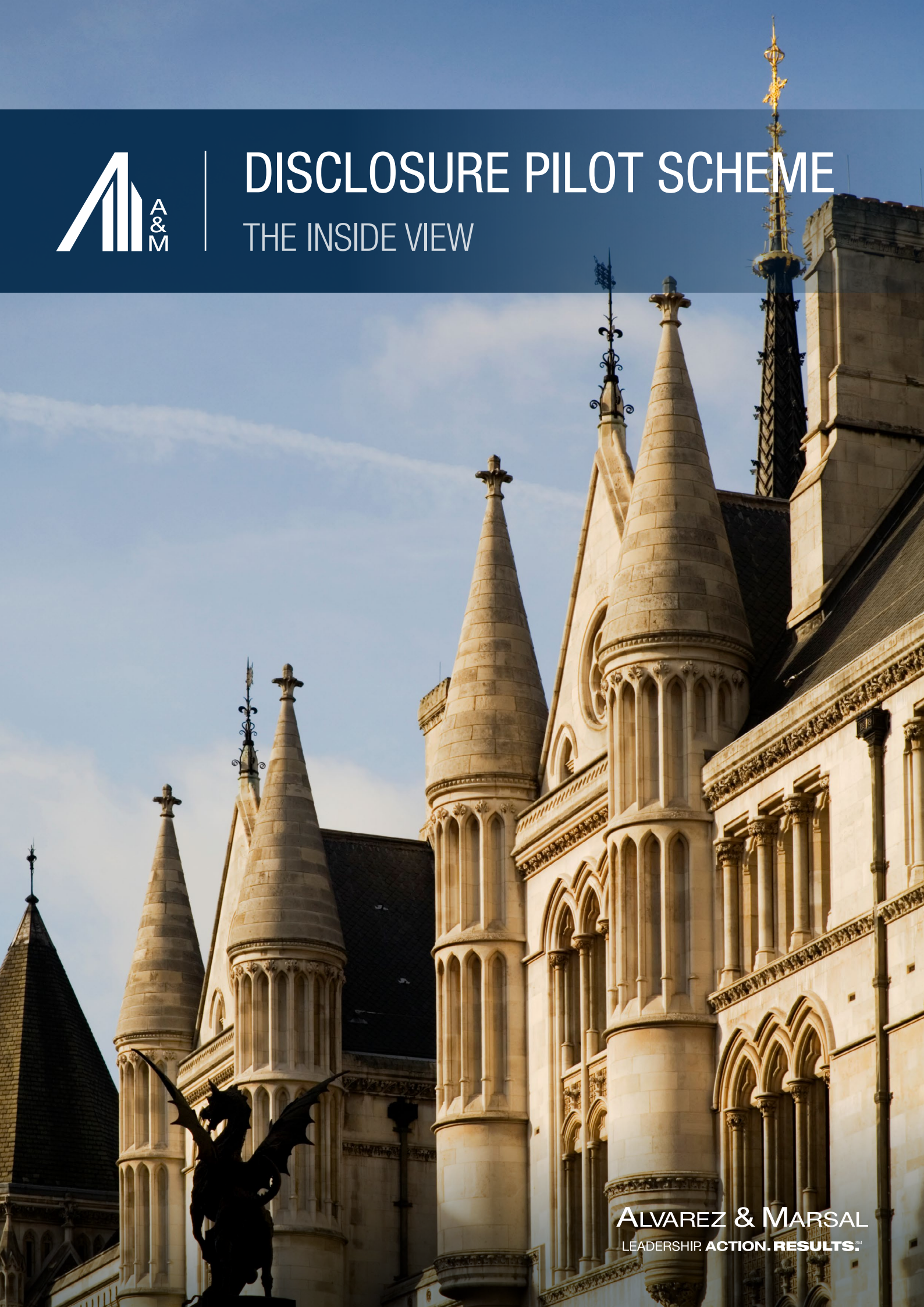




DISCLOSURE PILOT SCHEME

THE INSIDE VIEW



ALVAREZ & MARSAL
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How parties and their legal advisers approach the Pilot could elevate disclosure in the U.K.'s commercial courts to the next level.

A new attitude to disclosure is needed which reconciles the inevitably adversarial nature of litigation with disclosing documentary evidence only when it is necessary for the courts to decide an important issue in the case.

Natalie Osafo
Senior Associate
(Commercial Litigation), Stewarts Law

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Foreword

We publish this report with only months left to run on the Disclosure Pilot Scheme currently being trialled in the U.K. Business and Property courts. We surveyed 250 senior lawyers to gauge sentiment on the progress of the pilot so far, and on how the scheme may still need to evolve before it becomes ‘business as usual’ for law firms.

We were struck by the forthright and nuanced responses we received. The pilot scheme has unquestionably created more options for lawyers and other court users when it comes to disclosure processes. It is also heartening to see that technology and expert advice is part and parcel of completing disclosure requests quickly and efficiently.

All the same, the lawyers we surveyed highlighted some significant flaws in the pilot scheme as things stand. There is a danger that rather than making it easier for parties to agree on the right way to deal with relevant documentation, the scheme may instead be placing further barriers between parties in the crucial early stages of disputes.

There appears to be a long way to go for the scheme to win the fulsome support of the legal profession. Even so, we hope that with further simplification of the scheme’s structure and more robust guidance on best practices, the Disclosure Pilot Scheme can still benefit lawyers and their clients.



