

The Sedona Conference WG1 TAR Case Law Draft Primer, Second Edition

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QUESTIONS FOR DISCUSSION AT 2022 MIDYEAR MEETING
THE SEDONA CONFERENCE TAR CASE LAW PRIMER (SECOND EDITION)

The TAR Case Law Primer Drafting Team welcomes comments concerning the draft Second Edition Primer. In particular, the Team seeks feedback regarding the following:

- Does Section IV - Sedona Principle 6 belong in this Primer? Should it be a stand-alone Section or consolidated with other discussions?
- Should the scope of Section VI.C of TAR Workflow Considerations (Manual Review Following TAR Review) be narrowed to manual privilege review following TAR review? If not, should the Manual Review Following Use of Search Terms be shortened?
- Should Section VII - TAR Protocols be its own section even though it may overlap with other sections? In the event it should, should it be moved up earlier in the Primer?
- Should *In re* Broiler Chicken Antitrust Litigation be mentioned in the Primer and, if so, in what context? Currently, it is referenced in footnote 3 as an example of additional guidance on TAR uses and methodology within stipulated TAR protocols. In the event that the current placement is acceptable, should the footnote be expanded to have more caveats?
- Is the Appendix Quotation useful? Is there any concern that practitioners may use it as a shortcut to citing cases without reading them?

THE SEDONA CONFERENCE TAR CASE LAW PRIMER (SECOND EDITION) *

*A Project of The Sedona Conference Working Group on
Electronic Document Retention and Production (WG1)*

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I. INTRODUCTION

Courts have generally accepted the use of Technology Assisted Review (TAR)¹ as a means to search for ESI responsive to requests for production. They routinely cite its benefits and encourage its use. With more frequent implementation of TAR and greater familiarity with workflows such as continuous active learning,² courts in recent years are handling increasingly complex TAR disputes compared to when The Sedona Conference published the first edition of the *TAR Case Law Primer* (“*First Edition Primer*”).³ The *First Edition Primer* addressed the early cases, providing courts and parties with authority on the common TAR issues of that time.

In the five years since, case law has further developed to address more complex issues, such as TAR methodologies, metrics, and validation. This updated *Primer* (“*Second Edition Primer*,” or “*Primer*”) updates and replaces the *First Edition Primer*. This *Primer* is intended to assist courts and practitioners in staying abreast of this evolving area of law and technology. It spotlights key trends and issues relating to TAR through the end of 2021, identifies supporting case law, and summarizes the current state of the law, and the open questions that remain.

The *Primer* addresses caselaw deciding disputes relating to TAR and does not address cases in which parties used TAR successfully without challenge. Beyond the scope of the *Primer*, parties may find additional guidance on TAR uses and methodology within stipulated TAR protocols.³

1. TAR is a “process for prioritizing or coding a collection of electronically stored information using a computerized system that harnesses human judgments of subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining documents in the collection.” The Sedona Conference, *The Sedona Conference Glossary: E-Discovery and Digital Information Management*, Fifth Edition, 21 SEDONA CONF. J. 263, 379 (2020) (definition adopted from Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review with Foreword by John M. Facciola*, U.S. Magistrate Judge, 7 FED. CTS. L. REV. 1, 32 (2013)). The terms “predictive coding” and “computer-assisted review” are sometimes used interchangeably with TAR to describe this process. This *Primer* will use the term “TAR,” unless quoting a case that uses another term.

2. See Section II for a more detailed explanation of continuous active learning workflows.

3. See, e.g., *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, 2018 WL 1146371 (N.D. Ill. 2018)(stipulated ESI Order establishing that parties must be “reasonably transparent” about the universe

Section II addresses the history of judicial acceptance of TAR, discussing key cases for TAR acceptance and trends and providing context for modern TAR jurisprudence. Beginning with *Da Silva Moore v. Publicis Groupe* in 2012,⁴ courts quickly began to recognize the potential value of TAR to increase efficiencies in the discovery process. As parties' use of TAR also increased and evolved, courts more recently have addressed issues relating to TAR workflows, such as "Continuous Active Learning" (CAL, sometimes also called TAR 2.0).

Section III discusses how courts have accepted the use of TAR when parties have agreed to its use, and how they have held parties to their prior agreements about the use of TAR. Courts, however, mostly decline to require a responding party to use TAR when it objects to doing so.

Section IV discusses how, in accordance with Sedona Principle 6,⁵ courts generally defer to the responding party's choice of methods for collecting, reviewing, and producing its own ESI, including the use of TAR. However, courts have also acknowledged that a party's unilateral decisions about its use of TAR, even if permissible under Principle 6 standards, may still create disadvantages if the responding party raises a proportionality issue, or if the requesting party raises a production deficiency. Also, while Principle 6 is the general rule, courts may not apply it when the responding party's methodology deviates from a stipulated ESI protocol.

Section V examines the level of transparency and disclosure that courts expect in connection with TAR. This section starts by discussing generally whether the use of TAR should be disclosed. It then addresses examples of disclosure—whether (and how) information about seed, training, or validation sets should be shared; should TAR metrics and methodologies be divulged, including during Rule 30(b)(6) depositions; and situations in which null sets and non-responsive documents should be produced.

Section VI addresses issues related to TAR workflows, including search term culling, recall thresholds, ESI orders, and TAR protocols.

of documents collected and searching methodology, and providing a detailed validation plan). While stipulated TAR protocols are a useful tool, this Primer is not intended to endorse any specific provisions of stipulated protocols.

4. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 183 (S.D.N.Y. 2012).

5. The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Principle 6, 19 Sedona Conf. J. 1, 118 (2018).

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The final four sections of this *Primer* examine the application of proportionality in connection with TAR (Section VII); instances where courts have considered cost shifting (Section VIII); TAR cases from foreign jurisdictions (Section IX); and considerations for using TAR in governmental investigations (Section X).

The Appendix contains selected quotations from the TAR caselaw. In these instances, the courts' own words may convey their decisions more clearly than any summaries can.

II. HISTORY OF JUDICIAL ACCEPTANCE OF TAR

A. *From Da Silva Moore in 2012 to Rio Tinto in 2015*

In 2012, *Da Silva Moore v. Publicis Groupe* became the first published opinion recognizing TAR as an “acceptable way to search for relevant ESI in appropriate cases.”⁶ The decision paved the way for practitioners to use TAR with confidence as a defensible discovery tool and for additional courts to reinforce that principle. As the use of TAR became more common, courts have consistently opined that the acceptability of its use is well-established. Moving beyond the issue of *whether* a party may use TAR, courts have confronted issues on *how* parties are using TAR. Meanwhile, the ways parties use TAR have evolved in ways that impact the issues in TAR cases, with a notable example of TAR 1.0 and TAR 2.0 workflows.

The court in *Da Silva Moore* approved a party-negotiated TAR protocol, which had set forth the manner of selection and review of the seed and training document sets,⁷ and addressed those aspects of the protocol about which the parties disagreed.⁸ The court stated that “[w]hat the Bar should take away from this Opinion is that [TAR] is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.”⁹ The court stated, however, “[t]hat does not mean computer-assisted review must be used in all cases, or that the exact ESI protocol approved here will be appropriate in all future cases that utilize computer-assisted review.”¹⁰

The court suggested that “the best approach” when a party wishes to use TAR is to “follow the Sedona Cooperation Proclamation model” and “[a]dvice opposing counsel

6. *Da Silva Moore*, 287 F.R.D. at 183.

7. *Da Silva Moore* involved TAR 1.0, which refers to the use of Simple Active Learning (“SAL”) and Simple Passive Learning (“SPL”) protocols, both of which are single-time training protocols. See below for further discussion. The seed set is “[a] manually compiled set of documents used to train an analytic index for the purposes of performing some form of technologically-assisted review.” The Sedona Conference, *The Sedona Conference Glossary: E-Discovery and Digital Information Management*, Fourth Edition, 15 SEDONA CONF. J. 305 (2014).

8. See *Da Silva Moore*, 287 F.R.D. at 182–83, 190–93.

9. *Id.* at 193.

10. *Id.*

that you plan to use [TAR] and seek agreement.”¹¹ If the parties cannot agree, the court stated that they should “consider whether to either abandon [TAR] for that case or go to the court for advance approval.”¹²

With respect to court approval, the court stated that it “recognizes that [TAR] is not a magic, Staples-Easy-Button, solution appropriate for all cases.”¹³ While the technology should be used where appropriate, courts should consider the particular protocol that is proposed. “[I]t is not a case of machine replacing humans: it is the process used and the interaction of man and machine that the courts need to examine.”¹⁴ The court emphasized: “While this Court recognizes that [TAR] is not perfect, the Federal Rules of Civil Procedure do not require perfection.”¹⁵

The court concluded that defendant’s use of TAR was appropriate, considering the following factors: (1) the parties’ agreement to use TAR (even though they disagreed on certain aspects of its implementation); (2) “the vast amount of ESI to be reviewed (over three million documents);” (3) “the superiority of [TAR] to the available alternatives (i.e., linear manual review or keyword searches);” (4) “the need for cost effectiveness and proportionality” under Federal Rule of Civil Procedure 26(b)(2)(C); and (5) “the transparent process proposed by [defendant].”¹⁶

Following *Da Silva Moore*’s recognition that TAR was an acceptable search methodology, courts began encouraging the use of TAR or commenting on its potential to reduce cost and burden.¹⁷ Some courts in these early cases encouraged (and even ordered) the parties to consider TAR.¹⁸ And some cases, without engaging in substantive discussions,

11. *Id.* at 184 (quoting Andrew Peck, *Search, Forward*, L. TECH. NEWS, Oct. 11, 2011, at 29).

12. *Id.*

13. *Id.* at 189.

14. *Id.*

15. *Id.* at 192.

16. *Id.* at 191–92.

17. *See, e.g.*, *Nat’l Day Laborer Organizing Network v. U.S. Immigr. & Customs Enf’t Agency*, 877 F. Supp. 2d 87, 111 (S.D.N.Y. 2012)(TAR could address keyword search shortcomings); *In re Domestic Drywall Antitrust Litigation*, 300 F.R.D. 228, 233 (E.D. Pa. 2014)(use of technology could lead to greater efficiency and more beneficial results); *Malone v. Kantner Ingredients, Inc.*, Case No. 4:12-CV-3190, 2015 WL 1470334, at *3 n.7 (D. Neb. Mar. 31, 2015).

18. *See, e.g.*, *FDIC v. Bowden*, No. 4:13-cv-245, 2014 WL 2548137, at *13 (S.D. Ga. June 6, 2014)(ordering parties to consider the use of TAR); *Aurora Coop. Elevator Co. v. Aventine Renewable Energy*, No. 4:12-

noted the parties' use of TAR in reviewing productions of opposing parties or nonparties.¹⁹ In these earliest cases, before the acceptance of TAR was well established, cooperation and agreement by parties on both sides initially weighed heavily into courts' approval of TAR.²⁰

Courts soon began referring to the use of TAR as a well accepted methodology. The court in *Dynamo Holdings I*,²¹ for example, rejected the requesting party's assertion that TAR is an "unproved technology," noting that "the understanding of e-discovery and electronic media has advanced significantly in the last few years, thus making predictive coding more acceptable in the technology industry than it may have previously been."²² The court added that "[i]n fact, we understand that the technology industry now consid-

CV-230, 2015 WL 10550240, at *1 (D. Neb. Mar. 10, 2014)(court ordered the parties to "consult with a computer forensic expert to create search protocols, including predictive coding as needed, for a computerized review of the parties' electronic records"); *Johnson v. Ford Motor Co.*, No. 3:13-cv-06529, 2015 WL 4137707 (S.D. W.Va. July 8, 2015)(court ordered the parties to "involve their IT experts and to consider other methods of searching such as predictive coding").

19. *New Mexico State Investment Council v. Bland*, No. D-101-cv-2011-01434, 2014 WL 772860 (D.N.M. Feb. 12, 2014); *Arnett v. Bank of America*, No. 3:11-cv-1372, 2014 WL 4672458 (D. Or. Sept. 18, 2014).

20. See *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. at 193 (parties had negotiated and agreed on a protocol); *Kleen Products LLC v. Packaging Corporation of America*, No. 10-cv-5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012)(ordering parties to cooperate where a requesting party sought to require responding party to use TAR); *Federal Housing Finance Agency v. JPMorgan Chase & Co.*, No. 1:11-cv-06188-DLC (S.D.N.Y. July 24, 2012) (transcript at 9, 14) (court appeared to encourage disclosure of the training sets by stating that for the TAR process to work, "it needs transparency and cooperation of counsel"); *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 129 (S.D.N.Y. 2015)(noting the level of transparency required for certain workflows was not established but did not need to be decided because the parties had agreed to a protocol addressing the issue).

21. *Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue*, 143 T.C. No. 9, 2014 WL 4636526 (Sept. 17, 2014).

22. *Id.* at *5 (citing *Moore v. Publicis Groupe*, 287 F.R.D. 182, N.2 (S.D.N.Y. 2012), adopted sub nom. *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012). See also *Progressive Cas. Ins. Co v. Delaney*, No. 2:11-cv-00678-LRH-PAL, 2014 WL 3563468, at *8 (D. Nev. July 18, 2014) (providing citations of articles which indicate that TAR has proved to be an accurate way to comply with a discovery request for ESI and that studies show that it is more accurate than human review or keyword searches); *F.D.I.C. v. Bowden*, No. CV413-245, 2014 WL 2548137, at *13 (S.D. Ga. June 6, 2014) (directing that the parties consider the use of TAR).

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ers predictive coding to be widely accepted for limiting e-discovery to relevant documents and effecting discovery of ESI without an undue burden.” Many courts have also commented on TAR as a means to reduce cost and burden.²³

In *Rio Tinto PLC v. Vale S.A.*, decided in 2015, the court observed that “[i]n the three years since *Da Silva Moore*, the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it.”²⁴ The court pointed to a long list of cases in which courts had approved the responding party’s use of TAR during that three-year period of 2012-2015.²⁵

B. From TAR 1.0 to CAL, TAR 2.0

As TAR has become more widely used, TAR technologies, uses, and workflows also have evolved. A particularly notable technological and workflow development has been TAR workflows using “Continuous Active Learning” (CAL, also referred to as TAR 2.0), which has affected issues that may arise between parties and resulting caselaw. The terms

23. See, e.g., *Harris v. Subcontracting Concepts, LLC*, Case No. 1:12-MC-82, 2013 WL 951336, at *5 (S.D.N.Y. Mar. 11, 2013) (TAR can dramatically reduce time and cost of production); see also *Chevron Corporation v. Donziger*, Case No. 11-Civ-0691, 2013 WL 1087236, at *32 n.255 (S.D.N.Y. Mar. 15, 2013); *Zhulinska v. Niyazov Law Group, P.C.*, No. 21-CV-1348 (CBA), 2021 WL 5281115, at *3 (E.D.N.Y. Nov. 12, 2021); *Republic of the Gambia v. Facebook, Inc.*, CV 20-MC-36-JEB-ZMF, 2021 WL 4304851 (D.D.C. Sept. 22, 2021), vacated in part sub nom.

24. *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127, 129 (S.D.N.Y. 2015) (“One point must be stressed—it is inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion practice than the savings from using TAR for review”).

