

Consilio Institute: Practice Guide

THE MAIN EVENT: REVIEW FUNDAMENTALS

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THE MAIN EVENT: REVIEW FUNDAMENTALS

Document review has long been the most expensive phase of a discovery project. [One 2011 study estimated¹](#) that **58%** of the total costs to produce materials in discovery are attributable to document review, and [another study from 2012 estimated²](#) that **73%** of the total costs are attributable to document review. Even with the more sophisticated tools and techniques available today, document review remains the largest discovery expense in a typical matter.

The reason for these significant costs is the need for qualified people to spend time looking at a significant number of documents to make nuanced determinations about their relevance, their privilege, and more. Regardless of whether that work is concentrated in a small case team, spread among a large contract review team, or outsourced to a managed review service, the total time required has the potential to be in the hundreds or thousands of hours.

Moreover, the quality and consistency of all those hours of work must be ensured so that all relevant information can be uncovered, so that complete responses can be provided, and so that inadvertent disclosure of privileged or confidential material can be avoided.

About this Practice Guide

To help you to meet these challenges, we’re going to break review down into five subparts and discuss each in turn:

1. What gets reviewed
2. For what it gets reviewed
3. By whom it gets reviewed
4. Workflow design considerations
5. Quality control

¹ David Degnan, *Accounting for the Costs of Electronic Discovery*, 12:1 MINN. J. L. SCI. & TECH. 151-190 (2011), available at <https://www.claydesk.com/wp-content/uploads/2013/10/accounting-for-the-costs-of-electronic-discovery.pdf>.

² Nicholas M. Pace & Laura Zakaras, *The Cost of Producing Electronic Documents in Civil Lawsuits: Can They Be Sharply Reduced Without Sacrificing Quality?*, RAND Corporation (2012), available at https://www.rand.org/pubs/research_briefs/RB9650/index1.html.

WHAT GETS REVIEWED

The first step in any review project is determining what materials are going to get reviewed, because the volume and composition of those materials will inform your subsequent decisions about who does the reviewing and how they go about it. Without a clear picture of the what, you cannot make an effective plan for the who and the how.

In this context, we are not talking about the kinds of source identification that take place during preservation and collection. Rather, we are talking about identifying what requires review from within the pool of collected, processed materials already loaded into an eDiscovery platform. Traditionally, during processing, this pool of loaded materials has already:

- ▶ Had its system files, etc., removed
- ▶ Had its duplicates identified and removed
- ▶ Had any date restrictions applied

This will have left you with a pool of unique files, from the relevant time period, that could contain relevant information. Ideally, you will then have engaged in some early case assessment (ECA) activities to gather information about the contents of this pool to help you decide what gets reviewed and how best to go about it.

From this pool then, you must decide whether everything gets reviewed, whether only the results of certain searches and filters get reviewed, whether only the results of a technology-assisted review (TAR) process get reviewed, or whether some hybrid plan is employed:

- ▶ **Everything**
 - ▶ For smaller pools of materials (*i.e.*, those containing only a few thousand documents) the simplest, fastest solution is often to just review everything. Reviewing everything is also the typical approach when reviewing

productions received from other parties, which can contain thousands of documents.

- ▶ **Search and Filter Results**
 - ▶ Identifying your ultimate review set through the application of searches and filters (whether established by negotiation or developed during ECA) is the most common approach. This typically requires reviewing the results of the chosen searches and filters, as well as some of the remainder to verify its irrelevance.
- ▶ **TAR Process Results**
 - ▶ For larger pools of materials, a TAR process may be employed to identify the relevant materials within the pool, or if speed is of the essence, a continuous active learning (CAL) process may be employed to identify the right materials. Those materials are then reviewed, along with some of the remainder to verify its irrelevance.
- ▶ **Hybrid Plans**
 - ▶ It is also common to employ a hybrid of these approaches specific to the exigencies of the case. For example, you might review all of the materials collected from the most critical custodian and then apply searches or a TAR process to the remaining materials. Similarly, targeted searches might be used to quickly identify the most important materials for immediate review, and then a TAR process might be applied to all the lower priority materials afterwards.

