A GUIDE TO LITIGATION IN ENGLAND & WALES

CLIENT INFORMATION REGARDING DISCLOSURE OBLIGATIONS

Under the English Civil Procedure Rules (CPR), the parties to a legal dispute in England & Wales must adhere to strict Disclosure Obligations. Please read these important instructions on how to deal with your documents and how to comply with the disclosure obligations.

Duty of disclosure

1. 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.
2. The **duty of disclosure is strict**, and the courts take it very seriously. Your lawyers are under a duty to inform you of these obligations, and ensure that you understand them.
3. Your lawyers will need to carefully consider what might be the most appropriate approach to disclosure in each individual case, to ensure that what is proposed is proportionate.

Duty to disclose documents, including electronic data

4. Your / your company's duty is to disclose documents. "**Document**" has a very wide meaning under the court rules. It includes not just paper documents, but all media in which information of any description is recorded: for example, tapes, computer records and emails.
5. 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

6. You / your company is obliged to disclose helpful or damaging documents that are, or have been, in your/its control. "Control" also has a specific meaning under the court rules. It is not limited to documents that you / your company has (or previously had) in its possession. It also includes documents that you / your company has (or had) the legal right to possess, inspect or copy (for example, documents held by you / your company's third-party professional agents, such as other firms of solicitors, or accountants).

The reasonable search

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

8. 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.

9. When considering the ease and expense of retrieval of electronic documents, specific points to consider include:

    - accessibility of electronic documents (including email communications) on computer systems, servers, back-up systems and other electronic devices or media.
    - location of relevant documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.
    - likelihood of locating relevant data.
    - cost of recovering, disclosing and providing inspection of any relevant electronic documents.
    - likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.

10. Another factor to consider in the context of electronic documents is the availability of documents, or contents of documents, from other sources.

11. Depending on the circumstances, it may be reasonable to search for electronic documents by means of agreed keyword searches.

12. When determining the extent of the search for documents that is required in each case, the underlying principle is proportionality. **Disclosure can be the most costly aspect of 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.

Dealing with electronic documents

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

14. It is possible that your lawyers will need IT consultants to assist with the search for electronic documents, to ensure that no material is inadvertently destroyed or altered during the search process.

15. Given the technical considerations that apply to electronic documents, it would be helpful if you / your company's IT manager are/is involved in discussing disclosure.

16. Please **advise everyone within your company** with access to any electronic documents (including emails and Word files or documents) that might be connected with this case, not to access, alter or destroy them until your lawyers have had the opportunity to agree how the material should best be preserved for review.

17. The procedural rules expressly require your lawyers to notify you, **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. Please contact me straight away if you have any queries about this, or if there are likely to be practical difficulties in implementing these instructions.

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

18. The first stage is to determine the extent of the search for documents that will be required. If there is a large volume of electronic documents, you lawyers may need to consider whether external IT consultants should be appointed to assist with the e-disclosure process.

19. The next step is to conduct the search. Once the documents have been located, your lawyers will review the materials and decide which documents must be disclosed.

20. If lists are to be exchanged, your lawyers will then draft a list of the documents that are required to be disclosed. The disclosed documents will be described in the list of documents in one of the three sections:

    - relevant documents that you / your company currently has, and which the opponent may (i.e. is entitled to) view or "inspect". These documents will be listed either individually or by category.
    - relevant documents that you / your company currently has, but which the opponent may not inspect: for example, privileged documents (see below). By convention, these documents are described generally rather than being individually listed but recent case law suggests that the nature of the documents should be stated and the factual basis of the grounds giving rise to the claim for privilege should be set out.
    - relevant documents that you / your company 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 you / your company should have but does not have, these will need to be identified specifically.

Documents that the opponent will not be allowed to inspect (although their existence must be disclosed)

21. The main categories of documents that are privileged are:

    - confidential communications passing between a party and its legal advisers, in which the party is seeking or obtaining legal advice. It applies to transactional advice as well as advice regarding contentious matters. These documents are subject to legal advice 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. These documents are subject to litigation privilege.
    - correspondence and other communications generated as part of a genuine attempt to settle an existing dispute. These documents are subject to "without prejudice" privilege.

22. 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 either within or outside you / your company until you have discussed the position further with your lawyers.

Confidential documents

23. Unless you / your company has a right or duty to withhold inspection, it will not be able to prevent the 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.

24. If there are any commercially sensitive relevant documents that you do not want the opponent to see, your lawyers will need to consider whether and, if so, to what extent, your lawyers can ask the court to put in place some specific protective measures. Sometimes, 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

25. The list of documents must contain a disclosure statement that is signed by your / a senior representative of the company. This is usually the person within the company who has co-ordinated or who takes overall responsibility for the search for documents.

26. 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.

27. The person signing the disclosure statement must certify that they understand the duty of disclosure and, to the best of their knowledge, have carried out the duty. They must expressly state that they believe 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**.

Important points to consider now (compliance checklist)

There are a number of important points to bear in mind. Please ensure that, as far as possible, anyone in the company who might be affected by these points is informed of the position as soon as possible. The points are as follows:

Do not destroy documents!

Now that litigation is in progress, please take steps to ensure that you / your company suspends any routine document destruction policies that it has in place.

The list of documents will need to state what has happened to any documents that have been lost or destroyed. A suggestion that potentially important documents may have been lost or destroyed after the proceedings began could be very damaging to you / your company's case. The court rules expressly require your lawyers to notify you, 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. Failure to comply with this could lead to the court drawing adverse inferences.

Do not create documents (or annotate or amend existing documents)!

It is very important that the company does not create any new documents that it might have to disclose to the opponent that could damage your / your company's case.

Some documents that are created may be protected by litigation privilege. However, you will need to monitor carefully any communications about the dispute by personnel within the company, whether internal or external. This includes communications between, or involving, those who are not witnesses or potential witnesses, or who are not involved in making decisions about the way in which the litigation should be

conducted. It may be appropriate to inform your personnel not to communicate about the dispute at all, unless they are instructed to do so. In any event, you should inform your personnel to take particular care when using email.

You should also inform your personnel not to amend, or in any way annotate, existing documents. Documents containing any relevant annotations will be treated as separate documents and may need to be disclosed even if the original document was not disclosable. Informal annotations, in particular, can be prejudicial to the case of the party that is obliged to disclose them.

Do not ask any third party to send you documents.

There are certain documents that you / your company may not have in your / its possession, and may not have the legal right to possess, inspect or copy (for example, the working papers of your / your company's third-party professional agents, such as other firms of solicitors, or accountants). Those third-party documents will not be disclosable, unless they come into your / your company's possession.

It is therefore extremely important that neither you nor any of the company's other personnel ask any third parties to send you (or your lawyers) documents that may relate to the dispute, until your lawyers have had the opportunity to assess the documents they propose to send.

It is likely, however, that most documents held by professional third parties on the company's behalf are, on a proper analysis, within its control. If so, those documents will be disclosable if they assist or damage any party's case.

Ensure that you comply with relevant data protection legislation.

It will be important to ensure that you keep in mind the relevant data protection requirements, including those that apply under the General Data Protection Regulation ((EU) 2016/679).

THUS: As soon as you think about suing someone in England, or as soon as you learn about the fact that you may get sued in an English court of law, immediately discuss with your lawyers the issue of disclosure, the level of documents that relate to the case and where they are stored.