25. See *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, 143 T.C. No. 9, 2014 WL 4636526 (Sept. 17, 2014); *Green v. Am. Modern Home Ins. Co.*, No. 14-CV-04074, 2014 WL 6668422 at *1 (W.D.Ark. Nov. 24, 2014); *Aurora Coop. Elevator Co. v. Aventine Renewable Energy—Aurora W. LLC*, No. 12 Civ. 0230, Dkt. No. 147 (D.Neb. Mar. 10, 2014); *Edwards v. Nat’l Milk Producers Fed’n*, No. 11 Civ. 4766, Dkt. No. 154: Joint Stip. & Order (N.D.Cal. Apr. 16, 2013); *Bridgestone Am., Inc. v. IBM Corp.*, No. 13-1196, 2014 WL 4923014 (M.D.Tenn. July 22, 2014); *Fed Hous. Fin. Agency v. HSBC N.A. Holdings, Inc.*, 11 Civ. 6189, 2014 WL 584300 at *3 (S.D.N.Y. Feb. 14, 2014); *EORHB, Inc. v. HOA Holdings LLC*, No. Civ. A. 7409, 2013 WL 1960621 (Del.Ch. May 6, 2013) 4; *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-MD-2299, 2012 WL 7861249 (W.D.La. July 27, 2012) (Stip. & Case Mgmt. Order); *Global Aerospace Inc. v. Landow Aviation LP*, No. CL 61040, 2012 WL 1431215 (Va.Cir. Ct. Apr. 23, 2012).

“TAR 1.0” and “TAR 2.0,” which have their genesis as marketing terms, refer to contrasting TAR workflow methodologies. The earlier of the TAR workflows, often referred to as TAR 1.0, refers to the use of discrete training sets along with either Simple Active Learning (“SAL”) or Simple Passive Learning (“SPL”) algorithms.²⁶ By contrast, TAR 2.0 refers to Continuous Active Learning (“CAL”), which is a continuous training algorithm, where generally, every document the TAR model identifies as most likely to be responsive, out of the unreviewed documents, is prioritized for review by human reviewers, and their coding further trains the algorithm.²⁷

CAL, or TAR 2.0, was first discussed in *Rio Tinto*.²⁸ There, the court discussed the evolution of TAR technologies and workflows and how those changes impacted parties’ discussions about TAR, including, for example, some requesting parties’ concerns about the composition of seed and training sets. The *Rio Tinto* court noted studies showing that with TAR tools employing continuous active learning, the seed set may have little or no impact, and that as a practical matter, there may be no discrete training sets to share.²⁹

III. COURT INVOLVEMENT IN TAR

Court involvement relating to TAR most commonly occurs when courts enter TAR protocols that the parties have negotiated and stipulated. Court involvement, however, may also occur when a responding party seeks court approval of its unilateral decision to use TAR or the methodology it intends to use. It also may occur when a requesting party seeks to compel a responding party to use TAR or implement a specific TAR protocol. Although a rare occurrence, courts may sua sponte, order the use of TAR.

26. Gordon V. Cormack & Maura R. Grossman, *Evaluation of Machine Learning Protocols for Technology-Assisted Review in Electronic Discovery*, in Proceedings of the 37th Int’l ACM SIGIR Conf. on Research & Dev. in Info. Retrieval (SIGIR ‘14), at 153–62 (ACM New York, N.Y. 2014), <http://dx.doi.org/10.1145/2600428.2609601> (“SIGIR study”).

27. While this generally describes a TAR 2 review for responsiveness, variations to this workflow exist.

28. *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125 (S.D.N.Y. 2015); see also Section II above, discussing TAR 1.0 and 2.0.

29. *Id.* at 128 (citing SIGIR study, above at n. 24).

A. *Permission Not Needed for Responding Party to Use TAR*

Generally, as discussed further in Section IV below, a responding party may not only determine how and whether to use TAR, it may do so without seeking the court's permission.³⁰ This was the holding, for example, in *Bliss v. CoreCivic*,³¹ where the court held that it did not need to preapprove or be involved in the responding party's use of TAR. The parties raised their disagreements about the Second Stipulated Discovery Plan and Scheduling Order, including whether the Court needed to approve the use of TAR. The Court reasoned that unless technological assistance "is either purposefully or inherently failing to identify proportional, relevant, and responsive ESI, the Court need not be involved."³²

Similarly, in *Entrata, Inc. v. Yardi Systems, Inc.*,³³ in denying plaintiff's motion to compel the complete methodology and results of TAR, the court noted that it was "'black letter law' that courts will permit a producing party to utilize TAR" and that plaintiff "was not required to seek approval from the Magistrate Court to use TAR where there was never an agreement to utilize a different search methodology."³⁴

In *Dynamo Holdings I*, the court opined that responding parties need not seek court permission to use TAR, and that the requesting party can object after production if the production is not complete. It explained responding parties are generally free to decide their own process for discovery without needing judicial approval.³⁵

30. As discussed in Section VII, the exception to this general practice is where parties deviate from the negotiated ESI protocol in implementing TAR.

31. *Bliss v. CoreCivic*, No. 2-18-CV-01280-JAD-EJY, 2021 WL 930692 (D. Nev. Feb. 9, 2021).

32. *Id.* at *1.

33. *Entrata, Inc. v. Yardi Systems, Inc.*, No. 2:15-CV-00102, 2018 WL 5470454 (D. Utah Oct. 29, 2018). Further discussion of *Entrata* is in Section IV.B.1. below.

34. *Id.*

35. *Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue*, 143 T.C. No. 9, 2014 WL 4636526 (Sept. 17, 2014) ("the Court is not normally in the business of dictating to parties the process that they should use when responding to discovery. If our focus were on paper discovery, we would not (for example) be dictating to a party the manner in which it should review documents for responsiveness or privilege, such as whether that review should be done by a paralegal, a junior attorney, or a senior attorney").

B. Whether Court May Compel TAR

While courts generally find that TAR is an acceptable methodology, courts generally decline to *require* responding parties to use TAR.

1. Courts Declining to Order TAR

*Kleen Products LLC v. Packaging Corporation of America*³⁶ was one of the first cases in which a court considered imposing TAR. There plaintiffs sought to require defendants to use TAR, rather than (according to plaintiffs) the “antiquated Boolean search of [defendants’] self-selected custodians’ ESI and certain central files.”³⁷ Defendants objected because they had already used key-word searches and viewed TAR as a “new, untested document gathering and production protocol.”³⁸ After holding evidentiary hearings on the efficacy of TAR,³⁹ the court ultimately declined to require defendants to adopt one methodology over another. Instead, the court ordered the parties to meet and confer regarding modifications to the existing search methodology.⁴⁰

With the acceptance of TAR since *Kleen*, courts have been more explicit in declining to force a party to use TAR. For instance, *Hyles v. New York City*⁴¹ held that defendant New York City could not be compelled to use TAR against its will, even though the court agreed that, “in general, TAR is cheaper, more efficient and superior to keyword searching.”⁴² Unlike prior cases, where the responding party had already expended significant

36. *Kleen Products LLC v. Packaging Corporation of America*, No. 10-cv-5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012).

37. Pls’ Statement of Position with Respect to Disputed Items for Dec. 15, 2011 Status Conference at 4-5, *Kleen Prods.*, Civil Action No. 1:10-cv-05711, ECF No. 266 (N.D. Ill. Dec. 13, 2011).

38. See Defs.’ Statement of Position with Respect to Disputed Items for Dec. 15, 2011 Status Conference at 4-16, *Kleen Prods.*, Case No. 1:10-cv-05711, ECF No. 267 (N.D. Ill. Dec. 13, 2011).

39. See Evidentiary Hr’g Tr., *Kleen Prods.*, Case No. 1:10-cv-05711, ECF No. 304 (Feb. 21, 2012); Evidentiary Hr’g Tr., *Kleen Prods.*, Case No. 1:10-cv-05711 (Mar. 28, 2012).

40. Evidentiary Hr’g Tr. at 297-300, *Kleen Prods.*, Case No. 1:10-cv-05711 (Mar. 28, 2012). Ultimately, the parties stipulated that plaintiffs could object to defendants’ search methodology and propose alternatives, but would withdraw their request for TAR. Stipulation & Order Relating to ESI Search, *Kleen Prods.*, Case No. 1:10-cv-05711, ECF No. 386 (Aug. 21, 2012). See also *Kleen Prods.*, 2012 WL 4498465.

41. *Hyles v. New York City*, 10-Civ-3119, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016).

42. *Id.* at *2.

effort and expense on document review and production,⁴³ in *Hyles* the responding party had not yet started its review, thus raising the issue of whether, on the requesting party's motion at the outset of discovery, a court can order a responding party to use TAR. The court declined to do so, holding instead that there "may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR," but "[w]e are not there yet."⁴⁴

Similarly, in *In re Viagra Products Liability Litigation*,⁴⁵ the court denied plaintiffs' request that defendant use TAR and that their representatives be involved in defendant's TAR process.⁴⁶ Defendant instead planned to use an iterative search term process, which it would test and validate through sampling. Relying on *Hyles*, *Viagra* held that it was not up to the court or the requesting party to force a responding party to use TAR when it preferred to use search terms. The court reasoned that it would not compel the use of TAR,, even if it were a superior method, absent evidence of insufficient discovery responses.⁴⁷ The court therefore denied the motion without prejudice.⁴⁸

In re Mercedes-Benz Emissions Litigation echoed that reasoning when it declined to compel the use of TAR, with the caveat that it would "not look favorably on any future arguments related to burden of discovery requests, specifically cost and proportionality," noting the "wide acceptance that TAR is cheaper, more efficient and superior to keyword searching."⁴⁹ Plaintiffs moved to compel defendants to use TAR to identify responsive documents, arguing that TAR "yields significantly better results than either traditional human 'eyes on' review of the full data set or the use of search terms."⁵⁰

43. The court stated that in prior cases "where the requesting party has sought to force the producing party to use TAR, the courts have refused." *Id.* The court noted, however, that in those cases, the responding party had already "spent over \$1 million using keyword search (in *Kleen Products*) or keyword culling followed by TAR (in *Biomet*)." *Id.*

44. *Id.* at *3.

45. *In re Viagra (Sildenafil Citrate) Products Liab. Litig.*, 16-MD-02691-RS (SK), 2016 WL 7336411 (N.D. Cal. Oct. 14, 2016).

46. *Id.* at *1.

47. *Id.* at *2.

48. *Id.*

49. *In re Mercedes-Benz Emissions Litigation*, No. 2:16-cv-881 (KM) (ESK), 2020 WL 103975 (D.N.J. Jan. 9, 2020).

50. *Id.* at *1.

Defendants objected, preferring instead to use custodians and search terms to identify relevant documents and arguing that there was no authority for a court to require TAR over the responding party's objection.⁵¹ In addition, defendants claimed that using TAR would not be appropriate in light of certain ESI issues, including language and translation, unique acronyms and identifiers, redacted documents, and technical documents that would make TAR challenging and ineffective.⁵²

The special master noted that while the benefits of TAR are widely recognized, no court has compelled a party to use TAR over objection; rather, courts that considered the issue declined to compel the use of TAR.⁵³ Despite his view that TAR would be the "more cost effective and efficient methodology," the special master allowed defendant to use a more traditional review approach.⁵⁴

2. Courts Ordering TAR over Producing Party's Objection

Only two courts have ordered the use of TAR over the producing party's objection, and those orders occurred in context of ongoing discovery problems by the responding party. In *Independent Living Center v. City of Los Angeles*, the court ordered the use of TAR to search more than two million documents after "little or no discovery was completed" before the discovery cutoff, and the parties had ongoing disputes after "months of haggling" over search terms that yielded large numbers of documents for review.⁵⁵

In *OSI Restaurant Partners v. United Ohana*, the Delaware Court of Chancery granted defendant's motion to compel in part, ordering plaintiff to identify responsive documents by applying TAR to all produced documents that had not previously undergone a document-by-document attorney-level review for responsiveness.⁵⁶ The court further directed that the parties work together, with their e-Discovery vendors, to develop a TAR process;

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at *2. See also *In re Bridgepoint Education, Inc. Securities Litigation*, No. 12-cv-1737, 2014 WL 3867495 (S.D. Cal. Aug. 6, 2014) (denying plaintiffs' request to require defendants to use TAR on documents that defendants had previously searched using traditional search terms).

55. *Independent Living Center v. City of Los Angeles*, No. 2:12-cv-00551, minute order, at 1 (C.D. Cal. June 13, 2014).

56. *OSI Rest. Partners, Ltd. Liab. Co. v. United Ohana, Ltd. Liab. Co.*, No. 12353-CB, 2017 WL 396357 (Ch. Jan. 27, 2017).

that plaintiff implement the TAR process; and that plaintiff make a new production to defendants.⁵⁷ In addition, the court stated that plaintiff would be responsible for all expenses associated with the TAR process.⁵⁸

3. Courts Suggesting TAR

Courts sometimes suggest the use of TAR to address discovery. For instance, in *EORHB, Inc. v. HOA Holdings LLC*,⁵⁹ the Delaware Court of Chancery sua sponte ordered the parties to use TAR or, alternatively, to show cause why TAR should not be used. Defendant ultimately elected to use TAR. Plaintiff, however, was not required to do so after informing the court that, because of the low volume of documents it expected to have to review and produce, the cost of using TAR likely would outweigh any practical benefits.⁶⁰

Similarly, in granting plaintiff's motion to compel, the court in *Davine v. Golub*⁶¹ expressly stated that defendants could rely on TAR in conducting its review of the compelled documents.⁶² It likewise ordered that defendants could "cease their review of the documents identified as possibly relevant when they made a good faith determination that the burden of continuing the review outweighs the benefit in terms of identifying relevant documents."⁶³

The court likewise suggested use of TAR to address overbroad discovery in *Story v. Fiat Chrysler Automotive*,⁶⁴ a race discrimination and retaliation case brought by an employee against his employer. There, plaintiff moved to compel discovery, claiming that defendant's responses to his interrogatories and requests for production of documents

57. *Id.* at *2.

58. *Id.*

59. *EORHB, Inc. v. HOA Holdings LLC*, Civ. Action No. 7409-VCL (Del. Ch. Oct. 15, 2012) (Hr'g Tr. at 66–67).

60. *See EORHB, Inc. v. HOA Holdings LLC*, Civ. Action No. 7409-VCL, 2013 WL 1960621 (Del. Ch. May 6, 2013).

61. *Davine v. Golub*, No. 3:14-CV-30136-MGM, 2017 WL 549151 (D. Mass. Feb. 8, 2017).

62. *Id.* at *1.

63. *Id.*

64. *Story v. Fiat Chrysler Automotive*, No. 4:17-CV-12, 2018 WL 5307230 (N.D. Ind. Oct. 26, 2018).

were incomplete.⁶⁵ Defendant objected to the document request that called for all documents and emails pertaining to or about plaintiff for an 18-month time period, arguing that the request was too expansive and not proportional to the needs of the case.⁶⁶ The Court agreed but encouraged counsel to consider “key word searches or technologically assisted review . . . to narrow the volume of an otherwise overly-broad request.”⁶⁷

The court in *Youngevity International Corporation v. Smith* encouraged the use of TAR from an early stage of discovery, suggesting that TAR might be an appropriate option in the case and instructing defense counsel to determine the cost of TAR to sort responsive from non-responsive documents.⁶⁸

C. Challenges to Responding Party’s TAR Methodology

1. Discretion to Responding Party

In addition to having discretion over whether to use TAR, responding parties typically may select the methodology they use for their TAR process without judicial involvement. Among other important TAR issues discussed in *Livingston v. City of Chicago*, the court declined to direct the responding party’s TAR process, where its proposed methodology “satisfies the reasonable inquiry standard and is proportional to the needs of this case under the federal rules.”⁶⁹ Defendant disclosed its intention to use a CAL TAR protocol after the court had entered an earlier discovery order requiring defendant to use keywords selected by the plaintiffs for culling email files, with a possibility of later narrowing the keywords if the results were too voluminous.