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Executive Summary

SELECTING MODELS

68%

of respondents **changed their approach to engage with disclosure models** that were not previously available pre-pilot.

74%

of respondents **believe that the DPS has exacerbated the adversarial environment** in the litigation process.

<50%

of the time, respondents found themselves agreeing with the opposing side on which model to use. A significant proportion of respondents (14%) state that **parties are often two models or more apart at the start of a disclosure process.**

ROLE OF TECHNOLOGY

Access to technology is a determining factor for

85%



of respondents when parties decide on their disclosure model.

77%



of respondents agree that **more effective technology could contribute to transforming the scheme for the better.**

IMPACT OF EXPERTS

100%



of respondents see a clear benefit to bringing in technology experts.

68%



of respondents **use technology experts from the start** of disclosure processes.

BELIEF IN THE SCHEME

97%



of respondents **express frustration** with aspects of the pilot scheme.

70%



of respondents **deem the scheme not fit for purpose** at present.



The Disclosure Pilot Scheme: A recap

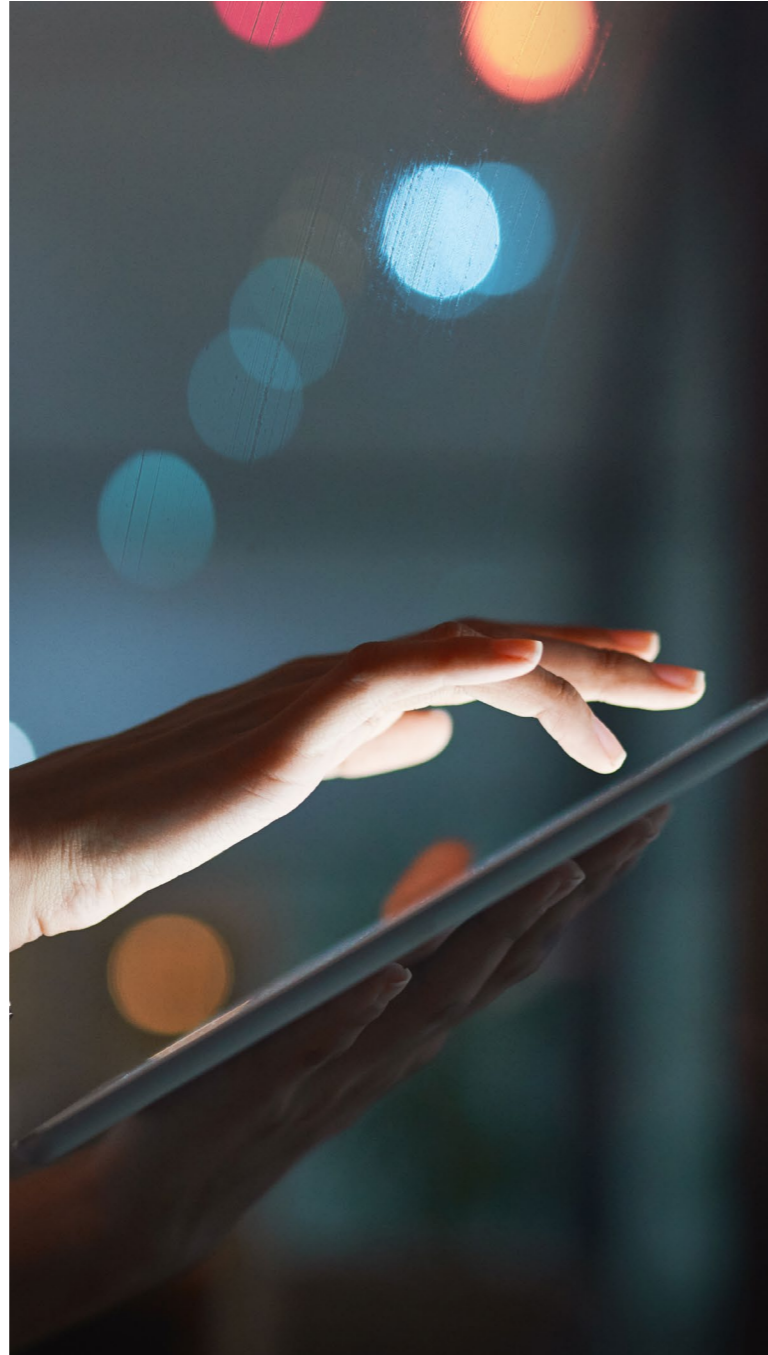
The Disclosure Pilot Scheme (DPS) was introduced in 2018 by the Disclosure Working Group, in response to concerns that the existing framework for document disclosures in legal cases needed a significant overview.

The DPS has been active in the Business and Property Courts in England and Wales since January 2019. The pilot was designed to mitigate some of the “excessive costs, scale and complexity”¹ experienced by parties under the previous set of standards for disclosure.

The pilot has introduced new processes and choices for legal practitioners, and other relevant stakeholders, in an effort to make the disclosure process more “proportionate and efficient,” in the words of the Disclosure Working Group (DWG).

The DPS was originally designed to run for two years, up to January 2021. In 2020, Professor Rachael Mulheron of Queen Mary University of London published a Third Interim Report,² which recommended a 12-month extension to the duration of the pilot. As such, the pilot is presently set to run to the end of 2021.

Standard disclosure often produces large amounts of wholly irrelevant documents, leading to a considerable waste of time and costs.



