



Disclosure Pilot Scheme

The Courts have been long considering how best to deal with (often vast) disclosure of documents in modern litigation. As most documentation is now held electronically, disclosure is often one of the most expensive and time consuming stages in litigation, potentially involving the review of millions of documents in large litigations. Despite great technological advancements in systems to harvest and review documentation for the purposes of litigation, parties and lawyers have been largely constrained by slightly outdated procedural rules.

In an attempt to address that and reduce the significant cost and time burden, the Disclosure Pilot Scheme (DPS) was introduced on 1 January 2019 and will be operating for two years in the Business and Property Courts (B&PCs) in England and Wales.

The DPS is mandatory subject to limited exceptions, and it applies to both new and existing cases (commencing prior to 1 January 2019) proceeding in the B&PCs. Its aim is to achieve a cultural change in the approach to disclosure in civil litigation by making the overall process more proportionate and has introduced a number of changes.

The DPS is set out in the new Practice Direction 51U (PD) to the Civil Procedure Rules (CPR). Below is a summary of its key provisions, but if you would like to discuss this in more detail then please do get in touch.

1. Duties of the parties and the legal representatives

A key feature of the DPS is that it sets out detailed duties which are owed to the Court by both parties and their legal representatives. These are owed up until the conclusion of proceedings. These duties are set out in paragraph 3.1 (parties' duties) and paragraph 3.2 (legal representatives' duties) of the PD. Included within these duties is:

- a wider duty to preserve documents within their control,
- a duty to disclose "known adverse documents" and
- a duty to co-operate with the opposing party.

2. Disclosure of known adverse documents

As mentioned above, parties are required to disclose known adverse documents. Such documents are defined in paragraph 2.8 of the PD as 'documents of which a party is aware of and which are/were within their control'. Such a document will be adverse if it contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute or if it supports the contention or version of events of an opposing party on an issue in dispute (paragraph 2.9 of the PD).



In relation to a party being "aware", it is clear whose knowledge will be relevant where that party is an individual. Alternatively, where a party is a company or organisation, the "knowledge" will be that of:

- any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the proceedings; or
- any person with accountability or responsibility within the company or organisation for the conduct of the proceedings.

This knowledge element is specifically extended to include both current and former employees. Therefore in relation to a former employee, it will be necessary to take reasonable steps to check the position regarding the existence of known adverse documents with that former employee.

The PD also requires the disclosure of these documents "once proceedings have commenced" (paragraph 3.1(2) of the PD). This suggests that there is an immediate requirement to disclose any known adverse documents. Irrespective of this, later provisions in the PD state that all known adverse documents will need to be disclosed either within 60 days of the first case management conference (if there is no Extended Disclosure – see below) or along with Extended Disclosure; and a Disclosure Certificate must be provided to confirm that this has been done.

3. Preservation of documents

The DPS specifies detailed requirements regarding procedural steps to be taken in relation to document preservation (section 4 of the PD). For the duration of the proceedings, both parties to the litigation and their legal advisors are under a duty to ensure that relevant document deletion or destruction processes are suspended.

Notice is required to be given by the parties to all relevant current and former employees, agents and other third parties who may be holding documents on the parties' behalf.

- Reasonable steps must also be taken to ensure that no documents are deleted or destroyed.
- Written confirmation will also need to be obtained by legal advisors from their client (or an appropriate representative of the client) that steps have been taken to preserve relevant documents in accordance with these duties.
- Confirmation will also be required from the parties when statements of case are served.

4. Initial Disclosure

The DPS introduces the concept of Initial Disclosure and its key requirements are set out in section 5 of the PD. Initial Disclosure involves each party providing 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 (usually in electronic form), copies of the following:

- key documents on which a party has relied (expressly or otherwise) in support of their claim or defence advanced in their statement of case; and
- key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.



Paragraph 5.3(1) of the PD states that Initial Disclosure is not required where the parties have agreed to dispense with it. This must be agreed in writing, before or after the commencement of proceedings. This may also only be agreed in certain circumstances, including where giving Initial Disclosure would involve a party providing more than 1,000 pages or 200 documents. In such circumstances, the requirement to give Initial Disclosure ceases for all parties for the purposes of the case, thus there will be no need to get another party's agreement.

