

## 100<sup>th</sup> UPDATE – PRACTICE DIRECTION AMENDMENTS

The new Practice Directions and the amendments to the existing Practice Directions, supplementing the Civil Procedure Rules 1998, are made by the Master of the Rolls under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and are approved by Lucy Frazer QC MP, Parliamentary Under-Secretary of State for Justice, by the authority of the Lord Chancellor.

The new Practice Directions and the amendments to the existing Practice Directions come into force as follows—	
Revocation of 99 <sup>th</sup> Update – Practice Direction Amendments	With immediate effect
Practice Direction 2B – Allocation of cases to levels of judiciary	1st October 2018
Practice Direction 51O – The Electronic Working Pilot Scheme	1st January 2019
Practice Direction 51U – Disclosure pilot for the Business and Property Courts	1st January 2019
Practice Direction 57AB – Shorter and Flexible Trials Schemes	1st October 2018
Practice Direction 81 – Applications and proceedings in relation to contempt of court	1st October 2018
Practice Direction relating to the use of the Welsh language in cases in the civil courts in or having a connection with Wales	1st October 2018

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The Right Honourable Sir Terence Etherton  
Master of the Rolls and Head of Civil Justice

Signed by authority of the Lord Chancellor:

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Lucy Frazer QC MP  
Parliamentary Under-Secretary of State for Justice  
Ministry of Justice  
Date: 04 September 2018

## **REVOCATION OF 99<sup>TH</sup> UPDATE – PRACTICE DIRECTION AMENDMENTS**

- 1) The 99<sup>th</sup> Update – Practice Direction Amendments is revoked with immediate effect.

## **PRACTICE DIRECTION 2B – ALLOCATION OF CASES TO LEVELS OF JUDICIARY**

- 1) For paragraph 8.1, substitute—

“8.1 Applications for orders and interim injunctions which may not be made or granted by a District Judge in the High Court may not be allocated to a District Judge in the County Court. In the first instance, the following applications for orders and interim remedies (including injunctions whether interim or final) will be allocated to a District Judge—

- (a) proceedings which have been or may be allocated to a District Judge pursuant to paragraph 11.1 below;
- (b) injunctions sought in money claims which have not yet been allocated to a track and the amount claimed does not exceed the fast track financial limit;
- (c) injunctions that are to be made under any of the following provisions—
  - (i) sections 36A, 26B or 26C or 91(3) of the Anti-social Behaviour Act 2002;
  - (ii) section 27(3) of the Police and Justice Act 2009;
  - (iii) section 3 of the Protection from Harassment Act 1997;
  - (iv) sections 34, 40 or 41 of the Policing and Crime Act 2009; or
  - (v) Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014.”

- 2) Omit paragraph 8.1A.

- 3) For paragraph 8.3, substitute—

“8.3 Any proceedings in which the court may make an order committing a person to prison or attach a power of arrest to an injunction or remand a person will be allocated to a Circuit Judge, unless the order, power of arrest or remand is made—

- (a) In proceedings which have been or may be allocated to a District Judge pursuant to paragraph 8.1 above;
- (b) pursuant to section 23 of the Attachment of Earnings Act 1971; or
- (c) pursuant to section 14 and section 118 (but only in relation to proceedings before a District Judge) of the County Courts Act 1984,

or where the order may be made in relation to a breach of an undertaking given in proceedings referred to in (a), (b) or (c) above.”

## **PRACTICE DIRECTION 510 – THE ELECTRONIC WORKING PILOT SCHEME**

- 1) For Practice Direction 51O, substitute the amended version as set out in Annex A to this Update.

#### **PRACTICE DIRECTION 51U – DISCLOSURE PILOT FOR THE BUSINESS AND PROPERTY COURTS**

- 1) After Practice Direction 51T, insert Practice Direction 51U as set out in Annex B to this Update.

#### **PRACTICE DIRECTION 57AB – SHORTER AND FLEXIBLE TRIALS SCHEMES**

- 1) After the Practice Direction – Business and Property Courts (which has been renumbered as Practice Direction 57AA), insert Practice Direction 57AB as set out in Annex C to this Update.

#### **PRACTICE DIRECTION 81 – APPLICATIONS AND PROCEEDINGS IN RELATION TO CONTEMPT OF COURT**

- 1) In paragraph 10.2, in sub-paragraph (2), omit the words after “judge of the County Court” to the end.

#### **PRACTICE DIRECTION RELATING TO THE USE OF THE WELSH LANGUAGE IN CASES IN THE CIVIL COURTS IN OR HAVING A CONNECTION WITH WALES**

- 1) For the Practice Direction relating to the use of the Welsh language in cases in the civil courts in Wales, substitute the Practice Direction relating to the use of the Welsh language in cases in the civil courts in or having a connection with Wales that is set out in Annex D to this Update.

## **ANNEX A**

### **PRACTICE DIRECTION 510 – THE ELECTRONIC WORKING PILOT SCHEME**

*This Practice Direction supplements CPR rules 5.5 and 7.12*

#### **Contents of this Practice Direction**

Title	Number
General	Para. 1
Usage and Operation of Electronic Working	Para. 2
Electronic Working and Alternate Filing Methods	Para. 3
Original Documents	Para. 4
General Rules Regarding Issue and Filing	Para. 5
Payment of Fees	Para. 6
Electronic Sealing	Para. 7
Service	Para. 8
Transfer of Proceedings and file transmission	Para. 9
Applications in Proceedings	Para. 10
Case and Cost Management and other Directions	Para. 11
Statements of Truth	Para. 12
Trial Bundles	Para. 13
Inspection of Documents on the Electronic Working Case File by Parties or Permitted Persons	Para. 14
Public Kiosk Service for the Electronic Inspection of Publicly Available Documents	Para. 15
Supply of Electronic Copies of Documents by email	Para. 16
Security	Para. 17

## General

**1.1** (1) This Practice Direction is made under rules 5.5, 7.12 and 51.2 of the Civil Procedure Rules (“CPR”). It provides for a pilot scheme (“Electronic Working”) to—

(a) operate from 16 November 2015 to 6 April 2020;

(b) operate in the Chancery Division of the High Court, the Commercial Court, the Technology and Construction Court, the Circuit Commercial Court, and the Admiralty Court, at the Royal Courts of Justice, Rolls Building, London (together, “the Rolls Building Jurisdictions”), the Central Office of the Queen’s Bench Division at the Royal Courts of Justice; and

(c) apply to existing proceedings and proceedings started on or after 16 November 2015 in the Rolls Building Jurisdictions and in the Central Office of the Queen’s Bench Division will apply to proceedings started after 1 January 2019 and will not apply to existing proceedings unless ordered by the court.

(2) Electronic Working is a permitted means of electronic delivery of documents to the court for the purposes of rule 1.46 of the Insolvency (England & Wales) Rules 2016 (“IR 2016”).

**1.2** (1) Electronic Working works within and is subject to all statutory provisions and rules together with all procedural rules and practice directions applicable to the proceedings concerned, subject to any exclusion or revision within this Practice Direction.

(2) In particular, the following provisions of the CPR apply unless specifically excluded or revised by this Practice Direction—

Part 49 (Companies Court)

Part 57 (Probate, Inheritance and Presumption of Death)

Part 58 (Commercial Court)

Part 59 (Circuit Commercial Courts)

Part 60 (Technology and Construction Court Claims)

Part 61 (Admiralty Claims)

Part 62 (Arbitration Claims)

Part 63 (Intellectual Property Claims)

Part 63A (Financial List)

Part 64 (Estates, Trusts and Charities)

Part 74 (Enforcement of Judgments in different jurisdictions)

Part 77 (Provisions in support of criminal justice)

Practice Direction – Insolvency Proceedings

Practice Direction: Directors Disqualification Proceedings

EU Competition Law Practice Direction

(3) The following provisions of the CPR shall not apply to this Practice Direction—

Part 76 (Proceedings under the Prevention from Terrorism Act 2005)

Part 88 (Proceedings under the Counter-Terrorism and Security Act 2015)

(4) Parties will also need to give careful consideration to the Chancery Guide, the Admiralty and Commercial Courts Guide, the Technology and Construction Court Guide, the Financial List Guide, the Circuit Commercial Court Guide, the Patents Court Guide, the Intellectual Property Enterprise Court Guide and the Queen’s Bench Guide (where applicable).

(5) Where the provisions of this Practice Direction conflict with the provisions of Practice Direction 5B, this Practice Direction shall take precedence.

## **Usage and operation of Electronic Working**

**2.1** Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal Court office opening hours and on weekends and bank holidays, except—

(a) where there is planned “down-time”: as with all electronic systems, there will be some planned periods for system maintenance and upgrades when Electronic Working will not be available;

(b) where there is unplanned “down-time”: periods during which Electronic Working will not be available due, for example, to a system failure or power outage, or some other unplanned circumstance; and

(c) where the filing is of a notice of appointment by a qualifying floating charge holder under Chapter 3 of Part 3 of the IR 2016 and the court is closed, in which case the filing must be in accordance with rule 3.20 of the IR 2016.

**2.2** Electronic Working applies to and may be used to start and/or continue CPR Part 7, Part 8 and Part 20 claims, pre-action applications including applications under rule 31.16, insolvency proceedings, and arbitration claims in the Rolls Building Jurisdictions and in the Central Office of the Queen’s Bench Division.

In the Rolls Building Jurisdictions from 1 October 2017—

(a) for a party who is legally represented, Electronic Working must be used by that party to start and/or continue any relevant claims or applications; and

(b) for a party who is not legally represented, Electronic Working may be used by that party to start and/or continue any relevant claims or applications.

**2.2A** In the Central Office of the Queen’s Bench Division from 1 January 2019—

(a) for a party who is legally represented, Electronic Working may be used by that party to start and/or continue any relevant claims or applications; and

(b) for a party who is not legally represented, Electronic Working may be used by that party to start and/or continue any relevant claims or applications.

**2.3** To file a document using Electronic Working, a party shall—

(a) access the Electronic Working website address specified by Her Majesty’s Courts and Tribunals Service (“the Website”);

(b) register for an account or log on to an existing account;

(c) enter details of a new case or use the details of an existing case;

(d) upload the appropriate document; and

(e) pay the appropriate fee.

**2.4** Proceedings issued in the Rolls Building Jurisdictions and the Central Office of the Queen’s Bench Division will be stored by the Court as an electronic case file (“the Electronic Working Case File”).

**2.5** The Website contains further details, updated from time to time, on how to complete a filing, including in the event of down-time or where a particular document format is not compatible with Electronic Working, information about the timing of any planned down-time, and a support email address to contact in the event of any down-time or when experiencing any other technical difficulty in using the Website.

### **Electronic Working and alternate filing methods**

**3.1** Any document which is filed using Electronic Working must not also be filed by some other means unless this is required by paragraphs 3.4(2), 10, 11 and 13 or a rule or practice direction, or Court order or Practice Note.

**3.2** Proceedings which have not been started using Electronic Working may be continued using Electronic Working after documents originally submitted in those proceedings have been converted to PDF format. The proceedings shall then continue as if they had been started using Electronic Working.

**3.3** To permit use of Electronic Working for proceedings initially started by other means—

(a) the Court will, where appropriate, seal the paper copy of the document;

(b) the parties will pay any fee due;

(c) the Court will either request that the party provide the document in PDF format or scan the document into PDF format and store it on the Electronic Working Case File; and thereafter

(d) the parties will, subject to paragraph 3.5, file documents needing to be filed through Electronic Working in accordance with this Practice Direction.

**3.4** (1) The Court may refuse to convert documents to PDF format where those documents were originally submitted by some other means.

(2) In relation to any document required by the Rules, any Practice Direction or any order of the court to be filed, the Court will not accept that document for filing if submitted by e-mail and any such document must be filed through Electronic Working (unless submitted on paper); but if a Judge, Master or Registrar has requested or permitted the submission of such a document by e-mail then it must be so submitted as well as being filed through Electronic Working (or on paper).

**3.5** (1) Where an original document is required by order of the Court or by provision of the CPR or IR 1986 or 2016 to be filed, such original document cannot be filed using Electronic Working and must instead be physically filed with the Court.

(2) This includes original wills, grants of probate or evidence of testamentary documents which must be filed physically with the Court in order for contentious probate claims to be issued. As a result, contentious probate claims cannot be issued using Electronic Working unless the Court permits.

## **Original documents**

**4** Where parties file documents using Electronic Working, the original signed documents, including the original exhibits to any witness statement filed, must be preserved and must be made available for inspection if required by another party to the proceedings and/or by order of the Court.

## **General rules regarding issue and filing**

**5.1** Any document which is filed using Electronic Working must—

- (a) consist of one copy only unless required by a Court order, rule or practice direction;
- (b) be in PDF format unless the Court directs otherwise or unless the document is a draft order, in which case it shall be in “Word” format;
- (c) not exceed 50 (fifty) megabytes or such other limit that may be specified by Her Majesty’s Courts and Tribunals Service; and
- (d) be categorised or labelled as to the type of document that it is (e.g. “Claim Form”, “Witness Statement”, “Exhibit”) and numbered sequentially.

**5.2** (1) In the event that a document exceeds the maximum limit specified in paragraph 5.1(c), the party seeking to file the document shall divide the document into parts and file each part separately.

(2) Parties can, in one filing, file up to 10 (ten) documents with each document not exceeding 50 (fifty) megabytes or such other limit specified by HMCTS.

**5.2A** In the event that a document is confidential and is required to be filed, it must, when filed in the Electronic Working Case File, be filed as a confidential document, using the process set up in Electronic Working for that purpose, in order to ensure that it is not visible to everyone.

**5.3** (1) Submission of any document using Electronic Working will generate an automated notification acknowledging that the document has been submitted and is being reviewed by the Court prior to being accepted (the “Acceptance”).

(2) The court may make an order to remedy an error of procedure made while using Electronic Working, in accordance with CPR 3.10(b). When the court makes such an order, a document filing will not fail Acceptance because of the error of procedure made.

(3) Court staff may refuse to include a submitted document in its corresponding Electronic Working Case File if the document has been scanned and saved upside down or is otherwise illegible or incomplete.

