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Arnold & Porter's Sharon L. Taylor explains why a defendant's efforts to meet its discovery obligations in cases pending prior to their consolidation in a Multidistrict Litigation proceeding did not waive the proportionality standard contained in Federal Rule of Civil Procedure 26.

Predictive Coding, Proportionality, and Productions

By Sharon L. Taylor

In a recent products liability case concerning Biomet's metal-on-metal hip replacement system, the MDL court overseeing the coordinated litigation upheld the defendant's use of predictive coding in its discovery protocol, over the plaintiffs' objections. See *In Re Biomet M2a Magnum Hip Implant Products Liability Litigation*, MDL No. 2391, 2013 BL 107705 (N.D. Ind. Apr. 18, 2013) (*MDL Discovery Order*).

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Rather than determining whether the proposed eDiscovery protocol of the plaintiffs' steering committee was superior to the eDiscovery protocol implemented by the defendant before the cases had been consolidated in the MDL, the MDL court applied the proportionality standard under Federal Rule of Civil Procedure 26(b)(2)(C).

In doing so, the court rejected the plaintiffs' call for the defendant to restart the discovery process using predictive coding on all documents, instead of those that the defendant had identified using a keyword search—unless the plaintiffs were willing to bear the additional costs (See, 13 DDEE 209, 4/25/13).

At a basic level, this case is about the procedures a party must undertake to identify and produce relevant documents. And the MDL court provided some solace for producing parties.

Defendants' Discovery Protocol

In the months prior to the creation of MDL No. 2391, (See *In Re Biomet M2A Magnum Hip Implant Products Liability Litigation*, 896 F. Supp. 2d 1339 (U.S. Jud. Pan. Mult. Lit. Oct. 2, 2012)), defendant Biomet, which was ''neither sold on centralization nor free of judicial exhortations in other cases against it,'' began to identify and produce documents to plaintiffs with cases pending in various federal courts—in some instances, against repeated admonitions from plaintiffs' counsel that the defendant should wait until the decision was made whether the cases would be consolidated in an MDL. *MDL Discovery Order* at *1.

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Identification Process. To identify potentially relevant documents, Biomet conducted a three-step process.

First, it implemented keyword searches, culling the universe of documents from 19.5 million documents to 3.9 million documents.

Second, Biomet removed duplicate documents, reducing the 3.9 million documents to 2.5 million documents.

Finally, Biomet applied a predictive coding tool to identify relevant documents within the 2.5 million document set.

Predictive Coding. Recently, predictive coding (a.k.a. computer-assisted review or technology-assisted review) has gained momentum as a means of identifying relevant documents in electronically stored information.

Following an attorney-conducted iterative training process, the predictive coding tool applies a math algorithm to identify relevant documents, which are reviewed by attorneys.

Predictive coding is designed to reduce the volume of documents to be reviewed and prioritize the most relevant documents for review, thereby rendering the discovery process more efficient.

In *Biomet*, contract attorneys reviewed a sampling of documents identified by the predictive coding tool from the 2.5 million document set for relevance, confidentiality, and privilege.

Biomet offered plaintiffs the opportunity to propose additional search terms and to produce from the 2.5 million document set the remaining non-privileged documents not identified by the predictive coding tool so that plaintiffs could verify that the relevant documents were being produced.

The plaintiffs rejected those offers, asserting that Biomet's initial application of keyword searches had ''tainted'' the eDiscovery process. *MDL Discovery Order* at *2.

Plaintiffs' Request

Arguing that Biomet had ''unilaterally moved forward with its own self-selected electronically stored information . . . production protocol,'' six months before the MDL was formed, ''despite being admonished [by some plaintiffs' counsel] not to do so,'' the plaintiffs' Steering Committee instead requested that Biomet start its document production process over and apply the predictive coding tool to Biomet's original (pre-search term) 19.5 million document set, with the plaintiffs and Biomet jointly entering search commands into the predictive coding tool. Plaintiffs' Memorandum in Support of Collaborative Predictive Coding at 1,17 (Apr. 1, 2013) (*Plaintiffs' Memorandum*).

