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Organizing Your Evidence (Including Documents)

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ORGANIZING YOUR EVIDENCE (INCLUDING DOCUMENTS)

I. Introduction

There are a number of reasons why organizing your evidence for trial is an important topic that should be considered throughout the progress of a file, including:

(a) You want to make the best and most efficient use of your time in running a litigation file;

(b) You want to be sure you put all the evidence you need before the court;

(c) You want to put your evidence before the court in an organized and persuasive manner;

(d) You want to be able to anticipate and address objections as to admissibility or relevance;

(e) You do not want to be scrambling to locate documents or other information during trial;

(f) To the extent you can, you want to have reached agreements with your friend on documents, admissions, agreed statement of facts and other matters.

In this paper, I will address some things to consider and strategies to implement to organize your evidence before trial, during trial preparation, and at trial.

II. Before Trial

It is helpful to establish a system that enables you to manage correspondence, memoranda, information, documents, research, "to do" lists and other information from the time you are retained through to trial.

The comments in this paper are geared towards a civil litigation practice in which most matters will lead to resolution either by way of summary process or a fairly short trial.

A. File Organization

A litigation file should be organized to make it easy for you to find information to prepare for and conduct the trial. This is increasingly important in the days of information overload in which we currently find ourselves. It is not helpful to have every communication stuck in a correspondence file, or every email saved to a single email folder, for the case.

Every lawyer has his or her own file system. The goal should be to implement and follow a system that organizes communications, documents, work product and other file material in a way that makes it easy to both manage the file and locate information when you need it.

One example of how to organize a hard copy file might be to use a large accordion file containing sub-files for specific categories of information, such as:

(a) Contact information for people involved in the file (the client, opposing counsel, etc) – this is often most usefully kept on a single sheet of paper at the front of the correspondence file;

(b) External correspondence file;

(c) File for memos-to-file and inter-office memos;

(d) "To Do" list on a board (or on computer);

(e) Pleadings and proceedings (coloured board or binder with index);

(f) Witness statements and information;

(g) Documents (client's and opposing party's) in files or in binders;

(h) Discovery transcripts and exhibits;

(i) Law/legal research (cases and memoranda);

(j) Experts; and

(k) Accounts.

Electronic file organization is equally important. As with a paper file, use folders and subfolders to store categories of information similar to those listed above. Develop a protocol for naming documents when saved to the system so that it is easy to locate files. Be detailed and specific; the content of the file should be apparent from its name ("Memo to file" is not helpful; a better choice would be "Memo to file re: witness interview with Jane Doe").

Whatever your system is, the key is to develop a file management system that works for you. There is no one "right" way to do this; through trial and error counsel should strive to identify and refine a system that works for their practice. Work with the team assigned to the file (lawyers, paralegals and legal assistants) assistant so that the system is followed by everyone and used automatically.

B. Chronology

Some people regularly maintain a chronology of relevant events for each file. It can be a very useful tool, particularly when developed at an early point in the file. Some chronologies are simple timelines. Others are more detailed. Tom Manson once gave an in-house presentation entitled something to the effect of "lawyers die (or go to the bench) but files go on forever." His thesis was that your file should always be prepared such that a new lawyer can pick up the file, read the chronology and theory of the case, and be able to get up to speed in a short period of time. His practise was to develop a detailed chronology for every file. He would start with the style of cause and a simple summary of the issues, and add to it after he interviewed witnesses, attended discoveries or reviewed documents. This type of chronology is a very useful system, and can be a very effective tool for refining your theory of the case, focusing the issues in dispute, and preparing your case for trial.

C. Documents

Increasingly, documents are stored, managed and produced electronically, even in relatively small files. Where this is the case, take advantage of the ability to name and annotate documents in a way that makes them easy to locate through electronic searches.

Many counsel do still prefer binders of hard copy documents using the list of documents as an index, which is manageable where the number of documents remains relatively low. In a file with a significant volume of document production, consider creating binders of key documents so that you are not overwhelmed with paper.

D. Examinations for Discovery and Exhibits

(a) Keep the original discovery transcript separate. Do not mark it up. You will likely have to give it to the judge during the trial.