(4) Where Court staff has not included a submitted document on its corresponding Electronic Working Case File for one of the reasons listed in paragraph 5.3(3), the submission will not have failed Acceptance, but the party having made the submission will have to upload the document again in accordance with Court staff instructions in order for the document to be properly included on the corresponding Electronic Working Case File.

**5.4** (1) Where payment of a court fee is required to accompany the filing of a document, the date and time of filing on Electronic Working will be deemed to be the date and time at which payment of the Court fee is made using Electronic Working.



(2) The date and time of payment will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working.

(3) For all other document filings, the date and time of filing will be the submission date and time for the purposes of any direction under the appropriate rules or for the purposes of complying with an order of the Court, unless expressly provided otherwise by the Court.

(4) Once a document filing is accepted, a notification will appear on the Electronic Working online account registered to the filing party to confirm that the document has been accepted and to confirm the date and time of issue or the date and time of filing in accordance with paragraphs 5.4(1) to 5.4(3).

(5) The date and time of issue or the date and time of filing of a document submitted using Electronic Working will not be delayed by Acceptance, unless the submission fails Acceptance because the filing error is more serious than an error of procedure, or the Court orders that it has failed Acceptance for some other reason.

(6) If the submission fails Acceptance, notice of the reasons for failure will be given to the party on that party's Electronic Working online account and if the submission was of a claim form or other document requiring to be issued, it will be deemed not to have been issued.

(7) In cases where payment of the Court fee has already been made and a claim form or other originating application fails Acceptance, the fee will be refunded and a corrected claim form or originating application will have to be submitted and the Court fee paid again in order for proceedings to be issued. In such cases, the new submission will generate a new date and time of issue or date and time of filing in accordance with paragraphs 5.4(1) to 5.4(3).

**5.5** A claim form or other originating application filed by a party using Electronic Working will, subject to Acceptance and payment, be issued in the relevant Rolls Building Jurisdiction or Central Office of the Queen's Bench Division and the claim will proceed in that Court unless it is transferred to another Court.

**5.6** If any documents that are not required by any rule, practice direction, order or direction to be filed are submitted via Electronic Working, they may not be retained on the online account and/or Electronic Working Case File.

## **Payment of fees**

**6.1** (1) Where any rule or practice direction provides for a fee to be paid, a party filing a document using Electronic Working must, except in circumstances specified in subparagraph (4), pay the appropriate fee by account or by credit/debit card or by any other online method specified by Her Majesty's Courts and Tribunals Service.

(1A) When a party enters its payment by account number into Electronic Working when prompted by Electronic Working to do so, that party will be deemed to have made the payment. The party will thereby owe the relevant court fee to Her Majesty's Courts and Tribunals Service.

(2) The court will keep a record of when payment was made or deemed to have been made.

(3) In proceedings where payment under the Insolvency Rules is required to be made in a manner that precludes online payment (such as the official receiver's deposit for a winding up petition, which must be paid by cheque), parties will be able to use Electronic Working to initiate those proceedings, but must post or deliver payment to the Court within seven

calendar days of submitting the originating application document(s). Failure to do so may result in the originating application failing Acceptance or the petition being struck out.

(4) For filings other than the issue of originating proceedings which incur payment of a fee, a party who is not legally represented and who wishes to pay that fee by account or by credit/debit card must make the filing and the payment through Electronic Working.

**6.2** A party who has applied or wishes to apply for Help with Fees or partial Help with Fees must contact the Court to obtain a Help with Fees payment by account number, prior to using Electronic Working to issue a claim or to initiate other proceedings requiring the payment of a court fee.

### **Electronic sealing**

**7.1** When the Court issues a claim form or other originating application which has been submitted using Electronic Working and accepted by the Court, the Court will electronically seal the claim form or originating application with the date on which the relevant Court fee was paid and this shall be the issue date, as per the provisions of paragraph 5.4.

**7.2** The electronic seal may differ in appearance to the seal used on paper.

### **Service**

**8.1** The Court will electronically return the sealed and issued claim form or originating application to the party's Electronic Working online account and notify the party that it is ready for service.

**8.2** Unless the Court orders otherwise, any document filed by any party or issued by the Court using Electronic Working in the Rolls Building Jurisdictions and Central Office of the Queen's Bench Division which is required to be served shall be served by the parties and not the Court.

**8.3** The CPR and IR 2016 as to filing evidence of service apply.

### **Calculation of time periods**

**8A** Notwithstanding the operation of Electronic Working outlined in paragraph 2.1 above, CPR rule 2.8 applies, where relevant, to any issue, filing, or other originating application, including the presentation of a winding-up petition or a bankruptcy petition, made through Electronic Working.”.

### **Transfer of proceedings and file transmission**

**9.1** (1) If proceedings which have used Electronic Working are subsequently transferred to a jurisdiction not operating Electronic Working, no documents will be able to be filed in those proceedings through Electronic Working after the date of transfer and this Practice Direction will cease to apply to those proceedings.

(2) Her Majesty's Courts and Tribunals Service shall make arrangements for a version of the Electronic Working Case File of the transferred proceedings to be made available to the receiving Court in a format requested by the receiving Court.

**9.2** Where a request for transmission of the Court file of any insolvency proceedings is made pursuant to IR 2016 rule 12.39(12), the Court shall make arrangements for a version of the Electronic Working Case File of the proceedings being transmitted to be made available to the Secretary of State or the official receiver, as the case may be, in a format of their choosing.

**9.3** If proceedings are transferred into one of the Rolls Building Jurisdictions or the Central Office of the Queen's Bench Division, all filing subsequent to the order transferring those proceedings may be done using Electronic Working after documents originally submitted in those proceedings have been converted to PDF format in accordance with paragraphs 3.2 and 3.3.

### **Applications in proceedings**

**10.1** (1) Where a party to proceedings files an application for an order or other relief using Electronic Working and a hearing is required, the party filing the application shall lodge an application bundle with the Court.

(2) The application bundle may be lodged in electronic format.

**10.2** The application bundle must—

(a) also be filed as a paper copy, unless ordered otherwise;

(b) contain the application notice and any evidence filed in the application, including exhibits together with such other documents as may be required by any rule, practice direction, order of the Court or relevant Court guide; and

(c) be filed in accordance with the time limits required by any applicable rule, practice direction, order of the Court or relevant Court guide or, in the absence of such a requirement, 3 (three) days before the hearing.

**10.3** The electronic copy of the application bundle must—

(a) be filed using Electronic Working;

(b) be formatted as one PDF document with bookmarks as appropriate for each document and with section headings within the document, unless its size exceeds 50 (fifty) megabytes, in which case it can be divided into up to 10 (ten) documents of that size, each bearing bookmarks as appropriate; and

(c) be updated as required and filed in compliance with paragraphs (a) and (b) above.

**10.4** The copy in paper format should be indexed and should correspond exactly to the electronic version of the bundle including sequential pagination.

### **Case and cost management and other directions**

**11.1** Where—

(a) a rule, practice direction, or order of the Court requires—

(i) the Court to give case or cost management or other directions, whether at a hearing or not; and

(ii) a bundle to be filed with the Court in connection with case or cost management or other directions; and

(b) a party wishes to file the bundle using Electronic Working,

the bundle must contain such documents as are required by any rule, practice direction, order of the Court or Court guide.

**11.2** The Bundle must be filed in paper copy as well, unless the Court orders otherwise.

**11.3** The claimant, applicant or petitioner, as appropriate, shall be responsible for ensuring the electronic copy of the bundle complies with the requirements specified in paragraph 10.3 above.

**11.4** The claimant, applicant or petitioner, as appropriate, shall be responsible for ensuring the paper copy is indexed and corresponds exactly with the electronic version of the bundle with sequential pagination.

### **Statements of truth**

**12** CPR Part 22 and the practice direction supplementing that part and any rule applicable to the Bankruptcy and Companies Courts which require certain forms and documents to be verified by a statement of truth shall apply to any forms or documents filed using Electronic Working.

### **Trial bundles**

**13.1** The trial bundle must be filed with the Court in paper format.

**13.2** An electronic version of the trial bundle must also be filed if the Court so orders, in which case it must comply with the requirements of paragraph 10.3 and the paper copy must comply with paragraph 10.4.

**13.3** The Court will retain any electronic copy of the trial bundle for a period of 2 (two) months after judgment has been delivered, after which it may be deleted.

**13.4** The time in paragraph 13.3 may be extended by order of the court at the request of a party or on the court's own initiative.

### **Inspection of documents on the Electronic Working Case File by parties or permitted persons**

**14.1** In addition to any inspection facility that may be available through the Website or a party's Electronic Working online account, the parties to any proceedings except insolvency proceedings, or their legal representatives, shall be entitled to inspect an electronic record of the proceedings in person at the Court on a terminal provided for that purpose by Her Majesty's Courts and Tribunals Service and obtain electronic copies of documents contained in the Electronic Working Case File subject to the provisions of CPR rule 5.4B.

**14.2** In addition to any inspection facility that may be available through the Website or a party's Electronic Working online account, persons permitted by IR 2016 rule 12.39(3)-(6) to inspect the Court file of insolvency proceedings shall be entitled to inspect an electronic record of the proceedings in person at the Court on a terminal provided for that purpose by Her Majesty's Courts and Tribunals Service and obtain, subject to paragraph 15.2, electronic copies of documents contained in the Electronic Working Case File, unless permission of the Court is required under IR 2016 rule 12.39(9)-(10) and subject to rule 12.39(7) and (11) and Chapter 10.

**14.3** The Electronic Working Case File will be updated by the Court as and when documents are filed by the parties and accepted.

**14.4** Information concerning the availability of the facility outlined in paragraph 10.1 will be communicated by Her Majesty's Courts and Tribunals Service on the Website.

### **Public kiosk service for the electronic inspection of publicly available documents**

**15.1** A public kiosks are available at the Royal Courts of Justice both at the Strand and at the Rolls Building, London, for non-parties to proceedings governed by the CPR, to enable such non-parties to examine an electronic record of the proceedings and determine whether any documents in relation to the proceedings are publicly available.

**15.2** Persons wishing to obtain copies of documents available to non-parties in accordance with CPR rule 5.4C must—

- (a) complete the appropriate office copy request form; and
- (b) pay the appropriate fee.

### **Supply of electronic copies of documents by email**

**16** Persons permitted to obtain copies of documents may request electronic copies of the documents to be sent by the Court by e-mail to an address supplied by such persons.

### **Security**

**17** Her Majesty's Courts and Tribunals Service will take such measures as it thinks fit to ensure the security of information communicated or stored electronically. These may include requiring persons using Electronic Working to follow security steps such as—

- (a) entering an email address as their customer identification and/or password;
- (b) providing personal information for identification purposes; and
- (c) complying with any other security measures as may from time to time be required before using Electronic Working.

## **ANNEX B**

### **PRACTICE DIRECTION 51U**

#### **DISCLOSURE PILOT FOR THE BUSINESS AND PROPERTY COURTS**

##### **1.General**

###### **SECTION I**

##### **2.Principles, “documents”, “adverse” and “known adverse documents”**

##### **3.Duties in relation to disclosure**

##### **4.Preservation of documents**

##### **5.Initial Disclosure**

##### **6.Extended Disclosure**

##### **7.Identifying the Issues for Disclosure**

##### **8.The Extended Disclosure Models**

##### **9.Other provisions concerning Disclosure Models**

##### **10.Completion of the Disclosure Review Document**

##### **11.Disclosure Guidance Hearings**

##### **12.Complying with an order for Extended Disclosure**

##### **13.Production of documents**

##### **14.Right to withhold production of documents (other than public interest immunity)**

##### **15.Confidentiality**

##### **16.Redaction**

##### **17.Failure adequately to comply with an order for Extended Disclosure**

##### **18.Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents**

##### **19.Restriction on use of a privileged document which has been inadvertently produced**

##### **20.Sanctions**

##### **21.Documents referred to in evidence**

**22. Cost**

**23. False Disclosure Certificates**

**SECTION II**

**31.16. Disclosure before proceedings start**

**31.17. Orders for disclosure against a person not a party**

**31.18. Rules not to limit other powers of the court to order disclosure**

**31.19. Claim to withhold inspection or disclosure of a document (public interest immunity)**

**31.22. Subsequent use of disclosed documents and completed Electronic Documents Questionnaires**

**Appendix 1: Definitions for the purpose of Section I**

**Appendix 2: Disclosure Review Document**

**Appendix 3: Certificate of Compliance**

**Appendix 4: Disclosure Certificate**

## 1. **General**

- 1.1 This Practice Direction is made under rule 51.2 and provides a pilot scheme for disclosure in the Business and Property Courts. Section I provides a new scheme for disclosure.
- 1.2 The Commencement Date is 1 January 2019. The pilot applies from the Commencement Date for two years to existing and new proceedings in the Business and Property Courts of England and Wales and the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle. For the avoidance of doubt, it does not apply in the County Court although this may be reviewed in the course of the pilot.
- 1.3 The pilot shall not disturb an order for disclosure made before the Commencement Date or before the 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 into a court that is not one of the Business and Property Courts, any order for disclosure made under the pilot will stand unless and until any other order is made by the transferee court.
- 1.4 The pilot shall not, unless otherwise ordered, apply to proceedings which are—
  - (1) a Competition claim as defined in Practice Direction 31C;
  - (2) a Public Procurement claim;
  - (3) within the Intellectual Property and Enterprise Court;
  - (4) within the Admiralty Court;
  - (5) within the Shorter and Flexible Trials Schemes; or
  - (6) within a fixed costs regime or a capped costs regime.
- 1.5 In the Patents Court, PD63 paragraphs 6.1 to 6.3 will continue to apply under the pilot with the following modification: unless the court expressly orders otherwise, no provision in this practice direction nor any disclosure order made under this pilot will take effect as requiring disclosure wider than is provided for in PD 63 paragraph 6.1.
- 1.6 The pilot will continue to apply after the end of the two year period to any proceedings to which it applied at that point.
- 1.7 For the purposes of the pilot, where the provisions of this Practice Direction conflict with other provisions of the rules or other Practice Directions, this Practice Direction shall take precedence.
- 1.8 Terms in Section I of this Practice Direction shall have the meaning given to them in the schedule of definitions at Appendix 1.
- 1.9 Save for those provisions of CPR Part 31 that are set out in Section II, and the related provisions of Practice Directions 31A and 31B, CPR Part 31 and Practice Directions 31A and 31B shall not apply to any proceedings falling within the pilot.



