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Courts Endorse New Data-Sorting Formulas For E-Discovery

By **Allison Grande**

Law360, New York (July 3, 2013, 1:40 PM ET) -- In the first half of 2013, federal courts gave law firms and their clients some much-needed guidance on e-discovery, issuing several rulings that clarify how they should use an emerging method for sorting through reams of data and rebuking those that offer lazy replies to discovery requests.

With the advent of technology that allows companies to store more data than ever before, attorneys and others involved in complex litigation are increasingly turning to emerging document review methods such as predictive coding, or computer-assisted review, which sorts through massive amounts of client data for specific keywords, and orders and tags the data based on its relevance to them.

"Predictive coding may significantly cut defense costs, particularly in patent and other IP cases involving millions of potentially responsive electronic documents," Haynes and Boone LLP attorney Jason Gonder told Law360. "While we have yet to see a critical mass using predictive coding — keyword searching still dominates — it is the next e-discovery frontier."

During the past six months, courts have done their part to pave the way for the widespread adoption of the technology, issuing several decisions that built on the groundbreaking 2012 decision by a Southern District of New York magistrate judge in Da Silva Moore v. Publicis Groupe, which concluded that predictive coding is "an acceptable way" to search for relevant information in litigation.

Predictive Coding Costs Recoverable

Qualcomm Inc. recouped their predictive coding expenses on Feb. 1, when a California federal judge awarded the company $2.8 million to cover the costs of its computer-assisted, algorithm-driven document review in an intellectual property case brought by Gabriel Technologies Corp.

The predictive coding costs were part of Qualcomm's request for more than $13 million in attorneys' fees against Gabriel Technologies. The Feb. 1 order concluded that Gabriel owed $12.4 million in attorneys' fees, including the nearly $3 million for "a document review algorithm" generated by outside vendor H5, based on the plaintiff's bad faith pursuit of baseless patent and trade secret misappropriation claims.

"This case hits on ... the enormous burdens that the discovery phase places on parties, particularly when attorney-client privilege and confidential proprietary information are involved, and a court's broad discretion and inherent powers," said Fernando M. Pinguelo, chairman of the cybersecurity and data

protection and crisis management groups at Scarinci Hollenbeck LLC. "This case demonstrates, among other things, that e-discovery's 'hot' trend toward technology assisted review just jumped another hurdle toward the mainstream."

Gabriel Technologies is represented by Kenneth M. Fitzgerald, Robert G. Knaier and Keith M. Cochran of Chapin Fitzgerald LLP.

Qualcomm is represented by Steven M. Strauss, John S. Kyle, Timothy S. Teter and Jeffrey S. Karr of Cooley LLP.

The case is Gabriel Technologies Corp. v. Qualcomm Inc. et al., case number 3:08-cv-01992, in the U.S. District Court for the Southern District of California.

Objections to Mixed Discovery Methods Fall Flat

In multidistrict litigation over allegedly defective hip implant products, an Indiana federal judge gave a boost to emerging document review methods on April 18, when he ruled that Biomet Inc.'s combined use of keyword searches and predictive coding satisfied its discovery obligations under the Federal Rules of Civil Procedure.

The ruling rejected the plaintiffs' arguments that Biomet's decision to reduce the document population from 19.5 million to 2.5 million with keyword searches before performing predictive coding diluted the value of the predictive coding process, and concluded that ordering the company to go back to square one and institute predictive coding as the plaintiffs had requested would impose an unreasonable additional cost on the company.

"The most important thing in this case is that the court asked the right question," Norton Rose Fulbright LLP e-discovery and information governance practice group co-head David Kessler said. "The question is not whether predictive coding is better than using search terms or if Biomet could have done a better job or if there was a better way; the question is whether Biomet fulfilled its discovery obligations."

The plaintiffs are represented by Robert T. Dassow of Hovde Dassow & Deets LLC, Thomas R. Anapol of Anapol Schwartz Weiss Cohan Feldman & Smalley PC and W. Mark Lanier of The Lanier Law Firm.

Biomet is represented by John Winter of Patterson Belknap Webb & Tyler LLP and John D. LaDue and Erin Linder Hanig of LaDue Curran & Kuehn LLC.

The case is In re: Biomet M2a Magnum Hip Implant Products Liability Litigation, case number 3:12-md-02391, in the U.S. District Court for the Northern District of Indiana.

