



## **The Pitfalls Of Paperless Discovery**

By Shannon O'Malley and Eric Mandel

Published in [Law360](#)

Litigation discovery has evolved. Once, discovery meant calling up your client and asking her to look through her files to locate relevant information, resulting in a few boxes of documents to review to find the subset of relevant, nonprivileged documents to produce. And lawyers expected to receive a similar volume of documents from the opposing side.

Cases with such limited discovery are now the exception rather than the rule. With the advent of the digital age and electronic communication, lawyers can now expect to receive gigabytes or even terabytes of electronically stored information (ESI), which, if printed, would amount to thousands of boxes of documents. The magnitude of information can, and often does, overwhelm the litigation process and significantly increases the cost of dispute resolution.

Recently, many law firms have enhanced their in-house electronic discovery capabilities by employing a combination of people, process and technology to manage the costs and risks associated with complex discovery. As a result, clients now have a choice between their outside law firm or an e-discovery vendor to provide legal technology services.

While law firms have invaded the technology arena traditionally occupied by vendors, many of those same vendors are entering the traditional law firm realm by providing contract attorney document review services. As a result, this cross-competition is driving down discovery costs on a per-unit basis.

The true purpose of discovery — learning the facts of the case — is often lost in the morass of electronic discovery issues. All e-discovery service providers, be it law firms or vendors, use technology to facilitate the processes of collecting, culling, processing, hosting, reviewing and producing ESI.

By understanding the options available, attorneys can safely negotiate the hurdles and pitfalls of e-discovery to ensure the clients' best interests are met and protected. This starts with understanding the potential risks and benefits of the available technology, people and processes.

## **Choosing Technology Services — Factors to Consider**

In selecting a law firm or vendor to provide technology services, it is important to understand the needs of the case, the capabilities of the provider, the available technology and the costs for their services.

Notwithstanding the sweet whisperings of e-discovery marketing gurus, there is no technology that allows an attorney to load a terabyte of ESI onto an e-discovery platform, push a button and obtain a set of responsive documents and a privilege log all bundled up and ready to produce.

The inescapable truth is that technology — be it "early case assessment," "predictive coding" or the next new thing — is merely a tool that assists the people who manage and utilize that tool. Regardless, clients now have more choices in technology and who ultimately uses that technology to process and host their documents.

### *Collection Technology*

In some cases, it is a toss-up between a law firm and an outside vendor as to which will provide the best technology service options in terms of price, expertise and legal defensibility. Other times, there is a clear choice.

For example, collection of ESI is generally the domain of vendors. Law firms rarely provide this service, and for good reason. The primary risk of data loss and spoliation occurs during the collection of ESI. To ensure a defensible process, it is best to have a third-party vendor handle ESI collection and be available to testify if an issue of authenticity or spoliation arises.

### *Processing and Analysis Technology*

For years, it was cost-prohibitive for all but the largest law firms to purchase and maintain the large data processing server farms necessary to process ESI in a timely manner. Recently, that changed. New disruptive technology entered the market, providing fast processing on top of analytics to help more easily cull out junk and locate hot documents.

The vendors who heavily invested in what is now late-model, legacy processing software are now competing against law firms who can use the new tools to effectively process, analyze and cull large volumes of ESI with a relatively modest capital investment.

As such, some law firms, particularly those working on a cost-recovery rather than profit-center model, can now offer better rates for data-processing and analysis technology than most vendors.

Ultimately, the decision to select a law firm or a vendor to process the ESI will depend

on the needs of the case and the firm's resources and capabilities. While many firms have the new technology tools available, there are still costs involved, and the technology that is right for one case may not be the best option for another.

### *Document Review and Production Technology*

After the ESI has been processed and culled, it needs to be reviewed. The document review and production platform is another technological tool that can be hosted by either the law firm or the vendor. As a general principle, the entity that processed the ESI should be the same as that which ultimately hosts the ESI for review.

During the initial boom of e-discovery, many law firms invested in the first-generation commercial document review software platforms available for installation at a law office. Those platforms rarely met the attorneys' expectations for efficient document review, however.

