

TAR Quotation Appendix

The Sedona Conference



QUOTATION APPENDIX

This Appendix compiles case quotations from the most relevant cases presented in each section of the Primer, all of which are discussed more fully above.

I. INTRODUCTION

II. HISTORY OF TAR

- A. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 183 (S.D.N.Y. 2012): “This judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases.”
- B. *Harris v. Subcontracting Concepts, LLC*, Case No. 1:12-MC-82, 2013 WL 951336, at *5 (S.D.N.Y. Mar. 11, 2013): ““With the advent of software, predictive coding, spreadsheets and similar advances, the time and cost to produce large reams of documents can be dramatically reduced.”
- C. *Chevron Corporation v. Donziger*, Case No. 11-Civ.-0691, 2013 WL 1087236, at *32 n.255 (S.D.N.Y. Mar. 15, 2013): “Predictive coding is an automated method that credible sources say has been demonstrated to result in more accurate searches at a fraction of the cost of human reviewers.”
- D. *Kemps LLC, v. IPL, Inc.*, No. 19-0753-CV-W-BP, 2020 WL 12688372, at *4 (W.D. Mo. Nov. 6, 2020), report and recommendation adopted, 19-0753-CV-W-BP, 2020 WL 12688374 (W.D. Mo. Nov. 25, 2020): “Moreover, IPL is not required to individually examine each document that produces a search term ‘hit’ but may use other acceptable methods to identify the subset of documents that are relevant and should ultimately be produced . . . , such as computer-assisted review or predictive coding.”
- E. *Zhulinska v. Niyazov Law Group, P.C.*, No. 21-CV-1348 (CBA), 2021 WL 5281115, at *3 (E.D.N.Y. Nov. 12, 2021): “Moreover, as courts have recognized, predictive coding is an efficient and acceptable means of culling responsive documents to be produced from ESI identified through keyword searches.”

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- F. *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 126, 128 (S.D.N.Y. 2015): “In 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.”

“If the TAR methodology uses ‘continuous active learning’ (CAL) (as opposed to simple passive learning (SPL) or simple active learning (SAL)), the contents of the seed set is much less significant.”

- G. *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, 143 T.C. No. 9, 2014 WL 4636526, at *5 (Sept. 17, 2014): “In fact, we understand that the technology industry now considers predictive coding to be widely accepted for limiting e-discovery to relevant documents and effecting discovery of ESI without an undue burden.”

III. COURT INVOLVEMENT IN DECISION TO USE TAR

- A. *Bliss v. CoreCivic*, No. 2-18-CV-01280-JAD-EJY, 2021 WL 930692, at *1 (D. Nev. Feb. 9, 2021): “Such technology assistance is ordinary, and unless there is a basis to believe that the mechanism used is either purposefully or inherently failing to identify proportional, relevant, and responsive ESI, the Court need not be involved.”
- B. *Entrata, Inc. v. Yardi Systems, Inc.*, No. 2:15-CV-00102, 2018 WL 5470454, at *14 (D. Utah Oct. 29, 2018): “Nevertheless, the court is persuaded that because it is ‘black letter law’ that courts will permit a producing party to utilize TAR, Entrata 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.”
- C. *Kleen Products LLC v. Packaging Corporation of America*, No. 10-cv-5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012): “At the conclusion of the second day [of an evidentiary hearing related to search methodology], the Court observed that under Sedona Principle 6, ‘[r]esponding parties are best situated to evaluate the procedures, methodologies, and techniques appropriate for preserving and producing their own electronically stored information.’”

