



PREDICTIVE PATH

A road map to get your judge to “yes” on technology-assisted review.

BY PETER BUCKLEY AND SCOTT VERNICK

PREDICTIVE CODING (aka technology-assisted review) involves the use of e-discovery software that helps document reviewers “train” the software to identify relevant documents, using mathematical algorithms. The goal is to minimize the review and production of irrelevant data. Predictive coding has been thrust to the forefront of e-discovery in recent months. Over objections, a federal court in New York and a state court in Virginia have approved the use of predictive coding for review and production of electronic documents in discovery. And a federal court in Illinois is holding hearings on whether the technology should be used to ensure the accuracy of the defendants’ production of electronically stored information.

Whether you are looking at predictive coding to control the costs of electronic data discovery or to test the completeness of a document production, these recent developments can, and should, influence your litigation strategy. Parties can always agree to an EDD protocol—if you

are looking to employ the technology, seeking an agreement is a good place to start. But, what if the other side refuses? What if your opponent insists on manual review or keyword searches, and won’t consent to the efficiencies achieved by predictive coding? Here is a road map to help you secure court approval of predictive coding over objections, summarizing the current legal landscape, gathering relevant resources, and offering insight on how to persuade the court to adopt a predictive coding protocol.

LEGAL LANDSCAPE. Although predictive coding has been around for a while, there are few cases to date. Decisions in three pending actions break new ground and provide the beginnings of relevant guidance:

» *Da Silva Moore v. Publicis Groupe*, 2012 WL 607412 (S.D. N.Y., Feb. 24, 2012). United States Magistrate Judge Andrew Peck, a noted EDD expert, approved the use of predictive coding to aid in the review and

production of approximately 3 million electronic documents. On April 25, 2012, Judge Andrew Carter, Jr., adopted Peck's decision. Peck explained that *Da Silva Moore* should be read to acknowledge 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."

» *Global Aerospace v. Landow Aviation*, No. CL 61040 (Va. Cir. Ct., Loudoun County, Apr. 23, 2012), similarly approved a predictive coding protocol after defendants moved for a protective order due to the volume of data sought by plaintiffs. Relying on *Da Silva Moore*, defendants successfully argued that predictive coding was not only significantly less expensive than a manual review and keyword searches, but also significantly more reliable in identifying relevant documents. Plaintiffs' brief provides a strong case for predictive coding.

» In *Kleen Products v. Packaging Corp. of America*, No. 10-C-5711 (N.D. Ill.), plaintiff seeks to force the defendant to employ predictive coding as a means to ensure the accuracy of defendants' document production. The court held evidentiary hearings during which EDD experts testified about the usefulness and accuracy of predictive coding. As of press time, no decision had been reached.

Although these cases break important new ground, how other courts decide issues of predictive coding remains very much an open question. Here are three more resources:

» Andrew Peck, "Search, Forward," *Law Technology News*, Oct. 2011, where Peck suggests that the use of predictive coding is consistent with the mandate in Rule 1 of the Federal Rule of Civil Procedure to "secure the just, speedy and inexpensive" determination of litigation.

» Maura Grossman and Gordon Cormack, "Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review," XVII Rich. J. L. & Tech. 11 (2011). It compares recall and precision rates of predictive coding to manual review and keyword searching.

» "The Sedona Conference Commentary on Proportionality in E-Discovery" (www.sedonaconference.org), published in 2010 under editor-in-chief Conor Crowley, advocates for the use of new technologies to reduce the cost and burden of ESI.

PERSUADING THE COURT. How do you persuade your judge to implement a predictive coding protocol in your case?

1. *Know your data, inside and out.* Before seeking court approval, gather statistics about your data set and be able to describe it with sufficient, reliable detail. How many gigabytes? How many documents or emails? Conduct a preliminary review and describe data composition. Is it mostly related to the litigation, or not? Are documents related in a broad sense, but not relevant to trial issues? Tell the judge what kind of data you are confronting; describe the efficiencies that can be achieved from using predictive coding. Have your expert ready in case the court wants you to support your assertions.

2. *Keep it simple, compare your alternatives.* Many judges grew up when discovery meant reviewing paper files. That's good and bad. They understand the concept of long, expensive reviews, but may not be as familiar with the complexities of EDD and the current state of technology. Explain what the review would look like if done in paper, how long would it take, and how many boxes it would fill. The numbers will speak for themselves — so too will the cost. Provide a rough estimate of the cost of reviewing every document or using keywords. Then compare the accuracy of the different approaches.

3. *Be open.* As with anything related to discovery, judges prefer that the parties agree upon resolutions. Seek agreement on a predictive coding protocol. If you make a reasonable proposal and your opponent

objects, you will look better in the eyes of the court. If you have to seek court intervention, propose an open process. Subject to confidentiality and privilege redactions, offer to give your opponent access to the data used to train the review software. Propose quality controls to double-check accuracy of coding, and offer to share results. Agree to regular intervals where you will revisit the protocol to ensure that objectives are being achieved. If the court perceives you to be open and fair, you are likely to get your way.

4. *Rely on timeless concepts.* *Da Silva Moore*, *Global Aerospace* and The Sedona Conference may provide you with support, but so too do long-standing legal principles that courts are used to enforcing. Peck pointed to Rule 1 of the *Federal Rules of Civil Procedure* in "Search, Forward." The court in *Global Aerospace* found support from the Virginia Rules of the Supreme Court that address the avoidance of unduly burdensome and expensive discovery. EDD is relatively new,

ORDER IN THE COURT

KNOW YOUR DATA inside and out.

KEEP IT SIMPLE. Compare your alternatives, and explain the consequences of paper review or keyword searches.

BE OPEN. Seek agreement on a protocol. If you must seek court intervention, propose an open, transparent process.

RELY ON COMMON SENSE legal principles. Spending more on discovery than the amount in controversy is always a bad idea.

but spending more money on discovery than the amount in controversy has always been a bad idea.

5. *Never promise perfection.* Predictive coding will not solve every EDD problem. It is still expensive, and will likely not locate every relevant document in a collection. The sheer size of data sets in complex cases does not allow for perfection. Recognize that you are advocating for the least-flawed approach, not the perfect one.

As Peck points out, predictive coding is not for every case. But in complex commercial cases involving hundreds of thousands, if not millions of documents, its use should be explored both for the cost savings and improved results. With any luck, you and your opponents can agree upon an appropriate predictive coding protocol. If not, new case law and existing source materials, along with the observations provided here, should guide your motion for court approval.

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