

I Love Document Reviews

Before I became a lawyer, I was both a law secretary and a paralegal, and in all of these roles I have loved doing document reviews. I have now been practicing law for more than twenty-five years, and I still enjoy poring through documents, both those of my opponents and those of my client. I cannot imagine a better way of getting the feel of a case—the good, the bad and the ugly—than actually getting my hands dirty handling documents.

Paper discovery can often reveal the weaknesses in an opponent's case; it can also expose the weaknesses in your own client's case. And who has not gotten that *frisson* of excitement from actually laying hands on the smoking gun?

Of course, discovery can also provide you with, we hope, admissible documentary evidence to prove your view of the facts to a judge or jury. It is a rare case that proceeds on testimony alone. Documents are the building blocks upon which lawsuits rest, and I doubt there is an American lawyer practicing who would disagree.

Why, then, do so many associates (maybe including

you) lament that they have been assigned to review documents, whether the client's or an opponent's?

"It's boring," you may say. "This is not why I became a lawyer."

The only positive thing most new associates say about document review: great billables! What they don't realize is that reviewing documents produced in discovery is the equivalent of peeking in a friend's medicine cabinet or going through his closet. The rules of civil procedure are license to snoop. If you have an interest in people—and you must to be a good litigator—document review is an opportunity to find out the intimate thoughts of the people involved in your case, whether they are acting as employees of corporations or as individuals. Documents also, of course, help explain your story of what happened in the case, and why your client is the good guy.

E-discovery has fundamentally changed the way discovery looks and feels, but, additionally, it has added a greater personal component to what we can find out during document review. Correspondence by way of letters is more considered than emails; people email each other not just about work but about personal matters, often in the same email. Routinely, we find personal emails among those relating to our corporate cases, and those personal emails can both spice up the review experience and provide insight into why corporate decisions are made.

Another huge benefit of document review is that it is educational. Every litigator worth her salt becomes an expert in the subject matter of her case, at least for the time the case

goes on, particularly if the subject matter is new to her. I have always enjoyed being a litigator for this reason: I get to learn the ins and outs of welding, for example, or of the corporate structure of my client, for another. For the life-span of the case, I know more about the subject than most people, except for experts (and sometimes even more than they do). And it is the documents I've reviewed that have given me this knowledge.

The first time I realized how much I could learn from documents about the subject matter of a case was when I was working as a paralegal at a large New York City firm, approximately 150 years ago. There was no Internet and no email, although there was (despite what my son thinks) paper, pens, and computers.

I was ushered into a roomful of hundreds of thousands of documents, and I was asked to Bates-stamp them, catalog them and summarize what I found. Specifically—unlike what I later learned I was supposed to do when reviewing documents as a lawyer—I was to set out in a list the nature of every document (letter, from whom, to whom, date). I was told very little: the case involved an oil refinery in Newfoundland. The owner of the refinery was suing the manufacturer of one of the components of the refinery because it didn't work as it was supposed to. Go fetch, Janet.

I started out not understanding a word of what I was reading, which was actually irrelevant given the limited nature of my job; documents referring to a cracking unit were puzzling, to say the least. But, by the second day, I found the Rosetta Stone of oil refining, an article that had

appeared in a trade journal about cracking technology. I found myself reading the article.

I discovered that raw gasoline recovered from petroleum consists of light naphtha and heavy naphtha. Light naphtha is processed through an isomerization unit and heavy naphtha is processed in a catalytic reforming unit, or reformer, so that gasoline octane is improved. Gas oil is converted in fluid catalytic cracking and hydro cracking units into gasoline and diesel.

Now it was clear what the case was about—an important and material part of the refinery, which allowed the refinery to make crude into fuel for transportation, was malfunctioning. (Today, a lawyer puzzling over unfamiliar technical terms can turn to the Internet, which often can provide helpful explanations.)

Finding the article on catalytic cracking made me feel as though I had really accomplished something—and I had, in fact, suddenly become familiar with the case and the facts and the technology. I now read through the documents charting the cracking unit's failures with real understanding. And I was the hero for the lawyers on the matter, who circulated copies of the article on the technology so that they too could understand their own case. Going the extra step—actually reading the document and calling the lawyers' attention to it—made me a valued employee as well as a better one.

