DISCLOSURE PILOT MONITORING

in the

BUSINESS AND PROPERTY COURTS

THIRD INTERIM REPORT

'AN ANALYSIS OF QUESTIONNAIRE FEEDBACK FROM LEGAL PRACTITIONERS'

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PREFACE

Dear colleagues

This report — the ***Third Interim Report*** — analyses the feedback to a Questionnaire which was distributed to the legal marketplace in October 2019. The Questionnaire is reproduced in ***Appendix A***. The list of respondents who provided feedback on the Questionnaire is at ***Appendix B***. Submissions totalled 768 pages.

This Third Interim Report follows the ***First Interim Report*** dated 26 March 2019 dealing with 'Court Processes', and the ***Second Interim Report*** dated 1 July 2019, an 'Empirical Report' based upon a 4-month study of Disclosure Review Documents filed on the CE File in the London B&PCs.

The purpose of the Questionnaire was two-fold:

(1) to elicit feedback on the 'micro aspects' of the Disclosure Pilot in the Business and Property Courts of England and Wales, and on particular aspects of PD 51U which governs the Pilot; and

(2) to ask respondents their views in relation to the overall effect of the Pilot, given that it was *'intended to effect a culture change. The Pilot is not simply a rewrite of CPR Part 31. It operates along different lines driven by reasonableness and proportionality*': ***UTB LLC v Sheffield United Ltd*** [2019] EWHC 914 (Ch) [75] (per Sir Geoffrey Vos, Chancellor of the High Court).

Given that it is intended to be a 'living pilot', it is anticipated that feedback and comments received from those who are involved in the Pilot will be taken account of by the Disclosure Working Group, and where necessary, amendments to the content of PD 51U may possibly be made, as the Pilot progresses.

The tenor of the responses to the Questionnaire which prompted this report were frequently quite negative, and sometimes, emphatically, even vociferously, so. Perhaps this can be attributed to two factors:

(1) it is early in the life of the Pilot — and the outcome of some aspects of it, such as the impact upon overall costs, are just too early to tell; and

(2) several of those who have answered the Questionnaire have clearly done so because they had concerns, 'beefs', difficult experiences, and/or suggestions for change, and hence the statistics are undoubtedly reflective of that scenario.

Some hint of the concerns which come through the results to the Questionnaire was also present in the recent recent judgment of Sir Geoffrey Vos in ***McParland & Partners Ltd v Whitehead*** [2020] EWHC 298 (Ch):

> *[53] ... I do wish to emphasise the need for a high level of cooperation between the parties and their representatives in agreeing the Issues for Disclosure and completing the DRD. The Disclosure Pilot is built on cooperation as its terms make clear (see [2.3], [3.2(3)], and [20.2(3)]). This is not intended to be mere exhortation.*
>
> *[54] It is clear that some parties to litigation in all areas of the Business and Property Courts have sought to use the Disclosure Pilot as a stick with which to beat their opponents. Such conduct is entirely unacceptable, and parties can expect to be met with immediately payable adverse costs orders if that is what has happened. No advantage can be gained by being difficult about the agreement of Issues for Disclosure or of a DRD, and I would expect judges at all levels to be astute to call out any parties that fail properly to cooperate as the Disclosure Pilot requires.*
>
> *[55] The Disclosure Pilot is intended to operate proportionately for all kinds of case in the B&PCs from the smallest to the largest. Compliance with it need not be costly or time-consuming.*
>
> *[56] The important point for parties to understand is that the identification of Issues for Disclosure is a quite different exercise from the creation of a list of issues for determination at trial. The Issues for Disclosure are those which require Extended Disclosure of documents (i.e. further disclosure beyond what has been provided on initial disclosure) to enable them to be fairly and proportionately tried. The parties need to start by considering what categories of documents likely to be in the parties' possession are relevant to the contested issues before the court.*
>
> *[57] Unduly granular or complex lists of Issues for Disclosure should be avoided. Likewise, the models chosen should simplify the process rather than complicate it. Here model C was appropriate for an issue where vast documentation was likely to exist, most of which was irrelevant to the actual dispute, and model D was appropriate to the two central issues of breach and loss, in which there was significant mistrust between the parties. No Extended Disclosure at all was required for other issues.*
>
> *[58] Cooperation between legal advisers is imperative. The Disclosure Pilot must not be used as an opportunity for litigation advantage. If that is attempted, the parties responsible will face serious adverse costs consequences.*

As will be seen, the sentiments expressed by legal practitioners in this *Third Interim Report* do not necessarily coalesce with all of the hopes expressed in the above passage. In that regard, I trust that the information contained in the *Third Interim Report* is helpful and of interest,

Best wishes

Prof Rachael Mulheron
Professor of Tort Law and Civil Justice
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1. THE METHODOLOGY AND DATA SET

As the Disclosure Pilot neared the end of its first year of operation, the Questionnaire was prepared and distributed in October 2019 in order to assist with the monitoring exercise. For those who had experience of the Pilot (no matter how large or how small), they were invited to take the opportunity to provide feedback on their experiences. The deadline for responses to the Questionnaire was 29 November 2019.

Most respondents to the Questionnaire provided an overall, or representative, view of their fee-earners' experiences under the Pilot.

However in several of the Questionnaires, the responses per firm were divided amongst fee-earners, where each fee earner had different experiences and insights to relate about their involvement in the Pilot. Where this occurred, then in the statistical analysis contained in the report, these individual responses were each treated as *individual* statistics.

In total, when taking account of these individual responses, there were **71** responses to the Questionnaire.

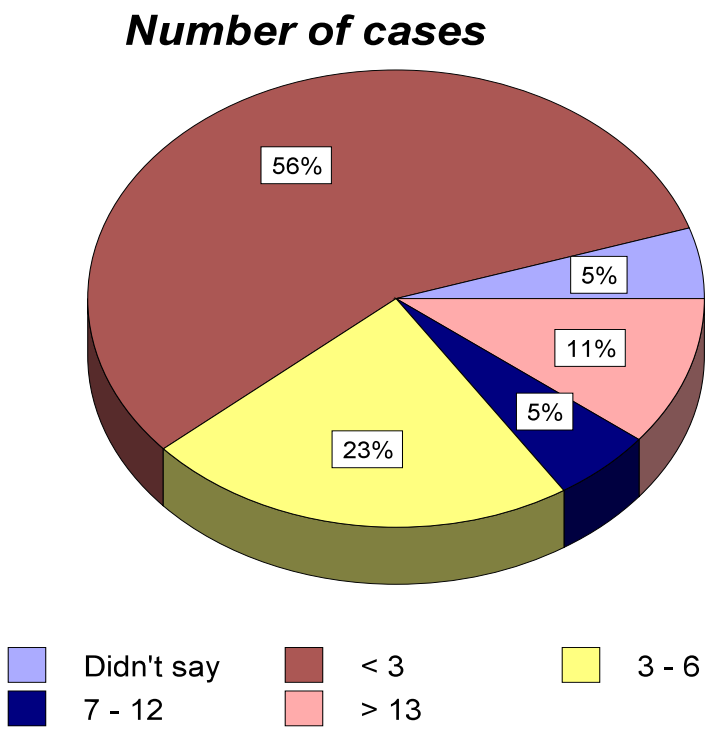
Some respondents provided relevant feedback via the DWG email address, rather than via the Questionnaire itself. Given that such feedback contained many points of importance, these responses are duly incorporated within this Report.

A. The number of cases the subject of respondents' experiences

The Questionnaire was distributed early in the life of the Pilot, and consequently, the number of cases of which the Respondents had direct experience under the Pilot was necessarily quite restricted. The majority of respondents had 1–2 cases thus far under the Pilot. Hence, the feedback should be read with that in mind.

Furthermore, the stage to which proceedings had reached varied enormously, from just sending out letters regarding the preservation of documents, to starting the completion of the Disclosure Review Document (DRD), to having participated in the first CMC, and beyond.

The graph overpage indicates the number of cases under the Pilot of which the respondents had direct experience:

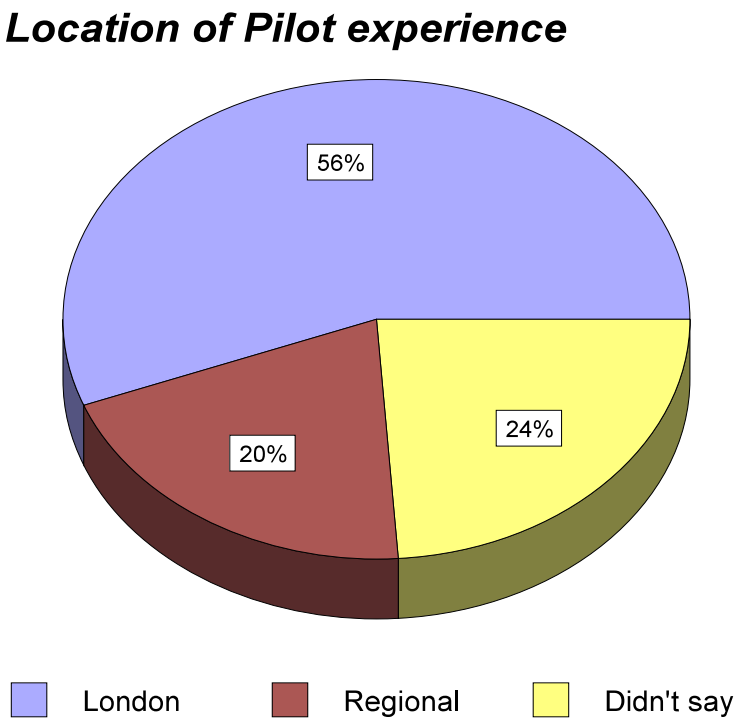


B. Location of Disclosure Pilot experience

By far the most common location in which respondents had been involved in the Disclosure Pilot was in London's B&PCs. However, some experience in regional centres such as Bristol, Manchester, and Leeds, was also noted.

From this Questionnaire analysis, it was **not** possible to discern any difference between the practices of the B&PCs in London and in the regional centres.

The graph overpage below illustrates where those who had experience under the Pilot were conducting their cases.



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2. INITIAL DISCLOSURE

The obligations in relation to Initial Disclosure are contained in PD 51U, [5]. This section of the report deals with how that obligation has been viewed by Respondents in five parts:

(A) reasons why Initial Disclosure has been dispensed with by parties' agreement;
(B) evaluating the threshold at which the obligation ceases;
(C) those who support the requirement of Initial Disclosure, and why;
(D) those who consider that the requirement of Initial Disclosure should be abandoned, and why; and
(E) Respondents' various suggestions for amendment of the drafting of para [5], and of Initial Disclosure generally.

Dealing with each in turn:

A. Reasons given for parties' agreements to dispense with Initial Disclosure

Under para [5.3(1)], the parties can agree to dispense with Initial Disclosure. The Table overpage summarises the various reasons cited by Respondents as having been relevant in cases conducted under the Pilot to date.

In those Questionnaires in which the question was answered, Respondents generally noted that the parties' agreement was subsequently endorsed by the court by consent.

Reasons for dispensing with Initial Disclosure by agreement

- ❑ the key documents required for Initial Disclosure had been provided at the pre-action stage, either through pre-action correspondence, or by disclosure before proceedings started pursuant to CPR 31.14–31.16
- ❑ several parties were to be joined to the proceedings after service of the claim form, and hence, the parties agreed to deal with disclosure at the CMC stage and not before
- ❑ it was '*not a document-heavy case*', and '*in the interests of proportionality, the parties considered that it would save costs and time for both parties if it was dispensed with*'
- ❑ the parties agreed that '*the volume of documents was too large*' to warrant Initial Disclosure (rather analogous to where the obligation of Initial Disclosure ceases, under [5.3(3)])
- ❑ the case was '*too complex to provide Initial Disclosure*'
- ❑ tactically (said one Respondent), one party may include duplicates, copies of the other party's correspondence, documents copied onto two pages when one would have done, multiple printouts of publicly-available documents (e.g., Companies House documents), in order to take the bundle over the 1,000 pages, making it tactically difficult for the other party, who must either agree to dispense under [5.3(1)], or apply to court for an order under [5.3(2)]
- ❑ the key documents had already been exchanged between the parties in a related arbitration
- ❑ in several transitional cases, where the Claim Form was served before the Pilot commenced, and where the defence and counterclaim were served after the Pilot commenced, Initial Disclosure was dispensed with, to achieve consistency of approach and/or because the parties agreed that disclosure should be solely dealt with by way of Extended Disclosure at the CMC — some Respondents criticised the lack of transitional provisions governing Initial Disclosure, and suggested that if the Pilot applies to new types of proceedings or is introduced into new courts, then the PD should include transitional provisions to clarify what should happen in these circumstances.

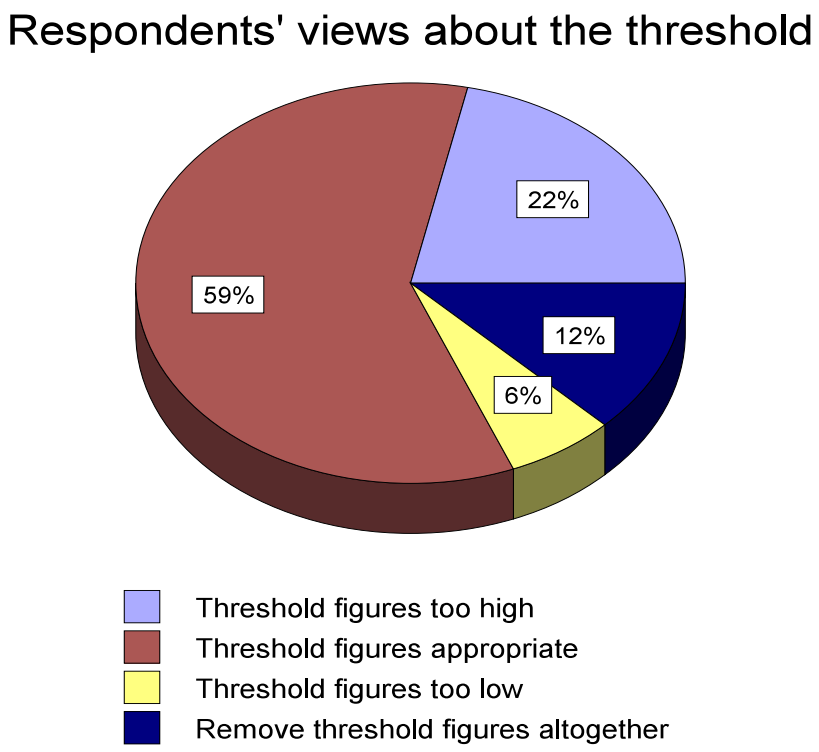
The first-mentioned was the most commonly-cited reason given by Respondents for the parties agreeing to dispense with Initial Disclosure. One Respondent noted that:

> '*it would be helpful if the Disclosure Models were aligned with the pre-action disclosure required by the PAP, so that Initial Disclosure (or even Model B disclosure) were given pre-action ... presently, there is a real risk of duplication of work complying with both*'.

This was a regularly-recurring theme across the Questionnaires.

B. Evaluating the threshold at which the obligation ceases

The threshold at which Initial Disclosure ceases is stipulated, in [5.1(3)], as the larger of 1,000 pages or 200 documents. Respondents were asked whether that threshold was appropriate and realistic. The graph below depicts, in percentages, the responses:



Teasing out Respondents' reasons for their views that the threshold in [5.3(3)] should be amended below:

Respondents' views	
'It's too low'	★ '*the limit is too low to be meaningful in document-heavy commercial disputes*'

'The thresholds should not apply', and/or [5.3(3)] should be deleted altogether:	★ including any sort of threshold '*can be used by parties to avoid Initial Disclosure'; that 'it is too easy to dispense with Initial Disclosure*'; and that this exception is simply being used where Initial Disclosure is *'not convenient*' — hence, only agreements to dispense, per [5.3(1)] or court orders, per [5.3(2)], should apply, and [5.3(3)] should be removed ★ although good faith is required, the exception in [5.3(3)] can '*easily be used as an excuse not to provide Initial Disclosure*', and hence, the exception should not have been included in PD 51U, [5.3] at all ★ '*there is merit in disclosing all documents*', and the thresholds '*should not be a consideration*' ★ if the documents exceed the thresholds, then '*solicitors should have an obligation to narrow the documents down to the most relevant documents, rather than dispensing with Initial Disclosure altogether*'
'It's too high'	★ '*it is entirely arbitrary*'; and should be reduced '*to, say, 500 [pages]*' ★ if the bundle of key documents '*exceeds more than 1–2 lever arch files, it becomes potentially disproportionate*', and '*disclosure up to that threshold is a very significant investment at this stage, and disproportionate*' ★ with the threshold stipulated so high, *'a party will likely have done significant work before it knows whether the limit is going to be breached*' ★ '*a page limit is less helpful than a document limit*', and the latter could perhaps be around 50 documents ★ '*if the intention of Initial Disclosure was to assist in cases where there is unlikely to be further disclosure than what has already occurred*', then the thresholds should be reduced, because that would '*remove a stage of work from cases where further disclosure is to be given*'

Finally, there were some criticisms as to how [5.3(3)] was drafted. One Respondent considered that the threshold was unclear, and that [5.3(3)] should be re-drafted. The view was put: when does the obligation to give Initial Disclosure cease — suppose that a party has 100 documents, each of 20pp each – totalling 2,000 pages. This would be more than the 1,000 pp of the threshold, but it would be fewer than the 200 documents mentioned —

> '*we think it is unclear on the current wording whether the party has or has not hit the threshold of "the larger of" 1,000 pp or 200 documents ... issues such as this should be capable of being resolved by the parties taking a reasonable and constructive approach [but] there is a risk that opponents may not take such an approach, and cost is likely to be incurred in corresponding on issues like this. It would therefore be helpful if the wording could be made clearer*'.

Other Respondents critiqued the requirement that Initial Disclosure requires solicitors to determine what documents the clients hold, and discount from this the documents that the other party already has, which (they said) followed as a consequence of [5.4(3)]. One said that this was '*hard to manage*', whilst another said that the calculation of the threshold was '*made overly complex*' by that paragraph. On this issue, one Respondent proposed this:

> *Assessing whether another party has particular documents takes time (and so incurs additional expense). Further, it is unfair that a party who has complied with its pre-action obligations and has already provided to the other parties 'key documents relevant to the issues in dispute' (pursuant to PD - Pre-Action Conduct and Protocols, para 6(c)) should, in effect, have a wider Initial Disclosure obligation than a party that has failed to comply with its pre-action obligations. We would suggest that such documents are not excluded for the purposes of calculating whether the threshold at which Initial Disclosure is not required has been met (although there should continue to be no obligation to provide copies of those documents).*

C. Reasons given for supporting the requirement of Initial Disclosure

Some Respondents were positive — indeed, some were very positive — about the introduction of a requirement for Initial Disclosure. The Table overpage summarises these views:

Why Initial Disclosure is a positive step	
❑	it focusses the parties' minds at the outset as to key documents, can assist parties to assess the merits of their cases, promotes a 'cards on the table' approach, and can help to promote earlier settlement discussions
❑	for a third party defendant, Initial Disclosure helped to fill in the gaps in knowledge about the Claim, and saved time and cost in having to ask for additional documents
❑	Initial Disclosure suits contractual disputes well, where there are a limited number of documents
❑	the largely non-prescriptive approach to the Initial Disclosure List of Documents is welcomed, because it '*allows parties to take a sensible approach, e.g., to list documents by category where appropriate, avoiding incurring costs on individually listing out large numbers of documents unless necessary*'
❑	the obligations entailed in Initial Disclosure is not excessively burdensome, given that Initial Disclosure does not involve a search obligation, and many of the key documents will already be in the possession of the other party
❑	whilst Initial Disclosure replicates the diclosure required under the pre-action protocols CPR 31.14, the requirement for Initial Disclosure '*ensures that any appropriate early exchange of key documents actually occurs*'

D. Reasons given for abandoning the requirement of Initial Disclosure

On the other hand, several Respondents considered that the requirement of Initial Disclosure should be dispensed with altogether, and that its introduction under the Pilot had been unworkable. About 25% of the Respondents fell into this category. The Table overpage summarises their views:

Why Initial Disclosure should be abandoned

- ❑ Initial Disclosure of 'key documents' was already completed by the parties at pre-action stage, such that '*parties are used to providing/requesting copies of key documents in accordance with the pre-action protocols*', per CPR 31.14. Hence, Initial Disclosure was '*just a duplication*'; did not allow the parties to obtain any further documents than pre-action stage revealed; and '*increased the time and costs burden on the parties*'
- ❑ Initial Disclosure '*made the process of preparing the pleadings a lot more stressful for clients and their legal representatives*'; '*was an unwelcome distraction when there was so much else to do at pre-issue stage*'; and was '*unworkable*'
- ❑ it is just another avenue by which to give rise to satellite litigation, and it can be difficult to know what the other party is going to plead, so early on in the proceedings
- ❑ in some cases, the parties' respective Initial Disclosure Lists of Documents were virtually identical, which meant that they were of limited value, but had taken time and costs to prepare
- ❑ if a party does not take a 'realistic view' as to what documents fall within Initial Disclosure, because they have disregarded what 'key documents' means, then the party provides every document in its possession by way of Initial Disclosure, '*which only front-loads costs*'
- ❑ for '*simple but high value claims*', say, a contractual debt claim '*in which there is no dispute over the amounts owed or the source of the obligation to pay these amounts*', then either entry to the Flexible Trials Scheme (where the Pilot does not apply), summary judgment, default judgment, admitted liability, or early settlement, were on the cards — if parties cannot agree to dispense with Initial Disclosure, then Initial Disclosure needlessly front-loads costs
- ❑ because of the need to submit the Initial Disclosure List of Documents, D required more time to prepare its Defence, 'which lengthened proceedings rather than shortening them'
- ❑ where service is likely to be problematical, a requirement to provide a large number of documents simultaneously '*would be an unnecessary hindrance*'
- ❑ the parties' understanding of what amounts to a 'key document' is so widely differing that it renders Initial Disclosure very problematical.

