

PARADIGM SHIFT: CORPORATIONS BATTLE THE E-DISCOVERY COST CRISIS WITH PER DOCUMENT PRICING

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EXECUTIVE SUMMARY

Corporations are increasing their level of involvement in the electronic discovery process to reduce cost and risk.ⁱ In fact, more than half of the respondents to a recent survey of corporate counsel said they are in-sourcing more aspects of discovery than in previous years to control costs and enhance management of the process.ⁱⁱ

E-discovery is a complex, multi-stage process, so in-house legal teams focused on risk mitigation and financial control may be at a loss on where to begin. A growing body of research indicates that “the largest addressable cost in e-discovery is the cost of legal professionals who review data.”ⁱⁱⁱ As such, that area presents the greatest potential for significant savings. The challenge is that corporate legal departments are generally unaware of their total cost for review therefore they are at a disadvantage in attacking and reducing that cost. They are fully capable of calculating the total cost for discovery by adding up law firm and vendor bills, but they do not break out the time spent for review. Without knowing that figure, and more specifically the cost per document, they cannot properly control their spending.

In order to lower expenses, legal departments must first learn how to determine the cost to review each document. This requires collaboration between business units, legal teams (in-house and outside counsel), and vendors to share intelligence, collaborate and approach the challenge with a unified front. In addition to achieving reduced e-discovery expenses, once this cost is calculated, legal teams will gain a clearer view of a more transparent process and a better ability to forecast and budget for upcoming litigation and discovery matters.

HISTORICAL PERSPECTIVE

Historically, corporations transferred discovery oversight to outside counsel, receiving a periodic report and often a large bill in return. That bill contained a blended number for services rendered on an hourly basis with little indication of the individual amounts spent on each aspect of the process.

There is also a history of law firms treating non-core business functions such as word processing, photocopying, faxing, and scanning as profit centers until market forces pushed them to outsource to specialized lower cost providers. Over the past ten years, law firms have also largely lost the ability to bill for bibliographic coding on an hourly basis because domestic and offshore outsourcing providers could provide quality services at far lower prices on a per document basis. Today, first pass review is a major line item on law firm bills that is increasingly coming under pressure from outsourcing experts with a flat per-document rate.

THE COST QUANDARY

In preparing its Fourth Annual Litigation Trends Survey Findings, Fulbright & Jaworski surveyed 253 U.S. corporate counsel and 50 U.K. corporate counsel on various aspects of litigation. More than half of those advised that more than 5% of their litigation budget in the past year was spent on pre-production review.^{iv} 30% estimated that privilege review comprised 6-10% of their litigation costs, while 16% said that number was between 30-50%.^v

Despite the amounts spent, chief legal officers (who made up 52% of those surveyed) are still confused about calculating the total cost for review. That is understandable, considering that there is no current industry standard across vendors and service providers for billing. The confusion over what it costs to review one document stems from the fact that law firms, staffing agencies and consulting firms typically bill on an hourly basis and processing and hosting vendors typically charge on a per GB basis.

Another factor that makes it unlikely for companies to perform a full analysis of e-discovery costs is the common absence of a repeatable e-discovery process. Without such prior organization, companies often fail to adequately plan, or in “bet the company” type cases often skip performing, a detailed cost analysis, which again can result in increased overall costs.

The ultimate calculation requires knowledge of:

- The total number of gigabytes at issue
- The number of documents to review after using technology to cull the data set (e.g. de-dupe, date filters, key word searches)
- The total cost for attorney review (normally determined by the total hours spent by lawyers and contract reviewers times their hourly rates)
- The number of document decisions made per hour

While numbers can range greatly depending on the type of case or amount of data involved, informal industry averages suggest that without utilizing advanced e-discovery processes and tools, the cost per document is \$8.00 - \$10.00,^{vi} broken down by:

- Preservation - \$0.50
- Collection – as much as \$0.50
- Processing - \$0.50
- Review - \$7.00
- Production - \$0.50

Once the entire filtering process is complete, often less than 25% of the data is left for review. Of that remaining 25%, often less than 10% is potentially interesting or privileged. In a 100 GB dataset yielding one million documents, proper filtering and effective first pass review might only require an outside law firm to closely scrutinize 25,000 (i.e., 10% of 25%) documents for on-going, in-depth substantive coding and analysis, case preparation, and final privilege determination.

If left unchecked, the fees would be astronomical, but now some corporations are demanding alternatives. There is a trend toward a fixed-price model.^{vii} In fact, The Wall Street Journal has reported that Cisco Systems is a leader in alternative billing and paid 70% to 75% of its 2006 \$125 million legal budget under fixed-fee arrangements.^{viii} Advanced Micro Devices Inc. and Tyco International Ltd. reportedly have similar arrangements.^{ix}

With review comprising over three times more than the sum of all other aspects of electronic discovery, the pace of acceptance for a fixed per-document review fee is certain to accelerate.

