

7 ways to tame the eDiscovery cost monster

Selecting the optimal review method for every scenario



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Executive summary

The term eDiscovery has traditionally been associated with document review for production in litigation or in response to regulatory requests. Faced with rapid digital transformation, legal practitioners now recognize the need to search, retrieve, analyze, and categorize electronic data in many contexts beyond traditional litigation and investigations. This includes subject rights requests (SRRs), as well as data breach response and analysis.

Each document review scenario comes with different priorities, goals, timelines, and risk factors. A one-size-fits-all approach cannot deliver the optimal legal and business outcome in every scenario.

To truly control the eDiscovery “cost monster” and optimize the outcome of every case requires a more modern, nuanced, and flexible approach. This paper reviews common document review use cases and examines the key factors that make each one unique. It then outlines common mistakes review teams make which diminish review efficiency and effectiveness. Finally, the paper proposes a new way of approaching eDiscovery—one that offers a more sophisticated analysis of needs and requirements, and matches them to the optimal method of review.

Introduction

Document review has always been the most expensive and time-consuming phase of the eDiscovery lifecycle—by far. A 2012 study by the RAND Corporation found that review typically consumed about 73 percent of all production costs.¹

That study also noted that review costs are difficult to reduce significantly when performing traditional linear review. Reasons cited included unlikelihood of significant reduction in labor costs, that techniques for grouping documents would probably not foster sufficiently dramatic improvements in review speed, and that human reviewers are “highly inconsistent.”

However, technology assisted review (TAR) methodologies then began to gain traction. While TAR has become somewhat common, adoption has not been as widespread as many predicted. Some have found the concept of machine learning associated with TAR difficult to understand, others have found that it’s not suitable for every document collection or every use case.

As a result, growth in the use of TAR for review has stagnated in recent years. As reported by **eDiscovery Today** in its [2023 State of the Industry Report](#), only **29.2 percent of 364** respondents use predictive coding technologies and approaches in all or most of their cases, while more than one third (**35.4 percent**) of respondents use it in very few or none of their cases. Those adoption numbers for TAR have actually dropped when compared to the first year of the report in 2021.

The good news is that review methodologies have evolved to the point where they can be combined or modified to provide numerous high-level methods of document review. We’ll look at seven in the context of six different review scenarios. Each method has characteristics that make it suitable for specific review scenarios, providing a level of granularity not previously available.

¹ RAND Corporation, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery. (2012)



Six common scenarios for document review

Today, we see at least six common scenarios to which document review can be applied. They include:

- **Litigation – outbound productions**
Assessing documents for responsiveness and privilege to support outbound productions is the most common scenario for document review.
- **Litigation – inbound productions**
Reviewing documents produced to you to understand the evidence and identify gaps in production is also a traditional document review scenario.
- **SRR data privacy review and reporting**
GDPR in Europe, and tougher data privacy laws in other countries and selected US states, have given individuals the right to request information on the ways companies collect, process, and manage their personal data or information. To respond to those Subject Right Requests (SRRs), organizations often must conduct document reviews to identify documents where personal information of the requesting party resides.
- **Third-party subpoenas**
Parties to a litigation are not always the only parties involved in production. Third parties may receive subpoenas requesting documents responsive to the case as well. While there are similarities between responding to litigation requests and responding as a third-party, there are also differences in needs and workflows.
- **Regulatory document requests**
Document review can be necessary to respond to regulatory requests from government agencies, such as Hart–Scott–Rodino (HSR) Second Requests by the FTC and/or DOJ to investigate potential antitrust considerations. Document reviews to support HSR Second Requests require specialized workflows because they typically involve large document collections and tight deadlines.
- **Data breach response reviews**
When an organization experiences a data breach, it's imperative for them to identify individuals who may have had their personal information compromised. Data breach response reviews driven by mandatory breach notification obligations also have tight deadlines, with a specific focus on identifying personally identifiable information (PII) and protected health information (PHI) that may have been compromised, so their workflows reflect this unique focus.

Organizations need to address reviews in different ways that support each scenario.

