DISCOVERY

LESSON 1 – INTRODUCTION

1. Overview

1.1 Discovery is an important part of civil litigation and a task that is frequently assigned to paralegals.

1.2 This course:

(a) explains what discovery is and why it is important;

(b) explains the procedure for discovery in NSW under the Uniform Civil Procedure Rules 2005 (NSW);

(c) explains the procedure for discovery in the Federal Court under the Federal Court Rules 2011 (Cth);

(d) considers issues to be aware of when undertaking discovery, including claims for privilege and the use that may be made of discovered documents; and

(f) provides a practical guide to discovery, including a step by step guide of what a paralegal would do if they were helping with discovery, including use of electronic document management systems.

LESSON 2 – WHAT IS DISCOVERY?

2. What is Discovery?

2.1 Discovery is the process by which a party in civil litigation requires one or more other parties to the proceeding (or, in limited circumstances, people or companies who are not parties to the proceedings) to produce documents in their possession. It is one of the principal means by which parties are able to obtain documents that are relevant to the proceeding to use as evidence.

2.2 If documents were once in a party's possession but no longer are, discovery also requires the party to disclose that fact.

2.3 Documents that must be produced pursuant to discovery orders are described as being "discoverable".

2.4 Historically, a broad view was taken of what documents were discoverable. However, with the introduction of modern technology and the proliferation of documents held electronically, civil procedure rules and court practices have now curtailed the extent of discovery in litigation.

2.5 The process by which orders for discovery are made by the courts are set out below.

3. Advantages and Disadvantages of Discovery

3.1 Discovery is crucial to civil litigation for the following reasons:

(a) it allows parties to discover the relevant material that might be used in evidence to prove their claim;

(b) it prevents ambush and surprise;

(c) it promotes a fair trial;

(d) it helps to define the issues; and

(e) if used at an early stage ("preliminary discovery" is discussed further below), it allows parties to identify a prospective defendant or their whereabouts, or obtain advice on the prospect of succeeding in their claim.

3.2 However discovery has been described as an "*invasive procedure*": *Austral Ships Pty Ltd v Incat Australia Pty Ltd* [2009] FCA 368 at [129] (McKerracher J).

3.3 Discovery can also be a costly exercise. In *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264, Allsop P (as he then was) stated (at [101]):

> Discovery can be a highly expensive exercise. Courts in defamation, as in all other matters, including commercial matters, should be astute to ensure that it is

> not used as a weapon of oppression by wealthy litigants to oppress less well-funded parties. Even when all parties are well resourced, over-enthusiastic and unnecessary use of discovery impedes the due administration of justice and undermines confidence in the court system's ability to resolve disputes justly, quickly and cheaply. Parties should understand that there is no entitlement to "chain of inquiry" discovery. If discovery is being used abusively, the courts can and should control it.

3.4 Similarly, in *Seven Network Ltd v News Ltd* [2007] FCA 1062, Sackville J noted (at [21]):

> Much of the cost of conducting mega-litigation is generated by the discovery process. The process can impose a crippling burden on the parties, requiring them to locate and produce thousands of documents created over many years. The court may attempt to limit this burden, for example by making orders restricting the scope of discovery to specified categories of documents. Sometimes it may be appropriate to direct that separate questions be determined in advance of other issues in the proceedings. Such an approach can reduce the discovery burden and, depending on the answers to the separate questions, relieve the parties from the need to adduce evidence and argument on all the issues raised by the pleadings.

3.5 Since the introduction of the *Civil Procedure Act 2005* (NSW), courts in NSW have been particularly concerned with the spiralling costs of litigation and the risk that such costs reduce access to justice. Accordingly, the mantra of "*just, quick and cheap*", as set out in s 56 of the *Civil Procedure Act*, will be at the forefront of judges' minds in determining the scope of discovery in any particular case.

4. Types of Discovery

4.1 There are two types of discovery:

(a) preliminary discovery; and

(b) discovery during the course of proceedings.

4.2 Preliminary discovery occurs before proceedings have commenced.

4.3 There are two types of preliminary discovery: discovery to ascertain the identity or whereabouts of a prospective defendant ("identity discovery"), and discovery to determine whether or not to commence proceedings ("cause of action discovery").

