

# Why I Love Document Reviews

by Janet S. Kole

Before I became a lawyer, I was both a law secretary and a paralegal. In each of these roles, I loved doing document reviews. I have now been practicing law for more than 25 years. I still enjoy poring over documents, those of both my opponents and my clients. 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 the client's case. And who has not experienced the frisson that occurs when we actually put our hands on the smoking gun?

Of course, discovery also provides us, we hope, with admissible documentary evidence to prove our 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 our cases rest.

Why, then, do young associates lament that they have been assigned to review documents, whether the client's or an opponent's? "It's boring," they say. "This is not why I became a lawyer." The only positive thing new associates say about document review: great billables!

What they don't realize is that reviewing documents produced in discovery is the equivalent of poking around in a friend's medicine cabinet or 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.

Electronic discovery has fundamentally changed the way

discovery looks and feels. It has also added a greater personal component to what we may find during document review. Correspondence by letter is more considered than e-mails; people e-mail one another not just about work but about personal matters, often in the same message. We routinely find personal e-mails among those relating to our corporate cases, and those personal e-mails 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 about the ins and outs of welding, for example, or my client's corporate structure. For the life span of the case, I know more about the subject than most people except the experts (and sometimes even more than they do). And it is the documents I review that give me this knowledge.

The first time I realized how much I could learn about the subject matter of a case from a document review was when I worked as a paralegal at a large New York City firm, seemingly 150 years ago. There was no Internet and no e-mail, although there were (despite what my son thinks) paper, pens, and even computers. I was ushered into a roomful of hundreds of thousands of documents and asked to catalog and summarize what I found. I was told only that the case involved an oil refinery in Newfoundland whose owner 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; 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 in a trade journal about cracking tech-

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nology. 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 hydrocracking 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. Fortunately, a lawyer puzzling over unfamiliar technical terms today can turn to the Internet to find helpful resources and explanations.

Finding the article on catalytic cracking made me feel as though I had really accomplished something—and in fact, I had suddenly become familiar with the case and the facts and the technology. I then 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.

Now, my environmental knowledge is much more extensive than it was those many years ago, and in my work as an environmental lawyer, I review many documents that consist of lists and charts of chemical data, field logs and notes, and other highly technical data. And it is important that I review the data rather than leave it to an environmental consultant to interpret for me, because on more than one occasion, I have known of a regulatory change in allowable limits for contaminants that the consultant had not. My review of the data made a real difference to my client because it showed that his property contained contamination that the state environmental agency would require to be remediated. The consultant's report would have been incorrect and might have lulled us 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 have reviewed over the years—are known as “boring logs.” They can be boring, and a few of my associates have keeled over from tedium while 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 a site can 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 know someone who does not), what can you do to change the negative attitude? Along the lines of those “glass as half-full or half-empty” discussions, the key is to change your mindset about what you're doing and realize that there is a whole lot more to document reviews than great billables. I offer the following observations as an antidote to the resistance of lawyers at all levels to document reviews.

**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 had me

accompany the president of a corporation I represent to a crumbling shed on an abandoned site, climb a rickety ladder, and go through rain-soaked boxes of papers, most of which were unreadable, to answer a discovery request.

I got my hands dirty in the figurative sense as well on that occasion. 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. 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.

If you do not 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. Early in my career, for example, in a case involving a contract for the exclusive licensing of classic films, I represented the Hollywood studio defending against a claim of breach of contract by a distributor. The plaintiff, relying on an exhibit attached to the contract, claimed that she was entitled to license certain famous movies—let's use *Gone with the Wind* as an example—that my client refused to give her. My client insisted *Gone with the Wind* had never been on the final exhibit list.

I reviewed the documents relating to formation of the contract that the distributor had provided. One of the versions of the exhibit in her files—the one she claimed had been agreed to by my studio client—listed *Gone with the Wind* but had 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 that film?

It turned out the handwriting was in fact the distributor's. On the stand, confronted with her note, she tried to explain it away by claiming her “wish” had become reality when the studio had graciously acquiesced in giving her the exclusive right to distribute *Gone with the Wind*. The judge did not believe her, and she lost her case. I never would have found this key piece of evidence for the defense had I not gotten my hands dirty.

**Don't rely on reading alone.** This example may be an idiosyncratic occurrence that perhaps should not be extrapolated into a discussion on document reviews—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 in which 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 had been whited-out, but when I ran my finger across the white lines, I discovered that the gel had been painted onto the actual documents sent to me. I held a page 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 forgo the pleasure of springing it on an unwary witness at trial and instead sent a request for admissions, asking the insurer to

admit that in-house counsel had said what the document reported. The company paid up the following week.

