

GAINING A COMPARATIVE ADVANTAGE IN THE PROCESS

A partnership among client, law firm and provider is necessary.

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There is a perfect storm brewing in the sea of discovery. The quantity of potentially relevant electronic information is increasing exponentially, law firms' hourly rates are climbing, pressure to reduce costs is growing and, at the very same time, attorneys are beginning to face malpractice claims and ethical charges because of discovery-related failures. The result is a general reluctance by counsel to rely on anything but what they perceive to be the most defensible positions in electronic discovery, even if those solutions do not hold up any sort of honest analysis of cost or quality.

At the heart of the matter is the geometrically expanding growth of populations of electronically stored information (ESI). Jason R. Baron, director of litigation at the National Archives and Records Administration, has concluded that ESI is growing so fast that even with unlimited funds and unlimited human resources it will soon be impossible for humans to review these large document populations.¹ At the same time, legal publications announce increases in lawyers' billable hour rates with a tiresome regularity.

The combination of these factors is causing the cost of discovery to skyrocket, leaving companies

frustrated and looking for solutions. However, we are also in an era of increased risk and finger-pointing. Just this year, Cupertino, Calif.-based Day Casebeer Madrid & Batchelder faced sanctions for its role in alleged discovery violations in a patent infringement case; New York-based Kaye Scholer recently was sued by its own client for alleged discovery failures; and New York-based Sullivan & Cromwell filed suit against its electronic discovery service provider. In this environment, it is hard for law firms to propose any solution but the one that will keep them on the most comfortable ground.

Legal teams historically have deployed two solutions to address this storm. The most common method of reducing the size of electronic document populations is through the use of keyword searches. And the most common method of reducing the cost associated with the review itself is the use of contract attorneys. Both, however, are attempts that treat symptoms and do not get to the root causes.

Keywords ultimately fail both because they are over-inclusive in what they bring forward and because they leave behind many, and sometimes a majority, of the documents that should be retrieved. An

early landmark empirical study showed that while lawyers thought they were retrieving about 75% of the relevant information, the true results were closer to 20%.² The Text Retrieval Conference (TREC), co-sponsored by the National Institute of Standards and Technology and the U.S. Department of Defense, did a study and found only 22% of relevant documents using Boolean keyword search techniques. It has become crystal clear that keyword searching is not a long-term solution to the rising tide of data, because of the high number of nonresponsive documents returned for review.

When clients complained loudly about the cost of law firm associates for document review (and the document populations became large enough to stretch the firms' capacity), firms started to use contract attorneys to get the work done. And while contract attorneys do provide some relief, they are far from a perfect solution. At a typical rate of \$60 per hour—which can easily escalate to a blended rate of \$160 per hour when overhead and supervision are considered—contract attorneys are still expensive for nonstrategic work. Worse, the attorneys themselves earn much less than their \$160 billing rate, which sometimes causes motivational difficulties. Because they are temporary employees by nature, it can be difficult to keep a stable, trained workforce. Reviewing documents 12 hours a day is not usually the job an American attorney hopes for upon entering law school. While the use of contract attorneys has become an accepted practice, it

is becoming clearer and clearer that they are no longer a high-quality solution.

A better answer lies in the classical economic concept of “comparative advantage.” Countries trade with one another for the same reason that individuals, businesses and regions do: to exploit their comparative advantage. This approach—relatively new to the legal industry but long used in most others—allows each participant to do what it does well by relying on a partnership among client, law firm and service provider. The client sets the objective. The law firm serves as the “legal architect” and develops the strategy, direction and supervision of the process. The service provider executes the logistical and tactical applications to provide the desired results. This approach usually will cut discovery cost by a minimum of one-third.

A process designed to maximize comparative advantage has four main tenets not applied to most of today's large ESI projects:

- Applying better technological methods of reducing document sets.
- Using quality-assurance techniques, such as sampling, to check results.
- Limiting the use of high-price attorneys to tasks that provide high value, where their rate is justified.
- Implementing proper staffing and management to provide real project management.

Greater sophistication

Most lawyers will admit that they are not experts in technology and mathematics, usually saying something like: “That's why I went to law school.” At the same time, these same lawyers act as if they know best what technology to use and how to measure results in a major discovery project. Keywords are a good example of this. They are pervasive and law firms insist that “alternative search methodologies” have not surpassed performance of keywords, despite what scientists, linguists and mathematicians say. A reasonable person should look at this objectively: “Do you really believe that the National Security Agency is using keywords to study e-mails for potential terrorist activity?” The most attractive element of keywords is that they are familiar, since lawyers have been using them to run LexisNexis and Westlaw searches for 25 years. They may be familiar, but that does not make them effective.

The tide may be turning, however. In his recent decision in *U.S. v. O'Keefe*, No. 06-249 (D.D.C. Feb. 18, 2008), Magistrate Judge John M. Facciola commented that concept searching is “more efficient and more likely to produce comprehensive results” than keyword or Boolean searches. Concept search applications, which attempt to locate information that relates to a desired concept, fall into three basic categories, which sometimes overlap: statistical, rule-based and linguistic. When coupled with measurement techniques, these search applications have proven to be far superior to Boolean or keyword searches.

