

Sharing Documents

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Document Management in Complex Litigation Files

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SHARING DOCUMENT RECORDS WITH THE OTHER SIDE:

BEST PRACTICES ON DOCUMENT SHARING IN A COMPLEX LITIGATION MATTER

THE NEED TO SHARE DOCUMENTS ELECTRONICALLY

As litigation and dispute resolution processes evolve, and our use of computers and technology follows suit, document production and the manner in which records are obtained and produced is also changing. Increasingly, we receive records from clients in an electronic format and, most often, even if the records are provided in paper format, they are scanned and produced electronically.

As a result, in particular in large scale, complex litigation, which often involves multiple counsel, corporate clients with documents being obtained from a number of custodians, and records which span many years, it is important to ensure that a coherent and cohesive method for obtaining and producing records is prepared and agreed to among the parties to the litigation as early in the litigation or dispute resolution process as possible.

Review Teams and Co-Counsel

At the outset of the litigation or dispute resolution process, when addressing the issue of record production, it is critical to determine who will be reviewing and accessing the records, both internally and externally.

In complex litigation, it is common that a team comprised of associates, paralegals and partners will often be involved in reviewing and producing documents. It is therefore critical that all individuals involved internally begin with the requisite information that will guide their review. In particular, all members of an internal "review team" should be provided with:

1. All relevant pleadings; and
2. Any guide to assist in the process of coding the documents for production.

In addition, it is important to understand whether co-counsel will also be reviewing documents, whether this is in-house instructing counsel, or counsel from another firm with whom documents will be shared and reviewed in advance of the production of records in the litigation or dispute resolution process.

As will be discussed further below, if external counsel will also be reviewing documents, all parties involved must have an understanding of the anticipated process and the issues in the litigation to enable any difficulties regarding accessibility to be determined and addressed.

Clients and Experts

In addition to counsel, it is likely that both clients and experts will be participating in the record review and production process. It is important to ensure that clients understand the way in which records will be obtained and produced in order to ensure that they can assist to the greatest extent possible. It is helpful to ensure that the method of record production makes sense to the client, to allow them to continue to assist throughout the litigation process. For example, if a client has been heavily involved in obtaining records internally and has some familiarity with the records, but is then unable to locate any of the records once they have been produced, their ability to assist is significantly decreased. A client's input is invaluable as they may be able to provide helpful suggestions for the organization of records and for searching within the records themselves.

In the same manner, experts must be able to access the records in order to prepare any expert opinions or reports. Not only must the expert be able to review the records, but they must be able to properly identify the records that they are relying upon in the preparation of their opinion such that the opposing parties understand the basis for the expert's opinion. This requires counsel to explain to the expert not only how to review the records, but also how to reference the records that have been produced.

Other Parties

In order to ensure that document production is as efficient as it can be, as will be discussed in detail below, it is helpful to reach an agreement with respect to record production as early as possible in the litigation process. It is important to have an agreement in place with respect to the methods by which records will be obtained internally and produced to ensure that there is consistency among the parties once document production actually takes place. Without this type of discussion and agreement, there is the possibility that one party will produce records with significantly more (or less) information than the other. It is for this reason that an agreed upon Document Protocol is of significant assistance, in particular in complex litigation.

SHARING DATA: THE COMPONENTS OF AN ELECTRONIC DOCUMENT RECORD

Sources of Data

The vast majority of document records are created in electronic format; and much of it is never printed to paper. Electronic records in native format may be the best available source of records for disclosure. They provide the most accurate information about the content and creation of a document record, and are usually the least expensive way of producing records for disclosure. Paper