

08 July 2005

This final draft Practice Direction has been prepared by a LiST Group¹ working party consisting of Jonathan Maas (jonathan.maas@simmons-simmons.com), Serena Cobley, Mark Dingle (mark.dingle@simmons-simmons.com), Christine Gabbitass (christine.gabbitass@dentonwildesapte.com) and Vince Neicho (vince.neicho@allenovery.com), assisted by Clive Freedman (Barrister, 3 Verulam Buildings). It follows on from the drafts initially produced by Sandra Potter, whose contribution is gratefully acknowledged. This draft final has been updated following further discussion by the drafters and extensive comments received from the legal profession and other interested bodies on previous drafts. In particular, the extensive comments of Janet Lambert (Barlow Lyde & Gilbert) and Graham Smith (Bird & Bird) are acknowledged. (These drafts do not necessarily reflect the views of the firms mentioned above or of partners within those firms.)

This 08 July 2005 draft has now been presented to the Department of Constitutional Affairs (“DCA”) for their consideration. No further work will be undertaken on this Practice Direction by LiST unless requested to do so by the DCA. This draft and all previous drafts of this Practice Direction are available on LiST’s web site at <http://www.listgroup.org>.

Some end notes relating to the questionnaires at Annexes 1A and 1B may be retained in the final version to provide guidance to parties using them. Otherwise, neither the end notes, this preamble nor the release history (at Annex 5) are intended to be reproduced in the final version.

PRACTICE DIRECTION - THE USE OF TECHNOLOGY IN CIVIL PROCEEDINGS²

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Introduction

1. This Practice Direction provides a framework for the parties to co-operate in making appropriate use of technology in civil litigation, thereby enabling the court to dispose of proceedings in accordance with the overriding objective referred to in **CPR Rule 1.1**.⁴

2. The parties to civil proceedings are encouraged to use technology where appropriate, since in many cases it is likely substantially to save time and/or cost and to assist the court in dealing with the case expeditiously and fairly.⁵
3. In the event of any conflict between this Practice Direction and the Civil Procedure Rules, the Civil Procedure Rules prevail. For the avoidance of doubt, nothing in this Practice Direction affects
 - (1) the law governing the scope of a party's duty to disclose documents⁶, or
 - (2) the law governing the circumstances in which a party accepts service of documents by electronic means.⁷

Definitions

4. For the purposes of this Practice Direction:
 - (1) A "Document" means anything in which information of any description is recorded (as defined in **CPR Rule 31.4**), and may therefore include (for example) electronic documents, such as email and other electronic communications, word-processed documents, databases, residual or back-up data stored on servers and back-up systems, and additional information stored and associated with electronic documents known as "metadata".⁸
 - (2) "Action Documents"⁹ means a statement of case, witness statement, witness summary, affidavit, Disclosure List, expert's report, skeleton argument, written legal submission or similar document brought into being for the purposes of the proceedings. The term "Action Documents" does not include inter-solicitor correspondence.
 - (3) "Disclosure List" means a list of Documents served pursuant to CPR Rule 31.10(2).
 - (4) "Disclosure Documents" means Documents disclosed by a party in accordance with CPR Part 31.
 - (5) "Disclosure Data" means data which identifies Disclosure Documents, including for example the type of Document, the date of the Document, the names of the author/sender and the recipient, and the party disclosing the Document.
 - (6) A "written request" includes a request sent by email in accordance with **paragraph 3 of the Practice Direction to CPR Part 6**.
 - (7) "Original electronic format" means the electronic format in which the document was originally created (for example MS Word 97 or WordPerfect 5.1).

- (8) "Documents Technology Questionnaire" means the questionnaire contained in Annex 1A.
- (9) "Trial Technology Questionnaire" means the questionnaire contained in Annex 1B.

Duties of the parties

- 5. (1) At the earliest opportunity (before commencement of proceedings as well as after), the parties shall consider and thereafter keep under review the extent to which technology can assist in the expeditious and fair disposal of the proceedings and the achievement of the overriding objective referred to in CPR Rule 1.1. In particular the parties shall consider, in accordance with the provisions of this Practice Direction, the extent to which technology might be used in relation to
 - (a) communications between the parties and with the court,
 - (b) disclosure,
 - (c) preparation for trial, and
 - (d) the presentation of their cases at trial.
- (2) Annex 4 provides an example agreement recording the consensus reached between the parties on the use of technology in civil proceedings.

