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THE SEDONA CONFERENCE® COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY

A Project of The Sedona Conference® Working Group on Electronic Document Retention & Production (WG1)

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Preface

Welcome to another major publication in The Sedona Conference® Working Group Series (WGS℠): *The Sedona Conference® Commentary on Proportionality in Electronic Discovery.*

This effort is a product of our Working Group in Electronic Document Retention and Production (WG1) and represents the collective expertise of a diverse group of lawyers and representatives of firms providing consulting and legal services. Not only has a diverse drafting team been responsible for the writing, it has been the subject of dialogue at three meetings of WG1, and numerous WG1 members have contributed comments and edits outside of the context of our meetings.

On behalf of The Sedona Conference®, I want to thank the editorial team and all WG1 members whose dialogue and comments contributed to this Commentary for all of their efforts to draft a commentary of immediate benefit to the bench and bar.

As with all of our WGS℠ publications, this Commentary is first being published as a "public comment version." After sufficient time for public comment has passed, the editors will review the public comments, and to the extent appropriate, edit the current version. The Commentary will then be re-published in a "final" version, as always, subject to future developments in the law that may warrant a second edition.

We hope our efforts will assist lawyers, judges, and others involved in the legal system work with the concept of proportionality in discovery. If you wish to submit any suggested edits or comments, please utilize the "public comment form" on the download page of our website at www.thesedonaconference.org. You can also submit feedback by emailing us at rgb@sedonaconference.org.

Richard G. Braman
Executive Director
The Sedona Conference®
August 2010

The Sedona Conference® Principles of Proportionality

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.

3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.

5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.

6. Technologies to reduce cost and burden should be considered in the proportionality analysis.

Introduction

This Commentary discusses the origins of the doctrine of proportionality, provides examples of its application, and proposes principles to guide courts, attorneys, and parties. The principles do not merely recite existing rules and case law but rather provide a framework for the application of the doctrine of proportionality to all aspects of electronic discovery. Although the Commentary cites primarily federal case law and rules, the principles are equally applicable to electronic discovery in state courts.

In 1938, the Federal Rules of Civil Procedure ("Federal Rules") were adopted, providing for "the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1 (1938). Over the years, the Federal Rules have witnessed various technological revolutions, such as the "modern miracle of photographic reproduction,"[1] which one court noted "lessen[s] what might otherwise be burdensome transportation of records and documents."[2]

Since their enactment in 1938, the Federal Rules have been amended several times to keep pace with the changing demands of courts and parties. In 1983, Rule 26(b)(1) was amended to grant courts the authority to limit discovery where it was found to be redundant or duplicative. The Advisory Committee noted that the amendments were intended to "guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."[3] This was important, because "[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems."[4] As explained by the Advisory Committee, the amendments were designed to address the problem of disproportionate discovery, listing factors to be considered in determining whether discovery is proportional: the nature and complexity of the lawsuit, the importance of the issues at stake, the parties' resources, the significance of the substantive issues, and public policy concerns.[5]

The Federal Rules were amended again in 1993 to address the tremendous increase in the amount of potentially discoverable information caused by the "information explosion of recent decades" and the corresponding increase in discovery costs with the addition of a new paragraph, Rule 26(b)(2).[6] Rule 26(b)(2) provided courts with even greater discretion to limit the scope and extent of discovery. The Advisory Committee Notes explain that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery . . . ."[7]

In 2006, Rule 26(b)(2) was amended to limit the discovery of ESI deemed not reasonably accessible by reason of the costs and burdens associated with retrieving such information. The Advisory Committee Notes to this amendment state that the costs and burdens of retrieving not reasonably accessible information are properly considered as part of the proportionality analysis, and that discovery of such information may be limited or the costs of such discovery shifted from the responding to the requesting party.[8]

1 *Herbst v. Able*, 278 F. Supp. 664, 667 (S.D.N.Y. 1967).
2 *Goldberg v. Taylor Wine Co.*, No. 77-1548, 1978 U.S. Dist. LEXIS 19891, at *14 (E.D.N.Y. Jan. 27, 1978).
3 Advisory Committee Notes to 1983 Amendments to FED. R. CIV. P. 26(b).
4 Advisory Committee Notes to 1983 Amendments to FED. R. CIV. P. 26.
5 Advisory Committee Notes to 1983 Amendments to FED. R. CIV. P. 26(b).
6 Advisory Committee Notes to 1993 Amendments to FED. R. CIV. P. 26(b).
7 *Id.*
8 Advisory Committee Notes to 2006 Amendments to FED. R. CIV. P. 26(b)(2).

