Appendix 2 to Practice Direction 51U

Explanatory notes for Disclosure Review Document

~~Explanatory Note~~

([Draft] Amendments – September 2020)

Introduction

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~~does not need to be completed in cases where an order for only Models A and/or B Extended Disclosure is sought. Section 1A and Section 2 of the DRD only need to be completed if the parties are seeking an order for Extended Disclosure ~~where~~involving a search-based Disclosure Model (i.e. Models C, D and/or E~~)~~). Where Model C Extended Disclosure is proposed~~. In complex cases,~~, Section 1B of the DRD will also need to be completed.

5. The DRD may be modified (shortened or lengthened) as required to ensure that key information is provided to the court in a convenient and helpful format. This may include revising some of the questions asked in ~~Sections~~Section 2 ~~and 3~~ of the DRD or adding others relevant to the particular disclosure exercise to be undertaken.

~~5~~6. In some proceedings, not every section of the DRD will need to be completed, particularly if the proceedings are likely to require limited disclosure and/or if the identification and retrieval of documents is expected to be straightforward.

7. 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~~8. 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
Step 1	Each party should state, in writing, whether or not it is likely to request search-based 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
Step 2	Where one or more of the parties has indicated it is likely to request search-based Extended Disclosure~~,~~ (i.e. Models C, D and/or E), 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
Step 3	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

Step 4	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
Step 5	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.
Step 6	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.

Step 7	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 the likely amount of documents involved). Section 2 of the Disclosure Review Document should be completed only if the parties are seeking an order for Extended Disclosure involving a search-based Disclosure Model (i.e. Models C, D and/or E).	Para 10.6	As soon as reasonably practicable and in any event not later than 14 days before the case management conference.

Step 8	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
Step 9	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
Step 10	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

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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[1].

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~~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).

[1] It is to be competed 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~~;~~ confined to known adverse documents[1]

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~~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.

[1] Under Model A, the only further disclosure that is required is to disclose any known adverse documents in relation to the relevant Issue for Disclosure (without the need for any search), in accordance with the duty under paragraph 3.1(2) of the Practice Direction.

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.

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Completion of Section 1B

of the DRD
(Request-led ~~Research~~search-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. Model C requests are not intended to be used to replicate the approach sometimes taken in arbitration with Redfern schedules where parities may include a large number of broad requests for disclosure from the other side, addressing all issues in dispute and all potential data sources. As described in paragraph 8.3 of the Practice Direction, the approach envisaged with Model C is very different.

~~3.~~4. The parties' requests should be limited in number, focused in scope 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 2**~~

5. In addition, Model C requests should not be used where extensive search-based disclosure is sought other than "to give disclosure of particular documents or narrow classes of documents relating to a particular Issue(s) for Disclosure".[2] In such cases, it may well be more efficient to use a combination of Models A, B and D. It will rarely be appropriate to have a large number of Model C requests in respect of the same data set, because that is likely to (a) make it more difficult for the parties to agree what the Model C requests should be; and b) increase the complexity, costs and time required to undertake the subsequent review exercise. Further, using multiple Model C requests can, in fact, undermine rather than facilitate the use of technology / computer assisted review tools and should therefore be avoided.

[2] See paragraph 8 of the Practice Direction

Completion of Section 2 of the DRD

~~1. The~~

1. Section 2 of the DRD only needs to be completed if the parties are seeking an order for Extended Disclosure involving a search-based Disclosure Model (i.e. Models C, D and/or E). This is because Models A and B do not require mandatory searches to be undertaken.

~~1.~~2. In cases where a search-based Disclosure Model (Models C, D or E) is proposed by the parties, 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.

3. Section 2 of the DRD should also be used to identify data that can be excluded from the review process, for example, particular custodians, data ranges and back up data to ensure that the data pool is it is reasonable and proportionate, having particular regard to the factors in section 6.4 of the Practice Direction.

~~2.~~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. In Section 2 of the DRD, the parties should 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.

~~3.~~6. 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. The DRD may be adapted to meet the needs of the particular case and the parties are not required to answer all of the questions. In particular:

(1) In cases where the disclosure exercise is likely to be complex and substantial with multiple sources of data, it may ~~not~~be necessary to raise additional questions and to provide other information. Conversely, it may not in fact 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~~ because that information may not yet be available.

(2) In cases where the disclosure exercise is likely to be less complex or involving a very limited documents or sources of data, the parties may complete only those parts of Section 2 which are relevant or helpful for a particular case.

(3) The parties are expected to take a reasonable and proportionate approach in completing Section 2 and to seek to agree upon on any such changes to achieve that outcome as far as possible.

~~4.~~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~~The parties are expected to do this by phone, video conference or in person. Extensive correspondence in relation to the DRD is unlikely to be efficient or helpful. Where particular points cannot be agreed ~~must~~, they should be recorded, in a summary form~~,~~ in ~~those~~the relevant sections ~~to be completed~~of the DRD after discussions between the parties.

~~5.~~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~~.~~

~~6.~~9. 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?

~~7.~~10. 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.

~~8.~~11. 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

~~9.~~12. 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~~10 to ~~17~~12 of Section 2.

~~10.~~13. 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.

~~11.~~ 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).

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~~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.[3]

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)[3] 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.

[3] 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 (for example by 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~~e.g. 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.

(12) 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[4] method applied.

(3) Any DeNISTing[5] 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.

[4] 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.

[5] "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.