- 1.10 Save that references in Section II to an Electronic Documents Questionnaire should be treated as references to the Disclosure Review Document, nothing in this Practice Direction is intended to change the application or working of those provisions of CPR Part 31 that are set out in Section II and the related provisions of Practice Directions 31A and 31B, and CPR Part 31 as a whole should still be used to interpret those provisions.

## SECTION I

### 2. Principles, “document”, “adverse” and “known adverse documents”

- 2.1 Disclosure is important in achieving the fair resolution of civil proceedings. It involves identifying and making available documents that are relevant to the issues in the proceedings.
- 2.2 For the purpose of disclosure, the term “*document*” includes any record of any description containing information. The term is further defined below.
- 2.3 The court expects the parties (and their representatives) to cooperate with each other and to assist the court so that the scope of disclosure, if any, that is required in proceedings can be agreed or determined by the court in the most efficient way possible.
- 2.4 The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in Appendix 1).
- 2.5 A “*document*” may take any form including but not limited to paper or electronic; it may be held by computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings.
- 2.6 In addition to information that is readily accessible from computer systems and other electronic devices and media, the term “*document*” extends to information that is stored on servers and back-up systems and electronic information that has been ‘deleted’. It also extends to metadata, and other embedded data which is not typically visible on screen or a print out.
- 2.7 Disclosure extends to “*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.
- 2.8 “*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.
- 2.9 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.

### 3. **Duties in relation to disclosure**

3.1 A person who knows that it is or may become a party to proceedings that have been commenced or who knows that it may become a party to proceedings that may be commenced is under the following duties (“the Disclosure Duties”) to the court—

- (1) to take reasonable steps to preserve documents in its control that may be relevant to any issue in the proceedings;
- (2) once proceedings have commenced against it or by it and in accordance with the provisions of this pilot scheme, to disclose, regardless of any order for disclosure made, known adverse documents, unless they are privileged;
- (3) to comply with any order for disclosure made by the court;
- (4) to undertake any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search;
- (5) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and
- (6) to use reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure in the proceedings.

3.2 Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, are under the following duties to the court—

- (1) to take reasonable steps to preserve documents within their control that may be relevant to any issue in the proceedings;
- (2) to take reasonable steps to advise and assist the party to comply with its Disclosure Duties;
- (3) to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology;
- (4) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and
- (5) to undertake a review to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained.

3.3 The duties under paragraph 3.1 and 3.2 above are continuing duties that last until the conclusion of the proceedings (including any appeal) or until it is clear there will be no proceedings.

3.4 Where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any further order that the court may make.

#### **4. Preservation of documents**

- 4.1 Documents to be preserved in accordance with the duties under paragraph 3.1(1) and 3.2(1) above include documents which might otherwise be deleted or destroyed in accordance with a document retention policy or in the ordinary course of business. Preservation includes, in suitable cases, making copies of sources and documents and storing them.
- 4.2 The duty under paragraph 3.1(1) and 3.2(1) includes—
- (1) an obligation to suspend relevant document deletion or destruction processes for the duration of the proceedings;
  - (2) an obligation to send a written notification in any form to all relevant employees and former employees in accordance with paragraph 4.3 below; and
  - (3) an obligation to take reasonable steps so that agents or third parties who may hold documents on the party's behalf do not delete or destroy documents that may be relevant to an issue in the proceedings.
- 4.3 A written notification under paragraph 4.2 above should—
- (1) identify the documents or classes of documents to be preserved; and
  - (2) notify the recipient that they should not delete or destroy those documents and should take reasonable steps to preserve them.
- 4.4 Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, must within a reasonable period of being instructed—
- (1) notify their client of the need to preserve documents and of their obligations under paragraph 3.1 above; and
  - (2) obtain written confirmation from their client or an appropriate representative of their client that their client has taken the steps required under paragraphs 4.2 and 4.3 above.
- 4.5 Each party must confirm in writing when serving their particulars of claim or defence (as appropriate), that steps have been taken to preserve relevant documents in accordance with the duties under paragraph 3.1(1) and 3.2(1) above, and as required by paragraph 4.1 to 4.4 above.

#### **5. Initial Disclosure**

- 5.1 Save as provided below, and save in the case of a Part 7 claim form without particulars of claim or a Part 8 claim form, each party must provide to all other parties at the same time as its statement of case an Initial Disclosure List of Documents that lists and is accompanied by copies of—

- (1) the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and
- (2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

5.2 This form of disclosure is known as “Initial Disclosure”.

5.3 Initial Disclosure is not required where—

- (1) the parties have agreed to dispense with it (see paragraph 5.8 below);
- (2) the court has ordered that it is not required (see paragraph 5.10 below); or
- (3) a party concludes and states in writing, approaching the matter in good faith, that giving Initial Disclosure would involve it or any other party providing (after removing duplicates, and excluding documents referred to at paragraph 5.4(3)) more than (about) whichever is the larger of 1000 pages or 200 documents (or such higher but reasonable figure as the parties may agree), at which point the requirement to give Initial Disclosure ceases for all parties for the purposes of the case.

Documents comprising media not in page form are not included in the calculation of the page or document limit at (3) but, where provided pursuant to a requirement to give Initial Disclosure, should be confined strictly to what is necessary to comply with paragraph 5.1 above.

5.4 A party giving Initial Disclosure—

- (1) is under no obligation to undertake a search for documents beyond any search it has already undertaken or caused to be undertaken for the purposes of the proceedings (including in advance of the commencement of the proceedings);
- (2) should briefly describe in its Initial Disclosure List of Documents any searches just mentioned;
- (3) should not provide unless requested (but should still list in the Initial Disclosure List of Documents) documents by way of Initial Disclosure if such documents—
  - (a) have already been provided to the other party, whether by disclosure before proceedings start (see CPR 31.16) or through pre-action correspondence or otherwise in the period following intimation of the proceedings (and including when giving Initial Disclosure with a statement of case that is being amended); or
  - (b) are known to be or have been in the other party’s possession.

5.5 Unless otherwise ordered, or agreed between the parties, copies of documents shall be provided in electronic form for the purpose of Initial Disclosure. The Initial Disclosure List of Documents should be filed but the documents must not be filed.

5.6 In proceedings where a statement of case is to be served on a defendant out of the jurisdiction Initial Disclosure is not required in respect of that defendant unless and until

that defendant files an acknowledgement of service that does not contest the jurisdiction, or files a further acknowledgement of service under CPR 11(7)(b).

- 5.7 For the avoidance of doubt, Initial Disclosure does not require any document to be translated.
- 5.8 The parties may agree in writing, before or after the commencement of proceedings, to dispense with, or defer, Initial Disclosure. Each party should record its respective reasons for any agreement, so that those reasons may be available to the court, on request, at any case management conference. The court may set aside such an agreement if it considers that Initial Disclosure is likely to provide significant benefits and the costs of providing Initial Disclosure are unlikely to be disproportionate to such benefits.
- 5.9 The court shall disregard any prior agreement to dispense with Initial Disclosure when considering whether to order Extended Disclosure.
- 5.10 If a party is requested but does not agree to dispense with Initial Disclosure, the requesting party may apply to the court with notice to the other party for directions limiting or abrogating the obligation to provide Initial Disclosure if it considers compliance with the obligation will incur disproportionate cost or be unduly complex. Such an application must be made by application notice, supported by evidence where necessary, and, save in exceptional cases, will be dealt with without a hearing or at a short telephone hearing.
- 5.11 In an appropriate case the court may, on application, and whether or not Initial Disclosure has been given, require a party to disclose documents to another party where that is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply.
- 5.12 A complaint about Initial Disclosure shall be dealt with at the first case management conference unless, exceptionally and on application, the court considers that the issue should be resolved at an earlier hearing.
- 5.13 A significant failure to comply with the obligation to provide Initial Disclosure may be taken into account by the court when considering whether to make an order for Extended Disclosure and the terms of such an order. It may also result in an adverse order for costs.
- 5.14 For the avoidance of doubt, nothing in this paragraph affects the operation of paragraph 7.3 of Practice Direction 16.

## 6. **Extended Disclosure**

- 6.1 A party wishing to seek disclosure of documents in addition to, or as an alternative to, Initial Disclosure must request Extended Disclosure. No application notice is required. However, the parties will be expected to have completed the Disclosure Review Document pursuant to paragraphs 7 and following below.
- 6.2 The court will determine whether to order Extended Disclosure at the first case management conference or, if directed by the court, at another hearing convened for that purpose or without a hearing.

- 6.3 Save where otherwise ordered, Extended Disclosure involves using Disclosure Models (see paragraph 8 below) after Issues for Disclosure have been identified (see paragraph 7 below). The court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.
- 6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—
- (1) the nature and complexity of the issues in the proceedings;
  - (2) the importance of the case, including any non-monetary relief sought;
  - (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
  - (4) the number of documents involved;
  - (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
  - (6) the financial position of each party; and
  - (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.
- 6.5 A request for Extended Disclosure must specify which of the Disclosure Models listed in paragraph 8 below is proposed for each Issue for Disclosure defined in paragraph 7 below. It is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable and proportionate (as defined in paragraph 6.4). Where Disclosure Model D or E is proposed parties should be ready to explain to the court why Disclosure Model C is not sufficient.
- 6.6 The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that increases cost through undue complexity.

## **7. Identifying the Issues for Disclosure**

- 7.1 Within 28 days of the final statement of case each party should state, in writing, whether or not it is likely to request Extended Disclosure to include one or more of Models B, C, D or E (see paragraph 8 below) on one or more issues in the case. At this point it should not particularise the Model(s) or the issue(s) in the case.
- 7.2 Where one or more of the parties has indicated it is likely to request Extended Disclosure, the claimant must within 42 days of the final statement of case, prepare and serve on the other parties a draft List of Issues for Disclosure unless the equivalent of such a list has already been agreed between the parties (for example, as part of a fuller list of issues). The List of Issues for Disclosure should be set out using Section 1A of the Disclosure Review Document (see further paragraph 10 below).

- 7.3 “*Issues for Disclosure*” means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission.
- 7.4 The claimant should seek to ensure that the draft List of Issues for Disclosure provides a fair and balanced summary of the key areas of dispute identified by the parties’ statements of case and in respect of which it is likely that one or other of the parties will be seeking Extended Disclosure.
- 7.5 In the event that a particular Issue for Disclosure has not been included in the List of Issues for Disclosure, or is described in a manner that is unacceptable to the defendant, using section 1A of the Disclosure Review Document the defendant should provide the claimant with its proposed wording or alternative wording for inclusion in the draft List of Issues for Disclosure as soon as practicable but in any event no later than 14 days after service of the draft List of Issues for Disclosure.
- 7.6 In advance of the first case management conference, the parties must discuss and seek to agree the draft List of Issues for Disclosure. They should consider whether any draft Issue for Disclosure can be removed. For each Issue for Disclosure that is maintained, the parties should indicate at this point, using section 1A of the Disclosure Review Document, which Model of Extended Disclosure is sought for each party. Where Model C Disclosure is contemplated the parties should discuss the requests that might apply for the purpose of that disclosure (see further paragraph 10.5 below).
- 7.7 The List of Issues for Disclosure may be revised or supplemented at any time prior to or following the case management conference, including as a result of statements of case or amended statements of case subsequently served or discussions between the parties in relation to the Disclosure Review Document.
- 7.8 If the parties are (subject to the court) agreed that there are preliminary issues suitable for determination before other issues in the case, or that the case should be divided into stages, the parties may apply to the court before any case management conference for an order for the trial of those issues or for trial in stages (and related directions), and they may agree in writing to limit the work towards disclosure required by this Practice Direction until that application has been heard.
- 7.9 In an appropriate case where the claimant is acting in person and a defendant is not the court may request the legal representatives of the defendant to lead on the preparation of the List of Issues for Disclosure.

## **8. The Extended Disclosure Models**

- 8.1 Extended Disclosure may take the form of one or more of the Disclosure Models set out below.
- 8.2 There is no presumption that a party is entitled to Extended Disclosure, and in particular to Model D or Model E disclosure. No Model will apply without the approval of the court.
- 8.3 The court may order that Extended Disclosure be given using different Disclosure Models for different Issues for Disclosure in the case. In the interests of avoiding undue complexity the court will rarely require different Models for the same set of documents.



The court may also order that Extended Disclosure be given by only one party, or that different Models are to apply to each party's Disclosure on a particular Issue for Disclosure.

Model A: Disclosure confined to known adverse documents

The court may order that the only disclosure required in relation to some or all of the Issues for Disclosure is of known adverse documents in accordance with the (continuing) duty under paragraph 3.1(2) above.

Model B: Limited Disclosure

- (1) The court may order the parties to disclose (where and to the extent that they have not already done so by way of Initial Disclosure, and without limit as to quantity)—
  - (a) the key documents on which they have relied (expressly or otherwise) in support of the claims or defences advanced in their statement(s) of case; and
  - (b) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet;

and in addition to disclose known adverse documents in accordance with their (continuing) duty under paragraph 3.1(2) above.

- (2) A party giving Model B Disclosure is under no obligation to undertake a search for documents beyond any search already conducted for the purposes of obtaining advice on its claim or defence or preparing its statement(s) of case. Where it does undertake a search however then the (continuing) duty under paragraph 3.1(2) will apply.

Model C: Request-led search-based disclosure

- (1) The court may order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure, by reference to requests set out in or to be set out in Section 1B of the Disclosure Review Document or otherwise defined by the court.
- (2) If the parties cannot agree that disclosure should be given, or the disclosure to be given, pursuant to a request, then the requesting party must raise the request at the case management conference. The court will determine whether the request is reasonable and proportionate and may either order the disclosing party to search for the documents requested, refuse the request, or order the disclosing party to search for a narrower class of documents than that requested. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document.
- (3) For the avoidance of doubt, a party giving Model C Disclosure must still comply with the duty under paragraph 3.1(2) above to disclose known adverse documents; these will include any arising from the search directed by the court.

Model D: Narrow search-based disclosure, with or without Narrative Documents

- (1) Under Model D, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure.

