

Controlling Legal Costs – Service Providers

Controlling Document Review Costs While Sustaining A Defensible E-Discovery Program

The Editor interviews **Laura Kibbe, Esq.**, Senior Vice President, eDiscovery Solutions, Epiq Systems.

Ms. Kibbe was formerly senior corporate counsel at Pfizer, Inc. where she launched and managed the Discovery Response Team. She is currently working with Judge Marina Corodemus (NJ-Ret.) on a special chapter in West's publication "E-Discovery for Corporate Counsel," titled "E-Discovery and Mass Torts."

Editor: Laura, please tell us about the Document Review Services division at Epiq Systems.

Kibbe: Epiq Systems Document Review Solutions group provides managed review services for data collections of all sizes. Epiq professionals have successfully managed, reviewed and produced more than 500 million pages of information, all while achieving demonstrable cost and time savings. Our document review teams are admitted to practice law and are in good standing within their respective jurisdictions. To identify and eliminate inefficiencies, and to ensure a defensible outcome, Epiq assists in platform selection, strategic testing of key words and other cull methodologies, and creates efficient workflow processes that benefit the whole legal team.

Editor: How has document review evolved since you first began working in this area?

Kibbe: Only a few years ago, the focus of document review was at the "brute force" level that involved collating and carting loads of documents – a straight paper, linear review process. Today, the volume of documents and the cases have become more complex, as potential evidence may be hidden through a maze of e-mail attachments, large document files, text messages and more, which has dramatically expanded the difficulty of what needs to be collected.

Today, other dramatic changes may also be observed in document review. For example, attorneys are more accepting of technology; new technology and productivity tools have been proven; and flaws in current e-discovery models are increasingly understood. We do believe that usage of e-discovery technology services will be further boosted going forward – neither litigation nor regulatory compliance matters are going away and clients want options to reduce e-discovery costs and speed review.

Editor: What are some of the currently false assumptions about document review?

Kibbe: One false assumption is that search terms are always accurate in identifying all the relevant documents and that the classic document review methods are not error free. Interestingly, in many cases, fewer than 20 percent of most documents are relevant to the matter. The cost of identifying the relevant set is extremely high, as are the error rates, which leads to difficulty defending some

of these outmoded processes. Today's newest technologies are offering more accurate, defensible alternatives.

Editor: So, are you saying that linear review is dead? Will "machine review" ever completely replace humans? Is there a hybrid that is defensible?

Kibbe: No, not entirely. Linear review will always have its place in certain types of cases. While machine review might not ever completely replace human review, in most cases it can intelligently inform human decision-making in the document review process. Machine technology does offer strengths in prioritizing the most responsive documents and predicting certain issues in large data sets. Using threading technology, the machine can put a series of e-mail conversations in front of a single reviewer, thus leveraging that reviewer's understanding of all that occurred in that sequence. The second kind of machine review involves using software to predict, within a data set, which documents will be responsive. The inefficiencies involved in a linear review can be resolved by leveraging technology that enables attorneys to focus their time and resources on those documents that are actually important to the case.

Editor: Is there now, or will there be, an ultimate e-discovery tool that can identify relevant ESI with sufficient accuracy to gain acceptance by the courts?

Kibbe: I think we are already there in some respects – or, at least close. We're using technology and process together in a defensible and explainable way, so that the courts are becoming more comfortable. While machine review may never completely replace human review, in most cases it can intelligently inform human decision making in the document review process.

Already, we have seen where the use of prioritization tools acts as a valuable quality control mechanism. As the prioritization rating is available for the duration of the review, sampling documents where the human review call is contrary to a very high or low prioritization rating, the software can be a useful way to perform spot checks on the quality of the review as it progresses.

This use of the software not only helps by identifying reviewers who may require clarification on aspects of the review protocol, but also adds to the defensibility of the review methodology as the team engages technology to balance volumes as well as time and costs in performing a large review of electronic material.

While we still struggle with having the technology survive *Daubert/Frye* scrutiny, we have the building blocks and efforts of the Electronic Discovery Institute and TREK to help us build defensibility and invulnerability. Testing has also



Laura Kibbe

been conducted by The Electronic Discovery Institute. In one test, it compared data that had been reviewed by attorneys with a machine review of the same data set. The initial results showed that the machine was more accurate. TREK is now doing the same.

