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How the new disclosure rules impact approaches to preservation and collection

Dr Tristan Jenkinson

The New Disclosure Rules

The New Disclosure Rules are currently (as of 1 January 2019) part of a two-year pilot within the Business and Property Courts of England & Wales.

In 2016 a disclosure working group was created following growing concerns over the increasing costs of litigation. The working group created a new draft practice direction which was subsequently updated following consultation. The resulting draft (and the corresponding Disclosure Review Document – "DRD"), has now been included in the Civil Procedure Rules as Practice Direction 51U[1], and are commonly referred to as the "New Disclosure Rules."

It is envisaged that if the pilot is a success, that the practice direction would be applied more widely.

Key New Points for Consideration

Duties of Parties and Lawyers Are Expressly Stated

The principles of the practice direction, and the relevant duties of parties involved, are clearly and expressly stated. These include specific requirements relating to preservation.

Under paragraph 4.4, for example, legal representatives must notify their clients of the need to preserve documents (as well as other obligations) but must also obtain written confirmations that their client has taken such steps. Additionally, each party must also confirm in writing (when particulars of claim/defence are served) that steps have been taken to preserve relevant documents.

Other duties include the duty to cooperate and engage with opposing parties to promote a cost-efficient approach, as well as the duty to disclose known adverse documents, which is required, no matter which model is ordered to be used for disclosure.

No More "Standard Disclosure"

The approach previously termed "standard disclosure" does not appear (directly) in the new rules. Instead it is suggested that there will be a two-stage approach to disclosure. The new approach also incorporates the use of a new Disclosure Review Document. This document acts similarly to the Electronic Documents Questionnaire (Form N264) although there are some significant differences.

Initial Disclosure

Under the new disclosure rules, unless excluded (for example by agreement or order of the court) there will be an initial disclosure, which will be provided at the same time as the statement of case. This initial disclosure should include the key documents relied upon in producing the statement of case and other key documents which are necessary for other parties to understand the claim or defence.

The initial disclosure is not designed to be extensive or burdensome and should not exceed 200 documents or 1,000 pages. If a party concludes that the initial disclosure would exceed these values, then, by confirming in writing, it may be possible to dispense with the initial disclosure. It seems likely that this will be a common occurrence in many commercial cases.

The working group envisaged that in some cases initial disclosure may not be required at all, while in others it may resolve the need for any further disclosure exercise(s).

1 A copy of Practice Direction 51U can be found at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51u-disclosure-pilot-for-the-business-and-property-courts.

Disclosure Review Document and Issued Based Approach for Extended Disclosure

As mentioned, replacing the Electronic Documents Questionnaire is the new Disclosure Review Document ("DRD"). This document is designed to assist parties and their advisors to co-operatively discuss and identify a proportionate and cost effective approach to disclosure. The DRD should be completed after the closure of the statement of case, but before the case management conference.

One of the key points of the DRD is to identify the key issues in the dispute which the extended disclosure (i.e. disclosure subsequent to the initial disclosure exercise) should provide information on. This is because the new approach is designed to be more "issues based".

The focus on an issues based approach is further demonstrated by the requirement under the DRD to exchange details of how disclosure will be approached for each issue. This allows for different approaches across the different issues at play.

The different approaches are referred to as disclosure Models. There are five disclosure Models that can be applied, referred to as Models A to E.

- Model A – No order for disclosure
  While described as "no disclosure", there is still a requirement to disclose any known adverse documents (in accordance with Practice Direction 51U paragraph 3.1(2)).

- Model B – Limited Disclosure
  A similar approach to initial disclosure (i.e. key documents relied upon plus key documents to understand the claim or defence), with the addition of any known adverse documents. It is worth noting that while there is no obligation to perform any searches (in addition to those already performed), where additional searches are run, any adverse documents returned will be considered to be "known" and would therefore need to be disclosed.

- Model C – Request-led Search-based Disclosure
  Disclosure is to be made of specific documents, or narrow sets of documents, based on requests made by the opposing party (as well as known adverse documents, including those identified from any of the required searches to perform the required disclosure).

- Model D – Narrow Search-Based Disclosure (with or without Narrative Documents)
  This model in the closest to the former concept of Standard Disclosure, requiring parties to undertake a reasonable and proportionate search. Narrative documents (which should be excluded unless specifically ordered to be included) are those which are relevant to the background and/or context of an issue, but not the issue itself.

- Model E – Wide Search-Based Disclosure
  This model would include those items included under narrow search-based disclosure (Model D) above, including narrative documents, but would also include documents which may lead to a train of inquiry which may then result in the identification of other documents for disclosure. This model is designed to be used only in exceptional cases. This model is similar to that which existed before the implementation of Part 31 in 1999 (i.e. the form of disclosure referred to as Peruvian Guano disclosure) though with the additional requirements of the search being reasonable and proportionate.