Electronic versions of Action Documents

- 6. (1) Where an Action Document has been served on a party and exists in electronic form, that party may if he undertakes to pay reasonable costs¹⁰ request the party which served the Action Document to provide an electronic version of the document¹¹ in the appropriate format (as specified in sub-paragraph (2) below),¹² together with such brief technical explanation as may be necessary to enable him to access the document.¹³
- (2) Annex 2 contains guidelines for the provision of electronic versions of Action Documents.¹⁴ If parties fail to agree on the methods and formats to be adopted, the default methods and formats referred to in Annex 2 shall apply unless the court orders otherwise. The parties may use the Documents Technology Questionnaire (with such variations as they consider appropriate) to identify their preferred formats for providing or receiving electronic versions of Action Documents.

An electronic version of an Action Document requested under this paragraph must be provided within 5 working days of receipt of a written request accompanied by an undertaking to pay reasonable costs.

Where an electronic version of an Action Document is provided under this paragraph and is found by the recipient to be corrupted, infected by a virus, or otherwise unusable, a sound copy shall be provided within 1 working day of receipt of a written request, unless the original version is itself corrupted and it is not reasonably practicable to repair it.

Where an Action Document contains additional data which is not intended to be visible on a printed copy, such as comments, document properties or tracked changes, a party supplying an electronic copy may, except in the case of spreadsheet formulae, take steps to delete such data.

Hearing bundles

7. In order to promote consistency of document layout when parties are separately preparing their own copies of agreed hearing bundles, where an Action Document or an inter-solicitor letter¹⁵ has been provided to a party in an electronic format only, that party may request from the other party either a printed copy of the document or (if the providing party agrees to do so) an electronic copy in the format specified in Annex 2 or other agreed format, together with such brief technical explanation as may be necessary to enable him to access the document.¹⁶ An electronic copy provided under this paragraph should be in a format which ensures that page layouts in printed copies do not vary.

Disclosure¹⁷

8. (1) This paragraph applies to any action or intended action in which
 - (a) one or more of the parties considers that it might be advantageous to make use of technology for managing documents for the purpose of disclosure and/or
 - (b) disclosure of a substantial quantity of material held by a party in electronic form is likely to be required.
- (2) In an action to which this paragraph applies:
 - (a) Each party should consider providing to the other party at an early stage
 - (i) information about the categories and electronic formats of electronic documents within his control, and
 - (ii) proposals as to the format in which Disclosure Documents should be provided by each party for inspection.
 - (b) The parties should at an early stage endeavour to reach agreement on the use of technology for document disclosure purposes, including the basis of charging for or sharing the cost of the provision of electronic copies of Disclosure Documents

and the exchange of Disclosure Data in an agreed electronic format using (where appropriate) agreed fields. In 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.¹⁸

9. (1) In the case of Documents of the type referred to in sub-paragraph (2) below, a party entitled to request a copy under **CPR Rule 31.15(c)** may if he undertakes to pay reasonable costs request a copy in the Document's original electronic format, together with such brief technical explanation as may be necessary to enable him to access the Document.
- (2) Sub-paragraph (1) above applies to a Disclosure Document¹⁹ which is listed in a Disclosure List as being in electronic form or identified under sub-paragraph (3) below as being in electronic form, where the electronic version
 - (a) contains data which is disclosable in accordance with standard disclosure (as defined in CPR Rule 31.6) and is not privileged from disclosure, and
 - (b) such data is not visible on a copy supplied under CPR Rule 31.15 (for example a spreadsheet containing formulae, or metadata showing when the Document was created or modified²⁰).
- (3) A party shall provide such information as the other party may reasonably request as to whether a Disclosure Document is available in electronic form and as to the electronic format in which it is available. Such information shall be provided in writing within 7 days of receipt of a written request.
- (4) A copy of a Document requested under sub-paragraph (1) above must be provided within 7 days²¹ of receipt of a written request accompanied by an undertaking to pay reasonable costs.
- (5) Where a copy of a Disclosure Document is provided electronically and is found by the recipient to be corrupted, infected by a virus, or otherwise unusable, a sound copy shall be provided within 5 working days of receipt of a written request, unless the original version is itself corrupted and it is not reasonably practicable to repair it.
- (6) A party providing an electronic copy under this paragraph may not take any steps to alter original Documents (for example by deleting metadata such as comments, Document properties or tracked changes), but may, unless the court orders otherwise, supply the other party with a version of the Document in which text or data has been redacted, deleted or otherwise altered, provided that
 - (a) he has reasonable grounds (on the basis of relevance, privilege or otherwise) for supplying an altered version,

- (b) he promptly informs the other party in writing that altered version or versions are being supplied and of the grounds for so doing (in the case of metadata this notification may be in general terms), and
 - (c) he ensures that the original unaltered version is preserved, so that it remains available to be disclosed if required.²²
- 10. Schedule 1 Part 1 of a Disclosure List should normally be set out in accordance with Annex 2 to this Practice Direction, in substitution for the first sentence of **paragraph 3 of the Practice Direction to CPR Part 31**. Annex 3 contains an example Schedule 1 Part 1 of a Disclosure List.²³ Where there is a large number of Documents all falling into a particular category the disclosing party may (in accordance with **paragraph 3 of the Practice Direction to Part 31**) list those Documents as a category rather than individually.²⁴
- 11. Where (a) a Disclosure Document is best accessed using technology which is not readily available to the party entitled to disclosure, and (b) 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 **CPR Rule 31.3**.
- 12. While the party supplying an electronic version of a Document should make appropriate efforts to provide a virus-free copy, it is the responsibility of the recipient to check for viruses.

