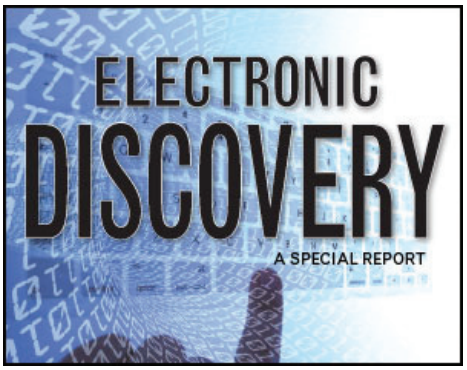
THE NATIONAL LAW JOURNAL
with D.C. news from LegalTimes

Permission is one thing; adoption quite another

Despite technological advances, attorneys are reluctant to yield control of the discovery process.

Sonya L. Sigler, Vice President of Product Strategy, SFL Data

The National Law Journal | May 21, 2012



As legal technology advances and data volumes expand, it's difficult for lawyers and in-house counsel to manage electronic discovery efficiently and effectively. Even with predictive coding and other technology-assisted review (TAR) choices on the rise, only the earliest adopters are ready to abandon the ever-present and misunderstood keyword search in favor of more technologically advanced search methodologies.

As experienced attorneys know, it's not that simple to change from one methodology to another. While TAR can heighten defensibility and lower costs compared with linear review, many litigators view it only as a budding trend.

Perhaps that's because most lawyers didn't go to law school to do document review; they went to law school to learn how to try cases on their merits. So why aren't they wholeheartedly embracing technologies that simplify document review while allowing them to focus on the merits of the case?

One reason is lack of knowledge about how advanced search-and-retrieval technologies apply to litigation. Even though these technologies have been used for more than 40 years in a variety of industries, they only have about a decade of use in the legal community.

The use of advanced technologies is mentioned in the notes to Federal Rule of Evidence 502 and in case (*U.S. v. O'Keefe,* 537 F. Supp. 2d 14, 24 (D.D.C. 2008)) after case (*Victor Stanley Inc. v. Creative Pipe Inc.,* 250 F.R.D. 251 (D. Md. 2008)) after case (*William A. Gross Const. Associates Inc. v. American Mfrs. Mut. Ins.* Co., 256 F.R.D. 134, 135 (S.D.N.Y. 2009)). Yet lawyers seem to remain unwilling to use TAR. They want their eyes on every document, even though expanding data volumes make this impossible. Millions of dollars will be wasted until lawyers catch up to the technology.

OBJECTIONS

Slow adoption of TAR is due to the strong desire among lawyers for a legal precedent that blesses its use. Interestingly, there was never a case that blessed the use of keyword search; however, lawyers seem to be comfortable using this method. This comfort provides a false sense of security, given that keyword search is simultaneously overinclusive and underinclusive when it comes to finding relevant data. Yet lawyers continue to rely on keyword search as they wait for a case that says it's acceptable to use TAR.

There are several cases swirling around the question of whether parties can use TAR solutions on their own volition or whether the court, or the other party, has to approve it. One example, *Da Silva Moore v. Publicis Groupe,* 11 Civ. 1279 (S.D.N.Y. Feb. 24, 2012), has shown us the importance of having a defined protocol surrounding the deployment of predictive coding even when both parties agree to its use.

Additionally, court-ordered predictive coding is a new phenomenon with several surrounding questions, as we see in *Kleen Products LLC v. Packaging Corp. of America, No. 10 C 5711* (N.D. Ill. Feb. 21, 2012). But the Virginia state court case *Global Aerospace Inc. v. Landow Aviation L.P. dba Dulles Jet Center,* No. CL 61040 (Loudoun Co., Va., Cir. Ct. April 23, 2012) may be the first in which the use of TAR was ordered as a better search method than keyword search.

The third objection to using TAR centers on price. Some are calling for pricing changes so that the adoption of TAR can be more rapid and widespread. Recently, the Rand Institute for Civil Justice published a study, "Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery," April 2012, revealing that more than 73 percent of litigation costs are related to document review for "relevance, responsiveness, and privilege." Using TAR will lower review costs significantly — from 50 percent to 90 percent — yet law firms and corporations persist with linear review.

The general lack of knowledge regarding TAR processes, the absence of settled legal precedent and pricing are three primary reasons that the use of advanced search methodologies hasn't been widely adopted. However, these merely indicate a more significant factor that prevents TAR from reaching broad acceptance within the legal community: the billable hour.

VESTED INTEREST

To remain profitable, law firms have a vested interest in billing hours to generate revenue. One plaintiffs attorney declared, "All of our cases are costly to litigate because we are suing…corporations [that] use outside counsel who bill by the hour and have little incentive to do things efficiently." Federal Judicial Center Report, In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation, at 8 (March 2010). Another lawyer said, "Lawyers in firms produce in the form of billable hours rather than focusing on client needs." Id. at 11.

