Disclosure in civil litigation: All change please, all change!

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From 1 January 2019, a mandatory pilot scheme will operate in the Business and Property Courts across England and Wales, ushering in a new era of disclosure management in civil litigation. Walker Morris' head of commercial dispute resolution, Gwendoline Davies, and senior associate and professional support lawyer, Amanda Kent, consider the changes and what they mean for in-house lawyers.

The 'cards on the table' approach to disclosure is one of the features which has traditionally attracted commercial parties to litigate their disputes in England and Wales. But it is widely known that disclosure can be an expensive exercise – it is one of the key drivers of litigation costs – and the ever-increasing amounts of electronic data are piling pressure on a system ripe for reform.

A working group established in May 2016 was tasked with identifying the problems with the disclosure regime and proposing a practical solution. Fast-forward to November 2017, and it had reached the unanimous view that 'a wholesale cultural change is required', which 'can only be achieved by the widespread promulgation of a completely new rule and guidelines on disclosure'. Following a period of consultation, a proposed new practice direction for a two-year disclosure pilot scheme was approved by the Civil Procedure Rule Committee in July 2018. At the time of writing, the practice direction and associated documents are still in draft form and may be subject to minor changes. Ministerial sign-off is expected later this year.

One of the key criticisms levelled at the current system is that voluminous standard disclosure is still seen as the default. That is despite the rules having changed in 2013 to provide for a 'menu' of disclosure options which can limit disclosure, and the costs associated with it, to that which is necessary to deal with cases justly, having regard to the overriding objective.

Under the pilot scheme, the current menu of disclosure options will be replaced by initial disclosure of key documents with the parties' statements of case (which may be dispensed with by agreement), and extended disclosure comprising a new list of 'models', ranging from disclosure of known adverse documents only, to wide search-based disclosure.

It is clear that parties will need to fully engage with the disclosure process at an early stage. This includes a requirement to discuss and jointly complete a disclosure review document, setting out the list of issues for disclosure, the proposals for the appropriate disclosure model, and sharing information about how documents are stored and how they might be searched and reviewed (including with the assistance of technology, and if so which). Estimates of the likely costs are required. This is intended to provide a mandatory framework for parties and their legal advisers to co-operate and engage prior to the first case management conference with a view to agreeing a proportionate and efficient approach to disclosure.

There will be no automatic entitlement to search-based disclosure, or indeed to any form

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of extended disclosure, and the working group is clear that the court should not accept without question the disclosure model proposed by the parties. The court may order that extended disclosure is given using different models for different issues for disclosure in the case.

Another key feature of the pilot scheme is that it expressly sets out the parties' duties, including: taking reasonable steps to preserve documents in the party's control that may be relevant to any issue in the proceedings; undertaking any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search; and using reasonable efforts to avoid providing documents to another party that have no relevance to the issues for disclosure.

Importantly, the duty in relation to preservation of documents includes obligations to: suspend relevant document deletion or destruction processes for the duration of the proceedings; send a written notification to all relevant employees and former employees which identifies the documents or classes of documents to be preserved and notifies the recipient that they should not delete or destroy those documents and should take reasonable steps to preserve them; and 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.

One of the steps involved in complying with an extended disclosure order (and following any initial disclosure) is the provision of a disclosure certificate. As part of that, the party giving disclosure is required to certify that it is aware of, and to the best of its knowledge and belief has complied with, its duties. There is a note at the end of the certificate which explains that, if the party making disclosure is a company or other organisation, the person signing the certificate should be 'someone from within the organisation with appropriate authority and knowledge of the disclosure exercise', and that they will have 'received confirmation from all those people with accountability or responsibility within the company or organisation either for the events or circumstances which are 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'. The role of the person signing is then specified, with an explanation as to why he or she is the appropriate signatory. Proceedings for contempt of court can be brought for signing a false disclosure certificate.

It will be essential to review and update internal policies and procedures, and to provide or refresh staff training, to ensure that these duties and other requirements are complied with.

Unsurprisingly, the parties are required to discuss and seek to agree on the use of software or analytical tools, including technology assisted review software and techniques (or TAR), with a view to reducing the burden and costs of the disclosure exercise. In the past few years, the English courts have approved the use of predictive coding, a form of TAR where a sample data set is reviewed by (probably senior) lawyers acting on the case and coded, with that coding then effectively being applied by specialist technology to review the remaining documents. While the use of TAR will not be appropriate in every case, it is likely to become increasingly prevalent.

The new approach to disclosure is designed to be more flexible than the current rules and to reflect developments in technology. In reality, it could be argued that the flexibility is already there, but the parties – and the court – do not make the best use of it. The provisions of the disclosure pilot are more prescriptive and will focus the parties' minds. The challenge for in-house lawyers will be getting to grips with the management of the disclosure process at an early stage, and mobilising the key individuals within the business to get on board. External lawyers can expect to play an increasingly collaborative and strategic role in helping their clients to maximise efficiencies. ■