



Why My

HUMAN DOCUMENT REVIEWER

Is Better than Your

Algorithm

By Richard Russeth
and Susan Burns

We all know that the ballooning scope of ediscovery poses a growing problem for in-house counsel. In an effort to cut ediscovery costs, you may be understandably tempted to increase your reliance on document search technology and temporary agencies for document review. But doing so will add no benefit – and in a worst-case scenario, it may also decrease quality and increase costs – if the attorneys supervising the litigation have little understanding of the review process. Incomplete searches, lack of reviewer training and ineffective lines of communication can result in an enormous waste of time and money. Addressing these issues at the outset of your document review can help you save money and, perhaps more importantly, improve document review outcomes.

Technology is not the superhero

The information explosion and the attendant increases in the cost of discovery are all too familiar to in-house counsel. New Federal Rules of Civil Procedure and Rules of Evidence were enacted in 2006 and 2009 respectively, and Model State rules of Civil Procedure are in various stages of adoption — all in an attempt to deal with the exponential escalation of ediscovery and the burdens it imposes. Numerous articles have been written and conferences are popping up all over the country, all aimed at controlling ediscovery costs. In this time of recession, the ediscovery business is booming.

In-house counsel and law firm trial lawyers alike are bombarded with sales calls, product literature and other marketing ploys touting the latest technology designed to cut expenses and save us from the fate of the *Qualcomm* lawyers¹ or clients who have been stung by failure, and conduct appropriate document searches. However, these tools are generally marketed with the (rather significant) provision that no search tool is 100 percent effective, and that great care, thought and time (and presumably expense) must be spent in designing protocols in order to ensure the most effective search possible. But let's not forget: "A perfect review of the resulting volume of information is not possible. Nor is it economic. The governing legal principles and best practices do not require perfection in making disclosures or in responding to discovery requests."²

Socha & Gelbmann report in their 2009 ediscovery survey that, "While two years ago every copy shop in the land became an EDD [Electronic Data Discovery] provider, today law firms nationwide purport to harbor deep EDD expertise. Much of this is convenient fiction, useful for marketing but of questionable veracity when it comes to client service; many participants estimated that no more than 100 to 200 lawyers in the entire country really 'get EDD.'"³

The not-so-surprising fact that most lawyers don't "get EDD" explains the inexplicable: In the rush to expand the use of technology in ediscovery, it is being overlooked that the practice of law is still about lawyers. And, it is the lawyers, and not computer searches, that must make the critical decisions, guide discovery and, ultimately determine what to produce and what not to produce. Firms seem willing to spend money on new (and often unproven) technology, but this should not come at the expense of the people that actually make it work. If new technol-



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ogy is substituted for human resources, the document review attorneys at the heart of the discovery process can underperform at significant cost to clients.

The excessive focus on technology as a superhero, rescuing corporations from the high costs of ediscovery in litigation, is misguided. Yes, technology is and can be enormously helpful, but it is only as good as the people managing it. The true benefit of technology is in culling the amount of data for review, so that litigants can cut down on review and production and make trial preparation more cost-effective. To make effective use of this benefit, care needs to be taken in this critical implementation step.

Mere mortals to the rescue: strategic use of search technology

Document search software, unless carefully deployed based on a thorough understanding of the case and the software capabilities, is largely ineffective — resulting in missed key documents and undue expense. Culling down the universe of documents is

effective *only if* you are very strategic about your search terms, and that is only possible if you understand the case. Whether you are using a keyword search, Boolean search, conceptual search or other search methodology, if you are not doing a straight-line review of all available documents, it is imperative that you spend time to focus and define your search, stop and review initial searches (check your results by sampling), and continue to refine searches until you get the search right. If you cull too much, you can miss key documents and suffer the consequences, and if you don't cull enough, you run up unnecessary expense in processing, review and production.

There is more about this later, but make sure to inform your document reviewers about the thought process behind selection of search terms and the methodology used to implement them. You may be surprised at the suggestions for further refinements to search terms they can offer. Put a system in place to solicit your review team's input from the beginning to the end of the process.

The reason effective implementation of search methodologies is so important is because failure to do so can be massively expensive, resulting in adverse inferences, which can then result in huge verdicts (See, e.g., \$1.4 billion, *Morgan Stanley v. Coleman* — reversed on other grounds — and \$29 million in *Zubulake vs. UBS Warburg*.) It can also result in sanctions imposed during the discovery process [as in *Louis Vuitton Malletier v.*



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Dooney & Bourke, Inc., 2006 U.S. Dist. LEXIS 87096 (S.D. N.Y. Nov. 30, 2006)] and waiver of privilege [as in *Victor Stanley v. Creative Pipe, Inc.*, 2008 WL 2221841 (D. Md. May 29, 2008)].

Effective attorney review is still paramount: Mere mortals to the rescue AGAIN

It is puzzling that, while the prevailing view is that attorney review is the most expensive part of the document review process, only a handful of authorities in the ediscovery field have focused on the importance of an effective review team as a means of cutting costs. This is perhaps because having someone manage technology seems simpler than managing people, or because an algorithm gives one a sense (albeit a false one) of precision and confidence, while humans are, well, messy.

