Discovery of documents in litigation proceedings

Client Guide

CLIENT GUIDE

DISCOVERY OF DOCUMENTS IN LITIGATION PROCEEDINGS

The purpose of this guide is to provide general information on the kind of documentation you will be required to disclose to your opponent during the course of litigation. It is not meant to be definitive advice on this subject and the client is recommended to take legal advice before attempting to comply with his discovery obligations.

We recommend that you read this guide in conjunction with our guide on privilege.

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Introduction

If you are involved in litigation before the Royal Court you will invariably be compelled to follow the 'discovery process'.

Broadly speaking the discovery process is where the parties to the litigation have to disclose and exchange all the documentation relevant to the litigation (even if that documentation undermines or harms their own case), to each other at a specified time. Whilst there are some exceptions to this rule, the overriding principle of the discovery process is to allow the court to do justice to the parties, by allowing each party to the litigation an equal opportunity to put their case fairly.

Another purpose of discovery is to ensure that each party is in a position to evaluate the strengths and weaknesses of its case in advance of trial. The court acknowledges that information revealed by the discovery process may lead to a party re-evaluating their claim/defence which allows for an early settlement of the case, which in turn avoids the costs, stress and disruption of a contested trial.

Discovery should therefore be viewed as a positive stage, which may facilitate an early resolution of the dispute; and with it, both time and cost savings.

Clients should be aware that deliberately destroying or concealing relevant documents is likely to be a contempt of court and may constitute the offence of attempting to pervert the course of justice. Both of these are criminal offences that carry a risk of imprisonment. Even an innocent failure to disclose documentation you should disclose may have adverse consequences in costs, time and delay. The court may also find you to be less honest than the other side, which could undermine your case at any contested trial. If documents which you wish to rely upon are disclosed late, the court may exclude them if they determine it is too prejudicial to the other side.

As a general rule, documents and information obtained from disclosure must only be used for the purpose of the litigation in which they were disclosed. They cannot be used or disseminated for any collateral or ulterior purpose without specific leave of the court. Where copy documents are circulated internally (to communicate with others involved in the proceedings) the recipients must be informed of the restrictions on the use of the documents. A breach of these obligations may amount to a contempt of court.

It is important to note that the discovery obligation is a continuing one. Relevant documents must be disclosed whenever they come into the party's possession, custody or power. This includes up to, and even during, the trial. Therefore, great care must be taken when creating new documents once proceedings are contemplated. Should further documents be created or found following the exchange of lists (see below), a supplementary list and supporting affidavit must be produced.

When does discovery take place?

The discovery process is usually started once the parties have filed a summary of their case with the court. The documents setting out each parties' case are collectively referred to as 'pleadings'.

Disclosure of the existence of relevant documents is given by way of a list (the 'exchange of lists') which identifies the documents which will be made available to the other party/ies for inspection and copying. Each party to the litigation is required to swear an affidavit verifying the accuracy of the list of documents. In the case of a company, the affidavit will usually be sworn by either the company secretary, or by a director, with knowledge of the litigation.

After the exchange of these affidavits, parties may inspect the original documents referred to in the other party's discovery list and take any photocopies they require. In appropriate cases, the court may place restrictions on who can inspect the documents; for example, lawyers and independent experts only.

What documents need to be disclosed?

All parties to the litigation must give discovery of the documents which are, or have been, in their "possession, custody, or power", relating to the matters in issue in the proceedings. It does not matter how the documents came into the relevant party's possession, they are nevertheless disclosable.

The meaning of "documents" in the context of discovery is broadly construed, and includes (but is not limited to) correspondence; formal documents; e-mails; handwritten notes; telephone notes; diaries; meeting notes; plans; drawings; and any other form of record.

A party's obligations to disclose documentation extends beyond physical paperwork and emails. The disclosure duty includes anything on which information is recorded, whether in a tangible or intelligible form, which may be made tangible or intelligible. This broad scope therefore encompasses photographs; microfilms; films; videos; and computer databases containing information which can be retrieved in legible format, tape recordings and their transcripts.