The Rand study cited document review rates ranging from $40 an hour to $320 an hour. Rand, at 26. With millions of documents to review, some law firms

and corporations are pressured to reduce costs and have outsourced document review to vendors and contract reviewers. Despite cost controls, law firms have been slow to embrace TAR to lower e-discovery costs further. In fact, many law firms see document review as a revenue source and have established dedicated document-review facilities.

While many law firms do invest in new technologies, some want to use it on every case — appropriate or not — to improve the return on their investment. Client needs end up being ignored in favor of pursuing return on investment. Corporations need to be aware of law firms with a one-search-tool-fits-all-cases mindset and work with their law firms and vendors to find a search-and-retrieval tool that fits their particular case.

Corporations are forcing the use of other solutions like TAR and other business models. For example, FMC Technologies Inc. is requiring law firms to bid on work and use billing structures that do not involve billable hours. Consequently, law firms bidding on FMC work must estimate and control costs closely. When work is brought in under the bid price, the corporation shares the difference with the law firm as a reward for cost effectiveness. Participants in the Rand study noted that "recent economic conditions had resulted in significant changes in their financial relationships with outside counsel. Pressure to reduce costs was said to have led to alternative billing arrangements and increased use by law firms of less expensive resources (such as contract attorneys and vendors) for review tasks." Rand, at 39.

Other companies are lowering costs by bringing e-discovery in-house and building in-house expertise and review teams that employ TAR. Companies such as Microsoft Corp., Freddie Mac and Google Inc. have internal e-discovery teams. Google has licensed predictive-coding technology and is hiring a variety of industry experts to handle its e-discovery. What Multinational General Counsel Value Most, GC Value Insights, April 2012.

Developing in-house expertise allows the corporation to control its e-discovery workflow, processes and costs. It also enhances defensibility by allowing the reuse of produced data and the ability to maintain a library of privileged materials.

Chevron Corp. is also moving away from using law firms to using service firms for first- and second-pass document review. This move maintains control so that the corporation has more consistency, higher quality and cost predictability for document review. By working in concert with its law firm and a document-review company, Chevron is designing review protocols and employing TAR tools that involve clustering and concept-searching technology. This approach demonstrates the importance of combining the efforts of the corporation, its law firms and vendors — and not just a mere reliance on the next greatest technology.

Other corporations such as Oracle Corp. are moving to a managed-service model whereby they have a vetted process and workflow and rely on an outside vendor to manage a data repository, workflow and infrastructure, as well as the TAR software. Greater cost control and predictability were important factors in prompting this change from performing e-discovery in-house.

Corporations are leading the charge to adopt TAR because it reduces personnel costs and controls the review workflow. People are a finite resource, and using TAR requires far fewer people. When TAR is employed, case-knowledgeable attorneys can be used up-front and their expertise extrapolated to the entire data set, rather than having thousands of reviewers deciding relevancy and privilege.

An incredibly expensive part of the review process is privilege review. One former document reviewer cited in the Rand study voiced concerns that he and other temporary attorneys were the final arbiter of relevancy, even though his "entire knowledge of this case is based on the 15-minute conversation [they] had with all the temps at the beginning of the project. Is it any wonder that privileged information gets through time and again, when the people who should be the final arbiters are nowhere to be found? I think not." Rand, at 55. Corporations that control the privilege process also control these costs and decisions more effectively.

NO 'EASY BUTTON'

TAR is not a one-size-fits-all method. There is a resounding misconception that this new technology provides an easy-button approach to ESI review and that human reviewers are becoming obsolete. On the contrary, the roles have simply shifted in favor of efficiency and expertise.

Human reviewers will remain an integral part of the review process, working alongside a sophisticated technology platform with required input from subject matter and case experts. Using TAR to its fullest potential requires attorneys to consider matter complexity, litigation processes/procedures, available resources and expertise.

It's important to view TAR for what it truly is: a successful information-retrieval methodology that requires iterative testing and feedback. When used correctly, this kind of automated review can become an integral part of an end-to-end e-discovery process that results in lower overall cost, quicker deployment and, most importantly, case conclusion.

While other industries like the smart-phones sector clamor for the next greatest technological development, the legal profession seems to be actively resisting it. Given finite resources, lawyers must leverage the latest technologies to help find the relevant, most important data quickly.

Let the search-and-retrieval technologies do what they have been developed to do so efficiently — find responsive information to a query or data classification request. This way, lawyers can do what they do best — use their experience and legal judgment to work on the merits of the case.