Notwithstanding the foregoing amendments, courts have not always applied proportionality in circumstances when its application was warranted.[9] When courts have applied proportionality, they have not always described it as such.[10] In the electronic era, it has become increasingly important for courts *and* parties to apply the proportionality doctrine to manage the large volume of ESI and associated expenses now typical in litigation. Below is a discussion of the key issues to consider when conducting a proportionality analysis pursuant to Rule 26(b)(2)(C), followed by a discussion of recommended principles.

The Availability of the Information From Other Sources

Rule 26(b)(2)(C)(i) provides that courts must impose limitations where "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." FED. R. CIV. P. 26(b)(2)(c)(i). Where relevant information is available from multiple sources, this rule allows courts to limit discovery to the least expensive source.[11]

Waiver and Undue Delay

Rule 26(b)(2)(C)(ii) provides that courts must limit discovery where "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action." FED. R. CIV. P. 26(b)(2)(c)(ii). This provision allows courts to prevent protracted discovery by applying the concept of waiver to reject untimely discovery requests and objections.[12]

The rule allows courts to ensure proportionality in the discovery process by denying as untimely discovery requests that should have been propounded earlier in the litigation or objections interposed too late. Pursuant to this provision, parties' discovery requests, and any corresponding objections, must be reasonably prompt or they may be deemed waived.

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9 *See* Advisory Committee Notes to 2000 Amendments to FED. R. CIV. P. 26(b)(1) ("The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated."); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2008.1, at 121 (2d ed. 1994) (describing the "paucity of reported cases" applying the proportionality rule and concluding "that no radical shift has occurred").

10 *See, e.g.*, *Waldron v. Cities Serv. Co.*, 361 F.2d 671, 673 (2d Cir. 1966), *aff'd*, 391 U.S. 253 (1968) ("The plaintiff . . . may not seek indefinitely . . . to use the [discovery] process to find evidence in support of a mere 'hunch' or 'suspicion' of a cause of action."); *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 925 (5th Cir. 1964) ("Full and complete discovery should be practiced and allowed, but its processes must be kept within workable bounds on a proper and logical basis for the determination of the relevancy of that which is sought to be discovered."); *Dolgow v. Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971) ("A trial court has a duty, of special significance in lengthy and complex cases where the possibility of abuse is always present, to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense."); *Welty v. Clute*, 1 F.R.D. 446 (W.D.N.Y. 1940) (finding a second deposition of a plaintiff unnecessary given the availability of other discovery).

11 For example, in *Young v. Pleasant Valley School District*, the court rejected the plaintiffs' request for production of emails located on back-up tapes, citing Rule 26(b)(2)(C)(i), and noting that "[t]he burden and expense of rebuilding the district's email system in order to provide the discovery requested by the plaintiffs, along with the additional and less expensive means available for plaintiffs to get this material[,] makes the plaintiffs' discovery request impractical." *Young v. Pleasant Valley Sch. Dist.*, No. 07-854, 2008 U.S. Dist. LEXIS 55585, at *6-7 (M.D. Pa. July 21, 2008).

12 *Ford Motor Co. v. Edgewood Props.*, 257 F.R.D. 418, 426 (D.N.J. 2009) ("One may reasonably expect that if document production is proceeding on a rolling basis where the temporal gap in production is almost half a year apart, a receiving party will have reviewed the first production for adequacy and compliance issues for a reason as obvious as to ensure that the next production of documents will be in conformity with the first production or need to be altered. It was incumbent on Edgewood to review the adequacy of the first production so as to preserve any objections. The Court is not dictating a rigid formulation as to when a party must object to a document production. Reasonableness is the touchstone principle, as it is with most discovery obligations. The simple holding here is that it was unreasonable to wait eight months after which production was virtually complete.").