A further point to note when considering disclosure models is that the appropriate model for each issue needs to be ordered by the court (at the case management conference). Where parties disagree over the appropriate disclosure model for each issue, the court will make a decision and issue a corresponding order. Where there is agreement between the parties, the relevant model still needs to be confirmed by an order of the court. This is explicitly stated in paragraph 8.2 of the practice direction which states "No Model will apply without the approval of the court".

The courts have also been advised to take a proactive approach to decisions regarding the correct models to be applied and should not simply accept the disclosure models put forward by the parties.

The Disclosure Review Document in More Detail

The Disclosure Review Document is designed to serve a similar role as the Electronic Document Questionnaire ("EDQ") from CPR Part 31, though there are some significant differences. One of the key points of the DRD, as noted above, is to identify the relevant issues in the case, and also the relevant disclosure models which should be applied for the extended disclosure to be made for each of the issues.

The DRD is designed as a joint document, as opposed to an EDQ, which would be completed separately by each party. The aim is that the parties involved should meet to discuss and complete the DRD. This appears to be designed to increase cooperation of parties at the early stages of a matter, something which has been flagged by some as being lacking in too many cases, and has been identified as one of the contributing factors to the increasing costs of disclosure. This has also led to the duty of parties to liaise and correspond with opposing parties.

The DRD is also designed to be a mandatory framework, rather than the EDQ which was advised, but not actually required, to be completed by the involved parties.

Sanctions for Non-Compliance

The draft practice direction also sets out sanctions that can be applied for those failing to comply with their disclosure obligations. These sanctions include adjournment of any hearing, or adverse costs orders, and are in additional to the Courts' powers with regard to contempt, as well as the full powers and the full range of sanctions otherwise available to the Courts.

Considerations for Preservation (and Collection)

As discussed, the new disclosure rules set out the duties of parties. These include stating that parties have a duty to preserve documents relevant to any issue in proceedings, once proceedings have commenced, or once they know that proceedings may be commenced.

Additionally, legal advisors are now required to ensure that they have documented confirmation from their clients to confirm that they have met their obligations with regard to data preservation, including the suspension of relevant deletion or destruction policies, sending notifications to relevant employees and former employees and taking reasonable steps to ensure that agents or third parties do not delete or destroy relevant documents.

These new duties mean that data preservation could be even more important under the new disclosure rules than it was previously.

The Difference between Preservation and Collection

While many may feel that when it comes to litigation, data "preservation" is the same as data "collection", this is not necessarily the case. The two areas do have significant overlap – not least that forensic collection is often considered to be the gold standard form of preservation – but they can and do have different potential approaches.

Preservation is designed to preserve data, i.e. to prevent the deletion or alteration of documents. There are a number of ways that this can potentially be achieved, including:

- The use of legal hold notices (and/or relevant software)
- Cancellation/suspension/alteration of retention policies which delete material to prevent the deletion of relevant material
- Taking back-up tape sets out of rotation so that they are not overwritten
- Arranging for (non-forensic) copies to made of data to be taken
- Arranging for forensic copies of data to be taken

As set out in the new practice direction (at 4.1) "Preservation includes, in suitable cases, making copies of sources and documents and storing them". It is the "in suitable cases" phrase which is key here. One of the important considerations with regards to data preservation is that there are a number of approaches and each of those has an associated risk. Parties and their legal advisors should be aware of the potential risks with each approach so that they can make a decision on the best course of action.

For example, the use of hold notices may not be enough to deter people from deleting data – which could be a significant risk and could be highlighted and questioned by opposing parties. One method to bring the relevant risk down would be the use of specific software to put the legal hold in place and to ensure that the relevant files cannot be deleted (or altered).

There are several potential inherent risks with each approach (some of which are discussed further in the Consilio white paper "DIY Searching – A Cheap Solution or an Expensive Mistake"). The "gold standard" of preservation is considered to be using an independent third party to collect the data in a forensic manner, ensuring that all metadata (such as dates and times etc.) is also maintained.

The Impact of Disclosure Models

When it comes to preservation, questions could arise about the relevant scope of the preservation exercise, with specific regard to the disclosure models.

For example, if a party is planning to utilise a particularly targeted model for disclosure on an issue, this does not necessarily mean that the same targeted approach can be taken to identify the data that requires preservation. The other side may take a view that the disclosure should be wider than the targeted approach planned. Indeed, there are concerns in some quarters that such actions (identifying targeted approaches and demanding a wider disclosure model) could be used as strategic weapons during the discussions between parties to complete the DRD or at the case management conference when the court decides which disclosure models to order.

To mitigate such risks, it may be best to anticipate the universe of data that may realistically be covered in an order for disclosure and ensure that all such data is preserved.

