



THE ENGLISH COURT DISCLOSURE PILOT, WHAT DOES IT MEAN FOR LITIGANTS?

This Client Guide outlines the mandatory English High Court Disclosure Pilot (Disclosure Pilot), which came in under Practice Directive 51U (PD 51U) from 1 January 2019 and applies to most actions in the Business and Property Courts.

This Client Guide is updated to reflect the recent reforms, including those that came into force on 1 November 2021 under the 136th PD Update.¹

The Disclosure Pilot brought about a whole-scale change to the English litigation disclosure process, which all users of the English High Court should be aware.

What is disclosure?

Disclosure is the process whereby parties exchange certain documents which are material to the issues in their dispute. Historically, parties in English litigation have chosen to give what is known as ‘standard disclosure’ that is, provide their counterparty with documents relevant to all issues which support their case or that of their counterparty.

What is the Disclosure Pilot?

The Disclosure Pilot is intended to reduce the scope and therefore the cost of disclosure by reference to a two-stage disclosure process:

1. Initial Disclosure – requiring disclosure of certain documents when serving the statement of case (e.g. claim form, particulars of claim, and defence); and

2. Extended Disclosure – comprising five disclosure models, including that there be no disclosure, and from which the court may order one, or a combination.

When will the Pilot apply?

The Disclosure Pilot was brought in in 2019 and applies to most of the Business and Property Courts (High Courts) including the Commercial Court, Chancery, and Technology and Construction. A number of courts are excluded, namely: the Admiralty Court, the Shorter and Flexible Trials Schemes, the Queen’s Bench Division, and competition claims.

The Disclosure Pilot, initially intended to last for two years, has been extended and will now run until 31 December 2022.

The Disclosure Pilot is mandatory and the working group behind the Disclosure Pilot is taking into consideration court users’ opinions and reforming the Disclosure Pilot on the basis of feedback received. We are feeding back on our experiences and would be happy to include your comments, please do feel free to send them to the author of this Client Guide, or your usual HFw contact.

The Disclosure Pilot will not affect a disclosure order made before the 1 January 2019, or before 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, any order for disclosure made under the Disclosure Pilot will stand until another order is made by the new court.

The Disclosure Pilot does not affect pre-action or non-party disclosure.

¹ https://www.justice.gov.uk/_data/assets/pdf_file/0011/177239/cpr-136-pd-update.pdf



Disclosure duties of litigants and lawyers

Litigants' disclosure duties	Lawyers' disclosure duties
<p>Include:</p> <ul style="list-style-type: none">• taking reasonable steps to preserve documents in your control that may be relevant to any issue in the proceedings;• disclosing “known adverse documents” (see below);• complying with any order for disclosure made by the court;• undertaking any search for documents, as ordered by the court, in a responsible and conscientious manner to fulfil the stated purpose of the search;• acting honestly in relation to the disclosure process;• using reasonable efforts to avoid a ‘document dump’ i.e. avoid providing documents to another party that have no relevance to the issues in the proceedings; and• signing the Disclosure Certificate and the Statement of Truth (confirming that you have complied with your duties under the Disclosure Pilot and the process has been followed correctly).	<p>Include:</p> <ul style="list-style-type: none">• preserving any documents within the lawyer’s control which might be relevant to proceedings;• taking reasonable steps to advise on and assist clients to enable them to comply with their duties;• obtaining written confirmation from clients that they have taken the steps required in suspension of document deletion or destruction policies;• liaising and cooperating with their counterparty’s lawyers to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology;• undertaking a review to ascertain whether any claim by clients to privilege from disclosure is properly made, and the reason for the claim to privilege is sufficiently explained; and• sign the Certificate of Compliance (confirming that advice on the Disclosure Pilot and disclosure process has been given).

Recent reforms to the Disclosure pilot

The most recent reforms, which came into force on 1 November 2021 include:

Model C re-defined

Model C disclosure has been re-defined and re-named as the “Disclosure of particular documents or narrow classes of documents” rather than “Request-led search-based disclosure”. The change is intended to limit the disclosure by ending the reference to a wide category of documents.

Creation of a separate regime for ‘Less Complex Claims’

A new separate regime within the Disclosure Pilot for Less Complex Claims, largely applicable to claims valued at less than £500,000, with a simplified version of the Disclosure Review Document (DRD).

Changes to multi-party claims under the Disclosure Pilot

The Disclosure Pilot continues to apply to multi-party claims, but with recognition that these claims are likely to need a bespoke approach from the court. The changes encourage the parties to work together to agree whether all of the disclosing party’s documents should be provided to all of the other parties, or only to some.

Streamlining of the Lists of Issues for Disclosure

A new streamlined approach to proposing and agreeing Lists of Issues for Disclosure and associated disclosure models.

Disclosure Guidance

Disclosure Guidance will now be provided by written application without the need for a hearing.

An end to 'standard disclosure'

There is no longer any 'standard disclosure' (that is, the exchange of documents on which parties rely that support their case or their opponent's case), which has long been criticised for resulting in unnecessarily voluminous amounts of documentation being exchanged and increasing the costs of litigation. Instead, the Extended Disclosure models (see below) provide disclosure options for the parties.

'Initial Disclosure'

Initial Disclosure is likely to be the first stage in the exchange of disclosure.

Initial Disclosure will be provided with the statement of case (e.g. claim form, particulars of claim or defence), unless agreed otherwise, or where an exception applies e.g. the claim form is served out of the jurisdiction, or if in the Commercial Court, will be served with the particulars of claim.

A search for documents is not required but can be undertaken.

