disclosure. If a custodian or range of dates is only relevant to certain Issues for Disclosure, or if a certain date range is only relevant to a particular custodian, please indicate this next to their name if this might allow the scope of the search to be narrowed. If the list is extensive, please set out a proposal to prioritise key custodians.	
5.	*(For completion after discussions between the parties)* Are the proposals at 4. agreed? If not, set out any areas of disagreement.	

6.	**Search proposals** Please list any searches and methods of searching (including any automated searches or techniques other than keyword searches) you have identified at this stage that you may use to search the data to identify documents that may need to be disclosed. If a certain method of searching, proposed search or keyword is relevant only to a particular Issue for Disclosure, please indicate this if it might allow the scope of the search to be narrowed. Note: The use of initial keywords may assist the parties to identify the likely volume of data that may need to be reviewed. However, keywords will need to be tested and refined during the disclosure process. Accordingly, any keywords proposed at this stage are for the purposes of discussion only. The fact that a party may propose a keyword at this stage should not be taken as an acceptance that the keyword should ultimately be used, particularly if, on testing the keyword against the available data, it provides false positive results. If it is not practicable to provide a list of keywords prior to the CMC, the parties should engage and seek to co-operate following the CMC to identify and agree the key words they propose using and thereafter test those key words against the data to determine whether or not they are appropriate.	

	Question	Details
7.	*(For completion after discussions between the parties)* Are the proposals at 6. agreed? If not, set out areas of disagreement.	
8.	**Irretrievable documents** Please state if you anticipate any documents being irretrievable due to, for example, their destruction or loss, the destruction or loss of devices upon which they were stored, or other reasons.	

9.	**Technology / computer assisted review** Parties are to consider the use of technology to facilitate the efficient collection of data and its further use for data review. This may include the use of some of the more sophisticated forms of technology / computer assisted review software (TAR / CAR / analytics). If the parties are in a position to propose the use of any technology or computer assisted review tools in advance of the CMC, those proposals should be set out in this section. Where parties have considered the use of such tools but decided against this at this stage (particularly where the review universe is in excess of 50,000 documents), they should explain why such tools will not be used, particularly where this may mean that large volumes of data will have to be the subject of a manual review exercise. Parties should update this form and draw any material updates to the attention of all parties and the Court if they later determine it would be appropriate to use such tools.	
10.	**Estimates of costs** Where the parties have agreed searches to be undertaken, state the estimated cost of collection, processing, search, review and production of your Extended Disclosure.	

11.	Where any aspect of the approach to Disclosure is not agreed, estimate your costs of collection, processing, search, review and production of your documents based on Extended Disclosure (Models and scope of any search required) requested by the claimant(s).	
12.	Where any aspect of the approach to Disclosure is not agreed, estimate your costs of collection, processing, search, review and production of your documents based on Extended Disclosure (Models and scope of any search required) requested by the defendant(s).	

Appendix 2 to Practice Direction 51U

Explanatory notes for Disclosure Review Document

Introduction

1. The Disclosure Review Document ("DRD") is intended to:

   (1) facilitate the exchange of information and provide a framework for discussions around the initial scoping of disclosure;

   (2) help the parties to agree a sensible and cost-effective approach to disclosure and identify areas of disagreement; and

   (3) provide the court with parties' proposals on disclosure, agreed or otherwise, so the court can make appropriate case management decisions at the case management conference.

2. The explanatory notes to each section of the DRD are guidance. Nevertheless, parties are encouraged to follow this guidance, where applicable, unless there are good reasons not to do so.

3. Unless otherwise stated, references to paragraph numbers in the DRD are to Practice Direction 51U. If there is a conflict between the DRD and the Practice Direction, the Practice Direction will prevail.

4. The DRD does not need to be completed in cases where an order for only Models A and/or B Extended Disclosure is sought. Section 1A and Section 2 of the DRD only need to be completed if the parties are seeking an order for Extended Disclosure involving a search-based Disclosure Model (i.e. Models C, D and/or E). Where Model C Extended Disclosure is proposed, Section 1B of the DRD will also need to be completed.

5. The DRD may be modified (shortened or lengthened) as required to ensure that key information is provided to the court in a convenient and helpful format. This may include revising some of the questions asked in Section 2 of the DRD or adding others relevant to the particular disclosure exercise to be undertaken.

6. In some proceedings, not every section of the DRD will need to be completed, particularly if the proceedings are likely to require limited disclosure and/or if the identification and retrieval of documents is expected to be straightforward.

7. The DRD should be completed and submitted electronically as a single document to the court by the parties. The claimant will be responsible for doing this.

8. Unless otherwise agreed between the parties or ordered by the court, the timetable for completion of the DRD is set out in paragraphs 7 and 10 of the Practice Direction. For convenience the timetable is summarised below as follows:

	Stage to be completed	**PD Ref.**	**Deadline**
Step 1	Each party should state, in writing, whether or not it is likely to request search- based Extended Disclosure to include one or more of Models C, D or E on one or more issues in the case. At this point it should not particularise the Model(s) or the issue(s) in the case.	Para 7.1	Within 28 days of the closure of statements of case
Step 2	Where one or more of the parties has indicated it is likely to request search-based Extended Disclosure (i.e. Models C, D and/or E), the claimant must prepare and serve on the other parties a draft List of Issues for Disclosure unless the equivalent of such a list has already been agreed between the parties (for example, as part of a fuller list of issues).	Para 7.2	Within 42 days of the closure of statements of case

Step 3	In the event that a particular Issue for Disclosure has not been included in the List of Issues for Disclosure, or is described in a manner that is unacceptable to the defendant, using section 1A of the Disclosure Review Document the defendant should provide the claimant with its proposed wording or alternative wording for inclusion in the draft List of Issues for	Para 7.5	As soon as practicable but in any event no later than 14 days after service of the draft List of Issues for Disclosure

Step 4	The parties must discuss and seek to agree the draft List of Issues for Disclosure. They should consider whether any draft Issue for Disclosure can be removed. For each Issue for Disclosure that is maintained, the parties should indicate at this point, using Section 1A of the Disclosure Review Document which Model of Extended Disclosure is sought for each party. Where Model C Disclosure is contemplated the parties should discuss the requests that might apply for the purpose of that disclosure.	Para 7.6	In advance of the first case management conference
Step 5	Any party proposing Model C Disclosure must complete and then provide Section 1B of the Disclosure Review Document to the other parties.	Para 10.5	No later than 28 days after the defendant has responded in accordance with paragraph 7.5 of the Practice Direction to the claimant's draft List of Issues for Disclosure.

