

Electronic disclosure

Towards the end of 2005 new provisions were introduced into the Civil Procedural Rules (CPR) in recognition of the huge growth in the use of electronic communication and documentation. They attempt to define the duties imposed on litigants to search and preserve electronic documents for the purposes of the disclosure process in litigation. These provisions are likely to have a significant impact on the way businesses instruct their lawyers in any litigation in the future.

Disclosure is the stage of litigation when each party is required to disclose to one another the documents on which they rely, the documents which adversely affect their own case or another party's case and the documents which support another party's case. The CPR defines a document as anything in which information of any description is recorded. Although this definition encompasses electronic documents the new provisions have clarified it as including:

- email
- other electronic communications
- word processed documents
- databases
- documents that are readily accessible from computer systems and other electronic devices and media.

The latter category includes laptops, mobile phones, iPods, documents that are stored on servers and backup systems, electronic documents that have been deleted and additional information

stored and associated with electronic documents known as metadata.

The CPR requires litigants to carry out a 'reasonable' search for these documents. The factors that determine what is 'reasonable' are as follows:

- the number of documents involved
- the complexity of the proceedings
- the ease and expense of the retrieval of any particular documents relative to the size and importance of the claim and
- the significance of documents that are likely to be located during the search.

This however is likely to result in arguments and/or misunderstandings between parties as to whether or not the parties have carried out a 'reasonable' search for electronic documents. The new provisions recognise the potential for that happening and aim to avoid disputes by requiring the parties to specify in their disclosure statement the searches that have been carried out for electronic disclosure.

Disclosure statements

The disclosure statement is attached to the list of documents that a party discloses to its opponents. The new provisions require the party to confirm in the statement whether or not it has searched for various electronic documents. The statement is then signed by the party. In the case of the business client this will be someone in a position of responsibility who has the authority to sign for and on behalf of that business.

By signing this statement the party is certifying that it understands and has carried out its duty to give disclosure and the searches that have been made by that party for the purposes of locating documents. Giving a false statement may be a contempt of court and result in a fine or imprisonment.

In the context of the business client it is therefore important that the person responsible for signing the disclosure statement understands and is familiar with the business's IT systems and electronic document management procedures. The client's lawyer will also require a similar understanding if he is to be able to advise on what the court is likely to view as a 'reasonable' and compliant search for electronic documents in the context of the claim.

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