DISCLOSURE PILOT SCHEME: HERE TO STAY

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ALVAREZ & MARSAL

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FOREWORD

At Alvarez & Marsal we have been following the Disclosure Pilot Scheme (DPS) closely since its inception in 2018, whilst also helping our clients navigate their disclosure obligations in a world that is constantly evolving.

Back in May 2021 we published an initial report on the DPS. The pilot which was, at the time of writing, being trialled in the England and Wales business and property courts. For this specific paper, we surveyed 250 senior lawyers to gauge their sentiment on the progress of the pilot and evaluated whether the scheme needed to evolve further before it became 'business as usual' for law firms.

We were struck by the very nuanced responses we received. From a positive point of view, the pilot scheme was seen to be creating more options for lawyers and other court users in the disclosure processes, and it was encouraging to see that technology and expert advice was seen as part and parcel of completing disclosure requests quickly and efficiently.

That being said, we did note some very significant flaws in the pilot scheme at that time. On writing our first paper it seemed that there would be a long way to go for the scheme to win the full support of the legal profession. In fact, some even said that it wasn't fit for purpose in its current guise.

Today, and in this paper, we revisit the pilot scheme which was subsequently approved on 15th July 2022. The scheme, which will now be known as Practice Direction 57AD, will come into force this year on 1st October 2022.

During the past few years of the pilot, we have certainly seen changes made to the DPS through its lifespan, many of which have attempted to refine the disclosure process for certain cases.

This paper will provide an overview of the DPS as it stands and consider how it has changed and evolved over the last few years. We will then look to demonstrate the importance of the role of legal technology in the evolution of the disclosure process and cover off how legal professionals can leverage technology to better aid their processes. We hope you find it useful reading.

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A RECAP ON THE DPS

Introduced in 2018 by the Disclosure Working Group (DWG), the DPS was a response to concerns that the existing framework for document disclosures in legal cases needed a significant overview.

The DPS has been active in the Business and Property Courts in England and Wales since January 2019. The initial pilot was designed to mitigate some of the "excessive costs, scale and complexity" experienced by parties under the previous set of standards for disclosure.

The pilot has been subject to continuous feedback and refinement over the last couple of years to ensure that it meets its aims. And as a result, many positive changes have been made through the living pilot as a result of direct feedback to the DWG.

> "During the pilot, the DWG introduced numerous new processes and choices for legal practitioners, and other relevant stakeholders, in an effort to make the disclosure process more "proportionate and efficient."

In July 2021, the DWG concluded that the pilot required more time, and as such the pilot was extended until 31st December 2022.

The pilot scheme was later approved on 15th July 2022, and from 1st October 2022, the DPS will become a permanent part of the court rules, known as Practice Direction 57AD.

The Practice Direction will apply to all existing and new proceedings in the business and property courts, subject to limited exceptions, and is substantially in the form of (and replaces) Practice Direction 51U, which originally introduced the pilot.

KEY CHANGES THAT HAVE BEEN MADE

As a direct result of the extensions to the pilot, multiple iterations have been presented by the DWG. Here are just some of the changes that took place during the pilot:

01 The DPS took quite some time to bed in having been disrupted by the global pandemic. It was noted that the culture change to disclosure the DWG were aiming for would take time to achieve.

02 Further instructions on the use of the disclosure models, particularly the use of Model C was requested and provided.

03 Additional changes were required to make the process more efficient and cost effective. For example, in the disclosure guidance section, one party can now ask the court for guidance instead of both sides having to agree for guidance. This can save money by not having to attend the hearing.

04 Less complex claims won't go through the same DRD process dependent on model or a simplified version of model.

05 Clarification was required, and provided, regarding when known adverse documents should be disclosed.

06 More guidance was requested, and provided, regarding the approach that should be adopted when formulating issues for disclosure.

07 Confirmation was given that a disclosure certificate may be signed by the party's legal representative, as long as that legal representative has already explained the significance of the disclosure certificate to their client and had written approval to sign the disclosure certificate on behalf of their client.

08 The introduction of a lighter touch process for "Less Complex Claims", defined as claims whose "nature, value, complexity and the likely volume of Extended Disclosure may not benefit from the full procedure" set out in PD 51U. The changes presume that a claim valued at less than £500,000 will meet this criteria.