Frustration with the disclosure pilot scheme is common among practitioners, especially when litigants take tactical positions. The increased choice of models is good in principle, but this can encourage positional negotiations, with parties deliberately opening two or more models apart. However, with increased access to technology, it may be possible in time for parties to reach sensible common ground sooner, before needing to rely on judicial intervention.

Dan Smith
Counsel, Latham & Watkins





The models being piloted

The DWG suggests that the DPS gives parties a “menu of options” to choose from when scoping a disclosure process. Parties may agree on one or more models to use in a given case, with different parameters potentially appropriate for different issues. As a reminder, here are the models:

A Limited disclosure to known adverse documents

This is the narrowest disclosure model.

D Narrow search-based disclosure

This model was previously the ‘default’ disclosure process prior to the start of the pilot scheme.

B Limited disclosure

This model includes key documents that have supported a party’s case and those which will aid other parties to understand the case against them. This does not require parties to conduct a search for relevant documents.

E Wide search-based disclosure

Here, parties must disclose not only all documents directly relevant to the case but also any documents that might contribute to further inquiries and the surfacing of new evidence.

C Request-led search-based disclosure

Model C is designed to give one party the ability to request the disclosure of specific documents or groups of documents (as long as requests are ‘narrow’). The nature of these searches should be defined by the Disclosure Review Document and agreed by both parties.



For more information on what these models mean in practice, including their impact on the use of technology in investigations, read A&M’s **Technical Perspective on the Disclosure Pilot Scheme**, published as the scheme was kicking off in 2019.



Insights from the legal profession

With several months still to run on the DPS, it is vital to gauge the impact the scheme is having on legal practitioners. Failing to understand the way it impacts the work of lawyers risks implementing procedures that only serve to compound the problems that led to the DPS in the first place.

In order to better understand lawyers’ views on the DPS, we surveyed 250 senior lawyers at U.K. law firms between February and March 2021. The survey’s conclusions shed light on several key themes that will come into sharper focus as the pilot draws to a close:

- the potential problems in incorporating more models into an already complex process;
- the importance of incorporating technology and third-party expertise into disclosure procedures; and
- the pilot scheme’s essential fitness for purpose as things stand



Our respondents’ insights paint a picture of a scheme that can point to some initial successes, but which exhibits significant flaws.





New models: pouring fuel on the fire?

The DPS offers parties a choice of models for managing disclosure requests, in contrast to the previous 'default option' which is now just one of five potential avenues for parties.

This choice has allowed lawyers to explore a wider range of approaches to disclosure requests. 32% of respondents reported that they used Model D (the closest equivalent to the 'old' process) most often (see Graph 1). 68% of respondents, therefore, have changed their approach to engage with a disclosure model that was not previously available over the course of the scheme. Model C – request-led search-based disclosure – was the most-used option for 46% of respondents, making Models C and D by far the most frequently used forms of disclosure.



It [the DPS] frontloads quite a lot of cost, in terms of lawyer time spent breaking down the issues and seeking to agree the disclosure approach to be taken in respect of each of them. In taking that approach, it prioritises the reduction of the number of sources and documents within the scope of the review, rather than focusing upon the use of innovative technologies designed to extract the relevant information from voluminous materials in an efficient and (where appropriate) automated fashion.

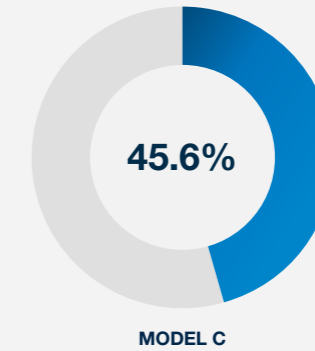
Partner
Magic Circle law firm

Graph 1. Question asked: Which Disclosure Pilot Scheme model do you use most often, if any? Respondents were asked to select one option

Most frequently used DPS model by participants

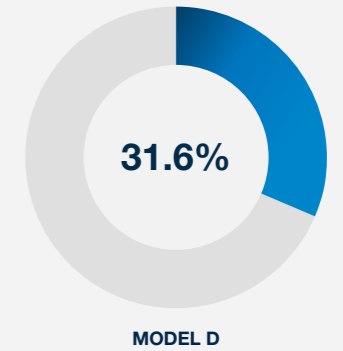
Model C

Request-led search-based disclosure – The court may order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure.



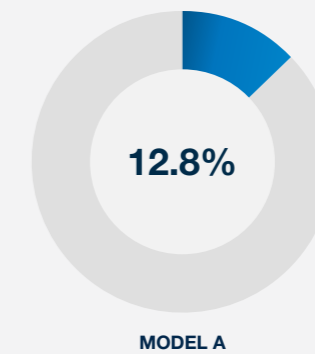
Model D

Narrow search-based disclosure, with or without Narrative Documents – A party shall disclose 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.



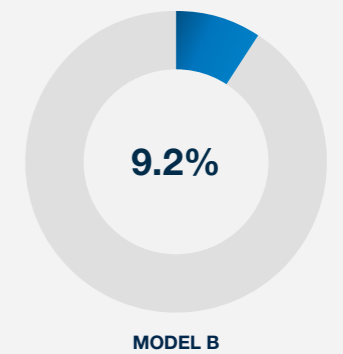
Model A

Disclosure confined to known adverse documents – The court may order that the only disclosure required is of known adverse documents.



