The Sedona Conference WG6 Brainstorming Group Outline – Proportionality in Cross-Border Discovery

The Sedona Conference Working Group 6 Brainstorming Group Outline - Proportionality in Cross-Border Discovery

(February 2021)

Brainstorming Group:

Ross Gotler (Brainstorming Group Leader)

Jim Calvert

Mark Clews

Elana Katcher

Josh Samra

Jennifer Scullion

Rena Verma

Jay Yelton

Michael Zogby

Jeane Thomas (Steering Committee Liaison)

The Sedona Conference Working Group 6 Brainstorming Group on Proportionality in Cross-Border Discovery

I. Our Brainstorming Group

A. Goals of the Brainstorming Group

The 2015 amendments to Federal Rule of Civil Procedure 26(b)(1) make explicit that the scope of permissible discovery in U.S. federal courts is limited to that which is "proportional" to the needs of the case, considering certain factors. Following those amendments, some U.S. courts have used a Rule 26(b)(1) proportionality analysis to consider the impact of U.S. data privacy laws and concerns on the production of information and documents in U.S. litigation. However, U.S. courts generally have not looked at international data privacy issues through a Rule 26(b)(1) proportionality "lens." *The Sedona Conference International Litigation Principles* provides guidance on balancing potential conflicts between U.S. discovery requirements and non-U.S. data protection laws, and specifically references Rule 26(b)(1) in this context. In addition, *The Sedona Conference Commentary on Proportionality in Electronic Discovery* references "privacy" interests generally as a potential factor that may weigh in favor of limiting discovery.

The Proportionality in Cross-Border Discovery Brainstorming Group (BG) was tasked with considering in greater depth whether the U.S. legal community would benefit from additional guidance from The Sedona Conference Working Group 6 on International Electronic Information Management, Discovery and Disclosure (WG6) on whether it is appropriate under Rule 26(b)(1) to consider cross-border legal conflicts involving data protection in the proportionality analysis, and if so, what factors should be considered as part of this analysis.

B. Summary and Key Issues for Further Consideration

Our BG conducted three conference calls to brainstorm on issues surrounding proportionality in cross-border discovery. We reached general agreement on the importance of educating the bench and bar on this topic, as such guidance could be extremely helpful as part of navigating cross-border discovery challenges, and we urge the WG6 Steering Committee to strongly consider moving forward with work product. Some key issues, however, that we will highlight for the Steering Committee to be resolved prior to moving forward with drafting are:

1. Whether to expand scope of the work product to include proportionality guidance on management of requests from U.S. government regulators for non-U.S. information. With such situations common today, and with organizations and practitioners grappling with cross-border issues both in the litigation and investigation contexts, we believe a discussion of proportionality that includes participants with a government-side regulatory perspective is merited, as set forth in more detail below.

2. The form and format of the work product. We cover this in more detail in section III of this outline, and consider it critical for the Steering Committee to provide clear guidance to any drafting team on this point. While there were varied opinions on the BG, generally we believe that, especially if the work product were to be expanded to consider issues relevant to investigations in addition to civil litigation, the intended audience would most benefit from a stand-alone, deep dive on the topic from Working Group 6.

3. The overlap of comity analysis factors and proportionality analysis factors, and whether promoting more focus on proportionality could lead to dilution or undermining, or expansion of, of international comity standards. This was the topic of spirited dialogue during our calls, along with whether issues of non-U.S. law should be presented at all as part of a proportionality analysis under FRCP 26(b)(1) or if such an analysis should be limited only to a comity analysis under *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987) and its progeny. We raise this here to advise the Steering Committee accordingly, even though the BG did reach general consensus that as part of a proportionality analysis it was important to look at the burdens and expenses associated with compliance with non-U.S. laws, and that we should address the comity versus proportionality issue by speaking in the eventual work product to the circular nature and the overlap of issues between proportionality and comity analyses.

