Dialing Back Disclosure:
Best Practices for Balancing Cooperation and Client Interests

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Introduction

Technology-assisted review (TAR) has proven to be a superior alternative to manual, human review for large document sets — in terms of both cost savings and search quality. Studies conducted as part of the Text Retrieval Conference (TREC) show TAR produces higher levels of recall and precision as well as better relevancy calibration.[1] For these reasons, courts are seeing the value of TAR, and in some instances, ordering parties to implement TAR methodologies.[2] Most early TAR-related court opinions commend a high level of cooperation and disclosure between opposing parties. However, the inherent risks associated with overdisclosure may discourage litigators from adopting TAR methodologies. A balance must be struck between the duty to cooperate and the duty to zealously represent a client's interests.

Minimization of litigation costs and avoidance of sanctions necessitate cooperation between parties. However, balancing a client's interest in minimizing costs, while maintaining privilege and confidentiality can be complicated. The Federal Rules of Civil Procedure say nothing about review method disclosure requirements. Federal Rule of Civil Procedure 26(f) requires that parties "meet and confer" regarding issues related to the disclosure of ESI, but the Rule and Committee Notes only list preservation and form of production as disclosure issues to be discussed.[3] Courts look favorably upon early cooperation between parties to establish an agreed-upon review methodology, noting that early agreement can avoid lengthy discovery disputes later, thereby lowering litigation costs.[4] Further, *The Sedona Conference® Cooperation Proclamation*, endorsed by over one hundred judges, encourages parties to jointly develop "automated search and retrieval methodologies to cull relevant information."[5] Conversely, courts have generally found that unilaterally created keyword lists and search protocols provide little evidence as to the defensibility of one's review methodology.[6] As such, producing parties should

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[1] *See* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII RICH. J.L. & TECH. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf.

[2] *EOHRB, Inc. v. HOA Holdings LLC*, C.A. No. 7409-VCL (Del. Ch. Oct. 19, 2012).

[3] *See* Fed. R. Civ. P. 26; *See also* Fed. R. Civ. P. 26, Committee Notes on Rules, (2006).

[4] *Kleen Products, LLC v. Packaging Corp. of America*, No. 10 C 5711 (N.D. Ill. Sept. 28, 2012) (Nola, Mag. J.) (finding that plaintiff's Sixth Interrogatory violates the spirit of cooperation and granting defendant's motion for protective order).

[5] *Id*. *See* The Sedona Conference®,*The Sedona Conference® Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009).

[6] See, e.g., *In re Seroquel Products Liability Litig.*, 244 F.R.D. 650, 662 (M.D.

be prepared to disclose their intended method of review and proposed search terms with opposing counsel who seek to reach agreement on these issues.

Recent Court Decisions

Recent court decisions regarding the use of TAR expand producing parties' disclosure requirements beyond discussions of keywords and review methodologies. In *Da Silva Moore*, the landmark electronic discovery decision that first recognized the appropriate use of predictive coding, Judge Peck advised the producing party "to give [their] seed set, including the seed documents marked as nonresponsive to plaintiff's counsel," should they choose to utilize predictive coding.[7] Later, Judge Peck noted that he considered the producing party's transparent process, which included disclosing both the responsive and nonresponsive documents that comprised the seed set, as a factor in finding that the use of predictive coding was appropriate.[8] Taking cooperation a step further, the court in *In re Actos Products Liability Litigation*, approved a case management order that included the joint initial review of a random selection of five hundred non-privileged emails conducted by members of both the producing and requesting parties.[9]

In contrast, traditional linear review imposes no expectation on producing parties to disclose nonrelevant documents or share their review protocol. The court in *Lockheed Martin Corp. v. L-3 Communications Corp.*, found that "documents containing instructions about how to conduct the search and what specifically to search for are opinion work product."[10] Similarly, in *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, "the court agree[d] with plaintiff that the compilation of search results reflects the legal strategy of counsel."[11] Judge Miller, in *In Re: Biomet M2a Magnum Hip Implant Products Liability Litigation*, saw no need for "counsel from both sides to sit in adjoining seats while rummaging through millions of files that [have not] been reviewed for confidentiality or privilege."[12] Even Judge Peck, while praising the producing party's high level of transparency, recognized that "not all experienced ESI counsel believe it necessary

