

ANNEX 1

PRACTICE DIRECTION 31B: DISCLOSURE OF ELECTRONIC DOCUMENTS

This Practice Direction supplements CPR Part 31

Purpose, scope and interpretation

1. Rule 31.4 contains a broad definition of “document”. This extends to Electronic Documents.
2. The purpose of this Practice Direction is to encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner.
3. Unless the court orders otherwise, this Practice Direction only applies to proceedings that are (or are likely to be) allocated to the multi-track.
4. Unless the court orders otherwise, this Practice Direction only applies to proceedings started on or after 1st October 2010. Paragraph 2A.2 to 2A.5 of Practice Direction 31A in force immediately before that date continues to apply to proceedings started before that date.
5. In this Practice Direction—
 - (1) “Data Sampling” means the process of checking data by identifying and checking representative individual documents;
 - (2) “Disclosure Data” means data relating to disclosed documents, including for example the type of document, the date of the document, the names of the author or sender and the recipient, and the party disclosing the document;
 - (3) “Electronic Document” means any document held in electronic form. It includes, for example, e-mail and other electronic communications such as text messages and voicemail, word-processed documents and databases, and documents stored on portable devices such as memory sticks and mobile phones. In addition to documents that are readily accessible from computer systems and other electronic devices and media, it includes documents that

NOT FOR SIGNATURE

are stored on servers and back-up systems and documents that have been deleted. It also includes Metadata and other embedded data which is not typically visible on screen or a print out;

- (4) “Electronic Image” means an electronic representation of a paper document;
- (5) “Electronic Documents Questionnaire” means the questionnaire in the Schedule to this Practice Direction;
- (6) “Keyword Search” means a software-aided search for words across the text of an Electronic Document;
- (7) “Metadata” is 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;
- (8) “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; and
- (9) “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.

General principles

6. When considering disclosure of Electronic Documents, the parties and their legal representatives should bear in mind the following general principles—
 - (1) Electronic Documents should be managed efficiently in order to minimise the cost incurred;
 - (2) technology should be used in order to ensure that document management activities are undertaken efficiently and effectively;

- (3) disclosure should be given in a manner which gives effect to the overriding objective;
- (4) Electronic Documents should generally be made available for inspection in a form which allows the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure; and
- (5) disclosure of Electronic Documents which are of no relevance to the proceedings may place an excessive burden in time and cost on the party to whom disclosure is given.

Preservation of documents

7. As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved include Electronic Documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business.

Discussions between the parties before the first Case Management Conference in relation to the use of technology and disclosure

8. The parties and their legal representatives must, before the first case management conference, discuss the use of technology in the management of Electronic Documents and the conduct of proceedings, in particular for the purpose of—
 - (1) creating lists of documents to be disclosed;
 - (2) giving disclosure by providing documents and information regarding documents in electronic format; and
 - (3) presenting documents and other material to the court at the trial.
9. The parties and their legal representatives must also, before the first case management conference, discuss the disclosure of Electronic Documents. In some cases (for example heavy and complex cases) it may be appropriate to begin

NOT FOR SIGNATURE

discussions before proceedings are commenced. The discussions should include (where appropriate) the following matters—

- (1) the categories of Electronic Documents within the parties' control, the computer systems, electronic devices and media on which any relevant documents may be held, storage systems and document retention policies;
- (2) the scope of the reasonable search for Electronic Documents required by rule 31.7;
- (3) the tools and techniques (if any) which should be considered to reduce the burden and cost of disclosure of Electronic Documents, including—
 - (a) limiting disclosure of documents or certain categories of documents to particular date ranges, to particular custodians of documents, or to particular types of documents;
 - (b) the use of agreed Keyword Searches;
 - (c) the use of agreed software tools;
 - (d) the methods to be used to identify duplicate documents;
 - (e) the use of Data Sampling;
 - (f) the methods to be used to identify privileged documents and other non-disclosable documents, to redact documents (where redaction is appropriate), and for dealing with privileged or other documents which have been inadvertently disclosed; and
 - (g) the use of a staged approach to the disclosure of Electronic Documents;
- (4) the preservation of Electronic Documents, with a view to preventing loss of such documents before the trial;
- (5) the exchange of data relating to Electronic Documents in an agreed electronic format using agreed fields;
- (6) the formats in which Electronic Documents are to be provided on inspection and the methods to be used;
- (7) the basis of charging for or sharing the cost of the provision of Electronic Documents, and whether any arrangements for charging or sharing of costs

NOT FOR SIGNATURE

are final or are subject to re-allocation in accordance with any order for costs subsequently made; and

- (8) whether it would be appropriate to use the services of a neutral electronic repository for storage of Electronic Documents.