Editor: What are judges' expectations of lawyers in document review?

Kibbe: Judges are quite adamant that attorneys must meet mandated deadlines and work with a process that is clear and defensible. Attorneys must stay on top of technology, learn it, or bring in support that is able to manage this for them. Ignorance of the process is not acceptable.

Courts are increasingly supportive of efforts to control review costs. Proportionality discussions are becoming more common on the discovery front today. Discovery by ambush or the David/Goliath approach simply won't be tolerated by the courts. Counsel seeking information must be able to clearly articulate why they need information for their cases. The court will weigh that need against the relative exposure and value of the case, and control discovery accordingly.

The Sedona Conference proportionality paper is strongly supported by many members of the judiciary as a way of reinserting rationality and balancing into today's complex discovery process.

Editor: What considerations should in-house counsel have in applying technology to cost savings and controls?

Kibbe: Assessing "Total Case Costs" by considering all expenditures is really the objective. In-house counsel behind the firewall knows best what data they have to manage. Through a comprehensive litigation strategy, it is in-house counsel who can determine where and how they balance their total legal expenditures. In the situation where they know they may want to settle a case, they may want to apply first-year reviewers to save money. In a case where they don't know where they stand, they may need the ability to dig quickly through massive documents to ascertain their cases and strategy. Both human manpower and technology need to be considered together in these instances.

Technology such as Epiq's own IQ Review, for example, permits documents most likely to be responsive to be delivered to senior case experts sooner, while more junior reviewers can search through the remaining population. Time and client money can be spent more effectively from the outset of a case, and the amount spent on irrelevant material is greatly reduced.

Editor: According to Fulbright & Jaworski's Litigation Trends Survey (October 2009), at least 58 percent of large cap companies have some in-house e-discovery expertise. Do you see this trend continuing to grow, and what changes are you seeing about how document review is managed in-house?

Kibbe: In the past few years, the legal profession experienced increased pressure to reduce spending while maintaining a high level of client service. With that, in-house counsel continues to look for smarter and more efficient ways to manage discovery and investigations. Document review is expected to be a focal point for 2010, as it remains the most time-consuming and costly activity in the process.

The key to reducing the cost of review has been focused on reducing the number of documents to review. To this end, a variety of highly effective analysis tools, like e-mail threading, near-duplicate identification, and concept clusters, have increasingly been incorporated into the process to help lawyers review faster and more accurately.

Where the review operation sits will continue to morph depending on the culture of the company. In some cases, conducting the review onsite is desirable and cost efficient. In others, outsourcing to the firm or a management company is more desirable. What is common, however, is that in-house counsel continues to take control of the management of the process. Actors and executors will change, but in-house counsel is the CEO of the review operation.

Editor: In the past few years, more in-house counsel purchased or upgraded in-house legal technology solutions in an effort to cut discovery costs. Has insourcing technology built efficiencies and saved costs in the long run?

Kibbe: In-sourcing technology should be confined to in-house oversight. We predict that some of the companies that decided to bring such processes in-house will find that this approach has not proven sustainable. We also predict that some of the firms that adopted this approach will experience declining returns on their investments and an increased burden in maintaining the demanding service levels that continue to evolve rapidly with the leading outsourced service providers.

Editor: On an ending note, what do you think is the most important thing to consider as in-house counsel reviews new document review technology and establishes its strategic approach to review?

Kibbe: Business processing of document review is about extrapolating key facts in support of a case, and funneling that information appropriately. In-house counsel is ideally positioned to clearly define the process, providing appropriate checks and balances along the way. The goal of discovery is not document review, but fact development. A process and technology that gets the facts of the case in the hands of the legal team who can make strategic decisions based on those facts is what is sorely needed. Don't be blinded by features and functionality or unrealistic cost savings that will not achieve the real goal – know the facts. Look to total case cost and manage the "case," not the component.

Please email the interviewee at lkibbe@epiqsystems.com with questions about this interview.