

The Art of Effectively Managing an Electronic Document Review

Electronic document reviews are inherently ripe with potential pitfalls and inefficiency, due to the sheer amount of discoverable data coupled with the task of supervising a review team. However, if review protocols are properly established and people are effectively managed, your legal team can comfortably meet all document production and privilege log deadlines, as well as identify key case documents and thereby gain an edge over opposing counsel.

The below topic headings identify the crucial steps one should undertake to successfully manage a large review project. Strict adherence to these steps does not guarantee that you will avoid all roadblocks, yet a well-managed project *does* maximize the chances of a smooth review and document production.

Overview: The Typical Sequence of Events

In general, the steps in most electronic document reviews are as follows:

1. Coordinate with your client and IT professionals to identify and preserve all sources of electronic data that may potentially contain information responsive to the document requests. This includes but is not limited to data in various electronic databases, email inboxes, computer backup tapes, instant messages, image and audio files, and PDA's.
2. Run targeted searches against the above universe of potentially responsive data to segregate out the population of documents to be reviewed.
3. Segregate out potentially privileged materials from the universe referenced in Step 2. To err on the side of caution, you should employ overbroad search terms to identify and bulk code these potentially privileged materials. Use a list to conduct these searches, running the names of known attorneys and law firms, as well as generic terms such as "privileged," "work product," etc. As you learn more about the players in the case and your attorney list grows, you should periodically re-run these privilege searches against your reviewable population set.
4. After segregating out potentially privileged documents, conduct a "first-wave" review of the remaining documents for responsiveness, subject to the document requests. If possible, run targeted searches and segregate out specific types of completely irrelevant documents, bulk coding these as non-responsive. If a protective order is in place, make sure that documents are also reviewed for confidentiality during this first phase of review. Also keep an eye out for privileged documents, since your effort to segregate potentially privileged materials into a separate population rarely culls out every single privileged document.
5. If you are utilizing "temps" (e.g., contract attorneys) for the project, conduct a "quality control" review of each temp's work product, to ensure that they are following the correct responsiveness, confidentiality and privilege review guidelines. Provide these temps with constructive feedback if they are making particular errors. Moreover, identify your stronger reviewers so that they can

be utilized for higher level tasks, such as screening each production set before it is actually produced, and drafting the privilege and redact logs.

6. Tee up the document production(s). Before each production goes out the door, have trusted attorneys conduct a “quality control” of each document population, running various searches to ensure that no privileged materials are inadvertently produced. Furthermore, check to see that parents and attachments have consistent coding, that various iterations of email strings are similarly coded, and that documents have been given the correct confidentiality designations.
7. Before a given document production set is produced to opposing counsel, make sure you have preserved a copy of this production for your own records. Make sure all productions are numbered in consecutive bates order without gaps.
8. Once your last set of responsive, non-privileged documents has been produced, there is the task of assembling the privilege and redact logs. As previously noted, if utilizing temp attorneys, this project should probably be assigned to your strongest reviewers.
9. Finally, when going through the “potentially privileged” population and drafting a privilege log, you will invariably encounter a handful of documents that are truly not privileged and must be produced to opposing counsel. In general, opposing counsel will not raise fury if a handful of “straggler” documents are produced past the discovery cutoff, however, production of a *significant* amount (which is admittedly a subjective term) could lead to a motion for sanctions. Furthermore, note that the content of these straggler productions will be heavily scrutinized, and if a key document is produced among these final stragglers, a motion for sanctions is more likely to be filed.

To achieve the above goals in a timely fashion, it is imperative that a senior attorney lay out clear review protocols as to responsiveness, confidentiality, and privilege, and also commission an appropriate number of junior attorneys to meet case deadlines while keeping the project within the client’s budgetary constraints. Moreover, one must stress that efficient protocols, training and management are only effective if a sophisticated computer application is utilized to review and code your documents.

Reviewer Training: Establish Clear Document Review Guidelines

Once your law firm or in-house legal department has laid out the project’s responsiveness, confidentiality and privilege criteria, it is time to relay this information to your team of junior attorneys, whether they be associates or temp/contract attorneys. It is advisable to hold a training session and brief your reviewers, going over three essentials before beginning the project: (1) familiarizing the reviewers with the case; (2) setting forth clear review guidelines; and (3) training everyone on the electronic review tool.

With regard to the substance of the case, one should draft a memo that provides a brief overview of the litigation, along with the salient facts that will be helpful for the purposes of the document review. It is customary to attach a copy of the most recent Complaint to this memo, although if the Complaint is extremely voluminous, you may want to instruct your reviewers to focus upon your summary.

Moving on to the review protocols, your memo should contain separate sections as to responsiveness, confidentiality and privilege. As to responsiveness, your memo should enumerate the topics that are relevant, along with subjects that are to be designated "non-responsive" to the document requests. Some choose to provide reviewers with copies of the document requests, yet in many cases this is not advisable, for document requests can be quite lengthy, not to mention the fact that you may be objecting to some of the requests, thereby necessitating that the reviewers also read your discovery responses.