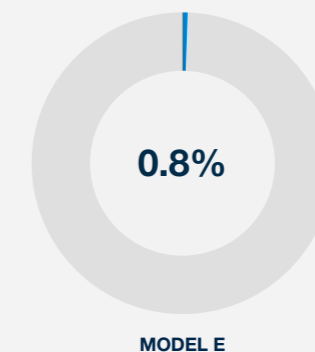
Model B

Limited Disclosure – The court may order the parties to disclose (a) the key documents on which they have relied on; and (b) the key documents that are necessary to enable the other parties to understand the claim or defence.



Model E

Wide search-based disclosure – A party shall disclose 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 or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure. Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure.



We don't use a particular Disclosure Pilot Scheme model most often.

No particular model

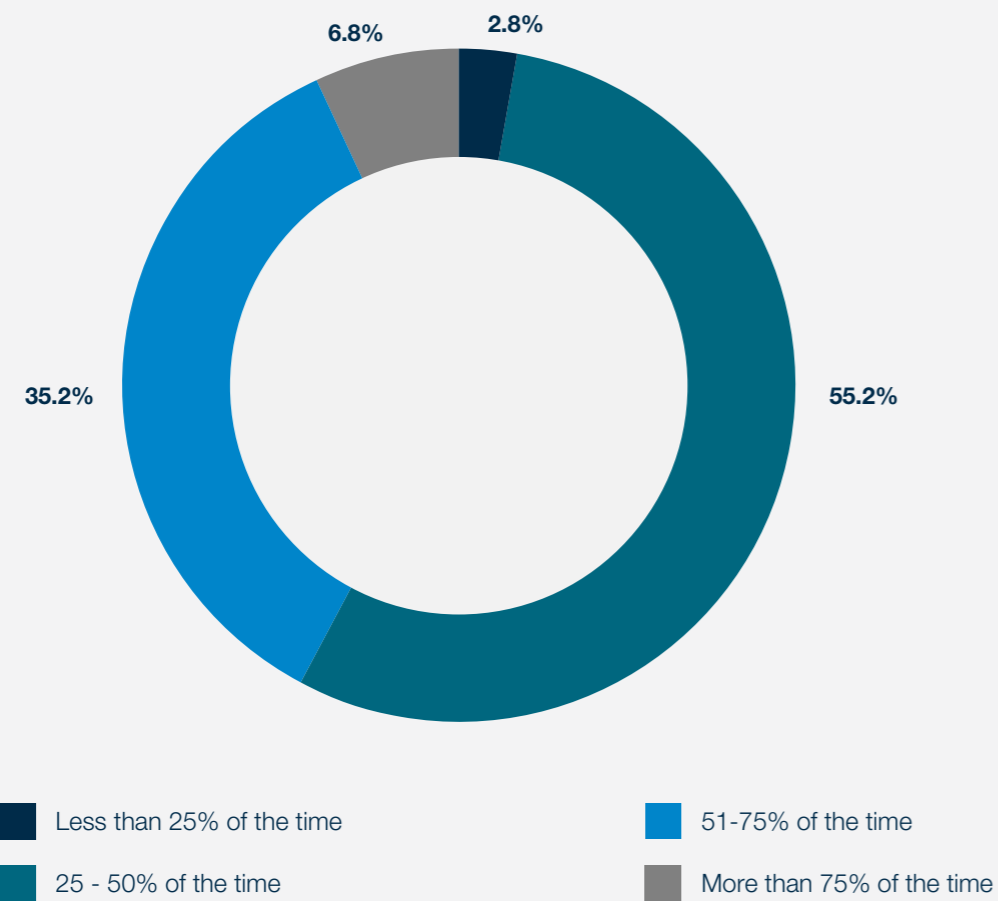
We don't use the Disclosure Pilot Scheme.





Graph 2. Question asked: How often do opposing parties agree on which model to use, if at all? Respondents were asked to select one option

How often do opposing parties agree on which model to use



Despite broadening lawyers' horizons when it comes to using different models, the increased choice enabled by the DPS may create new difficulties in the cold light of day. Litigation is by definition a contested process. In this context, finding agreement on the right disclosure model presents another decision to be made and another dispute to resolve.

Graph 3. Question asked: What is your main frustration with the Disclosure Pilot Scheme, if anything? Respondents were asked to select one option

Participants main frustration within the DPS



When asked for their view on how often opposing parties agreed on which model to use, more than half of respondents 58% said that they agreed less than half the time (see Graph 2). Only 7% of respondents said that they found agreement more than 75% of the time. Meanwhile, 14% of respondents said that lawyers being

