EDWARDS ANGELL PALMER & DODGE

Guidance

Electronic disclosure

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Electronic disclosure

Importance of electronic disclosure

Today over 92% of all information produced, viewed and stored is not in paper form – it is electronic. In 2008, it was estimated that 210 billion emails had been sent every day worldwide. Furthermore, well over 70% of this information was never printed to paper. 60% of it is stored within corporate computer systems. In other words, the vast majority of information – and hence the evidence that lawyers may ultimately need in order to properly conduct litigation – exists only within a company's IT systems. Therefore, it is essential that lawyers (both in-house and external) become familiar with, and know how to access and review, a company's computer database.

In litigation, the phenomenon of the *'smoking gun'* email has also emerged – that email that can win or lose a case – the Holy Grail for lawyers. Whilst the reality is that it is rarely the case that a single email will secure victory in a case, lawyers are always utilising damaging or ambiguous emails obtained through the disclosure process to strengthen their client's position.

As well as the prominence of electronic documentation in a litigation context, new legislation has been introduced to assist companies in conducting business electronically. For example, whereas the Companies Act 1985 only permitted companies to send certain limited documentation electronically or by publication on a website (eg notices of meetings and copies of annual reports and accounts), the Companies Act 2006 makes electronic communications the norm for companies.

Furthermore, on 20 January 2007, the FSA's Disclosure and Transparency Rules sourcebook implementing the EU Transparency Directive (2004/109/EC) came into force. The provisions on e-communications are contained within

Chapter 6 and relate to companies whose securities are admitted to trading on a regulated market (eg the Main Market).

It is clear that the world is still moving swiftly towards a business environment that is conducted predominantly, if not entirely, electronically. The globalisation of business has meant that the once techno-phobic legal profession has had to adapt to and anticipate electronic-related issues and, in particular, the difficulties associated with electronic disclosure in litigation.

This guidance note will analyse the most recent legal developments in relation to the storage, retrieval and use of electronic information in a litigation context. It will also provide some practical guidelines on how to manage the issues associated with electronic disclosure in proceedings and how to minimise the problems it creates.

Electronic disclosure – CPR Part 31 (revised practice direction)

Document

Disclosure concerning hard copy documents alone is usually a complex and time-consuming exercise. Disclosure involving electronic documents is more so. The difficulty is that electronic documents can be stored on numerous systems and devices. The business disruption and resulting cost of searching through all these systems can be significant.

The usual rule concerning standard disclosure of documents in litigation is that a party must disclose those documents upon which it relies and those that: (1) adversely affect its own case; (2) adversely affect another party's case; and (3) support another party's case.

The term *'document'* in the Civil Procedure Rules ("the CPR") was originally defined as *"anything in which information of any description is recorded"*. Although this implied that electronic documents were covered, it did not actually mention them. Following the recommendations of a working party chaired by Mr Justice Cresswell on the subject of electronic disclosure, the Practice Direction ("the PD") to part 31 of the CPR was revised in October 2005 and the term '*document*' was amended to reflect the growing complexity in the storage of information and now specifically includes electronic documents stored on computers, servers, back-up systems and even those electronic documents that have been deleted. This showed that the courts were aware that the remit of the normal disclosure exercise was expanding and becoming more time-consuming and complicated.

These changes, especially the inclusion of deleted items within the scope of a disclosure exercise, may lead to a very significant increase in the cost of litigating. However, the revised PD has attempted to reduce and/or avoid unnecessary expenditure by:

— Encouraging the parties at an early stage in the litigation to discuss issues regarding potential searches and the preservation of electronic documents: this would include revealing what types of electronic documents are within the parties' control as well as their document retention policies

— Encouraging the parties to agree early on in the proceedings as to the format in which the electronic copy documents are to be provided for inspection

— If there is a dispute in relation to the above, the revised PD states that the matter should be referred to a judge for directions as soon as possible and before the first Case Management Conference.