Burden Versus Benefit

In assessing whether to limit discovery, courts consider whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." FED. R. CIV. P. 26(b)(2)(C)(iii). In analyzing these factors, courts weigh the burdens of discovery against the potential benefit of the information to be produced, in light of the specific circumstances of the case. For example, a court may order a party to engage in a burdensome and costly production if the information sought is extremely relevant to the case and is unavailable elsewhere. But what if the cost of producing the information exceeds the total value of the case? Or, what if expensive production is warranted given the value of the case, but the producing party lacks the resources to pay for the production? What if the amount in controversy is low, but the case raises important societal issues? These are all issues a court may consider in assessing whether to limit discovery.[13]

Although Rule 26(b)(2)(C)(iii) discusses a number of monetary considerations, courts may likewise analyze whether nonmonetary concerns, such as the societal benefit of the case or the nonmonetary burden on the producing party, weigh in favor of limiting discovery. The "metrics" set forth in Rule 26(b)(2)(C)(iii) provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources.

Most courts that have addressed proportionality have focused on Rules 26(b) and (c). However, Rule 26(g) also requires parties propounding or responding to discovery requests to conduct a proportionality analysis. Described by one court as "[o]ne of the most important, but apparently least understood or followed, of the discovery rules,"[14] Rule 26(g)(1) provides that

> [e]very discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name . . . . By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry . . . with respect to a discovery request, response, or objection, it is . . . neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

13 *See, e.g.*, *Young v. Pleasant Valley Sch. Dist.*, 2008 U.S. Dist. LEXIS 55585, at *6-7; *see also Spieker v. Quest Cherokee, LLC*, No. 07-1225, 2008 U.S. Dist. LEXIS 88103, at *10-11 (D. Kan. Oct. 30, 2008) (assessing a request to limit discovery in a class action, rejecting "defendant's argument that the 'amount in controversy' is limited to the named plaintiffs' claims" and stating that "defendant's simplistic formula for comparing the named plaintiffs' claims with the cost of production is rejected"); *Southern Capitol Enters., Inc. v. Conseco Servs., L.L.C.*, No. 04-705, 2008 U.S. Dist. LEXIS 87618, at *7 (M.D. La. Oct. 24, 2008) ("Perfection in document production is not required. . . . In these circumstances Rule 26(b)(2)(C)(iii) comes into play. At this point in the litigation, the likely benefit that could be obtained from [further discovery] is outweighed by the burden and expense of requiring the defendants to renew their attempts to retrieve the electronic data."); *Metavante Corp. v. Emigrant Sav. Bank*, No. 05-1221, 2008 U.S. Dist. LEXIS 89584, at *10 (E.D. Wis. Oct. 24, 2008) ("In viewing the totality of the circumstances, including the amount in controversy in this case, the parties' resources, and the issues at stake, the court concludes that the burden [of production] does not outweigh the value of the material sought."); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) ("I noted during the hearing that I had concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each."); *Cenveo Corp. v. Slater*, No. 06-2632, 2007 U.S. Dist. LEXIS 8281, at *4 (E.D. Pa. Jan. 31, 2007) ("The dispute before the Court requires a weighing of defendants' burden in producing the information sought against plaintiff's interest in access to that information. Because of the close relationship between plaintiff's claims and defendants' computer equipment, the Court will allow plaintiff to select an expert to oversee the imaging of all of defendants' computer equipment.").

14 *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008).

FED. R. CIV. P. 26(g)(1). The Advisory Committee acknowledged that the rule is intended to impose "an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37."[15] To that end, the rule "provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."[16] Indeed, the Advisory Committee noted that "the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor."[17]

In sum, courts applying the doctrine of proportionality may consider a variety of factors, including the benefit of the proposed discovery (including nonmonetary considerations), the burden or expense of the proposed discovery, the availability of the information from other sources, and undue delay on the part of the party seeking discovery.

We recognize that some parties may inappropriately raise proportionality arguments, either as a sword to increase the burden on the producing party,[18] or as a shield to avoid legitimate discovery obligations.[19] Courts must be wary of such abuses. In any event, the burden or expense associated is simply one factor to be considered in a proportionality analysis and may not be dispositive or even determinative in specific cases.

