



PRACTICE FOCUS: LITIGATION

Outsourcing Document Review Has Its Risks

By Edwin Schklar and Maggie Heim



LITIGATION IS EXPENSIVE. While it makes sense to pursue litigation efficiently and to save on costs when possible, you must not lose sight of your ultimate goal: to win or to achieve a great settlement for your client. A great settlement will rarely be achieved unless you are on the right path to winning your case.

To win, you must get the evidence to prove your case. In business litigation, documents are a critical part of the evidence. Someone must review the documents. Your attorneys cannot use evidence to your advantage if they do not know it exists.

The trend in large litigation has been to outsource document review to companies with teams of document review “professionals,” to contract attorneys or overseas. Lately, the emergence of artificial intelligence has raised hopes of eliminating humans altogether in document review. The point of out-sourcing document review is to save money. Outsourcing document review might save money, because the people reviewing the documents are paid much lower wages than the hourly rates your business pays its attorneys, or, with artificial intelligence, the need for people might be completely eliminated or reduced.

Despite the initial cost savings, outsourcing document review is usually not the best option for litigation. One consequence of outsourcing document review is that it might defeat your ultimate goal of winning or achieving a great settlement. Another consequence is that it might cost your business more money in the end. How can that be?

First, having a small team of attorneys who thoroughly know your case is extremely advantageous (provided you have the right attorneys). Continuity is important. The attorneys who review the documents should be the same attorneys who draft the pleadings, prepare discovery requests, deal with motions to dismiss and for summary judgment, handle mediation and ultimately try the case.

Persons hired solely for document review will never understand the case well enough to find every gem in favor of, or bombshell against, your side. Artificial intelligence is not yet reliable enough to find the relevant documents or to eliminate duplicates. What you do not know can hurt you. The case you initially believe you have might not be the reality. What appears on the surface to be an innocent mistake might actually be fraud, or vice versa. What appears to be a legitimate document might actually be a forgery. Claims with estimated damages in the six-figure range may turn into claims worth millions of dollars with the right documents. People make all manner of admissions in writing, whether in letters, emails, text messages or social media. Smoking guns do not always have the key words you predicted.

Second, your attorneys cannot know whether you have received all documents requested during discovery unless they read them. Not reviewing the documents defeats the purpose of requesting them in the first place. How do you know whether all email attachments were produced unless you read the emails to see whether they refer to attachments? How do you know whether you have all of the docu-

ments incorporated into a contract by reference, unless you read the contract? Will a contract attorney notice that another party scanned in only the front page of documents that originally had information on both the front and back of each page? An intelligent, dedicated and well-trained paralegal may take the first shot at reviewing documents to find missing pages and attachments. However, not everything that is missing will be so obvious. To intelligently assess what the other side is hiding, the same attorney(s) who drafted the pleadings and document requests should read the documents.

Third, without the evidence to calculate your damages, you cannot know what result would constitute winning the case or achieving an excellent settlement. Your attorneys or expert witness who will calculate damages, such as a forensic accountant, will need to study the evidence.

Fourth, litigation, like the game of chess, is best played by attorneys who can anticipate their opponent’s every move and plan accordingly. Litigation is often full of surprises, some of which can be very expensive. Since attorneys cannot read minds, the next best option is a small team of attorneys who thoroughly understand the evidence and can anticipate what arguments their opponents might make, what motions might be filed and what questions might be asked at depositions and trial. Such considerations will affect your case strategy.

Even when surprises occur, an attorney who knows where to find the evidence that refutes your opponent’s arguments is invaluable.

Fifth, thorough document review done by the attorneys who know your case can save you money. It eliminates duplication of effort, because multiple people will not need to review the same documents. It can eliminate the need to take certain depositions, which tend to be more expensive than document review. It can increase your likelihood of settling the case with a better presentation at a mediation. It can yield the evidence necessary for the court to dispose of the case on summary judgment. It can prove that the recoverable damages are much higher or lower than originally anticipated or that your company has a great claim for, or a great defense against, attorneys’ fees and punitive damages.

Sixth, do not trust an uninformed document team in a foreign country with your attorney-client privilege.

How can your company mitigate its document review costs? Communication with your attorneys is important. Every case is different and requires its own strategy. Well-drafted document requests might avert the production of millions of worthless documents. A paralegal or associate can tackle the first review of documents to determine what might be missing, to eliminate duplicates and to reorganize documents that were shuffled out of order. Key personnel at your company who are fact witnesses can review the documents and communicate to your attorneys what is important and what is meaningless to narrow the scope of their review. Nevertheless, there is no substitute for quality work. Cutting corners can hurt your case, especially when the stakes are high. Outsource document review at your own peril.



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