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Implementing Technology into Your Commercial List Practice

The practice of commercial litigation today is in many ways unrecognizable from even a few years ago. Advances in technology and adaptations arising from the pandemic have transformed how we think about, prepare for, and conduct litigation.

Commercial List disputes are no different. Many matters on the Commercial List are factually and legally complex, involve a high volume of documents, and can proceed on an accelerated timetable. Thoughtful use of current technology and familiarity with how the Court itself has modernized can make your advocacy more effective and, ultimately, lead to better outcomes for clients.

In this post, we reflect on some of the ways you can use recent technology to give yourself an edge in Commercial List matters, both inside and outside of the courtroom.

Grappling With Evidence

Modern commercial disputes frequently involve massive amounts of documentary evidence. Consider the hundreds of documents we unthinkingly create daily: emails, text messages, call logs, word processing and spreadsheet documents, but also audit/system logs and trails, financial records, electronic signatures, browser history, social media posts and interactions, GPS and movement data, and all metadata associated with the creation, editing, or viewing of electronic data. A complex commercial dispute involving numerous parties over several years can easily result in a very high volume of evidence.

Evidence-management software is essential. By using technology-assisted review and machine learning, evidence-management software can save time and resources through:

- De-duplication of identical documents, so you can limit the number of documents you need to review
- Email threading and family group organization, so you can view entire email conversations and their attachments in one place
- Metadata fields that automatically populate, so you can easily export them

- Sophisticated search terms and strings, so you can sort through large volume to find relevant documents efficiently
- Analytics, so you can quickly get an idea of the number and types of documents in the database

Using evidence-management software also means you can serve your productions electronically in native format, and conversely, that you can receive and upload other parties' productions in the same way, preserving both the metadata and original format of the evidence.

The types of evidence in litigation are also changing. In addition to emails and written documents, relevant evidence now exists in nontraditional formats, such as social media posts or messages, data from phone applications or smart devices, GPS data, and other records resulting from the constant rollout of new technology. Retaining a digital forensics expert to collect and image devices preserves the integrity of the evidence and its metadata, decreasing risks surrounding authenticity and admissibility. An expert can also prepare a report for the Court documenting the preservation methods and providing analytical conclusions.

Preparing & Filing Your Materials

You can now swear or affirm affidavits virtually. Be sure you are familiar with the requirements of remote commissioning of affidavits and the applicable regulation. Modify the jurat to (a) indicate the oath or declaration was administered in accordance with the applicable regulation, and (b) state the locations of both the commissioner and the deponent.

Many Commercial List matters now proceed as entirely paperless. Motion and application records, documentary productions, and submissions are often so voluminous that parties and judges prefer electronic versions only. Accordingly, the usability and formatting of electronic materials should be front of mind when preparing them for use in a hearing. The Court expects you to hyperlink indices, authorities, and citations to the evidentiary record; refer to the most current Commercial List Practice Directions for details on the Court's requirements before finalizing and filing your materials.

File materials with the Commercial List office online through the Ontario Courts Public Portal (OCPP). Upload materials for use at a hearing to Case Center (formerly CaseLines) within the times prescribed by the Rules or an agreed-upon timetable. Review the Commercial List Practice Directions for specific requirements. Consider undergoing OCPP training or Case Center training in advance so you have no issues with filing

right before a big deadline or navigating Case Center mid-hearing.

Maximizing Use of Generative Artificial Intelligence

Strategic use of generative AI can deliver useful insights quickly and at a low cost. There are several generative AI products developed specifically for use in the legal industry, some of which can:

- Scrape the internet to gather general knowledge on a specific topic or locate a particular source
- Securely store a large volume of confidential documents or case law and enable AI-driven search and analysis
- Draft legal documents and examination outlines from a prompt or uploaded documents
- Research case law and generate detailed research memos
- Assess cases and provide feedback on arguments

The quality of generative AI output is quickly improving but is still imperfect. Hallucinations are common. Always verify AI work product before relying on it in court.