Given the high volume of search term hits, 192,000 unique emails, defendant disclosed its intent to use TAR and the protocol it planned to follow. Plaintiffs objected, claiming

65. *Id.* at *1.

66. *Id.* at *2.

67. *Id.* at *3.

68. *Youngevity Int’l Corporation v. Smith*, No. 16-cv-00704-BTM, 2019 WL 1542300 at *8, 15 (S.D. Cal. Apr. 9, 2019) (instructed counsel to find out the cost of TAR and then ordered meet and confers about it), report and recommendation adopted sub nom. *Youngevity Intl. v. Smith*, 16-CV-704-BTM-JLB, 2019 WL 11274846 (S.D. Cal. May 28, 2019).

69. *Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020). See Section II.C for further discussion of *Livingston*.

that TAR or any process other than full manual review would be inconsistent with the court's prior order. In the alternative, plaintiffs argued that defendant should adopt plaintiffs' own proposed TAR protocol: TAR review of the entire ESI collection without narrowing via keywords in the prior order.⁷⁰ The court rejected plaintiffs' argument that the prior order prohibited the use of TAR, explaining that the order did not limit which review methodologies defendant could apply to the results of the keyword search.⁷¹

As to which proposed review methodology should be used, the court noted that plaintiffs offered no authority that the City should adopt their preferred method.⁷² Significantly, the Court rejected plaintiffs' argument that the City must collaborate with them to establish a TAR review protocol and validation process, holding that this assertion had "no foothold in the federal rules governing discovery."⁷³

In *Coventry Capital U.S. LLC v. EEA Life Settlements Inc.*, the parties generally agreed to use TAR but disagreed about the specific protocols to be used, leading to a "protracted and contentious" TAR review process.⁷⁴ The court declined to order defendant, over its objection, to add a new ESI subset into the TAR review process at a late discovery stage, rejecting plaintiff's argument that manual review of that subset would cause delay.⁷⁵

Similarly in *Lawson v. Spirit AeroSystems, Inc.*, the court rejected plaintiff's complaints about the specific recall Defendant used in its TAR process, explaining that defendant's TAR review process was reasonable, and that plaintiff's motion to compel the additional review of residual documents was disproportionate to the needs of the case.⁷⁶

70. *Id.*

71. *Id.* at *3.

72. *Id.*

73. *Id.*

74. *Coventry Cap. U.S. LLC v. EEA Life Settlements Inc.*, No. 17-CIV-7417-VM-SLC, 2020 WL 7383940 (S.D.N.Y. Dec. 16, 2020) at *8, objections overruled, 17-CIV-7417 (VM), 2021 WL 961750 (S.D.N.Y. Mar. 15, 2021).

75. *Id.* at *11 (noting that, although courts generally permit a responding party to use TAR, "where the requesting party has sought to force the producing party to use TAR, the courts have refused") (internal quotations omitted) (citing *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 n.1 (S.D.N.Y. 2015)).

76. *Id.* at *8. As in prior cases, the court recognized that TAR is widely accepted under the law. *Id.* at *6 (citing, among other authorities, *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 183 (S.D.N.Y. 2012) and *The Sedona Conference Glossary E-Discovery and Digital Information Management*, Fourth Edition, 15 SEDONA CONF. J. 305 (2014)).

2. Redesigning Problematic TAR Processes

While courts generally do not direct how a responding party uses TAR, they may require parties to redesign unreasonable processes. The parties in *In re Diisocyanates Antitrust Litigation*⁷⁷ generally agreed to use TAR in discovery, but they disagreed over the specific TAR protocols to be used.⁷⁸ The court adopted the Special Master's report and recommendation, which expressly rejected plaintiffs' motion to compel defendants to follow their suggested TAR protocol.⁷⁹ Rather, the Special Master provided "a roadmap highlighting the potholes in Defendants' prior positions and how to proceed to achieve reasonable and proportionate search terms and TAR methodologies."⁸⁰ Defendants were free to conduct their review consistent with the Special Master's guidance and were "not compelled to adopt Plaintiffs' search terms or TAR methodologies."⁸¹

Similarly, the court required certain disclosures of the responding party relating to the appropriateness of the search process in *Winfield v. City of New York*.⁸² There, plaintiffs objected to various aspects of the defendant City's document review process, which included the use of TAR for certain custodians.⁸³ Significantly, the court authorized the City to begin using its TAR process in light of the large volume of ESI collected, with the goal of speeding up the identification, review, and production of responsive documents.⁸⁴

Plaintiffs argued that the City's TAR training and review processes were not reliable because the City over-designated documents as non-responsive during the training set review.⁸⁵ Thus, plaintiffs claimed they were entitled to increased transparency in the process and requested that the court direct the City to provide random samples of certain

77. *In re Diisocyanates Antitrust Litig.*, MC 18-1001, 2021 WL 4295719 (W.D. Pa. Sept. 21, 2021).

78. *Id.* at *1.

79. *Id.*

80. *Id.* at *2.

81. *Id.*

82. *Winfield v. City of New York*, No. 15-cv-05236-LTH (KHP), 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017).

83. *Id.* at *2.

84. *Id.* at *4.

85. *Id.* at *5, *9.

categories of documents for plaintiffs' review (including documents scoring above the TAR cut off score but that attorneys designated as non-responsive).⁸⁶

Like many other courts, *Winfield* explained that the responding party is in the best position to manage its own discovery process, and that reasonableness, rather than perfection, is the standard in discovery.⁸⁷ The court disagreed with plaintiffs' contention that the City's TAR process was defective. Rather, it concluded, based on its own *in camera* review of the City's submission, that the City "appropriately trained and utilized its TAR system."⁸⁸ The court found that five of 20 documents submitted by the City were incorrectly coded during the initial review, but determined that human error in coding a small subset of documents was not enough to draw into question the accuracy of the City's TAR system, particularly since the seed set comprised over 7,000 documents.⁸⁹ Moreover, the City provided information about the training of reviewers and the search criteria used and submitted to *in camera* review, which was enough to overcome plaintiffs' challenge to its TAR system.⁹⁰

While it rejected plaintiffs' claim that the City's TAR system was defective overall, the court granted plaintiffs' motion in part, ordering the City to provide plaintiffs with a random sample of non-responsive documents from the review populations to increase transparency.⁹¹ The court explained that it was not unreasonable to grant this request given the facts and evidence presented, including the volume of documents collected, the low responsiveness rate of documents pulled for review by the TAR software, and the examples plaintiffs presented suggesting some human error in coding.⁹²

86. *Id.* at *6.

87. *Id.* at *9.

88. *Id.* at *10.

89. *Id.* at *11.

90. *Id.*

91. *Id.*

92. *Id.*

IV. SEDONA PRINCIPLE 6

When addressing TAR issues and to support rulings on party discretion in determining the method of document preservation and production, courts continue to rely on and cite to Principle 6 of The Sedona Principles, which states:

Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.⁹³

Under Principle 6, judicial intervention and “discovery on discovery” are eschewed “unless a specific deficiency is shown in a party’s production.”⁹⁴

Although courts have generally been deferential to a responding party’s choice of document preservation and production methodologies under Sedona Principle 6, they apply a standard of reasonableness rather than afford parties unlimited discretion. Therefore, courts applying Principle 6 generally refuse to intervene in a responding party’s decisions on whether and how to use TAR, unless a requesting party can show a specific deficiency in a responding party’s production, or unreasonableness of the selected process.

While Principle 6 generally applies to disputes involving responding parties’ unilateral decisions about their production processes, courts tend to give even higher priority to ESI protocols agreed between the parties. Courts may enforce ESI protocol even where those agreements differ from a party’s later arguments about reasonableness of the agreed discovery methods.

Sedona Principle 6 was key to the court’s holding in *Livingston v. City of Chicago*, where the court allowed the defendant to use its preferred TAR protocol and declined to force plaintiffs’ suggested TAR protocol on defendant.⁹⁵ A key area of disagreement between the parties was whether it was appropriate to apply keyword culling to the dataset prior to applying TAR.⁹⁶ The court found that the City’s TAR proposal was reasonable under

93. The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Principle 6, 19 Sedona Conf. J. 1, 118 (2018).

94. *Id.*

95. *Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848 (N.D. Ill. Sept. 3, 2020). *See also* Section III.A.above (containing case summary).

96. *Id.*

the federal rules, and citing Sedona Principle 6, held that the City is “best situated to decide how to search for and produce [responsive] emails...”⁹⁷

Also relying on Principle 6, the court in *Kaye v. N.Y.C. Health*, held there was no basis to force an inquiry into the search methodology of a responding party that used TAR, where the requesting party had not identified any deficiency in the production.⁹⁸ In this employment discrimination case, defendants disclosed to plaintiff that they planned to use CAL technology, the software they intended to use, the workflow, and the validation process. However, plaintiff insisted that she also be provided with search terms and a disclosure of the culling process.⁹⁹ Citing Sedona Principle 6, the court ruled that a requesting party does not have the right, in the first instance, to conduct discovery about the responding party’s production methodology, and that any such inquiry must also be based on identification of some deficiency and must be proportional to the facts and circumstances.¹⁰⁰

While responding parties generally are free to decide their processes to produce documents under Principle 6, they may also bear risks if their selections are inefficient or may result in deficiencies. This was noted by the court in *In re Mercedes-Benz*, which denied plaintiffs’ motion to compel defendants to use TAR, holding that “Defendants may evaluate and decide for themselves the appropriate technology for producing their ESI.”¹⁰¹

However, the special master cautioned defendants that their decision could bring other consequences. He warned that he would “not look favorably on any future arguments related to burden of discovery requests, specifically cost and proportionality, when Defendants have chosen to utilize the custodian-and-search term approach despite wide acceptance that TAR is cheaper, more efficient and superior to keyword searching.”¹⁰² In

97. *Id.* at *3.

98. *Kaye v. N.Y.C. Health and Hospitals Corp.*, No. 18-CV-12137, 2020 WL 283702 (S.D.N.Y. Jan. 21, 2020).

99. *Id.*

100. *Id.* at *3-4.

101. *In re Mercedes-Benz Emissions Litigation*, No. 2:16-cv-881 (KM) (ESK), 2020 WL 103975, at *2 (D.N.J. Jan. 9, 2020); *see also id.* at *1 (citing *Hyles v. New York City*, No. 10-CIV-3119, 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016) (citing The Sedona Conference, *The Sedona Principles, Second Edition: Best Practices & Principles for Addressing Electronic Document Production*, Principle 6)). For additional discussion of this case, *see above* at Section III.A.1.

102. *Id.* at *3.

addition, the court noted that once the production was made, plaintiffs could renew their request to compel the use of TAR if defendants' production was, in fact, deficient.¹⁰³

Principle 6 does not entitle responding parties to an unlimited right to rely on unreasonable methodologies. In *In re Diisocyanates Antitrust Litigation*, an MDL regarding price fixing allegations, plaintiffs and defendants presented to the Court separate proposed ESI proposals, each differing on the use of search terms and TAR methodologies.¹⁰⁴ In a highly technical opinion, the special master recognized that "a producing party has the right in the first instance to decide how it will produce its documents."¹⁰⁵ However, the special master also observed that this general rule does not allow a party to engage in discovery procedures that are deficient or not reasonable.¹⁰⁶ Applying these principles and also noting the need for cooperation and transparency, the special master observed that defendants' suggested methodologies contained "serious flaws" and were "not reasonable," and thus recommended that the court deny defendants' motion for a protective order approving the use of their proposed review protocol.¹⁰⁷ Significantly, the special master likewise recommended denial of plaintiffs' motion to compel defendants to adopt plaintiffs' proposed discovery protocols, holding that defendants should not be compelled to adopt plaintiffs' methodologies where reasonable alternative methodologies existed and could still be used.¹⁰⁸

The district court adopted the special master's report and recommendation and ultimately allowed defendants to proceed with a modified TAR protocol, which addressed the flaws with their original methodology.¹⁰⁹ Under the modified protocol, defendants

103. *Id.*

104. *In re Diisocyanates Antitrust Litigation*, Misc. No. 18-1001, MDL No. 2862, 2021 WL 4295729 (W.D. Pa. Aug. 23, 2021), *report and recommendation adopted by* Misc. No. 18-1001, MDL No. 2862 (W.D. Pa. Sept. 21, 2021).

105. *Id.* at *6.

106. *Id.* (noting that Sedona Principle 6 does not require a court to "blindly accept all of the specific details of the proffered methodology").

107. *Id.* at *8-12. Specifically, the court explained that defendants' validation protocol was defective because defendants intended to calculate the estimated recall rate for only the TAR review portion of the process. In addition, the protocol did not take advantage of CAL despite its availability to defendants and the fact that CAL gives the parties "a powerful method for evaluating search at the margin, helping them decide whether further search and review will be proportional."

108. *Id.* at *12-13.

109. *In re Diisocyanates Antitrust Litig.*, MC 18-1001, 2021 WL 4295719, at *2 (W.D. Pa. Sept. 21, 2021).

would apply their own search terms but would also be required to provide plaintiffs with a validation analysis of the search term and TAR phases at the end of the production process.¹¹⁰

While Sedona Principle 6 generally allows for deference to responding parties in determining the best method for collecting, reviewing, and producing its own ESI, stipulated ESI protocols between the parties will take priority when entered as an order by the court. In *Valsartan Products Liability Litigation*, the District of New Jersey recognized that a party has “the right in the first instance to decide how to produce its documents,” citing *Hyles v. New York City*, which relied upon Sedona Principle 6.¹¹¹ However, the Court found that Principle 6 does not trump an ESI Protocol where the parties had agreed upon certain discovery methods and that agreement was “memorialized in a Court Order.”¹¹²

In this product liability multidistrict litigation (“MDL”), the court entered as a case management order a stipulated ESI discovery protocol that required the parties to meet and confer over the identification of custodians and search terms. A year later, defendants announced they planned to use a “Continuous Multi-Model Learning” (CMML) TAR application to review documents.¹¹³ Plaintiffs objected to this change of plans, as they had invested “countless hours” into negotiating search terms and a limitation on the number of custodians. However, the parties negotiated and nearly agreed on a TAR protocol, though it was not finalized due to defendant’s objection to submitting the protocol for the court to order, and plaintiffs’ proposed validation provision that would have required defendant to disclose a 5,000 document sample of documents predicted not responsive by TAR.

110. *In re Diisocyanates Antitrust Litigation*, Misc. No. 18-1001, MDL No. 2862, 2022 WL 173678, at *2 (W.D. Pa. Jan. 7, 2022), *report and recommendation adopted by* Misc. No. 18-1001, MDL No. 2862, 2022 WL 170036 (W.D. Pa. Jan. 19, 2022). Plaintiffs later brought a second motion to compel, again asking the court to order defendants to use plaintiffs’ proposed search terms or, alternatively, for adjudication of the search term dispute. The court denied plaintiffs’ motion, but indicated that plaintiffs could re-visit their challenge to the reasonableness of defendants’ search terms at the end of the production. *Id.* at *3-4.

111. *In re Valsartan Products Liability Litigation*, No. 19-2875, 2020 WL 7054284, *6 (D.N.J. Dec. 2, 2020); *Hyles v. New York City*, 10 Civ. 3119, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016).

112. *In re Valsartan*, 2020 WL 705428, *13.

