

## Preservation of evidence and disclosure key fact sheet

### Preservation of documents

We live in a culture where documents are created at a rapid rate, and it is therefore important to ensure that appropriate document retention systems are in place. One of the reasons this is so vital is not only because these documents will have a bearing should any claim develop following an incident, but it is also possible that a party will be required to complete disclosure in any subsequent proceedings.

There is a duty on any party to therefore preserve documents in its control as soon as it becomes aware that it may become involved in legal proceedings. Parties therefore need to be aware of its obligations and ensure that it has sufficient policies and procedures in place, should disclosure be ordered in the future.

### What is disclosure?

Disclosure is a key aspect of English Litigation by which parties are required to disclose documents that are beneficial or harmful to its case. In recent years the disclosure process for certain types of cases has undergone some changes for certain types of cases focusing on 'streamlining' the disclosure process, both from a time and costs perspective.

### Disclosure in the Business and Property Courts

New rules were introduced in the Business & Property Courts in the form of Practice Direction 57AD of the Civil Procedure Rules. These are intended to allow parties to focus on the main issues in dispute, with a view to ensuring that the scope of disclosure can be limited to what is reasonable and proportionate, in light of the specific facts of each case.

The rules provide a set procedure that parties are to follow from the outset of a dispute which encourage genuine cooperation in an effort to try and ensure that the disclosure process is proportionate and workable for all the parties.

### Initial disclosure

Parties are required to engage in the process of disclosure when serving its Statement of Case. This is in the form of 'initial disclosure' which consists of the key documents that a party relies upon, within its pleadings, in support of its claim or defence. At this stage parties are also required to confirm that adequate steps have been put in place to preserve documents. There are situations where initial disclosure is not required, such as the parties agree to dispense with it, but these are generally confined to case specific circumstances.

### Steps before the first Case Management Conference (CMC)

If a party requires disclosure of documents in addition, or as an alternative, to initial disclosure it must request search-based extended disclosure following service of its Statement of Case.

Ahead of the first CMC if extended disclosure is sought, the parties will be required to prepare and seek to agree the 'Disclosure Review Document', also known as the DRD.

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## Steps before the first Case Management Conference (CMC) Cont'd

The DRD is a substantial document and requires the parties to propose key issues for disclosure and models of disclosure in respect of each issue. The issues for disclosure should be limited to only those key matters in dispute. The issues should provide a balance that summarises both sides be kept as brief and concise as possible. The onus is on the claimant to provide an initial draft list of issues for disclosure. Following this parties are to agree proposed models of the disclosure for each issue.

There are five models of extended disclosure Models A – E with Model A being the most restricted search and Model E being the widest. Other items to be addressed in the DRD include cost estimates, key word search terms and document custodians. Prior to the first CMC, parties are to file a single joint DRD with the Court which sets out each party's position, highlighting areas of agreement and disagreement. In addition to this, parties must also sign a Certificate of Compliance confirming that they understand their disclosure obligations and have complied with the rules. At the first CMC the Court will consider the DRD and any representations by parties as to areas of

disagreement. The Court will then make an order for extended disclosure. When extended disclosure is given parties must sign a Disclosure Certificate confirming that they have complied with the rules and any Court orders. A Disclosure Certificate is also required even if extended disclosure is not ordered.

### Practical Tips

1. Early preservation of documents and sufficient document retention policies.
2. Give thought to disclosure early – ensure you know what your obligations are under PD 57AD and Part 31 of the CPR bearing in mind the applicable timescales for completing the required steps.
3. Understand what documents you or your client holds that are relevant to the issues to enable early identification of helpful or harmful documents that may form part of future disclosure.
4. Think about privilege – know what the rules are and how they may impact your case. [Click here](#) to see our previous Podcast in this series on privilege for more information.

If you have any questions, please contact us:



**Chander Agnihotri**

Legal Director, London

+44 20 7876 6179

[Chander.Agnihotri@clydeco.com](mailto:Chander.Agnihotri@clydeco.com)



**Lauren Penton**

Senior Associate, London

+44 20 7876 6196

[lauren.penton@clydeco.com](mailto:lauren.penton@clydeco.com)