



WHITE PAPER

ACHIEVING PROCESS-DRIVEN QUALITY DOCUMENT REVIEW

This paper details the steps involved in building and executing a quality process for reviewing documents in response to a discovery request. It is intended both to identify the elements of a quality process and to provide information about properly planning and executing each element.

EXECUTIVE SUMMARY

The realities of the electronic age, in which vast quantities of documents are created and stored every day, require a drastic change in the approach to document review. On one hand, litigants can leverage available tools and technologies to make information search and retrieval much easier. But the sheer volume of potentially relevant information makes a manual document-by-document review virtually impossible in most cases. Mistakes in categorizing documents are more likely to occur and to be found out. And the costs of document review have skyrocketed.

To defend against potential claims that a party has failed to produce responsive documents, and to protect against the inadvertent production of privileged information and subsequent waiver of that privilege, it behooves a party to develop an appropriate process geared toward achieving a quality document review. A quality document review will be cost-effective and timely, will minimize potentially significant mistakes, and will provide defensibility in the face of challenges to the litigant's compliance with its document production obligations.

The goal of any document review process is to accurately and consistently categorize documents, so that responsive documents can be identified and produced, and privileged documents can be designated and withheld from production. While a document review will almost never be 100% accurate and consistent, a sound process can increase the accuracy and consistency substantially. The review process should be structured from beginning to end to enhance the team's ability to achieve accuracy and consistency, and to document the steps followed.

There are a dozen key elements to a quality document review process, each of which plays an important role. Many of the elements are not surprising, but one central element in particular may not be universally understood. Quality control, as a part of a document review process, is not merely accuracy testing through random selection and re-review. Rather, it involves an important element of remediation, directed toward identifying and correcting systemic errors that may occur during the initial review. As with all the elements of a quality process, the quality control procedures should be thoughtfully planned with a goal of generating greater accuracy and consistency while maximizing efficiency.

By pursuing each element of a quality document review process in an appropriate way, parties will satisfy their obligation to identify appropriate documents for production or withholding, and will establish evidence that a defensible effort was made in conducting the document review.

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1. INTRODUCTION

For the first centuries of American jurisprudence, litigants were, for the most part, trusted to have taken appropriate steps to produce documents responsive to requests made by opposing parties. Only in rare cases where a party was shown to have engaged in the intentional withholding of relevant data was there real concern about the fulfillment of production obligations. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977).¹ In fact, the primary concern regarding discovery related not to underproduction but to overproduction — burying a requesting party in paper to raise costs and hide truly relevant documents.

Under the old paradigm, the particulars of a document review generally were not questioned. A party likely would be safe from challenges to its production as long as it: (a) did not make a conscious effort to fail to produce relevant information; (b) used an attorney to respond to the production request; and (c) met court-set deadlines. Similarly, reviewing for privilege was a fairly straightforward task; each document was read by a law firm associate to identify any basis for withholding work product or privileged communications. New litigation associates (and associates in any other department when the need for bodies arose) typically were put through a rite of passage that required them to spend a significant portion of the first few years of law practice performing document review. Because the universe of potentially relevant documents in each matter was relatively small, the expense of this associate-staffed review did not overwhelm litigation budgets. The associates' review determinations generally were not questioned — after all, these were intelligent law school graduates who had already been deemed qualified to join the firm and they were presumed to be able to perform document review competently.

The world of document review has changed, however. For a litigated matter or investigation, instead of tens, hundreds, or thousands of boxes of documents, there are now terabytes of electronic data flowing from many different sources, and hundreds of thousands — if not millions — of emails and other electronic files to be considered for potential production. It would be cost-prohibitive, and in many cases logistically impossible, to conduct a document-by-document review of this information using law firm associates. Furthermore, whereas the paper paradigm required a laborious manual document search to identify a document that may be responsive, privileged, or otherwise interesting, a thoughtful keyword search of an electronic set might instantly turn up thousands of such documents. In addition, the ability to conduct searches across documents has made it easy to find inaccuracies and inconsistencies in document determinations, belying earlier assumptions about the competency of attorneys to make consistent, appropriate document categorizations.

¹ The concern over intentional withholding of relevant information persists, as evidenced by a 2010 opinion from Judge Grimm. See *Victor Stanley v. Creative Pipe*, No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010) (stating that preservation failures “demonstrate intentional misconduct done with the purpose of concealing or destroying evidence,” granting default judgment on primary cause of action, awarding attorney’s fees and costs related to the spoliation, and finding civil contempt punishable by up to two years in prison, unless and until the attorney’s fees and costs are paid).

