Disclosure: Time for a change

The rules on disclosure should be revised to make electronic documents the norm and make it easier for the process to be tailored to the individual case, argues **Ed Crosse**

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Lord Justice Jackson recently suggested that no changes to the rules on disclosure were necessary. That might have been music to the ears of commercial litigators still getting to grips with the significant changes to the CPR made in recent years. Arguably, though, it underestimates the problems with the current disclosure regime.

It was only in 2013 that the rules on disclosure were last rewritten. Sadly, the changes have made little difference in practice and there is growing discontent with the cost and time expended on disclosure in commercial cases. The 2013 rules revisions introduced the 'disclosure menu', with options ranging from no disclosure or arbitration-style disclosure by requests through to full old-style 'train of enquiry' disclosure. This was a promising concept, allowing the disclosure exercise to be tailored to fit the case, taking into account how many really important documents were likely to be found.

In practice, however, the menu has been almost wholly ignored. Parties and the courts have continued to default to 'standard disclosure', perhaps predictably given that it kept this title. The fact that the other menu options did not include any detail as to how they would work scarcely helped. The option of 'disclosure to be given by each party on an issue-by-issue basis' was provided with no more guidance than that. Unsurprisingly, it has rarely been chosen.

The other problem with the existing rules is that they are drafted with hard copy documents in mind. The treatment of electronic documents is relegated to a practice direction. While there may still be some cases where documents are held in hard copy, electronic storage is now the norm, even in low-value claims. Concepts such as providing a 'list' and then arranging for 'inspection' of documents hark back to an era when solicitors sat in the offices of the other side, going through boxes and holding paper up to the light to see what lay under the Tipp-Ex.

In 2017 we can expect the prospect of new rules on disclosure to become a certainty. If the menu of options is to become the basis of active decision making about what disclosure is appropriate to a given case, it will need to be fleshed out with the necessary definitions, steps, and timetables. The first listed option of 'no disclosure' might usefully be replaced with a default provision that parties provide each other with key documents necessary to understand their own case, at the point pleadings are served, but with no right to further disclosure unless ordered by the court at the CMC.

Any new rule should assume documents will be electronically stored and hard copy-only disclosure will be reserved for cases where both parties agree that this will suffice. Australia offers a useful precedent. There, a maximum limit of pages is used, beyond which electronic disclosure is required. The provision of copies of documents in native format to the other side should be the default setting for disclosure. The use of technology assisted review will inevitably become more established, though it is likely still to be subject to the court's approval.

It is currently common for parties to arrive at the first CMC with insufficient knowledge of the data landscape they will be dealing with during disclosure. Often orders are made for disclosure that prove to be inappropriate once the number of responsive documents is identified, while on other occasions disclosure is held over to a further hearing. Neither approach is efficient. The current rules are ineffective at ensuring adequate engagement by the parties has taken place prior to the first CMC. The approach and timescales at this stage of a case need to be reconsidered.

The current practice direction states that if an electronic documents questionnaire has been completed, the person who signed it should attend the first CMC and any subsequent hearing at which disclosure is likely to be considered. It is often notable that at CMCs the discussion about disclosure is made more difficult by the remoteness from it of those on their feet. Counsel are generally not well versed in the technicalities of a modern electronic document review process, simply because most of them have never done one. Solicitors should take the lead on these discussions, not just between the parties, but in court as well.

Solicitors conducting litigation should engage with debate and consultation in 2017 as the introduction of more effective rules that do not default to standard disclosure could offer more efficient and cost-effective dispute resolution in the English courts. Any rule change requires caution for solicitors, however. If new rules are introduced, those not watching carefully may find themselves criticised in the courts and subject to cost sanctions. An increase in the variety of disclosure orders will favour those who prepare well in advance of the CMC, engage constructively with the other side, and know exactly what they want to achieve from the process. **SJ**