The Electronic Documents Questionnaire

10. In some cases the parties may find it helpful to exchange the Electronic Documents Questionnaire in order to provide information to each other in relation to the scope, extent and most suitable format for disclosure of Electronic Documents in the proceedings.
11. The answers to the Electronic Documents Questionnaire must be verified by a statement of truth.
12. Answers to the Electronic Documents Questionnaire will only be available for inspection by non-parties if permission is given under rule 5.4C(2).
13. Rule 31.22 makes provision regulating the use of answers to the Electronic Documents Questionnaire.

Preparation for the first Case Management Conference

14. The documents submitted to the court in advance of the first case management conference should include a summary of the matters on which the parties agree in relation to the disclosure of Electronic Documents and a summary of the matters on which they disagree.
15. If the parties indicate that they have been unable to reach agreement in relation to the disclosure of Electronic Documents and that no agreement is likely, the court will give written directions in relation to disclosure or order a separate hearing in relation to disclosure. When doing so, the court will consider making an order that the parties must complete and exchange all or any part of the Electronic Documents Questionnaire within 14 days or such other period as the court may direct.
16. The person signing the Electronic Documents Questionnaire should attend the first case management conference, and any subsequent hearing at which disclosure is likely to be considered.

Where the parties are unable to reach an appropriate agreement in relation to the disclosure of Electronic Documents

17. If at any time it becomes apparent that the parties are unable to reach agreement in relation to the disclosure of Electronic Documents, the parties should seek directions from the court at the earliest practical date.
18. If the court considers that the parties' agreement in relation to the disclosure of Electronic Documents is inappropriate or insufficient, the court will give directions in relation to disclosure. When doing so, the court will consider making an order that the parties must complete and exchange all or any part of the Electronic Documents Questionnaire within 14 days or such other period as the court may direct.
19. If a party gives disclosure of Electronic Documents without first discussing with other parties how to plan and manage such disclosure, the court may require that party to carry out further searches for documents or to repeat other steps which that party has already carried out.

The reasonable search

20. The extent of the reasonable search required by rule 31.7 for the purposes of standard disclosure is affected by the existence of Electronic Documents. The extent of the search which must be made will depend on the circumstances of the case including, in particular, the factors referred to in rule 31.7(2). The parties should bear in mind that the overriding objective includes dealing with the case in ways which are proportionate.
21. The factors that may be relevant in deciding the reasonableness of a search for Electronic Documents include (but are not limited to) the following—
 - (1) the number of documents involved;
 - (2) the nature and complexity of the proceedings;
 - (3) the ease and expense of retrieval of any particular document. This includes:
 - (a) the accessibility of Electronic Documents including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents

NOT FOR SIGNATURE

- taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents;
- (b) the location of relevant Electronic Documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents;
 - (c) the likelihood of locating relevant data;
 - (d) the cost of recovering any Electronic Documents;
 - (e) the cost of disclosing and providing inspection of any relevant Electronic Documents; and
 - (f) the likelihood that Electronic Documents will be materially altered in the course of recovery, disclosure or inspection;
- (4) the availability of documents or contents of documents from other sources; and
- (5) the significance of any document which is likely to be located during the search.
22. Depending on the circumstances, it may be reasonable to search all of the parties' electronic storage systems, or to search only some part of those systems. For example, it may be reasonable to decide not to search for documents coming into existence before a particular date, or to limit the search to documents in a particular place or places, or to documents falling into particular categories.
23. In some cases a staged approach may be appropriate, with disclosure initially being given of limited categories of documents. Those categories may subsequently be extended or limited depending on the results initially obtained.
24. The primary source of disclosure of Electronic Documents is normally reasonably accessible data. A party requesting under rule 31.12 specific disclosure of Electronic Documents which are not reasonably accessible must demonstrate that the relevance and materiality justify the cost and burden of retrieving and producing it.

