

The Admiralty and Commercial Court Guide **7th Edition 2006**

E. Disclosure

E1 Generally

E1.1 The court will seek to ensure that disclosure is no wider than appropriate. Anything wider than standard disclosure (see section E3) will need to be justified.

E2 Procedure

E2.1 At the case management conference the court will normally wish to consider one or more of the following:

- (i) ordering standard disclosure: **rule 31.5(1)**;
- (ii) dispensing with or limiting standard disclosure: **rule 31.5(2)**;
- (iii) ordering sample disclosure;
- (iv) ordering disclosure in stages;
- (v) ordering disclosure otherwise than by service of a list of documents, for example, by service of copy documents; and
- (vi) ordering specific disclosure: **rule 31.12**.

E2.2 The obligations imposed by an order for disclosure continue until the proceedings come to an end. If, after a list of documents has been prepared and served, the existence (present or past) of further documents to which the order applies comes to the attention of the disclosing party, that party must prepare and serve a supplemental list.

E3 Standard disclosure

E3.1 Standard disclosure is defined by rule 31.6. Where standard disclosure is ordered a party is required to disclose only:

- (i) the documents on which he relies; and
- (ii) documents which –
 - adversely affect his own case;
 - adversely affect another party's case; or
 - support another party's case; and
- (iii) documents which he is required to disclose by any relevant practice direction.

E3.2 A party who contends that to search for a category or class of document under rule 31.6(b) would be unreasonable must indicate this in his case management information sheet (see Appendix 6).

E3.3 In order to comply with rule 31.10(3) (which requires the list to identify the documents in a convenient order and manner and as concisely as possible) it will normally be necessary to list the documents in date order, to number them consecutively and to give each a concise description. However, where there is a large number of documents all falling within a particular category the disclosing party may (unless otherwise ordered) list those documents as a category rather than individually.

E3.4 Each party to the proceedings must serve a separate list of documents. This applies even if two or more parties are represented by the same firm of solicitors.

E3.5 If the physical structure of a file may be of evidential value (e.g. a placing or chartering file) solicitors should make one complete copy of the file in the form in which they received it before any documents are removed for the purpose of giving disclosure or inspection.

E3.6 Unless the Court directs otherwise, the disclosure statement must comply with the requirements of rules 31.7(3) and 31.10(6). In particular, it should

- (i) expressly state that the disclosing party believes the extent of the search to have been reasonable in all the circumstances; and

- (ii) draw attention to any particular limitations on the extent of the search adopted for reasons of proportionality and give the reasons why they were adopted.

E3.7 The disclosure statement for standard disclosure should begin with the following words:
“[I/we], [name(s)] state that [I/we] have carried out a reasonable and proportionate search to locate all the documents which [I am/*here name the party* is] required to disclose under [the order made by the Court or the agreement in writing made between the parties] on the [] day of [] 20[].”

E3.8 The disclosure statement for standard disclosure should end with the following certificate:

“[I/we] certify that [I/we] understand the duty of disclosure and to the best of [my/our] knowledge [I have/*here name the party* has] carried out that duty. [I/we] certify that the list above is a complete list of all documents which are or have been in [my/*here name the party's*] control and which [I am/*here name the party* is] obliged under [the said order or the said agreement in writing] to disclose.”

E3.9 An adapted version of practice form N265 (list of documents: standard disclosure) has been approved for use in the Commercial Court. A copy of this practice form (Form N265(CC)) is included at the end of the Guide. The court may at any stage order that a disclosure statement be verified by affidavit.

E3.10(a) For the purposes of PD31 §4.3 the court will normally regard as an appropriate person any person who is in a position responsibly and authoritatively to search for the documents required to be disclosed by that party and to make the statements contained in the disclosure statement concerning the documents which must be disclosed by that party

(b) A legal representative may in certain cases be an appropriate person.

(c) An explanation why the person is considered an appropriate person must still be given in the disclosure statement.

(d) A person holding an office or position in the disclosing party but who is not in a position responsibly and authoritatively to make the statements contained in the disclosure statement will not be regarded as an appropriate person to make the disclosure statement of the party.

(e) The court may of its own initiative or on application require that a disclosure statement also be signed by another appropriate person.

E3.11 All parties should have regard to issues which may specifically arise concerning electronic data and documents:

(a) Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including e-mail 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.

(b) The parties should, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies.

In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first Case Management Conference. For this purpose the parties should before any such hearing co-operate to provide the court with an explicit account of the issues as to retrieval and disclosure of electronic documents which have arisen and where proportionality is in issue each party should provide the court with an informed estimate of the volume of documents involved and the cost of their retrieval and disclosure.

- (c) The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. In the case of difficulty or disagreement, the matter should be referred to a Judge for directions at the earliest practical date, if possible at the first Case Management Conference.
- (d) The existence of electronic documents impacts upon the extent of the reasonable search required by Rule 31.7 for the purposes of standard disclosure. The factors that may be relevant in deciding the reasonableness of a search for electronic documents include (but are not limited to) the following: -
 - (i) The number of documents involved.
 - (ii) The nature and complexity of the proceedings.
 - (iii) The ease and expense of retrieval of any particular document. This includes:
 - (1) The accessibility of electronic documents or data including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents 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.
 - (2) The location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.
 - (3) The likelihood of locating relevant data.
 - (4) The cost of recovering any electronic documents.
 - (5) The cost of disclosing and providing inspection of any relevant electronic documents.
 - (6) The likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.
 - (iv) The significance of any document which is likely to be located during the search.
- (e) It may be reasonable to search some or all of the parties' electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of each and every document would be unreasonable. There may be other forms of electronic search that may be appropriate in particular circumstances.

E4 Specific disclosure

E4.1 Specific disclosure is defined by rule 31.12(2).

E4.2 An order for specific disclosure under rule 31.12 may in an appropriate case direct a party to carry out a thorough search for any documents which it is reasonable to suppose may adversely affect his own case or support the case of the party applying for disclosure or which may lead to a train of enquiry which has either of these consequences and to disclose any documents located as a result of that search: **PD31 §5.5**.

E4.3 Where an application is made for specific disclosure the party from whom disclosure is sought should provide to the applicant and to the Court information as to the factors listed in E3.11(d) above and its documents retention policy, to the extent such information is relevant to the application. At the hearing of the application, the Court

may take into account the factors listed in E3.11(d) as well as the width of the request and the conduct of the parties.

E4.4 The court may at any stage order that specific disclosure be verified by affidavit or witness statement.

E4.5 Applications for ship's papers are provided for in rule 58.14.

E.5 Authenticity

- E5.1** (a) Where the authenticity of any document disclosed to a party is not admitted, that party must serve notice that the document must be proved at trial in accordance with CPR 32.19. Such notice must be served by the latest date for serving witness statements or within 7 days of disclosure of the document, whichever is later.
- (b) Where, apart from the authenticity of the document itself, the date upon which a document or an entry in it is stated to have been made or the person by whom the document states that it or any entry in it was made or any other feature of the document is to be challenged at the trial on grounds which may require a witness to be called at the trial to support the contents of the document, such challenge
- (i) must be raised in good time in advance of the trial to enable such witness or witnesses to be called;
 - (ii) the grounds of challenge must be explicitly identified in the skeleton argument or outline submissions in advance of the trial.
- (c) Where, due to the late disclosure of a document it or its contents or character cannot practicably be challenged within the time limits prescribed in (a) or (b), the challenge may only be raised with the permission of the court and having regard to the Overriding Objective (CPR 1.1).