NOTE

CREATING A NEW STANDARD FOR JUDICIALLY-MANDATED PREDICTIVE CODING

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I. INTRODUCTION

Imagine litigation in which there are millions of records, documents, or any other recordings of information, including electronically-stored information, that could be produced in discovery. This level of production places a heavy burden upon the producing party both in cost and in time for review.[1] In this situation, both parties agree that it will require thousands of hours for human review of the information, which may translate to several years before the case will be ready for trial. The parties have filed their pleadings, discovery has commenced, and each party has sent requests for production of documents. Often, parties have no prior agreements that specify whether discovery should be conducted by human review of documents or some type of computer-assisted review.

There are four possible next steps that litigation document production may take. The parties may want to take the requisite number of years to process discovery through the traditional human document review, or the parties may potentially agree to employ a company to produce discovery through some sort of technology-assisted production, such as predictive coding.[2] In the event that there is no agreement and the task of human document review is too prohibitive, the producing party could ask the presiding judge to order predictive coding over the objections of the disinclined receiving party, or the receiving party may ask the judge to order the unwilling producing party to utilize predictive coding.

Courts have already determined that predictive coding is acceptable for discovery where parties agree to its use.[3] In a

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[1] *See* Matthew Young, *To Cure the E-Discovery Headache, Revamp the Rule 26(f) Discovery Conference*, 12 Nw. J. Tech. & Intell. Prop. 355, 355, 358 (2014) (noting that "a presumption exists that the responding party bears the cost of production," and if the costs and time are prohibitive, the responding party carries that burden).

[2] *See* Nolan Hurlbut, *No Right to Compel Predictive Coding/Technology Assisted Review (TAR)*, Cyberlex (Dec. 10, 2016), http://www.canadian cybersecuritylaw.com/2016/12/no-right-to-compel-predictive-codingtechnology-assisted-review-tar/ (noting that even though counsel has the right to choose discovery methods for litigation, which may include predictive coding as a form of technology-assisted production, they may not compel the opposing party to consent to those methods).

[3] Moore v. Publicis Groupe, 287 F.R.D. 182, 182, 184, 188 (S.D.N.Y. 2012). The presiding judge, Judge Peck, opined that "[t]he decision to allow computer-assisted review in this case was relatively easy—the parties agreed to its use." *Id.* at 189. Judge Peck was the first to "judicially-approve" predictive coding. *Id.*

situation where the parties have not agreed to use predictive coding, the judge would be exercising authority uncommonly exerted to govern the discovery process because, absent a motion to compel, the parties normally conduct discovery without substantial judicial interference.[4] If the judiciary is setting a general method for producing information, the order could influence the outcome of the case.[5] How would a court order potentially appear in a case? There are three types of orders that will be discussed in this note: (1) a judge could potentially order *sua sponte* predictive coding to speed up the process, even though neither party believes that it would be beneficial; (2) a judge could order predictive coding upon the producing party at the request of the receiving party, even though the burdens of production would naturally fall to the producing party; or (3) a judge could order predictive coding against the receiving party's wishes.[6]

This note seeks to define when judicial interference in discovery production methods is appropriate and to consider what factors are necessary to consider when the judiciary seeks to mandate predictive coding. This note's objectives will be achieved by (i) defining important terms necessary to understand predictive

at 183. He did not delineate any particular vendor or algorithm, but suggested that while parties seek to agree to a method, they should consider a method that holds some kind of transparency. *Id.* at 192. "If you do predictive coding, you are going to have to give your seed set, including the seed documents marked as nonresponsive to the plaintiff's counsel so they can say, well, of course you are not getting any [relevant] documents, you're not appropriately training the computer." *Id.* at 185. Since this first opinion, there have been very few cases that address predictive coding beyond the defensibility of the process, and no opinions have upheld the legality of a judge mandating predictive coding upon disinclined producing parties. *See The Sedona Conference Cooperation Proclamation*, THE SEDONA CONF., https://thesedonaconference.org/cooperation-proclamation (last visited Feb. 19, 2017) [hereinafter *Cooperation Proclamation*] (providing a list of legal scholarship and judicial opinions discussing predictive coding).

[4] According to FED. R. CIV. P. 26(b)(1) and (b)(2)(B), "[t]he court may specify conditions for discovery," but otherwise parties themselves seek materials that may be relevant to the case.

[5] *See* Tonia Hap Murphy, *Mandating Use of Predictive Coring in Electronic Discovery: An Ill-Advised Judicial Intrusion*, 50 AM. BUS. L.J. 609, 609, 638–40 (2013) (questioning whether a judge should exert authority in discovery orders). "Lawsuits may be won or lost because of incriminating electronic documents." *Id.* at 609 (emphasis omitted). This article sought to address the issue of mandated predictive coding, and advised against judicial interference because of the (1) "legitimate concerns that parties and attorneys may have about predictive coding" and (2) a "respect for the traditional judicial role." *Id.* at 640 (emphasis omitted).

[6] *See generally id.* at 612 (offering four real case examples where the orders to be discussed herein were utilized).

coding and document review, (ii) discussing the guidelines of the Federal Rules of Civil Procedure and relevant case law, and (iii) delineating a standard that was logically developed from factual analyses when predictive coding was considered in previous case law.

II. DEFINING TERMS

In order to understand predictive coding, there is some terminology that first needs to be defined.

1. Technology-Assisted Review ("TAR") is the process for "integrat[ing] [] technology into the process of human document review."[7] In this process, documents in large quantities can be sorted and analyzed according to algorithms that the manufacturing company creates.[8] The algorithms allow the computer to learn from a "seed set" of information, and then as more documents are processed by the computer, it can detect and select certain words, phrases, or categories,[9] making the document review process more efficient than human review.

