



International E-Discovery

A Global Handbook of Law and Technology

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Outsourcing document review

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1. **Introduction**

The continuous growth of electronically stored information (ESI) over the past two decades has brought the costs and risks associated with discovery front and centre for companies and their outside counsel. The approach to document review has enormous impact not only on the outcome, but also the overall cost, of a matter. At the same time, the exponential growth of electronic data has complicated the discovery process and ushered in a shift in how companies think about document review. There are now a variety of document review service and pricing models available to clients, each with its own benefits and drawbacks, that seek to meet these challenges. Further, there are a host of new considerations, such as the rise of artificial intelligence and other technological developments, the evolving data privacy landscape, ethics requirements and new forms of data that are significantly impacting costs, case strategy and results.

It is more important than ever for corporations and law firms to understand these issues in order to make effective decisions regarding the manner in which they handle the document review portion of discovery.

2. **Document review service models**

2.1 **Traditional law firm model**

Prior to the advent of electronic discovery, if a company had the resources and expertise to perform a document review, it might choose to do so internally with its own employees. However, in the modern age of e-discovery, the vast majority of document reviews are too voluminous, technologically challenging and/or time-consuming for an internal legal department to tackle on its own. Companies began to outsource document review to their outside counsel. Originally, outside counsel utilised a team of its own associates to review the documents. The primary benefit of this model was that the associates became intimately involved with the documents and the facts of the case. When it came time to take depositions or go to trial, the law firm was well positioned from a factual standpoint and steeped in the issues of the matter. The obvious drawback to this approach was that the document review itself could be extremely costly when handled by law firm associates. With the rise of larger-scale document review in the early 2000s, many corporations needed to find cost-effective alternatives to using large numbers of highly compensated associates.

2.2 Alternative law firm models

In order to maintain their grasp on this revenue stream, law firms responded by updating their models. At the start, many firms hired in-house 'staff attorneys' on either a permanent or project basis to perform document reviews. These staff attorney positions were typically non-partner track positions in which the lawyer's primary responsibilities were related to document review and e-discovery. Firms would bill these resources out to their clients at lower hourly rates than what they would typically charge for associates' services.

Some large law firms have taken it a step further and established in-house, alternative resource centres that utilise a lower cost structure to perform more commoditised tasks, including end-to-end discovery functions. Law firms such as Morgan Lewis, Nelson Mullins, Wilmer Hale and King & Spalding have created centres in lower cost cities/countries to take advantage of the availability of lower cost resources.¹ Magic Circle firms Allen & Overy and Herbert Smith, for example, have opened resource centres in Belfast to handle a variety of functions, including document review, for their offices globally.² Meanwhile, Am Law 100 firms Orrick and Reed Smith have established resource centres in Wheeling, West Virginia to perform similar functions.³ By opening these in-house alternative centres, law firms have attempted to provide a more cost-effective option for their corporate clients while enabling their firms to hold on to the revenue generated by document review. However, the number of law firms that have taken this approach has been relatively small because it requires a major upfront investment of capital and technology and there has been far greater demand from corporate clients to leverage already existing external options.

2.3 Outsourcing models

Today, companies and their outside counsel have a plethora of new options, based on service model type and geographic location, to meet the evolving challenges of e-discovery. The origins of outsourcing to external providers by corporations and law firms began with non-substantive, back-office work. Companies initially outsourced non-legal functions such as information technology and word processing. Many corporations looked to reap similar benefits by finding alternative models for document review. At the same time, some law firms decided they no longer wanted to make the substantial in-house investment necessary to handle this work and decided to re-focus their practice on their core competencies. Many of their

