REPRINT

CD corporate disputes

NEW DISCLOSURE RULES

REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
JAN-MAR 2019 ISSUE

www.corporatedisputesmagazine.com

Visit the website to request
a free copy of the full e-magazine

ankura

Published by Financier Worldwide Ltd
corporatedisputes@financierworldwide.com

MINI-ROUNDTABLE

NEW DISCLOSURE RULES

PANEL EXPERTS

Tanya Gross
Senior Managing Director
Ankura
T: +44 (0)20 7015 8803
E: tanya.gross@ankura.com

Tanya Gross is a senior managing director at Ankura, based in London. She has spent the past decade managing investigations and disputes that involve data (unstructured, structured and semi-structured formats). She has led large-scale evidence and disclosure management exercises in the UK, France, Switzerland, Hong Kong, Japan, the Middle East and the US.

Mark Chesher
Legal Director and Head of E-disclosure
Addleshaw Goddard LLP
T: +44 (0)20 7788 5146
E: mark.chesher@addleshawgoddard.com

Mark Chesher has over 14 years' experience of complex high value litigation, acting for various clients including FTSE 100 companies, banks, hedge funds, private companies and individuals. He has acted for and against parties based in the Middle East, Russia and the former Commonwealth of Independent States countries and most of his cases have an international element. Mr Chesher is also known as an expert in the field of electronic disclosure and document review and the related practical and legal issues (including privilege, cross-border data protection rules and privacy regulations).

Jon Fowler
Managing Director
Ankura
T: +44 (0)20 7015 8848
E: jon.fowler@ankura.com

Jon Fowler has extensive experience in leading and delivering on large, multijurisdictional matters, with global experience including assignments in India, China, Canada and multiple European locations. Mr Fowler's expertise focuses on assisting clients with their full disclosure strategy from scoping, through data processing and review to production and advising on appropriate analytic software and techniques, such as concept analysis and predictive coding, to bring value and efficiency to the process.

Nicola Gare
Professional Support Lawyer
HFW
T: +44 (0)20 7264 8158
E: nicola.gare@hfw.com

Nicola Gare is the global disputes professional support lawyer at HFW. Her particular areas of interest include privilege, costs and funding, and the use of legal technology in disputes. She is a member of the firm's Litigation Funding Committee, Brexit and also Belt and Road Groups, and the Supreme Court Users Committee. Ms Gare qualified as a solicitor in England and Wales in 1999, and prior to working in knowledge management was a disputes fee earner with a cross-border litigation and international arbitration practice.

CD: What key defects in the disclosure regime of England & Wales were identified by the working group chaired by Lady Justice Gloster?

Fowler: There has been a perception for some time that the costs of standard disclosure can be excessive, particularly in cases where the value of the claim is low. The core issue is that there can at times be little correlation between the value of a claim and the volume of data that is required to be searched for an electronic disclosure exercise. The effect of this is that for smaller, simpler claims, it can be hard to strike a proportionate balance when it comes to cost.

Chesher: There was widespread dissatisfaction with the existing disclosure regime, which has long been viewed as a costly and inefficient part of the litigation process. The last reform in 2013 following the wide-ranging Jackson Review saw the introduction of a 'menu' of options for disclosure. However, the alternatives to 'standard disclosure' received very limited uptake from practitioners and the judiciary, leading parties to continue the tried and tested trawl through substantial volumes of documents, even though ultimately only a few lever arch files of documents – the majority of which were often identified at the outset of the dispute – might prove decisive at trial. The working party identified the need to tailor disclosure to the particular dispute and encourage better use of existing and future technology as being key to making disclosure a more focused, cost-effective and efficient process.

Gross: From an electronic disclosure perspective, the UK disclosure regime was not designed with electronic data in mind. This was in some way addressed by Practice Direction 31B in 2010, however the current system was deemed unfit for purpose by the disclosure working group (DWG) as the scale, complexity and cost of disclosure have changed over time. The assessment of vast quantities of information has become the norm, proving often to be unmanageable, especially where technology solutions that could aid the process are not being used widely enough to assist.