Avoiding common mistakes that diminish review effectiveness

Two common mistakes many organizations make that negatively impact document reviews:

Failure to embrace technology to streamline review

Many legal professionals continue to apply linear review methods despite the advent of more efficient alternatives. The reasons vary from inability to understand how TAR works and how it can be effectively applied to concerns that it will require substantial negotiations over disclosures and protocols.

That philosophy is no longer viable in many cases. Data in organizations has skyrocketed over the years: a recent projection by [Statista](#) shows that global data is predicted to rise from **2 zettabytes** in 2010 to **181 zettabytes** by 2025,² which equates to 181 trillion gigabytes! The amount data in organizations is **doubling every two years**, on average.³ Manual linear review methods simply cannot keep up with larger data volumes. Firms and managed review vendors need to embrace technology to continue to provide valuable document review services to their clients. If they do not, their competitors will.

Trying to fit every review project into the same methodology

Another common mistake is trying to fit every project into the same review methodology. This is one of the biggest mistakes that advocates for TAR make—they try to apply TAR methods to document collections and review scenarios when TAR is not the optimal approach. These failures can cause legal professionals to reject the use of TAR, even when it is the optimal approach. To optimize document review, organizations must be flexible when it comes to choosing the method for each project.

Seven methods of document review

At least seven methods can be applied to a review project, each appropriate for specific document review scenarios.

Linear review

The term “linear review” applies to the document review method that involves “eyes-on” human review of every document in the set deemed to be potentially responsive to the document request or every document deemed to be potentially privileged in a privilege review.

While technology has advanced considerably over the years, linear review can still be an appropriate method for certain document collections and in certain circumstances, for example, review for selected outbound and inbound productions in litigation. A certain amount of manual linear review is part of every review method for tasks such as training algorithms or validating results.

Rapid analytic investigative review (RAIR)

RAIR uses advanced analytics to locate characteristically similar sets of documents that can confidently be managed as a group for purposes of ultimate disposition (e.g., production).

The essence of RAIR is the aggregation of substantively similar documents (from the perspective of the ultimate decision) in such a way that the entire amalgamated set can be subject to a single decision. RAIR will also typically be more efficient than even modern technology-assisted reviews when it is not necessary to independently review every document before it is produced.

In cases such as third-party subpoenas, HSR second requests, and SRR reviews, it is often unnecessary for the review team to put eyes on every document being produced. Additionally, cost and time pressures often necessitate an approach that is more efficient than even the best TAR.

With RAIR, aggregation takes place much faster than an individual document review and far fewer documents are reviewed with RAIR than any other technique, including continuous active learning TAR. Additionally, because it incorporates sampling and recording throughout the entire process and validation, RAIR is highly defensible if challenged.

² Statista, Volume of data/information created, captured, copied, and consumed worldwide from 2010 to 2020, with forecasts from 2021 to 2025. (2023)

³ Medium, The amount of data in the world doubles every two years. (2020)

Fixed-fee RAIR

Where budget certainty is the paramount concern, the RAIR team can conduct RAIR on a fixed-fee basis to avoid any risk to the client of cost overruns after the review begins.

RAIR for early data analysis (EDA)

In circumstances where it is necessary for the team to put eyes on most of the documents, particularly responsive documents, RAIR methodology can be used as an EDA tool to rapidly eliminate large swaths of documents that are not relevant. The remaining smaller set is then sent for linear review. In a data breach response review, for example, RAIR for EDA can dramatically reduce time, effort, and costs by quickly identifying documents that do not contain personal or sensitive data.

Technology assisted review (TAR)

TAR is a process of having computer software electronically classify or prioritize documents based on input from expert reviewers to limit and expedite the overall review of the document collection.

There are a variety of TAR protocols, the most common of which is **continuous active learning (CAL)**, where the learning process is continuous and integrated into the review process. As reviewers code documents, the system continually learns and updates its understanding of what is most likely to be relevant, thereby improving its suggestions over time. This approach is commonly referred to as TAR 2.0 and is the approach we're discussing in this paper as the typical TAR method.

RAIR-enhanced TAR

A RAIR-enhanced TAR combines aspects of both approaches and is suitable for review projects where there is a need to "jump start" the TAR process quickly for large-scale reviews. It is ideal where there is no requirement for cost certainty and a need to put "eyes-on" every document being produced.

