

Three P's in a Pod: Production, Privacy and Phantom Clients

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Goodmans^{LLP}



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Goodmans Presents: Three P's in a Pod: Production, Privacy and Phantom Clients

This session will explore some of the responsibilities and ethical considerations of your role as in house counsel, including:

Production of Documents— What to do when disputes arise

- What to do when your organization does not have an adequate document management system
- Managing the practical problems of document preservation and collection

Dealing with Privacy Breaches

- Coordinating a response among corporate departments
- Ethical dilemmas
- What outsiders should be informed of the breach and when
- Limiting the downside

Phantom Clients

- Clarifying your role and setting boundaries for your relationships with other parties such as members of the board, members of management and employees



Please Note: This program has been accredited by the LSUC for 1.5 Professionalism Hours toward the annual CPD Requirement and for 1.5 hours toward the New Member CPD Requirement.

Production of Documents— What to do when disputes arise

Suzy Kauffman

Preservation of Documents

- **Timing:** Obligation to preserve documents arises as soon as company becomes aware of the existence of litigation or reasonably anticipated litigation.
- **Duty to Preserve:** Obligation is to preserve, in original format, all documents that could reasonably be expected to be potentially relevant to the litigation, until such time as their actual relevance to the litigation can be determined.
- **Risks if fail to preserve documents:**
 - Company could face charges of spoliation of evidence – consequences serious- court could dismiss claim or strike defence or draw an adverse inference from the destruction of document.
 - Company also wants to ensure that the documents it needs to make or defend its case are available.

Practical Approach to Preservation of Documents

1. *Address Urgent Preservation Issues* — Are there any imminent spoliation concerns because documents may be destroyed, altered or removed in short term.
 - Look at company's email deletion policy or records destruction policy – should place stop on auto deletion of records immediately.
 - Possibility of alteration to electronic records that are in continuous use (change in metadata) – May want to take forensic mirrored copies of company's potentially relevant data to avoid possibility of it being modified or overwritten.
 - Electronic documents must be preserved intact so that the metadata associated with the electronic record is also accessible (printed copy of the record insufficient).
 - Departing employees - could give rise to loss of potentially relevant docs.
 - Prepare and implement urgent preservation plan where needed.
2. *Litigation Hold Memo*
 - Should be distributed company wide, or at least to any person who may be expected to have **had any** involvement in matter and potentially any relevant documents.
 - All potential custodians should be informed of the need to preserve documents in original format without modification.
 - Each individual should be asked to identify places where potentially relevant documents may be located (including personal computers, blackberries or home office files).

3. *Make Preservation Plan*

- One person should be in charge.
- Involve IT to assist in identifying forms of potentially relevant electronically stored data, methods of data storage.
- Understand archiving policy and procedure for retrieving archived documents.
- Ensure compliance with the litigation hold.
- Keep records of all preservation steps taken.

General Considerations

- Proportionality always a guiding principle in determining nature and scope of obligation.
 - Factors include importance and complexity of case, amounts in issue, costs, delay, burden and benefit associated with each step.
- The obligation to “preserve” documents should not unduly interfere with Company’s ability to carry on business.
- Obligations are ongoing throughout litigation.
- Recommendation is that parties “meet and confer” to agree on steps being taken to preserve documents. Not always practical.

SAMPLE – Litigation Hold Memo

Privileged and Confidential

DATE:

[Company Name (the “Company”)]
Document Preservation Notice

1. Your Obligation to Preserve and Produce Documents

As you may know, the Company is involved in a dispute with [ADVERSE PARTY]. You have received this notice because it is believed that you may possess or control documents, as defined expansively below, which may be relevant to this dispute.

The issues in this litigation arise from *[describe litigation]*.

As a custodian of potentially relevant documents, you are legally required to take all necessary steps to protect such documents from destruction, to preserve them in their original format, and to cooperate with the Company and its counsel in obtaining access to them. In particular, you must: *[list relevant document preservation protocols, with reference to document retention policies if applicable]*.

The obligation to make discovery of documents is ongoing. Your obligation to preserve and produce potentially relevant documents extends to documents created or obtained in the future.

