

Avoiding 6 Common E-Discovery Production Pitfalls

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Whether the scale of your document production during electronic discovery is large or small, the detailed coordination of many moving and interrelated pieces is critical. A mistake in one area has the potential to snowball into a multitude of other unforeseen issues. Preventing those problems from the start will ensure a smooth and effective discovery process.

From efficiently overseeing the attorneys reviewing the documents to ensuring the integrity of your production output, we will explore how to address common mistakes proactively and, if not avoided, the resulting impact they could have on a case.

1. Not Using Reviewer Analytics

Failing to use tools to capture information, even at the most basic level, about your document reviewers is an error that will cause, at best, inefficiency. At worst, the results will include repeated and uncorrected errors in coding. Using some of the following analytics will help ensure that your reviewers are engaged and understand the issues:

Documents or Pages Reviewed Per Hour

Understanding the number of documents and pages reviewed per hour is one of the most basic analytical tools available and grants insight into many aspects of a review. For example, this data can demonstrate which reviewers are speeding through documents at a rate where they are unlikely to be making calculated calls, or on the opposite end, where a reviewer is logging through at a pace that indicates they do not understand the material.

Breaking down this statistic further by what type of batch a reviewer is in, for example, a presumptive privilege batch or a key witness batch, will grant an even clearer window into where reviewers might be getting slowed down by complex issues. Understanding this statistic also allows you to extrapolate how long your review will take and whether additional resources are necessary to meet a deadline.

Overtake Rates

Sampling first level reviewers' coding decisions and tracking whether those decisions are confirmed or overturned will provide valuable information about the quality of the reviewers. It will show which reviewers perform at a high level and may even be worthy of promoting or retaining for future projects and which reviewers are not a good fit for the project.

Application Use

Even when reviewer analytics are utilized, it is typically only within the document review platform, meaning important information about where on the computer your reviewers are spending their time each day is not captured. Where possible, tracking how much time is spent in other applications (Word, Excel, etc.) may shed light on whether your reviewers are on track or distracted.

2. Failing to Purge a Production That Was Never Turned Over to the Other Side

Occasionally, productions are run but never turned over to opposing counsel. This situation occurs for any number of reasons — perhaps because you discovered a new fact that changed your privilege guidance impacting privilege calls on the documents in the production, or perhaps because the vendor inadvertently included the wrong population of documents.

Whatever the reason may be, if you did not turn the production over to another party, it is important to purge it from your workspace. Leaving these so-called false productions in your workspace has the potential to cause numerous issues, including the following:

Incomplete Production of Responsive Documents

If the false production is not purged, responsive nonprivileged documents will likely be inadvertently held back from future productions. The system will misread the documents as having been produced already.

Unexplained Bates Gaps

In future productions, your vendor will likely use the next bates number available based on the false production's ending bates number, thus leaving a bates gap for your opposing party and causing confusion, leading to questions that may require you to reveal the cause of the error.

Inadvertent Inclusion on Privilege Log

If privileged documents are within the false production and also fall into the parameters of your logging obligations, they may inadvertently be swept into the privilege logging process and included on a log.

Incorrect Production Statistics

Frequently, parties cite the number of documents and pages they have produced in a litigation, for example, to support arguments of burden regarding additional discovery efforts. If false productions are not purged, the numbers will be incorrect. Correction with the other parties and/or the court will be required, causing embarrassment and potential questioning as to how the error occurred.

Inability to Accurately Identify Your Own Production Set

Plain and simple, you need to know what the other side has. When preparing witnesses for deposition, exhibits for pleadings, etc., this understanding is critical.

3. Forgetting to Finalize Documents Held Back From Production



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There are many reasons why a document that has been reviewed can be withheld from production even if it might ultimately be responsive and nonprivileged. Some of those reasons include:

Nonfinal Responsiveness/Privilege Calls

Many reviews allow for a technical issues code to be applied if the reviewer cannot view the document's contents. Similarly, if the document is in a foreign language that the reviewer cannot understand, it may be coded with a tag indicating that.

Preliminary Call Made, With Specialized Confirmation Necessary

Complex reviews, such as those involving scientific material, often require a second review by those with specialized knowledge, such as an engineer or chemist. First-level reviewers are typically asked to utilize their best judgment in making the first line of calls, but a second pass could be required based on file type, search term or even a reviewer-applied tag requesting it.

Hot Documents

Counsel frequently want to investigate and understand documents considered "hot" or "key" in the case before they are produced. These occasionally take time to investigate and often require discussion with the client before production.

