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INSIGHTS

GETTING IT RIGHT FROM THE START

Why a Well-Drafted Document Request List Matters

by Paula Frederick and Lea Lynch





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In litigation, liability often receives the greatest attention at the outset: what happened, who was responsible, and whether the alleged conduct gives rise to a legal remedy. However, even where liability is established, a claim may fall short if the damages assessment is not properly supported.

Reliable and defensible quantification of damages depends on the quality of the underlying information. A well-drafted document request list is an important early step in identifying and obtaining the information needed to support that analysis.

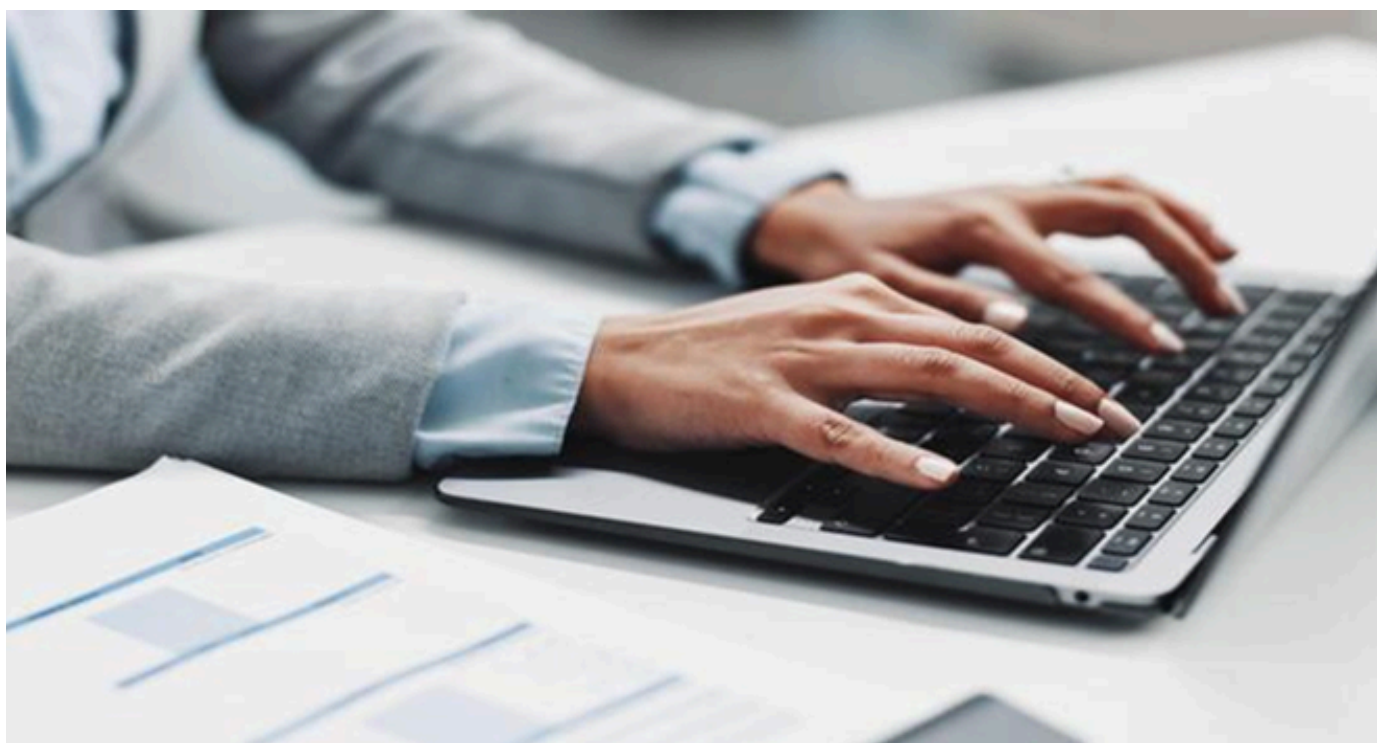
A document request list is more than an administrative checklist. It identifies documents, data, explanations and factual background relevant to assessing the financial consequences of the alleged wrongdoing. An incomplete, vague or poorly structured request list may leave gaps in the available information, potentially impacting the preparation of a robust and well-supported opinion.

