

This draft Practice Direction has been prepared by a LiST Group¹ working party consisting of Jonathan Maas (Jonathan.Maas@simmons-simmons.com), Serena Cobby (serena.cobby@lovells.com), Mark Dingle (mdingle@mayerbrownrowe.com), Christine Gabitass (cxg@dentonwildesapte.com) and Vince Neicho (vince.neicho@allenoverly.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. The draft has been updated following further discussion by the drafters and comments from the public on the first draft.

Appendix 1 referred to in the draft is still being worked on and is not yet ready for consultation. When ready, it will be released as a separate document, although it is intended to remain Appendix 1 to this Practice Direction (subject to a decision as to whether it would be more suitably published as a separate Court Form).

Comments are invited on this draft, and should be sent to Jonathan Maas² or other members of the LiST working group. Comments should be based on the latest version of the draft, which is updated from time to time to take account of comments and can be accessed using the link at the SCL web site (<http://www.scl.org/>). Comments should be provided if possible by 01 July 2004.

Neither the footnotes, this preamble nor the change history are intended to be reproduced in the final version.

PRACTICE DIRECTION - THE USE OF TECHNOLOGY IN CIVIL PROCEEDINGS

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](#).³
2. The use of technology by the parties to civil proceedings is encouraged, since in many cases it is likely substantially to save time and/or cost and assist the court in dealing with the case expeditiously and fairly.⁴
3. In the event of any conflict between this Practice Direction and the Civil Procedure Rules, the Civil Procedure Rules prevail. Nothing in this Practice Direction affects the law governing the scope of a party's duty to disclose documents.

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³ 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/>).

⁴ [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.")

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](#)).⁵
 - (2) "Disclosure List" means a list of Documents served in accordance with CPR Rule 31.10(2).
 - (3) "Disclosure Data" means data relating to Disclosure Documents, including for example the type of Document, the date of the Document, the names of the author and the recipient, and the party disclosing the Document.
 - (4) "Disclosure Documents" means Documents disclosed by a party in accordance with CPR Part 31.
 - (5) A "written request" includes a request sent by email in accordance with [paragraph 3.3 of the Practice Direction to CPR Part 6](#).
 - (6) "LiST Protocol" means the LiST Protocol setting out best practice and recommended standards for the exchange of electronic Disclosure Data and Disclosure Documents.

Duties of the parties

5. The parties shall consider at the earliest opportunity and keep under review the extent to which technology can assist in
 - (1) communications with the court and between the parties,
 - (2) disclosure,
 - (3) preparation for trial,
 - (4) the presentation of their cases at trial, and
 - (5) the court's fair disposal of the proceedingsconsistent with the overriding objective referred to in CPR Rule 1.1.

⁵ It is the drafters' ultimate intention to move away from "document" as the accepted term for anything in which information is recorded for the purposes of disclosure and introduce the term "item", the definition of which will include "document" (as defined in CPR Rule 31.4) as well as "database record", "email folder", "CD-ROM", "videotape", etc. It is felt that this term better encapsulates the different type, size and class of anything in or on which information can now be recorded. Cognizance is taken of the work being done in this area by the Commercial Litigators Forum. Any comment on this approach is welcomed.

Case management conference

6. (1) This paragraph applies to any case in which
 - (a) one of the parties considers that it might be advantageous to make use of technology (other than limited use such as ordinary use of a computer for word processing), and/or
 - (b) disclosure of a substantial quantity of material held in electronic form is likely to be required.
- (2) In a case to which this paragraph applies, the following steps shall be taken prior to the case management conference:
 - (a) Not less than 3 weeks before the date fixed for the case management conference,⁶ each party shall serve on the other party such information as may be necessary to enable them to reach agreement on how technology may best be used in the proceedings, including (as may be appropriate)
 - (i) an estimate of the likely volume of documentation to be reviewed and the likely volume of documentation to be disclosed,
 - (ii) a description of the types and formats of Documents to be reviewed and disclosed,
 - (iii) a summary of any steps already taken to use technology for managing Documents, and
 - (iv) a summary of the steps which a party is contemplating taking in relation to the use of technology at the trial for managing Documents, for the electronic presentation of evidence, or otherwise.⁷

