

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.

While 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.

On 1 October 2022, a mandatory disclosure pilot scheme operating in the Business and Property Courts was adopted as a permanent part of the Civil Procedure Rules ("**CPR**"), and has been implemented as Practice Direction 57AD, "Disclosure in the Business and Property Courts" ("**Disclosure in the B&PCs**").

The procedures originally introduced under the disclosure pilot scheme and now set out in the rules for Disclosure in the B&PCs promote a radical culture change in the approach to the disclosure process, requiring increased co-operation and engagement from the parties at an earlier stage of the case and greater oversight by the courts.

While a broad order for disclosure remains 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 rules for Disclosure in the B&PCs, the rules set out in Part 31 of the CPR will apply. Under those rules, while the court can impose a different form of disclosure, the most common order is standard disclosure.

This means you would 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 rules for Disclosure in the B&PCs apply 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 involves using disclosure "models" (different options for disclosure) 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 disclosure of particular documents or narrow classes of documents or other, broader, search-based disclosure orders.

Different models may apply to each party's disclosure on a particular issue or to different types of documents, or Extended Disclosure may be given by only one party. It is important, however, that there is moderation in the number of models used and the way in which they are applied to the issues, so that the Extended Disclosure process is practical. For these reasons, the court will rarely require different models for the same set or repository of documents, to avoid undue complexity.

The rules for Disclosure in the B&PCs recognise that flexibility may be required for multi-party cases, so that a bespoke procedure and timetable may be ordered by the court for a multi-party case. Any application to the court in this regard should be made at an early stage.

In addition, the rules for Disclosure in the B&PCs provide that the parties may agree or the court may order a simplified disclosure regime for "Less Complex Claims". A Less Complex Claim is a claim which by virtue of its nature, value, complexity and the likely volume of Extended Disclosure may not benefit from the full procedure for Disclosure in the B&PCs. Typically this will include cases worth less than £1 million.

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 and 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 any routine destruction of documents that might be relevant. Equivalent document preservation obligations are triggered under the rules for Disclosure in the B&PCs 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 rules for Disclosure in the B&PCs, 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 where there are reasonable grounds for believing that they may be in possession of disclosable documents that are not also in the party's possession. These requirements reflect 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); and

- hard copy documents such as 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 rules for Disclosure in the B&PCs) must be signed by the party giving disclosure or an appropriate person within the organisation. The disclosure certificate may also be signed by a party's legal representative provided that the legal representative has explained the significance of the disclosure certificate to their client and has been given written authority to sign it on the client's behalf. In such cases, the party will be deemed to have agreed to, and be bound by, the certifications given by their legal representative. 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. This includes 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 Part 31 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**"); or

- 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; or
- 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.

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 the document is read or referred to in open court or where the party disclosing the document and the person to whom the document belongs agree that it may be used for another purpose, 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 rules for Disclosure in the B&PCs 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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If you would like further information on any aspect of disclosure or on civil proceedings generally, please contact Jennifer Dickey or the person with whom you usually deal.

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