1. INTRODUCTION (continued)

In the new electronic paradigm, alternate approaches must be considered. And although automation and advanced search and retrieval technology can streamline the review process and eliminate the need for humans to review many of the documents collected, in virtually all matters some degree of human document review will be required.² In some smaller matters, review by law firm associates might still be feasible; in others, the review is more appropriately outsourced to contract lawyers managed by the law firm, non-lawyers, overseas attorneys, or integrated managed review providers. Regardless of the selected approach to human review, however, the review must satisfy the litigant's duty to make a reasonable effort to meet its document production obligations. To meet its obligations to the court and the requesting party, that effort must be directed toward identifying and producing the responsive documents. At the same time, that effort also must be directed toward identifying documents that are eligible for withholding on the basis of privilege³ or confidentiality.

²This paper focuses solely on achieving quality in that portion of a document review project conducted by humans. Assessing and achieving quality in automated review processes — which, when implemented properly, can be far more accurate than even the best human review — is not covered by this paper. For helpful guidance on achieving quality in that area, as well as in other aspects of the overall discovery process, see *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, May 2009, available online at http://www.thesedonaconference.org/dltForm?did=Achieving_Quality.pdf.

³The term “privilege” is used in this paper generically to refer to the attorney-client privilege and work product protection.

2. CHARACTERISTICS OF A QUALITY DOCUMENT REVIEW

A “quality document review” is one that enables a party to meet its document production obligations. There are several characteristics of a quality review. It must be timely and meet established deadlines. It must be cost-effective and comply with budget constraints. But from the perspective of whether the review enables the party to meet its production and withholding obligations, there are two key measures of quality: accuracy and consistency.

Assessing the accuracy of a review asks whether documents are correctly identified as being subject to production or not, and if subject to production, whether they are protected by privilege or confidentiality. Assessing the consistency of a review requires the litigant to consider whether identical or highly similar documents are categorized identically. Measuring consistency can be difficult, however, insofar as the proper responsiveness and privileged categorizations of a document (as well as the applicability of other subcategorizations related to specific issues of interest) are not always objectively verifiable, and it is not uncommon for different attorneys to have different opinions about the proper categorization of a document. Because the characterization of documents is often subjective, achieving perfect consistency is impossible. Thankfully, however, the law does not require perfection, and as long as a party takes reasonable steps to ensure consistency in the characterization of documents, its process should be defensible against challenges.

3. APPLYING PROCESS TO ACHIEVE A QUALITY DOCUMENT REVIEW

While both are critical to quality, neither accuracy nor consistency is easy to achieve in the era of document reviews encompassing millions of pages. It is impractical to have law firm associates (at law firm associate billing rates) conduct a document-by-document review of these vast quantities of electronic files, so other steps must be taken to assure an acceptable level of accuracy in each decision. Further, achieving an acceptable level of consistency across a sea of document decisions can be challenging, whether it is law firm associates, other law firm professionals, or anyone else making each decision; at the same time, it is easier for an opposing party to use automated tools to detect individual incidents of inconsistency.

There is no magic button to push to overcome these challenges and ensure that documents are reviewed accurately or consistently, as there is no purely technical solution that can be applied to generate accurate, consistent results. The key is to develop and execute a carefully thought-out, reasonable process that contains steps designed to (1) assure accuracy and consistency, (2) identify and correct areas where accuracy and consistency are insufficient, and (3) demonstrate that reasonable levels of accuracy and consistency have been achieved.⁴

There are a dozen critical elements that comprise an appropriate document review process. When carefully executed, these elements enable a party to satisfy its document review obligations and, just as meaningfully, generate a record to prove that satisfaction:

- Planning and Project Management
- Documentation
- Substantive Preparation
- Training
- Review
- Quality Control/Remediation
- Privilege Review
- Tracking
- Communication
- Supervisory Review
- Adjustments and Retraining
- Consistency Verification
- Auditing and Quality Testing

⁴With respect to the use of “process” in document discovery, courts have focused on the importance of following an appropriate process in generating keywords used to select documents for review. See *United States vs. O’Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008); *Victor Stanley v. Creative Pipe*, 250 F.R.D. 251, 262 (D. Md. 2008). Judges also will likely turn their focus to the process followed in categorizing documents for production when evaluating challenges to document production efforts — i.e., the selection of responsive documents for production or the withholding of privileged or other protected documents.