II. Intended Audience – Who Would Benefit and Why?

The BG believes that the proposed work product would benefit and address the interests of the following groups:

A. Litigants. This includes plaintiffs, defendants, and parties engaged in investigations, arbitrations, and other formal and informal proceedings that would involve proportionality, comity, cost and burden assessments, and accessibility issues involving cross-border discovery.

B. Courts, including state courts and international tribunals. Judicial officers, tribunals, and arbitrators will take particular interest in a discussion of case law relating to accessibility of data, cost and burden issues, international data protection regulation, and secrecy issues, as well as a discussion of the Federal Rules and how to balance the needs of a case, scope and cost equities, and issues of comity.

C. In-house counsel, especially international. In-house attorneys and business leaders within multinational or internationally-based companies will benefit from an understanding of how proportionality and comity considerations are addressed relating to U.S. discovery requests for data and information located outside the United States. This work product also would help in-house counsel anticipate the scope and sufficiency of requests to partner with outside counsel and consultants to balance comity, cost, and privacy issues when investigating accessibility of data.

D. Privacy counsel. Privacy counsel would benefit from supplemental guidance from The Sedona Conference on how proportionality and comity issues interrelate with data transfer and data privacy/secrecy laws to formulate educated recommendations on scope of or responses to discovery requests.

E. Technology and Forensic Consultants. This work product would assist technology and forensic consultants partnering with inside and outside counsel to prepare or respond to requests for particular data and to ensure specificity and account for international data transfer/secrecy issues that might impact any end users, holders of data, or require data subject notice or consents.

F. Practitioners. The attorneys engaged in litigation, arbitration, or other formal or informal proceedings that relate to commercial litigation, intellectual property, mass tort, International Trade Commission, regulatory investigations, antitrust, or a variety of other business disputes would be the most relevant beneficiaries of The Sedona Conference work product on balancing proportionality considerations in cross-border discovery and an analysis of the case law and policy factors that would impact discovery requests or responses to those requests.

G. U.S. government regulators. Regulatory authorities and U.S. government attorneys would benefit from an understanding of proportionality principles, comity, and cost and burden issues that should be considered when crafting or negotiating discovery requests.

H. International Data Protection Authorities. Similar to U.S. regulators, international data protection authorities and practitioners would benefit from work product discussing how U.S. courts and tribunals balance proportionality, comity, burden and cost issues, and non-U.S. data protection requirements.

I. Data subjects. Finally, individuals whose privacy interests are at stake –the data subjects – would benefit from a primer on how courts view proportionality principles when balancing privacy expectations that arise when personal information maintained outside the United States is sought for U.S. discovery .

III. Work Product: Goals, Scope, and Form

A. Goals of Work Product

The BG recommends that the work product seek to do the following:

1. Summarize why this issue is of interest and how the work product can assist the intended audience.

2. Provide education and background on the impact of data protection and secrecy laws on cross-border discovery. This may also include background on U.S. discovery

requirements for international litigants and in-house counsel and examples of the costs and burdens associated with complying with these laws in cross border discovery requests.

3. Provide summary and analysis of the case law concerning disputes over U.S. discovery requests implicating international data protection and secrecy laws under both a FRCP 26(b)(1) proportionality analysis and an *Aerospatiale* comity review. Any analysis should explain the overlap between the two.

4. Offer best practices for parties handling discovery requests in U.S. litigation that may implicate international data protection and secrecy laws. To the extent expansion to the U.S. investigations context is granted, the work shall also seek to guide anticipated requests from the U.S. government implicating the same.

5. Include some commentary on the policy rationales for and against analyzing compliance with international data protection and secrecy laws under the FRCP 26(b)(1) proportionality analysis.

B. Scope of Work Product

1. The BG recommends the scope of the work product be the applicability to cross-border discovery of a proportionality analysis in the U.S. civil litigation and investigation contexts and the interplay and impact of comity analyses. This will allow for a thorough consideration of the impact of FRCP 26(b)(1) proportionality factors and of the interplay of an *Aerospatiale* comity analysis.