2. Broad Meaning of “Documents”

“Document” has a very broad meaning and it includes a sound recording, video tape, film, photograph, chart, graph, map, plan, survey, book of account and data and information in electronic form.

The obligation to produce documents extends to electronic records stored on any kind of electronic media or in electronic format including, but not limited to, back up dates, spreadsheets, databases, emails (including archived and deleted emails), hard drives, USB storage devices, PDAs, including devices like Blackberries and iPhones, voicemail records, webmail and web-based file storage files, meta-data, temporary files such as internet history logs, internet temporary and “cookie” files, and auto-recovery files. Relevant documents should be retained whether they are located on company-owned, personally owned or third-party owned devices.

Relevant documents may be discoverable whether they are located in devices owned by the Company or by you personally. In discharging your obligations pursuant to this Notice, it is essential that you consider where you may have stored potentially relevant documents, such as filing cabinets, portable computers, PDAs, or your home office.

3. Consequences of Failing to Preserve and Produce Documents

Failing to preserve and produce potentially relevant documents could have serious consequences for the Company, including the failure of the Company's case in the lawsuit. The court could also assume that the documents that were not preserved would have been harmful to Company's case and draw inferences favourable to [ADVERSE PARTY]. The Company could be required to pay costs, damages or other sanctions.

Given the gravity of these potential consequences, it is essential that you give immediate attention to this Notice and comply with the directions contained within it. Failure to do so could have serious consequences, including up to and including dismissal.

4. Next Steps

You will shortly be contacted by [*identify the internal or external counsel, or service-provider*] to arrange for the production of your documents.

Counsel will review the documents to determine whether they are relevant, and will take steps to protect documents which are subject to privilege. Please do not attempt to make such determinations yourself.

5. Further Information

If you have any questions arising from this notice, please contact me directly.

[Signed by Senior Officer/General Counsel]

Dealing with Privacy Breaches

Peter Ruby

What is a privacy breach?

A privacy breach is the unauthorized access to, or the collection, use, disclosure or disposal of personal information. For example, personal information may be lost (records simply disappear), stolen (laptop thefts are a common example) or inadvertently disclosed through human error (information is mistakenly emailed to the wrong person).

Responding to a privacy breach

Responding to a privacy breach has two components: legal and practical. In light of the current state of Canada's privacy laws, practical and ethical considerations are usually more immediate than legal concerns.

There are five key steps to responding to a privacy breach:

1. Get the Right People Involved

Responding to a privacy breach typically requires the involvement, in a short timeframe, of the following personnel:

- Legal
- Senior management
- Public relations
- Often information technology
- Often human resources
- Sometimes investigator

2. Contain the Breach

The most important step following the reporting of a privacy breach is to immediately contain the breach. Its importance cannot be over emphasized. Steps may include the following:

- Stopping the unauthorized practice, recovering the records, shutting down the system that was breached, revoking access or correcting weaknesses in physical security.
- Immediately contact the person responsible for security in your organization. If there is no person responsible, designate an appropriate individual (or individuals) to lead the investigation and respond to the breach.
- Consider notifying the police if the breach appears to involve theft or other criminal activity.

It is also important at this stage to ensure that the evidence required to investigate the breach has not been altered or destroyed.

3. Evaluate the Risks Associated with the Breach

Consider the following factors when evaluating the risks associated with the breach:

i Personal Information Involved

- What is the type of personal information involved in the breach (i.e. name, address, SIN) and what form was it in (i.e. paper record, electronic database)?
- What are the possible uses for this information? Can this information be used for fraudulent or harmful purposes?
- What physical or technical security measures were in place at the time of the breach?

ii Cause and Extent of the Breach

- What is the cause of the breach? Is there a risk of ongoing breaches or further exposure of the information?
- What was extent of the breach? Factors may include the number of likely recipients and the risk of further access, use or disclosure, by mass media or online channels.
- Was the information lost or was it stolen? If it was stolen, can it be determined whether the information was the target of the theft?
- Is the information encrypted or otherwise not readily accessible?
- What steps have been taken to minimize the harm?

iii Individuals Affected by the Breach

- How many individuals have been affected by the breach?
- Who are these individuals (i.e. employees, clients, other organizations)?
- In what jurisdictions are the affected individuals located?

iv Foreseeable harm

- Is there any relationship between the unauthorized recipients and the personal information?
- What harm to the individuals will result from the breach?
 - i.e. security risk (i.e. physical safety), identity theft, loss of business or employment opportunities and damage to reputation.
- What harm to the organization could result from the breach?
 - i.e. loss of trust, loss of assets, legal proceedings and financial exposure.
- What harm to the public could result from the breach?
 - i.e. risk of public health, risk of public safety.

