

E-Discovery Technology And Attorney Review: A Defensible Strategy

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Evidence Exchange

On November 10, 2011, **Thomas J. Svoboda**, Managing Director at Evidence Exchange, was a panelist in the Sedona Conference Audio Update Webinar "Defensible Document Review Using Advanced Technology." Following are excerpts from that webinar.



Moderator: Why do we invest time and money in document review?

Svoboda: In a recent news article, a legal industry reporter described discovery as "the 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.

[Thomas J. Svoboda](#)

Document review is part of the fact-gathering stage of litigation, and it is critical to a successful trial practice. Lawyers need to learn about the case, its strengths, weaknesses and the same about the other side.

It is absolutely essential that both the client and trial counsel understand the landscape the litigation will expose, and this is accomplished by a thorough and thoughtful document review. Clients need such information to make an informed assessment of the potential risks (and rewards) of continued litigation. The trial counsel 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. There is simply no substitute for carefully developing a proper, compelling and well-presented story on the facts. And, of course, you need to produce the documents under the applicable rules.

Clearly, tension exists between cost control and factual investigation, but there needs to be a balance. Often, the focus of various media and some consultants is solely on cost reduction – lawyers need to become masters of the facts, and that requires reviewing the relevant documents and sometimes the non-relevant documents.

Moderator: The conventional approach to document review is under attack from a number of quarters. Summarize the critique if you can.

Svoboda: Beginning with the mid-nineties, the amount of ESI (electronically stored information) began to overwhelm traditional document review processes. As these volumes increased, the notion that lawyers could review each and every document became (nearly) impossible, and the cost in both time and resources became extensive.

As hardware platforms became more reliable and affordable, software was used to help cull document collections. Date filtering and keyword searches were used to further reduce the volume. Later, lawyers began using online review tools, which eliminated much of the need for paper and the large paralegal teams that were required to support paper reviews and

productions. This is one of the little-discussed impacts of online review. The software has drastically reduced the support requirements for paralegals since it is no longer necessary for them to log documents, inventory boxes, photocopy and "mirror" audit paper productions. Today, the review tool provides the necessary management support.

Others argue that the traditional approach is also less reliable than the new advanced technologies that are available today. Academic studies seem to indicate that this is true, but more importantly, people instinctively know automated processes can increase efficiency, reduce errors and produce better results. Choosing the right tool for the job includes making sure you have the support structure to operate and manage the tool. You need both skilled resources and litigation-tested experience.

Moderator: So, let's get specific – what is the role of human beings in an increasingly technological document review process?

Svoboda: You need a vertically integrated support organization that includes lawyers with knowledge and experience in the use of advanced e-discovery technology and a litigation tech ("lit tech") staff that not only possess technical skills, but also business and project management skills. When I say vertically integrated, I mean that the staff is 100 percent dedicated to the litigation department and is not a shared resource at the firm.

You need e-discovery lawyers that can collect documents, help interpret document requests and determine responsiveness, make privilege calls, create privilege logs, hire, train and supervise temporary lawyers and paralegals, and so on. It is essential that large projects be handled by lawyers who have experience with the process. This approach can help reduce the instances where we are "reinventing the wheel."

You need a lit tech staff to assist with the collection of ESI, data handling and management, vendor coordination, negotiations and pricing, training, project budgets and tracking, forensics and metadata analysis. The lit tech staff also plays an important role in quality control. They need to make sure the data received from vendors meets the specifications outlined in the project manual. Each matter must have a project manual where the data specifications and formats are clearly identified – where schedules are defined and communication protocols are described. Further, lit tech support must make sure that productions strictly follow the production formats agreed to by both sides. Clearly, the successful implementation of a technological document review process requires a well-organized effort of lawyers, lit tech staff, service providers and vendors.

Moderator: What are some common document review mistakes?

Svoboda: The obvious problems are reviewer mistakes – improperly coding documents, incorrect calls, etc. However, the more critical problems are defects in the management and operation of the review process. You need experienced lawyers that know how to use the advanced features of today's review tools, and they must be good supervisors and managers. This is not a process that can be put on autopilot.

Here are some specific examples: First, productions need to be checked before they are produced. While that sounds obvious, for some reason that I can't explain, some lawyers believe that the responsibility for quality control of productions belongs to the service provider or lit tech support. Ultimately, lawyers need to take the last look.

Last checks should include looking for privilege terms and inconsistencies, like documents that have redacted images but are not coded that way, or vice versa. An email thread analysis tool can be used to ensure consistency and improve the quality of the production. Document review and productions are like a manufacturing process, where each step in the process needs the appropriate quality control check.

Second, it is never a good idea for reviewers to simultaneously code for responsiveness and issues. Due to the complexity of the decision-making process, the review becomes cumbersome and slow, and often this approach is abandoned resulting in a significant loss of time.

Third, production documents need to be locked down, or it needs to be made clear to all members of the team that these documents cannot be changed. Sometimes, lawyers working on other aspects of the case make changes to documents that are fully coded and redacted. As a result, the database does not correctly reflect the produced image.

Finally, large files should be identified and set aside, in order to prevent individual reviewers from attempting to download and review these files. The random review of large files can sometimes crash the system by unnecessarily straining system resources.

Moderator: Implementing a well thought out e-discovery process is about much more than saving costs, isn't it?

Svoboda: Yes, it is more than a cost issue. The integrity of the entire discovery process is at stake. The lack of ESI processing standards may leave many unreported exceptions, such as "unprocessed" encrypted files or "unprocessed" embedded files. Even with today's software development tools, it is not possible to test for every potential error condition. You need a close partnership between the review team and the service provider to reduce the exposure to this type of problem.

I think it is important to remember that the implementation and use of technology in litigation is quite different from how technology is implemented and used in other industries. In litigation, it is expected that the application(s) will be up and running at full capacity and efficiency from the moment someone presses "Go."

In other industries, new applications and technologies are rolled-out in a planned and deliberate manner – they are phased in over time. Pilot programs are often used to test the software and operating processes. Users are given time to train and feedback from the pilot program is used to help improve the eventual launch of the new application.

Since litigation applications go from a standing start to full throttle, they inherently have a higher defect rate. Consequently, it is even more important to make sure you have a well thought out e-discovery process that includes experienced lawyers, lit tech support and a competent service provider. All of this will lead to a legally defensible process and one that is cost-effective.

About Evidence Exchange

Evidence Exchange (www.evidenceexchange.com) is well known by leading law firms and corporate legal departments as a high quality provider of Electronic Discovery Processing & Online Document Review Services. We combine 30 years of business experience in legal consulting and technology development with the industry's best track record in the area of Electronic Discovery Processing and Online Document Review. We provide a full range of services including, analysis & consulting services, ESI processing, hosted review, production and testimony. We are also the first recipient of kCura's 2011 Best In Service Award for Relativity and are recipients of two USPTO patents for our current ESI Processing Tool. Evidence Exchange was founded back in 1996 as a successor to Prounis Consulting Group, Inc. (established 1989), which was an Arthur Andersen & Co., S.C. spin-off. Evidence Exchange maintains corporate offices in New York, NY and Leesburg, VA and operates SAS 70 data centers in Herndon, VA and Dallas, TX. For more information, please visit www.evidenceexchange.com.

Please send comments to thomas.svoboda@evidenceexchange.com.

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The Metropolitan Corporate Counsel, Inc. 1180 Wychwood Road, Mountainside, NJ 07092.

Contact us at info@metrocorpcounsel.com

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