A few examples from the field will illustrate why the human aspect of document review is so expensive. One

reason is mismanagement by lead attorneys, however unintentional. Recently, we interviewed “Sarah” (not her real name), a document review lawyer working on a large case projected to entail six to eight months of review time for 35 attorneys. Sarah suspects the vendor in charge is being paid by the number of documents reviewed, because despite the fact that the case is fact-driven and issue-intensive, the quota for each reviewer is 125 electronically-culled documents per hour. That’s less than 30 seconds per document, regardless of length or complexity. If the reviewers underperform, they risk losing their jobs. Who among us, no matter our intelligence or experience level, could provide meaningful review of a Chili’s menu, let alone what could be a critical document, in 30 seconds? The result, according to Sarah, is that reviewers blow through documents at an unsustainable rate and could easily miss significant documents that are positive or negative for the client’s position. Sarah wants to keep her job, so she doesn’t go around

ACC Extras on... Document Review and Ediscovery

ACC Docket

- *And You May Find Yourself in a Large Document Review (May 2009)*. Document review can be a pricey part of the litigation process, but it’s also a necessary component of the legal puzzle. This article provides cost-cutting suggestions to minimize review spending and offers real-world solutions for controlling costs. www.acc.com/docket/lgdoc_rev_may09
- *Corporate Strategies for Reducing Ediscovery Costs (Feb. 2008)*. This article discusses the general ways costs associated with ediscovery can be minimized including a records retention policy, a data map and establishing partnerships. www.acc.com/docket/corpstr_ediscsts_feb08
- *The Emerging Role of Office of Technology Counsel (May 2007)*. Corporations are facing new challenges in litigation due to the changes in case law and the amendments to the Federal Rules of Civil Procedure (FRCP). This is changing corporate infrastructures and expanding services and technologies offered by ediscovery providers. Read on to find out how this new landscape in litigation affects your job as in-house counsel. www.acc.com/docket/techcounsel_may07
- *Streamlining Ediscovery Costs (July 2005)*. Use this guide to proactively reduce ediscovery costs. www.acc.com/docket/strmlinediscv_jul05
- *Managing Discovery in Large-scale and Pattern Litigation: Use Technology for Efficiency and Cost Effectiveness (Oct. 2003)*. As in-house counsel, you should assess what technology tools are available and their costs, advantages

and drawbacks. Early assessment and coordination with your litigation counsel and business people are paramount. www.acc.com/docket/mgtdiscov_oct03

Quick Reference

- *Due Diligence Checklist: Best Practices (Dec. 2007)*. Use this quick due diligence checklist as a reference when engaging an offshore service provider to perform first level document review services. Includes considerations of qualifications, formal procedures and legal competence. www.acc.com/quickref/duedilcklst_dec07

Education

- *Outsourcing/Offshoring First Level Document Review in an Era of ediscovery (Dec. 2007)*. Learn how to manage and limit ESI for necessary discovery and pending litigation. www.acc.com/1stlvlvdoc_review_dec07
- *Metrics Mania: Leveraging Law Department Metrics to Manage Costs and Improve Performance (Oct. 2008)*. This material shares best practices on using metrics to manage or control costs, evaluate outside counsel performance, increase efficiencies and communicate the value of the law department to management. www.acc.com/lwdeptmetrics_oct08

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her project supervisor and raise these concerns with the managing attorney, but she really hopes that someone at the client level is conducting a third-level review.

Incongruously, review lawyers are often asked to make decisions about responsiveness of documents with much less information than what is provided to those setting up computer search parameters in the first place. This is allowing the proverbial tail to wag the dog. Just compare the time spent defining search parameters and feeding that information into computer search models with that spent educating the review team. In our view, just a little more time and money invested in training and supporting the review team would yield a much better review product at a lower cost.

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In fact, it is a commonplace occurrence in document review that review protocol is not clear — always at a big cost to the client. Another example of how human document review can ramp up costs is a case in which reviewers were given vague instructions regarding “hot” documents. “Hot” is defined as a document that, on its face, contains strong evidence supporting or negating an element of the case that you would consider using at trial or in support of a motion for summary judgment. Reviewers were told that all documents mentioning “additional compensation” were to be tagged as “hot” — “additional compensation” in this case referring to kickback schemes. Members of the document review team, not wanting the trial team to be embarrassed by not seeing a “hot” document, erred on the side of coding documents as “hot.”

It was clear after two days of review that coding needed to be re-evaluated as each of the 60 review attorneys tagged at least 50 documents “hot” each day because the documents mentioned “additional compensation” (primarily because the term was found in performance reviews and other non-responsive employee materials). Unfortunately there was no one there to change protocol for the

review team because the junior associate managing the review was pulled for another project and there was no other designated go-to person to answer questions.

When the junior associate returned, he addressed the “hot” document coding issue with the trial team at their weekly meeting. At the weekly meeting, it was decided that a handful of attorneys involved would look into the issue and come up with better instructions. It took a total of 15 working days to get the coding instructions clarified and the changes communicated to the review team. During that time, 45,000 documents (3,000 documents a day x 15 days) that were primarily non-responsive were tagged as “hot,” essentially rendering the category meaningless.

If we conservatively estimate that all 60 review attorneys were billing at \$65 per hour, and they spent half an hour every day inaccurately tagging “hot” documents for 15 days, that alone is \$29,250. Then you have the 15 minutes the trial team spent discussing the issue: 10 attorneys and paralegals with an average hourly rate of \$300. That comes to \$750 ($\$300 \times .25 \times 10$). Then you have a team (with an average hourly rate of \$300) who spent an hour clarifying the instructions. That’s \$900. That totals up to \$30,450 in wasted attorney review time. The cost to fix the problem comes on top of the expense for wasted review time: a senior level attorney to review the 45,000 documents (18 banker’s boxes) tagged as “hot” that need to be re-categorized. Even if the ridiculous quota of 125 documents per hour is imposed on the senior level attorney, this senior level review would add up to \$108,000 ($45,000 / 125 \times \300). The grand total: \$138,450 for mistakes that could have been avoided by proper initial coding, an effective two-way communication process and an efficient protocol for decision making. All of these avoidable mistakes add up to make improperly conducted document review a very expensive proposition.

