Bits, Bytes and Brains:

Still the "No-Brainer" E-Discovery Tool

By Larry G. Johnson

I love gadgets and toys. I have spent a good deal of my life justifying purchases of all kinds of computer hardware and software just so I can play with them (after, *ahem*, justifying them as business expenses … *which of course they are, IRS*).

When Computers Were New

Back when computers were fun and new, what did lawyers expect to do with them? I first got into personal computers the moment they became commercially available in the late '70s. One of my first thrills was to have a disk drive the size of a shoebox that ran this huge thing called a floppy disk that could hold a whopping 16,000 bytes! Wow!

I was always looking for ways to work computers into my law practice. I had a chance to do so when there were so many documents in a mass tort case, the 1981 MGM Hotel fire in Las Vegas, that my firm had to hire a librarian to catalog and keep track of them all. So, I figured I would create a database of those files that were in electronic format, such as the text of deposition transcripts, and be my own librarian. I had great fun putting that together and showing it off.

In those days, I had a "portable" computer the size of a small suitcase called an Osborne 1 that I carried around with me to depositions around the country. The thing barely made it into an overhead bin on an airplane. It had a screen about 3 inches wide, with small, green text against a black background that was barely readable. But it did the job: It found very quickly relevant snippets of other witnesses' depositions with which I could challenge the current deponent.

But perhaps the best effect this little dinosaur ever had on a witness was when

I told him the computer monitored voice stress levels to detect whether a person was lying. He didn't catch the humor of what I said and at critical moments in his deposition he glanced uncomfortably from time to time at my computer. That taught me a valuable lesson: In the ways of the law, theater will trump technology every time.

Since those days, of course, all kinds of technology advances have been made in the fields of litigation support and electronic discovery, starting simply with being able to search text with the "Find" feature in word processing and email applications. Then things moved quickly to more sophisticated software with complex and fancy sounding search algorithms: "Boolean searches," "proximity searches," "fuzzy logic." Needles were expected to come flying out of haystacks!

Litigation Technologies Get Serious

Then came a more rarefied era with such companies as DolphinSearch, Attenex and others where the buzz words were "semantic profiling," all very complex, based on Bayesian probability mathematics and other arcana.

The idea, essentially, was that you teach a computer the kinds of information humans are interested in, and the computer uses artificial intelligence to develop an evolving mathematical profile for the kinds of words and sentence structures associated with the content of the "seed" text. After building up enough of a core of such relevant seed documents, that entire set becomes "the search term" to be applied to masses of other documents, and magically through this huge filter only likely relevant documents are supposed to appear.

The vendors of this technology had great demos to show how this stuff worked, and of course I had to play with it and see for myself. I never could get these products/systems to work well, and so I gave up on them, as apparently many others in the legal profession have.

And now the big, shiny, new buzz words in e-discovery today are "predictive coding," which, as far as I can tell, is just another spin on the whole semantic profiling fad. If predictive coding were truly a success, most lawyers would not still be stuck negotiating what search terms they should use in a case, or search terms would no longer be the subject of so many model e-discovery orders and local rules. As I understand it, the evangelists for predictive coding say search terms are generally passé; the artificial intelligence behind predictive coding is so much better at finding the relevant evidence.

To which I say: "Oh, yeah? Show me the case where *any* technology and not human effort came up with the smoking gun?" Because — and I finally get to the point of this article — there is something vastly superior to artificial intelligence: *real* intelligence, of the human kind.

The Best Computer Is Still the One between Your Ears

Think about it: How do lawyers win cases when there is so much information out there in ever exponentially expanding ways that it cannot possibly be digested by any one human, group of humans or even a computer? The answer is stunningly simple and obvious: *because lawyers have brains*.

So much of what your brain does occurs beneath consciousness. The brain is constantly evaluating our ever-

changing environments and quickly sifting out what is unimportant and putting focus on what is. It does so without our conscious involvement.

While we are busying ourselves with something, the brain keeps evaluating and processing objects and data in all sizes and shapes, quickly comparing all that to similar objects and data from past experience, and it tees up decisions for us long before we become consciously aware we need to make them.

And that's what lawyers do with lawsuits. Things enter their brains and get stored for later processing. No lawyer gets a case with just a bunch of amorphous piles of data and otherwise a blank slate, yet so many e-discovery solution vendors seem to think so. Important pieces of information are present right there at the beginning of a new matter, waiting eventually to be given meaning.

For example, the client is going to tell the lawyer a whole lot about the case and what he or she thinks are going to be the key documents to prove or disprove the allegations in the claim or complaint. And the lawyer will bring to that conversation all of his/her life experiences, training and professional experience to know what to focus on and what to leave alone, at least for now, and which issues are key and which ones are of lesser priority.

Both lawyer and client will have a fairly clear idea where the most obvious place to start looking for evidence is; indeed, there is probably at hand plenty of evidence for and against the case already, assuming it is not frivolous.

So, while I am innately predisposed to beat the drums for technology, I have to admit, based on trying cases myself (and sharing war stories with other litigators), to an essential phenomenon: The mysterious workings of our incredibly complex brains are what take us to real moments of truth. You throw yourself at a case in a seemingly random way, you talk to as many witnesses as you can, you read as many documents as you can (most of them probably worthless), you prepare and prepare, and then … suddenly things just congeal out of the mist, and you *know* your case. You just know it. And the other side knows you know it, too.

Here is a maxim that derives from that observation: Rare is the case that turns on more than a few dozen documents, if that. All of which you will know by heart by the time of trial.

Modern science still does not fully understand how the brain works with its 100 billion cells and vast networks of neurons, but we have all had at one time or another that "Aha!" moment when suddenly everything neatly fits a pattern and a consistent story. The pieces come together as if by themselves.

Something like what famously happened to Albert Einstein in 1905 when he looked at a clock tower from a streetcar in Zürich and suddenly the whole theory of relativity came together in his head. We tend not to acknowledge properly the sublime magic of the "Aha!"

That is not to say that electronic discovery and the tools that can be used to find and organize digital information are not valuable; but the legal profession and the public it serves could probably benefit much by our spending less time and resources on text-searching technologies and more on old-fashioned hard work. ∎

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