THE IMPORTANCE OF GETTING DISCLOSURE RIGHT

Undoubtedly the approach to disclosure is now more scrutinised than ever. And given our lives are more digitalised than ever before, data is fast becoming one of the most important factors in working out who did what, and indeed, who is right or wrong in a legal case. This means there really is no excuse to cut corners for a fair trial.

The importance of documents and data during the disclosure process cannot be disputed, however, just the sheer amount of electronic material that is now generated has spiralled and can often be seen as all encompassing. Context is, nevertheless key, and this means that all data must be evaluated carefully and robustly.

A robust and defensible collection process, done in a forensically sound way is therefore essential. And on top of this, and before moving forward, both parties should seek to reach an agreement with one another on the appropriate approach taken. Agreeing disclosure protocols in advance, i.e., by saying to the other side 'this is how I will disclose', 'this is the format", and 'this is the metadata', will avoid further issues and delays down the line.

Cases

The approach to Disclosure has been commented on in recent high-profile cases such as Vardy v Rooney and Cabo Concepts Ltd v MGA Entertainment. As the DPS has taken hold, the approach to disclosure is regularly commented upon by the courts.

- In Vardy v Rooney & Anor [2022], the approach to redactions, the availability of historic devices and the disappearance of media files from WhatsApp messages were all contentious points for the parties.
- In Cabo Concepts Ltd v MGA Entertainment (UK) Ltd & Anor, the court had heard that in the lead-up to June's trial date, around 40% of documents were missed by the defendant– during the harvesting stage, amounting to 800,000 documents in total. Nearly half of all potentially relevant documents were never even reviewed and a number of warning signs inadvertently overlooked.

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OUR EXPERIENCE AT ALVAREZ & MARSAL

We have been fortunate here at A&M in that we have seen multiple cases under the DPS including four cases that were listed by The Lawyer as their 'Top 20 Cases' of the year.

All these cases presented with varying complexity and data volumes and ranged from high profile individuals to some of the largest global corporations. All of this has given us unique insights to be able to better help our clients moving forward.

From our experience, early involvement of data experts has always been key to an efficient disclosure exercise, particularly on many of the complex data heavy cases that tend to take place in todays digitised world.

We have also seen the advantages of having a subject matter expert or dispute expert involved early on. Not only will this allow the forensic expert to understand the data quickly, but it will also allow the client access to a subject matter expert/ testifying expert who will be able to advise on what documents will be useful at trial. This can help ensure that the collection and review methodology are aligned, and that no one is having to claw around later looking for that vital last piece of evidence.

At A&M we utilise a wide range of systems to forensically collect the right data across a range of devices and systems. In today's digitalised and hybrid working world, it is commonplace that relevant data is stored across multiple media and platforms including email, instant messaging, laptops, and mobile phones. Having the forensic capabilities to collect and analyse all of these data sources can be hugely beneficial to the eDiscovery process.

