

Antitrust

COMMENTARY

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Document Conversion and Review In Antitrust Second Request Matters

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A "request for additional information and documentary material," or "second request," in the course of a federal merger investigation places a significant and often costly burden on legal teams: reviewing mountains of potentially responsive documents within a short timeframe and delivering the results of the review to the U.S. Department of Justice or Federal Trade Commission in an acceptable form. The challenge for most firms is to find the resources, both human and technical, to review and produce the documents quickly enough to keep the merger or acquisition on schedule.

Typically, the review process involves two key steps:

- A deluge of paper documents and electronic files must be converted to a common, searchable format in preparation for the review; and
- The files must be made available to the review team, which often must be sizable to complete the review on schedule.

If the required number of attorneys necessary to complete the review on time is not available locally, the team must expand geographically.

Second requests are challenging today and will only become more so in the future as the number of electronic documents continues to grow. IDC estimates that 31 billion person-to-person e-mails were sent each day in 2002 and that number is expected to increase to 60 billion per day by 2006. Peter Lyman and Hal R. Varian, *How Much Information? 2003*, retrieved from www.sims.berkeley.edu/research/projects/how-much-info-2003, Oct. 30, 2003.

E-mail, however, is not the only source of electronic documents. In "Enterprise Instant Messaging Market, 2005-2008," the Radicati Group (www.radicati.com) anticipates

that the number of corporate instant messaging users, sometimes called "turbo-charged e-mail" because it enables instant communication between participants, will rise to 42 million by the end of 2004. Even voicemail is now often stored as electronic files, significantly increasing the amount of information that companies archive. *Voicemail Poised to Become the Next Target of E-Discovery*, *LAWYERS WEEKLY USA*, July 2003.

To successfully handle second requests with increasing data volumes and tight deadlines, legal teams must find a cost-effective way to accelerate the process without compromising quality. To do so, they must fully understand the impact that rapidly processing large volumes of data has on the technology and procedures utilized during document conversion and review.

In addition, it helps to work with groups that have previous experience with second requests and can provide insight and guidance into the best practices that have proven successful in similar matters.

Document Conversion

Scalability and Reliability

Tight second request deadlines require scalable and reliable document conversion technology to convert electronic files into a common, reviewable format such as ".tif" or ".pdf." Review teams must be able to rapidly increase the data conversion rate without compromising quality if the quantity of documents changes unexpectedly.

For example, a new source of data such as previously unknown backup tapes or compressed files, which yield more documents than originally anticipated, may come to light after the initial project scope is determined.

Scalable, reliable production systems depend on robust technology infrastructure. To have the conversion capacity in place to quickly process massive data volumes, the system must be designed with databases, software and network hardware that will scale easily and cost-effectively. In practical terms, if any component of the document conversion system is weak, it will not support the demands of a second request. Instead, it will become a choke point, leading to delays and missed deadlines.

Document Complexity

It is not enough, however, merely to obtain sufficient system throughput. Processing capacity without quality assurance can be very costly. As with all electronic discovery, if files have not been properly labeled, if duplicate files have not been eliminated, if problem files — such as corrupted files, password protected files or those in an unsupported file format — have not been completely and correctly identified, firms risk long delays and increased expense. More important, if critical files are inadvertently mishandled during the process or if the process is not transparent and well documented, additional delays can be the result.

These problems are magnified in second requests, as the flood of data can seem overwhelming with rapidly approaching deadlines. Experienced people — the right number of experienced people — and meticulous processes are just as important as technology. Procedures must be in place to ensure thoroughness and quality output.

For example, procedures must ensure the successful processing of nested documents, such as zipped archive files and e-mail attachments. A zipped archive can exist within a zipped archive within a zipped archive and so on. An e-mail can contain deeply nested attachments, and an attachment, such as a Microsoft Excel spreadsheet, can contain links to external charts and graphs. Automating processing to achieve high-speed, highly accurate throughput is critical to the overall success of document conversion for second requests.

Exceptions

The ability to accurately identify files that cannot be processed using standard procedures is very important. In addition to unsupported file formats, problems arise from file corruption and viruses. With sufficient experience and the right tools, many of these problems can be overcome — by running anti-virus software for example — but every problem that cannot be fixed, and every change to even a single byte of the original data, must be recorded and communicated to the litigation team.

Media Restoration

Beyond these basic issues of robust technology, experienced people and rigorous procedures, two areas of electronic discovery are tested by second requests: media restoration and de-duplication. The issues in these areas must be anticipated and managed to meet second request deadlines.

Media restoration is resolving problems related to accessing data on source media. Access problems may arise from many causes including:

- Turning off a computer while it is accessing a hard disk, causing file or disk corruption;
- Damaging hard disks or CDs during shipment;
- Using programs that do not ensure data integrity to write information to CDs and DVDs, resulting in errors;
- Putting labels on CDs or DVDs that introduce data errors during read attempts;
- Using the wrong software to extract data from Microsoft Exchange, which can introduce formatting problems; and
- Operating environments that no longer exist and must be recreated prior to reading files on archived media.

To minimize these and other problems, firms must institute clear guidelines for data collection and delivery. These guidelines should include recommendations such as copying internal hard disk data to an external hard disk that can be disconnected and safely shipped. Beyond such preventative measures, document conversion practitioners must be able to solve as many media problems as possible, a capability that comes from experience and technical expertise.

De-duplication

De-duplication can dramatically reduce document review time by eliminating the review of the same document more than once. Typically, de-duplication eliminates at least 50 percent of the electronic files collected for conversion to a reviewable format in response to a second request. Successful de-duplication depends on the use of a digital document “fingerprint,” an algorithm known as MD5, that unambiguously identifies the content of a document and can be used as the basis for rapidly and accurately de-duplicating very large data sets. While

MD5 is a commonly used technology, it can be implemented incorrectly. An experienced team is the only assurance that de-duplication will be accurate and effective.

