LITIGATION

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Disclosure

The Duty of Disclosure

Disclosure of documents to your opponent is a key part of the litigation process. The duty of disclosure is strict and the courts take it very seriously. Broadly speaking parties are required to disclose to the opposing party the documents on which it relies, that adversely affect its case or another party's case, or that support another party's case.

The disclosure obligation in each case will depend on a number of factors, including the procedural "track" to which the case is allocated (for example, fast track or multi track) and whether electronic documents will have to be disclosed.

The usual order will be for what is known as standard disclosure. Under that procedure, the documents are usually disclosed by serving a list of documents on the opposing party. The underlying principle is that the court can only deal with the case justly if all of the relevant material is out in the open.

Since 1 April 2013, a new disclosure procedure has applied for multi track claims. The court will decide what is appropriate for the case from a menu of options. There is considerable flexibility. The court will make its order having in mind what is known as the "overriding objective" (which means dealing with cases justly and at proportionate cost) and the need to limit disclosure to what is necessary to deal justly with the case.

Parties are compelled to disclose to each other any damaging documents, as well as helpful ones. The disclosure process, therefore, forces parties to be realistic about their chances of success in the litigation and, for that reason, many disputes settle either shortly before or shortly after disclosure.

Do's and Don'ts

Do not destroy any documents that might be relevant to the dispute. You have a duty to preserve disclosable documents, including electronic documents

Do not mark or annotate any existing documents that might be relevant to the dispute

Do not access, 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 ask any third parties to send you documents

Discuss with us first any documents that you propose to circulate internally

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Disclosure in *Multi - Track* Cases

In substantive disputes the court may make an order for something other than standard disclosure if the case is allocated to the multi track. There is no set procedure in the rules where an order is made for something other than standard disclosure. Instead, the judge will give directions on how disclosure is to be given. It is likely, in such cases, that aspects of the standard disclosure procedure, such as the requirement for lists of documents, will be adopted.

In multi track cases, there are more onerous requirements on the parties in their preparation for disclosure. Each party must file and serve a disclosure report, not less than 14 days before the first case management conference (CMC). This report must:

- Briefly describe matters such as the documents that exist that are (or may be) relevant to the matters in issue and where, and with whom, the documents are (or may be) located.

- Describe how any electronic documents are stored.

- Estimate the broad range of costs that could be involved in giving standard disclosure (including the costs of searching for and disclosing electronic documents).

- State which type of disclosure order will be sought.

We will need to carefully consider what might be the most appropriate approach to disclosure to ensure that what is proposed is proportionate.

Not less than seven days before the first CMC, the parties must discuss, and seek to agree, a proposal for the disclosure exercise. In most cases, the court will make the disclosure order at that CMC.

It is important to be aware that the time periods specified in the rules are deadlines. It is likely that work preparing the disclosure report, and discussions with the opposing party (or parties), will have to start significantly earlier.

Costs

For the purposes of the disclosure report, it will be necessary to prepare an estimate of the broad range of costs that could be involved in giving standard disclosure (and whatever form of disclosure we propose for the case).

In some cases, it will also be necessary to provide a detailed budget for the costs of the case as a whole (including the costs of the disclosure exercise). This will be prepared based on the order for disclosure that we decide to propose.

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The Disclosure Process

Duty to disclose documents, including electronic data

"Document" has a very wide meaning under the court rules. It includes all media in which information of any description is recorded, for example, tapes, computer records and e-mails, as well as paper.

The definition of a document also extends to electronic material that is not easily accessible, such as electronic documents stored on servers and back-up systems, and electronic documents that have been deleted. It also includes information stored and associated with electronic documents, known as metadata.

Duty to disclose documents that are, or have been, in the party's control

The 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. It is not limited to documents that a party has (or previously had) in its possession. It also includes documents that the party has (or had) the legal right to possess, inspect or copy (for example, documents held by third party professional agents, such as other firms of solicitors, or accountants).