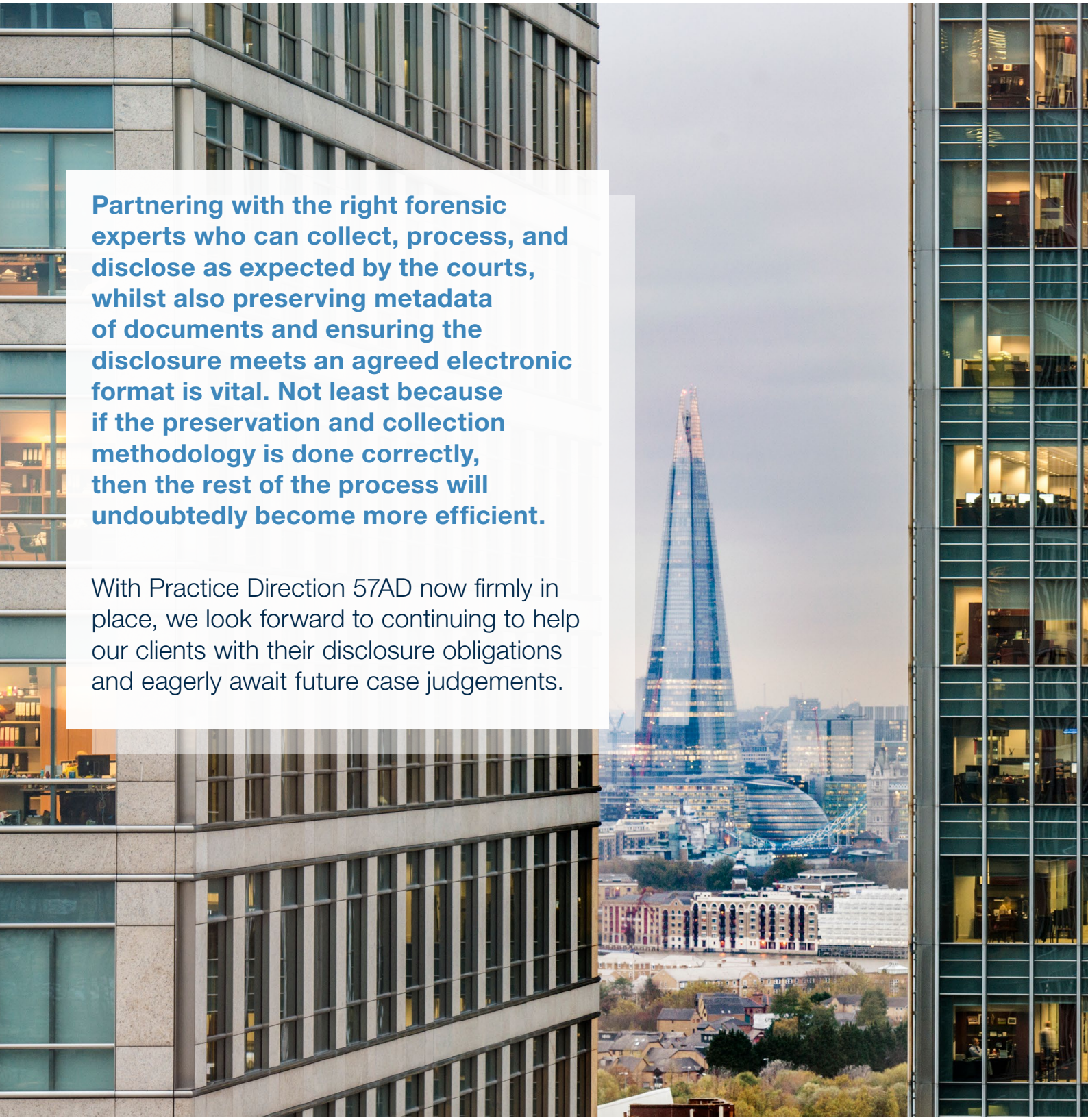
Ensuring messages from the mobiles or from instant messaging platforms are collected in a forensic and sound manner with the view of disclosure requirements is key. Our leading forensic and eDiscovery tools allow us to slice and dice chat data into whole conversations, into separate days or into separate messages, giving our clients the flexibility in review workflow and also disclosure.

These days data can be spread across email, SharePoint, instant messaging systems such as Slack/ teams, and on mobile phones and WhatsApp data too. Having a forensic professional engaged early, speaking to all relevant parties and IT, and understanding the data landscape is paramount.

At A&M our use of technology and AI to drive analysis and review is second to none. Technology has come a long way, and there are so many great options available, but that being said, complex cases still require experienced disclosure and tech professionals to get the most out of the technology.

Our collaborative approach to discovery management involves working alongside our client and their counsel to deliver comprehensive solutions. Within our forensic technology services offering, we combine advanced technology and expert advisory services to deliver an end-to-end consultative eDiscovery service.

CLOSING WORDS



Partnering with the right forensic experts who can collect, process, and disclose as expected by the courts, whilst also preserving metadata of documents and ensuring the disclosure meets an agreed electronic format is vital. Not least because if the preservation and collection methodology is done correctly, then the rest of the process will undoubtedly become more efficient.

With Practice Direction 57AD now firmly in place, we look forward to continuing to help our clients with their disclosure obligations and eagerly await future case judgements.

ABOUT ALVAREZ & MARSAL

Companies, investors and government entities around the world turn to Alvarez & Marsal (A&M) for leadership, action and results. Privately held since its founding in 1983, A&M is a leading global professional services firm that provides advisory, business performance improvement and turnaround management services. When conventional approaches are not enough to create transformation and drive change, clients seek our deep expertise and ability to deliver practical solutions to their unique problems.

With over 6,000 people across five continents, we deliver tangible results for corporates, boards, private equity firms, law firms and government agencies facing complex challenges. Our senior leaders, and their teams, leverage A&M's restructuring heritage to help companies act decisively, catapult growth and accelerate results. We are experienced operators, world-class consultants, former regulators and industry authorities with a shared commitment to telling clients what's really needed for turning change into a strategic business asset, managing risk and unlocking value at every stage of growth.

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