Whichever path you choose, you will also need to make decisions about the handling of families, threads, and near-duplicates to finalize your review set:

▶ **Families**

- ▶ “Families” refers to the family groups of related documents, such as “parent” emails and “child” attachments. If you are reviewing everything, all family group members will already be included in your review set, but if you have applied searches or a TAR process, the results of those efforts may not be family group complete. You will have a choice about whether to pull related family members in too, or to just review the actual results. Most of the time, they are included – both for the context they provide and because production in complete family groups is common.

▶ **Threads**

- ▶ “Threads” refers to the threads of related emails going back and forth between participants, which often contain within themselves the text of the messages that preceded them. The single email at the end of the thread may contain the complete thread within itself. Such emails are called “inclusive emails.” Most review platforms will give you the option to identify inclusive emails and limit review to just those, excluding from the review set all of the individual preceding emails (and some allow review decisions to be propagated across a thread).

▶ **Near-Duplicates**

- ▶ “Near-duplicates” refers to those documents that are extremely similar (or superficially identical) to other documents in your collection but that were not removed by deduplication during processing due to some small variation(s) between them (e.g., edits in successive drafts, differences in metadata values). Most review platforms will also give you the option to identify near-duplicates, either for grouped inclusion in the review set, or to exclude all but one instance (and then propagate review decisions across the group).

Scope and Process Negotiations

One of the most important factors in determining what gets included in your review set is the scope limitations and process decisions you negotiate with the other parties before, during, and after the meet and confer. It is common to negotiate agreements to limit the scope to specific custodians, to specific enterprise sources, to specific date ranges, to specific file types, and more. It is also common to negotiate over what searches should be run, what TAR process should be used, and other aspects of the review set identification process. The more scope limitations you can negotiate, the less time and money you will have to spend on review, and the more process elements you can negotiate up front, the fewer decisions you may need to defend later.

FOR WHAT IT GETS REVIEWED

The next aspect of review to consider is for what your identified review set needs to be reviewed, including:

- ▶ Relevance and responsiveness
- ▶ Privilege
- ▶ Confidentiality
- ▶ Deposition preparation

Relevance and Responsiveness

When planning and executing a document review effort, it is important to remember that relevance and responsiveness are distinct things:

- ▶ Relevance, as defined by [Federal Rule of Evidence 401](#),³ is a question of whether a particular piece of evidence “has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” And discoverability, as defined by [Federal Rule of Civil Procedure 26](#),⁴ extends to any evidence that is both relevant and proportional.
- ▶ Responsiveness, in contrast, refers to whether or not a given piece of evidence is responsive to any proportional discovery request propounded by another party. The universe of responsive materials should be a subset of the universe of relevant materials.

Everything that is relevant may be helpful to you in understanding the underlying events, and you may wish to plan and execute your review with the intent of finding it all. On the other hand, you might wish to focus your review more narrowly on just finding all the materials responsive to the actual discovery requests received. It is also common to conduct review as a hybrid of these two approaches: applying a top-level tag for relevance versus non-relevance, while also applying request-specific tags to relevant materials that are responsive to one or more specific discovery requests.

Privilege

Reviewing for privilege is of equal importance to finding the relevant and responsive materials within your review set – both because attorneys have an ethical duty to protect client confidentiality (see, e.g., [ABA Model Rule of Professional Conduct 1.6](#)⁵) and because inadvertent disclosures can lead to privilege waiver if reasonable steps to prevent the disclosure weren’t taken (see [Federal Rule of Evidence 502\(b\)](#)⁶). In addition to the standard attorney-client privilege and work product immunity, you may need to review for other privileges, such as the joint-defense privilege or the physician-patient privilege, depending on the case.