113. This workflow is described above in Section II as CAL/TAR 2.0.

Defendant then informed the court that it “would not use TAR to eliminate non-responsive documents to be reviewed” and would instead undertake an “extremely burdensome” manual review.¹¹⁴ Defendant reviewed a random sample of 15,000 documents identified by CMML as non-responsive, and determined that only 109 of the 15,000 documents were responsive.¹¹⁵ It then argued that “it would be grossly disproportionate to require it to review the documents designated non-responsive by its TAR [and that] ... it ‘[s]hould not be forced to spend months and millions of dollars reviewing documents that . . . are likely to be non-responsive based on well-known technology that has become the norm in eDiscovery.’”¹¹⁶

The court did not address the merits of TAR, noting that “[w]e are past the time when parties and courts view TAR as an outlier” and agreeing “with the line of cases [holding] that a responding party has the right in the first instance to decide how it will produce its documents.”¹¹⁷

However, the court ruled that defendant had violated the ESI protocol “by not timely disclosing its use or possible use of its CMML,” and it declined to enter an order allowing defendants to proceed with its proposed TAR process. The court held that while a responding party may select its own methodology, the fact that a protocol had been negotiated by the parties and ordered by the court “trumps” general principles, and violations of the agreement cannot be defended with proportionality arguments or citations to protocols adopted in unrelated litigation.¹¹⁸ Without addressing the merits of TAR, the court entered as a court order the TAR protocol to which defendant had previously objected, including the provision allowing plaintiffs to review 5,000 documents from the set defendant withheld from production as predicted non-responsive by TAR.

114. *Id.* at 615.

115. *Id.*

116. *Id.*

117. *Id.* at 616.

118. *Id.* at *15-16, 21 (“In the Court’s view there is not legitimate question that the Court’s Order trumps [defendant’s] proportionality argument.”).

V. TRANSPARENCY AND DISCLOSURE

For responding parties using TAR, courts generally encourage, but do not require, cooperation, transparency or disclosure of the fact that TAR is being used, metrics and processes involved in the TAR review, or sharing of which documents were used in training or validation. Cases that do require disclosures involve a) a demonstrated production deficiency; b) misconduct that requires disclosures to further assess the responding party's process; or c) disregard for an ESI protocol that does not permit TAR.

A. No General Requirement to Disclose TAR Use or Process

Courts generally encourage transparency on TAR metrics and methodologies, but do not require disclosure of the TAR process or nonresponsive document sets associated with training or validation. In addition, courts may consider information about a party's TAR process to be protected attorney work product. In *Winfield*, for example, the court required defendant to submit a letter for *in camera* review describing its TAR process and training for document reviewers.¹¹⁹ The court ultimately reasoned that such information was protected attorney work product and therefore not subject to disclosure.¹²⁰

In *Entrata*, the court denied the requesting party's request for disclosures of the responding party's TAR process and metrics.. *Entrata I* involved a defendant in a commercial dispute moved to compel production of the complete methodology and results of plaintiff's TAR process, claiming that it "need[ed] [plaintiff's] TAR information in order to assess the adequacy of [plaintiff's] document production, as well as [plaintiff's] collection and review efforts."¹²¹ The magistrate judge denied the motion, reasoning that defendant did not provide "any specific examples of deficiencies" in the production "or any specific reason why it questions the adequacy of [plaintiff's] document collection and review."¹²² Defendant also waited until the last day of fact discovery to file its motion, and

119. *Winfield v. City of New York*, Case No. 15-cv-05236-LTH (KHP), 2017 WL 5664852, at *5 (S.D.N.Y. Nov. 27, 2017).

120. *Id.* at *12.

121. *Entrata, Inc. v. Yardi Systems, Inc.*, Case No. 2:15-cv-00102, 2018 WL 3055755, at *3 (D. Utah June 20, 2018).

122. *Id.*

“should have sought court intervention long ago” on any “specific concerns about [plaintiff’s] TAR process.”¹²³

On review by the district judge (“*Entrata II*”), the court affirmed the magistrate judge’s ruling, rejecting defendant’s argument that the Federal Rules of Civil Procedure and case law required plaintiff “in the first instance, to provide transparent disclosures as a requirement attendant to its use of TAR.”¹²⁴ The court distinguished the cases that defendants cited, noting that they all involved TAR processes upon which the parties had agreed.¹²⁵ The parties’ ESI Order required them to raise any questions regarding search methodology within 30 days of the Order, which had long since passed.¹²⁶ The court further reasoned that “[t]he scope of the obligation to search for, and produce, ESI is circumscribed by Federal Rule of Civil Procedure 26(g) . . . but ‘[n]othing in Rule 26(g) obligates counsel to disclose the manner in which documents are collected, reviewed and produced in response to a discovery request.’”¹²⁷

Unless deficiencies are shown, courts typically resist requests for “discovery on discovery,” including discovery of a responding party’s TAR process. In *Kaye v. N.Y.C. Health and Hospitals Corp.*, although defendants disclosed that they planned to use TAR 2.0 technology, the software they intended to use, the review workflow, and the validation methodology, plaintiff requested defendants’ pre-TAR search terms and a review of the “culling” process.¹²⁸ The court declined plaintiff’s request for “discovery on discovery,” citing plaintiff’s failure to meet and confer with defendants or provide any examples of production deficiencies.¹²⁹

The court reasoned that “whether [documents are] produced electronically or otherwise, the Court does not believe that, in the first instance, the receiving party has a right to examine and evaluate the way the production was made or require collaboration in

123. *Id.*

124. *Entrata, Inc. v. Yardi Systems, Inc.*, Case No. 2:15-cv-00102, 2018 WL 5470454, at *4 (D. Utah Oct. 29, 2018).

125. *Id.* at *6-7.

126. *Id.* at *6.

127. *Id.* (quoting Karl Schieneman & Thomas C. Gricks III, *The Implications of Rule 26(g) on the Use of Technology-Assisted Review*, 7 Fed. Cts. L. Rev. 239, 243 (2013)).

128. *Kaye v. N.Y.C. Health and Hospitals Corp.*, No. 18-CV-12137, 2020 WL 283702, at *2 (S.D.N.Y. Jan. 21, 2020).

129. *Id.* at *1.

the review protocol and validation process.”¹³⁰ The court ruled that any inquiry into a responding party’s methodology must be based on identification of some deficiency and must be proportional to the facts and circumstances of the case.¹³¹

In similarly denying a request for “discovery about discovery,” the court in *Edwards v. Scripps Media, Inc.* considered a motion for a protective order to prevent plaintiff from taking a post-production 30(b)(6) deposition on nineteen topics, each with up to ten subparts.¹³² The court rejected plaintiff’s request to inquire into defendant’s TAR processes, review workflows, and discovery metrics such as the total volume of ESI “collected, review, and produced.”¹³³ The court referred to precedent demonstrating that “[c]ourts have ordered ‘discovery about discovery’ when the record suggests that there is reason to distrust the responding party’s diligence.”¹³⁴

In some cases, courts have refused to grant requesting parties access to document training sets or validation samples to participate in TAR training or to assess the responding party’s TAR process. These sets would include nonresponsive documents.¹³⁵

In *In re Biomet*, the court denied plaintiffs’ request for access to the entire seed set and to participate in training the TAR software.¹³⁶ Plaintiffs sought a protocol to use TAR 1.0 like the one used in *In re Actos (Pioglitazone) Products Liability Litigation*,¹³⁷ in which each side nominated three experts to review the training sets and conduct quality control following TAR. The *Biomet* court rejected plaintiffs’ request, observing that Federal Rule of Civil Procedure 26(b)(1) only makes relevant, non-privileged information discoverable and commenting that “I’m puzzled as to the authority behind [plaintiffs’] request.”¹³⁸ The court also stated that although The Sedona Principles and local discovery rules encourage parties to cooperate in discovery, neither “expands the federal district court’s powers” or

130. *Id.* at *2.

131. *Id.*

132. *Edwards v. Scripps Media, Inc.* 331 F.R.D. 116, 117-120 (E.D. Mich. 2019).

133. *Id.* at 120, 125.

134. *Id.* at 125.

135. These cases involved TAR 1.0 procedures, where the seed set can be important to the results.

136. *In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, Case No. 3:12-MD-2391, 2013 WL 1729682 & 2013 WL 6405156 (N.D. Ind. Apr. 18 & Aug. 21, 2013).

137. *In re Actos (Pioglitazone) Products Liability Litigation*, MDL No. 6:11-md-2299, 2012 WL 7861249 (W.D. La. July 27, 2012).

138. *In re Biomet*, 2013 WL 6405156, at *1-2.

provides the “authority to compel discovery of information not made discoverable by the Federal Rules.”¹³⁹

Similarly, in *Aurora Cooperative Elevator Co.*, the court denied plaintiff’s request requiring defendant to disclose the non-relevant documents within the training set.¹⁴⁰ Citing Rule 26(b)(1), the court found defendant’s argument was “supported by the language, if not the spirit, of the civil discovery rules.”¹⁴¹

These cases demonstrate that parties should cooperate and communicate, but that responding parties are not under an automatic obligation to disclose those TAR processes absent a demonstrated deficiency.

B. Courts Encourage Cooperation and Transparency for TAR

Courts have generally encouraged parties to disclose their intended use of TAR. While early TAR cases in particular tended to emphasize that parties’ cooperation in TAR cases weighed in favor of the court accepting use of TAR,¹⁴² later cases have continued to encourage cooperation and transparency while also holding that a responding party generally does not have any duty to do so.

Responding parties who disclose and attempt negotiated protocols with requesting parties can be rewarded for their cooperation when a dispute arises. *Livingston v. City of Chicago* mainly concerned whether a party could compel another to *use* a certain TAR protocol, rather than *disclose* TAR methodology. However, the defendant’s transparency as to its TAR methodology contributed in part to the court’s decision to allow defendant to proceed with its own TAR protocol over plaintiffs’ objections.¹⁴³ Defendant disclosed its intention to use a TAR protocol to narrow the review population, the identity of the

139. *Id.* at *2.

140. *Aurora Coop. Elevator Co. v. Aventine Renewable Energy-Aurora W., LLC, Aventine Renewable Energy Holdings, Inc.*, No. 4:12CV230, 2015 WL 10550240, at *2 (D. Neb. Jan. 6, 2015).

141. *Id.*

142. See Section II above, n. [CITE].

143. *Livingston v. City of Chicago*, Case No. 16 CV 10156, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020). See also above in Section III.A. (containing case summary).

TAR software it intended to use, and how it intended to validate the results.¹⁴⁴ The court found those disclosures sufficient “to make the production transparent.”¹⁴⁵

Early TAR cases in particular emphasized the importance of cooperation and transparency when a party intended to use TAR. Even as TAR became more established, courts continued to encourage transparency but not require it. The emergence of TAR 2.0 complicated disclosure because seed and training sets became less meaningful than in TAR 1.0.¹⁴⁶

The court in *Da Silva Moore* stated that “the best approach” if a party wants to use TAR “is to follow the Sedona Cooperation Proclamation model,” “[a]dvice opposing counsel that you plan to use [TAR] and seek agreement[.]”¹⁴⁷ Defendant in *Da Silva Moore* voluntarily agreed to provide plaintiffs’ counsel with all non-privileged relevant and irrelevant seed set documents. The court recommended “that counsel in future cases be willing to at least discuss, if not agree to, such transparency in the [TAR] process.”¹⁴⁸ This “transparency allows . . . opposing counsel (and the Court) to be more comfortable with

144. *Id.*

145. *Id.*

146. With the evolution of TAR technology from TAR 1.0 to TAR 2.0, “the contents of the seed set [have become] much less significant.” *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 128 (S.D.N.Y. 2015). *See also* Maura R. Grossman & Gordon V. Cormack, *Comments on “The Implications of Rule 26(g) on the Use of Technology-Assisted Review,”* 2014 FED. CTS. L. REV. 285, 298 (2014) (Schieneman and Gricks’ suggestion . . . that “[o]ne of the ways to avoid disagreement over the methodology used to train the tool” is “to share the training set with opposing counsel” is . . . ill-founded. Disclosure of the seed or training set offers false comfort to the requesting party, in much the same way that disclosure of the keywords to be used for culling – without testing them – provides limited information.”). There has been robust debate against disclosure of seed set documents, particularly those identified via judgmental sampling. *See* John M. Faciola & Philip J. Favro, *Safeguarding the Seed Set: Why Seed Set Documents May Be Entitled to Work Product Protection*, 8 FED. CTS. L. REV. 1 (2015); cf. Karl Scheneman & Thomas Gricks, *The Implications of Rule 26(g) on the Use of Technology-Assisted Review*, 7 FED. CTS. L. REV. 239, 262 n. 92 (2013) (questioning whether seed sets are entitled to work product protection).

147. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 184 (S.D.N.Y. 2012) (citing Andrew Peck, Search, Forward, L. Tech. News, Oct. 2011, at 25). *But see* *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125 (S.D.N.Y. 2015) (noting that where parties do not agree to transparency, particularly in the area of disclosure of seed sets, courts are split); *Entrata, Inc. v. Yardi Systems, Inc.*, Case No. 2:15-cv-00102, 2018 WL 5470454 (D. Utah Oct. 29, 2018) (rejecting the notion that the Federal Rules of Civil Procedure and case law require transparent disclosures as a requirement to use TAR).

148. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 187, 192 (S.D.N.Y. 2012).

[TAR], reducing fears about the so-called ‘black box’ of the technology.”¹⁴⁹ *Da Silva Moore*,¹⁵⁰ *Bridgestone*¹⁵¹ and *Federal Housing Finance Agency*¹⁵² all involved responding parties voluntarily agreeing to disclose either a sample (or more) from the seed, training, or validation sets. Further, in both *Da Silva Moore* and *Dynamo Holdings II*, the responding party agreed to allow the opposing party to have some role in coding the documents used to train the TAR algorithm.¹⁵³

While in *Rio Tinto*, the court expressed its preference generally for cooperation in the disclosure of seed and training sets,¹⁵⁴ it also recognized that where the parties do not agree on transparency, there are other ways to evaluate whether the training in the TAR process was done appropriately. This may include among other things, “statistical estimation of recall at the conclusion of the review as well as [determining] whether there are gaps in the production, and quality control review of samples from the documents categorized as non-responsive” *i.e.*, null-set samples.¹⁵⁵

Similarly, in *Bridgestone Americas, Inc. v. International Business Machines Corp.*, the court advised that because it was allowing a change to the discovery approach midstream, it “expects full openness in this matter.”¹⁵⁶ In *Federal Housing Finance Agency v. JPMorgan Chase & Co.*, the court appeared to encourage disclosure of the training sets by (1) stating that for the TAR process to work, “it needs transparency and cooperation of counsel”; and (2) confirming that the responding party would be voluntarily providing access to

149. *Id.*

150. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012).

151. *Bridgestone Ams., Inc. v. Int’l Bus. Machines Corp.*, Case No. 3:13-1196, 2014 WL 4923014 (M.D. Tenn. July 22, 2014).

152. *Fed. Hous. Fin. Agency v. JPMorgan Chase & Co.*, Case No. 1:11-cv-06188-DLC (S.D.N.Y. July 24, 2012) (transcript at 14–15, 24); *see also id.* at 8–9 (commenting that the reliability of TAR depends on the process employed, particularly with respect to training the model using seed sets). *See also Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc.*, No. 1:11-cv-06188-DLC, 2014 WL 584300, at *3 (S.D.N.Y. Feb. 14, 2014) (same case).

153. *Dynamo Holdings LP v. Comm’r. of Internal Revenue*, 2685-11, 2016 WL 4204067, at *3 (T.C. July 13, 2016) (“*Dynamo Holdings II*”); *Da Silva Moore*, 287 F.R.D. at 192 (the collaborative seed set training process included disclosure and agreement on issue-tagging).

154. *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125 (S.D.N.Y. 2015).

155. *Id.* at 129.