15 Advisory Committee Notes to 1983 Amendments to FED. R. CIV. P. 26(g).
16 *Id.*
17 *Id.*
18 *See, e.g.*, *Kay Beer Distrib., Inc. v. Energy Brands, Inc.*, No. 07-1068, 2009 WL 1649592 (E.D. Wis. June 10, 2009). In this matter involving the terms of a distribution agreement, the plaintiff moved to compel a native production of five DVDs containing the defendant's emails and other ESI for a five-year period. The court denied the motion, holding that "[Defendant] has no obligation to turn over to an opposing party in a lawsuit non-discoverable and privileged information. . . . The mere possibility of locating some needle in the haystack of ESI . . . does not warrant the expense [defendant] would incur in reviewing it." *Id.* at *4.
19 *See Kipperman v. Onex Corp.,* 260 F.R.D. 682 (N.D. Ga. 2009). The court noted that "rather than seeking a protective order [the defendants] determined themselves that it would be overly burdensome" to produce the discovery in the court-ordered format. *Id.* at 693. The court sanctioned the defendants under Rules 26 and 37, for their failure to follow discovery orders, their lack of diligence in discovery, and "making blatant misrepresentations about the value of email discovery in this case in an effort to influence the court's ruling." *Id.* at 692.

The Sedona Conference® Principles of Proportionality

Principle 1: The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

The Federal Rules do not apply until litigation has commenced. However, courts may invoke their inherent authority to sanction parties for pre-litigation preservation failures. The proportionality principles set forth in the Federal Rules, while not directly applicable, may serve as a guide to parties considering pre-litigation preservation obligations.[20]

Thus, parties for whom an obligation to preserve potentially relevant information has arisen should weigh the burdens and costs of preservation against the potential value and uniqueness of the information when determining the appropriate scope and manner of such preservation.[21]

Courts conducting a post hoc analysis of a party's pre-litigation preservation decisions should evaluate the decisions based on the proportionality factors set forth in Rule 26(b)(2)(C) and the preserving party's good faith and reasonableness considering the knowledge available at the time of preservation.[22] Although there is no case law that applies the proportionality factors set forth in the Federal Rules in the pre-litigation context, parties who demonstrate that they acted thoughtfully, reasonably, and in good faith in preserving or attempting to preserve information prior to litigation should generally be entitled to a presumption of adequate preservation. However, parties must be prepared to make this demonstration and cannot rely on "pure heart, empty head." Courts should not allow hindsight bias to color the analysis of a party's deliberate, reasonable, and good faith preservation efforts.[23]

Principle 2: Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.

Rule 26(b)(2)(C)(i) provides that courts must limit discovery when the requested material can be obtained from sources that are "more convenient, less burdensome, or less expensive." FED. R. CIV. P. 26(b)(2)(C)(i). In other words, where relevant information is available from multiple sources, this provision grants courts the authority to limit discovery

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20 *See, e.g.*, THE SEDONA CONFERENCE®, THE SEDONA PRINCIPLES (2d ed. 2007), Principle 5 ("The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information."); THE SEDONA CONFERENCE®, THE SEDONA CONFERENCE® COMMENTARY ON PRESERVATION, MANAGEMENT AND IDENTIFICATION OF SOURCES OF INFORMATION THAT ARE NOT REASONABLY ACCESSIBLE 14 (July 2008) ("If the burdens and costs of preservation are disproportionate to the potential value of the source of data at issue, it is reasonable to decline to preserve the source."); THE SEDONA CONFERENCE®, THE SEDONA CONFERENCE® COMMENTARY ON INACTIVE INFORMATION SOURCES 11 (July 2009) ("A reasonableness/proportionality analysis should be conducted to determine whether it would be reasonable under the circumstances to take steps to preserve a specific inactive information store . . . ."); *see also* The Hon. Paul W. Grimm, et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381 (2008) (urging for "the application, by analogy, of Federal Rules of Civil Procedure 26(b)(2)(C) and 37(e) to the pre-litigation duty to preserve").

21 The determination of whether a preservation obligation has arisen is addressed in THE SEDONA CONFERENCE® COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS (2007). This principle addresses the appropriate scope and manner of preservation after the determination has been made that a preservation obligation exists.

22 *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards.").

