

## The Electronic Eye

WILL COMPUTERS REPLACE LAWYERS IN DOCUMENT REVIEW?

BY VICTOR LI

AUTOMATED E-DISCOVERY is suddenly hot. Just witness the frenzy of sniping among competitors when Recommind, Inc., announced in June that it had received a patent for the predictive coding automated e-discovery process used in its product, Accelerate On-Demand. Rivals Equivio Inc. and OrcaTec LLC immediately fired back that the Recommind patent only covered a narrow process and that their products fell outside the scope of Recommind's claims.

"Recommind's exclusivity claim was like saying you received a patent for potato peeling, when in fact all you got was a patent for a particular part of a pretty potato peeler for peeling pink potatoes," wrote Warwick Sharp, Equivio's vice president of marketing and business development, on his online blog.

The rivalry underscores the growing number of options for law firms looking to use technology in e-discovery to reduce billable hours. Computers have already proven that they can beat world champion chess players and dominate *Jeopardy!*. Now they're threatening to take over e-discovery—with potentially huge implications for law firms and their clients. "Literally a year ago, no one was interested in [predictive coding]," says Arnaud Viviers, chief executive officer of OrcaTec. But now several Am Law 100 firms have adopted automated e-discovery: Squire, Sanders & Dempsey is using Equivio's Equivio>Relevance product, and Wilmer Cutler Pickering Hale and Dorr; Morgan, Lewis & Bockius;

and Fulbright & Jaworski are using Recommind's Accelerate. (Viviers declined to name the law firms using OrcaTec's Document Decisioning Suite.)

Prior e-discovery relied on humans to do keyword searches. With automated e-discovery using predictive coding, attorneys who are familiar with a case identify a set of documents they consider relevant and program the computer to search for similar ones. The number of documents in the sample set determines how in-depth the review process will be. Software then selects similar documents, analyzing them on attributes other than keywords—including context, word frequency, and other qualities—and gives each document a relevancy score as compared to the sample set. Attorneys can choose whether to have the software examine all documents, or only a statistically significant sample size, which saves additional time and money.

Typically, attorneys then conduct quality control by reviewing the documents chosen as relevant by the computer.

THE BIGGEST REASON FOR adopting predictive coding is to save money. "The costs of e-discovery are skyrocketing. It's time to use this technology, because if we don't get a handle on [the costs], we'll lose the ability to do what we're needed for," says David Kessler, cohead of Fulbright & Jaworski's e-discovery and information governance practice, who says that Recommind's Accelerate with predictive coding is the firm's "core review tool." Stephanie "Tess" Blair, leader of Morgan, Lewis's eData practice, agrees, pointing out that the data volumes have gone up exponentially every year since 2004. "There comes a point where no amount of human effort will get you through that data in an efficient way," says Blair, who esti-



mates that three-quarters of her firm's e-discovery goes through the predictive coding process.

Steven Berrent, managing director of WilmerHale Discovery-Solutions, says that in one matter where the firm used predictive coding, it saved the client about 52 percent of the cost of a traditional review. He adds: "But [humans] still had to review 30,000 documents, which is not insignificant." Most of the new matters that come into the firm involving document review are being put into Axcelerate, he says.

Kessler says that predictive coding is helpful for early case assessment because it prioritizes the review process. Relevant documents are produced earlier, allowing lawyers to better evaluate the strengths of their cases. "Predictive coding doesn't change the documents that are produced,

nor does it change my interaction with the documents or the scope of what I review," says Kessler.

But is predictive coding as thorough as human review? Scott Kane, who cochairs Squire Sanders's e-discovery and data management team, says that when his firm first started using Equivio's predictive coding software, he used the program to re-review a document collection already reviewed by attorneys, and was pleased by how similar the results were. "Equivio was just as accurate and allowed us to review the data population in a small fraction of the time, leading to significantly fewer billable hours," Kane says.

Still, there wasn't an exact match between the two sets of docu-

ments. Kane says that the software picked up some documents that the humans had missed, and missed some documents flagged by human review. "The judicial standard for e-discovery is not perfection," he says. "It's whether the process is reasonable and likely to identify responsive documents. It's a false hypothesis that human review is the gold standard, and there are a number of studies that show that's not the case."

Proponents of automated e-discovery claim that their methods are more accurate than keyword searches. Equivio's Sharp says that keywords only retrieve about 20-30 percent of the relevant material, while producing a lot of irrelevant material. "[Our] soft-

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ware looks at the document as a set of attributes,” he says. “Words, groups of words, proximity between words—it can be other attributes like frequency of digits in documents, word frequency, etc. [The software] looks at a whole slew of attributes and analyzes those attributes to identify which documents in the pile are relevant.”

Nevertheless, there are still concerns within the legal world about predictive coding. “Any company can do a nice demonstration, but you have to test it for yourself to see if it works,” says David Cohen, head of Reed Smith’s e-discovery and records practice group, whose firm hasn’t adopted predictive coding. Although he doesn’t rule it out, Cohen says that he believes that human review still provides the best quality. “Software is impor-

tant, but people think it’s magic and lose focus on the process,” says Cohen.

**THERE’S ALSO ZERO CASE** law on predictive coding. However, proponents of predictive coding such as Kessler, Berrent, and Blair say that they aren’t worried about getting a harsh reception from the courts. Several judges, especially federal magistrate judge Andrew Peck, a well-known e-discovery maven, have spoken in public to encourage lawyers to embrace computer-assisted review without waiting for a case to tell them to do so.

Peck says he finds it ironic that lawyers remain reliant on keyword searches, especially since the decisions they cite on the legality of keyword searching don’t actually endorse it. Instead the decisions, which include Peck’s

2009 opinion in *William A. Gross Constr. Assocs., Inc. v. American Mfrs. Mut. Ins. Co.*, tend to highlight the limits of keywords and what happens when both sides can’t agree on what terms to use.

“From everything I’ve heard and read, predictive coding, or computer-assisted research, seems to work better than manual review. It’s cheaper and better than keyword review. It seems like a no-brainer,” says Peck.

For many lawyers, the real risk might seem to be losing their jobs to a machine. Given the ever-increasing volume of e-discovery, however, that seems unlikely.

“I think that there will always be the need for human reviewers,” says Wilmer’s Berrent. “Even if you’re only reviewing 10 percent of 1 million, that’s still 100,000 documents that need to be reviewed.” ■

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