156. *Bridgestone Americas, Inc. v. International Business Machines Corp.*, Case No. 3:13-1196, 2014 WL 4923014, at *1 (M.D. Tenn. July 22, 2014).

the non-privileged documents in the seed set.¹⁵⁷ In *In re Biomet M2A Magnum Hip Products Liability Litigation*¹⁵⁸ and in *Aurora Cooperative Elevator Co. v. Aventine Renewable Energy-Aurora West, LLC.*,¹⁵⁹ while the courts expressly held that they could not require seed set disclosure pursuant to the Federal Rules of Civil Procedure, they nevertheless encouraged the responding parties to “reconsider their position”¹⁶⁰ in the “cooperative spirit” encouraged by *The Sedona Conference Cooperation Proclamation*.¹⁶¹ In addition, working cooperatively would “allay the risk of having to repeat the process” if it is later challenged and the court agrees that the “training was faulty or unreliable.”¹⁶²

C. Disclosure Required to Address Production Deficiencies

Courts have ordered disclosure of process and documents when a deficiency is shown in the responding party’s production or TAR process. Courts have held that reasonableness, rather than perfection, is the standard in discovery and particularly in document review. Courts may order disclosure of non-responsive documents where some degree of human error is established, even if TAR processes are not demonstrably deficient. However, errors in a small subset of documents will not generally imply production-wide deficiencies or prompt additional disclosures.

Even where a TAR process was overall reasonable and not defective, some additional disclosure may be appropriate if specific deficiencies are known. In *Winfield v. City of New York*, the court ordered the City provide plaintiffs with sample sets of non-privileged, non-responsive documents that had been used to train the TAR software.¹⁶³ Plaintiffs objected to the City’s use of TAR because they believed that the City’s reviewers had over-designated documents as nonresponsive during the training stages and had improperly

157. *Federal Housing Finance Agency v. JPMorgan Chase & Co.*, No. 1:11-cv-06188-DLC (S.D.N.Y. July 24, 2012) (transcript at 9, 14).

158. *In re Biomet M2A Magnum Hip Products Liability Litigation*, No. 3:12-MD-2391, 2013 WL 6405156, at *1 (N.D. Ind. Aug. 21, 2013).

159. *Aurora Coop. Elevator Co. v. Aventine Renewable Energy-Aurora W., LLC.*, No. 4:12CV230, 2015 WL 10550240, at *1 (D. Neb. Jan. 6, 2015).

160. *Id.* at *2.

161. *In re Biomet*, 2013 WL 6405156, at *2.

162. *Aurora Coop. Elevator Co.*, 2015 WL 10550240, at *2.

163. *Winfield v. City of New York*, No. 15-cv-05236-LTH (KHP), 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017).

trained the TAR software.¹⁶⁴ While the court did not find that the TAR process as a whole was defective, it nevertheless found that there was sufficient evidence to justify plaintiffs' request.¹⁶⁵ The court reasoned "that the sample sets will increase transparency, a request that is not unreasonable in light of the volume of documents collected from the custodians, the low responsiveness rates of documents pulled for review by the TAR software, and the examples that [p]laintiffs have presented, which suggest there may have been some human error in categorization that may have led to gaps in the City's production."¹⁶⁶ Despite its order, the court acknowledged that "[p]laintiffs have [not] identified anything in the TAR process itself that is inherently defective."¹⁶⁷ The court reasoned that responding parties are in the best position to manage their own discovery and are not held to a standard of perfection, noting that courts should not "insert themselves as super-managers of the parties' internal review processes, including training of TAR software, or . . . permit discovery about such process, in the absence of evidence of good cause"¹⁶⁸

At least one court has granted "discovery about discovery" through a Rule 30(b)(6) deposition, but only where the parties had previously agreed to such an examination. In *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, plaintiffs sought a 30(b)(6) deposition to determine "why defendants' use of predictive coding failed to produce hundreds of thousands of potentially responsive documents."¹⁶⁹ Plaintiffs also contended that defendants' use of TAR violated the ESI Order because they did not alert plaintiffs that they were using it.¹⁷⁰ The court did not rule on whether the use of TAR violated the ESI Order, but agreed that "[a]s a result of a predictive-coding issue, defendants did not produce all relevant, non-privileged discovery."¹⁷¹ Plaintiffs initially requested the deposition at a status conference on the TAR deficiencies, and defendants

164. See *id.* at *12.

165. See *id.* at *25.

166. *Id.*

167. *Id.*

168. *Id.* at *9.

169. *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, Case No. MD 16-2695 JB/LF, 2018 WL 3972909, at *1 (D.N.M. Aug. 18, 2018).

170. *Id.* at *2.

171. *Id.* at *11.

agreed to it at that time.¹⁷² The court thus enforced that agreement and allowed plaintiffs to take one three-hour 30(b)(6) deposition to “inquire into defendants’ discovery methodology.”¹⁷³

D. Disclosure Required to Address Misconduct

Courts may require disclosure of seed or training documents where the responding party has repeatedly failed to implement an effective TAR process or otherwise engaged in misconduct. In *Independent Living Center v. City of Los Angeles*, the court ordered the use of TAR to search more than two million documents after “little or no discovery was completed” before the discovery cutoff, and the parties had ongoing disputes after “months of haggling” over search terms that yielded large numbers of documents for review.¹⁷⁴ Although defendant was initially concerned about the costs of using TAR, it agreed to do so when the court stated that it would only be required to produce the top 10,000 documents identified by the TAR tool. At defendant’s request, and to avoid subsequent disputes, the court also ordered that plaintiff “be involved in and play an active role” in the training process, including making “relevance determinations” in the training documents.¹⁷⁵ The court held that defendant was not necessarily required to engage in a quality-assurance process as part of the TAR protocol, however, if plaintiff insisted on such a process, then plaintiff would have to pay for 50% of its costs.¹⁷⁶

E. Failure to Disclose TAR when Not Permitted by ESI Protocol

In *Progressive Casualty Insurance Co. v. Delaney* and *Valsartan*, the responding parties had respectively agreed to ESI protocols, which were ordered by the courts, at the outset of discovery providing for the use of traditional search terms and manual review. When

172. *Id.* at *4.

173. *Id.*

174. *Independent Living Center v. City of Los Angeles*, No. 2:12-cv-00551, minute order, at 1 (C.D. Cal. June 13, 2014).

175. *Id.*

176. *Id.*, at 2.

the review costs became cost-prohibitive, however, the responding parties unilaterally decided to change course and use TAR.¹⁷⁷ *Progressive* denied the responding party's request to use TAR and ordered it either to produce all documents that hit on the search terms, subject to clawback of privileged documents or the application of privilege filters.¹⁷⁸ *Valsartan* refused to "endorse a TAR protocol that was unilaterally adopted by a producing party without any input from the requesting party."¹⁷⁹ Instead, the court ordered the responding party to use a TAR protocol that was negotiated in part but had not been fully agreed upon by the parties.¹⁸⁰

In *Valsartan*, also discussed above in Section IV, ordered the production of a null set in response to discovery misconduct. Defendant first raised its intention to use TAR over a year after the court had entered a stipulated ESI Order relating to searching that did not include TAR.²³⁵ The parties negotiated and almost agreed on a TAR protocol, but defendant would not agree to submit the protocol for the court to order, or to disclose a sample of 5,000 documents predicted not responsive by TAR and withheld from production. Although defendant then represented to the court that it was abandoning TAR, it nevertheless used TAR and then sought permission to end its review of documents predicted by TAR as not responsive, based on proportionality considerations.

Noting that defendant had violated the ESI protocol "by not timely disclosing its use or possible use of its CMML," the court entered the TAR protocol to which defendants had previously objected as a court order, giving plaintiffs the "right to review at the end of [defendant's] production 5000 alleged non-responsive documents."¹⁸¹ *Valsartan* demonstrates that parties should carefully negotiate ESI protocols to allow for flexibility and avoid prematurely agreeing to parameters that would disallow the use of TAR.¹⁸²

177. *In re Valsartan, Losartan, and Irbesartan Prods. Liab. Litig.*, No 19-2875, 2020 WL 7054284, at *30 (D.N.J. Dec. 2, 2020), also discussed in Section IV above; *Progressive Cas. Ins. Co. V. Delaney*, No. 2:11-CV-00678-LRH-PAS, 2014 WL 3563467, at *10 (D. Nev. Jul. 18, 2014).

178. *Progressive*, 2014 WL 3563467, at *17.

179. *In re Valsartan*, 2020 WL 7054284, *11.

180. *Id.*, at *14. See also Section IV and Section V.B.2.

181. *Id.* at 617, 624.

182. See Section VII below regarding ESI Protocols.

VI. TAR WORKFLOW CONSIDERATIONS

Since the publication of the *First Edition Primer* in 2017, the development of case law on TAR implementation has been inconsistent. Certain issues discussed in the first *Primer* saw no activity (e.g., retraining the TAR Tool and manual review following TAR), while others such as TAR after keyword culling and recall thresholds and validation had multiple decisions.

A. Search-Term Culling Before TAR

Numerous cases have addressed the appropriateness of using search terms to cull the document population before applying TAR. As illustrated below, court decisions have offered a split in authority on whether the application of TAR after keyword culling is permissible with the more recent cases finding that it is permissible.

1. Cases Allowing TAR after Keyword Culling

In *In re Biomet M2A Magnum Hip Implant Products Liability Litigation*,¹⁸³ the court upheld defendant's use of keywords to cull the collected dataset before applying TAR. There, defendant had used keywords to cull the collected document set from 19.5 million documents and attachments down to 3.9 million documents and attachments. After deduplicating the documents, it used TAR on this smaller data set, identifying almost 2 million documents for production. The court denied plaintiffs' motion to require defendant to redo its search and review process using TAR on the entire document population that it had collected instead of just on the documents that resulted from a keyword search.

Plaintiffs argued that keyword search is less accurate than TAR and that defendant's efforts were tainted by using keyword search before TAR. The court rejected plaintiffs' arguments on the basis of proportionality, holding that defendant's methodology satisfied the standard set forth in Federal Rules of Civil Procedure 26 and 34, namely, that its efforts must be "reasonable." The court in *In re Biomet* reasoned as follows:

It might well be that predictive coding, instead of a keyword search . . . would unearth additional relevant documents. But it would cost Biomet a million, or millions, of dollars to test the [plaintiffs'] theory that predictive

183. *In re Biomet M2A Magnum Hip Implant Products Liability Litigation*, Case No. 3:12-MD-2391, 2013 WL 1729682 & 2013 WL 6405156 (N.D. Ind. Apr. 18 & 21, 2013).

coding would produce a significantly greater number of relevant documents. Even in light of the needs of the hundreds of plaintiffs in this case, the very large amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of this discovery in resolving the issues, I can't find that the likely benefits of the discovery proposed by [plaintiffs] equals or outweighs its additional burden on, and additional expense to, Biomet.¹⁸⁴

Similarly, in *Rio Tinto PLC v. Vale S.A.*,¹⁸⁵ the court permitted the use of keyword culling before TAR because it was in the parties' stipulated protocol. "The Court itself felt bound by the parties' protocol, such as to allow keyword culling before running TAR, even though such pre-culling should not occur in a perfect world." But the court also noted that "the standard for TAR is not perfection," nor "best practices," "but rather what is reasonable and proportional under the circumstances."¹⁸⁶

In *Proctor v. Safeway*¹⁸⁷, the court, while not specifically evaluating whether TAR could be used on a dataset culled by search terms, did not object to defendant's use of TAR to conduct its responsiveness review on the dataset collected using search terms.

The court in *Bridgestone*¹⁸⁸ permitted plaintiff to undertake a hybrid approach, using TAR on documents initially identified through the use of search terms (but which still resulted in more than two million documents requiring review). The court expressly recognized that using TAR "is a judgment call."¹⁸⁹

At least four decisions since 2020 suggest a growing trend that courts find keyword culling prior to the use of TAR to be permissible. For instance, in *Livingston*¹⁹⁰, the court permitted defendant to use TAR to review the culled document set over plaintiffs' objec-

184. *In re Biomet*, 2013 WL 1729682, at *3.

185. *Rio Tinto PLC v. Vale S.A.*, Case No. 14 Civ. 3042, 2015 WL 4367250, at *1 (S.D.N.Y. July 15, 2015).

186. See *id.*

187. *U.S. ex rel. Proctor v. Safeway, Inc.*, 11-CV-3406, 2018 WL 1210965, at *3 (C.D. Ill. Mar. 8, 2018).

188. *Bridgestone Americas, Inc. v. International Business Machines Corp.*, Case No. 3:13-1196, 2014 WL 4923014 (M.D. Tenn. July 22, 2014).

189. *Id.*

190. *Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848, at *1 (N.D. Ill. Sept. 3, 2020). See also above in Section III.A. (containing case summary).

tion that the review would create an incomplete production. The court noted that application of the TAR tool to the original collection of documents would be unduly burdensome and wasteful. In its ruling, the court agreed with defendant that it was using TAR as a responsiveness review tool and not a culling tool and accordingly, it could be used after application of agreed upon search terms because “it satisfies the reasonable inquiry standard and is proportional to the needs of this case under the federal rules.”¹⁹¹

In *Valsartan*, while the court held that defendant’s use of TAR after using negotiated search terms to cull the data for review and without notification to plaintiffs violated the entered ESI Protocol, the court made clear that the lack of notice was the issue, observing “[a]mple case law exists to support [defendants’] position that in appropriate instances layering may be done.”¹⁹²

Further, in *Maurer v. Sysco Albany, LLC*¹⁹³, the court upheld defendant’s use of TAR post-search term culling. There, the parties had disagreed on the scope of custodians, date ranges, and search terms as well as on defendant’s use of TAR post-culling. Plaintiff proposed that defendant either manually review all documents resulting from a broad list of search terms or use TAR on each custodian’s entire mailbox for a date range that covered a large time period. Defendant proposed that it use TAR after application of more narrow date ranges and search terms. In upholding the use of TAR on data resulting from the application of search terms, the court noted that “the cost of conducting a linear review of every hit resulting from a search term-based search that includes all custodians’ names and name derivatives or reviewing the full custodian accounts using predictive coding dating back to 2013 is not proportional to the benefit and importance of ESI in resolving the issues presented in this case.”¹⁹⁴

Finally, in *In re Diisocyanates Antitrust Litigation*,¹⁹⁵ in ruling upon several motions to compel regarding search term culling, TAR review and validation protocols, the court held that agreed upon search terms could be used to cull down collected data prior to

191. *Id.* at *3.

192. *Valsartan*, Case No. 19-2875, 2020 WL 7054284 at *15 (D.N.J. Dec. 2, 2020), also discussed above in Sections IV and V.E.

193. *Maurer v. Sysco Albany, LLC*, Case No. 1:19-CV-821(TJM/CFH), 2021 WL 2154144 (N.D.N.Y. May 27, 2021).

194. *Id.* at *22.

