

Disclosure of Documents

The disclosure of documents is an essential step in any legal proceedings. It is often the first critical point in a case at which any party is able to understand the real strengths and any weaknesses of their case.

This note is intended to provide a simple overview of this important, but complicated, subject for any person involved in legal proceedings, but your solicitor must advise you in relation to the duty in each specific case.

What is “Disclosure”?

Disclosure is the step by which **all** parties to legal proceedings must provide details of any **document** which is in their control and on which they rely, as well as those documents which might support the other party’s case or those which might adversely affect either party’s case. Information about these documents must then be recorded in a schedule. Copies of the documents must then be supplied to other parties upon request in either paper or electronic form (subject to rules regarding payment) and the originals of paper documents made available for inspection, if required.

The duty of disclosure applies to all cases before the courts, and sometimes also before any legal proceedings are issued. The precise extent of disclosure will usually, however, depend on a number of factors, including the track to which the case is allocated (fast track or multi track and whether electronic documents will have to be disclosed).

What is a “Document”?

For the purpose of the duty of disclosure a “document” is anything onto which information is recorded. It includes both original and copy documents.

A document may be writing on paper (such as notes, letters, invoices, contracts and the like), but also in the form of photographs, plans, drawings and similar.

The extensive use of electronic communications and media (including use of computers, mobiles, tablets and the like) means that in some cases the principal form of disclosure will be in electronic form. Therefore, any material stored on a personal or office computer system (including on the hard drive), on electronic devices (such as a laptop, a blackberry or a pda, a mobile telephone, a memory stick), digital voice recordings, tape recordings, CDs, databases, text messages; indeed any material at all, including material which is in the “deleted” items of Microsoft Outlook may be covered.

If there is any doubt whether any material should be regarded as a “document”, ask your solicitor.

What is “Control”?

The documents to be disclosed are only those within a party’s “control”, which includes not only items in the physical possession of a party (for example, those stored on a computer system, lap top, tablet and mobile), but also those which the party has a right to possess or to inspect which are held by another person (such as a solicitor or an insurance broker), for which they have the right to decide can be released.

The Duty to Search

A party to litigation is required not only to produce those documents which are easily accessible, but must also conduct a reasonable search for other documents. What is a reasonable search will be assessed in each case, based on the principle of “**proportionality**”. This principle means that there should be a reasonable relationship of proportion between the documents to be searched for and the potential relevance or benefit which any documents located may bring to the case.

Preservation of Documents

Once any litigation is contemplated, or has commenced, it is the duty of all parties to ensure the preservation of relevant documents until it is resolved. This means ensuring that the “documents” are kept secure and available for inspection until the case has been resolved. This duty means, for example, ensuring that any standard office procedures for the systematic destruction or removal of documents (particularly procedures related to the regular deletion of emails or of computer back up files) are **postponed** until your solicitor has had an opportunity to consider each category of document.

In some circumstances, the failure to preserve documents without a good explanation might amount to a contempt of court or other offence.

Identifying Documents for Disclosure

Once all relevant documents have been located they must be recorded in a schedule which is then included in a document entitled “List of Documents”. In some cases there may also be specific directions given by the court concerning electronic disclosure, in addition to the more standard type of disclosure.

Each party must eventually certify (by a Statement of Truth) the extent of the searches made for documents and that the documents disclosed are believed to be the only relevant documents for the purposes of the proceedings. If this statement is knowingly false the person making it may be liable to prosecution for contempt of court.

The rules of court relating to disclosure have changed in recent years, and there is a much greater emphasis on the parties dealing with disclosure at an early stage. In this regard for multi-track cases the parties will be required to provide some details in advance of the first case management conference. In other cases no information need be given to the other side until directions have been provided by the court. Your solicitor will give you guidance in each case.

Objections to Producing Documents

Some documents although relevant may not have to be disclosed because they are privileged. In some circumstances, a party has the right to withhold disclosure of such documents. For example, legal professional privilege means that if a solicitor has provided a letter of advice to a client about a case, although that letter might be regarded as “relevant”, it will not have to be disclosed because the law determines it should remain confidential to the solicitor and his or her client. There are other categories of privilege, but these are matters to be discussed with your solicitor.

The best approach for a party when dealing with disclosure is to produce copies of all documents which relate, whether directly or indirectly, to the issues in the case. Pass those documents to your solicitor who will then be able to make a decision as to whether all or any of those documents should be disclosed and, if not, the basis for withholding them.

An Ongoing Obligation

Finally, it should be remembered that disclosure is an ongoing obligation. It is often the case that documents which could not be located when first searched for are found after the initial List of Documents was served, as the case proceeds towards trial. These documents should be produced to your solicitor as soon as possible after discovery, and a decision can then be made whether they must be disclosed.

This note is provided for general information only to the clients of Whitehead Monckton. It should not be relied on for specific advice in specific cases. In all circumstances advice on the subject should be sought from your solicitor.

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