

THE BASICS: WHAT DOCUMENTS MUST BE DISCLOSED TO AN OPPONENT IN A DISPUTE?

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One of the distinguishing features of litigation in England and Wales is the process of disclosure, whereby the parties to a claim must identify and make available to each other documents that help their own case, and on which they intend to rely, that help the other party to understand the claim or defence they have to meet and, crucially, that are adverse to their own claim. This unique 'cards on the table' approach forces parties to be realistic about their chances of success in the litigation and, for that reason, many disputes settle shortly before, or after, disclosure has taken place.

Here, we provide an overview of the disclosure obligations in multi-track claims (generally those over £100,000) proceeding in the County Court and Queen's Bench Division of the High Court pursuant to Civil Procedure Rule 31 (CPR 31) and in the Business and Property Courts pursuant to the Disclosure Pilot introduced by Civil Procedure Rule Practice Direction PD51U (PD51U). Although the Disclosure Pilot is running for two years from 1 January 2019, it is anticipated that it will ultimately form the basis of disclosure in all multi-track cases wherever they are heard.

What is meant by 'documents'?

'Document', in this context, has a wide meaning covering anything in which information is contained. It may take any form including, but not limited to, paper or electronic; it may be held on a computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings.

It extends to information that is stored on servers and back-up systems and electronic

information that has been 'deleted'. It also extends to metadata, and other embedded data, which is not typically visible on screen or on a print out.

Disclosure obligations

Any party involved, or potentially involved, in the litigation process has disclosure obligations. It is important to be aware of, and understand, these obligations.

One of those obligations is in relation to preserving documents. Once a person/company knows that it is or may become a party to proceedings that have or may be commenced, steps must be taken to preserve documents in its control that may be relevant to any issues in the proceedings.

Documents are in a party's 'control' if:

- they are or were in a party's physical possession;
- a party has or has had a right to possession; or
- a party has or has had a right to inspect or take copies.

Under CPR 31, the obligation to preserve documents is not as explicit as under PD51U. Practice Direction 31B provides "as soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents", including documents "which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business".

PD51U, however, sets out a number of express obligations on parties to litigation including an express '**duty to preserve documents**' which requires all parties to:

- take reasonable steps to preserve documents in its control that may be relevant to any issue in the proceedings;
- ensure the immediate suspension of any routine procedure for deleting or destroying documents, and to ensure the suspension remains in place for the duration of the proceedings;
- notify all staff / former staff (where appropriate) of the ongoing duty to preserve documents; and
- take reasonable steps to ensure that any agents or third parties do not delete or destroy potentially relevant documents.

Scope of disclosure

Before a claim is commenced, all parties are required to give disclosure as required by any specific pre-action protocol or in accordance with the Practice Direction on Pre-Action Conduct. For more on the steps to be taken before proceedings are commenced see our earlier insight, ['The Basics - Are there any steps I need to take before issuing a claim?'](#).

Multi-track claims in the County Court or the Queen's Bench division

The parties should try to agree which disclosure option set out in CPR 31.5(7) will apply, failing which the court will order, at the first case management conference (CMC), which disclosure procedure is to be adopted. In all cases the court will make, or approve, an order having in mind the overriding objective and the need to limit disclosure to what is needed to dispose of the case justly.

The options for the parties and the court include an order:

- dispensing with disclosure - ordering that no disclosure is required;
- that a party disclose the documents on which it relies and, at the same time, request any specific disclosure it requires from any other party;
- that the parties give disclosure on an issue by issue basis;
- that each party discloses documents which, it is reasonable to suppose, may contain information that will enable that party to advance its own case or damage the case of any other party, or leads to an enquiry that has either of those consequences;
- for "standard disclosure"; i.e. disclosure of documents on which it relies, that adversely affect its or another party's case, or support another party's case; or that it is required to disclose by a relevant practice direction. A party must undertake a reasonable search for such documents; or
- any other order that the court considers appropriate.

Despite CPR 31.5(7) providing a menu of different disclosure options, an order for standard disclosure is typically the order that is made.

Multi-track claims in the Business & Property Courts

Since 1 January 2019, in cases to which PD51U applies, in the first instance, subject to some stated exceptions, parties are required to provide Initial Disclosure. Each party, when serving its first Statement of Case (e.g. particulars of claim or defence) must

provide to all other parties, an Initial Disclosure List of Documents which lists and is accompanied by copies (usually in electronic form) of the following:

- the key documents on which it relies in support of its claims or defences (including documents referred to in that statement of case); and
- the key documents that are necessary to enable the other parties to understand the claim or the defence they have to meet.

