

# Pretrial Practice & Discovery

American Bar Association Litigation Section

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## Proportionality, Preservation, and Cost-Sharing: A Reminder on E-Discovery Considerations

The *Da Silva Moore* case serves as a useful example of the challenges that parties may face in e-discovery and the importance of proportionality and cost-shifting in this context.

By Harrison Zelt

Pretrial practice and discovery are critical stages of the litigation process, as they allow parties to gather and exchange information relevant to the case before it goes to trial. In recent years, the issue of e-discovery has become increasingly prevalent in pretrial practice, as more information is stored electronically. This has led to significant changes in how parties manage discovery, as well as how courts interpret and apply the rules governing e-discovery.

A case that highlights these challenges is *Da Silva Moore v. Publicis Groupe*, No. 1:2011cv01279 (S.D.N.Y. 2012). In this case, the plaintiff, a former employee of the defendant, brought an employment-discrimination-and-retaliation lawsuit against her former employer. During the discovery process, the defendant argued that the plaintiff's request for electronic documents was overly broad and unduly burdensome. The court ultimately agreed and ordered the defendant to produce only a limited set of electronic documents.

The *Da Silva Moore* case illustrates the importance of proportionality in e-discovery. The court recognized that, while the defendant had a duty to preserve and produce relevant electronic documents, the plaintiff's request was so broad and burdensome that it outweighed the potential benefits of producing all the requested documents. This decision demonstrates that, to avoid disputes over e-discovery, parties must be mindful of proportionality when making requests for electronic documents.

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The *Da Silva Moore* court also addressed the issue of cost shifting. The court ordered the defendant to bear the cost of producing the electronic documents, but also noted that the plaintiff may be required to reimburse the defendant for certain costs if the plaintiff ultimately loses the case. This highlights the importance of considering not only the breadth of the discovery sought but the potential the costs of that discovery, for both for the requesting party and the producing party.

To mitigate the challenges of e-discovery, it is essential for attorneys and their clients to be proactive in identifying and preserving electronic documents that may be relevant to the case. Parties should also be mindful of proportionality when making requests for electronic documents and be prepared to discuss the costs of e-discovery with the other party and the court.

Additionally, it is important for counsel to work closely with their clients at the onset of litigation to ensure that the client complies with the rules and procedures governing e-discovery. This includes document-retention procedures, document production, document requests, identification of document custodians, and potentially the identification of an in-house e-discovery coordinator and the retention of an e-discovery consultant or an e-discovery vendor.

In conclusion, e-discovery is an increasingly important and complex issue in pretrial practice and discovery. The *Da Silva Moore* case serves as a useful example of the challenges that parties may face in e-discovery and the importance of proportionality and cost-shifting in this context. It is important for parties to collaborate with their legal teams and be proactive in identifying, preserving, and producing electronic documents that may be relevant to the case, and be prepared to discuss the costs of e-discovery with the other party and the court.

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