(b) Make an index to the exhibits from the examination for discovery and keep the list and the exhibits with the discovery transcript.

(c) Keep a record of the outstanding questions and the responses in this file as well.

(d) You may want to prepare a summary of or index to the Examination for Discovery and keep it in the file as well.

III. Trial Preparation

By this time, the pleadings have closed, and you have interviewed your witnesses. You have completed discovery of documents and examinations for discovery.

You should also have settled on your theory of the case. The theory will tell you what evidence you need to prove your case.

The importance of settling on a theory can be seen from the following two examples from Mauet et al, Fundamentals of Trial Techniques, at 350-51:

> [1]In a manslaughter case, the evidence will show that the accused shot her husband. The accused's statement to the police is that they argued and struggled over a gun, which the accused grabbed and then used to shoot her husband.

As Crown counsel, is your theory:

- — the accused's statement is untrue, and the accused shot her unarmed husband because they had gotten in an argument? [or]
- — the accused's statement is true, but the accused was not entitled to use deadly force against an unarmed person? (unreasonable defence)

> [2]In an automobile negligence case, the plaintiff pedestrian is struck by defendant's car at an intersection. Some evidence will place the plaintiff within the crosswalk with the walk-light green. Other testimony will show the plaintiff was outside the crosswalk, jaywalking across the intersection.

As plaintiff's counsel, is your theory:

- — plaintiff was on the crosswalk and had the right of way? (ordinary negligence)
- — plaintiff was not on the crosswalk but was injured because the defendant could have stopped his car but didn't? (last clear chance)

When organizing your evidence for trial, keep these questions in mind:

(1) What witnesses do you need to call to prove your case? What evidence can your witnesses give that will undermine the other party's case?

  (a) Do you need to subpoena any of my witnesses? (Rule 12-5(31)–(35)))

  (b) In what order should the witnesses testify?

(2) What information can you get on cross-examination?

(3) What documents do you need to have entered as exhibits?

  (a) Can you reach a document agreement with opposing counsel?

(4) How can you use the discovery evidence?

(5) Are there any issues as to admissibility of any of the evidence you want to adduce?

(6) Are there any notice requirements that must be given regarding your evidence?1

Some of these topics have been or will be addressed by other presenters. I will refer to four.

A. Choosing Your Witnesses

Choosing your witnesses is a critical decision. No matter how good your Minutes of Evidence are or how well you have prepared your witnesses for cross-examination, once they are on the stand, they are largely on their own. The case will likely turn on how their evidence is presented and received.

In many cases, you do not have a great deal of choice as to who to call as witnesses. The eye witness probably has to be called, as do the key participants. If you have a choice, exercise it carefully.

(i) Consider the witnesses' demeanour. Will she "present" well? Is her evidence likely to be believed?;

(ii) Does she have evidence that is harmful and which may come out in cross-examination?;

(iii) Is the witness biased for or against your client?; and

(iv) Is the other party likely to call the witness in any event? If so, you may be able to get the information you need on cross-examination.

It is good practice to communicate trial dates to your witnesses as soon as they are known, to avoid a difficult conversation closer to the trial date when you learn that one of your witnesses plans to be out of the country on vacation during the trial To the extent you have any concern about attendance at trial, err on the side of caution and subpoena the witness.

B. Order of Witnesses

You will want to lead your witnesses in the way that makes the evidence most easily understood by the judge. That usually means that the witnesses should be called so that the evidence is presented chronologically. Keeping in mind the adage, "all generalizations, including this one, are false," here are a number of propositions to keep in mind when you are deciding on the order of your witnesses:

(i) Your first witness is your most important witness. This is the Court's first impression of your case. You want it to be a good impression. This witness should be able to provide the background and context to the case, as give evidence on matters in issue.

(ii) Your last witness is usually the second most important witness. This is the rule of "primacy and recency." People tend to remember the first and last witnesses most clearly.

(iii) Between the first and last witnesses, there is greater flexibility in the order of your witnesses, subject to trying to present the evidence chronologically or on an issue-by-issue basis.

