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## BEST PRACTICES

ACT Litigation Services' Elizabeth Pollock chronicles her journey from the traditional law firm/contract review work model, where only speed and time were tracked, to a strong belief in analytics and the measurement of all aspects of review, including quality.

### Confessions of a Contract Reviewer

By ELIZABETH POLLOCK

“**C**onfession” is not just an admission of guilt, it is also used to mean a profession of faith or belief. Having left a top tier law firm to have the flexibility and time to devote to a growing family, contract review offered a simple solution at a particular time in my life.

This paper is not about the good, the bad, or the ugly of contract reviewers—there are ample blogs and post-

ings about that diverse community to satisfy the most interested observer. Contract reviewers are wonderful, hard working people. However, through no fault of their own, they are in a bad system, which does not necessarily foster the highest achievable level of quality.

Many people still mistakenly think that a focus on quality adds too much to the discovery project cost. It does not. The right quality process increases value or it is not a quality process. When using a good process in review, costs of \$20 per document and \$7 per document by two different law firms were reduced to \$2.40 a document, including certification. It is all about the process.

**Historical Support.** Louis Brandeis, one of the most famous lawyers in American history, communicated often with Fredrick Taylor, Harrington Emerson, Frank Gilbreth, Henry Gantt, and other early pioneers of quality and efficiency in the study of work. In fact, it was Brandeis who coined the term “Scientific Management” to describe their profession.

Brandeis used this emerging discipline in cases that ranged from railroad rate disputes to labor problems. Scientific Management also found its way into the

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“Brandeis Brief,” which went beyond dependency on legal theory, but also included and relied on the analysis of factual data.

Brandeis strongly believed that scientific management would bring justice to an unjust world. He affirmed that, “Efficiency is the hope of democracy.”

**High Costs, Lack of Control.** Over the past few years, I have worked in an emerging and alternative economic model which is dependant upon measurement and process, designed to address the growing problem of client frustration due to rising costs spurred on by a lack of control in the discovery phase of litigation. The process is designed to give the end-point client control and predictability, as well as a high quality, low cost outcome.

Most of the cost in discovery (up to 80 per cent) is attributable to people looking at documents. In order to materially lower that cost, best practices for large jobs will first reduce the population to be reviewed and then review it in a high quality, low cost environment using analytics (i.e. statistical and quantitative analysis of the data, explanatory and predictive models, and fact-based management to drive decisions and actions).

**Integrating the EDRM.** The basic Electronic Discovery Reference Model (EDRM) is generally accepted as the industry standard, and used in this article as the basic reference.

The elements of the model are identified as Information Management, Identification, Presentation, Collection, Processing, Review, Analysis, Production and Presentation. The EDRM website ([www.edrm.net](http://www.edrm.net)) enables you to drill down into great detail on the various elements.

Currently, there is a trend to discuss these elements as separate unique activities. The best approach, however, is to integrate solutions across the whole model which helps to reduce cost and improve efficiencies, largely because each element in the system affects the next.

This is particularly true for review, which is often singled out as a unique activity, possibly because it is the largest cost element and has been a significant revenue source for law firms.

But review, like all segments of the model, should be treated as integrated into a unified discovery process, rather than as a series of separate, discrete tasks. This is applicable even if the work is done by different supply partners and law firms. In order to develop the lowest “all in cost” with the greatest quality, an integrated process should be employed across the whole EDRM model.

**Inefficiencies of Inspection.** Quality and measurement are critical to the review process. Most traditional review jobs use “inspection” as a quality control process; it frequently translates to “higher level reviewers looking through as many documents as they can and making changes to what they consider to be errors.”

But who inspects the inspectors? How many inspectors do you use? Do they all agree with one another?

Inspection is costly, unpredictable and not as effective as some alternatives. As the quality expert W. Edward Deming has stated, “Inspection with the aim of finding the bad ones and throwing them out is too late, ineffective, and costly.”

