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CAN PREDICTIVE CODING RELIEVE THE BURDENS OF ELECTRONIC DISCOVERY? *By Devin Chwastyk*

In civil litigation, the burden imposed by obligations to retain, sort, and exchange electronically stored information (“ESI”) with the opposing party can be tremendous. In the nearly twenty years since e-discovery issues began to emerge, these costs have shaped strategy and outcomes in complex commercial disputes. Today, predictive coding, an emerging search technology and litigation tool, promises to relieve these burdens on litigants.

The costs imposed by e-discovery obligations are two-fold. Initially, the burden of e-discovery seemed to be felt by clients most keenly *internally*, as their in-house information technology (“IT”) personnel had to cope with increased retention requirements and engage in complex recovery projects to restore data from backups and retrieve ESI for litigation purposes. The costs, in infrastructure upgrades and employee time, initially seemed tremendous. Today, however, IT departments have increasingly adjusted to these burdens, upgrading systems as necessary and formalizing solutions that permit the retention and discovery of ESI, as required for litigation. The internal costs imposed by e-discovery obligations seem to have diminished as technology and training have allowed cost-effective solutions for

corporate and government IT departments. Until recently, however, the *external* costs of e-discovery had shown no sign of slowing. Once documents are gathered from the client, lawyers must review the collection to sort for relevant documents, withhold privileged documents, and produce the responsive documents to opposing counsel. The prevailing model of document review has previously required hands-on review of each page by an attorney. A document review project has meant dozens of law firm associates or contract attorneys poring over boxes of paper documents (or, more recently, electronic archives of the same documents). And each week or month of such a large-scale project has meant dozens or hundreds of hours of attorney time billed to clients.

These costs had a significant impact on litigation strategy and outcomes. For some defendants, the mere prospect of the significant costs of document review militated toward settlement of some claims. Individual plaintiffs and smaller defendants, without large stores of ESI, had no such concerns.

Today, predictive coding offers potential to balance the litigation battlefield by significantly reducing the external costs of e-discovery.

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WHAT IS PREDICTIVE CODING?

Predictive coding (also called “computer-assisted coding”) is a computer search technique that can be used to significantly optimize human review and significantly reduce the amount of ESI that must be reviewed by attorneys. It combines human review of sample sets of documents with advanced computer search algorithms to identify, cull, and code the relevant documents out of a large set of non-responsive documents.

HOW DOES IT WORK?

The first step in predictive coding, as with any document review, is gathering the electronic documents from the client (e.g., .msg files, .pst mailbox files, .doc, .xls, .ppt, etc.). Predictive coding requires native electronic files with metadata. That collection is then stored on a server, or in the cloud. Predictive coding software can then be used to search the collection.

The predictive coding review process begins with an initial human review of a randomly generated representative sample, or “seed set,” of the document collection. This initial review is performed by a senior reviewer, an attorney already very familiar with the case and able to identify responsive documents with a high degree of accuracy. The initial reviewer is required to code documents from the seed set until a sufficient number of responsive documents have been identified as such for the computer to begin identifying similarities between those documents.

Once this initial review is complete, the predictive coding search algorithms go to work. The software locates common keywords, phrasing, themes and other identifying characteristics (e.g., common senders or recipients of emails) that appear most often in the seed set.

Having identified these commonalities, the predictive coding program then ranks the remaining documents in the collection based on which documents it predicts are most similar to the relevant documents identified in the sample set (and, therefore, most likely to be responsive). The initial review may have covered 1,000 documents of a collection of 1 million documents; after the initial sorting, the remaining 9,999,000 documents will be ranked by the computer in order of predicted relevance.

Then, the human review begins in earnest. As with unassisted document review projects, a team of attorneys begin review the collection and tagging documents based on relevance, issues, or other chosen criteria. The computer starts these reviewers with those documents that were ranked as most likely to be relevant.

Importantly, predictive coding is an iterative process: the computer continues to learn from each additional human review call, modifying its predictions of which documents are most likely relevant based on the continuing review, not just the initial review set, and re-ranking the remaining documents to bring the most relevant ones to the top of the collection.

