Lawyering 1.0 vs. Document Process 2012

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I. Presentation

In recent years, courts and commentators have been focused on the processes litigators employ in preserving, collecting, and producing documents, especially electronic documents. Perhaps that's as it should be. . But there is a danger in this trend: that we become so focused on technology, protocols, and checklists that we neglect critical, traditional skills, including developing relationships with our clients and their personnel, learning information from people, and using our judgment to address our clients' issues. We need to be mindful of this trap if we are to avoid it.

* * *

Discovery has been proceeding smoothly for many months, and you are confident that you have followed your checklists and protocols to a T.

You preserved broadly when litigation had become reasonably anticipated. You know that the failure to preserve documents has led to harsh sanctions for civil litigants, *see, e.g., Pension Committee of the University of Montreal pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 488, 496-497 (S.D.N.Y. 2010), so that was Item 1 on your list.

You collected from all the key custodians, as the failure to collect from key custodians has also led to sanctions. *See id*. at 493.

The other side refused to agree to search terms, so you ran a broad set and let the other side know they could pay for anything more. Your ESI expert oversaw the sampling of a statistically significant set of the documents that did not hit on search terms and added some terms based on this sampling, then repeated the process, adding more terms. Courts have recognized the insufficiency of bare search terms and the effectiveness of sampling as a method of enhancing their effectiveness. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008).

Your team reviewed the large set of documents that hit on the terms using a cutting edge combination analytical software, quality control, and review by well qualified and trained attorneys. While no court has yet opined on a specific case involving a computer assisted review process, computer analytics have been recommended by various authoritative sources, including court opinions. *See, e.g., id.*; *Disability Rights Counsel of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139, 148 (D.D.C. 2007). The Notes to Federal Rule of Evidence 502 also encourage the use of analytical software: "a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to hat taken `reasonable steps' to prevent inadvertent disclosure."

You produced many thousands of documents and logged many hundreds on a thorough privilege log. *Cf.* Klig v. Deloitte LLP, C.A. No. 4993-VCL (Del. Ch. 2010) (court orders production of documents and waiver of privilege due to inadequacy of original privilege log).

You had already done or were prepared to do all the things which exemplify the kind of process described as reasonable by experts in the field:

1. Explain why what you did was sufficient;
2. Demonstrate that it was reasonable and why;
3. Explain the qualifications of the personnel;
4. Develop keywords with input from the custodians;

5. Test for quality assurance in the recall of relevant documents.

Connor R. Crowley, "Defending the Use of Analytical Software in Civil Discovery," 10 Digital Discov. & E-Evidence (September 2010); Patrick Oot and Herbert Roitblat, "Mandating Reasonableness in a Reasonableness Inquiry," 87 Den. U. L. Rev. 533 (2010).

You thought you had achieved Document Process 2012, a bullet proof, patently reasonable response to the document requests served on your client. You were right, but you are still in trouble.

Now you are sitting, aghast, at the deposition of a former employee of your client. He is describing a special file on his outlook email tree where for many years he placed what he thought were the worst emails about the product at issue. He remembers a couple of them by date and word for word. He remembers them because the dates are, well, significant to the case. And the words are, well, just awful. They are not only awful words, but they are cryptic and unusual.

None of them are in your search terms.

He also recalls many of your current client custodians being copied on the emails.

The documents he is describing are not in your production. It turns out that many copies are, however, in your client's possession. You were unaware, however, because they were not hit by your search terms.

What happened?

* * *

Litigators have long recognized that among their most valuable skills is the art of getting to the truth through cultivating trust and rapport with their clients by speaking with them effectively. But as challenging as this can be with individual clients at times, it teeters on becoming a lost art when it comes to dealing with the individual employees and junior officers of corporate clients. Although billion dollar cases can rise and fall on the testimony and documents of these personnel, they are often an afterthought in pretrial processes. Their first exposure to the company's counsel usually begins with an *Upjohn* warning delivered by the associate who has shown up at their cubicle, without proper introduction, to quiz them about various topics on a checklist and to sequester or collect their documents. Handled clumsily, this interaction can set a tone that chills their cooperation with counsel. In that environment, even if the employee is asked all the right questions about the locations of her documents, her answers might not be complete or truly revelatory.

If, on the other hand, counsel approaches the employee with a more human, professional touch, the result can be quite the opposite. For example, a polite introduction and providing the employee some context, followed by the *Upjohn* warning and an invitation to hear any questions the employee might have, should be followed by an explanation of the importance of document preservation and collection. The employees should be told that the company wants to preserve and collect all of the relevant documents because they are key to its defenses and because it does not want it, or its employees, to get in trouble with the court. Similarly, most former employees respond appropriately when, as appropriate under the individual facts of the case, they understand that their lives are being interrupted because the plaintiff is attacking their work at the company. This approach can reinforce to the employee that the company's lawyer is there to protect the company from outside attack, not to pit the company against its present and former employees. In that environment, employees and former employees become invested in the process and are more likely to volunteer information that fills possible gaps in counsel's checklists.

In a world of ever increasing discovery costs, lawyers are vulnerable to the lure of technology. It seems so linear, so scientific. You can count the number of hits brought back by search terms. You can engage expert consultants, perform sampling, and demonstrate that your process is reasonable using all the recom-

mended steps. You can budget your review accordingly. You can rest in the knowledge that you did everything that could be done.

But if, in doing all these computer-assisted, recommended steps, you forget to be a lawyer, the result may still surprise you. While you were spending all your time supervising your defensible process, you neglected to take the time early in the case to ensure that the defense team built working relationships with the client's present and former employees, including asking them personally about facts and documents. This failure in Lawyering 1.0, a step that is so basic to the defense of a client in civil litigation, cannot be done better by software (though the involvement of the witness could be highlighted by analytics). The questions you ask the witness in your meeting could not be scripted by a computer (though it might help you find key documents). And the relationship with the witness or his counsel could not be developed by software (though knowledge gained might enhance your credibility).

No matter how good the document process, litigators cannot allow the technology to distract them from doing what lawyers have always done: building trust and rapport with the client and the client's key constituencies.

Given the extensive document review and production process here, the client in this matter would likely escape sanctions for failing to produce the documents from its files. The client and its outside counsel would not be saved, however, from the impact on their defense of such documents and the problems that could be created by the timing of the documents' discovery.