A questionnaire which may be used (subject to such variations as may be appropriate) is set out in Appendix 1.⁸

⁶ It has been suggested that there should be a requirement to refer to the proposed use of technology in Pre-action Protocol Letters. This point has not been incorporated in this draft for the following reasons. To deal effectively with proposals for the use of technology requires an exchange of detailed information - the questionnaire in Appendix 1 is (in its present draft) 16 pages. A great many cases settle after the Protocol Letter has been sent but before a Claim Form has been issued, and it follows that it would be more cost-effective to deal with proposals for the use of technology after proceedings have been commenced. The parties may not be ready to make appropriate proposals on the use of technology before the commencement of proceedings and before the issues have been clarified in the pleadings.

⁷ This would prevent a party deliberately not revealing the steps it has taken or intends to take, but it is not possible to ensure that the steps to be taken are the most cost-effective unless they are revealed. For example, if they are not revealed, this could result in a defendant duplicating steps which a claimant has already taken.

⁸ Appendix 1 in its present draft is about 16 pages and may therefore be more suitable to be published separately as a Court Form.

- (b) The parties shall endeavour to reach agreement on all matters relating to the use of technology, including
- (i) the appropriate method for exchange of electronic versions of documents,
 - (ii) the use of technology in the process of giving disclosure, 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 agreed fields,
 - (iii) the use of technology at the trial for managing documents, for the electronic presentation of evidence or otherwise,
 - (iv) the equipment and services (including appropriate hardware, software and additional infrastructure) which they and the court might require at trial,
 - (v) 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
 - (vi) the assistance which might need to be given to the court, in particular with respect to any training and equipment the Judge may require.

7. In a case to which paragraph 6 above applies the case summary provided to the court for the case management conference⁹ shall include a summary of the use which each party proposes should be made of technology and of the extent to which agreement between the parties has been reached on the use of technology. The parties' representatives should be in a position to address the court at the case management conference on the matters referred to in paragraph 6 above, whether or not these matters have been agreed by the parties. The court will then give such directions on the use of technology as may be appropriate, having regard to the overriding objective referred to in CPR Rule 1.1.
8. Following the case management conference the parties must co-operate in keeping each other informed of material changes in the information referred to in paragraph 6(2)(a) above. If appropriate an application should be made to the court for the directions to be amended.

⁹ It may be helpful to add an appropriate question relating to the use of technology to the Allocation Questionnaire.

Guidelines and Protocol for the exchange of documents in electronic form and Disclosure Data

9. Appendix 2 contains guidelines for the exchange of electronic copies of documents referred to in paragraph 11(2)(a) below and for the preparation and exchange of Disclosure Lists.¹⁰ If parties fail to agree on the methods and formats to be adopted, the default methods and formats referred to in Appendix 2 shall apply unless the court orders otherwise.
10. The LiST Protocol¹¹ for the exchange of electronic Disclosure Data and Disclosure Documents is available separately¹². If parties fail to agree on the methods and formats to be adopted, the default methods and formats referred to in the LiST Protocol shall apply unless the court orders otherwise.

Copies of documents to be provided in electronic form

11. (1) In the case of documents of the types referred to in sub-paragraph (2) below, a party entitled to request a copy of a document 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 necessary¹³ to enable him to access the document.¹⁴
- (2) The types of document referred to in sub-paragraph (1) above are:
 - (a) a statement of case, witness statement, witness summary, affidavit, Disclosure List, expert's report, skeleton argument, written legal submission or any other document brought into being for the purposes of the proceedings, where the document in question exists¹⁵ in the document's original electronic format;¹⁶

¹⁰ The intention is that once a common standard has been clearly identified, it will be followed in the future as the standard.

¹¹ The LiST Protocol is still being worked on and is not yet available. The LiST Protocol sets common standards for the cost-efficient exchange of Disclosure Data and Disclosure Documents between the parties. The latest version of the LiST Protocol should be freely available to the parties both on a web site (www.dca.gov.uk?) and in hard copy.

¹² The LiST Protocol 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. Reference, however, is made to it here to allow a direction as to its use by the parties to be made by the Judge.

