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Lawyers need to create defensible document reviews using stats

In the course of every litigator's practice there is inevitably at least one occasion when a client, co-counsel or opposing counsel will ask the question, "Should that document have been produced?" Although different people will respond in different ways — confident denial or affirmation, shrug of the shoulders or a blank stare — the fact remains that you must be confident that your document review process meets the "reasonable inquiry" standard under Federal Rule Civil Procedure 26(g)(1).

Recent cases have demonstrated that lawyers will be held accountable for the conduct of third-parties tasked with document collection and review projects. In 2010, Judge Shira Scheindlin ordered sanctions against the plaintiffs in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, No. 05 CIV 9016, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) for failing "to sufficiently supervise or monitor their employees' document collection." In addition, failure to properly supervise document reviews can also give rise to malpractice claims. In June 2011, J-M Manufacturing, the world's largest maker of plastic pipe, sued its former counsel, McDermott, Will & Emery LLP, based on the firm's release of 3,900 privileged documents in a pending lawsuit. *J-M Manufacturing Company, Inc. v. McDermott Will & Emery,* California Superior Court, Los Angeles County — Central District, Case No.: BC 462832.

However, despite the fears instilled by these recent cases, lawyers should not return to a linear review of all documents in-house and disregard the advancements made in technology and staffing options. To the contrary, the use of contract attorneys and e-discovery vendors, when paired with quality control by the responsible lawyers, can provide cost-effective options. Sampling provides an effective quality control measure to help ensure that a document review will not become a liability for law firms. Statistical sampling can serve several purposes, both during the document review and immediately before document productions. For example, it may be used as a quality control tool to measure an individual's or group's ability to correctly tag documents or to measure the probable error rate of the entire document review project.

The very mention of statistics causes most attorneys' eyes to glaze over. After all, there is a reason that most of attorneys eschewed degrees in engineering or economics for the pursuit of a juris doctorate. However, lawyers should not fear statistical sampling. Basically, the statistical sample method applies additional criteria, including confidence levels and intervals, to a random sample. Although non-random or judgmental sampling can help identify problems, such as errors by document reviewers, statistical sampling permits statements to be made about a population of documents from which the sample is drawn — including the probable review error rate. As stated in the Sedona Conference's, May 2009 Working Group Commentary article "Achieving Quality in the E-Discovery Process," "One area where statistical sampling has an advantage is that quantifiable measures of error and confidence intervals are possible, while judgmental sampling has no such formal measurement."

One of the most important concepts in statistical sampling is "confidence level." This is the probability, expressed as a percentage, that the characteristics of the documents sampled reflect the characteristics of the entire collection of documents. The "confidence interval" is how confident one is that a particular characteristic is present in the entire collection of documents. This is expressed as a plus or minus percentage. For example, assume that a review of a random sample of nonresponsive documents shows that 2 percent of the documents are, in fact, responsive and have been incorrectly tagged. If one uses a confidence interval of plus or minus 1 percent and a confidence level of 95 percent, then the attorney can say that he or she is 95 percent confident that the actual percentage of incorrectly tagged responsive documents in the entire population is between 1 and 3 percent.

Matthew C. Luzadder is an associate in the Chicago office of Kelley, Drye & Warren LLP. His practice focuses on complex commercial litigation, white-collar crime and labor and employment litigation. He can be reached at mluzadder@kelleydrye.com.

Statistical sampling has long been accepted by the courts and statistics relied upon and admitted into evidence. "Sampling has long been considered an acceptable method of determining the characteristics of a large universe ... such mathematical and statistical methods are well recognized by courts as reliable and acceptable in determine adjudicative facts." See *Rosado v. Wyman,* 322 F.Supp. 1173, 1180 (E.D.N.Y. 1970), *aff'd* 437 F.2d. 619 (2d Cir. 1970), *aff'd* 402 U.S. 991, 91 S.Ct. 2169, 29 L.Ed.2d 157 (1971). However, there is very little judicial guidance on what an acceptable error rate is for a document review. A (judgmental) sample of articles on document review error rates puts the human error rate on repetitive tasks, such as document review, above 3 percent. Therefore, an error rate below this percentage is likely to be determined by a court to be acceptable. And, although the use of statistical sampling can not guarantee that opposing counsel will not challenge the sufficiency of a document review, documenting the statistical sampling process can go a long way toward showing that the efforts used to review documents were reasonable under FRCP 26(g).

> ***"Lawyers should talk to their e-discovery vendors or in-house litigation support department about making statistical sampling part of their firm's document review process."***

In addition, if the statistical sampling process reveals a high error rate in the document review, an examination of the incorrectly tagged documents may give the responsible attorney a chance to delve into the issue and correct the problem. Although a re-review of all documents will likely not be practical, or even feasible, the responsible attorney can craft search terms to locate responsive documents that were incorrectly tagged. Once the responsive documents have been retagged, the statistical analysis may be performed again to determine if an acceptable error rate has been achieved. This process may be repeated multiple times in order to improve the accuracy of the document review.

Lawyers should talk to their e-discovery vendors or in-house litigation support department about making statistical sampling part of their firm's document review process. Many document review platforms have the ability to pull a random sample from a document set and the mathematical formulas are not difficult to understand, although it is recommended that someone double-check the math — especially if calculated by a J.D.

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