

Phased Discovery as a Means to Proportionality

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Phased Discovery As A Means To Proportionality

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Agenda

1. Meet our panelists
2. Proportionality and the Federal Rules of Civil Procedure
3. How do we achieve proportionality?
4. What are the benefits of a phased discovery approach?
5. Q&A

Today's Panelists



Ed Sohn

VP Product & Partner Management

Thomson Reuters

Ed Sohn is a VP Product & Partner Management with Thomson Reuters Legal Managed Services. After over five years as a BigLaw litigation associate, Ed spent time in India, managing hundreds of attorneys and professionals in delivering high-value managed legal services. He now focuses on creating and delivering integrated technology, managed services, and outsourcing litigation solutions.



Scott E. Zweigel

Partner

Parker, Hudson, Rainer & Dobbs

Scott is a partner with the firm's litigation practice group. He has experience negotiating a broad range of disputes, including securities litigation and securities arbitration, business tort and breach of contract litigation, class action defense, data breach disputes, litigation involving financial institutions, electronic discovery issues and complex contract litigation.



Robert Khayat

Partner

The Khayat Law Firm

Robert Khayat represents clients in the trial and arbitration of business disputes, advances the claims of whistleblowers in False Claims Act cases, consults with clients as their "outside" general counsel, and advises clients in connection with healthcare compliance. Mr. Khayat has significant experience representing both plaintiffs and defendants.

Proportionality

Discovery Scope and Limits.

(1) **Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and **proportional** to the needs of the case, considering

- the **importance of the issues** at stake in the action,
- the **amount in controversy**,
- the **parties' relative access** to relevant information,
- the **parties' resources**,
- the **importance of the discovery** in resolving the issues,
- and whether the **burden or expense of the proposed discovery outweighs its likely benefit.**

Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26

emphasis and formatting added

Proportionality in recent cases

Since the 2015 amendments, proportionality analysis has affected cases in a number of ways

Nece v. Quicken Loans

(M.D. Fla. 2018)

- Denying motion to compel three million emails for a putative class action when single plaintiff's case was worth \$6,000.

Ally v. MTD Products

(W.D. Pa. 2018)

- Finding disproportional discovery request for all previous discovery in other cases would cost more than \$100,000 in a case where the amount in controversy was about \$100,000.

Simon v. Northwestern Univ.

(N.D. Ill. 2017)

- Applying proportionality factors to find that requests for irrelevant date ranges were not proportional but grants a date range greater than what defendant had previously produced.

"...the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery."

- Chief Justice John Roberts, *on proportionality*

How can I help with proportionality?

- 1. Understand the rough tools in place to reduce a data set: date ranges, keywords, custodians, data sources.**
- 2. Test combinations of tools on the preserved and collected data sets to measure magnitude of focusing the effort.**
- 3. Use the most cost-effective vendors possible, as discovery costs will be considered as a factor.**
- 4. When there may be debate, suggest using a phased discovery plan.**