¹³ For example, details of a password.

¹⁴ 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.

¹⁵ This does not prohibit deliberate deletion of the original version. That may in practice be unlikely, as the document would no longer be available for amendment in the future. It might also invite costs sanctions.

¹⁶ A similar provision existed in RSC Order 66 rule 3, but has not been included in the CPR. 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.

- (b) a Disclosure Document listed in a Disclosure List as being in electronic form, where the electronic version contains relevant data which would not be visible on a printed copy (such as a spreadsheet containing formulae).¹⁷
 - (3) This paragraph applies irrespective of whether
 - (a) the parties have reached an agreement or the court has made a direction in relation to technology matters under paragraphs 6 or 7 above, or
 - (b) an electronic copy has already been provided in the agreed or the default electronic format.¹⁸
 - (4) A copy of a document within sub-paragraph (2)(a) above must be provided within 2 working days¹⁹ after a written request together with an undertaking to pay reasonable costs.
 - (5) A copy of a Document within sub-paragraph (2)(b) above must be provided within 7 days²⁰ after a written request together with an undertaking to pay reasonable costs.
 - (6) The following provisions apply to documents in electronic form which contain additional data such as comments, document properties or tracked changes:
 - (a) A party supplying an electronic copy of a document falling within paragraph 11(2)(a) above may take steps to delete data which is privileged from disclosure or to ensure that it cannot be accessed.
 - (b) A party providing an electronic copy of a Disclosure Document may not take any steps to alter the Document to prevent data being accessed, except with the agreement of the other party or in accordance with an order of the court.
12. Where a party provides an electronic version of a document, that document shall so far as is reasonably practicable contain the same text and formatting as a printed paper copy would contain.

¹⁷ The members of the Working Group, together with others who have provided comments on the draft, would welcome a general requirement to provide copies of Disclosure Documents in electronic form if this is requested by the other party (e.g. in .tif or .pdf format on a CD-ROM). 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 would require the assistance of a photocopying company. For this reason the Working Group has not included such a requirement in this draft.

¹⁸ This is to cover the possibility that a converted version is less usable than the original version, e.g. a WordPerfect document which has been converted to MS Word.

¹⁹ [CPR Rule 2.8](#) provides that in time periods of 5 days or less, weekends and bank holidays are not to be counted. The word "working" is however added in order to make the document more easily understood by litigants in person.

²⁰ The longer period reflects the fact that it may be necessary for the solicitor to obtain the file from the client. (7 days means 7 calendar days: see [CPR 2.8\(4\)](#).)

13. Disclosure Lists should normally be set out in accordance with Appendix 2 to this Practice Direction, in substitution for the first sentence of [paragraph 3 of the Practice Direction to CPR Part 31](#). Appendix 3 contains an example Disclosure List.²¹ 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.
14. Where a Disclosure Document is best accessed using technology which is not readily available to the party entitled to disclosure, 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](#).
15. While the party supplying an electronic version of a document should make every effort to provide a virus-free copy, it is the responsibility of the recipient to check for viruses.
16.
 - (1) Where a copy of a document falling within paragraph 11(2)(a) above 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 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.
 - (2) 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.

Costs

17. 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](#).

The trial

18. 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.²²

²¹ 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.

²² It has been suggested that reference should be made to filing of trial bundles by CD-ROM. This point is under consideration.

19. Where technology is to be used for the purpose of managing documents 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.²³

²³ This is based on [paragraph J4.3](#) of the Commercial Court Guide, and is aimed at establishing the use of one single system for electronic trial bundles. Paragraph J4.3 states "Where information technology is to be used for the purposes of presenting the case at trial the same system must be used by all parties and must be made available to the court." This has been narrowed, so that for example the use of different software for slide-show presentations is permitted.

APPENDIX 1²⁴

[Questionnaire for exchanging relevant information prior to the Case Management Conference]

²⁴ Appendix 1 is still being worked on and will shortly be available for consultation as a separate document.