The lesson I learned is to use all your senses, not just your eyes, when doing a document review.

**Knowing what's in the documents can keep your ethics intact.** There is an ethical benefit to ensuring you have reviewed all your client's documents relevant to your case: You have less 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 although 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 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 I would make a noisy withdrawal if he did not produce the document to the EPA, and also advised him it was better to deal with it up front 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 on. Nothing destroys a lawyer's credibility with the court, other lawyers, and government agencies faster than such an incident. It is always best to discover any unpleasanties and weaknesses that exist in your case as soon as possible, so you can figure out how to deal with them in court.

In the case at hand, 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.

What if the sheer number of documents gets the better of you, you forget about a box of documents, and you fail to produce it? Despite possible embarrassment for you and your firm, never 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 partner in a large Wall Street law firm, Donovan Leisure, hid in his office closet a box of documents, reviewed by his client's expert, that were called for in discovery during the course of a long antitrust litigation involving a claim by Berkey Photo against Kodak. The partner then perjured himself by swearing that the documents had been destroyed. Of course, the box of documents was discovered, and lead counsel for Kodak produced them during the jury trial. Kodak lost the trial because its sole expert was deemed not credible (it later won on appeal on the law). Donovan Leisure lost a big client: Kodak. That lawyer clearly made the wrong ethical decision—to hide 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 records will help you stay on the right side of the rules of discovery, and of the ethical divide. It will also keep your reputation in good standing in the legal community.

**You can't find the smoking gun if you don't look for it 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 is 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, Michigan, 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 in its construction but was now 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 noting 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.

Dow's counsel had obviously correctly advised the company to produce everything—to hold nothing back. Counsel 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 had done Lexis research to locate any other Sarabond cases. And when I found out they existed, I read the opinions and contacted plaintiffs' lawyers to hear what they knew. At that point I knew what I should look for: tests, letters, memos, and reports showing that Dow knew that when mortar containing Sarabond comes in contact with steel, it causes the steel to corrode. Corrosion creates by-products that expand around the steel, forcing the

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bricks to burst apart and the façades to fail. With some keywords in mind—*corrosion* and *steel*—we found all the documents showing Dow's history of such knowledge—within 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 involving either my client or 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 enable you to search the papers more efficiently.

**Learn a trade.** If you are a curious person by nature, finding out things about the subject matter underlying a lawsuit is a happy by-product of document production. You might even learn about a new field that will become your next career move. Although this by-product may seem inconsequential, I

am struck by how many of my colleagues now work as non-lawyers in fields they learned as lawyers. One of my real estate-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 young lawyers jump feet-first into the subject matter of every case they handle. I mentioned earlier that I learned the art of welding through document production. In another case, I was part of a team of lawyers suing a New Orleans ship-builder over the failure of insulating foam on supertankers. My job was to go through all the documents from the welding department. I began to realize how difficult and important welding is as I read through the mounds of documents; I discovered that, depending on the process, there is 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, I asked them to show me how they weld so I could fully understand the process. I found that the TIG welders consider themselves superior craftsmen whose welds will never fail, and that both the TIG and MIG workers had great recipes for fresh-caught crawfish.

Learning the welders' trade was good for my understanding of that part of the case, but it was also fun. Instead of having to go back to school for one graduate degree after another, the perpetual student in me relishes learning on the job I already have.

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

**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, e-mail correspondents tend to free-associate, making their messages long winded and often difficult to decipher. For another, most e-mail software is set up to "thread" messages so that the original message is at the bottom, with each response and counter-response printed above it. 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 e-mails produced in a case, on the ground that many were not substantive, i.e., were not related to the case. "How many times do I have to read about Rita's skirt being too short, or that Arthur is a drunk?" she asked me. Had I been the one reviewing those e-mails, I would have considered the personal references quite diverting and enjoyable—another example of the lawyer's license to snoop into people's personal lives, for both human interest and sometimes your client's advantage. Other people's personal secrets sometimes reveal important facts or motivations for an adversary's actions.

Remember that human interactions often have a direct bearing on the substance of your case. I represented a whistleblower in a qui tam case not long ago; because she had repeatedly complained about the company's illegal activities, the perception that she was not a team player was reflected in e-mails questioning her intelligence, knowledge, and social skills. My favorite "smoking gun" document came from an e-mail thread in that case. The whistleblower continued in her e-mails and other files to document what she believed to be improper actions by her employer. Attached to one of her complaining e-mails, which her supervisor 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 e-mail review will lead to legal gold. Even dross can be entertaining, though. Just imagine you are watching your favorite soap.

**It's all in the attitude.** Document reviews can satisfy many human needs: the urge to snoop, the desire to be a perpetual 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 a lot more than just great billables.