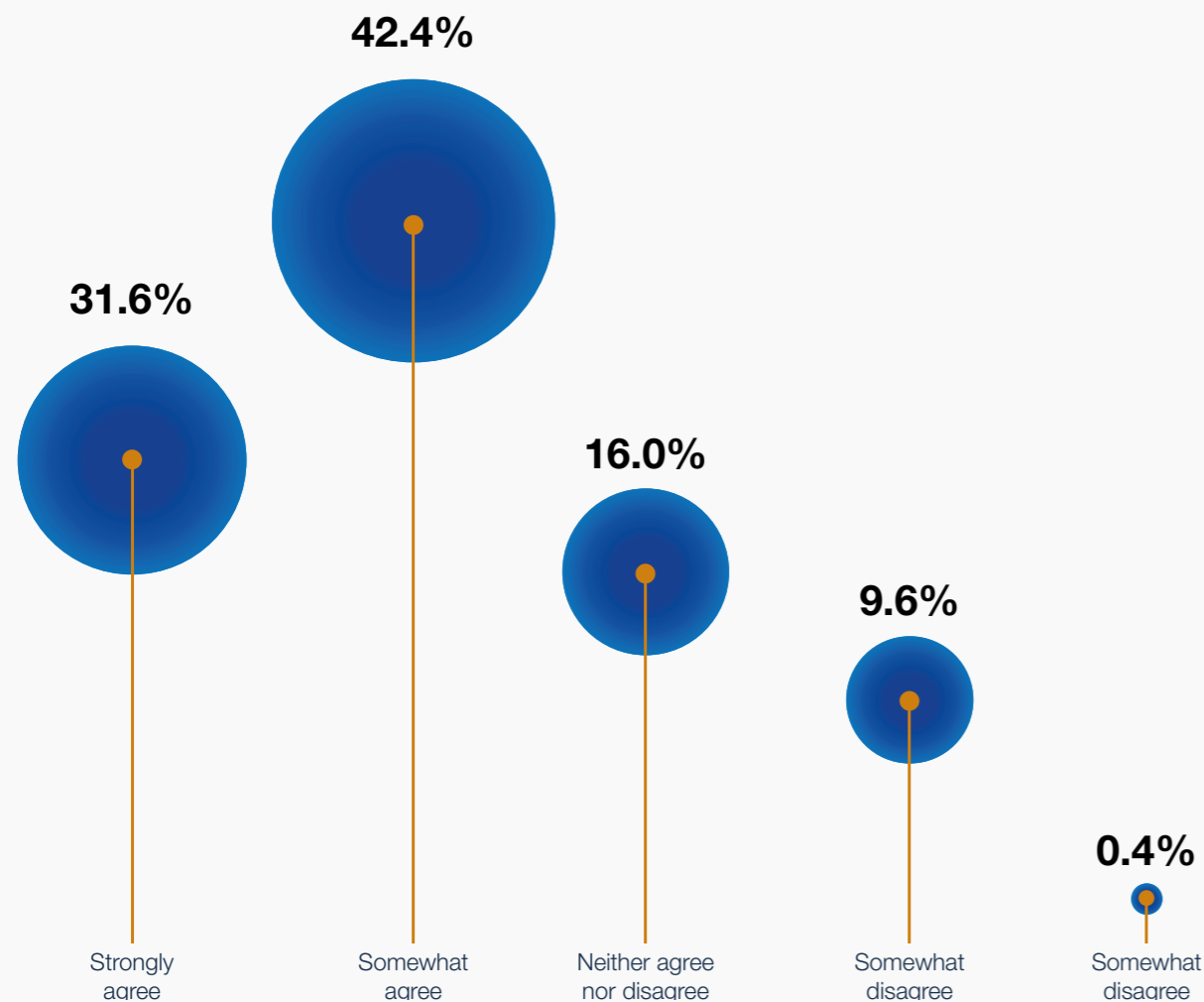
two models or more apart in the initial conversation was a main frustration. As the models progress in their breadth from A to E, being two models apart represents a significant gap in expectation and understanding of the case, creating a potentially prolonged dialogue that only serves to increase complexity and cost for clients.

Additional disputes like these risk heightening, rather than mitigating, the adversarial nature of the litigation process. When asked whether the DPS has exacerbated the adversarial environment in the litigation process, 74% (see strongly agree and somewhat agree in Graph 4) of respondents to our survey agreed. Whether the benefits of

more flexibility in disclosure requests outweigh the negative impact of a more abrasive and confrontational litigation climate is not a question for us to answer. But our survey raises questions about the long-term impact of the pilot's changes that may be of interest to the DWG and other relevant bodies.

Graph 4. Question asked: To what extent do you agree or disagree with the following statement: the Disclosure Pilot Scheme has exacerbated the adversarial environment in the litigation process. Respondents were asked to select one option

Extent participants agreed or disagreed with the following statement: the Disclosure Pilot Scheme has exacerbated the adversarial environment in the litigation



Unfortunately, in my experience, the DPS has significantly driven up the costs of disclosure, thereby exacerbating the main problem which it purported to address. What is most regrettable is that, in my view, none of the changes which it introduced were even necessary, as: (1) CPR 31 already provided scope for the Court to actively manage the scope of disclosure (rather than simply to order standard disclosure); and (2) technology assisted review already provided an effective solution to delivering disclosure at proportionate cost in cases involving substantial volumes of potentially disclosable data.