2. "Predictive coding" is a type of TAR in which a computer is ordered to apply decisions based on what it has learned for reviewing documents.[10] There are multiple ways to implement this process.[11] There is a "seed set" which is used to sort documents and teach the computer what to look for based upon an algorithm.[12] The Courts use predictive coding and TARs interchangeably.[13]

3. "Computer-assisted coding" is the phrase used by Judge Peck in *Moore v. Publicis Groupe*.[14] He defined it as "tools . . . that use sophisticated algorithms to enable the computer to determine

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[7] Edward Sohn, *Top Ten Concepts to Understand about Predictive Coding*, ASS'N CORP. COUNS.: LEGAL RESOURCES (May 22, 2013), http://www.acc.com/legal resources/publications/topten/ttctuapc.cfm.

[8] Ignatius Grande & Joseph Lee, *How Technology Assisted Review Can Decrease the Cost of E-Discovery in Arbitrations*, 7 N.Y. DISP. RESOL. LAW. 16, 16 (2014), file:///C:/Users/alex%20husain/Downloads/TAR-Arbitration-NYSBA-April2014-permission%20(2).pdf.

[9] Sohn, *supra* note 7.

[10] Moore v. Publicis Groupe, 287 F.R.D. 182, 183–84 (S.D.N.Y. 2012).

[11] *See* Melissa Whittingham et al., *Predictive Coding: E-Discovery Game Changer?*, 2 EDDE J., 11, 11–12 (2011) (discussing three types of predictive coding services offered by e-discovery vendors.).

[12] Young, *supra* note 1, at 363–64.

[13] *See* Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 126 (S.D.N.Y. 2015) (discussing the interchangeable uses of "predictive coding" and "TAR," but noting that "TAR" has been the more commonly used phrase since the first predictive coding case).

[14] 287 F.R.D. 182 (S.D.N.Y 2012).

relevance."[15]

4. Electronically-Stored Information ("ESI"), for the purpose of the Federal Rules of Civil Procedure, is "information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software."[16] Predictive coding is one method to find relevant ESI where there are large quantities to sort through.[17]

5. "Mandated predictive coding," for the purposes of this note, means that the presiding judge orders predictive coding without a mutual voluntary agreement. If both parties do not assent, then one of the three predictive coding options listed above would apply.

6. "Enforced predictive coding," for the purposes of this note, means that a judge only seeks to bind the parties to an agreement that they have already made.

7. "Clawback agreements" are typically made at the start of discovery and serve to allow parties to demand the return of any material that may have been mistakenly produced "without waiving any privilege or protection over those materials."[18]

8. "Defensibility" is a term used to evaluate the utility, sustainability, and prudence of predictive coding methods, and this notion has been heavily analyzed.[19] Courts have so far deemed TAR defensible because predictive coding meets discovery obligations.[20] This is the term of art because it is impossible to

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[15] *Id.* at 183.

[16] Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 Nw. J. Tech. & Intell. Prop. 171, 173 (2006).

[17] *See* Kevin F. Brady, *Computer Assisted Review in Discovery; Court of Chancery First Court to Order It*, Del. Corp. & Com. Litig. Blog (Oct. 26, 2012), http://www.delawarelitigation.com/2012/10/articles/chancery-court-updates/com puter-assisted-review-in-discovery-court-of-chancery-first-court-to-order-it/ (discussing the usefulness of computer assisted review "in situations where the lawyers understand the process, the stakes are large, and the volume of data is significant.").

[18] Scott J. Davis & Michael E. Lackey, *Best Practices for Preparing a Clawback Agreement*, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (Nov. 21, 2012), https://corpgov.law.harvard.edu/2012/11/21/best-practices-for-preparing-a-claw back-agreement/.

[19] *See Predictive Coding*, ABA Sec. Litig. 2012 Sec. Ann. Conf. (Apr. 18–20, 2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/m aterials/sac_2012/14-1_predictive_coding_written_materials.authcheckdam.pdf (examining judicially-established standards for determining whether a predictive coding process was a defensible approach to e-discovery); *see also* Sohn, *supra* note 7 (discussing the importance of establishing a "highly defensible predictive process.").

[20] *See* Sohn, *supra* note 7 ("[B]oth federal and state courts have generally

know if the method actually worked without following up with human document review that the parties were first trying to avoid. Instead defensibility focuses on transparency,[21] which will be further analyzed in this note.

9. "Seed Set" is "a sample from the universe of discoverable ESI, which informs the computer on the relevancy of the discoverable ESI."[22] The producing party identifies the seed set and can present it to the receiving party after labeling the documents as "relevant, responsive, or privileged."[23] Then, the computer learns to identify documents through this approach and can look at all ESI to determine if the material is "relevant, responsive, or privileged."[24]

III. EXPLAINING THE RULES

The discovery process, controlled in federal court by Federal Rules of Civil Procedure 26 through 37,[25] is said to be "one of the most hostile and burdensome civil litigation procedures in the United States."[26] Although it was "[o]riginally designed to . . . ensure fairness in litigation,"[27] the discovery process is sometimes used as a strategy to force a quick and costly settlement from a party who is less able to afford costly, protracted, and document-heavy litigation.[28] As technology continues to develop, it will be helpful for the judiciary to be able to consult a succinct standard for judicial interference in discovery production.

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approved the use of predictive coding as a means of fulfilling discovery obligations and maintaining costs proportional to the scale of the controversy.").

[21] *See id.* (suggesting that "you should always have a process expert track the process's transparency and maintain a strong audit trail that will help establish a highly defensive predictive process.").

[22] Young, *supra* note 1, at 364 n.64.

[23] *Id.* at 364.

[24] *Id.*

[25] FED. R. CIV. P. 26–37.

[26] *Discovery*, U.S. CHAMBER COM.: INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/issues/discovery (last visited Feb. 19, 2017).

[27] *Id.*

[28] *See id.* ("[C]ommon types of [discovery] abuse include: (1) demanding excessive amounts of unnecessary information, which imposes significant costs . . . (2) filing motions contesting the bounds of acceptable discovery instead of the merits of the underlying case. As a result, defendants face pressure to settle quickly rather than endure lengthy, burdensome discovery requests.").

