E-Discovery Quarterly: Rulings On Custodian Selection

By **Tom Paskowitz, Colleen Kenney and Matt Jackson** (January 9, 2025)

This article is part of a quarterly column analyzing the most notable e-discovery developments from the previous three months. This installment takes a closer look at recent decisions involving the standard principles of proportionality as they apply to the selection of custodians.

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Litigators in discovery are used to applying the standards of proportionality to the scope of document requests or interrogatories. But as a spate of recent federal court decisions demonstrate, the same principles of proportionality apply to selecting custodians from whose files a party will produce electronically stored information, or ESI.

As the U.S. District Court for the District of Massachusetts noted in Abiomed Inc. v. Enmodes GmbH in September, "[r]elatively little legal authority exists on the standards a court should apply when parties are unable to agree on designated ESI custodians and a party seeks to compel another party to designate an additional ESI custodian or custodians."[1] The recent decisions reflect that standard principles of proportionality should apply to such disputes. These principles, embodied in Rule 26(b)(1) since the 2015 amendments to the rules, will be familiar:

> 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.

As applied to a motion to compel one or more additional ESI custodians, this inquiry appears to often focus on the last part of the standard: whether the burden or expense of the proposed discovery outweighs its likely benefit. In particular, courts look to whether the movant has shown the proposed custodian(s) will add noncumulative and unique documents.

The recent decision in Abiomed demonstrates these principles.[2] Abiomed involved breach of contract and trade secret misappropriation claims in connection with a project through which the defendants were to assist the plaintiff in developing a next-generation compressible heart pump.[3] The defendants had produced documents from 10 custodians that they represented were "reasonably likely to have discoverable information," but the plaintiff sought an order compelling collection from four additional custodians that it claimed worked on the project at issue.[4]

Surveying prior decisions, the court noted certain principles applicable to a request to

compel designation of ESI custodians.

First, "[a]bsent agreement among the parties, the party who will be responding to discovery requests is entitled to select the custodians it deems most likely to possess responsive information and to search the files of those individuals," because the responding party "is typically in the best position to know and identify those individuals within its organization likely to have information relevant to the case."[5]

And, "unless the party's choice is manifestly unreasonable or the requesting party demonstrates that the resulting production is deficient, the court should not dictate the designation of ESI custodians."[6] Finally, the requesting party "bears the burden of demonstrating that the additional requested custodian would provide unique relevant information not already obtained."[7]

Applying these principles, the court in Abiomed denied the plaintiff's motion to add the additional custodians. There appeared to be no dispute that the documents from these custodians would be relevant, but the court found that the plaintiff had not "met its burden to show that they possess[ed] unique relevant information not already obtainable from the custodians already designated by" the defendants.[8] This was because the defendants had already designated as a custodian the research and development leader for the project, who was also the supervisor of three of the proposed custodians.[9]

An October decision from the U.S. District Court for the Southern District of Florida in Newman v. The Associated Press[10] similarly refused to order the Associated Press to add its president and CEO, Daisy Veerasingham, as custodian in a case involving allegations that the Associated Press aided the Oct. 7, 2023, attack on Israel by publishing pictures taken by freelancers affiliated with Hamas.[11]

The plaintiffs claimed that Veerasingham would have relevant material because, among other reasons, she provided the board of directors with updates about a U.S. Senate inquiry, she discussed a response to inquiries concerning freelance photographers in Gaza, and she received an update about the reputational risk of associating with certain freelance photographers.[12]

Noting that discovery must be "proportional to the needs of the case," the court framed the issue as whether the plaintiffs had established that a search of Veerasingham's documents "would provide unique relevant information not already obtained."[13] The court determined that it would not, finding that the plaintiffs had "fail[ed] to establish that [Veerasingham] has unique discovery material, a finding which weighs heavily against designating her as a custodian."[14]

This conclusion was based on the fact that Veerasingham "was not involved in the micro-level decision-making," undermining any suggestion that she possessed responsive documents "that would not be otherwise produced" through other designated custodians.[15]

But some recent decisions go the other way, like a September decision from the U.S. District Court for the District of Illinois in City of Chicago v. DoorDash Inc.,[16] in which the city of Chicago successfully moved to compel DoorDash to add three additional ESI custodians. The city supported its motion to compel with examples of relevant documents for the three proposed custodians that DoorDash had produced in other actions, but that were not included in DoorDash's custodial searches in this action.[17]

After finding that the custodians' documents would be relevant, the court turned to the question of "whether allowing this additional discovery would be disproportionate to the needs of the case or unduly burdensome when compared to the potential benefit of allowing the discovery."[18] The court rejected DoorDash's argument that the custodians' documents "may either be identical or substantially similar to what is already in the record."[19]

In particular, the court found that DoorDash had not provided details regarding the scope of its productions in other matters from the proposed custodians, and therefore could not meet "its burden to show the proposed additional searches of these custodians would be duplicative."[20]

The defendant in September's LifeScience Technologies LLC v. Mercy Health, in the U.S. District Court for the Eastern District of Missouri, similarly failed to demonstrate that documents from two additional proposed custodians would be duplicative and cumulative of documents that had already been captured in the ESI produced from other custodians.[21]

There, the defendant had identified seven custodians, but it turned out that the email records for four of them had been deleted before collection.[22] This fact led the court to overrule the defendant's argument that it would be unduly burdensome to produce the requested ESI because similar information had "likely already been provided under other custodians, making this ESI cumulative or duplicative."[23]

The court noted that because the two proposed custodians may have communicated with the custodians whose emails had been deleted, "any emails … exchanged with those individuals would not yet have been produced."[24]

Who Carries the Burden?

