

Planning for Variation and E-Discovery Costs

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President Eisenhower was fond of the quote, “In preparing for a battle I have found plans are useless, but planning is indispensable”. The same logic, creating a foundation and framework, can be applied effectually to the complex world of e-discovery where every case brings its own uniqueness and quirks.

That said, there are some check points that should be examined in triangulating the factors of cost, risk, and time that loom large in the world of complex litigation. Discovery is the most expensive piece in legal spend, with review as the most expensive element in discovery. Discovery and review are estimated at over 80% of the cost by some sources. It is therefore logical to be thoughtful about the discovery process in general and review in particular.

Cost Calculations

We suggest the following points be analyzed and considered in the decision making process of the legal discovery cost:

- ✓ **HOW DO THEY CHARGE?** Examine the basis for your Economic Model: Look for cost models that are document or gigabyte based. Explore alternative cost models that are fixed and transparent. Integrated costing models that combine both the cost of the law firm and the vendor on a fixed price basis can be advantageous. The critical path is to achieve the lowest all-in cost which includes the supervision of the law firm and their certification of the process. The line item costs taken in and of itself are not the critical path.
- ✓ **WHAT DO THEY MEASURE?** Know your enemy: You should know your blended hourly rate. The blended rate is the cost of the contract attorneys combined with the cost of the law firms to supervise and certify the review. This is usually the single largest cost in the discovery process and largest available cost saving opportunity in most projects. If you are not paying for the review by the document or gigabyte in an integrated cost model be sure to understand the blended rate.
- ✓ **WHAT TOOLS DO THEY HAVE?** Practice MTCO: “Measure Twice; Cut Once” is a best practice. There are numerous methods of measurement that can be applied to your project to cut cost and improve results. Just a few are blended rate, sampling, review rates, error rates, richness of the population, recall, precision, page counts, document counts, pages per

document, etc. that can be used to analyze your project. A vendor should have a tool box of metrics to explain and explore the best way forward. These metrics can be instrumental in reducing the size of the population to be reviewed in a reasonable good faith way and result in large direct savings in terms of all-in cost. Good metrics help foster innovation and are a catalyst to change.

- ✓ **WHAT DO THEY REPORT? Use sampling over inspection:** By all means necessary, avoid inspection as a quality assurance practice by the law firm in the review stage of discovery. Sampling is materially less expensive and produces a far superior result. Sampling will reduce the cost of your blended rate geometrically and provide more current and better results as to quality and how well the knowledge transfer has taken place. It allows for quick course correction and continuous improvement. Inspection is expensive rework that is not necessary.
- ✓ **CAN THEY DO IT FOR LESS? Quality processes should lower cost:** Understand the quality control and quality assurance processes being employed by the vendor and law firm. If they do not lower cost they are not quality applications. They are cost increases. The lowered costs should be measurable and produce the desired results.
- ✓ **CAN THEY DO MORE? Select an integrated provider:** The largest savings comes from reducing the discovery population to be reviewed as much as possible in a reasonable and good faith manner and reviewing it in a high quality low cost application. An integrated provider who offers processing, culling, hosting and first cut review is in the best position to achieve these efficiencies. Using an integrated provider allows for the growth and development of a strong partnership with the participating law firm.
- ✓ **HOW DO I LEARN MORE? Take advantage of third party information:** Use proven quality processes from other sources. The Sedona Conference Paper Achieving Quality in the e-Discovery Process is an excellent source. It references numerous other sources which are rich in information. Ralph Losey's blog is highly useful with a diverse set of contributors.
- ✓ **Keep up to date on current developments:** E-discovery is a fluid and dynamic field. The TREC 2009 Legal Track Interactive Task offers new insights into technology assisted review. Additionally, proportionality and cooperation are emerging as important factors in the discovery process.
- ✓ **Construct an Audit Trail and Flow Chart:** Document carefully the processes and results across the whole of the EDRM. You want a record that your process was reasonable, in good faith, and proportional. Be sure to document ongoing changes. Even your best planning will need to be adapted to emerging realities that could not have been anticipated or known.

Risk Evaluation

Variation in complexity, scale, cost, and risk are present in any system or process. Good quality is about reducing variation to acceptable and predictable levels which are confirmed by metrics. This is particularly true in the discovery process of litigation that represents the bulk of the legal spend. In general there has been some price compression on discovery activities but there is still a large amount of cost variation in the discovery process. The standard is that the discovery burden must be reasonable, in good faith, and proportional. By that standard, using measurement and understanding, the variation insures compliance with the requirement.

A few specific examples can show the scope of the problem that variation presents in the discovery process.

In an actual case, we audited one firm using contract reviewers at a cost of \$53 an hour for 1st Tier review with law firm attorneys doing supervision and 2nd Tier review at \$300 plus an hour which achieved an all-in cost of \$7 a document. In the same case, we found another firm using associates for 1st Tier review at a cost of \$250 an hour and 2nd Tier review and supervision for \$300 plus an hour for an all-in cost of \$20 a document. These were documents being reviewed in the same case with the same issues. The only difference was the cost and the process. In neither case were the results measured.

Evaluation: There is significant variation between the two firms and the costs do not include processing, hosting, or production. We participate in an alliance with a law firm that would offer an all-in price (collection, processing, hosting, 1st and 2nd Tier review, certification, and production) or total cost of approximately \$1.63 a document.

In another example, we audited a 1st Tier review at cost of \$0.05 per page. There was not an hourly rate or per document rate involved. There were approximately 50,000 documents with a page count of 7,400,000 pages all of which were billed by the page. This works out to an average document page count of around 150 pages per document.

Evaluation: On a per page basis at \$0.05 per page that turns out to be around \$370,000. A more common per document charge in the range of \$0.70 to \$1.10 a document works out between \$35,000 and \$55,000.

Looking at various per gigabyte all-in cost numbers, we find the variation is enormous. The average all-in cost (collection, processing, hosting, 1st Tier and 2nd Tier review, certification, and production) would be approximately \$70,000 a gigabyte plus or minus \$35,000. In our view, with a good integrated process the cost should be approximately \$24,000 a gigabyte plus or minus \$2,000 for all-in cost.

All of the pricing examples above offer large variations in outcomes. In planning, it is a good practice to measure from two different approaches and compare how close the results are to one another. We would recommend you examine several economic models for each project. Ask, how are we measuring results? What are the metrics, what is the cost per document, per gigabyte, etc? The difference between pricing by the page or document can be extreme.

Time Frame

The examples show the order of magnitude, variation, and the potential savings available in the cost of discovery. Eisenhower was also fond of the statement, "What is urgent is seldom important, and what is important is seldom urgent". In the hair on fire world of high stakes litigation this is not the conventional wisdom. However, the spiraling cost of discovery fueled by ever increasing volumes of ESI (electronically stored information) should give us cause to pause and take a hard look at process, variation, and measurement. Planning can be derailed or incomplete by the drama of law and press of events. The temptation to short cut the planning activity should be avoided even if the urgency is great. Planning is too important to be co-opted by urgency.

If a vendor offers a magic plan in the e-discovery maze, be wary. Only planning can prepare for variations, cause awareness of alternatives, help discover pitfalls, and refine our goals. The given check points are general concepts that can be expanded to more granular applications. The approach should be emergent, based on circumstance and need. It is basically a read and react scenario using concepts that may or may not be appropriate in a given circumstance. The suggestions are not new or radical. We are offering them as touch points to reduce costs, lower risk, and improve time. By no means are they a panacea or magic bullet to spiraling legal costs. We do suggest they are reasonable and good faith questions that should be asked and answered.

April 2011