**Sources and types of disclosure obligations**

This element covers sources and types of disclosure obligations

**Civil procedure rules**

The main CPR which support the content of this element are:

CPR 27.4 and 27A PD Appendix B (in relation to the small claims track)

CPR 28.2 and 28 PD 3.9 (in relation to the fast and intermediate track)

CPR 31.5 (in relation to the multi-track)

CPR 31.9 and CPR 31.11 in relation to broader disclosure points

**Where does an obligation to give disclosure come from?**

There is no automatic obligation to give disclosure of anything. The obligation comes from a court order.

The order for disclosure is usually given on allocation or at a case management conference. A party can also apply for an order for disclosure at a later stage in the proceedings, although this is less common.

There are many different types of disclosure which a court could order.

This element is concerned with:

- The court considering what disclosure order to make: standard disclosure or an alternative (or no order)

-Alternative disclosure orders the court can make (ie alternatives to standard disclosure)

**How does the court arrive at one of the orders?**

How the court arrives at an order for disclosure depends on the track to which the claim has been allocated.

Small claims track: Directions given on allocation. The usual order is that at least 14 days before the date fixed for the final hearing, each party must file and serve on every other party copies of all documents on which he intends to rely at the hearing (CPR 27.4(1) and (3))

Fast and Intermediate Track: The Court will give directions either on allocation (which his usual for fast track cases) or list the case for a CMC. Other than in claims which include a claim for personal injury (where unless the court orders otherwise the order will be for standard disclosure), the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justlywhich disclosure order to make (CPR28.2). The disclosure order can be:

a) An order dispensing with disclosure

b) An order that a party disclose the documents on which it relies and at the same time request any specific disclosure it requires from any other party

c) An order that directs, where practicable, the disclosure to be given by each party on an issue-by-issue basis

d) An order that each party disclose any documents which it is reasonable to suppose may contain information which enable that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences

e) An order for standard disclosure

f) Any other order for disclosure that the Court considers appropriate.

On the multi-track: there is a more complex system. This is largely because some multi-track cases can involve a large amount of documentation, and the wrong order could result in significant unnecessary inconvenience and expense. As a result, in multi-track cases (other than personal injury cases) the parties must:

- complete a disclosure report to be filed and served not less than 14 days before the first case management conference (CPR 31.5(3)).

- not less than seven days before the first case management conference, consider the issues in the case and enter into discussions to seek to agree a draft disclosure order which they will then ask the court to make. The proposal should meet the overriding objective to conduct litigation at proportionate cost and to limit disclosure to that which is necessary to deal with the case justly (CPR 31.5(5)).

At the CMC (in any case), the court will consider carefully what form of disclosure order is most appropriate.

**What is a disclosure report?**

The disclosure report (Form N263 – blank copy on next page) briefly explains:

- what relevant documents exist, or may exist;

- Where, and with whom, they are;

- How any electronic documents are stored;

- Estimate the broad range of costs that could be involved in giving standard disclosure in the case;

- States which of the disclosure directions (several alternatives to standard disclosure are offered) are to be sought (CPR 31.5(7) and (8)).

Where there are electronic documents to be disclosed, parties should consider also using the Electronic Documents Questionnaire (EDQ - Form N264) which provides information about electronic documents.

[at this point, the element shows a blank Form 263 – disclosure report]

**At the CMC**

At the CMC, the court uses the disclosure report and any other information available to consider if standard disclosure is too expensive and to consider what disclosure order to make. The court might dispense with the need to carry out a search for documents, or require disclosure in relation to only some of the issues, or require disclosure in stages, for example. The court can make any order in relation to disclosure that it thinks is appropriate.

There are concerns amongst judges and practitioners that this procedure for determining the type of disclosure which is required could be improved upon. As a result, in the Business and Property courts (part of the High Court) there is a specialist disclosure regime which is outside the scope of this module.

**Summary of usual path to a disclosure order**

Small claims track - Disclosure order included in directions given on allocation - Usual order: 14 days before hearing, file and serve documents relying on

Fast track - Disclosure order included in directions given on allocation - The Court will make an order for disclosure having regard to the overriding objective and limiting disclosure to that which is necessary to deal with the case justly.

Intermediate track - Disclosure order included in directions given on allocation/or listed for CMC - The Court will make an order for disclosure having regard to the overriding objective and limiting disclosure to that which is necessary to deal with the case justly.

Multi-track - Disclosure report filed and served not less than 14 days before CMC (not PI claims) - Conversation between the parties not less than 7 days before the CMC - Court makes appropriate disclosure order: there is no 'usual' order

**Copies**

A party does not have to disclose every copy of a document. In summary, copies of documents need only be disclosed if:

- They contain a modification, obliteration or other marking or feature which itself satisfies the test for standard disclosure (CPR 31.9). Such a copy document also needs to be separately considered for privilege; or

- The party has never had the original or no longer has the original in its control.

**The procedure for disclosure and inspection**

If the court orders standard disclosure - The procedure that accompanies that is prescribed by the CPR (CPR 31.10). See the element 'standard disclosure'.

If an order other than standard disclosure has been made - The procedure (in terms of preparing lists, exchanging lists, providing copies of documents etc) will be set out as part of the order

**Continuing obligation**

Any duty of disclosure continues until proceedings are concluded (CPR 31.11).

A party must disclose documents which come within its control or were created after the date it originally gave disclosure if they fall within its disclosure obligations.

**Subsequent**

A party to whom a document has been disclosed may only use that document for the purposes of the proceedings in which it is disclosed and not for any collateral or ulterior purpose eg in other proceedings (CPR 31.22(1)).

There are some exceptions to this rule:

- The document has been read to or referred to by the court at a hearing held in public ('read' includes pre-read and referred to in skeleton arguments);

- The court gives permission; or

- The party who disclosed the document and the person to whom the document belongs agree.

The court can be asked to make an order restricting or prohibiting the use of a document read or referred to at a public hearing.

**Summary**

There is no automatic obligation to give disclosure – the obligation comes from a court order.

On the small claims track there is a 'normal' order, although the court can order something different.

On the fast and intermediate track, the court will make an order having regard to the overriding objective and will limit disclosure to that which is necessary to deal with the case justly.

On the multi-track, the court decides what type of disclosure order to make. This is usually considered at a CMC with sight of the parties' disclosure reports (not in personal injury cases) and budgets.

The court can make any order in relation to disclosure that it thinks is appropriate. Instead of ordering standard disclosure, the court might (for example) dispense with the need to carry out a search for documents or require disclosure in relation to only some of the issues, or require disclosure in stages.

Only one copy of a document needs to be disclosed, unless the copies have (broadly speaking) changes / annotations which are material to the dispute.

The duty of disclosure imposed by a disclosure order carries on until proceedings are concluded.