- D. *Hyles v. New York City*, 10-Civ-3119, 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016): “Here, too, it is not up to the Court, or the requesting party (Hyles), to force the City as the responding party to use TAR when it prefers to use keyword searching. While Hyles may well be correct that production using keywords may not be as complete as it would if TAR were used, the standard is not perfection, or using the ‘best’ tool, but whether the search results are reasonable and proportional.”
- E. *In re Viagra (Sildenafil Citrate) Prods. Liab. Litig.*, 16-MD-02691-RS (SK), 2016 WL 7336411, at *2 (N.D. Cal. Oct. 14, 2016): “Even if predictive coding were a more efficient and better method, which [the responding party] disputes, it is not clear on what basis the Court could compel [the responding party] to use a particular [search method], especially in the absence of any evidence that [the responding party’s] preferred method would produce, or has produced, insufficient discovery responses.”
- F. *In re Mercedes-Benz Emissions Litig.*, No. 2:16-cv-881 (KM) (ESK), 2020 WL 103975, at *2 (D.N.J. Jan. 9, 2020): “While the Special Master believes TAR would likely be a more cost effective and efficient methodology for identifying responsive documents, Defendants may evaluate and decide for themselves the appropriate technology for producing their ESI. Therefore, the Special Master will not order Defendants to utilize TAR at this time.”
- G. *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 1813395, at *8 (D. Kan. Apr. 9, 2020): “In this case, the court finds that Spirit’s TAR was reasonable and production of the residual TAR documents is not proportional to the needs of the case.”
- H. *Coventry Capital US LLC v. EEA Life Settlements Inc.*, No. 17-CIV-7417-VM-SLC, 2020 WL 7383940, at *11 (S.D.N.Y. Dec. 16, 2020), objections overruled, 17-CIV-7417 (VM), 2021 WL 961750 (S.D.N.Y. Mar. 15, 2021): “Moreover, while ‘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[.]’ ‘[i]n contrast, where the requesting party has sought to force the producing party to use TAR, the courts have refused.’” (quoting *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 n.1 (S.D.N.Y. 2015)).

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- I. *In re Diisocyanates Antitrust Litig.*, MC 18-1001, 2021 WL 4295719, at *1 (W.D. Pa. Sept. 21, 2021): “Defendants are not compelled to adopt the Plaintiffs’ search terms or TAR methodologies and Plaintiffs’ objections are overruled.”
- J. *Winfield v. City of New York*, No. 15-cv-05236-LTH (KHP), 2017 WL 5664852, at *9 (S.D.N.Y. Nov. 27, 2017): “[T]here is nothing so exceptional about ESI production that should cause courts to insert themselves as super-managers of the parties’ internal review processes, including the training of TAR software, or to permit discovery about such processes in the absences of evidence of good cause”
- K. *Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020): “In the absence of any compelling argument from Plaintiffs, the court agrees with the City that as the responding party it is best situated to decide how to search for and produce emails responsive to Plaintiffs’ discovery requests.”

“Plaintiffs’ insistence that the City must collaborate with them to establish a review protocol and validation process has no foothold in the federal rules governing discovery.”
- L. *Davine v. Golub*, No. 3:14-CV-30136-MGM, 2017 WL 549151, at *1 (D. Mass. Feb. 8, 2017): ““Defendants are entitled to rely on their predictive coding model for purposes of identifying relevant responsive documents”
- M. *Story v. Fiat Chrysler Automotive*, NO. 4:17-CV-12, 2018 WL 5307230, at *3 (N.D. Ind. Oct. 26, 2018): “The Court encourages counsel for Plaintiff to consider that key word searches or technology assisted review are appropriate and useful ways to narrow the volume of an otherwise overly-broad request, such as this one, and encourages cooperation with opposing counsel to craft an appropriate search.”

IV. SEDONA PRINCIPLE 6

- A. *In re Mercedes-Benz Emissions Litig.*, No. 2:16-cv-881 (KM) (ESK), 2020 WL 103975, at *2 (D.N.J. Jan. 9, 2020): “While the Special Master believes TAR

would likely be a more cost effective and efficient methodology for identifying responsive documents, Defendants may evaluate and decide for themselves the appropriate technology for producing their ESI.”

