

COMPLEX LITIGATION & *E - Discovery*

Gain Efficiency in Document Review by Harmonizing People, Process and Technology

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Discovery is widely considered the most expensive part of litigation, and document review is usually considered the most expensive part of discovery. At the same time, mistakes in the document review process can be costly, with errors potentially leading to spoliation inferences, waiver of privilege and monetary sanctions. See *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). This inherent tension is heightened in complex litigation where document counts can reach into the millions. Law firms and corporate clients are sensibly focused on the bottom-line dollar figure of the electronic discovery process, but often fail to consider the additional cost of effective, defensible document review.

In addition, the burdens of effective document review appear to inexorably

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rise as the volume of electronically stored information (ESI) continues to grow exponentially. Furthermore, quality review requires a defensible process and should produce responsive, nonprivileged documents in a timely manner while avoiding costly mistakes. Performed properly, document review demands cost-effective management and staffing of projects while maintaining a high level of review quality.

What's the good news about document review? Approached properly, corporations and law firms can navigate the process effectively, manage costs and even decrease expenditures while mitigating risk by synchronizing people, process and technology.

People

Counsel must structure a review project with accountability well thought out. This initially requires identification of one decision maker who is ultimately responsible to make the necessary calls regarding the preservation, collection, processing and substantive review of potentially responsive ESI. This decision maker is

involved throughout the entire project. Day-to-day review management must be coordinated between counsel and a paralegal or review manager. The review manager is often the main point of contact for the administration of review and production, and should handle all aspects of the review that do not implicate the exercise of substantive legal judgment.

Next, counsel and the review manager must collaboratively select the best review team available and develop training materials to provide clear, consistent guidance as to that team's performance of the review. While it may be tempting from a budgetary standpoint to consider review staff as a commodity, productivity, discipline and consistency are best achieved through a respectful professional relationship. This begins with the provision of clear and comprehensive training materials to the review staff.

Communication and elevation protocols must also be established at the onset of the review and reinforced through consistent practice. Promptly answering substantive questions is essential, as those questions that are not timely addressed can result in irreparable harm to the case.

Furthermore, providing the review team with a clear picture of the theory and posture of the case at all times will keep them engaged and aid their ability to make sensible responsive and privilege calls. Ultimately, the review team itself is where the rubber meets the road in terms of effective and efficient review. Thus, fostering these review relationships are well worth the costs.

Process

With the commencement of the discovery process, counsel must develop a defensible process for the identification, preservation, collection, processing, review and production of documents to the opposing party. It is critical that counsel records every step in this process in the event that hostile discovery disputes lead opposing counsel to make allegations of negligence or willful misconduct. It is also critical that counsel familiarize themselves as soon as possible with the ESI involved. The project manager, working with a service provider, needs to pre-inspect the review data to ensure that it conforms with formatting, custodial and date-range requirements established by the parties in the course of fulfilling their meet and confer obligations (Fed.R.Civ.P. 26(f)).

In addition, counsel often approaches a case based upon a client's narrative of events and the provision of a few "core" documents. However, it is not uncommon for the actual data to reveal something quite different. This is not to suggest that the documents themselves contradict the client's characterization of the case, but rather that the discoverable documents are frequently different from what counsel expects to see. It is critical to understand the reality of the documents, rather than simply a theory of the case in order to structure and train for an effective document review.

Once the data is confirmed and review protocols and training materials have been developed, the hard work of the review itself commences. In the early stages of the review, counsel should engage in an early

review assessment of coding to ensure reviewers are adequately trained and are making the correct coding decisions. The assessment will also expose any gaps in the training or review protocols which may have been inadvertently missed. By performing this evaluation, with the flexibility to impose changes as necessary, potential issues are addressed quickly, saving time and money.

Regardless of confidence in overall coding decisions, best practices suggest that a systemic Quality Control (QC) protocol should be instituted. The details of the QC process are ultimately a matter of counsel's discretion, subject to conventional cost-risk analysis. Leveraging technology to assist in this process can reduce costs; however, as with every other aspect of ESI discovery, there should be a defensible, documented process in place. Some common approaches include sampling a certain percentage of the reviewed data, sampling by custodian, sampling by responsiveness or nonresponsiveness and/or using search terms to identify potentially privileged documents.

Finally, the review process and methodology must be supported by the technology chosen to perform the review and execute the production of documents. The review tool platform must support the selected review process and also the outputs specified by the parties in their meet and confer conferences.

Technology

No matter how much effort is expended in managing a document review project, little is gained without use of the right technology. It is important to select the best document review tool for the project, ensuring that features, security, stability and scalability are all suitable to project needs.

There are several factors to evaluate when selecting the right review tool. First, the size of review can determine if it is more sensible to work in a localized review tool or if a more comprehensive review tool solution is needed. Further, data that needs

to be remotely accessible can necessitate use of a Web-accessible tool. Regardless of what tool is used, it must be able to produce documents in the agreed-upon format, whether it is a TIFF, PDF or native file. Lastly, the tool should be easy to use and manage for the person(s) conducting the review.

Aside from standard tool options, there are many features that should be considered specific to the individual needs of the case to obtain maximum efficiency. These generally include automated workflow, advanced or concept searching, de-duplication, e-mail threading, privilege log creation and redaction, and category synching capabilities.

In addition, reporting and metrics capabilities can effectively ensure reviewers are productive and staffing levels are adjusted to meet deadlines. Counsel will want to know on a regular basis the number of responsive documents, privileged documents or documents with key categories to validate search terms, and will want to assess whether too much or too little of the data is being reviewed, adjust case strategy, estimate future work and production expectations, and ultimately avoid sanctions for negligent production if scoped too narrowly.

An effective review tool can provide counsel with offense as well as defense, since a review tool with advanced search technology allows the user to more readily detect potentially negligent production on the part of opposing counsel. Regardless of what tool is used, the service provider or in-house data support should be readily available to manage unforeseen crises that often occur at inopportune times.

Harmonizing

If you have the right people trained properly, follow the best practices in the review process and use the most applicable technology, the review is cost-efficient, more accurate and avoids many pitfalls associated with electronic discovery projects. ■