

Reducing the Cost Of Discovery

A Review of the Use of Lean Six Sigma As a Business Improvement Methodology For Lawyers

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General counsel face intense, unprecedented pressure to cut costs. At the same time, the sheer quantity of data being created in a corporate environment has resulted in spiraling discovery costs. In facing what seems a losing battle, general counsel need to grow the tools available in their arsenal when approaching discovery. An important skill is use of technology as a way to reduce the costs associated with document collection and legal review. However, the best technology will never overcome the pitfalls associated with recurring problems such as the over-collection of documents or the identification of a new issue deep into a large document review. Analysis of how you are handling and responding to discovery requests will eliminate errors and reduce costs. This article provides a case study of one legal department's use of Lean Six Sigma in identifying avoidable problems that occur again and again across a variety of cases. The result? Tens of thousands of fewer unnecessary documents collected in shorter time frames, and significant cost-savings.

INTRODUCTION

Outside the legal world, business process strategies are frequently employed in the manufacturing sector to identify areas of inefficiency or waste. The process of building a widget is analyzed and improved resulting in cost savings, better quality, and a streamlined process. In other words, you build better widgets faster for less. We worked with the legal department of a

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large government agency in its effort to use Lean Six Sigma to streamline their privilege review process to identify efficiencies and cost savings.

Over the years, we have all heard the business process buzz words such as Total Quality Management (TQM), Statistical Quality Control (SQC), Statistical Process Control (SPC), Six Sigma, and Lean Six Sigma. Each is a problem-solving theory rooted in measuring a process of variability with customer requirements. All use a similar process to identify the problem; look at root causes and develop ways to eliminate them; and implement solutions while measuring their success rate.

CASE STUDY

Given that privilege review is frequently the most expensive aspect of discovery, this area was a natural choice for a Lean Six Sigma analysis to determine if any cost-saving measures could be implemented. The working group consisted of the legal department practice areas heads, managers from the litigation support team, and an experienced Lean Six Sigma-trained participant.

Similar to the steps of most business process improvement methodologies, Lean Six Sigma's five process steps are: Define, Measure, Analyze, Improve, Control. The acronym for the steps is DMAIC.

Define

The first step is to define the process area for improvement. The scope of the project was document collection through the review and production. Collection delays resulted in late privilege reviews, increased costs, and expanded timelines. Over-collection was determined to be important because there were instances where too many documents were collected and reviewed when the amount of documents could have been decreased initially due to being non-responsive. Because of problems associated with the delay in collection and the over- or under-collection of documents, the scope of the initial project was expanded to include document collection.

Measure

The next step was to obtain measurable data. Before the data was collected, a determination was made as to where the data

Common Errors	Solution
<ul style="list-style-type: none"> Not enough of the right documents or too many of the wrong documents 	Hold a kick-off meeting with the document custodians before collecting documents to ensure they provide all and only the relevant documents.
<ul style="list-style-type: none"> Change in the review requiring re-review of documents already reviewed (for example, discover a new attorney name or privilege) 	Conducting a mini-review of a representative sample size of the document collection will identify potential problems before the review starts.
<ul style="list-style-type: none"> Insufficient pre-planning 	Mandatory pre-planning to address each aspect of the document collection, review, and production up front results in fewer errors.
<ul style="list-style-type: none"> Unproductive meet and confer with opposing counsel 	Learning more about your case up front such as the amount of documents so you can project out production timelines and formats realistically.
<ul style="list-style-type: none"> Failure to identify scope of document collection or review efforts 	Clearly identifying the scope of the collection efforts and legal review by utilizing a detailed checklist to ensure all topics are covered.
<ul style="list-style-type: none"> Too many variations in standard documents such as privilege or production log meant more time to make decision on what to include 	Templates for privilege and production logs to be used as a starting point. Allows lead attorneys to focus on practicing law.

would come from, how long the step should take, and what would constitute an "error" such that it would be considered an area for potential improvement. A sample group of cases of varying sizes across multiple civil law practice areas was selected. Cases included contract disputes, employment disputes, and environmental law claims. The document collections ranged from as small as 5,000 documents collected to in excess of 1.3 million documents. The exposure amount on these cases varied from hundreds of thousands to multiple millions of dollars.