4. Notification of Parties Involved

Notification may be important to an organization's mitigation strategy, but is not necessary in all circumstances. A key consideration in deciding whether to notify should be whether notification is necessary in order to avoid or mitigate harm to an individual who was subject to the privacy breach. The general questions to be considered in the notification process are outlined below:

i Should the affected individuals be notified?

- Is there a contractual or legal obligation for the organization to notify the individuals affected?
- What is the risk of harm?
 - For example, is there a reasonable risk of identity theft or fraud (i.e. does the breach involve SINs, credit card numbers, driver's license numbers, or any other information that can potentially be used for fraud)?
- Are the affected individuals able to avoid or mitigate possible harm?

ii If the individuals are to be notified, how will they be notified?

- What form of notification will be used?
 - Should the notification be direct (i.e. telephone call, letter or in person) or indirect (i.e. website information, posted notices, media)?
 - Direct notification is generally preferred when the identities of the affected individuals are known, their contact information is available and they require more information to protect themselves from harm.
 - Indirect notification may be more appropriate where direct notification would cause more harm, contact information is unavailable or is impractical (i.e. a large number of individuals are affected).
- Who will notify the affected individuals?
 - Is a third party required to facilitate this process?
- If police are involved, should the notification be delayed to ensure that investigation is not compromised?

iii What should be included in the notification?

- Notification should include the following information:
 - Date on which the breach occurred (or time period, if date is unknown);
 - Description of the circumstances of the breach;
 - Description of the information involved in the breach;
 - Description of any steps taken by the organization to mitigate the risk of harm (for example, identity theft insurance and credit monitoring);
 - Steps planned by the organization to prevent future breaches;
 - Steps the individual can take to further mitigate the risk of harm;
 - Contact information of a person in the organization who can answer questions and provide further information about the breach;

iv Are there others who should be informed about the breach?

- Mandatory reporting requirements to privacy authorities (for example, Alberta and health-related in Ontario)?
- Optional reporting to privacy authorities;
- The police should be involved if theft or other criminal activity is suspected.
- Any parties who are required to be contacted through contractual obligations (i.e. insurers, professional or regulatory bodies) should be involved.
- Consider contacting credit card companies or credit reporting agencies to help mitigate the effects of fraud.

5. Prevention of Future Breaches

An investigation into the cause of the breach is critical to prevent similar privacy breaches from occurring in the future. This may involve a security audit of both physical and technical security, reviewing and revising policies to reflect the lessons learned from the privacy breach and retraining staff to be more aware of potential threats to the unauthorized disclosure of personal information.

Training is often a central pillar for preventing recurrence.

Phantom Clients

Fred Myers

While there may not be any doubt in your mind as general counsel who you represent, there are often other parties who are not so clear including management, employees, shareholders to name a few. Here are some best practices in avoiding the “phantom” client:

- Education and Consistency in Approach - otherwise, it is a slippery slope!
 - Identify the client, particularly for others in the organization;
 - Ensure those authorized to give instruction to counsel are clearly identified;
 - Impart basic understanding of risks to the business/management team
 - Resist giving “one-off” advice regardless of the status of the “requestor”
 - Confirm Non-Clients, preferably in writing;
 - Recognize your own limits in expertise and recommend ILA
 - Consider potential loss of privilege in communicating qua executive and in communicating with non-clients or with conflicted individuals;
 - Consider risks of liability (breach of fiduciary duty of loyalty by acting against company’s interest and/or negligence for failing to protect phantom’s interests);
- Acting for multiple interests?
 - Need watch for conflicts now and guard against future conflicts;
 - Need written confirmation that no information is held in confidence;
 - Consider retainer of external counsel – need to identify client and who can give instructions to external counsel.
- Protect the organization and yourself in writing – practicalities, sensitivities and legalities.

