Providing E-Discovery Clients With Value

The prevalent practice among law firms and in-house legal departments faced with litigation involving electronic discovery is to load large amounts of GB directly into their chosen linear, manual document review platform immediately after collection of the data. The majority of the time the data is not deNisted, deduplicated, or near deduplicated. Thus, the size of the data to be reviewed is at its maximum capacity. Therefore, the costs of the most expensive phase of the e-discovery process are also maximized. The size of the manual review by attorneys could be lessened even further if predictive coding and analytic technologies were used. Unfortunately, these value creating technologies are not being given enough attention due to the risk averse nature of attorneys, and their uncertainty or lack of knowledge regarding the technologies.

Instead of utilizing the real weapons that can drive down costs, law firms and companies are mistakenly focusing their attention on the costs of their software and litigation support vendors. We do not pretend to suggest that being selective about the vendors chosen to handle the collection, hosting and production phases of e-discovery cannot generate real savings. However, these costs pale in comparison to the costs of reviewing the data. Frankly, the model outlined above is economically unsustainable. Twenty years ago, we were using floppy disks to store data. Now, think about your 8 GB iPod shuffle and your flash drive. Given the vast amounts of data that companies and individuals are producing and retaining, how can any litigation be cost effective if the standard is to put a lawyer's eyes on every piece of data to determine responsiveness and/or privilege?

At Hubbard & Jenkins, our focus is on creating value for our clients. We have built a model whereby we get compensated for our value creation and reduction of costs and risk rather than basing our pay on the amount of documents reviewed. As reported in blogs by Ralph Losey and Recommind, United States Magistrate Judge Andrew Peck's keynote speech at the Carmel Valley E-Discovery Retreat endorses our approach. Peck stated that predictive coding is an acceptable way to conduct search in civil litigation.

Importantly, his speech also recognized that manual review is not a model of accuracy. This should come as no surprise to anyone who has actually participated in an e-discovery project and reviewed documents. The work is tedious to say the least, usually performed by poorly compensated contract attorneys for long hours at a time and involves nuanced decisions on whether or not an email or attachment is responsive to a large set of discovery requests. After several days, it will certainly be difficult for any human being to remember previous coding decisions regarding similar documents to the ones presently being reviewed. Plus, many different attorneys are conducting the review with different interpretations of what constitutes a responsive or privileged document., and all of these reviewers are under pressure to review their documents in a timely fashion. It is unreasonable to xpect a consistent and accurate result from this set of circumstances.

It should also not be shocking that a tireless computer embedded with complex algorithms can be successfully trained to take individual human decisions and make accurate predictions of how similar documents should be coded. A recent study by Maura Grossman and Gordon Cormack in the Richmond Journal of Law & Technology confirmed that technologically-assisted review can produce better results than manual review with considerably less effort.

Thus, it is time for attorneys to embrace the new technologies, and cooperate with opposing counsel on the utilization of these technologies so that e-discovery disputes do not sidetrack litigation from the merits of the case. The fact of the matter is civil justice system and the future of litigation require it.