

PREDICTIVE CODING

Cambridge Place Investment Management, Inc. v. Morgan Stanley & Co., Inc., et al., a case pending in the Business Litigation Session of the Massachusetts Superior Court, is one of the many cases filed nationwide arising out of the sale of residential mortgage backed securities. In *Cambridge Place*, Bingham represented J.P. Morgan Securities LLC in motion practice concerning the use of predictive coding for document review and production. The motion resulted in the first known decision by a Massachusetts state court judge approving the use of predictive coding in document production. Following is an interview of Andrew Gallo, a partner in Bingham's FIRE Lit. practice group, who lead the Bingham team that handled this matter.

Q: First of all, can you briefly explain what predictive coding is?

A: To put it simply, predictive coding is a method of technology assisted review that involves using a computer to rank or prioritize electronic documents based upon their likelihood of being responsive to a particular set of document requests. The technology is similar to that used by popular websites, like Amazon, that can offer you selections based upon what you've searched for or purchased in the past.

Q: How does it work?

A: The process works by doing a manual review for responsiveness of a small set (often called a "seed set") of randomly selected documents or other electronically stored information from the documents or information to be reviewed. The documents manually marked responsive and non-responsive in the seed set are then analyzed by a computer program that can identify the unique characteristics of the documents marked as responsive (including frequency and placement of words and phrases). Once adequately trained, the computer can use information gleaned from the seed set to rank a much larger set of documents based upon likelihood of responsiveness. From there, the producing party can determine what to do with the ESI based upon the rankings. One may want to automatically produce those documents that the computer has ranked as most likely to be responsive, to manually review for production those documents in the middle range, and to discard, without further review, those documents the computer has deemed least likely to be responsive. The idea is to minimize the number of documents that require human review.

Q: How was the use of predictive coding introduced in the Cambridge Place matter?

A: We initially reached out informally to plaintiff's counsel to inform them that we intended to use predictive coding for purposes of the review and production of ESI. Plaintiff's counsel objected to its use, instead preferring that we do a manual, linear review of ESI following the application of to be agreed upon search terms. Because we were the only one of the dozen or so defendants in the case proposing to use predictive coding, and given that we were unaware of any court in Massachusetts sanctioning its use, we decided to bring a motion requesting that the court approve the use of predictive coding in advance of its application.

Q: Why did you decide to use predictive coding in this matter?

A: We had identified dozens of custodians with millions of emails that would be within the review set given the scope of plaintiff's document requests and the relevant time for the review. We were also under a tight deadline of just under 6 months to get the review completed. We believed that predictive coding would be useful not only to make the review process faster and more efficient but also to prioritize the most relevant documents for review and production early in the process.

Q: What was the focus of the motion practice?

A: Each side filed multiple rounds of briefs. We had the burden of explaining the technology to the court, as predictive coding is not a tool that has been used extensively, if at all, in Massachusetts state court cases. Each side cited various scholarly articles discussing predictive coding and the plusses and minuses of the technology. We had the benefit of a handful of published decisions from cases outside of Massachusetts where predictive coding was specifically approved for use in document production.

Q: How did the court rule?

A: The court ultimately approved the use of the technology but required the parties to agree upon a protocol that would govern how it was used and what information would be shared. This result was not unexpected as the majority of the published decisions permitting the use of predictive coding focus on cooperation and transparency in using the technology and required the use of protocols.

Q: Did the parties ultimately negotiate a protocol?

A: Yes, but there were certain critical issues that the parties were unable to agree upon initially. These included whether our client would be allowed to use search terms in the first instance to narrow the review set prior to the application of predictive coding. Another issue was whether the plaintiff would be allowed to review documents from the Seed Set marked as non-responsive to plaintiff's document requests. There was also general disagreement as to what methodologies would be used to test the accuracy of the review and the statistical information that would be provided concerning those tests.

Q: How was the impasse on those issues resolved?

A: After we could not initially reach agreement, there was another round of briefing with the court. Each side submitted its own version of an acceptable protocol and supported its submission with affidavits from statisticians, employed by discovery vendors, who are experts in the use of predictive coding. Given the court's relative lack of familiarity with the issues, it ordered the parties to continue negotiations — specifically including the discovery experts — in an effort to reach a resolution. Ultimately, we reached a compromise.

Q: What happened after the protocol was agreed?

A: The case settled shortly after we agreed to a final protocol, so we did not have an opportunity to fully implement its provisions. That being said, the experience of going through the motion practice and negotiating the protocol was invaluable for future forays into predictive coding. Also, the fact that we got approval from a Massachusetts state court to use the technology is nice precedent.

Q: What lessons did you take away from this experience?

A: First and foremost, it is important to be reasonably transparent with opposing counsel and the court if you intend to use predictive coding. Given that the technology will be new to many litigants and judges, you do not want to take anyone by surprise after the fact of having used it. Many courts have already accepted the technology, and the weight of the scholarly commentary is that the technology is more efficient and can be more accurate than a linear, manual review. Accordingly, litigants should be able to make a good case for the use of predictive coding, particularly where large amounts of ESI are involved.

Second, in negotiating any protocol, you should know going in what issues are important to your client and where you have room to give. Have an idea of where you would like to end up in the negotiation and a plan about how to get there. During the negotiation do not get caught up on issues that are immaterial to the process or statistically insignificant.

Finally, have a good vendor that can provide you with expert advice both on how the technology works and on statistical issues that may arise with respect to how the technology is implemented. Bingham's internal eDiscovery and Practice Technology group has experience with multiple vendors and can act as an invaluable resource in this regard. Experts, including a statistician, will be critical in helping you negotiate the protocol and, as was true in our case, you may need testimony from the expert during any motion practice.

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