Step 6	Any party provided with a completed Section 1B in this way must respond by completing the "response" column either agreeing to the request or giving concise reasons for not agreeing to the request.	10.5	Within 14 days of receiving requests in Section 1B of the Disclosure Review Document.
Step 7	Having agreed the List of Issues for Disclosure and exchanged proposals on Model(s) for Extended Disclosure, the parties should prepare and exchange drafts of Section 2 of the Disclosure Review Document (including costs estimates of different proposals, and where possible estimates of the likely amount of documents involved). Section 2 of the Disclosure Review Document should be completed only if the parties are seeking an order for Extended Disclosure involving a search-based Disclosure Model (i.e. Models C, D and/or E).	Para 10.6	As soon as reasonably practicable and in any event not later than 14 days before the case management conference.

Step 8	The parties must seek to resolve any disputes over the scope of any Extended Disclosure sought	Para 10.7	In advance of the first case management conference
Step 9	A finalised single joint Disclosure Review Document should be filed by the claimant. Related correspondence and earlier drafts should not ordinarily be filed.	Para 10.8	Not later than 5 days before the case management conference
Step 10	The parties must independently file a signed Certificate of Compliance substantially in the form set out in Appendix 3 to the Practice Direction	Para 10.9	As soon as reasonably practicable after the claimant has filed the single joint Disclosure Review Document, but in any event in advance of the case management conference

Completing Section 1A of the DRD

1. The purpose of Section 1A of the DRD is to provide a concise summary of the parties' proposals in relation to Extended Disclosure by identifying the Issues for Disclosure and the proposed Models for Disclosure in respect of such issues. The list of Issues for Disclosure must be completed in accordance with paragraphs 7 and 10 of the Practice Direction[1].

2. Issues for Disclosure are defined at paragraph 7.3 of the Practice Direction as only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission.

3. The Issues for Disclosure are a point of reference for further discussions between the parties about the manner and scope of disclosure to be given. They are not a statement of case. Nor are they intended to replace the List of Issues, which the parties may be required to prepare and file in advance of the case management conference, although the two documents should ultimately be consistent with each other.

4. The List of Issues for Disclosure should:

   (1) state whether each Issue for Disclosure is agreed or opposed and, if so, by whom;

   (2) seek to avoid any duplication of issues, by using consolidated wording for any overlapping Issues for Disclosure where possible.

5. In accordance with paragraph 7.5 of the Practice Direction, if a particular Issue for Disclosure has not been included in Section 1A by the claimant, or is described in a manner that is unacceptable to the defendant, using Section 1A of the DRD the defendant should provide the claimant with its proposed wording or alternative wording for inclusion in the draft list of Issues for Disclosure as soon as reasonably practicable but in any event no later than 14 days after service of the draft List of Issues for Disclosure.

6. If the parties cannot agree whether certain issues should be included as an Issue for Disclosure, such issues should be included with a tick in the "No" section of the "Issue Agreed?" column, along with an indication of the party not agreeing to it (C for claimant, D for defendant, D1 etc. for each defendant in cases with multiple defendants).

[1] It is to be competed as a Word Document, with any amendments proposed in redline by the parties during period when it is being discussed and finalised. A clean version should ultimately be provided to the court.

7. Where the parties disagree as to the need for Extended Disclosure or seek Extended Disclosure on different Models in relation to an Issue for Disclosure, that should be recorded in the "Proposed model of Extended Disclosure" column.

Specifying Disclosure Models in Section 1A of the DRD

8. The Disclosure Models under paragraph 8 are:

Model A: Disclosure confined to known adverse documents[2]

Model B: Limited Disclosure

Model C: Request-led Search-based Disclosure

Model D: Narrow search-based Disclosure, with or without Narrative Documents

Model E: Wide Search-based Disclosure

9. In addition to completing a List of Issues for Disclosure in Section 1A of the DRD, the parties should also specify which of the above Disclosure Models is proposed in respect of particular Issues for Disclosure.

10. If a party proposes that a different Disclosure Model should apply to each party in the case of a particular Issue for Disclosure, this should be noted (e.g. "Model B for C" (Claimant), "Model D for D" (Defendant)).

11. The claimant must update and re-circulate Section 1A of the DRD to identify areas of agreement and disagreement following the discussions required by paragraph 7.

Updating the Issues for Disclosure

12. The scope of disclosure may require ongoing review, discussion and co-operation between the parties.

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2 Under Model A, the only further disclosure that is required is to disclose any known adverse documents in relation to the relevant Issue for Disclosure (without the need for any search), in accordance with the duty under paragraph 3.1(2) of the Practice Direction.

13. The fact that a party has not included a particular Issue for Disclosure in the DRD, does not prevent that party from later proposing that a new Issue for Disclosure should be added to the list. For example, new factual issues relevant to the parties' statements of case may be identified because of documents disclosed or evidence exchanged during the proceedings, or because of amendments to a statement of case. In the usual way, if the issues in dispute change during the proceedings, then it may well be appropriate to update the Issues for Disclosure and, as a consequence, Section 2 of the DRD.

14. The parties may agree changes to the Issues for Disclosure after the first CMC without having to seek the court's approval, unless the effect of such changes will be to materially change an order already made, or impact in a material way on the procedural timetable, costs and/or trial date.

Completion of Section 1B of the DRD
(Request-led search-based Disclosure (Model C)

1. In accordance with paragraph 10.5, any party proposing Model C Extended Disclosure must complete Section 1B of the DRD and provide it to the other parties no later than 28 days after the defendant has responded in accordance with paragraph 7.5 of the Practice Direction to the claimant's draft List of Issues for Disclosure.

2. Any party provided with a completed Section 1B in this way must respond within 14 days by completing the "response" column either agreeing to the request or giving concise reasons for not agreeing to the request.

3. Model C requests are not intended to be used to replicate the approach sometimes taken in arbitration with Redfern schedules where parities may include a large number of broad requests for disclosure from the other side, addressing all issues in dispute and all potential data sources. As described in paragraph 8.3 of the Practice Direction, the approach envisaged with Model C is very different.