The Sedona Conference has a complete paper on search and retrieval applications.³ There is no magic bullet. The key is to understand measurement and variation and be able to evaluate the results. At a minimum, recall (the number and percentage of potentially useful documents brought forward) and precision (the number and percentage of potentially useful documents that have been selected for review as opposed to the false positives) should be measured.

Quality assurance and sampling

Management consultant Peter Drucker famously said, “If you can’t measure it, you can’t manage it.”⁴ To that end, it is important to use sampling, analytics and the measurement of large ESI populations not only to test the quality of search and retrieval methods, but also to gain an understanding and insight into what they contain. With this information the “legal architect” and the client can better triangulate among risk, cost and time in refining and adjusting their strategic intent.

Whether documents are selected by new technology, old technology or human review, sampling techniques should be used to test both the documents brought forward and those left behind to measure how well the search and retrieval process worked. To achieve that level of sophistication, an attorney needs an ongoing relationship with a discovery vendor that is grounded in shared theories and practices.

It matters little in terms of quality if documents are physically reviewed in Manhattan, Mississippi or

Mumbai. What does affect quality is the use of process and measurement applications to ensure the desired outcome. With proper statistical analysis, project control and mathematical evidence in place to ensure a quality result, location does not affect the work product, since there are tools in place to guarantee quality. Mumbai, however, will be decidedly less expensive than Manhattan. By offloading document review, expensive law firm partners and associates are freed up to accomplish higher-value tasks. For example, whether using keywords or more sophisticated technology, all computer work is subject to “garbage in; garbage out.” Setting the right terms at the beginning of a project is crucial and can require a lot of time. The savings from an accurate search are almost guaranteed to exceed the amount of attorney time spent honing terms, but such value cannot be gained if the attorneys are too busy reviewing documents.

Additionally, at least some of the quality-assurance work should be done at the highest levels. Because the computer extrapolates the feedback from these results to the entire document set, the results of the sampling must be accurate. Ensuring accuracy is well worth the time spent by senior attorneys.

Many lawyers delight in their “professional mystique.” They understand the law, and no one else does, so their clients must count on them and their advice. Service providers complicate and create needlessly complicated billing models to obscure and confuse.

Discovery, however, is a repeatable process that does not lend itself to this. In fact, as has been shown by Magistrate Judge Paul W. Grimm’s recent decision in *Victor Stanley Inc. v. Creative Pipe Inc.*, No. MJG-06-2662, 2008 WL 2221841 (D. Md. May 29, 2008), courts have concluded that a defensible, transparent process, based on reasonableness and good faith, is most important.

Since discovery is all about setting up repetitive rules and processes, it only makes sense to use preferred service providers on a standardized process. Not only does this provide economies of repetition, but the client can benefit as the service provider—already specialized in handling these types of matters—becomes more familiar with the company and the process.

This type of protocol is in play almost everywhere except the legal industry. For example, in the military, there is the “rule of 87%.” A second ship, for example, can generally be built in 87% of the time it takes to build the first one. A third ship can be built in 87% of the time it takes to build the second.

Repetition has a value, both in speed and in the reduction of errors. With repetition comes improvement and insight.

Some “serial litigators,” such as pharmaceutical companies, are starting to employ the concept of a national discovery counsel and single service provider. These providers develop the plan, implement the parts they do best and manage the rest. This affords a good process and allows the experts to

implement it. In contrast, if law firms and suppliers are all doing things differently, the system as a whole can never be improved.

To move beyond the superficial solutions of basic keyword searching and contract review to sophisticated search-and-retrieval applications, quality assurance and effective project management requires new thinking. It is possible to both reduce cost and improve quality. This efficiency is achieved by disciplined dialogue and engagement. It requires transparency and continuous improvement through good process. It is a relationship carefully managed by all parties.

The key to a good discovery process is for clients, counsel and service providers to work closely together to leverage the power of supply-chain integration and improved process. There is a real power when stakeholders get together to solve problems, and it is the kind of relationship that cannot be garnered from sending out a different request for proposal for every little project. And here is the reward: Everyone can avoid the perfect storm. By using process, partnership and measurement, attorneys can avoid claims of malpractice and ethical charges while saving their clients' money. Everyone wins.

¹ Jason R. Baron, "EED Showcase: Discovery Overload," *Law Technology News*, January 2008..

² David Blair and M.E. Maron, "An Evaluation of Retrieval Effectiveness for a Full-Text Document Retrieval System," *Communications of the Association for Computing Machinery*, March 1985, at 289-99.

³ Jason R. Baron, "Use of Search and Information Retrieval Methods in E-Discovery," *The Sedona Conference Journal*, Fall 2007.

⁴ Peter Drucker, *The Coming of the New Organization* 70 (1988).