Confidentiality

In addition to privilege, you may also need to review for certain types of confidential information. For example, disclosure of personally-identifiable medical information generally needs to be prevented to comply with [HIPAA’s Privacy Rule](#).⁷ If you are producing to a federal government agency, you may need to produce a second copy of your materials with confidential business information redacted to prevent disclosure of that information to others through [FOIA requests](#).⁸ If you are producing materials collected from within the EU, disclosure of personally-identifiable information may need to be prevented to comply with the [GDPR](#).⁹

Additionally, it is common to negotiate a protective order allowing for the redaction of certain confidential personal information (e.g., phone numbers and email addresses for individual employees) or for the special handling of certain

³ Fed. R. Evid. 401, available at https://www.law.cornell.edu/rules/fre/rule_401.

⁴ Fed. R. Civ. P. 26, available at https://www.law.cornell.edu/rules/frcp/rule_26.

⁵ ABA Model Rules of Professional Conduct R. 1.6 (2021), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/.

⁶ Fed. R. Evid. 502(b), available at https://www.law.cornell.edu/rules/fre/rule_502.

⁷ U.S. Dep’t of Health & Hum. Servs., Summary of the HIPAA Privacy Rule, HHS.gov, <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> (July 26, 2013).

⁸ U.S. Dep’t of Justice, What is FOIA?, FOIA.gov, <https://www.foia.gov/about.html> (Mar. 14, 2011).

⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 59, 1 (May 4, 2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0679-20160504&qid=1532348683434>

confidential business information to limit who can see it (e.g., trade secrets). Materials subject to such an order will also need to be identified during review.

Deposition Preparation

Later in the discovery process, you may also be reviewing documents – both your own and those produced by other parties – to prepare for depositions. Document review for deposition preparation is different from document review for production. In this context, you are generally re-reviewing materials that have already been determined to be relevant, non-privileged, etc., and you are reviewing them in more detail to create a physical or virtual “witness binder.” Such binders may include a chronology, lists of key topics and details, potential exhibits, and more.

WHO DOES THE REVIEWING

Now that you have made decisions about what you are going to review and for what you are going to review it, you need to make decisions about who is going to perform that review. Broadly speaking, your choices are internal resources (*i.e.*, the case team, existing corporate or firm staff) and external resources (*i.e.*, contract reviewers, managed review services).

Internal Resources

For smaller discovery efforts, it is common for the case team to do most or all of the review themselves, or to do it themselves in conjunction with help from additional paralegals or attorneys already on staff inside the organization or at the primary outside law firm for the matter. Case team members working on the review have the advantage of direct knowledge of the overall matter, its legal issues, etc., and existing staff have the advantages of having already been evaluated as effective team members and of already knowing the organization.

On the other hand, it may eat up a significant amount of the case team members’ time engaging directly in review and review management – time that may be

more costly per hour than external resources would be. Additionally, it can be disruptive or infeasible to tie up multiple existing employees, for an extended period of time to conduct review, and experienced team members may still be inexperienced document reviewers unable to effectively leverage review tool efficiencies.

External Resources

For larger discovery efforts, some form of external review resources often need to be utilized to supplement, or substitute for, the internal review resources described above. Broadly speaking, external review resources come in two types: contract review staff and managed review services:

1. Contract Review Staff – A variety of discovery services providers and staffing agencies provide document review attorneys on a contract basis, at an hourly rate. The hiring organization or law firm can typically specify required experience levels, required language skills, required knowledge (e.g., a chemistry background), and more. This can facilitate supplementation of an internal team for scale or specialization. Once hired, however, the hiring organization or

firm is then responsible for providing these contract reviewers with secure space, with workstations and systems access, and with assignments and oversight. You are being provided with reviewers rather than with review, which limits the scalability of this approach.