The courts have always imposed the obligation of good faith and reasonableness on parties, and that is what continues to be the standard today, in spite of the document avalanches caused by technology. So, while technology definitely has its place, the art of good judgment still comes down to people. People, like computers, make better decisions when they have more information. The phrase “garbage in, garbage out” applies as much to your document reviewers as it does to your computers. The solution is to train people on the review team, and provide them with the proper review tools and an environment that is conducive to effective performance. Reducing the cost of document review through effective management while



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raising the quality of review will have the ripple effect of reducing costs and improving your performance in the rest of the case.

Even super lawyers should spend a day as Clark Kent

To give you some idea of what takes place in the trenches, here is how a document review project for a large-scale case unfolds, from the perspective of a review lawyer. This is typical of many document reviews, but some of the identifying facts have been changed for confidentiality reasons.

Day one on the job: You are among 25 review attorneys brought on board at the start of the review on a securities fraud case. Some of your new colleagues are hired directly by the client. Others are hired through temp agencies. On the first day of the case, you are assigned your cubicle or other workstation (perhaps you'll be sitting staggered on opposite sides of a table, practically knee to knee with the other lawyers) and you are given a copy of the summons and complaint and asked to read it. There is a PowerPoint presentation on the case by junior associates and a tutorial on the use of the review software. Then sometime in the afternoon, everyone is assembled, and the lead trial attorney strolls in with other senior lawyers and gives a speech about the case and asks for any questions. There aren't many questions because no one really knows anything about the case yet, nor do most of the review attorneys have a background in securities law. Of course, there is always the one reviewer who needs to demonstrate his superior knowledge by asking a question about some finer point of securities law. And, of course, since no one else on the review team knows anything about securities law, the whole discussion is lost on all but one member

of the entire review team. You quickly do the math and figure that the client was conservatively billed \$3,000 for that whole lotta nothin'.

While you were in the meeting, you were mysteriously assigned your first batch of documents for review. Back at your station, you start reading and trying to remember if the people on the To/From/CC lines in the emails you are reading are significant to the case, while trying to decipher which of the 25 issue tags your document belongs in, having not been given the option of "non-responsive" as a category. One of the options is to tag the document as "communication with government agency" but you don't know if this means internal communication about on-going external agency communications or if the category is restricted to actual communication with the agency only. After mulling it around and conversing with your colleagues, you decide to err on the side of caution and tag all documents that have anything to do with any kind of communication connected with a government agency as "communication with government agency." While you realize that this might eventually make the category of documents with this issue tag meaningless, there is no one to consult, so you use your best judgment and move on. Meanwhile, your neighbor has decided that the category is restricted to actual communication with the agency only and is tagging documents according to his best judgment.

At the end of the first day, after two hours of actual review time, you have reviewed 10 documents and have no idea if you have done so accurately. Exhausted from the first day on a new job spent trying to process and remember lots of new information and get to know your new best friends, you head for home. You are nervous that you haven't reviewed enough documents, or that you may not have coded them correctly and that you will receive a call that night asking you not to report back to work tomorrow.

Day two on the job: You didn't receive the dreaded call and are back at your cubicle staring at documents. At a meeting with all review attorneys you are introduced to the partner in charge of the review. He is the firm's expert in the area of securities and has flown in from the San Francisco office. He is busy and can't stay long, but he tells you that your job is critical and, although he understands that it can sometimes be very tedious to review documents all day, he is counting on you to bring important issues to the forefront. He is sincere, but his speech reveals he is completely unaware of the workings of the review process or its requirements (ka-ching, ka-ching – another whole lotta nothin').

After he leaves, someone distributes a review manual. It is in a three-ring binder, designed for updating as the review progresses (even though it is ultimately updated only once, during week two) and it looks like someone, has put a lot of thought into its contents. The manual

RESOURCES: Document Review

- Publications from the Sedona Conference:
www.thesedonaconference.org/content/miscFiles/publications_html
- George L. Paul and Jason R. Baron, "Information Inflation: Can the Legal System Adapt?" 13 RICH. J.L. & TECH. 10 (2007),
<http://law.richmond.edu/jolt/v13i3/article10.pdf>
- "Strange Times," George Socha & Tom Gelbmann, *Law Technology News*, August 1, 2009
www.law.com/jsp/PubArticle.jsp?id=1202435558482
- "Bringing Ediscovery In-house for Dummies" by Jake Frazier, MBA, Esq.
http://info.emc.com/mk/get/15663_land_std?source_id=15995®_src=in.



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contains a lengthy cast of characters, and you discover that the custodian whose documents you are reviewing is not among the cast. Whew! You continue your review, somewhat relieved because your initial review, errors and all, is not likely to be significant because the documents you are reviewing apparently come from an insignificant player.

