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

This Client Guide outlines the mandatory English High Court Disclosure Pilot (the Pilot) which from 1 January 2019 applies to most actions in the Business and Property Courts.

This is a whole-scale change to our disclosure process of 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. Despite court rules (the CPRs) seeking to narrow the scope of disclosure and ensuring that the benefits of the disclosure exercise are not outweighed by the burden of the process, disclosure has remained a significant litigation expense, as historically parties in English litigation have chosen to give what is known as 'standard disclosure' that is documents relevant to all issues, and which support their case or that of their counterparty.

What is the Disclosure Pilot?

The 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 documents along with the particulars of claim, defence etc (akin to the process in international arbitration); 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 Pilot will apply to most of the Business and Property Courts (High Courts) including the Commercial Court, Chancery, and Technology and Construction. A number of courts and claims are however excluded, including the Admiralty Court, the Shorter and Flexible Trials Schemes, the Queen's Bench Division, and competition claims.

The Pilot is mandatory and the working group behind the Pilot will collate feedback. We are feeding back on our experiences and would be happy to include your comments in this also, please do feel free to send it to the authors of this Client Guide, or your usual HFW contact.

The 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 Pilot will stand until another order is made by the new court

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

WHAT ARE THE KEY CHANGES?

Litigants' disclosure duties	Lawyers' disclosure duties
These are new or where previously implied, are now express and include duties to: • preserve any relevant documents in their control- this will involve suspension of document destruction policies, and giving notice to employees, ex-employees, and third parties that documents should be preserved; • disclose known 'adverse documents', irrespective of whether an order to do so is made (unless they are privileged); • act honestly; and • use reasonable efforts to avoid providing documents that have no relevance ('document dumping').	These include: • obtaining written confirmation from clients that they have taken the steps required in suspension of document deletion or destruction policies; • taking reasonable steps to advise on and assist clients to enable them to comply with their duties; • liaising and cooperating with their counterparty's lawyers to promote the reliable, efficient and cost effective conduct of disclosure, including the use of technology; and • 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.

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. Standard disclosure will be replaced by the Extended Disclosure models (see below).

A new concept of 'Initial Disclosure'

A new concept, and likely to be the first stage in the disclosure process.

Initial Disclosure will be provided with the claim form, 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, and the parties can agree not to use Initial Disclosure for example, where the case is complex and Initial Disclosure will not assist, as it is too confined.

A new concept of 'Extended Disclosure'

A new concept. In addition to, or instead of, Initial Disclosure, which requires a court order, and involves using a new disclosure menu. Discussed in 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.

Adverse documents must be disclosed irrespective of the extended disclosure model (or none) chosen.

The need to use technology

The Pilot makes eDisclosure (the use of an electronic platform) the default position, and encourages the parties to use AI. The courts are keen on the use of technology in disputes as it increases efficiency, speeds up the process, is more accurate than the equivalent human approach, and reduces costs.

Costs

If the 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 associated costs. However, the costs will be more frontloaded, and this may require a period of adjustment.

An overview of the Extended Disclosure models, a revised Disclosure Menu comprising of five 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	"Request-led search-based disclosure", consisting of known adverse documents plus documents specifically requested by another party
Model D	"Narrow search-based disclosure", broadly equivalent to the current "standard disclosure" model in which a party discloses all 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 anticipated to be used most commonly in fraud cases.

Once a *disclosure order* has been made, the stages of disclosure are as follows:

- **Stage 1:** Identification and preservation of documents (although in practice this should be completed as soon as a claim is anticipated)
- **Stage 2:** Collecting, processing and reviewing documents (depending upon the Extended Disclosure model ordered)
- **Stage 3:** Preparation of the List of Documents
- **Stage 4:** Inspection of the counterparty's documents
- **Stage 5:** 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:

- '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 and the client and a third party – provided that the dominant purpose is either: 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' (usually correspondence in connection with the negotiation of a settlement is marked as 'without prejudice'), is still relevant in disclosure proceedings.

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 privilege under the laws of England may not be under the US system and vice versa.

For more information on Privilege, please see our **Privilege Client Guide** and **Privilege Pack**.

GDPR

The introduction of the General Data Protection Regulation (EU) 2016/679 (GDPR) in May 2018 means that any documentation with the potential to be disclosed must be examined for "personal data" - a definition with an extremely wide meaning.

The Future

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

Advances in legal technology and eDisclosure software have created an impact on both the time and cost implications of the process for example, a predictive coding system learns from a very limited number of coding decisions made by lawyers, forming algorithms enabling it to locate relevant documents itself, and push them to the front of the queue for manual review by the lawyers, thereby driving down the cost as lawyer review time will be 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.

CLAIRE MCNAMARA
Director of Knowledge Management
T +44 (0)20 7264 8021
E claire.mcnamara@hfw.com

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

hfw.com

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