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The Disclosure Pilot Scheme: Is the Disclosure Review Document a help or a hindrance?

A wholesale cultural shift and a change in professional attitudes is what the Disclosure Pilot Working Group thought was needed to address the perceived defects in the disclosure process under the old regime, governed by Part 31 of the Civil Procedure Rules. To achieve this change a completely new set of rules and guidelines to govern disclosure, the Disclosure Pilot Scheme (the "Pilot Scheme"), was introduced at the beginning of this year. In this, my third piece for London Legal looking at the Pilot Scheme, I take a closer look at the Disclosure Review Document (the "DRD"), the new document that needs to be completed (in varying degrees) by the parties, and consider whether it is helping or hindering the aim of a cultural change – if you missed my previous articles in which I detail the defects of the previous regime and look at recent cases that have interpreted the Pilot Scheme, click here to read them.

What is the DRD?

The DRD was introduced with the implementation of Practice Direction 51U of the Civil Procedure Rules, which governs the Pilot Scheme. For cases subject to the Pilot Scheme operating in the Business and Property Courts, it replaces both the Disclosure Report and non-mandatory Electronic Documents Questionnaire ("EDQ") which remain features of the Part 31 regime.

The DRD must be completed if at least one party seeks an order for Extended Disclosure (ie disclosure which goes beyond that which is required under the Pilot Scheme when pleadings are served, as well as known adverse documents which are required to be disclosed at a later stage in any event). In reality, a degree of Extended Disclosure will be sought in most cases proceeding through the Business and Property Courts and in my experience the DRD is now routinely being completed.

The DRD is now the single document which the parties should use to communicate with one another and with the court regarding the disclosure process. It is intended to:

1. facilitate the exchange of information between the parties and provide a framework for discussions around the initial scoping of a disclosure exercise;
2. help parties to agree a sensible and cost effective approach to disclosure; and
3. provide the court with the information it needs to make appropriate case management decisions.

If properly completed, the DRD should provide judges with the all information they need to make the necessary decisions in relation to disclosure at the first case management conference. It is designed to limit the amount of inter partes correspondence on the issue of disclosure. The document must be submitted to the court by the claimant. Although, any disagreement between the parties should be recorded in the DRD so that a judge is neither required to look at two spectate documents nor be referred to

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the correspondence in order for the parties' positions to be explained.

The document itself is broken down into three sections. The first is intended to provide the court with a summary of the parties' positions in relation to Extended Disclosure by identifying the "Issues for Disclosure". For each issue the parties must also record which of the five models of disclosure is intended to be used. Section two provides the court with information about the electronic data held by each party. It includes references to how the data is held, how the parties intend to process and search the data and to any points that have not been agreed through discussions and which they therefore need the court to determine. The third and final section contains guidance for the parties on some basic disclosure methodology. It is intended to serve as a guide to the key principles which the parties should discuss and seek to agree upon concerning their approach to the collection, review and production of documents. It also serves as a framework for maintaining a record of the disclosure process at each stage.

Is the DRD a help or a hinderance?

Even upon a cursory read it is apparent that the DRD has a distinct feel as compared to its predecessors, the Disclosure Report and EDQ. It is both more descriptive and prescriptive. It genuinely feels more like a guide to the disclosure process than a form that parties simply need to complete in order to comply with the rules. Also, there is no doubt that to properly complete the DRD the parties must engage with the disclosure process sooner than they are ever likely to have done before. This is useful and, in my view, is as it should be as it ensures clients are properly briefed on what is required of them to comply with their disclosure duties in a timely and orderly fashion. The alternative, which happened far too often under the Part 31 regime, is that disclosure is not properly thought about until the disclosure exercise needs to happen. At that point the parties are in rush and the reality is that this leads to a lack of cooperation which inevitably leads to conflict.

What the DRD also makes clear is that the Pilot Scheme puts electronic data squarely at the centre of the disclosure process. While this may seem obvious now, it was not the case under the Part 31 regime which was drafted shortly before the rapid rise in data volumes and as a result the provisions governing electronic disclosure felt like an afterthought. The shift from hardcopy to digital is significant and the DRD goes so far as requiring parties to consider how and what technology can be deployed to aid the review of electronic data. For example, if data volumes exceed fifty thousand documents, parties must justify why they do not intend to use technology aided review given its potential for time and costs savings.

Despite the number of positives in favour of the introduction of the DRD, I have observed, since its introduction, that it has become a hotbed of contention between the parties. Some might argue that this is exactly what the DRD is intended to be. The parties should air their grievances, record them in the DRD and have the court decide the outcome. However, to me, this misses the point of what the Pilot Scheme is trying to achieve, which is a wholesale

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cultural shift and change in professional attitudes towards the disclosure process. This requires greater cooperation between the parties but in some cases the DRD is providing more fodder for the parties to fight over. I have not noticed a reduction in the amount of correspondence; if anything, I have seen an increase. In particular, numerous letters are being sent in relation to the list of Issues for Disclosure. This increase in correspondence may of course be due, in part, to the fact that this is still a relatively new approach and parties are simply testing the parameters.

As a final thought, I question whether the drafting of the DRD is at fault. I suggest not, but that some parties are simply not ready to embrace change. Yes, the DRD affords opportunities to score points over your opponent but is this really to the benefit of your client and does it really accord with the overriding objective? Let me know what your thoughts are on the DRD and contribute to our wider discussion around the Pilot Scheme.

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If you would like to hear more about London Legal's e-Disclosure offering, please contact *Graham Jackson* at graham.jackson@london-legal.co.uk