Week two on the job: Sometime during the second week, you realize that the first 25 pages of the cast of

characters were done alphabetically, but then names were added and no one bothered to alphabetize them. (It would have been good if this had been pointed out a week ago.) And lo and behold, the custodian you had reviewed last week is an important figure after all. In fact, he is central to the litigation. Oops. After an hour of trying to figure out how to retrieve previously reviewed documents in the review software, you manage to pull up the few hundred documents you had reviewed during the

Finding a Needle in a Foreign Haystack: Managing the Foreign Language Factor in Ediscovery

By J. Bart Holladay



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The ediscovery landscape is covered with new software designed to lower the cost of managing large volumes of data. But what do you do when the data is not only massive but in a foreign language too? In fact, global business and communication often generates data in many foreign languages, some of which you may not even recognize. When a case involves this added complexity, the challenge is to extract critical information from a large volume of foreign language material, perhaps millions of pages, and make it available in a comprehensible form for the members of the litigation team who cannot read the source documents in the native language(s).

Until now, one approach has been to apply high-speed bulk machine translation (MT) and hope for the best. Traditional machine translation capability varies significantly depending on the MT software used, language and relevancy of the dictionary loaded in the system. On average, you can expect a 30 to 40 percent comprehension level and an even lower value for individual word precision. When measuring comprehensibility of a sentence, we've found that the subject and object are very important while the verb and syntax have minor importance. Your brain can effectively process muddled syntax and/or an inaccurate verb, but it is defeated by an inaccurate subject and/or object, even in context. The reader's reaction is often "Huh – What is this?!"

The low average comprehensibility level of MT is not attractive, and it is even less satisfactory due to variability of a perfect sentence followed by one that is gibberish. Also, the inaccuracy can lead to retrieval of mostly fatal results if

search and analysis tools are applied to the inaccurate MT output, leading to a large amount of irrelevant information. For these reasons, the user generally concludes that traditional machine translation is disappointing and not a solution.

However, there are ways to combine machine translation with other processes to manage the problem. It is a triage approach that can deliver most of the more important and correct information at low cost. This approach limits human translation to documents that have been determined to be most important and may be needed for submission to the court.

The following steps outline a solution to managing foreign language in ediscovery that makes the language conversion affordable and effective.

1. Convert all documents that are in an image form (e.g., PDF, TIFF or JPEG) to machine-readable text through Optical Character Recognition (OCR). Usually this process applies to all documents delivered by the opposing side, but may not be necessary for most of the documents from your side.
2. OCR applications vary in their ability to process foreign language text so it is important to use vendors who are accustomed to foreign language processing. Also a step to perform quality assurance on the accuracy of the OCR work is necessary in order to proceed with confidence.
3. Use appropriate software, Unicode or non-Unicode-reading, to separate documents in different languages. Many commonly used ediscovery technologies contain text analytics engines that will take care of this for you. A language service provider (LSP) will certainly be a useful member of your team to help from this point on.
4. Through text analytics (a method of determining the relationships of files in unstructured source data), categorize, index and cluster documents that have been stored in different folders according to subjects (still unidentified). This allows you to avoid wasting considerable effort later

first week and commence a re-review of the entire batch. The only lucky thing is that, so far, they haven't imposed an hourly quota for document review and the review will go faster this time around. Nonetheless, you have wasted several days of valuable review time. You mutter to yourself about the waste of time and energy that could have been prevented with just a little more attention and organization. You wonder how the client would feel if they knew that they were paying so much for someone's

silly mistake, but you just keep your head down and do your job like the cog in the machine you are treated as. You realize your neighbor has fallen asleep (it's so hot and stuffy in the room, you can't blame him) and it's okay by you because at least he won't be trying to talk to you ... and then he begins to snore.

In order to speed up your re-review of the documents, you decide to run a search for the custodian's name. You type the name and hit "enter" and your computer freezes.

translating a great deal of data that would only bury the important information.

5. Apply foreign language key words and other identification techniques to determine the actual subjects of the clustered folders that the key words have indicated as the information of interest. Employ a language service vendor to provide a subject matter expert language professional with experience searching legal documents to translate the search key terms.
6. Translate the results of the search and analyze them. Then it is possible to decide how to refine the search and continue to work iteratively with the language professional to prioritize groups of files for review.
7. Next, use bilingual reviewers to analyze the identified important folders and determine which folders are worthy of machine translation. It may not be necessary to employ an attorney, CPA or other non-linguist expert to do this review. Language translation companies have certified linguists who are knowledgeable in the subject's field. Thus, a translation service provider can offer qualified linguists who, if necessary, are licensed attorneys who can also review the documents.
8. After customizing the machine translation dictionary by thoroughly adding key words to maximize the quality of the output, run the selected folders through the machine translation software. The key word list would include words particular to the case like product names, names of people, names of places, processes, technical terms, search keywords and many others. Even a short list of terms can have a magnified effect. An example of this was evident in a case involving IP surrounding a Japanese product called the Immobilizer. The product name was spelled in Japanese イモビライザ using the katakana phonetic alphabet reserved for words borrowed from other languages. The MT application, however, because of unclear word spacing inherent in Japanese, parsed out the first syllable of the word 'imo' meaning 'potato.' Thus the MT was "potato" followed by the untranslatable Japanese characters 'ビライザ' which was totally incomprehensible, distracting and frustrating. By entering the correct "immobilizer" translated term to the dictionary before additional MT, the translation mistake for this key term was eliminated and far greater comprehension of the data became possible. Enhancement of the MT dictionary helps the monolingual reviewer improve the identification of relevant material.
9. On a selective basis, post-edit (human editing of MT) significant documents to make the machine translation comprehensible. This is a key step in optimizing the overall process. Documents that are significant, but of minor importance, can be semi-refined to the point of good comprehension but still having imperfect syntax, while more important documents should receive more extensive editing that approximates the comprehension level of human translation. The cost of this higher level of editing is only two-thirds of the cost of human translation. Lower priority documents needing improvement should receive an amount of editing that costs only one-third as much as human translation. There is a commensurate savings in turnaround time.
10. The highest priority documents, which are earmarked for submission to the court, should be translated from scratch by a human translator and certified as to its accuracy.