E. Criticisms of the drafting of the Initial Disclosure provisions, according to Respondents

A comment re the drafting of the threshold at which the obligation to provide Initial Disclosure ceases has been noted (please see p 11 above). Several Respondents took issue with other specific aspects of the requirement to provide Initial Disclosure. For the sake of thoroughness, these issues are listed below:

1. Dispensing with the Initial Disclosure List of Documents

It might be helpful (said one Respondent) to redraft the PD, para [5.1], to state that, even where Initial Disclosure is being provided, it is possible for parties to agree to dispense (just) with the Initial Disclosure List of Documents, as the production of such Lists may waste time and costs, especially where the key documents that would have been listed therein are mostly already exchanged.

2. Key documents

The phrase, '*key documents*' in [5.1], is not defined, and could helpfully be (said Respondents), to achieve more precision and certainty for the parties.

Re the phrase, '*the key documents on which it has relied (expressly or otherwise)*' in [5.1(1)] — it is unclear what 'otherwise' was meant to capture, and how the receiving party is able to assess whether the opposing party has complied with that requirement — further guidance would be helpful as to what categories of documents are intended to be covered by that word, 'otherwise'.

3. Timings

A few issues regarding the timing of Initial Disclosure were raised by Respondents. To summarise:

i. It is not clear, from para [5.1], what the time frame is for the Initial Disclosure List of Documents, if the Claim Form is served *without* Particulars of Claim, and whether the List of Documents can be delayed, and served with the Particulars of Claim.

ii. Where a party intends to propose to dispense with Initial Disclosure, the rules should provide that such a request can accompany the statement of case, rather than the statement of case being accompanied by the Initial Disclosure itself. Currently, a party is required to provide Initial Disclosure with its particulars of claim/defence, per [5.1], so would technically be in breach of that obligation if the parties had not agreed (or the court ordered) prior to that date that Initial Disclosure is not required. A party may well not be in a position to enter into (and finalise) discussions on whether Initial Disclosure is required or not, prior to the statements of case being served.

iii. In one case, the defendant did not provide Initial Disclosure with its Defence, where none of the exceptions in [5.3] were met — but D asserted that the Reply as between C and D was no longer '*the final statement of case*', and that there would be a Reply in the additional claim between D and a Third Party — in which case, when must D comply with the obligation of Initial Disclosure?

iv. In relation to the postponement of the claimant's Initial Disclosure obligation where D is served out of the jurisdiction (per [5.6]), one Respondent suggested that D's Initial Disclosure obligation should also be postponed until after C's Initial Disclosure has been provided.

4. Searches

Re [5.4(1)] (said one Respondent): it is difficult to know how far parties need to go to compile the Initial Disclosure List of Documents, e.g., where the legal representative knows that background documents exist, but are presumably not obliged to enquire after those documents at this stage.

Also, re [5.4(2)]: what level of detail is required when describing the searches undertaken — whether a high-level approach or a greater level of detail is required — is unclear from the para, especially when 'briefly' is mentioned — further guidance on the details required would be helpful.

5. An ongoing obligation?

One Respondent noted that whether Initial Disclosure is an ongoing duty, or is a one-off duty arising at the time that statements of case are served, is unclear, and should be clarified. What of 'key documents' that come to light after the statements of case are served, but before any further disclosure is required? Do those fall outside of the Initial Disclosure obligation? The Respondent suggests that they should lie outside, as an ongoing duty would create an unnecessary and inefficient disclosure burden, '*when parties are focusing on agreeing and producing Extended Disclosure and any known adverse documents*'.

6. Confidential documents

One Respondent noted that a practical problem arises '*where information which falls within the scope of Initial Disclosure is subject to confidentiality restrictions (particularly where obligations are owed to third parties) — if a confidentiality regime needs to be in place, that means that it is effectively impossible for the claimant (in particular) to comply.*' The Respondent suggests that this scenario could be explicitly dealt with in para [5], for greater certainty.

KEY SUMMARY POINTS

✓ a majority of those who answered this question (59%) considered that the threshold at which the obligation of Initial Disclosure ceases (the larger of 1,000 pp or 200 documents) was appropriately set;

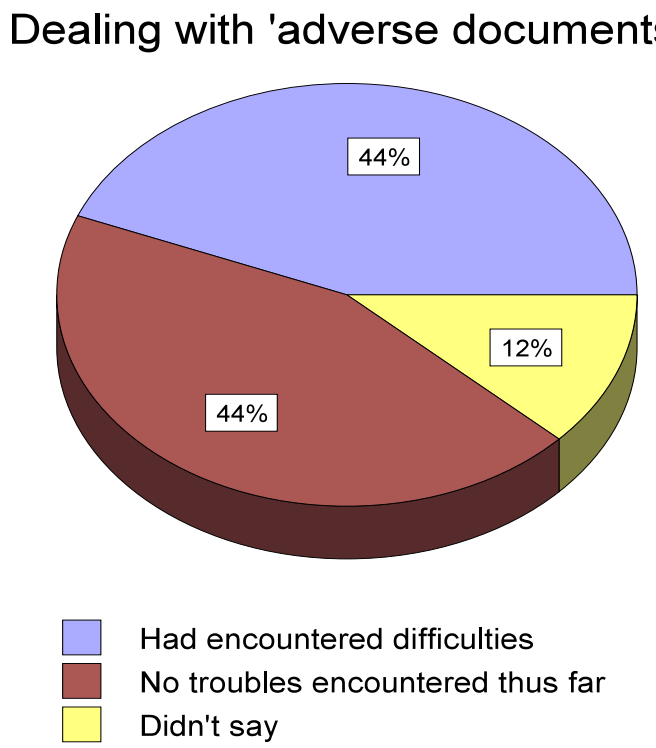
✓ however, there were very mixed views as to whether this permission to cease the Initial Disclosure obligation should be contained in [5.3(3)] at all, or whether the exceptions to Initial Disclosure should be limited to where both parties agreed [5.3(1)], or where a court makes such an order [5.3(2)]. That is, some Respondents considered that the exceptions to Initial Disclosure should be limited to two, and not extended to three. Given that some Respondents state that their reason for agreeing to dispense with Initial Disclosure was the 'volume of documents', the necessity for [5.3(3)] is perhaps undermined;

✓ there are also very mixed views as to whether Initial Disclosure is required **at all**, or whether the request/provision of documents pursuant to pre-action correspondence or via disclosure under CPR 31.16 (which is preserved under the Pilot in accordance with PD 51U, [1.9]) suffices. Many Respondents considered that Initial Disclosure duplicated previous disclosure already undertaken, and hence, unnecessarily front-loaded costs. Others, however, saw some benefit in the Initial Disclosure obligation. This aspect proved to be particularly contentious;

✓ finally, there were a number of drafting issues to do with the requirement for Initial Disclosure, raised by Respondents, which may be worthy of consideration. These matters relate to: the definition of 'key documents'; the 'searches' envisaged; what if a document is confidential; whether sanctions for non-compliance could be strengthened; whether Initial Disclosure was an ongoing or a one-off obligation; and whether the 'List of Documents' itself could be dispensed with.

3. ADVERSE DOCUMENTS

It was evident, from the Respondents' answers, that their experiences relating to adverse documents had been less-than-straightforward. Of the 71 responses, 44% had encountered an issue with this, either in relation to their own obligation to disclose, or with respect to the opponent's obligation.



According to the Questionnaire responses, there have been at least seven (7) issues associated with the disclosure of adverse documents which arose from the Respondents' experiences of this issue. Teasing these out separately:

A. The definition of an 'adverse document'

Under para [2.7], a document is 'adverse' if it *'contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute.*'

Contrasting views

Many Respondents were critical of the term, 'materially damages', calling it '*highly subjective*', '*unhelpfully debatable*', and '*not easy to explain to a client*'. One Respondent noted that there was a '*lot of discussion*' surrounding what constituted an 'adverse document', which came to the fore when the parties set about preparing the DRD for the CMC.

Other Respondents, however, were more philosophical, noting that similar issues commonly arose under the former C PR 31 regime, and in arbitrations, and that they did not envisage any more difficulties in identifying adverse documents under the PD 51U regime.

Issues for dispute versus issues for disclosure

Some Respondents raised a particular drafting point associated with the phraseology that a document 'contradicts or materially damages contention or version of events ***on an issue in dispute***', per [2.7].

The point was made that issues in dispute may well be wider than issues for disclosure, as [7.3] makes plain. That is, issues for disclosure does not extend to every issue which is disputed in the statements of case. Hence, it is unclear (said these Respondents) whether the duty to disclose adverse documents relates to the wider 'issues in dispute', or only relates to the narrower 'issues for disclosure'. These Respondents formed the tentative view that the obligation to disclose adverse documents relates to the issues in dispute, which are wider than the issues for disclosure.

Respondents also noted that the issue becomes 'particularly unclear' under the Model D Extended Disclosure model. For example, paragraph (1) of [8.3], under 'Model D', states that 'a party shall disclose documents which are likely to ... adversely affect its claim or defence ... in relation to one or more of the [narrower] Issues for Disclosure'. However, paragraph (4) appears to contradict this, because it requires a party to comply with the duty under [3.1(2)] to disclose known adverse documents — and that duty in [3.1(2)] ties back to the definition of an 'adverse document' which relates to the wider 'issues in dispute'. Another Respondent noted that the lack of clarity has led to increased costs, because if disclosure of adverse documents extends to all the issues in dispute (and not just the issues for disclosure), then:

> *this interpretation would require a document review team to review for "adverse" documents against the Issues for Disclosure pursuant to the Model D test, and also to review for "adverse" documents against all issues in dispute as set out in the parties' statements of case, in order to comply with the duty in [3.1(2)]. Such an approach complicates the review exercise, thereby making it more time-consuming and expensive than*

Standard Disclosure. In essence, the parties have to do 50% of a standard disclosure exercise (in relation to adverse documents) and 50% of Extended Disclosure. We consider that the rules in this regard require clarification and amendment.

B. How to tell whether an adverse document is '*known*'

An adverse document is 'known' if the disclosing party is actually aware that the document is adverse and within its present or past control, and knows that '*without undertaking any further search for documents than it has already undertaken or caused to be undertaken*', per [2.8].

For corporations, para [2.9] clarifies that what matter is whether '*any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case ... is aware*'.

Several issues pertaining to the meaning of an 'adverse' documents were raised:

Respondents' views	
i.	Some Respondents expressed misgivings as to what level of searches are really required in order to discharge this obligation to disclose 'adverse documents'. One Respondent noted that '*the issue is really the nervousness over the depth of the search which is required in order to find them at such an early stage [which] has the effect of front-loading costs*'.
ii.	Several Respondents noted that the subjective nature of the definition of a 'known adverse document' '*will cause a great deal of difficulty*'.

ii.	Some Respondents were concerned about how the requirement to disclose known adverse documents really applied to large multi-national companies, despite the provisions of [2.9] above — that '*provisions around knowledge are sometimes difficult to apply in a corporate context*', or that [2.9] '*does suggest some form of enquiry, which will be particularly relevant in relation to corporate awareness*'. Hence, some particular enquiries by Respondents, via the Questionnaire, were as follows: – '*is the test that the document should be sat upon the desktop of the individual who is providing instructions and therefore no search is required, or would this encompass a search of that individual's inbox or computer?*' – presumably some enquiries to appropriate people within a corporation (or who have left) will be necessary to meet the requirements of [2.9]: but '*if the enquiry highlights further adverse documents, is a search then required in relation to those documents? If so, how does that fit with the definition of "known adverse documents" which expressly states that no further search is required?*' – '*if a known adverse document exists, but those with "accountability or responsibility' have forgotten about it, they face the risk of being accused of having deliberately concealed it if it later comes out. In order to protect their position, the relevant individuals are likely to want a search carried out in order to identify such documents, even if the model [Models A or B] chosen does not require this*.
iii.	One Respondent cited that a problem had arisen in one of their cases — known **to whom**? The opposing party refused to disclose a document referred to in a witness statement which clearly met the definition of an 'adverse document', but there was a dispute as to whether the document was 'known' to the party's solicitor, or just known to the party, and which knowledge — the solicitor's or the party's — was relevant for the purposes of [2.8].
iv.	One Respondent raised the problem of what is to happen, if a case can be limited to Initial Disclosure or Model B — that means that the parties should not be required to carry out any further search for documents — but, '*the subjective nature of the definition of known adverse documents means that parties are likely to want to carry out such a search, despite the definition stating that this is not required*.'

C. The starting point: *When* adverse documents have to be disclosed

Quite a number of Respondents expressed concerns as to when adverse documents needed to be disclosed. Some commented that '*it is unclear on the wording of the rules governing the Pilot as to when the duty arises*' and '*is ambiguous*'.

One view: The obligation to disclose adverse documents arose at the point of Initial Disclosure, primarily because, under [3.1(2)], it appeared that this obligation was due to arise from the commencement of proceedings, i.e., '*once proceedings have commenced against a party or by a party and in accordance with the provisions of the Pilot scheme*'. This wording could be interpreted to mean that adverse documents must be disclosed immediately once proceedings have commenced.

> Some Respondents were very concerned at this possible interpretation, noting that:
>
> *We are not suggesting that parties would withhold adverse documents (in principle), but in practical terms parties are discouraged from early case analysis if they believe that disclosure of any adverse documents has to happen at a very early stage (i.e., if [3.1(2)] is read to mean once proceedings have commenced).*

The other view: If an order for Extended Disclosure is made, then adverse documents should be disclosed at the time ordered for Extended Disclosure, per [9.1]; and if no order for Extended Disclosure, then adverse documents should be disclosed within 60 days after the CMC, per [9.2]. Some Respondents noted that, in their experience, all relevant documents, whether adverse or not, were disclosed at the Extended Disclosure stage; and that in practice, parties '*do not appear to be disclosing known adverse documents at the stage of Initial Disclosure, mainly because Initial Disclosure in medium and large-scale cases is normally followed by Extended Disclosure*'.

> Some Respondents were very concerned at this possible interpretation, noting that:
>
> *If known adverse documents must only be disclosed with Extended Disclosure or by a longstop date after the CMC, then in large and complex cases, this could be a long time after the case is filed and pleadings settled. In the meantime, a party can conceal documents that undermine its position. In contrast, an obligation to disclose known adverse documents with Initial Disclosure would encourage a "cards on the table" approach ... more scope for earl settlement ... and would also help to promote a perception of fair and open justice in English proceedings. Also, an obligation along these lines would not require additional searches because it only applies to adverse documents that the party is aware of at the time.*

DWG clarification: Some Respondents commented that it had become clearer, from commentary, and from various events hosted by the DWG, that the obligation to disclose known adverse documents must be complied with contemporaneously with Extended Disclosure (or within 60 days of the CMC), and not earlier at the point of Initial Disclosure.

However, these Respondents noted that further clarity would be beneficial. Some noted that: it would '*be helpful if this wording could be clarified*' in both para [5] and para [3.1(2)]; that this amounts to '*informal guidance only, and that further clarity on the rules is required*'; that *'there is currently no authoritative source for this clarification*'; and that if there is no obligation to provide disclosure of adverse documents at Initial Disclosure stage, then that should be made clear.

Continuing problems: One Respondent noted that the issue remains a 'live' one, in that its legal team, and that acting for the opposing party, had a dispute about this point early in the life of the proceedings, but that the point was dropped prior to the CMC.

Another noted that 'there have been arguments as to whether the obligations to disclose known adverse documents bites as soon as proceedings commence, or only when disclosure otherwise has to be given.'

Another noted that a judge had ordered that known adverse documents should be disclosed by the time of the first CMC, thereby indicating some confusion and uncertainty on the point.

Positive reaction: However, some Respondents were very positive about this obligation to disclose adverse documents early in the piece:

> *It can be a very effective and powerful tool where it is obvious that there are documents available which may be adverse. It also has the effect of discouraging parties from issuing altogether, where they are nervous of needing to disclose those documents in short order.*
>
> *The stage at which known adverse documents must be disclosed has not been an issue, and there is the continuing obligation to disclose.*

On this latter comment, however, there has been some further consternation evident from the Questionnaire responses, as discussed in the following section.

D. The ending point: The Disclosure Certificate

When does the obligation to disclose adverse documents end, if ever? Is it a continuing obligation whilst the proceedings are on foot, or does it end with the issue of the Disclosure Certificate?

One Respondent noted that '*there is an inconsistency between the ongoing duty to disclose adverse documents, and having a defined date for their disclosure*'. This point is teased out by another Respondent as follows:

> *PD 51U [9.2] states that a party must within 60 days of the first CMC provide a Disclosure Certificate certifying that all known adverse documents have been disclosed. This appears to imply either all known adverse documents should have been disclosed by this point without reference to a deadline, or in the alternative, be disclosed at this point. This seems to directly contradict the duty set out in [3.1(2)] [which imposes a duty on the parties to disclose known adverse documents unless they are privileged] and [3.3] [which states that all the duties in [3.1] are continuing duties] …*
>
> *Furthermore, [9.2] states that this is only a requirement if Models B–E are ordered. If the court orders disclosure under Model A only, it is not clear at what point a Disclosure Certificate in relation to known adverse documents is required.*
>
> *It would be preferable to make clear that all adverse disclosure should be given with the main round of disclosure (unless it also qualifies as Initial Disclosure), except where it only comes to light afterwards. At the moment, it is uncertain and therefore difficult to deal with in practice. Alternatively, the PD or court could set a deadline for provision of adverse documents, once pleadings have closed and the parties have determined what types of disclosure are required.*
>
> *On timing under [9.2], if no CMC is listed, as the parties were able to agree directions: what would be the trigger for the Disclosure Certificate? Should this be dealt with in the Directions Order by a specific date?*

On the issue of the Disclosure Certificate, suppose that they have duly been completed and exchanged, under [9.2], certifying that all known adverse documents have been exchanged. One Respondent queried whether, '*in the event that additional disclosure comes to light after the exchange of disclosure certificates, do* further certificates need to be prepared, or will an additional list of documents (and copy documents) suffice?'

E. Litigants in person

One Respondent noted that LIPs '*particularly find it almost impossible to identify known adverse documents, since they commonly have an explanation as to why a document is not, in fact, "adverse" to their case*'.

F. Patents cases

Para [1.5] of PD 51U seeks to clarify the application of PD 51U to patents cases, by providing that PD 63, paras [6.1]–[6.3] '*will continue to apply under the Pilot with the following modification: unless the court expressly orders otherwise, no provision in this PD nor any disclosure order made under this pilot will take affect as requiring disclosure wider than is provided for in PD 63, [6.1]*'.

However, several Respondents considered that it was unclear as to how the requirement to disclose adverse documents interacts with the disclosure regime under CPR 63 in patents cases, and that PD 51U did not currently address that. One noted that '*it is unclear whether adverse documents should only fall within the window for disclosure set out in CPR 63.6.1(2), notwithstanding the wording in para [1.5]. If there are known adverse documents outside the window, it would seem unreasonable to not disclose these*'; whilst another noted that '*if there is a known adverse document but it would fall within the scope of a party's disclosure obligations under PD 63, [6.1]–[6.3], PD 51U seems to be unclear as to what is required*.'

G. What if no Initial Disclosure?

Some Respondents noted that, if Initial Disclosure is not being provided (because, say, one of the exceptions to [5.3] applies), then the position needs to be clarified. The obligation to disclose known adverse documents would not have arisen, under the former CPR 31 regime, until standard disclosure was provided, and '*this would appear to be the case under PD 51U as well*' (said some Respondents), where Initial Disclosure was dispensed with.

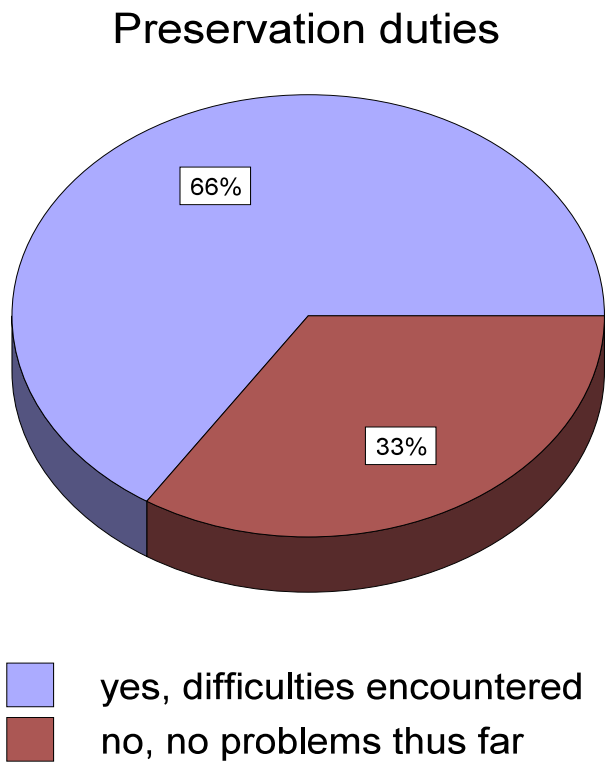
KEY SUMMARY POINTS

- ✓ a significant number of Respondents (44%) have experienced difficulties with the concept or the process governing adverse documents;
- ✓ how to judge whether a document 'materially damages' the disclosing party's case was said to be highly subjective and difficult to apply;
- ✓ whether (in order to be adverse) the document must materially damage, etc, re an 'issue in dispute' at trial, or more narrowly, re an issue for disclosure, was unclear on the drafting (and matters in practice), said several Respondents;
- ✓ how to tell whether an adverse document was 'known' was said to be difficult, *viz*, what level of searches are required to discharge that obligation is unclear; how that requirement practicably applies to corporations, and to those with 'accountability and responsibility' is said to be awkward; and some asked, 'known to whom', just to the party, or to the legal representative too;
- ✓ some Respondents queried what obligations to disclose adverse documents arise when disclosure is limited to Initial Disclosure or Model A or Model B, as technically, that means that the parties should not be required to carry out further searches for documents;
- ✓ re the starting point, there was uncertainty among Respondents as to whether the obligation to disclose adverse documents arises at the point of Initial Disclosure, or later when Extended Disclosure is ordered (or, if none is ordered, then within 60 days of the CMC);
- ✓ re the ending point, there was also uncertainty as to whether the obligation to disclose adverse documents ends with the issue of the Disclosure Certificate, or whether it runs for the entirety of the proceedings;
- ✓ disclosure of adverse documents in Patents cases, or where LIPs are involved, or if no Initial Disclosure is ordered at all, were also mentioned as being contentious.