Initial Disclosure should generally comprise no more than 200 documents or 1000 pages, which should be provided in electronic form, unless otherwise ordered or agreed between the parties.

The parties can also agree not to use Initial Disclosure, for example, where the case is complex and Initial Disclosure will not assist, as it is too confined.

'Extended Disclosure'

Extended Disclosure requires a court order. It can be in addition to, or instead of, Initial Disclosure. It involves using a disclosure menu of model options, which is discussed in more detail below.

The requirement to disclose '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. Perhaps known to many, more colloquially, as the 'smoking gun'.

Adverse documents must be disclosed irrespective of the Extended Disclosure model (or none) chosen.

The need to use technology

The Disclosure Pilot makes eDisclosure (the use of an electronic platform to assist with the process of what is now largely an electronic data review) the default position and encourages the parties to use Artificial Intelligence. The courts are keen on the use of technology in disputes as it increases efficiency, expedites the process, is more accurate than the equivalent human approach, and reduces costs.

Costs

If the Disclosure Pilot is used as intended, parties can expect to see the costs of disclosure decrease, mainly because we should see a reduction in the size of disclosure, and therefore, associated costs. However, in using eDisclosure the costs will be more frontloaded, and this has required a period of adjustment.

A summary of the five Extended Disclosure models:

Model A	"Disclosure confined to known adverse documents" - the previous model "No order for disclosure" is re-named to emphasise that the obligation to disclose known adverse documents will always apply.
Model B	"Limited Disclosure", consisting of known adverse documents plus Initial Disclosure, to the extent this has not already taken place.
Model C	"Disclosure of particular documents or narrow classes of documents", consisting of known adverse documents plus documents specifically requested by another party, and until the November 2021 reforms, was known as "Request led search-based disclosure".
Model D	"Narrow search-based disclosure", broadly equivalent to the previous "standard disclosure" model in which a party discloses documents that either support or are adverse to its own case or another party's case.
Model E	"Wide search-based disclosure", consisting of all standard disclosure documents, plus "train of enquiry" documents that may lead to the identification of further documents for disclosure; reserved for exceptional circumstances and most commonly used in fraud cases.

The stages of disclosure are as follows:

- **Stage 1:** Identification and preservation of documents (ideally this should be completed as soon as a claim is anticipated).
- **Stage 2:** Collation of documents for Initial Disclosure (if used).
- **Stage 3:** Creation of the DRD and List of Issues for Disclosure (which will form the basis of the requested Extended Disclosure Model).
- **Stage 4:** Collecting, processing, and reviewing documents (depending upon the Extended Disclosure model ordered).
- **Stage 5:** Preparation and service of the list of documents and documents (assuming Extended Disclosure is ordered).
- **Stage 6:** Review of the counterparty's documents.
- **Stage 7:** Specific (further) disclosure, if required.

Privilege

No discussion of disclosure would be complete without looking at privilege.

Documents may be kept from the counterparty on grounds of legal privilege. A reminder of the English privilege categories:

- **'Legal Advice Privilege'** protects confidential communications between a client and their lawyer, provided that the dominant purpose is the giving or receiving of legal advice i.e. business advice given by the lawyer will not be covered.
- **'Litigation Privilege'** protects communications between a client, their solicitor, and any third parties, as well as a client and a third party – provided that the dominant purpose is the giving or receiving of legal advice in connection with litigation; or the collection of evidence for use in litigation. The litigation need not be active, but must be in “reasonable contemplation”, i.e. more than simply a possibility. In this context, adversarial proceedings such as arbitration, and tribunal proceedings are also covered by “Litigation Privilege”.
- Although not a true form of legal privilege, **'without prejudice'/'without prejudice, save as to costs'** (usually correspondence in connection with the negotiation of a settlement is marked as 'without prejudice'), is still a relevant exception in disclosure proceedings (at least until the costs of the claim become the focus for the court).

Points to note:

- Marking documents as 'privileged' or 'without prejudice' will not determine whether they will be deemed to be privileged for the purposes of disclosure, this will be dependent on the context of the communication/document.
- Privilege can be waived through unintentional disclosure of a privileged document to a third party.
- Where the litigation or investigation has cross-border elements, it is imperative to establish at the outset, and before any documents are sent to other jurisdictions, exactly how relevant third party jurisdictions apply the concept of privilege e.g. a document privileged under the laws of England may not be under, say the US system and vice versa.

For more information on Privilege, please see our [Privilege Client Guide](#) and [Privilege Pack](#).

GDPR

The General Data Protection Regulation (EU) 2016/679 (GDPR) was retained in UK legislation following Brexit and is known as the UK GDPR and should be read alongside the Data Protection Act 1998. UK GDPR is relevant to disputes and specifically disclosure, and requires close consideration and compliance.

The Future

The reforms make England an even more efficient and cost-effective jurisdiction in which to litigate.

Advances in legal technology and eDisclosure software have created a positive impact on both the time and cost implications of the process of disclosure. For example, predictive coding systems learn from a very limited number of coding decisions made by lawyers, forming algorithms and enabling it to locate relevant documents itself, pushing them to the front of the queue for manual review by the lawyers. Thereby driving down the cost, as lawyer review time is reduced with no adverse effect on accuracy.

The use of technology in this area is exciting in terms of its potential to streamline this costly aspect of litigation, however its success depends on the parties' willingness to engage with the process.

This client guide was produced by the HFW Knowledge Management team, should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact them at KM@hfw.com or your usual HFW contact to discuss.



NICOLA GARE

Professional Support Lawyer
Dispute Resolution
T +44 (0)20 7264 8158
E nicola.gare@hfw.com

This is an updated version of the HFW Disclosure Pilot Client Guide first published in February 2019