

The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery (October 2010)

The concept of proportionality poses challenges for lawyers, their clients, and judges. The concept has been recognized in rules for many years, but in practice, it existed in tension with the belief that zealous advocacy notably required the pursuit of any information that might be related to the issues in the dispute.

Changes to the rules in many jurisdictions underscore that proportionality is a practical requirement as much as a conceptual ideal. The characteristics of electronically stored information (ESI) and its sheer volume require the earliest attention of the lawyers involved in the litigation and their clients, and the cooperation between the lawyers on all sides of the litigation and their clients. Civil litigation simply becomes cost prohibitive and burdensome without early and careful attention to identifying key sources of potentially relevant data and ensuring that only potentially relevant and unique data is preserved, collected, and reviewed for production.

The application of proportionality is not a simple process with precise checklists and formulas, but rather an examination of the costs and benefits of the discovery that might take into consideration factors such as the uniqueness of the information, its importance to the resolution of key issues, whether the request for further production is intended to pressure the opponent to settle, whether the refusal to produce reflects a desire to keep damaging evidence from disclosure, and the likely prejudice to the opponent if the documents are not produced.

The analysis in this *Commentary* is framed around 10 Principles of Proportionality in Discovery:

1. The burdens and cost of preservation should be weighed against the potential value and uniqueness of the information when determining whether its preservation is required.
2. Discovery should initially focus on those sources of information relevant to allegations, defences, and issues that are supported by material facts.
3. Only reasonably accessible and non-duplicative information in support of plausible causes of action should be requested or produced.
4. Requests for further production should be reasonably specific and targeted.
5. The burden, cost, and delay of further production should be balanced against the probability of yielding unique information that is valuable to the determination of the issues.

6. Refusals to requests for further production, not based on relevance or privilege, should include details of the burden, cost, delay, and/or prejudice on which the refusing party is basing its position.
7. Burden and expense that are the result of actions taken by the party asserting undue burden or expense should be weighed against that party.
8. A party's previous efforts to resolve problems through candour and cooperation should be considered, including in the cost award.
9. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
10. The value of technological tools and approaches to reduce the volume of irrelevant and/or duplicative information should be considered in weighing the burden and cost.

This *Commentary* is intended to assist lawyers, clients, and judges as a practical supplement in the application of The Sedona Canada Principles. While the focus of the *Commentary* is on the civil action, the application and importance of proportionality will also be applicable to many other situations under various provincial or federal rules.

The full text of *The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery* is available free for individual download from The Sedona Conference website at https://thesedonaconference.org/publication/The_Sedona_Canada_Commentary_on_Proportionality_in_Electronic_Disclosure_and_Discovery.

©2010 The Sedona Conference.
Reprinted courtesy of The Sedona Conference.