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FOREWORD

Judge Andrew Jay Peck[*]

It has been almost seven years since the 2006 Amendments to the Federal Rules of Civil Procedure dealing with discovery of electronically stored information ("ESI") took effect; yet, the courts and our "customers," i.e., lawyers, businesses, and other litigants, continue to struggle with electronic discovery ("e-discovery").

When I first began speaking before bar associations and other groups about e-discovery in anticipation of the 2006 Amendments, I assumed everyone would figure out how to manage e-discovery by the end of 2007. For better or worse, however, I believe I will still be on the speaking circuit in this area even beyond my retirement from the bench in about four years. There are two basic reasons for this. First, even if the Rules stay the same,[1] technology continually changes, solving discovery concerns while raising new issues. For example, after the 2006

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Judge Peck's key e-discovery opinions: Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y. 2012) (Peck, Mag. J.) (addressing predictive coding), *aff'd*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012); William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134 (S.D.N.Y. 2009) (Peck, Mag. J.) (discussing keyword search); *In re* NTL, Inc. Sec. Litig., 244 F.R.D. 179 (S.D.N.Y. 2007) (Peck, Mag. J.) (addressing spoliation and adverse inference instruction), *aff'd sub nom.* Gordon Partners v. Blumenthal, No. 02 Civ. 7377(LAK), 2007 WL 1518632 (S.D.N.Y. May 17, 2007); Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ. 2120(LMM)(AJP), 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995) (Peck, Mag. J.) (discussing the discoverability of electronically stored information).

[1] Proposed Rule amendments to further address electronic discovery and other discovery issues have just been published for public comment, with an earliest possible effective date of December 2015. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE (2013), *available at* http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf.

Amendments, some of the earliest judicial decisions dealt with whether "metadata" had to be produced in discovery; it is now clear that certain metadata must be produced.[2] Another early issue that arose was how to deal with backup tapes, but that is less likely to arise today where the backup function is provided by a "cloud" (which itself has raised new discovery issues).

Technology continues to generate more potential sources of discoverable ESI. E-mail still remains the principle focus of e-discovery, but more businesses are using instant messaging and communicating via Facebook and other social media outlets. Dropbox and other file sharing services also commonly are used. Some companies even have systems that e-mail a transcript of a voicemail message to the employee along with an audio file, thus preserving for discovery "candid" oral comments. While in the past (and still today) people have been more candid in e-mail than they would have been in a formal document, today they are even more candid in voicemail messages (e.g., Alec Baldwin's famous tirade to his daughter). Another major technological change is the use of Facebook, Twitter, and other social media which did not exist or were not as prevalent in 2006. To a certain extent, social media levels the playing field in "asymmetric" litigation, such as employment discrimination or personal injury cases, in which the defendant traditionally has most of the discoverable information and the plaintiff has little. Instead of hiring a private detective to prove that an allegedly injured plaintiff, who claims not to be able to get out of bed, is actually out skiing, a defendant now simply could discover that information from the plaintiff's Facebook page (although this has generated scores of federal and state court decisions, some of which are contradictory).

The second reason that we will need to continue to educate the bar (and the bench) is one of competence. While every litigator should be e-discovery competent—a subject addressed by Monica McCarroll's article—the sad fact is that many lawyers are not. Those of us within what is sometimes called the "Sedona Bubble" are just a small fraction of the bar. While Judge Morgan's and Ralph Losey's articles address the issue of predictive coding, the fact remains that far too many lawyers are content with poorly crafted keyword searches and the printing of e-mails

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[2] *Compare* Mich. First Credit Union v. Cumis Ins. Soc'y, Inc., No. 05-cv-74423, 2007 WL 4098213, at *3 (E.D. Mich Nov. 16, 2007) (holding that the defendant "shall not be required to produce its electronically stored documents in 'native format' or to produce metadata"), *and In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 1:05-md-01720(JG)(JO), 2007 WL 121426, at *5 (E.D.N.Y. Jan. 12, 2007) (exempting plaintiffs from re-producing ESI with metadata), *with* Aguilar v. Immigration & Customs Enforcement Div.of the U.S. Dep't of Homeland Sec., 255, F.R.D. 350, 355 (S.D.N.Y. 2008) (Maas, Mag. J.) (stating that metadata "is discoverable if it is relevant to the claim or defense of any party and is not privileged").

to paper. For example, two years ago I was asked to do a one hour e-discovery talk during the two-day annual Kentucky labor and employment law conference. At the speakers' dinner, I was introduced to one of the premier plaintiff's discrimination lawyers in the state. I asked him how he dealt with e-discovery, and was surprised when he said he did not; if he thought he needed e-mails in a case, he asked the other side to print them to paper. I suggested that if he requested them in electronic form, he could better search and organize them, but he responded that he saw no need to do so because he had a large conference table in his office and could sort them into piles. Needless to say, I changed my planned presentation to be more "E-Discovery 101" (or, as one booklet calls it, "E-Discovery for Dummies").

