Disclosure of documents in civil proceedings in England and Wales

May 2020

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Disclosure of documents in civil proceedings in England and Wales

Disclosure

"Disclosure" is the term given to the stage of the litigation procedure when each party may be required to collect and review documents potentially relevant to the dispute and then state to the other parties (usually in a formal list of documents) the disclosable documents which exist or have existed. The other party has a right to a copy of those disclosed documents, subject to certain exceptions. In cases where large numbers of documents are involved, disclosure may be a lengthy exercise involving a significant amount of management time. The cost of that time will not normally be recoverable from the other party. It is nonetheless essential that it is carried out conscientiously, since it can determine the success or failure of a party's case. Also, the parties and their solicitors are under duties to the court to ensure that it is done properly and the consequences of failure are potentially severe.

It is often only when disclosure has taken place that lawyers are in a position firmly to predict the likely result of the litigation, although it is possible to obtain pre-action disclosure in some cases (see below). The prospect of disclosure may compel a party to explore an early settlement before its opponent sees its documents, and in many cases settlement follows shortly after disclosure has taken place.

Purpose of this note

The purpose of this note is to explain in practical terms what disclosure entails and the problems most often encountered. One of the major challenges of disclosure is managing the increasing volume and variety of electronic documents which are potentially disclosable. This can be achieved by carefully considering what a party's legal obligations require in practice, forward planning of the process and appropriate and cost effective use of technology. Guidance is also given on ensuring that, once litigation is envisaged, the number of disclosable documents created thereafter is kept to a minimum and, so far as possible, steps are taken to ensure that documents are protected by "privilege" and therefore need not be shown to the other party (see below).

Parallel regimes

From 1 January 2019, a mandatory disclosure pilot scheme ("**Disclosure Pilot**") is operating in the Business and Property Courts (subject to limited exceptions). The Disclosure Pilot creates a new regime which is intended to promote a radical culture change in the approach to disclosure, with increased cooperation between the parties and greater oversight by the court.

Whilst a broad order for disclosure will still be available where appropriate (retaining the "cards on the table" approach), other cases may be determined on the basis of more focussed and limited disclosure.

For cases in other courts (including those heard in the Royal Courts of Justice in London) or falling within the exceptions to the Disclosure Pilot, the existing rules will apply. These existing rules are contained mainly in Part 31 of the Civil Procedure Rules ("**CPR**") and in the Practice Directions on disclosure ("**Part 31 Rules**"). This note summarises the points of main interest to clients in relation to the Disclosure Pilot and the Part 31 Rules. It looks at the issues and concepts common to both and the features specific to each regime.

INITIAL CONSIDERATIONS OF BOTH REGIMES

What is a document?

Both disclosure regimes use a broad definition of "document". A "document" means any record of any description containing information. The term includes electronic and hard copy documents. Electronic documents include documents accessed on all forms of electronic media, including desktop and laptop computers,

personal mobile devices (such as smart phones and tablets) and external storage devices (such as USB memory sticks and external hard drives). In addition to word-processed documents, the definition of documents covers email, other mail files (including Calendar, Journal and To-do lists or their equivalent), web-based applications, spreadsheet files and graphic and presentation files. It also extends to text messages, voicemail, audio or visual recordings, chat room and social media messages, photographs, plans and drawings.

The definition of "document" also covers documents stored on servers and back-up systems, electronic documents that have been deleted and "metadata", ie information stored with and about electronic documents, such as data showing by whom the document was created, when it was modified and by whom.

Preservation of documents

It is important under either regime to identify, locate and preserve intact all documents of possible relevance.

The trigger

The trigger for this requirement is generally the time litigation is contemplated, rather than the time when proceedings are commenced. Under the Disclosure Pilot, this is described as the point when a person knows that it is or may become a party to proceedings that have been commenced, or knows that it may become a party to proceedings that may be commenced.

Immediate actions

The safest way to deal with (and preserve) potentially relevant documents should be discussed immediately on instructing lawyers.