Now, as an environmental lawyer, many of the documents I review are lists and charts of chemical data, field logs and notes, and other highly technical papers. My environmental knowledge is much more extensive than it was those

many years ago as a paralegal, and so they actually mean something to me. And it is important that I review the data, not leaving it to an environmental consultant to interpret for me, because, on more than one occasion, I was familiar with a regulatory change in allowable limits for contaminants and the consultant was not. My review of the data made a real difference to my client, since it showed that his property had contamination that the state environmental agency would require to be remediated. The consultant's report would have been incorrect, lulling us all into a false sense of security.

I have always been amused that the records of soil tests involving penetration of the soil, hundreds of which I've reviewed over the years, are known as "boring logs." They can be boring, and a few of my associates have keeled over from the tedium of reading them through. But they are important to the matters we handle. They document the basic field tests showing the geologic makeup of soils and layers of contamination or water infiltration. They are an environmental lawyer's independent verification of an environmental consultant's conclusions about the presence or extent of contaminated soil. In the construction law field, boring logs will either support or undercut a party's contentions about whether or not a site is appropriate to handle the load of a particular building.

As I have made clear, I love document reviews. I believe doing them is essential to building a case or a defense. But if you don't like them, or you know someone who doesn't, what can you do to change the negative attitude? Along the lines of "glass half-full/glass half-empty" discussions, the key is to

change your mindset about what you're doing, and to realize that there's a whole lot more to document reviews than "great billables."

1. Getting Your Hands Dirty Is Important

For those of us who have pawed through papers in musty warehouses, soggy basements, and steamy attics, getting our hands dirty is a literal description of document discovery. One of my first experiences with document discovery as a lawyer was accompanying the president of a corporation I represented to a crumbling shed on an abandoned site, climbing a rickety ladder, and going through rain-soaked boxes of papers, most of which were unreadable, to answer a discovery request.

In the figurative sense, too, I was "getting my hands dirty." My opponent in the case claimed that my client had documents that were not being produced. The president swore he had produced everything that had anything to do with the lawsuit, and in order to assure myself that this was correct, I insisted on going through the current corporate files as well as any other files of which the company was aware. I did not leave it to my client to determine that I had all the relevant documents; I found out for myself. I could then with a clear conscience represent to my opponent and to the court that all documents had been produced.

Also, if you don't look at the available, tangible records of what went on in your case, how can you frame your presentation to the fact-finder? Even small scribbles on a piece of paper can become key.

For example, in my early career, in a case involving a contract for the exclusive licensing of old classic movies, I represented a Hollywood studio defending against a claim of breach of contract by a distributor. The plaintiff claimed she was entitled, according to the exhibit attached to the contract, to certain famous movies—as an example, I'll say one of them was *Gone With The Wind*—that my client refused to give her.

My client insisted *Gone With The Wind* was never on the exhibit list.

I reviewed the documents provided by the distributor, relating to formation of the contract. One of the versions of the exhibit in her files—the one she claimed had been agreed to by my client, the studio—had *Gone With The Wind* listed, and a handwritten notation next to it. The notation read: "wish." When I found that piece of paper, my heart started beating faster. If the handwriting was the plaintiff's, wasn't that an acknowledgment that she knew she could not get *Gone With The Wind*?

It turned out the handwriting was the distributor's. On the stand, confronted with her note, she tried to explain it away. Her explanation was that the "wish" had become reality when the studio graciously acquiesced to allowing her to have the exclusive right to distribute *Gone With The Wind*.

The judge did not believe her, and she lost her case.

In this case, a careful review of documents provided a key piece of evidence for the defense. And I never would have found it if I had not gotten my hands dirty.

2. Don't Rely on Reading by Itself

This is possibly an idiosyncratic occurrence, and perhaps I shouldn't extrapolate a discussion on document reviews from it, but if it happened to me, it can happen to you. I was reviewing documents from an insurance company, the defendant in a coverage case where I represented the plaintiff. The documents included pages from in-house counsel's files that had been redacted, purportedly for reasons of attorney-client privilege. The redactions were accomplished by means of a felt-tip marker making a line through the supposedly privileged material. I held the document up to the light, and discovered that I could read the "redacted" material. It said: "We probably have no defense to coverage, but I can slow down the case for a while to push payment into next year."

I was stunned and elated—a big lie that entitled my client to bad-faith damages was documented by the defendant's own production. But how to get it into evidence? I decided to forego the pleasure of springing it on an unwary witness at trial. Instead, I sent a request for admissions, asking the insurer to admit that in-house counsel said what he said. The company paid up the next week.