4.4 The rules relating to each type of preliminary discovery are discussed below.

4.5 Otherwise, the more common type of discovery is discovery during the course of proceedings.

4.6 Documents may also be obtained from parties to a proceeding by way of a Notice to Produce. A Notice to Produce is similar in some ways to discovery, in that it requires production of documents in the possession of the party. However a Notice to Produce requires production of specific documents, unlike discovery which generally requires production of categories of documents.

4.7 Discovery during the course of proceedings is usually not used to obtain documents from an individual or entity who is not a party to the proceeding. The process by which documents can be obtained from a third party is through the issuing of a subpoena. Like a Notice to Produce, a subpoena must require production of specific documents, rather than categories of documents.

5. How Does Discovery Work in Practice?

5.1 Discovery orders require production of categories of documents. This will mean that someone – usually a legal representative of the party – will be required to search the party's records to determine what documents are in the party's possession and must be produced pursuant to the discovery order.

5.2 As a paralegal, your primary role in relation to requests for discovery will be reviewing documents to determine whether or not they are discoverable. This will require you to pay careful attention to the contents of the document, but also work in an efficient way, as there may be vast quantities of documents to review.

5.3 You may also be required to review documents that have been produced by other parties to a proceeding pursuant to a discovery order.

5.4 Practical tools for undertaking discovery are discussed below.

6. Part 21 of the *Uniform Civil Procedure Rules 2005* (NSW)

6.1 The rules and procedures for discovery in NSW are governed by the rules of civil procedure contained in the *Uniform Civil Procedure Rules 2001* (NSW) (**UCPR**), and in some jurisdictions within NSW, specific practice notes.

6.2 Discovery is dealt with in Part 21 of the UCPR. Part 21 applies to all courts in NSW other than the Dusts Diseases Tribunal and the Small Claims Division of the Local Court.

6.3 Pursuant to UCPR r 21.2(1), a court may order that Party B give discovery to Party A of:

(a) documents within a class or classes specified in the order, or

(b) one or more samples (selected in such manner as the court may specify) of documents within such a class.

6.4 Part 21 also envisages that discovery will be limited to documents relating to particular issues or subject matters in issue in the proceeding, or limited to a particular period: UCPR r 21.2(3).

6.5 Any such class of documents must not be specified in more general terms than the court considers to be justified in the circumstances: UCPR r 21.2(2).

7. What is a "Document"?

7.1 Discovery orders will require a party to produce "documents". However it is important to bear in mind that the legal definition of a "document" extends beyond just pieces of paper.

7.2 A document means any record of information and includes:

(a) anything on which there is writing;

(b) anything on which there are marks, figures, symbols or perforations that have a meaning;

(c) anything from which sounds, images or writings can be reproduced.

7.3 Documents therefore include tape recordings, video cassette recordings, or even computer databases that can be converted into a readable form.

8. At What Stage of Proceedings Will a Court Order Discovery?

8.1 Traditionally, courts ordered discovery at an early stage. In many courts, this remains the case, and discovery is ordered after the close of pleadings – that is, after the defendant has filed its defence.

8.2 The position has changed in the Equity Division of the Supreme Court of NSW. In that Division, Practice Note SC Eq 11 now provides that the Court will not make orders for discovery until after the parties have served their evidence, unless there are exceptional circumstances. The intent of the Practice Note is partly to reduce the burden of discovery by ordering it only after the issues have been defined by the pleadings and refined by the affidavit evidence: see *Graphite Energy Pty Ltd v Lloyd Energy Systems Pty Ltd* [2014] NSWSC 1326 at [13].

8.3 Examples where "exceptional circumstances" have been found include where information necessary for one party's case was solely within the knowledge of the other party from whom discovery was sought (*Naiman Clarke Pty Ltd v Tuccia* [2012] NSWSC 314 at [26]) or an expedited hearing date meant that it is not possible or impractical to follow the normal rule (*Graphite Energy Pty Ltd v Lloyd Energy Systems Pty Ltd* [2014] NSWSC 1326 at [18]).

8.4 The Practice Note also makes clear that discovery will not be ordered as a matter of course; the Court will not make an order for discovery unless it is necessary for the resolution of the real issues in dispute in the proceedings.

9. Complying with a Discovery: The List of Documents

9.1 In complying with the order for discovery, Party B must serve on Party A, a list of documents that deals with all of the documents referred to in the order.

