

Document Review Essentials

Leveraging the Science to Improve the Art

By Anand S. Dayal

Document review has rapidly evolved to the point of becoming scarcely recognizable to many lawyers. Not surprisingly, document review often forms a major part of litigation, large corporate transactions, and compliance activities and typically accounts for a lion's share of the cost and time involved. This article examines how stunning improvements in the reliability and speed of document review have been achieved through a unique and powerful combination of:

- process and project management
- quality management and control
- collaboration and knowledge management

The proprietary processes derived from these techniques received the coveted global InnovAction Award from the College of Law Practice Management in 2008.

First to clarify the terminology: we intend the term "document review" to be comprehensive. It involves the review, analysis, and management of documents, including electronically stored information. It is not merely the tagging of documents, but rather the aggregation and creation of knowledge. Document review forms a part of litigation obviously, but also of merger-and-acquisition transactions, investigations in respect of antitrust and Foreign Corrupt Practices Act compliance, and procurement and other contracting and regulatory matters.

Creating the Legal Foundation

Document review is obviously not conducted in isolation. Its context is framed by the legal analysis of the issues involved, which guide and inform the document review and the deliverables sought. Accordingly, meaningful document review cannot be divorced from the applicable underlying law and facts of the case or transaction at hand; a grasp of which is a critical threshold requirement.

Memorandum of instruction. Outsourcing arrangements are typically a two-tier effort: involving a lead counsel, the law firm, or corporate counsel who has strategic responsibility; and reviewing attorneys, who perform the bulk of the work under instructions from the lead counsel.

Anand S. Dayal (adayal@novuspros.com) is vice president of global service delivery operations for Novus Law. A US citizen and full-time resident of India, he has practiced in New York and Washington, D.C., and is a member of the Bar Council of Delhi.

It is necessary in such an arrangement that lead counsel begin by preparing a memorandum of instruction for the reviewing attorneys, describing *inter alia* the theory of the case, legal issues, claims and counter-claims, and likely defenses. The memorandum also defines more precisely the parameters of the review.

By continually updating the memorandum of instruction as new information emerges, especially in the critical early stages of the review, the review attorneys are provided with essential clarifications and details that lead to a greater understanding of the case.

Attorney skills assessment. The reviewing attorneys for their part must assimilate the memorandum of instruction and in addition develop an understanding of the substantive law that is applicable. Developing a general understanding of the applicable law is fairly straightforward, but this is not enough. It is important that the reviewing attorneys go a step further and become well-versed in the more nuanced aspects that will be at issue in the case at hand. The time spent doing this adds immense value because, as explained below, it allows redundancies in the review process to be eliminated. To confirm that the reviewing attorneys have the requisite understanding of the applicable law, it is essential that each reviewing attorney successfully pass a matter-specific attorney skills assessment test before beginning the document review.

The attorney skills assessment is not a one-time event. As the document review progresses, review attorneys should be made to regularly demonstrate an understanding of the continuing developments in the matters they are covering. This includes adjustments based on the information newly uncovered in the document review, as well as developments elsewhere pertinent to the case. The use of regular assessments leads to measurable improvements in quality management and control.

Prevailing industry approach. The prevailing industry approach to document review is essentially the following: first-level review by contract lawyers, second-level review by law firm lawyers, and follow-on work by more experienced law firm lawyers. While technology is extensively applied to manage the collection, storage, and retrieval of documents, it stops short of improving the actual lawyering process. There is typically neither a structured process to impart the requisite legal knowledge to the contract lawyers, nor formal skills assessment to validate their suitability for the document review. In addition, there is often significant turnover among the contract lawyers hired on

any particular engagement, leading to a loss of matter-specific knowledge. This reduces the review to essentially a document-culling exercise, with scarcely any usable legal knowledge creation by the contract lawyers.

On the other hand, the use of rigorous processes and creation of the legal foundation enables the reviewing attorneys to use the document review as a tool for creating knowledge for the lead counsel.

Conducting the Review

The task of actual review is the most resource-intensive step in the document review process. Increasingly large sums of money are spent, particularly in view of the exponential growth in electronically stored information. To date, technology by itself is unlikely to be able to tame this escalation. What is needed is to reengineer the process of conducting the review.

Through the use of (1) structured process management to eliminate non-value-added work, (2) scientifically based quality-control programs to identify and fix defects, and (3) collaboration tools to organize and accelerate the creation and delivery of knowledge, it is possible to cut costs, make a quantum improvement in quality, and reduce the time taken for the review. Moreover, through the use of analytics pertaining to the document review processes it is possible to accurately predict the time and effort required, including precisely predicting completion dates and arriving at a firm and fixed cost for conducting the review, eliminating the uncertainty in the traditional model.

Structured process management: eliminating non-value-added work. In their influential 2005 book, *Lean Six Sigma for Service*, Michael George and his coauthors established that non-value-added work, or waste, accounts for almost one-half of all costs in professional services. Structured process management helps eliminate that waste. This is accomplished by reengineering the typical document review process, using fundamental operations-management principles to eliminate redundant steps while logically combining others to improve the efficiency of the process.

Some of the non-value-added work in the industry-standard document review process includes doing something more than once, making and then having to correct mistakes, doing work that did not need to be conducted in the first place, and completing work out of sequence and spending time waiting for others to finish their work.

One example of non-value-added work is second-level review, which can be made redundant (provided the review is properly structured) and accounts for a significant portion of all document review costs. When the reviewing attorney is properly qualified, trained, and empowered, most documents need only be reviewed and processed once, not multiple times. The current industry-accepted standard of rereviewing documents does not create value, takes more

time, lowers quality according to independent benchmark analyses, and adds cost (thus destroying value).

