What is a document?

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When a dispute arises, your lawyers will ask you to preserve and/or provide them with the relevant documents. In the past, we would have expected you to send us the hard copy file(s); more recently this would have been the relevant mailbox folder containing the emails. Now, with ever increasing methods of communication, documents are much more than a piece of paper, computer files or your mailbox folder.

The recent spectacle of the so-called "Wagatha Christie" case between Rebekah Vardy and Coleen Rooney[1] and another recent case demonstrate just how important these "non-traditional" forms of documentation and communication are in forming a clear picture of what has occurred and in determining liability. With the increased use of multiple, different communication platforms between professionals and clients and an increased blurring of work and personal devices, it is therefore important to understand what is meant by the term "document" and to know what you may have to disclose in any future litigation.

When it comes to disclosure for court proceedings in England and Wales, documents are defined as "*anything in which information of any description is recorded*"[2]. In arbitration, the IBA Rules on the Taking of Evidence in International Arbitration define a document as "*writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means*." These are both wide definitions and depending on the nature of the dispute, how the parties communicated internally, with each other and third parties and how your organisation records information, the following could be disclosable:

- letters, faxes, memos, minutes of meeting, manuscript notes, databases, diaries and presentation files;
- emails including for example Calendar, Journal and To Do Lists in mail applications;
- media such as photographs, plans, drawings, mobile phone texts, video clips and audio recordings;
- social networking messages and communications via messaging applications such as Google Chat, Microsoft Teams, Slack, Skype, WeChat and WhatsApp;
- computer files and documents stored not just on desktop computers, laptops and personal mobile devices including smart phones and tablets, but also on servers, back-up systems, portable devices such as memory sticks and external hard drives, as well as cloud sharing solutions including Dropbox;
- personal devices including mobile phone and laptops if relevant communications occurred outside of official channels; and
- electronic documents that have been deleted (but are retrievable) and the information stored and associated with electronic documents, known as metadata and other embedded data.

It is essential that all potentially relevant documents are preserved as soon as a party becomes aware of potential legal proceedings. It is important to ensure that all deletion or destruction

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processes are suspended, and that employees, ex-employees and third parties are notified of the need to not delete any relevant documents. It is crucial that assistance is sought in preserving the documents at this stage to ensure that the associated metadata is not lost.

The Wagatha Christie saga shows just how fatal to a party's case a failure to preserve such data can be, whether intentional or not. Mrs Vardy's failure to upload a full conversation made on WhatsApp due to a dubious claim concerning the corruption and failure of data to upload owing to the size of the conversation and the suspicious timing of her former agent's phone falling into the sea in August 2021 (the same month in which the agent was ordered by the court to have her device inspected), led Mrs Justice Steyn to infer that the loss of data was not accidental and was in fact deliberate. Ultimately, this led Mrs Justice Steyn to conclude that other key conversations had been deleted (rather than not occurred) and dismissed the claim accordingly, in favour of Mrs Rooney.

Adverse inferences were also drawn against a witness by Mr Justice Calver in a case concerning fraudulent nickel sale and repurchase transactions heard by the Commercial Court earlier this year[3]. In that case, a witness's WeChat messages were not disclosed. Various reasons were given for this failure including the fact that employees did not have personal WeChat accounts and that the WeChat app on the witness's company phone had been deleted by its two-year-old child. This was not accepted by the court who considered that the witness had deliberately deleted the WeChat app in an attempt to cover up the fraud. The claimant was awarded US$282 million in damages.

Depending on the nature of the dispute and relevant time period, an extremely large amount of data may exist. Once the data has been preserved and the disclosure process determined, we can work with you to identify the relevant documents including which sources should be reviewed.

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[1] *Rebekah Vardy v Coleen Rooney* [2022] EWHC 2017 (QB) – a defamation case involving the wives of two former England international football players.

[2] Civil Procedure Rules Part 31.

[3] *ED&F Man Capital Markets Limited v Come Harvest Holdings Ltd and others* [2022] EWHC 229 (Comm).

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