A. Relevant Records [§6.7]

The first step in the preparation of documents in the litigation process is normally to try to gather in as many of the documents potentially relevant to dispute as counsel can obtain. This includes both documents that are helpful to your position as well as documents that are harmful. Casting a broad net in obtaining documents from your client at an early stage, even before pleadings are filed, can help to ensure that your case is initially constructed on a solid factual foundation consistent with the surrounding documents, rather than on a skewed or one-sided basis resting on the client's judgment of which documents are important and which are not. Obtaining documents from your client and other sources initially based on a *Peruvian Guano* standard of relevance – even if that is not the basis on which disclosure of documents is ultimately made – can also avoid the inefficiency and possible confusion of having to go back to obtain further documents from sources initially tapped.

Rule 7-1(1) next requires all parties to prepare a list of all documents in the party's possession or control that could be used by any party of record at the trial to prove or disprove a material fact or that the party intends to refer to at the trial. This is a change from the former Rule, which required every document relating to a matter at issue in the proceeding to be disclosed. Counsel, and not the client, has the duty to ensure that all documents subject to discovery are disclosed in a proceeding. Under the current Supreme Court Civil Rules, with a more limited and nuanced scope of initial documentary production, it is even more important that counsel exercise this duty properly and in a non-adversarial fashion. (*Imperial Parking Canada Corp. v. Anderson*, 2014 BCSC 989 (Chambers) at para. 25).

B. The Test for Document Disclosure [§6.8]

Document disclosure under Rule 7-1 differs from the former Rule 26. Formerly, the Rules started with the obligation to disclose all documents that were relevant according to the *Peruvian Guano*test, under which a document that was relevant to the matters in question in the litigation had to be produced if it could enable the other party either to advance the party's own case or to damage the case of the adversary, or if it could lead him or her on a train of inquiry that could have either of these two consequences (*Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55).

The Supreme Court Civil Rules do not start with the *Peruvian Guano* test, though they do permit an order for disclosure at that standard if appropriate (Rule 7-1(11)). The Rules seek to cast aside the *Peruvian Guano* test in order to avoid the cost of listing and producing documents that may not be relevant to the issues in the case. In many cases it is disproportionate to the matter to include documents of little or no relevance in the disclosure, so the Rules start from the perspective that only documents that could be used to prove a material fact need be disclosed, with greater disclosure to be required only if warranted. A material fact is one that is necessary for the plaintiff or defendant to prove to be successful on the claim or defence, and one that has been placed in dispute (*Jones v. Donaghey*, 2011 BCCA 6). Production is not limited to documents that in themselves will prove or disprove a material fact; it includes documents that could assist in proving or disproving a material fact (*Biehl v. Strang*, 2010 BCSC 1391).

The difference between the two tests is, in practical terms, that those documents that are not relevant to proving a material fact but which may lead someone on a train of inquiry to other documents need not be included in the initial disclosure.

What does this mean in practice? Consistent with the case planning process, counsel should think carefully about what issues the case raises. Consider what evidence is likely relevant to those issues; the sources of such evidence and disclose those documents found there that are in the possession or control of the client; and the likely sources of evidence held by opposing parties and discuss the disclosure of any such documents with opposing counsel. Document disclosure is meant to be a non-adversarial process, so the discussion between counsel should result in all material documents being included in the disclosure. If not, further process for disclosure can be sought in a case planning order.

Such an order can include a requirement for disclosure to the *Peruvian Guano* standard. That is because the test survives in Rule 7-1(11), which provides that a party may request additional documents that relate to any matter in question in the action. However, Rule 7-1(12) goes on to provide that a party against whom such an order is sought may respond by advising that the requested documents will not be provided, with an explanation for the refusal. In light of the overt recognition of proportionality as a principle in the Rules, it would seem that the proportionality of the request relative to the nature of the proceeding should be a reason for refusing. If the parties continue to disagree on the need to produce the documents, then the court may make an order.

C. Collecting Your Client's Documents [§6.9]

You will likely find that the burden of disclosing documents involves a two-step process. The first step is to obtain the documents that your client sends to you. You need to consider them to form a preliminary perspective on the case and the kinds of documents relevant to the case that must exist. In most cases a second step is needed to ensure that both the lawyer and client are satisfying their procedural and ethical obligations.

The process of searching for and producing documents carries a heavy ethical burden. As McEachern, C.J. said in *Boxer v. Reesor*, 1983 CanLII 449 (BC SC) at 357, quoting Fraser and Horn, *The Conduct of Civil Litigation in British Columbia:* "Nowhere in civil procedure is the responsibility of the lawyer greater than in the area of the discovery of documents".

Rarely will a client provide complete disclosure without some help. You need to think about the types of documents that probably exist and go back to the client and ask that those documents be found too. Common categories of "forgotten" documents include diaries, billing records, cell phone records, telephone bills, credit card statements, tickets, text messages, or other social media postings, and other similar documents that can provide chronological information that can be key in creating the story of your case.

You must also consider documents that are in your client's control, though perhaps not in its possession. Common examples are bank records, documents in branch offices, or accounting documents.

Keeping in mind that counsel has an obligation to ensure that documents are disclosed pursuant to the Rules, it is imperative that you as counsel advise your client to give you everything related to the case. At this stage, therefore, practically speaking you really need access to all documents that would meet the *Peruvian Guano* test. It is up to counsel to determine what are "tier one" documents. While you may not need to disclose and produce documents to that standard, how will you as counsel be able to comply with your obligation to disclose documents if you have not been able to review, even quickly, what could be material? Your client will not always know what is material or not, because that question is answered by the application of a legal test (i.e., is this information material to the legal issues in

the matter?). You need to impress the importance of this on your client, usually more than once. You may wish to send a letter, similar in form to the letter included in this book, reminding the client of the importance of complete disclosure.