Other immediate actions include:

- If a party has routine procedures for destruction of documents, such as the deletion of computer back-up media, these must be halted until the documents they contain have been considered by lawyers for relevance.
- Parties must ensure that every person who has responsibility for an organisation's records management or document retention policies, including third parties, is notified of the preservation requirement as soon as possible.
- All personnel who may hold or subsequently create potentially relevant documents must be notified of the preservation requirement.
- Metadata must also be preserved and not altered in any way. Metadata is easily changed. In some cases merely accessing the documents by opening or copying them can irreversibly change the metadata that is (or may later be) relevant. This may delay the disclosure process and result in additional costs.

Under the Disclosure Pilot rules, there are more prescriptive requirements that need to be followed, such as sending a written notification regarding document preservation obligations to relevant current and former employees. A party is also required to provide written confirmation to their lawyers and other parties to a claim that they have taken the steps required for document preservation set out in the Disclosure Pilot rules. Your lawyers can advise you on drafting and issuing such instructions.

Why preservation is important

The preservation requirement is important because a party's credibility may be seriously weakened if it transpires that it has destroyed or failed to disclose a relevant document, whether or not this was deliberate. Subject to the question of privilege (see below), documents damaging to a party's case should not be withheld in any circumstances. The court may draw adverse inferences against a party that fails to disclose such documents, and may penalise it in costs. If a fair trial is no longer possible, the case may be dismissed or judgment entered against the party. Deliberate destruction of relevant documents is likely to be a contempt of court and may constitute the offence of attempting to pervert the course of justice.

Control

Under both regimes, subject to the type of disclosure ordered, a party must disclose documents that are or have been in its "control".

This means that documents must be disclosed if a party:

– has or had physical possession of them (whether or not it has a right to possess them);
– could obtain them by enforcing some right to possession; or
– has or had a right to inspect or take copies of them.

For example, the documents of a party's agent (such as an insurance broker) which the agent can be compelled to release must be disclosed. Documents of an associated company may not have to be disclosed unless there exists a right to inspect – this should be checked with a lawyer before such documents are collected.

The disclosure obligations extend to documents which are no longer in a party's control. If, therefore, relevant documents have been lost or disposed of (for example, in the course of routine destruction of files prior to litigation), those documents must be described in the list of documents with an explanation of why they are not being provided.

Preparing for disclosure

It is advisable for the lawyer who is to be responsible for a party's disclosure to arrange a client meeting to discuss disclosure as soon as litigation appears likely. This enables a full appraisal of the likely scale of the disclosure exercise to take place under either regime. It also affords the lawyer an opportunity to discuss with relevant personnel the client's paper and electronic filing systems, other relevant IT infrastructure and document retention policies and the extent to which the client will have to search for documents. In this way, the risk of disclosable documents being destroyed, or emerging at some later stage, is reduced. The lawyer can also advise whether any documents of an associated company must be disclosed.

In relation to hard copy documents, it often assists in attributing undated or unsigned documents such as manuscript notes if it is known where in the file the document in question was located. Files should therefore not be rearranged unless careful notes are kept to show which documents have been removed or placed elsewhere.

DISCLOSURE PILOT

Disclosure scope

Initial Disclosure

If the Disclosure Pilot applies to a party's case, it may be required to provide disclosure of key documents along with its statement of case ("**Initial Disclosure**"). This form of disclosure requires a party to list and provide copies of the key documents:

(a) on which it has relied in support of the arguments advanced in its statement of case (including the documents referred to in that statement of case); and

(b) that are necessary to allow the other parties to understand the claim or defence they have to meet.

There are several exceptions to this requirement which are likely to apply in a significant number of cases, including where the parties agree to dispense with Initial Disclosure.

Extended Disclosure

In addition or as an alternative, the court may order "**Extended Disclosure**" to be given. There is no right to Extended Disclosure – the court must be persuaded that it is appropriate in order to resolve fairly one or more of the issues in the case that have been identified as requiring disclosure ("**Issues for Disclosure**"). Orders for Extended Disclosure are made at the first case management conference ("**CMC**") in a case.

Where Extended Disclosure is ordered, the court must direct which of five different disclosure models will apply to each issue. Courts might order a tailored approach – ordering different models for each Issue for Disclosure.