195. *In re Diisocyanates Antitrust Litigation*, MC 18-1001, 2021 WL 4295729 (W.D. Pa. Aug. 23, 2021), report and recommendation adopted, MC 18-1001, 2021 WL 4295719 (W.D. Pa. Sept. 21, 2021).

applying TAR.¹⁹⁶ The court declined, however, to approve either party's proposed search term lists, sending them back to renegotiate. In so doing, it noted that it is reasonable to use broader search terms to cull data prior to application of TAR because recall is more important than precision¹⁹⁷ in those instances. "In this regard, it should be kept in mind that the function of search terms in this case is not to identify documents for production or even to select those that will be provided directly to human reviewers; it is to narrow the universe of documents to which TAR will be applied. In this context, precision, which is what defendants appear to seek, is relatively less important than recall."¹⁹⁸

2. Cases Not Allowing TAR after Keyword Culling

While courts generally allow TAR after keyword culling, it may be disallowed if use of TAR is found to violate a search protocol ordered by the court, as described in Sections IV and VII of this paper. For example, in *Progressive Casualty Insurance Company v. Delaney*,¹⁹⁹ the court denied plaintiff's request late in the process to switch from search terms and manual review to TAR after the parties had already stipulated to a protocol that included negotiated keywords for searching. The court criticized plaintiff's plan to apply TAR only to documents hitting the search terms, observing that such a process would be inconsistent with the "best practices" guide of its TAR vendor.²⁰⁰

In addition, at least one case has found keyword culling prior to the application of TAR to be inappropriate. *FCA U.S. v. Cummins*²⁰¹, the court held that TAR should be applied before culling the document set with search terms. "Applying TAR to the universe of electronic material before any key word search reduces the universe of electronic material is the preferred method. The TAR results can then be culled by the use of search terms or other methods."²⁰²

196. *Id.* at *13.

197. Precision is "the number of true positives retrieved from a search divided by the total number of results returned." The Sedona Conference, *The Sedona Conference Glossary: E-Discovery and Digital Information Management*, Fourth Edition, 15 SEDONA CONF. J. 305 (2014).

198. *Id.* at *10.

199. *Progressive Cas. Ins. Co. v. Delaney*, Case No. 2:11-cv-00678, 2014 WL 3563467 (D. Nev. July 18, 2014); see also Section VII below regarding protocols.

200. *Id.* at *11.

201. *FCA U.S. v. Cummins*, Case No. 16-12883, 2017 WL 2806896 (E.D. Mich. Mar. 28, 2017).

202. *Id.* at *2.

B. Retraining the TAR Tool for Subsequent Document Requests

One case addressed whether the responding party can be required to respond to additional document requests after it has already used TAR to respond to a prior round of requests. In *Smilovits v. First Solar*, the court held that defendants' use of TAR in response to plaintiffs' first round of document requests did not confine plaintiffs' document discovery to the first round of requests.²⁰³ The court also noted that defendants had not explained why the search for additional documents required the use of TAR, nor had they provided any concrete information about the costs to "retrain" the TAR tool to deal with subsequent requests.²⁰⁴

C. Manual Review Following TAR Review

Few cases have addressed whether a party may conduct a manual review following the use of TAR on its collected ESI. Guidance, however, may be found in the courts' deference to responding parties' methods of production as well as the courts' treatment of manual review following keyword searches.

1. Deference to Responding Parties' Methods

Generally, without any contrary agreement between the parties documented in an ESI protocol, courts have deferred to the responding party as to the methods it undertakes in making its production, including allowing the responding party to conduct a second-level manual review for responsiveness, confidentiality, compliance with TAR parameters, and/or privilege after applying TAR.

In considering proportionality where plaintiff sought additional document review and production by a defendant using a TAR 2.0 process, the court held that the defendant's review process was reasonable, including the use of outside counsel for second level review, even though those decisions created additional costs.²⁰⁵

203. *Smilovits v. First Solar*, No. 2:12-cv-00555, slip op. at 1–2 (D. Ariz. Nov. 20, 2014).

204. *Id.*

205. *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 1813395 (D. Kan. April 9, 2020). As in prior cases, the court recognized that TAR is widely accepted under the law. *Id.* at *6 (citing, among

The parties had already agreed to TAR parameters that called for two levels of review—including a second-level review by outside counsel following the application of TAR to select documents for review by the first-level review team. When defendant determined it had reached the agreed target recall goal for production, it stopped review, leaving 1,850 “residual” potentially responsive TAR documents that had been reviewed by the first level review team but not yet reviewed by the second-level team. Plaintiff moved to compel defendant to produce those documents, but defendant argued it should not be compelled to absorb the cost of second level review of those documents.²⁰⁶

Noting that there were “sound reasons” for second level review, the court agreed with defendant’s position that it was “necessary” to address “confidentially, privilege, and compliance with TAR.”²⁰⁷ The court recognized that “[c]ourts have found a second-level manual review following a TAR to be reasonable.”²⁰⁸ Moreover, it concluded that plaintiff should not be permitted to “renege” on its prior agreement to the second-level review.²⁰⁹

Similarly, in *Good v. American Water Works*,²¹⁰ defendants proposed a privilege review using both TAR and human review, along with a Federal Rule of Evidence 502(d) claw-back order. Plaintiffs argued that to ensure expedited production and because of the protection afforded by the 502(d) order, defendants should not be permitted to manually review the documents following TAR.²¹¹ The court disagreed with plaintiffs and approved defendants’ proposed protocol, finding that “their desired approach is a reasonable one.”²¹² The court stated that it was approving the protocol “with the expectation that defendants will marshal the resources necessary to assure that the delay occasioned by manual review” would be “minimized,” and the production would be accomplished

other authorities, *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 183 (S.D.N.Y. 2012) and *The Sedona Conference Glossary E-Discovery and Digital Information Management*, Fourth Edition, 15 SEDONA CONF. J. 305 (2014)). See also *Lawson*, 2020 WL 3288058, at *6, and below for additional discussion at [CITE].

206. *Id.* at *5.

207. *Id.* at *8.

208. *Id.* (citing *The Sedona Conference TAR Case Law Primer*, 18 SEDONA CONF. J. 1, 41 (2017)).

209. *Id.*

210. *Good v. Am. Water Works Co., Inc.*, CIV.A. 2:14-01374, 2014 WL 5486827 (S.D.W. Va. Oct. 29, 2014).

211. *Id.* at *2.

212. *Id.*

quickly.²¹³ The court also stated that if “undue delay” threatened to jeopardize compliance with the discovery schedule, plaintiffs could move to reconsider the court’s order that defendants use plaintiffs’ requested approach.²¹⁴

2. Manual Review Following Use of Search Terms

Analogous cases involving manual review following the application of search terms provide helpful insight and support for conducting a manual review for responsiveness or privilege following TAR. Indeed, several courts have held that a responding party’s agreement to apply search terms to its collection of ESI does not preclude it from conducting a subsequent manual review for responsiveness of the documents returned as search term “hits.”²¹⁵ In *Palmer v. Cognizant Technology Solutions Company*, the court explained that such an approach “is not the standard under Rule 26 for discovery” and held that it would not compel production simply because a document contains a search term without regard to whether it is “relevant and proportional to the needs of the action.”²¹⁶

Support for manual review following a culling method such as search terms or TAR can be found in *Chen-Oster v. Goldman, Sachs & Co.*,²¹⁷ where plaintiffs sought to compel

213. *Id.*

214. *Id.*

215. See, e.g., *O'Donnell/Salvatori Inc. v. Microsoft Corporation*, 339 F.R.D. 275 (W.D. Wash. 2021) (holding, as a matter of first impression, that a party’s agreement to run search terms “does not waive its right to review the resulting documents for relevance so long as the review can be done in a reasonably timely manner”); *Alabama Aircraft Industries, Inc. v. Boeing Company*, No. 2:11-cv-03577-RDP, 2017 WL 9565521 at *3 (N.D. Ala. Oct. 25, 2017) (“[a]lthough the parties agreed to certain search terms while collecting documents, those search terms do not override the scope of Boeing’s actual discovery requests”); *FlowRider Surf, Ltd. v. Pacific Surf Designs, Inc.*, No. 15cv1879-BEN (BLM), 2016 WL 6522807 at *8 (S.D. Cal. Nov. 3, 2016) (agreeing to run search terms “does not constitute Plaintiffs’ acquiescence to produce all resulting documents” and noting evidence that the document hits included numerous irrelevant and unresponsive documents); *BancPass, Inc. v. Highway Toll Administration, LLC*, No. A-14-CV-1062-SS, 2016 WL 4031417 at *3 (W.D. Tex. July 26, 2016) (rejecting the argument that the parties’ communications about search terms essentially amounted to an enforceable agreement to produce all non-privileged document hits).

216. *Palmer v. Cognizant Technology Solutions Co.*, No. CV 17-6848-DMG (PLAx), 2021 WL 3145982 at *9 (C.D. Cal. July 9, 2021).

217. *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950 (AT)(JCF), 2014 WL 716521 (S.D.N.Y. Feb. 18, 2014).

Goldman Sachs to produce all documents hitting on agreed-upon search terms without further review. The court observed that with TAR—the court considered the use of search terms to be a form of TAR—parties can agree to produce documents without human review but the parties had not done so in this case. The court stated that because Goldman Sachs had not agreed to produce the documents without further human review—and the court had not ordered it—Goldman Sachs was not precluded from reviewing the documents before production.

While courts generally will allow the responding party to conduct a manual review following the use of search terms, at least one case suggests that courts will not necessarily require it. In *Federal Deposit Insurance Corporation v. Boggus*,²¹⁸ the court rejected defendant's claim that plaintiff *must* conduct a manual responsiveness review following the application of mutually-agreed upon search terms, explaining that such a procedure was "not necessary."²¹⁹ The court noted that plaintiff had agreed to produce documents as they were kept in the usual course of business and that production without subsequent manual review would encourage both parties to engage in more "efficient discovery."²²⁰

D. Validation

Courts have held that when a party uses TAR, the Federal Rule of Civil Procedure 26(g) "reasonable inquiry" standard incorporates an obligation for the responding party to validate its result.²²¹ Court may apply this regardless of whether parties use TAR or keyword searches. *City of Rockford, v. Mallinckrodt ARD INC.*, involved a responding party that had refused to validate the results of its keyword searches. While the parties had agreed to use of keyword searches, they approached the court at an impasse on post-production validation processes.²²² Plaintiffs proposed that defendants provide a random sample of the null set, followed by meeting and conferring to determine whether any additional terms or term modifications were necessary. The court agreed, reasoning that

218. *Federal Deposit Insurance Corporation v. Boggus*, No. 2:13-cv-00162-WCO, 2015 WL 11457700 (N.D. Ga. May 13, 2015).

219. *Id.* at *2.

220. *Id.*

221. *In re Diisocyanates Antitrust Litig.*, MC 18-1001, 2021 WL 4295729, at *6 (W.D. Pa. Aug. 23, 2021), report and recommendation adopted, MC 18-1001, 2021 WL 4295719 (W.D. Pa. Sept. 21, 2021).

222. *City of Rockford v. Mallinckrodt ARD INC.*, 326 F.R.D. 489 (N.D. Ill. 2018).

“random sampl[ing] of the null set is a part of the TAR process” to quantify “the documents that will be missed and not produced,” and there is “no reason ... that a random sampling of the null set cannot be done when using key word searching.”²²³ The court adopted the parties’ proposed ESI order “with the inclusion of Plaintiffs’ proposal that a random sample of the null set will occur after the production and that any responsive documents found as a result of that process will be produced.”²²⁴

Beyond the threshold question of whether a party must validate, opinions focus on several validation sub-issues.

1. Recall Thresholds

Since *Global Aerospace Inc. v. Landow Aviation, L.P.*²²⁵ and *Independent Living Center v. City of Los Angeles*,²²⁶ few courts have addressed the issue of what the results of a “reasonable” TAR effort should be. Most of the cases that have addressed this issue have focused on recall, a measure of “the number of documents retrieved from a search divided by all of the responsive documents in the collection,”²²⁷ with one notable outlier.

In *Domestic Airline*, the parties entered into a validation protocol “to ensure accuracy and completeness.”²²⁸ As part of that protocol, defendant agreed to “set a minimum estimated recall rate of 75%” but also agreed to “endeavor to achieve a higher estimated recall rate if that rate may be obtained with a reasonable level of precision through reasonable additional training effort[.]”²²⁹ To evaluate recall and precision, defendant agreed to “engage in validation testing by reviewing a statistically representative sample of documents to test the accuracy of TAR as to the responsiveness of the documents” and report

223. *Id.* at 493, 494.

224. *Id.* at 496.

225. *Glob. Aerospace Inc. v. Landow Aviation, L.P.*, Case No. 61040 (Va. Cir. Ct. Apr. 23, 2012).

226. *Independent Living Center v. City of Los Angeles*, No. 2:12-cv-00551, slip op. at 3 (C.D. Cal. June 26, 2014).

227. The Sedona Conference, *The Sedona Conference Glossary: E-Discovery and Digital Information Management*, Fourth Edition, 15 SEDONA CONF. J. 305 (2014).

228. *In re Domestic Airline Travel Antitrust Litigation*, MC 15-1404 (CKK), 2018 WL 4441507, at *4 (D.D.C. Sept. 13, 2018).

229. *In re Diisocyanates*, 2018 WL 4441507, at *4.

those results to plaintiffs (number of “false negatives,” “false positives,” and “true positives”).²³⁰

Similarly, in *Lawson v. Spirit AeroSystems, Inc.*, defendant used TAR to produce with a recall of approximately 85%, which the court confirmed was reasonable and within a typical range for TAR matters.²³¹ Plaintiff had demanded that defendant switch from keyword searching to a TAR methodology, which defendant ultimately agreed to do, subject to filing a motion to shift costs based on proportionality.²³² An initial review using TAR 2.0 achieved a 68.5% recall rate of responsive documents, but plaintiff insisted that the process be repeated until an 75-85% recall rate was achieved. Defendant agreed to 80% recall, and then after stopping its review, determined that it had reached 85% recall.²³³

Even then, however, plaintiff moved to compel defendant to perform a second-level review of the set of residual TAR documents: 1,850 potentially responsive TAR documents that were reviewed in first level review, but not yet in second level review, once the desired recall rate was reached.²³⁴

The court denied the motion, explaining that defendant’s TAR review process was reasonable, and that plaintiff’s request for additional review was disproportionate to the needs of the case.²³⁵ The court noted that at an expense of \$600,000, only 3.3% of the 322,000-document set was found to be responsive, and defendant produced 85% of those responsive documents.²³⁶ The court rejected the perfection that plaintiff “effectively demands, which is a 100% target recall rate.”²³⁷ Ultimately, plaintiff had to pay for his unreasonable demands, when the court approved fee shifting of defendant’s TAR costs to plaintiff, as discussed below.²³⁸

230. *Id.*

231. *Lawson*, No. 18-1100, 2020 WL 1813395 (D. Kan. April 9, 2020). See also No. 18-1100, 2020 WL 3288058 (D. Kan. Jun. 18, 2020), *aff’d*, 2020 WL 6939752 (D. Kan. Nov. 24, 2020) and above at Section VI.C.1.

232. *Id.* at *4; see also *Lawson*, 2020 WL 3288058, at *6.

233. *Lawson*, 2020 WL 1813395, at *7-8.

234. *Id.* at *5.

235. *Id.* at *8.

236. *Id.* at *16.

237. *Id.* at *18.