A. PLANNING AND PROJECT MANAGEMENT

A single Project Manager should own and direct the process. The Project Manager is responsible for leading initial process planning and owning the project throughout its life.

Setting the process is the critical first step in establishing the framework that will be applied to the project. While the elements of a good document review process should not change much, if at all, from project to project, the particular methodologies to be followed — from technology tools, to the quantity and nature of training, to establishing credentials and number of review team members — are highly variable.

While the Project Manager does not have the final word on any such methodology, he or she is responsible for presenting the appropriate issues for consideration, offering best-practice suggestions, and shepherding the considerations into a group consensus.

Through the life of the process, there are many balls to juggle in executing a quality document review. Not only must the Project Manager ensure that the various elements are executed as planned, but he or she must also take prime responsibility for communications among the review team and the larger case team, setting and monitoring timelines, managing any vendors who may be assisting the process, and ensuring that costs stay in line with the budget.

B. DOCUMENTATION

The overall review plan should be well documented. Each element requires strategic planning, and the approach to be followed for each step should be memorialized. Preparing initial documentation of the overall process plan will help focus the review team leaders on establishing an appropriate workflow, and forms an important part of the evidence that the review was conducted as part of an organized, well-constructed approach.

Furthermore, throughout the process, an auditable trail of documents (e.g., checklists, communication logs, emails, audit reports) evidencing completion of the planned steps should be completed and stored. This trail of documentation is vital to proving that a thorough, organized process was planned and then executed.

Appropriate documents may include:

- Description of Planned Review Workflow
- Background Materials Binder
- Training Agenda and Materials
- Training Attendance Log
- Review Guidelines
- Review Assignment Checklist
- Quality Control Review Guidelines
- Quality Control Assignment Checklist
- Privilege Review Guidelines
- Privilege Review Assignment Checklist
- Lists of Search Terms and Their Uses
- Project Management Reports
- Notes from Communications Related to Review
- Emails Containing Communications Related to Review
- Review Guidelines Clarifications Log
- Review Tracking Database

C. SUBSTANTIVE PREPARATION

Before review can begin in earnest, responsible counsel, often with input from a review team leader, must develop appropriate review guidelines. Those guidelines should be as complete and accurate as possible. To that end, it is extremely helpful to have an initial team of reviewers study a number of sample documents before finalizing the review guidelines.

During that sample review, counsel and review leaders can confirm that the review guidelines provide adequate guidance, or identify areas in which the guidelines need to be amended or adjusted. Unanticipated documents are often encountered, and guidelines or overall workflow must be altered — for example, documents that appear relevant but do not relate to any previously identified issue may merit the amendment of the guidelines to describe an additional issue that reviewers should consider. Similarly, highly technical documents or foreign language documents that require specialist review may be encountered; these documents merit a culling effort and an additional branch in the review process that is responsible for such documents.

Another purpose of conducting a sample review is to identify exemplar documents. Exemplars are extremely useful in training the full review team, as they give reviewers a more concrete idea of the type of information or documents that relate to each issue. Especially when the review is more complex, having an organized group of exemplar documents for reference can save significant review time and generate more accurate categorizations.

D. TRAINING

The review team must receive training in three primary areas: matter background (substantive training), review tool usage (software training), and review process (procedural training).

Substantive training is vital. It should be as concise as possible while providing sufficient information for the reviewers to understand the criteria for categorizing documents. In addition to written review guidelines, reviewers should be given exemplar documents for their continual reference and any other information that the leadership team determines may be useful, such as chronologies, organization charts, area-of-law key points, and acronym and term-of-art dictionaries. Ideally, supervisory counsel should conduct the initial substantive training. Alternatively, the senior review team leader might conduct that training after supervisory counsel becomes confident in the leader's understanding of the matter and review criteria.

Software training typically is conducted by either the review leader or the Project Manager. Different review platforms have many similarities; at the same time, there are important differences between platforms, such as the way documents are presented for review, how family members (such as emails and attachments) are accessed, the way that search term highlighting will display, best practices for orienting the view of the documents, and the formats available for review. The trainer should be expert in the use of the platform from a review perspective so that he or she can best instruct the reviewers on the power and limitations of the software. Reviewers need to be trained on the basic usage of the platform and any features that are helpful in understanding the documents under review (such as looking at a document in a native viewer, a near-native viewer, TIFF, or XHTML format).