A. Federal Rule of Civil Procedure 26(b)(1)–(b)(2)

Since the 2015 amendments to Federal Rule of Civil Procedure 26(b)(1), information is discoverable if it is deemed relevant, unprivileged, and proportional to the needs of the case.[29] Discovery methods may be limited under Rule 26(b)(1), and strictly-construed, if the chosen method for discovery is going to substantially burden the case.[30] "First, Rule 26(b)(2)(C) imposes a proportionality principal, requiring the judiciary to balance a discovery request's potential benefits with the burden of producing the requested discovery. Second, Rule 26(b)(2)(B) requires the requesting party to show good cause for its request."[31] Because of this rule, the judiciary may have an important role in preserving the touchstones of Rule 1, and also in preventing discovery from becoming unduly burdensome if it outweighs "the importance of the issues at stake."[32] The proportionality doctrine was discussed in the Sedona Conference in 2010,[33] repositioned into the Federal Rules of Civil Procedure in 2015,[34] and includes a cost-benefit analysis meant to deter the "exploding costs of e-discovery."[35] The proportionality inquiry offers six principles that may guide the courts when considering potential discovery abuses or burdens that may be placed upon a producing party.[36] These soft guidelines

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[29] FED. R. CIV. P. 26(b)(1); STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 762–63 (24th ed. 2017) [hereinafter BAICKER-MCKEE ET AL.].

[30] FED. R. CIV. P. 26(b)(2).

[31] Young, *supra* note 1, at 357. Keep in mind that this proportionality concept has been moved to Rule 26(b)(1) with the 2015 amendment to the rules, but is enforced under Rule 26(b)(2)(C)(iii). For a more detailed discussion of the role of proportionality and its relationship to the scope of discovery, see FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment.

[32] BAICKER-MCKEE ET AL., *supra* note 29, at 768.

[33] *See* The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 292 (2010), file:///C:/Users/alex%20husain/Downloads/Proportionality2010.pdf (discussing the origins of the proportionality doctrine and its application).

[34] BAICKER-MCKEE ET AL., *supra* note 29, at 764 n.101.

[35] Ralph C. Losey, *A Survey of Emerging Issues in Electronic Discovery: Predictive Coding and the Proportionality Doctrine: A Marriage Made in Big Data*, 26 REGENT U. L. REV. 7, 38–39 (2013–14).

[36] *Id.* at 39–40. "The Sedona Commentary sets forth six principles of proportionality:

1. The burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the scope of preservation.

2. Discovery should generally be obtained from the most convenient, least burdensome and least expensive sources.

breed inconsistency, assuming that the most relevant and prudent concerns for computer-assisted review come from expenses. The proportionality principles consider conflict in terms of discovery abuse[37] and subjective burdens,[38] but do not consider that society is moving in a direction that may seek discovery reform with enhanced technology.[39]

Since the adoption of the 2015 amendments, there is an increased need to bring concerns over mandated TAR to the courts' attention. The time for reform is now because more efficient ways to access data are available. TAR may provide fairer outcomes where the parties were previously unable to easily synthesize all of the existing information that they requested. The judiciary should also consider that the parties are in the best position to determine the proportionality principle elements as they are more in touch with the financing of litigation. In a case where there are large quantities of documents, there may be a good faith reason to use predictive coding that has nothing to do with costs or burdens. A good faith reason to use TAR can be based upon the preference for quick results and easily-synthesized ESI. If a party has a good faith preference for a defensible production method, then that alone may be enough to allow it.

Although discovery is most often handled by the agreement and cooperation of the parties, appropriately so, there is more room for

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3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.

5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.

6. Technologies to reduce cost and burden should be considered in the proportionality analysis."

Id. These six methods focus on monetary burdens and are generally vague as to any other burdens that may arise. If a party presents before the court a good faith reason for predictive coding other than "costs and burdens," but instead just a preference for having key searches available, then this proportionality standard will have missed the integrity of the discovery process, which is to ensure fairness in litigation. *Id.*

[37] *Id.* at 40 (any discovery solution must bear in mind that reform is not a search for perfection, but is meant to pursue fairness in litigation).

[38] *See id.* at 38–40 (setting forth additional burdens imposed by the discovery process as outlined in the six principles of proportionality).

[39] *See id.* at 39–40 (the Sedona Conference made no acknowledgment of the impact that technological advancements may have on discovery).

the judiciary to get involved in e-discovery issues that will inevitably arise with growing technology.[40] As technology continues to advance, it will be useful for the parties to have a well-developed standard to consider when making requests to a court; a standard that considers factors beyond burdens of cost and time. However, the judiciary should respect the discovery process as an area for cooperation. Discovery production should normally be left to the parties to control, except in circumstances where a litigant's good faith preference for predictive coding is being resisted by an adversary.

B. Federal Rule of Civil Procedure 34(b)(2)(D)

Under Federal Rule of Procedure 34(b)(2)(D), the responding party, which is the producing party, is meant to determine the method for ESI production, unless the producing party objects to the form requested by the receiving party, or if there is no method for production specified in the requests.[41] "The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form— or if no form was specified in the request—the party must state the form or forms it intends to use."[42] The term "form" refers to how the produced discovery is passed on to the receiving party.[43] However, form should also include the mechanics of that production because it is implicit in Rule 34(b)(2)(D) that the producing party can control the method for gathering the documents before determining the form to produce them in.[44] If the producing party relays unacceptable document production or the receiving party believes that production is incomplete, then the receiving party may seek redress in a court through a motion to

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[40] *See* Young, *supra* note 1, at 374 (arguing that "courts cannot leave parties to independently manage the discovery process.").

[41] FED. R. CIV. P. 34(b)(2)(D).