Trial

- 13.
 - (1) This paragraph applies to any action in which a party considers that it would be advantageous to make use of technology for the trial of the action (other than use of computers for individuals' own use).
 - (2) When such a party completes the pre-trial check list²⁵ (required under **CPR Rule 29.6**), he shall also serve on the other party such information as may be necessary to enable the parties to reach agreement on how technology may best be used at trial, including (as may be appropriate) a summary of the steps which that party is contemplating taking in relation to the use of technology at the trial for managing documents, for the presentation of evidence, or otherwise. The parties may use the Trial Technology Questionnaire (with such variations as they consider appropriate) for this purpose.
 - (3) The parties shall endeavour to reach agreement on
 - (a) the use of technology at the trial for managing documents, for the presentation of evidence, or otherwise,

- (b) the equipment and services (including appropriate hardware, software and additional infrastructure) which they and the court might require at trial,
 - (c) the arrangements which may need to be made between the parties, the court and any third party service providers to ensure that appropriate equipment and services are available at the trial, and
 - (d) the assistance which might need to be given to the court, in particular with respect to any training and equipment the Judge may require.
- (4) In appropriate cases, electronic versions of documents to be used at the trial should be provided to the Judge shortly before the trial or otherwise as directed by the court.
- (5) Where technology is to be used for the purpose of managing documents to be used by the court at the trial, the same system must, unless the court otherwise directs, be used by all parties and must be made available to the court.²⁶

Costs

14. Unless the parties agree otherwise or the court orders otherwise, the costs incurred by a party in arranging the use of and using technology will initially be borne by that party. This is subject to the court's general discretion in relation to the payment of costs under **CPR Rule 44.3**.

ANNEX 1

TECHNOLOGY QUESTIONNAIRES

If these questionnaires were to be implemented as a Court Form, it is intended that some of the end notes would remain in the style of marginal notes, to assist in the Form's completion.

General guidance applicable to the technology questionnaires

These questionnaires may be used by each party to consider and exchange such information as may be necessary to enable them to reach agreement, in accordance with this Practice Direction, on how technology may best be used in the proceedings, and if necessary, to enable the court to give appropriate directions.²⁷

Many questions require a simple Yes/No answer. Guidance is given to the right of the page as to which question should be answered next. If you are completing these questionnaires in hard copy and there is insufficient space for any answers, please attach additional information on appropriately marked separate sheets.

Parties in heavy or complex cases are strongly urged to have regard to the possible use of IT in court (notably for managing documents, for the presentation of evidence, or otherwise and, in particular, the use of scanned images) when considering how IT should be used in earlier stages of the case.

Definitions

References in this document to the Practice Direction are to the latest draft of the Practice Direction on the Use of Technology in Civil Proceedings.

References to one party should be taken to refer to all parties. References to “you” or “your” should be understood as referring to either the party or their legal representatives.

“Document Type” means the generally accepted classification (such as letter, email, memo or report) of Disclosure Documents according to the purpose and audience for which each was created.

Throughout these questionnaires, the capitalised terms take the same definition as those set out in the Practice Direction.

ANNEX 1A

DOCUMENTS TECHNOLOGY QUESTIONNAIRE

PART 1 – EXCHANGING ACTION DOCUMENTS

- A1. Will you be using software to create any of the Action Documents in this case? Yes No If No, go to A3
- A2. Please give details (follow the examples shown):

Type of Software	Product	Version
Word processing	Microsoft Word	97
Spreadsheet	Lotus 1-2-3	6

PART 2 – THE DISCLOSURE LIST

- A3. Are you intending to prepare a Disclosure List in the default format set out in paragraph 8 of Annex 2 to the Practice Direction?²⁸ Yes No If Yes, go to A6.
- A4. Please describe details of any departure that you are intending to make in the preparation of your Disclosure List from the default format set out in paragraph 8 of Annex 2. In particular, please list the headings of any additional columns that you are intending to use.²⁹
- A5. Please list the Document Types that you are or will be using to categorise your documents in the Disclosure List.³⁰

PART 3 - OTHER RELEVANT INFORMATION

- A6. Is there any additional information that you feel would assist the parties in reaching agreement, or the court in giving appropriate directions in accordance with the Practice Direction?