Gare: A number of issues have resulted in the culmination of the Disclosure Pilot being introduced across most of the Business and Property Courts in January 2019. However, the key criticism of the English disclosure regime is the cost. Despite attempts by both Lord Woolf on the introduction of the Civil Procedural Rules (CPRs) in 1999 and more recently the introduction by Sir Rupert Jackson of a 'disclosure menu' in 2013, our system has continued to be dominated by the 'standard disclosure' approach, whereby the parties exchange documents upon which they rely or which adversely affect their case. Over the last 10 years or so, this has involved

an ever-increasing amount of data, leading to the cost of compilation and review increasing, often with no discernible benefit. The DWG also identified a reluctance by parties to work in a collaborative way, which has encouraged an unwillingness to adopt any alternative form of disclosure.

CD: In what ways do the 2018 proposals for new disclosure rules in the England and Wales Business and Property Courts seek to address these shortfalls? What are the key changes under the pilot scheme?

Gross: The proposals will streamline disclosure in the majority of cases and encourage greater dialogue between parties in more complex matters. The process of standard disclosure in its current form will no longer be the starting point of every case. The concept of initial disclosure will be introduced, which means disclosing not more than the greater of 1000 pages or 200 documents, being the key documents each party has relied upon to prepare its statement of case. The parties will then state whether they believe extended disclosure is necessary. In that case, they have a duty to cooperate and discuss the approach to disclose information using intelligent technology, if necessary. The Disclosure Review Document (DRD) replaces the electronic documents questionnaire, as a fair and balanced assessment of the requirements and proposals for extended disclosure, outlining the issues and information about the data available and how it would be collected, analysed and searched using intelligent approaches and technology.

> **"Rather than attempting to paper over the cracks in the current disclosure rules, the working party has provided a wholesale revision of CPR31."**
>
> *Nicola Gare, HFW*

Gare: Rather than attempting to paper over the cracks in the current disclosure rules, the working party has provided a wholesale revision of CPR31. Of most significance is that standard disclosure is no longer an option. The pilot scheme provides for early-stage disclosure of a limited and set amount of documentation, known as initial disclosure, to be followed if needed and with leave of the court by extended disclosure comprising of five disclosure model options, ranging from adverse documents only, through to a train of enquiry model, most useful

in fraud cases. New and express duties are set out for parties and their lawyers, including the duty to act 'honestly' to avoid 'document dumping' and requiring lawyers to cooperate in order to agree the most efficient disclosure methodology. Finally, the endorsement of the use of technology has brought the rule into the modern age, allowing greater efficiencies and cost reduction.

Chesher: In many ways it is not a dramatic departure, but rather a matter of giving the reform intended by the 2013 rule changes some real teeth, and giving an even stronger steer away from 'standard disclosure', now known as 'Model D'. I think the key changes relate to 'initial disclosure' and a more rigorous process designed to ensure that the parties and their representatives cooperate, discuss and properly apply their minds to the question of what disclosure is actually necessary to address and resolve the issues in dispute. That might be no disclosure at all, or it might be wider than standard disclosure, known as train of enquiry or Model E – or it could be a combination. The key change for me is the level of scrutiny applied to ensure that the parties consider, consult and agree the approach as far as possible.