Fixed-fee TAR

A fixed-fee TAR applies specific variations to achieve cost certainty.

Selecting the optimal document review method for your case

Three optimization factors for review

When it comes to optimizing review, there are three factors to consider:



Time

Some document review methods, such as RAIR, are optimized to meet aggressive deadlines in review scenarios such as HSR Second Request or data breach response reviews.



Cost

If cost certainty is a must, fixed-fee approaches must be considered; if that is not a requirement, other approaches may be more efficient and cost effective.



Risk

Risks of inadvertently producing documents that you don't want to produce and risks of having to defend your document review approach are examples of factors to be considered.



Applying the optimization factors to the assess review methods

Some review methods that are optimized to meet deadlines may not be as cost effective or may increase risk. Fixed-fee methods may also increase risk and may not be feasible with stricter deadlines. Selecting a review method that maximizes risk mitigation could be more expensive or time-consuming (or both) than other methods.

With a three-dimensional matrix of optimization factors in mind, here is how the seven document review methods could stack up.

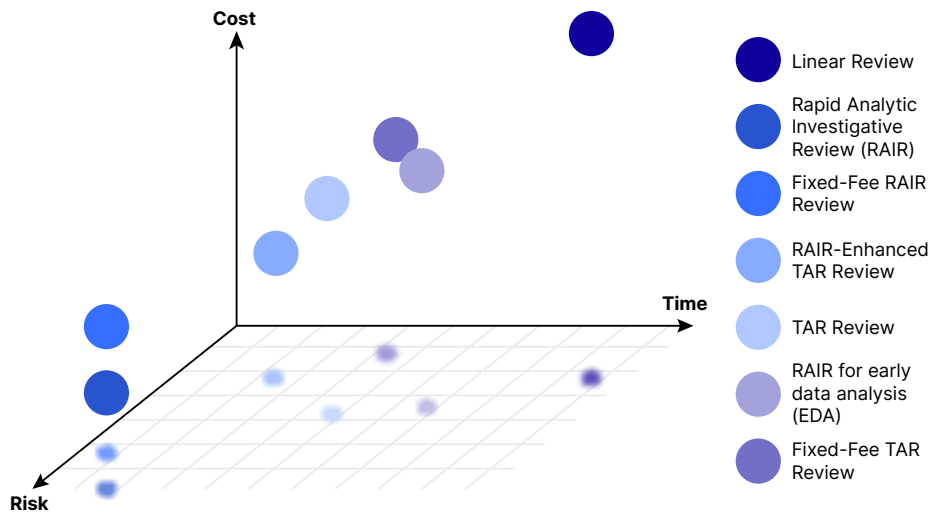


Figure 1: Seven methods of document review across the three optimization factors

It is probably not surprising that linear review is typically the most time-consuming and most expensive method. However, it may reduce some risks associated with methods where “eyes-on” review is not being applied to every document. Conversely, RAIR may be the most efficient and cost-effective method, but risks are increased, and there may be additional work necessary to defend that review method.

Example walkthrough

So, how do you select the optimal method for your scenario? Ask five simple questions.

Let’s walk through an example, using a simple review selection questionnaire to eliminate review method(s) with each question, leaving one at the end which is optimal for the review scenario.

Do you need to put eyes on EVERY document in the collection?