About Goodmans

Goodmans is recognized as one of Canada's leading business law firms offering market-leading expertise in specialties such as mergers and acquisitions, corporate finance, securities, corporate/commercial, banking and finance, private equity, REITs and income securities, tax planning, restructurings, litigation and commercial real estate. Founded in 1917, Goodmans has offices in Toronto and Vancouver with over 200 lawyers.

Goodmans provides a complete range of legal advice and representation to domestic and foreign business clients ranging from entrepreneurial businesses to multinational corporations, financial institutions, pension funds and governments across a wide range of industries.

Our lawyers are consistently recognized by leading industry arbiters, and in various surveys of clients and peers conducted by *Lexpert*, *Lexpert/American Lawyer Media*, *Chambers and Partners*, *Practical Law Company*, *Euromoney*, *International Financial Law Review*, *Law Business Research* and *Best Lawyers in Canada*. According to *Chambers and Partners*, as Canada's 21st largest law firm, Goodmans ranks solidly first in Canada on the proportion scale with over 20% of our lawyers recognized as the best in their fields.

Below is a sampling of our recent accolades:

- The *Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada* (2011 edition) lists 22 Goodmans partners among the leading Canadian lawyers excelling in 16 practice areas of law.
- The *Canadian Legal Lexpert Directory 2011* recognizes 40 Goodmans lawyers as being top-tier in their fields and leaders in 26 distinct areas of law.
- Chambers Global's *Guide to the World's Leading Lawyers 2011* ranks 41 individual Goodmans lawyers among Canada's finest. Goodmans' Restructuring/Insolvency Group stands alone as Number 1 in Canada for the 10th consecutive year and the Corporate M&A, Real Estate and Telecommunications practices are also ranked top-tier.
- In 2008 and 2009, Goodmans was named "National Law Firm of the Year for Canada" at *International Financial Law Review's* Americas Awards.
- *PLC Which Lawyer? Yearbook* ranks Goodmans in their top category in capital markets and restructuring and insolvency and "highly recommended" for banking and finance, construction, corporate real estate, corporate mergers and acquisitions, dispute resolution, private client, private equity/venture capital, tax and telecoms and media.
- *International Financial Law Review* 1000 ranks our M&A and insolvency and restructuring practices top tier and also recognizes our strength in capital markets and bank lending.
- *The Best Lawyers in Canada 2012* ranks 54 Goodmans lawyers across 27 practice areas, as among the best lawyers in Canada.
- *American Lawyer Media's 2010 Go-To Law Firm for the Top 500 Companies* guide selected Goodmans as a "go-to" law firm for financial service companies in the area of Canada.



Suzy Kauffman

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Profile

Suzy is a partner in the Litigation Group at Goodmans LLP. She has worked at the firm since starting as a summer student in 1996. Suzy has a varied litigation practice, including general commercial litigation, class actions, contractual disputes, employment law, directors and officers liability claims, real estate litigation, civil fraud, entertainment litigation, insolvency disputes, employee and fiduciary obligations disputes and estate litigation.

Suzy has appeared before all levels of civil courts in Ontario, including the Commercial Court, Divisional Court and the Court of Appeal, and has both trial and appellate experience. She has also been involved in proceedings before the Ontario Securities Commission and in judicial review applications of administration tribunals.

Suzy organizes the Continuing Legal Education program for the associates in the litigation department, and is integrally involved in the student program at the firm, acting as a mentor to summer and articling students.

Prior to joining Goodmans, Suzy was a figure skater and competed nationally and internationally.

Education

McGill University, B.A. (Political Science, Great Distinction)

University of Toronto, LL.B. (Dean's Honour List, Carey S. Stern Prize in Civil Procedure), 1997

Professional Affiliations

Advocates Society

Ontario Bar Association



Peter Ruby

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Profile

Peter Ruby is a partner at Goodmans. He has a national and international practice focused on business and information technology dispute resolution, including software, telecommunications, film, radio, television, privacy and data protection, intellectual property, ecommerce and internet litigation, arbitration, mediation and advice. Peter also deals with the regulation of the electricity industry and reviewing the actions and decisions of governments and government agencies.