23 *Cf. Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216, 226 (E.D. Pa. 2008) ("[H]indsight . . . should not carry much weight, if any, because no matter what methods an attorney employed, an after-the-fact critique can always conclude that a better job could have been done.").

to the least burdensome source, thus empowering courts to control litigation costs and promote efficiency in accordance with Rule 1. *See* FED. R. CIV. P. 1. Likewise, this provision enables courts to protect parties from abusive discovery requests. Although any one source is unlikely to meet the requirement of being the most convenient, least burdensome, and least expensive source, parties should carefully weigh these factors when determining which source is optimal.

For example, a court may consider limiting discovery of not reasonably accessible[24] back-up tapes if the information stored on the tapes can be obtained from other more accessible sources, such as through hard copy records, testimony, or nonparty discovery. If the producing party can easily produce hard copies of the emails, why should that party incur the costs of restoring back-up tapes containing the same emails?[25]

In determining whether to limit purportedly burdensome or expensive discovery pursuant to Rule 26(b)(2)(C)(i), a court's analysis should be tailored to the specific facts at issue, taking into account the various sources in which the requested information is located, the burden and expense of production from those sources, and whether limiting discovery to less burdensome or expensive sources will result in a reduction in the utility of the information sought. For example, hard copy emails may be more accessible and easily produced but because they are not in electronic form, the requesting party must incur the costs of scanning the hard copies and loading them onto a search platform or conducting a manual search. In this situation, it may be appropriate for a court to consider the totality of litigation costs, and who should bear certain of those costs, in assessing a request to limit production.

Depending on the facts available and the stage of the litigation, the parties and the court may be unable to assess whether limiting discovery is appropriate. If the litigation is in its early stages, the parties may not yet be fully aware of all of the viable claims and defenses or factual or legal issues that will ultimately be important to the outcome of the litigation. Similarly, if a requesting party seeks production of ESI archived several years ago, the responding party may not have a full understanding of the content of the ESI or its potential value to the litigation.[26]

Under these circumstances, the court, or the parties on their own initiative, may find it appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible and least expensive sources. Phasing discovery in this manner may allow the parties to develop the facts of the case sufficiently to determine whether, at a later date, further potentially more burdensome and expensive discovery is necessary or warranted. In addition, given that the vast majority of cases settle, phasing discovery may allow the parties to develop a sufficient factual record upon which to base settlement negotiations without incurring the costs of more burdensome discovery that may only be necessary if the case goes to trial.

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24 Rule 26(b)(2)(B) provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery." FED. R. CIV. P. 26(b)(2)(B).

25 *Cf. U.S. v. O'Keefe*, 2008 U.S. Dist. LEXIS 12220 at *22 (D.D.C. Feb. 18, 2008).

26 *See* Advisory Committee Notes to 2006 Amendments to Rule 26(b)(2) (noting that, "because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation," it may be appropriate for the parties to engage in "focused discovery . . . to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.").

Parties who wish to conduct phased discovery must communicate with one another about the issues relevant to the litigation and the potential repositories – both accessible and inaccessible – of relevant information. Moreover, the parties must cooperate with one another to prepare and propose to the court a phased discovery plan.[27]

Principle 3: Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

Although the Federal Rules do not set forth specific deadlines by which parties must propound or otherwise sequence discovery, courts will often set discovery deadlines in scheduling orders or based on local rules. Courts may also sequence fact and expert discovery, set specific dates for completion of document production, or limit the time period in which parties can raise discovery disputes. From a proportionality perspective, propounding discovery requests at the early stages of the litigation allows parties sufficient time to explore compliance with the discovery requests and bring any disputes before the court for resolution. Accordingly, parties should raise any discovery disputes as soon as is reasonably possible, but only after engaging in good faith attempts to resolve the dispute without the court's involvement.

Where a dispute cannot be resolved, it should be raised with the court promptly. In determining whether the requested relief is appropriate, the court may consider the time at which the issue arose and whether the moving party could have raised the issue earlier. The resolution of such disputes can be fact-intensive, requiring the court to assess whether the producing party complied with its discovery obligations, the degree of culpability involved, and the prejudice to the requesting party.

