

# Disclosure

Disclosure is the process during proceedings whereby the parties reveal to one another documents that either support or are detrimental to their claim.

## WHAT IS DISCLOSURE?

Disclosure is a key part of litigation and all parties in England and Wales are obliged to comply with it. Disclosure is where both parties reveal to one another relevant documents, both hard copy and electronic, (whether they support or are detrimental to your case) within a party's control. The theory is that it will allow the parties to explore settlement having understood the strength or weakness of an opponent's case based on the documents they hold and if the case proceeds to a final hearing that the court is able to determine a case with all relevant information to hand. In simple terms, it is designed so that the parties put *"all of their cards on the table"*.

There are a number of disclosure processes that can be followed, however, it is often the case that the court orders standard disclosure which requires a party to disclose the following:

1. the documents on which he relies; and
2. the documents which -
  - a. adversely affect his own case;
  - b. adversely affect another party's case; or
  - c. support another party's case; and
3. the documents which he is required to disclose by a relevant practice direction.

For cases that are valued £25,000 or above, it is likely the case will proceed in the multi-track. This means that parties are also required to provide eDisclosure alongside standard disclosure. eDisclosure is the process that applies to all documentation stored electronically<sup>1</sup>.

## WHEN DOES DISCLOSURE TAKE PLACE?

Depending on which court the claim is issued in, disclosure can take place at various junctures. If the claim is issued in the Business and Property Courts ("**B&PCs**"), disclosure takes place at the very beginning of the dispute when the claim form is issued<sup>2</sup>. For all other courts, disclosure normally takes place following a costs and case management conference and in line with an order from the court.

<sup>1</sup> Please see our executive summary entitled Electronic Disclosure.

<sup>2</sup> Please see our executive summary named Disclosure in the BP&Cs.

In order to narrow these issues and keep costs proportionate, the parties are encouraged to work with one another and if required, agree next steps before a costs and case management hearing.

### WHAT IS A DOCUMENT?

A document in this context has a wide meaning and covers anything in which information of any description is recorded. This could be both paper and electronic and covers databases, memory sticks, phones, social media, text message etc... It also extends to metadata and other embedded data which is not typically visible on a screen or print out.

Please note that as soon as a party is aware that litigation is a possibility there is an immediate duty to preserve all documents that may be relevant to the claim (or the defence). The duty to preserve these documents is ongoing and lasts until the claim is concluded.

### WHAT IS REQUIRED TO BE DISCLOSED?

Parties are obliged to disclose helpful or damaging documents that are, or have been, in its control. "Control" also has a specific meaning under the court rules and it encompasses the following;

- Documents in your physical possession.
- Your right to obtain a document from another party.
- Your right to inspect or take copies of a document in the hands of another party.

Certain types of document are not permitted to be seen by the other side as they are "privileged".<sup>3</sup>

### REASONABLE SEARCH

The parties must undertake a reasonable search for documents which are, or have been, in their control. This search has to be "*reasonable*" which means that you are not obliged to carry out an exhaustive search, sparing no expense and leaving no stone unturned. The court when considering if a search has been reasonable will take into account a number of factors such as:

- Number of documents involved;
- Nature and complexity of the proceedings;
- Ease and expense of retrieval of any particular document; and
- Significance of any document likely to be located during the search.

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<sup>3</sup> Please see our executive summary entitled Privilege.

There are additional factors to be considered when searching for electronic documentation and specific points to consider including:

- Ease and expense of retrieval of any particular document;
- Accessibility of electronic documents;
- Location of relevant documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents;
- Likelihood of locating relevant data;
- Cost of recovering, disclosing and providing inspection of any relevant documents; and
- Likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.

Disclosure is inevitably a costly exercise but one of the cornerstones of litigation is dealing with a case in a just and proportionate way and parties should keep this in mind when undertaking the search for documentation. This is especially important when considering eDisclosure<sup>4</sup> which runs in tandem with the disclosure procedure.

### PRESERVATION OF DOCUMENTS

As soon as there is a possibility that a claim with either be brought against a party or issued by them, there is an obligation to preserve and not to destroy any existing documents which are, or may be, relevant to the matters in issue. This includes preserving the integrity of the files or other format in which the material is kept.

If necessary, the preservation of documents may involve the suspension of any routine document destruction policies and the requirement to retain all potentially relevant documentation should be communicated to all staff/individuals relevant to the dispute. This is sometimes referred to as a “legal hold”.

Failure to preserve documents may result in adverse inferences being drawn, costs sanctions and a party will also need to explain what has happened to any documents that have been lost or destroyed.

In addition, it is important not to create any new documents which might be relevant and would therefore need to be disclosed. All electronic documentation should be retained in its original format and not amended.

Finally, do not ask third parties to send you (or your legal team) documents until the content and relevance of those documents has been considered. The reasoning is that if a party does not have a document in its possession or control then they will not be disclosable.

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<sup>4</sup> Please see our executive summary entitled Electronic Disclosure.

### CONTINUING DUTY

The duty of disclosure continues until the end of the claim. If any disclosable documents come into a party's possession or to their attention after the initial disclosure exercise has been completed, they must be disclosed immediately. This duty also includes the duty to preserve relevant documents.

### DISCLOSURE STATEMENT

The list of documents and the electronic disclosure questionnaire will need to be verified by a disclosure statement. This needs to be signed by a senior representative of the company. Normally this is a director or the person who has taken overall responsibility of the search.

The disclosure statement must set out the extent of the search that has been made to locate documents that are required to be disclosed and provide specific information regarding the search for electronic documents and the specific media searched.

The person signing the disclosure statement must certify that they understand the duty of disclosure and, to the best of their knowledge, have carried out the duty. They must expressly state that they believe that the extent of the search was reasonable in all the circumstances. Signing a disclosure statement without an honest belief in its truth carries the risk of proceedings for contempt of court. In addition, the person signing should attend the first case management conference, and any subsequent hearing at which disclosure is likely to be considered so it is important that the person signing is considered carefully.

### DISCLOSURE FROM THE OTHER SIDE

If a party is dissatisfied with the disclosure provided by the other side and believes it is inadequate, it is open to a party to make an application for an order for specific disclosure. This can require the other side to disclose specified documents or categories of documents or to carry out such further searches as specified by the order and to disclose the results of that additional search.

### SOME GENERAL "DO'S AND DON'TS"

#### Do's

- **Do** discuss with lawyers first any documents that you propose to circulate internally.
- **Do** ensure that you comply with any data protection requirements.

#### Don'ts

- **Do not** destroy any documents that might be relevant to the dispute. The procedural rules expressly require me to notify you, as soon as litigation is contemplated, of the need to preserve disclosable documents, including electronic documents that would

otherwise be deleted in accordance with a document retention policy or in the ordinary course of business.

- **Do not** amend, delete or destroy any electronic documents that might be relevant to the dispute.
- **Do not** create any new documents that might have to be disclosed in the litigation.
- **Do not** mark or annotate any existing documents that might be relevant to the dispute.
- **Do not** ask any third parties to send you documents.

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