Best Practices for Managed Document Review

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Introduction

Document review for litigations, regulatory actions and internal investigations remains the most costly aspect of eDiscovery/eDisclosure. The overall amount of data requiring review continues to grow despite efforts such as changes to the Federal Rules of Civil Procedure and Judge Rader's Model Order for IP litigations in the US, discovery pilot programs in US courts, the introduction of Practice Direction 31B in the UK, and the work of the Sedona Conference, Lord Justice Jackson and others that focus on key issues such as cooperation and proportionality.

Even as document review technology has evolved from linear review to concept and analytics-based and technology assisted review (TAR) has continued to gain acceptance, the volume of Electronically Stored Information (ESI) requiring review continues to rise. In addition, the volume of ESI derived from new sources, such as social media or audio files, continues to grow.

Legal Process Outsourcing providers (LPOs), particularly those that have developed best practices that incorporate sophisticated data analytics, are well suited to handle this ever-growing volume of ESI and other discovery-related tasks, whether it involves performing Early Data Assessments, creating efficient review methodologies or providing post-review discovery and trial support. This chapter will first provide an overview of how successful LPOs deploy best practices to drive high-quality, defensible document review solutions and then discuss a representative type of matter, review for RMBS litigation, which has proven to be particularly well suited for the LPO model.

Overview of ethical considerations in outsourcing legal services

A number of regulatory bodies in the US and the UK have issued ethical guidance for attorneys who outsource legal support services. These opinions share a number of common elements: the LPO should (1) be competent; (2) preserve client confidences; (3) avoid conflicts of interest; (4) avoid aiding in the unauthorized practice of law; and (5) aid the outsourcing attorney in supervising its work.

While an LPO's commitment to quality, transparent reporting and security should be goals unto themselves, they also serve another purpose – to give the outsourcing attorney confidence that the LPO it has selected helps the attorney satisfy his or her ethical obligations. Since an LPO does not provide legal advice, it is essential that the LPO involves and seeks guidance from the client at all stages of the review, and that it lets the client make or guide all substantive decisions. As part of best practices, most leading LPOs run a conflicts check procedure before accepting new engagements that is consistent with ethics principles.

Finally, a comprehensive security program serves to demonstrate that the LPO has taken effective measures to preserve the client's confidences and secrets. LPOs that take security seriously use a triad of measures in order to safeguard their clients' data: (1) personnel security, which consists first and foremost of building a culture of confidentiality by educating the workforce on the importance of maintaining data security and confidentiality. Other best practices consist of conducting employee screening and having employees sign stringent and enforceable confidentiality agreements; (2) physical security, which consists of a myriad of measures that ensure that no person or device is able to penetrate the company's infrastructure on the one hand, and that no unauthorized data leaves the company's premises on the other; and (3) IT security, which involves the use of technology to protect clients' data assets through the use of continuous monitoring and electronic countermeasures to block any intrusion, extrusion or interception attempts. Such measures include firewalls, anti-virus software, extrusion prevention software, biometric access control, and encryption algorithms. Finally, having an ISO 27001-certified information security management system and passing a meticulous SSAE 16 audit, preferably by a Big 4 accounting firms allows an LPO to further assure its clients that their critical data is safe and secure.

Process matters

Even where a search or review methodology has been judicially accepted, its defensibility ultimately rests on the design and implementation of the process surrounding that methodology. As Judge Grimm explained in Victor Stanley, '[t]he implementation of the methodology selected should be tested for quality assurance; and the party

selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.'

Victor Stanley was the latest in a line of cases including O'Keefe, Equity Analytics and Seroquel that drew similar conclusions. Beginning in early 2012, a series of high-profile rulings relating to the effective use of technology and process – Da Silva Moore, Kleen Products and Global Aerospace, among others – reaffirmed that the reasonableness and defensibility of document review is dependent on the process employed.

As Judge Carter noted in Da Silva Moore, '[t] here simply is no review tool that guarantees perfection.' As a result, it is critical that litigants follow Magistrate Judge Peck's mandate that 'counsel must design an appropriate process, including use of avail–able technology, with appropriate quality control testing, to review and produce relevant ESI.'

