

## 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 ~~two~~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 ~~two~~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 ~~Appendix 1~~ 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 ~~and in accordance with the provisions of this pilot scheme~~, 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 ~~all~~ relevant employees and former employees ~~in accordance with paragraph 4.3 below~~ 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 ~~excluding~~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 ~~(but should still list in the Initial Disclosure List of Documents)~~ 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 ~~such 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~~ 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 ~~ordered~~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 **B**, 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 10.54 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 ~~B~~, 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** In the Disclosure Review Document each party should (save as already described for Initial Disclosure: see paragraph 5.4(2) above) describe any searches for documents that it has already undertaken or caused to be undertaken for the purposes of the proceedings (including in advance of the commencement of the proceedings).~~

~~**10.5**~~ **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.

~~**10.6**~~ **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).

~~**10.7**~~ **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.

~~**10.8**~~ **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.

~~**10.9**~~ **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.

~~10.109~~ 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 ~~in advance of or after a case management conference, on any point~~ concerning the scope operation of ~~Extended Disclosure or the implementation of an order for Extended Disclosure pilot in a particular case~~, where—

(1) the parties have made real efforts to resolve disputes address the point between them; ~~and~~

~~(4) the absence of guidance from the court before a case management conference is likely to have a material effect on the court's ability to hold an effective case management conference, or the absence of guidance from the court after a case management conference is likely to have a material effect on the parties' ability to carry out the court's case management directions effectively.~~

(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) ~~and (2 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 ~~concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure.~~

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 **BA** 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~~ **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.
- (Rule 78.26 contains rules in relation to the disclosure and inspection of evidence arising out of mediation of certain cross-border disputes.)

### **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.

(Rule 78.26 contains rules in relation to the disclosure and inspection of evidence arising out of mediation of certain cross-border disputes.)

### **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;

~~(a) the document has been read to or by (b) 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 ~~by with~~ a clear description including the date and, where applicable, how the information is held (e-mail, webmail, memory stick, voicemail etc.) ~~and any~~ the author, ~~or~~ sender or ~~and any~~ 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.