4. PRESERVATION OF DOCUMENTS

The obligations upon legal representatives with respect to the preservation of documents are outlined in PD 51U, [3.2(1)] and [4]. Respondents were asked whether they had encountered any difficulties or issues in complying with these obligations, and in particular, whether they had encountered any difficulties in notifying former employees, agents, or third parties, of their obligation to preserve documents:

As the graph below depicts, the majority of Respondents had encountered difficulties. Indeed, for this section of Questionnaire, responses were generally lengthy and critical.



The various — and wide-ranging — details of the concerns raised by Respondents are expanded upon in the following tables.

A. The types of difficulties encountered — strict versus reasonable

One key point made by several Respondents was that it should be enough for the lawyer to take 'reasonable steps' to contact ex-employees, agents and third parties, and perhaps with *'further guidance on what is "reasonable"'*. Several Respondents considered that a reasonableness/proportionality test should be included for the obligation to contact ex-employees under [4.2(2)], as it seems to be for agents/third parties under [4.2(3)]. One Respondent noted that, in its strict form as currently drafted, the obligation to contact ex-employees was too onerous:

> *One of our clients had difficulties confirming that they could comply with the obligations in [4.2(2)]. This case spans decades, and therefore employees from the 90s, even the 80s, are/could be relevant. It took quite a while for the client to find current contact details for certain of such former employees, and we could not advise them, in the meantime, that it would be okay if they could not find these, as it is not obvious what the position is, if a party is unable to comply with [the strict obligations in] para [4.2(2)].*

One Respondent suggested that the notification requirement for former employees could be redrafted as follows:

(2) an obligation to take reasonable steps to send a written notification in any form to all:

(a) relevant employees, and
(b) relevant former employees who are likely to hold key documents on behalf of the employer, which are materially relevant to an issue in the proceedings, the copies of which the employer does not otherwise hold.

B. The types of difficulties encountered — for lawyers and for their clients

For those who have had difficulties with the obligations to preserve documents, some noted that para [4] '*is drawn too widely and too bluntly*'. For ***the Respondent lawyers, and their clients***, the problems were variously stipulated as follows:

Problems with preservation duties – from the lawyer's or client's perspective

- ❑ ***re privacy***: clients may be reluctant to notify the fact that they are in a dispute to ex-employees; the obligation to notify can mean the '*unnecessary disclosure of potentially confidential and sensitive information*' to recipients, who may not be involved anyway. Preservation notices have 'very little return', as the notices 'need to be drawn quite widely on the issues, being issued so early in the case', and clients are often reluctant to bring non-parties over whom the client has no control into the proceedings

- ❑ ***unco-operative conduct by the other side***: the opposing solicitors '*forgot*' to comply with the duty to preserve, meaning that 9 months worth of documents were '*routinely destroyed*' — and without an effective sanction

- ❑ ***front-loading:*** the preservation obligations front-load costs unnecessarily and disproportionately, because complying with the obligations costs a lot in fees and management/administration time — it can be very difficult to find these parties, plus voluminous correspondence can be required — and that time/cost would be better spent in pre-action correspondence and attempts to resolve the dispute, rather than 'tooling up' for litigation

- ❑ ***settlement likely - what's the point?***: '*many clients are confused , or think that it is unnecessary, when asked to preserve or ring-fence documentation so early in the dispute, especially when most cases settle well before litigation*' – clients '*think that it is an unnecessary cost burden*'. Some Respondents noted that sometimes, unilateral decisions were taken by them not to contact former employees, agents, or third parties, where those individuals were very unlikely to hold relevant documents

- ❑ ***wider***: the obligation on lawyers to notify third parties + ex-employees appears wider than the standard disclosure obligations (i.e., those relevant documents in the control of the parties)

- ❑ ***freezing and search proceedings:*** the obligations in PD 51U do not take heed of urgent/without notice applications in freezing or search proceedings, where the claim is issued and heard quickly, but where there is no wish to tip off employees, former employees, and others connected with a business

- ❑ ***unnecessary – the client has them already***: the client will often have access to copies of ex-employees' electronic documents, so that searches of those documents would be '*a reasonable alternative to sending written notifications*'. In that scenario, PD 51U, [4.2(2)], could be clarified to state that there are no 'relevant employees' to whom notification must be given. In this scenario, arguably there are not '*relevant former employees*' under para [4.2(2)], because whilst an ex-employee may have been 'relevant' to the events the subject of the dispute, that ex-employee '*may not hold any documents or have any knowledge of the events, over and above that held by current employees*' — so, they are not ex-employees who are 'relevant' in that scenario. Several Respondents suggested that the obligation should be watered down, so that preservation notice should only be required, *'if the party knows or has reason to suspect that a former employee would hold documents which are additional to those already held by the party, and which are potentially relevant to the dispute*'

Problems with preservation duties – from the lawyer's or client's perspective (cont'd)

- ❑ ***tangential or no involvement, so meaningless***: the obligation to notify is '*meaningless*' (said some Respondents) if ex-employees and third parties are not involved in the issues in dispute. One Respondent noted that the increased level of prescription and the obligation to notify all relevant and former employees meant that the client sent preservation notices '*to approximately 40 former employees who had some level of involvement in the transaction that was the subject of the dispute, as well as approximately 100 current employees ... this was disproportionate, given how tangential those individuals were to the transaction in question and the subsequent dispute*'

- ❑ ***what happened to the letter?*** it is difficult to know whether a notice has been received – *'very little guidance is given on how far a party needs to take notification. Should acknowledgement be requested? Where we have asked for that, many people have refused*'. Further, '*the PD is unclear as to what efforts a client is required to make before its obligations are discharged*'

- ❑ ***settlement could be put at risk***: 'where settlement discussions are ongoing, wider disclosure to third parties could jeopardise those talks'

- ❑ ***notices to former lawyers too***: it is not only former employees *of the client* who must receive these preservation notices – these obligations also appear to apply to former employees of the law firm which is representing the client, from a combined reading of [3.2(1)] and [4.2(2)]. One Respondent noted that, '*on a strict approach, solicitors need to get written confirmations of preservations notices having been sent to employees and ex-employees in the law firm too*'. Another Respondent notes that the DWG has indicated that these obligations would only be triggered in '*exceptional circumstances*', but that greater clarity in the rules would be highly desirable

- ❑ ***what can/should the lawyers do?*** One Respondent noted that '*legal representatives can only advise and warn, they cannot physically preserve documents not in their possession*'. The drafting '*suggests that the legal representative is acting as agent for the client, and hence, the legal representative's obligations relate to documents within the legal representative's control, rather than in the client's control*', and that this could be clarified

- ❑ ***disproportionate***: the preservation duties act as a positive disincentive to litigation, said some Respondents, and that preservation duties 'in practice, limited access to justice; this is particularly the case in cases of low to modest value, or where the litigants are SMEs, OMBs or individuals where the obligation is entirely disproportionate'

- ❑ ***an ex-employee as the opposing party/with a competitor***: where a former employee is a party to the proceedings, or even now employed by the client's competitor, that creates difficulties under the preservation duties — '*is compliance even necessary on those scenarios*'?

- ❑ ***counts against large companies***: '*there is a feeling that preservation duties are causing clients a lot of work, and that there is an unlevel playing field, with reputable organisations put to a lot of trouble and cost*'

Problems with preservation duties – from the lawyer's or client's perspective (cont'd)

- ❑ ***too premature***: '*when we write to the third parties and agents pre-claim, the latter is inevitably going to be quite vague, and bound to be met by a request, "what documents do you think that we are holding on your client's behalf?"*' — one Respondent notes it be to ironic, that '*the scope of preservation notices is generally very wide, given the whole idea of the Pilot is to narrow disclosure*'

- ❑ ***relating to group companies***: *'if a claim has been brought against the incorrect company within a group, does the solicitor only notify the employees of the company that the claim was incorrectly brought against, knowing nothing relevant will come up; or do you also notify the company that you know will eventually be identified as the correct party to bring a claim against?*'

- ❑ ***third party disclosure possible***: preservation notices to agents, ex-employees or third parties are onerous and unnecessary, *'when there is an ability to apply for third party disclosure in any case*'

- ❑ ***timing***: when does the obligation to contact ex-employees, re preservation of documents, arise? One Respondent said: 'if you act for a potential defendant, and the other side has intimated there may be a claim, but not as far as a letter of claim, should the client be contact ex-employees at this stage?'

Some problems were also cited by Respondents, re the documents that have to be signed in relation to the preservation duties imposed by PD 51U:

Written confirmation requirements

- ❑ re the written confirmation that the preservation duties have been complied with, as required by [4.5], can a legal representative sign that on behalf of its client, or does that have to be signed by the client alone? Given that '*the confirmation under [4.5] is in fact two confirmations — one that the client has complied with its duties, and one that the legal representatives have complied with theirs — we envisage that the legal representative would be able to confirm both*', but clarification would be desirable

- ❑ what is the sanction for the law firm, if they cannot obtain the confirmation required by [4.5]? One Respondent notes that '*it would have been helpful for us to be able to explain this to a client*'

- ❑ the Disclosure Certificate in App 4 appears to assume that the party is an individual, but it may be a corporate entity — so that (A)–(F), including the preservation documents, '*can create difficulties, especially in circumstances where some disclosure tasks (particularly in a large corporate entity) may have been delegated*'

C. The types of difficulties encountered — for recipients of the notices

Some of the identified problems with the preservation duties pertain specifically to ***the intended recipient*** of the notices:

Problems with preservation duties – focussing on the recipient

- ❑ ***scary or irritating***: in some cases, notification has an adverse effect on recipients, in that '*people are annoyed or scared by the formality of the request and refuse to co-operate*'

- ❑ ***ignorance***: if the recipient of the notice is a company in-house lawyer, *'the response is likely to be sensible*', but other recipients '*need educating on what PD 51U says first*'. Further, '*we felt that there was a risk that we were asking former employees to make value judgments around what was adverse and what wasn't*'

- ❑ ***hard to find***: many former employees are very hard to track down, especially where (1) the case has a historical element, (2) there is a high employee turnover at the client's, or (3) ex-employees left the client on bad terms. And even if these parties are found, they may (in a construction dispute, say) *'have no real interest in participating in anything to do with a site/project that completed several months (or years) ago*'

- ❑ '***leave clean'***: [this point was also made previously] some companies have policies that mean that relevant ex-employees should hold no data following the termination of their employment, nor take any such data with them, so *'sending notification in those circumstances may seem unduly onerous to the client, and lawyers would welcome pragmatic guidance on the extent to which notification is required*'. And such notices may seem completely unnecessary to the ex-employee who receives them. One Respondent put it that, '*former employees should have a reasonable expectation that their ex-employer would not be sending them legal notices several years after they have left that employment*'. Another observed that '*clients are amending their exit procedures to get leavers to confirm in writing that they have no documents, but it will take some years before clients will be able to rely on those confirmations to enable them to certify, in the Disclosure Certificate, that the client has complied with [the relevant preservation duties]*'

- ❑ ***data protection***: PD 51U comes at a time when '*third party corporate entities are increasingly cautious about data protection issues. Concerns about preserving data, and allowing others access to that data, have led to difficult conversations*'

- ❑ ***not IT savvy***: recipients of preservation notices may not be 'tech savvy' in relation to the IT aspects of document preservation, and moreover, email accounts are not always preserved

- ❑ ***how to find?*** sending preservation notices to those in large organisations can be very problematical, where there are many departments, across many jurisdictions

- ❑ ***lost their impact***: some noted that '*no relevant documents were returned from those who received preservation notices*', and they had become the norm, and '*for no or limited benefit*'

D. Interplay with other regimes

Finally, there were also some concerns expressed as to how the preservation obligations interplay with other regimes:

Problems with preservation duties – interplay with other regimes

- ❑ if it is agreed that a contractual debt claim is suitable for the ***Flexible Trial Scheme***, then it is unclear whether or not the parties are still required to comply with the pre-action protocols, including the obligations re preservation, under PD 51U — '*it may therefore be disproportionate for our client to have to comply with PD 51U, in circumstances where the claim is ultimately dealt with by the FTS, and where our client reasonably anticipated that outcome at an early stage*'

- ❑ in a ***patents case***, there was concern that the interaction between CPR 63 and PD 51U had not been given adequate consideration re the obligation to preserve documents; another Respondent noted that '*many such employees could have left the company some 15+ years prior (taking into account the timing for disclosure in patent litigation set out in window for disclosure pursuant to PD 63.6.1(2)*'

- ❑ ***insolvency practitioners*** may have acted in different capacities, so re the preservation duties re agents and third parties, the details can be quite difficult — '*we have to think about in what capacity third parties might be holding documents. You may get different answers, depending upon the type of appointment. And conflict issues arise.*'

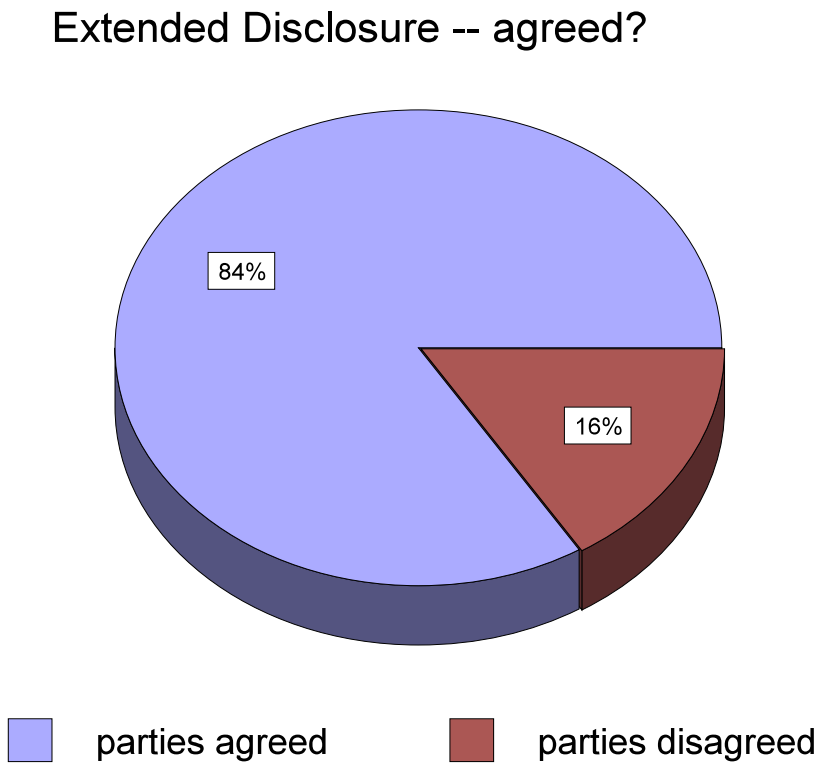
KEY SUMMARY POINTS

- ✓ the majority of Respondents (66%) had experienced difficulties with the obligations to preserve documents which are contained in the Pilot;
- ✓ many Respondents considered that the duty to notify former employees should be subject to a reasonable/proportionality test, i.e., that the parties were only obliged to take reasonable steps to send a written notification to those former employees, much like the reasonable obligation to notify agents and third parties — Respondents queried the inconsistency;
- ✓ there were numerous concerns expressed about the preservation obligations which are imposed on lawyers and their clients — including (but not limited to): the fact that a client may wish to keep private from a former employee the fact that the client is in dispute; their impact on settlement; the client probably has the documents already and hence, why the obligation to contact the former employee?; some former employees, third parties, etc, are entirely tangential to the dispute at hand; the notices must be sent when the issues can only be stated in the broadest of terms; and the frontloading of costs that the obligations impose;
- ✓ concerns about the sanctions imposed, if the legal representative cannot obtain a written confirmation that the preservation obligations were complied with, were raised; and who signs that, the legal representative or the client?
- ✓ several difficulties caused to recipients of those preservation notices were raised — including (but not limited to): the irritation or alarm caused; such notices are unnecessary where employees 'leave clean' of any data; former employees are often hard to track down; it requires former employees to make value judgments on often very little information; and the sometimes conflicting obligations surrounding data protection and who properly may obtain access to data;
- ✓ how the preservation duties interact with the (1) Flexible Trial Scheme, (2) patents cases under PD 63, and (3) the practices of insolvency practitioners, were also at issue.

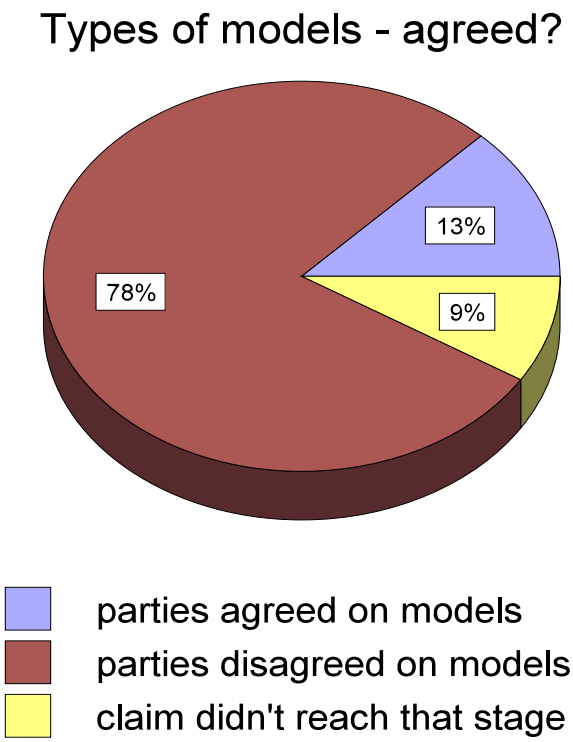
5. THE EXTENDED DISCLOSURE MODELS

A. Agreement on disclosure models

Respondents were asked whether or not the parties agreed on whether any Extended Disclosure was required, having regard to the 'reasonable and proportionate' factors listed in [6.4]. The graph below displays the results:



The Respondents were then asked whether or not the parties agreed as to **which** Extended Disclosure model to adopt per issue. Predictably, there was a large amount of disagreement. Again, the graph overpage depicts:



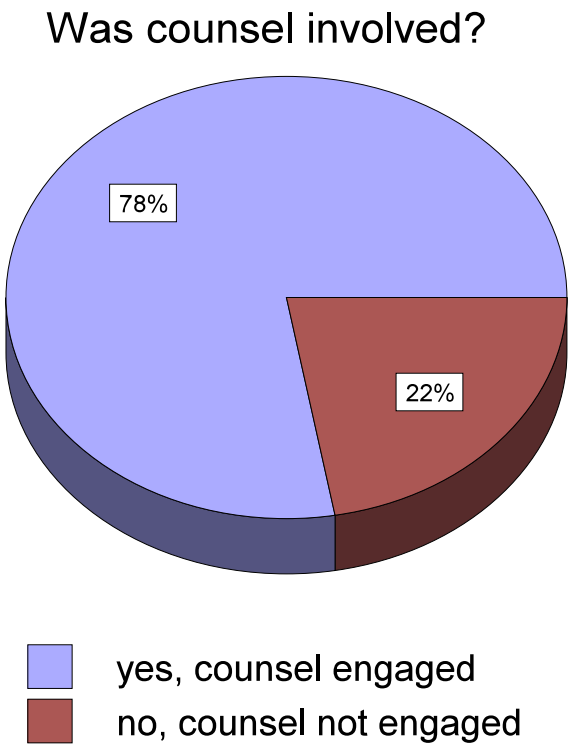
B. How discussions about Extended Disclosure occurred

According to Respondents, discussions about the different options for Extended Disclosure took place by various methods:

- ❏ by email ('*interminable emails*', said one)
- ❏ by letter ('*entrenched correspondence on micro-issues*')
- ❏ by phone ('*numerous*', '*multiple and highly costly*', said some)
- ❏ orally before the hearing
- ❏ by meetings ('*but these were not viewed to be productive, due to resistance from the parties*', said one Respondent)
- ❏ at the CCMC itself
- ❏ via the DRD itself, with '*multiple tracked changes and comments*' back and forth between the parties (one Respondent noted that, as a result, '*one party is seeking to put three different versions of the DRD before the court at the CMC*'

C. Counsel involvement

The vast majority of Respondents engaged counsel to argue for or against the models for Extended Disclosure at the CMC, and/or to draft a detailed Skeleton of Argument for the CMC. The graph below illustrates:



Several Respondents noted that the Pilot has led to Counsel being more routinely instructed on disclosure issues than was previously the case under CPR 31. One Respondent noted that, *'one of our partners has commented that it is the first time in his 38 years of practice that he has had to involve Counsel in relation to a disclosure exercise*.'

D. Comments about the Models — general

This section deals with comments about Models A–E in general, whereas the following section teases out comments about the individual models.

