Bake Offs, Demos & Kicking the Tires: A Practical Litigator's Brief Guide to Evaluating Early Case Assessment Software & Search & Review Tools

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Bake Offs, Demos, and Kicking The Tires: A Practical Litigator's Brief Guide To Evaluating Early Case Assessment Software and Search and Review Tools

By Ronni D. Solomon and Jason R. Baron

The litigator's typical introduction to complex electronic discovery is the unhappy realization and communication to her client that scores of electronic mailboxes used by her client's employees as well as the files created, edited or stored by these employees on the hard drives of their desktops must be reviewed for responsiveness, confidentiality and privilege in order to produce documents in response to a request for production. The expense of having attorneys review large volumes of electronically stored information ("ESI") has understandably triggered corporations to insist that their outside litigators use review tools and other technologies that enable the efficient and cost-effective review and production of ESI. This is especially true in this economy, where litigators are praised and receive additional business when they can successfully demonstrate they are reducing their client's legal spend while still providing quality legal services.

There are technologies available to help the litigator reduce the costs of reviewing and producing ESI while at the same time accomplish the objective of responding to a request for production. Most commonly used by litigators today are review tools that enable reviewers to review the ESI in an online repository. Vendors that provide these review tools also typically offer filtering and processing services, where they take ESI that has been collected, and, behind the scenes, apply filters to the ESI to narrow the volume to the ESI that is likely to be relevant to the request for production. A popular filter is the application of keywords, developed by the litigator, to the collected ESI. After applying the keywords, the vendor provides a "frequency report" or "hit list" of the number or percentage of documents that hit on a particular keyword so that the litigator can evaluate the efficacy of the selected keywords. There may be various iterations of this process until the litigator approves the results in the frequency report. The vendor then processes the filtered ESI and uploads it to a web-based review tool for the review to begin.

There is also new automated technology called "early case assessment" technology that has entered the marketplace, and which review tool vendors are rushing to add to their current products. This technology allows for a thorough front-end look at the volume of ESI collected in response to the request for production, instead of just the ESI that is filtered, processed and uploaded to the review tool. Thus, by using this new technology, the litigator can find the "significant documents" very early on in the case instead of waiting until the end of the review process after the reviewers have reviewed and "tagged" the significant documents. Moreover, this technology enables the administrator and/or the litigator to perform keyword searching and other filtering on their own

without incurring any additional charges and without having to rely on the vendor for these services. This technology also provides automated analytics so that the litigator can obtain a high level understanding of the ESI, which can identify key players, lines of communications between custodians and types of significant documents. This knowledge will help shape the review and the litigator's investigation of the facts of the case.

When it is clear a review and production of ESI is necessary, it is in the client's best interest for litigators to conduct "bake offs," where counsel and/or client invite two or more review tool or early case assessment technology service providers to demonstrate ("demo") their products and services and bid on obtaining work for a particular matter or group of cases. (No flour is required.) Conducting bake offs ensures that the litigator is evaluating the technology in the context of the case and that the litigator is selecting the technology that has the necessary features to reduce the costs for review and production. Additionally, a bake off ensures the litigator is receiving the most competitive price on behalf of the client. This article will provide a few tips on how to evaluate review tools, early case assessment technology and other software with the goal of significantly reducing the cost of the review and production of large volumes of ESI.

Tip 1. *Do not reinvent the wheel*. With the attention e-discovery has received over the last few years, it is very likely that litigators at your firm or company have used review tools before with varying degrees of success and have received feedback from their clients on the bills. It is in your best interest to learn about their past experiences so you do not make the same mistakes. You should also confer with your litigation support or IT team. They can be incredibly knowledgeable about the available early case assessment software and review tools, and can provide background on the companies offering this software, their billing practices and their reputation in the industry. You should also take advantage of the resources available from leading industry groups such as The Sedona Conference®. One example is The Sedona Conference's publication, *Navigating the Vendor Process: Best Practices for the Selection of Electronic Discovery Vendors* (2007), available at www.thesedonaconference.org (under "Publications").