The working group developed a set of interview questions to standardize measurement points across the sample cases. The lead attorneys for each case were interviewed and a detailed analysis of case documentation and communication threads was conducted. Sample pieces of information included, for example, the number of document custodians; document review metrics such as how many documents were reviewed per hour; how many privileges the reviewers were reviewing for; and whether a privilege log was created. The data was compiled in a spreadsheet for comparison across cases in the analysis step.

Analyze

After conducting multiple interviews and examining the compiled findings, key areas where common problems and bottlenecks occurred in the process were identified. These key areas included:

- Problems with accurate communication: attorney to custodian or attorney to litigation support contractor.
- Problems related to over- or under-collection of documents.
- Lack of standardized documents.
- "The Unknown" — issues that develop at a later time such as new claims which require rework.

Improvement

Having identified the common problems and bottlenecks, the working group focused on developing several tools to address the areas needing improvement. The tools developed loosely fall into the following categories:

- Pre-planning,
- Improved communications,
- Standardized documents, and
- Testing sample sets of documents.

Elevating the importance of pre-planning across every stage of the discovery process is intended to reduce the potential for unnecessary re-work and redundancy. All of the tools were created to help facilitate an increased emphasis on pre-planning at the start of the collection and review phases. The working group recognized that attor-

neys had different definitions, expectations, and formats for commonly required documents such as privilege logs and document review instructions. This area is ripe for misunderstandings. To minimize problems associated with this issue, a standardized set of documents was created containing agreed upon definitions which meet the needs of the wide range of cases handled by the client. Included within the set of documents consisted of document review planning checklists; privilege review instructions; and privilege logs. Providing a standardized set of documents to the lead attorney created a starting point allowing the attorney to focus on the specifics of a case instead of the document formats. Reaching agreed upon definitions is also intended to avoid miscommunication between multiple attorneys and the litigation support team.

To encourage a better relationship between the attorney and the document custodians, the working group created a set of documents intended to start the project on the right foot and minimize over-collection of non-relevant documents. Documents included standardized introduction letters to the document custodians, a sample kick-off meeting agenda, and a form intended to capture as much of the relevant information on a new custodian.

The working group also recommended that the handling attorney convene a mandatory discovery conference with lead counsels, the litigation support project manager, and key custodians to establish buy-in and provide an opportunity for the right questions to be asked and create reasonable expectations for the document collection process.

Frequently, new issues are uncovered when you are well into the privilege review. For example, a document with a new privilege is unearthed. What are you to do with the remaining collection and how can you avoid the cost of re-reviewing the other documents that came before it? A protocol was developed to reduce the impact of unknown factors by implementing a review of a sample set of documents before the privilege review is underway. Initially, the attorney is required to meet with the key players of the case to identify and collect key documents as early as possible. From within the document collection, the attorney should then select a representative sample of the types of documents from the various sources that are expected to be encountered during the litigation. Once the sample set has been identified it should be reviewed to identify the types of documents, potential privileges and, most importantly, the unknown issues within the sample set. Upon completion of

the sample review, the collection and review instructions can be modified based on the findings of sample testing review.

CONTROL PHASE

The improvements are being implemented, but the clients have already realized substantial cost and time savings in the standardized approaches. The group intends to evaluate a smaller group of cases to determine if and how the recommended changes have impacted the document collection and legal review process. Embracing an approach that acknowledges the realities of standardization while allowing for the personalization of management styles will result in cost and time savings that is something all can appreciate.

CONCLUSION

Evaluating the document collection and review process using Lean Six Sigma proved to be an effective approach for identifying problems and developing reasonable solutions. Looking at document review from an efficiency and quality control perspective was eye-opening. We were able to take a big-picture approach and develop tools and resources to address the issues head on and mitigate the cascading effects of these problems. Every irrelevant document collected, such as an e-mail invitation to Billy's high school graduation, adds costs and time to the review. Developing an approach to minimize the over-collection of documents will help to reduce the cost and time needed to complete legal reviews. Elevating the importance of pre-planning, improved communication between the attorneys and litigation support project managers, and recognizing new issues or factors at the front end of a legal review by evaluating a sample group of documents will also eliminate unnecessary rework.

Successful implementation of this analytical approach and the recommended changes required total buy in from the litigation team. General Counsel is in the perfect position to implement this type of approach. In the above example, management's commitment to the Lean Six Sigma approach required a substantial commitment of time and resources. The entire process was a top-down initiative which was necessary to get investment of time needed to successfully get data, analyze, and make the improvements mandatory. Management's commitment to this process resulted in a custom tailored recommendations that have the potential to reduce the costs associated with the discovery process.