There were some positive comments about the Model descriptions:

The Models – support

- ‘*we are happy with the wording [about the Models] provided. It provides a useful starting point for the parties/court, and we have no experience of any party being constrained by it*’
- we had ‘*a few disputes, but nothing more than what was disclosable pre-Pilot. The arguments usually get sorted out before the CCMC, and then you have a quick argument on the points that remain. ... The descriptions of the models are good enough. Narrative documents is the only slightly difficult point, and even that only takes about five minutes to understand and apply*’
- ‘*generally, we consider that the models have been satisfactorily defined and distinguished*’

However, by far the majority of Respondents were critical of the descriptors used for the Models:

The Models – critique

- ❑ there was '*an absence of meaningful guidance*' about the models which has hindered the Pilot
- ❑ the Model descriptions are unhelpful, because '*you rely on your opponent's description of the document as to which model it will fall into. As you don't get to see the document [at the point of the DRD], it has to be taken on trust, remembering that usually the solicitor will not have seen the document but is relyin on their client's description*'
- ❑ '*by producing different models in the Pilot, the parties are having to define, at an early stage, the limits of disclosure required from the other parties, when they perhaps have little idea what disclosure in any of the categories might produce*'
- ❑ '*the choices on the menu of Models give a party which wishes to "hide" documents a much greater chance of being able to do so*'
- ❑ having various models '*invites tactical use of the process. Having discussed with disclosure providers, there is a risk that multiple different models will increase costs setting up and verifying how search parameters are set up on a disclosure platform*'
- ❑ '*there is far too little guidance about Section 2 of the DRD, resulting in the parties completing the DRD in highly generic and widely drawn terms*'
- ❑ the various models '*are too complex to explain to clients*', with one Respondent noting that, '*the person who drafted the models should try explaining them to a lay client, and if they are reviewed, I strongly suggest that they are run by non-lawyers. I can't offer suggestions for change, as I remain unclear as to what they mean*'
- ❑ '*the model debate did not add value to the proceedings, and a huge amount of time was wasted discussing models*'
- ❑ '*we would prefer a simplified regime*'
- ❑ '*Extended Disclosure, and the requirement to complete the DRD, would seem to be targeted mainly at larger cases, in terms of scope and complexity)*'
- ❑ Some Respondents suggested that *'examples of what each Model may comprise would be useful guidance*'
- ❑ '*the descriptions need to be much simpler. They are very difficult to explain to lay clients ... would suggest something like:*

  A – Adverse documents only
  B – Key and adverse documents
  C – Disclosure by Category of Documents
  D – Disclosure by Issue
  E – Wide Search-based Disclosure'

E. Comments about the models — specific

Comments were asked about the various Models of Disclosure, A–E, as to whether they have been properly defined and distinguished for the purposes of this Pilot. By far the majority of comments about the Models focussed on Model C, about which there was a high degree of concern:

Model A:

- ❑ '*only appropriate for issues on which, effectively, no disclosure is necessary at all*'
- ❑ '*it is not clear why it is called "Extended Disclosure"*' under para [8]
- ❑ '*the model raises question and concerns about what is "known"; a party can easily "close its eyes" so that a document is not "known"*'

Model B:

- ❑ '*requires some highly subjective assessments as to what documents "are necessary to enable the other parties to understand the claim or defence they have to meet", especially where there is no trust between the opposing parties*'
- ❑ it '*requires the disclosing party to guess at the opposing party's level of understanding of the case*'
- ❑ '*in a case where Model B disclosure was ordered, the more limited nature of the disclosure obligations helped limit the number and extent of searches required of our client, and hence, the time and costs*'
- ❑ '*I do not understand the situations when Models A and B will be required. Are these not covered already by Initial Disclosure, and the duty to disclose known adverse documents? In which case, are they only intended to be used in Pt 8 claims?*'
- ❑ '*is Model B only likely to be of use in a case where there has not already been initial disclosure?*'

Model C (overpage):

- ❑ '*can lead to protracted correspondence after the CMC, as the parties argue about what constitutes a reasonable request for documents*'
- ❑ '*parties don't want to spend time preparing detailed disclosure requests before the court has decided which disclosure model should apply*'
- ❑ if the parties cannot agree all of their requests before the CMC, then the CMC *'effectively turns into a specific disclosure application*'
- ❑ '*model C is being argued for (or ordered) in cases where it is entirely inappropriate and where model D or E should have been ordered*'
- ❑ '*later on in proceedings (post experts, eg.), more disclosure may be required, and allowing for a specific disclosure request at that time seems sensible*'
- ❑ '*Model C is, in our experience, not very popular, because there is concern that the requestes might become oppressive, and it is very difficult to budget for. It also makes the possibility of a further hearing (which is, effectively, a specific disclosure application) more likely. We have not used it*'
- ❑ '*greater guidance is required on how specific and narrow the categories of documents need to be for Model C – parties are using Model C requests to request all documents relating to a certain issue for disclosure*'
- ❑ '*if one party suggests Model C on issues and does the requests for this model, which the other parties respond to, if at the CMC the judge orders a different model, a whole raft of costs has been incurred unnecessarily*'
- ❑ re Model C requests, '*there is real difficulty which classes of documents are relevant without seeing documents, where one party has all the documents (so can easily say that certain categories are irrelevant), and the other party can hardly argue to the contrary*'
- ❑ '*we have usually adopted/agreed Model C [with the opposing party]. Difficult to persuade judges otherwise*'
- ❑ '*C can ultimately look like a D. C needs to be more prescriptive than it is. Parties spent lots of time and effort spent trying to avoid D and/or justify why C was appropriate. But at the end of the day, D was largely ordered across the board. Opposite effect to the intention of the Pilot. With hindsight should have agreed D at the outset*'
- ❑ '*we have been involved in considerable debate over Model C, and what was a 'narrow class' of documents, which led to an application by the claimant about our interpretation';* and another noted that, *'model C has been one of the causes of increasing costs, as parties try to determine what a narrow class of documents is, and whether it is reasonable and proportionate to ask for it under Model C*'.

Model D:

- ❑ '*there is a particular risk of increased costs where parties over-engineer the Pilot process, perhaps feeling obliged to avoid Model D wherever possible. … we have experienced having to comply with a series of very wide Model C requests, the breadth of which required the application of very wide search parameters, leading to every large numbers of documents having to be reviewed. In those circumstances, a model D exercise across all the issues would have been simpler, cheaper, and achieved a similar outcome in terms of the documents to be disclosed*'

- ❑ '*there is considerable overlap between Model D and Model E. The first sentence of Model E is an exact replica of the first sentence of Model D, which creates confusion as to which Model is appropriate*'

- ❑ '*there were problems in our case in distinguishing between Model C and Model D*' (said several Respondents, some noting that '*this dispute took up significant time and lengthy correspondence*')

- ❑ '*the other side refused to consider Model C, on the basis that search terms under Model D could be used to achieve the same aim as the request approach*'

- ❑ '*if the parties consider Model D is appropriate, then 'there is no mechanism by which this can simply be agreed (as it can for Model B), without going through the process of compiling a list of issues for disclosure and a detailed DRD*'

- ❑ '*if model D searches are agreed on a majority of issues, it is easier to run Model D type searches across the full dataset than sift out documents for particular different issues/models*'

Model E:

- ❑ '*there is far too much ambiguity and uncertainty regarding the scope of the models, particularly in relation to the distinctions between Model D and Model E*'

- ❑ '*court seem overly reluctant to order Model E, yet in many cases (e.g., breach of restrictive covenant or fraud cases), this may be the most appropriate order to apply*'

KEY SUMMARY POINTS

- ✓ most respondents (84%) agreed with the opposing party, in the cases in which they had been involved, that some form of Extended Disclosure would be required; but in 78% of cases, Respondents noted that they had disagreed with the opposing party on which models of Extended Disclosure should be sought;

- ✓ the discussions between the parties about the models sought occurred by all sorts of means, email, letter, phone, meetings, at the CCMC, via exchange of the DRD back and forth, and orally before the CCMC;

- ✓ counsel was involved in the vast majority (78%) of CCMCs and in the preparation of arguments about disclosure for the CCMC. Many Respondents noted that counsel involvement in disclosure-related matters had increased under the Pilot, particularly when the parties did not know, at the point of the CMC or DRD, what the document universe looked like, and hence, did not want to 'give points up';

- ✓ some Respondents supported the descriptors used for Models A–E. However, most Respondents were critical about the descriptors of the Models, suggesting, variously, that: they should be simpler; that each should be illustrated by example/s; the Model choice was being used tactically; and the Models were targetted at larger cases in scope and complexity rather than for the 'ordinary case';

- ✓ of all the models, Respondents' comments were most frequently directed towards the difficulties associated with Model C.

6. THE LIST OF ISSUES FOR DISCLOSURE

A. List of issues – general comments

Respondents were asked whether they had any issues arising, regarding the agreement of the List of Issues for disclosure, and whether the demarcation between the List of Issues for disclosure (the sole subject of the DRD) and the list of issues for trial was kept clear. There were a great number of comments which Respondents made about defining the List of Issues for the CMC. In the Table overpage, these comments are grouped per issue, in a sample of the responses.

Respondents were also asked whether either party sought to add new issues for disclosure at a later date than the initial CMC. Very few Respondents indicated that new issues were added after the CMC (although, where that occurred, some frustration was very evident on the part of the relevant Respondents).

List of issues for Disclosure: Issues arising

- ❑ ***sheer number of issues***: the process is 'hopelessly laborious' in complex cases involving 37 issues, 92, 95 issues, 100, 135 issues (real-life examples cited by various Respondents)

- ❑ ***credibility***: what constitutes an 'issue for disclosure' '*is often contentious ... specifically, there should be some clarity as to the extent to which credibility is an issue for disclosure*'

- ❑ ***demarcation expensive/awkward***: in complex cases, '*this is a monstrously difficult task ... there are often collateral issues whic are not strictly necessary to determine the pleaded case, but which will obviously be live at trial and require disclosure*'; '*it would be more manageable if the issues for disclosure were more closely aligned with the issues for trial ... just because an issue had been identified for disclosure, documents were sought by the claimant, even though they would not have been probative of an issue for trial. Guidance from the court or in the rules on this issue would be helpful to keep a limit on costs*'

- ❑ ***the demarcation wasn't kept to***: *'in at least one case, the defendant continually referred back to issues for trial*'; it '*causes duplicated costs and work*'; '*both parties were addressing the draft list of issues for disclosure with one eye on what was to go in the list of issues for trial*'; '*we have had difficulties with the demarcation ... in one of our cases, the Master at the CMC wanted the two lists [list of issues for disclosure, and list of issues for trial] to speak to one another, which seems the opposite of demarcation*'

- ❑ ***other lists:*** 'there should be specific provision in PD 51U, court guide, or DRD, as to how the List of Issues for Disclosure relates and/or interacts with other Lists of Issues that need to be prepared in the course of proceedings'

- ❑ ***only points of law cause the demarcation***: the demarcation is causing undue cost and dispute, '*as it is difficult to see how the list of issues for disclosure and for trial can be different, unless some of the issues do not require any disclosure - presumably only points of law*'; '*every issue was listed in the List of Issues, including legal questions that could not realistically have documents associated with them (e.g., is the claimant entitled to an injunction or damages?*'

- ❑ ***documents per issue:*** '*in some cases, trying to work out whether each document related to a long list of issues rather than one overarching issues (as happened with standard disclosure) is extremely time-consuming ... and it is unclear whether you have to specify which issue each document relates to in the Disclosure List. If not, what is the point?*'; and *there was a lot of overlap between issues, and a considerable element of subjectivity as to which issue(s) a particular document pertained to, incurring significant costs and time*'; and '*the parties have replicated the list of issues for trial when producing the list of issues for disclosure, and that has resulted in too many searches being proposed by the parties*'

- ❑ ***too early:*** it is impossible to work out the list of issues for disclosure *'at an early stage of the procedings*'; the early process '*encourages parties to be quite pedantic about the form of the wording*'; a detailed list of issues for disclosure is fairly pointless, when the remaining trial is only concerned with quantum, because the parties' cases on quantum will be set out in the experts' reports - '*so there was some difficulty in working out which documents will be relevant before the experts have had their say*'

List of issues for Disclosure: Issues arising (cont'd)

- ❑ ***disproportionate:*** '*we do not consider the rigmarole of electing which disclosure model and identifying the issues for disclosure in a process which is separate to the DQ/CCMC process to be proportionate. The former two should be rolled into the latter, without the need for multiple deadlines and declarations/filing/correspondence*'; and '*the other side produced a very lengthy list of 20 issues, each subject to different time periods and different model regimes and different lists of custodians – having an additional list of issues for disclosure, rather than reusing the list of issues in the proceedings, adds complexity and costs ... the additional costs were a direct product of a separate lengthy disclosure list of issues being put forward and allowed under the Pilot rules*'

- ❑ ***tactics***: '*tactically, there is uncertainty whether it is preferable to draft a shorter list of broader issues, with the aim that they can be agreed but risk that they do not help narrow down searches; or to draft a longer list of more specific issues, helping to narrow down searches, but risking lengthy debate over the wording of the issues*'

- ❑ ***level of detail***: 'guidance on how granular the Issues for Disclosure are expected to be would be helpful, so parties can approach them with an appropriate level of detail'

- ❑ ***timings***: '*we had difficulties agreeing the List of Issues for Disclosure with the other party, but then we only had a limited amount of time to complete Section 2 before the CMC (and we did not wish to postpone the CMC)*'

B. A ceiling on the list of issues?

Several Respondents suggested that there should be a maximum of a list of issues, depending upon the value of the claim, for '*having more than 60 issues is extremely unmanageable*'. One suggested:

– in a claim worth £100,000, a maximum of 10 issues;
– in a claim worth £1,000,000, a maximum of 40 issues.

One Respondent suggested a maximum of 15 issues all up!

KEY SUMMARY POINTS

✓ very few Respondents cited that further Issues for Disclosure were added after the first CCMC — for most Respondents, the List of Issues for disclosure was resolved at the CMC — although, where additional isseus were added later, Respondents tended to be frustrated about what they saw as an inefficient process;

✓ however, many Respondents were concerned about the demarcation between the List of Issues for Disclosure, and the list of issues for trial. These included (but were not limited to) concerns that: the demarcation that necessarily requires that legal issues be excised from the disclosure list was not being kept to; devising the list was being required too early under the Pilot, and required disproportionate time and costs to be incurred; the process became unwieldy when a large number of issues were devised/agreed/ordered; the strict demarcation added to the complexity and cost of the disclosure process, especially in lower value claims; it was unclear whether credibility could be an issue for disclosure;

✓ some Respondents were so concerned by the complexity, frontloading, and expense created by the List of Issues for disclosure that they suggested that a ceiling on the number of issues should be stipulated in the PD (135 issues for disclosure was the highest figure mentioned by any Respondent, whilst several had a List of Issues which exceeded 100 issues);

✓ some Respondents considered that it was unclear under PD 51U as to how the List of Issues for disclosure related to, or interacted with, other lists of issues that were required in the course of proceedings.

7. THE DISCLOSURE REVIEW DOCUMENT

This section of the Questionnaire was by far the most vociferously answered! Many strongly-held views were expressed.

A. Views on the DRD – general

Respondents were asked for their views on the DRD form, the ease or difficulty of completing it, the costs of its preparation, and whether its presentation and format could be improved. It is really only possible to convey the views of Respondents by reproducing a lengthy sample of their comments.

Comments re the DRD – general critique

- ❑ under the Pilot, '*the content of the DRD has become litigious in itself*'
- ❑ the DRD '*is an enormously time-consuming document to prepare ... huge amounts of time were spent identifying issues for disclosure and negotiating disclosure models at considerable expense*'; and '*it adds a whole layer of work that never previously existed'; 'it is extremely difficult to complete, it's hard to tell how much detail you need, and the ground that it covers is significant*'
- ❑ '*the parties almost invariably settle on the basis that Model D should apply to all issues, or the judge ordered Model D to apply to all issues even where other models had been agreed between the parties, making the whole exercise redundant*', and '*judges simply aren't interested in going line by line through disclosure issues choosing disclosure models*'
- ❑ the DRD is '*horrendously costly and timeconsuming ... it, and the Pilot scheme generally, is being deployed tactically by defendants in an attempt to suppress disclosure*'
- ❑ the DRD '*frontloads costs ... the list of issues only lightly (if at all) informs actual disclosure, and then end up giving disclosure to the old standard disclosure ... but then, how to give extended disclosure after the CCMC is only dealt with in a very cursory manner, and in much less detail than previously in the CPR or the court guides*'
- ❑ '*often, the DRD is not particularly closely followed after the CCMC ... it is not clear how the list of issues is supposed to inform the List of Documents, and there is a great deal of inconsistency in how this is being approached at present*'
- ❑ '*our case is likely to settle before the full disclosure exercise is undertaken, so the frontloaded DRD costs, which are considerable, will be thrown away*'; another Respondent notes that *'the parties will not see any costs savings going forward if they settle at mediation, if anything, the frontloading of costs is a disincentive to settlement*'
- ❑ '*the fluid nature of the DRD, as opposed to a clear order on the scope of disclosure, means that parties do not feel obliged to stick to the disclosure approach [adopted at the first CCMC]*'
- ❑ arguments about which model to apply to each of the issues for disclosure '*is sterile and hypothetical, as none of the parties know what documents will be returned ... instead, the usual standard disclosure should be provided earlier in the proceedings, so that parties have all of the documents relevant to the issues earlier*'
- ❑ the complexity of the models which the DRD requires to be selected '*means that the more junior fee earners, who are normally relied on to assist with heavy document review tasks, are not able to assist, as they are often not as involved with the case or familiar with the issues in dispute and the disclosure issues agreed. Having more senior fee earners involved in disclosure, as a result of the Pilot and the DRD, is another reason why we consider it has actually increased costs*'

Comments re the DRD – general critique (cont'd)

- ❑ '*where previously, direction on a CMC were very often agreed, courts are now being faced with arguments about the models, which extend both court time and costs'*
- ❑ '*negotiating the issues in the case, then the issues for disclosure, then the appropriate model for each issue, and then (if Model C was adopted for any issue) the formulation of document categories for Model C disclosure, was a totally disproportionate exercise for the case I was involved in*'
- ❑ the opposing party '*failed to comply with their obligations to distribute preservation notices, but did not refer to this failure in Section 2 of the DRD, with this information only coming to light in subsequent correspondence*'
- ❑ '*many of the arguments occurring around the DRD (re search terms, e.g.) are arguments that might never have been had, absent the pilot. In seeking to agree the DRD, the parties are operating largely "blind" as to what might be in the other side's disclosure – they do not know whether what the other side are proposing as to their own disclosure is likely to generate a sensible crop of documents or not. As a result, in seeking to agree the DRD, it is difficult for a party to "let something go" on any given issue. Absent the pilot, the parties would have been looking at this with the benefit of having had the other side's disclosure already, and able to take a view on whether it appears that there were any real "holes" in it*;
- ❑ '*it is completely unclear what is required for completing Section 2 of the DRD ... and in terms of modification, the opposing party included three annexes that detailed custodians, date ranges and keywords'*
- ❑ '*it remains entirely unclear from the DRD what searches will be carried out by the other side for hard copy documents. This will inevitably raise the risk of expensive post-disclosure rows, and the potential need to make expensive specific disclosure applications down the line*'
- ❑ '*completing the DRD required significant IT systems information from our clients - more so than disclosure under CPR 31, and at an earlier stage*'
- ❑ '*cases that have settled early have done so at greater cost than they would have done under CPR 31, because of the frontloading of costs*'
- ❑ '*it is extremely difficult to justify to clients why so much money is being spent on an exercise from which they appear to be deriving no benefit (and in which they have little involvement and certainly no interest) ... it is leading to great client frustration*'
- ❑ '*if the DRD intends to be a comprehensive document, avoiding the need to refer to other correspondence, it would be useful to have a section in the DRD in which any party intending to seek confidentiality protections (this may be of particular importance to government bodies, given the nature of their work and the security restrictions on their documents) has to specify and briefly justify the protections it intends to seek, so that the other party can respond with its position*'

Comments re the DRD – general critique (cont'd)

- ❑ '*it should be clarified whether each party should request documents from the other side, or whether both parties should be required to run the same searches'*
- ❑ '*Section 1A is fine, but Sections 1B and Section 2 are extremely technical*'
- ❑ '*the data mapping questionnaire is not very helpful. For example, it asks questions about the file types twice, which means repeating answers'*
- ❑ the DRD '*becomes hopelessly complicated if several parties are making Model C requests, with various drafts being circulated*'
- ❑ '*it is impossible to complete Section 2 properly, until the List of Issues for disclosure have been settled, and that may not take place until the CMC. It is not possible to think properly about search terms, date ranges, custodians, etc, when the Issues for Disclosure has not been agreed. In many of our cases, the court has told the parties at the CMC to go away and work on Section 2 after the CMC (despite significant work in the run up to the CMC). Hence, the work involved in completing Section 2 of the DRD has eaten into the time period for actually completing the disclosure exercise*'
- ❑ '*the DRD assumes electronic disclosure, but our case did not warrant it, but the DRD assumes that it does'; and for another, 'ours is not a case where there is extensive electronic documentation, it is likely that the same documents would have been produced under the old rules, but much more cheaply and quickly*'
- ❑ the DRD is '*hopelessly laborious*' in complex cases involving 37 issues, 92, 95 issues, 100, 135 issues (real-life examples cited by various Respondents);
- ❑ one Respondent noted that the case was so complex that, by agreement, the list of issues was dispensed with, and a Scott Schedule appended instead

B. Views on the DRD – formatting

There were also several comments, contained in the Questionnaire, directed to the formatting and setting out of the DRD document. These are encapsulated in the Table overpage:

Comments re the DRD – formatting critique

- ❑ '*an official Word version needs to be made available forthwith (and one that does not say 'draft' at the top)*;' the only official version available is in pdf, which is unsuitable for many firms who don't have Adobe Write programmes

- ❑ '*both sides had no idea how you are supposed to file a "finalised single joint DRD", because it is not actually possible – each section requires responses from the other party, they are not one document that can easily be combined, and we concluded that they would have to stay separate rather than one document, there was no other option*'

- ❑ '*it is an ugly form, difficult to read and to navigate, spreads over numerous pages with its numerous columns*'; '*it is far too long' and 'becomes too lengthy ... one of the DRDs in our cases is currently over 50 pp, and has still not been agreed*'; the DRD is '*prone to a significant amount of duplication across various headings*'; and our DRD '*now runs to hundreds of pages, and the judge didn't look at it at the CMC*'

- ❑ the DRD '*is difficult to update*', and is '*totally unsuitable where the DRD needs to go back and forth between the parties many times and the volume of data is high*'

- ❑ the DRD '*contains too many sections — it should be condensed, so that all the searches are contained in one section*'

- ❑ '*we disagreed with the other party as to who should complete what, and whether this be completed in one form or separate forms for each party. The DRD got quite messy*'

- ❑ '*structurally, it is not clear how courts would like Section 2 of the DRD presented. The form is set out as if each party is to complete its own version of the form, but the claimant is obliged to file a single joint DRD in advance of the CMC. Should Section 2 be laid out more like Section 1, which contains columns for each party to fill in, so that the court can more readily see where there is agreement and view any differing positions side by side?*'

- ❑ in the section dealing with the proposed Models, *'the form should allow for different Models for each party for the same issue – we had no documents to provide on certain issues, and the claimant had a significant number. The existing form does not cater easily for two different responses on the Models'*

- ❑ '*in the data mapping section of the DRD, the wording of Q1 and Q2 suggests that you need to record all known locations where documents could possibly be held, whereas the wording of Q6 explicitly states that you need to record only those locations where documents are held that you intend to search*'

- ❑ '*the guidance notes are a nuisance for when you put it in an applications bundle, but it's not a big issue*'

- ❑ '*it was not always clear where each party is meant to have its own version and where there should be one version. Often maintaining a single document is not always realistic*'

Comments re the DRD – formatting critique (cont'd)

- ❑ '*the DRD is a very unwieldy document, difficult to manage, and there are a lot of descriptors in the beginning of the document which should be put as an appendix, which would allow the core information to be lifted from the document and sent out*'
- ❑ '*the difference between Q3 and Q4 is unclear; the difference between a file and a document type is unclear; the difference between Q13 and Q14 is unclear; it is unclear what the value of "party not agreeing" would be; it is unclear what the intention of the columns of Proposed Model is'*
- ❑ '*it would be helpful if Section 2 of the DRD included a section about agreeing method and scope of data collection, i.e., additional sections relevant to paras 6(1)–(4) of Section 3 of the DRD; and it would be helpful to have additional sections in Section 2 of the DRD that correspond to paras 6(9)–(11) of Section 3 of the DRD. This would focus the parties on these aspects which are really important yet tend to be costly*'
- ❑ '*the order of questions and the terminology around the use of technology does not follow how disclosure is approached in practice. We suggest that Section 2 of the DRD should start by addressing custodians and date ranges', and that these 'should be settled, as fundamental data set parameters as preliminary case management issues before the other parts of Section 2 of the DRD are completed*' [more on this below]
- ❑ the DRD is a '*disjointed and fragmented document ... would be better to have a draft list of issues, what model you want, and specifics, from the outset. With complex arguments and a non-English speaking client, we struggled to comply with both its formatting and the time-tabling*'

As a rare positive comment about the DRD, one Respondent noted that Section 2 of the DRD *'is pretty similar to the previous form N264 (EDQ), and we have no problems with it.'*

C. Some specific suggestions for DRD amendment

Re the DRD, one Respondent suggested the following four steps:

i. A precedent DRD based on a fictional case
ii. A document of instructions which could be read alongside the DRD
iii. A web page with FAQs which could be updated on a regular basis
iv. A hotline/point of contact, to deal with specific queries relating to the DRD

Some Respondents preferred the idea of a Redfern-type schedule: *'there should be column in the DRD for the parties to record agreement, like a Redfern schedule*'; whilst another noted that *'the model B/C/D points largely lapsed into irrelevance, large numbers of hours were wasted on this. It would have just been easier to have had a Redfern schedule*'.

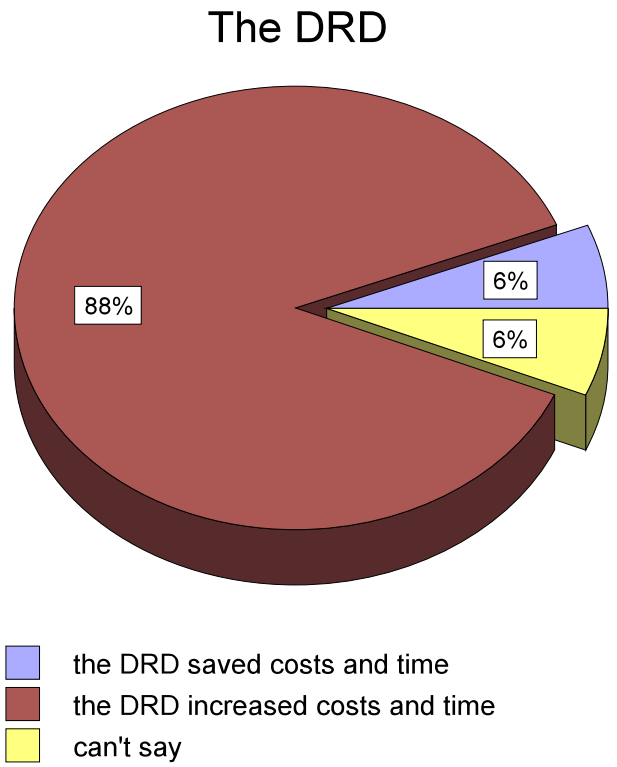
Another Respondent suggested that the ordering of the questions and the terminology around the use of technology be re-framed as follows:

	Initial Disclosure (with current question position in brackets)
1	Initial disclosure (5)
	Scoping
2	Custodians (6 and 7)
3	Date ranges (8 and 9)
4	Keywords (10 and 11)
	Data types, sources and locations
5	High level summary of data types (4 and 3)
6	Electronic data sources and geographical locations (2)
7	Hard copy document sources and geographical locations (1)
8	Irretrievable documents (12)
	Analytics and TAR
9	Use of Analytics (13) and TAR (14) (these should be merged)
	Cost/document quantities
10	Estimates - agreed (15)
11	Estimates – claimant request (16)
12	Estimates – defendant request (17)

This Respondent further suggested that custodians and date ranges should be dealt with as a preliminary case management issue either at a split CMC or at a DGH, *'as that would allow the parties to efficiently and meaningfully address the remaining Section 2 questions without having to consider the many permutations of the hypothetical*'.

D. The efficacy of the DRD

The Questionnaire asked: *the DRD is central to the efficacy of the Pilot. Do you think that the joint negotiations and completion of the DRD saved costs and time in the litigation in which your clients is involved?* The graph below demonstrates the results:



E. Issues arising from Section 1B of the DRD

Respondents were also asked: *if Model C was applied for, whether any issues arose for either party regarding the completion of Section 1B of the DRD.*

The overwhelming proportion of responses was that there was an issue/s associated with the completion/content of Section 1B. This section should be read in conjunction with the comments about Model C noted previously (at p 40).

Comments re Model C, and Section 1B of the DRD:

- ❑ ***a chicken and egg problem***: '*parties were very reluctant to formulate detailed requests for disclosure before being told which disclosure model would apply, as it might be entirely wasted time; and the courts are reluctant to order Model C without detailed requests*'

- ❑ ***no agreement***: where the list of issues for disclosure are not agreed prior to the CMC, then Model C requests in Section 1B '*amounted to a moving target, making it less likely that agreement would be reached on disclosure*'

- ❑ ***no room in the form to show ongoing negotiation***: '*Section 1B is unwieldy, complicated and time-consuming to complete ... after the responding party had provided its initial response in Section 1B, there is no scope within the document to record further rounds of negotiation, so that the court can see at a glance what the outstanding issues are*'

- ❑ ***wrong emphasis:*** Section 1B '*drives the parties towards debating the wording of Model C disclosure requests, when the more pertinent dispute in one recent claim was whether Model D or Model C should be ordered. The template DRD did not provide an effective means to negotiate that*'

- ❑ ***overlap with Model D, re search terms***: Section 1B deals with model C requests, and Section 2 deals with Model D requests, but as the searches will need to be run for both, '*it may be advisable to combine these sections, so one section of the DRD sets out all the requests, regardless of the classification*'; and '*it is odd that Section 1B does not also provide for debate regarding the parameters for Model D since, in reality, search terms and applicable date ranges are usually agreed in the context of Model D. We have experienced parties completing Section 1B regarding Model C requests for some issues, with correspondence at the same time between the parties regarding the scope of Model D requests for different issues. This is all overly burdensome and costly*'

- ❑ ***post CMC***: where Model C was ordered at the CMC with requests to follow, '*this prompted extensive argument over what constituted reasonable requests*'

- ❑ ***no such document***: '*what should happen if the respondent to a Model C document request says, through his legal representative, that the document does not exist – should the court will order him to sign a disclosure certificate to that effect? Or should the court simply refuse to order that item of disclosure?*'

- ❑ ***avoiding Section 1B***: '*we proposed Model C for the majority of issues, but our opponent proposed Model D. We believe this was so that the other party did not need to engage with completing Section 1B, and instead could engage with what was required for Model D at a later stage*'

- ❑ ***what documents?*** '*we had a vacuum of knowledge, as we weren't sure how the other side (a major tech company with intricate data storage regimes) stored its data. This meant it was very difficult to devise specific questions, as to we had to use general catch-all wording (and also involve Counsel in the process)*'

Comments re Model C, and Section 1B of the DRD (cont'd):

- ***different approaches***: '*Section 1B is cumbersome, each party took a very different approach – we took a more broadbrush approach, whereas the other side asked extremely detailed questions'*

- ***the proposing party***: '*we completed Section 1B as the proposing party, but we did not agree with the issues that the other side thought should be included. This made Section 1B difficult to complete, because we didn't propose or agree with the issues so we didn't know what documents the other side wanted. Perhaps if you propose an issue for which Model C is used, you should be responsible for completing Section 1B*'; contrast: '*we would suggest that where Model C is proposed by any party in relation to an issue where one party is the holder of the relevant repository, the party expecting to receive documents should always be responsible for preparing a first draft of the requests*'; and, again, '*the Model C requests should be drafted by the person with the documents (given their knowledge), as opposed to the person requesting disclosure. This may be something upon which the PD could give further guidance, as in some cases parties are working on a differing understanding on how Section 1B is intended to operate*'

- ***the parameters of disclosure***: '*we assume Model C disclosure generally only entails a party disclosing those documents within the relevant class of documents "which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure' (as section IB of the DRD indicates in the request heading). It would be helpful if [8.3] could expressly state this when Model C is described*'

F. The costs estimate required

Respondents were asked whether the provision of a costs estimate in Q15 of the DRD was feasible, or premature to answer, at the stage at which the DRD is being completed. The majority of Respondent's comments were critical of the requirements of Q15, so early in the litigation. The table overpage illustrates:

Comments about the costs estimate in the DRD:

- ***all rather vague***: '*all parties estimated their costs based upon a 'standard disclosure' order, rather than anything more bespoke, and the court did not make any comment*'; it was '*a ball-park figure, but not with much accuracy*'; '*the estimate was given, based on previous cases, which means by its essence, it was unlikely to be accurate*'; *'we provided an estimate, but it is caveated to the extent that it loses its value*'

- ***under-estimates a problem:*** in our experience so far, '*costs have been underestimated*'; *'both parties massively exceeded their estimates in Q15*'; and '*because of the Pilot, I am giving much higher estimates for the CCMC and disclosure stages, because of the very substantial amount of work required in complying with the Pilot*'

- ***more than one estimate required***: '*the Pilot makes the costs budgeting process extremely difficult, as you have to include a contingency for alternative models of disclosure being proposed, so the budget may have to be dealt with at a later hearing (at significant further costs to the parties), as the parties do not know what Model the court might order at the CCMC, and have not included provision within their budget for this*'; along the same lines, '*worse, we ended up preparing two costs estimates – one of our version of disclosure was adopted, the other if our opponent's was adopted*'

- ***duplicates costs-budgeting***: in multi-track cases under £10M, this duplicates work already done in preparing Precedent H cost budget and Precedent R Discussion Reports – '*so the court ignored the DRD on this point, and simply dealt with this issue in the context of costs budgeting in the usual course*'; '*this was yet another clash, another duplication — why did we have to estimate this, as well as deal with the costs budget?*'; '*it should be made clear whether the answer to this question will be taken in account at the detailed assessment*'; '*even if the court is prepared to have a delay in the completion of the disclosure column of Precedent H, it still demands costs figures for disclosure to be inserted into the DRD, and we see no reason why those elements of both documents should not be completed after the direction for disclosure has been given*'; and the work done to prepare for the CCMC falls within incurred costs for cost budget purposes — and '*the requirement to budget can only arise following the orders made at the CCMC. Is Q15 not at odds with costs budgeting?*'

- ***disregarded:*** '*the court did not even consider the estimates made, indicative of the general reluctance of the court to get involved in the "nitty gritty" of the dispute regarding disclosure issues*'

- ***premature:*** '*it is such a broadbrush and premature exercise. We do not complete the Precedent H budget for disclosure ahead of the CMC. Also, where we do not agree disclosure models with the opposite side, we have to do a "best" and "worst" case estimate, which is costly*'; Q15 is '*premature, before the document pool is known*'; '*you cannot meaningfully fill in the costs estimates before receiving the other party's DRD and knowing what documents you might have to work through*'; and *'it is not feasible to give an accurate costs estimate for disclosure when you do not know how much disclosure there will be. This leads to considerable exposure in a costs budgeted case*'

More positive reaction: Some were more positive about the role of Q15. One Respondent noted that: '*mostly it worked, and costs have been generally recognised as "reasonable and proportionate". A couple of times where the costs have been excessive, that's been reflected in the costs budget provision made at the CCMC*.'

G. Increase of costs due to the DRD

By how much has the DRD increased costs, i.e., caused additional costs? Some Respondents answered the question, by how much has the Pilot increased costs? Several Respondents gave specific figures, overpage.

- ❏ 'approximately £100,000 in one case'
- ❏ in one case, we estimate an additional £80,000 of costs for each side; in another case, several hundreds of thousands of pounds'
- ❏ 'for a claim worth about £300,000, the costs for one CMC were £30,000 (much higher than equivalent cases), £10,000 of which related to the preparation and negotiation of the DRD'
- ❏ 'around £20,000 added to the costs of each party in our most advanced cases'
- ❏ 'probably added £50,000 to our costs alone'
- ❏ 'around £20,000 of expected costs added to the CMC'
- ❏ 'whereas disclosure might cost £10,000–15,000 in a £120,000 cost budget, the pilot has added at least £2,000 to the bill'
- ❏ the DRD 'at least triples time and costs'
- ❏ 'if the Disclosure Pilot did not apply, I think the costs would be half'
- ❏ 'costs of > £75,000 have been incurred in respect of the DRD and related hearings, excluding the costs of disclosure itself'

H. Miscellaneous difficulties with the DRD

Litigants-in-person: One Respondent noted that '*we have encountered particular issues when dealing with litigants-in-person who do not necessarily appreciate that discussions regarding Extended Disclosure and the formulating of the DRD is intended to be a collaborative process*.'

Multiple defendants/Multi-party cases: Several Respondents noted comments on this point, both in relation to the Models, and the preparation of the DRD:

- '*The DRD is completely unworkable with multiple defendant, and can cause significant costs to the claimant who is trying to manage the process. At one case, the multiple defendants refused to engage at all in the process, and yet the Master at the CCMC made a costs order against the claimant for failing to produce a completed DRD*.'

- '*the Disclosure Pilot is particularly unworkable in multi-party cases. Choosing a model for each issue for each defendant makes the exercise very complicated. In one case, re the DRD, in a case involving 35 groups of represented defendants and 103 disclosure issues, the claimant has had to create a very large spreadsheet just to record the relevant information. The maintenance of that spreadsheet is a full-time job for two junior associates*'.

- '*In my multi-party case, with numerous groups of represented parties, the parties have sought to agree a protocol for agreeing the DRD, but it is far from straightfoward to try to do this in a multi-party case. It may take at least six months to agree the DRD, and will likely require at least one hearing, and the aggregate cost of the exercise is anticipated to be huge*'

KEY SUMMARY POINTS

- ✓ the preparation of the DRD, as an essential and pivotal part of the Pilot, was perhaps the most vociferously criticised aspect of the Pilot. This is illustrated well by the three pages of criticisms reproduced in this section!

- ✓ in addition, many Respondents were unhappy with the formatting of the DRD — from the lack of a Word version, to the data mapping section, to its number of sections;

- ✓ some Respondents suggested further support, such as: the provision of a precedent completed DRD based upon a fictional case, a hotline or point of contact to deal with specific queries relating to the DRD, and a webpage of FAQs devoted to the completion of the DRD;

- ✓ others suggested a re-arranged DRD, with a different ordering of questions to reflect how disclosure is approached in practice, and in particular, that the custodians, date ranges, and keywords be dealt with as a preliminary issue early in the process, to enable Section 2 of the DRD to be answered with an air of reality rather than as a hypothetical;

- ✓ a vast majority of the Respondents (88%) considered that the preparation of the DRD had increased the costs and the time associated with the disclosure process; various figures of those additional costs caused by the negotiation and preparation of the DRD were nominated, many of these sums of additional costs in five figures, and one in six figures;

- ✓ in accordance with the previous misgivings surrounding Model C, many Respondents critiqued Section 1B of the DRD as being difficult, unwieldy, and impossible to complete in some circumstances;

- ✓ several Respondents were critical of the need to insert cost estimates of the disclosure process in the DRD. The concerns included (but were not limited to): it was regarded as being duplicative of costs-budgeting; too premature in the process; the estimates were sometimes disregarded by the court at the CCMC; the DRD required (in practice) more than one estimate to be produced, depending upon the models adopted, adding to the frontloading of costs;

- ✓ the difficulty of completing the DRD when embedded in multi-party litigation was cited, with one party stating that it could feasibly take six months to negotiate the DRD prior to the CMC, given the complexity of the DRD.

8. TECHNOLOGY-ASSISTED REVIEW

Respondents were asked for their views, relating to the use of technology-assisted review (TAR) under the Disclosure Pilot. As with many areas under discussion, there were strongly-held and differing views on many points.

A. Types of TAR

Many Respondents indicated that they already used an electronic disclosure platform for disclosure. Others indicated that they had used third party analytics and TAR pre-Pilot, and would do so in the future too.

As one Respondent noted, '*Prior to the Pilot, we had already been using various forms of TAR, which are generally run in-house with the assistance of our forensic technology team Those practices have not changed with the advent of the Pilot*.'

Types of TAR used to date

- ❏ programmes mentioned: – the Relativity platform provided by Millnet; Ankura; Kroll (KL Discovery) Analytics; Cyfor
- ❏ types mentioned: email threading; textual near dupe; clustering and sampling; predictive coding

Costs of TAR

An enormous costs-range was cited across the responses to the Questionnaire:

- ❏ at the lower end of the range: from £1,500–£2,000 + VAT + review and admin time — to a RE approximate costs of TAR disclosure:
- ❏ mid-range: for initial set up costs for the platform: £20,000 + VAT + fee-earner time (excluding uploading opposing party's documents and analysis)
- ❏ at the higher end of the range: £150,000–£200,000

B. Views for and against TAR

There were huge variances in view about the benefit of TAR. These are shown in the Table overpage.

Some Respondents noted that TAR will not become widely used until judges order it as part of the Disclosure Pilot's process: '*judges have to get behind the use of TAR, and to enforce the obligations on legal advisors to advise their clients to use such technology*'.

Several Respondents noted that TAR is only cost-effective with a high-volume data-set — one noted that '*a pool of at 40,000 documents are required to make TAR effective*.' As another put it, TAR works best with a '*rich data set*', so that there needs to be '*a balancing between collecting (a) a sufficiently large enough dataset to ensure that TAR can work effectively (and is not prejudiced by biases or limitations in the data) so that TAR can help reduce costs overall; and (b) a data-set that is limited to only what is required and therefore, costs are not incurred collecting non-relevant documents*.'

TAR: The views in favour of

- ❑ TAR has meant a reduction in the documents reviewed at first pass (one Respondent said, between 20–50%), and that such a reduction in volume of documents can significantly reduce the overall costs of carrying out disclosure
- ❑ '*the Pilot missed an opportunity to focus on the use of technology (TAR) as a means of increasing efficiency and reducing cost. TAR, rather than the introduction of new rules, offers the best hope of reducing disclosure costs'*
- ❑ '*there is an argument for removing agreed keywords on certain document sets and simply allowing the TAR algorithm to identify the relevant documents based on a custodian/date range. In agreeing this form of approach, the discussions around keywords could be eliminated from the process*'
- ❑ the use of TAR will increase, *'and will reduce the costs associated with document reviews, negating the need for the Pilot*'
- ❑ TAR works where the application of keyword searches and date ranges have not been sufficient to reduce the document review sets to a reasonable level — but '*in a low to modest value case, it is entirely disproportionate and unnecessarily increases costs*'

TAR: The cautionary views

- ❑ '*in our experience, TAR is not always sophisticated enough to deliver disclosure in a manner which manual review delivers. If TAR is to be used going forward, it seems necessary that all parties and the court itself need to accept its limitations and come up with ways of working around them*'
- ❑ it is usually fairly obvious if TAR is appropriate, '*but it is not a panacea, and costs money*'
- ❑ TAR is being used by our opponents, and '*our sense is that this gives a large remit for opacity*'
- ❑ '*There is little guidance within the DRD or its notes to assist firms for whom TAR is new. The questions posed by the DRD are not likely to elicit the information which would enable parties to identify an appropriate method, e.g., for each issue, or depending on where documents are stored – they simply ask which methods are being considered, or why no TAR is being considered. Some wider guidance for parties about the characteristics and benefits of various methods, the way they save time/money, and how they might be deployed, would be beneficial*.'

