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RETHINKING TAR: NEW TECHNOLOGIES AND STRATEGIES SHOULD BRING THE PROMISE CLOSER TO REALITY

The good news is that a new generation of TAR tools and new strategies for using TAR are emerging that may obviate many hurdles.

BY GARETH EVANS

Despite its potential to dramatically reduce costs and save time, technology-assisted review, commonly referred to as "TAR," continues to be greatly underutilized for document review. When the first judicial decision approving the use of TAR was issued almost four years ago, many predicted that the established methodology—manual review of search term hits—would soon be a thing of the past. Those predictions have turned out to be woefully wrong.

To a large extent, this lack of adoption is due to attorneys' ignorance of TAR. But even those who may want to use TAR can be quickly deterred by a number of factors.

Nevertheless, there is a silver lining to these clouds. Advancements in TAR, including the emergence of a second generation of predictive coding tools—referred to as "TAR 2.0"—and the strategic use of TAR technologies may remove many of the barriers and should increase its use in the future.

What is TAR?

TAR refers to the use of text classification software that assists in finding responsive documents. Most often, the term is used to refer to predictive coding, which identifies documents likely to be responsive by extrapolating from coding decisions on a subset of the overall document population to the remainder.

Other forms of TAR are also available, such as analytics applications that can identify documents with the same or similar subject matter and show the relationships between various topics and individuals.

What are the Hurdles?

Hurdles deterring the use of TAR can arise from e-discovery vendors, opposing counsel, and even one's own counsel.

Vendor-Related Hurdles

Carefully selecting an e-discovery vendor considering, in particular, its TAR

offerings and expertise is critical to being able to effectively use TAR. Being tied to a vendor that cannot properly support a TAR project usually means either that you can't use TAR or, if you do, it will go poorly.

Too often, parties interested in using TAR are sidetracked by expensive pricing and the limitations of the vendor's TAR technology and personnel. Today, most vendors say that they offer a predictive coding tool. But what they often really offer is not their own software but that of a major software vendor that they are reselling.

While there is nothing inherently wrong with this arrangement, these tools tend to be "plain vanilla" first generation predictive coding technology requiring workflows that can be vulnerable to challenges from opposing counsel (more on that below). Pricing also tends to be high, and the reseller usually has little or no pricing flexibility.

Moreover, while many of these vendors represent that they have TAR experts on staff, this expertise is often exaggerated. Many a nascent predictive coding project has gone sideways as a result of poor up-front advice and the inability of the e-discovery vendor's purported "expert" to coherently defend the predictive coding protocol against challenge.

Opposing Counsel-Related Hurdles

One of the biggest deterrents to the use of TAR—particularly predictive coding—has been the demands that opposing counsel often make in exchange for not objecting to the use of this technology.

These demands are often referred to as the "TAR tax." With first-generation predictive coding tools, they frequently include having access to the documents in the seed and training sets used to train the tool and in the control set used to validate its performance. Such demands are particularly problematic because they usually involve providing opposing counsel with access to irrelevant documents in those sets. Opposing counsel may also demand unrealistic levels of recall, the percentage of responsive documents in the population that the tool is able to find.

Ostensibly to ensure that the predictive coding model is properly trained, and inaccurately framed under the guise of seeking "cooperation" and "transparency," these demands may, in fact, be made for the purpose of preventing the producing party from obtaining TAR's benefits. Opposing counsel know, for example, that many clients will not be comfortable providing access to irrelevant documents and, if that is required, then they will revert to manual review, with all of its burdens.

Fighting the TAR tax, moreover, can mean a time-consuming and expensive meet and confer and motion process, with no guarantee of success. The law regarding TAR protocols is unsettled and some judges—borrowing from the common practice of involving opposing counsel in negotiating search terms—instinctively feel that opposing counsel should have some role in the predictive coding process (notwithstanding that these search methodologies are not at all analogous).

Hurdles from Your Counsel

Some hurdles to using TAR may emanate from your own counsel. Not being aware of or comfortable with TAR technologies, and not knowing what vendors offer a suitable tool, they may not seriously consider TAR. Even if they do, counsel may not have sufficient expertise to use TAR optimally or to come up with a strategy that avoids the potential pitfalls. Although some law firms have attorneys with such expertise, the litigation team handling the case—not appreciating the potential complexities and pitfalls—may not think to involve them.

Overcoming the Hurdles: New Technologies and Strategies

The good news is that a new generation of TAR tools and new strategies for using TAR are emerging that may obviate many of these hurdles.

For example, predictive coding software using continuous active learning—which some have labeled "TAR 2.0"—does not utilize discrete training sets. Rather, the tool is continuously trained as reviewers code documents. Combined with using an initial seed set consisting solely of re-

sponsive documents, this technology may make opposing counsel's purported desire to see the documents in the seed and training sets moot. Furthermore, it is claimed that this second generation of predictive coding technology can yield high levels of recall more efficiently than first generation tools.

Additionally, instead of using a control set to validate the performance of the predictive coding model, one can attempt to find missed responsive documents by running keyword searches on the documents that the tool has identified as not likely to be relevant and responsive.

Even a first generation predictive coding tool can be used to prioritize the review of documents most likely to be relevant and responsive. This approach can be particularly effective in reviewing document sets that remain voluminous even after culling with search terms.

Using this approach, you are not using the tool to eliminate documents from human review sight unseen. As a result, it may be defensible for you not to disclose your use of predictive coding or to attempt to reach agreement on a protocol with an opposing counsel intent on frustrating your use of predictive coding—you will still be reviewing all of the search term hits.

Additionally, powerful visual analytics TAR tools are becoming available that group similar documents together and reveal in ways not previously available the topics and contents of documents. These tools allow reviewers to understand groupings of documents at a high level and also to "drill down" into the details. They can be used to understand the facts and find important documents fast, as well as to supplement other search and review methodologies, such as predictive coding.

Combined with selecting an appropriate vendor and involving counsel with expertise in TAR, this new generation of TAR technology and these strategies may allow TAR to better realize its potential.

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