4. The parties' requests should be limited in number, focused in scope and concise in order that the responding party may be clear as to the particular document(s) or narrow classes of documents relating to a particular Issue for Disclosure for which it is being asked to undertake searches. Broad and wide-ranging formulations such as "any or all documents relating to..." should not be used.

5. In addition, Model C requests should not be used where extensive search-based disclosure is sought other than "to give disclosure of particular documents or narrow classes of documents relating to a particular Issue(s) for Disclosure".[3] In such cases, it may well be more efficient to use a combination of Models A, B and D. It will rarely be appropriate to have a large number of Model C requests in respect of the same data set, because that is likely to (a) make it more difficult for the parties to agree what the Model C requests should be; and b) increase the complexity, costs and time required to undertake the subsequent review exercise. Further, using multiple Model C requests can, in fact, undermine rather than facilitate the use of technology / computer assisted review tools and should therefore be avoided.

3 See paragraph 8 of the Practice Direction

Completion of Section 2 of the DRD

1. Section 2 of the DRD only needs to be completed if the parties are seeking an order for Extended Disclosure involving a search-based Disclosure Model (i.e. Models C, D and/or E). This is because Models A and B do not require mandatory searches to be undertaken.

2. In cases where a search-based Disclosure Model (Models C, D or E) is proposed by the parties, the purpose of Section 2 of the DRD is to provide the court with information about the data held by each party, including:

   (1) where and how the data is held;

   (2) how the parties propose to process and search the data where a search-based Disclosure Model (Models C, D and E) is sought in relation to particular Issues for Disclosure); and

   (3) whether there are any points that the parties have not been able to agree through discussions and which they therefore need the court to determine at the case management conference.

3. Section 2 of the DRD should also be used to identify data that can be excluded from the review process, for example, particular custodians, data ranges and back up data to ensure that the data pool is it is reasonable and proportionate, having particular regard to the factors in section 6.4 of the Practice Direction.

4. In cases where no documents are held by a party, that party may confirm this in writing rather than complete Section 2 of the DRD.

5. In Section 2 of the DRD, the parties should seek to provide information about how they intend to approach disclosure so that the court is then in a position to decide what, if any, orders for Extended Disclosure should be made.

6. The parties should include in Section 2 any information that will assist the court in determining the appropriate scope of disclosure for each Issue for Disclosure. The information listed in Section 2 should be treated as a guide and not an exclusive list of the information that should be provided. The DRD may be adapted to meet the needs of the particular case and the parties are not required to answer all of the questions. In particular:

   (1) In cases where the disclosure exercise is likely to be complex and substantial with multiple sources of data, it may be necessary to raise additional questions and to provide other information. Conversely, it may not in fact be possible to answer all of the questions in Section 2 of the DRD questionnaire in advance of the case management conference because that information may not yet be available.

   (2) In cases where the disclosure exercise is likely to be less complex or involving a very limited number of documents or sources of data, the parties may complete only those parts of Section 2 which are relevant or helpful for a particular case.

   (3) The parties are expected to take a reasonable and proportionate approach in completing Section 2 and to seek to agree upon on any such changes to achieve that outcome as far as possible.

7. The parties must confer and seek to agree the contents of Section 2 of the DRD as it applies to their disclosure, in advance of the case

management conference. The parties are expected to do this by phone, video conference or in person. Extensive correspondence in relation to the DRD is unlikely to be efficient or helpful. Where particular points cannot be agreed, they should be recorded, in a summary form in the relevant sections of the DRD after discussions between the parties.

8. For the avoidance of doubt, if only one party considers that disclosure of certain materials is required, the other party must nevertheless state its proposals as to how the disclosure of such materials should be effected, without prejudice to its position that no order for disclosure should be made

9. The provision of information about the data that might be relevant to a request for Extended Disclosure shall not be treated as a concession that Extended Disclosure is appropriate.

Who has responsibility for incorporating the parties' comments on the DRD?

10. Unless otherwise agreed or ordered, the claimant is to be responsible for updating the DRD throughout the proceedings to ensure that it reflects the parties' combined comments and discussions. Where the claimant is unrepresented, it may be appropriate for the defendant's advisers to assist the claimant and/or take responsibility for completion of the DRD by agreement.

11. When a party other than the claimant is completing Section 2 of the DRD, it may do so by completing and sending across just Section 2 of the DRD completed (i.e. there is no need for the party to carry across any text already discussed and agreed in relation to Sections 1A and 1B). The claimant should then ensure that the information provided to it in Section 2 by the other party is incorporated into the latest draft of the DRD, over which it has ultimate carriage.

Estimates as to costs

12. In accordance with paragraph 22 of the Practice Direction, the parties are required to provide an estimate of what they consider to be the likely costs of giving the disclosure proposed by them in the DRD, and the likely amount of documents involved, in order that a court may consider whether such proposals on disclosure are reasonable and proportionate. This information is to be provide in answer to questions 10 to 12 of Section 2.

13. If the approach to Extended Disclosure is not fully agreed, the parties should be ready to provide more detailed information at the CMC as to how their global estimates were arrived at and the impact upon them of particular requests for Extended Disclosure.

14. In cases where the costs budgeting scheme applies, if it is not practical to complete the disclosure section of Form H in relation to disclosure prior to the court making an order in relation to disclosure at the case management conference, the parties may notify the court that they have agreed to postpone completion of that section of Form H until after the case management conference (see paragraph 22.2 of the Practice Direction).

Guidance on process after any order for Extended Disclosure has been made

1. Where the court orders the parties to give Extended Disclosure, the parties will need to consider the appropriate methodology for the disclosure exercise, which includes the collection, processing, review and production of documents.

2. The parties and their advisers are reminded of their Disclosure Duties to the court to discuss and endeavour to agree the approach to be taken to disclosure, always with a view to reducing the burden and cost of this process.

3. Although the parties are under a duty to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology, there may be points which cannot be agreed despite the best efforts of the parties, in which case the parties should request the assistance of the court in a Disclosure Guidance Hearing as set out paragraph 11 of the Practice Direction.

4. This guidance identifies various forms of analytics, and technology or computer assisted review software which are currently available and in use. The parties should not, however, feel constrained from proposing new forms of processing and review software, which may be developed in the future and which may be appropriate for use in any given case.[4]

Appropriate methodology

5. Although the parties may approach the disclosure exercise in different ways and using different technology, an appropriate methodology for a case involving electronic documents should always include the following:

   (1) Electronic documents should be collected in a format that preserves and does not alter the underlying document metadata (where possible)[3] thereby allowing the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure. This approach should generally be taken unless a document has been redacted.

