

New Precedents Issued on Predictive Coding

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Da Silva Moore ESI Protocol Approved

On April 25, 2012, United States District Judge Andrew Carter upheld Judge Peck's February 2012 rulings in *Da Silva Moore v. Publicis Groupe*, specifically in regard to the use of predictive coding. Judge Peck's February 24, 2012, decision was the first documented case to recognize predictive coding as an acceptable method of searching for electronically stored information. In upholding Judge Peck's rulings, Judge Carter found the use of predictive coding proper because "the search methods will be carefully crafted and tested for quality assurance, with Plaintiffs participating in their implementation." Opinion at 3. The judge found many of the plaintiffs' arguments premature and made clear that it is too soon to conclude that the use of predictive coding would deny plaintiffs access to liberal discovery. Judge Carter aptly pointed out that "there simply is no review tool that guarantees perfection" but, in the case of *Da Silva Moore*, the court upheld the decision that predictive coding is the preferred method in this instance.

See Reed Smith's previous Alert on the *Da Silva Moore* case [here](#).

Predictive Coding Ordered by Virginia Court Over Plaintiffs' Objections

On Monday, April 23, Loudoun County Virginia Judge James Chamblin ordered the use of predictive coding for the processing and production of electronically stored information, despite plaintiffs' objections. *Global Aerospace, Inc. v. Landow Aviation, LP* (Consolidated Case No. CL 61040) appears to be the first case where predictive coding was ordered by the court absent the agreement of all parties.

Defendants filed a motion for a protective order seeking the implementation of an ESI Protocol utilizing predictive coding. Landow argued that the court should approve the use of predictive coding to protect Landow from "the unnecessary burden and expense of alternative means of culling the Landow ESI." Landow Memorandum & Motion at 14. Landow cited the recent Southern District of New York case, *Da Silva Moore v. Publicis Groupe*, in its motion to support the claim that predictive coding is an acceptable document retrieval tool. Landow argued that predictive coding would be the most cost-effective tool in retrieving relevant documents because the case involves 250 gigabytes of reviewable electronically stored information, and defendants estimated that a linear first-pass review would take approximately 20,000 hours and cost \$2 million.

In addition, Landow argued that the use of predictive coding conforms to the applicable rules of court. Under the Virginia Supreme Court Rules, counsel is required to conduct a reasonable inquiry into whether a response to a discovery request is “consistent with [the] Rules and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law...” Va. Supreme Ct. Rules 4:1(g). Landow argued that the use of predictive coding would ensure that a sufficient search was conducted to obtain relevant documents so that discovery responses could be prepared.

Conversely, plaintiffs, in their Motion in Opposition, expressed concern that predictive coding would not produce all of the responsive documents necessary to their case and, while not opposed to the use of keyword searching, argued that “no computer program is an adequate substitute for having human beings review and sort the documents.” Global Aerospace Memorandum in Opposition at 4. The plaintiffs relied on a lack of case law on the subject and stated there was “no reason to believe that Virginia law permits such a radical departure from the standard practice of human review of documents as a necessary step in responding to a request for production.” Id. at 3.

Ultimately, Judge Chamblin granted defendant Landow’s motion and ordered the use of computer-assisted review. The Order Approving the Use of Predictive Coding simply stated that, after hearing argument with regard to the motion, “it is hereby ordered Defendants shall be allowed to proceed with the use of predictive coding for purposes of processing and production of electronically stored information.”

This case reflects another example of a court’s willingness to approve the use of new technology to aid in production.

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