

*August 8, 2012, as
revised 12/3/12
and 5/13/13*



Technology Assisted Review & Predictive Coding Overview



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Outline/ Agenda



- **I. Computer Engineering**
- **II. New Judicial Expectations**
- **III. Ex. of Available Technology**
- **IV. TAR Uses?**

I. Computer Engineering



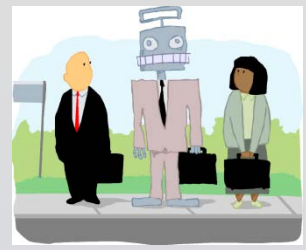
- **Technology Assisted Review (TAR) =**
 - binary . . . synonyms, taxonomy, etc.
 - like targeted-ads and spam-filters
 - relevant vs. irrelevant, a/k/a ON/OFF:
 - Responsive: Yes or No
 - Privileged: Yes or No
 - maybe including relevance rankings

VS. . . .

I. Computer/Tech Perspective *(c't'd)*



- **Predictive Coding =**
 - machine-tagging each item with one or more sub-topic (“issue”) codes
 - arguably based on a fallacy, *i.e.*, a relatively small sample set assembled based on perfect human review



I. Computer/Tech Perspective *(c't'd)*

- **“Recall” , “Precision” and “Accuracy” to measure retrieval effectiveness:**

$$\textit{Recall} = \frac{\textit{Number of Documents Predicted to Be Responsive}}{\textit{Total Number of Actually Responsive Documents}}$$

$$\textit{Precision} = \frac{\textit{Number of Actually Responsive Documents}}{\textit{Number of Documents Predicted to Be Responsive}}$$

$$F_1 = 2 \cdot \frac{\textit{Precision} \cdot \textit{Recall}}{\textit{Precision} + \textit{Recall}}$$

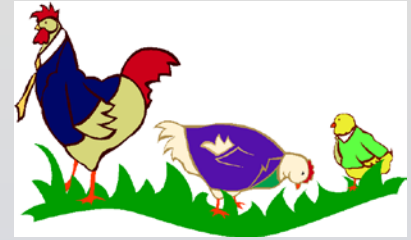
- [eDJ article](#) (citing Declaration in *Moore SDNY case*)
- **TO LEARN MORE: Text REtrieval Conference (TREC) <<http://trec.nist.gov>>**

II. New Judicial Expectations

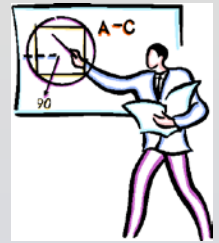


- **Five publicized cases in 2012**
- **First - OVERVIEW of Peck (SDNY) case:**
 - **Putative class-action vs. big advertising firm and U.S. sub**
 - **Wage/hour & gender-discrimination**
 - **Phase 1 of pre-certification discovery [class ultimately certified in June]**
 - **Disagreement as to Protocol for computer-assisted research**
 - **Court-ordered Protocol as to same**

II. Judge Peck in *Moore* (c't'd)



- ***Da Silva Moore v. Publicis Group and MSLGROUP*, , --- F.Supp.2d ----, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012) (Peck, M.J.), approved by 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (Carter J.)**
 - ***See also:***
 - 12/2/11 hearing transcript
 - 1/4/12 hearing transcript
 - 2/8/12 hearing transcript
 - 2/22/12 stipulated Order (as amended by Peck, w./ Exhs.)



II. *Moore Holdings/ Findings/Guidance*

- **Predictive Coding Protocol re: generating “seed set” to train [Recommind] software via:**
 - **π s’ input (keywords) and review**
 - **≥ 7 iterative rounds to stabilize training**
 - **For each of 7 rounds & final QC random sample . . . Δ to disclose ALL eDocs at which looked, including non-privileged & irrelevant**



II. Moore Findings *(c't'd)*

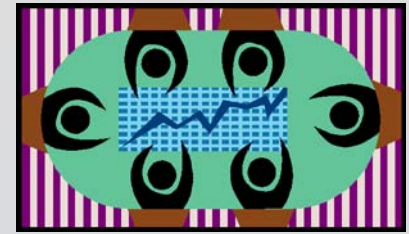
- **TAR better than linear manual review, per:**
 - Grossman/Cormack [RJOLT article](#)
 - Roitblatt, et al. [JASIST article](#)
- **Key words = “Go Fish”**
- **Here:**
 - 1) Parties agreed
 - 2) Vast amounts of ESI
 - 3) TAR’s superiority
 - 4) FRCP 26(b)(2)(c) proportionality [& FRCP 1]
 - 5) Transparent process proposed by Δ



