

## Financial Crisis – Service Providers

# Staying Afloat During A Financial Tsunami:

## Issues and Challenges of Document Review to Navigate the Waters and Control Costs in the Midst of an E-Discovery Storm

Diane Barrasso,  
Derrick Lee  
and Jay Lose

DELOITTE FINANCIAL ADVISORY  
SERVICES LLP

Alan Greenspan said recently in testimony before the House Oversight Committee, "We are in the midst of a once-in-a-century credit tsunami." In the context of this nationwide economic upheaval, and at a time when companies are especially vulnerable to any variable that affects earnings and market perceptions of stability, civil discovery practice has been undergoing a dynamic evolution that presents real challenges to businesses and their counsel in terms of costs and outcomes of litigation.

This evolution in discovery is due primarily to the substantial growth of electronically stored information (ESI) retained by companies in the normal course of business, in concert with the practical application of liberal pre-trial discovery rules that require its production when demanded by an opposing party. In addition to the high cost of complying with these discovery requests, there have been a growing number of cases where courts have entertained and granted motions for sanctions with respect to violations of rules governing discovery of ESI, the imposition of which have often resulted in extremely adverse outcomes to companies.

This article examines some defining features of the current electronic discovery environment as well as the issues and challenges associated with a well-executed document review.

### Economic Climate

#### *The Issue of Cost Containment*

Companies across the world are focusing on their expenses. The cost of complying with the new rules governing ESI discovery has fallen squarely on companies and often comprises the most expensive phase of a lawsuit. In light of the increasing cost of discovery, companies are now giving more thought to case settlement as another way to add to their bottom line. Companies are viewing the "meet-and-confer" stage of the discovery process as

*Diane Barrasso, PhD, is a principal and the leader of the Document Review Services practice of Deloitte Financial Advisory Services (FAS). She has 19 years of experience in providing document review services for inside counsel and law firms. Derrick Lee is a senior associate of Deloitte FAS Document Review Services and is an attorney licensed in New Jersey. Jay Lose is an associate of Deloitte FAS Document Review Services and is an attorney licensed in New York and Georgia. The views and opinions expressed herein are those of the authors and do not necessarily represent the views and opinions of Deloitte Financial Advisory Services or Deloitte member firms. Since Deloitte Financial Advisory Services does not engage in the practice of law, its services are provided under the direction and supervision of client's legal counsel, who establish document review guidelines.*

the first opportunity, if possible, to limit the scope of a document discovery through negotiated collection methodologies and data reduction techniques such as the application of keyword filters.

#### *The Challenges of Scope Creep and Project Do-Overs*

In order to balance the need for a thorough discovery practice within the current economic climate, companies now often seek out cost-effective solutions for document review that are equipped to see and avoid foreseeable cost overruns. Scope creep constitutes a factor that invariably impacts the bottom line. Experienced document review service partners have existing systems, radar if you will, in place to detect early warning signs of scope creep.

For example, scope creep often occurs when the volume of documents requiring page-level review increases significantly during the early phases of the project. You projected a total of 50 gigabytes for 50 employees. In reality, you are calculating three gigabytes per employee for the first five employees, with a new total projection of 150 gigabytes (three times the original project scope). As another example, the project is suddenly more complicated than expected. No confidential information is expected in the documents, but once you initiate the project, you find the need to redact social security numbers on every other page of a large group of documents, significantly impacting the page read rate and project cost and duration. With early detection, one can properly monitor and report any potential scope changes so the client can make an informed decision on how to proceed before the budget is consumed.

Re-work constitutes another foreseeable area of cost overruns. The economic impact of having to redo poor quality work, or of having to make review decision changes midway through a project, can be sizeable. A well-trained, well-monitored and well-valued staff is critical to minimize the costs of repeated work. Even in the best of circumstances, though, it is not unusual for new case information to require modification of a review rule. In this instance, carefully crafted review guidelines and a thoughtful approach to managing project rule changes will reduce the risks and costs associated with project do-overs.

Constant communication between counsel and the outsourcing partner can help ensure that the strategic objectives mapped out by counsel are being met. A variety of tools such as consistent status reports and budget reports can prevent surprises during a review project. If a company has several cases, an outsourcing partner can reduce overall costs by standardization of the review processes across all cases, which can maximize efficiency and reduce aggregate costs. Other cost-containing options, such as offshore outsourcing and setting predictable fixed costs per page or per data volume, can help to provide better budget management as well.

### Judicial Climate

#### *The Issue of Sanctions*

Sanctions imposed by courts for failure to timely produce relevant materials, or for destruction of relevant materials, also

known as spoliation, have been on an order of magnitude that dwarfs discovery costs in comparison.<sup>2</sup> Huge monetary sanctions, adverse inferences that shift the burden of proof at trial to the respondent and default judgments may and have resulted from discovery rule violations. A continuing litany of reported cases demonstrates that this trend persists unbridled and poses a major litigation pitfall for even the most prominent companies and their counsel.