Tip 2. *Develop an evaluation form*. It can be helpful to develop an evaluation form tailored for a particular case to be used during the bakeoff. This helps you brainstorm and identify the requirements for the tools before the bakeoff occurs. The evaluation form also helps you to take control of a vendor's demo and focus the demo on the subjects in the evaluation form rather than wasting time learning about features that are not of interest. The form also allows you to check off during each demo whether or not the review tool meets the requirements for the case, making it easier to evaluate all of the vendors at the conclusion of the bake off. Completing an evaluation form for each vendor will also provide more data to evaluate in the next bakeoff.

Tip 3. *Ensure that the early case assessment software and/or review tool has clustering technology*. It is not a secret that the most expensive part of a review is the hourly attorney fees that are incurred as a result of attorneys spending days or weeks or months reviewing large volumes of ESI. Thus, a primary goal of a review tool or similar technology is to cut down on the number of hours it will take attorneys to review ESI. Clustering review tools, tools that analyze the statistical or linguistic patterns of similar words and group words in the ESI, significantly reduce the time it takes to review ESI. The tools automatically group ESI containing closely related subjects together, which allows reviewers to determine quickly which ESI contains relevant information. The clustering tools also allow for parsing out of ESI to be reviewed by topic instead of by custodian and through a linear review, so that reviewers can move through ESI more quickly because they have context and are reviewing similar ESI. A review that is done using a tool that has clustering technology can be done two to three times faster than a review that is done with a tool without clustering technology. Thus, in many cases, simply using a tool with clustering technology can halve the attorneys' fees your client pays for a review.

Tip 4. *Evaluate whether the review tool will allow for completion of all tasks in one efficient workflow*. A number of review tools have features that cut down on review time like bulk tagging (*i.e.,* categorizing or tagging all emails in an email thread), but are ineffectual when it comes time for production. They might lack redaction or Bates-labeling capabilities requiring the expenditure of additional costs and fees associated with transferring data to and from other tools to accomplish these tasks. Thus, a litigator has to consider the entire process from beginning to end and the effect of her choice on the costs of other phases and the total costs.

Tip 5. *Utilize keyword "black lists."* If keywords are likely to be utilized to limit the volume of ESI reviewed, consider choosing a review tool or early case assessment technology that allows you considerable flexibility and visibility to assess whether the keywords selected sufficiently *removed* irrelevant ESI, and refine the keywords various times if necessary. Litigators today typically select a review tool where the vendor performs the keyword search and provides the "frequency report" or "hit list." Under these circumstances, the litigators have no "visibility into" the document set that hit on a keyword until after the ESI that has hit on a keyword is released into the database. Review tool vendors only allow for a few iterations of the keywords to be run without additional charges. Even then, there is not an ability to view a large sample of the hits and make tweaks to the keywords on the spot and then keep refining them as many times as necessary. Also problematic is where litigators have limited or no visibility into the documents that did not hit on the keywords because these documents are not loaded to the database for the review. Thus, the litigators may be relying solely on statistics provided in the "frequency report" or "hit list" as the indicator of whether the keywords sufficiently removed irrelevant ESI.

Litigators who plan to use keywords to initially limit the volume of ESI to be later searched and reviewed for relevant documents would be better served by considering utilizing early case assessment software to evaluate the efficacy of the keywords selected. These tools allow the user to process all of the data at a much lower cost and then run the keywords themselves as many times as necessary without additional cost to determine whether the keywords sufficiently removed irrelevant ESI. Moreover, this software allows a user who is negotiating with the other side regarding keywords to check whether the opponent's proposed keywords remove enough irrelevant ESI before agreeing to them. Arguably, if government counsel had utilized this type of software before agreeing to 400 keywords in the *In re Fannie Mae Litigation,* then counsel may have realized at an earlier date that such a large keyword search would require what became an impossible review of 660,000 documents by the previously stipulated to deadlines, ending in a contempt citation being affirmed on appeal. *See* 2009 WL 21528 (D.C. Cir.)