A carefully drafted document request list helps establish a sound informational foundation for the damages analysis and can better position the damages expert to explain and support their opinion under scrutiny from opposing counsel, opposing experts and the Court. Involving the damages expert early in the litigation process can help tailor those requests to the issues in dispute and the anticipated approach to quantifying damages.

1. Connecting the Legal Theory to the Damages Analysis

A document request list should be tied directly to the legal theory of the case and the specific heads of damages being claimed. Different claims require different information. For example, a lost-profits claim may require historical financial statements, customer records, pricing, costs, budgets, forecasts, and mitigation information. While a business interruption claim may also require operational records, capacity information, insurance materials, and market data. For an intellectual property matter, licensing agreements, sales volumes, margins, marketing materials, and evidence of non-infringing alternatives may be required.

The document request should reflect how damages are expected to be measured. Broad demands for “all financial documents” may generate unnecessary volume without producing the information needed to support the methodology, assumptions, and overall loss calculations of the damages expert.



2. Supporting Completeness and Reliability



A damages quantification analysis is only as reliable as the source information upon which it is based. Missing information can create gaps in the loss analysis, result in unsupported assumptions, and weaken the overall estimate of damages.

The document request can help identify records relevant to assessing the company's operating results before, during, and after the alleged wrongdoing. Depending on the circumstances, these may include financial statements, tax returns, sales and customer data, purchase records, contracts, budgets, forecasts, board materials, and relevant correspondence.



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A damages quantification analysis is only as reliable as the source information upon which it is based.

The document request should also consider information that would assist in corroborating the records produced. For example, reconciling detailed sales listings to the company's financial statements may help assess completeness. Comparing forecasts with historical performance and actual results for prior forecast periods may also assist in assessing their reasonableness and management's forecasting track record.

Reports obtained directly from an accounting system are generally preferable to Excel schedules prepared separately by management. Such schedules may have been prepared after the alleged wrongdoing and therefore require additional review and analysis to assess their accuracy and consistency with the underlying records.

ACCEPTABLE SOURCE

**Company-prepared
Excel schedules**

*(may contain errors or be prepared
after the alleged wrongdoing)*

PREFERRED SOURCE

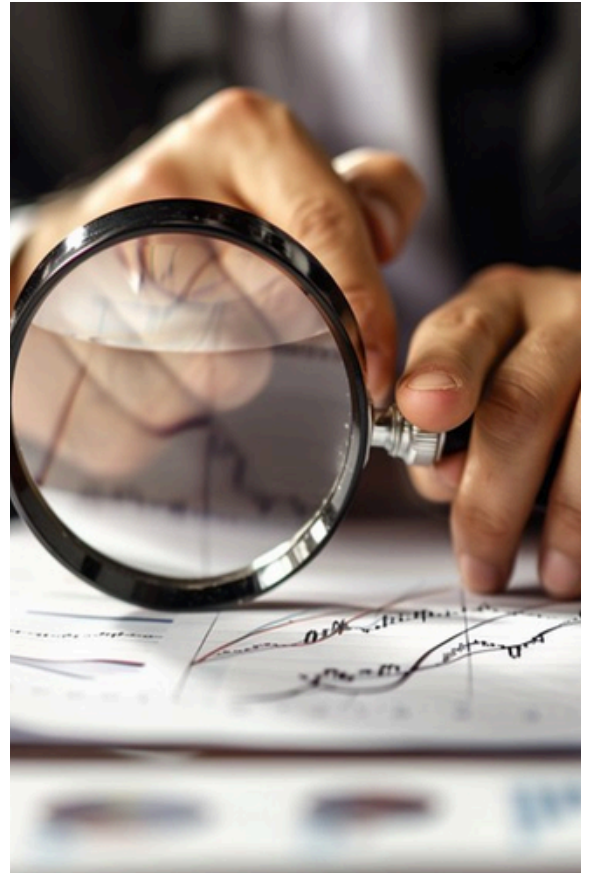
**Reports directly from
company's accounting system**

*(less errors, represents
contemporaneous information)*

3. Identifying Causation and Isolating the Loss Due to the Wrongdoing

One of the challenges in damages analysis is separating losses caused by the alleged wrongdoing from losses caused by other factors (e.g., market conditions, operational issues, competition, loss of key employee, customer behaviour, regulatory changes, or broader economic trends).

