

Disclosure

Disclosure is the name given to the stage of litigation where the parties set out (usually in the form of a list) details of the documents that are relevant to the dispute, and upon which they wish to rely during the course of the proceedings.

SUMMARY

Parties are obliged to disclose documents that either help or hinder their own case, or that help or hinder their opponent's case.

The rules relating to disclosure are fairly complex and parties are advised to seek legal advice on this area, as failing to disclose the correct documents can lead to costs consequences against a party.

The rules on disclosure in civil claims are set out in Part 31 of the Civil Procedure Rules. If your case is being heard in the Business and Property Courts, your case will be subject to the Pilot Disclosure Scheme, set out in Practice Direction 57AD.

Depending on which track your claim is allocated to, there are again different rules about what the parties need to disclose and in what format.

The aim of disclosure is to ensure that all relevant documents are before the court at the time of trial, and parties cannot ambush their opponent by suddenly producing a document at trial that their opponent has not had the opportunity to comment on beforehand.

Disclosure is made up of two distinct parts, namely disclosure and inspection.

Disclosure is defined as 'stating that the document exists or has existed', whilst inspection is the actual process of allowing your opponent to view the particular document, or more commonly providing a copy of the document to your opponent. Whilst both parts are often referred to together as 'disclosure', they are two separate parts and there are rules governing both. When a Court orders directions, they will usually include a direction that disclosure is to be made by a certain date, with inspection a week or two later.

Disclosure normally takes place by way of a list of documents, that are then exchanged with your opponent. This sets out documents into three categories:

1. Documents that are within your control and that can be inspected.
2. Documents that used to be, but are no longer within your control and therefore cannot be inspected.
3. Documents that are within your control but that you object to being inspected due to reasons of privilege.

The court has a wide discretion to order directions relating to disclosure. Courts are keen to ensure that parties do not simply list every single document for a particular claim, but wish to limit them to only those documents that are relevant. The Court will usually determine what searches should be undertaken, in what format the documents should be disclosed, and whether lists of documents are required.

Parties are asked to carry out a reasonable search of their records to locate documents, but such a search should only be proportionate to the dispute in question. Further, Courts may ask parties to limit their searches to certain agreed 'keywords' so that the search for electronic documents, such as emails, is made easier, rather than searching through years and years' worth of emails, documents, invoices etc.

Disclosure is an ongoing process. Solicitors are expected to advise their clients in relation to their disclosure obligations at the outset of a claim, and particularly when it appears as if the claim will be litigated. As such, it is essential that the parties do not destroy any relevant documents if it is likely those documents will be part of the disclosure. Solicitors should advise clients in relation to the preservation of documents as soon as they believe the case is likely to be litigated. Solicitors also need to advise their clients in relation to the production of new documents throughout the course of the litigation, as it is likely that such documents will also need to be disclosed (although maybe not available for inspection).

Further, the disclosure process does not end once disclosure lists have been exchanged and inspection taken place. Parties are under a continuing duty of disclosure, so if they become aware of a relevant document after inspection has taken place, they are under a duty to disclose its existence to their opponent, who may be able to request a copy of the same.

All documents need to be disclosed, but not all documents will be available for inspection by a party's opponent. For example, documents that attract legal privilege or have been created in contemplation of the litigation do not need to be provided to your opponent. This is because they will contain sensitive information about a party's case and information that a party would not want their opponent to know. However, these documents are still identified in the disclosure process. Such documents would include correspondence between the client and their legal advisers.

Part 31 of the Civil Procedure Rules also sets out the rules in relation to pre-action disclosure against potential parties to a claim, and disclosure from third parties who are not a party to the proceedings. Whilst disclosure normally takes place once a claim has been issued and after all statements of case have been served, sometimes a party may require a particular document from their opponent in order to properly set out their claim.

For example, if a claim is based on a contract, but the party has lost a copy of the contract, they will need to see the contract in order to properly plead their claim. If the opponent is refusing to provide a copy of the same, then you can make an application for pre-action disclosure, where the court will order that opponent provides the certain document within a certain time. Such an application for pre-action disclosure is only available against a potential party to those proceedings.

Similarly, there may be other documents not within a party's possession that they need to properly plead their claim. If they are aware that a third party has such documents (and is refusing to provide them), applications can be made against the third party for production of those documents. Disclosure against third parties (who are not likely to be a party to the proceedings) can only be ordered once proceedings have been issued.

WHAT IS A 'DOCUMENT'?