Information and documents which are stored electronically on computers or other back-up storage media, such as disks or tapes, may be discoverable in proceedings. For example, e-mail messages sent internally between members of staff, which may contain ill-considered comments may be discoverable. Creating, storing and destroying electronic data needs to be done with caution. For instance, data deleted before litigation proceedings are contemplated, that can be retrieved from back-up tapes, is discoverable.

When is a document in my "possession, custody or power"?

The parties to litigation must disclose all relevant documents which are, or have been, in their possession, custody or power.

Documents that are in a party's power include those which are not in the actual physical possession of a party, but are in the hands of an agent, e.g. a party's professional adviser. If the party has the power to obtain a document from another person by reason of a contractual right, for example, he will also need to disclose that document.

There is one important exception to this. A document which was previously, but is no longer, in your possession, custody or power still has to be listed in the affidavit, but there is no requirement to produce a document you cannot produce. The standard affidavit includes a section for this purpose.

The routine destruction of documents must therefore cease as soon as litigation becomes a reasonable possibility. Where documents have been lost or destroyed after litigation was contemplated, the party will be obliged to state in his affidavit when they were last in his possession, custody or power and what has become of them. It is therefore essential that all relevant personnel within the organisation are systematically notified of the obligation to preserve documents once litigation is reasonably in prospect.

How do I know whether a document is relevant to the case?

The test of a document's relevance is whether or not it relates to matters in dispute in the action. In practice, the issue of 'relevance' is determined by whether the document in question is relevant to the content of parties' respective pleadings.

If it is reasonable to believe that a document contains information that may enable either party to advance its own case or to damage the case of an opponent, it is relevant.

If the document in question could reasonably be expected to lead to a line of enquiry, which would be of assistance to a party, in relation to the matters in dispute, it is relevant.

Exceptions to the general rule to disclose all relevant documents

There are exceptions to the requirement to disclose all relevant documents. These include:

1. Privilege

One of the exceptions to the obligation to disclose all relevant documents is if a document is "privileged". Whilst these privileged documents do not need to be physically disclosed, their existence must be referred to in the list of discovery documents. An example of privileged documents are the communications you have with your lawyer in contemplation of litigation. It is important that clients are very clear on whether a document is privileged or not. If you are in any doubt you should always ask your lawyer for advice.

For more information on privilege and the kind of documents which can fall within this exception, please read our client guide which can be found at [insert link].

2. Confidentiality

As a general rule, the fact that a document is regarded as confidential is not usually a good enough reason in itself for the party not to fulfil his duty to disclose a document that is relevant to the issues in dispute.

Having said that, the court has a general discretion to allow a confidential document to be withheld. In making this decision the court will conduct a balancing exercise; weighing up the interests of the party seeking disclosure to assist his case against the competing interest of the innocent third party's right to confidentiality. A common example of such competing interests are banking records referring to other customers of the bank. As a general rule, the court in conducting this balancing exercise often give greater weight to preserving the confidentiality of innocent third parties than to the competing interest of the party seeking disclosure to assist his case. This can make an application for disclosure of an innocent third party's confidential information a difficult argument to win.

However, often the parties and the court adopt a more pragmatic approach, in finding the correct balance between the two competing interests of the party seeking disclosure to assist his case; as against an innocent third party's right to keep his private information confidential. Whereby the parties to the litigation and the courts agree not to disclose any confidential material that is irrelevant to the issues in dispute by redacting (concealing parts of a document) that information before the document is disclosed. For example, a company report may be relevant in part (and those parts must be disclosed), but…

If the other party to the litigation refuses to such redaction, it presents a risk that the court may order its disclosure in full, with the consequent risk that an innocent third party's confidence is breached. To avoid this dilemma, an entity should take proactive steps such as ensuring that when a document is created, it only deals with one subject. That is particularly so in the case of attendance notes and internal memoranda, which often prove to be important documents in litigation.

In certain circumstances confidential documents may be covered by legal professional privilege or, in exceptional circumstances, public interest immunity. However, a party's confidentiality alone will not result in a document being regarded as privileged.

It is important that careful consideration is given to each and every document to ascertain whether or not you are obliged to disclose it. Disclosure of a document which you were not obliged to disclose could irreparably damage your case.