This is not meant to be an onerous exercise and there is no requirement to undertake any search beyond any search already undertaken for the purpose of the proceedings.

The parties are then required to confirm whether they will seek disclosure of documents in addition to Initial Disclosure, known as Extended Disclosure. Extended Disclosure comprises 5 different Disclosure Models - Models A to E, as set out in PD51U - which in summary range from no further disclosure beyond Initial Disclosure and any adverse documents (Model A), to a very wide ranging order requiring disclosure of information that may be relevant or may lead to a train of inquiry that could be relevant (Model E). Save for Model A, disclosure is given in relation to Issues for Disclosure, which the parties identify and attempt to agree.

There is no presumption that a party is entitled to Extended Disclosure, and no Model will apply without the approval of the court.

The court can order Extended Disclosure using different Disclosure Models for different Issues for Disclosure, for Extended Disclosure to be given by only one party, or for different models to apply to each party's disclosure on a particular issue, and for Extended Disclosure to be completed in stages. In all cases an order for Extended Disclosure must be "reasonable and proportionate having regard to the overriding objective".

Regardless of the Disclosure Model ordered, known adverse documents must always be disclosed.

Right to withhold privileged documents

Documents (or parts or classes of documents) which are privileged, can be withheld from disclosure. The party seeking to claim privilege is required to describe those documents (or parts or class of document) and explain the grounds on which they are being withheld.

The main categories of documents where privilege may be claimed are:

- legal advice privilege which covers 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;
- litigation privilege which covers certain confidential communications made when litigation is anticipated or has begun, passing between a party and its legal advisers, a party and third parties (for example, potential witnesses) and the legal advisers and third parties, where the dominant purpose of the communication is to seek or obtain evidence for use in the litigation, or to seek or provide advice on the litigation; and
- "without prejudice" privilege which covers correspondence and other communications generated as part of a genuine attempt to settle an existing dispute.

Other types of disclosure order

There are other types of disclosure that may be required throughout the lifespan of any claim. Some of the key types are detailed below.

Pre-action disclosure

The court has the power to order pre-action disclosure if the criteria set out in CPR 31.16 are satisfied being:

- the applicant and the respondent are likely to be parties to subsequent proceedings;
- if proceedings had started, the respondent's duty by way of standard disclosure (under CPR 31.6) would extend to the documents, or classes of documents being sought;
- pre-action disclosure is desirable in order to:
 - a. dispose fairly of the anticipated proceedings;
 - b. assist the dispute to be resolved without proceedings; or
 - c. save costs.

Non-party disclosure

If a non-party to the proceedings is likely to hold documents that may either help the applicant's case or adversely affect another party's case, application can be made to the court for an order for disclosure against that party under CPR 31.17. The court will only order disclosure against a non-party after proceedings have been commenced, not before, and only if disclosure is necessary in order to dispose fairly of the claim or to save

costs.

Even if the criteria are satisfied, the court will still have discretion whether or not to grant the order.

The court can also order pre-action disclosure and non-party disclosure under the Disclosure Pilot. Although CPR31 does not apply to proceedings falling under the pilot, the provisions on pre-action and non-party disclosure in CPR 31.16 and CPR 31.17 have been expressly incorporated.

Specific disclosure

A party may make an application for an order for specific disclosure if it believes that the disclosure of documents given by a disclosing party is inadequate (CPR 31, Practice Direction 31A, section 5). In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective of the CPR (to deal with cases justly and at proportionate cost).

If the court concludes that the party from whom specific disclosure is sought has failed to comply with an earlier order for disclosure the court will usually make an order for specific disclosure to ensure that those obligations are properly complied with.

PD51U does not have an obvious provision that provides for the equivalent of a specific disclosure application. The court can however make such an 'equivalent' order by using its general case management powers.

Things to remember

- As soon as a party is aware that litigation might be possible, it has an immediate duty to preserve all documents that may be relevant to the claim (or any defence to that claim).
- The duty to preserve relevant documents is ongoing and lasts until the claim is concluded.
- Documents are not just those in paper format, a 'document' will include all electronic communications including email, text messages, voicemail and audio or video recordings.
- All parties to a claim are required to disclose adverse documents; documents that may damage their own claim and those that may assist any other party and this is

regardless of whatever other disclosure order might be made.

Disclosure exercises can be costly and onerous. The general direction of travel (as evidenced by the Pilot) is to require the parties to think carefully about the disclosure that is actually required to dispose of the case fairly and proportionately. Parties must, therefore, give thought to the evidence within their control at a very early stage and address their minds to disclosure issues at the outset of any dispute.

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