



Best Practices in Managed Document Review

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The key to minimizing the risks and maximizing the efficiency and effectiveness of the document review process is to construct, document and follow a defensible process based on best practices that reflect sound project management disciplines, good legal judgment, and counsel's specifications.

A Note on Legal Jurisdiction

This broad guide is intended to have specific application in discovery exercises in US jurisdictions but also to inform the practice surrounding disclosure exercises in UK and other former Commonwealth jurisdictions. Specific reference is made to recent revisions to the CPR regarding e-disclosure practice in the UK, in particular the new Practice Direction 31B (effective date October 1, 2010), which expands best-practice guidance for counsel engaged in litigation requiring electronic disclosure. Pending developments in electronic discovery/disclosure rules and procedures in Australia should be expected to align all three jurisdictions in respect to several elements, key being the requirement of maintaining defensibility.

In several respects, the UK Practice Direction incorporates principles of litigation readiness and e-disclosure best practice that have for far longer been the rule in the US under e-discovery amendments to the Federal Rules of Civil Procedure (FRCP), adopted in December 2006, and state law analogues. Without going into detail, under both the Federal Rules and PD 31B, parties and their counsel are obligated to confer regarding disclosure of electronic documents, and to agree on the scope of discovery, tools and techniques to be employed, and specifications for production (exchange) of documents, all with an eye to ensure cost-efficient and competent disclosure of relevant electronically stored information. And every process employed must be fully transparent and documented in order to contribute to a fully defensible discovery exercise in total.

As in the US, the adoption in the UK of a new definition of competent practice in the domain of e-disclosure can be daunting at first blush to many litigators, as it suggests a need for the lawyer to master a technological discipline somewhat alien to the traditional practice of law. Counsel is well-advised to seek competent e-discovery providers/partners to help navigate the e-disclosure landscape and to recommend processes and tools that have been proven in e-discovery practice.

Introduction

If there is a lot riding on the outcome of litigation, there is a lot riding on the manner in which discovery, and by extension, document review, is conducted.

Often we, both clients and counsel, think about conducting discovery and managing document review as necessary yet secondary concerns, a couple steps in priority and glory beneath the higher calling of designing and implementing case strategy. Moreover, in the past several years, there has been an increasing focus on cost-containment in this phase of discovery, leading to growing interest in simple and expedient solutions. But we should not lose sight of the stakes involved. Defensibility must remain the governing principle; we should want an efficient and effective process that meets a reasonable standard and that can be defended. In the wake of *Zubulake* and its progeny, specifically, we recognize that a defensible process, well-conceived and executed, is imperative *and* minimizes risk. Accordingly, counsel should guard against undervaluing discovery as a process. Best practice principles must be extended to the context of discovery and document review.

This paper outlines recommended best practices for managing document review – a basic best practice *guide* – having as its goals the design of an efficient, cost-effective and defensible workflow yielding consistent and correct work product.

Managed Document Review

There are, in basic construct, two standing industry models for outsourcing e-discovery document review projects – the managed review model and the staffing model.

Engaging a managed review provider is readily distinguishable from having a staffing agency supply temporary labor, such as attorneys or paralegals, to perform review. In the latter case, a law firm or client specifies reviewer qualifications and the staffing agency locates and vets the reviewers and assembles the team. But the staffing agency typically does little more than provide the raw workforce which must be trained, monitored, and supervised by counsel. In instances, the law firm or company also provides necessary infrastructure – physical space, technology systems, security controls, etc. – to support the review. Because staffing agencies don't assume responsibility for managing or governing the process, the law firm or client is solely responsible for planning, review design, assignment workflow, training, process documentation, reporting, and validation of results.

A managed review provider typically provides a review team, facilities, technical support, and project management, and shares with counsel responsibility for managing an efficient and defensible process. In the best examples, the review provider, whether a full-service e-discovery vendor or a stand-alone review operation, collaborates with counsel in recommending an optimal project workflow. In addition, the review provider offers proven operational features including complete metrics reporting to assist counsel in overseeing and ensuring an efficient and effective discovery exercise, from kick-off through post-production.

