



Disclosure and inspection

BACKGROUND

To ensure that litigation between parties is resolved justly, it will often be necessary for each party to be able to see documents which are in the control of another party. English law has long recognised that parties to a dispute should be required to disclose documents relevant to the matter in question. Rules governing when and how a party is entitled to see documents in the possession or control of another party are contained in Part 31 of the Civil Procedure Rules ("CPR"). Disclosure traditionally takes place after each party has set out its position in its statement of case.

With effect from 1 January 2019, a Pilot Scheme for disclosure for most cases to be heard in the Business & Property Courts of England & Wales has been introduced, which imposes different rules than in other cases. This Pilot aims to make disclosure more efficient and proportionate. Its rules are set out in Practice Direction ("PD") 51U of the CPR and it will run until 31 December 2021, at which point it may or may not be made permanent.

This practical perspective summarises the rules likely to be of relevance to members who are forensic accounting practitioners engaged as expert advisers and/or expert witnesses by parties involved in litigation proceedings to be heard in the High Court, County Court and the Civil Division of the Court of Appeal. If a member becomes involved with litigation in any capacity, there will normally be a solicitor and possibly counsel involved as well, such that any legal issues can be raised with them.

WHAT ARE DISCLOSURE AND INSPECTION?

Under CPR Part 31, a party involved in litigation "*discloses a document by stating that the document exists or has existed*" (CPR Part 31.2). Disclosure is made by service, by each party to litigation a list of documents in his control relevant to the matter in hand. The list will indicate those documents "*in respect of which the party claims a right or duty to withhold inspection*" (CPR Part 31.10(4) (a)) (typically because they are subject to legal professional privilege) (see further below). A 'document' is not restricted to paper or to original documents; it means "*anything in which information of any description is recorded*" (CPR Part 31.4) and includes electronically stored information ("ESI").

ESI comprises emails (including deleted emails), other electronic communications such as text messages, social media content, voicemail, audio or visual recordings, data held in databases, electronic personal organisers, file servers, back-up systems, hard drives, memory sticks and mobile phones. Disclosure of ESI also extends to the metadata and other embedded data attached

to the electronic document which shows the history and properties of the document. The process of identifying, preserving, collecting, filtering, reviewing and disclosing ESI is called electronic disclosure ("e-Disclosure"). The services of e-data providers are regularly used to collect ESI forensically and support with e-Disclosure.

Where the Pilot applies, the parties will generally give "Initial Disclosure" at the same time as serving their statements of case (as for a memorial style approach to arbitration matters).

Initial Disclosure consists of the key documents on which the party relies, or to which it refers in its statement of case, plus any other documents which are necessary for the other party to understand the case it has to meet. Initial Disclosure is subject to certain exceptions (e.g. it is not required if it will involve disclosing more than about 200 documents or 1,000 pages, whichever is larger).

The parties will then indicate whether they seek any further disclosure on any of the issues in the case and the court may order such "Extended Disclosure" as it sees fit. Extended Disclosure is based on applying various "Models" of disclosure to be applied to each of the key issues in dispute ranging from narrow disclosure (i.e. Model A - disclosure limited to known adverse documents) to broad disclosure (i.e. Model E - wide "train of enquiry" disclosure available only in exceptional cases such as certain fraud cases).

A party to whom a document has been disclosed has a right to inspect that document except in certain circumstances, which are set out below (CPR Part 31.3). Indeed where the Pilot applies, a party generally provides access to the documents at the same time as serving its list of Extended Disclosure.

A party also has a right to inspect any document mentioned in a statement of case, a witness statement, a witness summary or an affidavit (CPR 31.14(1), with similar provisions under the Pilot found in CPR PD 51U).

Experts should be aware that "*where a party has access to information which is not reasonably available to another party, the court may direct*" the party to provide a document recording such information (CPR 35.9). Experts should discuss such requests for information with their instructing solicitors without delay so that a request can be made from the other party and if necessary apply to the court for an order to provide the information. Such requests need to be considered in the context of whether the information is essential and whether provision of the information would be proportionate (CPR PD35 12.2).

It is possible for a party to apply to the court for disclosure from a person who is not a party to proceedings (CPR 31.17). The court will only grant such an application where the documents in question would support the case of the party applying for disclosure or adversely affect the case of another party to the litigation, and disclosure is necessary in order to dispose fairly of the claim or to save costs.

These applications are relatively rare as the normal course is for a party to obtain disclosure of relevant documents from the opposing party itself.

