

Using Technology to Estimate, Control and Manage Litigation Document Review Budgets

White Paper
by
Conrad J. Jacoby, Esq.



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INTRODUCTION

Calculating—and staying within—a realistic budget for a litigation or regulatory document review sometimes seems to 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 typically set before the parties finalize the scope of discovery, which can grow far beyond early estimates. Better understanding the case may require a significant upward adjustment in the initial budget, but such moves on the fly reduce the value of the initial budgetary process and almost always frustrate and anger clients.

Three basic strategies can be used to reduce the risk of litigation budget disputes between legal team and client. First, initial budget estimates can be made more accurate than they often are. Second, the legal team can take steps to increase the likelihood that they will stay within budget. Third, the legal team can use technology to increase the productivity of team members. Ideally, legal teams will use all of these strategies in combination.

INCREASING BUDGET ACCURACY

Neither law school nor real life seems to offer structured classes in how to create an accurate budget for litigation discovery. Instead, the most common practice is to look at the cost of a recently-completed matter and adjust that cost up or down based on the legal team's size estimate of the new document population compared to the one in the completed matter. This approach may have some validity when both disputes involve common facts, legal theories and opposing counsel, but changes in any of these variables can make such budget estimates woefully inaccurate. How, then, should a legal team proceed?

One approach for a legal team is to decide what the maximum discovery budget should be, given the potential legal exposure (or gain) for their client. The exercise should never be considered (or used as) a means of maximizing fees for the legal team; rather, it's an attempt to determine the rational top price for a client to achieve its litigation discovery goals. In addition to reviewing the maximum amount in controversy, the legal team should also analyze the importance of this matter to the client, as expressed by the client's revenue, overall profits, and business objectives.

Clients are almost never angry if litigation costs come in below estimates, so the legal team's analysis should naturally focus on the appropriate upper budgetary limit for these litigation activities. Whatever the result of these calculations, draft budget figures derived through this approach will illustrate the border between rational and irrational costs, based on an objective analysis of the value of the dispute. Deriving this figure independently from historical litigation costs also offers a client additional data to consider in setting an appropriate budget.

Once a maximum discovery budget has been calculated, the legal team should next evaluate exactly how much work can be done for this budget. Is it feasible to review the estimated document collection for this price, based on standard human review metrics? Would the document review remain within budget if the document collection proved to be 50% larger than initially estimated? 100% larger? Reviewing these analytical cases 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 a budget that includes these types of cost analyses permits easy communication of potential litigation costs and offers a perfect opportunity to develop decision trees regarding discovery and case strategy, depending on how accurate preliminary budgets prove when tested against the case as it evolves.

REMAINING WITHIN BUDGET THROUGHOUT THE REVIEW PROCESS

Legal teams can also take steps during the discovery document review process to ensure that their work is as cost-effective as possible and remains within budget. First, of course, litigators should strongly consider whether technology can be used to increase the productivity of human reviewers. For example, in many document review projects, 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.

A more complex but not uncommon challenge to a litigation budget arises when the scope of the document review far exceeds the litigation budget. This imbalance often occurs when one of two conditions takes place: (1) additional, unexpected repositories containing potentially relevant documents and information are found after the scope of discovery is set; or (2) a litigant is compelled to conduct extremely broad searches for potentially relevant evidence, regardless of cost. Faced with either of these scenarios, a client may conclude that its only economically rational decision is to settle the case so it can avoid the crippling costs of complying with these discovery obligations. However, some litigants are successfully using a different approach that permits them to continue moving their case forward even in these difficult circumstances.

It has been a truism for generations that most of the documents exchanged in fact discovery, even if arguably relevant, have no significant probative value. It is equally true that a tiny sliver of the document collection will have great evidentiary value in the dispute, with the remaining documents falling somewhere between these two extremes. Where once these relevance rankings could only be created using time-consuming human review, increasingly sophisticated computer modeling has begun to offer a relatively low-cost approach to ranking documents within a review collection by their

potential importance, not just by a manual determination of whether they are responsive to a given discovery request or other document production obligation.

Prioritizing documents in a review based on objective relevance criteria offers an interesting and non-traditional view into the document collection. Many attorneys already prioritize document review projects based on the importance of the custodian from whom documents and e-mail messages have been collected or based on time periods in which critical activities took place. These are valid criteria, but these approaches cast very large nets that almost always capture large amounts of low-value documents that consume review time without returning much (if any) increase in case understanding.

DEPLOYING TECHNOLOGY

Legal teams are increasingly asked to simultaneously achieve more while charging less and staffing cases as leanly as possible. Because of the large amount of attorney time required to conduct document reviews, client pressure is perhaps stronger during discovery than during any other phase of the case. Technology can greatly extend the productivity and consistency of legal analysis, while also reducing the effort required for many clerical and duplicative tasks that remain an inevitable part of every document review project. Legal teams should strongly consider integrating one or more advanced document review technology solutions into their standard operating procedures, for qualitative as well as budgetary reasons.

First generation electronic document review solutions focused on duplicating a traditional linear review experience (that is, marching through a document collection from start to finish) while reducing the effort to track productivity and the production history of specific documents. With the availability of inexpensive optical character recognition (“OCR”) technology—and the explosive growth of discovery of native electronic files whose text could be searched at even lower cost, keyword search became central to identifying the documents that required review. Still, however, keyword search results usually led to the linear review of the materials identified by this filter, and key documents might not be seen by the document reviewers until very late in—or even after—the close of discovery.

Today, next-generation document review technology addresses that specific issue by using a number of different approaches to prioritize (i.e., rank) documents within a discovery collection by their relevance. These tools may start with the same basic criteria that attorneys have traditionally used to plan a document review, such as keywords or key player information. However, newer technologies then add 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 diverse locations across the document population, the results can be unexpected and highly informative.

Because these new document analysis tools are semi or fully automated, they can be applied even early in a case to help the legal team get some sense of what kinds of responsive documents exist within a client's data repositories as well as their likely volume. The results of such analysis can be orders of magnitude more accurate than traditional sampling paradigms, giving both legal team and client new information critical to the litigation budget process, if not also to their valuation of the case as a whole.

Within the discovery process, reviewing documents based on their descending importance to a case can also save 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 team members have the most time to work and 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 completed. For example, with document ranking, 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 still touches the most critical documents. Similarly, document ranking values can serve as decision 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” 20% of the document collection? Answers will vary, but in at least some cases, the answer may well be, “No.”

Automated document ranking technology should not be seen as 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 important to a dispute. In particular, when a legal dispute changes course through the addition (or subtraction) of claims and defenses, initial calculations as to a document's importance can swiftly 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.

ABOUT EFFICIENTEDD

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Conrad Jacoby is the founder of efficientEDD, a consultancy specializing in electronic discovery and litigation information management issues. A seasoned litigator as well as a technology consultant, Mr. Jacoby writes and lectures extensively on electronic discovery issues. He is a long-standing member of the Sedona Conference Working Group on Electronic Document Retention and Production and is also the co-founder and Chair of the District of Columbia Bar Litigation Section's E-Discovery Committee. Mr. Jacoby can be reached at conrad@efficientEDD.com.

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