[42] *Id.*

[43] For example, this would refer to documents produced on a CD, jump drive, printed version, etc. under Rule 34(b)(2)(B), the amendments "reflect the common practice of producing copies of documents or [ESI] rather than simply permitting inspection." BAICKER-MCKEE ET AL., *supra* note 29, at 1763 (when those documents are produced, the producing party ordinarily controls the form of production).

[44] In the 2015 amendments to Federal Rule of Civil Procedure 37(a)(3)(B)(iv), the amendments again "reflect the common practice of producing copies of documents or [ESI] rather than simply permitting inspection." *Id.* at 1777. If the documents are not produced, a party may file a motion to compel. *Id.*

compel.[45]

TAR has invited new questions as to what is acceptable in the discovery process. Courts have said that predictive coding is an acceptable method for organizing and producing information based upon the concept of defensibility.[46] But, there is a question, open to interpretation, of whether predictive coding is only acceptable in cases of voluntary agreement between parties, or if can it be mandated by a presiding judge. This note contends that if the producing party wants to use TAR and the receiving party is asking the court to order human document review, then the court should entertain the producing party's reasons for using TAR because the method is defensible.

C. Relevant Case Law

There are a relatively small number of cases that have addressed concerns for predictive coding, and the Supreme Court of the United States has not resolved any predictive coding questions.[47] For this reason, we must look to the few diverging opinions and determine if there are any inconsistencies that may be confronted with one delineated test.[48] The threshold question presented in predictive coding cases was whether TAR is defensible.[49] The first case to enforce predictive coding was a New York case called *Moore v. Publicis Groupe*.[50] This case has already been heavily analyzed in terms of "the reliability and the applicability of predictive coding in a litigation context."[51]

In *Moore*, the parties agreed to use predictive coding, but did not determine how it would be implemented.[52] The presiding judge,

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[45] *See* FED. R. CIV. P. 37(a)(3) (listing the circumstances under which a party may move to compel discovery).

[46] *See* Moore v. Publicis Groupe, 287 F.R.D 182, 183 (S.D.N.Y 2012) (noting that computer-assisted review is an acceptable method of discovery).

[47] *See Cooperation Proclamation*, *supra* note 3 (listing the relatively few cases addressing this issue, none of which were before the U.S. Supreme Court).

[48] For the sake of avoiding redundancy, this note will only lightly analyze four cases in order to give enough background for potential situations in which predictive coding might be mandated. These four cases are heavily analyzed in other articles referenced in this note. They provide current legal standards, but because TAR is such a novel issue, courts have not yet scrutinized many potential concerns scholars have dreamed up for TAR. *See infra* pp. 11–21.

[49] *See Moore*, 287 F.R.D at 182–83 (computer-assisted coding is justified when it can speed up, reduce the cost, and/or ensure the fairness of cases).

[50] *Id.* at 187.

[51] *See Predictive Coding*, *supra* note 19 (noting the little caselaw addressing predictive coding).

[52] *Moore*, 287 F.R.D at 189.

Judge Peck, opined that predictive coding was an acceptable method[53] for the discovery process.[54] Judge Peck further outlined a five-part test for predictive coding at its early stages in 2012, and recognized that there may be only some cases in which predictive coding is the most prudent discovery choice.[55] His test includes the following elements: (i) the parties agree, (ii) large quantities of documents are subject to production, (iii) technology-assisted review is a superior method, compared to other available methods, (iv) a need for either cost-effectiveness or proportionality, and (v) the producing party remains transparent for the predictive coding method.[56] This test was meant to streamline cooperation, not to create a burden in document production, and therefore left the implementation to the parties acting in a mediator capacity, more than a judiciary in the discovery process.

The determination of the discovery production method is supposed to be removed from judicial interference unless there is a dispute.[57] Judge Peck, having become well-versed in predictive coding production through publishing his own research and attending conferences, found that it was acceptable technology if the parties agreed.[58] Merely months after his ruling, the court ordered predictive coding on an objecting receiving party in *Global Aerospace Inc. v. Landow Aviation*.[59] The producing party was allowed to use predictive coding because of the mounting expenses in producing millions of documents through human document review, although the receiving party objected.[60] This was the first case in which a court determined that predictive coding was judicially-enforceable where there was no agreement from the parties.[61] Again, the redress for unsatisfied receiving parties is a

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[53] *Id.* at 183. Later, defensibility became the coined phrase for discussing the validity of predictive coding. Defensibility is discussed twice in *Moore* as an interchangeable term with effectiveness and reliability. *Id.* at 184, 190.

[54] *Id.* at 183.

[55] *Id.* at 191.

[56] *Id.* at 192.

[57] *See* FED. R. CIV. P. 16; *see also* FED. R. CIV. P. 26 (indicating, when read together, that while the judge may engage in a dialogue over discovery, generally the parties collaborate or at least request information without judicial interference as to the implementation of gathering discovery).

[58] *Moore*, 287 F.R.D at 189.

[59] 2012 WL 1431215 (Va. Cir. Ct. 2012).

[60] *Id.*; *The BUZZ on Predictive Coding—Global Aerospace Inc., et al. v. Landow Aviation LP, et al.*, THE BUZZ ON INFO. MATTERS (May 1, 2012), http://www.redgravellp.com/sites/default/files/PredictiveCoding-GlobalAerospace_TamaraKarel.pdf.