- B. *Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020): “In the absence of any compelling argument from Plaintiffs, the court agrees with the City that as the responding party it is best situated to decide how to search for and produce emails responsive to Plaintiffs’ discovery requests.”
- C. *Kaye v. N.Y.C. Health and Hospitals Corp.*, No. 18-CV-12137, 2020 WL 283702, at *3-4 (S.D.N.Y. Jan. 21, 2020): “When documents are produced in discovery, whether they be 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 the review protocol and validation process.”
- D. *In re Valsartan Prods. Liab. Litig.*, No. 19-2875, 2020 WL 7054284, at *14-15 (D.N.J. Dec. 2, 2020): “The Court agrees 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. As will be discussed, however, this general principle is trumped by the requirements in an agreed upon ESI Protocol memorialized in a Court Order.” (internal citations removed).
- E. *In re Diisocyanates Antitrust Litig.*, Misc. No. 18-1001, MDL No. 2862, 2021 WL 4295729 (W.D. Penn. Aug. 23, 2021), report and recommendation adopted by Misc. No. 18-1001, MDL No. 2862 (W.D. Pa. Sept. 21, 2021): “Moreover, the right of a producing party to choose a general search method – search terms rather than TAR, for example – does not mean that a court must blindly accept all of the specific details of the proffered methodology. For instance, a party that could legitimately use search terms as its preferred method could not then specify terms that would exclude large swaths of relevant documents. Thus, the decisions holding merely that a court should defer to the producing party’s choice to use a generic search methodology... provide little guidance in a case like this...” (internal citations removed).

V. TRANSPARENCY AND DISCLOSURE

- A. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 184, 192 (S.D.N.Y. 2012) (citing Andrew Peck, Search, Forward, L. Tech. News, Oct. 2011, at 25): “Of course, the best approach to the use of computer-assisted coding is to follow the Sedona Cooperation Proclamation model. Advise opposing counsel that you plan to use computer-assisted coding and seek agreement; if you cannot, consider whether to abandon predictive coding for that case or go to the court for advance approval.”

“While not all experienced ESI counsel believe it necessary to be as transparent as MSL was willing to be, such transparency allows the opposing counsel (and the Court) to be more comfortable with computer-assisted review, reducing fears about the so-called “black box” of the technology. This Court highly recommends that counsel in future cases be willing to at least discuss, if not agree to, such transparency in the computer-assisted review process.”

- B. *Progressive Cas. Ins. Co. v. Delaney*, No. 2:11-CV-00678-LRH-PAS, 2014 WL 3563467, at *10-11 (D. Nev. Jul. 18, 2014): “In the handful of cases that have approved technology assisted review of ESI, the courts have required the producing party to provide the requesting party with full disclosure about the technology used, the process, and the methodology, including the documents used to “train” the computer.”

“Progressive is unwilling to engage in the type of cooperation and transparency that its own e-discovery consultant has so comprehensibly and persuasively explained is needed for a predictive coding protocol to be accepted by the court or opposing counsel as a reasonable method to search for and produce responsive ESI.”

- C. *In re Valsartan, Losartan, and Irbesartan Prods. Liab. Litig.*, No 19-2875, 2020 WL 7054284, at *30 (D.N.J. Dec. 2, 2020): “In the cases that have approved TAR, ‘the courts have required the producing party to provide the requesting party with full disclosure about the technology used, the process, and the methodology[.]’ This was not done here. The time for Teva to make its

TAR disclosure was before the ‘die was cast,’ not afterwards. The Court will not endorse a TAR protocol that was unilaterally adopted by a producing party without any input from the requesting party.” (internal citations removed).