- (2) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D disclosure has been ordered. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document.
- (3) The order should specify whether a party giving Model D disclosure is to search for and disclose Narrative Documents. If the order does not so specify, Narrative Documents should not be disclosed.
- (4) For the avoidance of doubt, a party giving Model D Disclosure must still comply with the duty under paragraph 3.1(2) above to disclose known adverse documents; these will include any arising from the search directed by the court.

Model E: Wide search-based disclosure

- (1) Under Model E, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure (because those other documents are likely to support or adversely affect the party's own claim or defence or that of another party in relation to one or more of the Issues for Disclosure).
- (2) Model E is only to be ordered in an exceptional case.
- (3) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model E Disclosure has been ordered. The scope of the search will be determined by the court using the information provided in the Disclosure Review Document and is likely to be broader than that ordered for Model D Disclosure.
- (4) Narrative Documents must also be searched for and disclosed, unless the court otherwise orders.
- (5) For the avoidance of doubt, a party giving Model E Disclosure must still comply with the duty under paragraph 3.1(2) above to disclose known adverse documents; these will include any arising from the search directed by the court.

**9. Other provisions concerning Disclosure Models**

- 9.1 Where an order for Model B, C, D or E Extended Disclosure is made on one or more Issues for Disclosure, any adverse documents to be disclosed in compliance with the duty under paragraph 3.1(2) above and not already disclosed must be disclosed at the time ordered for that Extended Disclosure.
- 9.2 In a case where no order for Model B, C, D or E Extended Disclosure is made in respect of a party on any Issue for Disclosure (so that the only disclosure has been Initial Disclosure or Model A Extended Disclosure) that party must within 60 days of the first case management conference provide a Disclosure Certificate certifying that all known adverse documents have been disclosed.
- 9.3 The provisions of paragraph 8 and this paragraph 9 do not affect the fact that the duty under paragraph 3.1(2) above is a continuing duty as provided by paragraph 3.3 above:

if adverse documents in the control of a party come to its knowledge at a later date they must (unless privileged) be disclosed without delay.

- 9.4 The court may make an order for Extended Disclosure in stages.
- 9.5 When it is necessary to decide any question of what is reasonable and proportionate under a particular Disclosure Model, the court will consider all the circumstances of the case including the factors set out in paragraph 6.4 above and the overriding objective.
- 9.6 Where the Disclosure Model requires searches to be undertaken, the parties must discuss and seek to agree, and the court may give directions, on the following matters with a view to reducing the burden and cost of the disclosure exercise—
- (1) that the scope of the searches which the disclosing parties are required to undertake be limited to—
    - (a) particular date ranges and custodians of documents;
    - (b) particular classes of documents and/or file types;
    - (c) specific document repositories and/or geographical locations;
    - (d) specific computer systems or electronic storage devices;
    - (e) documents responsive to specific keyword searches, or other automated searches (by reference, if appropriate, to individual custodians, creators, repositories, file types and/or date ranges, concepts);
  - (2) if Narrative Documents are to be excluded, how that is to be achieved in a reasonable and proportionate way;
  - (3) the use of—
    - (a) software or analytical tools, including technology assisted review software and techniques;
    - (b) coding strategies, including to reduce duplication.
  - (4) prioritisation and workflows.
- 9.7 In making an order for Extended Disclosure, the court may include any provision that is appropriate including provision for all or any of the following—
- (1) requiring the use of specified software or analytical tools;
  - (2) identifying the methods to be used to identify duplicate or near-duplicate documents and remove or reduce duplicate documents;
  - (3) requiring the use of data sampling;
  - (4) specifying the format in which documents are to be disclosed;
  - (5) identifying the methods that the court regards as sufficient to be used to identify privileged documents and other non-disclosable documents;

- (6) requiring the use of a staged approach to the disclosure of electronic documents;
- (7) excluding certain classes of document from the disclosure ordered.
- 9.8 In considering Extended Disclosure as well as when complying with an order for Extended Disclosure the parties should have regard to the guidance set out in Section 3 of the Disclosure Review Document.
- 9.9 In an appropriate case, the court may order that the question of which party bears the costs of disclosure is to be given separate consideration at a later stage rather than the costs being treated automatically as costs in the case;
- 9.10 For the avoidance of doubt, Extended Disclosure does not require any document to be translated.

## 10. **Completion of the Disclosure Review Document**

- 10.1 The Disclosure Review Document is the document by which the parties must identify, discuss and seek to agree the scope of any Extended Disclosure sought of Model C, D or E, and provide that information in due course to the court.
- 10.2 In a complex case the format of the Disclosure Review Document may be modified as required in order that information is exchanged and in due course provided to the court in an efficient, convenient and helpful format.
- 10.3 The parties' obligation to complete, seek to agree and update the Disclosure Review Document is ongoing. If a party fails to co-operate and constructively to engage in this process the other party or parties may apply to the court for an appropriate order at or separately from the case management conference, and the court may make any appropriate order including the dismissal of any application for Extended Disclosure and/or the adjournment of the case management conference with an adverse order for costs.
- 10.4 In the Disclosure Review Document each party should (save as already described for Initial Disclosure: see paragraph 5.4(2) above) describe any searches for documents that it has already undertaken or caused to be undertaken for the purposes of the proceedings (including in advance of the commencement of the proceedings).
- 10.5 Any party proposing Model C Extended Disclosure must complete Section 1B of the Disclosure Review Document and provide it to the other parties no later than 28 days after the defendant has responded in accordance with paragraph 7.5 above to the claimant's draft List of Issues for Disclosure. Any party provided with a completed Section 1B in this way must respond within 14 days by completing the "response" column either agreeing to the request or giving concise reasons for not agreeing to the request.
- 10.6 Having agreed the List of Issues for Disclosure and exchanged proposals on Model(s) for Extended Disclosure, the parties should prepare and exchange drafts of Section 2 of the Disclosure Review Document (including costs estimates of different proposals, and where possible estimates of likely amount of documents involved) as soon as reasonably practicable and in any event not later than 14 days before the case management conference.

- 10.7 The parties must seek to resolve any disputes over the scope of any Extended Disclosure sought in advance of the first case management conference. Any disputes which have not been resolved will normally be decided by the court at the first case management conference.
- 10.8 A finalised single joint Disclosure Review Document should be filed by the claimant not later than 5 days before the case management conference. Related correspondence and earlier drafts should not ordinarily be filed.
- 10.9 The parties must each file a signed Certificate of Compliance substantially in the form set out in Appendix 3 as soon as reasonably practicable after the claimant has filed the finalised single joint Disclosure Review Document but in any event in advance of the case management conference.
- 10.10 In an appropriate case where the claimant is acting in person and a defendant is not the court may request the legal representatives of the defendant to lead on the preparation and filing of the Disclosure Review Document.

## 11. Disclosure Guidance Hearings

- 11.1 The parties may seek guidance from the court by way of a discussion with the court in advance of or after a case management conference, concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure, where—
- (1) the parties have made real efforts to resolve disputes between them; and
  - (2) the absence of guidance from the court before a case management conference is likely to have a material effect on the court's ability to hold an effective case management conference, or the absence of guidance from the court after a case management conference is likely to have a material effect on the parties' ability to carry out the court's case management directions effectively.
- 11.2 A Disclosure Guidance Hearing may be fixed by issuing an application notice, before or after a case management conference. The application notice should contain a statement confirming the matters at (1) and (2) of paragraph 11.1 above. Evidence will not normally be required for a Disclosure Review Hearing and an early hearing will be offered where possible. The application will have a maximum hearing length of 30 minutes and a maximum of 30 minutes pre-reading.
- 11.3 At a Disclosure Guidance Hearing the court will generally expect a legal representative with direct responsibility for the conduct of disclosure to be the person who participates on behalf of each party in the discussion concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure.
- 11.4 The guidance given at a Disclosure Guidance Hearing will be recorded in a short note, to be approved by the court. Whilst the primary function of the Disclosure Guidance Hearing is to provide guidance, for the avoidance of doubt the court may, where appropriate, make an order at a Disclosure Guidance Hearing.
- 11.5 Unless otherwise ordered, the costs of a Disclosure Guidance Hearing are costs in the case and no order from the court to that effect is required.

## **12. Complying with an order for Extended Disclosure**

12.1 An order for Extended Disclosure is complied with by undertaking the following steps—

- (1) service of a Disclosure Certificate substantially in the form set out in Appendix 4 signed by the party giving disclosure, to include a statement supported by a statement of truth signed by the party or an appropriate person at the party that all known adverse documents have been disclosed;
- (2) service of an Extended Disclosure List of Documents (unless dispensed with, by agreement or order); and
- (3) production of the documents which are disclosed over which no claim is made to withhold production or (if the party cannot produce a particular document) compliance with paragraph 12.3.

12.2 The order for Extended Disclosure will not have been complied with until each step specified in paragraph 12.1 has taken place.

12.3 If a party cannot produce a particular document (because the document no longer exists, the party no longer has it in its possession or for any other reason) the disclosing party is required to describe each such document with reasonable precision and explain with reasonable precision the circumstances in which, and the date when, the document ceased to exist or left its possession or the other reason for non-production. If it is not possible to identify individual documents, the class of documents must be described with reasonable precision.

12.4 In the case of a company, firm, association or other organisation, or where the Disclosure Certificate is signed by a party on behalf of other parties, the certificate must—

- (1) identify the person signing the Disclosure Certificate; and
- (2) explain why she or he is considered to be an appropriate person to sign it.

12.5 A party may not without the permission of the court or agreement of the parties rely on any document in its control that it has not disclosed at the time required for Extended Disclosure (or within 60 days after the first case management conference in a case where there will be no Extended Disclosure). For the avoidance of doubt the party and its legal representatives remain under the duties under paragraph 3.1 (the Disclosure Duties) and 3.2 above.

## **13. Production of documents**

13.1 Save where otherwise agreed or ordered, a party shall produce—

- (1) disclosable electronic documents to the other parties by providing electronic copies in the documents' native format, in a manner which preserves metadata; and
- (2) (save as provided by paragraph 5.5 above in the case of Initial Disclosure) disclosable hard copy documents by providing scanned versions or photocopied hard copies.

- 13.2 Electronic documents should generally be provided in the form which allows the party receiving the documents the same ability to access, search, review and display the documents (including metadata) as the party providing them.
- 13.3 A party should provide any available searchable OCR versions of electronic documents with the original, unless they have been redacted. If OCR versions are provided, they are provided on an “as is” basis, with no assurance to the other party that the OCR versions are complete or accurate.
- 13.4 A party should not disclose more than one copy of a document unless additional copies contain or bear modifications, obliterations or other markings or features which of themselves cause those additional copies to fall within a party’s Initial or Extended Disclosure obligations.

**14. Right to withhold production of documents (other than public interest immunity)**

14.1 A person who wishes to claim a right or duty (other than on the basis of public interest immunity) to withhold disclosure or production of a document, or part of a document, or a class of documents which would otherwise fall within its obligations of Initial Disclosure or Extended Disclosure may exercise that right or duty without making an application to the court subject to—

- (1) describing the document, part of a document or class of document; and
- (2) explaining, in the Disclosure Certificate, the grounds upon which the right or duty is being exercised.

A claim to privilege may (unless the court otherwise orders) be made in a form that treats privileged documents as a class, provided always that paragraph 3.2(5) is complied with.

- 14.2 A party who wishes to challenge the exercise of a right or duty to withhold disclosure or production must apply to the court by application notice supported where necessary by a witness statement.
- 14.3 The court may inspect the document or samples of the class of documents if that is necessary to determine whether the claimed right or duty exists or the scope of that right or duty.

**15. Confidentiality**

If there are material concerns over the confidentiality of a document (whether the confidentiality benefits a party to the proceedings or a third party), the court may order disclosure to a limited class of persons, upon such terms and subject to such conditions as it thinks fit. The court may make further orders upon the request of a party, or on its own initiative, varying the class of persons, or varying the terms and

conditions previously ordered, or removing any limitation on disclosure.

## **16. Redaction**

16.1 A party may redact a part or parts of a document on the ground that the redacted data comprises data that is—

- (1) irrelevant to any issue in the proceedings, and confidential; or
- (2) privileged.

16.2 Any redaction must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process. A party wishing to challenge the redaction of data must apply to the court by application notice supported where necessary by a witness statement.

## **17. Failure adequately to comply with an order for Extended Disclosure**

17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—

- (1) serve a further, or revised, Disclosure Certificate;
- (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
- (3) provide a further or improved Extended Disclosure List of Documents;
- (4) produce documents; or
- (5) make a witness statement explaining any matter relating to disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).

17.3 An application for any order under paragraph 17.1 should normally be supported by a witness statement.

## **18. Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents**

18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).



18.3 An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.

18.4 The court's powers under this paragraph include, but are not limited to, making an order for disclosure in the form of Models B to E and requiring a party to make a witness statement explaining any matter relating to disclosure.

**19. Restriction on use of a privileged document which has been inadvertently produced**

19.1 Where a party inadvertently produces a privileged document, the party who has received the document may use it or its contents only with the permission of the court.

19.2 Where a party is told, or has reason to suspect, that a document has been produced to it inadvertently, that party shall not read the document and shall promptly notify the party who produced it to him. If that party confirms that the document was produced inadvertently, the receiving party shall, unless on application the court otherwise orders, either return it or destroy it, as directed by the producing party, without reading it.

**20. Sanctions**

20.1 Throughout disclosure the court retains its full powers of case management and the full range of sanctions available to it.

20.2 If a party has failed to comply with its obligations under this pilot including by—

- (1) failing to comply with any procedural step required to be taken;
- (2) failing to discharge its disclosure duties; or
- (3) failing to cooperate with the other parties, including in the process of seeking to complete, agree and update the Disclosure Review Document,

the court may adjourn any hearing, make an adverse order for costs or order that any further disclosure by a party be conditional on any matter the court shall specify. This provision does not limit the court's power to deal with the failure as a contempt of court in an appropriate case.

