



Assessing the Risk and Setting Strategy, the True North of Document Review

Most people know that a compass points North, which is useful if you want to go North. It takes a while to learn that the compass is only really useful if you use it as you enter the forest and when it is used along with a good topographic map. Once lost, taking out a compass is nearly worthless. So too, with technology and document review. Technology can be very helpful in identifying documents which lead you in a certain direction, but it takes knowledgeable and skilled lawyers to decide on the true course.

This page is devoted to bringing together lawyers to discuss the value of document review and the critical role it plays in the development of litigation strategy. The lawyers on this panel have years of experience in complex litigation and first-hand knowledge of various aspects of document review involving cases with millions of documents. Both inside and outside counsel offer their views on this page. (Later in this series and among others, we will hear from plaintiffs and a representative of the bench.) It has been our experience that document review often changes the nature or strategy of the case, and, while time and money are important, discovery is not a race to see how fast or how few documents can be reviewed and produced.

Instead, we have found that it is absolutely essential that both the client and trial counsel 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. Over the last several years, litigation support service providers have developed numerous products to assist

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litigators with the collection, processing, review and production of ESI.

Various products tout their ability to “winnow down electronic data” and to “supercharge your document review”. They offer “time and money saving features”, that assist with the “daunting task of documents review...” In a recent news article, a legal industry reporter described discovery as “the most nettlesome aspect of litigation.” The reporter went on to describe the lawyer’s work as “sleuthing” and “sifting”, and discovery as the “pain point” in litigation. At no time did he mention why lawyers review documents, or what they and their clients expect to gain from this very important task.

The US Supreme Court has said that discovery is intended to “make trial less a game of blind man’s bluff and more a fair contest with basic issues and facts disclosed to the fullest practical extent.” The pre Federal Rules approach of “trial by ambush” has long ago been relegated to the ashbin of history. Document review is the key to successful discovery. While it may be time consuming, great rewards come to the lawyer who becomes the master of the facts.

Full knowledge of the relevant facts is necessary in developing a realistic appraisal of one’s case. This, of course, is the objective of document review. Clearly, tension exists between cost control and factual investigation, but there needs to be a balance. While the focus of various media and consultants is on cost and how to reduce costs, there is little or no discussion of the value of lawyers becoming the master of the facts by thoroughly reviewing the relevant and sometimes the non-relevant documents in a case. The following begins an examination of this very important subject. Evidence Exchange is delighted to sponsor this dialogue!

Tom Svoboda, Roundtable Editor & Managing Director, Evidence Exchange

Roundtable Contributors

Alex Bowie is a partner at Day Pitney in New York. He represents clients in many different types of significant and complex litigation. Alex has represented business and individual clients in numerous federal and state courts around the country and in arbitral forums, including NASD and JAMS. His most notable matters include representing a multinational corporation facing a securities class action; representing a Fortune 50 corporation in a complex action involving antitrust, trade secrets, copyright, Lanham Act, and patent infringements claims; bringing arbitration on behalf of a stockholder and officer of a closely held corporation to resolve disputes over ownership and operation of the company; an arbitration over a former employee’s deferred compensation; defending an employee class action alleging violations of ERISA; and, special proceedings in New York State Supreme Court on behalf of a limited partner following the collapse of a hedge fund seeking access to partnership records, replacement of a liquidating trustee, and distribution of partnership holdings.

Todd McLawhorn formed McLawhorn Law Offices, PC. after practicing law for over eighteen years in three of the country’s largest law firms, both in Chicago and New York City. He has tried cases and appeared before courts in a variety of jurisdictions, literally spanning the country from coast to coast. Mr. McLawhorn has significant experience with complicated business litigation including matters involving contracts, consumer fraud allegations, shareholder disputes and valuations, commercial real estate, trade secret issues, deceptive trade practices claims, antitrust issues, and merger and acquisition issues. He has represented assorted clients in a wide array of industries, including those in the financial services, banking, computer hardware and software, membership services, manufacturing and professional sports fields. In addition, Mr. McLawhorn has devoted a substantial portion of his practice to class action litigation, particularly in regard to antitrust and consumer fraud claims.

Brian Pengra is Vice President and Chief Litigation Counsel of CommScope, Inc., a global leader in communications systems and products. In this role, he has managed outside counsel and discovery vendors in a variety of major litigations and arbitrations, ranging from domestic and foreign patent infringement actions, to complex commercial disputes, to shareholder litigation. He has also worked extensively to develop process and procedures for the Company’s e-discovery compliance efforts. After starting his career as a litigator at one of the country’s preeminent New York-based law firms, he spent time as an in-house attorney at both IBM and AT&T.

Tom Svoboda serves as Managing Director at Evidence Exchange where here 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.