Whatever the choice counsel makes in selecting a review solution – whether review conducted by associates, by a temporary staff of contract agency attorneys, or outsourced to a managed review provider – the solution should reflect an approach steeped in an understanding of applied best practices.

The following sets forth a minimal, standardized, framework which can and should be adapted to meet the needs of specific cases.

PLANNING AND PROJECT MANAGEMENT

- Ensure a project plan is tailored to the specifications of counsel and consistent with best practices
- Deliver a key set of documents that govern the execution and project management of the review process

TEAM SELECTION AND TRAINING

- Develop specific job descriptions and define a detailed protocol for recruiting, testing, and selection
- Conduct reference and background checks, and a conflicts check, where necessary
- Employ team members previously used on similar projects
- Ensure the review team receives comprehensive substantive and platform training

WORKFLOW

- Design processes, assignments and quality assurance steps specifically geared to the project's requirements
- Demonstrate compliance with key security and quality standards while maintaining acceptable pace

QUALITY CONTROL

- Develop quality control processes to achieve key project goals
- Implement controls to manage privilege designation and preparation/validation of results for production
- Test first review work product using sampling, targeted re-review, and validations searches
- Employ formal statistics to ensure the highest quality end result
- Maintain performance tracking for all reviewers

COMMUNICATION

- Develop a formal schedule of communications with counsel
- Calibrate initial review results, seeking counsel's guidance to confirm or correct results and to conform review protocol and training materials to insights gained

REPORTING

- Deliver regular, comprehensive reports to monitor progress and quality and to assist counsel in managing the review process

PRODUCTIONS AND PRIVILEGE LOGS

- Isolate and validate producible documents for counsel's imprimatur
- Prepare privilege logs in accordance with specifications set by counsel

POST-CASE

- Determine need for documents to be placed in a repository for future or related litigation
- Document the process from collection through production and assemble a comprehensive defensibility record

Best Practices

An effective document review team serves as a “force multiplier” that attempts, as closely as possible, to approximate the decisions that senior lawyers intimately familiar with the underlying case would themselves make if they had the time and opportunity to review each of the documents. A best-practices review establishes a construct in which counsel’s guidance can be – and should be – assimilated into many discrete decisions across a team of reviewing attorneys and those many discrete decisions can be calibrated to deliver consistent results.

PLANNING AND PROJECT MANAGEMENT

There are two key objectives to the discovery process. The first is to identify documents – the production set – relevant to the matter at hand and responsive to the discovery request(s), with privileged documents held apart. The second is to recognize and bring to the attention of counsel the subset of documents that warrant particular attention, either because they support the case or are likely to be used by opposing counsel and therefore merit a prepared response. Achieving these goals requires sound planning and project management tailored to the directives from counsel.

The outcome of the planning process should be a set of documents that govern the execution and project management of the review process. These documents ensure that all the key elements of the project have been discussed and specify all decisions, tasks and approaches. The planning stage documents should include:

- Protocol plan
- Comprehensive project management manual
- Privilege review guidance notes
- Sample reports

The protocol plan documents the background and procedures for reviewing documents in connection with the specified litigation – it is a roadmap for the review team. A protocol plan typically includes a backgrounder to provide context for the review exercise (with information regarding the underlying litigation and a high level statement of the objectives of the review). Additionally, it includes detailed document review guidance, including a description of and examples of what constitutes relevance or responsiveness; how broadly or narrowly privilege is to be defined for purposes of review; what information or content is to be designated “confidential;” a primer on substantive issues that are required to be identified; and how other materials are to be treated, including documents that cannot be reviewed (“technical defects”) and foreign language documents. The protocol also lays out the schematic or “decision tree” and procedures for how issues or questions are to be raised among the team members and with counsel.