4 The onus is on the parties to ensure they engage appropriate IT forensic expertise to assist with this process if they or their legal advisers do not have such expertise in house.

(2) A record should be kept of each stage of the process so that the methodology can be explained to the court if necessary after the event (see Methodology record below).

(3) To the fullest extent practicable, deduplication of the data set (for example by using the hash values of the documents) should be undertaken during processing and prior to giving disclosure of data to the other side.

Agreeing aspects of methodology

6. To the extent that this has not already been agreed between the parties or determined by the court, the parties should seek to agree the following as early in the process as possible:

(1) How the collection data set is to be identified and collected.

(2) Data culling measures applied at collection (i.e. date range, custodians, search terms).

(3) Any limitations that will be applied to the document collection process and the reasons for such limitations.

(4) Data exclusion measures applied during or post-collection (e.g. Domains such as @CompanyA.com).

(5) How each party intends to use analytics to conduct a proportionate review of the data set.

(6) How each party intends to use technology assisted review to conduct a proportionate review of the data set (particularly where the review data set is likely to be in excess of 50,000 documents).

(7) The approach and format for production. This will have an impact on the approach to the review exercises, so parties should endeavour to agree this point at an early stage.

(8) Format of documents to be exchanged – parties are encouraged to exchange documents in native format unless there is a reasonable justification not to do so (e.g. redacted documents). Electronic documents should generally be made available in the form which allows the party receiving documents the same ability to access, search, review and display the documents as the party giving disclosure.

(9) Management of document groups for production – parties should describe and agree the approach they will adopt for document groups (families). Often, it will be appropriate to agree not to break document groups (families) and to review a document group as a whole.

(10) If documents within a group are to be withheld at the production stage the parties should consider and agree whether to use placeholders indicating the reasons for document being withheld (e.g. Withheld for Privilege).

(11) Format for electronic exchange – parties are encouraged to agree database load file format and details to be included in load file/document index. All documents to be produced should be assigned a Disclosure Identification/Number. There is no need to produce a typed list of documents in the traditional sense, unless that will be of assistance to the parties.

(12) Methodology record

7. The parties should keep records of their methodology during the disclosure exercise, to include the following:

(1) Document sources not considered at collection and why.

(2) The deduplication[5] method applied.

(3) Any DeNISTing[6] applied.

(4) Approach to non-text searchable items.

(5) Approach with encrypted/password protected items (i.e. what measures were applied to decrypt).

(6) Search terms, including the number of search term responsive documents and search term responsive documents plus family members.

(7) Any use of clustering, concept searching, e-mail threading, categorisation and any other form of analytics or technology assisted review.

5 The options for deduplication are as follows; (A) Global - where documents across the entire processed data set are deduplicated against each other. This means that where a document exists in any location within the data set only one copy of it is retained; (B) Custodian - where documents held by the same custodian are deduplicated against each other only or (C) Custom – specific to the project.

6 "DeNISTing" is a method of reducing the number of documents subject to lawyer or computer review by removing file types that are highly unlikely to have evidentiary value. DeNISTing" is the National Institute of Standards and Technology and the process of DeNISTing is based on a list of file types maintained by the agency.

SCHEDULE 3

PRACTICE DIRECTION 57AC – TRIAL WITNESS STATEMENTS IN THE BUSINESS AND PROPERTY COURTS

This practice direction supplements CPR Part 57A

1. General

1.1 This Practice Direction is made under rule 57A.3. It concerns witness statements for use at trials in the Business and Property Courts and applies to new and existing proceedings, but only to trial witness statements signed on or after 6 April 2021. For the avoidance of doubt, nothing in this Practice Direction affects—

(1) affidavit evidence,

(2) evidence in a witness statement other than a trial witness statement, or

(3) the general powers of the court under rule 32.1, to control, exclude or limit factual witness evidence.

(Rule 32.6 provides for evidence in proceedings other than at trial; rule 32.15 provides where evidence may or must be given in the form of an affidavit.)

1.2 In this Practice Direction (including the Appendix) –

"relevant court guide" means any of the court guides referred to by paragraph 1.7 of Practice Direction 57AA that is applicable to the proceedings,

"relevant legal representative" means, in relation to a trial witness statement, a legal representative authorised to conduct litigation who has had responsibility for ensuring that the purpose and proper content of trial witness statements and proper practice in relation to their preparation have been explained to and understood by the witness (and "legal representative" has the meaning given in rule 2.3),

"trial" means a final trial hearing, whether of all issues or of only one or some particular issues, in proceedings (except as provided in paragraph 1.3 below) in any of the Business and Property Courts under CPR Part 7 or Part 8 or upon an unfair prejudice petition under section 994 of the Companies Act 2006 or a contributory's just and equitable winding up petition under section 122(1)(g) of the Insolvency Act 1986,

"trial witness statement" means a witness statement that is served pursuant to an order made under rule 32.4(2), or pursuant to rule 8.5 or an order made under rule 8.6(1)(b), or that is prepared for the trial of an unfair prejudice petition or a contributory's just and equitable winding up petition, including supplemental or reply witness statements where allowed by the court, and

"relevant party" means the party by or on behalf of whom the witness statement is served (and for the avoidance of doubt includes a party who is also a witness, as regards their own trial witness statement).
(Rule 32.4(2) requires the court to order service of witness statements for use at trials; rules 8.5 and 8.6 provide for the service and use of written witness evidence in proceedings under Part 8.)