That acceleration is due to the nature of first pass review and its ability to improve the overall e-discovery process by having attorneys quickly and cost effectively categorize documents with the following basic designations before outside counsel begins in depth substantive review:

- Responsive/Not Important: Responsive to a document request, but not material to either side's theory of the case
- Responsive: Responsive to a document request and relevant to the facts of the case
- Important: Responsive to a document request, relevant to the facts of the case, and particularly significant in determining relevant factual issues
- Privileged: Confidential data or information protected by law from disclosure
- Needs Further Review: Documents or data that need additional consideration before a confident disposition can be made
- Technical Issue: Cannot access the document due to technical problems with the file
- Not Responsive: Not responsive to any document request

While the responsiveness and privilege are the most widely recognized, supplemental notations for importance and required follow-up provide greater direction to the subsequent analyst.

FIRST PASS REVIEW

The evaluation of documents for responsiveness and privilege in first pass review provides in-house attorneys and their outside counterparts with an understanding of a dataset early in the matter. This enhances the ability to set

deadlines and budgets and strategize as to how to approach the case. While efficient and highly effective, it is not meant to substitute for the final assessment conducted by the attorneys who will try the case.^x

In fact, to maximize productivity, outside counsel is generally involved in creating the review guidelines at the outset of the project. Outside counsel also performs second pass review for quality control and substantive analysis on an ongoing basis.

Reviewers are typically immersed in the case background and make substantive decisions as they conduct their evaluations. Different types of first pass reviews require varying levels of analysis. For instance, a second request review does not typically mandate the same level of analysis as a products liability or patent infringement case.

Similarly, when a government agency requests the entire archive of a custodian's documents, reviewers can normally only withhold data for privilege and possibly to avoid violating personal privacy. In contrast, private litigants negotiate search terms in order to cull the data set and reduce the cost and time needed to review irrelevant data. In these instances the first pass review may become more substantive and take longer.

In addition to responsiveness and privilege, first-pass review allows review attorneys to simplify collections of any size by further organizing them by issues pertaining to categories relevant to inside or outside counsel. By highlighting a document's basis for relevance and grouping it with similar documents, the review becomes more accurate, risk is reduced and the legal teams can focus first on the most critical records and issues.

THE QUESTION IS OFTEN: WHO SHOULD CONDUCT THE FIRST PASS REVIEW?

Law firms and their associates are certainly qualified to conduct first pass review, and by sending the data to outside counsel the workload of in house legal departments can be reduced. When considering the cost, however, there are a number of alternatives available, such as contract staffing and integrated discovery management organizations that can provide more affordable options for legal review.^{xi}

Contract staffing agencies for example, can provide temporary lawyers to conduct first-pass review — often at a fraction of the cost of a full time associate. These individuals receive the same training as associates and can be as efficient.

Similarly, integrated discovery management organizations can offer lower-cost legal options, but unlike staffing agencies, they can do so using individuals with long-term institutional knowledge of first pass review protocols. This makes them effective specialists and the marriage of institutional knowledge and lower-cost labor can produce enhanced efficiencies.

FIRST PASS REVIEW SPECIALISTS

There are a growing number of discovery management organizations that focus on document review. These experts have developed workflows incorporating review best practices and procedures that enhance reviewer performance. Their strategy of developing and implementing an established first pass review methodology has been proven to reduce overall review time and cost.^{xii} Most importantly, their best practice protocols and methodologies encourage accuracy and consistency in document categorizations.

Given that individual reviewers can evaluate similar or related material differently and often inconsistently apply relevance and privilege designations – regardless of their intelligence, education, and experience – practices to encourage uniformity are essential. In essence, these specialists provide standardized review protocols and repeatable processes proven through project experience.^{xiii}

The risks for failing to standardize are high, and can result in opposing counsel receiving copies of improperly marked, yet extremely sensitive and privileged documents. Recently, 17% of U.S. companies and 38% of U.K. companies reported in 2007 that they had lost their right of document privilege due to inadvertent production of electronically stored information.^{xiv} When addressing only U.S. financial and retail firms, that number jumped to nearly 40%.^{xv}

COST IDENTIFICATION STRATEGIES

COLLECTION & CULLING

Collection factors influencing the cost of review include the volume of data, its location and how much of it corresponds to initial filtering techniques (e.g., keyword searches, file types and time periods). Those that collect only what they need and maximize their culling practices will significantly reduce the number of documents that require downstream review. If each document will cost at least \$1 to review, then each unimportant or non-responsive item that makes it through the collection and culling process will cost the corporation at least \$1. One of the best ways to save money on review is to reduce the number of documents that require review.

