

# Collaboration: A Requirement For Successful E-Discovery

**Manfred Gabriel**

**FTI CONSULTING, INC.**

After years at a major law firm working on large discovery matters, I appreciate that there is more to e-discovery and document review than sexy technology. The legal industry spends a great deal of time (and ink) discussing how technology is transforming e-discovery. But there is a more immediate way of improving document-review projects: after all, a breakdown in collaboration can easily turn e-discovery into a nightmare. Poor collaboration will lead to short-sighted early decision making, re-collection or re-review of data, inefficient workflows, and a myriad of other problems that raise costs and potentially expose the client and counsel to risk.

One of the largest but least understood factors increasing the cost of e-discovery is the proliferation of providers, who each only take responsibility for a small piece of the project and purport to save the client money, when really costs are merely being shifted, or hidden costs created.<sup>1</sup> The answer is integrated document review (or IDR), offered by providers who take responsibility for the life cycle of the project, from data collection or processing, through hosting, document review, and production.

From a corporation's perspective, using one IDR provider for technology and document review, in addition to a law firm as outside counsel, presents the optimal balance between specialization and streamlining. The law firm can focus on legal strategy, and the IDR provider can produce greater efficiencies in legal review. The law firm must be involved and accountable to the client, but optimal cooperation between counsel and an IDR provider will maximize the value of the counsel's time. And when an IDR provider uses its own legal review technology, some additional, and perhaps less apparent, benefits to corporate clients become available. IDR providers that invest heavily in research and development for their review software ensure that clients will continue to benefit from innovation and advanced features. And with hosted offerings, law firms and corporate clients can access the data from their desks with a simple login. This provides transparency to the process and enables the full legal team to review relevant materials as they are tagged, and without delay.

But, of course, counsel and the IDR provider must collaborate effectively to mitigate risk and contain cost. Software alone cannot provide the panacea to bring e-discovery costs under control, despite

*Manfred Gabriel is a Managing Director in the Technology business segment of FTI Consulting, Inc., and is based in New York City. Mr. Gabriel is an expert on e-discovery processes and tools, and helps lead FTI's all-in-one legal document review service offering, Acuity. Before joining FTI Consulting, Mr. Gabriel practiced in the Antitrust & Competition Practice Group of Latham & Watkins, LLP's litigation department. Mr. Gabriel holds a JD from Columbia University School of Law. Views expressed herein are those of the author alone and do not necessarily reflect the views of FTI Consulting, Inc., or its other professionals.*

promising advances in review technology. The most successful strategy for controlling cost is to tackle the problem from many sides at once, using most or all of these strategies in e-discovery and document review:

- Smart assignment creation;
- Culling not just at the beginning of a project, but during review;
- Search iteration and validation;
- Review prioritization;
- Conceptual clustering of documents for review;
- Computer-provided coding suggestions to guide reviewers;
- Efficient workflow design;
- Continual process improvement;
- Highly trained review attorneys; and
- Multilayered quality control.

All of these approaches, if implemented correctly, make each e-discovery project more complex. This trend toward differentiated workflows and staged uses of technology means two things in practice. First of all, corporations are now looking for an IDR provider who can manage the entire process and provide the benefit of modern, sophisticated workflows. Secondly, collaboration between IDR providers and outside counsel is at a premium. In order to gain efficiencies and cost savings that go beyond unrealistic hopes for Boolean searches, counsel and integrated providers need to work together and enable each other to fulfill their responsibilities to their mutual corporate client.

This kind of collaboration between an integrated service provider and outside counsel offers several benefits to the corporate client: the elimination of redundancies, the optimal amount of quality control, the continual improvement of substantive review criteria, and defensibility of the process. The biggest benefit is that the law firm enables the discovery provider to maximize the value of its work to the client, and, conversely, a well-integrated and effective service provider will maximize the value of the time the law firm spends on its client's discovery project. For example, if the client regards the highest value work that outside counsel can provide as strategic advice on whether or how to pursue the case, then an IDR provider adds the most value by making available to the law firm the information needed to advise the client as soon as possible.

This kind of effective collaboration between outside counsel and integrated e-discovery provider is not easy to achieve.

Consider that most document reviews combine the three functions of document review in one step. These three functions are the disposition of the documents (for production to the other side), the protection of privileged or confidential information, and the development of the facts for strategic decisions, depositions and trial. Counsel's desire to learn as much about the documents as possible may add considerable effort to the review with little or no benefit if the workflow is not set up correctly. A sophisticated discovery provider can help if collaboration with counsel means that the provider understands counsel's strategic goal. Issue codes are a common culprit; they are meant to make it eas-



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ier to find documents relating to specific issues in the case. But given the size of most cases today, issue codes might be applied to tens or hundreds of thousands of documents, which has the same practical effect as if they had not been used at all. Such broad codes make it no easier to develop the facts or to help prepare for depositions, with the added detriment that reviewers spend valuable time to do this.

