

Computer Assisted Review: Technology to Help Navigate the Murky Waters of E-Discovery

Pharmaceutical Law Update

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It has long been recognized that an overwhelming majority of documents produced in complex litigations inevitably come from electronic sources. With today's infinite volumes of electronically stored information (ESI) complicating the discovery process, the legal world has been forced to adapt and find reliable, efficient and cost-effective methods to facilitate e-discovery. A growing number of attorneys have begun to utilize a relatively new technology known as a "predictive coding." This technology, through the use of sophisticated computer programming and algorithms, enables a computer to predict the relevance of a large volume of documents by learning from a human reviewer's classification of a small sample set. Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches Be Replaced by Computer Assisted Coding*, L. Tech. News, Oct. 2011.

Predictive coding has proven to increase efficiency accuracy during the document review process, and reduce litigation costs. Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, Rich. J. L. & Tech., Spring 2011, at 48. Despite these proven benefits, most lawyers have been reluctant to embrace computer assisted review because of the difficulty in defending complicated discovery protocols and underlying technology that leave attorneys and their clients exposed to harsh discovery sanctions. This unwillingness was further supported by the absence of judicial direction on the subject. Well, the wait is over. In a landmark judicial opinion, Magistrate Judge Andrew Peck of the Southern District of New York cleared a path for litigants across the country to adopt computer assisted document review protocols, such as predictive coding, to facilitate and expedite the costly and cumbersome e-discovery process in appropriate cases. *Monique Da Silva Moore v. Publicis Groupe & MSL Group*, No. 11 Civ. 1279, Dkt. No. 96 (Slip Op.) (S.D.N.Y. Feb. 24, 2012).

At issue in *Monique Da Silva Moore v. Publicis Groupe & MSL Group* was a discovery dispute arising in the context of a class action suit filed on behalf of female employees of a multinational advertising conglomerate alleging claims of gender discrimination. During the discovery process, the defendants were faced with the challenge of reviewing more than 3 million documents. The parties were in agreement that some method of computer assisted review was appropriate, but could not come to an agreement on to the exact methodology. After reviewing all of the relevant submissions, Magistrate Judge Peck determined that computer assisted review could be used during the discovery process. This decision marks the first time any court has approved the use of computer assisted review in electronic data discovery.

Although Magistrate Judge Peck's order stems from a discovery dispute in an employment-based class action lawsuit, the effect of this decision is likely to have a broader reach, extending to a wide spectrum of practice areas, including traditionally document intensive litigations such as pharmaceutical and medical device litigations. In fact, Magistrate Judge Peck made no secret about the fact that he intended his opinion to resonate throughout the country, stating: "[w]hat the Bar should take away from this Opinion is that computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review."

While the ESI protocol adopted in *Da Silva Moore* is not a one-size-fits-all solution, it is instructive regarding the types of cases where computer assisted discovery should be considered, and provides a platform for the judiciary and future litigants to implement this type of efficient, cost-saving technology whenever appropriate. Anxiety over the ability to defend these types of protocols should be significantly reduced now that there is some legal support for the use of computer assisted review. As a result, firms and their clients need to take steps to educate themselves about computer-assisted discovery protocols and evaluate whether the use of such protocols is appropriate for their respective cases.

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