- D. *Bridgestone Americas, Inc. v. Int’l Business Machines Corp.*, Case No. 3:13-1196, 2014 WL 4923014, at *1 (M.D. Tenn. July 22, 2014): “Consequently, openness and transparency in what Plaintiff is doing will be of critical importance. Plaintiff has advised that they will provide the seed documents they are initially using to set up predictive coding. The Magistrate Judge expects full openness in this matter.”
- E. *In re Biomet M2A Magnum Hip Prods. Liab. Litig.*, No. 3:12-MD-2391, 2013 WL 6405156, at *2 (N.D. Ind. Aug. 21, 2013): “Biomet, the Steering Committee says, isn't proceeding in the cooperative spirit endorsed by the Sedona Conference and the corresponding Seventh Circuit project. But neither the Sedona Conference nor the Seventh Circuit project expands a federal district court's powers, so they can't provide me with authority to compel discovery of information not made discoverable by the Federal Rules.”
- “Based on what I have been given in the parties' memoranda, Biomet is right that it doesn't have to identify the seed set, but the Steering Committee is right that Biomet's cooperation falls below what the Sedona Conference endorses. An unexplained lack of cooperation in discovery can lead a court to question why the uncooperative party is hiding something, and such questions can affect the exercise of discretion.”
- F. *Aurora Cooperative Elevator Co. v. Aventine Renewable Energy-Aurora West, LLC*, No. 4:12CV230, 2015 WL 10550240, at *1 (D. Neb. Jan. 6, 2015): “The defendants' argument is supported by the language, if not the spirit, of the civil discovery rules. Under Rule 26(b)(1), a party may discover any nonprivileged matter that is relevant to any party's claim or defense. The rules do not authorize ordering the defendants to disclose irrelevant information.”

“That said, the court encourages the defendants to reconsider their position

and work cooperatively with the plaintiff in developing and implemented computer-assisted review. Working together will allay the risk of having to repeat the process if the plaintiff later challenges, and the courts agrees, that the defendant's unilaterally created computer review training was faulty or unreliable.”

- G. *Winfield v. City of New York*, No. 15-cv-05236-LTH (KHP), 2017 WL 5664852, at *11 (S.D.N.Y. Nov. 27, 2017): “In particular, this Court agrees 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 rate of documents pulled for review by the TAR software, and the examples that Plaintiffs have presented, which suggest there may have been some human error in categorization that may have led to gaps in the City's production.”
- H. *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 128-29 (S.D.N.Y. 2015): “In any event, while I generally believe in cooperation, requesting parties can insure that training and review was done appropriately by other means, such as statistical estimation of recall at the conclusion of the review as well as by whether there are gaps in the production, and quality control review of samples from the documents categorized as non-responsive.”
- I. *Entrata, Inc. v. Yardi Systems, Inc.*, Case No. 2:15-cv-00102, 2018 WL 5470454, at *6 (D. Utah Oct. 29, 2018) (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)): “‘[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.’”
- J. *Edwards v. Scripps Media, Inc.*, 331 F.R.D. 116, 117-120 (E.D. Mich. 2019): “Courts have ordered ‘discovery about discovery’ when the record suggests that there is reason to distrust the responding party's diligence.”
- K. *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):

“As a result of a predictive-coding issue, the Defendants did not produce all relevant, non-privileged discovery. Consequently, the Plaintiffs request one, three-hour 30(b)(6) deposition “to find out what happened” and to uncover “whether the fix is good enough” to remedy the error. The Defendants agreed to such a deposition. The Court will enforce the discovery agreement between the two parties.” (internal citations removed).

- L. *City of Rockford, et al., Plaintiffs, v. Mallinckrodt ARD INC., et al.*, 326 F.R.D. 489, 494 (N.D. Ill. 2018): “Defendants provide no reason establishing that a random sampling of the null set cannot be done when using key word searching. Indeed, sampling the null set when using key word searching provides for validation to defend the search and production process, and was commonly used before the movement towards TAR.”