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- 1 Gina Passarella Cipriani, "How a Few Savvy Law Firms Turned E-Discovery Into a Cash Cow", *American Lawyer*, 24 Nov 2017, available at: www.law.com/americanlawyer/sites/americanlawyer/2017/11/27/how-a-few-savvy-law-firms-turned-e-discovery-into-a-cash-cow/; "Alternative Legal Service Providers: Understanding the growth and Benefits of These New Legal Providers", Thomson Reuters, 2017, available at: www.2civility.org/wp-content/uploads/alternative-legal-service-providers.pdf.
 - 2 Claire Ruckin, "Herbert Smith to Open Belfast to Handle Disputes, Document Review", *Legal Week*, 24 Nov 2010, available at: www.legalweek.com/sites/legalweek/2010/11/24/herbert-smith-to-open-belfast-office-to-handle-disputes-document-review/?slreturn=20180029142839; Thomas Connelly, "Ulster University teams up with Allen & Overy and Baker McKenzie to launch UK's first legal innovation centre", *Legal Cheek*, 12 Feb 2017, available at: www.legalcheek.com/2017/02/ulster-university-teams-up-with-allen-overy-and-baker-mckenzie-to-launch-uks-first-legal-innovation-centre/.
 - 3 "Why Doesn't Every Biglaw Firm Have An Office In Wheeling, West Virginia?", *Above the Law*, 14 Aug 2012, available at: <https://abovethelaw.com/2012/08/why-doesnt-every-biglaw-firm-have-an-office-in-wheeling-west-virginia/>.

associates viewed document review work as less desirable, even menial in nature, and preferred to focus their practice on more substantive legal tasks such as writing briefs, filing motions and appearing in court.

For these reasons and others, it made sense for both corporations and law firms to outsource many elements of document review to a growing number of outside providers. This helped usher in the current era of document review outsourcing, in which there are two primary delivery models:

- the temporary staffing model; and
- the managed review model.

(a) *Temporary staffing model*

Under the staffing model, a company or their outside counsel contracts directly with a document review staffing firm that is responsible for supplying temporary contract attorneys to perform the review. The primary functions of the staffing firm are to locate and vet the contract attorneys according to the client's requirements; assemble the team; and ensure that the appropriate number of qualified contract attorneys are staffed on the project. The staffing firm also handles the associated administrative tasks, including timekeeping, supervision of attendance and dealing with day-to-day staffing and personnel issues. Under this model, either the staffing firm or the law firm provides the necessary infrastructure, including the physical space, technology systems and security controls to support the review.

Historically, companies and their outside counsel have utilised the staffing model to perform a basic first-level review of the documents for relevance, privilege and other issues pertinent to the case. The law firm retains full responsibility for management and supervision of the document review, with their associates or staff attorneys determining the qualifications of the contract attorneys for the staffing firm to source, developing training protocols, conducting training sessions, creating substantive guidelines and designing review workflows. They are also responsible for performing all substantive project management functions, establishing quality control procedures, conducting quality control exercises, evaluating performance of the temporary attorneys and monitoring their accuracy and productivity.

Geographic location in the staffing model: Under the staffing model, the document review is typically conducted either 'onshore' or 'nearshore'. While the two terms would seem to differentiate between projects performed within the country versus outside of the country, they are somewhat misnomers. Onshore review is typically used to refer to document reviews conducted within the same country and close to the supervising law firm in a major market, while the term 'nearshore' is often used to refer to document reviews located in a lower cost market within the same country.

The nearshore staffing model was developed by staffing agencies to combat cost pressures from corporate clients during the 2008 recession, as well as the growing competitive threat of offshore review providers. Nearshore reviews purport to offer the benefits of a lower cost market, while still supplying attorneys from the same country, which can be attractive to companies or law firms with a preference for

domestic providers. However, nearshore reviews under the staffing model can pose greater risks as well – since the staffing agency is not providing robust project or quality management, the model is dependent on the law firm fulfilling this crucial role, which is made more difficult by the lack of proximity between the law firm and review location.

Conversely, onshore document reviews conducted in major markets under the staffing model are typically more expensive than nearshore reviews, but have the benefit of close oversight by the law firm’s associates or staff attorneys.

(b) *The managed review model*

In the mid- to late 2000s, document review providers increasingly began to offer ‘managed review’ services under which they provided an end-to-end document review solution, as opposed to simply providing temporary contract attorneys to operate under the management of outside counsel. This model gained prominence as many clients and law firms began to view it as inefficient to have law firm associates manage the day-to-day, often rote, activities associated with document review. Performing such tasks was often tedious, time-consuming and, in many cases, far too costly for their clients. Many of these tasks also fall outside of the training, education and skillsets of law firm associates, and pull them away from their core substantive responsibilities.

A managed document review provider not only supplies the review team and infrastructure, but also assumes responsibility for establishing standard training and quality protocols, designing project workflows, overseeing quality control exercises, managing performance and productivity, providing administrative support, reporting and analysis, and many other aspects of project management. The law firm, on the other hand, remains closely involved with substantive activities such as training the team, answering questions, reviewing work product and making big-picture strategic decisions.

