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Use of Technology Assisted Review Finds Support in Northern District of Illinois

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In a recent order from *Livingston v. City of Chicago*, Magistrate Judge Young Kim of the Northern District of Illinois provided useful guidance to litigants in the use of technology assisted review, or TAR. Importantly, Judge Kim affirmed what is known as "Sedona Principle Six," the notion that a responding party is in the best position to design and evaluate procedures for preserving and producing its own electronically stored information, or ESI.

The high cost of communications review remains a pressing challenge in complex civil cases. TAR is a critical tool for managing these costs; by allowing attorneys to focus on documents that are most likely to be responsive, it reduces the total number of documents that must be reviewed and, as a result, substantially decreases the time and money spent on document review. Like many new ediscovery technologies, however, TAR has raised a host of novel legal issues that courts must address. One of the principles in their framework, Sedona Principle Six, provides that "responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information"—in other words, responding parties should be afforded some latitude in determining the best methodology for an ESI review because they are best positioned to understand their own documents.

The *Livingston* decision relies on that principle to resolve a dispute regarding the use of TAR to conduct a responsiveness review. There, the parties used agreed-upon search terms to isolate a universe of 192,000 emails, or 1.3 million pages of documents, which the City of Chicago was obligated to review. But the parties could not agree on a methodology for identifying responsive documents within this universe.

Plaintiffs sought to compel the City to run additional search terms on the emails in order to locate responsive documents, and then perform a manual review for privilege. The City contended that TAR would be a more efficient and accurate tool for assessing responsiveness and privilege. To support its decision to use TAR review, the City was transparent with the Court regarding its proposed TAR protocol. As the City explained, it planned to use Relativity's Active Learning (AL) feature, a "type of TAR software that uses learning algorithms to prioritize documents for its attorneys to review manually," as its review tool. Slip Op. at 2.

The City planned to utilize AL as follows:

- It would apply search parameters to create an initial review set, which would be reviewed manually by an attorney.
- The AL application would then utilize data points collected through attorney review of documents in the review set to organize the documents in the overall queue in a more efficient order. As reviewing attorneys made coding decisions, the AL tool would continuously update and reprioritize documents containing contextually similar content to the content of a document coded as responsive.
- At a certain point, the AL tool would determine that the remaining documents are not, in fact, responsive, allowing the City's attorneys to conclude the review without the need to review a large volume of nonresponsive communications.
- To ensure that no responsive documents were inadvertently excluded from production, the City proposed a number of sampling and quality control checks, including "AL's quality control applications (such as Elusion testing), graphing results, family reconciliation, and a 'cut off score.'"

As the City emphasized, the AL tool would not make its own coding decisions. It would simply modify the queue of responsive documents in response to responsiveness determinations made by reviewing attorneys, allowing them to efficiently prioritize the documents most likely to be responsive.

Plaintiffs objected to the use of TAR on several grounds, including that it would exclude from manual review a large number of documents as potentially nonresponsive. Judge Kim rejected that argument. Relying in part on Sedona Principle Six, Judge Kim held that the City, as the responding party, is best situated to decide how to search for and produce its own emails. That, according to Judge Kim, means that the City is in the best position to determine whether TAR is an appropriate methodology, and, if so, to devise appropriate sampling and quality control checks to ensure no responsive documents are missed.

By affirming Sedona Principle Six, this opinion is an important development in the emerging body of TAR case law. Permitting responding parties to devise TAR methodologies appropriate to their ESI—particularly where, as here, they provide detailed descriptions of their planned review protocol—may increase parties' willingness to employ TAR, with its cost-saving benefits, in their own review.

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