Traditionally, a party must bear the costs of responding to discovery requests, including the costs of production. In assessing whether a particular discovery request or requirement is unduly burdensome or expensive, a court should consider the extent to which the claimed burden and expense grow out of the responding party's action or inaction. In practice, this principle typically focuses on actions taken, or not taken, by the responding party with regard to the duties to preserve, search, and produce relevant information.[28]

A failure to preserve relevant information in an accessible format at the outset of litigation should be weighed against a party seeking to avoid the resultant burden of restoring the information. The Advisory Committee noted that an "appropriate consideration" in assessing burden and expense in the context of claims that information is not reasonably accessible is "the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources."[29]

This proportionality principle also applies to a party's failure to engage in early, meaningful discussions with an opponent to develop a discovery plan and avoid potential

27 These issues may be considered at the Rule 26(f) conference, at which the parties must "discuss any issues about preserving discoverable information; and develop a proposed discovery plan." FED. R. CIV. P. 26(f)(2).

28 *Quinby v. WestLB AG*, 245 F.R.D. 94, 104-05 (S.D.N.Y. 2006) ("[I]f a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data. This would permit parties to maintain data in whatever format they choose, but discourage them from converting evidence to inaccessible formats because the party responsible for the conversion will bear the cost of restoring the data. Furthermore, it would prevent parties from taking unfair advantage of a self-inflicted burden by shifting part of the costs of undoing the burden to an adversary. If, on the other hand, it is not reasonably foreseeable that the particular evidence in issue will have to be produced, the responding party who converts the evidence into an inaccessible format after the duty to preserve evidence arose may still seek to shift the costs associated with restoring and searching for relevant evidence.").

29 Advisory Committee Notes to 2006 Amendments to Rule 26(b)(2).

disputes. Application of the principle in this context is appropriate, given that a party can be sanctioned for failing "to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f)."[30] Examples of how a party's failure to engage in an early and meaningful meet and confer may weigh against the party in a subsequent proportionality analysis include cases in which: (1) a party refuses to consult with an opponent in the development of a keyword search protocol and a second search is necessary given the inadequacy of keywords initially applied; (2) a second production of material already produced is necessary because a party fails to confer on form of production and produces ESI in a form that is not reasonably usable.

Principle 4: Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.

Rule 26(b)(2)(C)(iii) provides that in considering whether to limit potentially burdensome or expensive discovery, courts should consider "the importance of the discovery in resolving the issues." FED. R. CIV. P. 26(b)(2)(C)(iii). In other words, the court may limit discovery if the information sought, while relevant, is not sufficiently important to warrant the burden and expense of its production.[31] This issue often arises in the context of requests for discovery of information that is duplicative, cumulative, or not reasonably accessible.[32] *See* FED. R. CIV. P. 26(b)(2)(B) (incorporating factors set forth in Federal Rule 26(b)(2)(C)).

When asked to limit discovery on the basis of burden or expense, courts must make an assessment of the importance of the information sought. Discovery should be limited if the burden or expense of producing the requested information is disproportionate to its importance to the litigation. Performing such an assessment can be challenging, given that it may be impossible to review the content of the requested information until it is produced.[33]

In some cases, it may be clear that the information requested is important—perhaps even outcome-determinative.[34] In other cases, courts order sampling of the requested information, consider extrinsic evidence, or both, to determine whether the requested information is sufficiently important to warrant potentially burdensome or expensive discovery.[35]

In *Kipperman v. Onex Corporation*, the court required the defendants to produce two "sample" backup tapes so that the court could gauge the volume and importance of the

30 FED. R. CIV. P. 37(f).

31 An alternative to limiting burdensome or expensive discovery is to shift its cost to the requesting party. *See* FED. R. CIV. P. 26(c); *see also Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) ("[T]here is no justification for a blanket order precluding discovery of the defendants' e-mails on the ground that such discovery is unlikely to provide relevant information… The more difficult issue is the extent to which each party should pay the costs of production."); *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) ("The converse solution is to make the party seeking the restoration of the backup tapes pay for them, so that the requesting party literally gets what it pays for.").

32 Courts may also employ sampling for the purpose of evaluating a request to shift costs. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) ("Requiring the responding party to restore and produce responsive documents from a small sample of backup tapes will inform the cost-shifting analysis.").

33 Advisory Committee Notes to 2006 Amendments to Rule 26(b)(2) ("The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation."); *see also Peskoff v. Faber*, 244 F.R.D. 54, 59 (D.D.C. 2007) ("Application of this factor can be challenging because the importance of the results of the forensic examination can only be assessed after it is done.").

