Client**Alert**

Commercial Litigation

e-Discovery Update: Increasing Judicial Acceptance of Computer-Assisted Document Review

In recent months, three different courts have considered the use of computer-assisted review of documents to select relevant materials for production in connection with litigation. The decisions by two[1] of these courts approving the use of computer-assisted review technology are indicative of an overall trend in both state and federal courts towards greater automation of the discovery process. Given the vast amounts of electronic data currently generated by businesses of all sizes, we expect this trend to continue and the implications of these decisions to be significant. Therefore, knowledge of available computer-assisted review technology and the changing scope and magnitude of discovery of electronically stored information is vital for any organization that may find itself faced with a demand for the production of information from an adversary in a litigation context.

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What Is Computer-Assisted Document Review?

Computer-assisted review of documents entails the use of computer software that utilizes an algorithm which enables it to learn which documents in a subset are relevant to the issues being litigated and which are not.[2] The software acquires its learning through interaction with a human reviewer.[3] Unlike manual review—which is typically conducted by more junior lawyers—computer-assisted review requires a senior associate or partner, i.e., someone with extensive familiarity with the case and the legal issues involved, to review and code a seed set[4] of documents which are then fed through the review software.[5] By examining the reviewers' coding of the seed set documents, the review software learns to make predictions as to the relevancy of the documents reviewed.[6] Once the computer's predictions and the reviewer's coding coincide, the computer has learned enough to apply its coding to the remaining documents in the collection in an automated fashion to determine the relevancy of those documents.[7]

Overall, this process takes far less time than alternative methods of review, such as manual review augmented by keyword searches. Additionally, several studies have assessed the accuracy of computer-assisted review and have determined that it is at least as accurate, if not more so, than traditional document review methodologies.[8]

The *Da Silva Moore* Decision

In *Da Silva Moore v. Publicis Groupe SA and MSL Group*, a gender discrimination case in the Southern District of New York, both parties had agreed to the use of computer-assisted review of electronic discovery; however, issues arose when the parties could not agree on how to measure and define relevance.[9] After seeking assistance from the court, Magistrate Judge Andrew Peck affirmed the parties' use of the tool and outlined a protocol for the parties to follow.[10]

Magistrate Judge Peck relied on the following factors in deciding to approve the use of computer-assisted review: 1) the parties had agreed to its use; 2) the large volume of documents to be reviewed; 3) the superiority of computer-assisted review to other alternatives; 4) the need for cost-effectiveness and proportionality under Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure; and 5) the transparent process proposed by the defendants.[11]

Following Magistrate Judge Peck's approval of the parties' use of computer-assisted review employing defendants' proposed methodology, plaintiffs moved for his recusal or disqualification from the case on the grounds that he was unduly partial to the use of such technology in discovery.[12] Magistrate Judge Peck denied plaintiffs' recusal motion on June 15, 2012, causing plaintiffs to file a Rule 72(A) objection to the denial.[13] That objection remains sub judice.

The *Global Aerospace* Decision

In *Global Aerospace Inc., et al. v. Landow Aviation, L.P.*, a case stemming from the collapse of three hangers at the Dulles Jet Center in 2010 during a major snow storm, the Circuit Court for Loudoun County, Virginia, was asked to approve of the defendants' use of computer-assisted review despite plaintiffs' objections.[14] Plaintiffs sought discovery from defendants, largely to uncover responsibility for the hangers' collapse and the existence of design and construction deficiencies, and requested that plaintiffs include electronically stored information.[15] Because the electronically stored information resulted in the generation of approximately two million documents, defendants informed plaintiffs that they wanted to use predictive coding.[16] Plaintiffs refused to consent.[17] As a preemptive measure, defendants filed a Motion for a Protective Order Regarding Electronic Documents and "Predictive Coding" with the court, seeking the court's permission to use the technology.[18]

In their arguments in favor of using the technology, defendants asserted that manual review of the approximately two million documents at issue would be extremely costly while locating only about 60 percent of potentially relevant documents.[19] Utilizing keyword searches, while more cost-effective, would still only retrieve approximately 20 percent of potentially relevant documents.[20] By using predictive coding, defendants argued they would avoid unnecessary costs and be capable of locating upwards of 75 percent of potentially relevant documents. Plaintiffs argued that retrieval of only 75 percent of responsive documents through the use of predictive coding would be insufficient as defendants are required to produce "all responsive documents located upon reasonable inquiry."[21] However, plaintiffs failed to address the lower recall a manual review or keyword search would produce.[22]

Judge Chamblin granted defendants' motion and permitted them to proceed with the use of computer-assisted review for the processing and production of their electronically stored information.[23] Judge Chamblin's short order did not address his reasoning behind this decision, but the judge did include a caveat allowing plaintiffs to raise an issue as to the completeness of the review, the contents of the production, or the ongoing use of predictive coding following defendants' first production of documents to plaintiffs.[24]

The *Kleen Products* Decision

The case of *Kleen Products LLC v. Packaging Corporation of America*, an antitrust class action pending in the Northern District of Illinois, is unique because it presented the first opportunity for a court to mandate a party's use of computer-assisted review in discovery over that party's objection and stated desire to use a more traditional keyword search for documents.[25] In *Kleen Products*, plaintiffs requested Magistrate Judge Nolan to require defendants to use computer-assisted review in the production of electronically stored information.[26] Plaintiffs argued that defendants' traditional Boolean keyword search methodology was not reasonable or adequate as required by the rules and that computer-assisted review was far more effective.[27] Defendants objected, asserting that they had already spent a large amount of time and money on a keyword search and had already started producing documents.