VI. TAR WORKFLOW CONSIDERATIONS

- A. *In re Biomet M2A Magnum Hip Implant Prods. Liab. Litig.*, Case No. 3:12-MD-2391, 2013 WL 1729682, at *3 (N.D. Ind. Apr. 18, 2013): “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 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.”
- B. *Rio Tinto PLC v. Vale S.A.*, Case No. 14 Civ. 3042, 2015 WL 4367250, at *1 (S.D.N.Y. July 15, 2015): “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.”
- C. *Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848, at *1 (N.D. Ill. Sept. 3, 2020): “While the court does not discount the possibility that using TAR at the onset might reveal more responsive documents overall, based on the number of documents that were discarded using Plaintiffs’

proposed search terms, pre-TAR culling will achieve the best possible review in this case. In other words, it satisfies the reasonable inquiry standard and is proportional to the needs of this case under the federal rules.”

- D. *In re Valsartan Prods. Liab. Litig.*, Case No. 19-2875, 2020 WL 7054284, at *15 (D.N.J. Dec. 2, 2020): “Further, the Court does not have to decide if there are instances when a party may layer a document production with search terms and TAR. Ample case law exists to support Teva's position that in appropriate instances layering may be done.”
- E. *Maurer v. Sysco Albany, LLC*, Case No. 1:19-CV-821(TJM/CFH), 2021 WL 2154144, at *22 (N.D.N.Y. May 27, 2021): “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.”
- F. *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, at *10 (W.D. Pa. Sept. 21, 2021): “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 the defendants appear to seek, is relatively less important than recall.”
- G. *Progressive Cas. Ins. Co. v. Delaney*, Case No. 2:11-cv-00678, 2014 WL 3563467 (D. Nev. July 18, 2014): “The method described [of applying TAR only to documents hitting on search terms] does not comply with all of [Plaintiff's e-Discovery vendor's] recommended best practices.”
- H. *FCA US v. Cummins*, Case No. 16-12883, 2017 U.S. Dist. LEXIS 45212, 2017 WL 2806896, at *2 (E.D. Mich. Mar. 28, 2017): “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.”

- I. *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 1813395, at *8 (D. Kan. Apr. 9, 2020): “Courts have found a second-level manual review following a TAR to be reasonable.”
- J. *Good v. Am. Water Works Co., Inc.*, CIV.A. 2:14-01374, 2014 WL 5486827 (S.D.W. Va. Oct. 29, 2014): “Inasmuch as defendants’ cautious approach is not prohibited by the text of Rule 502, and they appear ready to move expeditiously in producing documents in the case, their desired approach is a reasonable one.”
- K. *O’Donnell/Salvatori Inc. v. Microsoft Corporation*, 339 F.R.D. 275 (W.D. Wash. 2021): “While there is little case law on this issue, the courts that have addressed it have almost uniformly found that a relevance review, and the withholding of irrelevant documents, is appropriate.”
- L. *Palmer v. Cognizant Tech. Solutions Co.*, No. CV 17-6848-DMG (PLAx), 2021 WL 3145982 (C.D. Cal. July 9, 2021): “Additionally, plaintiffs’ argument that compelling defendants to produce all documents that contain only one search term without a responsiveness review would speed the production and be fairer, is not the standard under Rule 26 for discovery ... The Court will not compel defendants to produce any document simply because it contains a search term whether or not it is responsive to the discovery request, or, by extension, whether or not it is relevant and proportional to the needs of the action.”
- M. *Alabama Aircraft Indus., Inc. v. Boeing Co.*, No. 2:11-cv-03577-RDP, 2017 WL 9565521 (N.D. Ala. Oct. 25, 2017): “Although the parties agreed to certain search terms while collecting documents, those search terms do not override the scope of Boeing’s actual discovery requests.”
- N. *FlowRider Surf, Ltd. v. Pacific Surf Designs, Inc.*, No. 15cv1879-BEN (BLM), 2016 WL 6522807, at *8 (S.D. Cal. Nov. 3, 2016): “Plaintiffs’ agreement to run a search using the parties’ agreed-upon terms does not constitute Plaintiffs’ acquiescence to produce all resulting documents.”
- O. *BancPass, Inc. v. Highway Toll Administration, LLC*, No. A-14-CV-1062-SS, 2016 WL 4031417 (W.D. Tex. July 26, 2016): “Having reviewed the attached

affidavits detailing HTA's search and review process there is no reason to believe that HTA has withheld documents it was obligated to produce."