ANNEX 1B

TRIAL TECHNOLOGY QUESTIONNAIRE

PART 1 – TECHNOLOGY AT TRIAL

B1. Do you propose that a daily transcript should be produced of the proceedings during any hearings or at trial? Yes No

B2. Do you propose that a “real time” transcription service should be used during any of the hearings or at trial? Yes No

B3. Will you require any special facilities for any of the following at any hearing or trial?³¹ If Yes to any, go to B4

- The electronic presentation of documents or other evidence Yes No
- Digital recording of the proceedings Yes No
- Access to your external computer systems from the court Yes No
- Wireless technology Yes No
- Other (please specify) Yes No

B4. Please describe briefly the sort of facilities that you may wish to use.

PART 2 - OTHER RELEVANT INFORMATION

B5. Is there any additional information that you feel would assist the parties in reaching agreement, or the court in giving appropriate directions in accordance with the Practice Direction?

ANNEX 2

ACTION DOCUMENTS AND DISCLOSURE LISTS

Introduction

1. This Annex applies to
 - (1) the provision of electronic copies of Action Documents³² (namely a statement of case, witness statement, witness summary, affidavit, Disclosure List, expert's report, skeleton argument, written legal submission or similar document brought into being for the purposes of the proceedings, not including inter-solicitor correspondence), and
 - (2) the preparation of Disclosure Lists.
2. Parties are encouraged to consider the matters set out in this Annex from an early stage, as this is likely to assist during later stages.

Electronic Copies of Action Documents

3. When providing electronic copies of Action Documents no file-naming conventions are required unless agreed by the parties or otherwise ordered by the court, except that parties should endeavour to ensure that no two files bear the same name, other than by reason of replacement, and that file names adopted are consistent and logical.
4. In the absence of agreement between the parties the default format for the provision of electronic copies of Action Documents shall be as follows:
 - (1) Word-processor files: one of the following formats (at the option of the party supplying the document):
 - (a) Rich Text Format (.rtf)
 - (b) Microsoft Word 95 or 97
 - (c) an Adobe Acrobat portable document format (.pdf) from which text can without difficulty be directly copied and pasted into a new document (this does not include image .pdf files).³³
 - (2) spreadsheet files: Excel 97 (this being a format from which text can be copied and pasted into a new document, and which permits cell formulae to be examined);

- (3) other files containing text: the original electronic format in which the document was created, or (where reasonably practicable) an alternative format which enables text (including paragraph numbers) and images to be copied and pasted into a new document.
5. Where an electronic version of an Action Document is provided in the agreed or default format and that electronic version is (as a result of having been converted) unsatisfactory, the party providing it shall, if requested in writing to do so, promptly provide a copy of the document in the electronic format in which the document was originally created (if still available).
6. Where an electronic copy of an Action Document is requested under paragraph 6 of the Practice Direction, (i.e. in an electronic format in which the page and document layout do not change):
 - (1) the default format shall be multi-page tagged image file (".tif") with a resolution of 300 dpi and saved with CCIT Group 4 compression;
 - (2) the copy shall be in portrait orientation and in black and white, except insofar as the original may differ from this description;
 - (3) that copy shall as far as is reasonably practicable allow a true reproduction of the original document containing the same text and formatting as any paper version previously supplied.

Disclosure Lists

7. In all circumstances, that part of the Disclosure List itemising the Disclosure Data should be set out in a style that will enable other parties to transfer the Disclosure Data into some form of electronic case management system if they so wish.
8. The minimum requirement is that the Disclosure Data itemised in the Disclosure List should be set out in a single, continuous six column table or spreadsheet, each separate column containing exclusively one of the following types of Disclosure Data:³⁴
 - (1) Sequential Disclosure List number,
 - (2) Date,
 - (3) Document Type,
 - (4) Author/Sender,
 - (5) Recipient,
 - (6) Attached to Document.³⁵