Ben Sigler
Partner, Stephenson Harwood



The importance of technology and expert advice

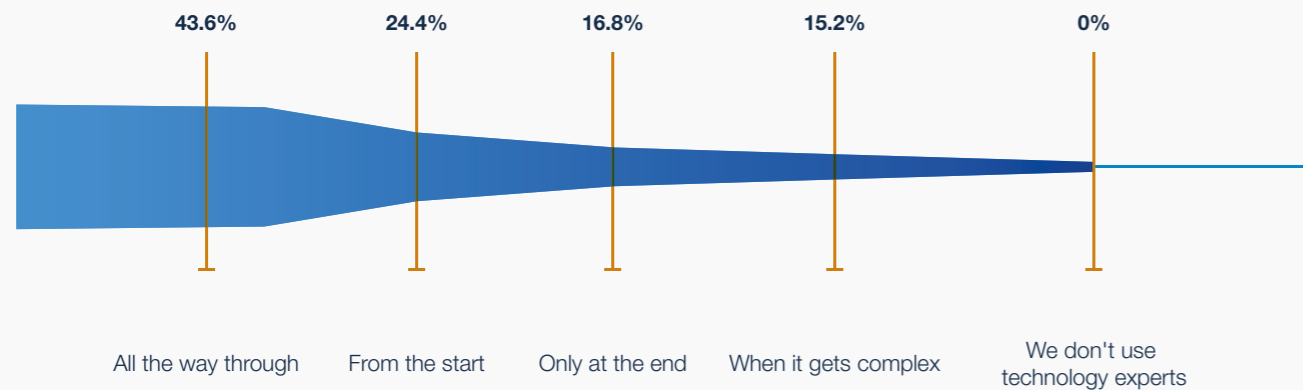
The opportunity to deepen the use of technology through the disclosure process was one of the factors cited by the DWG in the pilot scheme's early stages. This appears to be bearing fruit: strikingly, every one of our respondents engages with technology, and technology experts, at some point in a disclosure process.

It is imperative that our disclosure system is, and is seen to be, highly efficient and flexible, reflecting developments in technology

The choice of models that the DPS offers may help to strengthen the relationship between technology and disclosure. 85% (see very often and quite often in Graph 6) of our respondents see access to technology as a determining factor when parties decide on their disclosure model. Overall, technology stood out as one of the most important factors affecting the decision on which model to use, proving more popular than other factors including turnaround time, the approach of the 'opposition', and the size of the case.

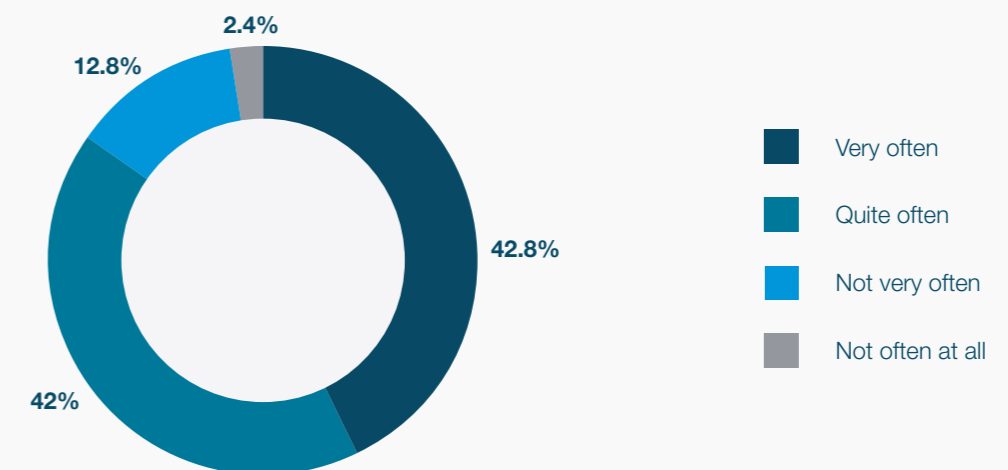
Graph 5. Question asked: When using the Disclosure Pilot Scheme, at what point do you use technology experts, if at all? Respondents were asked to select one option

Point in time participants use technology experts when using the DPS



Graph 6. Question asked: How often does access to technology determine what model you use, if at all? Respondents were asked to select one option

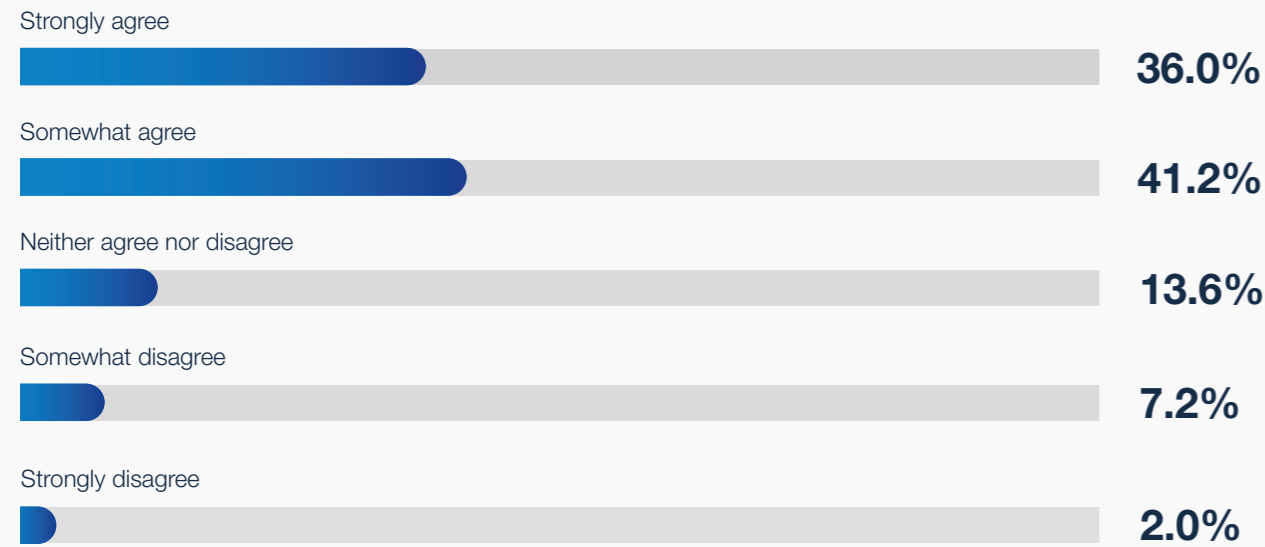
How often technology determines what model is used by participants





