

## ELITE DISCOVERY PRACTICE GUIDE

### Document Review: Managed Review Fundamentals

Controlling the cost of litigation often seems like an impossible endeavor. Litigation budgeting has always been challenging because of the unpredictable nature of cases and the inescapable fact that you cannot control the burdens imposed by your adversary, the court or government agency. Numerous analyses have established that document review is far and away the most expensive discovery activity:

- *[One research study](#) estimated that 73% of the total costs to produce materials in discovery are attributable to document review.*
- *[Another study](#) estimated that 59% of the total cost to produce materials in discovery are attributable to document review.*
- *In their 2009 market commentary, VRA Partners estimated that approximately \$5 are spent on review for every \$1 spent on data processing.*

The reason for these significant costs is the irreducible need for qualified people to spend time looking at a large number of documents to make determinations about their relevance, privilege, and much more. For many law firms and corporate legal departments document review projects can quickly scale to a size that can be difficult to manage in-house.

As the volume of data continues to grow, staffing can change or inhouse technology does not meet the needs of the case. For many corporations, the quest to reign in litigation costs and contain their legal spend is a priority of analysis. At Elite Discovery, we focus on strategies that can influence the cost at every stage of the discovery process, especially containing the cost of document review. By combining the latest eDiscovery software, artificial intelligence, and our deep analytical expertise with highly skilled licensed attorneys - we successfully navigate every aspect of a document review to drive lower costs without sacrificing quality.

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

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## WHAT GETS REVIEWED

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

In this context, we aren't talking about the kinds of source identification that takes 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 either isolated or 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 activities to gather information about the contents of this pool to help you decide what gets reviewed and the best method for review.

From this pool then, you must decide whether everything, only the results of certain searches and filters, the results of a Technology Assisted Review ("TAR") process gets reviewed; or some hybrid plan is employed:

- Everything is Reviewed
  - For smaller pools of materials (i.e., those with fewer than 10,000 documents) the simplest, fastest solution is often to just review everything. Reviewing everything is also the typical approach when the pool in question was derived not from materials you collected but from productions received from other parties.
- Search and Filter Results Reviewed
  - Identifying your ultimate review set through the application of searches and filters is, by far, the most common approach. This typically requires reviewing both the results of the chosen searches and filters, as well as some of the remainder to verify its irrelevance.
- TAR Process Results Reviewed
  - For particularly large pools of materials, or those for which effective searches can't be crafted, or those for which speed is of the essence, and even instances where work product already exists in the database, a TAR process can be employed to identify the most relevant materials within the pool. Those materials are then reviewed, along with some of the remainder to verify its irrelevance.

- Hybrid Approach to Review
  - It's also common to employ a hybrid of these approaches specific to the exigencies of the case. For example, you might review all 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 prioritize the review of everything else afterwards. You may even determine a threshold of documents to review based on the Probability Predictions assigned during the TAR process, such as any document receiving a positive prediction score greater than 50 will be included in the review.

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

- Include 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 will not be family group complete. You will have a choice about whether to pull related family members in or to just review the actual results. Most of the time, they are included – both for the context they provide and because production by family group is common.
- Email Threading & Suppression
  - "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 the individual preceding emails by suppressing them out of review. When applying email thread suppression methodology – you need to understand any limitations involved. For Example, can the review decisions be propagated to preceding emails within a thread prior to production or will you only produce the "inclusive emails" not suppressed from review.
- Near-Duplicates
  - "Near-duplicates" refers to those documents that are extremely similar (based on textual content present) to other documents in your collection but that were not removed by deduplication during processing due to some small variation between them (e.g., a difference in source directory or another metadata property). 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, if email suppression will be used so only “all-inclusive” emails are produced, and other aspects of the review set identification process. The more scope limitations you can negotiate, the less time and money you have to spend on review, and the more process elements you can negotiate up front, the fewer decisions you may need to defend later.

Elite Discovery can help you formulate effective strategies to optimize your review and discovery process before, during, and after the meet and confer. The experts at Elite Discovery regularly draft and audit ESI protocols to ensure you are optimizing the discovery process to your advantage.