9. A party may decide or the court may direct that additional columns should be used, such as but not limited to 'Copyee', 'Document Title', 'Document Format' (if the Disclosure Document is itself in electronic format), 'Redaction Information' and 'Parties' (if, for example, some Disclosure Documents are contracts or agreements and have no clear author/sender or recipient).
10. Annex 3 to this Practice Direction contains an example of the relevant part of a Disclosure List which illustrates the format which should be used.
11. The following practices should be adopted when preparing Disclosure Lists³⁶:
 - (1) Subject to sub-paragraph (3) below, a Disclosure Document and any attachment(s) should be listed and numbered separately.
 - (2) When listing an attachment the Disclosure List number of its parent or covering document should always be included in the 'Attached to Document' column.
 - (3) A large number of Documents falling into a particular category may be listed as a single item (e.g. "50 bank statements relating to account number XXX at XX Bank, 13 Apr 2000 to 12 Apr 2001").
 - (4) The Disclosure List number used in any supplemental Disclosure Lists should be unique and preferably run on from the last number used in the previous Disclosure List.
 - (5) Authors/senders, recipients and copyees should always be listed in separate columns.
 - (6) When printed, consistent column headings should be repeated on each page on which Disclosure Data is itemised.
 - (7) Parties should be consistent in the way in which they set out their Disclosure Data.
12. Before preparing Disclosure Lists, the parties should consider whether to discuss and agree:-
 - (1) The format the parties will use for recording dates. See Annex 3 to the Practice Direction for a practical suggestion.³⁷
 - (2) The format the parties will use for recording names; how, if at all, the persons named are connected with the organisations which they represent; and the method used to record multiple names. See Annex 3 to the Practice Direction for practical suggestions.³⁸
 - (3) Standard Document Types.

ANNEX 3

EXAMPLE OF DISCLOSURE DATA TO BE CONTAINED IN THE BODY OF A DISCLOSURE LIST

No.	Document Type	Date	Author/sender	Recipient	Copyee	Document Title	Document Format	Attached to Document
1.	Memo	13 Apr 2003	Abernethie H of ABC Ltd	Guthrie A of ABC Ltd Lansquenet C of XYZ PLC		Reference 2003/12/46/HA	Word 2000	
2.	Letter		Company Secretary of ABC Ltd	Lansquenet C of XYZ PLC	Crossfield G of Wisteria Property	30 Canterbury Grove	Word 2000	
3.	Bank Statement	01 May 2003	Gilchrist Bank	Abernethie H				
4.	Letter	02 May 2003	Shane Robert	Shane M	Narracot F of Dun Trading		WordPerfect 5.1	
5.	File of invoices	16 Jun 2003 to 27 Jul 2003	ABC Ltd	Abernethie H of ABC Ltd				
6.	Minutes	22 Jun 2003	Guthrie A of ABC Ltd	Crossfield G of Wisteria Property Armstrong EG of Wisteria Property Legge T Narracot F of Dun Trading				

No.	Document Type	Date	Author/sender	Recipient	Copyee	Document Title	Document Format	Attached to Document
7.	Agenda	15 Jun 2003	Guthrie A of ABC Ltd	Crossfield G of Wisteria Property Armstrong EG of Wisteria Property Legge T Narracot F of Dun Trading				6
8.	Note	14 Jun 2003	Collins S of ABC Ltd	Guthrie A of ABC Ltd	Rees-Jones Anthony	Apologies		6
9.	Report	22 Jun 2003	Narracot F of Dun Trading	Armstrong Edward of Wisteria Property	Guthrie A of ABC Ltd	Subsidence at 28 Canterbury Grove	Word 97	

ANNEX 4

EXAMPLE AGREEMENT ON THE USE OF TECHNOLOGY IN CIVIL PROCEEDINGS

Party A v Party B (No. XX-XXX)

Agreement for the use of IT during the conduct of the above matter

History

Version 1 dated 10 November 2004

Version 2 dated 22 December 2004

Version 3 dated 21 February 2005

The terms of this agreement will be updated as required to reflect accurately the situation between the parties with regard to the use of technology on this matter.

1. Action Documents

1.1. Electronic copies of Action Documents shall be exchanged as Microsoft Word 97 or Microsoft Excel 97 files, as appropriate.

1.2. Any Action Document provided as a “tif” file pursuant to paragraph 6 of Annex 2 to the Practice Direction shall be:

1.2.1. multi-page;

1.2.2. in the same orientation as the paper version it mirrors; and

1.2.3. in black and white regardless of any colours inherent on the paper version it mirrors except by express request of the receiving party.

2. Disclosure Lists

2.1. Disclosure Lists shall contain the following information in the order stipulated below:

2.1.1. Sequential Disclosure List number

2.1.2. Date

2.1.3. Document Type

2.1.4. Document Format (Party B only)

- 2.1.5. Author(s)/Sender(s)
- 2.1.6. Recipient(s)
- 2.1.7. Copyee(s)
- 2.1.8. Attendee(s)
- 2.1.9. Attached to Document
- 2.1.10. Redacted (Yes or No)
- 2.2. Hard copy (paper) Documents shall be listed in the order in which they appear in the original file.
- 2.3. Attachments or enclosures to correspondence shall be listed and numbered separately from their parent/covering document.
- 2.4. Appendices, annexures and exhibits shall be treated as forming part of the document to which they relate.
- 2.5. Party B's electronic documents shall be listed in ascending chronological order according to date created or, in the case of emails, date and time sent.
- 2.6. The agreed format for dates is DD MMM YYYY (i.e. 21 Feb 2005).
- 2.7. People and their organisations shall, wherever possible, be shown as "Surname First Name/Initial(s) of XXXX" (i.e. Armstrong Edward of Wisteria Property).
- 2.8. Multiple names will be recorded on new lines.
- 2.9. The parties are to agree common Document Types in due course.
- 2.10. Disclosure List numbers for supplemental Disclosure Lists shall run on consecutively from the last Disclosure List number of the preceding Disclosure List.