'Reasonable search'

When carrying out a disclosure exercise the parties are required to ensure that they carry out a *'reasonable'* search of their systems. However, the problem is that it is difficult to know whether this means, for example, recovering all deleted items, reviewing back-up tapes or disclosing metadata (hidden information about the document which is created without an intentional act by the user). The revised PD sought to assist by providing some guidance as to what is *'reasonable'*. Consideration should be given to:

— the number of documents involved

— the ease and expense of retrieving any particular document ie will back-up systems need to be reviewed or deleted items recovered

— the significance of any document likely to be recovered

— the nature and complexity of the proceedings

The revised PD introduced one particular approach to making a search reasonable and manageable: the use of keyword searches. Those should be agreed between the parties, if possible. In the US, the growing trend is for the courts to order the parties to employ '*data sampling*' protocols in which they would search a small number of hard drives, servers, back-up tapes, etc, to see if any relevant evidence exists before ordering a party's entire universal media to be collected, analysed and produced to find out if there are any potentially relevant documents. In practice, it seems that the courts should set the parameters of any electronic disclosure exercise at the Case Management Conference (or earlier) if it cannot be agreed.

Disclosure Statement

Finally, in order to clarify the extent of the search carried out by a party, the revised PD also introduced a far more comprehensive Disclosure Statement in which the party has to explain the extent of the search, as well as specifying what categories of documents were not searched. The form of the Disclosure Statement is set out below:

DISCLOSURE STATEMENT

I, the above named claimant [or defendant] [if party making disclosure is a company, firm or other organisation identify here who the person making the disclosure statement is and why he is the appropriate person to make it] state that I have carried out a reasonable and proportionate search to locate all the documents which I am required to disclose under the order made by the court on ..... day ..... of ..... I did not search:

(1) for documents predating .....,

(2) for documents located elsewhere than .....,

(3) for documents in categories other than .....

(4) for electronic documents

I carried out a search for electronic documents contained on or created by the following:

[list what was searched and extent of search]

I did not search for the following:

(1) documents created before.....,

(2) documents contained on or created by the Claimant's/Defendant's PCs/portable data storage media/databases/servers/back-up tapes/off-site storage/mobile phones /laptops /notebooks/handheld devices/PDA devices (delete as appropriate),

(3) documents contained on or created by the Claimant's/Defendant's mail files/document files/calendar files/spreadsheet files/graphic and presentation files/web-based applications (delete as appropriate),

(4) documents other than by reference to the following keyword(s)/concepts..... (delete if your search was not confined to specific keywords or concepts).

I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I certify that the list above is a complete list of all documents which are or have been in my control and which I am obliged under the said order to disclose.

Case-law

There has not been a great deal of case-law as yet on electronic disclosure or related issues, however we examine below the more important cases. If the English litigation system follows the US trend, then this is likely to change.

Pre-action disclosure – *Hands* and *SES*

In *Hands v Morrison* [2006] EWHC 2018 the prospective Claimant had requested pre-action disclosure of copies of documents evidencing any requests or enquiries made by the prospective Defendant or third parties for the purposes of seeking assurances that there was no reason why a motor racing circuit that was to be built by the prospective Defendant would not be completed on time and with reasonable skill and care. The objective of the application was that such disclosure would lead to a real prospect of achieving more focussed proceedings.

The prospective Defendant argued that what the prospective Claimant sought was contained within a large number of electronic documents, the equivalent of 850,000 lever arch files, as well as 550 files of hard copy documents. The prospective Defendant said the magnitude of the task would be very cumbersome and raise a serious costs issue.

The prospective Defendant's solicitors provided witness evidence in rebuttal of the application indicating that reviewing 550 files of documents would cost about £100,000. To upload the equivalent of the 850,000 files of documents on to a database for a search would take 50 days and cost £90,000 even before commencing a legal review. The Judge noted in his Judgment his concern that this exercise might have to be carried out again on standard disclosure (perhaps using different search criteria). The Judge also recognised the problem of business interruption. Furthermore, there was an element of criticism of the prospective Claimant for not having made any suggestion on how to narrow the search.

The Court ultimately held that although such pre-action disclosure might enable the prospective Claimant to focus its claim on certain critical issues, the order sought would cause cost and delay greater than the costs saved by the refined proceedings. The Court described this as the *"needle in the haystack problem"*. It was critical in the Court's view that the pre-action disclosure requested was unlikely to lead to the dispute being settled or one party walking away. As a result, the order was not made in favour of the prospective Claimant. However, during the hearing, the Court had heard evidence concerning more readily accessible evidence in the possession of the prospective Defendant's solicitors. As a result, the Court did order a small amount of pre-action disclosure limited to hard copy documents within the prospective Defendant's solicitor's possession (about 175 files), as this may have led to a real prospect of achieving the objective of more focussed proceedings.