An order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective of dealing with cases justly and at proportionate cost. Factors considered by the court include the nature and complexity of the issues, the importance of the

case, the number of documents involved and the ease and expense of searching for and retrieving particular documents.

The models range from minimal disclosure to broader, search-based disclosure orders, as follows:

- **Model A**: disclosure confined to known adverse documents.
- **Model B**: limited disclosure (without a limit on quantity) of key documents that are (a) relied on (expressly or otherwise) in support of the claims or defences advanced in statements of case; and (b) necessary to allow the other party to understand the case they have to meet.
- **Model C**: request-led, search-based disclosure.
- **Model D**: narrow search-based disclosure (with or without Narrative Documents).
- **Model E**: wide search-based disclosure – this model will only be ordered in exceptional cases.

A Narrative Document is a document which is relevant only to the background or context of material facts or events, and not directly to the Issues for Disclosure.

Disclosure Review Document

Generally, where a party seeks Extended Disclosure they will need to co-operate and constructively engage in completing, discussing and seeking to agree with other parties to the litigation the contents of a Disclosure Review Document ("**DRD**"). The DRD must be filed at court in advance of the first CMC; however the obligation to complete it (and update it) is ongoing. The DRD replaces the disclosure report and electronic documents questionnaire used under the Part 31 Rules and is designed to provide the judge with a single document containing all the information needed to make any order for Extended Disclosure.

The DRD requires parties to prepare and record the scope of their agreement in relation to the Issues for Disclosure, and to set out their respective proposals for the appropriate disclosure model that should apply to each of those issues.

Where a party is seeking search-based disclosure (Models C-E) it must also provide information on where and how its data might be held, including the sources, format and file types that might need searching, plus the search parameters that might be used to narrow the scope of the search. (See "Duty to search for documents" under the Part 31 Rules below for practical considerations which will also be relevant to a search-based model under the Disclosure Pilot.)

A party seeking search-based disclosure is also required to consider the use of advanced electronic disclosure software including technology assisted review ("**TAR**") tools to assist in the review. TAR is software used to prioritise and reduce the number of documents manually reviewed. The use of technology in the electronic disclosure process, which can take many forms, can result in huge savings in time and therefore cost. For advice on electronic disclosure from our in-house technology specialists, please get in touch with your usual partner contact.

Finally, parties are required to provide an estimate of what they consider to be the likely costs of giving the disclosure proposed in the DRD so that the court may consider whether such proposals are reasonable and proportionate. A party may also seek a short court hearing before or after the CMC to obtain any directions on disclosure needed and avoid delay to the process. This is known as a Disclosure Guidance Hearing.

List of documents

Initial or Extended Disclosure is given by providing the other parties with a list of documents and a copy of the documents being disclosed (for further details see below).

Continuing obligation

The Disclosure Pilot rules expressly set out the disclosure duties of the parties (and their lawyers) which continue until the end of the proceedings (including any appeal) or until it is clear there will be no proceedings. As well as the

document preservation duty explained above, they include a duty to:

- comply with any order for disclosure made by the court;
- undertake any search for documents ordered by the court in a responsible and conscientious manner to fulfil the stated purpose of the search;
- disclose known adverse documents in all cases (whatever the order for disclosure);
- act honestly in the process of giving disclosure and reviewing documents disclosed by the other party;
- disclose without delay any relevant documents that have come into existence, or are found, after disclosure has been given.

Adverse documents

Known adverse documents are documents (other than privileged documents) that a party is actually aware of without undertaking any further search for documents, and that: (a) are or were previously within its control; and (b) are adverse.

A document is "adverse" if it (or any information it contains):

- contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or
- supports the contention or version of events of an opposing party on an issue in dispute.

For these purposes, "awareness" of a company or organisation is based on the awareness of any person within the company who has accountability or responsibility for (i) the events or circumstances that are the subject of the case, or (ii) the conduct of the case.

