

## **PUBLICATION**

### **Civil Trial Preparation: Part II**

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#### **Civil Trial Preparation: Relying on Audio, Video or Electronic Evidence**

*This is the second article in the Civil Trial Preparation series discussing the topic of relying on audio, visual, or electronic evidence at trial. Please [click here](#) for the previous article.*

Evidence submitted at trial typically consists of oral testimony and paper documents. When evidence you are relying on at trial is in electronic, audio, or video form (i.e. electronic records), there are additional considerations that apply. This article will provide insights on the steps to consider when relying on electronic records in support of your case at trial.

Electronic records are relied upon when there is something inherent in the evidence that cannot be reduced to paper, whether it is an audio or video clip, or metadata. For example, in an action seeking to recover damages for defamation, a key piece of evidence may be a video in which the defendant makes false statements about the plaintiff. Another example would be the audio recording of a voicemail in which a plaintiff is threatened by her manager and subsequently fired from her job.

Rule 261.1 of the former Alberta Rules of Court, AR 390/68 stated that “on application to the Court and on showing good reason for doing so, the Court may permit evidence to be admitted by telephone, audiovisually or by other means satisfactory to the Court”. However, Rule 261.1 is now repealed and parties must decide how to handle this type of evidence themselves when preparing for trial.

A litigant relying on electronic records should be aware of the Court of Queen’s Bench of Alberta’s Civil Practice Note No. 4: Guidelines for the use of Technology in any Civil Litigation Matter. Practice Note No. 4 allows parties to use electronic records at trial in two circumstances:

- By agreement of all parties to the litigation, or
- Through an application to the Court, well in advance of trial.

#### 1. Use of Electronic Documents by Agreement

Litigants should be mindful early on in the litigation process if they need to rely on any electronic records. Once it has been established that a party to litigation will rely on an electronic record, they should discuss with all

other parties, the potential issues with the collection and production of those electronic records. Parties should be able to agree on what needs to be done to maintain the integrity of that electronic record, how to deliver the electronic record to other parties in an acceptable form, and how to ensure that the other parties can access and review the record with the necessary software. If the electronic record needs to be converted in order to be shared with the other parties, it must be maintained in its original form and available for other parties to access upon request.

Once an agreement on how to deal with document production is reached, parties should then address the use of technology in advance of the matter being set down for trial. In both Queen's Bench and Provincial Court actions, the parties have flexibility when making arrangements for the use of technology. Litigants in Queen's Bench matters may seek assistance from the Court pursuant to Rule 4.10 of the Alberta Rules of Court, Alta Reg 124/2010. In Provincial Court, parties can seek advice and direction at the Pre-Trial Conference.

The discussion regarding arrangements for the use of technology will include the equipment and software that the Court might require, the format of electronic records and whether it is compatible with the technology available in the courtroom. As well, a discussion on how costs arising from the use of the technology will be shared.

In Alberta, the Court of Queen's Bench has an e-Court Coordinator. The e-Court Coordinator's role is to assist parties in making arrangements for the provision of any required equipment to present electronic records. If electronic records are going to be produced at trial, parties must meet with the e-Court Coordinator at least 30 days before the first scheduled day of trial. Importantly, at least 14 days before the first meeting, parties must be prepared with joint written submissions to the e-Court Coordinator with the arrangements they propose. For Provincial Court actions, parties should write to the Clerk of the Court to confirm arrangements for technology in advance of trial.

## 2. Application for an Order Dealing with Electronic Records

When parties cannot agree on the use and inclusion of electronic records in a trial, they can apply to the Court to obtain an Order dealing with the previously discussed issues that arise with the use of technology (Electronic Records Order). In order to be successful, parties will need to demonstrate that best efforts have been used to come to an agreement on the use of technology and electronic records.

Any Electronic Records Order will need to be raised in further Application(s) seeking advice and direction on matters relating to technology. The Court must be satisfied that the parties have complied with the Court's previous direction on how to deal with the electronic records. Failure to comply with an Electronic Records Order may be grounds for refusing to admit the electronic record. At this point, parties are free to again make joint submissions to the e-Court Coordinator; if this is not possible in the circumstances, advice and direction can be sought at a further Application.

On the day of trial, the party relying on the electronic record should bring a laptop to connect to the Court's electronic systems, which display the electronic record on all screens in the Court, in full view of the witnesses and the Judge. Parties should also have the electronic record prepared in a form that they can leave with the Court, as it may be entered as an exhibit at trial. Since leaving a laptop behind would be undesirable, it is recommended that parties put the electronic record on a CD or a USB memory stick.

Finally, once the process of presenting the electronic records has been established with the Courts, litigants should then turn their attention to preparing to defend the electronic records' use, in terms of authenticity, accuracy, chain of custody and relevance. All of these factors may be questioned at trial; however the process of justifying the evidence can be shortened by entering an Agreed List of Exhibits (this will be covered in greater detail in the third article for the Civil Trial Preparation series).

If you have questions about relying on any electronic records in an upcoming trial, or would like further information regarding preparation for trials, please contact the authors, Vik Mall at 403.254.3837.

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This article is intended to be an overview of trial preparations and is for informational purposes only. Readers are cautioned that this article does not constitute legal or professional advice and should not be relied on as such. Rather, readers should obtain specific legal advice in relation to the issues they are facing.