On the other side of the fence, scores of vendors developed myriad proprietary systems, many more efficient than the aforementioned, but available only under a "software as a service" model, and thus not available to law firms for use in-house.

In the last few years, new disruptive technology entered the marketplace, allowing law firms to directly compete against vendors in providing state-of-the-art technology that facilitates more efficient document review and production at or below market pricing.

That said, not all document review and production platforms are equal, and whether in-house at a law firm or through a vendor, they vary greatly in terms of available features and pricing. Therefore, to determine which provider to choose, one should look to the platform available, the needs for culling and ease of review, and the production demands.

### *Combining Technology with the People and Processes in Document Review*

While law firms and vendors can both offer increasingly better and more cost-effective technology, all e-discovery service providers must rely upon people and processes to properly use the technology, and provide legally defensible results. The true cost of e-discovery is found in the attorney "eyes-on" document review process.

Accordingly, those charged with choosing the right technology for document review should not exclusively focus on the costs to host and process the data. Rather, they must also consider:

1. The quality of the people and processes providing the technology;
2. The capabilities of the attorneys conducting the review; and
3. The efficiency of technology in facilitating the review in terms of average documents reviewed per hour.

## **Choosing the Document Reviewers — Factors to Consider**

Document review is one of the best ways attorneys can learn nuances of the case, spot issues their clients may have missed and build evidence to support claims and defenses. But, as noted above, having attorneys performing the document review may be the most expensive and time-consuming aspects of discovery.

While clients may choose to use the technology provided by their law firms to host the document review, clients may encourage their litigation counsel to outsource the document processing and review to contract attorneys to save on these costs.

### *Finding Someone to Assist with e-Discovery Legal Issues*

In federal cases, and with increasing frequency in state courts, counsel are required to meet and exchange information regarding the parties' electronic systems and e-discovery issues. Although attorneys should be familiar with and cognizant of these rules, often the intricacies of clients' electronic systems are beyond their knowledge and/or expertise.

Therefore, attorneys are permitted, and often encouraged, to bring someone familiar with the discovery rules and electronic systems to these conferences.

Instead of looking to outside vendors to fill this role, many firms hire lawyers with this specific expertise as full-time employees. The e-discovery in-firm lawyers are not necessarily involved in the day-to-day activities of the case, but they have both the legal and technical know-how to assist the litigating attorneys in making the right e-discovery choices.

Additionally, they can provide practical unbiased advice when it comes to hiring vendors, vetting review tools and managing client expectations.

### *When to Consider Using a Contract Reviewer*

Once the ESI has been processed and loaded into a review platform, the next question is: Who is going to review it? Because document review is costly, but necessary, using contract attorney reviewers at significantly lower billing rates may be attractive.

In determining whether to use an outside reviewer, the litigating attorney and client should first consider the specific aspects of the review. For example, if the data is particularly sensitive, using contract reviewers may not be appropriate.

Similarly, if reading the documents is critical to the attorney's understanding of the case, contract reviewers may not provide a valuable return. But if the documents merely require a confirmatory privilege analysis, contract reviewers may be a better option.

In some circumstances, documents can be flagged during initial processing and analysis, and split between contract attorneys and law firm attorneys for first-pass review based on context.

Another consideration is the size of the document set and time constraints. When counsel is under tight deadlines to review a large volume of documents, a large number of contract reviewers can be quickly assembled to help meet those deadlines.

Also, many firms do not have the resources to divert a large number of attorneys to review documents in a single case. But professional contract review firms typically have the ability and resources to scale up staffing to fit the needs of the case.

It is also important to consider the type and complexity of the documents for review. For example, some relevant material may be interspersed through large sets of irrelevant data; for example, emails in a harassment case. Similarly, paper documents, which are more difficult to pre-sort or analyze by using technology, can be sent to contract reviewers for organization and coding.

On the other hand, in cases where there are complex legal issues or the data set requires some technical knowledge for the case, litigation counsel, even if more expensive on a per document basis, may provide better overall results.

