Top 4 from D4—2012 eDiscovery Predictions

By Peter Coons, Tom Groom, and Chuck Kellner

eDiscovery. There is a better way.

d4discovery.com

Top 4 from D4: 2012 eDiscovery Predictions

by Peter Coons, Tom Groom and Chuck Kellner

Will the New Rules ever feel like old news? Will predictive coding face legal or scientific challenge? Will social media become just another source of ESI? Will we ever find the holy grail of litigation support? Check out the D4 Brain Trust Predictions for 2012. Take a look, mix it up, leave a comment, a kudo, or a prediction of your own.

We wish all of our friends, clients and colleagues a successful, productive and satisfying 2012.

1. *Social Media – The ESI Frontier*

Courts are allowing opposing parties unfettered access to social media accounts and plaintiffs' counsel are finding themselves in unchartered territory. This is just the beginning and 2012 will see even more cases involving social media and decisions regarding preservation, disclosure and access to that information.

Based on some research by an eDiscovery software vendor there has been a huge uptick in the use of social media evidence –

"From January 1, 2010 through November 1, 2011, 674 state and federal court cases, with written decisions available online have involved social media evidence in some capacity."

One does not need to look further than recent cases such as Lester v. Allied Concrete Company; Zimmerman v. Weis Markets; McMillen v. Hummingbird Speedway; and Crispin v. Audigier, as these are setting the stage for future cases involving social media.

Lester v. Allied Concrete Company: If you are an attorney, do not even think about telling your client to purge unflattering content or posts. That is what the attorney did in this matter and he ended up being fined $522,000 and is now enjoying retirement. Well, I am not sure he is enjoying it, but he is not practicing law.

Zimmerman v. Weis Markets: Think your posts are private? In the case of Zimmerman v. Weis Markets, the court held that a person who voluntarily posts photos or information to a social-networking profile has no reasonable expectation of privacy that would prevent discovery of those posts.

McMillen v. Hummingbird Speedway: Think that someone can't get access to your entire social media account in litigation? After a motion to compel by defendants', the court found the requested information was not confidential nor subject to the protection of privilege and ordered its production to defendants' attorneys within 15 days. The Judge also ordered the plaintiff to not purge information from his social networking accounts.

Crispin v. Audigier: In this matter, the defendant subpoenaed Facebook unsuccessfully and used the Stored Communication Act to quash the subpoena. The Stored Communications Act

affords Fourth Amendment-like protection in the form of a statute that regulates government access to private electronic communications. Many may argue the SCA is outdated, but this was the first time it was used in a case involving social media.

2. *Technology Assisted Review (A.K.A. Predictive Coding)*

Technology Assisted Review (TAR) will become more commonly used in 2012. There are different TAR approaches (i.e. Predictive Coding, Relativity Assisted Review, Intelligent Categorization) each slightly different with their unique advantages and benefits, but they all combine human intelligence with machine efficacy to reduce costs.

Technology Assisted Review (TAR) was the subject of much debate and confusion in the eDiscovery space for 2011. Its proponents couldn't agree on what to call it and its skeptics feared that it may not be legally defensible. Names like "Predictive Coding", "Relativity Assisted Review" and "Intelligent Categorization" (all slightly different approaches for TAR) emerged from various vendors. However, TAR is not a radical new tool, but rather an evolution of widely accepted technologies and workflow practices that integrates human intelligence with machine efficacy.

2012 will be a turning-point-year for the combined "human aided by the machine" approach to prioritize document review via TAR workflows. There is just too much compelling evidence that TAR reduces cost, increases quality and squeezes days out of the review cycle. Consider the independent study by Maura Grossman and University of Waterloo professor Gordon Cormack, using data from the Text Retrieval Conference Legal Track.

"The idea that exhaustive manual review is the most effective — and therefore the most defensible — approach to document review is strongly refuted. Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort."

> Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, Richmond J. of Law & Tech., Vol. XVII, Issue 3, 1-48 (2011)

This study concludes with:

- Technology Assisted Review finds at least as many responsive documents as exhaustive manual review (meaning that recall is at least as good as manual review).
- Technology Assisted Review is more accurate than exhaustive manual review (meaning that precision is much better than manual review).
- Technology Assisted Review is orders of magnitude more efficient than manual review (meaning that it is quicker and cheaper).