1.3 This Practice Direction does not apply to the following proceedings, unless the court at any stage directs that it is to apply:

(1) an application under Part VII of the Financial Service and Markets Act 2000 for an order sanctioning an insurance business transfer scheme, a banking business transfer scheme, a reclaim fund business transfer scheme or a ring-fencing transfer scheme;
(2) an application under Part XXV of the Financial Services and Markets Act 2000 for an injunction or restitution in connection with contravention of relevant requirements, as defined in that Act;
(3) an application for an order under the Insolvency Act 1986 (other than a contributory's just and equitable winding up petition under s.122(1)(g) of that Act), under the Insolvency (England and Wales) Rules 2016, under any enactment or statutory instrument providing for a special insolvency or administration regime, and under Schedule 2 to The Cross-Border Insolvency Regulations 2006;
(4) a claim made under the Companies Act 2006 listed in Part II of Practice Direction 49A of the Civil Procedure Rules (whether in relation to limited companies or limited liability partnerships), an application for an order under Part 26A of that Act, a claim to restore a company to the register under section 1029 of that Act and a claim under Council Regulation (EC) No 2157/2001 listed in Part III of Practice Direction 49A;
(5) an application under Part II of The Companies (Cross-Border Mergers) Regulations 2007;
(6) proceedings falling within CPR Part 57, which applies to probate claims, claims for the rectification of wills, claims to substitute or remove a personal representative, and claims under the Inheritance (Provision for Family Dependants) Act 1975, the Presumption of Death Act 2013 and the Guardianship (Missing Persons) Act 2017;
(7) proceedings in the Intellectual Property Enterprise Court falling within Section V of Practice Direction 63;
(8) proceedings under CPR Part 64, which applies to certain claims relating to the administration of estates of deceased persons or trusts (Section I of Part 64), and to charity proceedings (Section II of Part 64);
(9) proceedings in the Technology and Construction Court relating to adjudication awards under Section 9 of the TCC Guide.

1.4 If a rule or other Practice Direction requires some matter to be stated in a witness statement that will be a trial witness statement, that requirement still applies

1.5 In the event of inconsistency between this Practice Direction and any other Practice Direction the provisions of this Practice Direction shall prevail.

2. The purpose of a trial witness statement

2.1 The purpose of a trial witness statement is to set out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence at trial without having provided the statement.

(Rule 32.2(1)(a) provides that in general any fact which needs to be proved at trial by the evidence of witnesses is to be proved by their oral evidence given in public, and rule 32.4(1) defines a witness statement as a signed statement containing the evidence the witness would be allowed to give orally.)

2.2 Trial witness statements are important in informing the parties and the court of the evidence a party intends to rely on at trial. Their use promotes the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial.

(The overriding objective is defined in rule 1.1.)

3. The content of witness statements

3.1 A trial witness statement must contain only –

(1) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and

(2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial and rule 32.5(2) did not apply.

(Rule 32.5(2) provides that where a witness is called to give oral evidence at trial, their witness statement shall stand as their evidence in chief unless the court orders otherwise.)

3.2 A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement. The requirement to identify documents the witness has referred to or been referred to does not affect any privilege that may exist in relation to any of those documents.

3.3 A trial witness statement must comply with paragraphs 18.1 and 18.2 of Practice Direction 32, and for that purpose a witness's own language includes any language in which the witness is sufficiently fluent to give

oral evidence (including under cross-examination) if required, and is not limited to a witness's first or native language.

(Paragraph 18.1 of Practice Direction 32 requires a trial witness statement to be in the witness's own words, if practicable, and to be drafted in the witness's own language and in the first person; paragraphs 18.1(1) to (5) and 18.2 set out further requirements; paragraph 23 of Practice Direction 32 provides that a party who relies on a witness statement in a foreign language must also file a translation.)

3.4 Trial witness statements should be prepared in accordance with –
(1) the Statement of Best Practice contained in the Appendix to this Practice Direction, and
(2) any relevant court guide,
for which purpose, in the event of any inconsistency, the Statement of Best Practice takes precedence over any court guide.

4. Confirmation of compliance

4.1 A trial witness statement must be verified by a statement of truth as required by rule 22.1(c) and paragraph 20.2 of Practice Direction 32 and, unless the court otherwise orders, must also include the following confirmation, signed by the witness:

" I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge.
I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.

This witness statement sets out only my personal knowledge and recollection, in my own words.

On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.

I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge. "

(Paragraph 3.2 of Practice Direction 22 provides that the statement of truth is to be signed by the witness; paragraph 3A of that Practice Direction applies if the witness is unable to read or sign a witness statement other than by reason of language alone.)

4.2 Any application for permission to vary or depart from the requirement to include the statement set out in paragraph 4.1 above may be made, and generally should be made, without notice, for determination without a hearing.

4.3 A trial witness statement must be endorsed with a certificate of compliance in the following form, signed by the relevant legal representative, unless the statement is signed when the relevant party is a litigant in person or the court orders otherwise:

"I hereby certify that:

1. I am the relevant legal representative within the meaning of Practice Direction 57AC.

2. I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to **[name of witness]**.

3. I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.

Name: ……
Position: ……
Date: ……"

4.4 Any application to dispense with the certificate of compliance referred to in paragraph 4.3 above, or for permission to vary or depart from the form for it there set out, may be made, and generally should be made, without notice, for determination without a hearing.

5. Sanctions

5.1 The court retains its full powers of case management and the full range of sanctions available to it and nothing in paragraph 5.2 or paragraph 5.3 below confines either.

5.2 If a party fails to comply with any part of this Practice Direction, the court may, upon application by any other party or of its own motion, do one or more of the following –

(1) refuse to give or withdraw permission to rely on, or strike out, part or all of a trial witness statement,
(2) order that a trial witness statement be re-drafted in accordance with this Practice Direction or as may be directed by the court,
(3) make an adverse costs order against the non-complying party,
(4) order a witness to give some or all of their evidence in chief orally.

5.3 The court may, upon application by any other party or of its own motion, strike out a trial witness statement not endorsed with a certificate of compliance pursuant to paragraph 4.3 above if there is reason to consider that the relevant party was acting in person when it was signed in order to avoid the application of paragraph 4.3 above to the statement.

Appendix to Practice Direction 57AC
(Statement of Best Practice in relation to Trial Witness Statements)

1. Introduction

1.1 This Appendix contains the Statement of Best Practice referred to in paragraph 3.4(1) of Practice Direction 57AC that should be followed in relation to trial witness statements as defined in paragraph 1.2 of that Practice Direction. For the avoidance of doubt, nothing in this Appendix removes or limits any privilege that would otherwise attach to documents generated by or for the purpose of obtaining evidence for use in litigation.

1.2 In this Appendix –

a "leading question" means a question that expressly or by implication suggests a desired answer or puts words into the mouth, or information into the mind, of a witness.

