Insights: Publications

Finding Proportionality in a Phased Approach to E-Discovery

LitSmart E-Discovery Blog

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Two recent decisions highlight the usefulness of phased e-discovery as a tool to satisfy Rule 26(b)(1)'s ever-important proportionality requirement. It is worth noting that neither phased discovery nor proportionality are particularly new concepts to e-discovery. To the contrary, proportionality has been the “key phrase” of Rule 26(b)(1) since the rule's 2015 amendment, and phased discovery has been around even longer. Moreover, phased discovery as a means to achieve proportionality is not that novel of an idea itself —indeed, one of Kilpatrick Townsend's own Senior Project Managers on the LitSmart® E-Discovery Team, Amy Catton, wrote an instructive article on the subject in 2018. Model orders for patent cases in numerous courts require phased discovery, typically phasing email discovery to occur after other discovery and only if deemed necessary. However, phased discovery is becoming prevalent in other types of cases as well. For example, recent decisions like *Weidman v. Ford Motor Co.*, No. 18-12719, 2021 WL 2349400 (E.D. Mich. June 9, 2021) and Huntsman v. Southwest Airlines Co., No. 19-cv-00083-PJH, 2021 WL 3504154 (N.D. Cal. Aug. 10, 2021) have renewed the value of this approach.

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