Keyword and other automated searches

NOT FOR SIGNATURE

25. It may be reasonable to search for Electronic Documents by means of Keyword Searches or other automated methods of searching if a full review of each and every document would be unreasonable.
26. However, it will often be insufficient to use simple Keyword Searches or other automated methods of searching alone. The injudicious use of Keyword Searches and other automated search techniques—
- (1) may result in failure to find important documents which ought to be disclosed, and/or
 - (2) may find excessive quantities of irrelevant documents, which if disclosed would place an excessive burden in time and cost on the party to whom disclosure is given.
27. The parties should consider supplementing Keyword Searches and other automated searches with additional techniques such as individually reviewing certain documents or categories of documents (for example important documents generated by key personnel) and taking such other steps as may be required in order to justify the selection to the court.

Disclosure of Metadata

28. Where copies of disclosed documents are provided in Native Format in accordance with paragraph 33 below, some Metadata will be disclosed with each document. A party requesting disclosure of additional Metadata or forensic image copies of disclosed documents (for example in relation to a dispute concerning authenticity) must demonstrate that the relevance and materiality of the requested Metadata justify the cost and burden of producing that Metadata.
29. Parties using document management or litigation support systems should be alert to the possibility that Metadata or other useful information relating to documents may not be stored with the documents.

Lists of Documents

30. If a party is giving disclosure of Electronic Documents, paragraph 3 of Practice Direction 31A is to be read subject to the following—

NOT FOR SIGNATURE

- (1) Form N265 may be amended to accommodate the sub-paragraphs which follow;
- (2) a list of documents may by agreement between the parties be an electronic file in .csv (comma-separated values) or other agreed format;
- (3) documents may be listed otherwise than in date order where a different order would be more convenient;
- (4) save where otherwise agreed or ordered, documents should be listed individually if a party already possesses data relating to the document (for example, type of document and date of creation) which make this possible (so that as far as possible each document may be given a unique reference number);
- (5) a party should be consistent in the way in which documents are listed;
- (6) consistent column headings should be repeated on each page of the list on which documents are listed, where the software used for preparing the list enables this to be carried out automatically; and
- (7) the disclosure list number used in any supplemental list of documents should be unique and should run sequentially from the last number used in the previous list.

Provision of Disclosure Data in electronic form

31. Where a party provides another party with Disclosure Data in electronic form, the following provisions will apply unless the parties agree or the court directs otherwise—

- (1) Disclosure Data should be set out in a single, continuous table or spreadsheet, each separate column containing exclusively one of the following types of Disclosure Data—
 - (a) disclosure list number (sequential)
 - (b) date
 - (c) document type
 - (d) author/sender

NOT FOR SIGNATURE

- (e) recipient
 - (f) disclosure list number of any parent or covering document;
- (2) other than for disclosure list numbers, blank entries are permissible and preferred if there is no relevant Disclosure Data (that is, the field should be left blank rather than state "Undated");
- (3) dates should be set out in the alphanumeric form "01 Jan 2010"; and
- (4) Disclosure Data should be set out in a consistent manner.

Provision of electronic copies of disclosed documents

32. The parties should co-operate at an early stage about the format in which Electronic Documents are to be provided on inspection. In the case of difficulty or disagreement, the matter should be referred to the court for directions at the earliest practical date, if possible at the first case management conference.
33. Save where otherwise agreed or ordered, electronic copies of disclosed documents should be provided in their Native Format, in a manner which preserves Metadata relating to the date of creation of each document.
34. A party should provide any available searchable OCR versions of Electronic Documents with the original. A party may however choose not to provide OCR versions of documents which 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.
35. (1) Subject to sub-paragraph (2) below, if a party is providing in electronic form copies of disclosed documents and wishes to redact or otherwise make alterations to a document or documents, then—
- (a) the party redacting or altering the document must inform the other party in accordance with rule 31.19 that redacted or altered versions are being supplied; and

NOT FOR SIGNATURE

- (b) the party redacting or altering the document must ensure that the original unredacted and unaltered version is preserved, so that it remains available to be inspected if required.

- (2) Sub-paragraph (1) above does not apply where the only alteration made to the document is an alteration to the Metadata as a result of the ordinary process of copying and/or accessing the document. Sub-paragraph (1) does apply to the alteration or suppression of Metadata in other situations.

Specialised technology

- 36. If Electronic Documents are best accessed using technology which is not readily available to the party entitled to disclosure, and that party reasonably requires additional inspection facilities, the party making disclosure shall co-operate in making available to the other party such reasonable additional inspection facilities as may be appropriate in order to afford inspection in accordance with rule 31.3.