

## Summary note on disclosure of documents in civil proceedings

This note is a summary of our note "Disclosure of documents in civil proceedings in England and Wales". Neither note is intended as a substitute for obtaining advice in individual cases.

### Disclosure orders

Disclosure involves parties to litigation identifying and making available to each other (unless privileged) relevant documents in their control, in accordance with a court order.

Whilst the extent of disclosure will ultimately be determined by the court, the parties are encouraged to try to agree the most proportionate means of carrying out the exercise.

From 1 January 2019, a mandatory disclosure pilot scheme ("**Disclosure Pilot**") is operating in the Business and Property Courts (subject to limited exceptions). The Disclosure Pilot creates a new regime which is intended to promote a radical culture change in the approach to the disclosure process, requiring increased co-operation and engagement from the parties and greater oversight by the courts.

Whilst a broad order for disclosure will still be available where appropriate (retaining the "cards on the table" approach), other cases may be determined on the basis of more focussed and limited disclosure.

For cases in other courts, or falling within the exceptions to the Disclosure Pilot, the existing rules (set out in Part 31 of the Civil Procedure Rules) will apply. Under those rules, whilst the court can impose a different form of disclosure, the most common order is standard disclosure. This means you will have to disclose documents which are in your control:

- upon which you rely;
- which adversely affect your or another party's case; or
- which support another party's case.

Documents are in your control if they are in your or your agent's physical possession, whether or not you actually own the documents, or if you have a right to documents or to inspect or copy them, even if they are not currently in your possession.

### Documents to be disclosed

If the Disclosure Pilot applies to your case, you may be required to provide disclosure of key documents with your statement of case ("**Initial Disclosure**") (subject to certain exceptions).

In addition or as an alternative, the court may order "**Extended Disclosure**" to be given, which takes the form of one or more different disclosure models for the different issues in the case that have been identified as requiring disclosure. There is no right to Extended Disclosure – the court must be persuaded that it is required and, if so, what the appropriate model(s) is. The models range from minimal disclosure where no search is required (confined to known adverse documents) to request-led or other, broader, search-based disclosure orders. Although a tailored approach may be adopted, the court will rarely require different models for the same set of documents to avoid undue complexity.

Under the Part 31 rules, standard disclosure requires you to make a reasonable search for documents. What is reasonable depends on the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval and the significance of documents likely to be found. The relative financial positions of the parties will also be taken into account.

In general under both sets of rules, "document" means any record of any description containing information, including electronic documents and data. The definition covers email and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings. It covers documents stored on all forms of electronic media, including desktop and laptop computers, personal mobile devices (such as smart phones and tablets) and external storage devices (such as USB memory sticks and external hard drives). Also included in the definition are documents stored on servers and back-up systems and metadata (data about documents, such as the date and time of creation of a file).

## **Requirement to search for and retain disclosable documents**

For cases under the Part 31 rules, as soon as litigation is reasonably in prospect you must stop the routine destruction of documents that might be relevant. Equivalent document preservation obligations are triggered under the Disclosure Pilot when a person knows that it is or may become a party to proceedings that have been commenced, or knows that it may become a party to proceedings that may be commenced.

Documents damaging to your case must not be destroyed in any circumstances.

It is also important to ensure that metadata is preserved and not altered in any way.

You should ensure that all those within your organisation who may have disclosable documents and agents/third parties who may hold these on your behalf are warned about their disclosure obligations as soon as possible. Under the Disclosure Pilot rules, there are more prescriptive requirements that need to be followed such as sending a written notification regarding document preservation obligations to relevant current and former employees. These requirements are reflective of existing best practice.

Relevant documents should be sought out at the earliest opportunity. Where a search is required, this should extend to consideration of:

- the likelihood of documents being found in all your locations;
- documents in storage;
- copies of significant documents which may have manuscript notes on them;
- notes made by all those who attended significant meetings;
- types of electronic document, including emails, word-processed, spreadsheet, graphic and presentation files, image files, mail files, voicemail recordings, instant messages, photographs, plans, drawings, video and sound recordings;
- where electronic documents may be stored, including those readily accessible on computer servers, desktop and laptop hard drives, mobile devices (such as smart phones

and tablets), external storage devices (such as USB memory sticks and external hard drives), and web-based applications;

- back-up data or metadata (in some cases);
- paper notebooks or diaries, if likely to be important to any of the issues.

Lawyers should be involved in the gathering of documents from an early stage.

Original paper files should not be disturbed or rearranged.

## **List of documents**

All disclosable documents have to be described in a formal list of documents to be supplied to the other party. In this you must also include relevant documents which used to be, but no longer are, in your control.

## **Disclosure certificate**

A disclosure certificate (or disclosure statement for cases not subject to the Disclosure Pilot) must be signed by the party giving disclosure or an appropriate person within the organisation. The disclosure certificate must identify the extent of any search for documents, including search methodology, and certify that the maker of the statement has complied with its disclosure obligations and the court's disclosure order. These include confirmation that it has taken reasonable steps to preserve documents; has disclosed known adverse documents; has acted honestly; and understands its ongoing disclosure obligation.

## **Production of documents and privilege**

The other side will be entitled to a copy (usually in electronic form) of all of your listed documents except privileged documents. This is known as production (or inspection under the existing rules).

Privileged documents are essentially documents which record confidential communications between:

- lawyers and their clients for the dominant purpose of giving or obtaining legal advice ("**legal advice privilege**");
- lawyers and their clients, or between either of them and third parties, for the dominant purpose of conducting, or aiding in the

conduct of, actual or likely litigation or other adversarial proceedings ("**litigation privilege**").

Not all of the employees of a client organisation will be classified as "the client" for the purpose of claiming legal advice privilege. The identity of those employees who constitute "the client" must be considered for each specific matter.

The following are unlikely to be privileged:

- internal memoranda prepared by non-lawyers, even if confidential;
- board minutes that go beyond merely recording legal advice;
- notes to accounts;
- correspondence with other professional advisers (such as accountants and, often, insurers) or the police or other authorities;
- documents obtained from third parties to provide evidence for your case;
- instructions to and correspondence and discussions with expert witnesses.

Care should therefore be taken to ensure that if such documents are created or obtained after litigation or other adversarial proceedings are contemplated or commenced, they are purely factual and contain nothing that will prejudice your case.

In order that privilege is maintained, as far as possible, requests for documents or other assistance from third parties should only be made after consultation with and (ideally) by your lawyer.

Privilege can be lost if you show your documents to third parties.

"Without prejudice" correspondence is correspondence arising in connection with settlement negotiations. Such correspondence cannot be shown to the court as evidence and production/inspection will usually be withheld on the grounds of privilege.

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## Use of disclosed documents

Documents and information from documents obtained through the disclosure process or as a result of any other court order must not be used for any purpose other than the litigation in question except where read or referred to in open court or agreed by the party disclosing the document and the person to whom the document belongs, unless the court orders otherwise. All members of staff to whom such material may be communicated must be warned against misuse. Misuse could amount to contempt of court.

## Express duties

Under the Part 31 rules, you have a continuing duty of disclosure until judgment or settlement, including preservation of documents. The Disclosure Pilot rules expressly set out the disclosure duties of the parties (and their lawyers) which continue until the end of the proceedings. As well as those explained above, they include a duty to disclose known adverse documents in all cases and to act honestly in the process of giving disclosure and reviewing documents disclosed by the other party.

## Consequences of failing to give proper disclosure

Failure to give proper disclosure, including failure to comply with your express duties, can amount to contempt of court and may have serious consequences, including adverse costs orders, dismissal of your claim or entry of judgment against you.

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