Procedural training should be conducted by the review leader. An appropriate process will not simply place a batch of documents before a reviewer with instructions to categorize those documents. Instead, reviewers should follow a standard process that ensures the greatest consistency in the review. There

may be persistent highlighting of helpful terms, or the reviewers may be instructed to run a search containing those helpful terms. The reviewers may be directed to run other searches to confirm that they have not made internally inconsistent categorizations or subcategorizations. Following established steps and methodology produces a more consistent, repeatable process that is less subject to significant variation and more likely to generate consistent categorization even if similar documents are reviewed by different reviewers.

E. REVIEW

Of course, the actual review of the documents is at the core of an appropriate process. The reviewers must follow a standardized process and apply a standard set of review criteria to maximize the likelihood that similar documents are treated similarly. Reviewers should follow a process-driving checklist to ensure that standard steps are followed in conducting their review. The checklist should be part of an overall assignment sheet (whether electronic or paper), which guides the reviewers through each assignment and provides documentary evidence of the steps followed by reviewers.

The review environment should be conducive to comfortable, focused review. The office environment should be professional — reviewers are and should be treated as professionals whose intellectual efforts are respected, valued, and counted on to provide an important service. There should be no distractions — cell phones and newspapers should not be close at hand. At the same time, reviewers should be encouraged to take periodic breaks so that they maintain their concentration while reviewing documents.

To minimize the risk that reviewers communicate information about the documents being reviewed to those outside the process, while they are reviewing documents reviewers should not have either cell phones or internet access. The consequences of a breach of such access restrictions can be significant, as attorney-client privileged communications might be revealed or highly proprietary or sensitive information might be disclosed. Similarly, adequate security precautions should be in place to deter unauthorized personnel from entering the review area or viewing documents under review or any project-related materials.

Reviewers should have a team leader present whenever they are reviewing documents. The team leader should be able to answer most substantive, procedural, or review platform questions that may arise, and refer as appropriate any questions that cannot immediately be answered.

The review team should be encouraged to raise questions early and often. It is helpful to have open discussions about questionable documents or categorizations — if one reviewer has a question, it is likely that other reviewers have similar questions, and by having an open discussion of any uncertain points, the team is much more likely to accurately and consistently categorize documents with similar content. To the extent that any significant clarification is made — either internally by the review team or with help from supervisory counsel — the clarification should be reflected in an appropriate log that is continually available to the reviewers.

Review must include steps designed to identify potentially privileged information. The initial reviewers' task is not to make final privilege determinations — those calls are appropriately made by supervisory counsel — but to identify any document that has a potential basis for a privilege claim.

Even if the circumstances of a document suggest that privilege may have been waived, or that an attorney's communication was business rather than legal advice, those ultimate decisions are appropriately left to counsel handling the matter. Comprehensive searches should also be run as a backstop to the potential privilege findings noted during initial review. Search terms should include general privilege-indicative terms, as well as terms designed to identify a party's internal counsel, known outside counsel, and, ideally, any recognizable law firm whose name or email address appears in the documents under review. A robust privilege review is critical both to identifying potentially privileged documents and to establishing a basis for arguing that a reasonable process was undertaken to identify potentially privileged documents. Even if some privileged documents are not identified and are produced inadvertently, the risk of such a production constituting a waiver of privilege is lessened when a reasonable process to identify those documents was followed consistently.

F. QUALITY CONTROL/REMEDIATION

It is important to distinguish between quality *control* and quality *testing*. Quality control refers to the steps taken during the review process to generate a quality review. Quality control involves an active search for systemic errors, and is followed by correction of those errors (remediation) and revision of the process to eliminate the systemic errors (typically through a combination of training and revision of the review guidelines). Good quality control requires sophisticated efforts to identify documents likely to be miscategorized, make any necessary corrections, and take steps to identify and prevent other similar miscategorizations. Quality *testing*, on the other hand, refers to efforts taken at or near the end of the review process to verify that quality has been achieved, typically through the review of a random selection of documents to verify that the process delivered accurate, consistent results.