The defensibility of a party's approach to a well-managed document review will depend ultimately on the effective use of technology, overall substantive management of the review and of course quality control mechanisms that were employed. In another context, Judge Grimm stated with regard to Federal Rule of Evidence 502 and potential waiver of privilege that, 'Reviewing courts must remember that the bellwether test under Rule 502(b)(2) is reasonableness, not perfection.'

The key, then to a defensible document review is to follow best practices that leverage people, process and technology. Leading LPOs often draw on their extensive experience to play a meaningful role in designing and implementing these best practices.

Utilise a robust process

A defensible review process begins with a reliable, tested, and process dependent quality assurance programme. Internationally recognised third party certifications such as the ISO certification are generally accepted as good standards when evaluating the robustness of a process. Successful LPOs have typically received the ISO 9001 certification or other comparable certifications for their Quality Management System for document reviews.

Such certifications demonstrate that a review process has been vetted by a reputable, independent third party and serve as an important indicator of quality to clients, courts, and opposing parties. Another key element of a robust process is the effective use of data-driven quality-improvement systems like Six Sigma. Manufacturers have successfully utilized Six Sigma for decades, and LPOs have been at the forefront of identifying innovative ways to apply its underlying principles to create methodologies to track and improve quality on large scale document reviews. Most importantly, it is not enough to just have processes; it is imperative that entities adhere to such processes, document this adherence and be prepared to testify if required.

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Take a quantitative approach to quality and defensibility

Use of advanced statistical concepts and data-based intelligent search methodologies also help in establishing defensibility of certain macro decisions made during the course of the review, such as culling selected review sets or not reviewing portions of the data set. By integrating these concepts into their robust processes and taking a quantitative approach to document review, LPOs help their clients make defensible decisions regarding Early Data Assessment, intelligent document reduction and the use of a technology-assisted review solution.

They establish appropriate quality-control protocols for every stage of the review, use advanced statistical concepts to select sample sets, measure accuracy and gauge performance, and then test and validate searches and search results. This last step is vital, because as Judge Grimm noted in Victor Stanley, and Judge Scheindlin cited approvingly in Pension Committee, the failure 'to assess the accuracy and validity of

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teams of permanent employees, which allows them to invest time and resources in training these employees in all aspects of their business. As a result, an LPO's reviewers become immersed in its processes and develop institutional knowledge of its clients' matters, industries, documents and preferences for handling document reviews, all of which makes them more effective than teams that do not have the benefit of such knowledge gained by historical experience.

This applies beyond the 'core' review team as well. As fully supported businesses, top-tier LPOs have full-time experts, such as search specialists, statisticians and linguists, whose primarily role is to help build and sustain robust practices described in the previous section that assist in improving review quality and efficiency. For example, an LPO might have a separate quality group that serves as an independent check on all projects, enhances the review team's performance on any given matter, and then takes valuable insights learned across matters and industries and applies them to enhance the quality and process stability of all the LPO's reviews.

Maximise benefits of technology

Without the effective use of technology, be it in quality control processes, constructing and implementing the best search assays or in designing a review workflow, it is nearly impossible to efficiently and accurately review large volumes of ESI. Given their exposure to various review platforms, top-tier LPOs, are typically adept at maximizing the benefits of technology and can use their familiarity with the relevant tool or comparable technology to help clients devise the best suited workflows for a given project.

An LPO's ability and freedom to work with any review platform also allows them to gather the data necessary to measure and drive quality, and their data-driven processes are uniquely suited to help identify and fill in the gaps where technology leaves off and enhance a review tool's strengths. In addition, LPOs understand the difference between the search algorithms particular tools employ and the implications these differences have on their processes.

Facilitate supervision by counsel

An LPO's processes should never be a 'black box'. At the end of the day, the client is responsible for the review and must stand behind the quality of the LPO's work product. Among other best practices, top-tier LPOs typically work with clients to: (1) initiate project kick-off calls and project-specific training; (2) assist in Early Data Assessments and search term validations to better understand the documents and reduce risk (and cost as well); (3) tailor its workflow to account for the client's preferences and the project's requirements, and integrate them into its processes; (4) customise its quality processes and create an issue escalation mechanism; (5) create a reporting schedule that allows transparency into

selected search terms' can constitute negligence.