Unfortunately, the court never reached the ultimate decision of whether to compel a party to use computer-assisted review since, after hearing two days of expert testimony on the efficacy of predictive coding methodology, Magistrate Judge Nolan urged the parties to develop a mutually agreeable keyword search strategy instead of debating over whether to use computer-assisted review.[28] As of this writing, the parties have agreed to meet and confer as to a mutually agreeable keyword search strategy, however, they have not foreclosed the option of scheduling further expert testimony if they cannot reach agreement, thus requiring the court to rule on the dispute.[29]

The Impact of Judicial Approval of Computer-Assisted Review

Recent judicial approvals of the use of computer-assisted review reflect the recognition that this technology is a valuable tool available to parties to better manage the production of electronically stored information in litigation. However, as noted by Magistrate Judge Peck in his *Da Silva Moore* opinion[30] and reflected in Magistrate Judge Nolan's reticence to rule in *Kleen Products*, courts have not yet reached the point of requiring parties to utilize this still-evolving resource.

The decisions in *Da Silva Moore* and *Global Aerospace* do, however, represent a definitive trend in litigation towards greater efficiency and cost-effectiveness through the use of technology. These courts' decisions explicitly recognize that computer-assisted review is a viable document discovery technology which can be effective to limit a litigant's cost of complying with discovery obligations that have expanded exponentially as the prevalence of electronically stored information in everyday life has exploded. Of course, not all technologies are created equal, and since this is a relatively new tool, further development and refinement of this tool will undoubtedly be made. By approving of the use of computer-assisted review, the *Da Silva Moore* and *Global Aerospace* courts have taken a bold first step into the ever-changing landscape of advanced discovery technology and, perhaps most importantly, provided clients and their lawyers with a clear signal that the use of this new technology is likely to be accepted in the future.

In the wake of these decisions, however, an open question remains—who gets to choose the applicable discovery technology and methodology to be used in searching for, locating and producing a party's electronic discovery? *Da Silva Moore* and *Global Aerospace* were decided in the context of a producing party either agreeing to use (*Da Silva Moore*) or arguing in favor of using (*Global Aerospace*) computer-assisted review. We have yet to see a court compel a producing party to utilize the technology or find that more traditional forms of document review are insufficient. However, given the undeniable onward march of technological progress, and clients' increased focus on reducing their discovery costs while increasing efficiency, it is not hard to envision a scenario in the not-too-distant future where a court does just that. When such a time comes, parties that embrace this paradigm shift to greater use of technology in discovery will find themselves at a distinct tactical advantage compared to those who do not.

1. The third court sidestepped the issue and urged the parties to reach an amicable resolution of their discovery dispute on their own. *See Kleen Products LLC v. Packaging Corporation of America*, No. 2010-CV-05711 (N.D.Ill.).

2. *See* Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches be Replaced by Computer-Assisted Coding?*, LAW TECHNOLOGY NEWS, October 2011, at 2.

3. *Id.*

4. The seed set can be compiled via various means, including through the use of keyword searches throughout the overall universe of documents collected. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See* Herbert L. Roitblatt, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC'Y FOR INFO. SCI. & TECH. 70, 79 (2010); *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; David L. Blair & M.E. Maron, A*n Evaluation of Retrieval Effectiveness for A Full-Text Document Retrieval System*, 28 COMM. ACM 289 (1985).

9. *Da Silva Moore v. Publicis Groupe SA and MSL Group*, 11 Civ. 1279, at 5 (S.D.N.Y. Feb. 24, 2012) (order granting use of computer-assisted review).

10. *Id.* at 25.

11. *Id.* at 22.

12. Magistrate Judge Peck is a generally recognized authority on e-discovery and has written several articles on the potential benefits of computer-assisted document review.

13. *Da Silva Moore*, 11 Civ. 1279 (S.D.N.Y. June 15, 2012) (order by Magistrate Judge Peck denying plaintiff's request for his recusal); *Da Silva Moore*, 11 Civ. 1279 (S.D.N.Y. June 29, 2012) (Rule 72(A) objection to Magistrate Judge Peck's denial of plaintiffs' Motion for Recusal or Disqualification).

14. *Global Aerospace Inc., et al. v. Landow Aviation, L.P.,* No. CL 61040 (Va. Cir. Ct. April 23, 2012) (order approving the use of predictive coding for discovery).

15. *See Global Aerospace Inc.,* No. CL 61040 (Va. Cir. Ct. 2012).

16. Memorandum of Defendants at 2, *Global Aerospace Inc.,* No. CL 61040 (Va. Cir. Ct. April 9, 2012).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Opposition of Plaintiffs at 2, *Global Aerospace Inc.*, No. CL 61040 (Va. Cir. Ct. April 16, 2012).

22. *Id.*

23. *Global Aerospace Inc.*, No. CL 61040 (Va. Cir. Ct. April 23, 2012) (order approving the use of predictive coding for discovery).

24. *Id.*

25. *Kleen Products LLC v. Packaging Corporation of America*, No. 2010-CV-05711 (N.D.Ill.)

26. *Id.*

27. *Id.*

28. Transcript of Evidentiary Hearing, *Kleen Products LLC*, No. 2010-CV-05711 (N.D.Ill. May 17, 2012).

29. *Id.*

30. *Da Silva Moore* at 25.

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