Though this system still has human components, it is a sophisticated hybrid approach that takes advantage of state-of-the-art software for organizing and identifying, and employs customized machine translation software to gain a leg up on producing fully comprehensible translation of only the significant documents. The result is a system that limits the cost of working with ediscovery foreign language material to a small fraction of what has been the conventional method of bulk translation without fine tuning. With the skyrocketing cost of ediscovery, this process offers litigators a better way — one that will not break the bank in coping with foreign language documents.

So does everyone else's. Apparently you cannot run such a search in that way with this particular review software. It takes two techs an hour to correct the problem, while 25 lawyers mill about having pleasant conversation. If you had known about this search issue, of course, you wouldn't have chosen to crash the system.

The system is back up and running, finally! So you decide you are going to try to speed up your review to make up for lost time. Many of the documents, in sequence, are

Outside counsel may not be as **motivated to increase efficiencies** in the **review process** simply because sorting through **issues that arise** as the review progresses is **"easier"** than **working hard** to do things **right on the front end.**

being coded exactly the same way. You consult the review manual to find the keystroke to use to auto populate the code field for consecutive documents. You can't find the information, so you ask your neighbors. They thumb through their manuals and look around on their computers, but they can't figure it out either. So, finally you ask one of the technical people. He shows you the keystroke but doesn't communicate the information to everyone. Why wasn't this in the manual and why isn't it being communicated now?

Later in week two: Later in the week, you have a substantive question and start discussing it with your review team colleagues. Everyone has a different opinion about the answer, so the group decides that it is important enough to raise with the powers that-be. You approach the junior associate who is running the project. She is nice, but doesn't know the answer. She promises to bring it up at the next trial team meeting on Friday morning. The trial team meeting is canceled because the senior partner is out of town at a hearing. She brings it up the next week, and everyone agrees it's an interesting question and someone will get back to you.

Week five: Three weeks later, you and the rest of the team receive the answer to your substantive question, but by now you've all moved on to an entirely different set

Class Act.

of documents. Of course, everyone approached the issue differently, and the documents in question are no longer available for review. You move on.

Week thirteen: Eight weeks later someone tells you that the senior partner finally weighed in, and the answer is different than the one you were previously given. Reasonable minds can differ. Not that having an answer to the question makes any difference to you at this point.

You get the idea. Lack of reviewer training and ineffective lines of communication result in a huge waste of time and money. Addressing these issues is the single greatest opportunity to reduce the total cost of discovery.

What can be done, and how can this process be effectively managed? How can a general counsel of even a small company feel like she has some control over billing in this field? First, every trial lawyer should be required to spend a week reviewing documents. Better yet, tell outside counsel that you would like to spend a week doing review with the team. This will give you the huge advantage of being able to view things from the perspective of the people at the heart of the review process on whom your success depends. What equipment and environment would make the reviewer's job easier? What information or training do they need in order to do a good job?

In addition, the standards of good faith and reason-

ableness should be your guide, and in connection with those standards, there are a few essential steps you can take to cut costs and gain efficiency, whether you bring a substantial part of this process in-house, manage vendors or let your outside counsel handle the entire process.

A new algorithm: "HAL" is so 2001:

In Kubrick's masterpiece "2001: A Space Odyssey," the astronaut has to take control of his ship back from the supercomputer HAL. Here are eight steps for taking back control of ediscovery and reducing its costs.

Step one: Aggressively manage outside counsel

Oversee how outside counsel manages process and expenditures — after all, they're spending your company's money. Outside counsel may not be as motivated to increase efficiencies in the review process simply because sorting through issues that arise as the review progresses is "easier" than working hard to do things right on the front end.

In addition, if outside counsel uses a temporary agency to hire review attorneys, or a vendor to manage the process and hire review attorneys, you are likely paying twice for the markup. While the review attorneys are paid \$25 per hour, the temporary agency bills them at \$45, and the

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Another problem, as noted earlier, is that **vendors that manage reviews may impose an unreasonable “documents per hour”** quota on reviewers (perhaps as high as **125 documents** per hour, per reviewer) meaning that those attorneys you are **paying \$125 an hour** cannot effectively **review the documents** they are being paid to review.

law firm that pays the temporary agency may bill them to you at \$125 or higher. That’s a markup of at least \$100 per hour. If you have hired a team of 10 document review attorneys — that’s a markup of \$1,000 per hour. If outside counsel is using agency review attorneys, ask them to pass the cost through without markup.

Another problem, as noted earlier, is that vendors who manage reviews may impose an unreasonable “documents per hour” quota on reviewers (perhaps as high as 125 documents per hour, per reviewer) meaning that those attorneys you are paying \$125 an hour cannot effectively review the documents they are being paid to review. If you cut out the middlemen, you can afford to have your document review attorneys do the job carefully and thoroughly, and hire an experienced attorney to lead the review.

If the outside trial counsel also manages the discovery process, make sure that they implement the other steps below.