Plaintiffs argued that predictive coding was ''superior, more efficient and less expensive'' than the use of search terms, and thus should be applied to the original set of data. *Id.* at 1.

Plaintiffs stated that Biomet had ''unilaterally selected a third-party ESI vendor, settled on its own Predictive Coding methodology and trained and seeded the software all without consulting the plaintiffs.'' *Id.* at 3.

The Gold Standard? Further, calling predictive coding the ''gold standard for document retrieval in complex cases,'' the plaintiffs asserted that the tool's utility was lost absent involvement by ''*all*'' parties. *Id.* at 7-8. Specifically, ''equal access and opportunity to code the 'seed set' of documents'' to train the tool was essential to the integrity of the predictive coding process, they asserted. *Id.* at 12.

As to Biomet's use of search terms to initially cull the documents before applying the predictive coding tool, the plaintiffs argued that the ''resulting accuracy plunges to unjust levels.'' *Id.* at 16.

Defendant's Response

Biomet objected to the plaintiffs' request to restart the eDiscovery process, citing the money it had already spent to fulfill its discovery obligations in the courts in which cases were pending prior to the creation of the MDL, and the additional millions of dollars it would cost to start the process over. Biomet's Submission in Support of its Discovery Efforts at 8-10 (Apr. 4, 2013) (*Biomet's Submission*).

Further, Biomet observed that the plaintiffs, ''[d]espite the purported certainty of an MDL,'' had filed individual cases in various federal courts, thereby requiring Biomet ''to defend these individual cases and engage in discovery including initial disclosures and discovery responses as required by the Federal Rules of Civil Procedure and by Judges then presiding over these cases.'' *Id.* at 12.

Proportionality Applied by the Court

Focusing on Biomet's discovery obligations, the MDL court concluded that Biomet's eDiscovery protocol fully complied with Federal Rules of Civil Procedure 26(b) and 34(b)(2).

Further, the court concluded that Biomet's discovery procedure was not inconsistent with the cooperation requirement of the U.S. Court of Appeals for the Seventh Circuit's ''Principles Relating to the Discovery of Electronically Stored Information,'' *MDL Discovery Order* at *2.

Moreover, the court found Biomet's actions consistent with the ESI discovery principles established by the Sedona Conference® (The Sedona Conference®, *The Sedona Conference Commentary on Proportionality in Electronic Discovery* (Jan. 2013); The Sedona Conference®, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189 (2007); and The Sedona Conference®, *Conducting E-Discovery After Amendments: The Second Wave*, 10 Sedona Conf. J. 215 (2009)) *Id.*

High Cost, Low Return. In contrast, the court found the plaintiffs' request inconsistent with Rule 26(b)(2)(C)'s proportionality standard. Requiring Biomet to restart the discovery process would cost it ''in the low seven-figures,'' and, according to Biomet's confidence tests, likely would identify only ''a comparatively modest number of documents.'' *Id.* at *3.

The court was not swayed by the plaintiffs' efforts to tout predictive coding over the use of keyword searches, even if additional relevant documents could be identified.

''Even in light of the needs of the hundreds of plaintiffs in this case, the very large amount in controversy, the parties' resources, the importance of the issues at

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stake, and the importance of this discovery in resolving the issues,'' the court could not conclude that ''the likely benefits of the discovery proposed by the Steering Committee equals or outweighs its additional burden on, and additional expense to, Biomet.'' *Id.*

Proportionality Standard Not Forfeited. The court also rejected the plaintiffs' Steering Committee's attempt to argue that Rule 26's proportionality standard was inapplicable because Biomet had initiated its eDiscovery process against the advice of some plaintiffs' counsel before the case[s] were consolidated in the MDL.

In concluding, the court presumed that Biomet would keep open its offer to permit the plaintiffs to suggest search terms and to produce the non-privileged documents to plaintiffs.

