

THE END OF PIECEMEALING: IMPROVING ALL-IN-ONE DOCUMENT REVIEW OFFERINGS

By FTI Technology

All-in-one offerings provide an attractive solution for outsourcing legal review, but many of the offerings in the market come with hidden costs and challenges. They provide an incomplete response to the risks and costs of piecemeal approaches. Integrated Document Review offerings can overcome these shortcomings if they fulfill certain requirements. When choosing an all-in-one, integrated document review provider, the focus should be on reducing the total cost of discovery while increasing defensibility and reducing risk.

This paper discusses the shortcomings of a piecemeal approach compared to an integrated approach, and how all-in-one offerings may still fall short. It explains the essential features of effective integrated approaches to e-discovery and document review, and lays out the specific features companies should consider in selecting an all-in-one, integrated document review provider.

THE CHALLENGE OF DOCUMENT REVIEW

The crux of the e-discovery process is to weed out irrelevant data, code documents efficiently, protect privileged and confidential data, and extract and understand the important information contained in the documents. Corporations create and store more data every year, and finding methods to handle e-discovery in a cost-effective manner is increasingly difficult.

Until 2006, when the Federal Rules of Civil Procedure (FRCP) were amended, many corporations simply deferred to a law firm's recommendations on how to collect, review and produce relevant information. Now a large and growing number of corporations exert direct control over e-discovery and its long-term legal and financial implications. In addition, while e-discovery costs continue to rise, the economic downturn has forced corporations to search out greater efficiencies across the board. As a result, corporations have begun bringing e-discovery tools and processes in-house. Instead of letting a law firm or legal service provider decide how a legal review should be handled, corporations have begun to orchestrate the review as a controllable business process.

Today, one popular approach is for corporations to look across the nine EDM steps and select the cheapest tool or service for each phase or step in each phase. This strategy is motivated by the hope that reducing the cost of each step will reduce overall costs without negatively impacting quality. But local optimization does not usually result in greater efficiency, especially for processes as complicated as e-discovery and document review. Instead, piecemealing often creates inefficiencies and additional expense. The approach is analogous to seeking the best price on a new car by purchasing each part of the automobile separately from the cheapest supplier—no one is accountable for the quality of the finished automobile, and the result, even if it will run, is more expensive. Given the complexity of e-discovery, the legal sensitivity of the process and the lack of standards or interoperability between tools, many corporations have actually found a piecemeal approach using multiple vendors to be harder to manage and defend legally. It also can be just as expensive, if not more so, than the traditional model. Defensibility depends on the chain of custody and integrity of the data, which are harder to maintain as the number of handoffs increases. And as the number of separate vendors involved grows, the effort and time required to manage the process grow: more relationships are involved, and the chances of miscommunication, bottlenecks, and duplication of effort multiply.

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The effects, including increased cost, inefficiency and delay, can become clear when the situation of e-discovery vendors and review providers is considered, particularly when they are forced to compete on price for a small and discrete step in the EDRM. They have little or no incentive to consider the overall cost of e-discovery, process integration with the law firm or other vendors, or minimizing data incompatibility and handoff costs.

The apparent attractiveness of choosing the best deal for each task during e-discovery is thus off-set by the real costs and risks of piecemealing. The preferable response to the challenge of rising costs in a complex system is an all-in-one offering, in which the company buys not a series of inputs, but a defensible end result, where price can be predicted and quality measured. Such a systems approach to the complexity of e-discovery and document review is both obvious and radical.

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GROWTH OF ALL-IN-ONE OFFERINGS

Over the past few years, a number of providers have begun bundling various services to help improve the e-discovery process for corporations. All-in-one offerings are handled by a single provider, under one contract, and can cover all EDRM steps from identification through production. In other instances, some but not all portions of the process are bundled. The key characteristic of these offerings is that review capability is combined with technology products and services such as data processing, hosting, and productions or exports.