**21. Documents referred to in evidence**

21.1 A party may at any time request a copy of a document which has not already been provided by way of disclosure but is mentioned in—

- (1) a statement of case;
- (2) a witness statement;
- (3) a witness summary;
- (4) an affidavit; or

- (5) an expert's report.
- 21.2 Copies of documents mentioned in a statement of case, witness evidence or an expert's report and requested in writing should be provided by agreement unless the request is unreasonable or a right to withhold production is claimed.
- 21.3 A document is mentioned where it is referred to, cited in whole or in part or there is a direct allusion to it.
- 21.4 Subject to rule 35.10(4), the court may make an order requiring a document to be produced if it is satisfied such an order is reasonable and proportionate (as defined in paragraph 6.4).

## 22. **Cost**

- 22.1 The parties are required to provide an estimate of what they consider to be the likely costs of giving the disclosure proposed by them in the Disclosure Review Document, and the likely volume of documents involved, in order that a court may consider whether such proposals on disclosure are reasonable and proportionate (as defined in paragraph 6.4). These estimated costs may be used by the court in the cost budgeting process.
- 22.2 In cases where the cost budgeting scheme applies, if it is not practical to complete the disclosure section of Form H in relation to disclosure prior to the court making an order in relation to disclosure at the case management conference, the parties may notify the court that they have agreed to postpone completion of that section of Form H until after the case management conference. If they have agreed to postpone they must complete the disclosure section within such period as is ordered by the court after an order for disclosure has been made at the case management conference. Where possible the court will then consider (and if appropriate, approve) that part of the cost budget without an oral hearing.

## 23. **False Disclosure Certificates**

- 23.1 Proceedings for contempt of court may be brought against a person who signs, or causes to be signed by another person, a false Disclosure Certificate without an honest belief in its truth.

## SECTION II

### **Disclosure before proceedings start**

**31.16.—**(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to—

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must—

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents—

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may—

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection.

(Rule 78.26 contains rules in relation to the disclosure and inspection of evidence arising out of mediation of certain cross-border disputes.)

### **Orders for disclosure against a person not a party**

**31.17.—**(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the proceedings or to save costs.

(4) An order under this rule must—

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require the respondent, when making disclosure, to specify any of those documents—

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may—

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection.

(Rule 78.26 contains rules in relation to the disclosure and inspection of evidence arising out of mediation of certain cross-border disputes.)

### **Rules not to limit other powers of the court to order disclosure**

**31.18.—**Rules 31.16 and 31.17 do not limit any other power which the court may have to order—

(a) disclosure before proceedings have started; and

(b) disclosure against a person who is not a party to proceedings.

### **Claim to withhold inspection or disclosure of a document (public interest immunity)**

**31.19.—**(1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest.

(2) Unless the court orders otherwise, an order of the court under paragraph (1)—

- (a) must not be served on any other person; and
- (b) must not be open to inspection by any person.

...

(8) This Part does not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest.

### **Subsequent use of disclosed documents and completed Electronic Documents Questionnaires**

**31.22.—**(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—

- (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
- (b) the court gives permission; or
- (c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made—

- (a) by a party; or
- (b) by any person to whom the document belongs.

(4) For the purpose of this rule, an Electronic Documents Questionnaire which has been completed and served by another party pursuant to Practice Direction 31B is to be treated as if it is a document which has been disclosed.

## Appendix 1 to Practice Direction 51U

### Definitions for the purpose of Section I

- 1.1 “*Control*” in the context of disclosure includes documents: (a) which are or were in a party’s physical possession; (b) in respect of which a party has or has had a right to possession; or (c) in respect of which a party has or has had a right to inspect or take copies.
- 1.2 “*Copy*” means a facsimile of a document either in the same format as the document being copied or in a similar format that is readable by the recipient, and in all cases having identical content;
- 1.3 “*Data Sampling*” means the process of checking data by identifying and checking representative individual documents;
- 1.4 “*Disclose*” comprises a party stating that a document that is or was in its control has been identified or forms part of an identified class of documents and either producing a copy, or stating why a copy will not be produced.
- 1.5 “*Disclosure Certificate*” means a certificate that is substantially in the form set out in Appendix 3 and signed in accordance with the Practice Direction.
- 1.6 “*Disclosure Review Document*” means the Disclosure Review Document at Appendix 2 which is to be completed by the parties pursuant to the Practice Direction, in respect of any application for Extended Disclosure;
- 1.7 “*Electronic Image*” means an electronic representation of a paper document;
- 1.8 “*Keyword Search*” means a software-aided search for words across the text of an electronic document;
- 1.9 “*List of Documents*” means a list of documents in chronological order (or if appropriate classes of documents in chronological order), identifying each document by a description including the date, how the information is held (e-mail, webmail, memory stick, voicemail etc.) and the author or sender and any recipient. Where appropriate the list must distinguish between documents which exist and those that no longer exist;
- 1.10 “*Metadata*” means data about data. In the case of an electronic document, metadata is typically embedded information about the document which is not readily accessible once the native electronic document has been converted into an electronic image or paper document. It may include (for example) the date and time of creation or modification of a word-processing file, or the author and the date and time of sending an e-mail. Metadata may be created automatically by a computer system or manually by a user;
- 1.11 “*Narrative Document*” means a document which is relevant only to the background or context of material facts or events, and not directly to the Issues for Disclosure; for the avoidance of doubt an adverse document (as defined at paragraph 2.6) is not to be treated as a Narrative Document;
- 1.12 “*Native Electronic Document*” or “*Native Format*” means an electronic document stored in the original form in which it was created by a computer software program;

- 1.13 “*Optical Character Recognition*” (*OCR*) means the computer-facilitated recognition of printed or written text characters in an electronic image in which the text-based contents cannot be searched electronically.
- 1.14 “*Technology Assisted Review*” includes all forms of document review that may be undertaken or assisted by the use of technology, including but not limited to predictive coding and computer assisted review.

## **Appendix 2 to Practice Direction 51U**

### **Disclosure Review Document**

#### **Explanatory Note**

1. The Disclosure Review Document (“DRD”) is intended to:
  - (1) facilitate the exchange of information and provide a framework for discussions around the initial scoping of disclosure;
  - (2) help the parties to agree a sensible and cost-effective approach to disclosure and identify areas of disagreement; and
  - (3) provide the court with parties’ proposals on disclosure, agreed or otherwise, so the court can make appropriate case management decisions at the case management conference.
2. The explanatory notes to each section of the DRD are guidance. Nevertheless, parties are encouraged to follow this guidance, where applicable, unless there are good reasons not to do so.
3. Unless otherwise stated, references to paragraph numbers in the DRD are to Practice Direction 51U. If there is a conflict between the DRD and the Practice Direction, the Practice Direction will prevail.
4. The DRD only needs to be completed where the parties are seeking an order for Extended Disclosure where a search-based Disclosure Model (i.e. Models C, D and/or E) is proposed. In complex cases, the DRD may be modified as required to ensure that information is provided to the court in a convenient and helpful format. This may include revising some of the questions asked in Sections 2 and 3 of the DRD or adding others relevant to the particular disclosure exercise to be undertaken.



5. The DRD should be completed and submitted electronically as a single document to the court by the parties. The claimant will be responsible for doing this. In some proceedings, not every section of the DRD will need to be filled out, particularly if the proceedings are likely to require very little disclosure and/or if the identification and retrieval of documents is likely to be straightforward.
6. Unless otherwise agreed between the parties or ordered by the court, the timetable for completion of the DRD is set out in paragraphs 7 and 10 of the Practice Direction. For convenience the timetable is summarised below as follows:

	Stage to be completed	PD Ref.	Deadline
<b>Step 1</b>	Each party should state, in writing, whether or not it is likely to request Extended Disclosure to include one or more of Models B, C, D or E on one or more issues in the case. At this point it should not particularise the Model(s) or the issue(s) in the case.	Para 7.1	Within 28 days of the closure of statements of case
<b>Step 2</b>	Where one or more of the parties has indicated it is likely to request Extended Disclosure, the claimant must prepare and serve on the other parties a draft List of Issues for Disclosure unless the equivalent of such a list has already been agreed between the parties (for example, as part of a fuller list of issues).	Para 7.2	Within 42 days of the closure of statements of case
<b>Step 3</b>	In the event that a particular Issue for Disclosure has not been included in the List of Issues for Disclosure, or is described in a manner that is unacceptable to the defendant, using section 1A of the Disclosure Review Document the defendant should provide the claimant with its proposed wording or alternative wording for inclusion in the draft List of Issues for Disclosure	Para 7.5	As soon as practicable but in any event no later than 14 days after

			service of the draft List of Issues for Disclosure
<b>Step 4</b>	The parties must discuss and seek to agree the draft List of Issues for Disclosure. They should consider whether any draft Issue for Disclosure can be removed. For each Issue for Disclosure that is maintained, the parties should indicate at this point, using Section 1A of the Disclosure Review Document which Model of Extended Disclosure is sought for each party. Where Model C Disclosure is contemplated the parties should discuss the requests that might apply for the purpose of that disclosure.	Para 7.6	In advance of the first case management conference
<b>Step 5</b>	Any party proposing Model C Disclosure must complete and then provide Section 1B of the Disclosure Review Document to the other parties.	Para 10.5	No later than 28 days after the defendant has responded in accordance with paragraph 7.5 of the Practice Direction to the claimant's draft List of Issues for Disclosure.
<b>Step 6</b>	Any party provided with a completed Section 1B in this way must respond by completing the "response" column either agreeing to the request or giving concise reasons for not agreeing to the request.	10.5	Within 14 days of receiving requests in Section 1B of the Disclosure Review Document.
<b>Step 7</b>	Having agreed the List of Issues for Disclosure and exchanged proposals on Model(s) for Extended Disclosure, the parties should prepare and exchange drafts of Section 2 of the Disclosure Review Document (including costs estimates of	Para 10.6	As soon as reasonably practicable and in any event not

	different proposals, and where possible estimates of likely amount of documents involved).		later than 14 days before the case management conference.
<b>Step 8</b>	The parties must seek to resolve any disputes over the scope of any Extended Disclosure sought	Para 10.7	In advance of the first case management conference
<b>Step 9</b>	A finalised single joint Disclosure Review Document should be filed by the claimant. Related correspondence and earlier drafts should not ordinarily be filed.	Para 10.8	Not later than 5 days before the case management conference
<b>Step 10</b>	The parties must independently file a signed Certificate of Compliance substantially in the form set out in Appendix 3 to the Practice Direction	Para 10.9	As soon as reasonably practicable after the claimant has filed the single joint Disclosure Review Document, but in any event in advance of the case management conference

## Completing Section 1A of the DRD

1. The purpose of Section 1A of the DRD is to provide a concise summary of the parties' proposals in relation to Extended Disclosure by identifying the Issues for Disclosure and the proposed Models for Disclosure in respect of such issues. The list of Issues for Disclosure must be completed in accordance with paragraphs 7 and 10 of the Practice Direction<sup>1</sup>.
2. Issues for Disclosure are defined at paragraph 7.3 of the Practice Direction as only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission.
3. The Issues for Disclosure are a point of reference for further discussions between the parties about the manner and scope of disclosure to be given. They are not a statement of case. Nor are they intended to replace the List of Issues, which the parties may be required to prepare and file in advance of the case management conference, although the two documents should ultimately be consistent with each other.
4. The list of Issues for Disclosure should:
  - (1) state whether each Issue for Disclosure is agreed or opposed and, if so, by whom;
  - (2) seek to avoid any duplication of issues, by using consolidated wording for any overlapping Issues for Disclosure where possible.
5. In accordance with paragraph 7.5 of the Practice Direction, if a particular Issue for Disclosure has not been included in Section 1A by the claimant, or is described in a manner that is unacceptable to the defendant, using Section 1A of the DRD the defendant should provide the claimant with its proposed wording or alternative wording for inclusion in the draft list of Issues for Disclosure as soon as reasonably practicable but in any event no later than 14 days after service of the draft List of Issues for Disclosure.
6. If the parties cannot agree whether certain issues should be included as an Issue for Disclosure, such issues should be included with a tick in the "No" section of the "Issue Agreed?" column, along with an indication of the party not agreeing to it (C for claimant, D for defendant, D1 etc. for each defendant in cases with multiple defendants).

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<sup>1</sup> It is to be completed as a Word Document, with any amendments proposed in redline by the parties during period when it is being discussed and finalised. A clean version should ultimately be provided to the court.

7. Where the parties disagree as to the need for Extended Disclosure or seek Extended Disclosure on different Models in relation to an Issue for Disclosure, that should be recorded in the “Proposed model of Extended Disclosure” column.

#### Specifying Disclosure Models in Section 1A of the DRD

8. The Disclosure Models under paragraph 8 are:

Model A: No order for Disclosure;

Model B: Limited Disclosure

Model C: Request-led Search-based Disclosure

Model D: Narrow search-based Disclosure, with or without Narrative Documents

Model E: Wide Search-based Disclosure

9. In addition to completing a list of Issues for Disclosure in Section 1A of the DRD, the parties should also specify which of the above Disclosure Models is proposed in respect of particular Issues for Disclosure.
10. If a party proposes that a different Disclosure Model should apply to each party in the case of a particular Issue for Disclosure, this should be noted (e.g. “Model B for C” (Claimant), “Model D for D” (Defendant)).
11. The claimant must update and re-circulate Section 1A of the DRD to identify areas of agreement and disagreement following the discussions required by paragraph 7.

#### Updating the Issues for Disclosure

12. The scope of disclosure may require ongoing review, discussion and co-operation between the parties.

13. The fact that a party has not included a particular Issue for Disclosure in the DRD, does not prevent that party from later proposing that a new Issue for Disclosure should be added to the list. For example, new factual issues relevant to the parties' statements of case may be identified because of documents disclosed or evidence exchanged during the proceedings, or because of amendments to a statement of case. In the usual way, if the issues in dispute change during the proceedings, then it may well be appropriate to update the Issues for Disclosure and, as a consequence, Section 2 of the DRD.
14. The parties may agree changes to the Issues for Disclosure after the first CMC without having to seek the court's approval, unless the effect of such changes will be to materially change an order already made, or impact in a material way on the procedural timetable, costs and/or trial date.