Companies should ask vendors for specific figures on how costs for collection are calculated. Some eventually perform the collection internally.^{xvi}

STAFFING

As law firms continue to raise the salaries of their associates, their billing rates increase as well. Hourly rates for junior associate lawyers in most major markets now begin above \$200 and average over \$300.^{xvii} In addition, to further profit on contract lawyer review, some firms are creating teams of “staff attorneys” by converting temporary attorneys into full time reviewers. Accordingly, corporations can save a great deal of money by having the firm use contract lawyers whenever possible and getting billed directly from the staffing agency.

To maximize savings, corporations should discard the per-hour billing model for document review and use vendors that base their fees on a per-document rate. This method should be more attractive as “the risk of inefficiency and the reward for efficiency is accepted entirely by the service provider.”^{xviii} It also eases the oversight burden on the company and outside counsel by “effectively reducing the variables that have to be managed to two: the number of documents and the rate per document.”^{xix}

Another trend in document review cost reduction efforts is the introduction of offshore lawyers from India or the Philippines into the process. In these countries, discovery management organizations can utilize talented, but lower paid local attorneys to mark documents for relevance and privilege. These positions in India and the Philippines are highly coveted so turnover is low and the desire to succeed at any specific task associated with the project is high. The trend toward this type of staffing will continue to gain broader acceptance.

PRODUCTION FORMATS

After an organization reduces its data set to a fractional group of the original potentially responsive items, those responsible for discovery must decide how to conduct the review. The decision could range from reviewing material in whatever native form they exist or converting to another form, e.g., TIFF/PDF.

With advancements in viewer technology that run across multiple file types, native review is increasingly a preferred review format. In fact, the advantages of native review are clear with certain file types (e.g., spreadsheets).

Unnecessary conversion should be avoided because 80% or more of material initially reviewed is irrelevant^{xx} — resulting in unnecessary expense to the client, insofar as the cost to TIFF or otherwise print a document is relatively high.

Federal Rule of Civil Procedure 26(f) requires parties to offer their positions on a form of production during their preliminary discovery conference. The production format generally impacts the ultimate conversion decision of the subset of documents that are to be produced. Regardless of production format, a company can typically minimize its costs by keeping documents in native form for as long as possible and only render to image when necessary for production.

LAW FIRM FEES

While most law firms understand that there is great efficiency in outsourcing the labor related to both first pass document review and project management, they also know that it is necessary for them to retain oversight of the document review. This may be a partner, a senior associate or even a small team of lawyers.

When determining what is being paid for review, accurately quantify the contribution of these lawyers and assess any possible redundancy. With billing rates for partners exceeding \$600 per hour, this analysis is critical. It is best to find firms that are like minded on the benefits of first pass review and are willing to work symbiotically with document review organizations to provide the best result for their clients.

SOFTWARE SELECTION

Software built to support the legal review process and make attorneys more accurate and efficient during initial review could dramatically cut the review cost. Anecdotally, Fortune 500 customers deploying legal review software have been able to cut the review cost to \$1.40 (an 80% reduction) from \$7, lowering the total cost per document to an average of \$3.40 from \$10.

The most effective first pass review software is designed to speed evaluation by grouping documents by concept and providing visualizations that help attorneys navigate large sets of documents. It is understood that visual analytics permit examiners to streamline decision making for volumes of data simultaneously. Of all human faculties, one's eyes transfer the most data to the brain in the least amount of time.^{xxi} Visualization-enhanced, concept-organized review is one of the fastest growing components of technology in e-discovery.^{xxii}

Software designed for deposition transcripts or management of case materials is not typically most effective for relevance and privilege reviews. These tools may in fact increase the cost by increasing the amount of time required to review documents. The results of first-pass review can ultimately be exported to a trial preparation system for outside counsel. To the extent that reviewing using specialized review software carries some technology cost, the amounts saved in review fees typically justify that cost.

An emerging trend is to include the cost of software into the price of each reviewed document. This will eliminate any pricing confusion when assessing a solution's cost. In the future, underlying technology selection and costs may not even be an issue.

For instance, no one is concerned with the type of photocopier used at Kinko's or the software used by bibliographic coding providers in India. The key factors are quality and the per-unit price.

SOFTWARE VALUE

When purchasing software, buyers should mainly look at the total cost of review and how the software will enable them to get the job done for the lowest cost. The price of the software itself can often be misleading. If software A costs \$10,000 less than software B, yet attorneys can only review 1,000 documents a day on software A versus 2,500 documents a day on Software B, the \$10,000 dollar expense can be recovered completely within in a matter of hours and generate exponential savings nearly as quickly.