APPENDIX 2

GUIDELINES

Introduction

1. These guidelines apply to
 - (1) the exchange by electronic means of the types of documents referred to in paragraph 11(2)(a) of this Practice Direction, namely a statement of case, witness statement, witness summary, affidavit, Disclosure List, expert's report, skeleton argument, written legal submission or any other document brought into being for the purposes of the proceedings, where the document in question exists in the document's original electronic format, and
 - (2) the preparation and exchange of Disclosure Lists.
2. These guidelines will be used by all parties regardless of the case management track to which the case has been allocated under CPR Part 26. However, it is anticipated that parties allocated to the multi-track may also agree or be directed to follow both these guidelines and the separate LiST Protocol for the additional exchange of electronic Disclosure Data and Disclosure Documents.
3. If parties fail to agree on the methods and formats to be adopted, the default methods and formats referred to in these guidelines shall apply unless the court orders otherwise.

Defaults for all documents

4. 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 file names adopted are consistent and logical.
5. No rules for formatting of documents other than Disclosure Lists are required unless agreed by the parties or otherwise ordered by the court.
6. In the absence of agreement between the parties the default format for the exchange of documents falling within paragraph 11(2)(a) of this Practice Direction shall be as follows:
 - (1) word-processor files: Word 97 (this being a format from which text can be copied and pasted);

- (2) spreadsheet files: Excel 97 (this being a format from which text can be copied and pasted, and which permits cell formulae to be examined).

Disclosure Lists

7. In all circumstances, whether or not other parties are currently using database technology, 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 a database. Appendix 3 to this Practice Direction contains an example of the relevant part of a Disclosure List which illustrates the format which should normally be used.
8. The minimum requirement is that the Disclosure Data itemised in the Disclosure List should be set out in a five column table or spreadsheet, each separate column containing exclusively one of the following types of Disclosure Data:²⁵
 - (1) Sequential Disclosure List number
 - (2) Date
 - (3) Document type
 - (4) Author
 - (5) Recipient.
9. By agreement between the parties or at the direction of the court additional columns may be added, such as but not limited to Copyee, Document Title, Document Format (if the Disclosure Document is itself in electronic format) and Redaction Information.
10. The following practices should be adopted when preparing Disclosure Lists:
 - (1) A Disclosure Document and any attachment(s) should be listed and numbered separately.
 - (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, after their parent or covering Document.
 - (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, 13/04/2000 to 12/04/2001").

²⁵ Blank entries are permissible, and preferred, if there is no relevant Disclosure Data (i.e. blank rather than "Undated").

- (4) The Disclosure List number used for any supplemental Disclosure Lists should run on from the last number used in the previous Disclosure List.
 - (5) Authors, recipients and copyees, where included in the Disclosure Lists, should be listed in separate columns.
 - (6) A party should be consistent in the way in which it sets out its Disclosure Data.
11. The following should be considered and agreed by the parties before preparing Disclosure Lists:
 - (1) The format the parties will use for recording dates. See Appendix 3 to the Practice Direction for examples.
 - (2) The format the parties will use for recording names and how, if at all, the persons named are connected with the organisations for whom they work. See Appendix 3 to the Practice Direction for examples.
 - (3) Standard Document types.
 12. Additional information about issues concerning the standardisation of Disclosure Data can be found in the LiST Protocol.
 13. If the party providing the Disclosure List and the party receiving it are both using database technology, then the LiST Protocol for the exchange of Disclosure Data and Disclosure Documents should be followed as appropriate.

APPENDIX 3

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

No. ²⁶	Document Type	Date	Author	Recipient
1.	Memo	13/04/2003	Abernethie H of ABC Ltd; Guthrie A of ABC Ltd	Guthrie A of ABC Ltd
2.	Letter		Guthrie A of ABC Ltd	Lansquenet C of XYZ PLC
3.	Bank Statement	01/05/2003	Gilchrist Bank	Abernethie H
4.	Letter	02/05/2003	Shane R	Shane M
5.	File of invoices	16/06/2003 to 27/07/2003	ABC Ltd	Abernethie H of ABC Ltd
6.	Minutes	22/06/2003	Guthrie A of ABC Ltd	Crossfield G of Wisteria Property; Armstrong EG of Wisteria Property; Legge T; Narracot F of Dun Trading

²⁶ Using these exact column headings will comply with the schema proposed in the LiST Protocol.