PART 31 REGIME

Disclosure scope

Under the Part 31 Regime, the court determines the appropriate basis for the disclosure of documents. Usually it will order disclosure on the "standard basis", or "standard disclosure". This requires disclosure of documents relevant to the dispute which are, or have been, in a party's control (see above) and which it relies upon or which adversely affect its own case, or which support or adversely affect another party's case. The test excludes background documents and documents which may indirectly advance or damage a party's case. Standard disclosure requires a party to undertake a reasonable search for documents (see below). A party cannot pick and choose which documents to disclose based on its own priorities.

"Standard disclosure", whilst the most common type of disclosure, is not the court's only option. The court can choose from a "menu" of disclosure options set out in Part 31. This includes standard disclosure, but also gives these five other options:

- an order dispensing with disclosure;
- an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;
- an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;
- an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences; or
- any other order in relation to disclosure that the court considers appropriate.

Disclosure process

The judge will decide what order for disclosure to make, usually at the first CMC, bearing in mind the overriding objective of the CPR and the need to limit disclosure to that necessary to deal with the case justly.

The judge will be guided by the parties, who must, before the CMC, have identified to each other in a "disclosure report" what documents exist, or may exist, which are, or may be, relevant to the matters in issue in the case. The reports will describe where those documents

(including electronic documents) are, or may be, located. The parties will also have to include in their reports estimates of the broad range of costs that could be involved if they were to give standard disclosure, including – very importantly, given that this is often the most expensive aspect of the disclosure exercise – the costs of searching for and disclosing electronically stored documents.

In their disclosure reports, the parties must indicate which type of disclosure from the menu of disclosure options would be most appropriate. Having each considered the other parties' disclosure reports, the parties must liaise to try and agree an appropriate, cost-effective, proposal for carrying out the disclosure exercise. At the CMC, the court can accept this or impose what it considers to be a more proportionate way of giving disclosure. The court can also give directions about how disclosure should be given.

Duty to search for documents

Where the court orders standard disclosure, there is a positive duty to make a reasonable search for all documents required to be disclosed. The search for electronic documents should encompass readily accessible data and standard metadata. In most cases, more extensive searches, for example for back-up data or additional metadata, should not be necessary. However, if the authenticity or manipulation of documents may be an issue, such as in a case where there are allegations of fraud, additional metadata is more likely to be relevant and therefore disclosable.

Parties should try to agree issues regarding searches for and preservation of electronic documents at an early stage in the proceedings. To this end, they may be required to share information about their IT infrastructure, including data storage systems and their document retention policies. For information about obtaining advice on electronic disclosure from our in-house technology specialists, please contact the partner you normally deal with.

The factors by which the reasonableness of the search for documents, including electronic documents, is to be judged include the number of documents involved, the nature and complexity of the proceedings, the significance of any document which is likely to be located during the search and the ease and expense of retrieval of any particular document. The court will also take into account the financial position of each party and its aim of ensuring that the parties are on an equal footing.

The CPR Part 31 Practice Directions on disclosure provide guidance on factors to be taken into account when considering the ease and expense of retrieving particular electronic documents. These include the accessibility of electronic documents or data; the location of relevant documents, data, computer systems, servers and the like; the likelihood of locating relevant data; the cost of recovering any electronic documents; the cost of disclosing and providing inspection of any relevant electronic documents; and the likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.

The following are pointers towards ensuring that a reasonable search is undertaken:

– if a company operates from more than one place, each location should be identified and the likelihood of relevant documents being found there assessed;

– if relevant files have been put into storage, these should be retrieved;

– if in addition to, or instead of, a central filing system, staff or management keep files of their own, those people should be asked to make their files available;

– where a significant document is recorded as having been distributed to a number of people within the organisation, all the copies should be located. Manuscript notes on copies are frequently important;

– where significant meetings have taken place, several people may have made their own notes of the meeting and these notes should be located;

– diaries kept by staff or management should be located if likely to be relevant to any of the issues;

– the company's various sources of electronic documents should be identified, as well as

the types of file which may hold relevant information (see "What is a document?" above); and

– certain functions may be outsourced to a third party provider, such as document hosting, IT or finance, and this may need to be taken into consideration when searching for documents.

List of documents

Unless the court orders otherwise, a party's disclosable documents must be set out and identified in a list of documents. The list is in a prescribed form and will include the disclosure statement (see below). The parties usually exchange lists after they have exchanged statements of case.