Graph 7. Question asked: To what extent do you agree or disagree with the following statement: a more effective use of technology could reduce costs and transform the Disclosure Pilot Scheme for the better. Respondents were asked to select one option

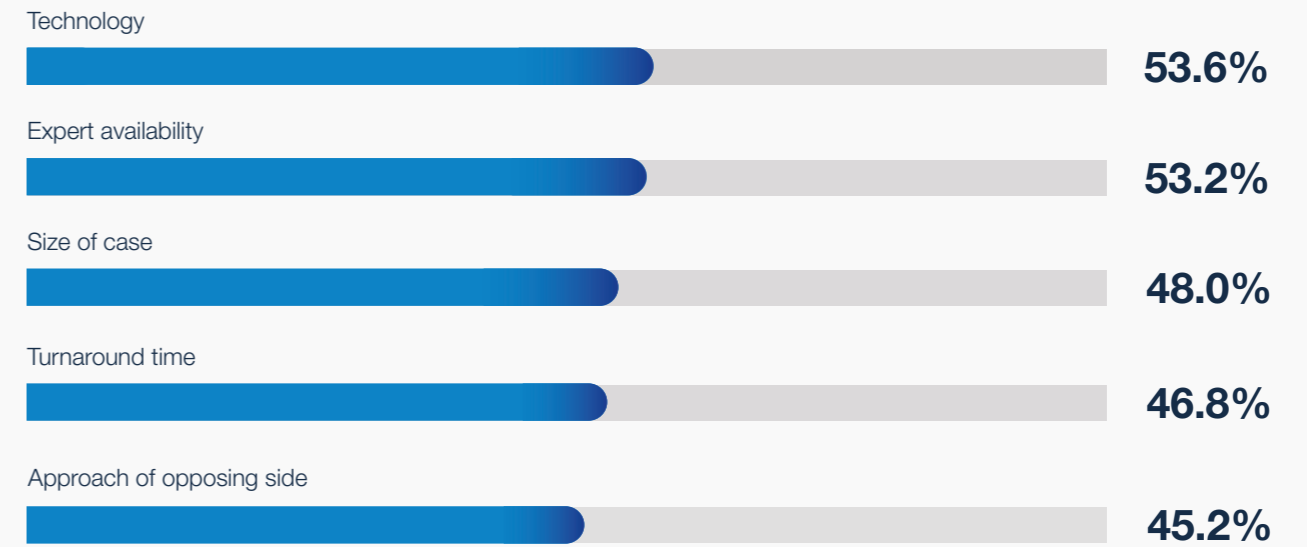
Extent participants agree or disagree with the following statement: a more effective use of technology could reduce costs and transform the Disclosure Pilot Scheme for the better



Respondents also highlighted the opportunity for technology to continue to drive improvements in the DPS itself. 77% (see strongly agree and somewhat agree in Graph 7) of respondents agreed that more effective technology could contribute to transforming the scheme for the better, with fewer than one in 10 respondents disagreeing.

Graph 8. Question asked: What key factors, if any, determine your choice of model in any instance? (Respondents were asked to select three options)

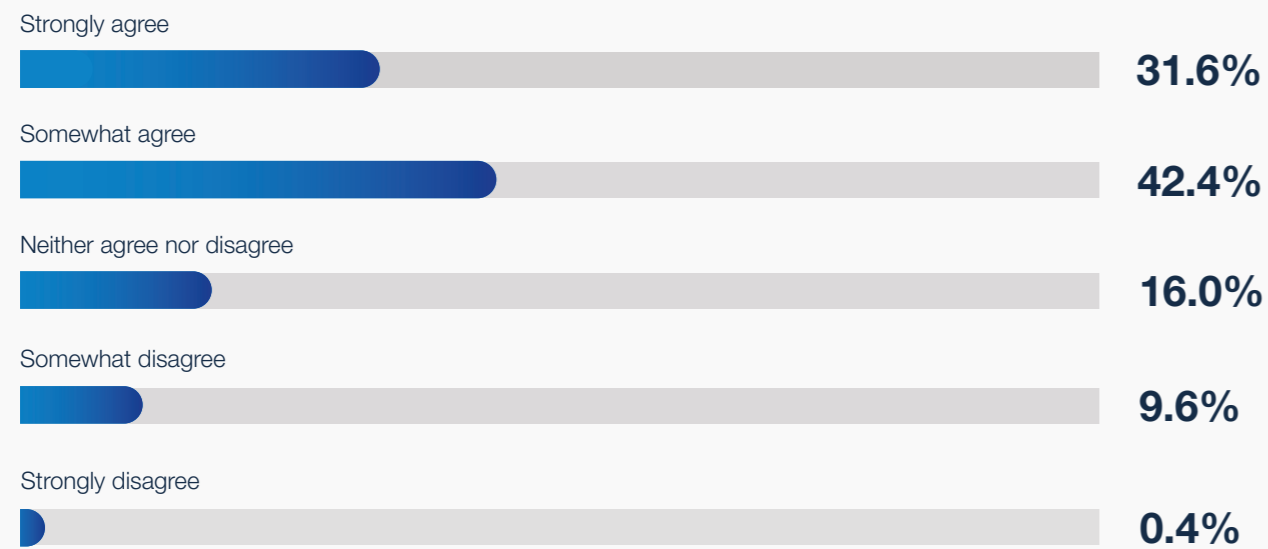
Key factors that determine participants choice of model



