



# Best Practices in Document Review

BY MARK LICHTENFELD, ESQ.

**In the 21<sup>st</sup> century world of electronically stored information, and with state and federal public agencies' desire to get as much of it as possible via subpoena or post-complaint requests for production, the role of a document review attorney is crucial during the early discovery process. The era of paperless communication has resulted in 90 percent of a party's information being stored in electronic format. Whether it's a government subpoena for records or a garden-variety class-action lawsuit brought by aggrieved plaintiffs, the request for emails from important party custodians assists in framing the trial strategy for both plaintiffs and defendants.**

Most litigation attorneys understand how the document review process works. In the early stages of a private-party lawsuit or a subpoena request from a public agency, both sides agree on a court order identifying the specific custodians from each party that must submit emails containing certain search terms that may be pertinent to the case. Upon request for discovery of this electronic information, the parties' respective counsel will normally hire an

outside agency to collect and sort the documents in acceptable data file form. Almost always, the party providing the information will utilize the outside agency's team of contract lawyers to sort through all the collected documents in order to identify relevant, privileged, or confidential information. After the documents are appropriately reviewed, the party's counsel will determine which documents will be provided to opposing counsel as relevant and which documents will be protected from disclosure due to attorney-client privilege or agreed-upon trade secret or confidential information not relevant to the case.

The importance of the contract lawyers comprising a document review team cannot be overstated. Many of us old-timers recall the disdain for document review attorneys during our careers. To be a document review attorney meant you were something of a second-class lawyer, utilizing an expensive law degree to sift through boxes of documents in the 1980s and '90s. Or even worse, with the debut of the internet age, being holed up in small, empty office spaces with dozens of computers facing blank walls while the grumpy review manager watched over everyone to ensure complete silence and total dedication to the screen. Every reviewer had horror stories that could go on forever.

COVID-19 changed that—no more on-site document reviews. For me, I was particularly fortunate to be one of the first reviewers trained in remote document review practice even before COVID hit. And after 2020, almost all document review houses abandoned on-site projects and went fully remote. Not being tied to an office is wonderful, especially for someone like me who

spent 30 years commuting by train to the Attorney General's office in downtown Chicago. Suddenly reviewing hundreds of thousands of documents from my kitchen table, hotel room, or Starbucks at any hour of my choosing has become the ultimate Las Vegas "retirement" dream.

Back to mechanics. A document review production can certainly be expensive to the client, and many of these cases are massive: especially government investigation matters like antitrust cases, DOJ subpoena requests, and FDA compliance matters. Accordingly, it is incumbent upon counsel to get the maximum value from the document review team. Here are five suggestions from an experienced document review attorney that will help expedite the records request, while concurrently providing a concise and quality finished product to the party's counsel designed to assist in the identification of both harmful and beneficial documents in the custodial database:

### **1. Do not expect the document review contract attorneys to be experts in the case.**

In my decade of document review work, I have seen numerous cases of specialized litigation farmed out to the agency's attorneys who clearly had no experience in the subject matter at hand. For example, FDA requests in pharmaceutical cases, FTC requests in corporate-merger matters, and high-tech patent litigation cases all involve the discovery of emails from specific custodians. Naturally, the subject matter consists of highly sophisticated and complex terminology, which requires specialized knowledge to properly decipher. It amazes me that the parties' counsel often assume that any contract attorney could delve through hundreds of thousands of documents and provide anything near a quality product in such scientific litigation. Remember, just because the party chose counsel for its respective subject-matter expertise, it is irrelevant to the document review attorney's knowledge. In most cases, the document review attorney simply has a law degree and is not an expert in any particular type of business or specialized field. To require a neophyte in gaming token law to hurry through 50 documents-per-hour as a

contract goal is guaranteed disaster. Trust me, I was once on a nuclear power plant construction litigation matter, and none of the reviewers had a clue about the specialized nature of these cases.

