At trial, the jury awarded significant damages to Plaintiffs; however, the trial court also instructed the jury on comparative fault and the jury reduced Plaintiffs' award by 35%. On appeal, Defendants argued that Plaintiffs could not recover damages because of "gaps" in Missouri's fence acts. Plaintiffs' cross-appealed arguing that the jury should not have been instructed on comparative fault.

The court found that the settled law in Missouri broadly places liability on an owner of livestock for any damages caused by that livestock, including personal bodily injury, if livestock crosses any lawful fence onto another's property. Defendants' interpretation of the fence statute therefore failed.

In their cross-appeal Plaintiffs argued that comparative fault does not apply to a strict liability statute. The court was not convinced by this argument and stated that Missouri courts are to apply comparative fault "insofar as possible" and it was possible in this case. *Id*. at 5. The Missouri Court of Appeals, Southern District, affirmed the trial court's award of damages to the farmer attacked by Ferdinand the bull along with the accompanying reduction based on comparative fault.

The Ins and Outs Finding Responsive Documents – from Keyword Searching to T.A.R.

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If you are like us (the writers) and attend multiple eDiscovery seminars and conferences a year (anyone?), you're familiar with the document review broken record effect —

"TAR is the future."

"TAR"

"TAR"

"Predictive coding is here to stay!"

"TAR"

While we were excited about this concept the first 10 times we heard it, we now find ourselves waiting for one of the panelists to discuss whether TAR ("Technology Assisted Review") is practical for most cases, how to make that determination and how to implement it without blindly putting your case in the hands of a vendor who is usually not in a position to advise on what's best, or defensible, on your case. No one ever seems to speak up. We thought we'd give it a try.

Given the exponential increase in data output by businesses, it's no surprise that litigation attorneys and their clients are desperate for a document review methodology that complies with their legal obligations but doesn't break the bank. TAR seems like an attractive option. TAR is premised on the idea that a computer can, after some training by humans, review and code the documents. In theory, TAR will replace the days of linear, page-by-page review by multiple $300/hour associates, all with different opinions on how to code a document. So why hasn't TAR taken off as some have predicted?

Here's the reality. TAR is great for some cases. It probably is here to stay. But it's not practical for all cases. It's expensive. Your TAR vendor can guide you through how the technology works but determining whether it is appropriate for a case requires more than understanding the new terminology. Read the latest cases on TAR. The law is quickly developing

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and changing. Knowing how to evaluate whether TAR and any combination of new technology will really reduce review volume, will reduce your clients spend.

The purpose of this article is not to bash on TAR. To the contrary, TAR is extremely cool, and we wish we had more cases on which to use it. The purpose of this article is instead to discuss the multiple options available to practitioners to whittle down their document review task in a defensible, cost-effective and strategic manner. Each has its pros and cons. Let's start with the most vintage approach — good 'ole keyword searching — before we move on to the middle ground of analytics (about which we are the most excited) — and finally, TAR.

1. Keyword Searching

Keyword searching is a type of search that looks for documents that contain one or more words defined by the user. Some commentators distinguish between keyword searching and "Boolean" searching (use of connectors, operators, and proximity commands to combine, limit, or exclude keywords). For purposes of this article, keyword searching and Boolean searching are the same. It is our belief that if you are running isolated keywords alone, you are probably setting yourself up for a larger review than is necessary for your case, even in the smallest, simplest cases.

The context of this section assumes you have properly collected the data and are using an appropriate tool to test keyword searches. If you are running attorney-crafted, untested searches on an Outlook Inbox, performing a Windows scan, or searching only the pile of documents that your annoyed client gathered from the alleged wrongdoer and forwarded to you, you need to read a different article. Try "How to Hit a Dartboard Drunk and Blindfolded and Charge your Client for the Result." Otherwise, please continue.

2. Analytics Tools (alone or in combination with keyword searching)

Keyword searching is used most often in "linear" review, meaning that after the keywords are applied and results culled down, reviewers dive in and begin reviewing documents one at a time, page-by-page. Even with appropriately tested keywords, this is usually a very expensive review methodology. For purposes of this article "analytics tools" refer to the large variety of methods that can be used to move beyond "linear" review and group like-documents together to exclude entire groups of documents from the review. We've picked three tools to discuss, but there are several other tools available — such as "clustering" or near duplicate grouping — to learn about.

Concept Searching – Concept searching uses analytics to expand the meaning of a query beyond words, to include concepts. Thus, the results may not contain any of the words in the query but rather will have documents that are conceptually similar.

Email Threading – Threading groups all emails in a conversation together and identifies which email or emails (and attachments) are inclusive (contain all parts of the conversation). Thus, rather than reading all the separate replies or forwards of one conversation, your reviewers can read only inclusive emails and attachments.