Yes No

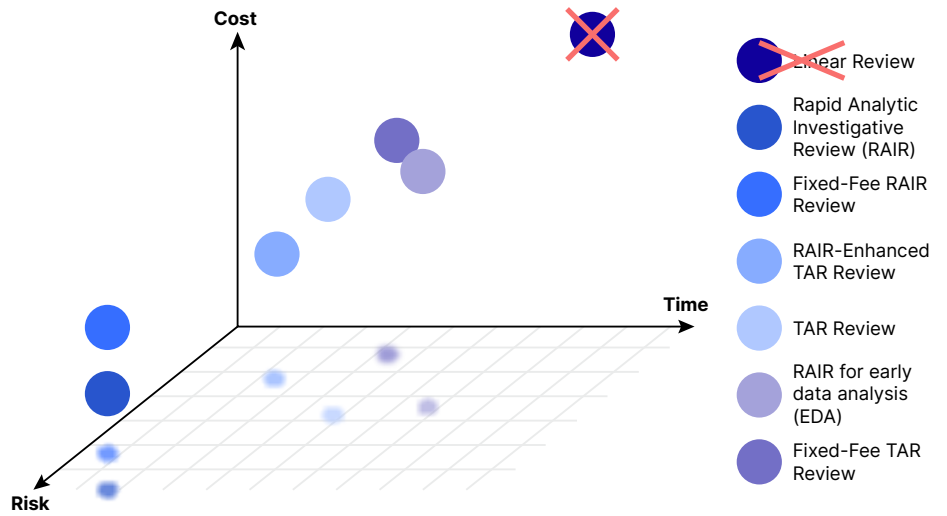


Figure 2: Eliminate linear review if you don't need to review every document

If not, you can safely eliminate linear review in most cases, because there are less expensive alternatives that do not impact the risk analysis. One down, six to go!

Do you need to put eyes on every document being produced?

Yes No

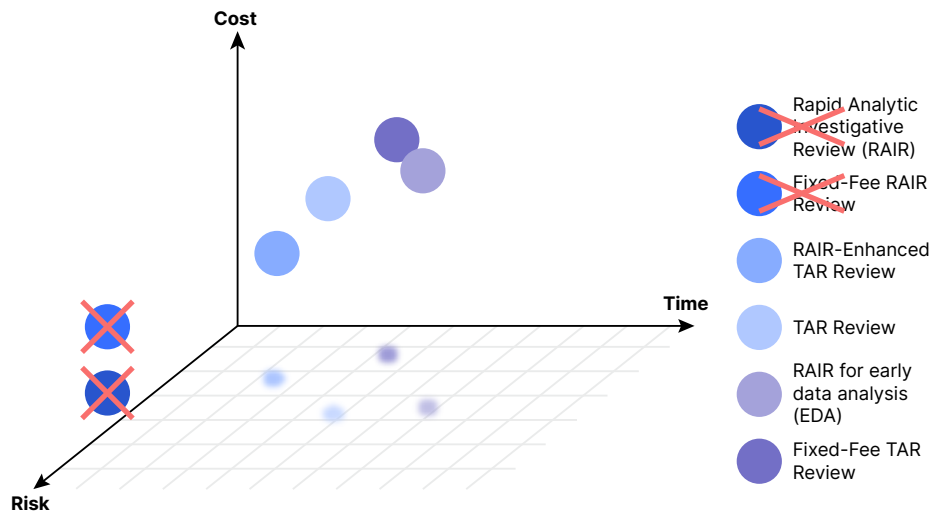


Figure 3: Eliminate RAIR and fixed-fee RAIR if you do need to put eyes on every document

If you **must** put eyes on every produced document, you can eliminate RAIR and fixed-fee RAIR, since they rely on bulk assessment. Four potential review methods remain! Let's add the third question.

Do you need to put eyes on every document coded non-responsive?

