Raising the Bar

Yours to Discover: 10 Tips for Navigating the Documentary Discovery Process

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In Ontario, the parties to a lawsuit are required to disclose all relevant documents in their power, possession or control.[1] This obligation is fundamental to the civil litigation process, and its core purpose is simple: "to prevent surprise and trial by ambush."[2]

In practice, however, the "documentary discovery" process can be complex, costly and overwhelming – particularly for employers, who are often in control of a disproportionate number of the documents that may be relevant to the legal proceeding.

In this issue of *Raising the Bar*, we share 10 tips and best practices to guide employers embarking upon their next trip through the document discovery process in a manner that is not only compliant with their legal obligations, but also controlled, strategic and cost-effective.

1. **Preserve Relevant Documents**. The duty to preserve all documentary and electronic evidence arises when litigation is reasonably anticipated – in other words, it can arise *before* the lawsuit is commenced. Therefore, employers should have a preservation plan (including template communications to internal and external custodians) that can be tailored to the issues and implemented as soon as a lawsuit is anticipated.
2. **Prevent Spoliation**. The intentional destruction of documents that may be relevant to ongoing or contemplated litigation is strictly prohibited. This act is referred to as "spoliation" and, once established, gives rise to a presumption that the destroyed evidence would have been unfavorable to the party that destroyed it.[3] Accordingly, it is imperative that employers take steps to preserve relevant documents, including by using some of the tips in this article.
3. **Identify Privileged Documents**. Relevant documents that are covered by a form of privilege (e.g. solicitor-client, litigation or common law) must be identified and disclosed, but do not need to be produced. Where a party has claimed privilege over a document (and that claim has not been successfully challenged), the document cannot be used as evidence unless the party waives its claim at least 90 days before trial. When collecting relevant documents, employers must consider whether any documents could be privileged so that they can raise that issue with counsel. Employers must also be mindful that they may stumble upon potentially privileged documents belonging to an employee (e.g. in an employee's email inbox) and should immediately contact counsel should this occur.
4. **Beware of Implied Waiver**. A party that claims privilege over a document may implicitly

waive that claim by intentionally disclosing a part of the document. This situation is referred to as “implied waiver.” Employers must ensure that all issues of potential privilege are canvassed with counsel, so that informed decisions about disclosing privileged documents can be made.

5. **Make Appropriate Redactions**. As a general rule, relevant documents must be produced in their entirety without any redactions.[4] Redactions may be permissible, however, when the specified portion is clearly not relevant and there is “good reason” why the information should not be disclosed. In the context of employment litigation, consideration should be given to protecting the privacy interests of employees who are not involved in the action and whose personal information is not relevant.
6. **Consider Confidentiality Agreements**. The privacy interests of non-parties may also be protected in certain cases through the use of confidentiality agreements. Employers who are concerned about customer or employee personal information should consider asking opposing counsel to enter into a confidentiality agreement before production of those documents.
7. **Monitor “Without Prejudice” Communications and Act Promptly if Disclosed.** Communications that are made on a “without prejudice” basis, in an effort to effect a settlement, are generally inadmissible as evidence (this is also referred to as settlement privilege). Employers should keep track of these communications and respond promptly to opposing counsel if they are disclosed or used inappropriately. If an employer fails to act promptly, it may lose its chance to do so. For example, in a recent employment dispute, the plaintiff (employee) included statements in her Statement of Claim that had been made by her employer without prejudice; the defendant (employer) then filed a Statement of Defence and waited four months before bringing a motion to strike out those portions of the Statement of Claim.[5] In that case, the Court held that the employer had effectively given up its right to move to strike the without prejudice statements.
8. **Be Mindful of the “Deemed Undertaking” Rule.** In Ontario, all parties and their lawyers are expressly prohibited from using documents obtained through the discovery process for any purpose outside of that proceeding (Rule 30.1). Subject to certain exceptions, this so-called “deemed undertaking” rule prevents the party receiving the document or information from revealing it to any third parties (including, for example, the media) (Rules 30.1(4)-(8)). It is important that employees in the organization who need to view the other side’s Affidavit of Documents are advised of the limitations on their use.
9. **Carefully Review the Affidavit of Documents.** Employers must carefully review the Affidavit of Documents for completeness and to identify issues such as waiver and redactions, to assist lawyers in identifying potential issues.
10. **Talk to Your Lawyer!** Lawyers in Ontario have a professional obligation to advise their clients on all aspects of the discovery process, including the necessity of full disclosure and the kinds of documents that are likely to be relevant. As soon as litigation is reasonably anticipated, employers should be seeking assistance from their lawyer to ensure that they understand their preservation and discovery obligations.

[1] Rule 30.02 of the *Rules of Civil Procedure* (Rule or Rules).

[2] *Iannarella v. Corbett*, 2015 ONCA 110, para. 33.

[3] *Leon v. Toronto Transit Commission*, 2014 ONSC 1600, para. 9.

[4] *King v. Picard*, 2017 ONSC 1647, para. 12, citing *McGee v. London Life Insurance Co*., 2010 ONSC 1408.

[5] *Gaska v. G.R.T. Genesis Inc*., 2019 ONSC 1491.