

Using Technology To Estimate, Control And Manage Litigation Document Review Budgets

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Calculating – and staying within – a realistic budget for a litigation or regulatory document review can sometimes require psychic powers of prediction. Budgets are set early in the litigation process, usually based on past costs in similar litigation matters. However, budgets are also often set before the parties finalize the scope of discovery, which can then grow far beyond early estimates. Adjusting the budget on the fly, however, reduces the value of the initial budgetary process and almost certainly frustrates and angers clients.

Several basic strategies can increase the accuracy of discovery budgets. First, initial budget estimates can be generated with greater precision. Second, the legal team can take steps to increase the likelihood they are staying within budget. Third, the legal team can use technology to increase the productivity of team members. Ideally, practitioners will use all of these strategies in combination.

1. Increase Initial Budget Accuracy

Neither law school nor most mentors teach how to create an accurate litigation discovery budget. Instead, lawyers usually review a recently completed matter and adjust those costs up or down based on their idea of how their new matter compares to it. This approach has some validity when both disputes involve similar facts, legal theories and opposing counsel, but changes in any one of these variables can make such budget estimates woefully inaccurate. How, then, should a legal team proceed?

One approach is to work backwards from a calculation of the maximum rational discovery budget, given the potential legal exposure (or gain) for their client. The exercise should never be considered (or used as) a way of maximizing fees for the legal team; rather, it's an attempt to determine an appropriate scope of work given the client's litigation goals. To calculate this maximum budget, the team should look not only at

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the amount in controversy, but also the importance of the dispute to the client in terms of the client's business objectives and financial status. The figure calculated by this exercise should be considered the border between rational and irrational costs, though it's obviously hoped the team can achieve client objectives for less.

Once a maximum discovery budget has been calculated, the legal team should evaluate the case development that can be performed for that amount. Can the team complete a comprehensive review of the document collection? What if the document collection proves to be 50 percent larger than initial estimates? A hundred percent larger? Reviewing these hypothetical situations will help the legal team quickly understand whether it's economically rational to develop a case for trial. At the very least, presenting a client with these scenarios creates a perfect opportunity for the legal team and client to productively discuss the limits of what can or should be done in discovery – and what should be budgeted for this phase of the case.

2. Remain Within Budget Throughout The Review Process

Legal teams should also take steps during a document review to ensure that they remain within budget. First, of course, litigators should strongly consider ways to increase the productivity of human reviewers. For example, in many situations, the analysis of one document can be extended to other similar documents, reducing the number of documents that require individual review. Tools that give the legal team this type of leverage can significantly speed a review, reducing the total time (and fees) required to complete the project.

Second, legal teams should be able to constantly track whether they are still within budget. Is the review proceeding as quickly as projected? Have additional documents come up that need to be reviewed? Too often, a legal team will continue executing a strategy even after it should have become apparent that changed circumstances will make the review run over budget. Promptly informing a client when budget and reality diverge demonstrates how closely the

legal team is managing this aspect of the case and may make it easier to re-evaluate and revise the overall case budget.

Third, it is a truism that most of the documents exchanged in fact discovery, even if arguably relevant, have little probative value. It is equally true that a tiny number of discovery documents will have great evidentiary value. One way to remain with budget is to find ways to review only the most important documents and spend relatively little time on tangentially relevant or wholly irrelevant documents. Once, such relevance ranking could only be determined using time-consuming human review, but increasingly sophisticated computer modeling has begun to offer a relatively low-cost way of achieving this same goal.

3. Leverage Technology

Clients are increasingly asking legal teams to achieve more while deploying fewer people and charging less. Within a document review, technology can simultaneously extend productivity and enhance legal analysis – while also reducing the effort required for many clerical and duplicative tasks that remain an inevitable part of every document review project. For qualitative as well as budgetary reasons, legal teams should strongly consider integrating advanced document review technology solutions into their discovery toolkits.

First generation electronic document review solutions focused on streamlining a traditional review that consisted of working through a document collection from start to finish. With the availability of inexpensive optical character recognition (“OCR”) technology for hardcopy documents and the explosive growth of discovery of native electronic files whose text could be extracted at even lower cost, keyword search became central to filtering a collection to identify documents that merited review. Keyword search results, however, were still reviewed in a linear manner, and key documents might not be seen by the document reviewers until very late in – or even after – the close of discovery.

Today's next-generation document review solutions challenge traditional ways of reviewing search results by prioritizing (i.e., ranking) documents within a search result by their relevance. These tools may start with the same basic criteria that attorneys have traditionally used, including keywords and key player information. However, these tools then use further analysis based on the content of documents to suggest which documents are likely to be most relevant to the legal issue in question. By pulling the most relevant documents from their locations across the document population, the results can be unexpected and highly informative.

Prioritizing review documents based on objective relevance criteria offers an interesting non-traditional view into the document collection. Equally important, reviewing discovery documents based on their declining importance to a case can save both time and money. Unlike

traditional linear review, document ranking greatly increases the chances that the legal team will review the most important documents early in the litigation life cycle, when the resulting analysis can materially affect case development strategy before large sums of money have been spent. This same approach also permits a legal team operating under budgetary constraints to greatly increase the chances of reviewing the most important documents in a collection, even if the document review must be suspended before it is fully completed.

For example, using document ranking technology, a legal team with a budget that permits it to review only 100,000 documents out of a 1,000,000-document collection can feel comfortable that its partial review will touch the most critical documents. Similarly, document relevance values can serve as stopping points at which a review team can analyze the effectiveness of its review. For example, is it cost-effective – and does it meaningfully advance the case – to review the “least important” 30 percent of a document collection? The “least important” 20 percent of the collection? Answers will vary, but based on review results, some legal teams and clients may feel comfortable winding down a review without spending time on these low-value materials. That, in turn, translates into substantial cost savings.

Automated document ranking technology is not a replacement for subjective human analysis. Document ranking algorithms rely on the variables fed into them, and an incomplete understanding of the issues in a case will create unreliable automated suggestions as to which documents are likely to be most relevant to a dispute. Further, when a legal dispute changes course through the addition (or subtraction) of claims and defenses, initial calculations as to a document's importance can instantly become obsolete. A legal team should never become complacent and believe that a one-time analysis of a discovery document population will remain equally accurate over the life of the litigation. And, indeed, the legal team should make sure that it's possible to regenerate document ranking values as the team's understanding of the case changes.

Conclusion

Preparing accurate document review budgets is a critical task for legal practitioners and one that plays an important role in providing excellent service to clients. Using technology that can prioritize the order in which discovery documents should be reviewed offers one interesting new approach for controlling the ongoing costs of a document review. Properly deployed, such tools may prove particularly valuable for legal teams seeking to distinguish themselves in the quality of their work – and in the value they provide their clients.

Please email the author at conrad@efficientEDD.com with questions about this article.