(iv) If you have two witnesses giving "overlapping" evidence on a particular point, have the strong witness with better recollection of detail go first.

(v) If you have "bad" evidence, bury it as best you can in the middle of the day, in the middle of a witness's evidence.

(vi) If you are presenting expert evidence, consider whether the expert evidence will be more readily understood if given after the party's evidence, or whether the party's evidence will be better understood with the expert's evidence in mind.

(vii) Having to attend Court to give evidence is almost always inconvenient for witnesses. Sometimes it is very inconvenient. Accommodate them if you must, but remember, this is your client's only opportunity to make her case. Putting witnesses on out-of-order can make it harder for the judge to understand the evidence and weaken your case.

Do not forget the Rules regarding the exchange of witness lists. Under the Rules, parties must exchange witness lists at least 28 days before trial or as set in a case plan order: Rule 7-4.

C. Document Agreements

A document may be marked as an exhibit and admitted for the proof of the truth of its contents if a witness has given admissible evidence as to the authenticity of the document and the content of the document.

Authenticity means that the document is what it appears to be. It means that the document was written by the author and sent to the named recipient, on or about the date of the letter. Proof that a document is authentic is not proof that the facts contained in the letter are true. If you need to establish the truth of the content of the letter, you will need an agreement to that effect, or you will need to call a witness.

For example, in a wrongful dismissal case, the employer may tender a warning letter from an earlier employment offence. Proof of the authenticity of the letter would not prove the earlier offence. To prove the earlier offence, a witness should give evidence about the contents of the letter; that is that the employee had been insubordinate and the letter was written to put the employee on notice that further infractions would lead to more serious discipline up to and including termination of employment.

In most cases there is no issue as to the authenticity of a document, and it is appropriate to enter into an agreement with your friend to avoid wasting time proving each document.

Sometimes there is little dispute about the content of the documents, and the parties may agree that some or all of the documents may be admitted as prima facie evidence of the facts and opinions in them, subject to proof to the contrary, or specific objections as to relevance, privilege or other such ground.

However, often there are disagreements about documents. Problems arise when counsel have not considered what a document will be used for. In Samuel v. Credit Canada Ltd., 2007 BCCA 431, the Court of Appeal considered the admissibility and weight to be given to statements in a book of documents put before a jury. It was a personal injury case. The book contained 325 pages of MSP print outs, prescriptions, clinical records of various doctors, etc. There was no document agreement.

The decision is a helpful review of points that counsel should keep in mind when tendering documents:

(a) counsel tendering a book of documents should inform the trial judge as to the purpose for which the book could be used;

(b) the practice of tendering copious volumes of clinical records is to be discouraged ("trial by Xerox");

(c) the mere filing of documents does not make all the statements in them true;

(d) counsel must analyze whether a statement in a document is admissible; and if so for what purpose.

> …clinical records should not be admitted into evidence, by consent or otherwise, unless counsel identify the specific purpose for particular potions of the records. Furthermore, it would be preferable to introduce discrete portions of the records when they become relevant so their admissibility can be ruled on at the time when the jury will better appreciate the purpose of those portions in the context of the case and will have the assistance of a contemporaneous limiting instruction. In no event should a "book of documents simply be handed up to the court and admitted as a whole." [para 89]

Three sample document agreements are appended to this paper. Note that the first two are primarily "authenticity" agreements only. The agreements do not address the concerns raised in Samuel v. Chrysler Credit Canada Ltd.; that is, for what purpose is the document tendered?

A further caveat: be careful when you admit the authenticity of all documents. If your case turns on the fact that a document was dated a certain date, or was sent or received in the ordinary course, an admission could be fatal. In Gordon v. McDonald, 2005 BCCA 261, an issue was whether the

plaintiff/appellant had delivered a notice to the defendant/respondent. The plaintiff argued that his lawyer faxed a form of notice to him, and that he then delivered it to the defendant that same day. The oral evidence was inconsistent. The trial judge was not persuaded that the plaintiff had effected timely delivery. On appeal, the Court referred to the document agreement that, with respect to letters by lawyers, "that they were sent, so my friend doesn't have to call the lawyer to say I sent this letter."