Section 1A:  
Issues for Disclosure and proposed Disclosure Models

Brief description of the Issue for Disclosure <sup>2</sup>		Reference to statement of case	Issue agreed?		Proposed Model of Extended Disclosure (A – E)		Decision (for the court)
			Yes	No (party not agreeing)	To be completed by claimant	To be completed by defendant	
1.							
	<i>[Alternative proposed wording, if not agreed]</i>						
2.							
3.							
4.							

<sup>2</sup> If the wording of any Issue for Disclosure cannot be agreed, the alternative wording proposed should be included immediately under the claimant’s formulation.

Brief description of the Issue for Disclosure <sup>2</sup>		Issue agreed?		Proposed Model of Extended Disclosure (A – E)		Decision (for the court)
		Reference to statement of case	Yes	No (party not agreeing)	To be completed by claimant	
5.						
6.						
7.						
8.						



Brief description of the Issue for Disclosure <sup>2</sup>		Issue agreed?		Proposed Model of Extended Disclosure (A – E)		Decision (for the court)
		Reference to statement of case	Yes	No (party not agreeing)	To be completed by claimant	
9.						
10.						

## Section 1B

### Request-led Research-based Disclosure (Model C)

#### Completion of Section 1B of the DRD

1. In accordance with paragraph 10.5, any party proposing Model C Extended Disclosure must complete Section 1B of the DRD and provide it to the other parties no later than 28 days after the defendant has responded in accordance with paragraph 7.5 of the Practice Direction to the claimant's draft List of Issues for Disclosure.
2. Any party provided with a completed Section 1B in this way must respond within 14 days by completing the "response" column either agreeing to the request or giving concise reasons for not agreeing to the request.
3. The parties' requests should be focused and concise in order that the responding party may be clear as to the particular document(s) or narrow classes of documents relating to a particular Issue for Disclosure for which it is being asked to undertake searches. Broad and wide-ranging formulations such as "any or all documents relating to..." should not be used.

**Section 1B: Model C requests for Disclosure**

<b>Claimant / Defendant (delete as appropriate)</b>				
	<b>Issue for Disclosure</b>	<b>Request for Document or narrow category of documents which are likely to support or undermine its own case or that of another party and which fall within the scope of the request made</b>	<b>Response</b>	<b>Decision (for the court)</b>
1.	Issue [ ]:			
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				

## Section 2

### Completion of Section 2 of the DRD

1. The purpose of Section 2 of the DRD is to provide the court with information about the data held by each party, including:
  - (1) where and how the data is held;
  - (2) how the parties propose to process and search the data where a search-based Disclosure Model (Models C, D and E) is sought in relation to particular Issues for Disclosure); and
  - (3) whether there are any points that the parties have not been able to agree through discussions and which they therefore need the court to determine at the case management conference.
4. In cases where no documents are held by a party, that party may confirm this in writing rather than complete Section 2 of the DRD.
5. The parties should include in Section 2 any information that will assist the court in determining the appropriate scope of disclosure for each Issue for Disclosure. The information listed in Section 2 should be treated as a guide and not an exclusive list of the information that should be provided.
6. In cases where the disclosure exercise is likely to be complex and substantial with multiple sources of data, it may not be possible to answer all of the questions in Section 2 of the DRD questionnaire in advance of the case management conference. However, the parties should nevertheless seek to provide information about how they intend to approach disclosure so that the court is then in a position to decide what, if any, orders for Extended Disclosure should be made
7. The parties must confer (in person or by phone) and seek to agree the contents of Section 2 of the DRD as it applies to their disclosure, in advance of the case management conference. Those issues that cannot be agreed must be recorded, in a summary form, in those sections to be completed after discussions between the parties.
8. For the avoidance of doubt, if only one party considers that disclosure of certain materials is required, the other party must nevertheless state its proposals as to how the disclosure of such materials should be effected, without prejudice to its position that no order for disclosure should be made.

The provision of information about the data that might be relevant to a request for Extended Disclosure shall not be treated as a concession that Extended Disclosure is appropriate.

Who has responsibility for incorporating the parties' comments on the DRD?

1. Unless otherwise agreed or ordered, the claimant is to be responsible for updating the DRD throughout the proceedings to ensure that it reflects the parties' combined comments and discussions. Where the claimant is unrepresented, it may be appropriate for the defendant's advisers to assist the claimant and/or take responsibility for completion of the DRD by agreement.
2. When a party other than the claimant is completing Section 2 of the DRD, it may do so by completing and sending across just Section 2 of the DRD completed (i.e. there is no need for the party to carry across any text already discussed and agreed in relation to Sections 1A and 1B). The claimant should then ensure that the information provided to it in Section 2 by the other party is incorporated into the latest draft of the DRD, over which it has ultimate carriage.

Estimates as to costs

3. In accordance with paragraph 22 of the Practice Direction, the parties are required to provide an estimate of what they consider to be the likely costs of giving the disclosure proposed by them in the DRD, and the likely amount of documents involved, in order that a court may consider whether such proposals on disclosure are reasonable and proportionate. This information is to be provide in answer to questions 15 to 17 of Section 2.
4. If the approach to Extended Disclosure is not fully agreed, the parties should be ready to provide more detailed information at the CMC as to how their global estimates were arrived at and the impact upon them of particular requests for Extended Disclosure.
5. In cases where the costs budgeting scheme applies, if it is not practical to complete the disclosure section of Form H in relation to disclosure prior to the court making an order in relation to disclosure at the case management conference, the parties may notify the court that they have agreed to postpone completion of that section of Form H until after the case management conference (see paragraph 22.2 of the Practice Direction).

## Section 2 Questionnaire

Claimant / Defendant (delete as appropriate)		
	Question	Details
<b>Phase 01</b>	<b>DATA MAPPING</b>	
1.	<p><b>Hard copy documents / files</b></p> <p>Confirm whether hard copy documents (for example, notebooks, lever arch files, note pads, drawings/plans and handwritten notes) that are not originally electronic files should be included in collection.</p> <p>Please propose an approach for the production of hard copy documents: if they will be scanned and made searchable or if they will be disclosed and made available for inspection in hard copy only.</p>	
2.	<p><b>Electronic files: data sources/locations</b></p> <p>Please set out details on all data sources to be considered at collection including:</p>	

	Question	Details
	<p>(1) Document repositories and/or geographical locations</p> <p>(2) Computer systems or electronic storage devices</p> <p>(3) Mobile phones, tablets and other handheld devices</p> <p>(4) Document management systems</p> <p>(5) Email servers</p> <p>(6) Cloud based data storage</p> <p>(7) Webmail accounts e.g. Gmail, Hotmail etc</p> <p>(8) Back-up systems</p> <p>(9) Social media accounts</p> <p>(10) Third parties who may have relevant documents which are under your control (e.g. agents or advisers).</p> <p>Please also set out details as to sources that are unavailable but may host relevant documents</p> <p>If a data source is likely only to host documents relevant to particular Issues for Disclosure, that should be noted.</p> <p>Please identify any sources which may raise particular difficulties due to their location, format or any other reason.</p>	

	Question	Details
3.	<p>Please describe the format or file types in which relevant documents may have been created or stored on devices.</p> <p>Please identify any bespoke or licenced proprietary software in which relevant documents have been created or stored which may not be available to the other party but without which it is not possible to review the relevant data (e.g. Microsoft Project, Lotus Notes, Bloomberg Chat etc.).</p>	
4.	<p>Please set out a high level summary of the document types (including but not limited to email, Word documents, spreadsheets, presentation and image files) likely to be relevant to Issues for Disclosure.</p>	
5.	<p><b>Initial Disclosure – description of searches already undertaken</b></p> <p>In accordance with paragraph 10.4 of the Practice Direction, each party should (save as already described for Initial Disclosure) describe any searches for documents that it has undertaken or caused to be undertaken for the purposes of the proceedings (including in advance of the commencement of the proceedings).</p>	<p><b>Claimant:</b> [ ]</p> <p><b>Defendant:</b> [ ]</p>
6.	<p><b>Custodians</b></p> <p>Please set out a list of those custodians whose files you propose to search for documents relevant to Issues for Disclosure for which any party seeks Extended Disclosure.</p> <p>If a custodian is only relevant to certain Issues for Disclosure, or a certain date range, please indicate this next to their name if this might allow the</p>	



	Question	Details
	scope of the search to be narrowed. If the list is extensive, please set out a proposal to prioritise key custodians.	
7.	<i>(For completion after discussions between the parties)</i>  Are the proposals at 6 agreed? If not, set out any areas of disagreement.	
8.	<b>Date ranges</b>  Please set out the date range (or ranges) within which you would propose to search for documents.  If a narrower range of dates is appropriate for a particular Issue for Disclosure, or a particular custodian, please indicate this.	
9.	<i>(For completion after discussions between the parties)</i>  Are the proposals at 8 agreed? If not, set out areas of disagreement.	
10.	<b>Keyword search terms</b>  Please list any keywords identified at this stage that you may use to search the data to identify documents that may need to be disclosed.  If a certain keyword is relevant only to a particular Issue for Disclosure, please indicate this if it might allow the scope of the search to be narrowed.  Nb: The use of initial keywords may assist the parties to identify the likely volume of data that may need to be reviewed. However, keywords will	

	Question	Details
	<p>need to be tested and refined during the disclosure process. Accordingly, any keywords proposed at this stage are for the purposes of discussion only.</p> <p>The fact that a party may propose a keyword at this stage should not be taken as an acceptance that the keyword should ultimately be used, particularly if, on testing the keyword against the available data, it provides false positive results.</p> <p>If it is not practicable to provide a list of keywords prior to the CMC, the parties should engage and seek to co-operate following the CMC to identify and agree the key words they propose using and thereafter test those key words against the data to determine whether or not they are appropriate.</p>	
11.	<p><i>(For completion after discussions between the parties)</i></p> <p>Are the proposals at 10 agreed? If not, set out areas of disagreement.</p>	
12.	<p><b>Irretrievable documents</b></p> <p>Please state if you anticipate any documents being irretrievable due to, for example, their destruction or loss, the destruction or loss of devices upon which they were stored, or other reasons.</p>	
13.	<p><b>Use of analytics</b></p> <p>Parties are to consider using the full range of tools in the analytics suite available to them (either in-house or via e-disclosure specialist firms), to assist in the review. This might include some of the more complex tools available such as technology</p>	

	Question	Details
	<p>(or computer) assisted review (TAR or CAR), and other similar software review tools (see question 14 below).</p> <p>Parties should identify which analytics tools / methods they will be using, and any configuration applied to those tools. Analytics can include but is not limited to the following: email threading, near duplicate identification, concept searching, concept clustering and foreign language analysis.</p>	
14.	<p><b>Technology / computer assisted review (TAR)</b></p> <p>Parties are to consider the use of technology / computer assisted review tools. These are software tools used for prioritising or coding a collection of documents which take account of a senior lawyer’s review and judgments on a set of documents and then extrapolate those judgments to the remaining document collection.</p> <p>Where parties have considered the use of such tools but decided against it at this stage (particularly where the review universe is in excess of 50,000 documents) they should set out reasoning as to why such tools will not be used.</p> <p>If the parties are in a position to propose the use of technology or computer assisted review tools in advance of the CMC, those proposals should be set out in this section.</p>	
15.	<p><b>Estimates of Costs</b></p> <p>Where the parties have agreed searches to be undertaken, state the estimated cost of collection, processing, search, review and production of your Extended Disclosure.</p>	
16.	<p>Where any aspect of the approach to Disclosure is not agreed, estimate your costs of collection, processing, search, review and production of <u>your</u></p>	

	Question	Details
	documents based on Extended Disclosure (Models and scope of any search required) requested by the <u>claimant</u> .	
17.	Where any aspect of the approach to Disclosure is not agreed, estimate your costs of collection, processing, search, review and production of <u>your</u> documents based on Extended Disclosure (Models and scope of any search required) requested by the <u>defendant</u> .	

### Section 3

#### Guidance on process after any order for Extended Disclosure has been made

1. Where the court orders the parties to give Extended Disclosure, the parties will need to consider the appropriate methodology for the disclosure exercise, which includes the collection, processing, review and production of documents.
2. The parties and their advisers are reminded of their Disclosure Duties to the court to discuss and endeavour to agree the approach to be taken to disclosure, always with a view to reducing the burden and cost of this process.
3. Although the parties are under a duty to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology, there may be points which cannot be agreed despite the best efforts of the parties, in which case the parties should request the assistance of the court in a Disclosure Guidance Hearing as set out paragraph 11 of the Practice Direction.
4. This guidance identifies various forms of analytics, and technology or computer assisted review software which are currently available and in use. The parties should not, however, feel constrained from proposing new forms of processing and review software, which may be developed in the future and which may be appropriate for use in any given case.

#### Appropriate methodology

5. Although the parties may approach the disclosure exercise in different ways and using different technology, an appropriate methodology for a case involving electronic documents should always include the following:
  - (1) Electronic documents should be collected in a format that preserves and does not alter the underlying document metadata (where possible)<sup>3</sup> thereby allowing the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure. This approach should generally be taken unless a document has been redacted.

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<sup>3</sup> The onus is on the parties to ensure they engage appropriate IT forensic expertise to assist with this process if they or their legal advisers do not have such expertise in house.

- (2) A record should be kept of each stage of the process so that the methodology can be explained to the court if necessary after the event (see Methodology record below).
- (3) To the fullest extent practicable, deduplication of the data set (using the hash values of the documents should be undertaken during processing and prior to giving disclosure of data to the other side.

### **Agreeing aspects of methodology**

6. To the extent that this has not already been agreed between the parties or determined by the court, the parties should seek to agree the following as early in the process as possible:
  - (1) How the collection data set is to be identified and collected.
  - (2) Data culling measures applied at collection (i.e. date range, custodians, search terms).
  - (3) Any limitations that will be applied to the document collection process and the reasons for such limitations.
  - (4) Data exclusion measures applied during or post-collection (e.g. Domains such as @CompanyA.com).
  - (5) How each party intends to use analytics to conduct a proportionate review of the data set
  - (6) How each party intends to use technology assisted review to conduct a proportionate review of the data set (particularly where the review data set is likely to be in excess of 50,000 documents).
  - (7) The approach and format for production. This will have an impact on the approach to the review exercises, so parties should endeavour to agree this point at an early stage.
  - (8) Format of documents to be exchanged – parties are encouraged to exchange documents in native format unless there is a reasonable justification not to do so (e.g. redacted documents). Electronic documents should generally be made available in the form which allows the party receiving documents the same ability to access, search, review and display the documents as the party giving disclosure
  - (9) Management of document groups for production – parties should describe and agree the approach they will adopt for document groups (families). Often, it will be appropriate to agree not to break document groups (families) and to review a document group as a whole.