C. Feasibility of identifying TAR in the DRD

Respondents were also asked whether Q14 of Section 2 of the DRD was feasible, or premature, to answer at the stage of the DRD's completion, re the parties' proposals for the use of TAR. The three main points derived from the responses were that:

- several Respondents commented that the question was premature, in that the volume of the '*document universe*' needed to be known before third party providers (or in-house teams) could provide suitable quotes for the TAR exercise — and that universe will likely not be known at the time that the DRD is being completed — *'this makes it difficult to make decisions which are cost-dependent at this stage*' and '*you cannot answer this until you receive and go through the documents*'

- one commented that '*at a very high level, Q14 is feasible to answer at the DRD state, but in practice, many months after exchange of the DRDs, the parties are yet to exchange any details*'

- several Respondents considered that the most important utility offered by Q14 is that it forced parties to think, early on, and ahead of the first CCMC, whether they would be using TAR, and if so, the types contemplated. For example, '*it's useful to use the section to detail the types of analytics approaches that the party will consider using, to assist with the review of documents, so that it puts the other side on notice that the available technology will be deployed in the most appropriate manner, once the "document universe" is known*'.

KEY SUMMARY POINTS

- ✓ several Respondents commented that they had used TAR in disclosure pre-Pilot, and would continue to do so post-Pilot too;
- ✓ the costs of TAR varied significantly, from £2,000 to £200,000;
- ✓ some Respondents considered that TAR was only cost-effective with a document universe of 40,000; and that it would only become practically effective when judges 'get behind it';
- ✓ some Respondents considered that the Pilot was unnecessary, if greater thought had been given (under CPR 31) to the use of TAR as a means of increasing efficiency and of reducing costs, particularly when date ranges and custodians were agreed/ordered early in the process;
- ✓ some Respondents noted that the use of TAR was relatively new to them, and that the Pilot provides little guidance on the various forms;
- ✓ identifying the potential use of TAR 'at a high level' was considered by some Respondents to be a useful step in the preparation of the DRD; although others commented that, until the document universe was known, it was impossible to provide accurate quotes for the TAR exercise.

9. NARRATIVE DOCUMENTS

'Narrative documents' are defined in App 1 to PD 51U, to mean documents '*which are relevant only to the background or context of material facts or events, and not directly to the Issues for Disclosure*'. Adverse documents (as defined in [2.7]) are not Narrative documents, according to that definition.

Model D and Model E orders for Extended Disclosure can be made with, or excluding, Narrative documents. There is a presumption under Model D that Narrative documents should **not** be disclosed if the order is silent as to Narrative documents (per para (3) of [8.3]). Respondents were asked for their views and their experiences on this Model D Extended Disclosure (given that this was likely to be a commonly-ordered Model).

A. The concept of 'Narrative documents'

Predictably, various orders for Model D Extended Disclosure were made with Narrative documents, and others without. Neither type of order seemed to predominate in the responses provided.

1. Meaning

The concept of a 'Narrative document' was critiqued by many Respondents are being uncertain: i.e,. how to identify a 'narrative document' was '*very difficult to apply in practice*', that its definition was *'a very difficult, subjective judgment, and likely to be highly contentious*', and that '*there is too much ambiguity surrounding the term, which leaves the entire process open to abuse*'.

One Respondent was convinced that '*neither the court nor the parties really understood what was meant by a "narrative document"*,' and hence, the matter had been '*ignored*' at the CMC stage.

The overarching view was that, if the presumption not to include Narrative documents is to remain, then the concept and definition of a Narrative document required more detail, illustration, and explanation.

2. Parties 'doing their own thing' under Model D

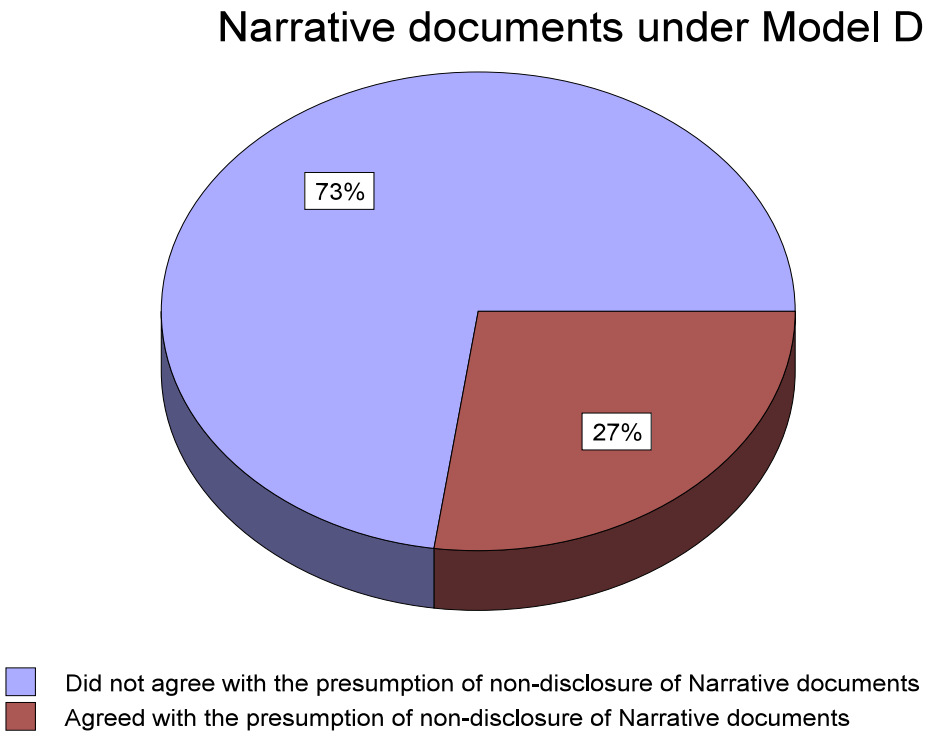
Interestingly, some Respondents noted that, in their experience, orders re Model D Extended Disclosure were frequently silent as to whether Narrative documents were to be included — and where orders were silent, the parties proceeded on the basis that Narrative documents **were** included within the obligation for

disclosure, i.e., they proceeded contrary to the presumption in (3) under Model D. As one Respondent noted, '*in our experience, parties are still routinely disclosing narrative documents under Model D*', regardless of what order (if any) was made about Narrative documents.

Another Respondent had the *opposite* experience under Model E — that the presumption under Model E that Narrative documents should be searched for and disclosed (under para (4) of [8.3]) was not followed either.

B. What about the presumption of non-disclosure under Model D?

The majority of Respondents who answered this question did **not** consider the presumption to exclude Narrative documents under Model D to be 'sensible and workable'. Indeed, the arguments that narrative documents should be included, both judicially and presumptively, under Model D were multifarious.



A variety of reasons were given for the majority's views, as the Table overpage illustrates:

Respondents: why the presumption to exclude Narrative documents from Model D was wrong:

- ❑ it was too risky to exclude Narrative documents (even if the judicial order re Extended Disclosure is silent), because '*there will often be emails or other documents which will be seized upon by the opposing party as being inconsistent with a party's evidence or case, but which do not at first glance appear central to the case. ... If we assume a document is relevant ... then to go on to categorise that document as 'narrative' is very risky, and most parties will err on the side of disclosure*', to avoid costs consequences or sanctions down the track

- ❑ narrative documents actually help: '*there is a significant difference between a relevant narrative document and a document which is not relevant*', and that the former should be presumptively disclosed; '*sometimes, narrative documents are not exclusively narrative documents ... [and] in any event, sometimes narrative documents help the judge make findings in a case, because they help to provide a fuller picture*', '*they are part of the story*', the '*are useful to understand the general context of the dispute*', and are so '*illuminative*' that if their disclosure is not obliged, then it can cause a party (and judge) to '*forego that potential advantage*' of reading them

- ❑ the presumption is unworkable because '*it is totally unclear what a narrative document is, and what it is not*', and that the presumption is only going to work if, say, '*examples of narrative documents*' were provided as part of PD 51U's explanatory notes

- ❑ the presumption is unworkable because '*neither the courts nor the parties in the cases we have been involved in have attempted to address the meaning of a narrative document ... the issue has not been even been considered at any CMC I've been involved in*'

- ❑ it can be difficult to know, early in the case, whether a document is a narrative document, or irrelevant – and disclosure may be disjointed where parts of an email chain is disclosed (as being relevant), but not all of it (because the rest of it is 'narrative')

- ❑ where TAR is used, it is not expensive or difficult to identify Narrative documents, so it makes no sense to presumptively exclude them

- ❑ presumptively excluding Narrative documents '*may actually increase costs, because documents will need to be reviewed by more senior lawyers in order to make that decision*'; and '*the sift takes up more time (and thus increases costs) more than the disclosure would*'

- ❑ the presumption to exclude only really works where the party and the document review team '*have a clear sense of the factual circumstances behind a dispute ahead of the document review*' — if they do not have that understanding, so early in the case, then the burden on the first pass reviewer to sift out narrative documents is prone to considerable error

- ❑ document review teams are already tasked with assessing relevance, and privilege – to screen 'narrative documents' introduces further costs and complexity in the review process

- ❑ if Narrative documents are excluded, it opens up real problems as to whether the document is adverse, and should nevertheless be disclosed (as the definition in App 1 requires)

KEY SUMMARY POINTS

- ✓ many Respondents critiqued the definition/concept of a 'narrative document' as being uncertain (albeit that some indicated that the matter was ignored at CMC stage);

- ✓ although the presumption for a Model D order is that, if the order is silent as to Narrative documents, they do not need to be disclosed, some parties were identifying and disclosing them anyway, as they felt uncertain about their meaning;

- ✓ some Respondents were concerned about the costs implications of not disclosing Narrative documents, in that document review teams are tasked already with assessing relevance and privilege — and to screen out 'narrative documents' introduced further costs and complexity in the review process;

- ✓ the majority of Respondents (73%) considered that the presumption not to disclose Narrative documents under Model D, unless the order stipulated their disclosure, was wrong, and should be reversed. These Respondents were also of the view that, if the presumption not to include Narrative documents under Model D is to remain, then the concept and definition of a Narrative document required more detail, illustration and explanation.

10. TIMINGS EMBEDDED IN THE PILOT

A. Criticisms of the timings

Respondents were asked whether the timings under the Disclosure Pilot were too short, too long, or reasonable. A majority of the Respondents had concerns about the timings, and these are summarised in the Table overpage:

Comments on timings – critique

- ❑ '*more time is required for giving Initial Disclosure*'
- ❑ '*the timetable is almost never kept to ... the completion of the DRD only arises as an issue when counsel is instructed to prepare for the CCMC, which means that the DRD is often prepared less than two weeks before the CMC, leaving almost no time for the required steps to be completed*'
- ❑ there is '*insufficient time between pleadings closing and the first CMC ... this has caused the usual recriminations between the parties as to who is to blame*' – '*the DRD itself is filed 5 clear days before the CMC, so you have only one week to complete it. This results in parties turning up at the CMC without having narrowed the issues, which results in the CMC being too long or part-heard, resulting in more costs. At least one month should be given for filing Section 2, and one week for filing of the DRD*'
- ❑ '*timings are too short, resulting in huge increase in costs prior to the first CCMC ... meaning that you have to prepare for the CCMC as soon as proceedings are issued (or before, if the claimant), even though very likely that settlement will be reached*'
- ❑ '*the timetable has been devised without any understanding of the financial and time pressures already on parties and the availability of the court ... in every case in which we have been involved, the CMCs have been adjourned or not completed, to provide further time to comply with the Pilot*'
- ❑ '*the list of issues are tied to the last statement of case, which can be months before the CCMC, meaning that the obligations under PD 51U kick in months before the CCMC ... the timing of these obligations get in the way, they should be tied to the CCMC*'
- ❑ '*there are too many deadlines surrounding the DRD, with inter partes correspondence arguing about which model to apply, and too prescriptive on actions that need to be taken prior to the CMC*'
- ❑ '*the timings simply do not work where the CMC was listed before pleadings had closed*'
- ❑ '*the timing at which parties must write to indicate that they are seeking Extended Disclosure is too early ... most parties send such letters now, without giving the issue much thought*'
- ❑ when pleadings are being amended, the timings don't work, *'because parties are required to be taking steps completing the DRD before the issues are agreed*'
- ❑ the deadlines definitely '*do not work for a case where the CMC is listed very shortly after filing of the Defence, as there is no time before the CMC to complete the required steps*'
- ❑ '*the timing built into the Pilot is too short for responding to Model C requests for disclosure*'
- ❑ '*everything has taken longer than the pilot anticipates*'

Comments on timings – critique (cont'd)

- ❑ '*as claimant, we were seeking an expedited process, and if followed strictly, PD 51U does not allow this at all ... it is easy for an opponent to doggedly stick to the time limits set out in PD 51U, rather than try to move matters along*'

- ❑ the PD 51U timetable '*seemingly takes no account of the need to comply with all other directions, including costs budgeting. Instead of working on the 'actual' claim and the legal issues and trying to focus on settlement, both sides spent a ridiculous amount of time on dealing with processes. The fact that we managed to settle the claim was despite the pilot, it was certainly not because of it*'

- ❑ '*we needed to have discussed Section 2 of the DRD, and finalised that by Monday, 23 Sep, ahead of the CMC on 20 Sep ... In this respect, the directions clashed ... on the one hand, the DRD was to go in the bundle which was to be filed not less than two, but not more than 7, days before the CCMC — but, on the other hand, the pilot provides that the DRD is to be filed not later than 5 days before the CMC. This needs to be resolved, because the outcome is inevitable duplication with it being filed twice (not to mention the time wasted whilst we tried to work out the best way to handle it)*'

- ❑ '*the five-day filing before the CMC is unrealistic; in most cases which reached the CMC, the parties were continuing to work on the DRD right up to the CMC. It would be helpful to shorten the deadline (perhaps 24 hours prior to the CMC)*'

- ❑ the date of service of the final statement of case is the trigger for much of the Disclosure pilot timetable (within 28 days of service, each party must let the other know whether they are likely to request Extended Disclosure) – but the timetable *'cannot be decided until you know if the claimant will file a Reply to the Defence or not*' — '*what about an express obligation on the claimant to tell the defendant whether they are going to serve a reply?*' Another Respondent suggested that the DRD process '*could potentially be referable to the filing of the Defence, as opposed to the "final statement of case"*'

- ❑ '*you have to file the DRD 5 days before the CMC. This is not sensible, as for those 5 days after filing, and before the CMC, you continue to negotiate the DRD. This means that the version filed, and the version debated during the CMC, can be very different, as it was in our case*'

- ❑ '*at least 16 weeks is required between the close of pleadings and a CCMC under the terms of the Pilot. Not all CCMCs are set with that in mind (in our case, there were only 7 weeks allowed, and as a result, almost none of the timings set out in the disclosure pilot could be observed)*'

- ❑ '*some stages of the pilot process are counted forward from statements of case, while some are counted backwards from CCMC. In practice, this can cause pinch points*'

- ❑ the timings are '*entirely inappropriate*' for multi-party cases, and need to be extended for such complex cases

Comments on timings – critique (cont'd)

- ❑ it has been suggested by the DWG that, under [2.11.1], time limits can be varied by written agreement of the parties, without requiring a court consent order. *'We think that it would be helpful if there are circumstances where an extension of time needs to be sanctioned by the court*'

- ❑ '*there is some uncertainty as to when proposals for the disclosure models (other than Model C) have to be exchanged*'

- ❑ under [7.6], '*there is no time limit on the process of seeking to agree the draft List of Issues, which means that this can be a moveable feast when the parties are seeking to complete Section 1B. A possible solution would be to have a prescribed period under [7.6] and to link the timings under [10.5] to that deadline*'

- ❑ the timing of disclosure under PD 51U was *'unclear in relation to unfair prejudice petitions (generally, and for Initial Disclosure). Should Initial Disclosure be provided with the petition presented to the court, or once the court has made an order as to whether the petition is to stand as points of claim?*'

B. Inconsistency with court guides

Some Respondents made particular reference to the fact that court guides were not consistent with PD 51U, and that the court guides had not been updated. To take a sample of responses:

Court guides

- ❑ '*there is a lack of clarity and issues of conflict between all of the guidance notes. It was extremely difficult – and timeconsuming – to reconcile PD 51U with the Chancery Guide and with the additional directions that were issued by the Court — which themselves were different to 'standard' procedure, and led to my having to produce a three-page timetable which attempted to reconcile all of the competing demands, and which had to be amended and updated regularly – I was on version 6 before we'd even reached the CMC. It was incredibly frustrating and time-consuming*'

- ❑ the timings in PD 51 U *'do not accord with the timetable in the Commercial Court Guide, see, e.g., para [D.3]*'

- ❑ '*the PD 51U timetable does not marry up with the timescales for doing things under different guides. For example, the Pilot requires timescales to be counted forward from statements of case, but budgeting is counted back from the date listed fro CCMC. The two need to fit together to avoid having to deal with the two issues at separate hearings*'

C. Support for the timings

Sometimes, there were more positive comments about the timings under PD 51U — and some rare Respondents even considered that the timings under the Pilot were too short!

Timings – support

- ❑ '*timings are about right. Solicitors are getting on this at the right time. You sometimes have a short delay on completion, but nothing serious*.'
- ❑ '*the deadlines under PD 51U are overly generous (spanning a period of 3–4 months). IN particular, the stipulation on the Claimant t provide draft list of disclosure issues 42 days after the Reply is filed risks building in lengthy delays between the close of pleadings and the CMC. It would be preferable if the deadlines were compressed, so that the DRD could be completed within a shorter time-frame*'
- ❑ '*the timescale to notify Extended Disclosure in case which are over £10M is too long. In most cases, it will be evident from the outset that Extended Disclosure is needed*'
- ❑ *'the parties agreed extensions between themselves, and it was not an issue*'
- ❑ in practice, the Pilot '*effectively means that there is a good 6-month period between the issue of proceedings and the first CMC*', which the Respondent suggested was too long

KEY SUMMARY POINTS

- ✓ the vast majority of Respondents considered that the timings under the Pilot were too short, and too condensed (although their criticisms were spread across a range of timings);
- ✓ many Respondents complained that the requirement to file a single joint DRD five days prior to the CMC was unrealistic, in that work was ongoing on the document thereafter, given its complexity and the ground that it covers;
- ✓ some Respondents were particularly critical of the timing allowed for responding to Model C requests for disclosure, regarding it as being too short;
- ✓ some Respondents suggested that PD 51U should incorporate an express requirement that the claimant must inform the defendant as to whether or not it is going to serve a Reply; currently, the date of service of the final statement of case is the trigger for much of the Disclosure Pilot (i.e., within 28 days of service, each party must let the other know whether they are likely to request Extended Disclosure), but the defendant can be in the dark as to whether the Defence was the final statement of case;
- ✓ some Respondents noted that some stages of the Pilot process were counted forward from the statements of case, whereas some were counted back from the CCMC, which could cause difficulties ('pinch points') in practice;
- ✓ ongoing inconsistencies between the timings under the Pilot, and the timings specified by various court guides which had not been updated, were causing some Respondents frustration and uncertainty;
- ✓ however, more rarely, some Respondents considered that the timings under the Pilot were too generous, too long, and that key aspects of the timings should be shorter.

11. DISCLOSURE GUIDANCE HEARINGS

The stated purpose of Disclosure Guidance Hearings (DGHs), per para [11.1], is to obtain '*guidance from the court ... concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure*'.

Only very rarely have Respondents been involved in a DGH. This has occurred in differing circumstances, e.g., where there was a genuine lack of certainty between the parties about a step related to Extended Disclosure; or because the opposing party *'was not engaging properly with the Pilot scheme at the time the application was made*'.

Across the Questionnaires, only **four (4)** Respondents had participated in a DGH. However, **six (6)** of the Respondents had participated in a CMC which closely doubled or duplicated a DGH — except that it was not called a DGH, and was (in most cases) much longer than the 30-minute hearing envisaged for a DGH in para [11.2].

