The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017
PHILADELPHIA, TUESDAY, FEBRUARY 7, 2017 VOL 255 • NO. 25 An ALM Publication

E-DISCOVERY

Getting Comfortable with Technology Assisted Review

BY BEN BARNETT, MATTHEW B. TATE AND LIESL SACHSE
Special to the Legal

Technology Assisted Review or (TAR) has been available as a tool in the e-discovery marketplace for roughly a decade. In those early days, some attorneys viewed TAR as simply a new label for existing smart review strategies. Other attorneys (particularly with risk-averse clients) were slow to embrace a review method that did not include a set of human eyes on every document before it went to government or opposing counsel in a production. Over time, much of the initial debate about the value of TAR fell away, particularly as more judges in U.S. courts identified TAR as the most sensible, efficient, and accurate process to review documents in the era of Big (and growing) Data. Now the discussion has shifted to TAR 2.0 and creating proposed uniform standards for TAR projects as the Duke Law Conference plans to do later this year.

BARNETT

TATE

BEN BARNETT *is a partner at Dechert. He co-chairs the firm's complex commercial litigation group and has experience effectively managing discovery in civil litigation and government or internal investigations.*

MATTHEW B. TATE *is a senior staff attorney at the firm and focuses his practice on products liability and mass tort matters, as well as e-discovery and data management.*

LIESL SACHSE *is the e-discovery coordinator for the firm.*

This discussion, while useful and necessary, overlooks the simple and significant fact that many clients and attorneys are still not employing TAR for e-discovery review projects. Given that multiple studies have demonstrated that a TAR review is more accurate than traditional search term and linear attorney reviews, the question is why. Part of the answer may be unfamiliarity with TAR and how it works. Attorneys who have never used TAR are less likely to recommend it to clients, particularly for high-profile, high-risk matters. This represents a missed opportunity to reduce the burden and cost of discovery and to streamline discovery in matters of all size and scope.

One practical solution to this problem is to understand that TAR is a flexible tool that can be used for a variety of important discovery tasks beyond document review. Once clients and attorneys apply TAR to these discrete projects, their understanding and comfort will grow and they will be better positioned to reap the full benefits of using TAR in a large-scale review. This article identifies and briefly discusses a few example of how TAR can be used for important but smaller scale projects in a litigation matter to promote

efficiency, effectiveness, and preparation for trial.

PRIORITIZATION OF MANUAL REVIEW

Prioritization of manual attorney review is an excellent way to dip your toes into the TAR waters as it will allow you to gain a better understanding of how the TAR process works while still getting reviewer eyes on documents prior to production. Training the TAR algorithm on a subset of all potential documents allows for the identification of likely responsive documents and front loading those documents for manual review can often times avoid reviewing nonresponsive document sets as the review progresses.

To begin, Subject Matter Experts (SMEs) utilize TAR to cull out the obviously not responsive documents and are able to put the most likely responsive documents in front of the manual review team. This process mimics a standard TAR process utilizing stratified samples and several training rounds until you reach a sufficient level of categorization. The review can then begin with documents deemed likely to be responsive based on these TAR categorizations. The manual review is then used to confirm responsiveness while also coding for privilege and any other substantive issues as necessary.

This hybrid TAR-manual review approach is particularly effective in matters where you need to produce a large population of responsive documents quickly. Partnering TAR with the manual review process allows the review to be streamlined but still provides the "comfort" of a traditional review process prior to production.

PREPARING WITNESS KITS FOR DEPOSITIONS

Beyond document production, TAR can also be extremely beneficial in helping to build witness kits for depositions or trial testimony. Historically, these preparation materials were compiled by reviewing the documents in a witnesses' custodial file and running searches across a broader set of documents in the hope to find all key documents. This approach was time consuming and still carried the risk of documents being missed that could then be used to surprise a witness and their counsel at deposition or trial.

As seen in both theory and practice over the last several years, the benefits and potential uses of TAR are far reaching.

