

## Briefing Note: Disclosure

### An Introduction to the Guide

This briefing note considers what is meant by disclosure and what disclosure related obligations arise in civil litigation. Broadly, disclosure is concerned with the parties to a claim telling each other what documents they hold that might have a bearing on the issues in dispute. Unfortunately, it can be one of the most time-consuming and expensive aspects of litigation. This guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

**Briefing Note**  
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**Summary:**

A general introduction to the treatment of documents and other evidence in litigation

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### Disclosure and Inspection

Part 31 of Civil Procedure Rules defines disclosure as 'stating that a document exists or has existed'. Critically, documents include 'anything in which information of any description is recorded' and these include written documents, audiotapes, videotapes and photographs. In our computer age, they also include every kind of computer file. This means everyday Word documents, Excel spreadsheets and emails, and less obvious things such as text messages, MP3 files, deleted files and metadata. Copies of documents must also be disclosed if they contain any relevant differences from the original (for example, handwritten notes or a different date).

Inspection is the process in which the parties exchange their documents and is inextricably linked to disclosure. The parties can either allow their opponent to inspect the original documents or, more commonly, provide the opponent with copies of the documents.

### Standard Disclosure

Typically the courts will order parties to provide standard disclosure (as opposed to a more or less onerous obligation). Broadly, this requires each party to disclose:

- (a) the documents on which they rely; and
- (b) the documents which:
  - i. adversely affect their own case;
  - ii. adversely affect another party's case; or
  - iii. support another party's case.

It is important to note that you are not entitled to withhold documents which either adversely affect your case or support your opponent's.

### Preservation of Documents and Document Management

As soon as there is a possibility that you will either bring or face a claim, you have an obligation to preserve relevant documents. This can present particular difficulties where you are a large organisation, or there are electronic documents. However, this is immaterial; the law requires you to preserve the documents. Consideration must be given to how this is to be achieved and a plan implemented.

In terms of document management:

1. You must not destroy or dispose of any potentially relevant documents. You should therefore ensure that everyone in your organisation understands this. You should also suspend any routine document destruction policies, including those relating to electronic documents.

## Briefing Note: Disclosure

2. Do not create any new documents which might be relevant (and so have to be disclosed) without first being clear whether or not they will fall to be disclosed. Also, retain all original electronic copies of documents and do not amend them.
3. Do not ask anyone else to give or send you (or us) documents until you have carefully considered whether they might have to be disclosed.

This guidance about the preservation and management of documents applies to both paper and electronic documents.

### Electronic Documents

From 1 October 2010, special rules apply to the preservation, management and disclosure of electronic documents in more substantial cases (principally those allocated to the multi-track). Their aim is to encourage and assist parties to reach agreement in relation to the disclosure of electronic documents in a proportionate and cost-effective manner. In essence, the rules require electronic disclosure to be addressed as a substantive issue at an early stage in the case. They also make provision about how parties should search for, sort and disclose electronic documents.

### Continuing Duty

The duty of disclosure continues until the end of the claim. Accordingly, if any disclosable documents come into your possession or simply to your attention after your initial disclosure, you must disclose them immediately.

### Control

Parties are only required to disclose documents which are or have been in their control. This obviously covers where the documents are in your direct physical control, but also where you have the right to possession of them (e.g. documents held by your professional advisers) and where you have a right to inspect or take copies of them. It also covers documents which you used to control.

### Requirement for a Reasonable Search

When the court has ordered the parties to provide disclosure, they are required to carry out a reasonable search for documents. This means that you do not have to go to the ends of the earth to find all and any relevant documents; however, it also means that the search must be genuine and of some substance. Factors that are taken in to account include:

- The number of documents involved. For example, if you know that there cannot be more than 100 relevant documents and that they are all in your accounting records, then there will likely be no good reason not to search for them all. However, if you would be required to search thousands of documents to find one or two which may have some relevance, then you may not have to.
- The nature and complexity of the proceedings. For example, in certain types of proceedings, certain types of documents will always be expected to be disclosed.
- The ease and expense of retrieving a document.
- The significance of any document likely to be located.

The search must, of course, extend to electronic documents of every kind, and in whatever media they are stored.

## Briefing Note: Disclosure

### Procedure for disclosure

Disclosure will usually take place once an order has been made, normally at the first case management conference or after the filing of allocation questionnaires. However, in more substantial cases (principally those on the multi-track), the parties are required to try to reach agreement as to the disclosure of electronic documents before the first case management conference.