2. **Managed Review Services** – Managed review services, on the other hand, provide review rather than reviewers. Such services, whether onshore or offshore, maintain their own pools of reviewers and review managers, usually a mixture of permanent staff and experienced, pre-vetted contract review staff. They also maintain their own secure environments, as well as standardized review, quality control, and documentation processes. Case teams still dictate review goals, assist in review team training, resolve review questions as needed, and evaluate review results, but most of the actual review and the management of the review are handled by the service provider.

Reviewer Training

Whether your team is internal only, internal plus contract, or entirely external, it is important that the reviewers have a clear and consistent understanding of what things they are looking for, what standards they are applying, and what processes they are

following. For example:

- ▶ What is the scope of relevance for the case?
- ▶ What are the meanings of any specific requests?
- ▶ What qualifies as a “hot” document?
- ▶ What context do they need to know?
 - ▶ About the organization?
 - ▶ About the underlying events?
 - ▶ About the primary legal issues?
- ▶ Are they checking for privileges?
 - ▶ Which ones?
 - ▶ Using what standards?
 - ▶ What about HIPAA, CBI, PII, etc.?

It is common to provide review teams with a written review protocol document that provides answers to all of these questions, along with relevant background information and example documents from the collection. This protocol and the associated examples are typically reviewed with the team during an initial training and question session, and then follow-up questions are addressed by the case team as needed throughout the review.

WORKFLOW DESIGN CONSIDERATIONS

Once you know what materials you’re reviewing, for what properties you’re reviewing them, and who’s doing that reviewing, you can plan the actual workflow by which the review work will be executed. If you are designing the review workflow yourself, rather than relying on a managed review service, you will need to consider document flow, tagging palettes, batch creation, and process documentation.

Document Flow Considerations

Designing an effective document review workflow is a project-specific exercise that requires consideration of a wide range of options and factors, including: the features and functions available to you in your chosen document review platform, the volumes and types of materials being reviewed, the number and nuance of things for which the materials must be reviewed, the number and skill level of the chosen reviewers, and the available time for completion of the review.

Smaller, simpler projects may require only a simple workflow, with just a traditional first level review checking for both relevance and privilege, and a second level quality control review double-checking some of that work prior to production. More complex projects may call for multi-level, multi-path workflows with specialized teams handling specific tasks. For example:

- ▶ Projects with numerous, nuanced responsiveness determinations to make might call for separating initial relevance review from subsequent issue responsiveness coding. Each additional determination a reviewer must make on a document decreases their review speed, and having too many determinations to make will increase their error rate.
- ▶ Projects with high volumes or with nuanced privilege issues might call for separating privilege review from relevance/responsiveness review, having it performed by particularly skilled reviewers only for the materials deemed responsive.
- ▶ Projects with a high volume of materials requiring redaction (for privilege, confidentiality, etc.) may separate redaction into its own step, handled by a dedicated team, rather than asking the first-level reviewers to complete redactions.

Tagging Palette Considerations

As we noted above, there is a tension in document review between speed, accuracy, and nuance: the

more determinations a reviewer must make, the longer it will take them, and the more mistakes they will make. Understanding this tension is important when creating the tagging palette your reviewers will use to annotate documents with their determinations.

Reviewers only working with tags for simple relevance, potential privilege, and hot documents will be able to work more quickly and consistently than those who must also apply tags for specific issues, specific privilege types, and other nuances. A good rule of thumb is to try to keep each reviewer from having to make more than five determinations at a time about each document. If many more than that are required, consider breaking those determinations up across multiple review passes or paths. Some platforms allow for the creation of multiple, separate tagging palettes to support complex workflows involving multiple teams.

Depending on your workflow and your chosen platform's built-in review tracking features, you may also need to include tags designed to aid you in:

- ▶ Tracking documents' progress through your workflow
- ▶ Tracking who's reviewed them at each step in the workflow
- ▶ Tracking whether tagging changes have been made during quality control

Ideally, you should rely as much as possible on the review tracking functions built into your chosen platform to minimize complexity in the tagging palette(s) being used.