As with review, a standardized quality control and remediation process is essential. The review leader should establish set searches that quality control reviewers run to identify documents most likely to require correction. Those searches might focus on particular terms or senders, or other criteria such as the categorization assigned to a document. Other quality control strategies take advantage of the features of the particular review platform, such as examination of documents within similar concept categories that have inconsistent categorizations. Quality control review must be customized to each project and review platform, and the particular steps may be adjusted during the review as certain types of miscategorizations are identified.

Efficiency in quality control is essential. While a 100% re-review of every document might theoretically be the best way to foster quality, the cost of such an effort makes that strategy inappropriate. The goal of good quality control is to create the most benefit within a given amount of time and within an appropriate budget. Too much time spent on quality control blows the budget, whereas insufficient quality control leads to poor results.

While random sampling may be an appropriate methodology for quality *testing*, it is not an appropriate approach for quality *control*. Mistakes will happen in any sizable review — trying to find those mistakes in the quality control process by blindly grabbing random sample documents is not efficient and will not identify systemic problems that require larger corrective steps.

Consider, for example, a document review involving 500,000 documents, 25 of which are miscategorized based on the same misunderstanding of one of the responsiveness criteria. Random selection of 10% of the documents for re-review (50,000 documents) leaves 450,000 documents without any quality control consideration. It would not be surprising if few — or none — of the 25 of the miscategorized documents existed within the 450,000 that were not selected for re-review.⁵ Even if some of the 25 were selected and corrected, the bulk of the miscategorized documents are likely not to be selected for re-review and remediation if only the randomly selected documents are included in the quality control group. It is more appropriate to develop a targeted approach that seeks out and identifies documents with a particular miscategorization; such an approach will be much more likely to find all 25 documents. A targeted approach could be based on certain terms within documents, similarity values generated by concept-analysis software, or any other appropriate tactic. An efficient quality control process requires thoughtful design and strategies to maximize the likelihood of finding any systemic miscategorizations while minimizing the time spent on the quality control effort.

Quality control review should occur directly on the heels of the initial review. This is most important early in the review process, when reviewers have the least experience and are most likely to miscategorize documents on a systemic basis because they misunderstand the review criteria or the significance of certain types of documents. Early identification of problems, coupled with a robust feedback loop to the entire review team, will help prevent recurring errors as the review progresses and will improve the overall quality of the review.

G. TRACKING

Regular tracking of the review should take place on several levels, and will serve multiple purposes. First, macro-level tracking of review progress on a daily basis should be done to confirm that a review is on time and on budget. Often a review is subject to internal or agency- or court-imposed deadlines. The Project Manager should keep a daily watch on review progress to ensure that a sufficient number of documents move through the process each day in accordance with the established schedule. If the process moves more slowly than expected, the Project Manager can raise the issue and pose the question of whether additional reviewers should be added. Identifying a need for more reviewers as

⁵In fact, the likelihood that none of the 25 documents would be within the documents selected for review is greater than 7% (and if only 7% of the documents were selected for re-review, that likelihood grows to over 16%). Furthermore, even at a level of 10%, there is an infinitesimal likelihood (1 in 10²⁶) that all 25 documents would be within the selection — far less likely than getting dealt a royal flush (1 in 649,740), and even much less likely than winning the hardest-to-win lottery, which is around 1 in 10⁹.

The above calculations related to the likelihood of target documents existing within a random sample are based on the Probability of z (P_z), where

- z is the number of target documents to be found in the sample
 - N is the number of documents in the entire population
 - N_x is the number of target documents with the population
 - N_o is the number of non-target documents within the population
 - k is the number of documents that are randomly selected
- such that
$$P_z = \binom{C}{k} \times \left[\frac{(N-k)!}{N!} \right] \times \left[\frac{N_x!}{(N_x-z)!} \right] \times \left[\frac{N_o!}{(N_o-k+z)!} \right]$$

early as possible is extremely valuable in avoiding a rush later in the project, which inevitably leads to shortcuts that jeopardize quality.

Virtually every organization conducting a document review is concerned about the cost of the review. Because the number of documents subject to review directly influences cost, the Project Manager should also keep the team apprised of the document counts on a daily basis. This tracking should include not just the number of documents actually being reviewed, but also the number of documents that pass through processing and culling into the review queue. When that number rises beyond expectations — which can occur when collections of documents are processed that have a higher than expected rate of responsiveness to the selection criteria — supervisory counsel may decide to revise the parameters of the review. Such revisions can include tightening up the document-selection criteria or limiting the custodians subject to review.