As part of their standard practices, most LPOs create an effective and defensible search process when they refine searches to accepted levels of recall and precision, use sampling methodologies backed by advanced statistical concepts to test results, and create efficient iterative feedback loops. In addition, they subject the review process itself to the same rigorous processes. Finally, this overall emphasis on a quantitative approach to quality creates essential audit trails that are usually helpful should the need arise subsequently to review process steps implemented in a review.

Emphasise human capital

A process is only as strong as its weakest link, and even the most sophisticated process will fail without adequate human capital. A document review process that relies on the exclusive use of permanent employees at all levels is inherently more robust and repeatable than one that only uses full-time employees at key positions or above a certain level of responsibility.

Top-tier LPOs only staff document reviews with

the review; and (6) perform calibration exercises as needed to ensure teams are generally consistent in their interpretations of review guidelines.

LPOs also stay in constant communication with the client throughout the review and continuously obtain and apply their feedback. By following these practices, successful LPOs ensure that their clients have complete insight into the review, can make timely changes or improvements to the process and can appropriately monitor the review team's performance and provide feedback, all of which allow the client to effectively supervise the outsourced work.

Best practices in action: RMBS

In the aftermath of the financial crisis of 2008, financial institutions faced an ongoing deluge of regulatory investigations and lawsuits, which were accompanied by extremely burdensome discovery obligations. As with any complex litigation or investigations in any industry, many elements of these matters made them conducive to using LPOs, which enabled these companies to effectively deal with large amounts of ESI in an efficient and defensible manner. In particular, one of the more high profile and common types of matters seen in recent years, RMBS litigations, proved especially well suited to the LPO model and provides a good case study for the benefits of employing the best practices discussed above.

Given the complexity, volume of documents and often repeated nature of these cases, a client must employ an incredibly robust, repeatable and defensible process for its RMBS matters. There is intense pressure to do things correctly the first time and avoid any unwanted distractions. In addition, RMBS cases are often complicated, with the documents needing to be coded and analyzed for a large number of issues. An LPO's strong process orientation will help ensure that everything stays on track, even when facing multiple, rolling deadlines in simultaneous cases. LPOs can also help streamline complex coding by intelligent use of predictive features of major tools combined with highly customised search assays.

People are a key ingredient in designing and implementing these processes. The fact that LPOs use permanent employees exclusively at all levels of their reviews offers several benefits in the RMBS context. A company embroiled in RMBS litigation will often deal with multiple related RMBS matters over the course of several years, each with similar fact patterns, custodian profiles and document types.

Having teams that retain and apply institutional knowledge of these cases adds tremendous value in terms of (1) implementing quality assurance procedures to drive reliability, defensibility and reduced costs; (2) approaching each review with a built-in degree of sophistication and ability to think strategically about the instant matter on a granular level; and (3) aligning more closely with

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counsel over time. Furthermore, an LPO that has worked on multiple RMBS matters will take best practices developed on one project and deploy them across successive ones, thereby increasing efficiency and quality in a way that would not be possible with a less permanent solution. The LPO can also seamlessly scale up or down as required with employees familiar with the matter or shift gears amongst priorities with regards to simultaneous matters, productions or even workflows.

The choice of technology also plays an important role in document reviews for RMBS litigations. It is critically important that the LPO is aware of both the potential benefits and limitations of the technology being used, especially given the high degree of structured data in the review pool for such matters. In this context, for example, certain technology assisted review or predictive coding offerings can help identify potentially relevant documents.

LPOs are well suited to use such sophisticated technology, which when combined with their sophisticated analytical capabilities would greatly enhance a client's knowledge and use of key documents. This provides clients with a strategic advantage in addition to the more obvious cost effective reason for utilizing LPOs.

Conclusion

Process is the key to a defensible document review, whether with regard to appropriate use of available review technology, validation of search terms, inadvertent production or any other aspect of document review that can be called into question as part of an adversarial process.

By employing the best practices discussed above, clients attain a higher level of quality, adopt a defensible approach to document review and logically minimize any concerns as to whether their processes are appropriate and reasonable. Due to their strong process orientation, focus on quality, exclusive use of permanent employees, skill in leveraging technology and emphasis on data security and confidentiality, successful LPOs are well situated to implement these best practices.

RMBS litigation, as described above, is but one example of how the best practices described in this chapter are more than an exercise in academics and actually provide concrete benefits to LPO clients, allowing them cost effectively to complete complex reviews with a high degree of quality and efficiency.