**Inspection**

This element covers the meaning and procedure of 'inspection'.

**Civil procedure rules**

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

- CPR 31.1, 31.14, 31.15, 31.19 and 31.21

**Inspection**

This element is concerned with inspection, which follows disclosure (whether standard disclosure or, in most cases, another type of disclosure).

A party has a right to inspect a document that has been disclosed except where:

- The document is no longer in the disclosing party's control (CPR 31.3(1)(a));

- Allowing inspection would be disproportionate (CPR 31.3(2); or

- The disclosing party has a right or duty to withhold inspection, ie it is privileged (CPR 31.3(1)(b)).

We will look first at these limitations on the right to inspect documents, and then we will set out the procedure for inspection.

**The document is no longer in the disclosing party's control**

This is common sense. Party A cannot let Party B look at a document which is not in its control.

**Allowing inspection would be disproportionate**

If a party disclosing documents thinks that it is disproportionate to permit inspection of a certain category/class of documents to be disclosed then it is not required to permit inspection, but it must state in its disclosure statement (usually contained in the party's list of documents) that inspection is not permitted and that allowing inspection would be disproportionate (CPR 31.3(2)).

This is going to be rare. Once a document has been found and disclosed, it is unlikely that the process of letting the other party see it / providing a copy would be disproportionate. Issues of proportionality are more likely to arise at the earlier stages of deciding what disclosure order to make and the scope of the search for documents.

Inspection cannot be refused on this ground where the reason for disclosure is that a party wishes to rely on the document, or that a practice direction requires disclosure.

**Right or duty to withhold inspection**

A document need not be produced if there is a right or duty to withhold inspection, a concept known as privilege. If a document falls within the scope of the order for disclosure made by the court and it is privileged, its existence must still be disclosed: it can only be withheld from inspection. Privileged documents are, however, described generically in a party's list of documents and are not listed individually.

There are many types of privilege, but the most important ones are:

- Legal advice privilege

- Litigation privilege

- Without prejudice communications

The types of privilege are considered in a separate element ("Types of privilege"), but the following principles apply to all types of privilege. These are explained in the subsequent pages.

**Redaction**

Redaction means blanking out parts of a document (digitally or traditionally by covering them with paper before copying, or copying, covering with black pen, and copying again - making sure to preserve the original unmarked). Although the CPR do not make provision for redaction, it is accepted that redaction is possible in certain circumstances.

Clients sometimes wish to redact parts of documents that are going to be inspected (ie documents that are not privileged). This is most often because they contain information which is confidential and commercially sensitive. This is not generally permitted – confidentiality / commercial sensitivity alone does not justify redaction.

There are two main circumstances in which it may be possible to redact parts of a document.

Firstly, if there is a clear and distinct part of a document which does attract privilege, but the remainder does not, then the privileged part can and indeed should be redacted, to avoid waiving privilege – waiver is explained later in this element (remember that we are talking here about a document which on the whole is not privileged).

**Example**: An accountant receives a letter of complaint from a customer. He telephones his solicitor to take advice in relation to the complaint, and makes a note of the advice on the letter from the customer. As explained in the element addressing types of privilege, the letter as a whole is not privileged and inspection of it would be permitted, but the note of advice from the solicitor would be privileged. That note should be redacted at the time of inspection.

Note that confidentiality and privilege are not the same thing. Many documents will be confidential but still not privileged.

Secondly, if the information is totally irrelevant to the dispute, it can be redacted. So information which is confidential / commercially sensitive and irrelevant is generally redacted.

**Example**: There is a dispute between a law firm and a recruiter about the terms of the contract between them. The recruiter is obliged to disclose and allow inspection of the correspondence it sent to the law firm. That correspondence also includes the addresses and personal details of work-seekers. That is sensitive information, and it is entirely irrelevant to the dispute. It can be redacted from the documents at the time of inspection.

When it comes to listing redacted documents in a disclosure list, the redacted version of the document will be listed in the first part of the list of documents and will be made available for inspection with the appropriate parts covered over. The un-redacted version will be listed generically in the second part of the list of documents – inspection refused.

**Waiver**

It is possible for a party to deliberately allow inspection of a privileged document if it considers that the document helps its case. This is called waiver of privilege. However, a party does not have an unrestricted right to determine precisely what it wishes to waive privilege over.

Firstly, waiver of privilege in part of a wholly-privileged document will lead to waiver of privilege over the remainder of the document, unless it deals with entirely different subject matter: a party cannot 'cherry pick' certain parts of a privileged document to reveal to the other side/the court (Great Atlantic Insurance v Home Insurance [1981] 1 WLR 529). Secondly, by way of expansion of the previous point, waiver of privilege in one document can lead to privilege being lost in other documents, if it would be unfair to allow the party waiving privilege not to put those documents before the court / opponent too (for example, if they all deal with the same subject matter and only permitting inspection of the first document could lead to the facts being misunderstood).

**Example**: For example: waiver of the privilege attaching to a solicitor's letter of advice may also result in privilege being lost in respect of letters from the same solicitor dealing with the same issue.

**Further principles relating to privilege**

*'Once privileged, always privileged'*

If something is privileged in relation to one set of proceedings, it will remain privileged in relation to all proceedings (*The Aegis Blaze* [1986] 1 Lloyd's Rep 203) unless something takes place to cause the privilege to be lost, such as waiver (see above).

*Burden of proof*

Where there is a dispute over whether a document is subject to privilege, the burden of proof is on the party claiming privilege to establish it.

**Documents referred to in statements of case and other specified documents**

As well inspecting documents disclosed pursuant to a court order, a party can inspect a document referred to in a **statement of case, a witness statement, a witness summary, an affidavit** and (subject to certain restrictions – not considered in this element) an **expert's report** (CPR 31.14). This may take place even before the disclosure stage of proceedings.

Case law suggests that this right to inspect is in fact subject to the usual rules on privilege, so that privilege in a document is not lost simply by reference to a document in a statement of case or witness statement, and the court in any event also has a general discretion to refuse inspection. However, reference to a document in a statement of case / witness statement could amount to waiver of privilege depending on the circumstances, and so parties should tread very carefully in this regard.

**Procedure for inspection**

A party wishing to inspect documents must send a written notice of its wish to do so to the other side and the other side must allow inspection within seven days of receipt of the notice (CPR 31.15(a) and (b)). The court directions may vary these time limits.

It is possible to ask for copies instead or as well, with an undertaking to pay reasonable photocopying charges (CPR 31.15(c)). Copies must provided within 7 days of receipt of the request.

In many cases, parties are content to complete 'inspection' solely by receiving copies.

A party may not rely on any document in respect of which he fails to permit inspection unless the court gives permission (CPR 31.21).

**Summary**

A party has a right to inspect a document that has been disclosed except where:

- The document is no longer in the disclosing party's control.

- Allowing inspection would be disproportionate.

- The disclosing party has a right or duty to withhold inspection (most likely because the document is privileged).

When allowing inspection of a document, a party can redact parts which are irrelevant or which are privileged. A party cannot redact something simply because it is confidential.

A party can waive privilege in a document, but this can lead to privilege being lost in other documents.

A party wishing to inspect documents must send a written notice, and inspection must then be allowed within 7 days. A party can also / alternatively ask for copies, if it undertakes to pay reasonable copying charges, and the copies must then be provided within 7 days of the request.