34 *See Covad Communs. Co. v. Revonet, Inc.*, 258 F.R.D. 5, 13 (D.D.C. 2009) (permitting discovery that "should establish once and for all" a key issue in the case).

35 Advisory Committee Notes to 2006 Amendments to Rule 26(b)(2) ("[T]he parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.").

information located on the tapes against the costs of their restoration and production before deciding whether to permit additional discovery.[36] After reviewing the results of the sample, the court determined that the information contained on the backup tapes was sufficiently important to warrant further discovery: "I don't . . . declare these to be smoking guns but they certainly are hot and they certainly do smell like they have been discharged lately."[37]

In addition to sampling, courts generally consider extrinsic information submitted by the parties to determine whether requested discovery is sufficiently important to warrant potentially burdensome or expensive discovery. Such evidence may include: the parties' opinions regarding the likely importance of the requested information,[38] whether the requested information was created by "key players,"[39] whether discovery already produced permits an inference that the requested information is likely to be important,[40] whether the creation of the information requested was contemporaneous with key facts in the case,[41] and whether the information requested is unique.[42] The analysis of the importance of the requested information is fact-specific and thus will vary from case to case.

The party opposing discovery may put forth evidence that the burden or expense of producing the requested information outweighs its potential importance.

Principle 5: Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.

The Federal Rules recognize that proportionality encompasses nonmonetary considerations. Rule 26(g)(1)(B)(iii) requires that an attorney (or *pro se* party) who promulgates discovery must consider "the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Rule 26(b)(2)(C)(iii) similarly requires that a court consider "the importance of the issues at stake in the action" in assessing whether to limit discovery. FED. R. CIV. P. 26(b)(2)(C)(iii).

The Advisory Committee Note to Section 26(b)(2)(C)(iii) states:

> The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.[43]

36 *Kipperman v. Onex Corp.*, 260 F.R.D. 682 (N.D. Ga. 2009).
37 *Id.* at 691 ("The court believes that some of the most interesting evidence in this matter has come from e-mail production.").
38 *Id. at* 689 ("Defendants argued that . . . the value of the information on the tapes was dubious at best.").
39 *Zubulake*, 217 F.R.D. at 317 ("[E]mail constituted a substantial means of communication among UBS employees.").
40 *Peskoff*, 244 F.R.D. at 60 ("[I]t can be said that the information that has been produced thus far in this case permits the court to infer the possible existence of additional similar information that warrants further judicial action."); *Ameriwood Indus., Inc. v. Liberman*, No. 06-524, 2006 U.S. Dist. LEXIS 93380, at *11 (E.D. Mo. Dec. 27, 2006) ("In light of the Samsung email, the Court finds that other deleted or active versions of emails may yet exist on defendants' computers.").
41 *Ameriwood Indus., Inc.*, 2006 U.S. Dist. LEXIS 93380, at *14-15 ("In the instant action, defendants are alleged to have used the computers, which are the subject of the discovery request, to secrete and distribute plaintiff's confidential information.").
42 *See* FED. R. CIV. P. 26(b)(2)(C)(i) (providing that courts must limit discovery that is "unreasonably cumulative or duplicative").
43 Advisory Committee Notes to 1983 Amendments to Rule 26(b).

What role should nonmonetary factors such as "the importance of the issues at stake" play in a proportionality analysis? Plainly, in the many civil actions that are essentially private disputes (such as breach of contract or traditional tort actions), nonmonetary factors may be irrelevant. However, in civil actions deriving from constitutional or statutorily created rights (such as those brought under 42 U.S.C. § 1983 or Title VII), nonmonetary factors may favor broader discovery. Any proportionality analysis should consider the nature of the right at issue and any other relevant public interest or public policy considerations, and whether, under the particular circumstances of the case, there should be restrictions on discovery.

For example, in *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, an action for injunctive relief under the Americans with Disabilities Act, the court denied the defendant's request to limit discovery of backup tapes, given "the importance of the issue at stake and the parties' resources."[44] Other courts have considered nonmonetary issues such as "the strong public policy in favor of disclosure of relevant materials,"[45] and even the health concerns and family obligations of the producing party.[46]

Principle 6: Technologies to reduce cost and burden should be considered in the proportionality analysis.