Next, tracking at the document custodian level is also advisable, on a daily or some other frequent basis. Often there are assumptions made at the outset of a review regarding the relative importance of various custodians. Some custodians may be expected to have a higher percentage of responsive, important, or privileged documents than others. By providing regular reporting on the breakdown of categorizations by custodian, the review leadership team can confirm that these categorizations are meeting expectations.

On the other hand, if the custodian-level tracking reveals that an unexpected custodian has higher (or lower) importance than expected, supervisory counsel can turn more (or less) attention to particular players, and add (or delete) others from consideration.

Finally, regular tracking of review progress at the level of the individual reviewer is extremely important, in two different ways. First, if a reviewer's categorizations are distributed markedly differently than other reviewers', a flag is raised. That reviewer's initial batches should receive closer attention to confirm that the reviewer has a proper understanding of the review criteria and the significance of documents under review. It is possible that the reviewer simply reviewed a more atypical set of documents that properly merited different categorizations; or it is possible that the reviewer needs additional training and guidance to better understand the review guidelines. Similarly, review rates can provide useful information — a reviewer who is moving significantly slower or faster through the documents than others may not have a comfortable grasp of the review criteria or may not be giving documents their due consideration. Reviewers with aberrant review rates merit quick attention, and a quality control reviewer should look at such reviewers' categorizations even before their first batches are completed.

H. COMMUNICATION

Frequent communication enables all stakeholders in the review process to stay informed and on the same page with respect to the substantive review as well as other critical matters such as timeline and budget adherence. All significant communication should be documented so that recollection of important points can be refreshed and documentary proof of the review process can be provided if necessary.

Communication about the review should be more frequent early in the process, when the review team is learning the process and becoming familiar with the guidelines and the documents. By providing a forum for timely feedback from the leadership team, early communication increases the ability of the review team to avoid systemic problems.

Within the review team, frequent communication ensures that everyone on the team shares in any clarifying information learned, helping the entire team to make more consistent and accurate categorizations. Equally important, review team leaders and supervisory counsel should communicate often about close questions or uncertain calls about categorization, and provide feedback on those issues to the entire review team. All such clarifications should be documented in the review guidelines clarifications log, indicating the nature, source, and date of the clarification.

The tracking information maintained by the Project Manager should be communicated to the review leaders, supervisory counsel, and the party. Most often, daily reports of key project-wide measurements are appropriate, coupled with more complete and detailed weekly reports.

I. SUPERVISORY REVIEW

Supervisory counsel must review the review team's categorizations early and often to confirm that the team is making accurate categorizations. If there are categorizations that supervisory counsel determines are inaccurate, those inaccuracies should be brought to the review leader's attention as quickly as possible, so that the entire review team can receive additional training to prevent such miscategorizations from continuing.

Without this early correction, misunderstandings by the initial review team can be replicated many times over, leading to a less accurate review. Even aside from inaccuracies, slight modifications of the review guidelines are inevitable, and larger modifications are not that unusual. Making those modifications early in the process improves the overall accuracy of the review moving forward.

Recognizing that supervisory counsel is busy working on substantive case matters, they should nevertheless participate fully in the review process and provide real-time confirmation or correction and retraining. Ideally, as soon as a batch of documents has been through initial review and quality control, it should then be put through second-pass review by supervisory counsel. Supervisory counsel should dedicate a sufficient team of attorneys to conduct this supervisory review. Even if first-pass reviewers meet every established deadline, a bottleneck in supervisory review jeopardizes the party's ability to meet its ultimate deadlines.

J. ADJUSTMENTS AND RETRAINING

The identification of systemic errors during the quality control review provides an early opportunity for adjustments to the review guidelines if miscategorizations result from ambiguity. It also provides an opportunity for retraining, even if the review guidelines are not revised. In either case, the reviewers need to be informed of the correct interpretation of the miscategorized documents and, ideally, given exemplar documents to illustrate the point.

Whenever supervisory counsel makes any change in review guidelines or interpretation, the entire review team must be apprised of the change as quickly as possible. The feedback should be documented in the review guidelines clarifications log, and the review leader should make sure that the entire team understands the clarification.

If a reviewer is making repeated incorrect categorizations, that reviewer must quickly receive additional instruction. If that reviewer continues to miscategorize documents at an unacceptable rate, or evidences a continuing inability to apply the review criteria to the documents under review, he or she must be removed from the project.