Fowler: The pilot scheme seeks to address these concerns in multiple ways. Firstly, there is no longer a requirement for standard disclosure in the new proposals. This has been replaced by a two-stage process, an initial disclosure of a small number of documents on which the party has relied upon in preparing its statement of case, followed by a possible extended disclosure on selected issues. The extended disclosure options range from disclosure of known adverse documents only, to a wide, search-based disclosure which is of a broader scope than the existing standard disclosure. Different disclosure options can be used for different case issues, meaning that the approach can be tailored to each individual matter. There is also an increased focus on technology in the new DRD. Rather than questioning the intention to use technology assisted review

> **"Bringing the use of TAR to the forefront of disclosure is an excellent way of assisting with the proportionality of costs."**
>
> *Jon Fowler, Ankura*

(TAR), the document instead asks for reasoning if it is not going to be used. Bringing the use of TAR to the forefront of disclosure is an excellent way of assisting with the proportionality of costs.

CD: To what extent do you consider the new proposals – such as the two-stage practice direction (PD) and disclosure review document (DRD) processes, the duty to disclose known adverse documents and changes to withholding documents on grounds of privilege – offer practical solutions, particularly to the complexity of e-disclosure?

Chesher: I think the mandatory completion of the DRD has the potential to be a real step forward. In many respects it is not a radical departure from what was meant to happen under the previous regime. However, the format and mandatory nature of the DRD, together with the fact that it is a document that all parties have to contribute to, will force parties to give proper thought to the process and what is important, with the knowledge that the court will be monitoring compliance, adjudicating disputes and reviewing and marking their homework.

Fowler: The new proposals offer practical options for limiting the scope of disclosure for issues where it is not required. However, it is important to remember that as cases develop, issues which may have been initially thought to only require a limited – or indeed no form of – extended disclosure, may require a more in-depth search. For this reason, it is important to ensure that the preservation phase of an electronic disclosure exercise is carefully planned and possibly conducted regardless of the future extended disclosure plans. If this part of the exercise is conducted thoroughly and correctly, it allows you to be agile when it comes to changing tactics further down the line.

Gare: The mandatory DRD offers a real change. Parties will need to engage and reach agreement on approach. Its predecessor, the electronic document questionnaire, failed to achieve this because it was optional. Initial disclosure, a process familiar to all who arbitrate, may have limited application for certain firms – for example parties can agree to dispense with it; and it will not initially apply where the claim form is served out of the jurisdiction, or where the claim is a Part 8 claim, such as for a declaration. Extended disclosure affords the parties a real opportunity to reduce their disclosure scope and agree innovative solutions – for example parties may wish to apply a pick and mix style approach to the level of disclosure for differing issues. The requirement to disclose known adverse documents at an early stage may be problematic – privilege aside, how are parties to carry out internal investigations without then needing to disclose what they find?

Gross: The very fact that it is a two-stage process requires the parties to consider their positions on disclosure more carefully than before. The DRD has been developed to allow the parties to identify issues for disclosure and can be updated throughout as the claim progresses. Having said that, there is a danger that parties may get disclosure wrong if their tactical assessment of the matter heavily expects initial disclosure only, or initial disclosure plus one of the less-onerous extended disclosure models. If a party deems it unnecessary to prepare for certain searches, it could be caught out if the other side is able to persuade the court to order, for example, Model E disclosure. The two-stage process should make the approach more transparent, encouraging the parties to share information about their proposed approach to identify documents and use technology as standard. Preservation and early case assessment (ECA) techniques that cluster documents into concepts or themes, enabling the identification of adverse documents early in the disclosure process, will become more widely used than they are today.

CD: With the disclosure reforms encouraging parties and courts to move away from broad disclosure models toward tailored solutions, how might this restrict larger, more complex cases? How can parties ensure that more

limited disclosure does not result in core documents being overlooked?

Gare: We need to remember that while disclosure will be more limited under the pilot, parties and their lawyers will still need to review the evidence in order to form a view of their own case. The likelihood of documents, and certainly the allusive 'smoking gun', being missed must be very low; in fact, arguably by disclosing fewer documents, the ability to hide the killer email amongst the tens of thousands of emails is reduced. In addition, the duty to disclose 'known adverse documents', irrespective of the extended disclosure model – or none – chosen will reduce the inadvertent non-disclosure of any harmful communications or documentation.