The expert should also note CPR part 31.14(2), by which "*a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed*

in the proceedings"; and CPR PD35 3.2(2) which requires the expert to "give details of any literature or other material which the expert has relied on in making the report". The Pilot also contains provision for parties to request documents mentioned in an expert report, which is defined as meaning "referred to, cited in whole or in part or [where] there is a direct allusion to it" (CPR PD 51U paras. 21.1 and 21.3).

So all documents seen which go to forming the expert's opinion must be listed, but care should be taken not to mention in the expert's report a document which those instructing the expert may not wish the other party to see, which is not crucial to the expert's opinion and which is not otherwise disclosable.

THE OVERRIDING OBJECTIVE

The Civil Procedure Rules are governed by an overriding objective of "enabling the court to deal with cases justly and at proportionate cost" (CPR Part 1.1). This involves, amongst other things, saving expense and dealing with cases in a way which is proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. The parties to litigation are required to help the court to further the overriding objective.

Parties should therefore take a cooperative and reasonable approach to requests for disclosure and not seek to unreasonably obstruct or obfuscate the ordinary process of disclosure. Similarly, parties should only seek disclosure when it is justifiable and reasonable to do so. Parties should have regard to the overriding objective at all times, and particularly the need to minimise costs. Reasonableness and collaboration is a particular focus of the Pilot.

NECESSITY

Flowing from the overriding objective is the principle that disclosure should be restricted to what is necessary in an individual case. Accordingly, in low value, less complicated cases the requirements are less onerous than in high value or complicated cases.

For cases on the 'small claims track' (claims with a value of < £10k), Part 31 of the CPR does not apply. For claims on the 'fast track' (less complicated claims with value of £10k - £25k), a party is required to provide 'standard disclosure'.

For claims on the 'multi track' (very complicated cases with a value of £25,000 or more), there is no standard procedure and the court has the discretion to deal with the case including disclosure in the most suitable way for the case; the first stage is ordinarily to provide standard disclosure. The judge will subsequently decide whether 'extra disclosure' is required. Part 31.6 of the CPR provides that standard disclosure involves disclosing to the other side:

- a) the documents on which he relies in the case;
- b) the documents which:
 - i. adversely affect his own case;
 - ii. adversely affect another party's case;
 - iii. support another party's case; and
- c) the documents which he is required to disclose by a relevant practice direction.

Category (a) is unsurprising. It is important to note, however, that category (b) requires that documents which are materially damaging to a party's case be disclosed to the other side. Category (c) relates to certain types of case, such as clinical negligence claims, which are governed by specific rules.

As noted above, under the Pilot there are different 'Models' of disclosure that the court may order, ranging from very narrow, through a Model similar to standard disclosure, to very broad. The court will only order disclosure insofar as it is reasonable and proportionate having regard to factors such as the nature, complexity and importance of the case.

SEARCHES FOR DOCUMENTS

When giving standard disclosure, parties are required by CPR Part 31.7 to carry out a 'reasonable' search for relevant documents including data held electronically'. What is reasonable is determined by the number of documents involved, the complexity of proceedings, the expense of retrieval and the likely significance of any document. Under the Pilot, where a search-based Model of disclosure is ordered, the court will generally give some directions as to the scope of the search to be carried out. ESI data is typically searched using key words and date ranges.

Having located documents, the solicitor in the case will have to serve on the other parties a list of documents. This will include a 'Disclosure Statement' by his client setting out the extent of the search. Under the Pilot, the same applies and the document which must be signed by the party is known as a 'Disclosure Certificate'.

Such information is also likely to be required where the search is being conducted on behalf of a client. A record of the searches undertaken should therefore be kept.

Standard disclosure (or its closest equivalent under the Pilot) does not require documents to be disclosed which are relevant, for example to the background of a case, but which do not support or damage a party's case. It is also not necessary, where this is the type of disclosure involved, to disclose documents which themselves do not advance or damage the case of either party, but which might lead an opponent on to a 'train of enquiry' which will assist his case or damage your own.

There is provision made under Part 31.12 CPR for 'specific disclosure' whereby a court can order the disclosure of a specific document, or classes of documents. The court can also do this under the Pilot.

THE DUTY TO DISCLOSE

There is no automatic duty to disclose. Parties are required to discuss and seek to agree a proposal for disclosure and file at court, before the first case management conference ("CMC"), a Disclosure Report accompanied by a statement of truth signed by the client setting out an overview of the documents that exist or may exist or may be relevant, location and custodians and how documents are stored. Parties are also required to discuss the parameters of e-Disclosure and the format for exchange from an early stage in the proceedings. Under the Pilot these discussions and proposals are all recorded in a single document known as the Disclosure Review Document ("DRD"); the court expects a high degree of collaboration between parties over the completion of the DRD.