Done right, an all-in-one approach generates numerous benefits to reduce the cost and frustration of e-discovery and document review by giving a service provider an incentive to reduce cost (rather than to shift it) and to control enough steps in the process to eliminate inefficiencies. Many all-in-one offerings can be purchased at a flat rate per document reviewed or per gigabyte and ensure greater cost control and predictability. In addition, by centralizing a sufficient number of EDRM steps with one provider, in-house attorneys and outside counsel can spend more time on case strategy and less time on project and vendor management.

Despite their promise, there are a number of flaws in existing all-in-one offerings, demanding diligence in selecting a provider. It takes much more than simply adding temporary staff attorney reviewers to a review platform to be successful. There are three key reasons why the current all-in-one offerings are not working:

All-in-one providers frequently seek to replace law firms, not integrate with them.

The pitch from service providers is often this: select us to conduct review instead of your law firm, and you'll see immediate cost benefits. From the very beginning, this creates an adversarial relationship between the law firm and provider when they should be working collaboratively to structure the review, assess and circulate relevant documents, and understand the facts of the case from the data set. In-house counsel may respond by managing the service provider themselves, but a bottleneck is created between the law firm and document review team, frequently causing delays and friction. The result is a worried outside counsel, uncomfortable with the process of document review, and an in-house team attempting to determine if outside counsel is “crying wolf” or facing legitimate obstacles to prosecuting or defending the case.

Unless the review team is closely integrated with counsel, divorcing the review team from the litigation team makes it harder effectively to use documents for depositions, to establish fact-based arguments in the case, or to support substantive submissions like briefs and whitepapers.

Cost has become a shell game.

What makes a document review? All-in-one review providers may leave significant work yet to be done, and thereby re-create the problem of cost-shifting. An all-in-one offering must increase the efficiency and integration between all parties (counsel, the review team, and the in-house legal team). Otherwise, a time-intensive and round-about workflow is created, and law firms may have to re-review documents so that they understand them. It is, after all, rarely sufficient simply to code documents for production. Counsel must know whether arguments are borne out by the facts and documents. In effect, review costs may double; yet, the all-in-one provider can point to the law firm's additional efforts as the cause of higher costs. Again, clients may be getting the best unit prices for review services, but if the incentives are not aligned, the provider and law firm may not be on the same page. Total costs will be both higher and unpredictable.

They are renters, not owners, of the review software.

Some popular review software has drawbacks that have nothing to do with its feature set. For instance, the review provider depends upon the software company to continually innovate and develop the toolset for the specialized function of legal document review. If the review service provider has insight on what new features should be added, it has to compete with other customers for inclusion of certain features into future versions of the software.

In addition, if a service provider does not own its review software, but licenses it, the provider is often contractually restricted in how the software is used. For example, a review service provider may not be able to provide clients and counsel with real-time access to the platform it uses during the "first-pass" review. This may mean that the counsel firm will have to conduct its own expensive review after the review provider has finished, a cost hardly justified by the label "first-pass" review.

INTEGRATED DOCUMENT REVIEW

Given the potential shortcomings of all-in-one offerings, a smarter approach is needed to eliminate bottlenecks and inefficiencies caused by piecemealing. What is required is not just the bundling of e-discovery services, but their integration. Integrated Document Review, or IDR, is a relatively new concept within the e-discovery and document review industries. IDR is designed to align incentives correctly, to maximize the value of outside counsel's work, and to create systemic efficiencies that overcome the limitations of piecemeal approaches, where costs are shifted but not reduced.

Integrated Document Review offerings are based on these fundamental principles:

ONE-STOP SHOP

IDR includes the core steps needed in any basic document review, from processing through production. In addition, the IDR provider should offer all the additional steps that may or may not be required for a particular case such as data identification, global data collection, structured data analysis, and data reuse, all backed by defensibility testimony. The breadth of such an offering means that inefficiencies from hand-offs and "too many cooks" are wrung out of the e-discovery and document review process.

