



## **DOCUMENT PRODUCTION**

### **DOCUMENT MANAGEMENT IN COMMERCIAL CASES**

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### **I. Introduction**

Commercial cases are often document intensive. Effective document management is a key aspect of counsel’s role and responsibility in such cases.

The process of document management begins with your initial client contact and continues through to the conclusion of the final arguments at trial. Conceptually, the process may be divided into three phases:

- (a) the collection of documents both from your client and from the other parties in the litigation;
- (b) the organization of the documents you have collected for production and review;
- (c) the analysis and retrieval of documents for use in discovery and at trial.

The goal of effective document management is to ensure that you have produced to and received from the other parties to the litigation all of the relevant documents, and are able to efficiently access the document material to your case from those that have been produced. The object of this paper is to identify a few practical points that may help in achieving those goals.

### **II. Collecting Documents**

#### **A. Your Client’s Documents**

The collection of documents from your client will normally begin with (or begin shortly after) your initial client meeting. The client will usually provide those documents that the client has identified as supporting the client’s claim or defence.

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The message that the client should receive from the outset is a simple one, and it should be sent loud and clear. All relevant documents must be produced. It is important to impress upon the client from the outset of the case that the obligation to produce extends to all documents in the client's possession that relate to the action, not just those documents that support the client's position.

The delivery of this message, however, is just the beginning, not the end of your responsibility as counsel in the collection of your client's documents. The B.C. courts have reiterated that "a very grave responsibility lies upon solicitors to ensure that their clients have made full and proper disclosure of all documents"; *Privest Properties Ltd. v. W.R. Grace & Co. – Conn.* (1992), 74 B.C.L.R. (2d) 353 at para. 44.

The decision of what is and what is not relevant must lie initially upon counsel preparing the list. Our rules depend upon his or her diligence in searching out from the client what documents are or have been in its possession and upon his or her integrity in listing those which are relevant. The decision of relevance must not be left to the client even where the client includes upon its staff a member of the Bar of this or any other country. (*Visa International Service Association v. Blockbrothers Realty Ltd.* (1983), 45 B.C.L.R. 305 (B.C.S.C.) at 307)

The classic statement of counsel's duty with respect to the disclosure of documents is found in the Judgment of Lord Wright in *Myers v. Elman*, [1939] 4 All E.R. 484 at 511:

The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realise the whole scope of that obligation without the aid and advice of his solicitor, who, therefore, has a peculiar duty in these matters, as an officer of the court, carefully to investigate the position, and, as far as possible, see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realise that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit, nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require, or if he insists on swearing an affidavit which the solicitor knows to be imperfect, or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to. That is the improper conduct which the judge has found to have been committed by the solicitor in this case, in his findings of fact which I have summarised above.

In a document intensive case, the discharge of counsel's "very grave responsibility" requires you to become familiar with the various kinds of documents created and received by your clients, and the method by which those documents or other records are maintained. This information may be obtained from your initial review of documents provided by your client, as well as from discussions with your client concerning how the client's documents and records are maintained.

Once you have an understanding of the various classes of documents and their sources, you should set out in a letter to your client the various classes of documents and records that you want to review, and the sources from which they should be gathered. This letter will assist you in focusing upon the kinds of documents you should expect to receive and will assist your client in collecting those documents for your review.

The instructions to your client should not be too specific. You do not want your client to become overly selective collecting documents for you. For example, if your litigation involves one of several different transactions that your client has engaged in with the other party to the action, and your client's documents with respect to all of those transactions with that party are filed together in one set

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of files concerning the other party, you should ask for delivery to you of all of those files so that you can assess which of the documents should be produced in the litigation.

To provide further assurance that all potentially relevant documents have been gathered from your client for your review, there are two other steps that you may take. One is to attend at your client's offices to review the filing system. Whether this step is necessary will depend in large part upon your client's organization of files and the extent to which you can rely upon that system to help identify files which may contain relevant documents.

Another step that should be taken, almost as a matter of course, no matter how organized your client's filing system may be, is to contact the individual principals who are involved in the events at issue in the litigation to determine if they have any further documents in their possession. Very often, individuals may maintain their own files or records outside of the formal files maintained by your corporate client. At the very least, these individuals may have a day-timer or other computer records that may be relevant to the issues in the action.

## **B. Foreign Documents**

If your client is a foreign company, it is possible that your client's documents may be in a language you do not understand. The fact that you cannot read your client's documents does not relieve you of your responsibility as counsel to take reasonable steps to satisfy yourself that all relevant documents have been produced.