9.2 The list of documents must:

(a) be divided in two parts. Part 1 sets out the documents that are in possession of Party B. Part 2 sets out the documents that are not in the possession of Party B but that were within the 6 months prior to the commencement of the proceedings.

(b) include a brief description, including the nature of the document and the date or period, of each document or group of documents. Where there is a group of documents, the list must specify the number of documents in that group;

(c) in respect of the documents or groups in Part 2, specify the person (if any) who Party B believes now has possession of the document or group of documents; and

(d) identify any document that is claimed to be a privileged document, and specify the circumstances under which the privilege is claimed to arise.

9.3 Identifying whether a document is privileged is discussed further below.

9.4 Usually discovery must be complete within 28 days, unless the court makes a different order.

10. Complying with a Discovery Order: The Affidavit and Certificate supporting the List of Documents

10.1 The list of documents must be accompanied by a supporting affidavit.

10.2 The affidavit must state that the person making the affidavit (the deponent):

(a) has made reasonable inquiries as to the documents referred to in the discovery order;

(b) believes that there are no documents falling within any of the classes of documents required to be produced that are, or that were within 6 months of the commencement of the proceedings, within the possession of Party B;

(c) believes that the documents in Part 1 of the list of documents are within the possession of Party B;

(d) believes that the documents in Part 2 of the list of documents are within the possession of the person or people specified in that Part; and

(e) where no person is said to have possession of documents listed in Part 2, the deponent does not know in whose possession the document is.

10.3 Where privilege is claimed in respect of a document, the affidavit must set out the facts relied on to support the claim for privilege. This can be a difficult exercise, as it is necessary to describe the nature of the document in enough detail to ensure that the Court has a proper understanding of the document and why it is privileged, without disclosing the contents of the document.

10.4 Making an affidavit involves swearing an oath or an affirmation. This means that it is important that the affidavit is completely accurate.

10.5 If the party who has been ordered to discover documents is represented by a solicitor, the list of documents must also be accompanied by a solicitor's certificate of advice.

10.6 The solicitor's certificate must state that the solicitor:

(a) has advised Party B of its obligations in complying with the order for discovery; and

(b) is not aware of any documents within any of the classes specified in the order (other than those referred to in Parts 1 and 2) that are, or that were within 6 months of the commencement of the proceedings, in the possession of Party B.

11. Complying with a Discovery Order: Disclosure of Documents

11.1 Once the list of documents has been prepared and provided to the other party, Party B must ensure that the documents described in Part 1:

(a) are physically kept and arranged in a way that makes the documents readily accessible and capable of convenient inspection by Party A; and

(b) are identified in a way that enables particular documents to be readily retrieved.

11.2 Within 21 days of being provided with the list of documents, Party A may request Party B to:

(a) produce the documents described in Part 1 (other than any privileged documents);

(b) make a person available who can explain the way the documents are arranged and assist in locating and identifying particular documents;

(c) provide photocopies or facilities for the inspection and copying of the documents.

11.3 Often, documents will be organised in an electronic data room to allow easy access to the parties.

12. Complying with a Discovery Order: Continuing Obligations

12.1 Party B's obligations pursuant to a discovery order do not cease once the affidavit has been made and the documents made available to Party A.

12.2 If, at any time after Party B's affidavit is made, but before the end of the hearing, Party B becomes aware of further documents that fall within the discovery categories that were not included on their list of documents, Party B must provide notice of those documents to Party A and make the document available to Party B.

13. Preliminary Discovery

13.1 As explained above, there are two types of preliminary discovery (that is, discovery that can be used before the commencement of proceedings): discovery to ascertain the identity or whereabouts of a prospective defendant ("identity discovery"), and discovery to determine whether or not to commence proceedings ("cause of action discovery").

13.2 The court may order preliminary discovery to assist a plaintiff if it appears that reasonable inquiries have been made to ascertain the identity or whereabouts of a person for the purpose of commencing proceedings against them, and some other person might have information that would assist the plaintiff: UCPR r 5.2.

13.3 The court may order that the person attend court to be examined as to the identity and whereabouts of the potential defendant, or order that the person give discovery of documents that would assist in ascertaining this information.

13.4 Cause of action discovery may be ordered if it appears to the court that the applicant may be entitled to make a claim for relief against a person (a prospective defendant) but, having made reasonable inquiries, is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant: UCPR r 5.3.