If there is a protective order in the case that calls for a confidentiality review, your memo should clearly set forth what types of documents merit a "confidentiality" designation. Depending upon the nature of the protective order, reviewers may have to code a document as "confidential," "highly confidential" or "attorneys' eyes only." Based upon the judge and the language in the protective order, you may want to advise the reviewers to err towards a more stringent standard when in doubt.

As for privilege issues, your initial search terms should have already segregated the bulk of potentially privileged documents from this "first wave" review population. However, there are still bound to be privileged materials within this collection, requiring first-wave reviewers to employ a privilege analysis. All reviewers should be given an attorney list and must be well acquainted with the nuances of attorney-client privilege and the work-product doctrine. If a particular document appears privileged or contains a portion of privileged material (requiring a redaction of this section), it should be coded as "privileged." At a later stage, the stronger reviewers will revisit this potentially privileged population to draft privilege and redact logs.

In addition to presenting the reviewers with the case background and responsiveness, confidentiality, and privilege criteria, you must obviously train everyone on the electronic review program. Typically, reviewers are shown the program's various applications on an overhead projector or via an online seminar. Although there is no need to become an expert on the review program, your team must learn certain vital functions, such as properly coding and saving documents, annotating a document with comments if so desired, highlighting salient document sections and bulk coding various files.

Incidentally, while many electronic review programs offer the distinct advantage of allowing team members to review documents from remote locations, a dispersed team generally requires greater communication. To ensure that everyone is on the same page, all team members should be copied on project emails and included on occasional conference calls.

In most cases, first-wave reviewers should be instructed to apply a handful of additional "tags" to certain documents, as well as coding for responsiveness, confidentiality and privilege. If one encounters a document that is harmful or helpful to the case, or especially informative, it should be marked as "hot." If a reviewer does not know how to handle a particular document, it should be coded as "TBD" (To Be Determined) or "For Further Review." Moreover, sometimes a review team is asked to "issue-code" documents, by selecting from a menu of salient issues that apply to each document. The utility of this task is obvious -- once materials are issue-coded, a specific type of document can be quickly retrieved as your legal team prepares for depositions, trial and settlement discussions.

Above all else, uniformity is crucial when coding documents. Not only should your review team apply identical responsiveness, confidentiality and privilege criteria -- parent documents (e.g., emails, memos, letters, etc.) and their attachments should be coded identically.

Prudent Planning as to Resources and Realistic Deadlines

Assuming there is a discovery cutoff date in the case, it is wise to produce responsive, non-privileged documents in several stages, allowing you to gauge whether you need to devote additional resources to the project.

At its most basic, creating a schedule involves some simple calculations including realistic estimates regarding the following: the number of documents that need to be reviewed; the number of documents that can be realistically reviewed by an attorney per hour; and extrapolating these figures, the number of files your team can review each week or month. You should definitely give yourself some wiggle room – in spite of prudent planning and coordination, unforeseen problems stemming from human error and computer malfunctions may develop. Moreover, when “teeing” up a document production, it will take several days to burn bates numbers onto the documents, regardless of whether you are producing the materials in hardcopy format or on some electronic media.

It is imperative that team members understand their roles and the deadlines that are set. For this reason, periodic meetings should be held to discuss the project status and key project members should be present at these meetings. Key members include the partner in charge, the associates on the case, your IT expert and if applicable, the electronic discovery services provider who is hosting your reviewable data.

It is also important to consider what equipment and facilities are necessary to accommodate your legal team. This is imperative for large-scale reviews involving contract/temp attorneys. In these cases, a supervisor needs to arrange for appropriate space, computers and internet connectivity. Once work stations are set up for temps, you should test the performance of the review tool, as results can widely vary and impact the efficiency of the review.

Taking Advantage of Technology: Targeted Searches and Bulk Coding

In most large document populations, you will encounter considerable numbers of files that are clearly non-responsive to the document requests. For example, there may be clusters of files that consist solely of document source code or email SPAM – yet for some reason they contain one or more search terms which brought them into the reviewable document universe. Once you identify these types of wholly non-responsive materials, you should bulk code them as non-responsive. This bulk coding can save an enormous amount of time by excluding thousands of documents from the reviewable population. As a precaution, you can then instruct someone to click quickly through these bulk coded materials, thereby confirming that all these files are truly non-responsive.

In addition, it is often efficient to assign particular folders to the same reviewers – for example, files from a certain custodian’s email inbox. This should lead to a faster review, since the same reviewer will be analyzing similar types of documents.

Monitoring Reviewers: Ensuring that Quantitative and Qualitative Expectations are Met

After the first-wave review has commenced, the supervising attorney(s) should utilize the electronic review tool to monitor each worker's progress and ensure they are on target to meet production deadlines. A good supervisor should also conduct a "quality control" of each reviewer's work to determine whether they are making correct calls as to responsiveness, confidentiality and privilege. In most cases, if a particular person is coding documents incorrectly, they can be taken aside and given clarification as to the proper review criteria.

