Andrew Kass
U.S. Legal Support, Inc.
425 Park Avenue, 5th Floor
New York, NY 10022
akass@uslegalsupport.com
(917) 512-7503

The Anthropology of Electronic Discovery

Andrew Kass

Director, Litigation Support at U.S. Legal Support, Inc.

A key hallmark of any society is the development of rituals. These formal customs help illustrate the society's world view, and help to perpetuate its values and beliefs through what Joseph Campbell terms the "affect value" of the rites.[1] "But," as Dr. Campbell asks, "if the magic of the rite is gone…."[2]

Nowhere in our society are ritual and precedent more deeply venerated than in the practice of law. Who among us can forget our first entry into a law library, the incense of leather-bound paper, the whispers of pages turning and pencils across pads? Witness the tribal hierarchy of the firm, a confederation of wise grey heads flanked by a Praetorian guard of senior litigators and junior acolytes seeking to rise through ordeal. And though our courts have dispensed with powdered wigs, there is yet a language and decorum of the bench that elevates the most common controversies to the symbolic scales of justice.

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[1] Campbell, Joseph, *Myths to Live By*, "The Confrontation of East and West in Religion", p.99 [Bantam, New York 1973].
[2] *Ibid.*

Fast forward to where a handheld device can access information from anywhere in the world, and store more data than a truckload of banker's boxes: The computer as principal knowledge tool is the new reality. Suddenly, a half-century's experience is simply stale, and the paper library too static to keep pace with precedential case law.

Disruption meets resistance, but as the circumstances of a culture change, the culture must change with it. Natives of the Plains, their buffalo gone, turned to ghost dances to affirm their identity as a people. Attorneys, faced with electronic discovery, must embrace technology.

This does not mean that a litigator now requires a Computer Science degree next to her Juris Doctor. Just as with any specialized area of litigation, relevant experts can be utilized. However, the organized identification, collection, processing and review of vast amounts of electronic data is a pervasive requirement in modern discovery, and thus requires more attention, and a more developed skill set, than the direction and digesting of subject matter expert review. The key skill set is not so much technological as it is managerial.

Litigation practice today places a premium upon dynamic knowledge assimilation and project management skills. It assumes as a first principle the continual study of new practices, tools and methods required to attain mastery of electronic discovery. *Project management* sounds like an engineering discipline, until one appreciates how deeply the allocation and balancing of scope, time and resource constraints affects the probability of successful electronic document discovery in the age of big data.

Until recently, the catechism *How do you evaluate discovery?* was answered *With as many reviewers as required*. Linear review of paper involved examining documents and keeping indexes, later compiled and presented as binders for the chief litigators. Even the development of electronic document review, using scanned images and database coding forms rather than paper and indexes, did not much change the methodology. The addition of optical character recognition, along with the acceptance of objective coding in some cases, brought the possibility of search into the picture; but as Blair and Maron proved in their seminal paper, the perception of effective recall and precision far outstripped the reality.[3]

The Blair and Maron study only involved about 40,000 documents (roughly 350,000 pages). The import when considering discovery involving 400,000 or 4,000,000 documents is profound: there is too much for any number of eyeballs to reliably and consistently evaluate, and plain keyword search is not sufficient. This problem only gets worse with the amount of data worldwide estimated to double every two years. The attorney as project manager must now consider what methods and resources will be required to cull, consider and produce such a corpus in a limited period of time. The attorney as assimilator of knowledge is called upon to select the proper tools for the job, and to integrate them with the discovery and review plan.

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[3] Blair, David C. and Maron, M.E., "An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System", *Communications of the ACM*, March 1985 (Volume 28, Number 3), pp.289-299: "[O]n average, STAIRS could be used to retrieve only 20 percent of the relevant documents, whereas the lawyers using the system believed they were retrieving a much higher percentage (i.e., over 75 percent)." [p.293]

This is the next phase in the development of our professional society, as foreseen by the shamans of Sedona: one must find and follow the new and narrow path. Faced with four million documents, a limited budget, and a production deadline, a single well-prepared reviewer sits alone and examines a randomly-selected sampling of the entire discovery, making rapid judgments as to whether each document is relevant or not relevant. As this hero toils, the computer is watching and weighing the content and meaning of the documents judged relevant and not. In a day or two, there is relevance ranking for all documents collected, not merely those examined. Our knowledge attorney has trained his computer how to assess the documents by example. This is called, variously, *Computer-Assisted* or *Technology-Assisted Review*, *predictive coding*, or *magic*.[4]

The project manager attorney may now defensibly select the most relevant material for deeper review, and a sampling of the non-relevant material for quality checking. The budget is saved; the production is on schedule. There is dancing, and adult refreshment.

This is the state of our culture, these the qualities of the leaders moving ahead. Tomorrow may bring another new paradigm, production from computers embedded within people, perhaps. But for today, let's celebrate our new thought leaders, and continue to spread their word.

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[4] Roitblat, Herbert L., "Measurement in eDiscovery: Technical White Paper" [OrcaTec, 2013], p.14: "Both the producing and receiving parties gain from the use of Computer-Assisted Review. The producing side can greatly reduce the burden of eDiscovery in terms of time, cost, and effort. The receiving party gets a more complete and accurate set of documents in a shorter period of time. In the business world, this is referred to as a win-win…."