A. Concerns about Disclosure Guidance Hearings

The Respondents to the Questionnaire cited various concerns and reservations about the present provisions governing DGHs, and explained why an application for a DGH was not an attractive or feasible option. These views are summarised in the Table overpage:

Respondents: Reasons mitigating against seeking a DGH in its present form

- ❑ ***too limited, as to what DGHs are for***: the wording which permitted a DGH was so limited in [11.1] that issues which arise at an early stage to do with, say, how to complete a section of the DRD, or a suitable date range for disclosure, lay outside the scope of the drafting, rendering a DGH inappropriate

- ❑ ***a CMC will do***: CMCs were held in lieu of DGHs in some cases. Some parties requested, and the court ordered, a further CMC, at which issues such as who has 'control' of a relevant document in question, were resolved; or a DGH was requested but declined by the court, because, '*it is not guidance the parties needed but a CMC to deal with disclosure*'

- ❑ ***too short***: even where it may be contemplated as being helpful, 30 mins + 30 mins pre-reading was considered to be too short, and it was perceived unlikely that a more realistic time-frame would be permitted, hence, the Respondents did not apply; OR for those who did apply, one Respondent had a DGH set for 2 hours and which went for 3.5 hours; another had a DGH that took a day and involved leading counsel, one had a DGH for an hour — all thereby suggesting that the 30-minute hearing in [11.2] was unrealistically short and incapable of giving real help; OR for those for whom a DGH was scheduled, it was for 2 hours, contrary to [11.2]

- ❑ ***costly, and fees apply***: costs was a major disincentive, because counsel and solicitors would be expected to attend, thereby frontloading costs further; the concept '*fails to appreciate the costs involved with such a hearing, and places further costs on the parties and strain on an under-resourced court system*' — and, in order to save costs of such a hearing, the parties '*have arranged inter-parties calls/meetings instead (without counsel)*'; plus the need to pay a fee for the application to have the DGH '*is not that attractive, especially where the problem will be sorted out at a CCMC ... an application fee should not be required*'

- ❑ ***listing not prompt enough***: a District registry would not be expected to arrange a hearing quickly enough to resolve the particular issue, and hence, the parties '*might as well await the CCMC, or maybe PTR*', whilst another noted that the concept of the DGH '*fails to appreciate the time it takes for a court to list the hearing which will result in the re-listing of the CCMC*'

- ❑ ***an incomplete picture:*** there was a concern that a Master hearing a DGH would be so focused on the issue that s/he may '*subconsciously tend towards making an order granting disclosure, not realising that there was a whole host of other surrounding issues*'

- ❑ ***what's the point?*** the utility of the DGH was hampered if no orders could be made by the Court (only guidance in the form of a court-approved note). One Respondent noted that, at its DGH, a court order to narrow the subsequent Disclosure Issues would have been useful, where the opposing party had not given any, or any sufficient consideration, to how they were going to conduct searches for relevant documents

- ❑ ***lack of judicial familiarity with the case***: some Respondents were concerned that judges will not have the time or the knowledge of a specific case to make DGHs effective, unless judges are docketed, or pre-reading time is substantially increased: '*it would further increase efficiencies if there could be a docketed case management/disclosure judge for all DGHs or split CMCS devoted exclusively to disclosure disputes*'

B. Drafting suggestions for DGHs

Quite apart from the abovementioned reasons as to why a DGH was not sought, or considered to be helpful under the Pilot, several Respondents called for changes in the drafting of the provisions governing the DGH. These suggestions are summarised in the following Table:

Respondents: Suggested changes to the DGH provisions
❑ the Pilot should be able to (1) accommodate a DGH upon **any** aspect of the Pilot where short guidance would be helpful to the parties; (2) encourage parties to seek a hearing that exceeds the suggested 30 minutes if that would be helpful (and specify the circumstances in which such a request is likely to be agreed); and (3) stipulate how often a DGH can be requested in a single case;
❑ why was there a need to allow for the possibility of a DGH in the parties' costs budget, when their applicability seems so limited?
❑ as part of the DGH process, it would be helpful if there was a process built into the Pilot whereby parties could submit short written questions, or requests for guidance related to the Pilot, that could then be decided on the papers, without the benefit of an oral hearing
❑ the usual practice under [11.5] is clearly not to award the costs of the DGH to any party, but guidance as to when adverse costs could be awarded under [11.5] would be welcome (e.g., due to the uncooperative conduct of the opposing party), '*as a way of incentivising party co-operation and of avoiding court resources being wasted on unnecessary (or unnecessarily long) DGHs*'
❑ it is presently unclear as to whether the application for a DGH should include simply a request for the hearing, or whether it should also include details of the guidance sought – '*it would be helpful if guidance was published on this*'
❑ it appeared from para [11.3] that only the solicitor with the conduct of the case, and not counsel, should attend the DGH. However, given that the Listing Officer advised one Respondent that the hearing should be fixed by counsels' clerks, how is that reconcilable with the notion that counsel are not involved in the hearing? '*It would be helpful if the process for listing the hearing, and who should carry out each step, was clarified*'
❑ DGHs could feasibly be replaced by 'early split CMCs', where hearings could be used *'to set key data set questions (e.g., custodians and data ranges) at an early stage, so that the remaining disclosure issues can be addressed in a more efficient and meaningful way without having to consider the many permutations of the hypothetical*'; decisions such as custodians and date ranges delineate the data set, and has a huge knock-on effect for all other disclosure issues and for Section 2 of the DRD, such issues are inevitably complex, and would usually need longer than 30 minutes – '*the investment of time to deal with such primary disclosure issues would save a great deal of time at the full CMC*'

KEY SUMMARY POINTS

- ✓ only a small fraction of Respondents had engaged in a Disclosure Guidance Hearing, properly called;

- ✓ a few others had participated in a CMC which closely resembled a Disclosure Guidance Hearing (except that it was for much longer than 30 minutes!), but which was not called that;

- ✓ several Respondents expressed misgivings about applying for a DGH, as presently couched. These concerns included (but were not limited to): what they are currently allowed for, issues-wise, was too limited; they were too short at 30 minutes; non-docketed judges may not understand the issues surrounding the disclosure dispute; the listing of a DGH was unlikely to be prompt; substantial costs and fees apply for such hearings, which parties can ill-afford; the utility of a DGH was lessened if no orders could be made by the court; and CMCs (however many of them required) do the same, if not a better, job, as the parties often need orders, and not guidance;

- ✓ a number of Respondents suggested redrafting the provisions governing the DGHs, including the following: widening their triggers for availability, specifying who should attend (just the solicitor with the carriage of the case, or counsel too), providing some alternative 'on the papers' for brief queries to be answered; and clarifying the position as to when adverse costs could be awarded for a DGH;

- ✓ some Respondents favoured replacing the DGH with 'early split CMCs', where the first CMC could be used to set key data set questions such as date range, custodians, and keyword searches.

12. CASE MANAGEMENT HEARINGS

Respondents were asked to comment upon the first CMC, at which any disputes about Initial Disclosure, and any orders for Extended Disclosure, are to be heard and decided upon.

In particular, Respondents were asked whether the first CMC was listed appropriately to take account of any issues surrounding disclosure, whether all the issues were disposed of at that first CMC, whether the judge seemed well-prepared for the CMC, etc.

A. Judicial preparedness

In the vast majority of responses, Respondents noted that the judge seemed well-prepared for the CMC, with some Respondents singling out praise for some judges: that the judge had a '*knowledgeable approach*'; that the relevant judges '*have been well-prepared and understand the process*', and that judges were being put to inconvenience on many occasions (e.g., '*the other side updated the DRD a day before the CMC, which the deputy master was reasonably displeased about*').

Occasionally, there were more negative comments that, '*the judge was understandably overwhelmed by the volume of issues in dispute at the first attempted CMC*'; that '*the judges and masters have been clueless, and the Pilot disregarded altogether*'; that '*experience has been variable*'; that '*in one case in the TCC in [a named regional centre], the court seemed not to be aware of the Pilot*'; that '*the masters and judges that we have encountered have been clueless as to the Pilot's interpretation and application, and regarding Section 2 of the DRD, Masters/judges expect completely different information*'; and that the judge '*was not engaged with the Pilot scheme at all, we were encouraged to just agree issues, rather than have any judicial input*'. But these latter were exceptional comments;

B. CMCs — support

Several Respondents noted some difficulties with the first CMC — but occasionally, Respondents were not concerned. One noted that, '*the issues were the same as they always were. ... notwithstanding the extra steps required under the Pilot, the court still needs to deal with disclosure, more or less as it did before, so ... the effect on the CCMC is neutral*'; whilst another noted that *'the parties were in regular correspondence prior to the CMC to limit the number of issues and for disclosure specifically ... [so that] there were only a few outstanding matters for the Master to decide*'.

Others, however, were not of that view! Many Respondents commented that any CMC in which the DRDs were the focus has become '*more adversarial*'.

C. Problems with the first CMC

There were a number of Respondents who had encountered difficulties with the first CMC. To summarise the crux of their complaints:

Identified problems

- ❑ additional time was required in many case, the first CMC was too short – e.g., one Respondent noted that the first CMC was set for 1.5 hours, relisted for 3 hours, whereas *'there are so many issues in dispute regarding the DRD that we will probably need a full day to resolve them*'; others did require a full day for the CMC, *'entirely disproportionate to the benefits gained, and unnecessarily costly for the client*'; another noted that the first CMC was too short, but the parties did not request additional time, '*as this would have resulted in a re-listing of the hearing a further six months from the date due to the court's availability*', but ultimately, the CMC was adjourned, '*at great cost to the client*'. One Respondent noted that they had had two CMCs, both directed to dealing with the DRD

- ❑ '*going through the DRD typically adds about 1–2 hours to the CMC process*', or '*the CCMC had to be listed for 2 days; without disclosure issues, say half a day*', or that '*the CMC was listed for one day, but this was extended to two days, each party was represented by a QC and a junior, so the process was fairly costly*'

- ❑ CMCs were frequently adjourned/carried over, when the issues arising from the DRD could not be dealt with within the time, although some Respondents said that this aspect was improving, '*as the courts and parties get used to the amount of additional time that will be required to go through the DRD and provide more accurate time estimates'*

- ❑ the CMC was set too early – in one case, it was listed before the defence was served

- ❑ the first CMC was too short when the costs budget also had to be completed at that CMC, together with disclosure issues

- ❑ the parties were doubtful that the CMC could be dealt with in one day — but it was dealt with in half an hour, because '*Model D was ordered across the board*'

- ❑ '*it would be helpful for Listing departments to factor in the timescales set out in PD 51U before listing CMCs. Alternatively, guidance would be welcomed as to what to do in circumstances where the disclosure timetable provided by PD 51U is unworkable, through no fault of the parties*'

KEY SUMMARY POINTS

- ✓ with some exceptions, Respondents were generally satisfied with the levels of knowledge and preparedness displayed by judges at the CMCs, when dealing with the requirements of the Pilot;
- ✓ several Respondents expressed concerns about the first CCMC – that it was too short, frequently carried over/adjourned, set too early, etc;
- ✓ some exhorted listing clerks to be more cognisant of the timings within PD 51U, so as not to set the first CMC, in particular, too early;
- ✓ some Respondents noted that they had observed that CCMCs had become far more adversarial under the Pilot than previously, perhaps because the parties were working 'blind', and in the dark, as to what documents the opposing party would have.

13. ADVERSE COSTS ORDERS

Only very rarely (i.e., in **three** cases) were adverse costs orders made regarding Disclosure, according to the Respondents who answered the Questionnaire. In a further **two** cases, an application for an order as to adverse costs order had been made by a party, to be decided later.

Some Respondents opined that, even where adverse costs may have been appropriate (due to the opposing party's conduct), *'there was no interest by the judge in investigating the conduct of the parties in dealing with the matter*'.

Another commented that, in its view, an adverse costs order was inappropriately made against its client for failing to complete the DRD, in circumstances where there were in excess of 10 defendants, none of whom had engaged in the process required by the Pilot; and where the deadlines for Initial Disclosure had already passed by the time that the case became subject to the Pilot, but where the Master had presumably '*been told to crack down on non-compliance*'.

14. UNREPRESENTED LITIGANTS

In only four cases in the sample had Respondents dealt with a Litigant-in-person (LIP) under the Disclosure Pilot. However, problems had been variously encountered by each of those Respondents when dealing with LIPs.

A. Additional tasks created

The types of additional tasks identified by Respondents as having to be completed by them, as the lawyers for the represented party, included the following:

Respondents: Additional tasks
❑ sole responsibility for preparing the DRD for both parties (on information from the LIP)
❑ suggesting the List of Disclosure Issues
❑ taking carriage of certain documents, whilst the opposing party was unrepresented for a period of time
❑ providing '*substantial assistance to the LIP re the rules that they were required to follow*'

B. Further difficulties encountered

Other problems identified by various Respondents, when dealing with LIPs, were as follows:

Respondents: Wider problems

- ❑ the represented party was highly reluctant to trust the LIP's ability or willingness to identify either 'known adverse documents' or 'narrative documents'
- ❑ the LIP frequently took the view that 'any document for whose contents she had a good explanation was not "*adverse*", and therefore not disclosable. One Respondent noted that LIPs '*particularly find it almost impossible to identify known adverse documents, since they commonly have an explanation as to why a document is not, in fact, "adverse" to their case*'
- ❑ the process and documents required under the Pilot is highly complex, and some Respondents expressed real misgivings about the effect upon costs, had they been dealing with a LIP as an opposing party — whilst one Respondent declared that engaging with an LIP under the Pilot was '*unworkable*' where there were multiple disclosure issues
- ❑ LIPs would not agree to what constituted a reasonable request for disclosure
- ❑ for one Respondent, it had had no engagement at all with an unrepresented defendant, despite the various obligations and deadlines which the Pilot imposes on all parties, and yet, there was no sanction cited
- ❑ one Respondent noted that '*we have encountered particular issues when dealing with litigants-in-person who do not necessarily appreciate that discussions regarding Extended Disclosure and the formulating of the DRD is intended to be a collaborative process*.'

KEY SUMMARY POINTS

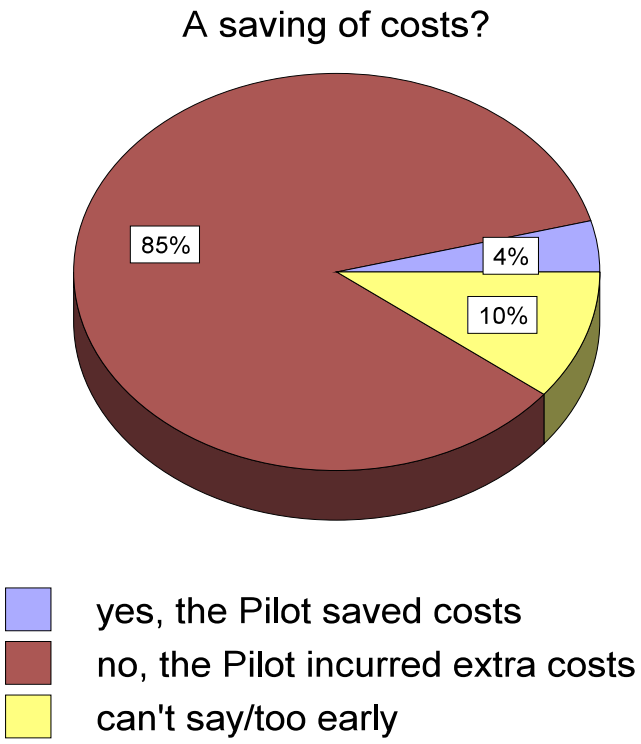
- ✓ unsurprisingly, LIPs had presented some challenges to those parties who did possess legal representation, with several legal representatives stating that they had to do additional work because the opposing party was a LIP, and another stating that the onerous and complex nature of the DRD made the process almost unworkable;
- ✓ some Respondents had the view that LIPs could almost never identify a known adverse document;
- ✓ some Respondents noted that, contrary to the required spirit of co-operation under the Pilot, many LIPs were rather adversarial when discussion about Extended Disclosure and the DRD occurred (although that scenario does not appear to have been limited to LIPs, according to the tenor of many of the Respondents' experiences!).

15. OVERALL OUTCOMES TO DATE

In the most wide-ranging question in the Questionnaire, the question was posed: *It is very early in the life of the Pilot. However, in your experience, and insofar as you can make meaningful comments at this stage, has the new process of disclosure under the Pilot achieve certain outcomes, especially by comparison with your experiences under CPR 31?*

A. Saving costs?

Respondents were asked whether, by comparison with their experiences under CPR 31, the new process of disclosure under the Pilot had saved costs overall:



Several Respondents expanded upon their comments, overpage:

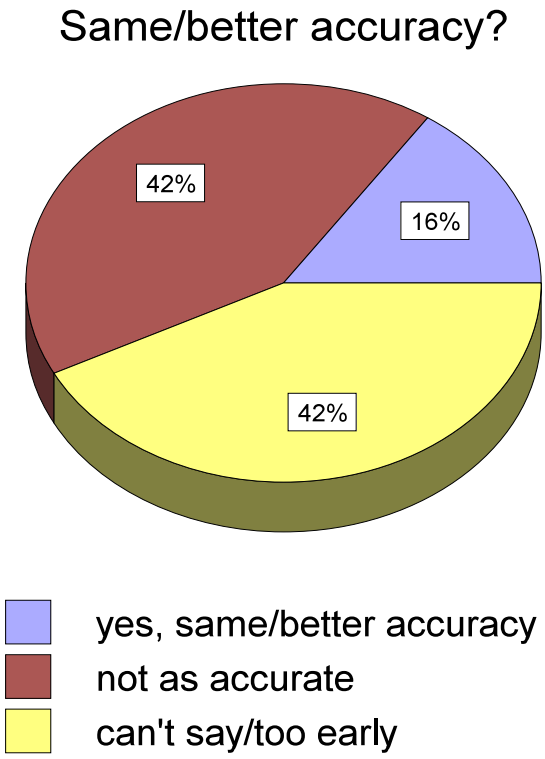
Comments: saving costs

- For cases < £250,0000, it is disproportionate — '*all the Pilot has done is force the parties to incur the often unnecessary costs of carrying out the disclosure exercise at a much earlier stage in the litigation. With cases of <£250,000, this has had the effect of rendering the case impossible to settle, as the parties' costs have too quickly become disproportionate as a consequence of front-loading the work required to engage fully with the Pilot*'
- '*the DRD is rarely considered again by the parties*', Model D was generally ordered anyway, and where Model C was ordered, '*that only gave rise to further disputes down the* line'
- the Pilot scheme '*is entirely misguided, and is actually increasing the costs of disclosure, whilst simultaneously confounding the stated purpose of disclosure, per PD 41U, [2.1]*'
- '*there is additional time advising the client pre-issue, coss in preparing initial disclosure then led to duplicated costs as these documents were then revisited at extended disclosure, and then quite a lot of time was spent discussing and agreeing the DRD and then discussing it at the CMC*'
- costs have been '*triplicated, when the parties have carried out: a partial disclosure exercise for Initial Disclosure, a further exercise for the purpose of identifying issues and costs for the DRD, and a final complete exercise when Model D is inevitably ordered*'
- '*in our cases, I suspect that the disclosure order which will eventually be obtained will be subject to challenge, as parties form the view that relevant documents have been suppressed*', adding to costs
- '*on paper, the Pilot looks sensible, but it ultimately fails because it has been designed to ease the difficulties in those cases that proceed beyond the CCMC, but a lot, perhaps the majority, do not. They settle once it becomes clear that one party or the other is prepared to issue proceedings and the case statements clarify the issues*'
- '*the only reason our case settled post-CCMC was that when the respective clients saw how much was spent on the CCMC process, they did not want to take the matter forward and convened a mediation*'
- '*considerable time had to be spent on the DRD and Pilot process, rather than trying to actually resolve the dispute. It means that more fee earners are needed on a case, as you need people to deal with the very time-consuming processes of the Pilot, in addition to trying to settle the matter*'
- '*the pilot has built costs into the process [which were not required under CPR 31]'*

In a rare 'bright note' on this question, one Respondent noted that *'we can see the benefit (and have had experience of this) in obtaining early disclosure of Key documents which may well impact on the costs of the case overall*.'