As one conducts this quality control of each individual's electronic folder, it will not take long to isolate the strongest reviewers in the group. As previously noted, these individuals can be utilized to conduct a "quality control" before a set of documents are actually produced (*see* next section) and draft the privilege/redact logs (*see* Page 6).

Creating and Tracking Document Productions

Another significant advantage of an electronic document review is the ability to use the review tool to catch errors and inconsistencies before a production goes "out the door." Prior to the production of any document set, an experienced attorney should conduct the following quality control measures:

- Make sure that parents and attachments are coded identically.
- Make sure that duplicates are coded identically.
- Make sure that iterations of email chains are coded similarly (*NOTE: Different permutations of an email string should often receive an identical responsiveness/confidentiality/privilege designation, but depending upon the last-in-time communication in the email string, different coding is sometimes warranted*).
- Using one's discretion, conduct targeted searches for certain privileged terms and phrases against the population to ensure that no privileged documents are inadvertently produced.
- Review any documents that have been coded as "hot," as well as any documents bearing particular issue-codes that one is concerned about.

Once this quality control review is complete, coordinate with your IT person and/or electronic discovery services provider to see if the coding on this discrete document population can be "locked." Moreover, you will naturally rely upon their technical expertise to convert these documents to your desired production format (e.g., TIFF, PDF) and burn bates stamps onto the images.

Before furnishing opposing counsel with any production set, it is vital to preserve a copy of such production on several electronic media, such as on CD, DVD, external hard drive, or on your server. Your copies should be easily accessible, for you will constantly refer to these bates stamped materials as the case progresses. Furthermore, it is wise to preserve a production set in a text-searchable format, such as TIFF images that have been run through the OCR (Optical Character Recognition) process.

Generating the Privilege and Redact Logs

Once all document productions are out the door, the project is only partially complete, as all documents that were withheld or redacted must be accounted for. In general, the producing party must furnish opposing counsel with a privilege and redact log. Typically, a privilege log is in spreadsheet format and for each document withheld, the log contains the following columns:

- **Document Type.** Common document types include emails, memos, letters, reports, and notes. If a privileged document has attachments, these “children” should be logged as a single entry with their “parent” document. For example, if a privileged email communication attaches a draft contract, this parent and attachment should be logged as a single entry, with the document type described as an “Email and Attachment.”
- **Document Date.** Please note that if a document consists of a parent and attachment(s), the date used should always be that of the parent document.
- **Author(s) of the Document.**
- **Recipient(s) of the Document.**
- **Individual(s) Copied as Additional Recipients (the “cc” list).**
- **Document Subject.** For example, a log entry typically reads “Attorney-client communication regarding [*Insert Topic*].”
- **Privilege(s) that are the Basis for Withholding the Document.** In most cases, documents are withheld based upon the attorney-client privilege and/or the work product doctrine, yet other privileges may apply, such as the physician-patient privilege, the psychotherapist-patient privilege, the clergy privilege, the taxpayer privilege, and various state-specific protections. It is for this very reason that the attorneys working on a privilege log must be among your best reviewers – experienced enough to understand the circumstances that create and destroy a privileged communication. Moreover, depending upon the case, these reviewers may need to understand various evidentiary doctrines, including the joint-defense privilege, the distinctions between federal and state work product protection, and fundamental principles of agency law.

By way of example, a typical privilege log entry is formatted as follows:

Date	Document Type	Author(s)	Recipient(s)	Additional Recipient(s)	Subject	Privilege
11/25/07	Email and Attachment	Smith, John	Taylor, Peter	Shapiro, Kelly; Gibson, Monica	Attorney-client communication regarding draft services agreement	Attorney-Client Communication; Work Product

As a time-saving measure, you may be able to export the data fields from your electronic database, thus generating a draft version of the privilege log. This is particularly helpful in populating the “objective” fields of the log, such as the document date and the author/recipient information. Beginning with this draft spreadsheet, your reviewers can complete the log entries by consulting each privileged document and filling out the “subjective” fields, including the document type, the subject description, and the privileges asserted.

As with privileged materials, if you have produced any documents where portions were redacted for privilege, a redact log must be provided to opposing counsel. Similar to a privilege log, each entry on a redact log will contain columns denoting the document type, document date, author(s), recipient(s), additional recipient(s), the subject that was redacted, and the privilege(s) asserted as to the redacted portion.

Just as on the eve of a document production, a supervising attorney should conduct a final quality control review of all privilege and redact logs. Scanning each log entry, they should make sure the entries are “solid on their face” – in other words, opposing counsel will be able to readily understand the grounds on which each document was withheld or redacted. If a log entry appears suspect, opposing counsel may bring a motion to compel production of these documents, which in turn could prompt a judge’s *in camera* inspection of the contested documents.

Finally, we must reiterate that during the assembly of your privilege log, you are likely to uncover some materials that were improperly coded as “privileged” during the first-wave review, thereby necessitating a small follow-up production. As discussed earlier, producing a handful of “stragglers” is customary in most cases and should not lead to problems, yet a production of a substantial number of files or key documents could lead to a motion for sanctions.