# A Lawyers Guide to a Lean Justice System and Proportional Discovery

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Corporate America has often complained "Our general counsel's office is the only one with an unlimited budget— and it has already exceeded it!" This is supported by the fact that most lawyers have never been to business school and in turn, most lawyers have never heard of Lean Sigma Six or similar methodologies (i.e., Mean, or Agile, or C and AG) used in the business world to manage workflows, improve efficiency, reduce costs and deliver added value.

However, clients are increasingly demanding what previously were considered "business-only," strategies from the law firms they hire as they look to avoid paying for unnecessary work and remaining within the bounds of their seemingly ever-shrinking budget. And quite honestly, it is not unreasonable to expect them to demand such strategies. Legal process improvements benefit not only the traditional client and hired-firm but the U.S. civil justice system as a whole, which has been skewed by the high costs and burdens of discovery. Now, the court system might consider its just, speedy and inexpensive goals—and perhaps start down the road to Lean Six Sigma. Perhaps it already has with the rulemaking process.

## ORIGINS OF LEAN SIX SIGMA

Lean thinking (or "lean") is a philosophy of continuous improvement, which originated in the Japanese automobile manufacturing industry. Toyota began developing it in the 1940s, after having studied the strengths and weaknesses of Henry Ford's continuous flow assembly line. Lean organizations (or practitioners) focus on the elimination of wasteful processes, leaving only the processes that increase customer value and optimize operations.

Borrowing its name from a statistical term, Six Sigma is an improvement methodology developed by Motorola in the mid-1980s to reduce errors, waste and variations, and increase quality and efficiency in manufacturing. Six Sigma has since been widely adopted in some of the top companies around the world, including General Electric, Boeing, Samsung and Xerox.

The Greek letter "Sigma" refers to how a given process deviates from perfection ("zero defects" state). A Six Sigma process is accurate 99.9997 percent of the time, meaning a process must produce no more than 3.4 defects per million opportunities (of nonconformance).

Although having originated in manufacturing industries, Six Sigma is equally applicable in service industries (i.e., legal) as today's competi-

tive environment leaves no room for error. Anything that can be tracked and measured can be subject to continuous improvement, thereby achieving as close to "zero defects" as possible within a specific process (i.e., a lawsuit).

## THE 2015 AMENDMENTS

While far from lean, the 80-year old federal rulemaking process is our court system's lengthy method to develop a more efficient and meaningful justice delivery system – The Judiciary's very own version of process improvement. Justice Stephen Breyer noted this almost a decade ago at a Georgetown Law H5 e-discovery forum when he opined, "If it really costs millions of dollars to do [e-discovery on a single large-scale matter], then you're going to drive out of the litigation system a lot of people who ought to be there. They'll go to arbitration … They will go somewhere where they will write their own discovery rules, and I think that is unfortunate in many ways." The courts system must provide value to its users.

Up until recently, the U.S. civil justice system allowed for seemingly unrestrained and disproportionate discovery, resulting in perverse costs which in turn, routinely forced unfair settlements for reasons other than a lack of merits. However, the 2015 Amendments to the Federal Rules of Civil Procedure (FRCP) (the "2015 Amendments") (which took effect on December 1, 2015), if implemented by judges and lawyers in the manner intended by the Rules Committee, will work to "balance the scales" and promote over-discovery prevention.

With the 2015 Amendments, The Judicial Conference has done a thoughtful job of balancing the discovery diet of the chubby data glutton that has had just-too-much to eat at the discovery table. Moreover, the 2015 Amendments might just provide the tools we need to return to goal oriented, outcome-driven and merits-focused litigation. In the Supreme Court's 2015 Year-End Report, Chief Justice Roberts propounded the importance of the 2015 Amendments and the path to resolution-driven dispute. "I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics," Roberts wrote.

"Collectively, the changes represent the most sweeping changes to the FRCP in years and were designed to lower the costs of litigation by (1) providing judicial tools to encourage and enforce proportional discovery limited to information relevant to "claims and defenses," and (2) reducing costs associated with over-preservation and ancillary litigation by establishing a uniform national standard for preservation obligations and a safe harbor for parties that take reasonable steps in good faith to preserve electronically stored information ("ESI")." Proportionality, or rather its emphasis in Rule 26(b) is not a new concept, but is now at the forefront as part of the very definition of permissible discovery in order to combat skewed discovery with high costs and burdens.

