New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 264—NO. 68
TUESDAY, OCTOBER 6, 2020

FEDERAL E-DISCOVERY

# Court: Responding Party Can Determine Its Own Search and Review Methodology

By **Christopher Boehning**
And **Daniel J. Toal**

In resolving ongoing discovery conflicts between quarreling parties, a court recently provided helpful guidance on the use of technology-assisted review as part of e-discovery. Of particular note, the court endorsed the position taken by many courts and commentators that responding parties are best positioned to determine the processes and technology they use to search and produce their own electronically stored information.

SHUTTERSTOCK

## 'Livingston v. City of Chicago'

In *Livingston v. City of Chicago*, 2020 WL 5253848 (N.D. Ill. Sept. 3, 2020), after a series of discovery disagreements, plaintiffs in the employment discrimination dispute sought to compel defendant city of Chicago to use a specific methodology for search, review, and production of electronically stored information (ESI).

In its November 2019 order, the court had granted in part the plaintiffs' prior motion regarding ESI collection and review, directing the City "to retain an outside vendor to export emails ... and then apply an initial keyword search using plaintiffs' search terms ... Depending on the number of hits after the initial keyword search using plaintiffs' proposal, the parties may use more finite terms to reduce the number of hits." However, the court had denied the plaintiffs' request "that once the initial universe of emails had been identified through keyword searches, the city should produce the same without any further review."

The city subsequently collected its emails and ran the keyword searches, which yielded "192,000 unique emails or a total of approximately 1.3 million

CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Ross M. Gotler, e-discovery counsel, and Lidia M. Kekis, e-discovery attorney, assisted in the preparation of this article.*

pages of documents." When the city informed the court that it planned to identify relevant responsive emails for production through the use of technology-assisted review (TAR), plaintiffs objected, claiming that TAR would not only exclude responsive emails, but its use would be inconsistent with the court's prior order. Plaintiffs then filed the instant motion, seeking "an order directing the city to use agreed-upon search terms to identify responsive documents and then perform a manual review for privilege[, as] authorized by the Nov. 20, 2019, order" or, alternatively, the adoption of plaintiffs' own TAR protocol, which would require that the city "use TAR on the entire ESI collection with an agreed-upon coding system for responsiveness."

### Technology-Assisted Review: You Can Call Me AL

In response to plaintiffs' motion, the city argued that the court's prior order did not restrict the search methodologies it could employ and "that the federal rules governing discovery impose no obligation on the responding party to conduct its responsiveness review in a manner dictated by the requesting party." With the plaintiffs challenging the city's planned use of TAR, the court advised that it was "necessary to clarify the type of TAR at issue and explain its key features[;]" here, the defendant sought "to use Relativity's Active Learning (AL), a type of TAR software that uses learning algorithms to prioritize documents for its attorneys to review manually."

While acknowledging the plaintiffs' concern that TAR "allows parties to set aside and never review large portions of an ESI collection[,]" the court further addressed AL and explained that "there comes a point when, based on the reviewers' coding decisions, the software establishes that the remaining documents in the queue are likely to be nonresponsive. It is then incumbent upon the reviewer to conduct sampling and other quality control tests to ensure that the remaining unreviewed documents are indeed irrelevant. The reviewer may of course forge ahead with his or her review, but typically documents identified as nonresponsive are neither reviewed nor produced. In short, the reviewer has discretion to decide when no further manual review is necessary."

> The court endorsed the position taken by many courts and commentators that responding parties are best positioned to determine the processes and technology they use to search and produce their own electronically stored information.

The court added that the city intends to rely on AL to assist its lawyers in the review of the 1.3 million pages of documents that hit on the plaintiffs' search terms, "to review only documents that meet a particular standard of relevance as determined by AL, and to discount documents falling below that standard" as well as "use AL's quality control applications (such as Elusion testing), graphing results, family reconciliation, and a 'cut off score,' to ensure that an attorney reviews all potentially responsive documents."

### The Reasonable Inquiry Standard, Proportionality, Uncertainty And Sedona Principle 6

As to plaintiffs' motion for compliance, the court "agree[d] with the city that the November 2019 order did not set forth the review methodology that the city must use to identify responsive ESI." And, as to plaintiffs' request that the city produce all 1.3 million pages, the court indicated that the defendant could do what it wanted, whether "dump all 1.3 million pages of documents on the plaintiffs with an entry of a Rule 502(d) order ... [or] produce only those documents that are responsive and relevant."

The court also flagged that, aside from the prior order, plaintiffs failed to cite any "binding legal authority to support their request to force the city to use refined keyword searches to identify responsive ESI." It found fault with plaintiffs' argument that pre-TAR keyword culling would "eliminate large amounts of potentially

relevant ESI." In reaching this decision, the court noted the relatively low responsiveness rate of the ESI collection in the case. Indeed, plaintiffs' own search terms hit on only 15% of the full ESI collection. As a result, the court found that while there was a "possibility that using TAR at the onset might reveal more responsive documents overall, based on the number of documents that were discarded using the plaintiffs' proposed search terms, pre-TAR culling will achieve the best possible review in this case. In other words, it satisfies the reasonable inquiry standard and is proportional to the needs of this case under the federal rules."

Dispensing with plaintiffs' argument that the city and its attorney reviewers might "improperly train the TAR tool by making incorrect responsiveness determinations or prematurely ending the review[,]" the court made observations about the nature of discovery document review rarely seen in such decisions. It wrote that "these concerns are present no matter which methodology is employed. In traditional manual review for example, reviewers may have different interpretations of whether a particular document is responsive. Even a single reviewer may make a different relevancy determination based on his or her knowledge about the case at the time of the determination. In short, uncertainty in determining responsiveness is not unique to TAR." Going further, the court found plaintiffs' concerns were negated due to the TAR quality control tools the city intended to use as part of the document review process.

Moreover, the court agreed with the defendant "that as the responding party it is best situated to decide how to search for and produce emails responsive to plaintiffs' discovery requests." This concept is often cited, as in this case, with reference to The Sedona Conference's influential Principle 6, which states, "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own [ESI]."

The court found plaintiffs' concerns were negated due to the TAR quality control tools the city intended to use as part of the document review process.

The court therefore found the city's planned search and review methodology sufficient. In particular, the court rejected plaintiffs' argument "that the city must collaborate with them to establish a review protocol and validation process," as a position that had "no foothold in the federal rules governing discovery." Indeed, the court found that forcing the city to use TAR on the full ESI collection would be "wasteful and unduly burdensome." The court therefore denied plaintiffs' motion.

### Lessons from 'Livingston'

While some may fault it for embracing TAR too readily, the judge in *Livingston* made important observations about the reality of modern e-discovery and document review. As set forth in prior cases and restated in *Livingston*, the responding party has a right to conduct a document review to produce documents that are responsive and nonprivileged (and to seek a Rule 502(d) order) and the standard for assessing the defensibility of discovery efforts is reasonableness, not perfection. Further, as part of those efforts, and while noting that cooperation throughout discovery is critical, absent a court order to the contrary, the responding party is generally granted deference in choosing how to search for and review documents—including what technology to use and how to use it.