### *How to Choose the Right Reviewers*

There are many types of contract reviewers and contract-review vendors. Some contract attorneys can come to the law firm and review documents under the eyes of litigation counsel. Others may be located across the country — or world — and will review documents on their own.

To ensure a smooth process under either scenario, lawyers should consider the following factors:

- An experienced company. Lawyers should vet and hire a company that has experience with the document-review process and can offer advice to the outside counsel on ways to effectively create a satisfactory review procedure.
- Experienced reviewers. When considering which vendor to hire, look at the experience of the contract attorneys who will be performing the review. Reviewers with actual litigation experience typically know why the document review process is important and are less likely to make errors.
- Consider a managed review. There are vendors who offer to manage the entire review process, including collaboration with litigation counsel to create review protocols and rules, quality check the document review on a daily basis, provide daily reports and generally take responsibility for a quality outcome.
- Ensure in-house quality-control checks. Even with a managed review and experienced reviewers, litigation counsel should never allow the document review process to be turnkey. Litigation counsel must have a process in place to

continuously review the contractors' work and collaborate with the reviewers to validate their work.

## **Ensuring A Defensible Process**

Counsel cannot simply rely on technology and people, as both are subject to well-known frailties. Software has bugs, even the best hardware breaks down and people make mistakes.

Both litigation counsel and vendors must build and maintain proper quality control and assurance processes to protect against the failures of the people they employ and the technology they utilize in the discovery lifecycle.

Failure to implement such processes can result in spoliation of ESI, failure to produce relevant and responsive documents, and/or the production of privileged or protected documents.

### *Data Collection*

Data collection providers should clearly address and demonstrate their procedure to ensure their processes are defensible. These processes include:

1. Contemporaneous completion of accurate chain-of-custody documentation during the collection;
2. Use of state-of-the-art write-blocking hardware and collection software or hardware that protects the files, including metadata, from alteration during copying or cloning; and
3. Safe storage of originally harvested data in the event of inadvertent spoliation during later processes.

### *Processing*

While the technical complexities of document processing are beyond the scope of this article, whether a vendor or firm will process the data, the processor should be able to demonstrate sound procedures to ensure:

1. Spoliation is avoided during ESI intake and output;
2. Proper options for processing and output are scheduled;
3. ESI is tracked as it enters and exits the software; and
4. Family groups, duplicates, and metadata are handled accurately.

## *Document Review*

Potential drawbacks may accompany any review. But arguably, these drawbacks apply with greater frequency during contract review, including:

1. Inadvertent disclosure of privileged information;
2. Increased subjectivity, and therefore less consistency, for document production; and
3. Failure to learn or fully grasp the nuances of the case.

To avoid these potential pitfalls, and to ensure the legal defensibility of the process, litigation counsel must establish a quality control and assurance process to conduct second or even third pass review of documents before they are produced.

This process involves using search terms, reviewing file and folder names, talking to key custodians, and collaboration with the contract reviewers to identify “key” or “hot” documents.

Putting a quality-control protocol in place that evolves as the review progresses keeps the litigation counsel involved in the entire document-review process and addresses unanticipated issues that may arise during the review.

## **Conclusion**

The advent of technology and the influx of available experienced contract reviewers offer attractive options to clients looking to save money in discovery. But there is no “one-size-fits-all” vendor, software, review tool or contract attorney reviewer. Instead, clients and their counsel need to carefully consider the needs of the case, the issues involved and the experience of the provider — be it technological or legal — in developing their e-discovery plan.

\*\*\*\*\*

Shannon O’Malley is a partner in the Dallas, Texas, office of Zelle Hofmann Voelbel & Mason LLP. Eric Mandel is the firm’s national e-discovery counsel and works in the Minneapolis office. Zelle Hofmann is a national law firm representing clients in their most challenging insurance-related disputes, antitrust/competition and other complex business litigation. The views and opinions expressed herein are solely those of the authors and do not reflect the views or opinions of Zelle Hofmann or any of its clients. For additional information about Zelle Hofmann, please visit [www.zelle.com](http://www.zelle.com).