Q & A On Document Review

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

Todd McLawhorn: There are several goals. You need to learn about your case, its strengths and weaknesses, and the same about the other side's position. You need to determine what you can prove through the documents and what you will need to prove through witness testimony. You also need to produce the documents that you are required to produce under the applicable discovery rules. You want to understand the resources needed and the time for completion. You want to anticipate other documents you may not need now, but might in the future, so as not to have to start anew for subsequent waves of document production. And you want to accomplish this in an efficient manner that is not disruptive to the client's business.

2. Editor: How much has technology changed the number of documents you review in order to prepare a case for trial?

Todd McLawhorn: Technology changes the way the documents are processed and sorted, but it does not alter the lawyer's fundamental job, which is to learn the facts of the case by reviewing the relevant documents that prove or disprove the allegations in dispute. Technology can help identify the relevant documents faster and increase the hit rate for finding "hot" documents, but it is not a substitute for reading the documents and learning the case. It is similar to the use of legal research databases like Westlaw and Lexis; those databases help lawyers more quickly find the relevant cases, but the lawyers still have to read and analyze the cases.

3. Editor: As in-house litigation counsel, what do you want to accomplish in a document production?

Brian Pengra: The obvious -- but incomplete -- answer is, primarily, to spend as little as possible to meet the

legal obligations imposed on my company, and secondarily, to prepare for trial. While in-house counsel must be concerned with cost control, they also need to look at the document production process as part of a more strategic process. Not every case is worth litigating to trial, or even deep into discovery. Conversely, not every case is (nor should it be) a candidate for early settlement. Different approaches to document production are implicated by these different types of cases and the role that document production serves in them is crucial.

Some cases (either as a plaintiff or defendant) warrant early resolution; i.e., generally those where the essential determinative facts are already known and where there are no deeper principles or cross cutting issues involved. If settlement is not reached before discovery starts in earnest, then the document production process is fairly straight forward. Gather, review, process and produce as cost efficiently as possible. Use the least costly resource reasonably possible and minimize the review to the bare minimum. As you generally understand the basic facts, document production serves the purpose of moving the litigation forward and confirming the case is of the nature initially assessed (i.e., nonstrategic).

Some cases require a different approach. Due either to the amount of money at stake or principles involved, it is unlikely that they will or should settle early. Cost control is important, but understanding the factual landscape is maybe more important. This means that you may not use the cheapest resource to review documents. You may need to have lawyers that are actually involved in the case reviewing not just "hot docs" but even "luke warm" documents so that they can get the flavor of the underlying transaction or facts at issue. This lets outside counsel get a better sense of the real issues that are involved, factual nuances that cannot be gleaned from only reviewing "hot docs" and a sense of who the key players are and how they think, which is crucial down the road when depositions need to be taken and ultimately the witnesses appear at trial. It also informs other waves of discovery.

4. Editor: How does in-house counsel use document production for more "strategic" ends?

Brian Pengra: I want as much knowledge as I can get as early as I can get it about both the strengths and weaknesses of my case to allow me to help my clients make the ultimate decisions about whether to fight or settle. If the document production demonstrates that our side has a strong position, then I can advise we take a stronger position with the other side. On the other hand, if my outside counsel

comes to me and says that there are lots of bad documents in the production or that our position is not real strong, I need to adjust accordingly. This means laying the ground work with my clients that the case may be one we want to settle quickly, or that if we proceed, they understand the risk of a bad outcome. It may also mean that I need to reconsider litigation budget assumptions, as I may have to expand the litigation in various ways increase the pressure that I am able to bring to bear on the other side.

5. Editor: What are a few ways to make document review more efficient while still incorporating the right level of manual review?

Alex Bowie: Think ahead and triage review so that high-value files receive more manual review. All files are not created equal. Begin by capturing and recording enough information at the collection of your client's documents so that you can intelligently distinguish those that warrant more manual review from those that warrant less, if any. For important documents, make sure to capture both content and the document's identifier (typically a production or "Bates" number) at the time of the responsiveness review for future use in the case.

6. Editor: Should more senior, supervising attorneys participate in document review to the extent feasible, and if so, why?

Alex Bowie: Yes. Nothing can replace familiarity with the underlying documents. Your understanding of your client's business will be deeper and more nuanced if you have spent time reviewing its documents. This familiarity can pay dividends in many contexts, including discovery negotiations and disputes, crafting cross examination, and building your affirmative case. The same is true of your opponent's documents. Striking the right balance between expending time reviewing documents and relying on descriptions or summaries of the source material is one of the most difficult challenges facing litigators today. Failure of the senior, supervising attorneys to develop sufficient familiarity with the underlying documents in a dispute can lead to significant risks in a variety of contexts.

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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