Step two: Appoint an experienced lawyer to manage the review and make sure she is available to make determinations now

Don’t agree to appoint a junior associate as point person just so that person can get some experience. This is a job better suited for seasoned veterans. The lawyer leading the review should meet with the trial team and the review team, ideally before search protocol and document collection has been determined. Make sure outside counsel includes this review leader in all trial update and strategy meetings, and that they are required to read and contribute to the pleadings and motion practice. The expense you incur here will be saved later in improved communication during review. It is important that this person also be dedicated to the case and not be juggling numerous other projects. Don’t allow the review team to drift on without guidance for days (or weeks) while the review leader is pulled off to write briefs, handle depositions or do other work. (See Step Five for more on how communication is key to cutting costs.)

Step three: Build the right review team

The use of experienced contract lawyers is cost effective. Their hourly rate is substantially lower than law firm billing rates for comparable lawyers and you avoid paying the salary, benefits and other overhead of full-time employees. Contracting directly with review lawyers also gives you the flexibility to bring enough people on board on short notice and not be overstaffed when the project ends, and saves the expense of the intermediary and re-billing.

So who is in the review attorney pool? It may be a more diverse group than you think: former in-house counsel; down-sized partners and senior associates; recent law school graduates and those pursuing a further degree; people re-entering the job market after years of downtime, etc. Being a review attorney provides a flexible work environment so people can pursue other interests: launch a solo practice; raise a child; relocate to another state where they are not admitted to practice; use legal education, but not have the stress of regular law practice.

Hire an experienced discovery management attorney to manage the contract review attorneys and interface with your firm, and you’ll have built a superior team and saved money by avoiding a temp agency or another vendor’s mark-up, and saved wasted money in an inefficient review process.

Effectively using the talents of your review team lawyers will continue to save you time and money. Define clear roles and responsibilities for reviewers. Assign review responsibilities strategically — for example: by custodian, priority, topic or concept — and keeping the reviewers’ background and experience in mind will yield more effective results. This will also support individual reviewers in gaining expertise on specific issues and custodians, which can be used to create efficiencies as the case progresses. Also, if your collection contains information that requires specific knowledge or skills, improve the accuracy and efficiency of your review process by creating specialized review teams. While you may spend a little more up front on tools and reviewers with specialized skills, you will likely save over the long term in reduced resource costs.

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Step four: Empowering the “lasso of truth” by implementing sufficient reviewer training

Reviewers must be properly trained in the law at issue and review software technology being used. The money you spend on training will be more than offset by greater efficiency, accuracy and the potential for a more positive case outcome. After all, document review attorneys are the first (or only) attorneys to see factual information pertinent to the case. Their ability to review and decipher the relevance of the facts to the substantive law is critical to your success.

Training in technology

Combining technology’s benefits with human expertise is the best way to design a large-scale document review. Every hour saved through effective use of technology allows you to focus time and money where it is most needed: responsive and privilege-protected documents that require a human’s subjective expertise.

Software training must be provided or all the latest technological bells and whistles won’t mean a thing. Review search application and protocols immediately after delivery of documentation and implementation of training for a case.

Unfortunately, examples abound of how ineffective training on the use of document review software reduces the quality of document review and increases costs. Ineffective training can leave reviewers unable to find and review relevant document groupings, retrieve previously reviewed documents and carry out other essential review work.

Training in the relevant law and related aspects of the case

It is also very important to take the necessary time to present your review attorneys with an overview of the case and follow that up with regular weekly meetings (though early on you may need more frequent meetings) to respond to their questions and provide

Before Leaving the Batcave — Saving Costs at the Outset: Negotiate a Limited Ediscovery Scope

More is not better. Be willing to cede scope for effective focus. A tighter focus means less data to collect, process, review and produce. If possible, enter into an agreement with opposing counsel to stipulate locations, custodians, search terms and search strategies. In order to negotiate effectively, you need to thoroughly understand your case *before* you start ediscovery, and you need to understand the “world of data” — sources, accessibility and custodians (no, not the guys emptying the wastebaskets). It is worth emphasizing here that to identify the useful electronically stored information (ESI) reasonably at issue requires an early understanding of the case, including issues, players, time frames and ESI sources possibly involved. Define what you actually want from the other side, so your side doesn’t have to sift through terabytes of irrelevant ESI. Remember that an over-aggressive refusal to cooperate drives up the cost of ediscovery for *everyone*.

Privilege and the importance of being earnest — avoiding excessive costs and reducing risk of waiver for inadvertent production

Privilege review and the preparation of privilege logs is another area where a little focus and training can go a long way to cut costs. It is easy enough to do a Level 1 search and review to segregate all potentially privileged documents for review at the appropriate time. And, while all reviewers should receive specific training on when privilege and work product apply, as well as the distinction between them, and should also be instructed to err on the side of caution, this

is an area where you can use the talents of the more experienced lawyers on your review team to reduce costs.

If you provide proper background and education on the issue of privilege and work product, you can have a significant amount of work on your privilege log done by your document review team at \$65 per hour rather than by an associate at \$200-300 per hour. You should, however, make sure that you have a senior attorney available for regular consultation to answer any questions and to make final decisions.

With a little focused effort, you can have a quality privilege log that will cut costs and demonstrate that you have taken reasonable steps to avoid inadvertent disclosure of privileged information. This is of particular importance if you find yourself in the unfortunate circumstance of having to argue for clawback of inadvertently produced privileged documents. No one wants to be on the losing end of this argument as happened in *Victor Stanley v. Creative Pipe, Inc.*, 2008 WL 2221841 (D. Md. May 29, 2008).

In that case, the court determined that defendants had waived privilege and work product protections with regard to 165 documents, in part, because they failed to demonstrate that the keyword search and review, conducted before production, was reasonable. The judge agreed that defendants did not present credible evidence to support an argument that reasonable search efforts were made to prevent production of these documents and that their production, therefore, acted as a waiver of the attorney-client privilege and work-product protection.



