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Client Guide to e-disclosure

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Client quick guide to e-disclosure

The purpose of disclosure is to make available evidence which either supports or undermines parties' cases. Disclosure of electronic documents has now become more dominant than the disclosure of hard copy documents in many cases, and it is more important than ever for parties to be aware of the specific process that applies to the disclosure of electronic documents. Set out below is a brief, and by no means exhaustive, outline of the key stages and rules relevant to an electronic disclosure process.

The stages in a typical electronic disclosure exercise include:

- Considering the potential sources and volume of electronic documents;
- Preserving documents;
- Searching for and locating relevant electronic documents;
- Filtering;
- Document review; and
- Exchange of lists and inspection.

Preparation for electronic disclosure

- Parts of the electronic disclosure process should take place long before the parties disclose documents to the other side. In particular, in multi-track claims, parties are required to file and serve a disclosure report not less than 14 days before the first Case Management Conference (CMC):
 - detailing what documents exist or may exist that are or may be relevant to the matters in dispute;
 - describing where and with whom those documents are or may be located;
 - describing how the documents are stored;
 - estimating the broad range of costs of searching for and disclosing any electronically stored documents; and
 - stating what order the party seeks from the court in relation to disclosure.
- Parties to multi-track claims must also, not less than seven days before the first CMC, discuss and seek to agree a proposal in relation to disclosure.
- In practice, it is therefore usual for parties to complete significant preparatory steps preceding the document review in advance of the first CMC.

Proportionality

- Proportionality (i.e. the proportionality of the time and cost to be incurred relative to the size and complexity of the dispute) will be a determining factor as to the parties' obligations in relation to document preservation, the scope of the reasonable search and the subsequent document review.

- The volume of electronic documents in a party's possession can be very significant and, if not carefully controlled, the costs of an electronic disclosure exercise can quickly become disproportionate to the sums in dispute.

Potential sources of disclosable electronic documents

- 'Electronic Document' has a very wide meaning under the court rules and includes email and other electronic communications such as text messages and voicemail, word-processed documents and databases, documents stored on portable devices such as memory sticks and mobile phones, as well as those stored on servers and back-up systems and documents that have been deleted. It also includes metadata embedded within documents which shows, for example, the date and time of creation or modification of a word-processing file.
- The content of websites such as Facebook, Twitter and LinkedIn can all fall within the definition of 'document', as can content on messaging services such as Skype, Facebook Messenger or Whatsapp.

Preservation of documents

- All individuals with access to electronic documents that might be relevant to the dispute should be instructed not to access, alter or destroy documents until it has been agreed how the material should best be preserved for review.
- It is important to consider whether any standard document retention/destruction policies need to be suspended in order to preserve electronic documents relevant to the dispute.

Searching for and locating relevant electronic documents

- It is relevant to consider and identify where/by who the relevant documentation is stored. For example:
 - Which email custodians' inboxes will contain relevant emails and attachments?
 - Where are relevant documents saved/stored?
 - Is relevant electronic documentation stored differently depending on when it was created?
- In many cases, specialist IT support will be needed in order to assist with the search for electronic documents, and to ensure that no material is inadvertently destroyed or altered during the search process.

Filtering

- Using specialist software, IT consultants can filter electronic documents in various ways in order to reduce the documents to be reviewed to a proportionate number. Ways of filtering the documents include:
 - De-duplicating documents;
 - Restricting the electronic documents to be reviewed to those falling within a date range identified as the period relevant to the dispute;
 - Searching large volumes of electronic documents using keyword searches where a full review of each and every document would be unreasonable/ disproportionate.

- If keyword searches are to be used, it is relevant to identify what the keywords will be in advance of commencing the document review in order to ascertain that the keywords identified return relevant results, and in order to inform proposals regarding disclosure (and the costs thereof) in the disclosure report to be filed not less than 14 days prior to the first CMC.

Document review

- Specialist IT consultants can upload the electronic documents on to a review platform in order to facilitate the review process.
- Once the documents have been located, uploaded to a platform and filtered, it is usually the legal team that will review the materials and decide which documents must be disclosed.
- Reviewing electronic documents on a specialist platform enables documents to be reviewed while preserving metadata, and enabling electronic categorisation (relevant/not relevant/privileged etc.).

Exchange of disclosure lists and inspection of documents

- In order to show the other side what documents are being disclosed, following the document review, each party's disclosable documents are listed and disclosure lists are exchanged between the parties.
- The disclosure list for electronic documents will detail the documents in a continuous table or spreadsheet, setting out document information including the document date, type, author/sender and recipient.
- The disclosure list must be accompanied by a disclosure statement that is signed by a senior representative of the disclosing party. This is usually the person who has co-ordinated or who takes overall responsibility for the search for documents. It is important to consider who the appropriate person will be at the outset of the disclosure process.
- The disclosure statement sets out the extent of the search that has been made to locate disclosable documents. The person signing the disclosure statement must certify that they understand the duty of disclosure and, to the best of their knowledge, have carried out the duty. They must expressly state that they believe that the extent of the search was reasonable in all the circumstances.
- Where the other side writes saying that they wish to inspect a document, this must be facilitated within seven days.
- In practice, electronic documents will usually be provided to the other party on an external hard drive, USB memory stick or DVD.

Documents that exist in hard copy only

- Relevant documents that exist in hard copy only cannot be ignored in an electronic disclosure process and, if potentially relevant to the dispute, will need to form part of the review process and disclosed as appropriate.

Ongoing duty of disclosure





- As disclosure obligations are ongoing throughout proceedings, further electronic documentation may need to be processed, reviewed and disclosed following completion of the disclosure process.



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