It is well documented that the volume of ESI is exploding in every corner of the digital world, increasing the volume of potentially discoverable information. Where appropriate, the application of technology to quickly isolate essential information serves the goal of proportionality by creating efficiencies and cost savings. Parties should meet and confer regarding technological approaches to preservation, selection, review, and disclosure that reduce overall costs, better target discovery, protect privacy and confidentiality, and reduce burdens.

Parties and/or their counsel should have a general understanding of the technology available to reduce the cost and burden of electronic discovery in accordance with the proportionality doctrine.[47] These tools and techniques change rapidly and keeping abreast of these changes can present a challenge. Counsel should remain current in the advancements or engage experts as needed to ensure they take advantage of best practices. The Sedona Conference® has published a number of commentaries recently that discuss the application of technology to contain costs and reduce expense and burden.[48]

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44 *Disability Rights Council of Greater Washington v. Washington Metro. Transit Auth.*, 242 F.R.D. 139, 148 (D.D.C. 2007). The court noted that: "Plaintiffs are physically challenged citizens of this community who need the access to public transportation that WMATA is supposed to provide. That persons who suffer from physical disabilities have equal transportation resources to work and to enjoy their lives with their fellow citizens is a crucial concern of this community. Plaintiffs have no substantial financial resources of which I am aware and the law firm representing them is proceeding pro bono. . . . I will therefore order the search of the backup tapes Plaintiffs seek." *Id.* at 148.

45 *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002).

46 *Hunter v. Ohio Indem. Co.*, No. 06-3524, 2007 WL 2769805, at *1 (N.D. Cal. Sept. 21, 2007) ("[T]he burden of a deposition on Ms. Jansen, who has virtually no knowledge of any [relevant] issues . . . , and is caring for a spouse with a life-threatening illness, would be inhumane as well as unproductive.").

47 Principle 11 of The Sedona Principles notes that parties may use technological tools for preservation and production: "A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information." THE SEDONA CONFERENCE®, THE SEDONA PRINCIPLES (2d ed. 2007), Principle 11.

48 *See* The Sedona Conference®, THE SEDONA CONFERENCE® COMMENTARY ON ACHIEVING QUALITY IN THE E-DISCOVERY PROCESS (May 2009); The Sedona Conference®, THE SEDONA CONFERENCE® COMMENTARY ON PRESERVATION, MANAGEMENT AND IDENTIFICATION OF SOURCES OF INFORMATION THAT ARE NOT REASONABLY ACCESSIBLE (Aug. 2008); The Sedona Conference®, THE SEDONA CONFERENCE® BEST PRACTICES COMMENTARY ON SEARCH & RETRIEVAL METHODS (Aug. 2007) and others available on the Publications page at http://www.thesedonaconference.org. In addition, the ongoing TREC Legal Track has yielded insights into best practices. *See* DOUGLAS W. OARD, JASON R. BARON, AND DAVID D. LEWIS, SOME LESSONS LEARNED TO DATE FROM THE TREC LEGAL TRACK (2006-2009), Feb. 24, 2010, http://treclegal.umiacs.umd.edu/LessonsLearned.pdf.

In considering arguments related to cost and burden, courts may request that the parties provide detailed information regarding the retrieval of electronic information, the use of review tools, and key word searches.[49] Parties familiar with the available technological tools and their costs will have an edge in asserting, or responding to, arguments as to cost and burden.

Parties and law firms that are involved in a significant amount of electronic discovery may choose a standard tool that meets their overall needs. The fact that the standard tool is not the best fit for an individual case should not be held against the firm or the party unless it is conspicuously inadequate for the case, as might happen where the volume of information is unusually high. Parties and law firms may have to consider other tools for cases that exceed the capacity of the standard tool.

While technology may create efficiencies and cost savings, it is not a panacea and there may be circumstances where the costs of technological tools outweigh the benefits of their use.

49 *Apsley v. Boeing Co.*, No. 05-1368, 2007 U.S. Dist. LEXIS 5144, at *19 (D. Kan. Jan. 17, 2007) (scheduling a hearing to consider arguments related to the burden of producing emails, including technological issues).