PREDICTABLE PER-UNIT PRICE

IDR offerings should be priced to enable clients to predict not only the total cost of document discovery near the beginning of the process, but as importantly, assure that the provider's incentives are aligned with the company's. Time-intensive and unpredictable tasks, such as redactions, will typically not be included in the per-unit price. Ancillary options, such as collections or structured data analysis, may be included or charged separately.

Two models have evolved. Under either model, the price is based upon assumptions about the scope and complexity of the review.

- Through a per-gigabyte model, corporations pay a flat rate determined by the number of gigabytes relevant in a matter for everything from collection or processing through to production. The per-gigabyte price is often based on "inbound" data, or the collected volumes. A tension exists here between the client's desire to pre-cull the data at the time of collection (a strategy that saves cost but may entail legal risks of underproduction and spoliation), and the safer approach of culling only after data has been processed in order to preserve all collected documents. To understand and compare per-gigabyte models, the underlying assumptions for survival after processing, de-duplication, and culling should be exposed.
- With a per-document pricing model, clients pay a flat fee for each document reviewed after data is collected and processed. This "outbound" model means that with a previous agreement on processing and culling strategies, the client is not charged for the volume of data processed or hosted. Before the data is collected and processed, however, the number of documents to be reviewed can only be estimated. Per-document prices are therefore most predictable once documents count is known.

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As a result of the predictable, all-in price, the IDR provider takes responsibility for making the whole complicated process efficient, rather than externalizing cost to other parts of the process.

IDR is an all-in-one offering, and clients should not face surprise fees or need to contract with other providers or firms to clean up what the original review missed. The premise of IDR offerings is that one price will cover all essential steps in the e-discovery and review process. The risk of longer review times is to some extent shifted from client to the IDR provider, who over a series of cases will gain the experience necessary to predict review effort and duration. The provider will also have an incentive to process and review as efficiently as possible, since (unlike the piecemealing model), the cost of inefficiency is not shifted to the client. It is important to note that efficiency is not simply equivalent to speed—speed can be increased by degrading quality; efficiency means that review is performed as fast as possible at the desired, demonstrable quality level. Apart from potential internal efficiencies, in-house counsel or the law firm will have to manage fewer vendors, and will have a single point of accountability.

An additional source of efficiency lies in the institutional knowledge an IDR provider will gain when employed for several matters. The provider will have understanding of the client's IT systems, collection issues or retention policies, as well as knowing the custodians, documents, and factors affecting privilege calls, such as who the inside and outside counsel are or what types of privileged documents exist.

THREE DIMENSIONS OF EFFECTIVE INTEGRATION

The essential difference between flawed all-in-one offerings and those that work is the level of integration. Under the ideal IDR approach, the integration of review services and technology should have three dimensions: (1) two or more vendors are integrated into one accountable provider; (2) counsel's role and substantive guidance is integrated with the entire review process; and (3) review technology and the review processes/methodologies are integrated.

Integrate two or more providers into one accountable provider

To overcome the risks and costs of piecemealing, IDR provides organizational integration. Clients only have to manage one contract and one integrated provider, and the accountability is with one provider rather than many. There is no finger-pointing. Less time is spent on contract negotiations and vendor management, and the legal team is freed up to focus on their core concerns. Project management for e-discovery and document review is the core competency of the IDR provider. This integration eliminates the competition between various service providers, technology companies and law firms. The shell game of hiding costs or shifting them to another EDRM step is eliminated.

Integrate and collaborate with outside counsel throughout the entire process

In IDR offerings, from the very beginning, the relationship with the law firms should be treated as a partnership. The challenge lies in bringing counsel's substantive guidance and strategic direction directly into the review. This cannot happen by lip service alone; it requires integrating workflows that go beyond simple training of review attorneys and a technological solution. To be effective, the IDR offering must achieve technological integration of outside counsel and collaborative workflows to embed substantive guidance from the law firm throughout the review. This collaboration must work in two directions: counsel must provide substantive guidance and must receive effective feedback of the review findings to permit fact-based strategic decision-making.