Continuing obligation

The obligation to disclose documents to the other party continues until the proceedings have been concluded. Sometimes relevant documents come into existence, or are found, after the list is served, such as those relating to the amount of damages claimed (for example, the final account in a building contract, where the claim is for the cost of remedial works). A party must notify the other party as soon as such documents come to its notice. Such documents are normally disclosed in a supplemental list or a letter to the other party's lawyers.

REQUIREMENTS COMMON TO BOTH REGIMES

Production/inspection of documents

The other parties are entitled to a copy of all of your listed documents except where they are no longer in your control or where you have a right or duty to withhold disclosure or provision of a copy of these (for example, because a document is privileged). Providing a copy of the documents is known as production under the Disclosure Pilot and inspection under the Part 31 Rules. In exceptional circumstances, where documents contain highly confidential material, such as technical secrets, production/inspection may be restricted to a party's legal advisers or an independent expert. A party may challenge the withholding of documents by application to the court.

It can be very time consuming, depending on the volume of documents disclosed and the complexity of the document review, to prepare documents for production/inspection, including applying any necessary redactions or electronic "blanking out" of privileged or irrelevant yet confidential information. It is therefore important that there is sufficient time in the case timetable to prepare the documents for production/inspection.

The parties should discuss and agree at an early stage the format in which lists and production/inspection of documents will be given.

Disclosure certificate or statement

At the time disclosure is given, a disclosure certificate (or disclosure statement for cases under the Part 31 Rules) must be signed by the party giving disclosure or an appropriate person within the organisation.

The certificate identifies the extent of any search for documents, including search methodology, and certifies that the maker of the statement has complied with its disclosure obligations and the court's disclosure order. This includes confirmation that it has taken reasonable steps to preserve documents; has disclosed known adverse documents; has acted honestly; and understands its ongoing disclosure obligation. The document also specifically refers to the need to have obtained confirmation from all of those people with accountability or responsibility within the organisation for the events or circumstances that are the subject of the case, or for the conduct of the litigation, including those who have left the organisation, that they have disclosed all adverse documents of which they are aware.

The disclosure statement under the Part 31 Rules sets out the extent of the search that has been made and certifies that (i) the maker of the statement understands the duty to disclose documents and (ii) to the best of their knowledge they have carried out that duty. The wording of the disclosure statement also

requires the maker of the statement to make clear the extent to which, in conducting a reasonable and proportionate search, a search has or has not been carried out to locate electronically held documents. This extends to specifying those types of hardware and files which have not been searched, as well as making it clear if the search for documents was limited to particular keywords or concepts or a particular date range.

It is important to identify at an early stage the appropriate person to sign the disclosure certificate or statement so that person can participate in the decisions on the extent of the disclosure required, including any search for documents, and provide background factual information needed for the document review exercise. It should be someone from within the organisation with appropriate authority and knowledge of the disclosure exercise. That person may be an in-house lawyer responsible for the litigation or, more likely, the member of management with conduct of the proceedings. Identification of this person is another matter on which lawyers can advise.

A person signing a false disclosure certificate or statement without an honest belief in its truth faces the prospect of contempt of court proceedings. Therefore, it is important that the duty of disclosure is fully understood and complied with.

Privilege

Certain documents, although otherwise disclosable, may be kept from the other party on the ground of privilege. These documents will be referred to in the disclosure certificate (under the Disclosure Pilot) or in the list of disclosed documents (under the Part 31 Rules).

Sometimes a party may claim privilege for part only of a document or only part of the document may be relevant for disclosure. In such a case, the privileged or irrelevant part of the document may usually be redacted or "blanked out" for inspection/production.

Whether or not a document is privileged can be a matter of contention between the parties. It is often necessary for lawyers to give careful consideration to whether particular documents are privileged. For present purposes, it is sufficient to say that there are two broad categories of legal professional privilege: legal advice privilege and litigation privilege.

Legal advice privilege

The main example of documents which are subject to legal advice privilege is correspondence and other written communications between a client and its lawyers, whether or not connected with litigation/adversarial proceedings, which are confidential and written for the dominant purpose of giving or receiving legal advice.

