Utilizing Contract Attorneys for Document Review

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INTRODUCTION

As litigation data volumes expand, and the scope and costs associated with discovery continue to escalate, the use of contract attorneys is a popular option for reviewing documents in an efficient and cost-effective manner. Employing contract attorneys, however, presents a variety of ethical, practical, and technological challenges. By following best practices for utilizing contract attorneys for document review, law firms and corporate legal departments can avoid potential pitfalls and successfully utilize contract attorneys.

ETHICAL ISSUES

A lawyer is required to adhere to various ethical rules when outsourcing work to contract attorneys. These include verifying: that the lawyer's representation is competent; that any non-lawyers are properly managed; and that the contract attorneys are authorized to practice in the jurisdiction in which they are working. *See* ABA Model Rules 1.1 (Competence), 5.3 (Responsibilities Regarding Non-Lawyer Assistance), and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). The ABA recently updated some of the comments to these Model Rules to clarify lawyers' ethical obligations in light of increased use of legal outsourcing. *See* American Bar Association House of Delegates Resolution and Report 105C, available at http://www.abanow.org/2012/06/2012am105c/.

In addition to these rules, courts have held that outsourcing tasks to e-discovery vendors does not relieve clients and law firms of their e-discovery obligations and their ongoing duty to supervise vendors. For example, the court in *In re Seroquel Prods. Liab. Litig.* held that the "[u]ltimate responsibility for ensuring preservation, collection, processing, and production of electronically stored information rests with the party and its counsel, not with the nonparty consultant or vendor." 244 F.R.D. 650, n.14 (D. Fla. 2007).

Local jurisdictions may have additional rules which impact the use of contract attorneys. For example, the local rules in Washington, DC have a significant impact on the delegation of contract attorney staffing and management functions to document review or e-discovery vendors. While a document review or e-discovery vendor may handle the administrative aspects of hiring/supervising attorneys, a member of the DC bar with an attorney-client relationship with the client must make the final selection of contract attorneys on the project. Moreover, the document review or e-discovery vendor cannot offer legal advice, even if one of their members is a member of the DC bar. Given these strictures and the necessity of safeguarding the attorney/client relationship, it is important to maintain the requisite supervision and communication among all members of the group performing review.

STAFFING OF REVIEWERS

Whether a law firm or corporate legal department, or a document review or e-discovery vendor, is handling the staffing of reviewers on a matter, the review-team selection is one of the more important aspects of the document review process. Creating a methodology for staffing, and adhering to the methodology in every matter, will result in the creation of excellent review teams. This methodology can be encapsulated in three different phases: identifying quality reviewers; verifying credentials; and obtaining reviewers with specialized skills.

Identifying Quality Reviewers

While there are many contract attorneys available in most large cities in the United States, it is often difficult to discern the quality document reviewers from the large number of reviewers available. Critical in this endeavor is the analysis of the candidates' resumes and the interview of the candidates. A quality reviewer will generally have a mix of prior document review experience, as well as more traditional law firm or corporate experience. This background helps ensure the reviewer will have both a review perspective and a practice perspective to bring to bear on the project.

While a resume can give the outlines of a reviewer's experience, the interview is where less obvious qualities can be discerned. Factors to consider in this process include whether the reviewer is eager to join the review, whether they appear likely to stay on the review until completion, and whether they have the background and training to handle the complexities of a given review.

Once a review is underway, the reviewers' performance should be gauged and documented. Reviewers who demonstrate excellence should be utilized on subse-

quent projects if possible, and those reviewers should be incentivized to become regular periodic employees through project completion bonuses, opportunities to assume greater responsibility for review team management, and fair, transparent and dignified treatment. Ideally, these reviewers become the pool from which future document review team members are drawn.

Verifying Credentials

It is always important to verify that the reviewers' credentials are accurate. As appropriate, it is useful to verify education and prior employment, and to check references. Depending on the matter, criminal background checks, credit checks and drug and alcohol testing can also be utilized.

Obtaining Reviewers with Specialized Skills

A matter will often call for reviewers with specialized skills, including knowledge of the hard sciences or facility with foreign languages. Finding reviewers with these skills, especially admitted attorneys, can sometimes be challenging, as they are often skills not associated with attorneys. On an initial project, these types of reviewers can be obtained through normal recruiting channels, but this is often a time-consuming process, because the decision-maker must cull through many candidates who will not have the requisite skills. Once the initial searching process has been completed, however, it is crucial to retain records of candidates, including those candidates who are not necessarily hired, for future projects. Having this information in a searchable database will aid in finding specialized candidates quickly and efficiently for future projects.

THE REVIEW PROCESS

Once the reviewer staffing process is complete, the most critical phase of the project, the review process itself, begins. In order to have an effective and defensible review process, an ordered and defined review procedure should be utilized. There are three phases to be addressed in the review process: preparation; training; and review and quality control.