Document Review

Scalability and Reliability

Document review systems must be built with the same level of robust databases, application software, and network hardware as electronic discovery systems. Review systems must have sufficient capacity to store and manage the massive amounts of data that may result from a second request.

Just as important, the review team must be able to quickly add as many reviewers as needed to complete the project on time. As law firms add more reviewers to the team in order to meet an approaching deadline, they often rely on reviewers from multiple offices.

In other situations, a firm may use attorneys from multiple offices, each with unique expertise, to successfully complete the review. In these instances, firms often use Internet-based solutions that provide access to registered users no matter where they are located or when they are trying to access the data. In these instances, PC-based software is typically unable to offer the flexibility necessary for dispersed review teams.

Security

Internet-based review tools raise a key consideration: security. Security is critical when storing sensitive corporate information online so the data must be protected with state-of-the-art network security, including SSL 128-bit encryption and firewalls at all network access points. Virus checking of all documents should be standard. And security must be granular — enabling administrators to specify access at the database, folder, document and field levels as well as by user or user groups such as attorneys, expert witnesses, litigation support or co-counsel.

Document Management Tools

To enable reviewers to complete their reviews quickly and thoroughly, an online review system must include a complete set of document management tools. These tools should enable a strategic sub-division of the project as well as the ability to work across the entire document set when searching or reviewing the project status. Features typically required in second requests include:

- A fully searchable file folder system that allows users to organize documents by issue, expert, search terms or other relevant criteria;
- A variety of available search methods, such as keyword, form-based, Boolean, fuzzy logic and thesaurus searches, and the ability to search on both the full text and metadata of documents within a folder or across the entire document set;
- The ability to detect and remove duplicate documents to prevent repetitive work;
- The ability to see the review status of a document or multiple documents at a glance via visual cues; and
- The ability to review documents in native file format.

Review Tools

Automated review tools reduce the time required to respond to a second request. When reviewing documents, reviewers require an in-depth view of the document as well as a structured, repeatable coding process to assure uniformity throughout the project. The review window should conveniently show both the original document as well as its associated metadata (e.g., when an e-mail was sent, who sent it, who received it, when it was opened).

Customizable coding fields should be available to assure uniformity. It should also be easy to add annotations or redactions to documents. An audit trail should be created automatically to ensure effective management and accurate tracking.

Team Collaboration

Effective team collaboration keeps reviewers efficient, productive and aware of deadlines. Tools such as an online team calendar, online bulletin board, online directory and automated e-mails announcing changes to the review site are frequently employed to ensure that everyone on the review team stays informed and up to date.

Reporting Capabilities

Efficient project management, a key to successful completion of second requests, depends on effective reporting tools. Reporting tools should be available to quickly generate a report detailing the progress of an entire review as well as details on the progress of individual reviewers or review folders. The reporting tools should be flexible and include a variety of sorting and formatting controls as well as the ability to access reports online or download them to a spreadsheet.

Finding the Right Solution

Document Conversion

When considering developing an in-house document conversion capability to handle second requests, firms should thoroughly investigate the hardware and software costs, the system capabilities and the long-term operational costs. PC-based systems typically will not scale efficiently to provide very rapid processing and may not support a sufficient range of file types. For many firms, hiring sufficient document conversion and IT expertise to build, maintain and run the system may be cost prohibitive.

By outsourcing document conversion, firms eliminate the capital investment, personnel and maintenance costs, and time delays associated with building an adequate technology infrastructure to handle large projects with tight deadlines. While not all companies are comfortable with the outsourcing model, when it comes to second request deadlines, outsourcing may be the only viable option for most firms.

The key to eliminating discomfort over outsourcing is investigating potential vendors carefully. Vendors must have robust technology, experienced personnel, rigorous processes, an extensive track record and overall business sustainability to deliver on their commitments.

Online Review

For most firms, the only practical option for implementing online document review is through an application service provider. ASPs offer an attractive business model for law firms, providing a dedicated website where reviewers have access to their case documents. Some ASPs offer services on a pay-as-you-go model, enabling service costs to be easily billed back to clients. Others provide a review site at no additional cost for a specified period of time if they also handle the document conversion work.

There is no upfront capital investment with the ASP model and the review site can usually be set up and ready for use in a matter of days. New reviewers from any geographic location, with only a PC and an Internet connection, can be added in minutes. Data security,

scalability, reliability and application upgrades are all core competencies of the leading ASPs, allowing law firms to leverage this expertise and avoid hiring expensive IT employees or consultants.

The legal industry is increasingly realizing the benefits of the ASP model. Maturing applications, increased network speeds, and improved reliability and security — as demonstrated by the success of ASP solutions in other markets such as customer relationship management provider Salesforce.com and online meetings provider WebEx — have resulted in law firms adopting ASP alternatives to what was previously the domain of desktop software or paper-based review methods. Turbo-charging the review process by utilizing outsourced electronic document conversion and Internet-based on demand review tools to rapidly scale the review team has resulted in impressive results.

For example, one leading East Coast law firm was able to convert, review and produce 44GB of data (about 220,000 pages) in only 10 business days using 40 lawyers in four offices. The review was completed in response to a Justice Department second request on a large, proposed acquisition of a competitor. The acquisition was successfully closed on schedule.

Summary

Second requests will always involve meeting the challenge of quality production within a limited timeframe. But with the right technology, people and processes in place — or by outsourcing document conversion and online review to a vendor with the right technology, people and processes in place — firms can handle second requests efficiently: reducing costs, balancing workloads and successfully meeting deadlines.

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