1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:

(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but

(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore

(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

2. Principles

2.1 The content of any trial witness statement should be limited to the evidence in chief the relevant party and its legal representatives (if the party is represented) believe the witness would give if

(1) rule 32.5(2) did not apply (so the witness statement would not stand as the evidence in chief of the witness), and

(2) the principles set out in paragraphs 2.2 to 2.6 were followed.

2.2 In trials in the Business and Property Courts, often many matters of fact do not require witness evidence, either because they are common ground or because witness testimony adds nothing of substance to the disclosed documents. The fact that there is or may be an issue concerning what the disclosed documents mean or show does not, without more, mean that witness evidence is required.

2.3 Factual witnesses give evidence at trials to provide the court with testimony as to matters of which they have personal knowledge, including their recollection of matters they witnessed personally, where such testimony is relevant to issues of fact to be determined at trial, and:

(1) a matter will have been witnessed personally by a witness only if it was experienced by one of their primary senses (sight, hearing, smell, touch or taste), or if it was a matter internal to their mind (for example, what they thought about something at some time in the past or why they took some past decision or action),

(2) for the avoidance of doubt, factual witness testimony may include evidence of things said to a witness, since the witness can testify to the statement made to them, if (a) the fact that the statement was made to the witness is itself relevant to an issue to be determined at trial or (b) the truth of what was said to the witness is relevant to such an issue and the statement made to the witness is to be relied on as hearsay evidence.

2.4 The duty of factual witnesses is to give the court an honest account of matters known personally to them (including, if relevant to the issues in the case, what they recall as to matters witnessed personally by them or what they would or would not have done or thought if the facts, or their understanding of them, had been different). It is improper to put pressure of any kind on a witness to give anything other than their own account, to the best of their ability and recollection, of the matters about which the witness is asked to give evidence.

2.5 The evidence in chief of a factual witness, if not given by witness statement, must be given to the court without the use of leading questions (except where their use has been permitted by the court).

2.6 During evidence in chief given otherwise than by witness statement, the witness's memory may be refreshed by being shown a document, but only if

the witness created or saw the document while the facts evidenced by or referred to in the document were still fresh in their mind, so that they would have known if they were accurate or inaccurate.

3. Practice

General

3.1 Paragraphs 3.2 to 3.8 below apply to all trial witness statements. Paragraphs 3.9 to 3.13 below do not apply to a trial witness statement where the relevant party (as defined in paragraph 1.2 of Practice Direction 57AC) is a litigant in person when the statement is prepared and signed. Paragraphs 3.14 to 3.16 below apply only to a trial witness statement where the relevant party is a litigant in person when the statement is prepared and signed.

3.2 Any trial witness statement should be prepared in such a way as to avoid so far as possible any practice that might alter or influence the recollection of the witness other than by refreshment of memory as described in paragraph 2.6 above.

3.3 Trial witness statements should be as concise as possible without omitting anything of significance.

3.4 A trial witness statement should refer to documents, if at all, only where necessary. It will generally not be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraph 3.2 of Practice Direction 57AC, unless paragraph 3.7 below applies or the witness's evidence is required to:

(1) prove or disprove the content, date or authenticity of the document;

(2) explain that the witness understood a document, or particular words or phrases, in a certain way when sending, receiving or otherwise encountering a document in the past; or

(3) confirm that the witness saw or did not see the document at the relevant time;

but in the case of (1) to (3) above if (and only if) such evidence is relevant. Particular caution should be exercised before or when showing a witness any document they did not create or see while the facts evidenced by or referred to

in the document were fresh in their mind. Where a trial witness statement does refer to a document, it should not exhibit the document but should give a reference enabling it to be identified by the parties, unless it is a document being produced or disclosed by the witness that has not been disclosed in the proceedings.

3.5 The document list to comply with paragraph 3.2 of Practice Direction 57AC should identify or describe the documents in such a way that they may be located easily at trial. Documents disclosed in the proceedings may be listed by disclosure reference. Privileged documents may be identified by category or general description.

3.6 Trial witness statements should not –

(1) quote at any length from any document to which reference is made,

(2) seek to argue the case, either generally or on particular points,

(3) take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument, or

(4) include commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence (save as set out at paragraph 3.4 above).

3.7 On important disputed matters of fact, a trial witness statement should, if practicable –

(1) state in the witness's own words how well they recall the matters addressed,

(2) state whether, and if so how and when, the witness's recollection in relation to those matters has been refreshed by reference to documents, identifying those documents.

3.8 The preparation of a trial witness statement should involve as few drafts as practicable. Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection.

Represented Parties

3.9 Any witness providing a trial witness statement should have explained to them, by the legal representatives of the relevant party, the purpose and proper content of such a statement and proper practice in relation to its preparation, before they are asked to prepare or consider any draft statement and, wherever practicable, before any evidence is obtained from them (by interview or otherwise). This should include ensuring that the witness has read, or reading to them, the witness confirmation required by paragraph 4.1 of Practice Direction 57AC.

3.10 Wherever practicable –

(1) a trial witness statement should be based upon a record or notes made by the relevant party's legal representatives of evidence they obtained from the witness,

(2) any such record or notes should be made from, and if possible during, an interview or interviews (using any convenient format, for example face to face meeting, video or telephone call or conference, webchat or instant messaging),

If a trial witness statement is based upon evidence obtained from the witness by other means (for example by written answers to a questionnaire or the exchange of emails or other forms of correspondence, or by the witness preparing their own draft statement), the guidance set out in this Appendix should still be followed, so far as possible and modified as necessary.

3.11 An interview to obtain evidence from a witness –

(1) should avoid leading questions where practicable, and should not use leading questions in relation to important contentious matters,

(2) should use open questions as much as possible, generally limiting closed questions to requests for clarification of or additional detail about prior answers, and

(3) should be recorded as fully and accurately as possible, by contemporaneous note or other durable record, dated and retained by the legal representatives.

3.12 If a trial witness statement is not based upon evidence obtained by means of an interview or interviews, that should be stated at the beginning of the statement and the process used instead should be described (to the extent possible without waiver of privilege).

(Paragraph 18.1(5) of Practice Direction 32 provides that any trial witness statement should state the process by which it has been prepared.)