Having production validation processes that stop documents like the above from going out without taking the appropriate steps is essential. But so is resolving them. If there is no workflow in place for regularly identifying and resolving items in withheld populations like the above, the result could be a failure to meet your production obligations.

4. Not Providing Reviewers Clear Guidelines on the Style of Redaction Drawings

Review platforms offer many different redaction styles, including black, white and text boxes. The latter can be set up in your workspace to have various default options, such as personally identifiable information, privileged and confidential business information, and the like. This style also provides potentially limitless options when reviewers can type in any text. Here are some things to keep in mind as you consider your redaction strategy:

Electronically Stored Information Protocol

More and more parties specify how redactions should be applied in their protocols for electronically stored information. These specifications often require material redacted for privilege and material redacted for personally identifiable information to say as much in the text box so that your opposing counsel can differentiate. Be sure to check your orders and follow them to a tee to avoid challenges.

Drawbacks of White Redaction Boxes

If white-box redactions are utilized, other parties may not be able to tell that certain documents have been redacted at all. Depending on the document and redaction, the area redacted in white might appear to be blank. This use does not provide adequate opportunity for opposing counsel to understand where redactions have been made and challenge their appropriateness. While that might sound appealing, it is likely to get you in trouble with the court for lack of fair play.

Advantages of Text Boxes

While using black boxes tends to be the default, one benefit to redacting using text is that you will be able to do a quality check on your production text before it goes out the door. This format allows one to ensure the images were properly scanned and that the text underneath the redaction box was not included.

Additionally, if you identify the type of redaction via the textual description, this may reduce challenges as opposing parties may care less about personally identifiable information than they do allegedly privileged material.

5. Failing to Scrub Privileged Information in Production Load Files

Commonly used legal review applications like Relativity and Concordance utilize various load file types to ingest the images, text and metadata associated with each document. During the production process, withheld privileged files are replaced with a slip sheet to ensure that the image containing the privileged content is not produced. However, this is not the only portion of the production that needs to be scrubbed to protect the privileged information.

Text File

The text file accompanying each document provides the text-based content of a document used for searching. When a document is withheld or redacted for privilege, it is important to confirm that the privileged content is removed from the associated text file.

Load Files

Metadata for each document is commonly provided using a Concordance load file. If appropriate in your jurisdiction and in connection with your applicable orders and agreements, the load files should have specific metadata scrubbed for privileged records, such as email subject and file name.

When you later provide a privilege log regarding these documents, it can provide any necessary metadata to support the privilege claim. This action allows you the time and benefit of a privilege log review to ensure that no privileged material is disclosed in the metadata.

Native Files

If your production requires the inclusion of native files, do not forget to exclude them when the document — or a portion of it — is being withheld for privilege. Be sure to check the final production by comparing the number of native files to the number of nonprivileged documents and ensuring they match.

6. Not Requesting Helpful Fields in the Load File

Many folks have standard ESI orders that they have been using for years now. Several jurisdictions even provide model stipulated ESI orders for consideration. There will undoubtedly be times where the standard production requirements suit the parties' needs but consider whether less common fields might be helpful. Though these may seem unnecessary at the start, these fields have the potential to reduce the burden on both parties as the case progresses:

Confidentiality

Requesting a field that reflects the confidentiality designation for each document can help each party quickly assess the level of confidentiality applied across the productions and offer some extra protection by providing the designation beyond just the face of the document. This request can be especially helpful when approaching trial because the designation could be easily included in exhibit lists to help facilitate discussions about the appropriate use of the documents in the courtroom.

MD5 Hash

Requesting an MD5 hash, a digital fingerprint for a document, provides a way to verify data integrity. If you are producing files in native format, it can ensure no inadvertent changes were made to the file. The MD5 hash can also provide a way to identify and apply consistent treatment to all production duplicates.

Redactions

Requesting a field that reflects if a document was produced with redactions and the redaction type — e.g., personally identifiable information or privilege — can help each party work through redaction challenge issues quickly and efficiently by allowing the exclusion of the types of redactions the parties may not be interested in challenging.

Conclusion

Although review and production can be a complex endeavor, proactively avoiding common pitfalls may help prevent what is commonly referred to as discovery on discovery, meaning discovery requests concerning efforts to comply with discovery obligations. Courts typically require evidentiary support regarding concerns of discovery misconduct before such discovery is permitted, and the existence of errors in productions can help provide that evidentiary basis.

Preventing problematic issues such as those discussed here may help go a long way in keeping cases focused on the merits and steering clear of collateral disputes. Avoiding these pitfalls will help ensure that your processes run smoothly, leading to greater efficiencies in review and production that will also be sure to leave your clients happy.

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