- P. *Federal Deposit Ins. Corp. v. Boggus*, No. 2:13-cv-00162-WCO, 2015 WL 11457700, at *2 (N.D. Ga. May 13, 2015): "In short, the court finds that the circumstances in this case suggest that a manual review following the application of mutually agreed-upon search terms to the ESI database is not necessary."
- Q. *In re Domestic Airline Travel Antitrust Litig.*, MC 15-1404 (CKK), 2018 WL 4441507, at *4 (D.D.C. Sept. 13, 2018): "Pursuant to the Protocol, United was 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 United would report to Plaintiffs the results of this review, which would permit Plaintiffs to calculate the rate of precision and the rate of recall."
- R. *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100, 2020 WL 1813395, at *8 (D. Kan. Apr. 9, 2020): "In contrast, authority supports the reasonableness of Spirit's recall rate. Courts have found TAR processes achieving a 75% recall rate to be appropriate. . . . In this case, the court finds that Spirit's TAR was reasonable and production of the residual TAR documents is not proportional to the needs of the case."
- S. *In re Diisocyanates Antitrust Litig.*, MC 18-1001, 2021 WL 4295729, at *6, 9 (W.D. Pa. Aug. 23, 2021), report and recommendation adopted, MC 18-1001, 2021 WL 4295719 (W.D. Pa. Sept. 21, 2021): "As applied to the complexities of TAR, the principle of reasonableness incorporates an obligation for the producing party to validate its search. . . . Accordingly, courts have required parties to validate their TAR search methodologies."

"Using validation based exclusively on elusion testing and recall statistics may be reasonable for parties using only search terms or TAR 1.0. But CAL gives the parties a powerful method for evaluating search at the margin, helping them decide whether further search and review will be proportional."

- T. *In re Domestic Airline Travel Antitrust Litig.*, No. 15-1404, 2018 WL 4441507, at *7 (D.D.C. Sept. 13, 2018): “[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.”

VII. THE ROLE OF TAR PROTOCOLS

- A. *Livingston v. City of Chicago*, Case No. 16 CV 10156, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020): “The City has disclosed the TAR software—Relativity’s AL—it intends to use and how it intends to validate the review results, which in this case is sufficient information to make the production transparent.”
- B. *In re Broiler Chicken*, Case No. 1:16-cv-08637, 2018 WL 1146371, at *1 (N.D. Ill. Jan. 3, 2018): “With the goal of permitting requesting Parties an appropriate level of transparency into a producing Party’s electronic search process, without micromanaging how the producing Party meets its discovery obligations and without requiring the disclosure of attorney work product or other privileged information, the Parties will endeavor to be reasonably transparent regarding the universe of documents subject to targeted collections or culling via search terms and/or TAR/CAL.”
- C. *In re Domestic Airline Travel Antitrust Litig.*, Case No. 15-1404, 2018 WL 4441507, at *3 (D.D.C. Sept. 13, 2018): “Plaintiffs explain that United’s production was based on the results of the TAR process and to ensure accuracy and completeness, the parties entered into an agreement regarding a validation Protocol.”
- D. *Progressive Cas. Ins. Co. v. Delaney*, Case No. 2:11-cv-00678, 2014 WL 3563467, at *9 (D. Nev. July 18, 2014): “Had 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. However, this is not what happened.”

- E. *Bridgestone Americas, Inc. v. Int’l Bus. Machines Corp.*, Case No. 3:13-1196, 2014 WL 4923014, at *1 (M.D. Tenn. July 22, 2014): “In the final analysis, 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 Magistrate Judge believes that he is, to some extent, allowing Plaintiff to switch horses in midstream. Consequently, openness and transparency in what Plaintiff is doing will be of critical importance.”