Geographic location in the managed review model: Managed review providers can be located onshore, nearshore, or offshore, although there are variations in the support model by location. Onshore or nearshore managed document review providers still typically use temporary contract attorneys to perform the vast majority of the first-level review and quality control work. These teams are overseen by a project manager, who may be either be a full-time employee of the review provider or hired on a project basis, and is responsible for working directly with the law firm to create a project plan or prepare review manuals and training materials. The project manager may also be tasked with identifying the contract attorneys to serve as quality control reviewers and the technology vendor’s point of contact. The onshore/nearshore managed review model is often still very much a hybrid model, with the law firm involved in many of the nonsubstantive or administrative tasks.

The late 2000s also saw corporate legal departments and law firms increasingly turn their focus offshore in order to maximise the benefits of the talent/wage differential in other locations. This movement was spearheaded by large corporations in highly regulated or litigious industries, such as financial institutions

and insurance companies. Many of these companies had a prior history of outsourcing other services to offshore locations and were more willing to make the initial transition based on this experience and their desire to cut costs.

Offshore managed review providers are primarily based in India, the Philippines or South Africa, countries that offer an attractive combination of lower costs, a talented labour pool and strong English language skills. To date, India-based service providers have dominated the offshore document review industry, due in large part to the country's long history as an outsourcing centre for Western companies, a strong educational system in which English is the primary language, a common law legal system and a deep pool of attorneys due to the country's large population. Compared to onshore managed review service models, offshore providers tend to offer a more comprehensive end-to-end solution. This comprehensive solution is driven by two factors:

- Time zone and geographical differences require providers to be more self-sufficient and handle the management or administrative responsibilities of document review; and
- the lower labour and input costs allow offshore providers to invest in a more robust delivery model, including hiring teams of permanent employees, experienced managers, process and technological experts and quality managers, among others, to support the review.

This robust model and support system has enabled many companies and law firms to assign higher-level tasks to offshore managed review providers as clients have become more comfortable with the model and providers have become more proficient and sophisticated. This is a notable change from earlier years, when clients initially turned to offshore in search of cost-effective ways to handle basic first level document review.

3. Pricing models

There are a few main pricing models commonly used in the document review industry. Many clients and providers find that there is no one ideal model, and that the appropriate model and fee structure can depend on the unique circumstances of the legal matter, industry, scope of work and data sources. Understanding these unique considerations can enable parties to make more informed decisions when selecting a document review provider or implementing a new pricing model.

3.1 Hourly pricing

The hourly pricing model is still the most common for document review and the most easily understood by clients, as it has traditionally been the dominant pricing model used by legal services providers. A primary benefit of the hourly model is that it requires significantly less upfront analysis, scoping, or agreement. At a basic level, initiating a new matter under the hourly pricing model simply requires

- agreeing to the applicable billing rates at different levels; and
- determining which activities are billable or non-billable (which can also vary by resource level).

There is no need for providers or clients to engage in complex and time-consuming analysis related to the scope of work in order to calculate an appropriate fixed or per-unit rate that offers a fair balance of risk to each party and allows for a reasonable profit margin. Further, the two sides do not need to carefully define the review criteria, scope of work, or other circumstances under which an alternative pricing model would apply. As discussed below, doing so can often be difficult and lead to protracted negotiations between the service provider and client.

There is also an inherent assumption that under the hourly pricing model, total costs accurately reflect the value of the work completed. In other words, if a provider spends more time completing tasks than anticipated, whether due to increased volume or complexity, their revenue increases accordingly.

For these reasons, the hourly model works particularly well compared to per-unit models when it is difficult to predict accurately how much time and effort will be required. For example, the total hours required for activities such as preparing privilege logs, reviewing non-email data sources (eg, audio files, chat files and social media), summarising key documents or preparing customised analyses and reports can be very hard to determine up front, even when the overall volume is fixed.

The hourly pricing model is not perfectly efficient, however, and does in part rest on the assumption that the amount of value per billable hour is itself fairly predictable and consistent, which is not always the case. For example, a document review provider that is able to leverage its employees' skills and expertise, analytical abilities and fluency with technology to streamline the scope of work or reduce data sets may significantly lower client costs by accumulating a relatively low number of billable hours. While there are other long-term benefits to taking such an approach, doing so may still create a situation in which a provider is not receiving fair compensation for the value provided. Conversely, if billable hours are higher than expected due to provider inefficiency or a lack of productivity, the costs will also not be representative of the value provided.