A loss analysis that compares actual results with a forecast can be strengthened by considering other factors that may have impacted the company's performance. A document request can therefore be used to seek information that will help to assess causation, such as market/industry/economic reports, management and customer communications, budgets and variance analyses, employee departure information, and other information that may help identify events affecting the company's performance.



4. Supporting Assumptions

Every damages calculation involves assumptions; the key is whether they are reasonable and supported. A targeted and well-drafted document request list can help identify the information necessary to support the assumptions used in the damages analysis.

For a lost profits analysis, relevant considerations may include expected sales volumes, pricing, variable and fixed costs, capacity constraints, customer retention, and the period of loss. Assumptions related to these issues will be informed by the available documentary evidence and other relevant support.

To the extent that relevant information was requested but not provided, the damages expert can assess its significance in light of the other evidence available and explain any resulting scope limitations in the report. The Court may then draw an adverse inference from a party's failure to produce requested information that is within its control.

5. Anticipating Challenges from the Opposing Party

In litigation, the damages analysis will often be challenged by opposing counsel and opposing experts in relation to the assumptions made, alternative causes of loss, the loss period selected, and the assessment of the plaintiff's mitigation efforts, among other things. Requesting information related to these issues early in the litigation process can help the damages expert to assess their significance and address them directly and transparently in the damages report and potentially reduce challenges from the opposing party.



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Request information early to identify and address issues directly before being challenged later.



6. Promoting Efficiency and Potentially Reducing Cost

Poorly drafted document requests can result in delays, repeated follow-up requests, unnecessary disputes, and increased litigation costs. Overly broad requests may produce irrelevant information, while narrow or unclear requests may require repeated clarification.

A well-structured document request list promotes efficiency by organizing requests by issue, time period, entity, document type, damages category, etc. It should clearly describe the information required and, where appropriate, specify the preferred format. For example, financial information to be relied upon by the damages expert is more useful in native spreadsheet (e.g., Excel) or database format than in PDF documents. Although follow-up may still be required, a thoughtful first document request can materially reduce later requests and associated litigation costs.

POORLY DRAFTED REQUEST

- Delays
- Repeated follow-up requests
- Unnecessary disputes

= **Inefficient process, unsupported damages analysis and increased litigation costs**

VS.

WELL-DRAFTED REQUEST

- Targeted relevant information
- Fewer follow-up requests

= **Efficient process and well-supported damages analysis**

7. The Role of Collaboration

The most effective document request lists are usually prepared collaboratively, as follows:

- Counsel brings knowledge of the pleadings, legal issues, procedure, and strategy;
- The client understands the business and the available records; and,
- The damages expert knows what is required to quantify losses and support the damages analysis, as well as the types of financial records and other documents that are typically maintained by companies.

Early collaboration amongst these parties can help identify relevant sources of information and reduce the risk of overlooking documents that may be useful to the damages analysis. This is especially important in procedural frameworks that limit the information gathering process. Under such circumstances, an incomplete initial document request/production may be difficult to remedy later in the litigation process.

Counsel	Client	Damages Expert
Pleadings Legal issues Procedure Strategy	Business operations Available records	Damages quantification Financial evidence Support required for analysis

Concluding Comments

A well-drafted document request list helps connect the legal theory to the financial analysis and identify information relevant to assessing causation, mitigation and the assumptions underlying the damages analysis. It can also contribute to a more efficient and effective information gathering process.



Damages are proven through supporting evidence, analysis, and a clear explanation of measurable financial loss.



Damages are proven through supporting evidence, analysis, and a clear explanation of measurable financial loss. A thoughtfully drafted document request list, prepared collaboratively by counsel, the client and the damages expert early in the litigation process, helps establish a sound foundation for a credible and robust damages analysis.

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With offices in Toronto and Ottawa, CHS is a leading Canadian boutique specializing in damages quantification, business valuation and forensic accounting services. Our Principals have been involved in many of Canada's largest financial quantification mandates and provided expert testimony in matters in various Canadian and international courts and arbitrations.



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