3. Electronic Disclosure Documents

- 3.1. At this early stage the parties expect the electronic Disclosure Documents in their control to include the following categories and formats:
 - 3.1.1. Party A: No electronic Disclosure Documents
 - 3.1.2. Party B: Emails (with attachments) (Microsoft Outlook 97), office documents (Microsoft Office 97 suite), other documents (Quark Express, Adobe Acrobat, etc.).

3.2. Wherever possible Party B shall be providing for inspection copies of electronic Disclosure Documents in their original electronic format.

4. Trial

4.1. The parties have not yet discussed any technology requirements for the trial.

5. Other

5.1. Transfer media: electronic Disclosure Documents and Disclosure Data will be transferred between the parties on a medium to be agreed once the volume is known.

Signed by the parties:

For and on behalf of Party A

Dated

For and on behalf of Party B

Dated

Example

ANNEX 5

PRACTICE DIRECTION - THE USE OF TECHNOLOGY IN CIVIL PROCEEDINGS RELEASE HISTORY

Date	Release
08 July 2005	<ul style="list-style-type: none"> • Sixth, and final, version released to the Department of Constitutional Affairs • Fourth, and final, version of Annex 1 released to the Department of Constitutional Affairs • Fifth, and final, version of Annex 2 released to the Department of Constitutional Affairs • Fifth, and final, version of Annex 3 released to the Department of Constitutional Affairs • Second, and final, version of Annex 4 released to the Department of Constitutional Affairs • Fourth, and final, version of Annex 5 released to the Department of Constitutional Affairs
03 March 2005	<ul style="list-style-type: none"> • Fifth version released for consultation • Third version of Annex 1 released for consultation • Fourth version of Annex 2 released for consultation • Fourth version of Annex 3 released for consultation • First version of new Annex 4 released for consultation • Third version of Annex 5 (old Appendix 4) released for consultation
24 September 2004	<ul style="list-style-type: none"> • Fourth version released for consultation • Second version of Appendix 1 released for consultation • Third version of Appendix 2 released for consultation • Third version of Appendix 3 released for consultation • Second version of Appendix 4 released for consultation
15 July 2004	<ul style="list-style-type: none"> • Third version released for consultation • First version of Appendix 1 released for consultation • Second version of Appendix 2 released for consultation • Second version of Appendix 3 released for consultation • First version of Appendix 4 released for consultation
28 May 2004	<ul style="list-style-type: none"> • Second version released for consultation • First version of Appendix 2 released for consultation • First version of Appendix 3 released for consultation
26 March 2004	<ul style="list-style-type: none"> • First version released for consultation

END NOTES

¹ Litigation Support Technology Group: www.listgroup.org.

² Although this draft reflects points made as a result of consultations, it may well be the case that there are others who would wish to express views who are unaware of the draft. Further consultations may therefore be desirable. There was a consensus that earlier drafts were too prescriptive, and there are some who still consider that the draft is too prescriptive. The drafters have, however, tried in each section to strike the right balance between mandatory rules on the one hand and guidelines on the other, and it is considered that the draft sufficiently makes this clear within each section.

³ A number of people have commented that it would be more helpful if the document was split up so that sections dealing with particular topics were dealt with in the relevant Part of the CPR, e.g. paragraphs relating to Disclosure should be dealt with under CPR 31. There is some force in this point, but it is convenient for the time being to include all the topics covered in a single document.

⁴ Certain CPR references are (in this draft) hyperlinked to the text of the CPR at Roger Horne's web site (<http://www.hrothgar.co.uk/YAWS/>).

⁵ **Paragraph J4.1** of the Commercial Court Guide reads as follows: "The use of information technology at trial is encouraged where it is likely substantially to save time and cost or to increase accuracy." This wording has been varied in order to lay greater stress on the likelihood that the use of technology will be cost-effective. (The original wording of this paragraph was as follows: "The use of technology by the parties to civil proceedings is encouraged where it is likely substantially to save time and/or cost, or to assist the court in dealing with the case expeditiously and fairly.")