It may be possible that an agreement can be reached between parties early in the process, regarding the preservation scope. It is still worth bearing in mind that the obligation to preserve is in place once litigation is realistically contemplated – i.e. this duty would likely exist prior to any such discussions (and resulting agreements) with the other side.

When it comes to data collection, if the data was not collected (in a forensic manner) at the preservation stage, then collection will likely still be required.

If this is the case, the issues are known at the point of collection and the relevant disclosure models have been ordered, then there is a relatively simple argument that the data to be collected could, therefore, be limited to the scope of the relevant disclosure models which have been ordered.

Additionally, it can often be the case within the Part 31 approach that the data collection is performed at a fairly early stage in proceedings, to ensure that relevant party has enough time to complete the review to their satisfaction. There is a potential risk in waiting for the DRD to be agreed and the relevant models for disclosure to be ordered before performing the collection; if a wide disclosure (such as models D or E) was ordered, this could potentially mean that the relevant party may not have as much time as they would have had under Part 31 to perform the same level of review.

The Impact of an Issues Based Approach

One of the potential problems with taking an issues-based approach to preservation is that the disclosure models may not be ordered until significantly after the parties have an obligation to preserve. Recall that parties have an obligation to preserve once there is a knowledge that proceedings may be brought. In addition, it may not be the case that all the issues that will be discussed will be obvious to both parties - the specifics of certain issues may only become known when the issue is raised by the opposing party during discussions of the DRD. As above, due to the timing, this can also have an impact on data collection.

A further potential problem is that if additional issues are identified during the disclosure process, additional preservation or collection efforts may be required, based around the requirements of that issue and the relevant disclosure model.

One of the most effective ways to mitigate these risks is to carry out a wide preservation and collection exercise. This may be by considering the universe of data that may realistically be covered in an order for disclosure and ensuring that this universe is preserved/collected.

Known Adverse Documents

There are now specific requirements to ensure that parties disclose any known adverse documents. In addition, any additional adverse documents which come to light as the result of searches performed, would also need to be disclosed – even if the other results from the search are not disclosable. The new practice direction is much wider than the corresponding obligations under Part 31. Paragraph 3.1(2), for example, of the practice direction states that parties have a duty;

> *… to disclose, regardless of any order for disclosure made, known adverse documents, unless they are privileged;*

The question of what should be considered to be a "known" adverse document is also explicitly covered in the practice direction. Paragraph 2.8 and 2.9 explain that;

> *"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.*
>
> *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.*

Due to this obligation to disclose, parties (and their legal advisors) will need to consider known adverse documents when considering the appropriate methodologies for data preservation (and/or collection) to ensure that these items are preserved and later disclosed.

Impact on Overall Approach

With the additional considerations, especially the duty to "liaise and cooperate with the legal representatives of the other parties to the proceedings … to promote the reliable, efficient and cost-effective conduct of disclosure"[2], it is likely that parties and their legal advisors will need to consider appointing electronic disclosure vendors earlier in their process than under Part 31. This will enable parties to be more considered in their stance with regards to preservation and collection, as well as have a greater understanding of the potential issues and the relevant disclosure models that should be requested to be ordered by the Court.

This better understanding will be key in supporting a reasonable and agreeable process with regards the development of the joint DRD prior to the case management conference, and to build arguments in favour of the disclosure models you are seeking orders for from the Court.

[2] Practice Direction 51u Paragraph 3.2(3).

About the Author

Dr Tristan Jenkinson is an expert witness with over eleven years of experience in the digital forensics and electronic disclosure field. He has been appointed as an expert directly by parties, as well as being appointed as a single joint expert by the court. Previously, he led the UK based Digital Forensics and Incident Response team for a global consultancy. Tristan advises clients with regard to forensic data collections, digital forensic investigations and issues related to electronic discovery.

The matters that Tristan has worked on have been wide ranging across both the digital forensic and electronic disclosure disciplines. This has included investigations of fraud, bribery, corruption and asset tracing, data falsification and manipulation in relation to both files and emails, intellectual property theft, failures to meet disclosure obligations, contractual disputes, blackmail, rogue trading, regulatory investigations and breaches of competition law.

Tristan has managed and provided strategic advice to clients on a large number of electronic disclosure cases. This has included managing complex multijurisdictional fraud and bribery investigations, onsite collection, processing and review of sensitive data, and regulatory investigations across numerous industry sectors for regulators based in a number of different jurisdictions. He has also advised clients responding to requests from law enforcement and governmental inquiries, including attending meetings with the Metropolitan Police.

He has been the lead investigator on many forensic investigations, including a number of high-profile cases. In addition to providing expert evidence his work has included formal expert meetings and court attendance at the request of counsel to assist with cross-examination. He has performed analysis of opposing expert's reports identifying inconsistencies, omissions and inaccurate statements. Clients have also sought his advice on the wording of instructions for Single Joint Experts.