As far as defensibility, the legal grounds of TAR are supported by the Federal Rules of Civil Procedure, as well as, authoritative thought leadership organizations and the judiciary,

including Judge Andrew Peck in his article *Predictive Coding: Reading the Judicial Tea Leaves*, (Law Tech. News, Oct. 17, 2011).

3. *Why Not Predictive Costs?*

In 2012, predictable eDiscovery costs will achieve prominence. Law firms and corporate law departments will increasingly ask their litigation support providers to offer flat rates for projects, and they will ask for annual pricing for a given level of volume and service. Providers who can do this will succeed and others will have to step up.

When clients ask *"How Much?"*, they become impatient with "*It Depends*." At the beginning of litigation discovery projects, so the answer goes, there may be too many variables to predict costs with any reasonable accuracy.

Still, our clients want predictable costs and as an industry we owe realistic answers. Many law firms offer alternative fee arrangements that are based on time, performance, complexity of the job, and some sharing of risk. In 2012 the litigation support community will step up to doing more like this. Some providers are already leading the change. Others will come along. They will evaluate their cost structures, their risks, their cost accounting, and their revenue visibility to come up with predictable pricing in what is essentially a project-based business.

Busy litigation groups in law firms and corporate law departments certainly know their budgets from years past. They are keeping and analyzing their historical data regarding how many cases, how many custodians, how many gigabytes, and how many documents have gone through what parts of the discovery process. Used carefully, this data forms the basis for assumptions about future requirements. Clients will use this historical data as the set of assumptions upon which to request pricing. More litigation support providers will commit to these arrangements based on their clients' overall purchasing power and from the economies of scale that come from knowing their clients well.

4. *Integration of Review with Analysis and Selection*

In 2012, more of the EDRM workflow will coalesce into single and integrated operations. Advanced technologies will allow us to do more identification, analysis, selection, review and processing in a single step, or on a single platform.

Identification, analysis, review, and processing have been separate blocks in the EDRM workflow, not because having it that way is ideal, but because there have been no effective ways to integrate them.

In years past, the steps of selecting what data required review was separate from review itself. Depending on what technologies you were using, processing came before or after selection. The time and cost associated with getting a collection ready for review was too great to put a whole large collection into a review tool, and if you did, you would have no cost-effective way to cull it.

Now what if in one single operation, we could load our data, start reviewing, refine what we need to review and produce, and export results that are production-ready? There are tools and technologies already available to do this in eDiscovery, and we predict by the close of 2012, their use will be common.

We are already searching effectively, prior to processing, and have been doing so for awhile. The range of ECA tools available to us is proof that we have advanced considerably in only a few short years in the power of indexing, identification of file types, deconstruction of complex files, and extraction of text and metadata. Processing itself (the task of deconstructing a collection and extracting text and metadata into a database) has become less of an industry issue or cost.

Now we are harnessing these capabilities to concept analytics and full-featured review technologies. Combined, they are giving us the time and cost advantages of technology assisted review, predictive coding, speed coding, whatever you want to call it. As we take advantage of the savings, we make it easier to use these systems for larger and larger data collections. We are effectively moving closer to putting identification, analysis, processing and review under one roof.

"*Why can't we just push a button?*" is no longer just a rhetorical question.

eDiscovery. There is a better way.

D4, LLC is national leader in litigation support and eDiscovery services to law firms and corporate law departments. D4 covers the full spectrum of the Electronic Discovery Reference Model (EDRM). D4 assists attorneys in litigation response planning, strategies for negotiation of scope and meet-and-confer, computer forensics, expert testimony and cost reduction practices in litigation support projects, complemented by eDiscovery and paper document services throughout the United States.

Headquarters

222 Andrews Street · Rochester, NY 14614 · Tel: 1+ 800.410.7066 · Fax: 1+ 585.385.9070 · d4discovery.com

Buffalo | Denver | Grand Rapids | Lincoln | New York | Omaha | Tampa | San Francisco | San Diego | San Jose