In the case of *SES Contracting Limited & others v UK Coal PLC & others* [2007] EWHC 161 (QB) the Court did order pre-action disclosure. SES Contracting Limited (a subsidiary of SES Holdings plc) ("SES") had bid unsuccessfully for a contract with UK Coal Mining Limited, a subsidiary of UK Coal plc ("UK Coal"). Centechnology (UK) Limited ("Centechnology"), another subsidiary of UK Coal plc, won the contract. Centechnology's CEO, Mark Weston, had previously been CEO of SES Holdings plc, and a director of companies controlled by it.

SES believed that Mr Weston had collaborated with UK Coal to create Centechnology in order to eliminate SES from the market. SES had obtained emails showing communications by Mr Weston to this effect. SES, in its application, alleged that Mr Weston may be in breach of confidence and fiduciary duty and that UK Coal and Centechnology were potentially liable for inducing this breach (and unlawful means conspiracy).

SES applied to the Court for pre-action disclosure under CPR 31.16 of, amongst other things, emails and internal memoranda, showing communications between Mr Weston, UK Coal and Centechnology.

The Court granted the application on the basis that SES had requested the documents to assist it in determining whether or not to commence proceedings. The Court's view was that if such documents did not support SES's suspicions then it would not continue with a claim, but if they did, then it was likely that UK Coal would wish to avoid proceedings being commenced and settle the matter. In addition, UK Coal had not suggested in rebutting the application that it would have any difficulties locating the documents. Finally, if there was no pre-action disclosure, the claim was likely to be speculative and without particularity which would increase costs.

The case was appealed, but only in relation to the issue of who should bear the risk of the costs of the application (see *SES Contracting Limited & others v UK Coal PLC & others* [2007] EWCA civ 791).

In both cases above, it is evident that the courts were keen to ensure that disclosure is limited to that which was necessary in order to ensure the most expeditious and cost effective resolution of the case. Where it is obvious that electronic documents exist that are highly critical to a matter and that they are easily retreviable, then pre-action disclosure might be ordered. The attitude of the courts in these cases will no doubt be reflected in future decision-making where significant electronic disclosure exercises are involved.

Resonableness of search – *Chantrey Vellacott* and *Digicel* cases

In most cases it will be reasonable to limit the search to *'active data'* - that is information that is directly accessible on the desktop eg sent or received emails. However, a wider search may be necessary where the specific issues or complexity of the case warrant it. In *Chantrey Vellacott v The Convergence Group Plc* [2005] EWHC 290 the Claimant made an application for specific disclosure of certain categories of email correspondence held by Defendant. The Claimant was a firm of chartered accountants who were

suing for unpaid fees. The Defendant had counterclaimed claiming that the Defendant was negligent in its advice and as a result it was prevented from pursuing a proposed telecoms project in Greece. The case was large and complex and the value of the counterclaim was for over $100 million.

The Claimant's application was wide-ranging and claimed that such disclosure was essential for the fair disposal of the case. The Defendant argued that the application was oppressive and designed to wear it down. During the course of the action the Defendant had already given disclosure by five successive lists of documents. However, the Claimant wanted disclosure of certain categories of documents. In this Guidance Note we will only consider the email category.

The Claimant stated that no emails had been disclosed in relation to the Silk Route Project (the failed transaction that formed the basis of the counterclaim) in respect of 1997 or 2003 and only 72 emails in respect of 1998; whereas a large number of emails were disclosed for the intervening years (718, 1,341, 802 and 107 respectively). The Defendant's response was that relevant emails were printed off in hard copy format during the transaction and only those had been disclosed. Naturally, the Court took the view that the Defendant had been wrong to take this approach. The Judge stated that the fact an email was not printed off because it was not important to the transaction, did not mean it was not relevant to the litigation. It was clear that the Defendant had conducted no search of its email archive for relevant documents. Indeed, the Claimant produced documents for the missing years which it had obtained from other sources that demonstrated that the Defendant had failed to disclose relevant documents. The Defendant further argued that it was disproportionate to make a further order as the cost of such additional search of the Defendant's documents would amount to about £15,000 and was unlikely to yield any further valuable information. The Court took this point on board but held that in light of the significant value of the counterclaim (in excess of $100 million) contemporaneous records may have been critical to the resolution of the case (although the Court did narrow down the search categories).