The concept of disclosure refers to 'documents'. The definition of a 'document' is:

'Anything in which information of any description is recorded.'

As such, this not only encompasses hard copy documents, but also includes electronic documents, such as emails, text messages, and voicemails, and USB sticks. It also includes backup copies of these documents contained on computer servers or other backup systems, and could include emails or documents that have been deleted. It will also include the information associated with the production of those documents, known as

metadata, such as the details of when a document was created, edited or printed.

WHAT DOCUMENTS NEED TO BE DISCLOSED?

Only documents that are or have been in a party's control need to be disclosed. This includes any documents in actual physical possession, but also documents that a party has a right to obtain or inspect from another party.

If standard disclosure is ordered (which is the most common disclosure order), the parties are obliged to carry out a reasonable search for documents that help or hinder their own case and that help or hinder another party's case. What is 'reasonable' will depend on the nature and complexity of the claim, the likely number of documents, how those documents are stored and how easy it is to retrieve those documents. The costs of retrieval will also be a factor. This also applies to electronic documents, including backup systems and servers.

As such, with electronic documents in particular, it may be more cost effective and reasonable for the parties to agree a number of 'keywords' that can then be searched. This should help narrow the scope of the search and will avoid having to search through years and years' worth of emails and deleted items.

Parties do not have to provide multiple versions of the same document unless they contain any annotations. For example, in a chain of emails, you only need to list each email once, as opposed to listing each email in the chain, whenever a new email is sent.

LIST OF DOCUMENTS

Disclosure normally takes place by the parties exchanging lists of documents. This is usually in the court form N265. As the N265 form itself does not provide much room to list all of the documents, it is often accompanied by a separate schedule that sets out the details of the documents themselves. This schedule should set out each document in sufficient detail so that the document is easily identifiable and distinguishable from other documents on the list. For example, when listing emails, you should consider including the date and time of the email, details of the sender and recipient, and possibly the subject of the email.

If possible, the documents should be listed chronologically and each given a different number, so they can be easily identified by their opponent, who may wish to request inspection of only certain documents on the list.

The list of documents contains a number of different parts that the parties need to complete, and also must contain a disclosure statement, which has to be signed by the party to confirm they have carried out the searches they were required to carry out. The list of documents will also confirm the date range of the documents, where they were stored, what electronic devices have been searched, together with any keyword searches.

Where documents are listed, they are split into three sections:

- Documents that are in a party's control and can be inspected.
- Documents that are in a party's control but the party objects to being inspected.
- Documents that used to be in a party's control and cannot be inspected.

Once lists have been completed, the parties simultaneously exchange the lists.

If a party believes their opponent's list is incomplete and should include other documents that their opponent should have in their possession, they should make a specific request for the same. If the opponent refuses to then provide such a document, a party can make an application for specific disclosure of that document.

INSPECTION OF DOCUMENTS

Once lists have been exchanged, there will then usually be a set time period (as ordered by the court) for each party to review the list and revert back to their opponent with requests for inspection of any of the documents on the list (that their opponent has said are available for inspection). Each party will then have a set timeframe to provide those requested documents to their opponent.

The parties will usually agree as to how those documents are to be provided, whether in hard copy format or electronic versions such as PDF copies, or even by allowing a batch of emails to be uploaded to an opponent's email system so they can review them.

In some instances, a party may wish to inspect an original document (for example, if they wish to assess the validity of an original signature on a document). In these cases, a party will not usually send the original document to their opponent (as there is a risk that the original could get lost or destroyed), but instead the parties will agree a mutually convenient time when their opponent can carry out a physical inspection of that document.

A party is also allowed to inspect any document that is referred to in their opponent's statement of case, such as the Particulars of Claim or Defence. Such documents are usually attached to the statement of case, but if they are not, then there is an automatic right for a party to be provided with them. Similarly, any documents referred to in witness statements, witness summaries or expert reports (all of which are normally dealt with after disclosure) are available to be inspected by the other party.

GET IN TOUCH



Mark Ovenell

PARTNER

Dispute Resolution

E: mark.ovenell@bindmans.com

T: +44 20 7833 4433



The lawyers have incomparable client service skills. They are very clear and always make sure they understand the picture, even if it is a complicated one.

CHAMBERS AND PARTNERS 2022

BINDMANS LLP

236 Gray's Inn Road | London | WC1X 8HB

T: +44 20 7833 4433 | E: info@bindmans.com | W: bindmans.com