The lesson I learned is to use all your senses, not just your eyes, when doing a document review. Other lawyers have pointed out to me that the physical feel of a document can tell a tale, be the smoking gun, or convince a jury of the document's importance. Consider a raised seal—a requirement on many legal documents. If the party supposedly having custody of such a document has only "flat" copies, what happened to the original? Did one ever exist? Is the flat copy

genuine or a forgery of some kind? And if there is a raised seal on the document, presenting it to a jury for the feel as well as the terms of it can add to the solemnity and importance of the document in the jury's mind.

3. Knowing What's in the Documents Can Keep Your Ethics Intact

There is an ethical benefit as well to making sure you have reviewed all of your client's documents: You have less of a worry that your client is holding out on you. One of my clients several years ago had, among thousands of pages of manifests, one bill of lading showing that it had moved hazardous waste from one site to another. The client had no permit for transporting hazardous waste. The Environmental Protection Agency was investigating the company for other alleged improprieties related to construction waste, and had asked for all manifests and bills of lading for the time period that included the hazardous waste shipment.

My client's CEO said we should not produce that manifest. I told him we had to. He said he would fire me so that he could "deep-six" it. I told him that I would instead make a noisy withdrawal if he did not produce the document to the EPA. I also told him it was better to deal with it upfront than to have the EPA discover it later. He finally acquiesced. Had I not gone through the documents, though, I might have found myself in the unenviable position of representing to the EPA that it had all relevant documents, only to be faced with the offending manifest later. Nothing destroys a lawyer's credibility with the court, other lawyers, and government

records will help you stay on the right side of the ethical divide. It will also keep your reputation in good standing in the legal community.

4. You Can't Find the Smoking Gun if You Don't Look, and Know What You're Looking For

Every lawyer propounds discovery with the hope that the other side's documents will help win his case. Sometimes, there really is a smoking gun, but often if there is, it's well-hidden in a boatload of documents.

As a new partner, I headed up a team of lawyers and paralegals tasked with traveling to Midland, Mich., to review everything produced by Dow Chemical about its mortar additive, Sarabond. Sarabond was touted by Dow as a miracle chemical that would so strengthen the bond between bricks in a building that the bricks would never separate from each other. Our firm represented the owner of a building that had incorporated Sarabond and was crumbling, with parts of the brick facade falling into the street.

When we arrived, we were shown into a warehouse with boxes and boxes and boxes of papers, with everything from chemical formulas to industry articles about Sarabond. We were given two days to review the boxes. We anticipated filing a motion to compel if this time proved to be too short.

Unlike the Donovan Leisure partner who withheld documents, Dow's counsel had obviously correctly advised the company to produce everything, and to hold nothing back.

agencies faster than such an incident. And it is always better to discover what unpleasantness and weaknesses exist in your case as soon as possible, so you can figure out how to deal with them in court.

In the case of my transporter client, we divulged the offending manifest, explained that it was an aberration, showed that the waste went to a permitted hazardous waste landfill and were able to reduce the EPA penalty to a relatively nominal sum.

It of course goes without saying that no lawyer should even consider holding back discoverable documents no matter how much it appears that the client or the law firm needs the documents hidden.

Many years ago, a major Wall Street law firm, Donovan Leisure, began a downward slide that eventually led to its unraveling, after one of its partners hid in a closet a box of documents called for in discovery during the course of a long litigation involving a claim by Berkey Photo alleging that Kodak monopolized certain aspects of the photography industry. The partner then perjured himself by swearing that the documents had been destroyed.

When the actual whereabouts of the documents was discovered, Kodak lost the case (it later won on appeal). Donovan Leisure lost a big client, too—Kodak. For his perjury, the offending lawyer went to jail. While that lawyer clearly made the wrong ethical decision—to hide the evidence of his misfeasance instead of reporting it, transforming a possibly negligent error into criminal malfeasance—a thorough awareness of what your client has in the way of

5. Learn a Trade

If you are a person curious by nature, finding things out about the subject matter underlying a lawsuit is a happy by-product of document production. You might even learn a new field, other than law, that becomes your next career move. Although this by-product may seem inconsequential, I have been struck by how many of my colleagues now work as non-lawyers in fields they learned as lawyers. One of my developer clients, for example, started as a lawyer in the real estate area, litigating various kinds of land disputes.

