

What's Hot in E-Discovery?

by Sharon D. Nelson, Esq. and John W. Simek
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Machine-Assisted Review

Let's start with a very hot if not very sexy topic. You may have heard of new technology called predictive coding or technology-assisted review. Recently, we've seen the phrase "machine-assisted" review a lot. They are all the same thing. A rose is a rose is a rose, but we have not yet settled on a name for this nascent technology.

The way most lawyers engage in traditional keyword searches is, as others have suggested, the equivalent of "Go Fish." The requesting lawyer makes his best guess about which keywords might produce relevant evidence without having much knowledge of the other party's "cards." Even worse, the attorney for the responding party often doesn't know what is in his own client's cards. So no one is talking from a standpoint of incisive knowledge.

To make this explanation as non-technical as possible, machine-assisted review means using sophisticated algorithms to enable a computer to determine relevance based upon training by a human reviewer. Generally, a senior partner or team will review and code a "seed set" of documents. As the reviewer continues to code, the computer begins to predict the coding based upon the human's prior decisions. When the computer's predictions and the lawyers coding pretty much coincide, the reviewer has confidence that the computer can code the remaining documents.

No one doubts that 2012 will be a break-out year for this technology but we have two serious caveats to pass along. First, it's very expensive – the point of entry is generally six figures. This is not a small or mid-sized case solution. Typically, it takes the review of several thousand documents to become confident that the computer can code accurately – again, suggesting that this technology will remain in the stratosphere with the major league cases.

E-Discovery Review for Under \$1000

So what are you supposed to use for review when your cases aren't mega-cases? We suggest you check out Digital WarRoom by Gallivan, Gallivan and O'Melia. At a price point of \$895 for a one-year license, we've seen many attorneys who are thrilled with this review platform. We've been recommending it for a long time, but in the interest of full disclosure, GGO recently began sponsoring our *Digital Detectives* podcast on Legal Talk Network. That aside, we are unaware of any other product which does what Digital WarRoom does at such a friendly price – and the

website will allow you to schedule a demo or use the product on a trial basis, so check it out and see if it works for your firm. Other experts across the country have also praised this product.

Smartphones

Boy oh boy are we seeing a lot of smartphones. Perhaps a 300% increase, which is a testament to how tied we are to these devices 24X7. We joke (although it really isn't a joke) that smartphones are actually computers that happen to be able to make a phone call.

In general, the iPhones are rich with data, the BlackBerry is all but devoid of data (don't waste your money – you need the computer the device was synced to). All the other smartphones are somewhere in the middle. Lawyers have had a tendency to go after computers and neglect the smartphones, so make sure you are thinking about smartphones in cases where they might be important, especially if you are interested in text messages.

Never let your client receive a smartphone as a gift. Increasingly, we are seeing spyware pre-loaded on the “gift.” Now, that's a gift that keeps on giving – to the giver of the gift. In October of 2011, a suspicious husband gave his wife a new iPhone with the iOS 5 operating system – the phone contained an application called “Find My Friends” designed to help folks track and meet friends. The app led him straight to his wife at her lover's house and gave him powerful evidence in his divorce case. He was quick to post his appreciation to Apple on a social media site.

Social Media

There has been an absolute explosion in the use of social media as evidence. Facebook is the big kahuna, but we've seen LinkedIn, Twitter, YouTube and blogs as well. Clients still fail to understand that their friends may be their undoing – from the world of family law, here is an excellent example.

In Kentucky, an appellate court affirmed a lower court's decision to award primary custody to the father, based in part on Facebook photos showing the mother partying and drinking against the advice of her mental health providers. Though she admitted the photos were authentic, she said she had never authorized the postings which were done by her friends but “tagged” her by name.

Personal injury and employment law cases tend to be rich in social media evidence. A man who claimed to be unable to do anything requiring exertion posted photos of his skiing trip. Another man with the same claim saw that his wife was videoing him as he was using a chainsaw to cut wood and decides to do a little Irish jig for the benefit of the camera. She (of course) places the video on YouTube where the insurance company finds it.

Then there was the video of a Broadway mogul's wife who said there had been no sex in the marriage but that she had his stash of condoms, pornographic movies and Viagra – she called his

stunned assistant live on the video and asked what she should do with the stash. That stunt so irritated the judge that he gave the defendant a divorce on the grounds of cruel and inhuman treatment by the wife.

As to Facebook in general

Facebook has once again mucked with privacy settings and even had to sign an agreement with the FTC agreeing to a 20 year monitoring of its privacy practices. The lesson here for lawyers is that clients should be advised to post cautiously on social media and to periodically go through their privacy settings. They also should not accept a friend request from someone they do not know. They should think of every single post as potential evidence in a future matter. They should not drink or do drugs and post. They should not post when they are angry. As one of our friends says, “nothing good every came of a 3 a.m. post.” If in doubt, don’t post.

Preserving Social Media and Website Evidence

There are a lot of good products to preserve websites and social media evidence, including Iterasi, Hanzo, NextPoint and Reed Technology’s Web Preserver. Web Preserver is very cost-friendly at \$35 per seat for 10 GB of data. It is also an excellent research tool, allowing you to create folders for subjects you’re researching and curating relevant articles and other materials you might find online. We used it to research this article.

We could go on and on but we just reached our word count limit. Invite us back next year and we’ll do it again!

*The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology, information security and computer forensics firm based in Fairfax, VA. 703-359-0700 (phone)
www.senseient.com*