



THE ESCALATE GUIDE TO:

# Duty of standard disclosure



When the parties involved in court proceedings begin to disclose relevant documents, the claimant and defendant must each sign a 'disclosure statement'. By signing the document, each party confirms that their duty to disclose under the Civil Procedure Rules has been understood and that, to the best of their knowledge, this duty has been undertaken.

A list of those documents which are to be disclosed will be attached to the disclosure statement, and the party will have to certify that this is a complete list of all documents that have been in the party's control and that it is obliged to disclose.

## What does standard disclosure require you to disclose?

You must disclose any of the following which are now or have previously been in your control:

- The documents upon which you intend to rely;
- The documents that adversely affect your own case or that of any third party's case or that support another party's case;
- Any document that we may inform you should be disclosed under a relevant practice direction.

## How extensively must you search?

You are required to make a 'reasonable search'. The facts relevant in deciding reasonableness will include the number of documents involved; the nature and complexity of the proceedings; the ease and expense of retrieval; and the significance of any document likely to be located. This list is not intended to be exhaustive but it outlines the usual factors of relevance.

You should seek our specific advice if you are unsure about the reasonableness of your search.

You must tell us if you do not search for a category or class of document on the grounds that it would be unreasonable to do so. This is because the disclosure statement must be amended to explain your reasons and identify the class or category of document.

## What materials should be disclosed?

Disclosure is only concerned with documents - but a 'document' is anything in which information of any description is recorded, or onto which information recorded in a document has been copied, including 'electronic documents'.

The court has clarified that an electronic document includes all documents created by or stored on a computer - including:

- Off-site computers, including laptops, employees' personal computers, personal digital assistants and hand held devices;
- All databases, servers, archive facilities and back-ups;
- All programmes including Excel, Powerpoint etc (or the equivalent), web facing applications and mail files.

It is sensible to ensure that all information you have stored on your computer system is easily accessible from the perspective of a reasonable search, and that you have an adequate document retention system. This means that you should, as a general rule, identify how documents are created and stored within your business and how easy it would be to retrieve such documents should the need arise.

We would recommend that you stop any automatic deletions of electronic documents such as emails at the point when litigation is being considered or proceedings have been served upon you.

Note that a copy of a document must be disclosed separately to the original if it contains any modifications or marks (e.g. handwritten notes or other comments) upon which you intend to rely or which adversely affects your case or supports the opponents case.

## What about privileged documents?

You may wish to claim that a document should be withheld from inspection by the court or other party because it is privileged. If so, you must still disclose the existence of that document but explain why you claim privilege in the relevant section of the List.

Privileged documents fall into three categories only:

- Documents that are self-incriminating in respect of some criminal offence;
- Legal professional privilege - usually documents passing between a solicitor and their clients, or a solicitor and third parties where the dominant purpose of the document is to use it to obtain legal advice or to help in the conduct of litigation that was at the time reasonably contemplated;
- Without prejudice communications made with the intention of seeking a settlement of litigation. The privilege applies even if the words 'without prejudice' are not used, provided the purpose was to seek a settlement. Equally, use of such words will not attract privilege if the document does not relate to settlement negotiations.

## Who should sign the disclosure statement?

The signatory must have an understanding of the duty to search as explained above and also knowledge of the documents and issues in the case. In complex cases, the person signing may be required to be present at a Case Management Conference or any other hearing where the issue of disclosure arises.

This note is intended to give general advice to assist you in discharging your duty of disclosure. However, if you are in doubt as to whether or not a document should be disclosed you should pass it to us so that we can advise you on the issue. This is why we will often ask you to simply provide us with copies of your entire files so that we can then review them.



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