[61] *Global Aerospace Inc.*, 2012 WL 1431215.

motion to compel, which is consistent with the ruling in this case.[62]

Another important decision for predictive coding came from a 2012 case in Delaware Chancery Court, *EORHB, Inc. v. HOA Holdings, LLC*,[63] where the court required the parties to show cause as to why they would not benefit from using computer-assisted review.[64] This case was the first instance in which *sua sponte* predictive coding was addressed.[65] The presiding judge later relented when a producing party returned to court, demonstrating that upon a cost-benefit analysis, predictive coding was not an acceptable method in that case.[66] The transcript shows that the judge asked the parties to consider predictive coding, without either party injecting the subject, and for the parties to inform the court as to why they should not use predictive coding.[67] Here, the judge imposed a rebuttable presumption that the method would be most efficient and for any objecting party to explain why human document review was better.[68] The order for *sua sponte* predictive coding read as follows: "[a]bsent a modification of this order for good cause shown, the parties shall (i) retain a single discovery vendor to be used by both sides, and (ii) conduct document review with the assistance of predictive coding."[69] After this order, the parties submitted to the court that "[b]ased on the low volume of relevant documents . . . counsel has determined that the cost of using predictive coding assistance would likely be outweighed by any practical benefit of use."[70] The result was that the defendant would use TAR to produce documents because there were large quantities of documents to be produced.[71] However, the plaintiff would not use TAR because there were fewer documents to produce, making it too expensive and without any additional benefit.[72] Although we can see that the court originally mandated predictive coding, the judge willingly considered objections from the parties when the producing party

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[62] FED. R. CIV. P. 37(a)(3)(A).

[63] 2013 WL 1960621 (Del. Ch. 2013).

[64] *Id.* at *1; Brady, *supra* note 17.

[65] *EORHB, Inc.*, 2013 WL 1960621, at *1.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *EORHB, Inc.*, 2013 WL 1960621, at *1 (noting that the parties requested computer-assisted review tools to assist with the discovery process).

[72] *See id.* (noting that the parties did not have to use the same review platform, and that plaintiff elected to use more traditional methods for document review).

asserted that TAR would be burdensome.[73] As demonstrated in *EORHB, Inc.*, the parties are in the best situation to determine the appropriate method for discovery, and the judiciary should not create a presumption for using predictive coding, but instead encourage the parties to cooperate.

"[W]here the producing party wants to utilize TAR for document review, courts will permit it"[74] was accepted as law in *Rio Tinto PLC v. Vale S.A.*[75] Judge Peck opined this case in the District Court for the Southern District of New York.[76] *Rio Tinto PLC* was decided in 2015, and Judge Peck gave an overview of the developed history of TAR since his *Moore* opinion.[77] Judge Peck followed a Tax Court decision as guidance, stating that "[the judiciary] is not normally in the business of dictating to parties the process that they should use when responding to discovery."[78] This case demonstrates that the discovery process is supposed to entail cooperation of the parties, and that the judiciary should not interfere, except in rare cases.

Judge Peck further wrote that the use of TAR should hinge on the transparency of the seed set.[79] Parties can achieve transparency by publishing the seed set algorithms.[80] The algorithms sort the information based on key words and phrases, which can highlight privileged and relevant materials.[81] Transparency can solve many concerns that parties have for TAR, but some still contend that privileged information is not safe when there may be obscure terms that are common to the business.[82] Others argue that predictive coding may leave out relevant

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[73] *See id.* (showing that the court agreed to the parties' wishes after a reconsideration of the circumstances).

[74] Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 127 (S.D.N.Y. 2015).

[75] 306 F.R.D. 125 (S.D.N.Y. 2015).

[76] *Id.*

[77] *Id.* at 125–28.

[78] *Id.* at 127 (quoting Dynamo Holdings Ltd. v. Comm'r of Internal Revenue, 143 T.C. 183, 188 (2014)).

[79] *See Rio Tinto PLC*, 306 F.R.D. at 128 ("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." The Court notes that transparency is key to the cooperative process that this note endorses for all TAR cases. Additionally, the parties may determine the definition of transparency as it applies to their case, but there should be openness about how the documents were reviewed).

[80] Young, *supra* note 1, at 364.

[81] *Id.* at 363–64.

[82] *Id.* at 364–65 (discussing concerns that have deterred the widespread use of TAR).

information.[83] The answer may be to expand the lists of terms in the seed set, and if the parties are transparent with their algorithms, then a party may be able to ask for more specialized terms. When the receiving party fears an incomplete response to discovery by using TAR, then the remedy could be a motion to compel any suspected missing documents, document categories, or documents sources.[84]

In *Rio Tinto PLC*, the Court was asked to approve the parties' TAR protocol, including the level of transparency and method for preventing non-privileged material from not being recognized in the seed sets.[85] Judge Peck made it clear, once again, that he was approving a proposed agreement and was not ordering the parties to use TAR or any specific algorithms.[86] Generally, predictive coding cases have something in common; they have placed the judiciary into the role of a mediator, where, ultimately, the parties determine their TAR method if the parties will use TAR, but the judge approves the method as being defensible.[87] Currently, there is no standard for when mandated predictive coding may be appropriate, although scholars have begun to question the possibilities.[88]

IV. EXPLAINING DEFENSIBILITY

Defensibility asks a very simple, but criticized question: "does it work?"[89] It is impractical to gather validating information in any case to determine if predictive coding actually produces results better than human review because the costs of such twin

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[83] *Id.*

[84] *Rio Tinto PLC*, 306 F.R.D. at 127 (discussing the Tax Court's acknowledgement that the parties had additional means to protect themselves against any belief that the discovery response was incomplete).

[85] *Id.* at 129 (deferring to the parties' agreements).

[86] *Id.* at 128–29.

[87] *See* Young, *supra* note 1, at 365–67 ("In the eleven-week period between Judge Peck's assignment and his issued opinion, the judge mediated dialogue between the two parties, played a continuing, active role in setting the coding protocol to be used, held three status conferences, and handled plaintiff's objections that defendant's proposed coding protocol was unreliable due to a lack of adequate transparency.").

[88] *See generally* Murphy, *supra* note 5, at 648, 649–50, 655 (discussing various theories on mandating predictive coding based on factors including the facts and needs of a case, how expensive the case is, and the value of new technology).