3.13 The legal representatives of the relevant party should assist the witness as to the structure, layout and scope of the statement and may take primary responsibility for drafting it, but in that case the content should be taken from, and should not go beyond, the content of the record or notes referred to in paragraph 3.10(1) above where such a record or such notes exists or exist. If the legal representatives wish to indicate in a draft for a trial witness statement that further evidence is sought from the witness to clarify or complete the statement, that should be done by non-leading questions for the witness to answer in their own words and not by proposing content for approval, amendment or rejection by the witness.

Litigants in Person

3.14 Any witness providing a trial witness statement should read and understand the statement set out in paragraph 4.1 of Practice Direction 57AC, before any draft for the trial witness statement is prepared. That applies to a litigant in person in relation to their own trial witness statement, if there is one, as well as to other witnesses providing statements.

3.15 A litigant in person should understand that any trial witness statement must set out only what the witness providing the statement says are known personally to them or says they remember about matters witnessed personally by them. That applies to the litigant in person's own trial witness statement, if there is one, as well as to any witness statements provided by other witnesses. Witness statements must not be used to argue the litigant's case.

3.16 A trial witness statement may be prepared by reference to answers provided by the witness to questions posed by the relevant party. Where that is done, (1)

leading questions should be avoided where possible, especially on important points, and (2) a full record should be kept by the relevant party of the questions posed and the answers provided, whatever form the trial witness statement takes. The content of any trial witness statement should be in the witness's own words so far as practicable and no one should suggest to any witness what factual account they should or might wish to give (or not give) in a statement.

Introduction

3.17 This Appendix contains the Statement of Best Practice referred to in paragraph 3.4(1) of Practice Direction 57AC that should be followed in relation to trial witness statements as defined in paragraph 1.2 of that Practice Direction. For the avoidance of doubt, nothing in this Appendix removes or limits any privilege that would otherwise attach to documents generated by or for the purpose of obtaining evidence for use in litigation.

3.18 In this Appendix –

a "leading question" means a question that expressly or by implication suggests a desired answer or puts words into the mouth, or information into the mind, of a witness.

3.19 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:

(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but

(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore

(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

4. Principles

4.1 The content of any trial witness statement should be limited to the evidence in chief the relevant party and its legal representatives (if the party is represented) believe the witness would give if

(1) rule 32.5(2) did not apply (so the witness statement would not stand as the evidence in chief of the witness), and

(2) the principles set out in paragraphs 2.2 to 2.6 were followed.

4.2 In trials in the Business and Property Courts, often many matters of fact do not require witness evidence, either because they are common ground or because witness testimony adds nothing of substance to the disclosed documents. The fact that there is or may be an issue concerning what the disclosed documents mean or show does not, without more, mean that witness evidence is required.

4.3 Factual witnesses give evidence at trials to provide the court with testimony as to matters of which they have personal knowledge, including their recollection of matters they witnessed personally, where such testimony is relevant to issues of fact to be determined at trial, and:

(1) a matter will have been witnessed personally by a witness only if it was experienced by one of their primary senses (sight, hearing, smell, touch or taste), or if it was a matter internal to their mind (for example, what they thought about something at some time in the past or why they took some past decision or action),

(2) for the avoidance of doubt, factual witness testimony may include evidence of things said to a witness, since the witness can testify to the statement made to them, if (a) the fact that the statement was made to the witness is itself relevant to an issue to be determined at trial or (b) the truth of what was said to the witness is relevant to such an issue and the statement made to the witness is to be relied on as hearsay evidence.

4.4 The duty of factual witnesses is to give the court an honest account of matters known personally to them (including, if relevant to the issues in the case, what they recall as to matters witnessed personally by them or what they would or would not have done or thought if the facts, or their understanding of them, had been different). It is improper to put pressure of any kind on a witness to give anything other than their own account, to the best of their ability and recollection, of the matters about which the witness is asked to give evidence.

4.5 The evidence in chief of a factual witness, if not given by witness statement, must be given to the court without the use of leading questions (except where their use has been permitted by the court).

4.6 During evidence in chief given otherwise than by witness statement, the witness's memory may be refreshed by being shown a document, but only if the witness created or saw the document while the facts evidenced by or referred to in the document were still fresh in their mind, so that they would have known if they were accurate or inaccurate.

5. Practice

General

5.1 Paragraphs 3.2 to 3.8 below apply to all trial witness statements. Paragraphs 3.9 to 3.13 below do not apply to a trial witness statement where the relevant party (as defined in paragraph 1.2 of Practice Direction 57AC) is a litigant in person when the statement is prepared and signed. Paragraphs 3.14 to 3.16 below apply only to a trial witness statement where the relevant party is a litigant in person when the statement is prepared and signed.

5.2 Any trial witness statement should be prepared in such a way as to avoid so far as possible any practice that might alter or influence the recollection of the witness other than by refreshment of memory as described in paragraph 2.6 above.

5.3 Trial witness statements should be as concise as possible without omitting anything of significance.

5.4 A trial witness statement should refer to documents, if at all, only where necessary. It will generally not be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraph 3.2 of Practice Direction 57AC, unless paragraph 3.7 below applies or the witness's evidence is required to:

(1) prove or disprove the content, date or authenticity of the document;

(2) explain that the witness understood a document, or particular words or phrases, in a certain way when sending, receiving or otherwise encountering a document in the past; or

(3) confirm that the witness saw or did not see the document at the relevant time;

but in the case of (1) to (3) above if (and only if) such evidence is relevant. Particular caution should be exercised before or when showing a witness any document they did not create or see while the facts evidenced by or referred to in the document were fresh in their mind. Where a trial witness statement does refer to a document, it should not exhibit the document but should give a reference enabling it to be identified by the parties, unless it is a document being produced or disclosed by the witness that has not been disclosed in the proceedings.

5.5 The document list to comply with paragraph 3.2 of Practice Direction 57AC should identify or describe the documents in such a way that they may be located easily at trial. Documents disclosed in the proceedings may be listed by disclosure reference. Privileged documents may be identified by category or general description.

5.6 Trial witness statements should not –

(1) quote at any length from any document to which reference is made,

(2) seek to argue the case, either generally or on particular points,

(3) take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument, or

(4) include commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence (save as set out at paragraph 3.4 above).

5.7 On important disputed matters of fact, a trial witness statement should, if practicable –

(1) state in the witness's own words how well they recall the matters addressed,

(2) state whether, and if so how and when, the witness's recollection in relation to those matters has been refreshed by reference to documents, identifying those documents.

