

THE FALL OF THE BERLIN WALL AND IT'S PARALELLS TO E-DISCOVERY

With DESI V being set in Europe on June 14th, 2013, I thought I would brush off an article I started working prematurely on back in early 2012 that seems to be more pertinent today. Plus the military analogies seem more topical in Europe where WWI, WWII, and the brunt of the cold war was most keenly felt. Lastly, Jason Baron suggested I publish this back in 2012 and I didn't. Given Jason's involvement in DESI V, I thought this article could serve as a talking point at the conference. That the use of predictive coding is really just a first step in the process but we need to do a better job of developing and using software tools that do more than cull data and do a better job in answering the question of what really has happened in a case.

If we accept the impact of the growing number of predictive coding cases, da Silva Moore, Global Aerospace, Actos, Biomet, and Kleen Products as being similar to the moment the Berlin Wall fell and a new world order of analytical review began emerging, you can appreciate the analogy of the evolution of ediscovery technology as compared to the evolution of weaponry post Berlin Wall. Much of the debate on the impact of predictive coding has been focused on the task of document review and the reduction in the need for contract attorneys. For example, the Rand Institute for Civil Justice Study entitled Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery observed, that based on their limited study of 44 cases involving 8 companies, in order for review costs to fall in line with processing and collection costs, they would need to fall by 75% and computer assisted review is the only tool they could identify which can hit this target. Pace, Nicholas M. and Laura Zakaras. Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery. Santa Monica, CA: RAND Corporation, 2012 at page 59.

<http://www.rand.org/pubs/monographs/MG1208>. Also available in print form. This article accepts this thesis and draws analogies on the evolution in the technology that is occurring in e-discovery with a growth in analytic tools which parallels the changing weaponry analogy of we have seen by the military once the Cold War ended. It also suggests that predictive coding is really just a first step in culling. The next battle for technology is the use of analytical tools to make reviews more effective and to provide a check on the incorrect seeding of predictive coding tools.

Back when the world order was based on a fear that the Red Army was going to come through Europe or creep through Asia and kill Democracy, the United States military machine churned out incredible weapon systems designed to defeat communism in head to head combat. We created tanks like the M1 Abrahms until we recognized that anti-tank weapons made any tank an easy target to destroy. The B-52 bomber with its ability to carry heavy payloads and to remain airborne for long periods of time made it an ideal deterrent to the Soviet Union for its ability to deliver nuclear strikes as part of the Mutually Assured Destruction plan. But when the Soviet Union collapsed we lost a common enemy who our larger weapons could be trained on to fight effectively. The enemies have changed over the last decade and they are harder to find and they often fight us with terrorism. As a result, we have created a new world of stealth weapons such as F117 radar evading planes and unmanned drone reconnaissance and Predator Drones. Today it seems silly to fly a B-52 bomber to find terrorist leaders hiding in the desert

even if they carried a smart bomb in their bomb bays. It makes more sense to fly drones to find and hunt terrorists with stealth and precision. Similar analogies can be made in the world of E-Discovery where the tools we use today might be archaic and cumbersome.

One of the high water marks in my electronic discovery career was the 200 attorney document review project I staffed for approximately five years in a large pharmaceutical case that ultimately resulted in my selling this company to a publicly traded staffing company. That e-discovery battle was fought with rudimentary search tools where we were less concerned with deduping documents and more concerned with processing decisions made by reviewers through a string of QC steps designed to produce accurate decisions and through privilege teams which scoured documents a final time to which we hoped ensured that privilege wasn't waived and key documents were coded correctly and redacted to protect confidential information. Put simply, it was brute force review. The e-discovery weapons that this project helped to create and predecessor projects like it such as Vioxx, the MCI-Verizon merger, and other large cases were end-to-end online database systems designed for managing workflows for armies of reviewers, tracking productivity by reviewers, and creating assignments for reviewers by segregating data into manageable buckets. The best tools in this world tracked productivity of reviewers like documents reviewed by an hour, segregated data into access points designed to limit information flow to senior attorneys on a project. Other tools like invisible managers peering into the review room were developed to watch reviewers as they clicked away while reading documents with yes, no, no, no, no, no, no, no, yes, coffee break, no, no, yes, cell phone call, no, no, yes, Internet break... types of activities. These systems were designed to scale to infinite data proportions and handle as many reviewers as review shops could throw at them and would still scale as far as the money corporate clients were willing to pay for the processes they managed.

Today the data that has been created to be reviewed has hit 1.8 zettabytes and is predicted to grow to by 50 times in 2020. 2011 Digital Universe Study entitled **Extracting Value from Chaos**, June 2011 By John Gantz and David Reinsel. <http://www.emc.com/collateral/analyst-reports/idc-extracting-value-from-chaos-ar.pdf> As a result, it would seem that review tools would continue to scale to tackle the data deluge. However, closer scrutiny of the newer review tools reveals stronger analytical software such as predictive coding, email threading, clustering and concept searches to speed review, and network analyses, and sentiment analysis for early case assessment. These tools do the work of large teams of reviewers faster, cheaper and more accurately. Search has gone "semantic" over key word oriented in all sorts of fields outside of the legal profession meaning the battle might not be won by the team with the most people who can tackle projects with brute strength, but may now be carried by the team who has the best tools and can use them to their fullest capabilities. Effective sampling and predictive coding can eliminate lots of needless no, no, no, no clicks that are paid for by the hour with low cost trained software that replicates the coding responses of your most skilled reviewer. Well known e-discovery lawyer Ralph Losey said it best at LegalTech in New York City this past year when he described lawyers primary search approach of relying on keywords as being based on 1960's technology.