More recently, the Court has focused in even more detail on the reasonableness of the electronic disclosure search carried out by a party to litigation in *Digicel (St Lucia) Ltd v Cable & Wireless plc and others* [2008] EWHC 2522 (Ch). In this case the Claimant argued that the Defendants had not carried out a reasonable search and applied for specific disclosure of emails contained in back-up tapes of certain key employees of the Defendants. This is despite the fact that the Defendants had already spent over £2 million in legal fees and manually reviewed 197,000 documents (from a starting point of 1 million potentially relevant documents). The Claimant within that application also applied for a widening of the keyword searches used by the Defendants to narrow down their accumulated search material.

The Court held that the decision as to what constituted a reasonable search rested at first instance with the solicitor in charge of the disclosure exercise. But, the Court was critical of the fact that in this case the parties had failed to discuss the extent of any search before the disclosure was carried out, and prior to the first CMC, as they were expected to have done pursuant to Paragraph 2A.2 of the PD to CPR 31. In any such discussion, the parties should have considered the relevant factors in deciding upon the reasonableness of the search set out under CPR 31.7 and PD 2A.4 (which are referred to at pages 5-6 of this Note). Whilst the Court stated that it was the solicitor's initial responsibility to decide what was reasonable, it held that it was for the Court to ultimately determine what was reasonable taking all the factors of the case into account.

In this case, the Court ruled that the Defendants had not carried out a reasonable search taking into account the relevance of the emails (of the 7 individuals) to the case and the difficulties in restoring the back-up tapes. However, the Court determined it would be inappropriate to make a simple order that the Defendants restore all the back-up tapes identified because of the risk that some may be so difficult to restore as to mean it was prohibitively expensive. Therefore, the Court ordered the parties to meet

and discuss how best to restore the back-up tapes and allowed the Defendants the opportunity to return to the Court if they determined that any part of the exercise ought not to be done.

On a separate point, in respect of the disclosure exercise already carried out, the Court also ordered the Defendants to run further keyword searches as it felt certain relevant keywords had not been utilised when filtering the 1 million original documents.

It is clear that where it is readily apparent that relevant documents exist which have not been disclosed, the Courts are likely to order disclosure. If the claim is of high value and the documents being sought could be of critical importance, it is more likely than not that the Court will prefer the interests of justice over the burden and cost imposed on the disclosing party in locating these documents. But, most importantly for those in litigation, it is critical for the parties to communicate at an early stage about the extent of the dislosure exercise and the parameters of the search. Otherwise a party risks being forced to incur more time and the considerable expense of redoing the entire disclosure exercise again.

Obligation to preserve information and sanctions – *Douglas v Hello*

The general duty to preserve documents arises only once proceedings have commenced or are contemplated. This duty will obviously extend to electronic records.

The case of *Douglas v Hello* [2003] All ER 1087 had cause to consider the obligation to preserve information in the context of electronic records. In this case an application was made to have the defence struck out on the basis that, amongst other things, the Defendant had deliberately destroyed documents.

In finding that there had indeed been a deliberate destruction of certain electronic records the Judge held that a distinction had to be drawn between those electronic records which were destroyed or disposed of before the proceedings were commenced and those which were destroyed or disposed of thereafter.

The Judge relied on an Australian authority (*British American Tobacco Australia Services Ltd v Cowell & McCabe* [2002] VSCA 197 (6 December 2002)) to state that the Court could only intervene where documents had been destroyed before proceedings had commenced where that destruction was an attempt to pervert the course of justice. In the *Hello* case it was held that in relation to certain documents this was not the case, as the Defendant was able to prove that the deletion of emails was common practice. However, the Defendant had also destroyed documents after the litigation had commenced.

