

The Disclosure Pilot Scheme

Disclosure is the process whereby the parties reveal to one another documents that either support or are detrimental to their claim. Co-operation and proportionality are fundamental to the disclosure process under the Disclosure Pilot Scheme.

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. Typically, standard disclosure will apply meaning that each party must list and make available to the court:

- a) Documents on which they rely; and
- b) Documents which;
 - a. Adversely affect another party's case;
 - b. Adversely affect another party's case; or
 - c. Support another party's case.

WHY IS THE BUSINESS AND PROPERTY COURT PROCESS DIFFERENT?

Proceedings that are commenced in the Business and Property Courts (“B&PCs”) are subject to a new disclosure regime under the Disclosure Pilot Scheme (“DPS”) which is currently operating in the B&PCs under Practice Direction (PD) 51U. The DPS is intended to run as a 2-year pilot from the 1 January 2019.

A key aim of the DPS is to ensure that in the face of ever-increasing numbers of electronic documents that the volumes and costs do not become disproportionate to the underlying proceedings.

The DPS differs from traditional disclosure as the process is mainly “*front loaded*”. What we mean by this is that disclosure does not normally happen until further down the court process.

The idea is that by “*front loading*” the disclosure at the beginning of proceedings, this will focus the parties’ minds and allow one another to evaluate the strengths and weaknesses of their case. This may promote early settlement.

WHAT IS THE DPS PROCESS?

Co-operation and proportionality are fundamental to the disclosure process. To understand the full DPS process, please see our executive summary entitled Disclosure in the Business and Property Courts. Below is a high-level overview relating to the duties owed to the court.

Under the provisions of the DPS, you must comply with the following express duties that are owed to the court:

- To take reasonable steps to preserve documents in your control that may be relevant to any issue in the proceedings. This includes (i) documents that are (or were) in your physical possession, (ii) documents in respect of which you have (or had) a right to possession or (iii) documents in respect of which you have a right to inspect or take copies (for example, documents held by third-party professional agents, such as other firms of solicitors or accountants).
- To disclose “known adverse documents”, in accordance with the timings specified in the rules.
- To comply with any order for disclosure made by the court (which will usually be at the first case management conference, after each party has provided details of what disclosure it considers to be reasonably required).
- To undertake any search for documents, that is ordered by the court, in a responsible and conscientious manner to fulfil the stated purpose of the search.
- To act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party.
- To use reasonable efforts to avoid providing documents to another party that have no relevance to the issues in the proceedings on which disclosure of documents is required.

These are continuing duties that will last until the conclusion of the proceedings.

SOME GENERAL "DO'S AND DON'TS"

Do's

- **Do** discuss with your legal team any documents that you propose to circulate internally.
- **Do** preserve all documents that are potentially disclosable.
- **Do** suspend any document destruction policies (both paper and electronic documents).
- **Do** liaise with your team about preserving documents.
- **Do** consider if any third parties hold documents that may be relevant to your dispute as you may need to instruct your lawyers to write to those third parties to seek that they preserve the relevant documents.
- **Do** ensure that you comply with relevant data protection requirements. It will be important to ensure that you keep in mind the relevant data protection requirements, including those that apply under the General Data Protection Regulation ((EU) 2016/679).

Don'ts

- **Do not** search for documents until we have had a chance to discuss the claim with you in more detail. Note that it will be necessary to keep a record of any searches that are undertaken (or caused to be undertaken) and to provide the court with brief details.
- **Do not** create new documents (or annotate or amend existing documents) relating to the dispute. It is very important that you do not create any new documents that might have to be disclosed that could damage your case.
- **Do not** circulate documents to your internal team that may be relevant to the dispute.
- **Do not** ask anyone externally (third parties) to send documents to you without talking to the team here.
- **Do not** destroy any documents (either paper or electronic).

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