Traditionally, counsel provide substantive guidance through memoranda summarizing the case and the request underlying the review (whether it is a complaint, discovery request, or investigative demand), and perhaps a short orientation for review attorneys at the beginning of a review. But this is not all that can or should be done. One innovative approach is to have counsel participate in the creation of a "reference set" of documents at the beginning of the review which demonstrates and incorporates counsel's coding expectations for responsive, hot, or privileged documents. The reference set can be leveraged through integration in the review assignments or through predictive coding technology. The reference set guides reviewers as they work through the documents, improving accuracy and speed of review. It should be refined and expanded throughout the review.

Integration with outside counsel also requires meaningful and ongoing feedback. Throughout the process, as "hot" and other relevant documents surface, the law firm should receive immediate access to the information in order to develop and refine case strategies, rather than having to wait until the end of a "first pass" review. As the review progresses, the integration with the law firm allows the provider to modify the reference set and review instructions, minimizing and potentially eliminating the need for re-review and additional costs.

Integrate review technology and the review process

Though it may seem counter-intuitive, an IDR provider should not be “tool agnostic.” Advanced legal review tools, such as those with visualization, can dramatically reduce the overall cost of legal review. Also, technology should leverage counsel’s substantive guidance more than a binder with review instructions can. Reference-set documents embedded within the review tool will guide the reviewers better than notes scribbled in the margins of a training memo. Speed and consistency will improve. As the sophistication of the review tools used by an IDR provider increases, the cost benefits and quality advantages of the integrated solution also increase. And when an IDR provider uses their own legal review technology, some additional, and perhaps less apparent, benefits to corporate clients become available, such as:

- 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.
- 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.

As data volumes grow, predictive coding—the propagation of coding decisions to uncoded documents—is increasingly viewed as a probable and necessary option for cost-effective review of large data sets. The efficiency and defensibility of predictive coding has yet to be proven, however. New software features available help bridge a gap between the current human review process and tomorrow’s predictive coding. These features preserve human review decisions by guiding decisions through concept-clustering of documents and the integration of reference documents into the review. Review decisions become more consistent and faster, without relinquishing control over the substantive decisions for each document.

In addition to these key strengths of a correctly integrated offering, additional benefits to the corporation are attainable.

SAFE AND DEFENSIBLE PROCESS

A proven track record is important. IDR providers should have considerable experience in managing legal review for thousands of matters, from large, multi-year and multi-district litigation to smaller, internal investigations and regulatory requests handled in a matter of days. With this experience, the provider develops best practices in a process that includes quality control, transparent integration of substantive guidance from counsel, and the ability to testify to the integrity of the process.

STATISTICAL SAMPLING

The quality of document review provided should be ratified not only through training, technological integration of substantive guidance and careful quality-assurance, but also through statistical validation of the document review. Statistical sampling has recently been endorsed by the Sedona Conferences’ Commentary on Achieving Quality in the E-Discovery Process:

Statistical sampling can ... be used to measure the probable error rate for a project, a key custodian’s documents, or even for a specific document reviewer. An acceptable error rate can be defined and document groups with error rates above this threshold can be re-reviewed and re-tested until the results meet or exceed the quality standard.¹

The IDR model makes statistical sampling more practically achievable, since review technology and review processes—including quality control—are integrated. IDR providers should have both the ability to put in place an effective sampling methodology and the experts to monitor the processes and testify to their integrity. The larger point here is the importance of review quality: the provider should have the incentive to work efficiently while maintaining quality, and statistical sampling is one means of demonstrating review quality to counsel, the client, the opponent, and the court.

GLOBAL REACH

European data privacy laws can sometimes require in-country data collection and review. A large and increasing number of matters involve international companies or subsidiaries, and data that resides around the world. A true all-in-one provider will not require clients to contract with multiple firms for data collection and review, but instead will have the people and resources to deploy anywhere in the world and meet any data privacy requirements. This broad reach is also an important consideration when the corporate control of sensitive data is a priority for the client.