"Lawyers" includes correspondence with in-house lawyers, unless it relates to administrative matters or their executive or business function rather than legal advice. Note that it does not apply to advice given by in-house lawyers in EU competition investigations.

For these purposes, "client" means only those employees of an organisation expressly or impliedly tasked with obtaining or receiving legal advice. In other words, it cannot be assumed that all of the employees within a client organisation can be classified as "the client". This narrow definition of client has received certain criticism in recent times (including from the Court of Appeal), but it remains good law at the time of writing.

Accordingly, communications between an organisation's lawyers and its "non-client" employees will not attract legal advice privilege. It is important to consider carefully with your lawyers which employees will constitute "the client" at the outset of a matter and as the matter progresses and take care that privileged communications do not cease to be privileged as a result of their being copied to others within the organisation who are not "the client".

Note that documents generated by "non-client" employees will not be privileged, even if created for the dominant purpose of seeking legal advice (such as to provide information to or for the purpose of putting before a lawyer) and even if sent to lawyers directly or through "client" employees, unless litigation is contemplated at the time they are created. As case law has highlighted, this is of particular concern in the context of investigations (where litigation

privilege may not apply – see below) because records of interviews of and other fact finding from non-client employees are unlikely to be protected by legal advice privilege. However, various practical steps can be taken when creating such documents to support a claim that they are protected by privilege (although a lawyer's verbatim note of a non-privileged communication will not be protected by privilege). For more information, see "Ten rules for retaining privilege" in the Hogan Lovells Privilege Overview note (available on hoganlovells.com).

In terms of what constitutes "legal advice", the House of Lords (the predecessor to the Supreme Court) has made clear that privilege will cover not only advice on legal rights and obligations under both private and public law, but also advice as to what prudently and sensibly should be done in the relevant legal context and also factual exchanges for the purposes of facilitating either (this is sometimes called the "continuum of communications"). The relevant legal context includes:

- the giving of advice in relation to the law;
- the consideration of particular circumstances from a legal point of view;
- the giving of advice in relation to an investigation or to an inquiry which might become the subject of a judicial review; and
- the giving of advice in relation to something which could impact on public or private rights and obligations or which could give rise to criticism of the client or affect the client's reputation.

Documents which will usually be covered by legal advice privilege will include:

- presentational advice;
- draft submissions and statements of case (litigation privilege is also likely to apply to these); and
- documents which reflect the use of legal skills in implementing legal advice as now broadly defined.

In considering the application of legal advice privilege, the Court of Appeal has recently confirmed that there is a "dominant purpose" test in legal advice privilege (in other words, the confidential communication must have come into existence for the dominant purpose of seeking or giving legal advice). Identifying the legal context and dominant purpose of a communication can be especially challenging for in-house lawyers, whose role is even more likely to include dealing with commercial, as well as legal, issues. All lawyers and those instructing them should consider why a lawyer is copied into a communication and the reason for sending that communication – not every communication involving a lawyer will attract privilege.

This recent Court of Appeal judgment focused on multi-addressee communications such as email chains which involve legal and non-legal individuals. Care should be taken to restrict circulation of privileged documents to those in the (narrow) "client" team (see above), and the content of the communications should – so far as possible – be confined to legal advice (in its broad legal context sense – above) – and marked privileged. Separate email communications should be used for the discussion of anything else. In this context, and other practical situations, see 'Ten rules for retaining privilege' in the Hogan Lovells Privilege Overview note (available on hoganlovells.com).

Litigation privilege

Litigation privilege covers not only litigation, but also other proceedings that are, or have become, sufficiently adversarial in nature.

Litigation privilege protects correspondence and other written communications between a party and its lawyers or between either of them and a third party (including a "non-client" employee), where the confidential communication was made for the dominant purpose of conducting litigation or adversarial proceedings which are on foot or reasonably in prospect. For these purposes, there must have been a "real likelihood" of litigation/adversarial proceedings at the time the communication was made.