Fowler: It is important to remember that the purpose of the rules is to limit excessive and complex disclosure exercises when they are not required. For larger and more complex cases, a disclosure option equal to or even broader than standard disclosure can still be chosen. In any exercise where a balance is sought between costs and thoroughness, there is a risk of documents being overlooked. The key is determining what level of search is proportionate to both the quantum and complexity of the issues at hand. The risk of missing documents is clearly increased by more specific disclosure models, as fewer documents are being

searched. Extra levels of comfort can be obtained by the intelligent use of technology to interrogate the data sources in question and apply due diligence to the methods being chosen.

Gross: The greater dialogue between parties should be enough to assess the challenges up front rather than conducting an exercise of gathering too much information and increasing the costs of disclosure. It will hopefully encourage prioritisation of information gathering to assess the requirements before embarking on a costly exercise, avoiding providing documents that are not relevant to either party. It is important to remember that both sides have the opportunity to make their case for a particular model of extended disclosure, and that this can be tailored around the issues. So, if one particular point requires a deeper review, it can be ordered.

Chesher: The models available encompass all of the options that were available prior to the reforms, so I do not think the reforms will restrict larger, more complex cases. In such cases, I think it is often more important to deploy tailored solutions than in smaller cases. Ultimately, only a small percentage of cases of any size go to trial and even in a large Commercial Court trial there is a limit to the number of documents that it is truly necessary to put in front of a judge. Core documents are often identified at the outset and 'smoking guns' are largely confined to fictional legal dramas. In some cases, it is necessary to search to find the vital documents that unlock key issues. By all parties applying proper rigour to the process from the outset, the searches and reviews should be far more focused, and avoid the need to trawl through reams of irrelevant material.

CD: How have court users and the judiciary responded since the publication of the pilot scheme in July 2018? What concerns remain to be addressed in order for the reforms to produce real improvements?

Fowler: The response has been positive. The view appears to be that while the changes will not have a huge effect on larger and more complex cases, it could be helpful for smaller claims and those where disclosure is unlikely to unearth documents which would materially alter the outcome of the case. Although the reforms do place a renewed emphasis on the use of technology, I feel that more detail on this would be beneficial. For example, the reference to TAR itself is still not given a full definition. References to TAR and predictive coding are often seen as interchangeable, when they can actually mean very different things. TAR is not just about predictive coding and there is, for example, no specific reference made to the use of email threading or custom de-duplication. If we assume the reference to TAR is in relation to predictive

coding, more detail could be included about how it can be used – for example, for prioritisation, culling review or a privilege screening.

Chesher: The reception to the pilot scheme has been largely positive – there is certainly widespread recognition that things need to change. It is obviously in the nature of a pilot that there may be teething problems as parties, their lawyers and the judiciary get to grips with the regime. There are questions over how things will work in practice, but one particular area of concern is in relation to cases that are in the early stages, where disclosure could fall under either regime. There are no transitional provisions, so a pragmatic approach will need to be taken, but ultimately it should be in everyone's interest to work to take advantage of the new regime as far possible.

Gross: Court users and the judiciary have welcomed the considerations from the DWG but have expressed several concerns, particularly with regard to judiciary buy-in and resource time, such as the fact that the new pilot is focused on firms that handle large-scale litigation in London only, rather than firms that exist outside which will likely have different requirements. The vast number of cases do not proceed to trial and the cost may be prohibitive in certain circumstances. On this basis, they have suggested that the pilot only be mandatory where the court determines a case is sufficiently complex where the claim is over £500,000 and it should be voluntary for cases that are less than this figure.