⁶ The width of the search to be made for electronic documents has not been covered in this draft, as that raises more substantive legal issues as opposed to matters related more directly to the use of technology as a tool in the conduct of litigation, and this point is already covered by the Commercial Court Guidance. This reflects the feedback which we received as to the scope of the areas which should be covered in the draft Practice Direction.

⁷ See **Practice Direction – Service (CPR Rule 6.2(1)(e))**.

⁸ This definition is based on the Commercial Court Guidance, which is as follows: "Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including email and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been 'deleted'. It also extends to additional information stored and associated with electronic documents known as metadata. In most cases metadata is unlikely to be relevant."

⁹ The expression "Action Documents" is not ideal, but has been selected after considering a number of alternatives.

¹⁰ The working group considers that costs incurred should, in general, be negligible.

¹¹ A similar provision existed in RSC Order 66 rule 3, but has not been included in the CPR. RSC Order 66 rule 3 referred to provision "with sufficient technical information to enable the party entitled to such copy to read the document", and required the copy to be provided within 48 hours after a written request. Comments have been received objecting to the requirement to provide an electronic version of an Action Document on two grounds.

(i) It is suggested that requests may be made which are not justified, and which cause unnecessary work in meeting the request. The working party does not agree that the requirement should for this reason be dropped. Those making a request are better placed to decide whether there is good reason for the request than those to whom the request is made, and if it is possible to refuse the request, argumentative inter-solicitor correspondence on a very minor matter may follow. The reasons for including this requirement in RSC Order 66 continue to apply.

(ii) Concern has also been expressed in relation to the format in which the electronic version should be supplied. This is addressed in an end note to Annex 2 paragraph 4(1).

¹² The additional cost of providing copies in electronic format is likely to be minimal.

¹³ It should be noted that paragraph 3 of the Practice Direction to CPR Part 6 provides that where a document is served by email in accordance with that paragraph, it is not required that a hard copy must also be served. This could apply to a document which requires a Statement of Truth, as **CPR 22.1(7)** allows for a Statement of Truth to be contained in a separate document.

¹⁴ The intention is that once a common standard has been clearly identified, it will be followed in the future as the standard.

¹⁵ Letters are included because consistency of format is necessary when creating party and party correspondence court bundles.

¹⁶ The purpose of this is to ensure that all parties have access to copies of documents with the same page and document layout. This is important e.g. for preparation of consistent bundles for hearings. This cannot be achieved with Word, Excel, etc. since they print out differently on different computers and printers.

¹⁷ Earlier drafts of this document which were published in order to obtain comments contained an optional questionnaire with detailed questions relating to disclosure. The working party anticipated that this questionnaire might generate controversy. Parties would be required to be open with each other and with the court in relation to their use of technology for the management of their cases, since the information asked for in the questionnaires would be required by the court if it is to make appropriate directions to deal with cases expeditiously and fairly, in accordance with the overriding objective referred to in CPR Rule 1.1. Although the drafters were aware that the provision of detailed information required by the questionnaire might limit strategic or tactical use of IT for some users of the civil justice system, a balance needs to be struck between the freedom for parties to conduct their own cases in the most advantageous manner and the just, speedy and cost-effective management of cases, bearing in mind that the objective of the Practice Direction was that technology should be used as a tool in the management of cases, not a weapon. In the event, as a result of comments received the disclosure questionnaire has been omitted from this draft. There was a strongly held view that the detailed questionnaire would too often be costly to answer, but that the existence of an officially approved questionnaire would result in pressure on parties to complete it, even in cases where on proportionality grounds it was not required. It was also considered that prior to the CMC parties would often not have enough information to be in a position to provide meaningful responses to the questionnaire.

There remain some who still consider that paragraphs 8 and 9 are too prescriptive. However, the drafters do not understand this criticism. Paragraph 8(2) makes it clear that this is a guideline and not a mandatory rule. Paragraph 9 applies only in specific circumstances, i.e. where there is additional information which should be disclosed in accordance with standard disclosure, and paragraph 9 will in most cases not need to be used.

¹⁸ The members of the working party, together with others who have provided comments on the draft, would welcome a general requirement to provide copies of Disclosure Documents in electronic form (e.g. in .tif or .pdf format on a CD-ROM) on a reciprocal basis. Such a requirement would encourage wider use of technology in the disclosure process. Large solicitors' firms would have no difficulty in complying with such a requirement. However, small firms and litigants in person may require outside assistance. For this reason the working party has not included such a requirement in this draft.

¹⁹ This is intended to be consistent with the wording recently added to section E3.1 of the Commercial Court Guide, to the effect that metadata will in most cases not be relevant. Paragraph 9 applies only where there is additional information which should be disclosed in accordance with standard disclosure.

²⁰ This is intended to reflect the existing law applicable to hard copy documents, e.g. as to inspection of an original to examine staple marks or handwriting.