For companies getting a fixed fee from an outsourced provider, the cost of the software becomes less critical as the outsourcer can include the software cost in the fixed per-document price.

CASE-SPECIFIC EVALUATION

By asking law firms how they plan to respond to a discovery request and how much it will cost, the GC gains a better understanding of the process, and ultimately will be better equipped to assess and prepare the company for discovery requests.

To optimally reduce a data set, determine the total number of documents to be reviewed and establish the anticipated speed at which review teams can operate, the plan must include:

- Studying case details
- Crafting and testing review guidelines
- Developing an efficient workflow
- Implementing unique culling strategies (every document that does not need to be reviewed will typically save the corporation at least \$1)
- Establishing schedules with milestones
- Prioritizing the review of the files of key individuals by importance

“HOW MUCH WILL MY COMPANY’S DOCUMENT REVIEW COST?”

The question sounds obvious, but is not an easy one to address on a basis other than a per-document rate. For that reason, seek commitment from your law firm on the total cost for review. Breaking up the costs into hourly rates and variable component parts will distort the review and prompt a selection committee to base decisions on factors that appear objective on the surface (e.g., cost), yet mask substantial confusion when considered in perspective (analyzing various costs per hour with regard to the true number of hours to be spent). A fixed budget will allow uniform evaluation and decision making.

Another option – and perhaps the most thorough approach to answering the above question – is to have an outsourced provider run a pilot program to determine the document review costs. It is best to do this when you have legacy data and cost analysis from an old case. You can then compare what it has been costing the corporation to what the cost could be brought down to.

“WHAT IS YOUR EXACT PLAN?”

The key to maximizing the efficiency of a corporation’s discovery process is planning. Of course, that preparation begins internally with the development of an understanding of an organization’s document universe. When addressing a specific matter, however, a detailed plan of coordinated attack is at the essence of any potential success. That plan should identify specific tools that will be used, list team members who will apply talents tailored to the matter at issue, set strict milestones and provide regular reports to the entire legal team.

Perhaps most importantly, planners need to identify custodians, search terms, phrases and even concepts, along with a list of important events and historical highlights.

“HOW DO YOU MANAGE QUALITY CONTROL?”

Given that the cost of first pass review is exponentially higher than any other element of electronic discovery, those conducting the review must not only understand the tagging and evaluation, but must appreciate the value of using leading-edge technology and placing an emphasis on project management. If an outside vendor only performs quality control on a small percentage of documents, then the cost for its services may be lower. It is difficult to define quality since the same document could be interpreted differently by different members of a group of senior lawyers. It is best to make sure that a quality assurance plan is developed for each matter and to make sure the vendor uses software to improve the effectiveness of the quality control process.

“IS THE REVIEW SCALABLE?”

It is not uncommon to expect to review the documents in the possession of a handful of custodians in a single location, only to learn that there are many more individuals involved in remote locations using various media. That uncertainty necessitates the capability of applying the same framework for review to any project, regardless of size. It also requires the ability to compartmentalize as needed to efficiently distribute the workload.

Dividing the work in this manner requires the type of skilled management addressed above to ensure completeness and defensibility. Additionally, the faster the technology lets you review, the fewer reviewers are needed. For example, a linear review tool might require 60 reviewers to complete a project whereas a visual analytics tool will be faster and only require 20 reviewers.

SHRINKING THE HAYSTACK^{xxiii}

An outsourced review partner will add the most value to corporate legal departments by shrinking the discovery haystack. The “needle” can and should be found and analyzed by outside counsel. The key is to have the low cost resource cull down the population so that by the time the legal experts evaluate the data set it consists only of relevant – or better still, only of highly relevant, documents.

While making decisions based on a per-document cost is an inevitable trend, the ultimate privilege call should not be outsourced and will always remain the responsibility of the legal team. In addition, attorneys with knowledge of a particular field should always review highly substantive documents, and any whose production or withholding involves a complex matter of law.

CONCLUSION

With no end in site to the proliferation of electronic discovery, cost has become a paramount concern for corporations. Unfortunately most corporations do not have a good understanding of the breakdown of the costs associated with electronic discovery.

The largest addressable area of concern should be first pass review. Given the astronomical expenses associated with this aspect of e-discovery, the most effective pricing model is based on a fixed per-document rate. Greater efficiency can be attained when working with an integrated discovery management organization offering a per-document price for a managed review, incorporating best practices for first pass review. Managed per-document-priced review offers the greatest level of transparency and the most incentive for efficiency and quality control.

The transition toward this outsourced flat-rate model of efficiency is inevitable, but achievement requires the commitment of an entire organization. The cost savings are real. For organizations facing constant litigation, investing the time to determine the true cost and evaluating alternatives is a worthwhile exercise.

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