13.5 This type of discovery will be ordered where the prospective defendant may have in his or her possession information that can assist in determining whether or not the applicant is entitled to make a claim for relief, and inspection of the document or information would assist the applicant to make the decision concerned.

14. Power to Order Discovery

14.1 The procedure for obtaining discovery is governed by the *Federal Court Rules 2011* (Cth) (**FCR**). The Federal Court's Central Practice Note: National Court Framework and Case Management (CPN-1) also contains relevant provisions.

14.2 Discovery in the Federal Court requires an order of the Court: FCR r 20.12. Paragraphs 10.1 to 10.13 of CPN-1 make clear that discovery will not be ordered as a matter of course, even when the parties consent, and the Court will mould any order for discovery to suit the facts and issues in a particular case. The Court expects parties and their representatives to take all steps to minimise the burden of discovery.

14.3 A party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible: r 20.11. CPN-1 also contains a range of policy considerations when making an order for discovery, and emphasises that the Court will not approve expansive or unjustified requests. Requests for discovery must be limited and targeted, and proportionate to the nature, size and complexity of the case.

14.4 These rules reflect a policy of the court that discovery should be under the control of the court.

14.5 The Court may make an order for discovery after the close of pleadings. A party seeking discovery must file an affidavit stating the orders sought, the party's calculation of the cost of making discovery, and why the orders should be made: r 20.13.

15. Scope of Discovery Orders in the Federal Court

15.1 The Federal Court may make an order for "standard discovery" under r 20.14. This requires a party to give discovery of documents:

(a) that are directly relevant to the issues raised by the pleadings or in the affidavits of which, after a reasonable search, a party is aware; and

(b) that are, or have been, in the party's control.

15.2 Documents that are "directly relevant to the issues" raised must meet at least one of the following criteria:

(a) the party discovering the documents intend to rely on the documents;

(b) the documents adversely affect the party's own case;

(c) the documents support another party's case; or

(d) the documents adversely affect another party's case.

15.3 In making a "reasonable search", a party may take into account:

(a) the nature and complexity of the proceeding;

(b) the number of documents involved;

(c) the ease and cost of retrieving a document;

(d) the significance of any document likely to be found and

(e) other relevant matters.

15.4 A party may also seek non-standard and more extensive discovery under r 20.15. This will generally involve a party seeking discovery of categories of documents.

16. What is a "Document"?

16.1 "Document" has a broad definition in the FCR. See above at [7.1] to [7.3] for examples of types of documents that fall within the definition.

17. Complying with a Discovery Order: The List of Documents

17.1 Like in NSW, a discovery order in the Federal Court requires a party to serve a list of documents: r 20.17.

17.2 The list of documents is divided into Parts 1, 2 and 3:

(a) Part 1 sets out each category of documents in the party's control in respect of which there is no claim of privilege;

(b) Part 2 sets out each category of documents in the party's control in respect of which a claim of privilege is made; and

(c) Part 3 sets out each document that has been, but is no longer in the party's control, a statement of when the document was last in the party's control and what became of it.

17.3 Parts 1 and 2 must sufficiently identify the category of documents but not necessarily the particular document.

18. Complying with a Discovery Order: The Affidavit supporting the List Of Documents

18.1 The list of documents must be accompanied by a supporting affidavit: rr 20.21 and 20.22.

19. Complying with a Discovery Order: Disclosure of Documents

19.1 Once the list of documents has been served, a party may apply to the Court for an order that the party who compiled the list of documents produce for inspection any document that is included in the list of documents and is in that party's control: r 20.32.

19.2 The party who seeks inspection of documents may copy of scan the documents that are produced.

20. Complying with a Discovery Order: Continuing Obligations

20.1 A party who has been ordered to give discovery is under a continuing obligation to discover any document not previously discovered, and that otherwise complies with the discovery order: r 20.20.

21. Preliminary Discovery

21.1 The FCR permit preliminary discovery in order to either ascertain the identity of a potential respondent or determine whether to commence proceedings.

21.2 The court may order preliminary discovery to assist a prospective applicant where the prospective applicant may be entitled to obtain relief against a prospective respondent but is unable to ascertain the description of a prospective respondent: FCR r 7.22. A "description" of a prospective respondent includes a person or corporation's name and address.