²¹ 7 days is the time specified in **CPR Rule 31.15** for providing copies. It has been suggested that the deadlines in paragraph 9 may in some cases be too short. The deadlines have been specified on the basis that deadlines should be deadlines which are appropriate in the majority of cases, rather than deadlines which would be appropriate in the most complex cases. In complex cases more time can be requested.

²² This could cover (a) privileged or irrelevant contents, and (b) metadata. As regards metadata, the approach is that in most cases metadata is unlikely to be relevant (Commercial Court Guide section E3.1), and it would be disproportionate for parties to need to review their own metadata before disclosure.

²³ The existing layout of Disclosure Lists as suggested by paragraph 3 of the Practice Direction to CPR Part 31 is not technology-friendly and does not readily lend itself to computer manipulation.

²⁴ Earlier drafts referred to the LiST Protocol, which is still being worked on and is not yet available. It will set common standards for the cost-efficient exchange of electronic Disclosure Data and Disclosure Documents between parties. The latest version of the LiST Protocol should be freely available to the parties both on appropriate web sites (for example www.dca.gov.uk and www.listgroup.org) and in hard copy. It is a highly technical document that will from time to time change as technology and best practice develops. It will only be appropriate to refer to it in the small number of cases where litigation databases are likely to be used. It is therefore not thought appropriate to include it as part of this Practice Direction.

The working party considered stating that the LiST Protocol should apply in the absence of other agreement by the parties. However (a) it would have been necessary to demarcate those cases to which the LiST Protocol should apply by default, and this would be difficult, and (b) the LiST Protocol has not been finalised and has not yet proved its worth in practice.

²⁵ The Trial Technology Questionnaire might perhaps be incorporated into the pre-trial check list.

²⁶ This is based on the Commercial Court Guide paragraph J4.3.

²⁷ These questionnaires could usefully be completed on-screen and/or online (ideally they would be interactive, expanding and contracting as Yes/No boxes are ticked and details are entered) although hard copy versions should be made available for those without access to the appropriate technology.

²⁸ Where a party has collected information beyond that included in the default Disclosure List, they are encouraged to exchange it either by appending columns to the Disclosure List or by exchanging the additional information together with the Disclosure Data.

²⁹ This is to enable the parties to determine if they can agree to a mutual exchange of additional data beyond the bare minimum set out in Annex 2.

³⁰ This is to enable the parties to determine if it is possible for them to agree a common list of, and nomenclature for, Document Types.

³¹ For example, the ability to view video evidence, videoconferencing for examining witnesses, viewing documents on screen, ability to hear audio evidence, ability for counsel to make presentations about the evidence, presentation of expert evidence, etc.

³² No proposals are made for the default format in which electronic copies of Disclosure Documents should be supplied. The draft Practice Direction contains no requirement to provide such copies, and it is therefore a matter for the parties to deal with by agreement. Such agreement would need to cover the electronic format to be used. The drafters expect that the LiST Protocol will be of considerable assistance in this area.

³³ This reflects widespread concern that .rtf and .doc documents may inadvertently contain confidential metadata. The working party considers that parties should be free to use these formats if they choose, but that it is preferable to avoid later versions of MS Word formats which may not be accessible by the recipient. The main criteria should be that text readily be cut and pasted, and that documents should be machine readable so that they may be searched in a database of documents, as this means that the documents can be used with maximum efficiency by the recipient. These criteria make image .pdf documents unsuitable, as the text of such documents is not machine-readable without scanning and character recognition.

³⁴ Other than for the Disclosure List number, blank entries are permissible, and preferred, if there is no relevant Disclosure Data (i.e. blank rather than “Undated”).

³⁵ Following consultation, the working party has removed the following (old paragraph 10(2)): “Regardless of the overall order of the Disclosure Documents, attachments should be listed in the same order as they were held in the original file or folder, usually after their parent or covering Document.”. Instead, by requiring use of the Attached to Document column, a party may present its Disclosure List in any order that seems most appropriate and the connection between a covering document and its attachments can still always be made. For this to work in practice the entry here would have to be the unique Disclosure List number of the covering or parent Document. See Annex 3 for an example.

³⁶ Suggestion has been made that the drafters consider how best to handle emails and email threads in a Disclosure List. The drafters acknowledge that this is an area that needs to be addressed but by the profession as a whole.

³⁷ Although the parties should seek to agree date formats the working party recommends as best practice DD MMM YYYY: 06 Sep 2004.

³⁸ Although the parties should seek to agree formats for recording names and affiliations, the working party recommends as best practice *surname initial(s) of organisation* or, where only a job title is available, *job title of organisation*. In the event of multiple names, each name and affiliation should be placed on a new line.