It is the responsibility of counsel to share with the IDR provider the high-level goals in the matter, and it is the service provider's responsibility to enable counsel to fulfill its role most effectively. This requires collaboration built on several layers of transparency and information exchange.

The first layer of the next information exchange concerns the hard outline of the case. IDR providers should make available to counsel a full suite of reports showing the progress of the matter, the coding, as well as specific review details. These can include the percentage of privileged documents for each custodian—often an important consideration for counsel. These reports should be easily available, updated frequently and cover everything from data intake processing through culling, review, and production. A lack of information about the data and review progress will frustrate counsel intensely.

The second layer of transparency required for optimal collaboration between counsel and the IDR provider concerns the access to the data. Counsel should have access to the data at all times, even if counsel's attorneys are not contributing significantly to the actual review of documents. Counsel should be able to run searches and access analytics that show the efficacy of search terms. Counsel should also have access to specific tools designed to discover the most highly relevant documents in the case. In other words, even if the client decides not to use outside counsel's associates for document review, the integrated discovery provider should give counsel as much or greater transparency into the review. A recommended practice is to have an associate participate in the review at the review location.

The third and by far the most important aspect of transparency and information exchange between counsel and the integrated discovery provider concerns the substance of the case and the review instructions. It goes without saying that counsel and IDR provider must collaborate to draw up review instructions and provide training to the reviewers. Much more can be done and should be done to improve review quality and speed through collaboration between counsel and service provider.

In the past ten years, the focus in the discovery space has been almost exclusively on making review technology smarter. Little or no attention has been paid to making document reviewers smarter. To do so, counsel and service provider must work together to give reviewers the most relevant information and answers they need at the right time in the right manner. To achieve this level of substantive collaboration, it is necessary to define a set of reference documents. These reference documents are drawn from the actual documents in the case, and they are coded and quality-controlled by counsel, ideally by attorneys sufficiently senior to have a broad view of the case, the law and what is at stake for the client.

The resultant set of coded reference documents represents a rich set of review instructions for the reviewers. The IDR provider's responsibility is to select the most impactful reference documents, typically 200 to 400 documents that counsel has already designated as important, early in the case. Counsel benefits from taking a hard look at a small slice of documents, and the impact on review instructions and workflow is immediate. Most importantly, however, the reference documents are placed in the review assignments to guide the reviewers. Using advanced concept clustering technology, similar documents are displayed together in an interface permitting visual analytics of the assignment and substance of the documents. The effect is that referenced documents guide reviewers to make efficient and consistent review decisions. If a reviewer is unclear how a document should be coded, reading a conceptually related reference document and observing how counsel coded that reference will answer the reviewer's question. This approach avoids the common problem of upfront training: providing reviewers with too much information out of context that they cannot digest or retain efficiently.

The document reviewers will soon be the people who know the most about the documents. An effective collaboration between IDR provider and counsel therefore ensures that the knowledge gained by document reviewers is made available in an efficient manner to counsel. Again, referenced documents provide an efficient workflow. As they review materials, reviewers suggest new reference documents, comment on reference documents that they don't agree with or point out inconsistencies in reference documents as soon as hot or significant documents are available. These are then added to the reference set of documents so that counsel will continually and immediately have access to all highly relevant documents without being overwhelmed by the volume of documents produced by broad issue coding.

The effect of this workflow is to deepen and continually improve the training of the reviewers, making them smarter and the review faster, better and more cost-effective. At the same time, collaboration at this level ensures that counsel receives the most relevant or "hot" documents daily, with no delay. Counsel and the IDR provider will refine and evolve the instructions as the case progresses, using a continual, substantive feedback loop, which simultaneously improves review quality and helps counsel develop the case.

Effective collaboration comes down to communication and trust. It sounds simple, and, as usual, the devil is in the details. The promise of a dynamic, three-way partnership between client, outside counsel and integrated document review provider makes putting thought and effort into optimal collaboration worth it. Cost savings are achievable, along with full transparency, substantive and productive exchanges of information, as well as increased efficiency and quality in document review.

<sup>1</sup> *The End of Piecemealing: Improving Upon All-in-One Document Review*, white paper by Manfred Gabriel, available at <http://www.ftitechnology.com/Resource-Center/White-Papers/End-of-Piecemealing-Topic-2009.aspx>.

Please email the author at [manfred.gabriel@fticonsulting.com](mailto:manfred.gabriel@fticonsulting.com) with questions about this article.