



Assessing the Risk and Setting Strategy, the True North of Document Review - A Judicial Perspective

In the first installment of this multi-part roundtable, we used a compass analogy to help explain our theme. We said that, along with a good map, a compass can be used to find your way along an unfamiliar path. For litigators, large scale document reviews are a journey of unknowns.

Our experience tells us that document review often changes the nature and strategy of the case. That's why it is critically important to understand what the documents tell us about the case. In our first roundtable, which appeared in the June edition of MCC, we heard from both inside and outside lawyers; all of whom have had years of large complex litigation experience. Among other things, our panelists emphasized the importance of thorough and complete document review. They gave us similar, but easily distinguishable points of view.

For instance, clients and trial counsel must understand the factual landscape the litigation will expose. The former needs such information to make an informed assessment of the potential risks (and rewards) of continued litigation. The latter requires it to develop strategies to optimally deal with the facts (good and bad) that will ultimately be presented to the judge or jury for decision in the case.

The second installment of our roundtable features comments by United States Chief Magistrate Judge Thomas J. Shields of the Southern District of Iowa. Judge Shields responds to the very same questions we asked our panel in the June edition.

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Below you will find the next point on our compass. Much like the cardinal points of a compass: North, South, East and West, we hope to provide perspective from all points of view. Part III of this series will feature the views from plaintiff's counsel perspective, and perhaps, more dialog from inside counsel and defense counsel.

Tom Svoboda: serves as Managing Director at Evidence Exchange where he leads the firm's client education and peer- to-peer collaborative ventures. He also serves as a strategic advisor to the company and its clients. Tom joined Evidence Exchange in January 2010, having spent 15 years as Director of Litigation Support for Cravath, Swaine & Moore. Tom came to Cravath from IBM where he held various marketing and technical management positions, including six years managing IBM's Corporate Litigation Analysis Department.

Judge Thomas J. Shields: was appointed a part-time United States Magistrate Judge for the Southern District of Iowa on January 14, 1997, and in June, 2000 was appointed to full-time status. Magistrate Judge Shields received his B.A. from the College of William & Mary in Virginia, and his J.D. from Indiana University. After completing law school, Magistrate Judge Shields worked as a law clerk for the Honorable W.C. Stuart, United States District Judge for the Southern District of Iowa. He was in private practice at Lane & Waterman, Davenport, Iowa from 1974 until 2000. Magistrate Judge Shields is a fellow of the American College of Trial Lawyers and a fellow of the Iowa Academy of Trial Lawyers. He is also a member of Working Group 1 of the Sedona Conference.

Tom Svoboda, Roundtable Editor & Managing Director, Evidence Exchange

Q & A On Document Review

1. Editor: What is the goal of the document review from the Court's perspective?

Judge Shields: The ultimate goal of any document review by parties in litigation is to insure that all relevant documents, communications, data and metadata and which could lead to the discovery of admissible evidence are identified, catalogued, verified and preserved. Obviously, pursuant to Fed.R.Civ.P. 26(a), some, or all of that information will be identified in the initial disclosures, and following that will be produced in response to requests for production served pursuant to Fed.R.Civ.P. 34, or under the appropriate procedures in answering interrogatories served pursuant to Fed.R.Civ.P. 33.

The Court recognizes, and expects, that in appropriate situations, documents will be identified as being protected from being produced because of the existence of, and timely and appropriate assertion of, certain privileges: i.e., attorney/client; work product.

Courts are finding with regularity that active case management, not micro management, is making the review, identification and production of relevant documents and data much more efficient for the parties. In this regard, the scheduling of monthly or quarterly telephonic status conferences and the requirement that parties file joint stipulations regarding electronically stored information issues greatly improves discovery cooperation and timeliness.

The ultimate goal is to encourage, promote, and enforce cooperation among parties during discovery so that costs are reduced, unnecessary motion practice is eliminated and early trial setting is preserved.

2. Editor: How much has technology changed the number of documents the Court reviews?

Judge Shields: An easy, quick response is one word: exponential. But, having said that, it should be pointed out that in all but a small percentage of cases, the lawyers involved in complex litigation are experienced, competent and members of larger firms which have the capabilities, resources and staffs to make sure that in camera inspections are able to be handled electronically with appropriate logs being prepared fully identifying the documents in dispute, the claimed privileges or reasons for withholding production and the legal bases for the withholding of the documents.