The Court of Appeal held that the admitted delivery from the lawyer to the plaintiff did not conclusively prove the consequent delivery to the defendant, but it was evidence upon which an inference could be drawn. That conclusion, along with another conclusion, led to the appeal being allowed and a new trial directed.

D. Anticipating Objections to Evidence

When you are preparing your witness statements and gathering documents you wish to mark as exhibits, you should consider whether objections might be raised as to the admissibility of the evidence or the purpose for which it may be used. The time to prepare for those objections is before trial. Have an outline of the argument for admissibility and sufficient copies of the authorities for your friend and the court. If your friend does not object, you may not need to make the argument. Far better to be prepared than to have evidence excluded because you were not.

IV. At Trial

Lastly, you need to organize the materials you will need in court. The goal is to be able to put your hands on the document or transcript page without delay. You want the paperwork to be organized so you are free to concentrate on the trial. This is where the investment of time in establishing and maintaining file organization and document management systems pays off.

A. Documents/Exhibit Brief

You will need to prepare all the documents that you want to mark at trial, in a form convenient to the court. Your documents should be organized (probably chronologically) indexed and bound. Consider how you want to describe the document exhibits. It is convenient to mark your brief of documents as, for example, "Exhibit 2", with the individual documents referred to as Exhibit 2 – [Tab #].

You may have documents that you have reserved for use in cross-examination. Keep them separate, but have copies for the witness, your friend, the judge and the court clerk. Think of how you (and the court) will keep track of them. A stack of loose papers is not the best system. One option is to put your "in chief" documents in a three ring binder, with extra tabs at the back. Your additional documents can be inserted in the binder as they are marked

1. Binder re: Objections to Evidence

You will have anticipated objections that may arise at trial, and prepared arguments in support of your position, and copied the supporting authorities. If you have more than one or two, put them in a binder and prepare an index

2. Original Discovery (for the Court) and Exhibits

You will need to have the discovery evidence on hand. The original transcript should be available for the judge. A set of exhibits should also be on hand. You should cross reference the discovery exhibits to the trial exhibits. You should keep a copy of your and your friend's list of "read-ins" in the file as well.

3. Brief of Authorities and Draft Argument

By the time you are at trial, the issues should be fairly clear, and you should have a good idea of the facts. You should be able to draft a final argument and have a tentative brief of authorities prepared. As the trial progresses, update the draft argument to refer to the evidence. Note admissions. Prepare your response to bad evidence. If new issues arise, add them to the argument.

Your job is to make it as easy as possible for the judge to decide in your favour. Being able to present a written argument, replete with references to the evidence and a clear legal analysis, assists the court.

4. Counsel's Trial Brief

Lastly, you will need a system for keeping track of your witness statements, notes for cross-examination and other materials at trial. This will be your trial brief. Everyone has a different structure. I keep a tabbed binder that follows the order of events at trial.

(i) Plaintiff's opening

(ii) Plaintiff's witness #1- direct

— cross-examination

(iii) Plaintiff's witness #2- direct

— cross-examination

(iv) Discovery read-in

(v) Defendant's opening

(vi) Defendant's witness #1- direct

— cross-examination

(vii) Defendant's witness #2 - direct

— cross-examination

(viii) Reply

(ix) Plaintiff's closing argument

(x) Defendant's closing argument

(xi) Reply

You will have inserted the minutes of evidence for your witnesses, and your notes for cross-examination of the other party's witnesses.

By the end of the trial you will have a complete record of the trial.

V. Conclusion

Organizing your evidence for trial is not magic. It is preparation and common sense. If you are prepared going into the trial then you are in a far better position to deal with surprises that will occur during the trial. You can focus on being persuasive.

