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Outside Counsel

Expert Analysis

Efficient but Effective Commercial Litigation: Read the Documents

Litigators do not enjoy document discovery, and our clients do not want to pay us for it. But in commercial litigation, the case is in the documents, and if we do not learn the documents, we will not advance the case.

Not long ago, my associates and several of our client's personnel were met at a warehouse by our adversaries and several armed "security" guards. They intended to monitor our search for additional documents in the second phase of a commercial arbitration. One of the lawyers on the other side said, "After what you found last time, we're not giving you free access again to roam the warehouse."

I explained to my team that we had just been paid a nice compliment. Our adversaries had sought to sandbag us, tossing us the keys to a warehouse filled

By
**Mark P.
Zimmet**



with documents they had not reviewed and did not know. But we had found the evidence and used it effectively to their surprise at the Phase I hearing.

Today, cash-strapped business clients have been deferring litigation where they can and otherwise urging their outside counsel to cut costs, especially on document discovery. The black hole of commercial litigation expense is discovery, and its vortex is document discovery.

Litigators have responded with lower cost service providers and proposals for, or at least talk about, alternatives to hourly rate-based billing: fixed fees, caps, contingent fees and other arrangements. However, a recent survey indicates that most chief legal officers have no confidence that their outside counsel are serious about delivering legal services at greater value (Altman Weil

Inc. 2009 Chief Legal Officer Survey, June 30, 2009, www.altmanweil.com/CLO2009).

Occasionally, a cost-benefit choice is made not to review or word-search the client's own documents before producing them, believing or assuming that they contain nothing prejudicial. But as the above warehouse search illustrates, in a case of any serious consequence—and if the case is not serious, why pursue it?—that can be, and often is, unwise.

In other situations, document discovery is used for tactical advantage, despite its expense, (i) to try to wear out an adversary with limited time or money or both, (ii) to stave off the start of depositions when client officers are called to account for themselves and (iii) to buy time to prepare senior management and to reserve for a potential loss.

Those tactical considerations aside, how have outside counsel efficiently but effectively managed document discovery in commercial cases?

Document Triage by Outside Service Providers and Contract Attorneys. Large law firms have come to accept what we at smaller firms have long realized: the cost advantages of outside

MARK P. ZIMMETT, of the Law Offices of Mark P. Zimmet, practices general commercial, financial and international litigation. He can be reached at mzimmet@mpzlaw.com. For further information, please visit www.mpzlaw.com

service providers and flexible staffing. Small firms use document management companies with offshore document reviewers (in India, Pakistan, Eastern Europe and elsewhere), law students, part-time lawyers, paralegal assistants and contract attorneys in addition to full-time salaried associates.

Large law firms have increased their use of document management companies and contract attorneys at a lower cost to them and their clients as opposed to using career-track associates and paralegals. Clients may be willing to pay the hourly rate of the senior lawyer(s) whom they have chosen to lead their case, but object to paying upwards of \$400 per hour for platoons of unknown associates, particularly for a task as basic as document triage.

Use of Client's In-House Lawyers and Other Personnel Including Client-Hired Contract Attorneys. Obviously, this is most economical for the client, and small law firms generally embrace the immediate no-cost boost in capacity to manage document discovery. A large firm, looking upon this as a lost billing opportunity, might feel otherwise. However, large or small, all firms have the incentives to win the case, be responsive to the client and retain the relationship. And it may be that the client's own personnel can do a better job, as, for example, when it is the client's own documents that must be found, reviewed and analyzed or when understanding the material requires industry knowledge or technical expertise.

But managing the process and cost of searching and sifting the documents does not complete the job that needs to be done. It only just begins it. Yet clients become frustrated that the process seems never to end and their cases do

not advance. They see no value in that (unless the object is to try to wear out the adversary or buy time).

Don't Just Manage the Documents, Read Them! Commercial litigators are expert at scanning, sorting, logging, digesting, spreadsheeting and otherwise managing documents. Less often do the lawyers in charge of the case read them. The point of the triage process is to reduce the terabytes of documents to a readable number capable of human understanding. It takes an average of 2½ hours to read and take notes on a banker's box filled with 4,000 pages of documents, or approximately 62.5 hours for each 100,000 pages. It can take hours to slog through a box of e-mail messages.

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It takes only minutes to review a box stuffed with the umpteenth identical copies of the already-read final deal documents. The more one reads, the faster it goes as one learns the history of what happened, the significant time periods and the roles of the various participants.

The documents tell a story. In a commercial case, that is where the evidence is. Rarely are we looking for an eyewitness. Our job is to get the story out of the documents, to edit it, learn it and tell it to a judge, a jury or a panel of arbitrators, none of whom will be impressed with the initial size of the databank or document depository.

They want—or need—to understand the story. And there are limits to their time, attention and patience.

The documents should be read, sooner than later, not by a document manager, contract attorney, paralegal assistant or the most junior associate, but by the lawyer(s) who will take and defend the depositions, argue the substantive motions and try the case. This is how to advance the case to those next phases where either meaningful settlement discussions will dispose of it or the court or the arbitrators will decide it.

The point of the document management process is to find, learn, present and win the case that is buried in the documents. Too often the process becomes the point, and we get bogged down in the time and motion studies and alternative billing arrangements to pay for the process. Ultimately, our service must be efficient and effective, and when it is both, our clients will be more readily convinced of its value.