#### *The Challenges of Timeliness and Accuracy*

While the costs of outsourcing litigation document review are not insignificant, the comparative direct and indirect costs of failing to develop an accurate record of relevant materials (privileged and otherwise), of making substantive production errors or of missing court-imposed deadlines are far greater. Any single change to production parameters can result in significant challenges, but combined changes can challenge even the best-laid plans.

For example, it is not unusual for deadlines or priorities to change. When deadlines and priorities change at the same time, it takes considerable pre-planning and experience to be able to swiftly adjust the level of staffing and the tracking of priority changes to meet the new aggressive production demands without error. The outsourcing partner's experience and proven abilities in this arena cannot be overestimated for purposes of successfully avoiding costly ESI production errors, avoiding production of sensitive and privileged information to the opposing party and precluding serious mistakes that may lead to court-ordered sanctions.

### Ethical Climate

#### *The Issue of Practice of Law*

During the course of an engagement there are the additional ethical concerns of avoiding the unauthorized practice of law, ensuring a quality work product that complies with discovery requests and protecting the company's confidential information. A recent bar opinion has analogized the relationship between counsel and outsourcing partner to that of counsel and paralegal.<sup>3</sup> The counsel-paralegal relationship provides a framework on how to prevent ethical issues when using an outsourcing provider. Another bar opinion has artfully broken the issue down to "...the greater the independence of the non-lawyer in performing functions, the greater the likelihood that the non-lawyer is practicing law."<sup>4</sup> The most recent American Bar Association opinion asserts "the lawyer remains ultimately responsible for rendering competent legal services to the client."<sup>5</sup> All three of these opinions emphasize the need to appropriately supervise the outsourcing provider.

#### *The Challenges of Supervision and Competency*

Before engaging an outsourcing partner, companies should ensure that the partner under consideration has an appropriate procedural framework to comply with existing ethical and legal standards, and in particular, has a framework that simplifies proper supervision of document review work by counsel. This supervision should begin at the outset of an engagement

through counsel's approval of review guidelines, which explicitly detail strategic objectives and company information that should be protected. Consistent communication from outsourcing partner to outside counsel should continue through the life of an engagement via tools such as regularly scheduled status reports, budget reports and well-documented procedures as an audit trail of the process. These reports help to maintain counsel's direct supervision of the work product as well as help to avoid hidden costs. In this respect, one should seek references and contact representative outside counsel to ascertain the form and quality of the supervisory relationship between counsel and the provider.

In addition to inquiries as to supervision, counsel should inquire about competency concerns such as the built-in systems the provider has in place for project training, workflow management, document production and review staff utilization. One should inquire about how effective the outsourcing partner performed in terms of staying within budget, minimizing business disruptions and responding to and addressing company concerns. One should ask how well the outsourcing partner operated under counsel's supervision, how the partner adapted to needs of counsel regarding timelines and special projects and how efficient the partner was overall throughout the engagement. Also one needs to be aware of conflict of interest concerns, and inquire what measures exist to detect potential conflicts, as an experienced provider has procedures in place to address and resolve conflicts, which simplify inside and outside counsels' respective burdens.

### Conclusion

During the current "credit tsunami", companies are asking themselves how they can control their expenses, including litigation costs. Be aware of the current economic, judicial, and ethical climates and seek out sufficient transparency to the process in controlling the cost of electronic discovery. Engaging an experienced outsourcing partner to perform document review can lead to significant savings in this environment and can result in real benefits in avoiding the aforementioned pitfalls of discovery. These benefits, in turn, can increase a company's chances of staying afloat in this challenging and evolving climate.

<sup>1</sup> Testimony of Former Fed Chairman Alan Greenspan before the House Committee on Oversight and Reform, October 22, 2008.

<sup>2</sup> See *Qualcomm v. Broadcom Corp.*, 2007 WL 229641 (S.D. Calif. 2007) (awarding \$8,568,633 in sanctions against Qualcomm for failing to produce 46,000 ESI documents until after trial, sanctioning of six lawyers for discovery violations, and several of Qualcomm's patents held invalid as to the World; *Coleman (Parent) Holdings v. Morgan Stanley & Co.*, No. 03-5045, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005) (adverse inference against Morgan Stanley for spoliation and failure to produce resulted in a \$1.45 billion judgment, reversed on other grounds); *United States v. Philip Morris USA, Inc.*, 327 F. Supp 2d 21 (D.D.C. 2004) (Court imposed \$2.75 million dollar sanction for spoliation).

<sup>3</sup> See *New York City Bar Association Formal Opinion 2006-3*, August 2006.

<sup>4</sup> See *San Diego County Bar Association Ethics Opinion 2007-1*.

<sup>5</sup> *American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 08-451*, August 5, 2008.

Please email the author at [dbarrasso@deloitte.com](mailto:dbarrasso@deloitte.com) with questions about this article.