Batch Creation Considerations

In addition to planning your document flow and creating your tagging palette(s), you will also need to make some decisions about how the large pool of documents to be reviewed should be broken up into batches for reviewers to complete:

- ▶ How should your review pool be organized into batches?
 - ▶ Depending on your review goals and priorities, you might break up your review pool into batches by custodian, by search term hits, by concept clusters, by chronology, by source type (e.g., batching text messages together, emails together, etc.), or by other factors.
- ▶ How should threads and near-duplicates be handled?
 - ▶ As we discussed above, you will need to decide whether you are including or excluding near-duplicates and non-inclusive emails and, if so, you will need to decide whether to keep them grouped together during batch creation.
- ▶ How should family groups be handled?
 - ▶ As we also discussed above, you will need to decide whether you are keeping family groups of related records together; if you are planning to produce in complete family groups (most common), it is generally best to create review batches that way too, both for the additional context it provides, and so that all family members get reviewed prior to production.
- ▶ How large should each batch be?
 - ▶ Batch size should be selected based on how you want your reviewers to work; it is generally best to keep batch sizes small enough that they can be completed in 1-2 hours, as error rate increases the longer reviewers go without a break; how many documents that is will depend on your documents, but batches of 50-100 documents are common.

Another factor that can affect the speed of your reviewers' work is the mix of file types and file lengths that they receive in each batch of documents they review. While the majority of documents are likely to be text documents of moderate length through which

they can move at a quick, even pace (e.g., emails and Word documents), some may be outliers that will break the rhythm of their work, such as:

- ▶ Multimedia files requiring a switch to listening or watching
- ▶ Large spreadsheets requiring a switch to native review
- ▶ Very long documents requiring protracted reading time

If you are running a large, time-sensitive review, it may well be worth the effort to preemptively filter such files out of the general review pool before batch creation (by file type, file size, etc.). Once segregated, those rhythm-breakers can be grouped into their own batches, by type, for separate review.

Documentation Considerations

When engaged in design of a review workflow, you will also need to think in advance about the documentation needs you will have during the course of the review. Generally, you will want some way to track:

- ▶ Your overall progress, your progress against budget, and your rate of progression
 - ▶ *To project remaining time and cost to completion*
- ▶ Your rates of relevance, privilege, redaction needed, etc.
 - ▶ *To project the production, privilege logging, and redaction work still to be done*
- ▶ The speed and accuracy rates of individual reviewers
 - ▶ *To identify and address misunderstandings and performance issues*

Additional metrics may be also tracked for both intra- and inter-project benefits.

Once you're tracking your chosen metrics, you will also need to generate reports to share and contextualize the important information with relevant team members, client representatives, etc. Frequency and content is entirely dependent on your needs, but it is common to provide weekly review progress reports, often with some additional reporting done monthly. Although all of this tracking and reporting can be done manually, most review platforms now include features to address these needs.

In addition to tracking and reporting on aspects of your project's progress, you will also want a plan for documenting decisions about the review project. In the event that there is a later challenge to your methods and their results, it will be invaluable to have contemporaneous notes or emails documenting why you did what you did the way you did it – both as potential evidence and to refresh your recollection of decisions made months or years before.

I QUALITY CONTROL FUNDAMENTALS

The final and most important fundamental of review to understand is quality control. No matter what you're reviewing, what you're reviewing it for, who's reviewing it, or how you're reviewing it, you will need to take proactive steps to ensure the overall quality and consistency of that work. Perfection [isn't](#)¹⁰ [possible](#)¹¹ and isn't required, but reasonable efforts to meet your obligations of completeness, accuracy, and privilege protection are both.

The Myth of the Gold Standard

The Sedona Conference's [Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery](#)¹² describes a persistent myth in eDiscovery:

It is not possible to discuss this issue without noting that there appears to be a myth that manual review by humans of large amounts of information is as accurate and complete as possible – perhaps even perfect – and constitutes the gold standard by which all searches should be measured.