Cost-Saving Benefits of Predictive Coding Endorsed

A Southern District of New York judge relied in part on the availability of predictive coding in a March 15 decision rejecting Patton Boggs LLP's objection to a subpoena that Chevron Corp. served on it in a racketeering suit related to the firm's representation of the plaintiffs in an Ecaudorean pollution suit that resulted in an $18.2 billion judgment against Chevron.

Patton Boggs had argued that the discovery request was unduly burdensome, but, citing the Moore case from last year, the judge characterized predictive coding as a method "that credible sources say has

been demonstrated to result in more accurate searches at a fraction of the cost of human reviewers" and reiterated an earlier suggestion that the technology could reduce the burden and effort required to comply with the subpoena.

The decision "suggests that predictive coding has sort of made its way now through the consciousness," from starting off as an unknown technology to emerging as a method that is "just so common and acceptable to courts" that judges think about its impact on e-discovery without being prompted, according to Foley & Lardner LLP senior counsel Akiva Cohen.

"If that sort of shift in judicial thinking has already been made, then that's going to have a profound impact on the way litigants conduct discovery going forward because there will be no defensibility question for predictive coding anymore, and that really changes the costs and the analysis and who you need to have running your case if you want to do predictive coding right," he said.

Chevron is represented by Randy M. Mastro, Andrea E. Neuman, Scott A. Edelman, Kristen L. Hendricks and William E. Thomas of Gibson Dunn.

The defendants are represented by John W. Keker and Elliot R. Peters of Keker & Van Nest LLP, Julio C. Gomez Attorney at Law LLC and Craig Smyser, Larry R. Veselka and Tyler G. Doyle of Smyser Kaplan & Veselka LLP.

The case is Chevron Corp. v. Donzinger et al., case number 2:11-cv-00691, in the U.S. District Court for the Southern District of New York.

Predictive Coding Isn't for Everyone

The Delaware Chancery Court reconsidered its prior support for predictive coding on May 6, when it modified its October 2012 ruling that EORHB Inc. and HOA Holdings LLC should conduct document review in their dispute over the purchase of a Hooters restaurant chain with the assistance of predictive coding.

The revised order cleared the way for EORHB to conduct document review using "traditional methods" rather than predictive coding, based on the parties' agreement that, based on the "low volume of documents" expected to be produced in discovery by EORHB, "the cost of using predictive coding assistance would likely be outweighed by any practical benefit of its use."

The ruling shows "predictive coding is not suitable for every case," Gonder said. "However, parties should discuss it early and often and lawyers should become familiar with how it works, as well as its costs and benefits."

The plaintiffs are represented by Richard P. Rollo and John Mark Zeberkiewicz of Richards Layton & Finger PA.

The defendants are represented by A. Thompson Bayliss of Abrams & Bayliss LLP and Douglas H. Hallward-Driemeier, Christopher G. Green and Amy D. Roy of Ropes & Gray LLP.

The case is EORHB Inc. et al. v. HOA Holdings LLC et al., case number 7409-VCL, in the Court of Chancery of the State of Delaware.

Boilerplate Discovery Responses Don't Fly

On Jan. 4, a District of Delaware magistrate judge awarded electronic discovery sanctions jointly and severally against Branhaven LLC and its counsel for failing to produce documents in a timely manner and in the proper format, among other violations of Federal Rules of Civil Procedures 26(g), in a dispute brought against Beeftek Inc. over certain licensing and distribution agreements.

Branhaven "essentially misled defendants" by agreeing to make responsive documents available at a mutually agreeable time when it had yet to conduct a review of the two email servers and laptops where these documents were stored, and displayed a "casualness at best and recklessness at worst" in its treatment of its discovery duties, according to the magistrate judge's sanctions order.

"What the decision shows is that courts are really getting fed up with drive-by discovery," Kessler said. "They're seeing people responding to discovery requests without much thought and then saying that they will work it out later, which leads to disputes that eventually wind up in front of the court."

Branhaven is represented by Steven N. Leitess and Jennifer S. Lubinski of Leitess Friedberg PC.

Beeftek is represented by Hugh J. Marbury, T. Brendan Kennedy and Benjamin D. Schuman of DLA Piper.

The case is Branhaven LLC v. Beeftek Inc., case number 1:11-cv-02334, in the U.S. District Court for the District of Maryland.

--Editing by John Quinn and Katherine Rautenberg.