As with any other dispute, the decision as to which party carries the burden on a motion to compel additional custodians could be dispositive. But as the U.S. District Court for the Northern District of Illinois noted in Dale v. Deutsche Telekom in October, "courts tend to go both ways regarding whose burden it is to show discovery is proportional or disproportional."[25]

In September's Om Records LLC v. OM Developpement SAS, the Northern District of Illinois stated that "in order to succeed on a motion to compel, a moving party bears the burden to show that it has satisfied proportionality and other requirements of Rule 26."[26] Other courts have placed the burden on the objecting party, finding that "[o]nce a showing of relevance has been made, the objecting party bears the burden of showing that a discovery request is improper."[27]

Considerations for Selecting ESI Custodians

Not every case will require difficult decisions regarding the selection of ESI custodians or disputes among the parties about whether certain custodians need to be included, but the cases above reflect some guidance for those cases where disputes do arise.

These cases make clear that the proportionality of additional proposed custodians will often rise or fall on whether the custodians have unique relevant documents, i.e., relevant documents that will not be produced from other sources. Producing parties can consider whether a potential or requested custodian would be duplicative because his or her involvement in the subject matter was too high level, like in Newman; or if multiple members of a group or project team would likely have mostly overlapping ESI, like in

Abiomed.

When fielding a demand to add a new custodian, producing parties should consider whether information already in the record — or in the public domain — will show that they have relevant documents that otherwise might not be produced. This could be as a result of gaps in a production like the missing email files in LifeScience Technologies or because of gaps in reproductions from prior cases like in DoorDash.

Either way, if the dispute is submitted to a court, both parties will need to be prepared to establish whether the proposed additional ESI is proportionate or disproportionate to the needs of the case in light of the uncertainty regarding which party bears the burden.

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[1] Abiomed Inc. v. Enmodes GmbH, No. 23-10087-DJC, 2024 WL 4028295, at *4 (D. Mass. Sept. 3, 2024).

[2] No. 23-10087-DJC, 2024 WL 4028295 (D. Mass. Sept. 3, 2024).

[3] Id. at *1.

[4] Id. at *3.

[5] Id. (quoting In re EpiPen Mktg., Sales Practices and Antitrust Litig., No. 17-md-2785-DDC-TJJ, 2018 WL 1440923, at *2 (D. Kan. Mar. 15, 2018). See also The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 52 (2018) ("[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own [ESI]").

[6] Id.

[7] Id. at *4 (quoting Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co., 297 F.R.D. 99, 107 (S.D.N.Y. 2013)) (emphasis in original). See also In re Exactech Polyethylene Orthopedic Products Liability Litigation, No. 22-md-3044 (NGG)(MMH), 2024 WL 4381076, at *9 (E.D.N.Y. Oct. 3, 2024) ("courts will grant motions to compel disclosure of additional custodians when the moving party can show 'that they will have additional, highly relevant materials' that were not previous shared").

[8] Id. at *4.

[9] Id.

[10] No. 24-cv-20684, 2024 WL 4433465 (S.D. Fla Oct. 4, 2024).

[11] Id. at *1.

[12] Id.

[13] Id. at *4.

[14] Id. at *5.

[15] Id. The court ultimately concluded that because the plaintiff had not demonstrated that Veerasingham was in possession of unique discovery documents, it would not be proportional to the needs of the case to "force Defendant to search through the countless documents in her possession." Id. See also Dale v. Deutsche Telekom AG, No. 22 C 3189, 2024 WL 4416761 (N.D. Ill. Oct. 4, 2024) (denying motion to compel additional custodians in a case challenging alleged anticompetitive pricing effects of a merger where, among other factors, "many of the other agreed custodians would have" documents similar to one of the proposed custodians).

[16] No. 21-cv-05162, 2024 WL 4119165 (N.D. Ill. Sept. 9, 2024).

[17] Id. at *2.

[18] Id. at *3.

[19] Id.

[20] Id. at *4.

[21] No. 4:21-cv-01279-SEP, 2024 WL 4349266 (E.D. Miss. Sept. 30, 2024).

[22] Id. at *3.

[23] Id. at *4.

[24] Id.

[25] 2024 WL 4416761 at *2 n.3.

[26] 2024 WL 4100870 at *3. See also Exactech, 2024 WL 4381076 at *12 ("Plaintiffs have not met their burden of identifying why Mr. Cloutier's custodial file is particularly unique nor do they argue what specific information or documents are missing in the current production that Mr. Cloutier's file would reveal").

[27] Abiomed, 2024 WL 4100870 at *2. See also DoorDash, 2024 WL 4119165 at *4 (finding that DoorDash had not "met its burden to show the proposed additional searches of these custodians would be duplicative").