Gare: From internal discussions with clients, counsel, and other lawyers, it seems the change is welcomed. The pilot, as published, has evolved from the initial drafts and is certainly more practical than those early incarnations. There are though real concerns with some key points, including the duty to approach ex-employees and seek their agreement to preserve documents. Is this practical where contact has been lost, or where the ex-employee has, as part of a compromise agreement or similar, confirmed that all documentation has been returned? Will they be willing to hand over the file gathering dust

> **"Ultimately, only a small percentage of cases of any size go to trial and even in a large Commercial Court trial there is a limit to the number of documents that it is truly necessary to put in front of a judge."**
>
> *Mark Chesher, Addleshaw Goddard LLP*

in the garage and risk being sued for breach of the agreement?

CD: How do you expect the pilot scheme to unfold?

Gross: Like with any process, it requires education and adoption. When Practice Direction 31B was implemented, keywords were somewhat pioneering, technology was evolving and workflow was being established. Technology has advanced to a level that people have tried and tested it and the market understands the benefits. Having said that, technology should not be looked at in a vacuum. It is really the people and understanding of the workings of the technology that drive the best results. There is an emphasis on bringing newer techniques – such as TAR, clustering and sampling – to the forefront of the disclosure workflow. This is a welcome change and one that will require some guidance from industry experts – just as the application of keywords did when that process was considered an advanced approach.

Gare: It will no doubt take time to convert those wedded to a more 'traditional' style of litigation, and we imagine that the court's time will be taken up with satellite issues relating to the pilot. Disclosure hearings may help reduce the inevitable delay. It would seem fair if the judiciary adopted a lenient approach to the introduction of the pilot. However, we suspect that it will be necessary for parties to be encouraged to move away from the comfort of Model D, and so we anticipate seeing some 'example setting' orders being made once a 'grace period' of a few months has expired. Parties wishing to avoid the new regime may be able to issue proceedings in courts currently outside of the pilot – for example the County Court, the Queen's Bench, or the Shorter and Flexible Trials Scheme, at least for now.

> **"Technology has advanced to a level that people have tried and tested it and the market understands the benefits. Having said that, technology should not be looked at in a vacuum."**
>
> *Tanya Gross, Ankura*

Fowler: As with all changes of this type, I would expect small changes initially while people get used to the new reforms. One of the extended disclosure options – option C – is fairly similar to existing standard disclosure, and I can envisage quite liberal

use of that option initially. As people become more comfortable, I imagine that more use will be made of the more limited options, certainly for specific issues under dispute. Broadly, I think the reforms are a positive step, and although I would expect small changes and amendments along the way, I would expect these reforms to be permanently adopted on a wider basis.

Chesher: There is bound to be some confusion and grounds for dispute initially as the pilot beds in. Already I can see potentially contentious issues like whose 'knowledge' of adverse documents is relevant. It will be vital to have some early, clear decisions. How smoothly it goes will depend on the investments made in educating lawyers and judges, both on the rules and technology. I will be interested to see how 'disclosure guidance hearings' work in practice. In my experience, disclosure issues that cannot be resolved between sensible commercial parties represented by experienced lawyers are unlikely to be capable of resolution by a judge – who has had only 30 minutes pre-reading – in a 30-minute hearing. Realistically, that sort of judicial time will only be sufficient to resolve disputes where the issue is fairly clear-cut, or one party is being unreasonable.

CD: If deemed to be a success, how might the pilot scheme's provisions impact dispute resolution strategies moving forward?

Chesher: I think there are potentially a lot of features of the pilot scheme that could impact on litigation strategies. To some extent, costs on disclosure are even more frontloaded than ever. The requirement for initial disclosure and early disclosure of 'adverse' documents – within 60 days of a case management conference (CMC) – could lead to early settlements. Conversely, if the costs of disclosure are meaningfully reduced, it could lead to cases that currently settle pre-disclosure fighting, because the cost of disclosure is less of a disincentive to pursuing a good case beyond that stage.

Fowler: I feel that the provisions in the pilot scheme will increase the importance of frontloading costs from both a legal and a technology perspective. It will be increasingly important to be able to be flexible in approach as a case progresses, which emphasises the need for a robust and defensible preservation of data and an intelligent use of technology throughout the process. The role of technology will continue to grow as data volumes increase and proportionality of costs remains a focus.