Each party must make and serve a list of documents identifying the documents in a convenient order and manner and as concisely as possible. In addition, a questionnaire about the existence and types of electronic documents may have to be prepared and disclosed.

### Disclosure statement

This is a statement made by the party disclosing the documents. It

- a) sets out the extent of the search that has been made to locate disclosable documents;
- b) certifies that the party understands the duty to disclose documents; and
- c) certifies that, to the best of their knowledge, they have met that duty.

It normally accompanies the list of documents. Where the disclosing party is a company, firm, association or organisation it must be signed by a person who is an appropriate person to make the statement. This will usually be someone who has been responsible for undertaking the search. Equally, that person should take responsibility for the electronic search.

### Withholding inspection

A party can withhold the right to inspect documents which have been disclosed. This is usually if the party claims that the documents are *privileged* from inspection. Privileged documents fall into three broad classes:

- a) documents protected by legal professional privilege;
- b) documents tending to incriminate the party producing them (this rule applies to criminal liability or penal proceedings);
- c) documents privileged on the grounds of public policy.

In civil litigation, the question is almost always whether a document can be withheld because the party concerned can rely on legal professional privilege.

### Legal professional privilege

This relates, firstly, to communications passing between a party and his legal advisers ('advice privilege'). Letters and other communications passing between a party and their solicitor are privileged from inspection provided they are written by or to the solicitor in his professional capacity and for the sole or dominant purpose of obtaining legal advice or assistance. This will include advice about what should prudently and sensibly be done in the relevant legal context. The privilege also covers instructions and briefs to counsel, counsel's opinions and counsel's drafts and notes.

It is very important to appreciate that not all client-solicitor communications will be privileged: they must concern the giving or receiving of legal advice.

Secondly, legal professional privilege includes communications passing between the solicitor and a third party ('litigation privilege') where:

## Briefing Note: Disclosure

- a) they come into existence after litigation is contemplated or commenced; and
- b) they are made with a view to the litigation, either for the sole or dominant purpose of obtaining or giving advice in regard to it, or for obtaining evidence to be used in it.

The type of documents that would fall under this head would be a report from an expert obtained by a solicitor with a view to advising his client about existing or contemplated litigation, or witness statements obtained by a solicitor for the purpose of existing or contemplated litigation.

Communications between you and third parties also fall within the scope of litigation privilege as long as they are produced for the sole or dominant purpose of obtaining legal advice in respect of existing or contemplated litigation, or to conduct, or aid in the conduct of, such litigation. It must be the case that litigation was reasonably in prospect at the time when the document was brought into existence.

Where you are larger a organisation, not everyone can communicate freely with the organisation's solicitor (without fear of the correspondence having to be disclosed). Also, documents created and circulated internally (rather than to or from your solicitors) may not be privileged. Accordingly, strict controls and procedures need to be set up as soon as there is a prospect of a claim.

Finally, all documents which are withheld as privileged must be confidential. This is not just a necessary component of privilege, but a key warning not to disseminate documents that are potentially privileged to your opponent or to third parties without first taking advice. To do so risks losing the right to claim privilege.

### Failure to disclose

A party who fails to disclose a document or fails to allow inspection of a document may not rely on that document unless the court permits. Furthermore, the party will be penalised by the court and could even see their claim or defence being struck out.

### Applying for specific disclosure

If a party is dissatisfied with the disclosure provided by another party and believes it is inadequate then they are entitled to make an application for an order for specific disclosure. This can require a party to:

- a) disclose specified documents or classes of documents;
- b) carry out a further search, as specified by the order, and disclose any documents located as a result of that search.

### Pre – action disclosure

There is a procedure which allows a would-be party to a claim to seek the disclosure of certain kinds of documents before any claim is commenced. This might be done where a party is unsure whether it has a good case but suspects the other party will have documents which will clarify the position.

### Non – party disclosure

Where proceedings are already in existence, a party to the proceedings can apply for disclosure against a non-party. The application must be supported by evidence. The court may order non-party disclosure only if:

- a) the documents in question are likely to support the applicant's case or adversely affect the case of another party; and
- b) disclosure is necessary to dispose fairly of the case or to save costs.

## Briefing Note: Disclosure

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If you would like to know more about this topic or our other legal services, please contact:

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