A party's obligation is to conduct a *reasonable* search for documents that are, or have been, in its control. A party is not obliged to carry out an exhaustive search for documents, sparing no expense and leaving no stone unturned.

The reasonable search

What constitutes a reasonable search will depend on the facts of each case, but there are certain factors that the court will apply when assessing the reasonableness of a search. These include:

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

When determining the extent of the search for documents that is required in each case, the underlying principle is proportionality. Disclosure can be a costly aspect of the litigation. The court will be looking to manage the disclosure exercise so as to facilitate a just outcome, but with an eye to balancing the sums in issue with the cost of litigating. We will discuss how these principles apply to the present case, and the extent of the search required.

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Dealing with electronic documents

Specific procedures apply for the disclosure of electronic documents (often referred to as e disclosure).

You should be aware, 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. It is essential for you to consider whether any standard document retention policies need to be suspended. Failure to comply with this could lead to the court drawing adverse inferences, for example, if any disclosable documents are destroyed.

The practicalities of the disclosure exercise and preparing a list of documents

The first stage is to determine the extent of the search for documents that will be required. The next step is to conduct the search. Once the documents have been located, we will review the materials and decide which documents must be disclosed. If lists are to be exchanged, we will then draft a list of the documents that are required to be disclosed.

The documents are usually listed in a prescribed court form. There are alternative options available for listing electronic documents. We will consider those options in more detail, once we have established whether there is likely to be a significant volume of electronic documents to disclose.

The disclosed documents will be described in the list of documents in one of the three sections:

1. Relevant documents that the party currently has, and which their opponent may view or "inspect". These documents will be listed either individually or by category.

2. Relevant documents that the party currently has, but which their opponent may not inspect, for example, privileged documents (see below). By convention, these documents are described generally.

3. Relevant documents that the party has had, but no longer has. By convention, originals of documents that have been sent to third parties are described generally, but if there are documents likely to be relevant to the matter, that the party should have but does not have, these will need to be identified specifically.

The reasonable search

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Privilege continued

Litigation Privilege. Certain confidential communications made when litigation is likely or has begun, passing between a party and its legal advisers, a party and third parties (for example, potential witnesses) and, in certain circumstances, the legal advisers and third parties, where the main purpose of the communication is to seek or obtain evidence for use in the litigation, or to provide advice on the litigation.

Without Prejudice Privilege. Correspondence and other communications generated as part of a genuine attempt to settle an existing dispute.

Where documents are privileged, it is extremely important that you do not take any steps that might result in privilege being lost (or "waived"). This may occur if confidentiality in the material is lost. Therefore, please take care not to circulate any existing documents that might be relevant to the dispute

Confidential Documents

Unless a party has a right or duty to withhold inspection, it will not be able to prevent their opponent from seeing any documents that are required to be disclosed just because they are confidential. However, the court rules prevent a party that has acquired documents on disclosure from using those documents outside the litigation in which they are disclosed, except in certain circumstances: for example, if the court's permission is obtained.

If there are any commercially sensitive relevant documents that you do not want your opponent to see, we will need to consider whether and to what extent, we can ask the court to put in place specific protective measures. In limited circumstances, for example, it is possible to obtain an order that an opponent's legal advisers (but not the opponent) may inspect those documents.

The Disclosure Statement

The list of documents must contain a disclosure statement that is signed by the party (or in the case of a company a senior representative of the company who takes overall responsibility for the search for documents).

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 he understands the duty of disclosure and, to the best of his knowledge, has carried out the duty. He must expressly state that he believes that the extent of the search was reasonable in all the circumstances. This is a serious matter. Signing a disclosure statement without an honest belief that it is true carries the risk of proceedings for contempt of court and the penalty of imprisonment.

For more advice contact Matthew Knight on 01722 410664 or email matthew.knight@sampsoncoward.co.uk

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