Real-World Scenarios to Test the Ethics of Technology Assisted Review (TAR)

A White Paper

Table of Contents

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Wading through the massive amounts of data typically produced during discovery is an ongoing headache for lawyers. Getting ahead of the data and using it for strategic advantage can sometimes seem like wishful thinking. Fortunately, developments in technology and the law, particularly around technology assisted review (TAR), now offer the promise of cost-effective, thorough and defensible data review.

Along with saving time and reducing costs, TAR allows legal teams to focus on the documents most likely to be strategically important.

TAR, also known as predictive coding, blends human knowledge with computing and machine learning techniques to determine quickly and accurately which documents are responsive during discovery proceedings. Legal teams train software by reviewing a small, random subset of documents from the overall collection and tagging them as responsive or not responsive. Then, the algorithm compares the human input against the full collection to assign likelihood of responsiveness to every document.

Reviewers then repeat the process on new samples to provide additional parameters and improve accuracy. With the iterative use of statistical sampling and quality control, the technology refines the decisions it makes to rank documents by likelihood of responsiveness. This allows the legal team to prioritize, assign the appropriate level of reviewers or even set aside some documents from further manual review.

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The Ethical and Legal Landscape

As TAR becomes more widely used and acceptable, however, it raises new ethical questions. Many of the issues represent tenets of basic discovery and litigation ethics. However, the context can be very different than what attorneys, judges and bar associations are used to. There is limited case law around TAR, so it is necessary to take hints from a number of sources, such as the American Bar Association ("ABA") Model Rules, the Federal Rules of Civil Procedure, some states' own rules and the few opinions that offer clear guidance on the issue.

Attorneys who fail to understand and address the ethical challenges of using TAR may damage their clients' cases, risk spoliation claims and even face sanctions by the court.

Knowing where the ethical and legal minefields are, how they relate to TAR and how to avoid even the appearance of impropriety will allow lawyers to utilize technology in a way that is defensible and strategically useful for their clients.

Competence Regarding Technology

Q: At the meet-and-confer, opposing counsel surprised you by asserting their client's plan to use TAR. Are you properly prepared to represent your client's interests?

Under the ABA Model Rules, attorneys have long been obligated to employ competent representation to their clients. In 2012, the ABA House of Delegates amended Model Rule 1.1 to specifically address the issue of competence around technology: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

"Those involved in litigation and investigations can no longer turn a blind eye to TAR. As clients, judges and opposing counsel begin to accept and even demand the use of TAR, lawyers will need to develop a basic understanding of how the technology and underlying algorithms work, when it is appropriate to use, and how it fits into the overall discovery process—and, perhaps most importantly, how to effectively negotiate its use with opposing counsel for strategic advantage," said Anthony Diana, partner and co-leader of Electronic Discovery and Information Governance Practice for Mayer Brown.

Attorneys don't need to become statisticians or software developers to become competent, but they must be able to grasp the technologies and methods well enough to oversee its proper use.

Client Communication and Informed Decision Making

Q: You believe TAR would be useful in a particular matter. Are you able to effectively communicate the pros and cons to your client?

Along with demonstrating competency, lawyers must be able to communicate with their clients about the risks, benefits and logistics around the use of TAR. Under ABA Model Rule 1.4, attorneys must both "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

One critical difference between TAR and simple keyword searches is the need for the technology to adapt and "learn" as it works its way through the document collection, so the process of communication and informed consent is an ongoing one. Since TAR uses an iterative approach, attorneys must regularly monitor the process and update clients on changes and adaptations. It is imperative that the client is apprised of their TAR strategy and method options at the outset and with every step of discovery.

Confidentiality

Q: Opposing counsel asks you to share the seed set. Should you?

ABA Model Rule 1.6 addresses technology's impact on confidentiality, and those involved with TAR should pay special attention to it: "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."

Attorneys should consider this rule if asked to produce its set of seed documents, which by definition include nonresponsive ones. However, they may feel some pressure to do so as part of a protocol of "Cooperation." (See page 7 for more detail on Cooperation.) In In re: Biomet,[1] the court ruled against the plaintiff's request for production of the seed set: "That request reaches well beyond the scope of any permissible discovery by seeking irrelevant or privileged documents used to tell the algorithm what not to find. That the [plaintiff] has no right to discover irrelevant or privileged documents seems self-evident."

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1. In re: Biomet M2a Magnum Hip Implant Prods. Liab. Litig., NO. 3:12-MD-2391, 2013 WL 6405156 (N.D. Ind. Aug, 21, 2013)

The ruling also states, however, that "Biomet's cooperation falls below what the Sedona Conference endorses." One strategy might be to share the seed set but also employ ways to mitigate the risk of inadvertent disclosure through redaction and sensitivity logs.

Redaction tools and other methods, such as TAR quality control protocols, must be in place to decrease the risk of inadvertent disclosure, particularly in the healthcare or financial services context where there are strict regulations concerning protection of personal information.

While in an inadvertent disclosure situation counsel can invoke the "clawback" provision under FRCP 26(b)(5)(B), the optimal path is to plan ahead and have mechanisms in place early in the process. Generally, it is sensible for the process to include a clawback agreement, sensitivity logs, implementation of auto-redaction tools and/or a second-level (human) review or quality check of documents coded for production.