The project management manual includes the review protocol and also lays out operational elements for the project, including: review scope; timeline; deliverables; staffing including team structure and job responsibilities, training, and work schedules; productivity plan; workflow; identification and features of the review application/platform; a quality control plan; feedback loops; query resolution process; communication plans, including reporting, validation methodology and final privilege review; and key project contacts, project closing procedures, and security protocols.

Privilege review guidance notes summarize guidance for the privilege review process and should cover the following areas: overview of reviewer roles, guidance on categories and the scope of privilege, guidance on accurate coding, and privilege logging of documents.

Sample reports provide counsel with examples of the reports that will be routinely delivered throughout the project. This is important to ensure up-front agreement on all reporting requirements.

TEAM SELECTION AND TRAINING

Assembling a review team entails formulating specific job descriptions, identifying the associated skill sets based on the parameters of the engagement, and defining a protocol for recruiting, testing, and selection.

The process should reflect relevant regulatory requirements and guidelines such as those set forth in ABA Formal Opinion 08-451, which states:

“At a minimum, a lawyer outsourcing services ... should consider conducting reference checks and investigating the background of the lawyer or non-lawyer providing the services ... The lawyer also might consider interviewing the principal lawyers, if any, involved in the project, among other things assessing their educational background.”

The level of training and experience of the review team is contingent upon the described task set. For example, a review for the purpose of redacting personal or confidential information may require limited legal training, and may be delegated to teams of paralegals under a lawyer’s supervision. Other reviews require an exercise of judgment or discretion wisely entrusted to teams of qualified junior lawyers, or even elements of substantive legal knowledge within the purview of the most highly trained and experienced attorneys.

It is expected that all team members will receive thorough substantive training from counsel and an orientation or re-orientation to the selected review platform (application) prior to the commencement of each review. Early review results should be reported in detail to counsel and detailed feedback sought. In pro-actively soliciting counsel’s guidance on any reviewed documents on which a question was raised by reviewers, and to confirm or correct coding decisions made early in the review, the

team is progressively more closely aligned to counsel's instructions. Review protocols should be fine-tuned or expanded, as necessary, as additional guidance is received from counsel.

WORKFLOW

Workflow design is a synthesis of science and art. How a reviewable population of documents is approached in review will determine both the efficiency and pace of review. Workflow on linear review platforms – using conceptual searching tools and clustering or similar technology – can be optimized by applying screens to a given document population, sorting into queues those documents having similar content or format from specified custodians, or isolating discussion threads. This can aid reviewers in making consistent calls more quickly. Additional techniques can be integrated into the process to speed review, including highlighting specific search terms within documents and segregating potentially privileged documents for focused review. Other techniques can be applied to ensure accuracy of review, such as employing a mix of sampling and validation searches and targeted re-review of reviewed documents, sampling of results by counsel, and employing a formalized query resolution process that requires counsel to formulate specific answers to questions in writing.

Workflow design includes the review tagging structure, incorporating desired behaviors, and constraints for individual tags. Consideration must also be given to the preferred treatment of document families, confidential or personal information, and whether redactions need to be applied.

Related issues include attention to data integrity and security protocols to be followed during review and on the review platform.

QUALITY CONTROL

Any endeavor involving human effort, employing tools designed by humans, is inherently prone to error. Therefore, the standard for discovery, or indeed execution of any legal service, is not perfection. Rather, work product is expected to be correct within tolerances defined at times as consistent with diligent effort and the exercise of reasonable care. The dividing line between inadvertent error and culpable error or wanton carelessness lies in whether *reasonable* care was exercised in avoiding and detecting such errors. For a specific example, Federal Rule of Evidence 502(b) provides that inadvertent disclosure of privileged material will not result in waiver where the holder of the privilege (through counsel) “took reasonable steps to prevent disclosure” and “promptly took reasonable steps to rectify the error.” So one question is, how do we define *reasonable steps* [to prevent disclosure of privileged material] and, more broadly, *reasonable care*, in the context of document review?