Without advocating changing professions, I still recommend jumping feet first into the subject matter of every case you handle. I mentioned earlier learning the art of welding through document production. I was part of a team of lawyers suing a New Orleans shipbuilder over the failure of insulating foam on supertankers. My job was to go through all the documents from the welding department. I actually began to realize how difficult, as well as important, welding is as I read through the mounds of documents; I discovered that, depending on the process, there was “TIG” welding (high-quality, skilled, precision welding) and “MIG” welding (high deposition rate, continuous feed, semiautomatic welding). When I met with the welders to review the documents, and in order to fully understand the process, I convinced them to show me how they welded. I found that the TIG welders considered themselves superior craftsmen whose welds would never fail, and that both the TIG and the MIG men had great recipes for fresh-caught crawfish.

He apparently also advised Dow not to organize the documents in a way that related to our requests for production. So somewhere in that warehouse room was an explanation of why our client’s walls were tumbling down, but we had to find it.

I didn’t walk into that warehouse blind, however. I had reviewed the brochures the client’s contractor had received from Dow about the superiority of Sarabond. I did Lexis research to see if there were any other Sarabond cases. And when I found out that there were other cases, I read the opinions and contacted plaintiffs’ lawyers for what they knew. Then I knew what I should look for—tests, letters, memos, and reports that would show Dow knew that when mortar containing Sarabond came into contact with steel it caused the steel to corrode. Corrosion creates by-products that expand around the steel, forcing the bricks to burst apart, and the facades to fail. With some key words in mind—corrosion and steel—we found all the documents showing the history of Dow’s knowledge in the two days we were allotted.

Those were the days before access to the Internet was ubiquitous. Today, I prepare for a document review by plugging terms into a search engine about chemicals or companies, parties or persons. I still, however, check to find other cases either involving my client or my opponent, read any opinions from those cases and, often, call the lawyer who represented my client’s counterpart in those lawsuits.

Preparing ahead of time for a document review will put what you find in context, as well as enabling to you look through the papers more efficiently.

into people's personal lives, both for human-interest purposes and sometimes to the advantage of your client. Other people's personal secrets can sometimes reveal important facts or motivations for an adversary's actions.

Remember that human relations and interactions often have a direct bearing on the substance of your case. I represented a whistleblower in a *qui tam* case not long ago, and the perception that she was not a team player, because she kept complaining about the company's illegal activities, was reflected in emails questioning her intelligence, her knowledge, and her social skills.

My personal favorite "smoking gun" document came from an email thread in that case. The whistleblower kept documenting what she believed to be improper actions by her employer, including in her emails. Attached to one of her complaining emails, which he forwarded to other executives, was a comment from in-house counsel: "Shouldn't we Enron these documents?" For those who had been living in a cave, he added: "Let's find and shred."

Paying attention to the threaded messages, as well as people's perceptions of the actors in the case, can often result in a "find" for your case. It certainly did for me.

Obviously, not every email review will lead to legal gold. Even dross can be entertaining, though. Just imagine you are watching your favorite soap.

7. It's All in the Attitude

As I have tried to show, document reviews can satisfy many human needs: the urge to snoop, the desire to be a perpetual

It was good for my understanding of that part of the case, but it was also fun. Instead of having to go for one graduate degree after another, the perpetual student in me relished learning something new.

As one of my former law partners used to say, it's always good to have a backup. (She had started her work life as a beautician, and, despite being a partner in a major national law firm—or perhaps because of it—always renewed her beautician's license every year.)

6. If It's Still Boring, Focus on the Personal

I must admit that e-discovery has upped the boredom quotient for document reviews. For one thing, email correspondents tend to free-associate, making their messages long-winded and often difficult to decipher. For another, most email software is set up to "thread" messages, so that at the bottom you will find the original message followed, from bottom to top, by responses and counter-responses. You may thus find yourself reading the same original message more than once.

One of my young associates complained about the hundreds of hours she spent reviewing emails produced in a case on the ground that many were not substantive, that is, they were not related to the case. "How many times do I have to read about Rita's skirt being too short, or that Barbara is a slut?" she asked me.

Now, had I been the one reviewing those emails, I would have considered the personal references quite diverting and enjoyable. It's another example of a lawyer's license to snoop

The Keys to Enjoying Paper Discovery

1. Get your hands dirty.
2. Use all your senses.
3. Personally find out what's in the documents.
4. Immerse yourself in the case.
5. Don't hide documents.
6. Don't let your client hide documents.
7. Keep your ethics intact.
8. Know what you're looking for.
9. Focus on the personalities involved.
10. Think of how much fun you're having.

student, the ability to find a backup to your law practice. They are much more than a necessary evil. Properly viewed, document reviews are interesting, enlightening, and sometimes fun. Keep yourself engaged, and you will find they are more than just “great billables.”