Revised October 2018

ISSUES: To what extent may lawyers use technology assisted review to identify documents to be produced in response to demands for production requiring analysis of voluminous documents?

DIGEST: Whereas lawyers may use technology assisted review products to identify responsive documents for productions, they should communicate with their clients about such use, must take care to understand the products they use, and may not cede their independent judgment.

AUTHORITY INTERPRETED:

STATEMENT OF FACTS

Lawyer is litigating a matter involving a decade's worth of documents regarding a complex series of investments that Client engaged in and the financial and business performance of each of the entities invested in. As a result of the complexity of this matter, Client has over 10 million documents that relate to the negotiations and performance of these several investments. Adverse Party serves document demands that require a fairly narrow identification of particular categories of documents. Lawyer estimates that, due to the volume of potentially responsive documents, it would take even extremely efficient document reviewers over 100,000 hours to review the documents. Because that would be cost prohibitive and because Lawyer believes that Lawyer would not be able to adequately supervise the work of the several hundred contract lawyers that would be necessary to review all of the documents in a timely manner, Lawyer elects instead to use technology assisted review ("TAR") to identify responsive documents.

This, in fact, is a TAR 2.0 system with continuous active learning. Lawyer has used the particular technology before. After Lawyer provides the recommended amount of seed sets appropriately identifying documents as responsive or not responsive, the software uses the information to analyze the remaining documents. Lawyer next conducts a random review of the documents identified, provides some additional seed set samples to eliminate some documents erroneously identified as being responsive, and runs the results again. Lawyer then produces the several hundred thousand documents identified as being responsive.

Opposing Counsel identifies approximately 5,000 documents that are not responsive, accuses Lawyer of engaging in a document dump, and brings a motion for sanctions for discovery abuse. When Lawyer communicates the sanctions motion to Client and the basis thereof, Client becomes upset that Lawyer did not tell Client that Lawyer was relying on artificial intelligence and that Lawyer did not personally review every document being produced. Upon review of the production, Client then identifies two dozen documents that Client considers to be proprietary and claims should have been excluded.

DISCUSSION

Lawyers' use of TAR does not in and of itself violate ethical obligations. But, as with any services that lawyers provide, it must be performed competently. Indeed, this is also a practical necessity since lawyers must be prepared to defend the use of TAR as they would any other discovery search methodology. An ethical use of any litigation tool requires communication with the client,

competence in using the tool, protection of confidential information, and non-interference with the lawyer's independent judgment.

Communication

As a preliminary factor, lawyers have an obligation to discuss significant developments in their representation of clients. Rule of Professional Conduct 1.4 provides that a lawyer's duty to communicate includes reasonably consulting with the client about the means to accomplish the representation's objectives. (Rule of Prof. Conduct 1.4(a)(2).)

Such communication should include a discussion about the advantages and disadvantages of using a particular means or tool. For example, in the case of TAR, advantages could potentially include greater reliability, especially where there is also disclosure to an adversarial party in advance so that it will be more difficult to effectively challenge the results if it is aware of the method in advance and does not object or otherwise request modification. Disadvantages could potentially include new controversies over the use of TAR, including the results generated. Even if an agreement can be reached, some of the financial benefits of the technological efficiency may be lost in battles with other counsel regarding the terms for searching, reviewing, and producing documents.

Competence

We have previously addressed the duty of competence in the use of technology in SDCBA Legal Ethics Opinion 2012-1; other bar associations have recently done so as well. (See, e.g., LACBA Opn. No. 529; ABA Formal Opn. 477.) But some of these concepts bear repeating.

As a reminder, the duty of competence means to have the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of such service. (Rules of Prof. Cond., rule 1.1) If lawyers do not have sufficient learning and skill, then they may either associate in another lawyer who does or acquire the requisite learning and skill. (*Ibid.*) To the extent that lawyers supervise others, a necessary corollary to the duty of competence includes the duty to supervise (see Rules of Prof. Cond., rule 5.1), including not only subordinates within the lawyer's firm but also non-lawyers both inside and outside the firm (Rules of Prof. Cond., rule 5.3). Accordingly, lawyers must be responsible not only for their own competence, but that of all who assist with the provision of legal services to their clients.

What the standard for competency is will continue to evolve, is often fact-specific, and is outside the scope of this opinion. But within the context of using a TAR, lawyers may wish to consider a number of factors. These may include considering whether there are other reasonable methods either to narrow the subset of or to identify potentially responsive documents, considering whether the seed set of documents is representative of the universe to be searched, and monitoring and sampling of results to determine whether the algorithms employed are either over- or under-identifying responsive documents.

Confidentiality

Business and Professions Code section 6068, subdivision (e), provides that lawyers must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets" of their clients. Confidentiality concerns in the context of technology use are discussed in State Bar of California Formal Opinion 2012-184.

First, lawyers should understand who else may have access to the information. Third-party access may trigger the obligation to protect confidentiality, such as through the use of a non-disclosure agreement or similar tool. This includes not just those involved in the review of client documents, but also those that may have access by virtue of the platform used. Lawyers should familiarize themselves sufficiently with the technology to determine whether there is a risk of unauthorized access. What level of security is appropriate will be based on what is reasonable under the circumstances.[1]

Notwithstanding this, lawyers should consider whether addressing not only the use of TAR, but the terms being used, with opposing counsel is necessary under the circumstances to avoid a later challenge that would require disclosure of meaningful information for a material response. A natural question could arise about what documents were used as seed samples for non-responsive documents. That is because in addition to wanting to make sure that enough information was submitted for inclusion of documents within the TAR to identify what is responsive, there may also be a question whether what was excluded was too broad. The problem with responding to that element is straightforward. Disclosing non-responsive documents may violate the lawyer's duty of confidentiality since non-responsive information would not be discoverable to begin with and could otherwise contain trade secrets, sensitive financial data, or other proprietary or personal information that, if disclosed, would be harmful or embarrassing to the client.

A related risk is that, absent appropriate screening measures, attorney-client privileged or other protected information could be inadvertently shared with opposing counsel. And while clawback provisions may address inadvertent waiver, they cannot remove disclosed confidential information from the mind of opposing counsel.

Independent Judgment

Often, one of the primary benefits that a lawyer brings to a representation is the judgment that has been developed as a legal professional. This concept is a corollary to the duty of competence and is protected in other contexts. (See, e.g., Rules of Prof. Cond., rule 5.2.) Accordingly, lawyers must take care not to cede the entirety of the decision-making process for identification of responsive documents to any automated procedure. That does not mean, however, that they cannot rely on somebody or something, such as TAR, to assist them. But lawyers should act consistently with the concept that responding parties and their lawyers are in the best position to determine how to search for, review, and produce responsive documents. (See, e.g., *Hyles v. New York City* (S.D.N.Y. 2016) 2016 U.S. Dist. LEXIS 100390; *Dynamo Holdings L.P. v. Comm'r* (2014) 143 T.C. 183 [both concluding that courts are "not normally in the business of dictating to parties the process that they should use when responding to discovery"].)

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[1] This concept is supported by a number of ethics opinions addressing the need to take competent and reasonable steps in protecting confidential data. (See, e.g., State Bar of Arizona Opn. Nos. 05-04 and 09-04; New Jersey Comm. on Prof. Ethics Opn. 701; Nevada Standing Comm. on Ethics and Prof. Resp. Formal Opn. 33; and Virginia Standing Comm. on Legal Ethics Opn. 1818.)