CLM 2018 Annual Conference
Houston, TX

Measuring Success and Avoiding Pitfalls in Discovery for Litigated Claims

It may only be a small percentage of claims that filter through to the Legal Discovery stage, but the financial implications for those matters weigh heavily on Insurance Carriers and the Claims Professionals responsible for them. Understanding how Claims Professionals measure success during this phase of the claim and how to avoid common pitfalls in Legal Discovery is key to the overall success of a litigated claim.

I. Identification of Claims Likely to Advance to Discovery

The earlier a claim can be identified as advancing to the legal discovery stage, the sooner the preparation and strategy can begin. Common factors making it likely for a claim to advance to the litigation phase include unrealistic settlement demands from opposing parties, significant factual disputes in the complaints, and aggressive positioning from opposing counsel.

II. Strategies to Mitigate Risk and Costs

Preparation

Early preparation is key especially talking with panel counsel about their discovery plan. It's important that counsel understand the facts as early as possible as arguments to limit the scope of the case rely upon the potential costs for litigating the claim. Understanding the number of custodians, the time frame for potentially relevant data, and how narrow or broad the criteria for relevancy may be are all essential.

Developing a strategy for discovery also involves identifying providers who can offer consultative workflows and efficient technology to support the discovery, which depending on the carrier's relationship with service providers, can require contracting for services. Having a panel of services providers lined up with pre-negotiated (typically discounted) rates for common services and a Master Services Agreement in place can

save time, costs, and ensure that thoroughly vetted service providers are involved in the claim.

Being prepared is a powerful operational advantage. Technology can play an important role in that preparation and can also substantially reduce discovery expenses. Having a conversation with panel counsel about whether technology is being considered to reduce the data set (such as predictive coding) is important.

Limiting the Scope of Discovery and Setting Production Expectations with Opposing Counsel

Have discussions with counsel early in the case about how to proactively limit discovery. For example, are there arguments to be made at the 26(f) meet and confer conference, or the state equivalent, to limit collections to certain custodians, date ranges, or to limit the types of data to be collected?

In certain cases, it may be reasonable for counsel to show that the costs for discovery are disproportional to the case (i.e. the amount in controversy is not much more than the cost of discovery.) This argument cannot be made however, without preparation and an understanding of what the discovery costs would be based on agreed-upon assumptions.

Setting expectations with opposing counsel for the format of discovery productions to be delivered and received is also crucial. It is reasonable to ask that opposing parties provide responsive ESI in a form that best serves you and your technology platform. Coming to a formal agreement on the format of the productions, the scope of the case, search terms and date ranges to reduce the data set is key to the success of a claim in legal discovery.

Document Review Strategy

As document review is widely regarded as the most expensive part of discovery (the latest RAND study estimates is it over 70% of the Discovery budget), it is also crucial to have a conversation with panel counsel about what their strategy for review is and whether they are considering technology assisted review and/or contract attorneys to help reduce expenses.

Technology Assisted Review (TAR), including predictive coding workflows, can help significantly reduce the population of data for review. In these workflows, guided by the service provider, panel counsel trains the tool to identify potentially relevant and not relevant data. The machine learning then takes over (after multiple iterations with panel counsel).

Typically, the best way to reduce review costs is a combination of TAR and the use of contract attorneys. Unlike associates within a firm, professional contract attorneys have invested in a career of document review. This specialized focus lends to accuracy, efficiency and certainly cost savings compared to associate rates. Workflows generally ensure that panel counsel perform quality control and advanced review on percentages of documents. The contract attorney teams are trained in the facts of the case by panel counsel and receive a review protocol from counsel to set the requirements for the review.

Considerations on whether or not to utilize TAR on a matter include the volume of responsive documents and deadlines for disclosure, the resolution strategy, and case value-dependent factors (e.g. does it make financial sense for spend on TAR when matter may be settled for a lesser amount than the cost of TAR?)

III.   How do you avoid pitfalls?

In this section of panel discussion, panelists will share specifics examples of what didn't work and why.

One common pitfall is assuming that counsel is familiar with technology advancements in eDiscovery. While some counsel may be up to speed on the latest eDiscovery tools, many are comfortable with key word searches but are unfamiliar with or unsure of other review tools that could reduce review time and results in significant cost savings.

Another common pitfall is misjudging the proper scope of discovery at the outset of a case. If the scope has not specifically been addressed with opposing during the meet and confer meeting, then it's possible the discovery completed is overly broad, which would have resulted in fewer discovery expenses. Or, if the scope was too narrow, it could require recollection and review with supplemental productions, all at additional expense and potential unfavorable court positioning, and/or contentious disputes with opposing. The most important takeaway from this panel is that investing time upfront can save time, expense and headaches on the backend.