Practically Speaking

What does this mean for a producing party?

First, notwithstanding the attributes of predictive coding, the court stepped back and focused on the steps the defendant had taken to identify and produce relevant documents rather than asking: ''Was there a 'better' way for the defendant to conduct eDiscovery?''

Even if the defendant's protocol meant that some relevant documents might not be produced, that did not mean that the defendant had failed to comply with its eDiscovery obligations under the Federal Rules. Rather, the court looked at what the defendant had actually done to determine whether its actions complied with the federal rules.

Second, by weighing the cost of the requested start-over with the potential gain, the court implicitly acknowledged what every practitioner knows: there never has been, nor will there ever be, a perfect document production. Even the first federal court to give its imprimatur to predictive coding has acknowledged this:

> ''In large-data cases like this, involving over three million emails, no lawyer using any search method could honestly certify that its production is 'complete.' '' *Da Silva Moore v. Publicis Groupe SA*, 287 F.R.D. 182 (S.D.N.Y. Feb. 24, 2012),(*aff'd*), 2012 BL 101971 (S.D.N.Y. Apr. 26, 2012).

Perfection is not the standard for document productions under the Federal Rules of Civil Procedure. *Id.*

Instead, the methodology for locating and producing relevant documents must be reasonable. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y. Feb. 6, 2006) (quoting The Sedona Principles, *Best Practices Recommendations & Principles for Addressing Electronic Document Production*, Principle 11 (2003) (''A responding party may properly access and identify potentially responsive electronic data and documents by using reasonable selection criteria, such as search terms or samples'').

Although acknowledging that Biomet might identify additional relevant documents under the plaintiffs' scheme, the MDL court concluded that any likely benefit failed to outweigh the additional burden and cost to Biomet.

Third, as to the parties' obligation to cooperate, the court stated that that obligation did not ''requir[e] counsel from both sides to sit in adjoining seats while rummaging through millions of files that haven't been reviewed for confidentiality or privilege.'' *MDL Discovery Order* at *2.

Biomet did, however, give the plaintiffs the opportunity to proffer additional search terms. In addition, Biomet had offered to produce the remaining non-privileged documents to permit the plaintiffs to confirm that they were receiving the relevant documents. The court assumed that Biomet would keep those offers open to the plaintiffs.

Fourth, the court found the cost of implementing the plaintiffs' request too high to identify what was expected to be ''a comparatively modest number of [additional] documents.'' *Id.* at 2-3.

For its part, Biomet had given the court an estimate of the cost to comply with the plaintiffs' request—an additional $3 million to $8 million, which included the number of contract attorneys to be used, their hourly rate, and the estimated amount of time to complete the project as requested by the plaintiffs. *Biomet's Submission* at 9-10, 26-30.

There never has been, nor will there ever be, a perfect document production.

Finally, the court did not accept the plaintiffs' argument that Biomet should have waited until the cases had been consolidated into the MDL before starting its discovery process, and that by proceeding with discovery, Biomet had effectively waived the proportionality provision of Rule 26.

During the same month that the plaintiffs filed the initial petition to centralize the cases in the MDL, Biomet started culling and producing electronically stored documents in individual cases filed by the plaintiffs—consistent with its discovery obligations in those cases. *See Plaintiffs' Memorandum* at 6; *Biomet's Submission* at 2-4.

Recognizing Biomet's disclosure and ''document identification obligation'' in the cases subject to centralization in the MDL, the court explained,

> ''[u]ntil the MDL Panel enters a centralization order under 28 U.S.C. § 1407 (or transfers a tag along pursuant to an earlier centralization order), a transferee court is free to act on pending matters. Indeed, through its conditional transfer orders, the Panel regularly encourages transferee courts to do so.'' *MDL Discovery Order* at *3.

In short, until a case is transferred to the MDL, a producing party that satisfies its discovery obligations in the transferee court does not waive Rule 26(b)(2(C)'s proportionality provision.