The importance of experts to disclosures was highlighted by our respondents, more than half of whom saw the availability of expert advice as a key factor in model selection (see Graph 8). 68% (see 'all the way through' and 'from the start' in Graph 5) of respondents said that they used experts from the start of a disclosure request, with expert contributions delivering benefits such as more decisiveness over the right model to use and better speed of delivery.

Graph 9. Question asked: To what extent do you agree or disagree with the following statement: the Disclosure Pilot Scheme has exacerbated the adversarial environment in the litigation process. Respondents were asked to select one option

Extent participants agreed or disagreed with the following statement: the Disclosure Pilot Scheme has exacerbated the adversarial environment in the litigation



Technology promises to drive continued benefits for parties on both sides of the disclosure process, helping to reduce costs and get results more quickly. Furthermore, lawyers recognise that expert advice is necessary in getting the most out of technologies – both when using existing products more efficiently, and when it comes to exploring new and developing technological discovery and analysis solutions.



As the role of technology has become more central to disclosure exercises, law firms are acknowledging that experts are needed early in the process to help accelerate work and serve clients better. It is important that experts are fully integrated into the team as trusted advisors, and are not just used to address ad hoc technical challenges, but to add value right the way through the disclosure process.

Richard East
Partner, Quinn Emanuel Urquhart & Sullivan



The benefits of using technology in disclosure have been obvious for many years. This survey result shows that lawyers acknowledge that, and that technology is playing an influential part in how disclosure is conducted.

Dan Wyatt
Partner, RPC



Fit for purpose

The DPS was set up as a 'living pilot', and questions over certain parts of the scheme were inevitable and expected. However, our survey reveals widespread dissatisfaction with the purpose of the scheme. 97% of respondents expressed frustration with aspects of the pilot scheme. 70% judge that the scheme is not fit for purpose.



It seems to be reasonably certain that the DPS is here to stay despite the known teething problems that practitioners have experienced to date. There is a concern about front-loading of costs and creating new room for argument about the form and content of the DRD. Recently introduced changes are likely to assist in resolving some of this, but more is needed.

Hugo Plowman
Partner, Mishcon de Reya



Conclusions

Although the DPS has helped open up more choice for parties dealing with disclosure requests, our survey of senior lawyers with experience using the scheme has highlighted inadequacies and frustrations.

It is worth questioning whether a model-based approach to disclosure is the right one given the inherently adversarial litigation environment. Certainly, a high proportion of respondents to our survey agree that litigation is being made more confrontational, not less, by the creation of an additional decision-making stage concerning model selections.

Another factor that needs to be considered is whether the DPS has had enough time to become a fully integrated part of the disclosure culture within the legal sector. Although the scheme has already been extended once, COVID-19's effects may have hampered adoption of the scheme's best practices and principles.

The Civil Procedure Rule Committee itself said that the pilot was "intended to effect a culture change", and it is fair to question whether remote working has prevented the DPS from taking full effect.

Regardless of this, a majority of respondents stated that as things stand, the DPS is not fit for purpose. The clock is ticking to resolve these issues, and something needs to change. The objectivity that technology brings to complex cases should be taken into account as the pilot continues to evolve. Deliberately guiding parties towards technology from the start of procedures may help execute requests promptly and reduce the overall administrative burden of disclosure processes, for instance.

With months to go before the DPS expires and a decision is made on long-term disclosure best practices, we hope this report helps to clarify aspects of the ongoing debate around the Disclosure Pilot Scheme.





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- Collaborate with and deploy the best people for the case – especially expertise and location
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- Fee structure built around value add and not data fees

Laser focus on scope and cutting through complexity

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- Simplify issues whenever possible, expand workload only when needed
- Clear and actionable outcomes
- Clear and concise reporting, unambiguous opinions and insights
- Actionable outcomes to promote learning, recovery from issues and future improvement
- Advanced analytics capabilities to ECA and analyse complex data sets efficiently
- Continuous Active Learning (CAL) to prioritise review

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- Partner with other A&M specialists around the world
- World-class technology support



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Experts listed in Global Investigations Review and Who's Who Legal guides

Appendix

1

[Disclosure Working Group Press Announcement, 31 July 2018.](#)

2

[Disclosure Pilot Monitoring in the Business and Property Courts, Third Interim Report: 'An Analysis of Questionnaire Feedback From Legal Practitioners', 25 February 2020.](#)



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A&M's global capabilities compliment the international footprint of our firm's clients and the cross-border data transfer issues associated with modern litigation and investigations. Our experts and investigators work all around the world in North America, Latin America, Europe, Asia and The Middle East.

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support needs. Our consultants come from FTSE-listed corporations, global law firms, top consulting firms, and government agencies, and most have 10+ years of experience in technology support.

If you are interested in discussing how we could help you through a rapid diagnostic or implementation, please contact one of our experts.

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