Propagation (not a true analytics tool, but a useful feature in most document review tools, so we've included it here) – Propagation allows you to automatically code a group of documents the same. For example, you can set the tool to automatically code all duplicate documents (based on hash value – think electronic fingerprint) the same. Thus after the first time a document is reviewed, all duplicates of that document in the database will be coded the same. You can also propagate to email families or email conversation groups.

3. TAR

TAR is the process of training a computer system to make decisions about the responsiveness or relevance of a document that would otherwise be reviewed and coded by a manual reviewer. Human effort is not eliminated, but used throughout the review process to train the system. Once the training process is complete, the computer reviews and codes the documents.

Our point is, don't assume (you know what that does!) TAR is the only "wave" of the future. Keyword searching may work just fine in your case. If your case has two or three custodians (but be honest!) and simple concepts, keyword searching may land you comfortably in the 3,000 – 7,000 document range. Add email threading and propagation to the mix, and voila, you're probably good to go. If you are dealing with more than 7,000 or so documents, however, consider how adding an analytics tool or two can speed things up, get you better results and a more concise look at your own evidence. If you have 50,000 plus documents, you may well be in TAR land.

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Keyword Searching

APPROPRIATE CASES FOR USE	NO case is appropriate for keyword searching if you don't intend to test (qualitatively) the terms first. Otherwise, most cases are appropriate for keyword searching, at least as a first step. The question of whether additional methodologies (discussed below) should be applied is still open. For example, in commercial cases with a dozen custodians and multiple issues, keyword searching may still leave you with a disproportionally large document review and you may need to combine keyword searching with other options, such as email threading, concept searching or TAR.
INAPPROPRIATE CASES FOR USE	Any case where you don't intend to test (qualitatively) the terms first. Otherwise, few cases are per se inappropriate for keyword searching. (NOTE – there remains some dispute about the applicability of keywords prior to employing TAR.) That said, some cases are just tough nuts to crack when it comes to crafting keywords that actually reduce the volume. Sometimes, an obviously relevant and responsive keyword (such as a product name) appears in nearly every communication, regardless of how you bend and stretch the operators to exclude noise words and false hits. Further, keywords involving numbers (i.e., patent cases), acronyms or punctuation require special care and consideration. Not all keyword searching technology, or the indexes behind them, are the same. You need to understand your tools if you are searching for dates, credit card numbers, patent numbers, social security numbers, etc.
NOTES ON COST	As with every method in this article, there is some cost to process (make searchable) the appropriately collected data in the first place, so we aren't taking that cost into account here. That cost is typically based on volume ($$ per GB) and can get quite high. (Enter: eDiscovery trained attorneys to help you make strategic collection decisions!) The cost of running keywords is in the testing. Search term testing absolutely requires the involvement of an attorney who: (1) knows the facts; (2) knows the players; and (3) knows the issues in the case. Depending on your case, expect to pay an attorney for anywhere from five to 20+ hours (that's on a very complex case) to test terms and make recommendations. It's obviously cheaper to make a list of words, have a vendor run them and start your review (a separate cost). But, you get what you pay for. Your client will especially enjoy the part where your Judge makes you re-do it.
POTENTIAL PITFALLS	Applying searches directly to Exchange Servers, File Servers, Hard Drives, etc. is rife with risk. The accuracy of your searches is greatly limited by the indexes of these programs/systems (sorry, Mr. Gates), the metadata fields being searched, and whether the document (such as PDF) requires additional steps to be made searchable. Email attachments may not be searchable at all, especially in old versions of Exchange. Extract the files from the source based on custodian and date range, process the files in an appropriate tool and then run your searches. Further, blindly-crafted, untested keyword searches result in hugely overbroad document reviews that are often missing the most relevant communications. Keyword searches and Google searches are not the same, folks. Google search success does not mean you can craft appropriate keyword searches in litigation. Test, test, test.
DISCLOSURE ISSUES	This is a jurisdictional issue. Check the local rules, ESI guidelines and other case law about how courts are trending on disclosure of use of keywords and the keywords themselves. Short of a rule, court order, case or party agreement, you generally don't need to agree on search terms in advance. That said, it may be strategic or economical to negotiate and agree on terms in your case. Most federal judges will expect some level of cooperation and disclosure in cases involving sophisticated parties, especially when both sides have a similar amount of data to sift through.
AVAILABILITY	Keyword searching is widely available. As long as your data is properly indexed and PDFs have been OCR'ed (so that they are searchable), most vendors can provide access to a tool wherein you can test terms if you do not have the capability in-house. If you are hiring a vendor, demand direct access so that you are not relying on "sample sets" of search hits from the vendor—a painfully inefficient and potentially risky option.
SUMMARY PROS/CONS	PROS – Defensible, if done correctly (or agreed upon); CONS – human error/risk is large; not reviewer friendly (concepts and keywords in a document are not always in agreement); gives attorneys a false sense of security that they found what they need/want (probably not).