Yes No

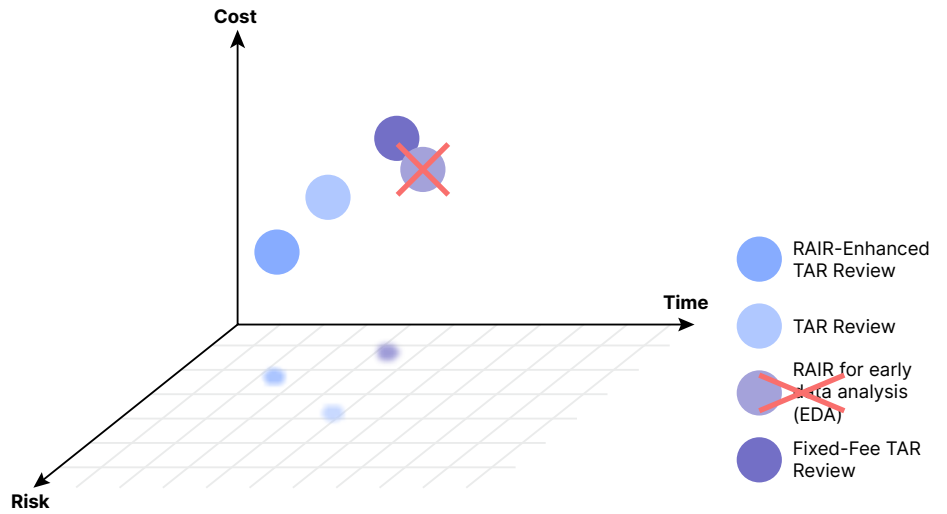


Figure 4: Eliminate RAIR for EDA if you do need to put eyes on every document coded non-responsive

If you also must put “eyes on” every document coded non-responsive, RAIR for EDA isn’t the optimal method. Three review methods left! Let’s add the fourth question.

Do you need cost certainty?

Yes No

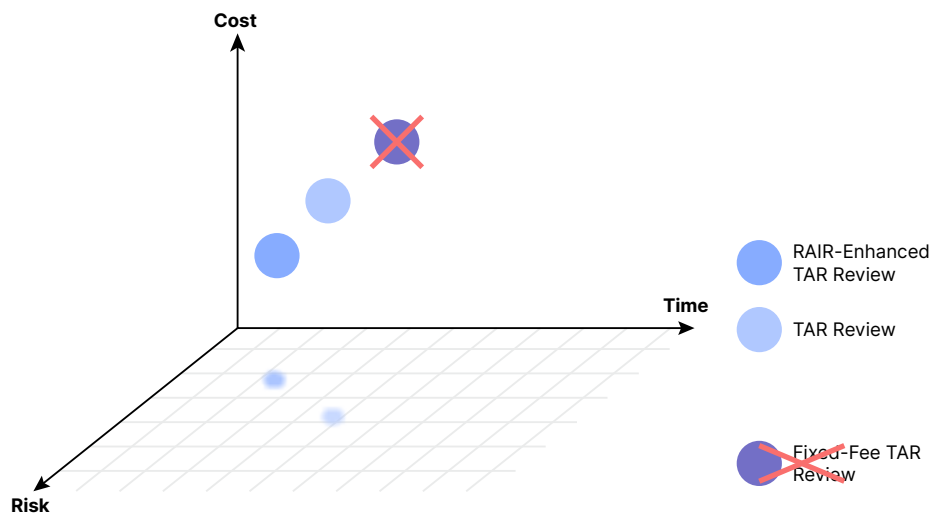


Figure 5: Eliminate fixed-fee TAR if you don’t need cost certainty

If cost certainty isn’t necessary for your scenario, fixed-fee review options are not optimal because they tend to cost more than a standard approach. We already eliminated fixed-fee RAIR, now we can eliminate fixed-fee TAR. Let’s add the fifth and final question.

Do you have more than 50,000 documents to review?

Yes No

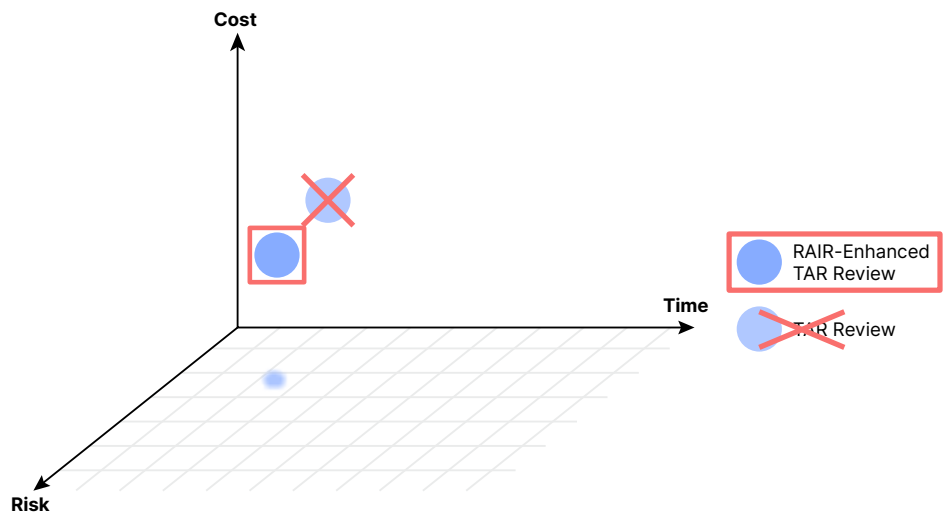


Figure 6: Eliminate TAR if you have more than 50K documents

While TAR can be an appropriate review method for large-scale document collections, it is not necessarily optimal, given the other conditions.