CONCLUSION

In-house legal teams are under increasing pressure to reduce the cost of discovery, including document review, and to do more with less. 78% of corporations are reducing their e-discovery budgets or keeping them flat, according to the recent IDC survey.ⁱⁱ With over 600 providers claiming some form of e-discovery software or services, corporations have a bewildering array of options available to handle e-discovery.ⁱⁱⁱ Parceling out the process to the cheapest provider of each step increases both risk and cost.

All-in-one offerings provide an attractive solution for outsourcing legal review, but many of the offerings in the market come with hidden costs and challenges. They provide an incomplete response to the risks and costs of piecemeal approaches. Integrated Document Review offerings can overcome these shortcomings if they fulfill the requirements described above: ensuring incentives are aligned correctly, and that integration is effective throughout, including substantive guidance from counsel. When choosing an all-in-one, integrated document review provider, the focus should be on reducing the total cost of discovery while increasing defensibility and reducing risk.

What follows is a check list of necessary elements that make up an effective integrated document review offering—one that eases the pressure faced by corporations exposed to litigation or investigations in today's challenging e-discovery environment.

THE INTEGRATED DOCUMENT REVIEW CHECKLIST:

The following elements make for an effective integrated document review offering. If fewer than all are in place, in-house counsel should be careful to test that the offering will meet their needs:

- ❑ **One-stop shop:** Everything needed is provided by one provider whose incentive to drive cost from the process is aligned with the client's.
- ❑ **Accountability:** The integrated review provider is a single point of accountability with experience to ensure satisfactory completion.
- ❑ **Predictable pricing:** Clients will have a choice of predictable pricing options, providing control and transparency over the total cost of document discovery. Pricing options should include, at a minimum, per-gigabyte and per-document prices.
- ❑ **Integration with counsel:** From the beginning and throughout the review, substantive guidance is solicited from counsel with a defined feedback loop to share findings with counsel.
- ❑ **Substantive guidance is effectively leveraged during the review.** Apart from workflows such as training, the review technology should provide an effective means of integrating substantive guidance from counsel, for example, through a reference set concurrently displayed to the reviewers.
- ❑ **Technology:** The integrated provider should own and actively develop the e-discovery and review technology. Sophisticated review technology should provide speed and accuracy. Outside counsel and in-house counsel should have concurrent and seamless access to the documents during the review.
- ❑ **Flexible and secure review teams:** Experienced review teams that can scale up or down for any matter, and secure review locations and procedures.
- ❑ **Defensible processes:** One of the reasons to use one integrated provider from collection and processing through review and production is to preserve the integrity of the process; the integrated provider must be able to document defensibility and testify to it.
- ❑ **Project management:** Expert project managers manage the process and are a central point of contact for clients, providing regular, customized reports on the review status.
- ❑ **Quality control:** Regular quality testing ensures accuracy in the review. Quality control must effectively integrate outside counsel.
- ❑ **Modular and expandable approach:** A broad range of e-discovery services are provided so clients can choose to add more services, such as collection, structured data collection and analysis, industry expertise, and technology customization.
- ❑ **Global reach:** An ability to perform collections around the globe as well as host and review data outside the U.S. Clients should also consider expertise on privacy laws, especially in European countries.
- ❑ **Statistical sampling:** Industry best practices for statistical sampling (as outlined by the recent Sedona Conference commentary) are followed.

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- i The Sedona Conference Working Group Series, Commentary on Achieving Quality in the E-Discovery Process, 11 (May 2009)
 - ii Corporate E-Discovery Trends 2009: Doing More with Less While Facing Increasing Complexity in E-Discovery, by Vivian Tero, IDC, November 2009. Sponsored by FTI Technology.
 - iii 2008 Socha Gelbmann Electronic Discovery Survey by George Socha and Tom Gelbmann. August, 2009.