- F. *Livingston v. City of Chicago*, Case No. 16 CV 10156, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020): “The court agrees with the City that the November 2019 order did not set forth the review methodology that the City must use to identify responsive ESI. . . . Aside from the November 2019 order, Plaintiffs point to no binding legal authority to support their request to force the City to use refined keyword searches to identify responsive ESI.”
- G. *In re Valsartan Products Liab. Litig.*, Case No. 19-2875, 2020 WL 7054284, at *14-15 (D.N.J. Dec. 2, 2020): “The Court agrees 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. As will be discussed, however, this general principle is trumped by the requirements in an agreed upon ESI Protocol memorialized in a Court Order.” (internal citations removed).

VIII. PROPORTIONALITY

- A. *Davine v. The Golub Corp.*, No. 3:14-cv-30136-MGM, 2017 WL 549151, at *1 (D. Mass. Feb. 8, 2017): “Defendants are entitled to rely on their predictive coding model for purposes of identifying relevant responsive documents, and 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.”

- B. *City of Rockford v. Mallinckrodt ARD Inc.*, 326 F.R.D. 489, 495 (N.D. Ill. 2018): “The Court's experience and understanding is that a random sample of the null set will not be unreasonably expensive or burdensome. Moreover and critically, Defendants have failed to provide any evidence to support their contention.”

“Although Defendants have only argued expense and burden, when considering the other proportionality factors, the Court is persuaded that a random sample of the null set is appropriate in this case”

IX. FEE SHIFTING

- A. *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100, 2020 WL 3288058, at *22 (D. Kan. Jun. 18, 2020), *aff'd*, 2020 WL 6939752 (D. Kan. Nov. 24, 2020): “The court is mindful of the default rule that the producing party should ordinarily bear the costs of production, and therefore finds good cause to require both parties to bear some portion of the expenses for the overall ESI/TAR process on the issue of competitive overlap between Spirit and Arconic. Spirit has already borne approximately \$150,000 through the ESI sampling exercises. Because Lawson is the party that wanted to proceed with the TAR process at a point in time when it was disproportional to the needs of the case, the court will allocate the TAR expenses to Lawson to protect Spirit from undue burden and expense.”
- B. *Youngevity Int'l Corp. v. Smith*, No. 16-cv-00704-BTM (JLB), 2017 WL 6541106, at *1, *12 (S.D. Cal. Dec. 21, 2017): Where plaintiff improperly produced a 4.2 million page document dump, ordering, as an alternative to reproducing after reviewing for responsiveness, that plaintiff “pay the reasonable costs for [defendant] to conduct a TAR of the 700,000 documents and the July 21, 2017 and August 22, 2017 productions for responsiveness.”
- C. *Dremak v. Urb. Outfitters, Inc.*, No. D071308, 2018 WL 1441834, at *7-*8 (Cal. App. Mar. 23, 2018): “In support of its request to be awarded the special cost of this method of document retrieval, Urban's counsel submitted a declaration setting forth the time-consuming process that Urban employed to produce a final set of 1,658 responsive documents and the associated costs of that process. This evidence supported the trial court's finding that these

costs were reasonable and necessary to the litigation and class plaintiffs have not shown this finding constituted an abuse of discretion.”

- D. *Gabriel Technologies Corp. v. Qualcomm Inc.*, No. 09-cv-1992, 2013 WL 410103, at *10 (S.D. Cal. Feb. 1, 2013): Awarding attorney’s fees and TAR-related costs where plaintiff brought “objectively baseless claims” and “[defendant’s] decision to undertake a more efficient and less time-consuming method of document review [was] reasonable under the circumstances.”
- E. *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 274 F.Supp.3d 485, 499-500 (W.D. La. 2017): In opinion related to common benefit fees and expenses in an MDL, awarding fees and expenses related to TAR and stating that the plaintiffs’ steering committee “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].”

X. INTERNATIONAL ADOPTION OF TAR

XI. USE OF TAR IN GOVERNMENT INVESTIGATIONS