21.3 The court may order that a third party who has information that would assist the prospective applicant attend court to be examined in relation to the description of the person concerned, or give discovery of documents that would assist in ascertaining this information.

21.4 Discovery may also be ordered from a prospective defendant. Where a prospective applicant reasonably believes that it may have a claim against a prospective respondent and, after making reasonable inquiries, does not have sufficient information to decide whether to commence proceedings, the Court may order the prospective defendant to provide discovery of documents that assist the prospective applicant in determining whether they have a right to obtain relief: FCR r 7.23.

22. Privilege

22.1 A party is not required to produce documents that are "privileged" when complying with an order for discovery.

22.2 There are a number of categories of privilege that are relevant to your work as a paralegal. As you conduct document review for the purposes of discovery, you should take care to mark any document that you think might be privileged.

22.3 The principal category of privileged documents that you are likely to encounter is documents that contain legal advice or that relate to litigation.

22.4 A party will not be required to disclose a document that contains:

(a) a confidential communication made between a client and its lawyer,

(b) a confidential communication made between two or more lawyers, or

(c) a confidential document prepared by the client, lawyer or another person that was made in order for the lawyer to provide legal advice to the client.

22.5 Similarly, a party will not be required to disclose a confidential communication or document that was prepared in order to provide legal services relating to a court proceeding.

22.6 As such, when you are conducting discovery, you should pay careful attention to any document that you see that relates to a lawyer giving legal advice, a client requesting legal advice, or to litigation. If you are unsure about whether a document falls into this category, you should ask your supervising lawyer.

22.7 Another category of privileged document that you may encounter is documents relating to settlement negotiations. These types of documents will often be marked "without prejudice" or "without prejudice save as to costs", but will not necessarily be. Again, if you come across documents that fall into this category, you should bring them to the attention of a lawyer.

22.8 Other categories of privilege that are less common include:

(a) privilege against self-incrimination: an individual who is party to a proceeding may wish to apply to the court for an order excusing them from producing any documents that might incriminate him or her in respect of a criminal offence or a civil penalty;

(b) public interest immunity: this category would be relevant if your client is a government department. The rules relating to public interest immunity mean that the State may not be required to produce documents where there is a public interest in preserving secrecy or confidentiality in relation to the information.

22.9 The primary reason why you must be careful to identify documents that might be privileged is that privilege may be waived where documents are disclosed to another party. This means that if you accidentally provide another party with documents that are privileged, they may no longer be considered privileged by the court.

22.10 That said, however, the High Court has held that where there is an inadvertent disclosure of documents by solicitors contrary to their clients' instructions, there may be no waiver of privilege, the documents should be returned and all electronic copies should be deleted: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

23. Use of Documents obtained by Discovery

23.1 A party who obtains documents from discovery is entitled to use those documents as evidence in the proceeding in which they were discovered.

23.2 However, a party who obtains discovery is subject to an obligation not to use, or permit to be used, those documents for any purpose other than the proceedings (or for any "collateral or ulterior purpose"). This is known as the "Harman undertaking" or the "implied undertaking". Breach of that obligation may constitute a contempt of court.

23.3 In NSW, this principle is also contained in UCPR r 21.7. For proceedings in the Federal Court, it is also contained in FCR r 20.03.

23.4 There are several exceptions to this rule. Documents obtained pursuant to discovery may be used outside of the proceedings in which they were obtained if:

(a) the Court gives leave (i.e. permission);

(b) the document is received into evidence in open court; or

(c) the producing party consents.

LESSON 6 – PRACTICAL ASPECTS OF WORKING ON DISCOVERY

24. Overview

24.1 As a paralegal you will become involved in discovery in one of two ways:

(a) Your client is responding to a request for discovery and must determine which documents to produce to the requesting party.

(b) Your client issued the request for discovery and has now received the response to the request and needs to review the documents in order to find evidence or identify lines of enquiry that might be relevant to your case.

24.2 Both processes involve collating and managing documents as well as reviewing the contents of documents.

24.3 The details of the practical steps that you will carry out during discovery will vary from firm to firm and from case to case. Much will depend on the number of documents involved: discovery can range from producing a limited number of documents that can, and have, been identified with precision, to considering thousands of documents that have been identified from large computer networks with the assistance of electronic search terms. Nevertheless, the general contours of the process are usually similar and are set out in more detail below.