A further requirement under the PD is for the list of Documents to be provided at the same time the parties serve the Initial Disclosure Disclosure Certificate, as opposed to the documents having to be specifically requested.

5. Extended Disclosure

The Court will only make an order for Extended Disclosure in instances where it is persuaded that it is appropriate to do so in order to fairly resolve any issues for disclosure identified by the parties (paragraph 6.3 of the PD). Such an order will need to be "reasonable and proportionate having regard to the overriding objective".

The new Disclosure Review Document (DRD) is a document which records the parties' approach to the disclosure exercise. The list of issues identified by the parties for disclosure must be completed in accordance with paragraphs 7 and 10 of the PD and will be set out in a tabular form in the DRD. Once these issues have been identified and either agreed or ordered, the Court will determine the appropriate review methodology to be applied to each issue. This is based on one of five models which can be ordered by the Court in addition to, or as an alternative to, Initial Disclosure. The models under paragraph 8 of the PD have the following features:

- Model A: No order for disclosure (which amounts to disclosure of known adverse documents only);
- Model B: Limited disclosure, requiring disclosure of key documents relied on, based on a search no broader than that undertaken as part of gathering documents for Initial Disclosure, together with any adverse documents;
- Model C: Request-led search-based disclosure, amounting to disclosure of particular or narrow classes of documents;
- Model D: Narrow search-based disclosure, which is similar to standard disclosure under CPR 31.6 and which will only be ordered if it is reasonable and proportionate to do so; or
- Model E: Wide search-based disclosure, which is similar to disclosure under Peruvian Guano, e.g. documents that would lead to additional enquiries/ searches being conducted possibly resulting in further documents being identified for disclosure.

It is important that the parties bear these models of Extended Disclosure in mind from the outset. In addition to completing a list of issues for disclosure, the parties should specify which of the above models is proposed in respect of particular issues for disclosure.

Similarly to Initial Disclosure, there is also a requirement to serve a Disclosure Certificate in addition to the documents themselves when giving Extended Disclosure.



6. Disclosure Guidance Hearings

When dealing with disclosure issues, in order to reduce the amount of time taken up during a case management conference (CMC), the DPS introduces a 30 minute Disclosure Guidance Hearing. Paragraph 11 of the PD provides for Disclosure Guidance Hearings. These hearings are deliberately kept short and are a means of seeking guidance from the Court by way of a discussion with the Court in advance of, or after a CMC. If such a hearing is sought, the parties will need to confirm that a genuine effort was made to rectify any disclosure disputes prior to approaching the Court in accordance with their duties to co-operate.

7. Use of technology

Encompassed within the duties owed to the Court by legal representatives is the requirement to liaise and cooperate in connection with the use of technology so as to promote the reliable, efficient and cost-effective conduct of disclosure.

When determining the appropriate disclosure model to be used in Extended Disclosure, legal representatives must consider whether the use of software or analytical tools should be adopted, including technology assisted review software and techniques.

The use of technology in order to minimise the burden of disclosure is a recurrent theme throughout the DPS. For example, section 2 of the DRD states that parties are to consider the use of technology/ computer assisted review tools and where the parties decide against using these, they will need to set out their reasoning as to why such tools will not be used.

Appreciating the need to understand and utilise technology may well be the most challenging aspect of the DPS for practitioners. The DPS has however, identified the need to hire specialised disclosure lawyers and to provide further training within law firms, in order to provide clients with the maximum benefits attained from disclosure technology.

8. Budgets

Costs are dealt with in paragraph 22 of the PD. The parties are required to provide an estimate of the likely costs of giving the disclosure proposed by them in the DRD, plus the likely volume of the documents involved. This will enable the Court to consider whether the proposals on disclosure are reasonable and proportionate.

It may not always be practical to complete the disclosure section of Form H in advance of an order being made at a CMC, as the exact scope of the disclosure exercise will not be known until the Court has made appropriate orders. Therefore, the parties may agree to postpone completion of this section until after the CMC and at the same time, notify the Courts of such (paragraph 22.2 of the PD). This encourages more accurate budgets for disclosure and avoids the need for parties to apply for variations to their budget as a result of disclosure issues arising after a disclosure order has been made. As a result of this, the Courts are now a lot less reluctant to allow such variations.



Please get in touch with the Howard Kennedy Commercial Litigation team if you require any advice or assistance in relation to disclosure and the DPS.

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