## FOR WHAT IT GETS REVIEWED

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

- *Relevance and Responsiveness*
- *Privilege*
- *Confidentiality*
- *Deposition Preparation*

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### 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, 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, extends to any evidence that is both relevant and proportional.
- Responsiveness, in contrast, refers to whether 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) 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)). 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. 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. 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 and the EU-US Privacy Shield.

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 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 YOUR REVIEW

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

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### INTERNAL RESOURCES

For smaller discovery efforts, it is common for the case team to do most or all the review themselves, or with help from additional paralegals or attorneys already on staff inside the organization or 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., as well as the existing staff helping them have the advantage of already being verified as effective team members and 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 to conduct review. Also, 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 should be utilized to supplement or replace the internal review resources described above. Broadly speaking, external review resources come in two types: contract review staff and managed review services.

A variety of discovery service providers and staffing agencies provide **contracted document review attorneys** at an hourly rate. The hiring organization or law firm typically can specify required experience levels, language skills, 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 space or facilities to work, workstations and systems access, assignments, and oversight. You are being provided with reviewers rather than with review, which limits the overall scalability of this approach.

**Managed review services**, on the other hand, provide *review rather than reviewers*. Such services 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 secure environments where the reviewers work, and standardized review processes, quality control processes, and process documentation. 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

More importantly, perhaps than which reviewers you ultimately choose to conduct the review, is how effectively those reviewers are trained. Whether your team is internal only, internal plus contract, or entirely external, it is important the reviewers have a clear and consistent understanding of what they are looking to discover, 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.?

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Elite Discovery partners with you to create a written review protocol document that provides answers to all these questions and more for the review team. Along with relevant background information, the review protocol may also include example documents from the collection. This protocol and the associated examples are 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 you're reviewing, what you're reviewing it for, and who is doing the reviewing, you can plan the actual workflow by which the review work will be executed.

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### 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 **several 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 materials in **multiple languages** or **highly technical** or **scientific materials** might also be broken into paths based on the need for specialized reviewers, creating a special path for each foreign language or for the technical and scientific materials.
- 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 as they find them.

To some extent, the range of workflows you can create will be dictated by the review management tools available to you in your chosen document review platform. Obviously, all manner of workflows can be executed and tracked manually – as they were in the days before sophisticated review platforms were available, but the manual management and documentation burden is (and was) much greater. Thankfully, most document review platforms have now evolved to offer a great deal of review management, workflow customization, and progress monitoring functionality.

## TAGGING PALETTE CONSIDERATIONS

As we note above, there is a tension in document review between speed, accuracy, and nuance: the more determinations a reviewer must make, the longer the review takes and creates more opportunity for mistakes. This is reflected in the creation of the tagging palette you make for reviewers to annotate documents with their determinations.

Reviewers only working with tags for simple relevance, potential privilege, and “hot” documents are able to work more quickly and consistently than those who must also apply tags for specific issues, specific privilege types, and other nuances. When thinking about what tagging should happen in each phase of your review workflow, a good rule of thumb is to try to keep each reviewer from having to make more than about five determinations at a time about each document. 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’s paths and levels.
- Tracking who reviews them at each step in the workflow.
- Tracking whether tagging changes are made during QC.
- Tracking whether documents require special endorsements for production (e.g., those subject to a protective order).
- Tracking the progress of what’s already produced.

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

## BATCH CREATION CONSIDERATIONS

In addition to planning your document flow and creating your tagging palette(s), you also need to make some decisions about how the batches of documents to be reviewed should be assembled:

- How should your review pool be organized into batches?
  - Depending on your review goals or 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 previously discussed, 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 previously discussed, 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 should each batch be sorted?
  - You may also be able to specify the default sorting for the materials within each batch; sorting them chronologically is the most common choice (this can often be done by a family group master date rather than each document's individual date to maintain family groupings together within the chronological sort)
- 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 one or two hours, as error rate increases the longer reviewers go without a mental break; how many documents that is will depend on your documents

Another factor that can affect the speed of your reviewers' work is the mix of file types and file lengths they receive in each batch of documents. While most documents are likely to be text documents of moderate length (e.g., emails and Word documents), some may be multimedia files, large spreadsheets, long PDF documents, or other outliers that usually break the rhythm of their work:

- Launching media players and switching from reading to listening or watching.
- Navigating through the rows, columns, and tabs of a large spreadsheet.
- Stopping normal review to read through 40, 50, or 100 pages of text.