Tip 6. *Require vendors to identify all potential costs before you select the winner of the bake off*. When analyzing review tool vendors, many litigators spend most of their time analyzing one or two of the elements of vendor pricing such as processing charges and then select the vendor based on this pricing alone thinking they have secured a great deal for their client. Then, when the client receives the invoices from the vendor, the client may be surprised, even horrified to view all of the incidental charges and learn, for example, that the user fees or hosting charges in one case are approaching $30,000 per month. A better strategy would be to develop a hypothetical based on the litigator's knowledge of the case to date that requires the vendor to itemize all of the pricing that would be applicable to the case. Receiving a response from each vendor to the hypothetical allows the litigator to understand and compare the total costs rather than elements of the pricing. It is also a good idea to manage the client's expectations by providing an estimate of the total costs when recommending a particular tool.

Tip 7. *Ensure "quality" by insisting that the vendor perform some form of "QC" process through use of sampling or other metrics.* Counsel should insist that vendors provide specifics on what quality assurance measures are available to check on the accuracy and comprehensiveness of whatever automated methods are employed. For example, the vendor should explain what testing has been employed to evaluate the vendor's own product. Beyond this, the vendor should provide the means for counsel and client to sample all results obtained, pursuant to the methods described above in Tips 3-5. For an in-depth look at quality measures, counsel should be aware of the forthcoming *Sedona Commentary on Achieving Quality in the E-Discovery Process,* which makes the case in favor of employing quality assurance and control measures of various sorts in the document review process, given the volume and complexity of ESI. *See In re Seroquel Prods. Liab. Litig.,* 244 F.R.D. 650, 660 n.6, 662 ("common sense

dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness.")

Tip 8. *Be prepared to tell a coherent "story" of how automated tools were used in the particular litigation context at hand.* When considering any form of early case assessment or review tool, counsel would be well advised to consider how best the "story" of the use of the automated technology will be told, through counsel or, if required by the court, a specific IT declarant. As courts become more savvy with the use of new technologies in e-discovery, they are demanding that counsel inform the trier of fact of exactly how decisions were made along the way. For example, in the case of *Victor Stanley v. Creative Pipe,* 250 F.R.D. 251 (D. Md. 2008), Magistrate Judge Grimm found that defendant's counsel had waived attorney-client privilege after the use of a faulty keyword search to exclude privileged documents. At several junctures during the course of the opinion, Judge Grimm reminded the parties of the importance of providing the Court with enough documentation so as to justify the reasonableness of the steps taken:

> [Defendant's counsel] have failed to provide the court with information regarding: the keywords used; the rationale for their selection; the qualifications of . . . [the] attorneys to design an effective and reliable search and information retrieval method; whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators; or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation.

Id. at 260.

CONCLUSION

It has become increasingly clear how important it is to consider and evaluate in bake offs review tools and early case assessment technologies to manage the rising cost of discovery, consistent with Federal Rule of Civil Procedure 1's emphasis on the "just, speedy, and *inexpensive* determination of every action and proceeding" (emphasis added). Following the above eight tips will hopefully provide benefits to counsel and to clients, both in terms of economics as well as in getting a better handle on what really is at stake in complex litigation.

Note on Authors

Ronni D. Solomon is Counsel at King & Spalding in Atlanta, Georgia, where she specializes in e-discovery. In addition to her membership in The Sedona Conference Working Group on Electronic Document Retention and Production, she is active in a wide variety of electronic discovery and records management industry groups, including acting as Co-chair of the Electronic Discovery Subcommittee of the Pretrial Practice and Discovery Committee of the Litigation Section of the American Bar Association, and serving as Director of the Atlanta chapter of Women in E-Discovery. She was appointed by U.S. District Court Judge Timothy Batten to be on a committee to provide recommendations to the U.S. District Court for the Northern District of Georgia regarding amending its local rules to address e-discovery issues.

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