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The proposed overhaul to Part 31 of the Civil Procedure Rules (CPR) in English court litigation: the end of standard disclosure as we know it?

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While the disclosure regime can be an attractive tool in English court litigation, it often comes at a significant price; one which inevitably increases as growing volumes of data are generated, extracted and reviewed. The framework has become somewhat antiquated as electronic disclosure has overtaken paper disclosure and Technology Assisted Review (TAR) has emerged. The more significant issue though is the reliance that parties, their legal representatives and judges have continued to place on standard disclosure as the default approach, demonstrating a widespread reluctance to deviate from that which has become the norm. This year should see the introduction of a two-year pilot scheme across the majority of cases in the Business and Property Courts in England and Wales, in an effort to tackle these issues and promote a more efficient and cost-effective disclosure process.

Basic and extended disclosure

The ultimate objective is to limit disclosure to what is reasonable and proportionate in the circumstances of any given claim, in order to determine each issue. In its current form, the pilot provides for two potential rounds of disclosure (basic disclosure with service of the pleadings and extended disclosure following the first case management conference (CMC)), though in certain cases one or both of these will not be appropriate.

Basic disclosure will require a party to produce key known documents which are: (i) relied upon to advance arguments made in a statement of case; and (ii) necessary for the other parties to understand that party's case, save for documents previously provided or known to be in the other parties' possession. To the extent that such documents number more than 500 pages (which may occur quite frequently in high-value disputes), basic disclosure will not apply, presumably because the burden would start to outweigh the benefit. Whilst there is clearly logic in this 'cards on the table' approach to litigation, the pilot envisages that parties may dispense with (or simply defer) basic disclosure by agreement, which at first glance would seem a fairly straightforward means of evading this step where it would otherwise apply, though it requires the parties to document their respective reasons for contracting out and the court may overturn their agreement.

To the extent that further disclosure is required to resolve one or more key issues (presumably in all but the most straightforward cases or where basic disclosure was deficient or did not take place), the parties will then need to consider extended disclosure. In place of the current form of standard disclosure and the alternative options that tend to be ignored, five different models of extended disclosure will be available:

- model A: no order for disclosure;
- model B: limited disclosure (of key documents not already provided via Basic Disclosure);
- model C: request-led search-based disclosure (of particular documents or narrow categories of documents);
- model D: narrow search-based disclosure (of documents likely to support or undermine any party's case); and
- model E: wide search-based disclosure (of documents likely to support or undermine any party's case, or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure).

A model will be selected per issue, with discussion and ideally agreement between

the parties, though the court will determine what is a reasonable and proportionate model for each issue, taking into account all the circumstances of the case. Rather than adopting a single model for the entire disclosure exercise, each party may use some or all models in respect of multiple issues: for example, one issue may require no disclosure (model A), while another might require request-led search-based disclosure (model C). Standard disclosure is most closely resembled by model D, though it is clear that there will be no 'go to' option. Model E will facilitate an even broader category of disclosure, albeit one reserved for exceptional cases.

In theory it is possible that there might be no disclosure on a given issue, as any prior agreement to abandon basic disclosure will not influence the court's decision as to whether to order extended disclosure, whereas failure to comply or engage with basic disclosure might. Nonetheless, regardless of the model(s) ordered, there would be an ongoing duty on each party to produce any documents which adversely affect their own case, at the time of extended disclosure (models B to E) or within 30 days of the first CMC (model A). Where models A or B are ordered and no search is to be conducted, this would be limited to known adverse documents. Therefore, one party's suspicion that another may be in possession of adverse documents should not influence their position as to which model might be appropriate for any given issue.

Early co-operation and a more interventionist court

The proposed rules will require the parties to give proper consideration to the subject of disclosure at the very outset of a claim. Aside from providing basic disclosure where applicable, at the time a party serves its statement of case it must also indicate whether it is likely to request extended disclosure (models B to E) in respect of any issue. The parties will then need to discuss and seek to agree a draft list of issues for disclosure in advance of the first CMC, including the nature of any requests that might be made under model C. The approach is more structured than the current regime, which simply provides that parties must discuss and seek to agree a disclosure proposal at least seven days before the first CMC (CPR 31.5(5)).

Following discussions, the parties will be required to jointly complete (and again seek to agree) a disclosure review document (DRD) ahead of the CMC, documenting proposals as to the scope of any extended disclosure sought and how such exercise might be conducted, detailing the location of potentially disclosable documents and considering whether TAR should be used. The parties will be expected to consider these issues with a view to reducing the burden and costs of the disclosure exercise. The DRD will replace the optional electronic disclosure questionnaire and presumably the shorter disclosure report, though it may continue to be updated by the parties throughout the proceedings, consistent with the continuing duty of disclosure.