II. Moore Findings *(c't'd)*

- **Peck's open issues**
 - one side wants TAR & other side doesn't (citing pending N.D. Ill. case = *Kleen*)
 - transparency/work-product
- **Peck's "Lessons":**
 - 1) when court can approve stopping review/produce . . .
 - 2) staging is a way to control costs
 - 3) counsel for each side to be more proactive re: custodians and sources
 - 4) "bring your geek to court"

II. Moore Findings *(c't'd)*



- Judge Carter ultimately held:
 - Peck's rulings well-reasoned and considered potential advantages and pitfalls
 - Protocol has standards for measuring reliability of process and builds in levels of participation by π 's
 - Reliability arguments premature
 - No "review tool . . . guarantees perfection"
- *DaSilva* π 's kept challenging Protocol & sought Peck's recusal, claiming "appearance of partiality": [8/1/11 speech](#); & [10/1/11 article](#)
 - Judge Carter *denied* Recusal/Disqualification Motion in [2012 WL 2218729](#) (June 15, 2012)

future?

II. *Moore* Impacts? *(c't'd)*

- **Need to get a senior lawyer involved EARLY**
- **Will Peck's type of protocol *reduce* costs?**
- **Work-product vs. "cooperation"**

II. New Judicial Expectations *(c't'd)*



■ Four Other Cases:

- *Global Aerospace v. Landow Aviation*, [Order Approving the Use of Predictive Coding for Discovery](#) (Va. Cir. Ct. Loudoun Cty. 4/23/12) [despite π s' objections; see [\$\Delta\$ s' Brief](#) (4/9/12)]
- [Kleen Prods. LLC v. Packaging Corp. of Am.](#), Joint Status Conference Report No. 3 (N.D. Ill. 5/17/12) (attaching Transcripts' excerpts)
- [In re Actos \(Pioglitazone\) Prods. Liability Lit.](#), 6:11-md-2299 (W.D. La 7/27/12)
- [EORHB, Inc., et al v. HOA Holdings, LLC](#), C.A. No. 7409-VCL (Del. Ch. 10/15/12)



II. New Judicial Expectations *(c't'd)*

- **And Another Case in 2013:**
 - *In re Biomet M2a Magnum Hip Implant Products Liability Litig.* (MDL 2391), 2013 WL 1729682 (N.D. Ind. 4/18/13)
 - *Indiana Federal Court OKs Jump-Start on Predictive Coding*, LTN (4/22/13)
("[i]n feisty case, District Court Judge Robert Miller . . . OKs defense team's jump-start on predictive coding.")
- **Excellent T-A-R Glossary [here](#).**

II. TO LEARN MORE *(c't'd)*



- **Some articles:**
 - Greg Buckles, *Tech Take Aways in Judge Peck's Da Silva Opinion*, eDiscovery J. (3/7/12)
 - Matthew Nelson, *Kleen Products Predictive Coding Update – Judge Nolan: "I am a believer of principle 6 of Sedona,"* e-discovery 2.0 (6/5/12)
 - Greg Buckles, *Kleen Products vs Da Silva Moore: Measurement vs Method*, eDiscovery J. (4/16/12)
 - Brownstone, *Collaborative Navigation of the Stormy e-Discovery Seas*, 10 Rich. J.L. & Tech. 53 (2004)

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III. Example of Available TAR Technology



- **Advanced features of Lateral Data Viewpoint:**
 - **“Concept Analyzer”**
 - **“Email Redundancy”**
 - **“Near Duplicate ID”**
 - **“Relationship Analyzer”**
 - **“Suggestive Coding”**
 - **“Assisted Review” (TAR)**

- ***See also Predictive Coding Expertise Saves Client over \$1 million in Attorney Review Fees (June 20, 2012)***

IV. TAR Uses ?



- **Outbound and Inbound data**
- **QC/QA**
- **Privilege**

Conclusion/Questions

Let's be careful out there . . .



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THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.