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Three Litigation Management Strategies

Spend Less, Improve Quality

By Raymond E. Bayley

Preparing documents for litigation or investigations is the largest and fastest growing legal expense in corporate America today, and about one-half of what is being spent is wasteful. This troubling situation has been well documented. A recent survey by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System found there is “a serious concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs, as opposed to the merits, of cases.”

This article will present three strategies that can be used to significantly reduce the cost and improve the quality of this expense.

Corporations spend roughly 60 percent of their legal operating budgets on litigation. Eighty percent of that is spent preparing documents for litigation. Thus about half of corporate legal budgets are spent collecting, processing, reviewing and re-reviewing documents, and preparing privilege logs, witness files and key issue summaries for litigation. That's the “industry standard” process.

Today the cost of this process is affected most by the unbridled growth of electronically stored information, which is increasing up to 60 percent annually according to studies by IDC and the UC Berkley School of Information. Therefore, in the absence of a technological solution or a change in the rules governing civil procedure, the cost to prepare documents for litigation in five years may reach \$400 billion for the top 1,000 U.S. corporations.

Currently, there is too much redundant work, the quality of the work product is poor and too much time is spent searching and waiting for information. As a result, corporations often spend twice what is needed to prepare documents for litigation. This will only get worse as the volume of electronically stored information grows. Yet, there are strategies, ubiquitous in other industries, to address this problem: process management, quality control and collaborative systems.

PROCESS MANAGEMENT

More than 50 percent of the cost of the industry-standard process is wasteful due to redundancies. An example of this is second-level review, in which second-level review lawyers typically validate the work of first-level

review lawyers without improving quality.

Much of the work done to identify, validate and log privileged documents is also redundant. A privileged document does not need to be reviewed, tagged and re-reviewed multiple times before it is added to a privilege log.

In a recent unpublished analysis of the industry-standard process, it was found that documents were reviewed, tagged, read and logged on average 14 times each as they were prepared for litigation. Most of this work was redundant.

In addition to making the industry-standard process more expensive and time consuming, redundant work decreases accuracy because it introduces more opportunities for human error. There is a direct relationship between accuracy and the number of steps used to process a document: as the number of steps increase, quality always decreases.

To validate this assumption, the analysis measured the accuracy of the work product on four separate matters before and after second-level review. It found that accuracy decreased after second-level review, while costs and the time to complete the work more than doubled.

Creating a new, structured process is one way to eliminate redundancy. It will also help confirm that nothing in the process is forgotten or done out of order, and it will optimize each party's role in the process.

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Documenting the process should begin with a checklist, which is the recommendation of the Litigation Section of the American Bar Association. Checklists are used in industries as diverse as aviation, healthcare, food service and public accounting to manage resources, quality and costs. A checklist can be just as useful in the legal industry, and should include all of the activities necessary to prepare documents for litigation in as much detail as possible. Once a checklist is prepared, activities can be assigned to the responsible parties, and linked together so everyone knows how they fit into the larger process.

Once a process is in place, it becomes possible to measure the quality, time and cost of each activity, analyze which of them are most valuable and modify or

eliminate those that are wasteful.

By following these guidelines it will become apparent that second-level review, much of the work to prepare privileged documents for litigation and a variety of other activities in the industry-standard process are redundant, therefore it is possible to reduce the cost of the industry-standard process by more than 50 percent.

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QUALITY CONTROL

More than 20 percent of the cost of the industry standard process is wasteful because time is spent correcting errors. Based on process and quality management research, largely undocumented processes like the industry-standard process usually result in a work product that is 93.3 percent accurate.

With each one percent decrease in accuracy, costs usually rise two to three percent. This indicates that time spent to correct errors accounts for up to 20 percent of the cost of any undocumented process.

To test the accuracy of the industry-standard process, the second-level review work of four large law firms was independently measured. The accuracy of the work product ranged between 78 percent and 91 percent, resulting in cost increases of 20 percent to 40 percent, as mistakes were made, identified, corrected and checked again for accuracy.

Improving quality requires diligently documenting work product specifications, systematically measuring the accuracy of the work product, analyzing what causes mistakes to occur and implementing the changes necessary to eliminate them.

Systematic measurement of work product accuracy can be done effectively by using the judgmental and statistical sampling techniques recommended by the Sedona Conference. Judgmental sampling depends upon the judgment of the lawyer. It is an effective technique for identifying and measuring documents that the attorney believes may be processed incorrectly. Judgmental sampling is best done daily, so mistakes can be identified, corrected quickly and prevented from becoming systemic.

Statistical sampling depends upon the science of statistics and is an effective technique for identifying and

measuring documents that are unknowingly processed incorrectly. It provides scientifically-based information about the overall accuracy of the work product and is better than second-level review for ensuring accuracy.

By using judgmental and statistical sampling, it is possible to produce a work product that is more than 99 percent accurate while reducing the cost of the industry-standard process by more than 20 percent.

COLLABORATIVE SYSTEMS

More than 20 percent of the work done in the industry-standard process is wasteful because excessive time is spent searching or waiting for information.

In general, office workers, including senior executives and lawyers, spend more than 20 percent of their time searching for information, according to studies by IDC, Gartner, Inc. and LexisNexis. Senior executives and attorneys spend excessive time searching for information that is stored in a variety of non-digital formats, e.g., paper documents, file folders, notebooks, filing cabinets, or in flat file digital formats, e.g., voice mails, emails, laptop and server directories. This makes it difficult to find information and time-consuming to aggregate it for decision making.

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Senior executives and lawyers also spend too much time waiting to receive the information necessary to understand issues or make strategic decisions because the industry-standard process depends upon batch processing of information – that is, first-level review, followed by second-level review, followed by the preparation of witness files, etc.

Thus, for example, more than 60 percent of the industry-standard process is complete before executives and their legal counsel have the knowledge necessary to consider a motion for summary judgment or settlement. The batch processing of information also delays finalizing strategies, which often means there are further costs to re-process documents for additional information.

Collaborative systems centrally store and control

information. They create opportunities to collaborate in real-time as preparation of documents for litigation occurs, and they are effective tools to reduce the time executives and attorneys spend searching and waiting for information.

Centrally storing information and making it fully text searchable, which is readily achievable using Web 2.0 technologies, makes it easy and inexpensive to find and aggregate important information for decision making. It also makes it easy to manage succeeding versions of information to ensure that the most up-to-date information is available.

Using Web 2.0 tools, like wikis, blogs and RSS feeds, facilitates the creation and delivery of knowledge in real time as the preparation of documents for litigation occurs. For example, the preparation of witness files or key issue summaries can be done as the documents are reviewed, rather than in a batch process mode after second-level review, thus providing early insight into important issues that will drive strategy.

In a recent McKinsey Global Survey, 68 percent of respondents reported a 30 percent improvement in access to information, and 54 percent of respondents reported a 20 percent reduction in communication costs, by using collaborative systems based on Web 2.0 technologies. This means senior executives and their legal counsel who simply implement these tools and replace the inefficiencies of non-digital and flat file digital media can reduce the cost of the industry-standard process significantly.

In the foregoing examples of redundant work, poor quality, and time spent searching and waiting for information, there is significant overlap, so the cost-savings examples as described are not necessarily additive. But senior executives and attorneys who implement these steps can significantly reduce the burdensome costs of preparing documents for litigation, which ultimately protects the financial viability of their companies and the usability of our civil justice system.



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