B. Improved accuracy?

Respondents were asked whether, by comparison with their experiences under CPR 31, the new process of disclosure under the Pilot had achieved as accurate a result (i.e., the right documents disclosed and the irrelevant ones sifted out), achieving not a perfect outcome, but a proportionate outcome, given the overriding objective of CPR 1.1:



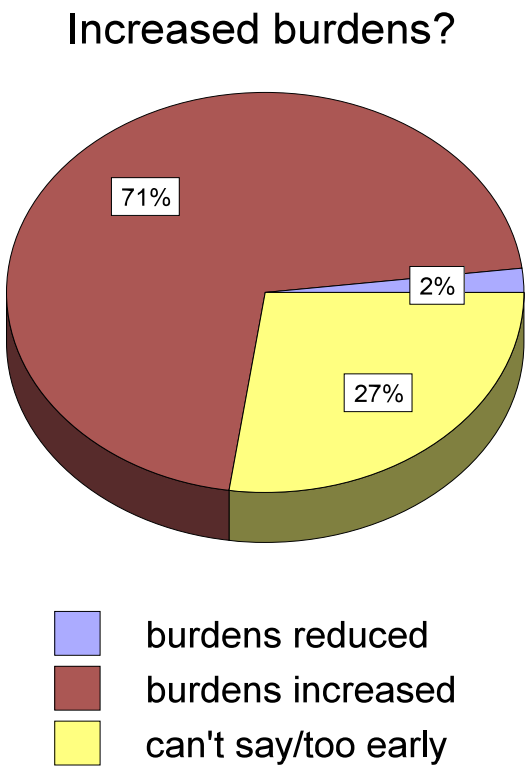
Some Respondents had some pertinent comments:

Comments: accuracy

- ❑ the Pilot '*is being deployed tactically and is not resulting in appropriate disclosure*'
- ❑ '*the problem is that disclosure matters are now being argued at a stage when parties cannot really be expected to have got to the bottom of who has what documents and where they are*', so it is difficult to frame appropriate requests for disclosure
- ❑ '*probably as accurate as under the previous regime's standard disclosure, but at far greater and disproportionate cost*' (this point was made by several Respondents)
- ❑ '*the Pilot is predicated on the basis that both parties (not their lawyers) are reasonable and will comply with their obligations. The solicitors cannot inspect every document. Everything is supposition. 'I'm told by my client that there are no accounting records older than 6 years'. If those instructions are untrue or mistaken, and the model adopted is based on those instructions with no further searches made, then relevant documents will remain undisclosed*'
- ❑ the Pilot, and '*its new models are open to interpretation and can be exploited by an unscrupulous party*'
- ❑ '*in some cases, the Pilot could lead to "relevant" documents not being disclosed (e.g., if opposing party does not make a search-based request) which may not assist in the fair resolution of the dispute*'

C. Reduced burden on the court?

Respondents were asked whether, by comparison with their experiences under CPR 31, the new process of disclosure under the Pilot had reduced the burden on the court in resolving issues of disclosure and (if applicable) in resolving issues for trial:

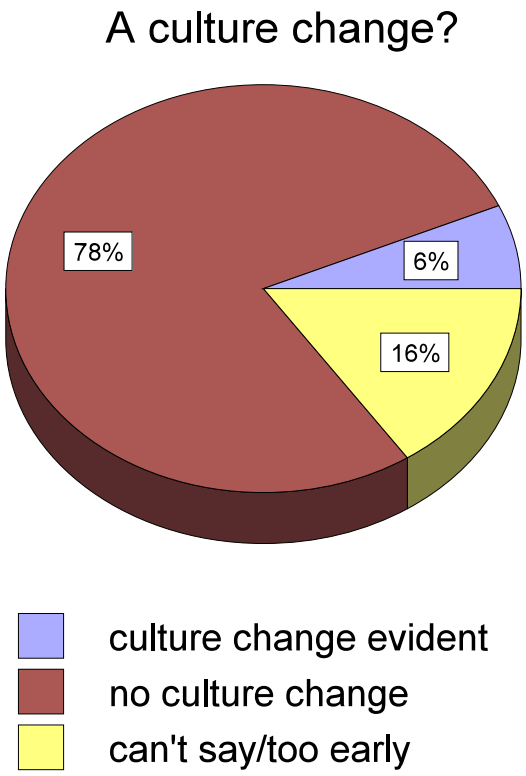


Some sample comments are noted below:

Comments: reducing court burdens
❑ burdens are increasing, in that '*in three of our four cases, further hearings have been required*'
❑ '*it is increasing court time in dealing with the DRD at CCMC stage*'
❑ '*the burden appears to have drastically increased on the court, both in* terms of the time needed for the CCMC, and the listing of Disclosure Guidance hearings'
❑ '*we have had to have multiple CMCs, increasing the burden on the court hugely*'
❑ '*there is scope for intractable disputes over, e.g., issues for disclosure and the scope of an issues-based disclosure order, leading to the need for greater court scrutiny*'

D. A culture change?

Respondents were asked whether, by comparison with their experiences under CPR 31, the new process of disclosure under the Pilot had achieved as 'culture change', i.e., a greater degree of co-operation, proportionality, and reasonableness, in the parties' approach towards disclosure:



Several Respondents clearly felt quite strongly about this aspect of the Questionnaire, and a sample of comments are noted overpage:

Comments: a culture change? – critique

- ❑ '*none whatsoever*'
- ❑ '*the process has been marked by a high degree of distrust between solicitors, unnecessary position-taking, and unending vituperative correspondence ... the scheme should be withdrawn without delay*'
- ❑ '*much of the language of Pd 51U is highly complex and difficult to explain to a lay client, which means that they become less engaged in the disclosure process, as they often do not follow what is involved, particularly in relation to the difference between the various disclosure models ... it has simply added a further administrative layer, and is substantially increasing costs of CCMC preparation*'
- ❑ there can be no culture change, '*whilst there is no effective sanction for the failure by one party (and their solicitors) to stop routine document destruction*'
- ❑ '*definitely not – the parties default to agreeing the more detailed models, as neither they nor the court is bold enough to agree/order the limited models. So, the process ends up like Standard Disclosure, but with the added costo of the Pilot*'
- ❑ '*the CCMC has become far more adversarial and time-consuming, as the parties are now arguing over, and producing, correspondence preceding the CCMC relating to the Pilot*'
- ❑ '*in one case, the parties did co-operate, but there is no reason to suppose that there would not have been such co-operation, had the old system operated. In the other case, it had the opposite effect, and provided fertile arena for disagreement between the parties*'
- ❑ '*there has been a culture change ... parties have more opportunity to argue with each other*'
- ❑ '*it appears to have been devised by a panel that has been influenced by those involved in big-ticket litigation*'
- ❑ '*the culture change is that the introduction of the Pilot has caused a further barrier to justice, for parties who have claims of around £250,000 in value will be deterred from issuing proceedings as a consequence of the front-loading of costs occasioned by the Pilot*'
- ❑ '*a system that was working fine for the majority of High Court cases has been ruined by the Pilot, which appears to have been introduced to accommodate high value insurance and banking litigation, without any thought for the majority of cases it will impact for which it has no benefit whatsoever, and has only caused to increase costs for the parties*'
- ❑ '*parties are now much less co-operative, and more defensive, and it has led to Counsel being more routinely instructed on disclosure issues than was previously the case*'
- ❑ the culture change is that of '*creating a "cottage industry" for Counsel and disclosure platform providers'*

Comments: a culture change? – critique (cont'd)

- ❑ '*if there is to be a culture change, and a move away from Model D as the norm, judges will be required to exercise their discretion even where the parties have agreed the issue, which in our experience is not happening*'
- ❑ '*whilst many first CMCs in the past had not been heavily contested, since the introduction of the Pilot, first CMCs now tend to be quite heavy*'
- ❑ the steps under the Pilot '*has taken ages, increased costs, and led to a lot of bad feeling between the parties. We still haven't agreed all the disclosure issues, searches, or Section 2 of the DRD, as we approach 5 months post close of proceedings - on what should be a simple low cost claim (only £2.4M)*'

E. A reversion to CPR 31 for the 'ordinary case'?

Some Respondents were adamant that it would be better to 'go back':

- ❑ '*our strong preference would be to revert to something close to CPR 31, but to place more reliance on TAR to cut down the amount of documents that legal representatives actually have to review ... as long as custodians, date ranges, issues for disclosure are agreed between the parties, technology can be relied on to reduce the costs and complexity of disclosure*'
- ❑ '*Save for the introduction of initial disclosure, it would be better to revert to the previous disclosure regime, but perhaps with greater judicial intervention and use of the "menu" where appropriate*'
- ❑ '*no, quite the opposite! The DRD has created more opportunities for dispute and challenge. The better option is to revert to having standard disclosure as the default provision, but to encourage case management judges to deploy the full powers available to them under CPR 31'*
- ❑ '*for ordinary cases, there was nothing wrong with the previous system. Everyone knows what standard disclosure is, and it is only when parties do not comply with their obligations that applications for specific disclosure become necessary. The current Pilot unnecessarily complicates these cases, as well as increasing the costs for the parties. I do not think that the Pilot is particularly helpful in the ordinary case (which will form the majority of cases coming on before the court)*'

F. Supportive comments re the outcomes under the Pilot

Comments that a positive culture change **had** been achieved were rare, but to reproduce a sample overpage:

A culture change? Support for:

- ❑ 'I *had my doubts over the DRD and the extended disclosure process generally, but in actual fact, having now provided extended disclosure, it does make you review more rigorously the documents you are disclosing rather than document dumping, and that potentially gives rise to a costs saving. When considering the other side's documents, you will have less rubbish to go through; and it should make oneself think more carefully about the content of documents being disclosed, and that should save costs on witness statements too (because you are applying documents to the issues)*'

- ❑ '*The Pilot required our clients to engage with the question of what documents were in their possession and potentially disclosable at an earlier stage than would otherwise have been the case*'

- ❑ '*There is benefit to making it clear early on what you expect to see from your opponent. Overall, my objection is not to the aims of the Pilot, and the idea is good, but the process is far too unwieldy*'

- ❑ '*On the whole, we and our opponents have been more cooperative as regards disclosure under the Pilot*'

- ❑ '*The list of issues is the biggest culture change*'

- ❑ '*It is too early to tell whether the new regime is an improvement, since practitioners and judges need time to get used to the Pilot, and it may be that it does ultimately result in significant cost savings in reducing the scope of disclosure exercises in future*.'

16. FURTHER FEEDBACK NOT ENCOMPASSED IN THE PRECEDING SECTIONS

A. Sanctions for non-compliance

The lack of '*realistic*' and '*with teeth*' sanctions for non-compliance with disclosuer obligations was noted, both in respect to Initial Disclosure, and more widely.

Some Respondents focused on Initial Disclosure, noting that, in practice, there are '*no checks and balances on any failure by any party to comply with Initial Disclosure*'. Moreover, '*there are a range of views as to how compulsory Initial Disclosure is, and a lack of remedy/recourse available to either party if Initial Disclosure is not provided*'.

In para [5], relating to Initial Disclosure, [5.12], re complaints drawn to the attention of the judge at the first CMC, and [5.13], re the possibility of adverse costs, do exist in PD 51U, but these were not considered to be effective.

More widely, some Respondents considered that there just weren't sufficient opportunities to hold the opposing party to task, if their conduct was not in the spirit of the Pilot. According to one Respondent:

> *When a party simply dumps documents on another party without carrying out proper searches, there is in reality no comeback. Whilst there are potentially costs penalties down the line, the reality is (I) very few matters proceed to a detailed costs assessment where such issues could theoretically be looked at, and (II) there is limited appetite to actually engage with disclosure issues at a detailed assessment hearing. There is effectively "too much water under the bridge" to make it worthwhile to go back and review the decisions that were made. There needs to be more immediate sanctions at the time disclosure is dealt with.*

Re preservation of documents, one frustrated Respondent noted that '*where the opposing solicitor 'forgot' to preserve documents, 'there is no effective sanction, and you have to wait to trial to raise the issue*'.

B. Redaction

One Respondent was concerned about [16.2] of PD 51U, and the provision that '*any redaction must be*

accompanied by an explanation of the basis on which it has been undertaken and confirmation ... that the redaction has been reviewed by a legal representative with control of the disclosure process.' The Respondent's queries were three-fold:

- ❑ By whom is the explanation and/or confirmation to be given? Unless a LIP is involved, presumably by the legal representative, in which case:
- ❑ How, and in what form, is the explanation and/or confirmation to be given? As part of the Certificate of Compliance? Or in the Disclosure Certificate? Or in a List of Documents accompanied by a statement of truth?
- ❑ Is it envisaged that the explanation/confirmation be given on a document-by-document basis, or is it acceptable to provide an explanation/confirmation for the exercise as a whole, or for specified classes/categories of documents?

C. The requirement for 'native' form

In [13.1(1)] of PD 51U, e-documents are to be provided in the documents' native format, unless otherwise agreed/ordered. Some Respondents queried this — whilst noting that it was probably '*implicit in the EDQ*' — and that it may '*impact on smaller firms. We had a bit of an issue with converting documents into readable format while preserving native form (in a manner that is GDPR compliant)*'. One Respondent suggested that this requirement be deleted from PD 51U.

D. The interplay with CPR 20

One Respondent noted the following:

> '*We would welcome clarification as to how the Pilot is intended to operate with CPR 20. What are the parties' obligations where a third party is introduced to the claim? Para [7.2] requires the claimant to serve the draft List of Issues for disclosure 'on the other parties'. Para [7.5] allows the defendant to propose additional wording or amendments to those within 14 days of service. Is it the case that the claimant must serve the draft List of Issues on all parties, but only the defendant can propose amendments? Is it intended that there is then a separate List of Issues as between the defendant and the third party, which the defendant must prepare and serve on all parties, but which only the third party can comment on? That would be consistent with the treatment of an additional claim as a claim per CPR 20.3(1).*'

APPENDIX A THE QUESTIONNAIRE

THE DISCLOSURE PILOT
in the
BUSINESS AND PROPERTY COURTS

Relevant Questionnaire, circulated to all interested parties, October 2019
by
Prof. Rachael Mulheron, Official Monitor of the Disclosure Pilot

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Please note: This document is also available for download at the following Queen Mary University of London website:

https://www.qmul.ac.uk/law/research/impact/discmon

Your responses to the following questions (or to those which have arisen in your experience of the Disclosure Pilot) would be gratefully received:

Q1. ***Your own experiences.***

Approximately how many cases have you conducted in which you have had direct experience of the Disclosure Pilot? What is the furtherest stage that your case/s have reached under the Pilot?

Q2. ***Initial Disclosure.***

(a) Were you involved in a case in which the parties agreed to dispense with Initial Disclosure? What were the reasons (per [5.8]) for that agreement?

(b) Did the court order that Initial Disclosure was not required? If so, what reasons were given for that dispensation?

(c) Do you think that the threshold at which Initial Disclosure is not required (i.e., the larger of 1,000 pp or 200 documents) is appropriate and realistic?

Q3. ***Adverse documents.***

The Disclosure Pilot requires the disclosure of adverse documents. Have you encountered any difficulties with:

(a) identifying an 'adverse document' which 'materially damages' the disclosing party's argument or version of events (as that is defined in [2.7]); or

(b) the stage in the proceedings at which known adverse documents must be disclosed?

Q4. ***Preservation of documents.***

The obligations upon legal representatives with respect to the preservation of documents are outlined at [3.2] and [4].

(a) Have you encountered any difficulties or issues in complying with these obligations?

(b) In particular, have you encountered any difficulties in notifying former employees, agents, or third parties, of their obligations to preserve documents?

Q5. ***Extended disclosure.***

(a) In the cases in which you have been involved, have there been any disagreements arising between the parties as to whether Extended Disclosure is required, having regard to the 'reasonable and proportionate' factors listed in [6.4]?

(b) Did any issues arise for either party regarding the completion of Section 2 of the Disclosure Review Document (DRD)? Was there disagreement as to which Extended Disclosure model to adopt *per issue*?

(c) What reasons were given for the judicial decision to approve one model of disclosure over another? Were different models ordered for different issues for disclosure?

(d) Did discussions about the different options for Extended Disclosure per issue take place in person or by phone? Was there more than one discussion as to how to complete Section 2 of the DRD?

(e) Did you engage counsel to argue for or against the models for Extended Disclosure at the CMC and/or to draft a detailed Skeleton of Argument on this issue for the CMC?

(f) Do you agree that the various Models of disclosure, A-E, have been properly defined and distinguished, for the purposes of this Pilot? If not, how would you revamp the Models described?

Q6. ***Issues for disclosure.***

(a) Have you had any issues arise regarding the agreement of the list of issues for disclosure?

(b) Was the demarcation between the list of issues for disclosure (the sole subject of the Disclosure Review Document) and the list of issues for trial kept clear, in your view?

(c) Did either party seek to add new issues for disclosure at a later date than the initial CMC? Was an application made to the court, or was it dealt with by consent on the papers?

Q7. ***Disclosure Review Document.***

(a) Do you have any comments on the DRD form, and about the ease or difficulty of its completion? Did either party modify the form in any way? If so, in what way? Could its presentation and format be improved, in your view?

(b) Did you encounter any difficulties in filing the DRD on the CE file? If so, please outline.

(c) If Model C was applied for, did any issues arise for either party regarding the completion of Section 1B of the DRD? Did the court order that any further information should be supplied? Please provide details if possible.

(d) The models for Extended Disclosure have already been discussed in Q5(f) above. Have you any other comments to make, in relation to the completion of Section 2 of the DRD?

(e) Did the judge seem knowledgeable as to (i) the various models of disclosure, and (ii) the types of analytical methods and software review which were proposed, agreed, or ordered?

(f) In Section 2, was the provision of an estimate of costs (Q15) feasible or premature to answer at the stage of the DRD completion? Did the court consider that the estimates provided were 'reasonable and proportionate'? If not, why not?

(g) The DRD is central to the efficacy of the Pilot. Do you think that the joint negotiation and completion of the DRD has saved costs and time in the litigation in which your client is involved?

Q8. ***Technology-assisted review.***

(a) Did your client, or your opponents, use analytics, or technology-assisted review (TAR), or computer-assisted review software? Was this provided by a third party?

(b) What was the approximate basic cost of that disclosure?

(c) Was Q14 of Section 2 of the DRD feasible or premature to answer at the stage of the DRD completion?

(d) Do you have any particular comments relating to the use of TAR under the Disclosure Pilot?

Q9. ***Narrative documents.***

(a) In your experience, was Model D or Model E disclosure ordered with, or excluding, narrative documents? Was that order sensible, in your view?

(b) Do you consider that the presumption to exclude narrative documents under Model D is sensible and workable?

Q10. ***Timings.***

(a) Did any issues arise with regard to the timetable for the various steps under the Pilot? Was the timing too short, or too long, in your view? If so, did you draw this to the attention of the court, prior to, at, or after, the CMC?

(b) Were there any issues relating to the timing of: written confirmation as to whether Extended Disclosure would be sought; preparation of the list of issues for disclosure; any amendments to that list of issues; completion of the DRD; and filing of the certificate of compliance?

Q11. ***Disclosure Guidance Hearings.***

(a) Did either party request a Disclosure Guidance Hearing? If so, why? If you were tempted to, but did not, why did you decline to request such a hearing?

(b) If you have participated in a Disclosure Guidance Hearing, was it listed promptly? What was the time taken for the hearing? Was it heard by telephone or in hearing? Was it helpful to the overall outcome?

Q12. ***Case management hearings.***

(a) Was the CMC listed appropriately to take account of the issues surrounding disclosure which were to be resolved in the case? Did either party request additional time for the CMC?

(b) Was the CMC completed at the first hearing, or did it have to be adjourned? What was the total time taken for the CMC?

(c) Did the judge seem well-prepared for the CMC? Did the judge comment upon any additional information that would have been helpful to resolve disclosure disputes at the CMC?

Q13. ***Adverse costs orders.***

Were any adverse costs orders made against either party in connection with disclosure? Please provide details if possible.

Q14. ***Unrepresented litigants.***

Did you act for either the claimant or for the defendant in proceedings in which the opponent was legally unrepresented? If so, please confirm any additional tasks that had to be completed by you.

Q15. ***Overall outcomes to date.***

It is very early in the life of the Pilot. However, in your experience, and insofar as you can make meaningful comments at this stage, has the new process of disclosure under the Pilot (especially by comparison with your experiences under CPR 31):

(a) saved the parties costs overall (insofar as the parties can assess that at this stage)? If it is too early to draw any analysis as to costs saved or incurred by comparison: as a result of the disclosure undertaken to date, do you consider that you were able to obtain a more focused order on disclosure from the court (e.g., an order for disclosure that departed from Model D across all issues in a case) which will, ultimately, serve to save costs as the proceedings progress?

(b) achieved as accurate a result (i.e., the right documents disclosed and the irrelevant ones sifted out), relevant to the issues for disclosure, as the previous system, i.e., not a perfect outcome, but a proportionate outcome, given the 'overriding objective' of CPR 1.1;

(c) reduced the burden on the court, both in interlocutory and trial time, in resolving issues of disclosure and (if applicable) in resolving issues for trial; and

(d) achieved the sort of 'culture change' which was the purpose of the Pilot, *viz*, a greater degree of co-operation, proportionality, and reasonableness, in the parties' approach towards disclosure?

Q16. ***Amendments to PD 51U.***

In your view, are there any modifications to PD 51U's drafting which would help to streamline or to improve the efficiency of disclosure, or to make the process of disclosure easier, particularly given that the Pilot may be 'rolled out' to other courts in due course?

Q17. ***Any other feedback.***

If you have any further suggestions/comments which are not covered by the points above, please feel free to provide those further comments.

Please send all responses to: Prof. Rachael Mulheron, via either of the following methods:

Email: r.p.mulheron@qmul.ac.uk, or

Post: Dept of Law, Mile End Road, London, E1 4NS

The final date for responses is: ***Friday, 15 November 2019***

All comments will be anonymized, and will be collated and summarized in a Third Interim Report, which will be provided to the Disclosure Working Group by the end of 2019.

Thank you very much for your feedback!

APPENDIX B LIST OF RESPONDENTS

A. In several of the Questionnaires, the responses were divided per fee-earner, where each fee earner had different experiences and insights to relate about their involvement in the Pilot. Where this occurred, then this is noted in the list below. In total, when taking account of these individual responses, there were **71** responses to the Questionnaire.

B. * denotes that the respondent provided relevant feedback via the DWG email address, rather than via the questionnaire itself. Where respondents provided feedback to the DWG email address, and then followed that up with a response to the Questionnaire, the designation of * is not applied.

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1. 3 Verulam Buildings
2. 5 Paper Buildings
3. Addleshaw Goddard
4. Allen and Overy
5. ALPS collated response
6. Assn of Pension Lawyers *
7. Brabners
8. Brickcourt Chambers (three different fee-earners' feedback)
9. Bristows
10. Bryan Cave Leighton Paisner
11. Burges Salmon
12. Capstick-Dale & Partners
13. City of London Law Society
14. Clyde & Co *
15. COMBAR
16. Cripps Pemberton Greenish
17. DLA Piper (six different fee-earners' feedback)
18. Fenwick Elliott (two different fee-earners' feedback)
19. Fieldfisher
20. Fox Williams
21. Gateley Legal
22. Goodman Derrick
23. Gowling WLG (two different fee-earners' feedback)
24. Herbert Smith Freehills
25. Hill Dickinson (Property Litigation)
26. Hill Dickinson (Commercial Litigation)

27. Hogan Lovells
28. Latham and Watkins (two different fee-earners' feedback)
29. Maitland Chambers
30. Mayer Brown *
31. Michelmores
32. Mishcon de Reya
33. New Square Chambers
34. Pinsent Masons
35. Radcliffe Chambers (two different fee-earners' feedback)
36. Reynolds Porter Chamberlain (13 different fee-earners' feedback)
37. Shoosmiths
38. Slaughter and May
39. Squire Patton Boggs (four different fee-earners' feedback)
40. Stewarts (two different fee-earners' feedback)
41. Taylor Wessing
42. Walker Morris
43. Wilberforce Chambers
44. Winckworth Sherwood

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