
August 3, 2016

Federal Magistrate Judge Declines to Force a Responding Party to Use Predictive Coding

On August 1, 2016, Magistrate Judge Andrew Peck of the Southern District of New York released a decision reaffirming the presumption that the party responding to discovery requests is best positioned to determine the steps they should take to preserve and produce relevant information.

In *Hyles v. New York City*, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016), Judge Peck wrote on an issue that has become his trademark – the use of predictive coding in e-discovery. Predictive coding, referred to by Judge Peck as "TAR" (technology-assisted review), is the use of computer algorithms and machine learning to complement document review by lawyers. Judge Peck has released well-known decisions on the topic, including *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012) and *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125 (S.D.N.Y. 2015), and has been a vocal advocate of expanding the use of predictive coding.

In this matter, the plaintiff sued the City of New York, asserting claims of discrimination and a hostile work environment. The case was referred to Judge Peck due to a significant discovery dispute – the plaintiff wanted the City to use predictive coding to review its own documents and the City declined. Before Judge Peck was the question "whether the requesting party can have the Court force the responding party to use TAR[.]" *Hyles* at *2, as part of responding to a discovery request. Judge Peck, a self-described "judicial advocate for the use of TAR in appropriate cases[.]" *id.* at *3, determined that "[t]he short answer is a decisive 'NO.'" *Id.* at *1.

Judge Peck's decision also includes a number of interesting observations about modern e-discovery practice. First, Judge Peck relied on Principle 6 of The Sedona Conference's *The Sedona Principles: Second Edition*, which states, "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." *Id.* at *3. This is still true, potentially more so in today's e-discovery climate in which responding parties are preserving, collecting, reviewing, and producing massive volumes of data, often from complex systems. As Judge Peck writes in his decision, referencing Sedona Principle 6, "the City as the responding party is best situated to decide how to search for and produce ESI responsive to Hyles' document requests." *Id.*

Second, while there is some belief, including by Judge Peck, that the technology used in predictive coding is "cheaper, more efficient and superior to keyword searching," *id.* at *2, and such advanced technologies have become generally accepted as a permitted part of e-discovery, it is still a process to be used in

appropriate situations as one of many available tools for document review and it is not "unreasonable for a party to decline to use[.]" *Id.* at *3.

Third, while it is critical for parties to cooperate as part of the e-discovery process, cooperation may not be used as a sword. As Judge Peck writes, "I am a signatory to and strong supporter of the Sedona Conference Cooperation Proclamation, and I believe that parties should cooperate in discovery The December 1, 2015 Advisory Committee Notes to amended Fed. R. Civ. P. 1 emphasized the need for cooperation. Cooperation principles, however, do not give the requesting party, or the Court, the power to force cooperation or to force the responding party to use TAR." *Id.* at *2.

Fourth, perfection is not required as part of the document review and production process. As Judge Peck notes, "[w]hile Hyles may well be correct that production using keywords may not be as complete as it would be if TAR were used, the standard is not perfection, or using the 'best' tool, but whether the search results are reasonable and proportional." *Id.* at *3 (internal citations omitted).

While parties should always focus on ensuring quality, efficiency, and defensibility in e-discovery and consider what technologies and processes are best suited to the document review process, *Hyles* is an important decision that reaffirms the long held notion that responding parties are best situated to determine how to respond to discovery requests.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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