These are our recommendations to ensure your use of AI is effective and responsible:

- Prompts matter! Getting useful output from generative AI depends on what you input. Take advantage of any training your AI products offer to understand how the algorithm works, where the algorithm draws information from, and what the product can and cannot do. Practice interacting with the AI and preparing different prompts to get a sense of how its answers change based on what you input.
- Unless the AI product has specific functionality to securely store and search confidential documents, never input confidential client information into generative AI. If you are securely uploading confidential information or documents into an appropriate AI product, always obtain informed client consent before doing so.
- Consider implementing a firm-wide AI policy to ensure each team member understands which AI products are firm-approved, how to use AI in the workplace, and any associated risks.

Nailing Your Virtual Hearing

The use of Zoom is commonplace on the Commercial List, allowing the Court to deal with quick-moving matters efficiently.

It is important for litigators to be familiar with the Court's requirements and best practices for a seamless virtual attendance or hearing.

The Court conducts short matters (including "9:30" chambers matters, scheduling appointments, case conferences, and hearings of 90 minutes or fewer) over Zoom. The Court holds hearings of over 90 minutes in person at 330 University Avenue in Toronto, but the presiding judge can order otherwise.

Videoconferencing does not dispense with the professionalism and etiquette expected of counsel, parties, or witnesses when interacting with the Court. Below, we list our top tips for making sure you are putting your best foot forward when making a virtual appearance from your home or office:

- **Start With the Hardware**: Invest in quality hardware, including a camera, microphone, or multiple screens. Always test your internet connection to make sure it is operating at a speed conducive to videoconferencing.
- **Think About Your Setup**: Like staging in a play, think in advance about how you want to present yourself on camera. Are you more comfortable sitting or standing? Do you require a podium? You should also consider if there is anything in the background that may be distracting to you or others. Is there a light causing an obstructing glare or is confidential information viewable? And, if there will be others in the room with you (like a client), will they need to be onscreen or captured by a microphone?
- **Test Your Setup**: Enlist a colleague to join a test call to make sure your hardware functions and to confirm you are happy with how you present virtually. Are you centred on the screen? Does the microphone clearly pick up your voice?
- **Get Comfortable With Zoom**: If you are unfamiliar with Zoom, practice using it beforehand so your participation in the hearing is seamless. Knowing where the mute button is, how to troubleshoot audio issues, and how to share documents onscreen are skills you should not learn on the fly!
- **Get Comfortable With Case Center**: Familiarity with Case Center should not be limited to your law clerk. As the mandatory document-sharing platform for any Superior Court hearings in Ontario, you must know how to navigate through bundles and documents mid-hearing (and often, mid-submissions). Ensure you are comfortable doing so in advance of any appearances.

Case Center also has some helpful functionality, such as presenting a document live or directing participants to a particular page, which can be very effective during submissions or examinations.

- **Mind Your Courtroom Etiquette**: Refresh yourself on expected conduct when attending virtual court, including when to gown. If you are attending with a client or witness, tell them what to expect in a virtual courtroom and explain the rules of court decorum.
- **Use Electronic Aids:** Virtual hearings provide a great opportunity to strategically implement visual aids, including slide decks, diagrams, and multimedia. For example, using slides during an opening statement (which you can easily screenshare) can help tell your client's story through visuals, timelines, and bullet points of key anticipated evidence or legal principles.

The widespread use of Zoom has created a lot of flexibility in how hearings and trials can proceed. While some hearings proceed fully virtually, hybrid hearings (where some of the participants and witnesses are present or give testimony in person, while others join remotely) are also common. Deciding on the best approach depends on the nature of the evidence a witness will give, how important that witness is to your case, and the witness's own circumstances.

A hybrid trial may be more convenient for your witnesses and may sometimes shorten the trial, but there are trade-offs. For example, having a good witness testify in person about key issues can be highly effective in establishing credibility and ultimately having that witness' evidence accepted by the trier of fact. Written evidence can increase trial efficiency but necessarily increases the pre-trial work for both lawyers (who are drafting the sworn testimony) and the judge (who has more reading to do before the trial starts). Whichever process you undertake, consider carefully whether a hybrid process will increase efficiency or whether you can achieve efficiency by other means, and always consider the impact on the trial judge.

Before any trial proceeds there will always be some type of trial management conference to determine if a hybrid trial is needed or appropriate. The case management judge will usually have the trial judge oversee the trial management conference so the trial proceeds in accordance with the trial judge's preferences and schedule and the parties' needs.