

# DESI V Workshop

## Reality Bites: Why TAR's Promises Have Yet to be Fulfilled

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# Themes

- ◉  $2 + 2$  doesn't always = 4 (remember – we are talking about lawyers)
- ◉ Clash of different cultures with different objectives
- ◉ A way forward

# Thought-Leaders Recognize Shortcomings of Manual Review and Keyword Search

# Moving away from Keyword Searching and Toward Advanced Analytics

- Blair & Maron (1985)
- The Sedona Conference, The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery (2007)
- TREC Legal Track (NIST)
- Recent commentaries by Baron, Oard, Grossman, Cormack, and others

# Leading Jurists Move Away From Key Word Searching

- ◉ ***Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth. (2007)***
  - Judge Facciola recognizes concept searching, as opposed to keyword searching, “is more efficient and more likely to produce the most comprehensive results.”
- ◉ ***Victor Stanley (2008)***
  - Judge Grimm points to growing body of literature that highlights the risks of conducting an unreliable or inadequate keyword search or relying exclusively on such searches.
- ◉ ***Nat’l Day Laborer Org. Network v. U.S. Immig. & Customs Enforcement Agency (2012)***
  - (Scheindlin) “parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools.”

# Judicial Support for TAR

# Judicial Acceptance of TAR

- Da Silva Moore v. Publicis Groupe
- In re Actos Products Liability Litigation
- Global Aerospace, Inc. v. Landow Aviation, LP
- Kleen Products LLC v. Packaging Corporation of America
- In re Biomet M2a Magnum Hip Implant Products Liability Litigation

# Early Decisions Endorsing TAR

## ◎ *Da Silva Moore* (Feb. 2012)

- › First opinion endorsing TAR
- › Issued by noted jurist (Peck)
- › Computer assisted review is acceptable way to search for relevant ESI in appropriate cases.
- › Transparency deemed vital: defendants required to turn over their seed set to plaintiffs, including documents tagged as non-responsive in the training rounds, to enable plaintiffs to determine whether the computer was being appropriately trained.

## ◎ *Global Aerospace* (April 2012)

- › State court case
- › Permits defendants, over plaintiffs' objection to use TAR methodology to search for responsive documents
- › Court did not specifically endorse the technology or conclude it was better suited than other legal search tools
- › Recognized that plaintiffs still had right to object post-production



# Actos and Transparency

- Actos CMO issued in July 2012
  - › Custodians used for sample collection
  - › Size of random control set
  - › Early production of privilege log
  - › Parties nominate six experts to review control set
  - › Following review of control set using active learning model, experts work collaboratively to determine responsiveness
  - › Court mandates sufficient training rounds
  - › Parties meet and confer to agree on relevance score

# Deference to Producing Parties

- ***Kleen Products*** and ***Biomet*** follow reasoning in Global Aerospace
- ***Kleen Products***
  - › Plaintiffs arguing for use of TAR as do-over to earlier application of keyword search methodology
  - › Plaintiffs later agreed to withdraw demand for existing production requests
- ***Biomet***
  - › Court refuses to disturb defendants' unilateral decision regarding process used for TAR search and culling

What about the lawyers?

# Objections to Transparency

- Scope of discovery under FRCP does not include “discovery about discovery”
- Disclosure of protected work product
- Unnecessary risk of additional litigation when non-responsive information disclosed
- Attorney certification of conduct of reasonable search for responsive documents should suffice

# Other Reasons Impeding Attorneys' Adoption of TAR

- Ignorance
- Comfort with older methodology
- Expense
- To date, only a few judicial opinions have addressed TAR
- Fear of "do-over" if Court does not endorse methodology

# Different Cultures, Different Objectives

# SCIENTISTS

- Collaborative
- Seek perfection about search results
- Interested in disclosure rather than defensibility
- Less concerned about costs?



# ATTORNEYS

- Seek defensibility; not perfection
- Trying to win; not interested in helping opposing party
- Restricted from divulging privileged information
- Worried about the bottom line
- Trained not to take risks
- Will adopt advanced search methodologies if in best interest of client or if ordered by court





# A Way Forward

# Transparency and Cooperation

- ◎ Potential disclosures:
  - › Specific software
  - › Nature of documents
  - › Size of corpus
  - › Culling techniques to be employed
  - › Use of control set
  - › Sampling techniques used to generate “seed set”
  - › Workflow/process
  - › Experience/expertise of reviewers
  - › Relevance/responsiveness thresholds
  - › Precision/recall rates