Peter leads Goodmans' IT practice group and is recognized as a leading IT litigator in *Chambers Global Guide to the World's Leading Lawyers for Business* and *The Best Lawyers in Canada*. He represents both large multi-national organizations and some of Canada's most entrepreneurial and growing IT companies.

Peter has also acted as counsel for the Canadian Electricity Association and has represented electricity utilities across Canada, as well as green energy developers. He has appeared at the Ontario Energy Board with respect to generation, transmission and distribution issues and before other provincial energy regulators.

With respect to privacy, Peter has successfully litigated business-related privacy cases that have been brought before the courts and has considerable experience assisting clients in dealing with privacy breach incidents. He also assists organizations to draft privacy and data retention policies, deal with privacy inquiries and investigations by privacy commissioners, and negotiate privacy-related agreements.

Peter acted as a law clerk to the Federal Court of Canada, taught at Osgoode Hall Law School and is a Professor of Law (adj.) at the University of Toronto teaching Telecommunications and Internet Law. Peter is a frequent speaker at industry and legal events and is the author of articles in his field of practice.

Selected activities:

- Counsel to Oracle Corp. in Ontario litigation
- Counsel to SAP Canada in arbitration proceedings
- Counsel to Google, Inc. in certain internet law matters
- Counsel to Software AG in disputes with Canadian companies and governments
- Counsel to the Business Development Bank of Canada in IT litigation
- Counsel to software developer Navantis Inc. with respect to joint venture/shareholder litigation and disputes with customers
- Counsel to the Open Internet Coalition (with members such as eBay and Skype) with respect to Canadian traffic management regulation
- Counsel to Universal Studios in copyright litigation with respect to the film Charlie Wilson's War

- Counsel to Park 'N Fly in on-line trade-mark infringement litigation
- Retained by the Canadian Internet Registration Authority to review the dot-ca Dispute Resolution Process and make recommendations with respect to its improvement
- Counsel to Primus Telecommunications Canada Inc. in litigation, arbitration and regulatory matters
- Provides outside counsel to the Ontario Energy Board with respect to cutting edge issues
- Acts as counsel to the Canadian Electricity Association (the trade association for major power utilities)
- Represented 19 power companies in a landmark matter before Canada's telecommunications regulator and successfully on appeal in the Supreme Court of Canada
- Counsel to SkyPower Ltd. with respect to the regulation of renewable energy facilities
- With respect to novel matters in each of their provinces, advised and/or represented in hearings many power companies including Hydro Quebec, B.C. Hydro, New Brunswick Power, ENMAX Corporation, Manitoba Hydro and Greater Sudbury Hydro
- Counsel to CTVgm in a Reference to the Federal Court of Appeal opposite Canada's largest cable and satellite companies
- Counsel in litigation Canada's television channel for blind and low vision Canadians
- Successfully represented before the Ontario Court of Appeal a major theatrical company, with respect to a dispute concerning Toronto's Canon Theatre and other properties
- Advises Postmedia (the owner of the National Post and other newspapers) with respect to privacy issues
- Counsel to the Canadian Recording Industry Association with respect to its internet music downloading appeal
- Counsel to Sun Media Corp. in litigation against the City of Toronto
- Counsel to CBS Television in internet identity theft litigation
- Represented in shareholder litigation one of the owners of a television network and two of the owners of a Toronto radio station
- Counsel to the major shareholders of a radio station in injunction proceedings

Education

Osgoode Hall, LL.B., 1994

Osgoode Hall, LL.M. (Specializing in administrative law), 2000

Professional Affiliations

International Technology Law Association

Canadian IT Law Association (Member of the Board of Directors)

Toronto Computer Lawyers Group

Year of Call

1996 Ontario



Fred Myers

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Profile

Fred Myers is a partner at Goodmans. He has 25 years experience as a commercial litigator with a practice emphasis on insolvency, restructuring and corporate governance matters. Fred has extensive experience appearing in cases on the Commercial List of the Superior Court of Justice in corporate restructuring proceedings. He is recognized as a leading practitioner of insolvency and financial restructuring by *The Canadian Legal Expert Directory*, *The Expert/American Lawyer Media Guide to the Leading 500 Lawyers in Canada*, *Chambers Global Guide to the World's Leading Lawyers* and *The Best Lawyers in Canada*.

