



THE ESCALATE GUIDE TO: E-disclosure and the revised Civil Procedure Rules



Electronic communications have transformed the way that business is done. They sometimes create a challenge for anyone involved in a dispute which goes to litigation, if only because of the considerable growth in e-mail usage and the fact that electronic documents are rarely lost forever.

In litigation, disclosure is one of the stages when documents are considered

in detail. Even before e-mail and the growth of electronic documents, disclosure was one of the most expensive and time-consuming phases of litigation. Now, the Civil Procedure Rules (CPR) have been revised to take account of the difficulties created by electronic documents. This new approach in itself poses questions for litigators and their clients alike.

What are the challenges?

The pool of documents readily (or potentially) available for litigators to review and then exchange with opponents is now significantly larger than it was even five years ago.

The huge growth in electronic communications (fuelled in part by the ease of copying many recipients into an e-mail and then 'replying to all'), the seemingly indestructible nature of electronic communication (whereby, for example, deleted e-mails can invariably be restored from a computer hard drive, back-up or intermediate service provider), and the increasing range of retained ephemeral data (such as instant messaging messages and even calls on platforms like Teams and Zoom) has forced the legal profession to reconsider its approach to disclosure.

Since judges decide most cases on the basis of oral factual evidence, expert evidence, or documents, litigators have traditionally wanted to read every document that their client considers relevant.

Not only is this process part of seeking to obtain the best result for the client - looking for 'smoking guns' and identifying strengths and weaknesses in the case - it is also a part of a litigant's obligation to disclose documents (those to be relied on and those that will help or hinder any party) to be listed and exchanged.

How are the issues being managed?

The original CPR, introduced in 1999, made no specific reference to electronic documents and also gave parties the ability to limit where they search for documents – typically by date (setting a backstop), physical location, and only searching for certain categories of documents.

However, these restrictions do not sit well with electronic documents, which can be searched

for with varying degrees of ease and which may be found in a variety of different locations. As a result, the rules setting out the way in which parties must disclose how they searched for electronic documents have been changed:

An enhanced disclosure statement

The 'disclosure statement' has been enhanced to show just how far it is possible to search for electronic documents.

The disclosure statement for electronic documents now states:

I carried out a search for electronic documents contained on or created by the following. [list what was searched and extent of search] I did not search for the following [list what was not searched].

1. documents created before [date]
2. documents contained on or created by the claimants/defendant's:
 - PCs
 - portable data storage media
 - databases
 - servers
 - back-up tapes
 - off-site storage
 - mobile phones
 - laptops
 - notebooks
 - handheld devices
 - PDA devices (delete as appropriate);
3. documents contained on or created by the claimant's/defendant's mail files/document files/calendar files/spreadsheet files/graphic and presentation files/web-based applications [delete as appropriate]; documents other than by reference to the following keyword(s)/concepts [delete if your search was not confined to specific keywords or concepts].

Clarifying the definition of a 'document'

The new rules confirm that a 'document' includes e-mails and databases. It also clarifies that it is not limited to readily accessible documents, but also those stored on servers and back-up systems as well as 'deleted' documents. Usefully, it states that the meaning of 'document' includes metadata

- information about the document stored in electronic format, such as the last saved date, which is not available on the hard copy.

The revised CPR requires the parties to discuss issues that may arise concerning searches for, and preservation of, electronic documents, and suggest that in case of difficulty or disagreement the matter should be referred to a judge for directions at the earliest practical date. The rules also provide that the parties should co-operate as to the format in which electronic documents are going to be exchanged.

The updated rules then go on to set out the factors that a party may rely on in deciding how far to search for electronic documents. These factors include accessibility, location, likelihood of success in the search, cost and significance.

The importance of keywords

There is confirmation that, in some cases, it may be reasonable to search using keywords. This is important, as it is one of the ways in which the review of documents can be sped up, and costs saved. With large electronic disclosure exercises, searching using keywords is an obvious route to limiting the scale of the physical search for relevant documents, and avoiding reading every one. It is important to keep a record of what keyword searches were done.

New technology allows far more than simply searching for exact matches with words or phrases. 'Conceptual searching' for matching linguistic patterns may mean that search results can be grouped into categories of documents which are concerned with the same subject matter even if the same words are not used in them.

What does this mean for you?

Even a cursory glance over the new disclosure statement shows that it is not a document that can be signed without some considerable thought. Since the individual responsible for signing it is unlikely to be the person who has searched for the electronic documents personally, there clearly needs to be careful co-operation and clear auditable lines of reporting within organisations.

In addition, issues arise from the bigger picture of how businesses deal with electronic documents in the long-term. As the new CPR makes clear, even deleted documents are documents for the purposes of disclosure.

While the law does not set any specific obligation to retain documents for use in potential future civil litigation, companies are required to preserve them for at least six years by the Taxes Management Act 1970.

What can I do?

Introduce (or update) a document retention policy for electronic documents

An up-to-date document retention policy not only helps with documentation in the event of a dispute; it can have many commercial benefits such as freeing up electronic storage space and improving IT performance. Clearly, this policy should not be put in place with the aim of limiting the amount of properly disclosable material to the court, in the event that a dispute arises at a later date.

Ensure your back-ups are easily accessible

The mechanism for performing back-ups can make a significant difference to how easy it is to find data at a later date. Find out if your back-up is done in a way that means it takes significant time and effort to identify documents. Discovering any such shortcomings when under pressure once a dispute is in full flow will not be helpful.

Keep all relevant documents once a dispute arises

Once a dispute does arise, the ordinary mechanical performance of a document retention policy should be re-examined to ensure that documents that would be destroyed in the ordinary course by reason of their age, but which are relevant, are not lost.

Keep an audit of how electronic documents are searched for and a record of keyword searches

This is now a requirement of the disclosure statement, so you can save yourself time and hassle later on by recording properly the searches that you undertake.

Stay up-to-date with changes to your organisation's use of electronic methods of document creation, communication and storage

Make sure that you understand how your business' use of electronic documents is evolving – particularly in light of the widespread adoption of new communication channels such as Teams, Zoom and Slack. Keep updating your document retention policy in response to these changes.

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