[89] *Evolving Judicial Attitudes Towards Predictive Coding Suggest It May Soon Be Time to Retire the Defensibility Question*, FOLEY & LARDNER LLP (Apr. 10, 2013), https://www.foley.com/evolving-judicial-attitudes-towards-predictive-codi ng-suggest-it-may-soon-be-time-to-retire-the-defensibility-question-04-10-2013/.

productions would be too burdensome for the parties. Generally, in discovery, the producing party controls what is produced based upon the tailored questions of the receiving party.[90] This process is not perfect,[91] but it can produce information to help the other side to prepare their case.[92] In reality, under human review, just as in predictive coding, the receiving parties do not actually know if they have received all of the relevant information.[93]

The central factor for determining defensibility is transparency in the process, meaning that the receiving parties can check behind the producing parties to see if they exhausted the necessary search terms.[94] Currently there are a multitude of businesses that have created technology that can be considered "predictive coding."[95] The courts have not identified any specific company or product that is the best or most effective.[96] The courts have left it to the parties to choose the method, but the method must be defensible, meaning that the product works, and the opposing side has the opportunity to examine the algorithms for transparency.[97]

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[90] *See* FED. R. CIV. P. 34(a) (discussing that a party can use discovery to get documents through requests).

[91] *See* Moore v. Publicis Groupe, 868 F. Supp. 2d 137, 146 (S.D.N.Y. 2012) (discussing that predictive coding is a rapidly-evolving technology whose reliability has not yet been fully explored).

[92] *See id.* (discussing that predictive coding provides parties in litigation alternatives to human review).

[93] *See Predictive Coding—A Dispatch from the Front Lines of E-Discovery*, JONES DAY: COMMENT. (Sept. 2012), http://www.jonesday.com/predictive_coding/# (noting that predictive coding systems can mix irrelevant documents with the precision set).

[94] *See Predictive Coding Defensibility: The Symantec Transparent Predictive Coding Workflow*, SYMANTEC, at 1–2 (2013), http://eval.symantec.com/mktginfo/ downloads/ltny2013-Predictive-Coding-WP.pdf (discussing that prediction insight allows visibility into the process of predictive coding and displays content and metadata).

[95] *See Moore*, 868 F. Supp. 2d at 145 (noting that both the plaintiff and MSL used ESI protocols with predictive coding).

[96] *See id.* at 143–44 (Judge Peck states that "[t]here was absolutely no discussion of the details of the predictive coding protocol in this case, or in what a predictive coding protocol should look like in general."); *see also* Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 126 (S.D.N.Y. 2015) ("Nor does this Opinion endorse any vendor . . . nor any particular computer-assisted tool.").

[97] *See Rio Tinto PLC*, 306 F.R.D. at 127–29 (discussing that the Court does not dictate discovery procedures, and that cooperation and transparency is needed for the use of TAR).

V. WHEN IS MANDATED PREDICTIVE CODING APPROPRIATE?

There is currently no legal standard for when TAR may be mandated.[98] This note seeks to provide for those rare instances where the judiciary may seek to impose a discovery method. However, before determining if predictive coding should be mandated, the judiciary should acknowledge the following threshold guidelines for the discovery process:

(1) Discovery is not a search for perfection.[99] No standard can endeavor to seek perfection. The facts of the case will distinguish when judicial interference is acceptable. Perfection is not required or necessary to ensure a prudent system for discovery.

(2) Ordinarily, the producing parties should be the ones to dictate the method of production. In human review, this is the standard, so why would this change with TAR? The only thing that changes with TAR is that there is a seed set that teaches the computer to sort the documents, so the producer-chosen standard should remain the same in predictive coding just as it is in human review.

(3) In the discovery process, the judge's role is most often that of a mediator, and should be so, because the entire purpose of discovery is to ensure fairness when preparing for the next steps in the case. If every case went before a judge to determine the specifics of discovery, the courts would be even more clogged, and the Rule 1 touchstones of just, speedy, and inexpensive determinations of actions would not be realized.

(4) Mandated TAR should be limited to only the most extraordinary cases because discovery is meant to be cooperative.

These threshold rules are important because they preserve the touchstones of Rule 1 and maintain the ordinary standards for discovery production. TAR does not require a change to the entire system, but there may be circumstances where, despite these guidelines, judicial interference is necessary to ensure fairness in litigation. Therefore, these four threshold guidelines should be considered in a judge's determination of whether predictive coding should be mandated.[100] As Judge Carter wrote in hearing

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[98] *See generally id.* at 126 (discussing how this opinion was the first to approve computer-assisted review, but that it is not required to be used in all cases, or even that it will be appropriate for future cases).

[99] *See Moore*, 868 F. Supp. 2d at 147 (discussing that predictive coding may be appropriate under certain circumstances, when it can be validated, but also implying that it may be inappropriate under other circumstances).

[100] *See Rio Tinto PLC*, 306 F.R.D. at 128–29 (discussing various factors to

objections to Judge Peck's ruling in *Moore*, "the devil is in the details,"[101] and only the rarest circumstances should compel the court to dictate the mechanics of discovery. As previously illustrated, there may be a situation in which it is necessary for the court to mandate predictive coding in order to preserve the touchstones of Rule 1.[102] Keeping in mind the guidelines mentioned above, I propose the following rules for when mandated predictive coding should be considered.

A. Rule for Sua Sponte Judicially-Mandated Predictive Coding

Sua sponte predictive coding is when the court orders predictive coding of its own initiative, and the parties have not agreed to its use.[103] There is a rebuttable presumption that the producing party should be able to determine the method of discovery production.[104] Judges should only mandate predictive coding over the objection of both parties as a last resort, as the touchstone of Rule 1[105] cannot be achieved at times without mandating predictive coding. Parties should be given notice and an opportunity to be heard regarding the implementation of predictive coding methods, and to present evidence as to why predictive coding is not the most prudent method for gathering discovery.

Keeping in mind the guidelines, the court should be persuaded of the following elements in order to *sua sponte* mandate predictive coding: (1) there are such large quantities of documents that human document review is substantially and imminently burdensome for the court in regard to timeliness, cost, or serving justice; (2) utilizing predictive coding must reasonably meet the concerns over timeliness, costs, or justice that the court has over human document review; and (3) the court has considered the concerns of the parties in using TAR and can define how much transparency is required to meet those needs. If all three elements

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consider when determining the most efficient discovery method).