Fred has appeared before all levels of civil courts litigating commercial disputes principally involving insolvent enterprises. Fred had a lead litigation role in the largest restructuring in Canadian history involving the non-bank asset-backed commercial paper market. He had leading roles in the insolvency proceedings of Nortel Networks Corp., AbitibiBowater Inc., Stelco Inc. and many others. Fred also has considerable experience with corporate governance issues involving plans of arrangement, contested takeover bids, contested shareholder elections, liquidations under the *Credit Unions and Caisses Populaires Act, 1994* and oppression remedies.

Fred was the Gold Medallist at Osgoode Hall Law School in 1983. After serving as a law clerk for the Rt. Hon. Bora Laskin, Chief Justice of Canada, Fred obtained a Masters degree in law at Harvard Law School.

Fred is a Past President of the Toronto Lawyers' Association. He is a prolific legal writer with over thirty published articles and is a leading figure in legal education for insolvency practitioners having chaired programs for the Law Society of Upper Canada, the Insolvency Institute of Canada, the Canadian Bar Association Insolvency Section and the Canadian Institute to name among others.

Education

Harvard University, LL.M., 1985

Osgoode Hall Law School, LL.B., 1983

Professional Affiliations

Member of the Board of Directors of the Insolvency Institute of Canada

Member of the Commercial List Users Committee, Ontario Superior Court

Member and former President of the Toronto Lawyers' Association

Member of the Ontario Bar Association, Civil Litigation and Insolvency Sections

Member of the Advocates Society

Year of Call

1986 Ontario



Neill May

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Profile

Neill May is a partner at Goodmans. His practice focuses on all aspects of securities law, with particular emphasis on mergers and acquisitions and corporate finance. Neill has developed a reputation for expertise in securities law and for his ability to negotiate and complete complex and innovative transactions.

Neill has counselled participants in numerous public and private M&A transactions, and has represented clients on both sides of friendly and hostile takeover bids. Public M&A transactions in which Neill has been involved include acting for the special committees of both O&Y Real Estate Investment Trust and Hudson's Bay Company, acting for CI Financial Income Fund in its acquisition of Rockwater Capital Corporation and for Onex Corporation and Onex Partner Funds in the acquisition of Husky Injection Molding Systems Inc., and acting for the vendor in the sales of Menu Foods Income Fund and KCP Income Fund.

He has also structured and implemented a vast range of corporate reorganizations and financing transactions, including domestic and cross border public offerings, and private strategic and venture capital financings. Recent corporate finance transactions in which he has played a leading role include the initial public offerings of Royster-Clark Ltd., IBI Income Fund, Allied Properties REIT and Medical Facilities Corporation, the sale of BCE Inc.'s interests in BCE Emergis by way of subscription receipts and the initial public offering and two follow on offerings by Yellow Pages Income Fund.

Neill is recommended as a leading practitioner of corporate finance law by *The Canadian Legal Expert Directory* and has been recommended by Chambers *Global Guide to the World's Leading Lawyers* (corporate/M&A), Practical Law Company's *Which Lawyer?* and *Equity Capital Markets Handbook* (equity capital markets), Euromoney's *Guide to the World's Leading M&A Lawyers*, IFLR 1000 (M&A) and *The Best Lawyers in Canada* (corporate). Neill was recognized as one of Canada's "Top 40 under 40 Lawyers" by *Expert* magazine in 2004. He joined Goodmans in 1992, has been a partner since 1998 and co-heads one of the firm's business law groups.

Neill is a member of the Toronto Stock Exchange Listing Advisory Committee and is a former member of the Ontario Securities Commission's Securities Advisory Committee, and of the Ontario Securities Commission's Small Business Advisory Committee. He has co-authored reports for the Ontario Securities Commission Task Force on small business financing. He is currently an Adjunct Professor at the University of Toronto Faculty of Law, has guest lectured at Osgoode Hall and has been a Bar Admissions Course instructor in the area of business law. Neill heads Goodmans' continuing legal education committee.

Education

University of Toronto, LL.B., 1990