A RAIR-enhanced TAR method would generally be the optimal method if: **1)** you **do not** need to put “eyes-on” every document in the collection, **2)** you **do** need to put “eyes-on” every document being produced, **3)** you **do** need to put “eyes-on” every document coded non-responsive, **4)** you **do not** require cost-certainty, and **5)** you have more than 50,000 documents to review.

Hopefully, this example illustrates how answering five simple questions can enable your team to quickly identify the optimal review method for any scenario!

Cost comparisons

Generally, each of the seven methods of review has a different level of costs associated with it. As noted above, manual linear review is the most expensive. If you represent each of the other six review methods as a percentage of the cost associated with linear review, the figure below represents what typical costs look like for a typical review project with one million documents and 15 percent richness of responsive documents.

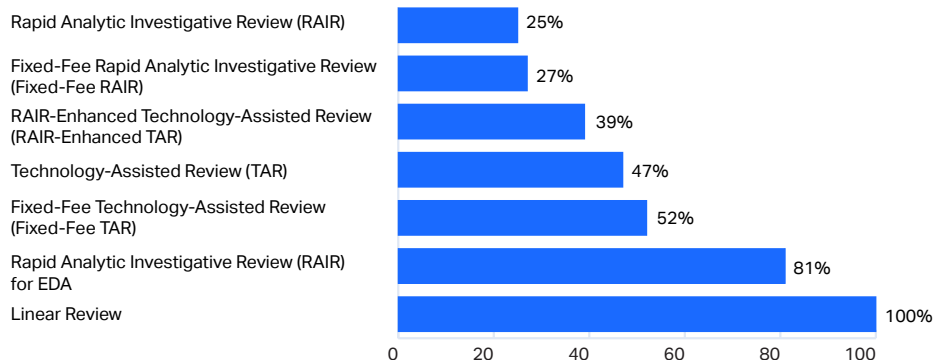


Figure 7: Seven methods cost comparison (Relative costs based on 1M documents with 15% richness)

As you can see, the RAIR method can cost as little as 25 percent of a typical linear review method (in a case with one million documents and 15% richness) illustrating its cost-effectiveness!

➔ Solution overview:
OpenText
Managed Review

➔ OpenText Managed
Review for
Hart-Scott-Rodino
Responses

➔ Web page: Managed
Document Review

➔ Responding to data
breaches leveraging
eDiscovery tools
and techniques

Review methods best suited for each scenario

While it's best to ask the five questions above to be sure you've found the right answer, here are general "rules of thumb" as to which method(s) are typically best suited for each scenario.







 Litigation — outbound productions  Litigation — inbound productions	<ul style="list-style-type: none"> • Linear review • TAR • RAIR-Enhanced TAR
 DSAR / SRR data privacy review and reporting (incl. PII, PHI)  Third-party subpoenas  Regulatory document requests — eg. Antitrust, HSR Second Requests	Rapid Analytic Investigative Review (RAIR)
 Data breach response reviews (incl. PII, PHI)	RAIR for early data analysis

Figure 8: Methods best suited for each scenario

Requirements for cost certainty may change the review method, but the fixed-fee TAR and fixed-fee RAIR variations of TAR and RAIR are best suited for the same review scenarios respectively as TAR and RAIR.

Conclusion

A one-size-fits-all approach for document review is no longer appropriate. To battle the "cost monster" and optimize document review for each of the six common review scenarios in eDiscovery, it's important to be informed about the seven review methods and variations. Answering five simple questions at the outset of your review can enable your team to optimize document review in every project, regardless of the scenario.

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