2. The BG further recommends focusing on U.S. federal rules and federal case law to further the analysis under FRCP 26(b)(1). However, the work should aim to inform federal and state courts alike.

3. Additionally, the BG recommends consideration of non-U.S. data privacy laws and not U.S. privacy laws, so that the focus of the work product is cross-border discovery and the interplay with comity considerations.

4. And, the BG recommends that the work product, where applicable, rely on the considerable other Sedona materials for background on items such as proportionality generally, or international litigation generally.

C. Options for Form of Work Product

1. The BG discussed three options for the form of work product to be drafted by The Sedona Conference on this topic:

Option 1. An addendum or dedicated section in *The Sedona Conference International Litigation Principles on Discovery, Disclosure & Data Protection in Civil*

Litigation. These Principles provide guidance on balancing potential conflicts between U.S. litigation requirements and non-U.S. data protection laws, and discuss both FRCP 26(b)(1) proportionality review and the *Aerospatiale* comity analysis. An addendum or dedicated section on proportionality in cross-border discovery may supplement a new version of this document.

Option 2. An addendum to *The Sedona Conference Commentary on Proportionality in Electronic Discovery* focusing on the applicability of proportionality in cross-border discovery. This commentary from WG1 references "privacy" interests generally as a potential factor that may weigh in favor of limiting discovery and may benefit from a full addendum addressing privacy considerations under international data protection and secrecy laws.

Option 3. [Recommended] The BG's current recommendation is for a standalone, deep dive on the topic from WG6, *e.g.*, "*The Sedona Conference Commentary on Proportionality in Cross-Border Discovery and Investigations*." Such a document will allow for detailed analysis of the varied issues that impact a consideration of proportionality in the cross-border discovery context that may not be possible in other options, especially if the scope of the work product expands into the U.S. investigations context.

2. In section IV below, we provide an outline of potential work product in line with our recommendation of a standalone commentary from WG6.

IV. Outline of Work Product

A. Part I – Background

1. Why and how proportionality in cross-border discovery is of interest to the intended audience.

(a) Cross-border discovery raises proportionality issues that can be difficult for litigants, practitioners, and courts to navigate, particularly where non-U.S. data protection laws create conflicting obligations that U.S. courts typically resolve by applying a comity analysis. In this context, guidance is needed with respect to the interplay between the comity and proportionality analyses to avoid confusion, conflict, or dilution of standards.

(i) Proportionality is a fundamental principle affecting and limiting the scope of discovery under Federal Rule of Civil Procedure 26(b)(1).

(ii) U.S. courts have used a 26(b)(1) proportionality analysis to consider the impact of U.S. data privacy laws on the production of documents and information in U.S. litigation.

(iii) However, courts typically have not resolved conflicts between U.S. discovery obligations and non-U.S. data protection laws through a proportionality "lens" and instead have relied on the comity analysis outlined in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987).

(iv) Although proportionality and comity are different legal analyses for different goals, they share overlapping factors that may, in some cases (but certainly not all cases) lead to the identical results whether a court applies one or the other.

(v) When cross-border discovery is sought, a thorough proportionality analysis should dovetail with a comity analysis in order to fairly consider the potential costs and burdens of the discovery being sought.

(b) Accordingly, this proposed work product will provide value by thoroughly examining the landscape of overlapping proportionality and comity analyses, offering commentary on various approaches, and providing guidance to litigants, practitioners, and courts faced with navigating these challenges.

(c) Additionally, this work product can be a valuable resource by providing education on numerous topics that impact proportionality analyses and cross-border discovery, including:

(i) Guidance on current non-U.S. data protection laws will be particularly helpful given the evolving nature of the international data protection regimes. This educational aspect may be especially valuable to state courts and U.S. practitioners with relatively little experience navigating cross-border discovery issues.