5.8 The preparation of a trial witness statement should involve as few drafts as practicable. Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection.

Represented Parties

5.9 Any witness providing a trial witness statement should have explained to them, by the legal representatives of the relevant party, the purpose and proper content of such a statement and proper practice in relation to its preparation, before they are asked to prepare or consider any draft statement and, wherever practicable, before any evidence is obtained from them (by interview or otherwise). This should include ensuring that the witness has read, or reading to them, the witness confirmation required by paragraph 4.1 of Practice Direction 57AC.

5.10 Wherever practicable –

(1) a trial witness statement should be based upon a record or notes made by the relevant party's legal representatives of evidence they obtained from the witness,

(2) any such record or notes should be made from, and if possible during, an interview or interviews (using any convenient format, for example face to face meeting, video or telephone call or conference, webchat or instant messaging),

If a trial witness statement is based upon evidence obtained from the witness by other means (for example by written answers to a questionnaire or the exchange of emails or other forms of correspondence, or by the witness preparing their own draft statement), the guidance set out in this Appendix should still be followed, so far as possible and modified as necessary.

5.11 An interview to obtain evidence from a witness –

(1) should avoid leading questions where practicable, and should not use leading questions in relation to important contentious matters,

(2) should use open questions as much as possible, generally limiting closed questions to requests for clarification of or additional detail about prior answers, and

(3) should be recorded as fully and accurately as possible, by contemporaneous note or other durable record, dated and retained by the legal representatives.

5.12 If a trial witness statement is not based upon evidence obtained by means of an interview or interviews, that should be stated at the beginning of the statement and the process used instead should be described (to the extent possible without waiver of privilege).

(Paragraph 18.1(5) of Practice Direction 32 provides that any trial witness statement should state the process by which it has been prepared.)

5.13 The legal representatives of the relevant party should assist the witness as to the structure, layout and scope of the statement and may take primary responsibility for drafting it, but in that case the content should be taken from, and should not go beyond, the content of the record or notes referred to in paragraph 3.10(1) above where such a record or such notes exists or exist. If the legal representatives wish to indicate in a draft for a trial witness statement that further evidence is sought from the witness to clarify or complete the statement, that should be done by non-leading questions for the witness to answer in their own words and not by proposing content for approval, amendment or rejection by the witness.

Litigants in Person

5.14 Any witness providing a trial witness statement should read and understand the statement set out in paragraph 4.1 of Practice Direction 57AC, before any draft for the trial witness statement is prepared. That applies to a litigant in person in relation to their own trial witness statement, if there is one, as well as to other witnesses providing statements.

5.15 A litigant in person should understand that any trial witness statement must set out only what the witness providing the statement says are known personally

to them or says they remember about matters witnessed personally by them. That applies to the litigant in person's own trial witness statement, if there is one, as well as to any witness statements provided by other witnesses. Witness statements must not be used to argue the litigant's case.

5.16 A trial witness statement may be prepared by reference to answers provided by the witness to questions posed by the relevant party. Where that is done, (1) leading questions should be avoided where possible, especially on important points, and (2) a full record should be kept by the relevant party of the questions posed and the answers provided, whatever form the trial witness statement takes. The content of any trial witness statement should be in the witness's own words so far as practicable and no one should suggest to any witness what factual account they should or might wish to give (or not give) in a statement.

SCHEDULE 4

PRACTICE DIRECTION 70B – DEBT RESPITE SCHEME UNDER THE FINANCIAL GUIDANCE AND CLAIMS ACT 2018

This practice direction supplements CPR rule 70.7

General

1.1 This practice direction is made under rule 70.7 and makes provision in relation to the debt respite scheme established by the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 [(SI 2020/1311] ("the 2020 Regulations"), which are made under section 7 of the Financial Guidance and Claims Act 2018. This practice direction makes provision for those procedural matters which are not covered by the 2020 Regulations, and should be read alongside those Regulations.

1.2 Unless the contrary intention appears, words and phrases used in this practice direction have the meaning given in the 2020 Regulations.

Applications and Appeal

2.1 The following applications and appeal under the 2020 Regulations must be made under Part 23 (and Rules 23.2(4) and 23.2(4A) apply where a claim has not already been issued):

(a) an application under regulation 7 (permission to take certain steps);

(b) an application under regulation 19 (request for cancellation of a moratorium);

(c) an appeal under regulation 38(9) (appeal against an unsuccessful application to a debt advice provider for non-disclosure of the debtor's usual residential address).

2.2 Applications under regulation 7 and regulation 19 of the 2020 Regulations must be heard on notice to the debtor, any joint debtor and the relevant debt advice provider.

2.3 An appeal under regulation 38(9) of the 2020 Regulations must be heard on notice to the relevant debt advice provider. The court must ensure that the debtor's usual residential address is not disclosed to third parties pending determination of the appeal.

Notifications to the court

3.1 A notification under regulation 10(1) of the 2020 Regulations must—

(a) be made in writing;

(b) state that the debt is subject to a breathing space moratorium or a mental health crisis moratorium;

(c) where possible, state the date on which the moratorium commenced;

(d) where possible, be accompanied by a copy of the notification provided by the Secretary of State under regulation 4(4) of the 2020 Regulations.

3.2 If a moratorium debt is cancelled pursuant to regulation 18 of the 2020 Regulations and the creditor wishes to notify the court of this, the notification must—

(a) be made in writing;

(b) state that the breathing space moratorium or a mental health crisis moratorium has been cancelled;

(c) where possible, state the date on which the moratorium was cancelled; and

(d) where possible, be accompanied by a copy of the notification provided by the Secretary of State under regulation 18(5)(b) of the 2020 Regulations.

3.3 Where the court is notified of a breathing space moratorium under regulation 10(1) of the 2020 Regulations, any hearing relating to enforcement of a court order relating to a moratorium debt that is scheduled to take place during the moratorium period must be adjourned to the next available date following the end of the moratorium period.

3.4 Where the court is notified of a mental health crisis moratorium under regulation 10(1) of the 2020 Regulations, any hearing relating to enforcement of a court order relating to a moratorium debt that is scheduled to take place after the notification is received must be adjourned generally, with permission for either party to restore.

3.5 Any existing proceedings subject to a mental health crisis moratorium must be referred to a judge for directions 6 months after the notification under regulation 10(1) of the 2020 Regulations is received.