

OVERVIEW GUIDANCE NOTE

DISCLOSURE IN LITIGATION

This Guidance is not intended to be relied upon as specific legal advice relevant to the circumstances of your particular case. If you require advice on disclosure specific to your instructions or case, please contact the advocate who is dealing with your case.

1. What is Disclosure?

- Disclosure is a compulsory part of civil litigation, requiring parties to list and show documents to each other.
- It's intended to prevent surprise at trial, inform parties of the issues, and facilitate dispute resolution.
- The process involves identifying, listing, and making available documents that are relevant to the issues in the proceedings.

2. What Documents are Disclosable?

- **Standard Disclosure**

Generally, parties must disclose documents they rely on, that adversely affect their own case, or that support or adversely affect another party's case.

- **Documents in Your Control**

This includes documents in your physical possession, or documents you have a right to inspect or copy, even if not in your possession.

- **Relevance**

A document is relevant if it relates to the issues in dispute, even if it only indirectly helps or harms a party's case.

- **Reasonable Search**

Parties must conduct a reasonable search for relevant documents.

The documents liable to disclosure as to their existence include:-

- electronic records, emails, memos, drafts, and any information stored in digital or physical form; and

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- all documents which are or have been in your possession, control, custody or power, including documents which have been destroyed or lost.
- You must not destroy or alter any potentially relevant documents once litigation is contemplated or underway.
- Until the process of disclosure has been completed, it is not possible to decide which documents may be relevant and indeed the parties may disagree as to what they consider relevant. Therefore it is very important that no document should be destroyed which could conceivably be relevant to the action.
- Failure to comply with disclosure obligations may lead to sanctions and damage your case. It is important to ensure that everyone within a company or other organisation is aware of this obligation to make disclosure of relevant documents.

3. What is the Client's Role?

- **Understand the Duty**

Clients need to understand their disclosure obligations and cooperate with their advocate.

- **Provide Information**

Clients should provide their advocate with all relevant documents, or facilitate access to them.

- **Seek Guidance**

If unsure about the relevance of a document, the client should disclose it to their advocate for advice.

- **Preserve Documents:**

Avoid creating, deleting, or destroying documents related to the dispute, and implement document preservation processes.

- **Governance and lines of reporting**

Nominate a person of sufficient seniority who has responsibility for gathering documents, recording searches undertaken and is aware of the location of servers, archives etc.

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- **Document the searches undertaken as they occur**

Record, physical and e-searches undertaken, key words applied, email accounts accessed, email accounts known to be deleted, data retention and archiving policies. Your advocate will work with you – and the other side – to make the search proportionate and effective so as to discharge the disclosure obligations.

4. What is the Advocate's Role?

- **Explain the Duty:**

Advocates must explain the duty of disclosure to their clients.

Note: This is only a general guide and not intended to be specific legal advice

- **Supervise the Process:**

Advocates must supervise the disclosure process and ensure their client makes a full and proper disclosure. They will need to understand your business architecture, data management and archiving and storage arrangements.

- **Advise on Relevance:**

Advocates will advise on whether documents are disclosable.

- **Maintain Confidentiality:**

Advocates must maintain the confidentiality of client information, including documents disclosed.

5. Consequences of Failure to Disclose:

- **Court Sanctions:**

Failure to disclose can lead to court sanctions, including fines or adverse inferences against the non-disclosing party.

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- **Case Weakening:**

Non-disclosure can weaken a party's case and potentially lead to a loss. Inferences may be drawn or the credibility of oral evidence may be undermined.

6. Key Considerations:

- **Early Preparation:**

Begin preparing for disclosure as soon as a claim arises.

- **Cooperation:**

Be prepared to co-operate with the other party to streamline the disclosure process and try and minimise disputes. Disclosure is one of the more .

- **Formal Documentation:**

Document your processes for document preservation and deletion.

7. Other

Once legal proceedings are contemplated or begin, care should be taken not to bring into existence any documents which are not legally privileged from production and which reflect adversely on the party's own case, e.g. internal memoranda or board minutes outlining weaknesses.

Such documents may be liable to be disclosed under a Subject Access Request or risk being inadvertently disclosed as part of litigation disclosure. As with the disclosure obligation, relevant people should be made aware of the need **not** to create documents which may have to be disclosed.