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Fla. 2007) ("[W]hile key word searching is a recognized method to winnow relevant documents from large repositories, use of this technique must be a cooperative and informed process. Rather than working with Plaintiffs from the outset to reach agreement on appropriate and comprehensive search terms and methods, AZ undertook the task in secret."); Principle 2.05, Seventh Circuit Electronic Discovery Committee, *Seventh Circuit Electronic Discovery Pilot Program, Phase One*: October 1, 2009 -MAY 1, 2010 7 (2009), available at http://www.insd.uscourts.gov/News/7thphase%20one.pdf [hereinafter Pilot Program]; *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260, 262 (D. Md. 2008); *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009).

[7] *Da Silva Moore v. Publicis Groupe SA*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412 (S.D.N.Y.) Feb. 24, 2012) (Peck, Mag. J.) (approving predictive coding protocol)(citing Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches Be Replaced by Computer-Assisted Coding?*, L. TECH. NEWS (Oct. 1, 2011).

[8] *Id*.

[9] *See* Case Management Order: Protocol Relating to the Production of Electronically Stored Information ("ESI") 6-16, *In re Actos (Pioglitazone) Prods. Liab. Litig.*, MDL No. 6:11-md-2299 (W.D. La. July 27, 2012).

[10] *Lockheed Martin Corp. v. L-3 Communications Corp.,* 2007 WL 2209250, *10 (M.D. Fla. July 29, 2007).

[11] *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, 143 F.R.D. 611, 624 (E.D.N.C. 1992).

[12] Order, *In re: Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, NO. 3:12-MD-2391 (N.D. Ind. Apr. 18, 2013). See - Principle 1.02, Pilot Program.

to be as transparent as [the producing party] was willing to be in *Da Silva Moore*."[13]

Alternative Methods for Establishing Transparency

The aforementioned conflict of interest created by TAR's increased transparency expectations and the Model Rule of Professional Conduct 1.6(c), which requires lawyers to make reasonable efforts to prevent unreasonable disclosures of client information, alarm many legal practitioners.[14] Thus, the acceptable threshold for transparency between opposing parties should stop short of dissuading the responding party from implementing a TAR methodology. As an alternative to disclosing their seed set, review protocol, or iterative process, opposing parties should:

1) meet early to establish protections for inadvertently disclosed documents;
2) rely on sampling and the Federal Rules of Civil Procedure 26(g) and 34(b)(2) for assurance of the review method's completeness; and
3) as a last line of defense utilize third-party neutrals and in-camera review of specific contentious documents when relevancy calibration concerns arise.

I. Establish Protections

As an initial step, the parties should seek a court order under Fed. R. Evid. 502(d), which protects the producing party from waiving privilege on any inadvertently disclosed documents, both in the current matter and any other federal or state matter.[15] The Advisory Committee's Note on subsection (d) states that, "the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product."[16] Failure to obtain a 502(d) order may put a producing party at risk for malpractice.[17] Once these initial protections are in place, the parties should consider how to best implement a defensible review methodology that does not overly expose the producing party to disclosure risks.

II. Rely on Sampling

Statistical sampling has been recognized as a defensible tool for many uses in electronic discovery.[18] Federal Rule of Civil Procedure 34(b)(2) provides that absent a timely objection, the

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[13] *Da Silva Moore v. Publicis Groupe SA*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412 (S.D.N.Y.) Feb. 24, 2012)
[14] MRPC Rule 1.6(c) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client").
[15] *See* Fed. R. Evid. 502(d) ("A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding").
[16] *See also* Fed. R. Evid. 502(d), ADVISORY COMMITTEE NOTE, (2008).
[17] *See* Barkett, John M., *More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review*, <http://law.duke.edu/sites/default/files/centers/judicialstudies/TAR_conference/Panel_5-Original_Paper.pdf> (visited May 8, 2013).
[18] *Da Silva Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC) (AJP), 2012 WL 607412, (S.D.N.Y. Feb. 24, 2012); Case Management Order: Protocol Relating to the Production of Electronically Stored Information ("ESI") 6-16, *In*