In relation to the scope of "conducting litigation", the Court of Appeal has held that communications for the dominant purpose of avoiding or settling proceedings which were

reasonably in contemplation could be protected by litigation privilege. Confidential communications created for the purpose of obtaining legal advice or information in connection with the conduct of the litigation are also protected, as are documents in which such information or advice cannot be disentangled, or which would otherwise reveal such information or advice. However, documents created with the dominant purpose of discussing a commercial settlement between non-lawyers have been found by the court not to fall within the scope of litigation privilege. This means you should act cautiously, and seek advice from your lawyers, before having internal commercial discussions about settlement.

Investigations by regulators may not always be sufficiently adversarial in nature to attract litigation privilege. It can be difficult to pinpoint exactly when (and if) a regulatory investigation becomes sufficiently adversarial. A 2015 case implied that this point might be met as soon as the regulator's fact finding begins, but did not provide direct judicial authority on the issue. The ability to claim litigation privilege in the context of an investigation has been strengthened by a recent Court of Appeal case which decided, on the facts of the case, that a criminal investigation by the Serious Fraud Office (SFO) was sufficiently adversarial to give rise to litigation privilege. The court found that where a prosecuting agency makes clear that there is a possibility of criminal prosecution and legal advisers are engaged, there is a "clear ground" for contending that prosecution (and therefore litigation) is in reasonable contemplation. The judgment was based on the particular facts of the case in question, and the Court of Appeal emphasised that not all SFO investigations would be sufficiently adversarial in nature. Given the reliance on particular factual circumstances, you should consider your claim to litigation privilege carefully at the outset of an investigation and continue to review it throughout; it is also sensible to consult lawyers at an early stage to discuss your claim to privilege.

Documents which may be subject to litigation privilege (depending on the circumstances of the case) include:

- notes of meetings or telephone conversations between the client or its lawyer and the client's employees created for the dominant purpose of gathering information in connection with the litigation or adversarial proceedings; and
- experts' reports and witness statements prepared for the dominant purpose of the litigation or adversarial proceedings (unless and until disclosed to the other side).

The following documents may not attract litigation privilege:

- notes regarding the litigation prepared by the party for internal purposes, unless for the purposes of:
    - reporting when strictly necessary to others within the party's organisation on advice received from lawyers; or
    - seeking information requested by lawyers for the purposes of the litigation;
- board minutes recording discussion of the proceedings (unless for the purposes described above);
- notes to the published accounts concerning the litigation and any provision for the proceedings in the accounts (whether or not privilege ever existed, it will have been waived by inclusion in the published accounts) and related correspondence with accountants;
- written communications between a party and outsiders (such as the police and other authorities, insurers and professional advisers other than the party's own lawyers), or written notes recording such communications, unless such documents came into existence for the dominant purpose of existing or contemplated litigation or adversarial proceedings; or
- instructions to and correspondence and discussions with expert witnesses in certain circumstances.

Privilege: Some general rules

Some general rules emerge from the above examples:

- internal notes and memoranda are not privileged just because they are internal;
- documents are not privileged just because they contain confidential information;
- marking documents as "privileged" or "confidential" may be useful for other purposes (see below), but it does not determine whether in fact those documents are privileged;
- it should not be assumed that, once litigation or adversarial proceedings are begun, all documents that then come into existence are privileged. Great restraint should be exercised in creating documents relating to the proceedings once the matter has become (or looks likely to become) adversarial;
- wherever possible, communications with outsiders should be made orally or through lawyers. Where such documents have to be created, this should be either for the purpose of essential internal reporting on advice received from lawyers or for the dominant purpose of assisting the lawyers to conduct the litigation or adversarial proceedings (for example, passing on requests for information);
- where you consider privilege to apply, it may be helpful to mark such documents "privileged" so as to keep them distinct and thus reduce the risk of their being disclosed by accident;
- great restraint should be exercised in obtaining documents or copies from third parties for use in the litigation. They may not be privileged and may be disclosable and produced for inspection. Collecting such documents should ordinarily be left to lawyers;
- it is possible to waive privilege in a document unintentionally by disclosing it (or part of it) to third parties (which may include "non-client" employees within the client organisation);
- care should be taken in communications with expert witnesses and these should, where possible, be through a lawyer; and
- it should not be assumed that investigations by regulators and authorities are adversarial from the outset (or indeed, at all) therefore documents created in dealing with such investigations may not be privileged. Advice should be sought from lawyers on when (and if) litigation privilege applies.