Achieving proportionality in real life

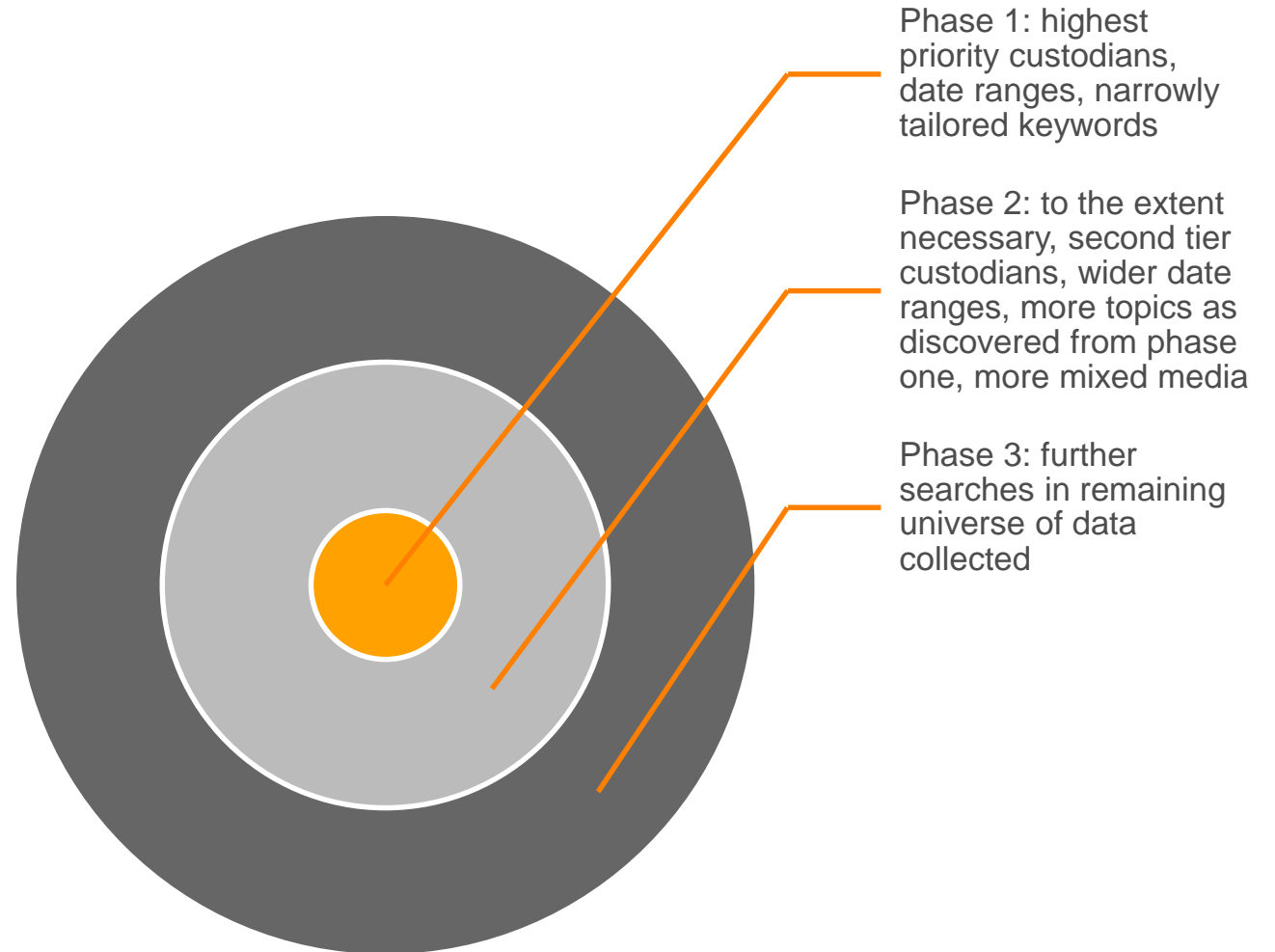
- 1. How have you made discovery more proportional, historically?
What are some of your best practices?**
- 2. What do you need to learn or know in order to help make decisions about what is proportional?**
- 3. Have you dealt with judges that have considered proportionality in discovery?**
- 4. How does this play out in a meet-and-confer or initial conference?**

What is phased discovery?

"...the most promising, but least burdensome or expensive sources of information could be produced initially, which would enable Plaintiffs to reevaluate their needs depending on the information already provided." *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 365.

Ordering phased discovery is a convenient way for a court to achieve proportionality without having to issue an “all or nothing” ruling, but rather one that meets the legitimate concerns of both parties.

- Judge Paul Grimm



Opinions for phased discovery

Chen-Oster v. Goldman, Sachs & Co.,

285 F.R.D. 294, 300-01 (S.D.N.Y. 2012)

- Phasing discovery would help to keep it proportional

Fisher v. Fisher,

2012 WL 2050785, at *5 (D. Md. June 5, 2012)

- Narrowing the scope of discovery initially sought by plaintiff, initiated phased discovery to focus on the most important facts, and informed plaintiff that the possibility of further discovery would depend upon the results of the initial discovery

Tamburo v. Dworkin,

2010 WL 4867346, at *3 (N.D. Ill., Nov. 17, 2010)

- Ordering the parties to meet and confer to develop a phased discovery schedule, reminding them of their duty to cooperate

What are the benefits to this phased approach to discovery?

1. How does this benefit you and your client?
2. How does this benefit your opposing counsel?
3. What are the unnecessary roadblocks to the parties agreeing upon and employing phased discovery? How can these roadblocks be removed?
4. Where would you start with creating a phased discovery plan? Are there typically data sources, date ranges, or custodians you would focus on first?

Questions from the audience?

Additional Resources

Articles

[Proportionality in Discovery One Year Later: The Focal Points of Planning, Protocol, and Process](#) *Feb. 2017*

By Kevin P. Broughel, James Worthington & Tom Barnett

[The Sedona Conference Commentary on Proportionality in Electronic Discovery](#) *May 2017*

[How to Achieve the Mandate of Proportionality Through Phased Discovery](#) *Nov. 2017*

By Robert E. Sumner IV and Charles R. Scarminach

[Occam's Phaser: Making Proportional Discovery \(Finally\) Work in Litigation by Requiring Phased Discovery](#) *2016*

By Michael Thomas Murphy

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How to Contact Our Panelists



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Thank you!