[101] *Moore*, 868 F. Supp. 2d at 147.

[102] *See* FED. R. CIV. P. 1 ("[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[103] Bill Toth, *Predictive Coding is Coming. Let It*, 15 COLUM. SCI. & TECH. L. REV. (Nov. 20, 2012), http://stlr.org/2012/11/20/predictive-coding-is-coming-let-it/ (noting that the courts first compelled the use of predictive coding in discovery over the objection of a party in *Global Aerospace v. Landlow Aviation*).

[104] *See* Murphy, *supra* note 5, at 633 (noting that discovery procedure is party-driven).

[105] FED. R. CIV. P. 1.

are addressed, then it is appropriate for a judge to *sua sponte* mandate predictive coding on both of the parties. Once the Court has ordered TAR, the parties have a duty to employ a method that is both defensible and transparent. If the parties cannot agree at this point, they may seek judicial review over implementation based upon the most defensible and transparent method.

B. Rule for Judicially-Mandated Predictive Coding Upon a Receiving Party at the Producing Party's Request

Most likely a receiving party who is disputing the use of predictive coding by the producing party is concerned about either timeliness or the details of the algorithm to be used in the predictive coding.[106] In this situation, the receiving party likely fears that the producing party will not capture all the relevant information because not every document will be reviewed by a person.[107] Courts should mostly be concerned with the producing party's considerations of cost and timeliness because the burdens of discovery are initially always borne by the producing party.[108] One way to address this issue is to encourage more transparency from the producing party and to include more terms when testing the seed set. However, there may be certain situations in which the receiving party's concerns are enough to outweigh the producing party's request for utilizing predictive coding. Again, there is a rebuttable presumption that the producing party should be able to determine the method of discovery production.[109] Judges should only refuse a producing party's preference for predictive coding, and grant the receiving party's insistence on human review, where the touchstones of Rule 1[110] cannot be achieved without refusing predictive coding. Parties should be given notice and an opportunity to be heard regarding the implementation of predictive coding methods and to present evidence of why predictive coding is not the most prudent method for gathering discovery.

Thus, in order to be able to mandate predictive coding over the

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[106] Wallis M. Hampton, *Predictive Coding: It's Here to Stay*, PRAC. L.: E-DISCOVERY BULL., at 32 (2014), https://www.skadden.com/sites/default/files/publications/LIT_JuneJuly14_EDiscoveryBulletin.pdf (discussing the disadvantages of using predictive coding).

[107] *Id.*

[108] Murphy, *supra* note 5, at 640, 642.

[109] *Id.* at 633.

[110] FED. R. CIV. P. 1.

receiving party's objections, the court should be persuaded that (1) the method that the producing party requests is defensible and reasonably transparent, (2) the receiving party's concerns do not substantially outweigh the court's or producing party's concerns in regard to timeliness, cost, or service of justice if the producing party were to utilize human document review, and (3) utilizing predictive coding would reasonably meet the concerns over either timeliness or the costs of human document review. If the receiving party is the party that is objecting to the method chosen, then it should be that party's burden to prove that there is something unique and substantial about this case that it can overcome the presumption that the producing party should control the method of production.

C. Rule for Judicially-Mandated Predictive Coding Upon a Producing Party at the Receiving Party's Request

There is an argument that the consequences of utilizing predictive coding may be undue if producing parties are forced to implement predictive coding methods, where they have valid concerns of sensitive information slipping, inadvertently, through the cracks of the predictive coding algorithms.[111] This would be the situation in which the nature of the entity has such obscure word usage, that it would be impractical to expect the parties to be able to train the computer to catch all of them.[112] It is likely that the producing party is concerned that clawback agreements will not address any concerns over privileged or otherwise protected information (such as trade secrets).[113]

A situation in which a receiving party asks the court to determine if predictive coding would be acceptable against the producing party's wishes is unlikely to prevail because normal

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[111] *See* Ben Kerschberg, *E-Discovery and the Rise of Predictive Coding*, FORBES (Mar. 23, 2011), http://www.forbes.com/sites/benkerschberg/2011/03/23/e-dis covery-and-the-rise-of-predictive-coding/#5cd237e67511 (discussing privilege concerns when relying on the use of algorithms).

[112] *See* Elle Byram, *The Collision of the Courts and Predictive Coding: Defining Best Practices and Guidelines in Predictive Coding for Electronic Discovery*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 675, 683 (2013) (discussing the computer "training" process used to implement predictive coding).

[113] *See Court-Imposed "Clawback" Agreements to Protect Privileged Communications*, FED. EVIDENCE REV. (Dec. 12, 2012), http://federal evidence.com/node/1614 (discussing the use of "clawback" agreements to protect privileged materials).

redress for inadequate answers is a motion to compel.[114] There must be unique facts where the touchstones of Rule 1[115] cannot be achieved without the court mandating predictive coding. The producing party should be given notice and an opportunity to be heard regarding the implementation of predictive coding methods and to present evidence of why predictive coding is not the most prudent method. Keeping in mind the guidelines, it is also important to stress that in no other circumstances does the receiving party get to determine how a producing party produces discovery.[116]

The rebuttable presumption is that the producing party is in the best position to know the appropriate method for identifying, gathering, sorting, and producing its discovery.[117] Only in rare circumstances should a court interfere with a producing party's chosen method of producing discovery. In order to be able to mandate predictive coding upon a producing party, a judge should determine that (1) the predictive coding method that the receiving party suggests is defensible and transparent; (2) human document review is substantially burdensome for the court or the receiving party in regard to timeliness, cost, or service of justice; (3) predictive coding must reasonably meet the concerns that the receiving party or the court has over human document review; and (4) the court can reasonably determine that clawback agreements and more extensive term lists for the seed set can address any concerns that the producing party has over utilizing predictive coding. It should remain the receiving party's burden to prove that there is something unique and substantial about this case that they can overcome the presumption that the producing party should control the method of production.