24.4 As many firms now use specific software programs for collating and managing documents during discovery some basic information about these programs is also provided at the outset of this lesson.

25. Managing Documents and Electronic Document Management Systems

25.1 Many firms use an electronic document management system (**DMS**) to assist with discovery, particularly if a large number of documents are involved. A DMS is a software program that stores documents in one place and allows the documents to be catalogued and reviewed electronically. A DMS effectively creates a searchable database of documents and allows you to annotate, categorise and make notes with respect to the documents. It can be useful both in preparing to respond to a request for discovery or in analysing the documents produced in response to a request.

25.2 Two of the more popular software programs are “Ringtail” and “Relativity”. Both operate on similar principles.

25.3 Larger firms or government departments may have a dedicated IT team that assist with running the DMS. Other firms may have outsourced the technical aspects to a third-party service provider who manages the technical aspects of the DMS.

25.4 Each software program is different and you should (hopefully) be provided with some training before you start using a DMS. However, the following points are useful to understanding conceptually how a DMS usually operates:

(a) As a first step, electronic files of documents need to be uploaded onto the DMS. This may involve coordinating to provide material to the IT section or third-party provider once it has been received from the client. Where documents have been provided in hard copy the documents will need to be scanned so that an electronic file exists that can then be uploaded.

(b) When a document is uploaded to the DMS it will be allocated a unique identification number, often in the form of several letters indicating the source of the document followed by a string of numbers, for example FRM.0001.0001.0055 and CLT.0001.0001.0033. The document number on the first page of the document will be the number most relevant as entering this number will locate the document on the DMS.

(c) The DMS will keep track of "families" of documents that should be treated in a similar manner. A host email and the documents that were attachments to that email is an example of a document family.

(d) The DMS will allow information to be recorded about each document and will store that information. The information recorded can be descriptive (for example, "date", "description", "host / attachment", "title", "author"), or require analysis (for example, indicating whether the document is relevant, whether the document is privileged or categorising the document by issue). The software allows the information entered to be tailored to each specific case. Sometimes it is possible for the descriptive information to be pre-populated based on the electronic file metadata (for example dates of emails), however often the information will need to be manually entered and this task is often allocated to paralegals. The process of recording information about the document in the DMS is often referred to as "coding" the document (although no need to worry, no technical computer coding is required, there will be a series of boxes to tick or drop down menus to complete in the software program).

(e) Documents can be viewed in the DMS without being downloaded. At the same time as viewing the document you will be able to see the coding information that has previously been recorded about the document or enter new information.

(f) The software will allow you to search across documents stored on the DMS by parameters based on the content of the documents (for example, word searches) or based on the coding information for the document (for example, locating all privileged documents, or all documents dated in a particular range).

(g) Most software programs will allow redactions to be made to the documents within the program.

(h) Some software programs will have powerful additional features such as being able to search for similar documents to ensure consistency in the way that similar documents are being treated.

(i) If you are responding to a discovery request, once all the documents have been coded electronic files of documents can be prepared from the DMS to produce to the requesting party. Schedules outlining information for each document produced, or each document over which privilege has been claimed, can be generated from the coding information in the database.

25.5 Of course, not all discovery requests require or involve the use of dedicated software. Many firms still use folders on a shared drive to manage documents during discovery, particularly when a limited number of documents are involved. If this is the case, it is important that you work with the supervising lawyers to establish clear naming and saving conventions so that you can keep track of documents and find the documents when and if required. It is also essential that you keep accurate and up to date records so that you can know exactly what steps have been taken with respect to documents you have handled.

26. Responding to a Request for Discovery

26.1 Generally speaking <u>responding</u> to a request for discovery will involve the following stages of work:

(a) locating and collating potentially responsive documents;

(b) determining which documents fall within the scope of the discovery request;

(c) making any claims for privilege over the documents that are within the scope of the discovery request; and

(d) preparing the documents in a form that can be produced to the party that has made the request.

26.2 Outlined in this section of the lesson are some of the tasks paralegals are often asked to undertake in each stage of work.

<u>Locating and collecting potentially responsive documents</u>

26.3 Your client will usually have to go through the process of locating documents that potentially respond to the discovery request and then will provide these documents to your firm. For example, the client may provide boxes of paper files containing documents that are potentially responsive. You may then be required to log the collection of the material and organise for the copying, scanning or saving of the material before the hard copies are returned or ensuring the safe storage of the hard copies.