SEEKING A PRELIMINARY INJUNCTION? DON'T FORGET TO POST A BOND *By Alexis Snyder*

In some circumstances, suing for money damages will not provide a sufficient remedy for a threatened injury. By the time the lawsuit has reached its conclusion, the harm will already have been done, and no amount of money will adequately compensate the plaintiff. In such cases, a party can seek a court order requiring another party either to take a particular action or to refrain from doing something. These court orders are called injunctions.

In general, a person or entity that is threatened with some harm will initially seek a preliminary injunction, which can be obtained relatively quickly, and will ultimately seek a permanent injunction, which requires the formalities of a typical lawsuit, including discovery and a full hearing on the merits of the claim. To obtain a preliminary injunction, the plaintiff must prove that it will suffer irreparable harm (which means harm that cannot be compensated in damages) if the court does not intervene and that it is likely to prove its claim at the ultimate permanent injunction hearing. The court also must be satisfied that granting the injunction will not cause a greater harm to the defendant and will not be contrary to the public interest.



The predictive coding search eliminates those documents that are not likely to be relevant to the project, relieving the burden on human reviewers to pore over a significant percentage of the collection. Once all likely relevant documents are reviewed, keyword searches can be run through the remaining documents deemed non-relevant to verify that all responsive documents have been gathered.

WHAT ARE THE BENEFITS OF PREDICTIVE CODING?

Predictive coding can substantially reduce the number of attorney hours required to complete a large-scale document review project. Studies have estimated that predictive coding requires 75% less to even 92% less attorney time than manual review. The resulting cost savings, even where manual review would be accomplished by junior associates or contract attorneys, is significant.

Of course, there are additional costs to predictive coding. Vendors must be hired to gather ESI onto a server, extract the metadata from the ESI and perform the predictive coding. These up-front costs, however, should be significantly offset by the reduced billable hours required to complete the project.

DOES PREDICTIVE CODING SATISFY THE COURTS?

The Federal Rules of Civil Procedure, and state counterparts, require that litigants engage in reasonable

efforts to search for relevant documents.

Initially, predictive coding prompted some concerns that courts may not accept the results of a document search unless humans were involved with all facets of the review. Studies have shown, however, that human reviewers identify as little as 60% of responsive documents in a collection, while predictive coding technology can locate upwards of 75% of potentially relevant documents at a fraction of the cost.

Although no Pennsylvania court has yet ruled that predictive coding is a suitable replacement for manual review or keyword searching, state and federal courts around the country have so found. A July decision from Judge Shira Scheindlin of the United States District Court for the Southern District of New York suggested that predictive coding, coupled with keyword searching and careful quality control, may represent the best practice for electronic discovery. ■



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One additional requirement that is often forgotten, however, is the posting of a bond. Both state and federal law require a party seeking a preliminary injunction to post a bond that will be adequate to cover any damages to the defendant if the injunction is later found to be unwarranted. Fortunately, obtaining a bond is not very difficult or expensive. The plaintiff needs to pay only a fraction of the total bond amount to obtain the bond.

In the haste of rushing to court to obtain a preliminary injunction, parties and their attorneys sometimes overlook the bond requirement. Courts occasionally forget to order the posting of a bond as well. If a court neglects to order a plaintiff to post a bond, the plaintiff might believe it has gotten a lucky break. Unfortunately, the opposite is true: courts have repeatedly held that an injunction issued without the posting of a bond is invalid and must be reversed on appeal. Thus, even if the court does not require the plaintiff to post a bond, the plaintiff should respectfully request that the court amend its order to include a bond requirement. Doing so will prevent an appellate court from immediately vacating the injunction if the defendant appeals.

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The attorneys that make up the Injunction Practice Group at McNees Wallace & Nurick are well versed in the law governing injunctions, including the bond requirement. Our dedicated group of injunction attorneys has the experience and expertise necessary when running to court on a moment's notice. Businesses and individuals faced with imminent, irreparable harm from another's threatened actions or inaction should not hesitate to contact the injunction attorneys at McNees Wallace & Nurick. Our attorneys stand ready to move

quickly yet carefully in seeking injunctive relief to ensure that the impending harm is stopped before it occurs. ■



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