Reality Bites: Why TAR’s Promises Have Yet to be Fulfilled

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Themes

- 2 + 2 doesn’t always = 4 (remember – we are talking about lawyers)
- Clash of different cultures with different objectives
- A way forward
Thought-Leaders Recognize Shortcomings of Manual Review and Keyword Search
Moving away from Keyword Searching and Toward Advanced Analytics

- Blair & Maron (1985)
- TREC Legal Track (NIST)
- Recent commentaries by Baron, Oard, Grossman, Cormack, and others
Leading Jurists Move Away From Key Word Searching

  - Judge Facciola recognizes concept searching, as opposed to keyword searching, “is more efficient and more likely to produce the most comprehensive results.”

- **Victor Stanley (2008)**
  - Judge Grimm points to growing body of literature that highlights the risks of conducting an unreliable or inadequate keyword search or relying exclusively on such searches.

  - (Scheindlin) “parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools.”
Judicial Support for TAR
Judicial Acceptance of TAR

- Da Silva Moore v. Publicis Groupe
- In re Actos Products Liability Litigation
- Global Aerospace, Inc. v. Landow Aviation, LP
- Kleen Products LLC v. Packaging Corporation of America
- In re Biomet M2a Magnum Hip Implant Products Liability Litigation
Early Decisions Endorsing TAR

- **Da Silva Moore (Feb. 2012)**
  - First opinion endorsing TAR
  - Issued by noted jurist (Peck)
  - Computer assisted review is acceptable way to search for relevant ESI in appropriate cases.
  - Transparency deemed vital: defendants required to turn over their seed set to plaintiffs, including documents tagged as non-responsive in the training rounds, to enable plaintiffs to determine whether the computer was being appropriately trained.

- **Global Aerospace (April 2012)**
  - State court case
  - Permits defendants, over plaintiffs’ objection, to use TAR methodology to search for responsive documents
  - Court did not specifically endorse the technology or conclude it was better suited than other legal search tools
  - Recognized that plaintiffs still had right to object post-production
Actos CMO issued in July 2012

- Custodians used for sample collection
- Size of random control set
- Early production of privilege log
- Parties nominate six experts to review control set
- Following review of control set using active learning model, experts work collaboratively to determine responsiveness
- Court mandates sufficient training rounds
- Parties meet and confer to agree on relevance score
Kleen Products and Biomet follow reasoning in Global Aerospace

Kleen Products

- Plaintiffs arguing for use of TAR as do-over to earlier application of keyword search methodology
- Plaintiffs later agreed to withdraw demand for existing production requests

Biomet

- Court refuses to disturb defendants’ unilateral decision regarding process used for TAR search and culling
What about the lawyers?
Objections to Transparency

- Scope of discovery under FRCP does not include “discovery about discovery”
- Disclosure of protected work product
- Unnecessary risk of additional litigation when non-responsive information disclosed
- Attorney certification of conduct of reasonable search for responsive documents should suffice
Other Reasons Impeding Attorneys’ Adoption of TAR

- Ignorance
- Comfort with older methodology
- Expense
- To date, only a few judicial opinions have addressed TAR
- Fear of “do-over” if Court does not endorse methodology
Different Cultures, Different Objectives
SCIENTISTS

• Collaborative
• Seek perfection about search results
• Interested in disclosure rather than defensibility
• Less concerned about costs?
ATTORNEYS

- Seek defensibility; not perfection
- Trying to win; not interested in helping opposing party
- Restricted from divulging privileged information
- Worried about the bottom line
- Trained not to take risks
- Will adopt advanced search methodologies if in best interest of client or if ordered by court
A Way Forward
Potential disclosures:
- Specific software
- Nature of documents
- Size of corpus
- Culling techniques to be employed
- Use of control set
- Sampling techniques used to generate “seed set”
- Workflow/process
- Experience/expertise of reviewers
- Relevance/responsiveness thresholds
- Precision/recall rates