### **2. Prepare a coding panel that is short and concise.**

When a document review is farmed out to the agency's attorneys, counsel and the agency prepare a coding panel to be utilized for the identification of each document. The coding panel contains various choices such as *relevant*, *privileged*, *confidential*, and *technical issue precluding proper viewing*. In most cases, this process is sufficient for a quality product. Yet, what seems to happen in a substantial percentage of cases is that counsel provides sub-categories and subjective choices, which always muddies up the document review attorney's decision. For example, relevant choices can be sub-categorized as *warm*, *hot*, *neutral*, etc. ... Or responsiveness can be sub-classified further with choices "a," "b," or "c." If you've ever been involved in a document review, you know what I'm talking about. The more choices allowed, the greater the opportunity for conflicting codes. I've seen coding panels contain 30 or more choices. Then, during quality control review, the increased number of choices invariably results in the agency's attorneys coding the same style of document several different ways. Even worse, I have seen counsel's own attorneys code the same document differently. What this means is that the end product is deficient, and the client is not getting what it pays for.

### **3. Do not deviate from the protocol.**

On the kickoff of any review, the party's counsel engages in a video conference with the entire contract document review team. The conference goes through the written review protocol to further explain the goals and subject matter of the review. Unfortunately, what inevitably happens is that within the first seven days of the review, the party's attorney changes up numerous aspects of the protocol until it doesn't read like the original version. Here is an example.

In my most recent project, the protocol specifically stated that non-responsive documents do not need to be coded for privilege. Then suddenly, the review manager changed this instruction on her own and began complaining that 1,500 documents were not coded for privilege. I am 10 hours into reviewing all these documents, which simply means 10 hours have been wasted and charged to the client due to a unilateral change of the protocol on day two of the project.

True, circumstances often change during a project, resulting in necessary pivoting by the legal team, but I stress that this must be kept at a minimum. Again, the party's attorney is normally quite knowledgeable about the case, but too often counsel assumes the document review attorney possesses equal expertise. And this just isn't true. Less change is better.

### **4. The party's counsel must quickly answer all questions posed by the document review team.**

In a normal review, the document panel code includes a choice known as "query log." The review team utilizes this label to ask questions of counsel regarding documents that the team is seeing. It is imperative that counsel reviews a team's query log daily and provides immediate clarification that is disseminated to the team. The quicker the answer, the better the calibrated review product. Again, I have been involved in reviews where counsel's attorney timely answers the query log for the initial few days, and then simply ignores the queries thereafter. This circumstance is occurring at the time of this writing in my current project. We have not heard back from counsel on numerous query-log questions, and I can already see on quality control review that similar documents are being coded differently for responsiveness and issue-coding. All these discrepancies will have to be remedied later, once counsel answers the query logs. Conflicting coding results in increased quality control hours and costs to the client. Again, this increase could easily be avoided if counsel quickly responds to a query log.

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## 5. The party's counsel must have a go-to attorney handling all queries and responses.

What this recommendation refers to is the practice of numerous attorneys from the party's counsel answering query logs and providing other guidance for the review team. Often, different attorneys are answering similar questions inconsistently, which again causes the document review team to code near-duplicate documents in varying ways. It is essential that the guidance from the party's counsel be consistent, so the document review team can ensure appropriate calibration.

Of course, there are other aspects to any document review matter that can increase efficiency and excellence of product. But all too often, the party's attorney slowly seems to become invisible, and the quality of the document review eventually suffers. And when big stakes are involved in massive government oversight cases like drug company or airline mergers, it would be a disservice to the client to give away any confidential business records to the Department of Justice or Federal Trade Commission. So, it is incumbent upon the managing attorney representing the client to ensure that the review team comprehends the complexities of the client's business model. Most often this practice requires counsel to constantly oversee the document review project and not become suddenly invisible five days after the kickoff.

To sum it up, document review work is no longer the outcast of the legal world, particularly with the advent of remote review. It's probably still not a career goal, but for career public attorneys like me who have retired from long years of government service, the flexibility and reduced stress of document review work certainly provides an incentive to keep a law license active. That said, all attorneys have a duty to act in the best interest of the client, so hopefully, the suggestions incorporated into this article will resonate with law firm and legal department managers who may find themselves hiring out document review counsel in the future. On any document review project, remember that just a few simple tweaks along with consistent attention to the project will generally provide a quality product at the lowest price for the client.



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