However, the draft rules make clear that the parties cannot simply agree matters between themselves without input from the court, which will take a more proactive role and have the final say. Where the parties have agreed to dispense with basic disclosure, the court will determine whether the benefit of basic disclosure outweighs the burden. Similarly, where the parties request extended disclosure, the court must be persuaded to order it, having regard to numerous factors. This is quite a contrast to the current position where the court may approve the parties' disclosure proposals without a hearing and give directions in the terms proposed (CPR 31.5(6)).

Judges will also play an important role in circumstances where the parties have been unable to resolve their differences with regard to disclosure and the court's guidance is sought at a short disclosure guidance hearing, though the draft rules suggest that these will be rare. Nonetheless, judges and solicitors alike will need to understand the capabilities and limitations of the various review tools and technology in order to get the best out of the framework, not least because when giving guidance the courts will wish to hear from the person with direct responsibility for the conduct of disclosure. Furthermore, where the court makes an order for extended disclosure, it may also require use of specified software, data sampling and de-duplication methods, among other measures to determine how the disclosure process will be conducted, highlighting the need for parties to give this sufficient consideration beforehand.

Conduct and costs in relation to disclosure

A key component of the pilot scheme will be the introduction of express duties with regard to disclosure. Whilst the current regime imposes a duty on the parties to conduct a reasonable search and to disclose relevant documents, the new rules will add a duty to take certain reasonable steps to preserve potentially relevant documents in its control (currently legal representatives are simply required to notify their clients of the need to preserve disclosable documents under PD 31B.7) and a duty to refrain from disclosing non-relevant documents to another party. These duties will be key in establishing a more focused approach to disclosure, particularly the latter which should deter parties from the tactical production of large volumes of irrelevant documents. Where a party fails to discharge their duties, fails to cooperate with the other parties or fails to comply with any procedural requirement in respect of disclosure, they may be penalised with an adverse order for costs, among other sanctions such as an order to carry out further searches or disclose further documents.

The parties' legal representatives will be subject to similar duties under the pilot, as well as duties to liaise and cooperate with the other parties' legal representatives to promote the reliable, efficient and cost-effective conduct of disclosure, and to undertake a review of their client's privileged documents to ensure that they are properly withheld with a clear rationale. While these are steps that legal representatives should already be taking, the introduction of such duties should help to alleviate any doubts over the veracity of another party's disclosure exercise.

The proposed rules will require the parties to give greater consideration to the disclosure methodology in advance of the CMC but will excuse the parties from committing themselves at that stage to an estimate in respect of the disclosure phase in cases subject to the costs budgeting regime. This makes sense in circumstances where the court will have the deciding vote on the scope of disclosure to be applied, following which the parties will be in a better position to assess the likely costs, to be confirmed after the CMC. Throughout the disclosure exercise, the parties will be required to maintain a record of the methodology used to search for and review documents, including the use of any analytics or TAR. While the proposed regime would inevitably involve a greater frontloading of costs on disclosure strategy in the stages leading up to the CMC, the result should be a more targeted and transparent search and review process, which in turn would deliver significant cost savings in the long run.

Not a threat but an opportunity

Whilst the draft framework is presented as a complete overhaul of the existing regime, the majority of the proposed rules simply build on what is already in place. For example, the requirement on parties to preserve documents is more prescriptive but does not differ vastly from what should already be done. In theory, each of models A to E is available under the existing rules (CPR 31.5(7)), though without a separate duty to disclose known adverse documents and perhaps not on an issue-specific basis. Whilst there will be no 'one size fits all' model for extended disclosure, the draft rules standardise some of the more tedious aspects of the disclosure process, by removing the requirement to request inspection of documents and stipulating that electronic data be produced in native format with metadata preserved. This should focus the parties' collaboration on the issues that really matter, including whether TAR would assist in any disclosure exercise.

If the pilot succeeds in limiting the costs of disclosure to what is reasonable and proportionate, it should reduce the overall cost of litigating in England and Wales. However, there is more to the proposed rule change than cost savings: the requirement on parties in all cases to produce adverse documents without the corresponding burden of standard disclosure will be particularly attractive. Ultimately, the proposals aim to change the way we think about disclosure and achieve a shift away from a default approach to bespoke disclosure orders. Following a recent consultation period, the next step towards the new regime will be for the Disclosure Working Group to develop the pilot scheme for implementation later this year.