

# Disclosure Pilot Toolkit

2019







# Introduction

Paragraph references in this Disclosure Pilot Toolkit refer to the new Practice Direction 51U, and the hyperlinks direct you to the relevant paragraphs in PD 51U. This Practice Direction came into force on **1 January 2019** for all cases in the Business and Property Courts. It will apply to all existing cases as well as new ones, and there are no transitional provisions. For the full details of the new Pilot and its associated definitions, forms and procedures, please refer to [PD 51U](#).

We refer you in particular to:

- (i) paragraphs 3.1, 3.2 and 4 of PD 51U, which codify existing duties owed by parties in the conduct of disclosure; and
- (ii) the obligation to produce **known adverse documents**, which is a continuing duty once proceedings have commenced.

# Disclosure Pilot Toolkit

PHASE OF PROCEEDINGS	TIME LIMIT	RESPONSIBLE PART(Y)(IES)
<p><b>Litigation In Contemplation</b></p> <p><b>Preservation of Documents</b></p> <ul style="list-style-type: none"> <li>• Preserve documents in the possession of the part(y)(ies) (<a href="#">3.2(1)</a>).</li> <li>• Send litigation hold notice – this needs to be sent to all current and former employees who may have documents that could be relevant to any issue likely to be in dispute. This notice must be in writing, and identify the documents to be preserved, and notify the recipient (e.g. the relevant employees) that the documents should not be deleted or destroyed (<a href="#">4.2(2)</a>; <a href="#">4.3</a>; <a href="#">4.4(1)</a>)</li> <li>• Obtain written confirmation from an appropriate representative within the part(y)(ies) organisation(s) that steps have been taken to comply with document preservation duties (<a href="#">4.2(2)</a>).</li> </ul>	<p>This must be done within a “reasonable period” – <a href="#">4.4</a></p>	<p>Claimant and Defendant</p>
<p><b>Statements Of Case</b></p> <p><b>Preservation of Documents</b></p> <p>A written notice confirming steps have been taken to preserve documents must be provided to all parties when statement of case is served – <a href="#">4.5</a>.</p> <p><b>Initial Disclosure</b></p> <p>A party must provide, alongside its statement of case, an <i>Initial Disclosure List of Documents</i>, and copies of (1) the key documents on which it has relied, and (2) documents necessary to enable the other parties to understand the statement of case – <a href="#">5.1</a>. Documents in the other side’s possession only need to be provided if expressly requested.</p> <p><b>Exceptions:</b></p> <p><b>Parties may agree to dispense with initial disclosure; in which case record of reasons for doing so must be readily available at CMC – <a href="#">5.3(1)</a>, <a href="#">5.8</a></b></p> <ol style="list-style-type: none"> <li>The Court may order initial disclosure is not required (but only if an application to that effect is made – the default position will be that it is required) – <a href="#">5.3(2)</a>, <a href="#">5.10</a></li> <li>If Initial Disclosure would exceed 1000 pages / 200 documents (whichever is the larger) or some higher amount that the parties have agreed, then it will not be required – <a href="#">5.3(3)</a>.</li> </ol>	<p><b>Initial disclosure</b></p> <p>Must be provided at the same time as statement of case – <a href="#">5.1</a>.</p>	<p>Claimant and Defendant</p>