The efficiency and accuracy of this process can be improved by using TAR on produced documents, particularly key documents for the witness-custodian and documents identified as "interesting" or "hot" during the manual review. Using selected documents from these two groups of documents as a basis for the stratified sample allows TAR to identify other documents that match the categorization criteria. You can then run multiple rounds of review to identify all the produced documents that need to be accounted for in preparing a witness. The power of this process can additionally be enhanced by applying other data analytics tools, particularly clustering which will allow you to see the relationship between documents without being reliant on a custodian's name appearing in a document such as an email. Combining TAR rounds on key documents with clustering will narrow the documents needing review for deposition preparation far better than search terms alone, and is largely independent of first level coding by attorneys focused on responsiveness and not specific issues important to your witness. This also significantly lessens the likelihood of a nasty surprise at a deposition.

REVIEWING PRODUCTIONS RECEIVED FROM OPPOSING COUNSEL

Some attorneys view TAR solely as a tool to review and produce documents to opposing counsel. That limited view misses one of the most powerful applications of TAR—using it to speed review of productions received from opposing counsel.

For this process to work, your negotiated production protocol

needs to include a requirement for parties to provide extracted text with any production (practice tip: ask for it every time). With extracted text, you can even apply TAR to a TIFF format production. The TAR approach is particularly useful when an opposing party does a so-called document dump, producing millions of pages of documents when you have only limited time to review them. As noted in prior examples, utilizing TAR will allow you to focus on the documents that are more likely relevant to your claims, defense, or theories of the case. The process is the same as if you were reviewing the documents for production. Utilizing a random stratified sample of produced documents, you run a series of training and QC rounds to identify and eliminate a high percentage of documents that are likely not responsive to key issues. The volume of documents reviewed in these rounds can be a fraction of the total document universe. Once that process is complete, you apply the TAR algorithm to the remaining documents to focus your review on the documents that contain the most relevant content. This leaves documents that are less likely to be relevant for the end of your review. Should you have sufficient time, you can still examine these materials if you have not located key materials through your TAR-driven review. Utilizing TAR for post-production review is not only more efficient and accurate but also removes a significant amount of uncertainty that arises from tackling new or unfamiliar data sets, and is an effective defense to a strategic data dump from an opponent.

TAR 2.0

There is a significant amount of discussion today among e-discovery attorneys and experts regarding TAR 2.0 (i.e., the next generation of TAR). While some of this talk is sales and marketing, there are significant advantages to combining the power of TAR with other analytics tools such as email threading, near dupes, clustering and ECA to name just a few. The inclusion and integration of these tools into TAR allows TAR to serve as far more than a document production engine and it instead becomes an enhanced data management and analytics tool. Combining TAR with processes that clients and attorneys are already comfortable with, and already accept as appropriate technologies to utilize during review is another way to allow a greater sense of ease with relying on technology to assist in document review. Most counsel and clients have the same goal of mastering and understanding a massive volume of unstructured data as quickly and accurately as possible. Using technology to focus review resources on the documents and data most relevant to a matter, as identified by a team's most experienced attorneys, allows case teams to avoid spending unnecessary time and money reviewing irrelevant materials. The results are greater accuracy, efficiency, and the reduction of costs of discovery which, in some instances, are increasingly being borne by both parties to a matter.

CONCLUSION

As seen in both theory and practice over the last several years, the benefits and potential uses of TAR are far reaching. TAR is no longer limited to document production alone. Instead, TAR can be used as a tool to drive efficiency through the litigation lifecycle to support a client's objectives for a single case or hundreds of cases. While the historic reluctance to use TAR is somewhat understandable due to the long standing practice of wanting attorney review of all documents prior to production, that position is losing currency and justification. Whether used on its own for discrete litigation projects or coupled with data analytics or traditional attorney review, the benefits of TAR in terms of time savings, increased accuracy and overall cost reductions is a boon to both clients and their counsel. Doing so will get you more comfortable with TAR. •

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