"Without prejudice" documents

Documentation, particularly correspondence, which arises in connection with settlement negotiations, may attract "without prejudice" privilege. This means that it cannot be used in court as evidence by either side (unless both parties agree that it can). Such documents are usually disclosable (save in exceptional circumstances) although production/inspection will usually be withheld on the grounds of privilege. The presence or absence of a "without prejudice" marking on a document does not determine its status: that depends on whether it is genuinely part of settlement negotiations. Ideally a party should not enter into any such negotiations without first consulting its lawyer.

Pre-action disclosure

In certain circumstances, a party may apply, before commencing proceedings, for an order for disclosure of specified documents or classes of documents from its proposed opponent.

The rules on pre-action disclosure are not affected by the introduction of the Disclosure Pilot. To obtain such an order a party needs to show both that the documents would be covered by the opponent's standard disclosure obligations (under Part 31 of the CPR) if proceedings had started and that pre-action disclosure "is desirable in order to:

- dispose fairly of the anticipated proceedings;
- assist the dispute to be resolved without proceedings; or
- save costs".

The court will insist that these conditions are met, to avoid the danger of prospective claimants being allowed to carry out "fishing expeditions" for useful documents. However, the courts do not look favourably on parties who

unreasonably refuse to provide pre-action disclosure voluntarily, and have sometimes imposed costs penalties on them. (This may not apply to parties such as banks who require a court order because of their client confidentiality obligations.)

Apart from the pre-action disclosure regime, note that there is an obligation on parties, in any event, to act reasonably in exchanging information and documents relevant to a claim and generally in trying to avoid the need for proceedings.

Third party disclosure

A party may apply for an order for disclosure from third parties not involved in the proceedings and will be able to obtain specified documents or classes of documents if it can show that (a) the documents are likely to support its case or adversely affect the case of another party and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs. The Court of Appeal has held that the word "likely" in this context means "may well", rather than "more probable than not". These rules are also not affected by the introduction of the Disclosure Pilot.

Misuse of documents

Documents and information from documents obtained from an opponent or third party on disclosure or as a result of a court order requiring the production of documents are to be used only for the purpose of those particular proceedings. They must not be shown or given to persons unconnected with the proceedings or used to assist in developing a party's own business or for any other extraneous purpose. It is essential that this warning is brought to the attention of all members of staff who have any involvement in the proceedings or to whom documents obtained on disclosure (or information obtained from them) may be communicated. Misuse, even if unintentional, may amount to contempt of court. It applies except where a document has been read or referred to in open court, or where subsequent use is permitted by the court or the party disclosing the document and the person to whom the document belongs, unless the court orders otherwise.

Consequences of failing to give proper disclosure

If a party is dissatisfied with the extent of its opponent's disclosure, it can press the opponent for further documents. An order can be obtained from the court requiring a party to give further disclosure or conduct a further search. If the opponent satisfies the court that it has given disclosure as ordered by the court or that the disclosure it has provided is reasonable and proportionate, it will be very difficult to obtain such an order. The court will take account of the overriding objective of dealing with cases justly and at proportionate cost in reaching its decision and an order for disclosure of background documents or documents only indirectly relevant will rarely be made.

Failure to give proper disclosure, including failure to comply with your express duties, can amount to contempt of court and may have serious consequences, including adverse costs orders, dismissal of your claim or judgment being entered against you.

Further information

If you would like further information on any aspect of disclosure or on civil proceedings generally, please contact the person mentioned below or the person with whom you usually deal. CPD points are available for reading this note if it is relevant to your practice. If you would like any live training on this subject, we would be happy to give you a presentation or organise a seminar, webinar or whatever is most convenient to you.

Contact

Jennifer Dickey

Partner

Tel: +44 (0)20 7296 5903

jennifer.dickey@hoganlovells.com

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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