- (10) If documents within a group are to be withheld at the production stage the parties should consider and agree whether to use placeholders indicating the reasons for document being withheld (eg Withheld for Privilege).
- (11) Format for electronic exchange – parties are encouraged to agree database load file format and details to be included in load file/document index. All documents to be produced should be assigned a Disclosure Identification/Number. There is no need to produce a typed list of documents in the traditional sense, unless that will be of assistance to the parties.

### **Methodology record**

7. The parties should keep records of their methodology during the disclosure exercise, to include the following:
  - (1) Document sources not considered at collection and why.
  - (2) The deduplication<sup>4</sup> method applied.
  - (3) Any DeNISTing<sup>5</sup> applied.
  - (4) Approach to non-text searchable items.
  - (5) Approach with encrypted/password protected items (i.e. what measures were applied to decrypt).
  - (6) Search terms, including the number of search term responsive documents and search term responsive documents plus family members.
  - (7) Any use of clustering, concept searching, e-mail threading, categorisation and any other form of analytics or technology assisted review.

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<sup>4</sup> The options for deduplication are as follows; (A) Global - where documents across the entire processed data set are deduplicated against each other. This means that where a document exists in any location within the data set only one copy of it is retained; (B) Custodian - where documents held by the same custodian are deduplicated against each other only or (C) Custom – specific to the project

<sup>5</sup> “DeNISTing” is a method of reducing the number of documents subject to lawyer or computer review by removing file types that are highly unlikely to have evidentiary value. DeNISTing” is the [National Institute of Standards and Technology](#) and the process of DeNISTing is based on a list of file types maintained by the agency.

## Appendix 3 to Practice Direction 51U

### Certificate of Compliance (represented parties)

By submitting the disclosure review document to the court, I hereby confirm that I have discussed, explained and advised my client on the following:

1. The alternative orders that can be made by the court in relation to disclosure, including the question of whether or not an order for Extended Disclosure should be sought at all and, if so, what the Issues for Disclosure should be and which of the Disclosure Models are appropriate to achieve a fair determination of those Issues for Disclosure;
2. The duties that I and my client are under in relation to disclosure pursuant to paragraph 3 of Practice Direction 51U;
3. The overriding objective in all cases to seek to ensure that the burden and costs of disclosure are reasonable and proportionate in the context of the proceedings.
4. The likely costs that will be incurred in respect of the disclosure orders sought.

I further confirm that the information provided in this disclosure review document is, to the best of my knowledge and belief, true and accurate.

Name: .....

Position: .....

[Claimant / Defendant]



**Certificate of Compliance (unrepresented parties)**

By submitting the disclosure review document to the court, I hereby confirm as follows:

1. I understand the duties that I am under in relation to disclosure pursuant to paragraph 3 of Practice Direction 51U.
2. I am aware of the overriding objective in all cases to seek to ensure that the burden and costs of disclosure are reasonable and proportionate in the context of the proceedings.
3. The information provided in this DRD is, to the best of my knowledge and belief, true and accurate.

Name: .....

Position: .....

[Claimant / Defendant]

## Appendix 4 to Practice Direction 51U

### Disclosure Certificate

**Notes:** This Disclosure Certificate is for use in all claims which fall within Practice Direction 51U and are proceeding under the pilot scheme for disclosure in the Business and Property Courts.

In the	
<b>Claim No.</b>	
Claimant (including ref)	
Defendant (including ref)	
Date	
Party returning form	

#### **Initial Disclosure**

##### **Either:**

On [date] [party], with its [Statement of Case] provided [to party/parties] by way of Initial Disclosure a List, and copies, of the key documents referred to in [Statement of Case]. The Initial Disclosure List is found at [at Appendix A].

##### **Or**

No Initial Disclosure was required because [the parties agreed to dispense with it] [the Court ordered that it was not required] [it would involve [party] providing more than 1000 pages or 200 documents].

#### **Extended Disclosure**

If any of Models C, D or E were ordered in respect of any Issues for Disclosure, set out here the limits of the search conducted, by reference to custodians, date ranges, locations, document types, keyword searches and any other relevant limits specified in Section 3 of the Disclosure Review Document under “Agreeing aspects of methodology”.

To the extent any of these limits were not contained in the Disclosure Order or recorded in an agreement in writing between the parties either in the Disclosure Review Document or elsewhere,

please identify these and explain why they were necessary and why they were not agreed with the other part[y/ies]

--

I, the above-named [Party] certify that I am aware of and to the best of my knowledge and belief I have complied with my duties under Practice Direction 51U, including that I am required to have:

- A) taken reasonable steps to preserve documents in my control that may be relevant to any issue in the proceedings;
- B) disclosed documents I am aware (or, in the case of a company or organisation, of which the company or organisation is aware, within the meaning of paragraph 2.9 of Practice Direction 51U) to be or to have been in my control and adverse to my case on any issue in the proceedings, unless they are privileged;
- C) *[in the case of an order for Extended Disclosure of Model C, D or E only]* undertaken any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search and in accordance with my obligations as set out in Practice Direction 51U and [Order];
- D) acted honestly in relation to the process of giving disclosure;
- E) used reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure in the proceedings.
- F) produced electronic copies of documents in their native format, in a manner which preserves metadata and produced disclosable hard copy documents by providing scanned versions or photocopied hard copies.

I certify that I am aware of and to the best of my knowledge and belief have complied with the Disclosure Order.

I further certify that the List of Documents [at Appendix A] complies with the definition of a List of Documents contained within the Practice Direction and is a complete list of all documents which are or have been in my control and which I am obliged under the Disclosure Order to disclose.

I understand that I must inform the court and the other parties immediately if any further document required to be disclosed by paragraph 3.3 of Practice Direction 51U and the Disclosure Order comes into my control at any time before the conclusion of the case.

I wish to withhold production of the following [document, part of a document, or a class of documents] which would otherwise fall within my obligations:

Description of document, part of a document or class of documents	Grounds upon which production is being withheld
	<i>e.g. Privilege, already in other party's possession</i>

	<i>(inter-partes correspondence etc)</i>  <i>Documents no longer within party's control</i>

I am aware that proceedings for contempt of court can be brought against me if I sign a false Disclosure Certificate.

Signed

Date

(Party) (Party's representative)

***If the party making disclosure is a company or other organisation, the person signing this should be someone from within the organisation with appropriate authority and knowledge of the disclosure exercise. This person will have received confirmation from all those people with accountability or responsibility within the company or organisation either for the events or circumstances the subject of the case or for the conduct of the litigation, including those who have since left the company or organisation, that they have provided for disclosure all adverse documents of which they are aware. Identify here who the person making the disclosure statement is and why he or she is the appropriate person to make it:***

Name:
Role and explanation of why you are the appropriate person to sign this Certificate:

**Appendix A**  
**List of Documents**

## **ANNEX C**

### **“PRACTICE DIRECTION 57AB – SHORTER AND FLEXIBLE TRIALS SCHEMES**

*This Practice Direction supplements CPR Part 57A*

Contents of this Practice Direction

<b>Title</b>	<b>Number</b>
General	Para. 1
The Shorter Trials Scheme	Para. 2
The Flexible Trials Scheme	Para. 3

#### **General**

**1.1** This Practice Direction provides for two schemes, the Shorter Trials Scheme and the Flexible Trials Scheme.

**1.2** The schemes will—

- (a) operate from 1 October 2018;
- (b) operate in all the Business and Property Courts including those in the Rolls Building and those situated outside London;
- (c) apply to claims issued on or after 1 October 2015.

**1.3** Where the provisions of this Practice Direction conflict with other provisions of the rules or other practice Directions, this Practice Direction shall take precedence.

**1.4** In calculating the time provided by any order fixing, extending or abridging time under the Shorter Trials Scheme the period from 24 December to 2 January next following (both days inclusive) is excluded.

**1.5** Where a case is agreed or ordered to be suitable for the Shorter Trials Scheme, the court expects the parties and their representatives to cooperate with, and assist, the court in ensuring the proceeding is conducted in accordance with the Scheme so that the real issues in dispute are identified as early as possible and are dealt with in the most efficient way possible.

#### **The Shorter Trials Scheme**

##### **Shorter Trials Scheme – general**

**2.1** A claim in the Shorter Trials Scheme may be started in any of the Business and Property Courts.

**2.2** The Shorter Trials Scheme will not normally be suitable for—

- (a) cases including an allegation of fraud or dishonesty;
- (b) cases which are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence;
- (c) cases involving multiple issues and multiple parties, save for Part 20 counterclaims for revocation of an intellectual property right;
- (d) cases in the Intellectual Property Enterprise Court;
- (e) public procurement cases.

**2.3** The length of trials in the Shorter Trials Scheme will be no more than 4 days including reading time (and a case will not be suitable for the Scheme if it appears that it will require a longer trial).

**2.4** All Shorter Trials Scheme claims will be allocated to a designated judge at the time of the first case management conference (CMC) or earlier if necessary.

**2.5** All proceedings in the Shorter Trials Scheme will normally be heard or determined by the designated judge except that—

- (a) another judge may hear urgent or vacation applications if the designated judge is not available;
- (b) unless the court otherwise orders, any application relating to the enforcement of a judgment or order for the payment of money will be dealt with by a Master of the Queen's Bench Division or of the Chancery Division or a District Judge;
- (c) a case may be case managed and tried by a Master in the Chancery Division, or a District Judge in a Chancery District Registry, with the consent of the parties.

**2.6** Provisions in other rules or practice directions which refer to a Master or District Judge are to be read, in relation to claims in the Shorter Trials Scheme, as if they referred to a judge.

### **Starting proceedings in the Shorter Trials Scheme**

**2.7** Claims in the Shorter Trials Scheme must be issued in the appropriate registry in the appropriate Business and Property Court.

**2.8** As appropriate, the claim form must be marked in the top right hand corner as follows—

- (a) “Business and Property Courts of England and Wales, Commercial Court, Shorter Trials Scheme”;
- (b) “Business and Property Courts in Wales, Shorter Trials Scheme”, “Business and Property Courts in Manchester , Companies Court, Shorter Trials Scheme”, “Business and Property Courts of England and Wales, Patents Court, Shorter Trials Scheme” as appropriate;

(c) “Business and Property Courts of England and Wales, Technology and Construction Court, Shorter Trials Scheme”;

(d) “Business and Property Courts of England and Wales, The London Circuit Commercial Court, Shorter Trials Scheme”.

### **Transferring proceedings to or from the Shorter Trials Scheme**

**2.9** An application by a defendant, including a Part 20 defendant, for an order transferring proceedings out of the Shorter Trials Scheme should be made promptly and normally not later than the first CMC. An application may be made on paper prior to the first CMC if appropriate.

**2.10** If a successful application is made to transfer a case out of the Shorter Trials Scheme, the case will then proceed in the court in which it was issued unless a judge otherwise orders.

**2.11** An application to transfer a case into the Shorter Trials Scheme must be heard by a judge, save that in the Chancery Division it may be heard by a Master, or a District Judge in a Chancery District Registry. If a judge or Master orders a case to be transferred into the Shorter Trials Scheme, he may give case management directions.

**2.12** An application by any party for an order transferring proceedings into the Shorter Trials Scheme should be made promptly and normally not later than the first CMC.

**2.13** The court may, of its own initiative, suggest that a case be transferred into the Shorter Trials Scheme.

**2.14** In deciding whether to transfer a case into or out of the Shorter Trials Scheme, without prejudice to the generality of the overriding objective, the court will have regard to the type of case the Scheme is for, the suitability of the case to be a part of the Scheme and the wishes of the parties.

**2.15** If a case is transferred into the Shorter Trials Scheme, the court will consider whether it is necessary to require that Statements of Case which have already been served should be amended to put them in the form they would have been in had the case commenced in the scheme. Statements of Case which have already been served will not normally need to be amended.

### **Proceedings in the Shorter Trials Scheme**

**2.16** The procedure set out in this paragraph shall be substituted for any applicable pre-action protocols.

**2.17** Save where there is good reason not to do so, as in a case of urgency, a letter of claim should be sent giving succinct but sufficient details of the claim to enable the potential defendant to understand and to investigate the allegations.

**2.18** The letter of claim shall notify the proposed defendant of the intention to adopt the Shorter Trials Scheme procedure.

**2.19** The proposed defendant shall respond within 14 days stating whether it agrees to or opposes that procedure, or whether it has insufficient information to commit itself either way.



**2.20** Particulars of claim must be served with the claim form.

**2.21** In addition to the requirements of rule 16.4, the particulars of claim should include—

- (a) a brief summary of the dispute and identification of the anticipated issues;
- (b) a full statement of all relief or remedies claimed;
- (c) detailed calculations of any sums claimed.

**2.22** The particulars of claim should be no more than 20 pages in length. The court will only exceptionally give permission for a longer statement of case to be served for use in the Shorter Trials Scheme and will do so only where a party shows good reasons.

**2.23** The particulars of claim should be accompanied by a bundle of core documents.

**2.24** The claim form and particulars of claim shall be served promptly following—

- (a) the 14 day period allowed for the defendant's response to the letter of claim; or
- (b) the defendant's response, if a longer period for response is agreed between the parties.

**2.25** The claimant shall, promptly after serving the claim form and particulars of claim, take steps to fix a CMC for a date approximately (but not less than) twelve weeks after the defendant is due to acknowledge service of the claim form.

**2.26** The defendant shall be required to file an acknowledgment of service within the time periods prescribed by the rules.

**2.27** If the defendant files an acknowledgment of service stating that he wishes to dispute the court's jurisdiction, the period for serving and filing a defence is 28 days after filing of the acknowledgment of service (unless an application to challenge the jurisdiction is made on or before that date, in which case no defence need be served before the hearing of the application: see rules 11(7) and (9)).

**2.28** In cases where the jurisdiction of the court is challenged these provisions will not apply until the question of the court's jurisdiction has been resolved.