Reasonable care, in this context, equates to what we call “defensible” – and requires, at a minimum, an intelligently

designed suite of quality control measures matched to rigorous training, performance measurement, and reporting. A very capable quality control regime includes:

- Intelligent validation of results to ensure the set of reviewable data has been reviewed in its entirety by the appropriate reviewers
- Targeted review to detect potential errors and to identify materials requiring further review
- Targeted review to isolate from the production set all privileged documents

Quality controls should be implemented in at least two key areas: privilege designation and validation of presumptive production sets. Review results should be “tested” and determined to be:

- Consistent across the entire data set and team, across multiple phases of a project, and with protocol treatment for families, duplicates, etc.
- Correct in that it meets parameters for relevance, privilege, confidentiality, and issue coding, and that all potential privilege has been identified

There are significant challenges in designing and executing a rigorous and effective quality control regime. Where sampling is relied upon, there may be reason to employ statistical methods in order to identify statistically sound and representative random samples of a document population for re-review. The most effective and, arguably, more defensible approaches combine sampling with intelligently targeted quality control elements to identify documents meriting a second level of review, and also solicit continuous input from counsel to calibrate the review team. All quality control elements should be designed with counsel's input and documented.

COMMUNICATION

Best practices mandate developing a formal and regular schedule of reporting and communications among the review team, its managers, and supervising counsel throughout the process. During ramp-up, communications should be geared to ensure that supervising counsel is available to help confirm review guidelines and answer reviewer questions. A schedule of regular calls should be established to review progress and any issues. A best-practices communication plan will also document points of contact, escalation processes, and appropriate means of communication.

REPORTING

Reporting is a key element of the review process and is the primary means by which counsel is presented with information necessary to assess, in real time, whether a review is on track and on pace, how accurate the results are, the breakout of designations made for documents

reviewed thus far, and the number of interesting (“hot”) or problematic documents. Review reports, issued at agreed-upon intervals, deliver invaluable information on productivity, accuracy, operational issues, technical issues, team structure, folders released, and other requested metrics. Good systems can now generate reports containing these and other data points automatically. Best practice requires, of course, that the review vendor and counsel actually *read* the reports and act on information gained.

PRODUCTION AND PRIVILEGE LOGS

Where production is to be made to an adversary or requesting agency, best practices necessitate counsel and vendor to agree well ahead of time on production specifications (principally, format and included fields) and procedures. The provider handling processing and hosting of reviewable documents should provide to counsel a comprehensive production log, cross-referencing production ID numbers (Bates numbers) to document ID numbers on the review platform and correlated to the original data collection. Privileged and redacted or withheld documents ordinarily would be logged by the review team or its managers, with the format and content

of each log also having been agreed upon ahead of time. Final logs (and final privilege determinations) should be reviewed by counsel prior to production.

POST-CASE/DOCUMENTING THE PROCESS

Counsel should determine early in the process whether some or all documents should be maintained in a repository for future or related litigation, and necessary arrangements should be made with the responsible vendor. An advantage that can be gained through using a repository is that, once made, final privilege designations can be preserved if the same dataset is subject to future or related litigation discovery.

As a final element of best practices, counsel and vendors involved in all aspects of a discovery exercise, specifically including review, assemble a complete documentary record of the discovery process, including specifications of the collection, processing, review, and production(s). Such a record, which we refer to as a “defensibility binder,” is a valuable tool for counsel as a historical record to answer questions raised at a later date and as a means of demonstrating that discovery was undertaken with diligence and reasonable care.

Conclusion

Document review is a critical, resource-intensive component of the e-discovery process that, in order to be successful, requires active and competent project management, following a suite of well-designed processes that reflect relevant and agreed upon best practices. The result is the timely and cost-effective delivery of defensible work-product that facilitates the overall litigation process and enhances the favorability of its outcome.

ABOUT INTEGREON

Integreon is the largest and most trusted provider of integrated e-discovery, legal, research and business solutions to law firms and corporations. We offer a best-in-class managed review solution designed to deliver defensible work product at reasonable cost by designing cost-efficient and effective methods and applying intelligent processes that define best practice. Our review capability is global and our domain experience is substantial.

Learn more at www.integreon.com

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