The case-law on the failure to preserve documents is scant. However, the *Douglas v Hello* case did address this issue. The Court found that although a number of emails, electronic copies of photographs and hard disks had been deliberately destroyed after the commencement of proceedings it was not the Court's place to try the Defendant for contempt (that would need to be part of a separate prosecution); instead it was necessary to consider whether a fair trial was possible. In the circumstances, it was concluded that a fair trial was still possible and that the only sanction to be imposed on the Defendant was the possible adverse inference as to, amongst other things, the existence of further undisclosed documents.

As a general note, in considering the sanctions that are appropriate for deliberate document destruction, the Court will have regard to when the record was destroyed, why and in what circumstances it was destroyed, the relevance of the information that was lost and whether a fair trial of the

action was still possible. The Court in *IS Innovative Software v Howes* [2004] EWCA Civ 275 also had to consider the likelihood that emails had been deliberately destroyed. In that action, the Court of Appeal agreed with the trial judge that there was no evidence to suggest that emails had been purposely erased. The Court of Appeal did state that if there was evidence of 'spoliation' then it would reflect on the credibility of the destroyer's evidence and such evidence could be disregarded.

If the English courts follow the US precedents, serious sanctions may be ordered as a result of the deletion of relevant documents. For example, the US Federal Court ordered UBS AG in 2005 to pay a former employee $29.3 million after jurors were instructed to assume that relevant emails deleted by the bank would have been detrimental to its case.

Practical advice

Document management and retention policy

The key advice in relation to electronic disclosure for in-house counsel and businesses generally is the need to create a rational retention and destruction protocol. This would avoid problems at a later date and, in relation to litigation, show the courts how a company has dealt with its electronic information. Once litigation starts, a company must not destroy any relevant documents. Until that time, it is good practice to maintain documents according to specified time limits. What those limits are is the essence of a document retention policy. It should be remembered that documents can contain vital evidence for a company defending or bringing proceedings, although, of course, on the flip-side, they may well contain valuable information to help an opposing party. Ultimately, it is probably more important to keep full records of the company's activities as this will make it easier to comply with any disclosure obligations. Keeping all documents for an indefinite period, however, can do more harm than good and will inevitably make the disclosure process more expensive. Clearly any regulatory obligations must also be considered.

The case of *R v Stubbs* [2006] EWCA Crim 2312 is a good example of when having a good document retention policy would have been helpful. This was a Court of Appeal decision concerning the Defendant's appeal on his criminal conviction for defrauding his employer.

The Judge at the original trial had allowed evidence from a former employee of the Defendant's former employer (a bank) on the operation of an online banking system (on the bank's previous IT systems) through which the Defendant was alleged to have conducted unlawful activity. The Defendant objected to this evidence on the basis that this former employee lacked the requisite relevant IT expertise and he was not independent. However, an

independent expert analysed the computer systems and found that the old system had been superceded and there was no hardware in existence to run the old system.

The Judge ultimately ruled that the former employee did have enough knowledge to give evidence on the former system and his potential lack of impartiality went to the weight placed on his evidence. The Court of Appeal agreed with the trial Judge. However, it is clear that had the bank not had an employee available to give this type of evidence it may have struggled to assist in securing this conviction. One can perceive how this scenario may cause problems in civil claims and so retaining information may prove to be important.

There are basically two different approaches which can be adopted when formulating a document retention policy. The first involves a selective approach, whereby determinations will be made on an individual document or file basis, by analysing: (1) the likelihood of a claim arising to which the documents may be relevant; and (2) estimating the level of loss to the company if the claim did arise and the documents were not available to the company. A retention policy formulated by using the selective approach will centre around keeping for longer periods those files which have a high probability of being relevant if a claim is made and causing a large loss to the company if the documents are not available. This approach tends to be too labour-intensive in practice to be of commercial benefit.

The more efficient method is a policy-based approach purely focussed on the category of documents contained in the file and the age of that file. So, for example, files dealing solely with personnel issues such as references, job applications and appraisals would be given a short retention period, whereas files from a research and development department would be given a much longer retention period. By listing all of the departments within the company, and categorising the files created by each department, an effective retention policy can be implemented.

It is usual for an individual within the company to be given responsibility for establishing a retention policy, and for ensuring that files are stored and disposed of in accordance with the guidelines of the policy. Document retention should be part of the company's culture, with each department being rigorous in its application of the policy. A policy should be established and applied – inconsistent application is very dangerous. Complete records of the operation of the policy are likely to be important evidence in any claim.