The reality is quite different from this myth. In reality, even the best reviewers make mistakes due to simple human fallibility, and reviewers frequently come to different conclusions regarding questions of relevance, privilege, and more. [Studies have shown](#)¹³ surprisingly low consistency between the independent results of equivalent review teams ("Assessor Overlap").

Because of this reality, it is critical that your document review project include some steps to ensure an acceptable minimum level of quality, consistency, and completeness.

¹⁰ See, e.g., *Dynamo Holdings Ltd. P'ship, et al., v. Comm'r of Internal Revenue*, 143 T.C. No. 9 (USTC Sep. 17, 2014), available at https://www.millerchevalier.com/sites/default/files/resources/Dynamo_USTaxCourt.pdf.

¹¹ See, e.g., *Winfield v. City of New York*, 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017), available at <https://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015cv05236/444418/217>.

¹² The Sedona Conference, *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217 (2014), available at https://thesedonaconference.org/publication/Commentary_on_Search_and_Retrieval_Methods

¹³ Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII RICH. J.L. & TECH. 11 (2011), available at <http://jolt.richmond.edu/v17i3/article11.pdf>.

Traditional Methods

The most traditional method of quality control is second level (or second pass) review. In this method, some portion of the material reviewed by first level (or first pass) review is re-reviewed by more senior reviewers to check the accuracy and consistency of the work. The volume re-reviewed and the focus can vary widely depending on the needs of the project:

- ▶ In a smaller project, you might re-review everything deemed relevant and non-privileged to make sure nothing irrelevant or privileged is produced.
- ▶ In a larger project, you might re-review a random 10% of the first level review to look for recurring mistakes to address, or problem reviewers to retrain or replace.
- ▶ In a project using a TAR or CAL workflow, you might focus more on evaluating the materials deemed irrelevant to be sure nothing important has been missed.

In some projects you may establish more than two levels of review. For example, you might add a third level in which case team members re-review certain materials prior to production.

The other traditional quality control method is targeted searching. Targeted searching is the practice of running searches against the reviewed materials for key terms that would likely indicate clear relevance, irrelevance, or privilege and then double-checking that the results are coded correctly. For example, you might search for key attorneys' names and email addresses and then double-check the privilege tagging applied to the results.

Sampling

Sampling comes in two broad categories: judgmental sampling and formal sampling. Judgmental sampling is the informal process of looking at some randomly selected materials to get an anecdotal sense of what they contain. The random 10% second-level

review and targeted searching described above are examples of judgmental sampling. The goal of these efforts is to get an impression and make an intuitive assessment rather than to take a specific measurement.

Formal sampling is just the opposite: you are reviewing a specified number of randomly-selected documents with the goal of taking a defined measurement with a particular strength. Typically that measurement is either being taken to test classifiers or estimate prevalence:

▶ Testing Classifiers

- ▶ This is the process of seeing how effective and efficient a particular classifier actually is, be it a search, a TAR process, or a human reviewer. Using this technique, you can quantify the accuracy and error rate of individual reviewers and teams or quantify the recall and precision of searches or TAR processes.
- ▶ In the context of quality control, these measurements can be used to identify problem reviewers, to measure overall review effectiveness, or to implement lot acceptance sampling.

▶ Estimating Prevalence

- ▶ This is the process of reviewing a simple random sample of a given collection of materials to estimate how much of a given kind of thing is present.
- ▶ In the context of quality control, this is used most often to measure how much relevant material may exist in the unreviewed remainder left after applying searches or a TAR process (a.k.a. measuring elusion).
- ▶ You might also use this method to

create a yardstick for your review before you begin by estimating in advance how much relevant and privileged material you expect to find.