VI. Appendix A—Sample Document Agreement #1

"STYLE OF CAUSE"

DOCUMENT AGREEMENT

1. "Document" shall have an extended meaning and shall include a drawing, photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device.
2. By filing a copy of a document as an exhibit, the document shall, without further evidence, be *prima facie* proof that:
    (a) a copy of a document is a true copy of the original document,
    (b) it was written or created or is effective from the date it bears on its face,
    (c) where on its face or by its content or nature it was intended to be delivered to another person (e.g., a transmittal slip) that it was so delivered in the normal course of business, whether by post, fax, telex or physical delivery,
    (d) where on its face, it purports to have been written or created by or under the instructions of the person who signed it, or purported to authorize its creation that it was so written created or authorized, and
    (e) where it purports on its face to have been received on a particular date or at a particular time that it was so received.
3. Any party may lead evidence to contradict any document filed in accordance with this Agreement or prove that a document was not written by or under the instructions of the party whose signature appears on it or the date or dates that appear on the face of the document are incorrect, or prove that the document was not sent or received on a particular date or at a particular time.
4. Each party shall provide to each other party, on or prior to [fill in date] a list of the documents it intends to adduce at trial. Within two weeks, any party which objects to the admissibility of any document listed by another party shall give notice of objection to all other parties.
5. Each party shall be at liberty to seek such further directions from the case management or trial judge as may be required to resolve questions of proof of documents at trial.
6. Copies of documents, rather than originals, may be tendered as evidence at trial unless any party prefers the original.
7. Nothing in this agreement shall be deemed to restrict the right of any party to make proof of any fact by the mere filing of a document which is otherwise permitted by law or order of the Court.
8. Nothing contained in this Agreement shall limit or restrict the rights of any party to produce evidence or prove documents in any manner that might otherwise be permitted if this Agreement had not been made.
9. Nothing in this Agreement shall prevent any party from objecting to the entry into evidence of any document on the ground of relevancy, privilege or any other ground not in conflict with this agreement.

Dated:

_____

Counsel for the Plaintiff

_____

Counsel for the Defendant

VII. Appendix B—Sample Document Agreement #2 (Medical Records)

DOCUMENT AGREEMENT

The parties are agreed that the documents in the various Binders of Documents will be admitted into evidence on the following basis, in all cases subject to proof to the contrary or specific objections as to admissibility:

1. the documents are accepted as accurate photocopies of originals;
2. if dated, the document was prepared on or about the date shown;
3. if an author is indicated, the document was prepared by or on behalf of that person who had knowledge of its contents at the time;
4. purported signatures appearing on a document are authentic;
5. hospital records are business records, and the statements of fact as set out in the hospital records are proof that the statements were made in the ordinary course of business;
6. specifically as to the clinical records, without limiting the effect of paragraphs 1 through 5 above and subject to specific objection, the parties further agree that:
    (a) the doctor saw the plaintiff on the day in question;
    (b) the plaintiff was examined on that day;
    (c) treatments were prescribed as recorded;
    (d) medication was prescribed as recorded;
    (e) any medical procedures occurred as stated in the records; and
    (f) unless otherwise proven under Rule 11, opinions are admissible only for the purpose that the opinion was held and recorded and not for the truth of the opinion.

AGREED TO:

_____ _____

Counsel for the Plaintiff Dated

_____ _____

Counsel for the Defendant Dated

VIII. Appendix C—Sample Document Agreement #3 (Business Records)

DOCUMENT AGREEMENT

The parties are agreed that the documents in the various Binders of Documents will be admitted into evidence on the following basis, in all cases subject to proof to the contrary or specific objections as to admissibility:

1. The documents are accepted as accurate photocopies of originals;
2. If dated, the document was prepared on or about the date shown;
3. If an author is indicated, the document was prepared by or on behalf of that person who had knowledge of its contents at the time;
4. Purported signatures appearing on a document are authentic;
5. The documents in the agreed Binder of Documents are business records, and the statements of fact as set out therein are proof that the statements were made in the ordinary course of business;
6. Specifically, without limiting the effect of paragraphs 1 through 5, the parties further agree that the facts and opinions contained in the said business records are *prima facie* evidence of those facts and opinions, subject to proof to the contrary or specific objections as to admissibility.

AGREED TO:

_____ _____

Counsel for the Plaintiff Dated

_____ _____

Counsel for the Defendant Dated