If you are running a large, time-sensitive review, it is well worth the effort of 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.

## **TRACKING, REPORTING, AND DOCUMENTATION CONSIDERATIONS**

When engaged in design of a review workflow, you also need to consider the tracking, reporting, and documentation needs you will have during the course of the review. Generally, you will want some way to track:

- Overall progress, progress against budget, and rate of progression
  - *To estimate remaining time and cost to completion*
- Your rates of relevance, privilege, redaction needed, etc.
  - *To estimate 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

Once you are 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 are entirely dependent on your needs, but it is common to provide weekly review progress reports, as well as monthly. Although this tracking and reporting can be done manually, most review platforms now include robust 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 there is a challenge to your methods and their results, it is invaluable to have notes or emails documenting why certain methods were chosen – both as potential evidence and to refresh your recollection of decisions made months or years before.

## 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 possible (and isn't required), but reasonable efforts to meet your obligations of completeness, accuracy, and privilege protection are both.

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### THE MYTH OF THE GOLD STANDARD

*The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* describes a "persistent myth" in eDiscovery as,

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 numerous mistakes due to simple human fallibility, and reviewers frequently come to different conclusions regarding questions of relevance, privilege, and more. Studies have shown 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 of quality control to ensure an acceptable minimum level of quality, consistency, and completeness.

### 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.
- In a project utilizing a technology-assisted review workflow, you might focus more of your efforts 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 double-check the privilege tagging applied to the results.

## SAMPLING

Sampling broadly comes in two 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 is the process of seeing how effective and efficient a particular classifier 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). These measurements can be used to identify problem reviewers, to measure overall review effectiveness, or to implement lot acceptance sampling.
- Estimating prevalence 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 have been left behind in the pools of material that were not reviewed (or reviewed and deemed irrelevant). 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.

For a deeper dive on these two sampling techniques, please see our series, practice guides, or webinar on Estimating Prevalence and Testing Classifiers.

## 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 not just to 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.

The most important feedback loop is the one between the review managers and the reviewers. This is about feeding 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 discuss 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.

Having a feedback loop between the case team and the review managers is extremely helpful. This enables review managers to request guidance and clarification to share with their team. This also allows the case team to share any issues they identified during the quality control review.

## THE IMPORTANCE OF PRIVILEGE PROTECTION

As we conclude this Practice Guide, 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 discussed previously, [Federal Rule of Evidence 502\(b\)](#) 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 makes clear that "reasonable steps" are 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 is just as important as the 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.*

Victor Stanley Inc. v. Creative Pipe Inc., 250 F.R.D. 251, 262 (D. Md. 2008).



## ABOUT ELITE

Elite Discovery is a nationally recognized and award-winning alternative legal service provider for law firms, corporations, and government agencies. Since 2001, the experts at Elite Discovery use their extensive knowledge and experience developing and implementing strategic solutions to meet any ESI challenge. From depositions, eDiscovery, managed attorney review, and managed services, Elite’s expert services and strategic technology offerings span the entire EDRM.

## OUR MANAGED ATTORNEY REVIEW SERVICES

For many law firms and corporate legal departments, eDiscovery projects can quickly scale to a size that can be difficult to manage in-house. The volume of data can grow with discovery of new relevant information, staffing can change, or in-house technology does not meet the needs of the case. Your team needs an analytical advantage when tackling these large cases.

Elite Discovery’s managed attorney review services **increase accuracy, boost defensibility, and lower the cost of document review**. We combine our deep analytical expertise and tools with licensed review attorneys, experienced project managers and current technology to successfully navigate every aspect of a document review – no matter the size or complexity.

When engaging Elite Discovery for Managed Document Review, you receive:

- A single source for full case management
- Support for multiple review technologies
- Highly trained attorneys from multiple disciplines
- Customized workflow design and implementation
- Dedicated review director, analysts, and project managers



**DISCOVERY MADE  EASY**