K. CONSISTENCY VERIFICATION

As the review progresses, any documents that are identifiable as substantively duplicative (assuming that stand-alone true duplicates and “near” duplicates have been weeded out of the review through automated processes) should be analyzed for any inconsistencies in their categorization, and those inconsistencies corrected. There are two principal dangers stemming from inconsistency. First, if one document is withheld on the basis of privilege and its duplicate is produced, there is the danger of waiver of privilege. This is especially true because a court may determine that failing to find duplicates of a privileged document and consequently allowing such duplicates to be produced constitutes an insufficiently robust privilege review process such that the inadvertent production is not excused. Second, if a document is produced as “responsive” in one context and withheld from production as “non-responsive” in another, this scenario will raise a suspicion with the opposing party that other responsive documents were withheld from production. This suspicion will likely give rise to distracting and costly discovery disputes and possible motion practice. Indeed, the opposing party may have ammunition for arguing that the producing party did not consistently or thoroughly fulfill its production obligations and should be sanctioned.

The Project Manager’s ability to verify consistency — or identify inconsistencies — requires the generation of appropriate reports for the senior members of the review team to assess. Careful coordination with the organization hosting the documents under review, and thoughtful use of the review platform’s features and tools, are essential in generating such reports.

L. AUDITING AND QUALITY TESTING

Two types of auditing are appropriate: quality auditing (or quality testing) and process auditing.

To test the accuracy of a review after first-pass, privilege, and quality control review is complete, a senior review team leader should review a random sample of documents, assess their accuracy, and make any necessary corrections. The results of that review should be analyzed statistically to demonstrate a confidence level in the accuracy of the entire review.⁶ If any corrections are made, an appropriate search for similar documents should be conducted to determine whether there is a more widespread problem (and if so, to correct those documents). The quality testing results should be incorporated into the final Project Management report.

To demonstrate that the carefully designed review plan was thoroughly executed, the documentary evidence should be audited. The review plan should form the basis for the audit, and the auditor should confirm that documentary evidence supports the execution of each step in the process. The documents listed in section III.B. (*Documentation*) are the primary resources for the auditor; in addition to confirming the existence of the documents, the auditor should confirm that documents requiring completion and sign-off (such as the various review checklists) have been filled out appropriately.

⁶For a useful primer on statistical sampling, see *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, May 2009, Appendix A, available online at http://www.thesedonaconference.org/dltForm?did=Achieving_Quality.pdf.

4. CONCLUSION

In this age of vast quantities of electronic data, it is no longer appropriate or feasible to have attorneys simply plough through a horde of documents, categorizing documents as they best see fit. Such an unplanned, unmanaged review cannot form a tenable basis for a claim that the documents received a reasonable review or that a party's production obligations have been satisfied. Nor is it sufficient merely to sample a set of documents at the end of the review to demonstrate an accuracy rate. A careful review process must be developed and executed, which will (1) reasonably identify relevant, non-relevant, and potentially privileged or confidential information within the document set, (2) provide sufficient bases for withstanding challenges to the production, and (3) both prevent privileged or confidential documents from being produced and excuse any inadvertent production of privileged information that may occur. That process must be expertly managed by a dedicated Project Manager and marked by good tracking and communication, thoughtful quality control processes, and an attention toward providing updated guidance as early as possible. Those efforts, geared toward achieving an accurate, consistent review, form the basis of a reasonable review process in support of fulfillment of a party's production obligations.

ABOUT THE AUTHOR

After years of practicing securities enforcement law and clerking for Judge Bryson on the Federal Circuit U.S. Court of Appeals, David Shub became a frequent speaker and writer on discovery practices. At DiscoverReady, David has built internal review and quality control practices, led early case assessment practices, developed defensible keyword document selection practices, and played a key role in developing automated privilege review and automated document review processes.

ABOUT DISCOVERREADY

DiscoverReady was formed in 2005 as the first Integrated Discovery Management Company, immediately introducing the concept of fixed-fee document review, recognizing the powerful incentive fixed-fee pricing provides for developing efficient processes. DiscoverReady's review practice has always focused intensively on building and executing carefully designed processes. DiscoverReady has developed both PrivBank™ — an automated privilege screening process — and i-Decision™ — an automated review process, both of which involve years of testing and process-building, and are designed to bring greater efficiency and accuracy to document review.