Understanding the Jackson Reforms
A brave new world or business as usual?

Implementation of the Jackson Reforms is imminent, and understanding the impact on litigators of electronic disclosure is critical. The breakneck speed of technological advances in recent years has led to an exponential increase law firms' e-communications between litigators, clients and third parties.

Electronic disclosure (the process of managing and using electronically stored information (ESI) in litigation, arbitration and other disputes and investigations) is an increasingly significant issue for law firms, chambers and other legal organisations involved in dispute resolution. With at least 90% of business documents thought to be electronic, it's clear lawyers need to be prepared.

Disclosure Menu

Under the Civil Procedure (Amendment) Rules 2013[1], the presumption of standard disclosure is removed and replaced with a 'menu' of broad disclosure options. This gives the Court discretion in relation to disclosure orders depending on the specific circumstances of the case.

CPR Rule 31.5A and PD 31B Requirements

The new CPR 31 will assist litigation parties to undertake disclosure cost-effectively with Rule 31.5A, containing a range of options for disclosure in qualifying cases – where the costs of standard disclosure could potentially be disproportionate.

> "Combined with PD31B, Rule 31.5A is designed to encourage parties to collaborate and consider e-disclosure at the earliest opportunity. This will enable a disclosure option, proportionate and cost effective in relation to the value of the case - to be agreed and presented in detail at the first CMC."

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Practice Direction 31B on Electronic Disclosure requires litigators to consider e-disclosure matters **before** proceedings have commenced: the parties must each complete and exchange e-disclosure questionnaires as part of their compliance with Rule 31.5.

Rule 31.5 will dovetail with PD 31B and affect a lawyer's case if the first CMC is on or after 16th April. The new CPR 31 requires the parties (several weeks before the first CMC) to consider:

a. If any disclosure is required at all (standard disclosure no longer being the default position in larger commercial cases); and

b. If required, how disclosure can be managed to ensure it is proportionate and cost effective. The scope, timescale, search criteria and budget for the whole disclosure exercise will be set at the CMC and will be difficult to change.

Fourteen days before the first CMC, the parties must each file and serve a report verified by a statement of truth, estimating the range of costs that could be involved in giving standard disclosure in the case. This must include the costs of e-disclosure.

Litigators need to be continually alert to last-minute changes to the reforms. In late February, for instance, the High Court extended the automatic costs management exemption (new Rule 3.12) to commercial cases in the Chancery Division, Technology and Construction Court and the London Mercantile Court. In addition, CPR3 and PD 3E will not now apply to cases in those courts where, at the date of the first CMC, the disputed sums in the proceedings exceed £2m (excluding interest and costs), except where the court orders.

The onus is clearly placed on litigators to consider early in a case the costs consequences of disclosure of documents. They must also be able to set out and justify in detail their costs budget at the first CMC which represents a change for dispute litigation lawyers: they must now work proactively to present an e-disclosure strategy that is efficient and financially proportionate.

Elizabeth Wilkinson, legal director of Pannone's dispute resolution group, explains: "April will bring costs budgets prior to the first case management conference (CMC), costs management orders and costs capping orders and an overall focus on proportionality and costs management to most commercial cases. In turn, this brings the proposed scope of any task, be it disclosure, witness statements or expert evidence under intense scrutiny as the scope directly affects the costs associated with it."

She adds: "Parties have to agree the scope, extent and most useful format for e-disclosure; and consider issues such as intelligent searches, data sampling, staged disclosure, often by exchanging Electronic Disclosure Questionnaires."

Lack of Clarity

But can lawyers be confident in the new e-disclosure requirements? Problematic is the continued lack of detail, rules, regulations and guidance to assist.

Even the Court of Appeal has potentially confused matters: in *Henry v News Group Newspapers*[2], the decision of the costs judge was reversed. The applicant's case was settled and whilst she would normally have been entitled to costs she was, in the event, required to file a budget in court for its approval under a pilot scheme. The costs incurred turned out to be around £268,000 in excess of the approved budget and the costs judge would not award her that excess amount.

Her appeal succeeded, and whilst the Supreme Court could reinstate the costs judge's ruling, has the

overall issue of costs been dealt an element of confusion? Whilst some critics say the ruling will lead to further litigation, Wilkinson doesn't think the ruling undermines the new rules. But she says parts of the judgment[3] are interesting for commercial practitioners advising on multi track cases: "Moore-Blick LJ is quite emphatic that in these cases (as opposed to the defamation case in the Henry appeal), there is a greater emphasis on the responsibility of the court to manage costs and on the parties to keep budgets under review. Moreover, he says that in these cases the budget is more like a limit on recoverable costs."

The importance of first-rate, strategic costs budgeting systems and an early and real grasp of the issues in the case cannot be overstated. They are essential to lawyers' responsibility to presents a reasonable, proportionate budget which can be defended against challenge.

E-Disclosure: A Major Cost

E-disclosure is an increasingly major cost element in many court cases – sometimes prohibitively so. The traditional approach of physically sifting through documents (whether paper or digital) is laborious, time consuming and wastes fee earners' time, however junior their status. It's also an inherently defective method: the accuracy of such methods can never be guaranteed.

Furthermore, the volume of digitally stored information has increased exponentially as has the myriad of devices on which data may be stored. It's the ability to search this data intelligently using computer software that is critical to law firms and other legal organisations.

How Can Legastat Help You?

Legastat is at the forefront of assisting a range of organisations with their e-disclosure challenges. Our ethos is that e-disclosure is a service not simply software. Whilst we can utilise a range of technologies to deliver outstanding results, it is the experience our consultants have in managing a diverse range of issues for our clients that sets Legastat apart from our competitors.

Legastat's Jackson Readiness Assessment consultancy project will provide you with an informed understanding of your e-discovery obligations in each specific case. We will help you to:

1. Scope out the e-disclosure exercise, focusing on minimising each element to reduce costs where possible, taking into account the number of devices and custodians, types of ESI to be searched and how best to search those documents;
2. Budget for each stage of the process to ensure you can provide an accurate, efficient and proportionate costs budget; and
3. Provide you with an accurate Schedule of Costs.

I maintain that the authority could not have progressed its legal case to this point without the significant and professional support offered by the Legastat team, for which I offer my personal thanks."

Central Government Department

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We will provide you with clear explanations and justifications at each stage of the process and our team will provide expert help to litigators completing the ESI questionnaire requirement of Practice Direction 31B and on the exchange protocol.

Legastat is adept at working to very tight time schedules and our business operates 24/7 to meet the needs of our clients. The superior quality and accuracy of theservice we deliver and the experience of team continue to serveour clients well.

Jackson LJ warned in late 2011 that huge sums of money will be wasted if the legal profession gets electronic disclosure wrong. Let Legastat help you contain your costs.

[1]http://www.legislation.gov.uk/uksi/2013/262/made
[2]Henry v News Group Newspapers [2013] EWCA Civ 19
[3]Paragraphs 27 and 28

About us

Legastat are experts in reprographics and specialist litigation support for the legal sector.

Located in the heart of legal London we've been trusted to deliver a professional and efficient service since 1953.

Top law firms, corporations, government agencies, small law firms and sole practitioners rely on us to meet their litigation support and disclosure obligations on time, accurately and cost-efficiently.

At Legastat we put our customers' needs, quality and confidentiality at the heart of everything we do.

We are proud to be part of the government framework for Electronic Disclosure Services and Hard Copy review services for government (RM924).

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