You must, in such circumstances, put in place a structure that enables you to obtain an understanding of the documents in your client's possession and which of them should be produced. A description of such a process is set out in *Sumitomo Corporation v. Credit Lyonnaise Rouse Ltd.*, [2002] 4 All E.R. 68 (Eng. C.A.), which involved litigation arising out of the unauthorized trading activities of a former Sumitomo employee. The Court of Appeal described the document production process undertaken by Sumitomo, which had been initiated by its U.S. lawyers (PW) in response to regulatory investigations and class actions in the U.S.:

It included what was described in evidence as 'a comprehensive document collection exercise' at Sumitomo's offices in Tokyo and at its subsidiaries' offices in New York, Hong Kong and London. This exercise resulted in the assembling of some 6.9 m pages of documentation, mostly in Japanese. The next step was for a team of about 30 lawyers from PW, assisted by translators, to carry out a review of each document in this collection to determine whether and to what extent it was or might become relevant to the current, or any future, investigations and proceedings arising out of Mr. Hamanaka's unauthorized activities. Based upon this review, PW lawyers selected certain documents for inclusion in a computerized litigation database (the "PW database"). About 4 per cent of the totality of the documentation was imaged onto the PW database.

As part of this review process, which continued until 1998, PW commissioned English translations of some 5000 selected documents (about 30,000 pages, representing some 0.4 per cent of the totality of the documentation). The first step in the process of selection was for PW lawyers to identify relevant issues and transactions. The lawyers then reviewed each document with the aid of a translator. The translator would give a general indication as to the nature of the document and a summary of what it contained, and the lawyer would then make a judgment as to whether or not it should be translated, and if so with what degree of priority. Documents falling within the high priority category would be translated straight away, and with a high degree of refinement. Documents which were given lower priority were translated with less urgency and with lesser degrees of refinement. (*Sumitomo Corporation v. Credit Lyonnaise Rouse Ltd.*, *supra*)

It appears that there is no obligation to provide translations of foreign documents which are produced in the discovery process: *Jasper Millwork Ltd. v. Porden Co.*, [1997] 3 W.W.R. 653; *Bayer AG v. Harris Pharmaceuticals Ltd.*, [1991] F.S.R. 17 (Eng. C.A.) Ch. However, the English Court of Appeal in the *Sumitomo* case held that any translations that are prepared of foreign documents, even if those translations are produced for the purposes of the litigation are nevertheless subject to disclosure.

### **C. Documents from Other Parties**

Collecting documents from other parties is a much simpler process. In document intensive cases, the most efficient way to proceed will usually be to order a complete copy of all documents produced by the opposing party. Generally, it will be a much more efficient and effective use of your time as counsel to review the other party's documents in your office as part of your document analysis, rather than to spend time in the offices of opposite counsel making a preliminary assessment of whether you need copies of particular documents. Furthermore, there is the potential at this stage of the litigation to overlook documents that you would recognize as significant had you engaged in more extensive analysis of the documentary evidence. For these reasons, it is preferable to order a complete set of the opposing party's documents so that they are available for your review, unless it is patently obvious from the description of the documents, or a preliminary review of them, that they are simply duplicates of what you already have or will be of no assistance in the development of the evidence.

## **III. Organizing the Documents for Production and Review**

Once you have collected documents from your clients, those documents must be reviewed in order to determine which documents must be disclosed. This is not a clerical task. It requires an exercise of legal judgment. The determination of whether a document is relevant to the issues in the litigation or whether a claim of privilege should be asserted with respect to the document is one that should be made by a lawyer responsible for the conduct of the litigation.

### **A. A Preliminary Review and Index**

The first step in organizing the documents you have collected from your client should be to prepare a general index of the documents you have received. This index will provide a record of what you have received from your client, provide a general overview that will help you access those files and provide a structural framework to help keep track of documents produced from those files.

The index should employ a simple numbering system for the boxes and files you have received from your client. For example, if you have received five boxes of files, each box should be numbered box one through box five. Each file within the box should then be labelled with its box number and file number. So if box one contains 15 files, then each file would be numbered "Box 1, File 1" and then "Box 1, File 2" and so on. You can then prepare a summary of the contents of that file for the index, which will provide you with an overview of the documents you have received.

It may be that you will receive from your client some files in boxes and some files that are simply handed to you or delivered separately. Any such files should be boxed and numbered accordingly. Similarly, it is not unusual for your client to deliver boxes of files containing loose documents as well as files. These loose documents should be placed into a file with a notation on the physical file that it has been created by your office for document management purposes. As the result of this process, every document you have received from your client should be in a numbered file, and every file in a numbered box.