Feedback Loops

Regardless of the specific quality control methods you choose to employ on your project, it is critical that effective feedback loops are established. In most document review projects, you will be engaged in ongoing quality control throughout first-level review, giving you the opportunity to not just catch and correct errors, but to identify issues and address them with first-level reviewers to improve the rest of their work. Effective feedback loops make this possible.

A feedback loop between the review managers and the reviewers feeds the insights gleaned from quality control efforts back to the reviewers through additional instruction and clarification. For larger projects, it is common to have weekly review team meetings to review issues and answer questions. It is also common to have one-on-one sessions with individual reviewers identified as requiring additional guidance, and it is a good idea to maintain a shared list of reviewer questions and review manager answers for everyone's reference.

A feedback loop between the case team and the review managers enables the review managers to request guidance and clarification as needed and enables the case team to share any evolution in their understanding of the case, as well as any issues they identify during any quality control review they perform.

The Importance of Privilege Protection

It's worth emphasizing the particular importance of engaging in quality control for the purpose of preventing the inadvertent disclosure of privileged materials. As we noted above, [Federal Rule of Evidence 502\(b\)](#)¹⁴ establishes that inadvertent disclosures can lead to privilege waiver if reasonable steps to prevent the disclosure weren't taken.

The [Committee's Explanatory Note on Rule of Evidence 502](#)¹⁵ makes clear that "reasonable steps" is a case-by-case determination that can depend on factors such as the total number of documents to be reviewed, the time constraints for production, how records were managed, what tools were used, and more. Consequently, [taking steps to ensure the quality of your privilege review approach](#)¹⁶ is at least as important as what approach you take:

The implementation of the methodology selected should be **tested for quality assurance**; and the party selecting the methodology must be prepared to **explain the rationale** for the method chosen to the court, **demonstrate that it is appropriate** for the task, and **show that it was properly implemented**. [emphasis added]

¹⁴ Fed. R. Evid. 502(b), available at https://www.law.cornell.edu/rules/fre/rule_502.

¹⁵ Fed. R. Evid. 502(b), advisory committee's note, available at https://www.law.cornell.edu/rules/fre/rule_502.

¹⁶ *Victor Stanley Inc. v. Creative Pipe Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008), available at <https://casetext.com/case/victor-stanley-inc-v-creative-pipe>.

Key Takeaways

There are six key takeaways from this practice guide to remember:

1. Review is typically the largest discovery expense due to the need for qualified people to spend time looking at a significant number of documents to make nuanced determinations about their relevance, their privilege, and more.
2. Typically, you will review either the results of iterated/negotiated searches or the results of a TAR/CAL process, which are: family group complete; restricted to relevant dates; and, have had system files, duplicates, and non-inclusive emails removed.
3. At a minimum, you will review to identify privileged materials and relevant materials, but you may also need to review for: responsiveness to particular requests, the presence of confidential information, or deposition preparation details.
4. Smaller reviews may be performed by the case team, supplemented as needed with existing staff or contract reviewers, while larger reviews often require the aid of a managed review service. Effective review team training is essential regardless.
5. Selection of review methodology – including review workflow, tagging palette(s), and batch creation – is highly matter-specific and depends upon: the features in your platform, the volumes and types of materials, the number and nuance of needed determinations, the size and skill of the team, and the available time for completion.
6. Quality control – including informal and formal sampling, targeted searching, effective feedback loops, and other steps – is essential to ensuring that review is consistent, results are complete, and privilege and confidentiality are protected.

ABOUT THE AUTHOR

Matthew Verga is an attorney, consultant, and eDiscovery expert proficient at leveraging his legal experience, his technical knowledge, and his communication skills to make complex eDiscovery topics accessible to diverse audiences. A fourteen-year industry veteran, Matthew has worked across every phase of the EDRM and at every level, from the project trenches to enterprise program design. As Director of Education for Consilio, he leverages this background to produce engaging educational content to empower practitioners at all levels with knowledge they can use to improve their projects, their careers, and their organizations.



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