The duty to disclose arises as a result of:

- the parties making an agreement; or
- if the parties have not reached an agreement then if and insofar as a court orders disclosure arises. An order will usually be made at the first case management conference

The court may (although rarely do) order that no disclosure is required. The order may require the parties to disclose documents on which each party relies or on an issue by issue basis or whatever the court considers appropriate.

A lawyer owes an independent duty to the court to ensure that proper disclosure is given. Credibility at trial can be adversely affected by a failure to give proper disclosure if documents have been overlooked or destroyed.

The duty is limited to disclosure of "*documents which are or have been in [the party's] control.*" (i.e. of which the party has physical possession or has a right to possession, to inspect or to take copies) (CPR Part 31.8).

"*A party need not disclose more than one copy of a document*" (CPR Part 31.9(1)) albeit modified documents are treated as separate documents.

"*Any duty of disclosure continues until the proceedings are concluded*" (CPR Part 31.11(1)). If relevant documents are identified or created after the main body of disclosure is given, the further documents must be disclosed to the other side immediately. Where the Pilot applies, if a party wishes to rely on such a late-disclosed document, it must obtain the court's permission or the other party's agreement to do so.

DOCUMENTS EXEMPT FROM DISCLOSURE

There are many exceptions to the general rules requiring disclosure. The three classes most likely to be of relevance to members are:

- **The public interest** - "*A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the grounds that disclosure would damage the public interest*"(CPR Part 31.19(1)). It will depend on the specific circumstances of the case and the documents concerned but as an example may include documents containing information regarding local authority spending.
- **Documents which are privileged** - The most relevant types of privilege that apply are "legal advice privilege" and "litigation privilege."

Legal advice privilege relates to confidential communications (and evidence of those communications) between a client and its lawyers that were written for the purpose of giving or obtaining legal advice. The advice that is covered by legal advice privilege relates solely to a client's legal rights and obligations and is subject to a narrow definition of who the "client" is for these purposes.

Litigation privilege attaches to confidential documents that were created for the dominant purpose of actual, pending or 'reasonably contemplated' litigation including documents prepared by employees and third parties.

Note that marking a document with such words as 'Private, privileged and confidential in contemplation of litigation' does not of itself provide privilege.

Reports or documents prepared by members are unlikely to be privileged unless they are prepared for the dominant purpose of litigation which is reasonably contemplated at the time.

The fact that a document is confidential does not mean that it will be immune from disclosure. Furthermore privilege will no longer apply if a document loses its confidentiality such that it is important to maintain confidentiality in all privileged documents.

Sensitive information which has very little or no relevance to the dispute and which is contained in a document that has to be disclosed can sometimes be "redacted".

The other main type of privilege is "without prejudice" privilege, which applies to communications genuinely aimed at the settlement of a dispute. An example is an expert's discussion with another expert at a joint meeting or as part of the preparation of their joint report.

- **Incriminating documents** - A party is not in general required to disclose a document which will tend to incriminate him or expose him or his spouse to proceedings for a penalty.

ETHICAL ADVICE

If you are ever in doubt as to whether or not your conduct is ethical, you should step back from the situation and analyse it. It often helps if you put your thoughts down on paper or take a second opinion. Section 100 of the Code of Ethics (paragraphs 100.16 – 100.20) includes a framework for ethical conflict resolution. This outlines a series of steps that can help you not only to identify the problem but also to resolve the ethical conflict. In resolving such ethical conflicts it is important that you make a file note to explain the rationale for your position. This will help if your conduct is later challenged.

ICAEW members, affiliates, ICAEW students and staff in eligible firms with member firm access can discuss their specific situation confidentially with the Ethics Advisory Service on +44 (0)1908 248 250, via webchat or via e-mail ethics@icaew.com.

ACKNOWLEDGEMENTS

The Forensic & Expert Witness Community gratefully acknowledges Hayley Boxall of Pinsent Masons in the preparation of this practical perspective.

ICAEW Forensic & Expert Witness Community
E communities@icaew.com
icaew.com/forensic

This practical perspective is produced for guidance only. If in any doubt, members are always advised to seek expert advice.

© ICAEW 2021 All rights reserved.

ICAEW cannot accept responsibility for any person acting or refraining to act as a result of any material contained in this helpsheet. This practical perspective is designed to alert members to an important issue of general application. It is not intended to be a definitive statement covering all aspects but is a brief comment on a specific point.