## **B. Maintain the Status of the Original Files**

Once your client's files have been indexed, the files must be reviewed to identify document for production and those in respect of which a claim of privilege should be asserted. In this process, care should be taken to preserve the status of the original file:

It seems trite to say that when legal difficulties arise, it is crucial to preserve all documents and to maintain the documents in their original file format. Any alternative method of organizing documents, be it chronologically or by issue, should be done with photocopies. (*Machias v. Mr. Submarine Ltd.*, [2002] O.J. No. 1261 (S.C.) at para. 33)

It is important to maintain the state of the original file because the contents of the file may reveal information as to when a document was created or received. For example, the date of creation of an undated hand-written note may be indicated by its location in a particular file. Similarly, the filing of a dated document in a particular file may indicate that it was received at a much later date in time than the date the document was created. Potentially valuable information of this kind will be lost forever if your original documents are commingled in the process of document production.

There are three techniques you may employ to preserve the state of your client's original document when organizing them for production and analysis. First, you may physically replicate the files in copying the documents for disclosure. For example, if "Box 1, File 1" contains 30 documents but only 10 of them are relevant and need be produced, copies could be made of those 10 documents and then filed in a folder marked "Box 1, File 1." If there are any documents in this file over which a claim of privilege should be asserted, copies of those documents would be filed in a folder marked "Box 1, File 1 - Privileged."

Each copy of a document made from a particular file should then be assigned a number that would indicate its source. For example, the first copy made of a document from "Box 1, File 1" would be numbered 1.1.1, referring to "Box 1, File 1, Document 1," and so on. This will enable you to keep track of the source of each document produced. You could then list the documents using these numbers, or create a further set of documents organized chronologically for listing and production purposes.

The second process involves numbering each page of your client's original files prior to their review for document production. Under this type of system, each and every page of a document is given a unique number. There are various numbering systems that can be employed. In its simplest variation, the originals are numbered beginning with "File 1" and "Box 1" consecutively through all of the documents. A record is then kept on your index of the page numbers within each file. For example, "File 1, Box 1" may contain pages 1 to 225. Once documents are copied for production from this file, you will be able to identify where the original is located from the page numbers of the document.

A third method is used in conjunction with the creation of document databases. Each document flagged for production or privilege is given a record number. This record number is then used to record information and link images to that objective information. The first piece of information recorded in this process is the source of the original document.

Using one of the above systems, you can then organize your documents for production according to date, file or issue without disturbing the state of the original file. There should be no further need to work with the original files unless it is necessary to view a document in its original state.

### **C. Other Parties' Documents**

Little needs be said about the organization of documents received from other parties in the litigation. These documents should be organized in binders according to the list of documents to which they relate. This set of documents can then be available for reference in examinations for discovery and working copies can be made from this set for use in your document analysis.

## **IV. Analyzing and Retrieving the Documents**

### **A. Document Database**

The most effective and efficient way to analyze and retrieve your document is through the use of a document database. The document database can consist of a combination of recorded information about the document, the image of the document and its text. Obviously, the more information your database contains, the more powerful it will be as an analytical tool.

The first step in the construction of the document database is the entry of the basic objective information for each document record. This will include the type of document, the date, the author and recipient, and the source of the document. While counsel should be involved in the criteria for identifying types of documents, the entry of the objective data is a task that obviously can be performed by your support staff.

Once the objective information has been entered for each document, both your client's documents and those that have been produced by the other party, counsel can then begin the process of analytical review. This process will result in the inputting of further information into the document database based upon counsel's subjective assessment. Issues, witnesses, questions or comments can all be linked to the record document in the database.

Once this process is complete, you will be able to organize your documents by a number of variables, such as issues, witnesses and dates. This will assist in identifying key documents and preparing documents for use in discovery and discovery at trial. The criteria you have entered can also be used to quickly locate particular documents or classes of document.

There are two recent CLE papers that discuss in greater detail the construction of document databases. They are:

- (a) R.J.R. Hordo, QC, "Pretrial Management of Documents of Commercial Cases" in the CLE materials *Document Management*, May 31, 2001; and
- (b) Amy J. Lewis, "Document Management in Complex Litigation" in the CLE materials *Civil Litigation for Legal Support Staff - 2001 Update*, October 26, 2001.

### **B. Chronology and Issues**

If you are not using a document database, then it is essential to create a chronology of your documents cross referenced to the list of document number. This chronology can evolve as you review documents in the manner in which they are produced, or you can physically reorganize a set of all the documents in the litigation into chronological order. Whatever method you choose, the chronological analysis of the documents is recommended because otherwise there is a real risk that you may miss the significance of documents that are chronologically related but have been physically separated in the document production process.

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The other method by which documents should be analyzed is by issue. From your chronology, you should be able to easily prepare an outline of all the documents that relate to particular issues. The chronology and issue outline can then be used to assemble documents for use in cross examination in discovery and trial.