At the risk of repetition, it is very important that you not rely entirely on your client. At times the client simply will not know whether a document is relevant or not. Legal judgment will have to be applied. As stated by Lord Wright in *Myers v. Elman*, [1939] 4 All E.R. 484 (H.L.) at 322:

A client cannot be expected to realize 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 realize 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.
A failure to take seriously your client's obligation to thoroughly search and disclose appropriate documents not only exposes your client to court sanctions, but exposes you as counsel to criticism and potentially discipline.

Satisfying yourself that you have all of the relevant documents, regardless of whether they are material or can be used at trial, is important for two reasons. To be able to properly advance or defend the case, you need to know all of the possible evidence that could be at your disposal. This is just part of good advocacy. But the Rules and your ethical responsibilities as counsel also require you to produce all documents that could be used at trial, either by you *or your opponent*. This casts upon you as counsel for the party the burden of ensuring fair and complete production, within the tests required by the Rules. It also requires you to produce documents that may be the subject of further requests for documents, regardless of whether they help or hurt your client's case.

This burden should be discharged in all cases in a non-adversarial way. It may be wise to attend at the client's premises to look for yourself to be satisfied that all that should be produced is in fact produced.

These days, the search for a client's documents will undoubtedly involve searching for information in electronic or digital form. So much communication is conducted by emails, text messages, and even social media. You will need to consider all of these sources. It would be prudent to discuss with your client all of the means that the client or the client's organization uses to communicate. And for each method, think of where the information may reside. For example, if email is the medium, does it reside on a corporate email server or with a service like Google mail? Are text messages kept or discarded as they arrive? If kept, how can you access them? Are documents kept on drives, or in the Internet "cloud"? In many respects, the task of finding your client's documents is much more complicated than before because of the wide variety of communication media and storage locations. It is important to think of all of the possible locations and sources of documents so that you can gather a complete set of material upon which to exercise your judgement about your case and the disclosure required of your client.

For further assistance on electronic documents see "The Sedona Canada Principles Addressing Electronic Discovery", 2nd ed. (The Sedona Conference®, November 2015), an excellent paper

written by a panel of Canadian judges and lawyers with useful advice on handling and disclosing electronic documents. An electronic version is available on canlii.org in CanLIIDocs under "Commentary". The Sedona Principles have been endorsed by British Columbia courts (see, for example, *Dykeman v. Porohowski*, 2010 BCCA 36; and *Sonepar Canada Inc. v. Thompson*, 2016 BCSC 1195 (Chambers), the latter of which provides a useful summary of authorities and principles concerning production of electronic documents).

See the Forms and Precedents section for:

- Precedent Letter—Client Document Production Obligations

D. Documents from the Opposite Parties [§6.10]

Your task of managing documents does not end with your own production. Added to the volume of documents you obtain from your client are the documents that you will obtain from the other side in response to their obligation to disclose. It is important to review the other side's production of documents, not only to add to the facts that may help or may hurt your case, but also to test the completeness of your opponent's production. Does one document refer to another document that has not been disclosed? Typically you will find gaps in the production during the process of examinations for discovery when questions and answers lead you to documents that were not considered in the initial disclosure. These gaps may be with respect to documents that ought to have been listed in the first instance (governed by Rule 7-1(10)) or additional documents that relate less directly to the issues in dispute yet still would be useful at trial (Rule 7-1(11)). Where you notice these gaps in advance, you should write to opposing counsel asking them to make inquiries about documents that may have been missed. Rule 7-1(10) and (11) expressly require this process. It is useful and disciplined to draft such a demand letter to resemble a court submission, with specific references to paragraph numbers in the pleadings setting out the materiality and relevance of each demand. Demands should be restrained and precise, and limited to specific and narrow date ranges, employees, email folders, and the like, to be searched. Make the reasonableness and proportionality of your request patently clear to your opponent and, if necessary, to the judge or master hearing a resulting documents application, at which your letter will be Exhibit "A" to your assistant's affidavit. The era of a wide blanket documents demand is over.

A request made on discovery for production of certain documents does not comply with the requirements of a demand under Rule 7-1(10) (*Totzauer Holdings Ltd. v. Nanaimo Forest Products Ltd.*, 2012 BCSC 1882 (Master) at paras. 47 to 58).

For more on the process and principles of demanding documents from the other side, and the "two-tiered" process, see *Imperial Parking Corp. v. Anderson*, 2014 BCSC 989 (Chambers).

In a complicated case with many documents stored in many locations, both paper and electronic, it is wise and efficient for counsel to meet and confer at an early stage to agree on at least preliminary parameters of document search and production. At such meetings, counsel may be able to agree on reasonable search parameters: date ranges, locations, and whose records (e.g., certain employees or custodians). Counsel may be able to agree to lists of keyword electronic searches to more efficiently identify relevant documents for review and production. Counsel should continue the meet and confer process throughout the litigation, not just at the start. Such conferences can save both clients thousands of dollars and hours. Unfortunately, such meetings are still the exception rather than the rule.

Finally, some care is necessary in what you do with and how you handle documents that you receive from an opponent through the discovery process. There is an implied undertaking of confidentiality that requires that a party to civil litigation keep confidential all documents disclosed by the adverse parties in the litigation (*Juman v. Doucette*, 2008 SCC 8). This means that you cannot share the documents with parties outside the litigation or use the documents in other proceedings, either for the same client or another client, without the adverse party's consent or leave of the court. Otherwise you and your client may be found in contempt of court.