Quality control: fewer defects, lower cost. On average, unstructured and unmeasured processes like the industry-standard document review process are error prone. Using a structured process not only improves efficiency by eliminating redundant steps, it also improves quality. Fewer steps means there are fewer handoffs between steps, so less can “fall through the cracks.” There are fewer opportunities for mistakes to occur, so the quality of the work product is measurably better.

This is intuitively obvious and also borne out by four separate, scientifically based, and statistically valid analyses (each one possessing a 95% confidence level with a margin of error of 3%), conducted by Novus Law of four Am Law 100 firms. These studies concluded that the industry-standard document review process yields accuracy rates ranging from 78% to 91% and averaging 86%. This is the equivalent of 90,000 to 220,000 errors for every one million documents reviewed.

Many work-product defects are caused by ambiguous or incomplete review protocols. For example, information about a key issue might be ambiguous or incomplete, thus causing attorneys to overlook or misidentify important issues; or a privileged party may not be identified, thus causing privileged documents to escape withholding from a production. Most work-product defects occur early in a document review. This is understandable because it is difficult to include everything in a review protocol before a review begins. Nevertheless, these work-product defects are often compounded when a rigorous quality-control program is not in place. Defects made early in a document review are thus not identified and corrected so that they are repeated thousands of times during the review, which can take weeks or months to complete.

A procedure of systematically measuring, analyzing, and correcting work-product defects should occur early in the review period (at least daily for the first 10 or 15 days, as attorneys experience a learning curve). By following such a procedure, and modifying the review protocols accordingly, work-product defects can be substantially reduced and the cost of associated rework can be saved.

Overall, there is a 2% to 3% increase in cost for every 1% decrease in accuracy. So as work-product defects are identified, document collections are searched for similar defects, defects are corrected, and the work product is reevaluated for accuracy, a multiplier effect results in greater-than-ratable cost savings for every percentage of increase in accuracy. Specifically, if average work-product accuracy is 86% (as cited above), rigorous quality control can easily reduce document review costs by at least 20% to 40% through a reduction of the work-product defects that require work to be done more than once.

Collaborative systems; creation of knowledge. The

purpose of document review in a nutshell is to find and aggregate relevant information in a usable form for decision making. This would be straightforward if the size of the collection was small enough that a small group (fewer than six attorneys) could focus on all the information and extract from it the useful knowledge. In reality, the collection even in routine cases is enormous; the information therein perforce must be processed in parallel by several attorneys to extract the usable knowledge.

In the prevailing industry approach, contract lawyers for the most part work independently on portions of the document collection, sporadically communicating at a peer level, and feed their findings to an aggregating level, which in turn may then process (make a decision) or further aggregate the information. The creation and assimilation of knowledge in such a process takes place at best only when the information is aggregated, not while the review is underway.

A collaborative system helps organize and accelerate the delivery of information because it facilitates the aggregation and co-creation of knowledge on a real-time basis. Such systems use a matter-specific electronic collaboration and a knowledge-management forum that makes communicating, collaborating on, and controlling the extraction of knowledge more efficient.

By using a collaborative forum of this type, the reviewing attorneys have access to better information so that they can make decisions on more complex aspects of the document review. The lead counsel will also be more effective because counsel will have access on a real-time basis to the knowledge as it is being extracted and have an opportunity to shape how it is being developed. For example, by using a collaborative forum, the lead counsel will know every question that is asked and answer given, every discussion that takes place, and every instruction that is provided to the reviewing attorney in real time. Lead counsel will also have access to daily statistical reports and weekly written updates about key developments and the progress of the engagement.

Using a collaborative forum eliminates the inefficiencies of point-to-point communications. (According to studies by Basex and The Danwood Group, point-to-point communications can consume more than 20% of a person's time.) Collaboration also accelerates access to and reduces the time spent looking for foundational information. (According to

studies by Gartner, IDC, and LexisNexis, such searches can also consume more than 20% of a person's time.) Accordingly, the use of a collaborative forum has the potential of reducing overall document-review costs by 20% to 30%.

As a collateral benefit, the adoption of such a collaborative forum gives the lead counsel more transparency into and control over the document review process, thus helping fulfill the ethical obligation in respect of "direct supervisory authority" over the work being performed by the reviewing attorneys, as set forth in ABA Formal Opinion 08-451.

The Measure of Certainty

The consistent application of the techniques described above delivers a measure of certainty to the quality of, and a reduction of the cost of, document review management and analysis services in litigation, corporate transactions, and investigations. For example, on a recently completed civil fraud and criminal matter for a global multinational corporation, 1.8 million pages of electronic documents (in multiple languages) were reviewed and privilege logs, witness, and key issue files were prepared; all within 60 days for a fixed fee. Using the techniques described above:

- Accuracy, from four statistically based quality-review audits (each at a 95% confidence level with a 3% margin of error) of the reviewing attorneys' work product conducted by lead counsel, was greater than 99.98%. Thus, there could have been 251,640 more mistakes had the prevailing industry average work-product accuracy of 86% been in effect.
- Delivery of the work product was achieved 14.3% (eight days) ahead of schedule.
- Savings, based on what the client would have paid had the law firm followed a more traditional process of hiring contract lawyers for first-level review and having the balance of the work done by law firm attorneys, totaled more than \$5.5 million.

The evidence is clear: structured process management, quality control, and collaborative systems provide significant improvement and measurable certainty in document review. ♦