This is not just a "small town" problem. In the Southern District of New York, we have a pilot program for "complex" cases (patent, class actions, etc.) requiring counsel to complete a "Joint Electronic Discovery Submission" form. The form includes a representation of "Competence" that states: "Counsel certify that they are sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf."[3] I also use the form in other commercial cases that appear likely to involve extensive e-discovery. The first two forms submitted to me in late 2012, however, contained the certification of competence, but stated that the parties had conferred, cooperated, and agreed to produce emails by printing them to paper. In whatever jurisdiction you practice, checklists and guidelines like the SDNY form and the District of Kansas Guidelines discussed in Judge Waxse's article, encourage cooperation and provide useful guidance that can improve e-discovery competence.

The amount of digital information that is created everyday is staggering, and many companies preserve almost everything. The old ways of handling paper discovery are insufficient (and too costly) to handle today's vastly greater volumes of e-discovery. While new technologies and ESI sources have added to the volume and cost of discovery, technology also offers solutions. Perhaps the biggest change is the move from keywords to predictive coding, which is also known as technology assisted review ("TAR"), or computer assisted review ("CAR"). As noted in my *William A. Gross* decision (quoted in Monica McCarroll's article in this issue), if counsel use keywords, they must carefully design

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[3] JUDICIAL IMPROVEMENTS COMMITTEE, PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES 18, 19 (2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Tab%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Litigation.pdf.

and test proposed keyword searches.[4] A search for "dog" will not retrieve ESI that refers to "hound" (whether of Baskervilles fame or otherwise). Keyword searches are literal and miss vast amounts of responsive ESI while also returning huge volumes of false positives (i.e., ESI containing the search term but not responsive to the document requests). Predictive coding allows better and cheaper searches.

I advocated for the use of predictive coding in appropriate cases in my article *Search, Forward*, published in the October 2011 issue of Law Technology News.[5] In early 2012, I wrote the first judicial decision approving the use of predictive coding in appropriate cases.[6] In the almost two years since my decision, other judges have approved the use of predictive coding, recognizing that it can improve the percentage of responsive documents produced while reducing the volume of non-responsive material that has to be reviewed, resulting in large cost savings. Based on his article, I am pleased to add Judge Morgan to the list of judges who have "approved" the use of predictive coding. It may be premature to say the law is clear based on only a dozen or so reported decisions, but in all the cases where the producing party sought to use predictive coding, the court allowed it to do so, subject to the requesting party's ability to challenge the results if it could show there were any deficiencies.[7] On the other hand, courts have denied applications by the requesting party to force the producing party to use predictive coding (perhaps because such motions were made after the producing party had spent large sums of money using keywords).[8] Both Ralph Losey's and Judge Morgan's articles contain informative discussions about predictive coding. I predict (pun intended) an increased use of predictive coding as more counsel and clients become comfortable with the process. After all, predictive coding software is derived from software we are all comfortable with—the spam filters in our email systems.

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[4] *William A. Gross Constr. Assocs.*, 256 F.R.D. at 136.

[5] Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches Be Replaced by Computer-Assisted Coding?*, L. TECH. NEWS, Oct. 2011, at 25, 29.

[6] Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 183 n.1, 193 (S.D.N.Y. 2012) (Peck, Mag. J.), *aff'd*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

[7] *See, e.g.*, *In re* Actos (Pioglitazone) Prods. Liab. Litig., No. 6:11-md-2299, 2012 WL 7861249, at *1, *3–4 (W.D. La. July 27, 2012); EORHB, Inc. v. HOA Holdings LLC, No. 7409-VCL, 2013 WL 1960621 (Del. Ch. May 6, 2013); Order Approving the Use of Predictive Coding for Discovery, Global Aerospace Inc. v. Landow Aviation, L.P., No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012).

[8] *See, e.g.*, *In re* Biomet M2A Magnum Hip Implant Prods. Liab. Litig., No. 3:12-MD-2391, 2013 WL 1729682 (N.D. Ind. Apr. 18, 2013) (refusing to force the producing party to use predictive coding when it had already done a keyword search because the additional burden and expense outweighed the benefits); Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *5, *20 (N.D. Ill. Sept. 28, 2012) (addressing and denying plaintiffs' motion to compel use of predictive coding).

One other new "tool" deserves emphasis: Federal Rule of Evidence 502(d). It amazes me how few lawyers utilize, or even are familiar with, that Rule. In virtually every production, no matter what search method is used or how carefully a manual privilege review is conducted, some privileged material will be inadvertently produced. A Rule 502(d) order is your "get out of jail free" card if that occurs. Rule 502(d) provides: "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."[9]

There can be no legitimate basis for a party (even with little ESI itself) to object to a Rule 502(d) order; in any event, the Court can enter a Rule 502(d) order over objection or even *sua sponte*. I have said at conferences, and I will reiterate here, it is almost malpractice not to seek a Rule 502(d) order.

Almost seven years after the December 2006 Rule Amendments, the biggest problem remains the unfortunate fact that only a minority of counsel is e-discovery competent, while the majority still struggle. The principles and information contained in the articles in this issue—which include discussions of competency, cooperation, transparency, and proportionality, and advocate for the use of predictive coding—will bring more lawyers into the "Sedona Bubble" of e-discovery competence.

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9 FED. R. EVID. 502(d).