producing party must produce all documents to a request.[19] Thus, rather than relying on the current trend of sharing all non-privileged documents used in the training sets and jointly making relevancy determinations, transparency should be established through reliance on anonymized metrics in conjunction with the assurances set forth in Rule 26(g)(1)(B), that the producing party's disclosures are "complete and correct".[20] In doing this, the producing party, codes a statistically valid sample of the data universe for relevancy and privilege. The relevant, non-privileged document population is then produced to opposing counsel for review and feedback. Results of the statistical sample provide insight for both parties as to the composition of the document universe and can be used to set benchmarks for the review. The requesting party can use this information to validate current search terms, suggest new ones, or make suggestions regarding the creation of the initial seed set. Further, the parties can use the information from the sample to set mutually agreeable thresholds for recall and precision. Upon review completion, the producing party should review a statistically valid sample of the discarded documents, as well as the documents determined to be relevant. The discarded document sample will show if any documents highly relevant to either the claims or defenses of the case were excluded from the production set. The production set sample serves as a quality control measure ensuring that confidential and privileged documents are removed and no large sets of irrelevant documents exist within the production set. A discrepancy analysis, where the producing party reviews documents with relevancy determinations made by the technology that differ from the determination made by the human reviewer for accuracy, could be conducted as a final measure of the systems' efficacy. Sharing the statistical results of these quality control methods (as opposed to the sample sets) with interested opposing counsel serves as an alternate means of assurance that no relevant documents were missed during the TAR.

III. In-Camera Review

Third-party neutrals and in-camera reviews of specific documents or sensitive case-related materials can serve as a final means of illustrating the defensibility of one's TAR methodology or settling relevancy calibration concerns. In *EEOC v. Original Honeybaked Ham Co.*, where Plaintiffs were required to turn over their personal email, text messages, and social media information, the court took special steps to protect the plaintiffs' private information.[21] Here, the court ordered the parties to jointly define the parameters of discoverable data. The plaintiffs submitted their login credentials to a court-appointed special master who accessed their digital information for in-camera relevancy review. Upon completion of the in-camera review, Plaintiffs assessed relevant documents culled out by the court for privilege and created a privilege log. The scope of required disclosure in *Honeybaked Ham* - requiring plaintiffs to reveal passwords and allow access to private data is concerning. However, the court's use of neutral special masters and in-camera reviews, which provide an effective alternative to broad, open

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re Actos (Pioglitazone) Prods. Liab. Litig., MDL No. 6:11-md-2299 (W.D. La. July 27, 2012); *Kleen Products LLC v. Packaging Corporation of America,* No. 10 C 5711 (N.D. Ill. Sept. 28, 2012).

[19] *See* Fed. R. Civ. P. 34(b)(2)(B)-(C).

[20] Fed. R. Civ. P. 26(g)(1)(B).

[21] *Equal Employment Opportunity Comm'n v. Original Honeybaked Ham Co. of Georgia*, No. 11-cv-02560-MSK-MEH (D. Colo. Nov. 7, 2012); *See Richards v. Hertz Corp.*, 100 A.D.3d 728, 953 N.Y.S.2d 654 (App. Div. 2012).

disclosure between opposing parties, can be used to settle relevancy and defensibility issues related to TAR.

Conclusion

The amount of data created doubles every two years.[22] In order to keep pace with the rate of data creation, the legal field must rely on advances in technology. Studies consistently show TAR to be at least as effective as alternative methods of review, while allowing for considerable cost savings.[23] Widespread adoption of TAR should be encouraged by establishing standards that reduce the professional and ethical risks associated with the current trends of increased transparency and broad disclosure between parties. Typical of any new technology, as TAR becomes more common and attorneys gain a better understanding of its capabilities, concerns regarding its efficacy will abate. Alternatives to increased transparency — such as the early establishment of protections for inadvertent disclosures, use of sampling to establish TAR defensibility, and reliance on neutrals to settle issues involving privileged subject matter — encourage TAR adoption by providing necessary assurances that the review method works correctly, while allowing attorneys to effectively represent their clients.

[22] Gantz, John and David Reinsel, *Extracting Value from Chaos* <http://www.emc.com/collateral/analyst-reports/idc-extracting-value-from-chaos-ar.pd>f (visited May 8, 2013).

[23] *Overview of the TREC 2011 Legal Track*, available at <http://trec.nist.gov/pubs/trec20/papers/LEGAL.OVERVIEW.2011.pdf> (visited May 8, 2013).