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eDiscovery Proportionality Review: Three Key Themes

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Substantial changes to the Federal Rules of Civil Procedure (FRCP) went into effect on December 1, 2015. The upshot of these amendments was to change several important procedural aspects of the FRCP governing eDiscovery (the process of finding and producing electronic information in litigation). Many believed that one of the most important changes inserted the concept of "proportionality" into the scope of what is discoverable in litigation. In essence, this change of emphasis bounded the definition of what was "discoverable" to matters that are proportional "to the needs of the case" considering several interrelated factors, such as the amount in controversy, access to information, party resources, etc. While the concept of proportionality was not brand new, using proportionality to define the boundaries of discoverable evidence and including the factors to be considered was a significant shift. Given these changes, this alert looks at what the case law can tell us from the intervening 14 months about what the proportionality changes mean to litigants, pointing out three interrelated trends for more effective application of proportionality limitations.

1. Courts expect cooperation. The rule amendments transferred proportionality from a limit that could be imposed on discovery to a definitional boundary of what constitutes discoverable evidence. Courts are framing proportionality as everyone's job. The influential Advisory Committee Notes called proportionality a shared responsibility between the court and both parties, and courts have focused on that principal (See, e.g., *Goes Int'l, AB v. Dodur Ltd.*). One court noted: "[u]nder the Court's reading, the revised rule places a shared responsibility on all the parties to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts" (*Salazar v. McDonald's Corp.*). This shows that the scope of proportionality touches all aspects of discovery.

2. Vague proportionality objections are ineffective. Boilerplate claims of disproportionality will not be impactful. In *Salazar*, a party sought to avoid a discovery burden by arguing that a request to search a few custodians' data for predetermined search terms was disproportionate, arguing generally that the cost was too high considering the needs of the case. The court rejected this argument. Instead, consistent with the cooperation trend, the parties were ordered to confer after the number of search term hits was determined and narrow them as appropriate. The court noted that despite claiming disproportionality, the defendant in that matter "ha[d] not challenged the relevance of the information Plaintiffs seek, only the costs of producing such information and theoretically the chance that the information Plaintiffs seek will not be particularly valuable." Parties should avoid unsupported, vague proportionality objections.

3. Fully and realistically supported proportionality objections can be effective. Litigants should be prepared to back up proportionality arguments with realistic and supportive data. In *Dao v. Liberty Life Assurance Co. of Boston*, a party calculated out for the court exactly how many hours it would take to respond to a particular discovery request, citing the total number of documents requiring review and the number of minutes it would take to review each document. Still, again consistent with the cooperation trend, the court disapprovingly noted that despite successfully avoiding a motion to compel by backing up their assertions with data, the party's failure to offer a more proportionate proposal to obtain the information being requested was problematic under the new rule. Specificity of objections should be coupled with cooperation.

Parties should consider how these trends operate together. Cooperation is inconsistent with boilerplate objections; it is consistent with realistically supported objections, when those objections are, in proper circumstances, coupled with proportionate counter-proposals. While the trends will continue to develop, open and collaborative inquiry into how best to achieve proportionate discovery as a shared responsibility seems a trend that is likely here to stay.

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