Deming explains, “In the first place you can’t find the bad ones, not all of them. Second it costs too much.”

Inspection also leads to a higher blended rate-per-hour charge for review. I have bench-marked blended rates at a \$160 an hour with \$50 to \$60 an hour going to the contract attorneys and \$100 an hour going for inspection and supervision.

Blended rates can run as high as \$200 an hour. Attorneys are used to using the hourly rate as the sole metric. You will often hear “our costs are \$50 an hour for contract attorneys.” This ignores the all-in cost of the blended rate which includes inspection and supervision by counsel, overall review productivity, and steps taken upstream to reduce the population prior to the review element. It also says nothing about how well these tasks were done.

**An Argument for Statistical Sampling.** Sampling addresses many of these issues. With sampling you can have one person with a high degree of knowledge and expertise looking at relatively small samples and giving feedback to the reviewers, thereby continuously improving the system. This is cheaper and better.

A client does not want to pay for hours; they want to pay for results. As Deming points out, you can not inspect quality into a process.

**Designing the Protocols.** Sampling protocols should be designed by expert mathematicians. A valid random sample can provide much better results than inspection and would take one person less than full time to accomplish.

This approach has the added advantage of giving deeper insights into the issues and document population over time by using one very knowledgeable expert. Quality control using sampling becomes a part time job for one person.

**Other Proponents.** My “eureka” moment did not come all at once or in a vacuum. The Sedona Conference® *Commentary on Achieving Quality in the E-Discovery Process* is an excellent source on this subject. Companies like FMC Technologies, DuPont, UTC, Cisco, and others have long lived in this world of measurement and process improvement. And they are not alone.

Pillsbury Winthrop, Bartlit Beck, and some other law firms are advocates of alternative billing models and the use of measurement. These methods are not new. Many of the methodologies and applications are more than 100 years old. They are well tested and proven. Why then are they not more widely adopted?

**Resistance to Sampling.** In the first place, sampling is counterintuitive. In my traditional review experience, logic told us that if you looked at X number of documents as a test, to look at 5X or 10X must be better. This is analogous to tasting a soup with a spoon to see if it needs seasoning and advocating that a better decision could be made by drinking a cup of the soup.

Proper sampling gives you a way to view and test the whole, economically, and produces better, statistically valid results. More is not always better, especially when applying Scientific Management principles to document review. In my world, less is more—more enlightening, more predictable, more cost effective.

The truth is that all professions resist change. For example, despite overwhelming data that the use of checklists in intensive care units materially reduces deaths and complications, their use is still resisted by many doctors. This resistance manifestation has been

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well documented by Paul Meehl and William Grove. It is not unique to doctors and lawyers. It can be found in baseball scouts and wine connoisseurs. It is a human condition.

**Need for Personal Input.** Scientific Management is not advocacy that machines and processes are better than humans. It is not an either/or matter. Humans are the key factor in making process measurement work.

In every legal case or document review, there must be some triangulation between risk, cost, and time. This is a critical judgment and it must be made by a person. He or she can be aided greatly in the decision by analytics and measurement, but only the person can apply legal judgment, strategy, and interpretation. Measurement helps produce better and clearer choices for humans.

Increasingly, judges are handing down decisions to support the use of measurement and quality in the dis-

covery process. *Victor Stanley Inc. v. Creative Pipe Inc.*, *Equity Analytics LLC v. Equity Methods*, *William A. Gross Construction Associates Inc. v. American Manufacturers Mutual Insurance Co.*, and other cases all speak to the need for measurement and good process.

Louis Brandeis did not see the development of computers and the explosion of ESI that we face today. He missed the expansion of scientific management from the manufacturing world to the service industries and now to the law. It is easy for me to imagine where Brandeis would have come down on measurement and quality in relation to the law.

In my view, good process makes me a better lawyer and delivers better value to clients. I think Brandeis would have made compelling arguments for the implementation of process in document review and advocated for it on a wider basis within the practice of law—and so should we all.