Another consideration regarding the hourly pricing model is the amount of administrative burden it places on each party. Providers must track and validate billing activities, ensuring that they accurately record all time accrued and bill it at the correct rates. On large engagements in which there are dozens or even hundreds of billable resources, often performing many different activities and at different rates, this can require exceptional organisation and project management. Clients, meanwhile, may also wish to engage in a similar review and analysis of billing activity to ensure accuracy.

Finally, clients may be concerned that the hourly pricing model decreases cost certainty and makes it more difficult to set budgets or predict legal spend. Where this is a concern, providers should aim to

- work with the client at the outset to determine expected costs for an engagement and create accurate budget estimates based on known information; and
- maintain transparency in their reporting and keep the client updated regarding actual costs incurred and changes to underlying assumptions that materially affect the estimated budget.

3.2 Per-unit pricing

Per-unit pricing models, whether tied to documents (the most common), pages, gigabytes, or other criteria, have become increasingly prevalent in recent years. These models offer greater cost predictability, as clients can generally determine expected costs based on total volume, and also shift risk to the document review providers, who receive the same revenue even if factors outside their control cause the engagement to be more labour-intensive (and expensive) than anticipated. This factor – the perceived levels of risk and upside – often has the largest impact on how per-unit models are structured and negotiated.

As an initial matter, providers must determine the circumstances in which they are willing to offer per-unit pricing. This generally means deciding

- whether to offer per unit pricing at an account level (ie, for all of a client's matters) or an engagement level (ie, customised per-unit pricing for each matter); and
- which parameters must be met in order for the per-unit price to apply.

If a client's legal matters tend to vary greatly in size, complexity or duration, such that formulating appropriate per-unit pricing in advance is difficult, the provider may wish to protect itself by offering this option only on a case-by-case basis or by defining in detail the circumstances under which per-unit pricing is not available. For example, the parties may decide that per-unit pricing will only be applicable if certain assumptions relating to volume, complexity, review criteria, timelines or review platform are met. If the review exceeds these parameters, they may then build in pricing escalators or choose to revert to the traditional hourly pricing model for the services performed outside the parameters.

The parties must also determine to which activities per-unit pricing applies. For example, the time required to review certain data types, such as chats, instant messages, audio files, social media or 'loose' files, can be very difficult to predict in advance. Utilising hourly pricing for these activities may provide a more accurate and fair assessment of the effort involved. Similarly, client and provider must agree on the activities, other than the actual review of documents, to be included. While activities that are directly tied to and support the document review itself, such as quality control, project management, basic reporting and training, are often included, other ancillary or valued-added activities, such as data analytics, foreign language review or in-depth substantive analysis are generally not. In such instances, a hybrid approach may make the most sense for all parties.

3.3 Full-time equivalent model

Under the full-time equivalent (FTE) pricing model, the document review provider assigns a dedicated team to the client at a fixed, recurring cost (typically monthly with a minimum duration required). The FTE model is rarely utilised in the document review industry, as litigation and investigation activity tends to be cyclical and unpredictable, with volumes and resource requirements varying greatly. It can therefore be difficult to determine in advance how large an FTE team is required, and clients may often find they are either paying for unnecessary resources

during downturns in activity, or they need to supplement the FTE team with additional resources during upswings. This model therefore works most effectively for clients who require long-term, ongoing support with relatively predictable volumes. Clients that do have a consistent minimum volume of work can explore creating a smaller FTE team and then adding additional resources during periods of greater activity.

The FTE model can offer great benefits in terms of review team expertise and knowledge retention. Dedicated teams become extremely familiar with a client's industry, business, processes and legal matters, thereby becoming increasingly efficient over time. Certain document review providers, particularly those with full-time employees and low attrition rates, are able to replicate many of these benefits under non-FTE models by building in organisation controls and using the same employees for each engagement.

This is an extract from the chapter 'Outsourcing document review' by Philip Algieri and Robert Coppola in International E-Discovery: A Global Handbook of Law and Technology, published by Globe Law and Business.