Analytics Tools (*alone or in combination with keyword searching*)

APPROPRIATE CASES FOR USE	Concept Searching – Cases where keyword crafting errors could be significant and large volume cases. Keyword searches, if done correctly, are still defensible and widely used. That said, the results are only as good as the terms themselves. Conceptual searching can fill the gaps in keyword searching by capturing conceptually-related documents, even if your supposedly exhaustive list of keywords would not have found the document. In theory, human omission is far less likely to impact results with concept searching than with keyword searching. Email Threading – Cases with a significant amount of email to review. Grouping emails by conversation threads speeds up the review, increases consistency and eliminates the need to review redundant email chains in one large email conversation. We've had success with email threading reducing the number of emails that requires review by 1/3 to 1/2 - significant cost savings in a large review. Propagation – Any case with a sizeable number of duplicate attachments or where all family members will be coded the same. Use caution when enabling propagation and engage a knowledgeable user to assist with this function.
INAPPROPRIATE CASES FOR USE	Concept Searching – the are no *per se* inappropriate cases, but in small, simple reviews, the extra cost, time and planning may cost more than just diving in to the documents. In most cases, however, concept searching is likely to pay for itself. Email Threading – same as with concept searching. In addition, rare are the cases where you will be required to produce all separate pieces of an email conversation rather than being allowed to just produce the most inclusive thread (such as by agreement or government agency rules). Even in those instances, consistency in coding is still increased exponentially by grouping email threads. Propagation – Use caution when using propagation and avoid it in cases where documents in your database have already been reviewed (in other words, don't turn it on mid-review). Also, avoid it in cases where inexperienced users are running the review. Propagation only makes sense if the coding decision is based on content alone, and not context. If relevance is assessed not only by the content but also the recipient or whether the document was attached to an email, use caution before enabling propagation.
NOTES ON COST	Most vendors charge a per GB cost for running analytics. We are of the opinion that in large cases, the increase in efficiency and speed of the review pays for the tools themselves. Propagation usually does not come with extra cost because it is typically built into the review tool itself. That said, it can add extra cost to re-review and code propagated documents that you did not realize were being propagated. Be careful!
POTENTIAL PITFALLS	Most attorneys, unless they have the expertise and tools in-house, will need to rely heavily on a vendor to employ these tools, increasing the risk of a Fed. R. Civ. P. Rule 26g violation or other slap-on-the-wrist (or worse) sanctions for "handing off" your discovery obligations to a vendor. Engage an attorney knowledgeable about these tools to act as a liaison between you and your vendor.
DISCLOSURE ISSUES	Unchartered water, but judges are beginning to encourage analytics in cases to reduce discovery costs
AVAILABILITY	Unless you have a tool with analytics built-in, you will need a vendor to access the features.
SUMMARY PROS/CONS	PROS – reduces review time, increases accuracy and consistency in coding; CONS – extra time and planning involved; potential over-reliance on vendor

TAR	
APPROPRIATE CASES FOR USE	Cases with 50,000 or more documents; cases where relevance is based on "yes/no" concepts
INAPPROPRIATE CASES FOR USE	Smaller volume cases; cases where it matters who is receiving a particular document (or other contextual importances); cases where relevance is based on open questions, such as determining what a certain custodian knew or assessing privilege
NOTES ON COST	Most vendors charge a per GB cost for using TAR. Strategic and targeted collection is necessary. Careless or ill-planned collection can result in staggering costs because, often, an entire collection is run through TAR. The cost of using TAR is usually not recouped by significant savings in review costs on smaller volume cases. Keep in mind that TAR requires a fair amount of front-end attorney coding time to "train" the system.
POTENTIAL PITFALLS	You must understand the technology you are using for the process to be defensible. Not all TAR tools work the same. Additionally, most TAR tools analyze each document separately. Meaning an email and its attachments are each analyzed individually. Since that doesn't work for privilege reviews and other cases where it matters who received or sent the attachment, you will likely have to do a separate review on the documents identified by TAR as relevant.
DISCLOSURE ISSUES	Highly encouraged, but not necessarily required unless the Court has a local rule or guideline that requires it (such as the District of Kansas). As of now, you do not need the court's or opposing counsel's approval to use TAR, unless you had already agreed to something else.
AVAILABILITY	Unless you have the technology in-house, you will need a vendor. There are many variations in TAR technology, each with a slightly different algorithm or methodology for training the system. Popular review platforms such as Relativity, Recommind and Catalyst have their own applications. Other tools, such as Equivio, allow you to use their tool to run TAR, but move the responsive set back into your own review tool.
SUMMARY PROS/CONS	PROS – can result in significant cost savings and higher accuracy in results; CONS – requires extra time to plan.

MODL Judicial Luncheons

Tuesday, April 12, 2016
University Plaza Hotel
Springfield, MO

Friday, April 15, 2016
Bartolino's
St. Louis, MO

Thursday, April 28, 2016
Lidia's Kansas City
Kansas City, MO

Thursday, May 5, 2016
Bleu Restaurant
Columbia, MO