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How the Predictive Coding Process Will Affect Paralegals

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Special to the Legal

Technology-assisted review and the predictive coding process have transformed the discovery process of litigation in ways that were inconceivable even a decade ago. In fact, if you look up the definitions of technology-assisted review and predictive coding in Black's Law Dictionary, Garner's Dictionary of Legal Usage, or the Wolters Kluwer Bouvier Law Dictionary, you will be forced to look elsewhere. This lack of definition does not minimize the importance of these concepts, but instead reflects the speed at which technology is changing.

Predictive coding, a form of technology-assisted review, is at the forefront of legal technology. It is a computer program that assists in document review through the use of an algorithm. The program "learns" how to review for responsiveness based on a legal professional's review of a sample set of documents. The predictive coding software then reviews the sample set of documents and applies what it has learned from this set to the entire document collection. The review team continues to refine the results through the predictive-coding software system until the software identifies likely relevant and responsive documents. The program's ability to increase accuracy and to reduce the time spent on human review and the cost associated with the review process are considerable.



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There are many vendors that provide technology-assisted review software, such as Kroll Ontrack, Equivio, Recommind, Servient and Symantec. The degree of success in using this software during the review process will depend upon the lawyer's knowledge and familiarity with the case, as well as the experience of the litigation support team or provider. Many debates are taking place in blogs, at conferences and in articles about whether or not technology-assisted review software will eliminate humans from the document review process entirely, but this seems unlikely. There will always be a need for human interaction in the technology-assisted review life cycle.

CASE LAW INVOLVING TECHNOLOGY-ASSISTED REVIEW

While there are currently no published Pennsylvania cases involving technology-assisted review, the reception from other jurisdictions has been positive. In the benchmark decision of

Da Silva Moore v. Publicis Groupe, No. 11-CV-1279, (S.D.N.Y., Feb. 24, 2012), U.S. Magistrate Judge Andrew Peck stated in his opinion 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."

Likewise, in the case of *Global Aerospace v. Landow Aviation*, No. CL 61040 (Va. Cir. Ct., Loudoun County, Apr. 23, 2012), Judge James Chamblin of the Twentieth Judicial Circuit Court of Virginia ordered technology-assisted review after the defendants moved for a protective order due to the large volume of data requested by plaintiffs.

Interestingly, in *Kleen Products v. Packaging Corp. of America*, No. 10-C-5711 (N.D. Ill. Sept. 28, 2012), the plaintiffs criticized the defendants' use of a Boolean search method to identify responsive documents. The plaintiffs argued that the Boolean keyword process is "'subject to the inadequacies and flaws inherent when keywords are used to identify responsive documents.' They requested that the defendants use 'content-based advanced analytics (CBAA) technology analytics to conduct natural language, subject matter searches.' ... The defendants defended their use of Boolean keywords, arguing that their testing and validations processes 'will have a degree of accuracy that

meets or surpasses not only industry standards but also the likely accuracy of any other available methodology.” The parties stipulated to and the court ordered that: The plaintiffs will not “argue or contend that defendants should be required to use or apply CBAA or ‘predictive coding’ methodology” and technology that were proposed by plaintiffs. The interesting thing about *Kleen* is that if the document culling and review had not been started years ago and been nearly complete, the subsequent order may have been very different.

In a recent case, *Gabriel Technologies v. Qualcomm*, No. 08cv1992 (S.D. Cal., Feb. 1, 2013), the plaintiffs filed claims for misappropriation of trade secrets and breach of contract. The defendants requested reimbursement of about \$2.8 million for computer-assisted, algorithm-driven document review. The defendants’ explanation for the resulting fees was that “over the course of the litigation, the defendants collected almost 12,000,000 records — mostly in the form of electronically stored information (ESI). Rather than manually reviewing the huge volume of resultant records, the defendants paid H5 to employ its proprietary technology to sort these records into responsive and non-responsive documents.” The court found that the defendants’ decision to undertake an efficient and less time-consuming method of document review to be reasonable and awarded the requested fees to the defendants.

THE ROLE OF PARALEGALS

In order to stay on top of rapidly evolving legal technology software and be a more valuable paralegal, it is important to learn and understand the tools involving the e-discovery process. According to Kamal Gad-el-Hak, a product manager with Krill

Ontrack, law firms and attorneys are relying on technology now more than ever and some are struggling to stay up to speed on the most current trends and standards. Litigation technology professionals, often coming from information technology and paralegal backgrounds, have created the perfect storm of professionals who are able and willing to fill the gap between technology and the legal profession with substantive e-discovery expertise. Gad-el-Hak also notes that the attorneys are relying on the technology to reduce the cost of discovery and increase the effectiveness of the human review process. The paralegals are just one of the various tools they can leverage, whether to help bridge the technology and legal process gap, or as part of the overall review process.

To further their utility as part of a client’s legal team, paralegals should understand the technology-assisted review process and its attendant concerns and possibilities.

Along these lines, Thomas F. Goldman, author of various legal publications (particularly *Technology in the Law Office*, third edition), sees the e-discovery process as a team effort that includes properly trained and knowledgeable paralegals, litigation support paralegals and lawyers. However, the ultimate responsibility is on the lawyer, who has an ethical obligation to supervise.

Dale M. Drury, vice president of AlphaLit, explained that paralegals need to take initiative, learn about

e-discovery, learn about the technology, embrace the technology, and be willing to take a leadership role in using the technology. In large firms, litigation paralegals (and case managers) need to be working closely with the litigation support department as a liaison between the technical people in litigation support and the legal team. Paralegals are in the perfect position to learn about predictive coding and bring it to the attorneys. In medium and smaller firms, paralegals won’t be able to rely on a litigation support department, so they need to become the true experts and guide the decision-making for using this technology and also manage the project to successful completion. This is not easy and the paralegals will need to rely on outside service providers. The challenges are many, but the opportunities are there for paralegals to become even more important to the discovery process.

To further their utility as part of a client’s legal team, paralegals should understand the technology-assisted review process and its attendant concerns and possibilities. Paralegals looking to enhance their skills in this regard should read e-discovery blogs, articles (such as Sedona Conference publications), and attend e-discovery seminars and certificate programs. There is tremendous possibility in this growing and evolving field. •