

Document Coding Offers a Clear Advantage

Clock-Control...

You don't have to be Adam Smith to understand what is likely the most basic of economic equations: *Time = Money*. Yet in 2004, the Atlanta-based Mariner Health Care (MHC) had to learn this lesson in higher math the hard way.

Because MHC and their counsel failed to produce hundreds of thousands of documents in discovery within the court-ordered timeline, a Judge dismissed MHC's \$500 million accounting fraud and breach of fiduciary duty suit against PriceWaterhouseCoopers. During a day-long motion-for-sanctions hearing filed by PriceWaterhouseCoopers, MHC's attorney was forced to live out any attorney's worst nightmare. He stood before the Judge and made the weak argument that, while they didn't "willfully" delay discovery, they were, in fact, "foolishly optimistic" about their ability to handle the volume of documents that would be required.

Establishing the timeline for discovery is the first and, often, among the most critical negotiations that occur in litigation. Because the court relies on the timeline to establish the case docket, the court's interest primarily administrative. But, for the plaintiff and defendant's counsel, negotiating the timeline is a much more strategic responsibility. Discovery of documents is often an arduous task, and the side that takes control of the available documentary evidence first has much more time to explore different options and strategies in preparing its case. The side that doesn't, as evidenced by the *Mariner* debacle, faces disaster.

Bungled Strategem

Law firms often unleash the paper storm of discovery as a tactic to overwhelm their opponents with the task of providing or managing incoming documentary evidence, but there are a number of opinions on the advantages and disadvantages of the long discovery timelines versus the short ones.

Short timelines put smaller firms with limited resources and manpower at a disadvantage against larger firms with armies of paralegals, interns and administrative staff at their disposal. But the *Mariner* case proved that there are exceptions to every rule when its counsel, one of the world's largest international law firms, pressed for the earliest possible trial date, but ultimately became the self-admitted victim of "foolish" optimism as it tried to keep pace with the court-ordered discovery timeline.

A Discovery Essential. At this stage in the evolution of professional services technology, one might assume that litigants and their lawyers are naturally prepared to manage documents and meet court deadlines. Yet, cases like MHC's suit against PriceWaterhouseCooper prove that assumption totally premature, as even a global law firm got caught with its documents down. **Sandra Serkes** offers best practices and a buyer's guide for document coding: automated, to be sure.....**Page 13**

Some outside the legal profession make the cynical argument that firms prefer long discovery timelines because they create the opportunity for more billable hours. The notion is absurd when one considers that the more time and resources spent on gathering and cataloging documentary evidence, the less time there is to actually prepare the case.

The true advantage in preparing a case comes from taking control of the discovery timeline as quickly as possible.

Until fairly recently, firms had to handle documentary case evidence by hand. Boxes or even truckloads of documents were delivered to the firm. The staff would have to go through them, catalog each page and determine its relevance to the case.

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Law firms (as well as their clients) know too well the potential problems associated with hand-coding. For example, given that even irrelevant documents have to be sorted and cataloged, hand-coding is slow and expensive. Even more significant, inaccuracies in coding can be devastating to a case. Too often, documents that would otherwise be protected by attorney/client privilege get caught in the paper storm and are delivered to the other side, where they become fair game in the preparation of the opposition's strategy.

Buying Tips

The development of sophisticated technology has spawned services and solutions that allow law firms to ease the burden of document coding. Not only are these products and services competitively priced and economical, they also free up valuable time for attorneys and firms to do what they do best: prepare the case for settlement or trial.

One of the significant advantages of these products and services is that they provide electronic solutions that enable lawyers and their staffs to find and access the documents they need when they need them. However, there are some important points to consider when choosing one of these solutions.

- Know your case timeline. As *Mariner* shows, the judge isn't interested in any excuses if you don't meet your discovery deadline.
- Look for a guarantee. Some of these outsource solutions actually encode the documents by hand, so firms face the same potential problems that they would face if they were to perform the coding themselves. To be sure, try to find an automated process. Again, when dealing with hundreds of thousands of documents, an automated process saves time and helps avoid human error.
- Have the vendor perform a small sample or pilot first. This enables you to determine and tailor the method to your particular needs.
- Make sure your vendor understands the legal world. A service that specializes in legal document coding is probably more sensitive to your needs than one that doesn't distinguish between legal, academic, financial or other clients. For example, my own company, [Valora Technologies](#) in Waltham, MA, does fully automated coding for litigation exclusively.
- Code for key words. Keyword search capability is the most efficient way to access the documents that you need. You could either provide them with your own list or the vendor can generate one for you.

As an alternative to specialized companies like Valora, the Austin, TX-based SPI Technologies and Software Ventures International (SVI), which is headquartered in the Phillipines, are among the largest document coding services. SPI and SVI have divisions for a number of client sectors, including legal. Both employ their vast workforces to manually code documents and produce electronic search capabilities. They offer competitive pricing for their services and a relatively quick turnaround of up to several weeks.

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However, because much of their work is done overseas where privacy laws differ from those in the US, make sure that appropriate privacy and securities are guaranteed when considering their services.

In addition to these services, there are a number of software applications available for law firms interested in performing document coding in-house. Among them are AI Coder and the internet-based services Text Miner and eArchiver. These are effective solutions for smaller scale jobs when outsourcing isn't necessary.

Whichever service or product your firm chooses, the advantages that electronic coding offers are clear. You and your clients save time and money; you can get a leg up on your opponent; and you can prepare your case much more productively and efficiently. ■

Sandra Serkes is President and CEO of [Valora Technologies](#), which offers state-of-the-art document encoding and unitization services for litigation support. She is an active participant in the MIT Enterprise Forum, the Massachusetts Software Council, and the Network of Harvard Alumnae and serves on the boards of several high-tech start-ups.