Document creation policy

As well as creating a corporate culture in relation to document retention, some thought needs to be given to document creation. It is a good idea to encourage staff to take care in their choice of language in written records. Flamboyant and extravagant words will be eagerly seized upon by parties in litigation and a meaning can be attached to them quite different from that intended by the author. Staff should be encouraged to think how their words could be misinterpreted before they write. It is important to ensure that documents reflect the whole story and are retained in an appropriate form. They should be legible, unambiguous, dated and should clearly state the name of their author and the people to whom they have been copied. Those employees involved in safety issues need to be particularly careful and if a risk or a problem is identified in a document, it should be described in objective and accurate terms. Once the problem or risk has been addressed, the solution should be clearly set out in another document.

The unintended recipient and privilege

It is inevitable that emails will be accidentally forwarded or copied to an unintended recipient. If this happens, it is always worth contacting the recipient and asking them to delete the email, especially if privileged or confidential material has been sent. When dealing with legally privileged matters great care should be taken as to whom a document is being sent or

copied containing legal advice (or sensitive/confidential information). It is very easy to waive privilege in a document that has been copied to a third party to a transaction (ie an accountant or surveyor).

When faced with a new problem, ensure that document management and protection is considered at the outset and devise a strategy for maximising protection. Please note that any strategy should take into account the laws of privilege in civil law jurisdictions, where relevant. Civil law jurisdictions include, for example, most of Europe. In-house lawyers in civil law jurisdictions are usually considered to be ordinary employees and their communications are not protected by privilege, although this is under challenge in Europe. The lack of privilege may, however, be balanced by more restrictive disclosure obligations.

Practical advice

Some further tips on protecting documents are detailed below:

— when obtaining external legal advice correspond with external legal advisers through the in-house legal department. This should ensure that communications with external lawyers are privileged and that limited internal circulation does not amount to a waiver of privilege

— ensure compliance with rigid protocols in relation to document creation, especially after a problem or potential dispute has been identified

— stop employees who are not members of a designated committee from creating documents

— ensure that the business involves the in-house legal department early in any significant issue where the company may face complaint or criticism from a third party, whether now or in the future

- investigations should be carried out by in-house lawyers or under their direction

- ensure that in-house lawyers prepare any notes of meeting or notes of interviews or summaries of events. If a lawyer cannot do so, at the very least have an employee prepare the document at the direction of a lawyer

- board minutes should reflect only the fact of a discussion on a particular issue and the decision made. Commentary on the business ramifications of a particular issue may not be useful in the event a dispute arises.

When a dispute arises, take control by doing the following:

- seek to assert litigation privilege where possible. If possible, mark documents *"privileged and confidential – prepared for the purpose of obtaining legal advice in contemplation of litigation"*. This label is not conclusive, but may help in asserting privilege in the future

- stop the circulation of emails (and other documents) speculating about an incident or event. Often the first instruction from in-house counsel should be not to circulate emails about an issue without approval. A litigation circular should be available to be circulated internally when a dispute arises

- identify who is preparing any reports into an event and why. Stop the creation of unnecessary reports. Ensure that any necessary reports are created under the instruction of internal or external lawyers and, if possible, for the purpose of obtaining advice on contemplated litigation.

- once litigation is contemplated ensure that existing relevant documents are preserved.

Final word

The reality is that not a great deal has changed over the last two or three years legally with respect to electronic disclosure. However, the fact is that serious practical problems are cropping up in every-day business relating to electronic documents, and, in particular, when dealing with litigation. Corporations are facing enormous costs and business disruption due to significant disclosure exercises in response to high value and complex claims. Companies can combat potential problems by taking pre-emptive measures, such as having a clear document management policy. It can also take steps once litigation has commenced (claiming or defending) to minimise the cost of any disclosure exercise by setting parameters with the opposing side as to the extent of the disclosure exercise at an early stage in the litigation. Of course, in some cases you may want the disclosure exercise to be as broad as possible, as it may assist your case.

Ultimately, in a world where technology is quickly evolving, your business must be equipped and prepared today to deal with the problems of tomorrow.

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This publication is for general guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

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