26.4 Increasingly, the material provided will be electronic, so documents may arrive on USB or be uploaded to a shared area such as Dropbox. If the number of documents is small a client may even just send the documents in a series of emails. Again, your role may be to log the collection of the material and sort it, save it in the appropriate place or

provide it to other colleagues or third parties who are responsible for upload to of the files to a DMS.

26.5 Documents are often provided by clients over time in a number of tranches, so it is important to know what has and has not been provided, and where tranches of material are up to in any processing (for example tranche 3 is being scanned, tranche 2 has been provided to DMS provider for upload, tranche 1 is fully uploaded and hard copies returned to client). Often paralegals assist with keeping records or spreadsheets of this information or otherwise assisting with the project management aspects of collating potentially relevant documents. Again, keeping accurate and up to date records is crucial to ensure all documents are accounted for and none are lost or overlooked.

Determining which documents fall within the scope of the discovery request

26.6 Unless the discovery request is very confined and it is easy to identify the requested documents with precision, clients will often provide a large number of documents that are potentially relevant and the firm will need to determine which documents actually fall within the scope of the request (sometimes referred to as the "relevant documents" or "reviewing for relevance"). This step can be a very large task when hundreds or thousands of potentially relevant documents have been identified by using electronic search terms that have been run over servers or email accounts.

26.7 Lawyers and paralegals will need to review the content of the potentially relevant documents to work out which documents need to be produced to the requesting party. Paralegals are often relied upon to make a first line assessment of whether a document falls within the scope of the request, with legal practitioners being involved in a second review to make a final call.

26.8 Often supervising lawyers will put in place a "review protocol" setting out more detail about the documents that they think fall within the scope of the discovery request and how to keep track of the documents that need to be produced. Review protocols are very common when there are large teams and a DMS is being used to manage discovery. If there is a review protocol in place in your matter it is very important that you read it and are familiar with how it should work as the protocol is being relied upon to ensure consistency across the team.

26.9 Even if there is not a formal review protocol in place you should discuss with your supervising lawyer the view that is being taken to which documents need to be produced. If you are not using a DMS you should also discuss with your supervising lawyer how to keep a good record of documents that have or have not been reviewed so that the work is completed efficiently.

26.10 The process of responding to discovery requests will usually require making indexes or schedules of material, both not privileged (to be produced) and privileged (to be withheld). For this to occur, basic information will need to be recorded about documents, such as document type, date created, author, if it is a communication the sender and recipient or a brief description of the document. For efficiency sake this information is usually recorded at the same time as reviewing the documents for

relevance to the request (although sometimes it is a separate process at the end). If a DMS is being used there will be fields to enter in the information in the program and this will be completed at the same time as reviewing the document. If no DMS is being used you may be required to enter the information about each document into a table or spreadsheet or draft index.

Making any claims for privilege over the documents that are within the scope of the discovery request

26.11 As discussed above, your client will not be required to produce documents that are privileged even if the documents otherwise fall within the scope of the discovery request. It is therefore important that careful attention is paid to identifying any privileged documents.

26.12 Ultimately, it should be a qualified legal practitioner who makes a final call on whether a document is subject to privilege or not. However, if you are assisting with reviewing documents for relevance to the request the lawyers will usually be relying on you to identify potentially privileged documents and bring these to their attention at the same time.

26.13 Whether a document is privileged will depend on a number of factors. You should be familiar with the principles of legal professional privilege outlined earlier and apply this analysis to the document. There are also some are indicators that a document might be privileged and should go through a further legal review. It is often useful to consider questions such as:

(a) Are there any markings on the face of the document to indicate that it might be privileged, for example “privileged and confidential”?

(b) Are there lawyers (either in house or external) involved in the communication?

(c) Does the communication or document set out legal advice?

(d) Was the document prepared for anticipated or ongoing legal proceedings, for example is it a draft expert report or witness statement?

(e) Is the communication directly related to anticipated or ongoing legal proceedings?

26.14 If the answer any of the questions above is “yes” then the documents should probably go through a secondary review by a supervising lawyer.

26.15 It is usually necessary for a party that is withholding documents on the basis of privilege to produce an index or schedule of those documents (sometimes also referred to as a “privilege log”). This document will record basic details about the document such as document type, date, description, and the basis for the privilege claim. You may be asked to assist with creating privilege schedules, or checking such schedules.