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feedback. Insufficient training in the relevant law results in reviewers not having sufficient background to assess the degree of document relevance, resulting in critical documents (both positive and negative) being missed. Do not underestimate or undervalue the intelligence of your review attorneys. Their understanding of the bigger picture enables them to think about the documents instead of mindlessly coding and makes them feel part of a team. Imagine the quality of work you'd be able to provide if a partner asked you to write a memo, but refused to tell you what the case was about or what you were trying to achieve.

If the case involves pharmaceuticals or another industry with highly technical terms, provide some background on the industry and its terminology. Depending on the case, consider having an industry expert on hand for the first couple of weeks and on-call thereafter to answer reviewers' questions. Investing in up-front training is less expensive than having a team of reviewers, each spending time trying to decipher complex technical jargon on their own.

Step five: Communicate, communicate, communicate

What is often missing in the review process is a "communication hub" between the trial team and document review team, to ensure that both the trial team and the review team get exactly the information they need when they need it, and that the information is reliably consistent. One of the key benefits of hiring a lawyer specifically to lead the review is that he or she can provide this two-way communication hub. The review leader can provide regular and consistent updates to the trial team on key factual findings to support early case assessment and influence litigation strategy, while also providing timely updates to the review team about changes in case strategy. This allows the review team to better identify key facts, witnesses and potential challenges to litigation strategy. Reviewers are often the first or only people to see a document, and if used properly they can provide updates for keywords and additional searches that need to be conducted, or advise you if there seems to be gaps in production. Be sure that reviewers have a method of communicating emerging issues that can impact case strategy and be open to adding new tags if the situation warrants.



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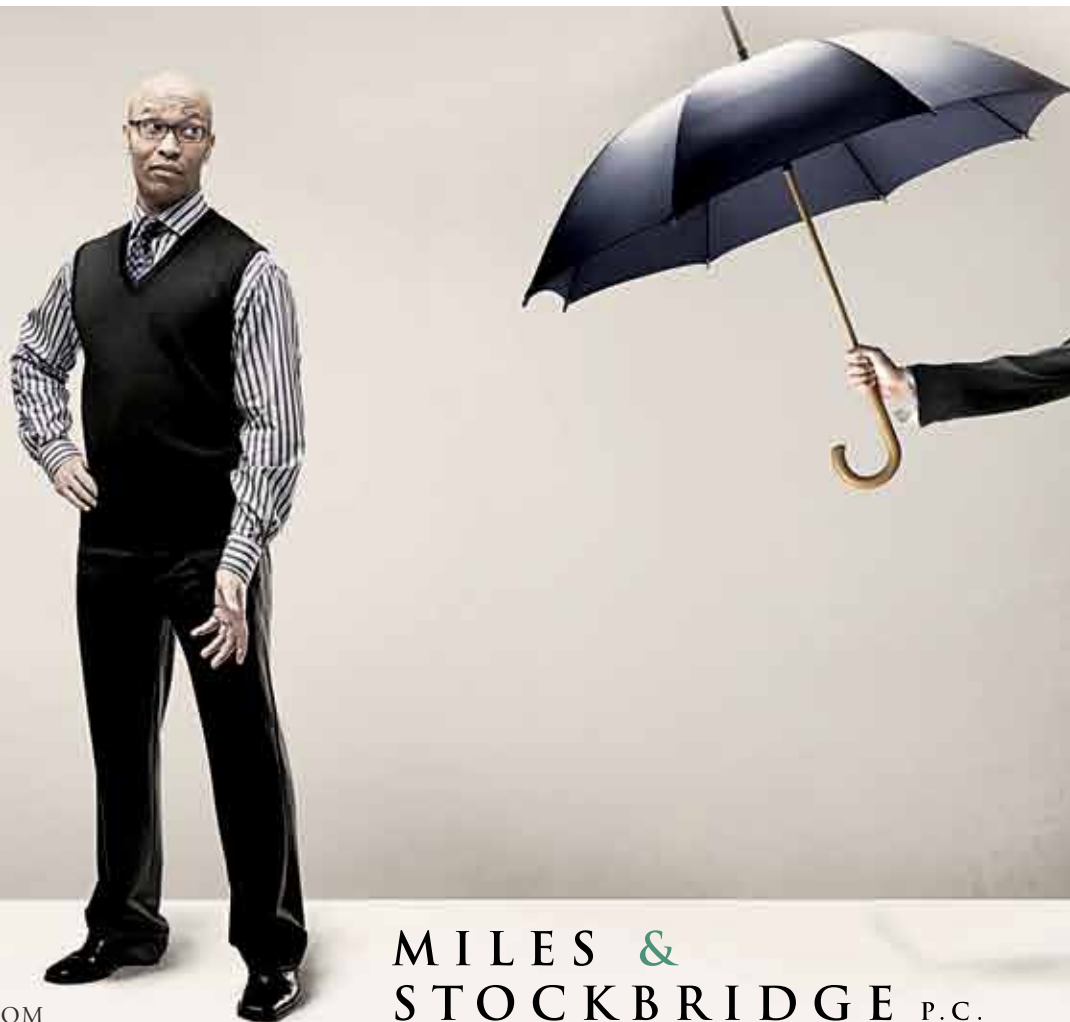
Supply reviewers with a manual that provides easy-to-understand instructions for tagging email chains or families, duplicates, annotations and redactions as well as other crucial information. Make sure that review protocol is very clear: identify review calls related to responsiveness, privilege, confidentiality, significance and issues. Delegate and provide sufficient training for first-round privilege review so that review lawyers can make the cuts on their own. Attorneys tend to overanalyze, so stay a step ahead of them by crafting protocol, which answers as many potential questions as possible.