238. See *Lawson*, No. 18-1100, 2020 WL 1813395 (D. Kan. Apr. 9, 2020), discussed below in VI.D.2. and IX.C.

2. Scope of TAR 2.0 Validation Set

In *In re Diisocyanates Antitrust Litigation*,²³⁹ the parties proffered dueling proposals on the use of certain search terms and specific TAR methodologies. The court-appointed special master found that due to the complexities of TAR, Rule 26(g)'s reasonable inquiry requirement obligated the responding party to validate its TAR methodology.²⁴⁰

After examining plaintiffs' and defendants' proposed TAR methodologies, the special master concluded that defendants' proposed methodology contained serious flaws that would preclude them from certifying that their discovery responses were reasonable under Rule 26(g).²⁴¹ Defendants proposed to calculate estimated recall based on elusion sampling of the unseen TAR collection and did not include documents that failed to hit on search terms, which may have overestimated the recall rate. In addition, while defendants' validation approach of using elusion testing and estimating recall may have been reasonable as a validation methodology under TAR 1.0, the special master stated that the validation of CAL or TAR 2.0 requires more.²⁴²

3. Dysfunctional Validation and TAR 2.0

Even with TAR 2.0, validation can be a complex process. For instance, consider *Domestic Airline*,²⁴³ a multidistrict class action in which plaintiffs sought to extend discovery due to one defendant's document production of approximately 3.5 million documents.²⁴⁴ Specifically, plaintiffs asserted that only 17% of defendant's production (600,000 documents) was responsive to their requests, and thus they needed more time to determine which documents were responsive.²⁴⁵ Previously, the parties entered into a validation protocol "to ensure accuracy and completeness."²⁴⁶

239. *In re Diisocyanates Antitrust Litig.*, MC 18-1001, 2021 WL 4295729 (W.D. Pa. Aug. 23, 2021), report and recommendation adopted, MC 18-1001, 2021 WL 4295719 (W.D. Pa. Sept. 21, 2021).

240. *Id.* at *6.

241. *Id.* at *9.

242. *Id.*

243. *In re Domestic Airline Travel Antitrust Litigation*, No. 15-1404, 2018 WL 4441507 (D.D.C. Sept. 13, 2018).

244. *Id.* at *2.

245. *Id.*

246. *Id.* at *3.

One business day before the production deadline, defendant provided the TAR validation metrics to plaintiffs, reporting an estimated recall of 85% and an estimated precision of 58%. Defendant also provided the validation sampling metrics required by the TAR protocol. “When Plaintiffs analyzed the metrics, they found that the statistics from the validation sample indicated that the TAR process resulted in a recall of 97.4% and precision of 16.7%,” in contrast to the metrics provided by defendant.²⁴⁷ After exchanges between the parties, defendant noted that “it had incorrectly reported the control set metrics, and that the correct control set metrics were, in fact, consistent with the validation sample results.”²⁴⁸ The court concluded that “the answer seems to be that unless [defendant] starts the process over, Plaintiffs must review all the documents.”²⁴⁹

The court concluded that “[defendant’s] production of core documents varied greatly from the control set in terms of the applicable standards for recall and precision and included a much larger number of non-responsive documents that [sic] was anticipated. Additionally, Plaintiffs diligently sought an amendment of the schedule after it became apparent that there was no way to resolve the excess non-responsive document issue short of starting over, and the 70 attorneys engaged in document review were not going to be able to complete the job under the current deadlines.”²⁵⁰

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at *7.

VII. TAR PROTOCOLS

A. *The Role of TAR Protocols*

While courts generally support the use of TAR to identify responsive documents in discovery, the level of specificity found in court-approved TAR protocols varies. Some courts issue detailed orders while others do not mandate particular validation protocols or search parameters.

In *Domestic Airline*, for example, the parties entered into a validation protocol “to ensure accuracy and completeness.”²⁵¹ That agreement was later used to support plaintiff’s successful request for an extension of fact discovery where defendant’s production demonstrated a low level of precision resulting in “millions of non-responsive documents.”²⁵² The protocol required defendant to “set a minimum estimated recall rate of 75% but [to] endeavor to achieve a higher estimated recall rate if that rate may be obtained with a reasonable level of precision through reasonable additional training effort.”²⁵³ In granting plaintiff’s extension request, the court reasoned that the TAR protocol noted that a reasonable level of precision was a concern, contradicting defendant’s argument that plaintiffs wanted a high level of TAR recall “without focusing on precision” and “got what they bargained for.”²⁵⁴

Whether parties unilaterally design their own TAR protocol or enter into one by agreement or court order, it is important to understand what such protocols require and how those requirements will be measured.

B. *Consequences for Deviating from Existing Search Protocols*

As ESI protocols have become increasingly routine, courts have assessed a responding party’s production decisions against any governing protocol, often enforcing the provisions negotiated by the parties or imposed by the court. Where no ESI protocol exists, however, the outcome is more varied.

251. *Domestic Airline*, Case No. 15-1404, 2018 WL 4441507, at *3 (D.D.C. Sept. 13, 2018).

252. *Id.* at *4.

253. *Id.*

254. *Id.* at *5.

1. Deference to ESI Protocols

In *Livingston* and *Valsartan*, the existence of a negotiated and entered ESI protocol dictated how the court handled a party's decision to use TAR.

In *Livingston*²⁵⁵, the court ruled that defendant's use of TAR was permissible because it did not contradict the existing protocol ordered by the court. In that case, the parties had spent two years negotiating an ESI protocol, which was silent on the method and process for review but included a detailed process for collection and keyword culling. After the court entered the protocol, defendant notified plaintiffs that it intended to use TAR to review the keyword-culled documents. Plaintiffs objected arguing that because defendant never mentioned using TAR during the protocol negotiations, doing so would violate the protocol. The court disagreed, noting that the protocol "did not set forth the review methodology that the City must use to identify responsive ESI."²⁵⁶

In contrast, the court in *Valsartan*²⁵⁷ ruled that defendant violated the existing ESI protocol when it used TAR without plaintiffs' consent because the protocol required defendant to timely disclose its use when its use was reasonably foreseeable.²⁵⁸ In ruling that defendant violated the protocol, however, the court nevertheless noted that it "agree[d] with the line of cases that holds that a producing party has the right in the first instance to decide how it will produce its documents."²⁵⁹

2. Contradictory Decisions – No Protocol

255. *Livingston v. City of Chicago*, Case No. 16 CV 10156, 2020 WL 5253848 (N.D. Ill. Sept. 3, 2020). See also above in Section III.A. (containing case summary).

256. *Id.* at *3. See also *Id.* at *8 citing 19 SEDONA CONF. J. 1, Principle 6; above in Section IV (court cited Sedona Principle 6 that defendant could use TAR to review the culled documents because "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own [ESI].")

257. *Valsartan*, 2020 WL 7054284.

258. *Id.* at *16-17.

259. *Id.* at *14-15, citing *Hyles v. New York City*, 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114, at *2 (S.D.N.Y. Aug. 1, 2016).

Two cases—*Progressive*²⁶⁰ and *Bridgestone*²⁶¹—have reached differing conclusions on whether a responding party may switch to TAR in the middle of discovery after having previously agreed to use search terms and manual review. The differing outcomes appear to result from the unique facts of each case.

In *Progressive*, the court denied plaintiff's request to use TAR. The factors the court cited included: plaintiff sought to use TAR extremely late in the discovery period; it had not yet produced a single document; it had previously agreed in the parties' ESI protocol to use search terms and manual review; it was not willing to reveal its coding decisions and irrelevant documents in the seed and training sets; and it made the decision to switch to TAR unilaterally, without informing defendants or the court.²⁶² According to the court, the parties had "spent months narrowing search terms," at plaintiff's insistence, to reduce its burden.²⁶³ The narrowed search terms that the parties agreed on yielded 565,000 "hit" documents out of a total population of 1.8 million. Although plaintiff had initially represented that it would begin production in September 2013 and complete it by the end of October 2013, it advised the requesting party on December 20, 2013, that the process of reviewing the documents retrieved by the search terms was unworkable.²⁶⁴

As an alternative to manual review, plaintiff proposed to apply TAR to the 565,000 documents that "hit" on the search terms and estimated that plaintiff's TAR process would result in a recall of 70–80% (i.e., that it would find 70–80% of the total number of relevant documents in the collection). Plaintiff would then manually review the documents identified by TAR for production.²⁶⁵

The *Progressive* court rejected plaintiff's proposal, on the grounds that it had previously agreed to manually review the search term hits and it was too late to change course. The court indicated, however, "[h]ad the parties worked with their e-discovery consultants and agreed at the onset of this case to a predictive coding-based ESI protocol, the court would not hesitate to approve a transparent, mutually agreed upon ESI protocol."²⁶⁶

260. *Progressive Cas. Ins. Co. v. Delaney*, Case No. 2:11-cv-00678, 2014 WL 3563467 (D. Nev. July 18, 2014).

261. *Bridgestone*, Case No. 3:13-1196, 2014 WL 4923014 (M.D. Tenn. July 22, 2014).

262. *Progressive*, 2014 WL 3563467, at *8.

263. *Id.* at *5.

264. *Id.* at *4, *5.

265. See *id.*

266. *Id.* at *9.

In *Bridgestone*, however, the court permitted plaintiff to change its search and review methodology to TAR mid-stream, based on plaintiff's determination that it would be a much more efficient process, despite defendant's objections that the request was an "unwarranted change in the original case management order," and that it would be unfair to allow the use of TAR "after an initial screening has been done with search terms."²⁶⁷ In permitting plaintiff to change course, the court observed "the use of predictive coding is a judgment call, hopefully keeping in mind the exhortation of Rule 26 that discovery be tailored by the court to be as efficient and cost-effective as possible." The court noted that the case involved "millions of documents to be reviewed with costs likewise in the millions."²⁶⁸

267. See *Bridgestone Ams., Inc. v. Int'l Bus. Machines Corp.*, Case No. 3:13-1196, 2014 WL 4923014, at *1 (M.D. Tenn. July 22, 2014).

268. *Id.*

VIII. PROPORTIONALITY

Courts may weigh proportionality factors in assessing whether a responding party employing TAR has discharged its discovery obligations. For example, in *Davine v. The Golub Corp.*,²⁶⁹ the court permitted defendants to use TAR to review documents and then to determine a stopping point based on a general proportionality assessment.²⁷⁰ While not expressly weighing proportionality factors, the court allowed defendants to determine when they would stop their review based on a unilateral, but good faith, assessment of whether the burden of further review would outweigh the benefits of doing so.²⁷¹

In *City of Rockford v. Mallinckrodt ARD Inc.*,²⁷² the court expressly engaged in a proportionality analysis in determining whether defendants should be required to review a random sample from the null set to validate the results of the keyword search process. “The court noted that in its experience and understanding, reviewing a random sample of a null set would not be unreasonably expensive or burdensome.”²⁷³ The court stated, “[v]alidation and quality assurance are fundamental principles to ESI production. The process provides the reasonable inquiry supporting the certification under Rule 26(g).”²⁷⁴ The court also stated, “critically, Defendants have failed to provide any evidence to support their contention” that it would be expensive and burdensome.²⁷⁵

Although defendants had not expressly made a proportionality argument, the court went on to analyze the proportionality factors under Federal Rule of Civil Procedure 26(b)(1). First, the court stated that the issues at stake—having to do with pharmaceuticals pricing—were substantial, having garnered national media attention.²⁷⁶ Second, the court found that the potential amount in controversy was “extraordinary” and “in today’s legal

269. *Davine v. The Golub Corp.*, No. 3:14-cv-30136-MGM, 2017 WL 549141 (D. Mass. Feb. 8, 2017).

270. See *id.* at *1.

271. *Id.* (stating that defendants “may cease their review of the documents identified as possibly relevant when they made a good faith determination that the burden of continuing the review outweighs the benefit in terms of identifying relevant documents.”).

272. *City of Rockford v. Mallinckrodt ARD Inc.*, 326 F.R.D. 489 (N.D. Ill. 2018).

273. See *id.* at 495.

274. *Id.* at 494.

275. *Id.*

276. *Id.*

vernacular, these are ‘bet the company’ cases.”²⁷⁷ Third, defendants had access to the majority of the relevant information in the case. Fourth, “as to resources, the main defendant is a large international pharmaceutical company with substantial resources.”²⁷⁸ Fifth, the court found that the ESI would “play a key role in resolving the issues in these cases.”²⁷⁹ Finally, the court found that “the burden and expense of a random sampling of the null set does not outweigh its likely benefit of ensuring proper and reasonable—not perfect—document disclosure.”²⁸⁰ Accordingly, the court ordered defendants to review a random sample of the null set based on a 95% confidence level with a margin of error of +/- 2%.²⁸¹

Requesting parties sometimes argue that a responding party’s use of TAR undercuts claims of undue burden. In *County of Cook v. Bank of America Corp.*,²⁸² the District Court rejected plaintiff’s argument that defendants’ use of TAR affected the Magistrate Judge’s assessment of the “burdens and volume of data” that would result from the searches plaintiff proposed. The court pointed out that defendants to date had reviewed 400,000 ESI documents for the 38 court-ordered custodians and had 36 attorneys working full time for three months reviewing documents. Additionally, defendants’ ESI vendor costs were projected to exceed \$1.3 million. The court held that “[t]hese numbers undermine any suggestion that Defendants’ use of TAR to aid in their ESI production affects [the Magistrate Judge’s] proportionality basis for denying the County’s request for ESI from the [additional] custodians at issue here.”²⁸³

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. See *id.* at 496.

282. *County of Cook v. Bank of America Corp.*, No. 14-C-2280, 2019 WL 5393997, at *3 (N.D. Ill. Oct. 22, 2019).

283. *Id.*

IX. FEE SHIFTING

In some cases involving TAR, courts have ordered cost shifting, and in so doing, paid particular attention to the efficiencies gained from using TAR or the inefficiencies resulting from a party's refusal to adopt or timely propose it.

A. Costs Remaining with Responding Party

The committee notes to the 2015 amendments to Rule 26 include a reminder that “a responding party ordinarily bears the costs of responding.”²⁸⁴ The court in *OSI Rest. Partners, Ltd. Liab. Co. v. United Ohana, Ltd. Liab. Co.*²⁸⁵, discussed in Section III.D. above, adhered to this general principle as applied to TAR.²⁸⁶

B. Costs Split Between Parties

In some cases, courts have departed from the general rule and have instead allocated costs of responding among the parties. In *Lawson v. Spirit AeroSystems, Inc.*,²⁸⁷ the court granted defendant's motion to shift the TAR-related costs and allocated the costs 80% to plaintiff and 20% to defendant because plaintiff had “wanted to proceed with the TAR process at a point in time when it was disproportional to the needs of the case.”²⁸⁸ the parties had engaged in protracted negotiations and motion practice related to discovery, initially involving disputes relating to search terms and the proposed custodians. Plaintiff then insisted that defendant switch to a TAR methodology, and defendant agreed, subject to filing a motion to shift costs if the effort was considered disproportionate. Throughout the TAR process, defendant gave into plaintiff's continued demands, until it took the position, and the court agreed, that it was finished. As discussed above, the court declined

284. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

285. *OSI Rest. Partners, Ltd. Liab. Co. v. United Ohana, Ltd. Liab. Co.*, No. 12353-CB, 2017 WL 396537, at *2 (Ch. Jan. 27, 2017).

286. *Id.*

287. *Lawson*, No. 18-1100, 2020 WL 3288058 (D. Kan. Jun. 18, 2020), *aff'd*, 2020 WL 6939752 (D. Kan. Nov. 24, 2020).

288. *Id.* at *22.

to force defendant to continue its review when its estimated recall met or exceeded even that initially demanded by plaintiff.²⁸⁹

The court found it was appropriate to shift costs of the TAR review to plaintiff because “Lawson’s continued pursuit of the ESI dataset via TAR was not proportional to the needs of the case,” and he had pursued “needlessly overbroad discovery.”²⁹⁰ Because he had “wanted to proceed with the TAR process at a point in time when it was disproportional to the needs of the case,” the court held that he should bear much of the cost, to protect defendant.²⁹¹

In another matter, *Youngevity Int’l Corp. v. Smith*,²⁹² after plaintiffs produced 4.2 million pages of documents without having reviewed them (and also failed to produce 700,000 responsive documents), plaintiffs admitted producing documents without conducting a document-by-document review. They argued, however, that they had produced the documents exactly as defendants requested, that every document was responsive because it hit on at least one of the agreed-upon search terms, and that the volume of the production resulted from defendants’ failure to narrow the search terms.²⁹³ The court disagreed, finding that the productions “improperly exceeded” defendants’ requests and did not comply with the parties’ agreed-upon protocol.²⁹⁴ The court gave Plaintiffs two options: (1) they could re-produce the documents after reviewing for responsiveness and privilege or (2) produce the 700,000 responsive documents omitted from prior productions without further review and pay defendants’ costs for applying TAR to the documents.²⁹⁵ The court also ordered plaintiffs to reimburse defendants for fees and expenses incurred in its motion.²⁹⁶

289. See Sections VI.C and VI.D.1 above, discussing *Lawson*, No. 18-1100, 2020 WL 1813395 (D. Kan. Apr. 9, 2020).

290. *Lawson*, No. 18-1100, 2020 WL 3288058 at *21-22.