## THE LAWYERS GUIDE TO LEAN SIX SIGMA & RULE 26(B)(1) PROPORTIONALITY

Operations professionals see Lean Six Sigma as a methodology of Defining, Measuring, Analyzing, Improving and Controlling (DMAIC) a process or workflow with the goal of enhanced efficiency. Rule 26(b)(1) sets out six proportionality requirements for litigants in the federal court system. Parties must adhere to these discovery limitations if hoping to operate under the rules of the court. Attorneys and judges now act as stewards to these

limitations and now must define how discovery is proportional to the needs of the case. Litigants might consider arming themselves with DMAIC data in litigation when analyzing Rule 26(b)(1) proportionality factors, and to prepare for Rule 26(f) meet and confer conferences. Sample lean preparations a party might undertake for a proportionality factor analysis might include:

1. Considering the Importance of the Issues at Stake in the Action: The parties must be prepared to define the issue that the requested discovery addresses, measure the level of importance in the litigant, analyze whether or not the issue is important enough to impose the discovery burden, improve the efficiency by narrowing the issue and request, and control the scope to avoid overbroad discovery.
2. The Amount in Controversy: The parties must be prepared to define the amount in controversy; defining may require court intervention. While a contract dispute amount might be clear, how does one define the amount in controversy when the dispute is over non-financial issues? However, parties can measure the real cost to the responding party, analyze whether or not the cost is warranted, improve the efficiency by lowering the cost or narrowing the scope, and control the cost by using the most efficient means to limit the burden and expense.
3. The Parties' Relative Access to Relevant Information: The parties must be prepared to define access. Do national borders matter? What about possession, custody and control? The parties must measure the burden and difficulty to obtain discovery materials. Does a foreign data privacy rule impose criminal sanctions? The parties (and/or the court) must analyze whether the burden of access is greater than the needs of the case. The parties might consider whether or not the courts assistance can improve access. For example, in some countries voluntary access to foreign sources is permitted while court compelled access will trigger blocking statutes. Alternatively, if the discovery materials reside at a third party —court intervention may be appropriate. Regardless, lean principles suggest that parties must control the access to avoid over-discovery.
4. The Parties' Resources: Counsel must define its resources (and its adversaries) and again measure the true costs of the request. Does a producing party have a sophisticated e-discovery system or alternatively will large-scale discovery place operational burdens on a producing or receiving party? Can the court's intervention improve a litigant's resources? For example, a court might order a software provider to grant a temporary license to a requesting party so it can understand the data it receives. All participants in the justice system must control the process, so not to unnecessarily bleed resources of a party– including third party Rule 45 respondents.
5. The Importance of the Discovery in Resolving the Issues: Requesting parties must be prepared to define when the request is important to resolving the issues. Is the issue so important this that the responding party should be subject to invasive discovery or is there a way to manage the request with informal discovery? The responding party should prepare to measure the cost of the request to provide to the court to potentially analyze the request against the importance of the data. Can court intervention improve efficiency by alternative fact-finding strategies or controlling the scope of the request?

6. Whether the Burden or Expense of the Proposed Discovery Outweighs its Likely Benefit: As above, the parties must develop concepts to help define both the burden, expense and likely benefit. While litigants may measure burden and expense through costs, time and effort—courts may need to intervene to analyze the likely benefit. Are there factors or tools that courts could deploy or can the parties agree on strategies to improve the process? How might the parties cooperate to control the burden when the cost dwarves the benefit?

## LOOKING FORWARD

Lean Six Sigma defines critical success factors to include engagement, management involvement, communications, resources, projects, discipline and consequences. While at the time of this article, the 2015 Amendments are just over two months old, practitioners should develop plans on how they will commit to engage and educate their colleagues and leadership in training programs around the Rules (like LegaltechNY and EDI's Summit).

Lean Six Sigma, applied to the U.S. civil justice system, might but seem strange at first, but the concept is right at "home" when discussing discovery. Applying Lean Six Sigma to discovery can assist in improving the primary review of documents and reduce overall costs, as the philosophy forces practitioners and courts to look at the bigger picture and ask—why is this discovery task done this way (or at all)? Why does the cost of collecting and storing data exceed "X" amount? Is this a value adding step that benefits the client, or the business or is it non-value added? Counsel should consider all these questions when developing his or her proportionality arguments if he or she expects to succeed in practice under the 2015 Amendments. It is up to practitioners to seek out education, make the proportionality arguments, and teach clients. If the 2006 Amendments are any indication of the learning curve, we have our work set out for us. •

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