Preparation

During preparation, the review project manager works with outside counsel and the client to understand the nature and scope of the project, finalize staffing and analytical workflow, and develop training materials. Outside counsel and/or the client in-house counsel, with assistance from the project manager, will arrange to create or compile training documents utilizing documentation provided by the project manager. Also important is communication with the e-discovery vendor, or the internal group within the law firm or corporate legal department, that is hosting the document for review, to ensure that the database is set up properly, review channels are created, and reviewers are added to the system as needed.

Most document reviews are now electronic in nature, and an early, efficient setup of the review tool before the review begins will avoid later headaches. The review coding panel seen by the reviewers should be structured so that it captures the needed information but is not overly complex or cumbersome. The more options presented in the coding panel, the more time each individual document will take for review, which will impact the speed and efficiency of the review.

Training

A standardized and well-planned training process is a key element in ensuring a successful review project. Counsel should train the reviewers, either remotely or in person, by describing the background of the matter and giving instructions on analyzing and coding the documents, utilizing sample documents to the greatest extent possible. Contract reviewers should be encouraged to ask questions they have on the information explained to them or provided in the review materials. Written training materials should include: the background of the matter; guidelines for making analytical decisions; supporting documentation (*i.e.*, attorney list, glossary, search terms, key player/custodian list, organizational charts and acronym list); and hard copies of sample documents, if available.

Special attention should be focused on privilege training. Privilege fundamentals should be outlined, and details should be provided regarding any specific privilege situations reviewers are likely to encounter in the documents, such as communications regarding lawyers' involvement in lobbying activities or bank examiner's privilege. If reviewers will be assisting with the creation of a privilege log, they should be given an overview of the privilege log process.

Review and Quality Control

Once training has been completed, the team will proceed to actual review. Reviewers should be split into teams of manageable size with a Quality Control ("QC") reviewer monitoring the quality and productivity of each team. The QC reviewer is also responsible for fielding questions that reviewers may have regarding the technical or substantive aspects of the review, and escalating any issues that they are unable to resolve to the project manager. Generally, review attorneys may commit two types of errors: (1) analytical defects (*i.e.*, incorrect analysis of a document; for example, determining that a document meets the criteria of a particular issue code when, in fact, it does not); and (2) coding defects (*i.e.*, properly analyzing a document, but then incorrectly filling out the database template; for example, correctly determining that a document is "non-responsive," but then inadvertently assigning it to an incorrect substantive issue code). The QC process should check for both of these potential defects. For analytical defects, the QC process will often entail (after any initial heavy QC process) a daily review of up to 10% of the work generated by each attorney the previous day. In addition, targeted searches across the population as a whole will often be conducted to address trending issues identified in daily Quality Control activities. For potential coding defects, the entire population will often be inspected using search queries designed to identify particular coding defects.

QC review should generally be performed while the review is taking place, to ensure that any errors are caught before they become systemic. Daily reports should be generated and reviewed by the project manager and appropriate follow-up action, including any necessary retraining, will be taken based on the results of that review. The daily reports will often contain the following information: (1) total review hours logged by each review attorney; (2) total documents/pages reviewed by each review attorney; (3) average review speed per review attorney; (4) number of documents subject to QC for each review attorney; (5) number of documents subject to QC that had zero defects; and (6) for documents containing QC defects, a breakdown by defect type for each reviewer. The daily reports should generally be reviewed by the project manager to ensure that the project is progressing in a timely manner, and the daily reports can be submitted to client if requested.

The project manager may want to provide outside counsel a sampling of the population of documents coded by the review team to allow them to perform a secondary review. If that happens, outside counsel should provide the project manager with timely feedback as a result of secondary review.

Finally, integration among the client, outside counsel, and project manager is critical to the overall success of the document review project. Ongoing collaboration during the actual review period between the client and the project manager, including regularly scheduled conference calls to discuss review activity and a designated point of contact with whom review issues can be raised on a regular basis, *e.g.*, by email, is necessary.

CONCLUSION

Law firms and corporate legal departments need an efficient, cost-effective and defensible method to review large volumes of data during discovery. Utilizing contract attorneys pursuant to the standard, documented and thorough procedures described in this article will help ensure that pitfalls are avoided and document review projects are successful.

ABOUT THE AUTHOR

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Ashish Prasad is widely regarded as among the leading experts on discovery in the United States. He has served, among other things, as Litigation Partner, Founder, and Chair of the Mayer Brown LLP Electronic Discovery and Records Management Group, Executive Editor of The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (2004), Co-Editor in Chief of the Practising Law Institute treatise Electronic Discovery Deskbook: Law and Practice (2009), Adjunct Professor of Law at Northwestern University Law School, Chair of the Defense Research Institute Electronic Discovery Committee, and Chair of the Advisory Council of the National South Asian Bar Association. Ashish has authored over two dozen articles and given over a hundred continuing legal education seminars on topics of electronic discovery before judges, practicing lawyers, and industry groups in the United States, Europe, and Asia. Ashish is a graduate of the University of Chicago Law School, where he was a member of the Law Review, and the

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