Establishing procedures and avoiding the pitfalls

1. General procedures

Many difficulties arise through failure to consider discovery implications before producing, copying or obtaining documents, or before scribbling potentially damaging comments on non-privileged letters or memoranda. The key to avoiding these traps is to have procedures in place to ensure that all relevant employees are at all times aware of the dangers, and in particular, as soon as there is a reasonable prospect of litigation.

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Subject to certain statutory restrictions, a company is generally entitled to destroy documents if the documents in question are not relevant to contemplated litigation. It will, generally speaking, make good commercial sense for a company to implement a document retention/destruction policy. On the one hand, to have access to relevant information and comply with regulatory requirements and on the other, to avoid building up an unmanageable quantity of paper.

2. Where there is potential for litigation

It is important to retain all potentially relevant documentation. Documents reduced to microfilm will only be 'secondary' evidence and therefore considered less reliable than the original 'primary' evidence on which it is based.

Having a company policy which prohibits the destruction of any documentation within a certain period is prudent, but may not be sufficient. All staff need to be made aware of the wide definition of "documents" and stored documentation should be readily available for identification and retrieval.

3. Once litigation is reasonably in prospect

The rule is that any documents which might be required in court should not be altered or destroyed. As soon as litigation is considered, the routine destruction of potentially relevant documents should stop, and all staff and persons who may have relevant documents should be notified of the need to collect and preserve them. Relevant staff and persons will include:

- Anyone involved in the matter subject to litigation, at any location or branch from which the company operates;
- Anyone who may have kept their own file relating to the matters in issue (relevant to the litigation);
- Anyone who received copies of documentation or memoranda relating to the matter subject to litigation, such as the company secretary or legal adviser; and
- Anyone who attended any meetings and who may have made their own notes or kept diary entries, relating to matters in issue.

Staff should be advised that the creation of new documents and internal notes relating to the litigation dispute should be kept to a minimum. Internal notes made by members of staff commenting on a litigation dispute, or unwary correspondence with third parties, may be damaging and not privileged. In creating or commenting on documents, staff should ask themselves whether they would be happy for the company's opponent in litigation to see the document or comment. There is a possibility that privilege may be protected by directing such documents through their independent lawyers.

Relevant documents must not be tampered with in any way and the copying and distribution of such documents should be restricted. In particular, it is important to stress that original files should not be rearranged or edited.

The original condition of a file may be as relevant as its contents. Once notified of threatened litigation, it is useful to issue a written request to staff for the retrieval of all relevant documentation. Firstly, not only just to ensure that they give proper consideration to whether they may have, or have had, relevant documents in their possession, but secondly, to seek to demonstrate at an early opportunity they are approaching disclosure in the correct manner.

Whenever possible it is advisable to record separate topics independently. A document which contains any information which is relevant to a dispute but also contains other irrelevant or confidential information, may be disclosable in full. Broadly speaking, if a document deals with two or more separate topics, not all of which are relevant to the litigation in question, the whole document must be clearly disclosed unless it can be regarded as, in effect, two separate documents. Whilst parts which are confidential and irrelevant may, by order after argument before the courts, or by agreement between the parties be redacted, the process of segregating the relevant parts from the irrelevant can be fraught with difficulty.

Additional difficulties arise where a document records both privileged and non-privileged information. Whilst privileged parts may be edited, this practice must be brought to the attention of the other party, so that it has the opportunity of challenging the decision.

One such difficulty is that it might be argued that the disclosed parts were actually privileged, leading to the waiver of privilege in the remainder of the document. The solution to this conundrum is to create individual documents wherever possible, so these difficult arguments may be avoided.

Summary

Much of the pain of disclosure can be avoided if an entity implements good practice as detailed above, before any litigation is contemplated. Such as having good document management and procedural systems, which can recall easily, all relevant documents; ensuring that documents are created for a single purpose; that unnecessary disparaging comments are not made in documents; and where possible, correspondence dealing with contentious issues should be addressed to an independent lawyer, so that they are priviliged. As prevention is always better than cure.

Please note: the law on this area is subject to evolution, so whilst every effort has been made to make this guide up to date at the time of writing, the law may have subsequently changed. Please therefore seek further advice before making any decision regarding this subject matter.

Contact us

If you would like more informtion on discovery of documents in litigation proceedings, please contact our team at Viberts who will be happy to help.

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