Gare: Whilst the pilot will reduce the costs associated with disclosure, there is no doubt that it

will frontload the costs, and this will inevitably and on occasion impact upon the parties' appetite for settlement at a far earlier point than that which we currently see, especially where the case is funded. One issue is how e-disclosure is resourced, with a view to complying with the pilot's objective to move from paper exercises to the default where all disclosure is technology led. In order to more easily comply with their duties, parties would be well advised to review their document creation and destruction policies and ensure that as soon as litigation is likely relevant documents are preserved. For parties involved in smaller cases, the burden of providing initial disclosure may discourage proceedings.

Gross: From a data perspective, the proposals will encourage the need for data expertise to be considered as part of the process right from the start. Possibly, data experts will be more involved in the CMC process, to provide guidance on the most practical and reasonable approaches. Currently there is far too much emphasis on large corpuses of data being collected and searched, sometimes unnecessarily. Targeted approaches to how data is collected and articulating the approach will form part of the process. There will also be a continual dialogue that centres around budgetary information and how the review technology will be used.

CD: In your opinion, are the amended disclosure rules the answer to longstanding concerns over document disclosure? Ultimately, do you expect the new measures to successfully allay concerns over the burden and cost of the process?

Gare: Whether the pilot addresses the issues with disclosure and provides the hoped-for streamlined and more cost-efficient process will very much depend upon the tone set by the judiciary. There have been previous attempts to improve the disclosure process, the most recent by Sir Rupert Jackson in 2013. Regrettably, the impact of the 2013 reforms was less than intended. If, as proposed, the judiciary is intending to support the reforms, then we are confident that both the current burden and cost will reduce. The pilot will not, however, address the concerns of international parties who engage with the UK's litigation process. For most, the idea of disclosure is often quite alien, and the now express obligation to provide known adverse documents is going to lead to some difficult conversations and will lead to some difficult issues over how corporations manage their internal investigations.

Chesher: The new rules are a solid starting point and, provided parties, lawyers and judges all devote sufficient time and effort to making them work,

the pilot and the final rules that result should be a significant improvement on the existing regime. There is no silver bullet however; data volumes generated by businesses continue to grow, new forms of data create new issues and there will always be difficult cases. Litigants in person are increasingly seen in the courts and disclosure is always a difficult issue to manage in such cases – it remains to be seen how these rules will work with such litigants. Getting parties to cooperate on disclosure can be particularly difficult where there is a significant asymmetry in the volume of documents held by the parties, and in fraud cases where one party is convinced that the other holds documents that will prove their case.

Gross: It is great to see that adjustments have been made to try and address some of the issues. Like with anything, it needs to be trialled to understand how it might work, and thereafter suitable adjustments or revisions can be suggested. It is only a pilot at this stage. At the same time, it is important that there is more education. The pilot does not necessarily herald the arrival of less onerous or cheaper disclosure involving less work or lower technology costs. The answer to these challenges lies in the careful assessment of your position and the selection of quality experts who are part of the fabric of your legal team. It seems that disclosure will become more strategic, meaning it will be highly important to instruct more experienced, seasoned professionals, who understand the challenges and have the confidence to challenge perceptions, to help with disclosure and keep costs to a reasonable level over time. A strong team, process and workflow, along with use of intelligent technology, will drive the best results.

Fowler: Generally, I feel that the amended disclosure rules are a step in the right direction. There is a danger of disclosure becoming more complicated on large cases due to the ability to mix and match disclosure options by issue, but overall it should simplify and increase the cost effectiveness of disclosure in most cases. My view is that the intelligent use of technology – in particular TAR and other types of machine learning – is a major factor in increasing the cost effectiveness and proportionality of disclosure, and that the reforms could go further to increase and legitimise its uptake. CD