Supervision of Attorneys and Non-Attorneys

Q: Your firm's technology team and e-discovery providers seem to be expert in TAR. Can you let them oversee everything?

Along with being competent themselves, attorneys have an ethical obligation to properly supervise other attorneys and non-attorneys.

ABA Model Rule 5.1 lays out the responsibilities for managing other attorneys: "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Model Rule 5.3 extends these responsibilities to "a non-lawyer employed or retained by or associated with a lawyer."

Attorneys are also responsible for supervising e-discovery providers. In re: Seroquel[2]: "Ultimate responsibility for ensuring the preservation, collection, processing, and production of electronically stored information rests with the party and its counsel, not with the nonparty consultant or vendor."

"Since TAR is so much more complex than a simple keyword search, supervising attorneys need to work closely with a skilled, vetted and experienced team of professionals to ensure that methodologies and processes are defensible, effective and appropriate. And while they need not be technical experts, supervising attorneys should at least understand the process and technology well enough to be able to ask intelligent questions of team members, including non-attorneys and e-discovery providers, and to have a sense of when things may be going awry," said Julie Brown, Litigation Technology Manager of Vorys, Sater, Seymour and Pease LLP.

Fairness and Access to Evidence

Q: Your adversary asks about your measurement process and production metrics. Are you prepared to respond?

Whatever their limitations, standard keyword searches are often easier to understand and explain. The methodology for TAR can be more complex, since the technology is "deciding" on some level, based on human inputs, what documents and information are likely responsive. When predictive coding is poorly designed or implemented (e.g., if the team chooses improper methods to measure the system's results), there is a risk that adversaries may not have access to evidence that should have been produced. And because by its very nature TAR replicates decisions quickly, the impact of a problem could be exponential.

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2. In re: Seroquel Products Liability Litigation, 2007 U.S. Dist. LEXIS 61287, *49-50 (M.D. Fla. Aug. 21, 2007)

Developing a proper methodology requires planning and a significant degree of knowledge. The legal team may need to employ TAR experts who can explain their approaches in layman's terms and who can successfully build a defensible plan, including proper results metrics, thereby meeting the duty of fairness and access to evidence.

Cooperation and Proportionality

Q: You are considering the use of TAR. Do you need to disclose your use or methods to opposing counsel?

Under the Federal Rules of Civil Procedure, attorneys are obligated to cooperate with opposing counsel, and the proposed amendments to the Rules make this even more apparent. The amended Rule 1 would state "[T]hese rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding," and the attached Committee Note explains: "[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."

The proposed amendment to Rule 26(b) would codify proportionality to limit the scope of discovery: "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Courts are increasingly involved in case management and insisting on cooperation between parties for the sake of proportionality. If the two sides cannot agree on methodologies, the court may decide for them. In EORHB v. HOA Holdings,[3] Vice Chancellor J. Travis Laster ordered the parties to use TAR: "If you cannot agree on a suitable discovery vendor, you can submit names to me and I will pick one for you."

Da Silva Moore[4] is the seminal case on TAR and the breakdown of cooperation. Despite plaintiffs' protests, Magistrate Judge Andrew J. Peck approved the use of TAR based on an original protocol agreement. The court in In re: Actos[5] took it one step further and issued an order with comprehensive instructions including the "Search Methodology Proof of Concept" governing TAR usage.

United States District Court Judge Paul W. Grimm publicized his standard discovery order: "Parties requesting ESI discovery and parties responding to such requests are expected to cooperate in the development of search methodology and criteria to achieve proportionality in ESI discovery, including appropriate use of computer-assisted search methodology, such as Technology Assisted Review."[6]

Arguably, one strategy is to not disclose the use of TAR. If the opposing party later challenges the production, there is a risk that the court may find failure to meet discovery obligations. Upon considering this strategy, clients need to be apprised of the risks and benefits, and special attention should be paid to ensuring a defensible process.

However, as Judge Peck stated in the Da Silva ruling: "Of course, the best approach to the use of computer-assisted coding is to follow the Sedona Cooperation Proclamation model. Advise opposing counsel that you plan to use computer-assisted coding and seek agreement; if you cannot, consider whether to abandon predictive coding for that case or go to the court for advance approval."

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3. EORHB, Inc. v. HOA Holdings LLC, C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012)
4. Da Silva Moore v. Publicis Groupe; No. 11 Civ. 1279 (ALC) (AJP), 2012 U.S. Dist. LEXIS 23350 (S.D.N.Y. Feb. 24, 2012)
5. In re: Actos (Pioglitazone) Products Liability Litigation, No. 6:11-md-2299, (W.D. La. July 27, 2012)
6. https://thesedonaconference.org/system/files/Judge%20Grimm%20Discovery%20Order.pdf

Conclusion

TAR and other advancements are proceeding far faster than the rules and court rulings can keep pace. Along with staying current with ethical and legal obligations, attorneys should proceed thoughtfully when using TAR. Often, it's best to start with smaller cases, or those with less time pressure, to get comfortable with the process, technology and negotiation strategies. This can help legal teams understand real-world implications and spot potential challenges. Attorneys should test hypothetical issues ahead of time, so when the real scenario plays out in court, they are ready to take full advantage of the benefits of TAR in the proper situation.

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