**2.29** The defence and any counterclaim must be served within 28 days of acknowledgment of service of the claim form. Subject to paragraphs 2.27 and 2.33 of this Practice Direction, CPR r15.4(1) applies to the period of filing the defence.

**2.30** The defence should include—

- (a) a statement indicating whether it is agreed that the case is appropriate for the Shorter Trials Scheme and, if not, why not;
- (b) a summary of the dispute and identification of the anticipated issues (if different to that of the claimant).

**2.31** The defence and counterclaim should be no more than 20 pages in length. The court will only exceptionally give permission for a longer statement of case to be served for use in the Shorter Trials Scheme and will do so only where a party shows good reasons.

**2.32** The defence should be accompanied by a bundle of any additional core documents on which the defendant intends to rely.

**2.33** Unless such extension would require alteration of the date for the CMC, if it has already been fixed, the defendant and the claimant may agree that the period for serving and filing a defence shall be extended by up to 14 days. However, any such agreement and brief reasons must be evidenced in writing and notified to the court.

**2.34** Any reply and defence to counterclaim must be served within 14 days thereafter.

### **Case Management Conference**

**2.35** If the suitability of the Shorter Trials Scheme procedure is disputed then that issue will be determined at the first CMC, if not before, and further directions given in the light of that determination.

**2.36** The legal representatives for the claimant will be responsible for producing and filing a list of issues, and where appropriate for revising it.

**2.37** The claimant's legal representatives shall provide a draft list of issues to the defendant's solicitors in sufficient time to enable the parties to use their best endeavours to discuss and agree the contents thereof prior to filing the CMC bundle at court.

**2.38** At the CMC the court will—

- (a) review the issues;
- (b) approve a list of issues;
- (c) consider ADR;
- (d) give directions for trial;
- (e) (if it has not already been done before the CMC,) fix a trial date (or window), which should be not more than 8 months after the CMC and with a trial length of not more than 4 days (including reading time);
- (f) fix a date for a Pre-Trial Review.

### **Disclosure**

**2.39** Rules 31.5(2) and 31.7 do not apply.

**2.40** If and insofar as any party wishes to seek disclosure from another party of particular documents or classes of documents or of documents relating to a particular issue, they must write to the other party to make such requests not less than 14 days in advance of the CMC and, absent an agreement regarding the extent of the disclosure to be given, raise such requests at the CMC.

**2.41** Where there is a dispute as to whether requested disclosure should be provided, in deciding whether it is necessary so to order the court will have regard to how narrow and specific the request is, whether the requested documents are likely to be of significant probative value and the reasonableness and proportionality of any related search required, having regard to the factors set out in rule 31.7(2).

**2.42** Unless agreed by the parties or otherwise ordered at the CMC, the following provisions for disclosure will apply—

(a) the parties shall, within 4 weeks of the CMC, make and serve a disclosure list in accordance with rule 31.10 and serve copies of all documents in the list, inspection of which is not objected to;

(b) the documents to be listed in the disclosure list are—

(i) the documents on which they rely as supporting their case;

(ii) the documents requested by the other party under paragraph 2.40 above that it agreed to produce or was ordered to produce by the court;

(c) each party must also provide a disclosure statement containing a brief description of the steps the party has taken to locate the document agreed or ordered to be disclosed.

**2.43** Applications for specific disclosure and further information made after the CMC are discouraged under the Shorter Trials Scheme and should not be made without good reason.

### **Witness statements**

**2.44** Unless otherwise ordered, witness statements will stand as the evidence in chief of the witness at trial. No witness statements should without good reason be more than 25 pages in length.

**2.45** The court will consider at the CMC whether to order that witness evidence shall be limited to identified issues or to identified topics.

### **Experts**

**2.46** Expert evidence at trial will be given by written reports and oral evidence shall be limited to identified issues, as directed at the CMC or as subsequently agreed by the parties or directed by the court.

### **Applications**

**2.47** Part 23 applies with the modifications set out in this paragraph.

**2.48** The court will deal with all applications (save for the CMC and pre-trial review) without a hearing in accordance with the following directions—

(a) all applications and documents filed in support must be concise;

(b) the respondent must answer in writing within 7 days of service of the application notice. The response must be concise;

(c) any reply from the applicant must be provided within 2 business days of service of the response and be concise;

(d) if any party contends the application should be dealt with at a hearing, they must give an explanation in writing;

(e) The court will deal with an application without a hearing unless the court considers it necessary to hold a hearing. In appropriate cases that may be a hearing by telephone.

**2.49** Save as otherwise provided herein the periods set by this Practice Direction and any other time limits applicable to a case in the Shorter Trials Scheme under any rule, practice direction or order of the court may be extended by agreement by up to 7 days. In all other cases, such time limits may only be extended beyond 7 days by order of the court and for good reason.

**2.50** Save in exceptional circumstances, the court will not permit a party to submit material at trial in addition to that permitted at the CMC or by later court order.

### **Pre-Trial Review**

**2.51** At the Pre-Trial Review the court will review the case and will fix the timetable for the trial, including time for speeches and for cross-examination.

### **The Trial**

**2.52** The judge hearing the trial will be the designated judge unless it is impractical for that judge to do so.

**2.53** The court will manage the trial to ensure that, save in exceptional circumstances, the trial estimate is adhered to. Cross-examination will be strictly controlled by the court.

**2.54** The trial will be conducted on the basis that it is only necessary for a party to put the principal parts of its case to a witness, unless the court directs otherwise.

**2.55** The court will endeavour to hand down judgment within six weeks of the trial or (if later) final written submissions.

### **Costs**

**2.56** Rule 3.12 shall not apply to cases in the Shorter Trials Scheme, unless the parties otherwise agree. If at the outset of the proceedings the parties agree that Costs Management should apply, they should seek an order to that effect at the CMC and apply for directions as to when budgets should be subsequently exchanged, discussed and submitted for the court's approval.

**2.57** Within 21 days of the conclusion of the trial, or within such other period as may be ordered by the court, the parties shall each file and simultaneously exchange schedules of their costs incurred in the proceedings.

**2.58** Such schedules should contain sufficient detail of the costs incurred in relation to each applicable phase identified by Precedent H to the Costs Budgeting regime to enable the trial judge to be in a position to make a summary assessment thereof following judgment.

## **2.59** Save in exceptional circumstances—

(a) the court will make a summary assessment of the costs of the party in whose favour any order for costs is made;

(b) rules 44.2(8), 44.7(1)(b) and Part 47 do not apply.

## **Appeals**

**2.60** The Court of Appeal will seek to take into account the fact that a case was in the Shorter Trials Scheme and the desire for expedition in deciding when applications for permission to appeal will be considered and when appeals will be listed.

## **The Flexible Trials Scheme**

### **Flexible Trials Scheme – general**

**3.1** The Flexible Trials Scheme applies to a claim started in any of the Business and Property Courts.

**3.2** The Flexible Trials Scheme enables parties by agreement to adapt trial procedure to suit their particular case. Trial procedure encompasses pre-trial disclosure, witness evidence, expert evidence and submissions at trial.

**3.3** The Flexible Trials Scheme is designed to encourage parties to limit disclosure and to confine oral evidence at trial to the minimum necessary for the fair resolution of their disputes. Its aim is to reduce costs, reduce the time required for trial and to enable earlier trial dates to be obtained.

**3.4** The Flexible Trials Scheme enables the parties to agree to invite the court to determine identified issues on the basis of written evidence and submissions. In such a case, whilst the court will seek to comply with the parties' request, it may call for oral evidence to be given or oral submissions to be made on any of the identified issues if it considers it necessary to do so. Where an issue is to be determined in writing it is not necessary for a party to put its case on that issue to the other party's witnesses.

**3.5** The Flexible Trials Scheme provides a standard trial procedure as set out in paragraph 3.9 below, the Flexible Trials Procedure. This may be varied by agreement between the parties.

### **Adoption of the Flexible Trials Scheme**

**3.6** If the parties wish to adopt the Flexible Trials Scheme they should agree to do so in advance of the first CMC and inform the court accordingly.

**3.7** If the parties wish to adopt a variation of the Flexible Trials Procedure such variations should be agreed in advance of the first CMC and the court informed accordingly.

**3.8** Unless there is good reason to order otherwise, where the parties have adopted the

Flexible Trials Scheme the court will give directions in accordance with Flexible Trials Procedure and any agreed variations of it.

### **Flexible Trials Procedure**

**3.9** Unless otherwise ordered, the following directions apply where the Flexible Trials Scheme is adopted—

(a) each party will be required to disclose the documents on which he relies and documents which are actually known to fall within rules 31.6(b) or (c) without the need for a search. At the same time the party may request specific disclosure of documents it requires from any other party. If the parties wish to agree that there be wider disclosure in accordance with rule 31.5(7)(a) to (f) they should seek to do so in relation to limited and defined issues;

(b) where there is a dispute as to whether specific disclosure should be provided in deciding whether it is necessary so to order the court will have regard to how narrow and specific the request is, whether the requested documents are likely to be of significant probative value and the reasonableness and proportionality of any related search required, having regard to the factors set out in rule 31.7(2). A party is only required to carry out a reasonable search and to provide a disclosure statement pursuant to rule 31.7 in relation to specific disclosure which it has agreed or been ordered to provide;

(c) witness evidence at trial will be given by written statements and oral evidence shall be limited to identified issues or identified witnesses, as directed at the CMC or as subsequently agreed by the parties or directed by the court;

(d) expert evidence at trial will be given by written reports and oral evidence shall be limited to identified issues, as directed at the CMC or as subsequently agreed by the parties or directed by the court;

(e) submissions at trial will be made in writing with oral submissions and cross examination subject to a time limit, as directed at the CMC or as subsequently agreed by the parties or directed by the court;

(f) where an issue is to be determined at trial on the basis of written evidence it is not necessary for a party to put its case on that issue to the other party's witnesses. Where an issue is to be determined on the basis of oral evidence it is only necessary for a party to put the principal parts of its case to the other party's witnesses, unless the court directs otherwise."

## **ANNEX D**

### **“PRACTICE DIRECTION RELATING TO THE USE OF THE WELSH LANGUAGE IN CASES IN THE CIVIL COURTS IN OR HAVING A CONNECTION WITH WALES**

The purpose of this Practice Direction is to reflect the principles of the Welsh Language Act 1993 and the Welsh Language (Wales) Measure 2011 that in the administration of justice in Wales, the English and Welsh languages should be treated on the basis of equality.

Contents of this Practice Direction
Title
1. GENERAL
2. THE DIRECTIONS QUESTIONNAIRE
3. CASE MANAGEMENT
4. LISTING BY THE COURT
5. INTERPRETERS
6. WITNESSES AND JURORS
7. ROLE OF THE LIAISON JUDGE

#### **1. GENERAL**

1.1 This practice direction applies to civil proceedings in or having a connection with Wales.

1.2 The existing practice of conducting a hearing in Wales entirely in the Welsh language on an ad hoc basis and without notice will continue to apply when all parties and witnesses directly involved at the time consent to the proceedings being so conducted.

1.3 In every case in Wales in which it is possible that the Welsh language may be used by any party or witness [or in any document which may be placed before the court], the

parties or their legal representatives must inform the court of that fact so that appropriate arrangements can be made for the management and listing of the case.

1.4 Any document placed before the court in civil proceedings in or having a connection with Wales may be in the English or Welsh Language. The parties or their legal representatives must inform the court as soon as practicable if a document in the Welsh language will or may be placed before the court so that appropriate arrangements can be made.

1.5 HMCTS forms in the Welsh language are available on the *justice.gov.uk* website. The Welsh Language Unit of HMCTS provides translation facilities.

1.6 If costs are incurred as a result of a party failing to comply with this direction, a costs Order may be made against that party or their legal representative.

1.7 Where a case is tried with a jury, the law does not permit the selection of jurors in a manner which enables the court to discover whether a juror does or does not speak Welsh or to secure a jury whose members are bilingual to try a case in which the Welsh language may be used.

## 2. THE DIRECTIONS QUESTIONNAIRE

2.1 In any proceedings in which a party is required to complete a directions questionnaire, that party must include details relating to the possible use of Welsh (i.e. details of any person wishing to give oral evidence in Welsh and of any documents in Welsh (e.g. documents to be disclosed under Part 31 or witness statements) which that party expects to use).

2.2 A party must include the details mentioned in paragraph 2.1 in the directions questionnaire even if that party has already informed the court of the possible use of Welsh in accordance with the provisions of section 1 above.

## 3. CASE MANAGEMENT

3.1 At any interlocutory hearing, the court will take the opportunity to consider whether it should give case management directions. To assist the court, a party or that party's legal representative should draw the court's attention to the possibility of Welsh being used in the proceedings, even where he or she has already done so in compliance with other provisions of this direction.



3.2 In any case where a party is required to complete a pre-trial check list (listing questionnaire) and has already intimated the intention to use Welsh, that party should confirm the intended use of Welsh in the pre-trial check list and provide any details which have not been set out in the allocation questionnaire.

#### 4. LISTING BY THE COURT

4.1 The diary manager, in consultation with the Designated Civil Judge and the Liaison Judge(s) for the Welsh language, will ensure that a case in which the Welsh language is to be used is listed—

- (a) wherever practicable before a Welsh speaking judge; and
- (b) where translation facilities are needed, at a court with simultaneous translation facilities.

#### 5. INTERPRETERS

5.1 Whenever an interpreter is needed to translate evidence from English to Welsh or from Welsh to English, the Court Manager in whose court the case is to be heard will take steps to secure the attendance of an interpreter whose name is included in the list of approved court interpreters.

#### 6. WITNESSES AND JURORS

6.1 When each witness is called, the court officer administering the oath or affirmation will inform the witness that he or she may be sworn or may affirm in Welsh or English as he or she wishes.

6.2 Where a case is tried with a jury, the court officer swearing in the jury will inform the jurors in open court that each juror may take the oath or may affirm in Welsh or English as he or she wishes.

#### 7. ROLE OF THE LIAISON JUDGE

7.1 If any question or difficulty arises concerning the implementation of this practice direction, contact should in the first place be made with the Liaison Judge(s) for the Welsh language.”