On the other hand the ability of parties to produce thousands, if not hundreds of thousands, of documents literally at the push of a button, is somewhat akin to the “old” practice of making documents available to opponents in discovery by simply opening up warehouses and identifying filing cabinets allegedly containing the responsive documents. In fairness however, because of the expected cooperation among lawyers, and the overriding ability of the Courts to manage discovery, the parties voluntarily, or otherwise, agree on the number of custodians, search terms, locations and scope of discovery that really expedites discovery and the production of relevant information.

3. Editor: What does the Court want to accomplish in document production?

Judge Shields: The answers to this question are in large part found in the answers to Questions No. 1 and No. 2 above. Bottom line is of course the insurance that each and every party to litigation is on the same level with every other party in terms of access to, and production of, documents and data that is required to be produced in accordance with relevant statutes, rules of civil procedure and Court orders.

In addition the Court wants to promote fair proportionality, timely access to relevant information, whether electronic or otherwise, and assurances that each party is effectively implementing litigation holds, document/data preservation and full compliance with orders of the Court regarding discovery.

4. Editor: What ways are available to make document review more efficient and still incorporate appropriate manual review?

Judge Shields: The Court is always the outsider looking in when discovery is initiated and when the first rounds of initial disclosure and discovery responses are served. The Court has every reason to trust and rely upon the ethical responses that lawyers make in accordance with statutes, rules of civil procedure and orders from the Court.

Certainly the most efficient means of document review begin with electronic searches of available documents and data. If parties negligently, or intentionally, fail to institute litigation holds, or identification of the appropriate custodians or locations of electronically

stored information then the Court must, and should, insist that the offending party undertake manual review of all available information.

Once the Court’s trust in the integrity of the discovery process is breached by a party or parties, then the Court’s primary role is to make certain that manual review is not thwarted and that it is accomplished in a fair, proportional manner.

Obviously if a party’s failure to preserve electronically stored information, whether intentional or otherwise, prejudices an opposing party then the Court must, and should, consider all the ramifications including more expensive discovery procedures, extensions of time to complete discovery, continuance of trial, and if necessary, the imposition of appropriate sanctions as permitted under Fed.R.Civ.P. 37 and Fed.R.Civ.P. 41.

Most Courts are reluctant to impose sanctions, but they are available and must be used in extreme cases.

5. Editor: Lawyer involvement in document review- the role of senior or supervisory lawyers.

Judge Shields: Relegation of document review to young, inexperienced lawyers cannot be countenanced by the Court. There is a reason for the inclusion in Fed.R.Civ.P. 11, of the penalties which can be imposed upon lawyers who sign pleadings improvidently and with knowledge that the pleadings are not accurate or true.

With the advent of complex litigation, and the reality that even in not-so-complex litigation there can be thousands of electronically stored documents, in addition to data, parties and their litigation counsel with increasing frequency are relying on third-party vendors to undertake reviews, organization, cataloging and even production of documents in response to discovery requests. This can be a slippery slope.

The reliance upon, and trust in, third-party vendors creates an even greater responsibility for senior lawyers to absolutely make certain that those vendors have accurately and honestly reviewed, identified and produced every document, or piece of data, that is to be produced. Because this work can be done remotely, it is not acceptable for lawyers to assume all is being done in accordance with the rules of discovery or court orders.

When vendors undertake this work, there is a much more difficult onus on the lawyers: they must be able to independently verify the work product of the vendors. This really is no different than if only tangible documents are available for production. In those cases senior lawyers must also make sure that if document review is being done manually within the law firm, then those lawyers assigned to the task are accurately and ethically carrying out their task.

This does not mean that if a law firm, in house, handles the electronic review and production that senior lawyers have little or no responsibility. The contrary is true. Thus, in many ways the advent of electronic document storage, review and production may actually create greater legal and ethical obligations to fall upon law firms and their senior lawyers.

This is not to suggest that many, or most, senior lawyers have little or no knowledge of what is occurring during document production, or that they wait until the eve of trial to make themselves aware of the documents that have been produced. But it is a warning that the Court can and does expect responsible and knowledgeable accountability and responsibility by senior lawyers throughout the discovery period.

Editor's Note: In the next issue, the Roundtable will continue to explore these questions with other Contributors. We also plan to expand the focus to also include the Plaintiff's and the Court's perspective on Document Review. Reader comments are welcome and should be sent to the Editor at:

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