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<p><b>Preparation for the CMC</b></p> <p><b>Extended Disclosure – 6.1</b> This means any disclosure of documents sought or ordered in addition to Initial Disclosure.</p> <p>There are five “Models” for Extended Disclosure.</p> <p>Extended Disclosure does not happen automatically – it must be specifically requested by a party. Note this is a change from the current position whereby disclosure is always ordered.</p> <p>There is no explicit presumption in favour of any particular “Model” – unlike the current position whereby the Court will usually order standard disclosure unless there is a reason not to).</p> <p>Different Models can be ordered for different Issues</p> <p><b>Action(s) to take (before the CMC):</b></p> <ul style="list-style-type: none"><li>• File/serve Notice that Extended Disclosure will be requested.</li><li>• Finalise and file Disclosure Review Document (“DRD”) and Certificate of Compliance</li></ul> <p><b>Models of Extended Disclosure – search and non-search based (8)</b></p> <table><tr><th>Model</th><th>Description / Disclosure Type</th><th>DRD Section</th></tr><tr><td>A</td><td>Confined to known adverse documents (3.1(2))</td><td>N/A</td></tr><tr><td>B</td><td>Limited disclosure</td><td>N/A</td></tr><tr><td>C</td><td>Request-led search-based disclosure / (closest to Redfern requests commonly used in international arbitration)</td><td>1B &amp; 2</td></tr><tr><td>D</td><td>Narrow search-based disclosure, with or without narrative documents (closest to the current “standard disclosure” approach)</td><td>2</td></tr><tr><td>E</td><td>Wide search-based disclosure/train of inquiry style (i.e. Peruvian Guano)</td><td>2</td></tr></table> <p><b>Identifying Issues for Disclosure – 7.1</b></p> <p>If Extended Disclosure is requested by <b>any party</b>, a draft List of Issues for Disclosure (7.2) must be prepared by the Claimant and provided to all other parties (using section 1A of the DRD (10)).</p> <p>Each party must then identify which Model it is seeking for each of the issues on the List of Issues for Disclosure by completing Section 1A of the DRD – 7.6.</p>	Model	Description / Disclosure Type	DRD Section	A	Confined to known adverse documents (3.1(2))	N/A	B	Limited disclosure	N/A	C	Request-led search-based disclosure / (closest to Redfern requests commonly used in international arbitration)	1B & 2	D	Narrow search-based disclosure, with or without narrative documents (closest to the current “standard disclosure” approach)	2	E	Wide search-based disclosure/train of inquiry style (i.e. Peruvian Guano)	2	<p><b>Notice that Extended Disclosure will be requested</b></p> <p>28 days from the final statement of case (7.1)</p>	Claimant and Defendant
	Model	Description / Disclosure Type	DRD Section																	
	A	Confined to known adverse documents (3.1(2))	N/A																	
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E	Wide search-based disclosure/train of inquiry style (i.e. Peruvian Guano)	2																		
<p><b>(Draft) List of Issues for Disclosure</b></p> <p>To be prepared and served: within 42 days of final statement of case (7.2)</p>	Claimant (if <b>any party</b> has provided notice that Extended Disclosure will be requested)																			
<p><b>If alternative wording / additional issue required for List of Issues for Disclosure</b></p> <p>As soon as practicable but no later than 14 days after service of List of Issues for Disclosure (7.5)</p>	Defendant																			
<p><b>Section 1B of DRD</b></p> <p>Completion time within 28 days of response to List of Issues for Disclosure per 7.5 (10.5)</p>	Party requesting Model C																			
<p><b>Section 1B (response column) of DRD</b></p> <p>Completion time within 14 days of receiving Section 1B (10.5)</p>	Party responding to Model C requesting party																			
<p><b>(Draft) Section 2 of DRD</b></p> <p>Completion and exchange as soon as reasonably practical but no later than 14 days before CMC (10.6)</p>	Claimant and Defendant																			



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<p><b>The Disclosure Review Document</b></p> <p><b>Completing the DRD – section by section – pre-CMC</b></p> <table><tr><th>Section</th><th>Function</th></tr><tr><td>1A</td><td>Identify issues for disclosure following close of pleadings</td></tr><tr><td>1B</td><td>Set out any requests for disclosure under Model C</td></tr><tr><td>2</td><td>Where any party chooses Models C, D, or E, the document landscape needs to be described</td></tr></table> <p><b>Certificate Of Compliance</b></p> <p>Once the DRD is filed, signed Certificate of Compliance to be filed at Court (<a href="#">10.9</a> and <a href="#">Appendix 3</a>)</p>	Section	Function	1A	Identify issues for disclosure following close of pleadings	1B	Set out any requests for disclosure under Model C	2	Where any party chooses Models C, D, or E, the document landscape needs to be described	<p><b>Finalised single joint DRD</b></p> <p>Filing no later than 5 days before CMC (<a href="#">10.8</a>)</p> <p><b>Certificate of Compliance</b></p> <p>As soon as reasonably practicable after filing of finalised DRD but in advance of CMC</p>	<p>Claimant</p> <p>Claimant and Defendant</p>
Section	Function									
1A	Identify issues for disclosure following close of pleadings									
1B	Set out any requests for disclosure under Model C									
2	Where any party chooses Models C, D, or E, the document landscape needs to be described									
<p><b>CMC</b></p> <p><b>The Court will make an order for disclosure.</b></p> <p>Practice Direction does not provide for there to be a “default” option or Model – the Court may order different disclosure models for different issues.</p>	<p><b>CMC takes place following completion of DRD.</b></p> <p>Note: parties’ duty to seek to agree and update the DRD is ongoing (<a href="#">10.3</a>).</p>	<p>Claimant and Defendant</p>								
<p><b>Disclosure Guidance Hearings</b></p> <p>Can be requested at any time (prior to, or following the CMC) so that the Court’s guidance can be obtained so that parties can carry out case management directions effectively – <a href="#">11.1</a></p> <p>Must be attended by a legal representative with <b>direct responsibility</b> for the conduct of disclosure – <a href="#">11.3</a>. In practice, this may mean that the Court expects to hear from the solicitors, rather than Counsel.</p>	<p>Can be held in advance of or after a CMC.</p>	<p>Claimant and Defendant</p>								

# The Team

Ranked 7th largest global disputes firm in the world and 10th largest in London, Reed Smith has a commitment to dispute management and litigation across its global platform and has garnered a reputation for producing solutions which respect the often multi-jurisdictional elements of modern litigation risk. Reed Smith's team of experts offers the knowledge, skills, experience and footprint to handle local or international concerns across a diverse range of sectors and industries, most notably financial services, life sciences, energy and natural resources, media and entertainment, and transportation. In London alone, we have over 120 litigation lawyers and are known for our expertise in complex, multi-party, multi-jurisdictional disputes.

For any questions relating to the new Disclosure Pilot, please contact the team below.



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