291. *Id.* at *22.

292. *Youngevity Int’l Corp. v. Smith*, No. 16-cv-00704-BTM (JLB), 2017 WL 6541106, at *1, *12 (S.D. Cal. Dec. 21, 2017).

293. *Id.* at *8.

294. *Id.* at *9.

295. *Id.* at *12.

296. See *id.* at *11-12.

Finally, in *Independent Living Center v. City of Los Angeles*, TAR fees were ordered split between the parties.²⁹⁷ In that case, the court ordered the responding party to use TAR to identify the 10,000 most relevant documents without using previously identified documents as seeds, despite the increased cost to them.²⁹⁸ However, the court ruled that if plaintiff wanted any documents beyond the 10,000, they would be required to pay 100% of the producing party's costs in producing them, including the attorney's fees incurred to review the additional documents.²⁹⁹

C. Costs Shifted to Requesting Party

One California state court decision shifted TAR related costs to a requesting party, based on a state procedural rule permitting such allocation. In *Dremak v. Urb. Outfitters, Inc.*,³⁰⁰ the California Court of Appeal affirmed a trial court's post-judgment award to defendants, who prevailed in the case, of \$57,912.84 of costs associated with their production of documents in response to plaintiffs' discovery requests, which included the use of TAR. Under California law, the trial court had discretion to grant defendants' request for post-judgment taxation of these costs provided they were "reasonable and necessary."³⁰¹

Defendants presented evidence that the search terms and custodians that plaintiffs asked defendants to use resulted in a population of over 400,000 documents.³⁰² Defendants then employed TAR to narrow the population to a production set of 1,658.³⁰³ The costs defendants sought consisted of payments "to vendors to process documents, conduct coding analytics to identify relevant documents, and to create and maintain a database to store thousands of documents."³⁰⁴ The court concluded that defendants' evidence supported the trial court's finding that these costs were reasonable and necessary to the

297. *Independent Living Center v. City of Los Angeles*, No. 2:12-cv-00551, minute order, p. 1 (C.D. Cal. June 13, 2014).

298. *Id.*

299. *Id.*

300. *Dremak v. Urb. Outfitters, Inc.*, No. D071308, 2018 WL 1441834, at *7-*8 (Cal. App. Mar. 23, 2018).

301. See *id.* at *8.

302. *Id.*

303. *Id.*

304. *Id.*

litigation and that plaintiffs had not shown that finding constituted an abuse of discretion.³⁰⁵

D. TAR Fees as Taxable Costs

In *Gabriel Technologies Corporation v. Qualcomm Inc.*,³⁰⁶ the court awarded more than \$2.8 million in fees incurred for the use of “computer assisted, algorithm-driven document review” for almost 12 million documents. The court awarded defendant attorney’s fees and TAR-related costs under federal patent law and for misappropriation claims under California’s Uniform Trade Secrets Act based on its finding that plaintiff acted in bad faith by bringing “objectively baseless claims.” The court further found that defendant’s use of TAR was “reasonable under the circumstances” of the case.³⁰⁷

In *In re Actos (Pioglitazone) Prods. Liab. Litig.*,³⁰⁸ the court awarded plaintiffs attorneys’ fees and expenses, recognizing that “[t]his MDL was one of the first to allow the use of a ‘predictive coding’ system to aid the discovery process and the production of relevant documents.”³⁰⁹ The court further stated that “the predictive coding system provided a unique way to, in part, realistically manage the immense amount of information needed to be produced and reviewed in this MDL.”³¹⁰ The court also observed that “[t]he predictive coding system, although not perfect or fully realized, nonetheless, provided an innovative efficiency to the discovery process when compared to the existing, prevailing methods of review.”³¹¹ The court concluded that plaintiffs’ steering committee and defense counsel “expended tremendous time, and computer and legal expertise, to harness this technological possibility with a quite positive, if not complete, result. As this area involved cutting edge technology, those counsel who could bring their unique expertise and skill to the task were exceptionally valuable to the [plaintiffs’ steering committee].”³¹²

305. *Id.*

306. *Gabriel Technologies Corporation v. Qualcomm Inc.*, No. 09-cv-1992, 2013 WL 410103, at *10 (S.D. Cal. Feb. 1, 2013).

307. *Id.*

308. *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 274 F. Supp. 3d 485, 499-500 (W.D. La. 2017).

309. *Id.* at 499.

310. *Id.*

311. *Id.*

312. *Id.* at 499-500.

X. INTERNATIONAL ADOPTION OF TAR

TAR continues to be accepted and discussed in foreign jurisdictions.

The European Court of Human Rights recognized that “courts in at least two jurisdictions (the United Kingdom and Ireland) have approved in recent years the use of technology-assisted review . . . for the purposes of electronic disclosure in high stakes civil litigation,” and reasoned that “[t]he rationale would apply with equal force in criminal cases of comparable complexity.”³¹³ The court further noted that TAR “allows parties to save a significant amount of time and resources in analyzing large data sets.”³¹⁴

In Ireland, the Irish High Court in *Irish Bank Resolution Corp. v. Quinn* granted a responding party’s motion to use TAR over the objection of the party requesting the production of documents, a ruling upheld by the Irish Court of Appeal.³¹⁵

In England, the English High Court in *David Brown v. BCA Trading* approved the use of TAR over the objection of the requesting party.³¹⁶ And in *Pyrrho Investments Ltd. v. MWB Property Ltd.* the parties jointly sought and obtained the approval of the English High Court to use TAR.³¹⁷ The same court, in *Astra Asset Management UK Ltd. v. MUSST Investments LLB* noted that “where a party is intending to use technology assisted review, the intention should be notified to the other party.”³¹⁸

In Canada, in *Perlmutter. v. Smith*, the Ontario Superior Court of Justice held that respondent’s counsel could review documents for relevance, not just privilege, where the parties were court-ordered to agree on search terms for respondent’s devices and had also agreed to use TAR.³¹⁹ The applicants had unsuccessfully objected to respondent’s counsel “reviewing the documents to narrow the production set generated by TAR other

313. Sigurður Einarsson v Iceland (App. No. 39757/15) [2019] ECHR 39757/15 (internal citations omitted).

314. *Id.*

315. *Irish Bank Resol. Corp. v. Quinn*, [2015] IEHC 175 (H. Ct.) (Ir.), upheld by the Irish Court of Appeal (see *Court of Appeal Approves use of TAR for Discovery*, McCann Fitzgerald (2016), <https://www.mccannfitzgerald.com/knowledge/disputes/court-of-appeal-approves-use-of-tar-for-discovery>).

316. *David Brown v. BCA Trading Ltd.*, [2016] EWHC (Ch) 1464 (Eng.).

317. *Pyrrho Inv. Ltd. v. MWB Prop. Ltd.*, [2016] EWHC (Ch) 256 (Eng.).

318. *Astra Asset Mgmt. UK Ltd. v Musst Investments; Musst Holdings Ltd v Astra Asset Mgmt. UK Ltd.*, [2020] EWHC (Ch) 1871 (Eng.).

319. *Perlmutter v. Smith*, 2021 ONSC 1372, 2021 CarswellOnt 2055 (2021).

than for privilege.”³²⁰ In *PM&C Specialist Contractors Inc. v. Horton CBI Ltd.*, the Alberta Court of Queen’s Bench declined to opine on what percentage of document review costs, including TAR, was a recoverable disbursement on a bill of costs.³²¹

In the first edition of this Primer, we cited *McConnell Dowell v. Santam Ltd*, where the Supreme Court of Victoria issued a decision recognizing party agreement on use of TAR and reviewed a TAR report from a Special Referee used to oversee the TAR process.³²² This case is now cited in Australia as precedent for use of TAR as an appropriate tool to gain efficiency during the eDiscovery process.³²³ Furthermore, additional cases have referenced the use of TAR without question to its acceptance.³²⁴ From the decisions, it appears that acceptance of TAR is no longer a threshold issue in Australia, and that when TAR is discussed, it is in general reference to its use or discussion of further details surrounding the process.³²⁵

320. *Id.*

321. *PM&C Specialist Contractors Inc. v. Horton CBI Ltd.*, 2017 ABQB 400.

322. *McConnell Dowell Constructors (Aust) Pty Ltd. v Santam Ltd.* (No 1) [2016] VSC 734 (Austl.).

323. *Mosslmani v Nationwide News Pty Ltd* (No 2), [2018] NSWDC 113 (2018).

324. *Santos Ltd v Fluor Australia Pty Ltd* (No 4), [2021] QSC 296 (2021); *VIIV HEALTHCARE CO v GILEAD SCIENCES PTY LTD* (No 2), BC202009855; *Parbery v QNI Metals Pty Ltd*, [2018] QSC 276 (2018).

325. See e.g., *VIIV HEALTHCARE CO v GILEAD SCIENCES PTY LTD* (No 2), BC202009855 (discussion of TAR interplay with search terms).

XI. USE OF TAR IN FEDERAL GOVERNMENT INVESTIGATIONS

Some United States government agencies have accepted the use of TAR for search and review in connection with document productions in regulatory investigations, particularly merger reviews. In October 2021, the Federal Trade Commission issued an update to its Model Second Request for merger antitrust investigations, which includes specifications related to the use of TAR in response to Second Requests.³²⁶ The Model Second Request expressly contemplates the use of TAR, among other discovery tools, subject to certain requirements. Significantly, the 2021 update requires the responding party to address its intent to use TAR through a written submission to the FTC *prior to* applying TAR to identify responsive documents.³²⁷ This change is meant to ensure an effective review process from the outset and to more closely align the FTC Second Request process with that of the DOJ Antitrust Division.³²⁸ The responding party also must disclose specified information to the FTC at the end of the document review process.³²⁹ In particular, the responding party must:

[b](i) describe the collection methodology, including: (a) how the software was utilized to identify responsive documents; (b) the process the Company utilized to identify and validate the seed set documents subject to manual review; (c) the total number of documents reviewed manually; (d) the total number of documents determined non-responsive without manual review; (e) the process the Company used to determine and validate the accuracy of the automatic determinations of responsiveness and non-responsiveness; (f) how the Company handled exceptions (“uncategorized documents”); and (g) if the Company’s documents include foreign language documents,

326. Fed. Trade Comm’n, *Model Request for Additional Information and Documentary Material (Second Request)* (revised Oct. 2021), https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request__+9+3_-_final_-_october_2021.pdf.

327. *Id.* at 12 (Specification 30), 22 (Instruction 15). See also Fed. Trade Comm’n, Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave* (Sept. 28, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined>.

328. Fed. Trade Comm’n, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave* (Sept. 28, 2021), n.144.

329. Fed. Trade Comm’n, *Model Request for Additional Information and Documentary Material (Second Request)*, at 12 (Specification 30), 22 (Instruction 15).

whether reviewed manually or by some technology-assisted method; and [b](ii) provide all statistical analyses utilized or generated by the Company or its agents related to the precision, recall, accuracy, validation, or quality of its document production in response to this Request; and [c] identify the Person(s) able to testify on behalf of the Company about information known or reasonably available to the organization, relating to its response to this Specification.³³⁰

The Instructions to the Model Second Request further specify that the responding party must provide to the FTC: “(a) confirmation that subject-matter experts will be reviewing the seed set and training rounds;³³¹ (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) a validation process that allows Commission representatives to review statistically-significant samples of documents categorized as non-responsive documents by the algorithm.”³³²

Similarly, counsel for the Antitrust Division of the Department of Justice has provided guidance regarding TAR protocols in response to Division investigations, updated in March 2021, which also states that the use of TAR should be addressed with the DOJ prior to embarking on a TAR-based review.³³³ Notably, the Instructions section related to Production Format of the DOJ’s Model Second Request states the following: “Before using software or technology (including search terms, predictive coding, de-duplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Request, the Company must submit a written description of the method(s) used to conduct any part of its search.”³³⁴ The DOJ Model Second Request also contains the same requirements as the FTC Model Second Request related to confirmation that subject-matter experts will review the seed set and training rounds, disclosure of recall, precision, and confidence-level statistics, and a validation process that includes review of statistically-significant samples of documents categorized as non-responsive.³³⁵

330. *Id.* at 12 (Specification 30).

331. Second Request productions tend to utilize TAR 1.0 procedures, though TAR 2.0 is also in use.

332. *Id.* at 22 (Instruction 15).

333. U.S. Dep’t of Justice, *Request for Additional Information and Documentary Material (Model Second Request)*, at 15 (Instructions 3 and 4) (revised Mar. 2021), <https://www.justice.gov/atr/request-additional-information-and-documentary-material-issued-weebyewe-corporation>.

334. *Id.*

335. *Id.*

It is important to note that actual practice may deviate from public guidance and policy statements. For example, a senior attorney with the Department of Justice, Antitrust Division issued a public statement that it will not allow a party to conduct a manual review for responsiveness after the TAR process has been completed.³³⁶ Despite this statement, however, the experience of eDiscovery practitioners who regularly engage with the Division in representing clients responding to Second Requests is that the Division has, in some instances, allowed a second-level, manual responsiveness review after TAR. Moreover, other Divisions of the Department of Justice routinely allow manual review after the application of TAR. In addition, the DOJ has itself reserved the right to conduct manual review after TAR in cases where it has represented client agencies as defendants in litigation. Thus, responding parties should continue to advocate for the most effective use of TAR and negotiate with agency staff to secure a favorable TAR protocol for their clients.

In summary, implementing TAR in the context of government investigations raises some unsettled questions and thus the responding party should consider proactively engaging with the government at the start of the eDiscovery process to discuss what specifications may be acceptable under a TAR protocol (including whether such a protocol is appropriate). Generally, these issues and the specifications for a TAR protocol will be worked out with agency staff on a case-by-case basis at the outset of the production process.

336. <https://www.justice.gov/atr/page/file/953381/download>

XII. CONCLUSION

Since 2012, case law's broad consensus on TAR has evolved from an acceptable methodology to black letter law that where the responding party wants to utilize TAR, courts will permit it. On the other hand, courts likely will not force a reluctant responding party to utilize TAR. There remain, however, numerous additional issues that should be addressed when TAR is to be used. A party seeking to use TAR is encouraged to be cooperative and transparent about their process and should not spring the use of TAR on opposing counsel or the court midstream. Search term culling, TAR protocols, recall thresholds, quality control, and validation are all details where the devil can, and, invariably does, reside. The general principles set forth in the cases discussed in this *Primer* should provide useful guidance to courts and parties seeking to use TAR to achieve the goals of Federal Rule of Civil Procedure 1 (the just, speedy, and inexpensive resolution of legal proceedings), Rule 26(b)(1) (proportionality)³³⁷, and Rule 26(g) (reasonableness).

337. See FED. R. CIV. P. 26(b)(1), Advisory Committee Note to 2015 Amendment (“Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.”).

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