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COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

DISCLOSURE DUTIES IN COURT PROCEEDINGS

After litigants have exchanged their statements of case (i.e. Particulars of Claim, Defence and Reply), the next key phase in the litigation will be disclosure of documents. Generally speaking, the purpose of “disclosure” is to make available to all parties documents which might tend to support or undermine the parties’ cases.

In this guide, we give a brief summary of the duties that the parties owe to the court in relation to disclosure (“the Disclosure Duties”). Failure to comply with the Disclosure Duties can result in sanctions, including cost orders, so it is essential to ensure that all of the necessary steps are taken.

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DISCLOSURE DUTIES

Disclosure is required to be directed only to the issues in dispute, and the scope of the exercise should not be wider than what is reasonable and proportionate in order to resolve those issues.

Each party must comply with the following Disclosure Duties (amongst others):

- To take reasonable steps to preserve documents in its control that may be relevant to any issue in the proceedings.
- To disclose any known adverse documents unless they are privileged (eg lawyer's communications). Adverse documents are those which contradict or materially damage the disclosing party's contention or version of events on an issue in dispute, or which support the contention or version of events of the opposing party.
- To undertake any search for documents in a responsible and conscientious manner.
- To act honestly in relation to the process.
- To avoid providing documents to another party that have no relevance to the issues for disclosure in the proceedings.

PRESERVATION OF DOCUMENTS

To ensure that any potentially relevant documents are preserved, parties are required to suspend any document deletion or destruction processes for the duration of the proceedings. Parties must also:

- notify all relevant employees and former employees to do the same; and
- ensure that any agents or third parties who may hold documents on their behalf do not destroy potentially relevant documents.

Failure to comply with document retention requirements can result in the court drawing adverse inferences against the non-compliant party.

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KEY STAGES OF THE DISCLOSURE PROCESS:

INITIAL DISCLOSURE

At the time of serving their statements of case, each party is also required to give "initial disclosure".

The initial disclosure should entail:

1. the key documents on which the party has relied in support of the claim or defence that they are advancing; and
2. the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

EXTENDED DISCLOSURE

Any further documents to be exchanged beyond the "initial disclosure" are known as "extended disclosure". Within 28 days of service of the final statement of case (which is usually the Reply) each party must state in writing whether it is likely to request extended disclosure.

There are five models of extended disclosure, ranging from narrow disclosure of only the known adverse documents (model A) to wide disclosure of documents which are likely to support or adversely affect the claim or defence of any of the parties (model E).

The party requesting extended disclosure has to satisfy the court that the disclosure it seeks is reasonable and proportionate.

LIST OF ISSUES AND DISCLOSURE REVIEW DOCUMENT

Where one or more parties indicates that they intend to request extended disclosure, the claimant must serve on the defendant a draft list of issues for disclosure within 42 days of the service of the final statement of case. These issues should be the key issues in dispute and which the parties consider should be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. Following service of the draft list of issues, the defendant must then provide any proposed amendments within 14 days, after which the parties should seek to agree the list of issues.

The final list of issues will be included in a "Disclosure Review Document" for the court. In that document, the parties must also explain where and how any potentially relevant documents/data is held, and how the parties propose to search the data. The parties can also detail any points which they have been unable to agree and which the court needs to determine. The court will then consider the Disclosure Review Document at the first case management conference and make appropriate orders.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide-range of disputes topics but are not a substitute for specific legal advice. For further guidance on the topic please contact Jean-Martin Louw at jean-martin.louw@collyerbristow.com or on +44 (0) 7796 712840 or contact any member of the commercial disputes team.



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