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[114] *See* Doug Austin, *Defendant Not Required to Use Predictive Coding by Court: eDiscovery Case Law*, EDISCOVERY DAILY BLOG (Nov. 9, 2016), http://www.ediscovery.co/ediscoverydaily/electronic-discovery/defendant-not-req uired-use-predictive-coding-court-ediscovery-case-law/ (discussing the court's unwillingness to order a defendant to use predictive coding).

[115] FED. R. CIV. P. 1.

[116] *See Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases*, DOJ AND AO OF THE U.S. CTS. JETWG, at 3–4 (Feb. 2012), https://nlsblogdotorg.files.wordpress.com/2012/03/final-esi-proto col.pdf (discussing a party's choice of discovery methods).

[117] *See* Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 127 (S.D.N.Y. 2015) ("[W]here the producing party wants to utilize TAR for document review, courts will permit it.").

VI. JUDICIAL POWERS IN RELATION TO PREDICTIVE CODING[118]

The judiciary should strive to take a mediator's role when discovery production is an issue before the court. There are some concerns with a judge practicing such a broad judicial power of interfering with the natural discovery process, which is cooperative, and can significantly prejudice cases by doing so.[119] As the law stands, with no expressed limits on the judiciary controlling the discovery process, judges could potentially mandate predictive coding in any of the three situations mentioned above where the discovery process is burdensome or untimely because they have the inherent power to control their dockets. It is good policy to allow courts to control their dockets, but it is better policy to encourage cooperation in discovery because cooperation will ultimately further the touchstones of Rule 1.[120]

Predictive coding may be a useful tool for quickly producing massive quantities of discoverable information, but while potentially curing some issues, predictive coding procedures open the door to harmful effects that remedies, such as clawback agreements, cannot necessarily repair, and to which parties may not want to open themselves up for in sensitive cases because it could impair their case. For example, "[t]echnological advances threaten privileged communication."[121] So, should a judge be given such broad discretion when privileged information is at stake? Alternatively, should the discovery methods be entirely left to agreements made by the parties involved, or should the producing party alone be able to control the discovery methods? And, who should be able to determine how to produce discovery? As previously discussed, all we know currently is that the Federal Rules of Civil Procedure prescribe a balancing test for the scope of discovery, which includes weighing the "proportional . . . needs of the case," including "the importance of the discovery in resolving

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[118] Recently a tax court approved predictive coding because it was found to be defensible. Jay R. Nanavati, *U.S. Tax Court Gives Strong Boost to Computer-Assisted Review*, DISCOVERY ADVOC. (July 28, 2016), https://www.discovery advocate.com/2016/07/28/u-s-tax- court-gives-strong-boost-to-computer-assisted-review-2/.

[119] *See* Young, *supra* note 1, at 358 (discussing the need for party cooperation throughout the discovery process).

[120] *See* FED. R. CIV. P. 1 ("[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[121] Young, *supra* note 1, at 358.

the issues," among other considerations, to determine "whether the burden or expense of the proposed discovery outweighs its likely benefit."[122] We also know that "[o]n motion or its own, the court must limit the frequency or extent of discovery . . . [if it] can be obtained from some other source that is more convenient, less burdensome, or less expensive."[123] So, in applying predictive coding to the Federal Rules of Civil Procedure, we can see potential facts that appropriately mandate predictive coding, but also some facts that may discourage predictive coding in order to encourage fairness in litigation.

Courts have yet to make any determinations about the specific implementation of predictive coding.[124] The tests for all three circumstances above allow the court to exercise its authority to control their dockets and to preserve the touchstones of Rule 1, but also maintain that discovery should be left to the parties. Here, the receiving party has a heightened role in the gathering process, and that alone makes them better off. The goal is to not prejudice the producing party's rights to determine production methods, but to keep the courts uncluttered, and to encourage the parties to agree. In the absence of cooperation, the court is the only authority left to decide. Ultimately if the court cannot decide, then no one can, and that would inhibit justice. This is why there must be a test for the court to consider in those rare circumstances where the parties cannot agree or the court must be forced to uphold the touchstones of Rule 1.[125]

VII. CONCLUSION

If there is a case with millions of documents to review, the parties may want to consider TAR for just, speedy, and timely gathering of discovery. Absent an agreement to use TAR, the judiciary may be able to mandate predictive coding over a litigant's objections, but should only do so in rare circumstances. The Federal Rules of Civil Procedure and case law generally support that ordinarily, the producing party should control the gathering

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[122] FED. R. CIV. P. 26(b)(1).

[123] FED. R. CIV. P. 26(b)(2)(C).

[124] The determination of appropriate TAR retailers, for example, are left to the parties. *See* Moore v. Publicis Groupe, 868 F. Supp. 2d 137, 146 (S.D.N.Y. 2012) (noting that the plaintiff chose to use DOAR to perform predictive coding during ESI review).

[125] FED. R. CIV. P. 1 ("[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

process.[126] However, there are three types of orders that go against the presumption: (1) a judge could potentially order *sua sponte* predictive coding to speed up the process, even though neither party believes that it would be beneficial to their case; (2) a judge could order predictive coding upon the producing party at the request of the receiving party, although the burdens of production would naturally fall to the producing party; or (3) a judge could order predictive coding against the receiving party's wishes.[127] The judiciary should consider the threshold guidelines before making a determination, and may look to the tests outlined in this note to determine if the facts of the case warrant mandated predictive coding. If the judiciary ever faces facts that may be appropriate for mandated predictive coding, then this test will serve to preserve the touchstones of Rule 1 and fairness in litigation.

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[126] *See generally supra* pp. 16–18 (describing the controlling procedural rules and caselaw).

[127] *See generally supra* pp. 18–22 (describing each particular judicial order in greater detail).