Preparing the documents in a form that can be produced to the party that has made the request

26.16 It may be necessary to make redactions to documents that are responsive to the discovery request before the final copy is produced to the requesting party. The redactions may be because only part of the document is privileged, or it may have been agreed between the parties that certain personal details, such as personal phone numbers or tax files numbers, will be redacted from documents. It is common to ask paralegals to assist with redacting documents. Sometimes redactions are made in a PDF reader, such as Adobe, sometimes on hard copies, or sometimes within the DMS.

26.17 Your role may also be assisting with finalising the copies of documents that are going to be produced. For example, where production is in hard copy, finalising hard copy folders or where production is occurring electronically organising the final files including the redactions to be saved so that the final electronic copy can be made.

26.18 Where large volumes of documents are being produced through a DMS those in charge of the database will organise the database files to be provided but you may still be required to check final details, for example checking that the correct number of documents being produced, that the redactions properly made and that any schedules produced form the DMS coding information are properly formatted.

26.19 It is also common for paralegals to assist with finalising indexes or schedules of documents that will accompany the production of documents.

27. Reviewing Material produced in response to a Request for Discovery

27.1 Generally speaking receiving a response to a request for discovery will involve the following stages of work:

(a) Checking the accuracy of the production set;

(b) Storing and cataloguing the documents produced; and

(c) Reviewing the documents produced in order to find relevant evidence or identify lines of enquiry that might be relevant to your case.

27.2 Outlined in this section of the lesson are some of the tasks paralegals are often asked to undertake in each stage of work.

Checking the accuracy of the production set

27.3 It is important to check that everything that the producing party says has been produced is actually in the production set. On smaller productions paralegals will often be asked check everything in the index has actually been produced in the hard copy folders, or check that all the electronic files on a USB can be opened. If there is no accompanying index (which can happen) you may be asked to produce a working index.

Storing and cataloguing the documents produced

27.4 You may be asked to organise for the produced material to be saved or filed in your firm's system or to coordinate with the DMS technical support for the upload of the material onto the database.

Reviewing the documents produced in order to find relevant evidence or identify lines of enquiry that might be relevant to your case

27.5 Once the discovery material has been received it will be necessary to identify the material that is relevant for your client's case. Particularly when there are large numbers of documents that have been produced, lawyers may rely on paralegals to do a first review of the documents to identify those that are most relevant. Many documents produced may not actually be relevant to what the lawyers are looking for, particularly if the producing party have interpreted the discovery request broadly.

27.6 Again, a review protocol might be put in place to assist with this process, or you may need to have a discussion with your supervising lawyers about what information in the documents is of most interest to them.

27.7 If a DMS is being used, the review protocol will often involve issue identification and categorisation. A list of issues that have been designed specifically for the case will appear in the review pane and you will have to tick those relevant (for example relevant to "Board meeting in 2015", "Company X", and "2015 Property transaction"). A lawyer will later be able to look through all the documents that have been tagged to a specific issue.

27.8 Occasionally when you are reviewing material produced in response to a discovery request you will find a document that looks like it may be privileged (for example a copy of a legal opinion). The party producing may have decided to waive privilege over the document (or may have previously waived privilege such that the document was not privileged at the time of production), or it may have been produced by mistake. You should bring these documents to the attention of a supervising lawyer so that the issue of inadvertent production can be raised with the producing party.

28. Some Useful Terminology

28.1 It can be helpful to know and understand some terms that may be used in relation to discovery processes:

(a) "*coding*" refers to entering information about each document onto the DMS when you are reviewing the document.

(b) "*DMS*" is an abbreviation for "document management system" and can be used to refer to programs such as Ringtail or Relativity.

(c) "*Doc ID*" is a shorthand to refer to the unique document number allocated to documents by a DMS.

(d) "*families*" is used to refer to documents that belong together. For example, an email and its attachments form a document family and document review protocols will often require that the whole family be treated in the same way (if a host email is privileged then the attachments should also be treated as privileged).

(e) "*tranche*" refers to a portion of the documents that are being treated in the same manner. For example, it is common to refer to tranches of documents being produced by the client for you to prepare, or where production of documents is staggered, tranche one, two, three to indicate groups of documents being produced.