For example, if you are asking reviewers to code dates, how should they handle multiple dates of origination in a document? Should they note the earliest or latest date? Which date should be used for regulatory filings that cover a period of time such as SEC fourth quarter filings? What kinds of documents fall under “communication with government agency?”

Failure to be clear and consistent in your instructions can render important and expensive review tasks meaningless. That said, no matter how thorough you are, ambiguities are bound to arise. Have a clear chain of

communication to resolve any ambiguities. Develop a protocol for handling “gray” documents for which relevance is unclear, determining how status of such documents is resolved, and how the decision is communicated to *all* members of the team. Finally, formalize a process for disseminating communication with the review team. For example, get a decision made as quickly as possible and update the team at the weekly Friday meeting. Don’t wait weeks to get a decision and then send out a mass email.

Here’s a real-life example of how you don’t want the communication process to work: A team of reviewers is working under a quota of 125 documents per hour. Reviewers who encounter ambiguities register them in an electronic question log that is slowly sent up the chain. Typically, individual reviewers receive an answer as much as 30 days (and 8x125x30 documents) later, by which time the answer is meaningless because the topics now being reviewed are completely different. Further complicating the issue: Other reviewers who posted the same question in the question log get different answers from different people at different layers of internal management because there is no centralized communication hub



to ensure consistency. The result: The questions about the documents were asked inconsistently which caused the documents to be incorrectly treated.

The Cardinal Rule: The flash is not the coder's best role model — do not emphasize productivity at the expense of quality, and find ways to reward good performance.

Step six: Implement quality control and provide ongoing training

Design and implement quality control procedures — including evaluation of review calls and identification of coding inconsistencies to minimize future mistakes. Identifying and retraining or removing poor performers improves the quality of your review and, although mere quantity of documents reviewed is not a good barometer of effectiveness, retraining or removing poor performers will improve overall review rates. Continue to provide ongoing support, case updates and training in both the relevant substantive law and the technology, as needed throughout the review process.

Step Seven: Invest in and continue to evaluate your review tools

Better system performance means faster reviews and improved work environments. Evaluate the performance of the review platform and confirm that reviewers have the right physical tools: optimized hardware and software, fast internet connections, large-screen monitors and a well-ventilated room suited to the number of people who will be working on the team, and comfortable seats and workspace.

Beyond the physical basics, the greatest focus should be on improving the interaction between the reviewer and the document within your review software: How quickly can reviewers navigate between documents? How easy is it to learn to use the software? Is navigation intuitive? Does the system require an unnecessarily large number of keystrokes or mouse clicks? Is certain metadata populated? What is functionality with regard to categories, redaction, document level note taking, highlighting, duplicate handling, production delivery wizards (privilege log) and workflow? What software requirements are needed to access repository data? What are the output options: does the system allow batch printing? How easy will it be to deliver responsive documents for production? How secure is the system? Is the system tried, true and tested?

One simple example of how better systems can save significant time and money is by enabling reviewers to quickly move from one document to the next. If it takes members of the review team 10 extra seconds to advance to the next document, the expense adds up. If you have even a small number of documents, say 500,000, the cost

for those extra 10 seconds of page turning is just under \$100,000 (10 seconds x 500,000 documents = 1,389 hours x \$65 per hour = \$90,285).

Step eight: Identify, document and encourage best practices

Like anything else, effective document review is a learning process. Tried, tested and true procedures should be documented and incorporated as part of the process. The best way to do this is to encourage ongoing and continuous dialogue with your review attorneys and document the systems and processes that are effective as you go along. It is also important to have a “lessons learned” review after project termination to identify practices for training, software selection, organization and quality control that should be duplicated going forward.

Don't despair. The review process is not your company's kryptonite

In spite of all the dramatic changes due to the information explosion and the attendant requirement to manage all that data, there are at least two constants: 1) regardless of how many “documents” there are to consider, collect, review or produce, discovery is still governed by the principles of good faith and reasonableness; and 2) regardless of the sophistication of software designed to manage this nightmarish process, it is ultimately humans who make the decisions. The better informed they are, the more effective your litigation strategy will be.

Focus on training and treating your review team right and these unsung heroes at the heart of the review process will save you time and money, and most importantly help you achieve positive case outcomes.

Last but not least, document review people run on coffee. Buy the good stuff and keep it hot. ☒

Have a comment on this article? Email editorinchief@acc.com.

NOTES

1. *Qualcomm* involved an ediscovery fiasco in which tens of thousands of easily accessible and relevant emails were not “discovered” until after trial. The clients were sanctioned, but the big surprise at the time was that the lawyers were held personally responsible and also sanctioned for their failure to “take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.” The judge additionally referred the lawyers to the State Bar of California for an investigation and the possibility of further sanctions. *Qualcomm Inc., v. Broadcom Corp.*, 2008 WL 66932 (S.D.Cal.).
2. The Sedona Conference® Best Practices Commentary on Search & Retrieval Methods (August, 2007) @ p. 193.
3. “Strange Times,” George Socha & Tom Gelbmann, *Law Technology News*, August 1, 2009 @ www.law.com/jsp/pubarticle.jsp?id=1202435558482.



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