So what do these changes mean to the weapons we have gotten used to? One solution is to bolt a bunch of analytical tools onto today's software. This is a good way to create the "Family Truckster" which Chevy Chase bought in the 1980's movie Vacation. This hideous looking car seemed to accomplish all conceivable tasks well. Yet it still was not appealing to look at. My thesis is strapping expensive analytical tools into software designed to manage hundreds of reviewers creates a tool that has more features than anyone can manage which can do the same tasks either with brute force or analytics. In addition to the complexity, overloading a software tool with many features thru excessive licensing can also create a more costly tool by forcing clients to pay double or triple for licensing fees depending on how many tools are bolted onto the software system. In a new world, the better tools might be the ones which were designed with analytics first in mind and handle review with a vision of having less documents to review and manage. In this world, communications between smaller teams of reviewers becomes more important than brute force management and training on leveraging the tools turns review into a skilled profession. This by the way is a profession which most lawyers are not experienced in yet today and which few law firms recognize.

So how should law firms be using stealth weaponry? In today's military battlefield, when the military finds the target it is looking for, they might send in the Navy Seals or a pilotless drone for a surgical strike instead of a division of soldiers. Good reconnaissance requires more technology resources than sending a regiment of soldiers into a city to hold it against a few unarmed and largely invisible terrorists. In the e-discovery world, the weapons can also become more closely tied to a skilled platoon who in the military world might have night vision goggles, special grenades, the ability to target an adversary and land via an H60 Blackhawk helicopter like the ones used to capture Bin Laden. In the e-discovery world, the individual members of this swat team could draw on a weapons tool kit that might include email threading which captures the time which concepts were discussed, sonar analysis of who was talking to who based on volume of data instead of time, concept clustering to figure out the weed from the chafe, and a command center in constant communication with this crack unit of soldiers. It could work by using analytics to find where you should be looking in the form of better early case assessment. Better early case assessment and rolling productions would lead to more intelligent productions and less burdensome preservation obligations.

The outcome of this new electronic discovery war is the soldiers have to be of a higher caliber because the weapons are now much harder to use. But when used effectively, the casualties are much less and the length of the engagement is faster. In e-discovery this can mean more targeted reviews, the ability to spot gaps in productions and react with appropriate requests, and the ability to know when a war is not worth fighting and surrender might be the best alternative.

So where does this technology go next? The more interesting target is into the records management space. If companies' could reduce the extraneous ESI closer to the point of creation, then litigation would be more manageable. Systems relying on people to make these decisions never work because people are inconsistent, save everything and some of us are very lazy about things we did yesterday. So by training preconceived search protocols based on training sets, would create a better and more useful document management system. Better statistical measuring in litigation matters could be used to control preservation efforts and reign in the malady of over-preservation. By not deploying analytics, every large company I have ever spoken with is stuck preserving lots of data that is largely irrelevant for many cases which have not even been filed yet. See Microsoft Letter dated August 31, 2011 to

Honorable David G. Campbell Chair, Advisory Committee on Civil Rules United States District Court found at

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Microsoft.pdf (only 1/3rd of 14,805 active litigation holds relates to a case where a law suit has been filed). Despite this potential, analytic tools are not yet targeting records management because they are still a recent phenomena in litigation. Yet this clearly is a space where the tools are needed.

This brings us to the last point. Does the infantry even know how to fight a war on E-Discovery based on analytics? The answer today is some do but most do not. Today the generals are law firms who oversee these projects. Many law firms still don't use the analytic tools effectively even when they use newer search and review software. One example which comes to mind is where an Amlaw 20 law firm I respect, worked with a newer, powerful ECA review tool I think is excellent, and turned off the topic modeling feature opting instead to run a brute force linear review with the tool. Another Amlaw 20 law firm used a new concept modeling software tool but kept the reviewers separate from each other impeding their ability to cross communicate and gave them extremely small batch sizes thereby diminishing the effectiveness of the analytical tools which show more meaningful patterns when they are compared to more data in a case. A final example involves using predictive coding but staffing with a large group of attorneys to train the software and thereby undoubtedly feeding inconsistent coding results into the software algorithm. These types of situations need to change if the power of the technology is to be leveraged. Otherwise, we are getting the B-52 bomber carrying the smart bomb analogy I described at the beginning of the article.

The generals and law firms who will be most effective will run more like platoons with more hands on responsibility than top down management. Given the power of the analytics, the first round reviewer can be almost like Iron Man by strapping on the hydraulics of a good analytics tool and digging into the ESI before starting and running predictive coding. Then deploying a mobile team to do review on largely responsive documents, a case can be better analyzed for its true risk and the cost of review, hosting, needless motions over key words which don't work, all get sharply reduced or disappear. Of course there will be other battles in designing predictive coding protocols which reduces the overall efficiency of the tools. But lawyers are paid to argue so it's unlikely to expect completely smooth sailing even with newer technology.

So pick your weapons well. The world is changing. Don't go into battle with a sword against a foe who has drones and analytics unless your check book is really big and your client is detached from the process and doesn't know any better.

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