(ii) Education and discussion of potential costs and burdens, including non-monetary risks and burdens, and including those potentially resulting from measures implemented in response to cross-border discovery under data protection or secrecy laws.

(iii) Education and guidance on how proportionality – and especially a proportionality analysis that dovetails with a comity analysis of non-U.S. data protection laws – factors into the scope of U.S. discovery should be valuable particularly to non-U.S. counsel, practitioners, and others with limited exposure to U.S. discovery obligations.

2. Background on 26(b)(1) proportionality and on cross-border discovery.

(a) Federal Rule of Civil Procedure 26(b)(1) was amended in December 2015 to explicitly include proportionality factors as part of the determination of the allowable scope of discovery.

> "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

(b) For detailed information on proportionality, see *The Sedona Conference Commentary on Proportionality in Electronic Discovery*.

(c) *The Sedona Conference International Litigation Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition)* provides guidance on balancing potential conflicts between U.S. litigation requirements and non-U.S. data protection laws, and specifically references Rule 26(b)(1) in this context.

(i) International Litigation Principle 2 states: "Where full compliance with both Data Protection Laws and preservation, disclosure, and discovery obligations presents a conflict, a party's conduct should be judged by a court or data protection authority under a standard of good faith and reasonableness."

(ii) These Principles further state that *Aerospatiale* mandates applying "proportionality considerations in framing an appropriate discovery order to balance domestic discovery obligations with the interests of that international sovereign. Among the considerations are the importance to the investigation or litigation of the documents or other information requested, the degree of specificity of the request, and the availability of alternative means of securing the information. Principle 2 urges that these same considerations should be used by Data Controllers and parties when they must make decisions concerning conflicting legal obligations, and that courts and data protection authorities use these factors if they are called upon later to evaluate the parties' actions in that regard." *Id.* at 13.

(iii) Proportionality also factors heavily in discussion of International Litigation Principle 3, which states: "Preservation, disclosure, and

discovery of Protected Data should be limited in scope to that which is relevant and necessary to support any party's claim or defense in order to minimize conflicts of law and impact on the data subject."

(iv) The commentary describes how this approach aligns with the Article 29 Working Party's approach toward EU data privacy obligations in the context of U.S. discovery and then considers several potential opportunities to "put Principle 3 into practice, thereby avoiding or at least minimizing conflicts of laws and damage to the rights of Data Subjects," including: limiting the scope of the request; discovery with specificity; phased discovery; minimizing the production of protected data; substitution of data; and limitations on the format of production. *Id.* at 15-19.

3. Background on data protection laws and data secrecy laws and their restrictions on data flows common to U.S. discovery.

(a) Many countries have adopted data protection statutes and regulations that place limits on the processing and transfer of personal information. These may, in turn, limit the allowable disclosure of personal information as part of U.S. discovery and investigations. Such laws are often adopted in countries with a much narrower tradition of discovery in their own litigation systems, and make few or no allowances for broad U.S.-style discovery.

(i) For example, the EU General Data Protection Regulation (GDPR) sets strict requirements for the processing and transfer of personal information. It is silent, however, on the topic of U.S. discovery.

(ii) The European Data Protection Board (EDPB), in its "Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679," notes a limited exception "derogation" to transfers relating to U.S. discovery. In these Guidelines, the EDPB first establishes that in all data transfers, even under a derogation, all other provisions of the GDPR must be met by data exporters.

(iii) Highlighting the intended limited application of Article 49 (1) derogations, the EDPB in these guidelines writes "data exporters should first endeavor possibilities to frame the transfer with one of the mechanisms included in Articles 45 and 46 GDPR, and only in their absence use the derogations provided in Article 49 (1)." *Id. at 3.* Additionally, "the derogations must be interpreted restrictively so that the exception does not become the rule[.] *Id.* at 4.

(iv) The EDPB then states that under Article 49 (1) (e), where a transfer is necessary for the establishment, exercise or defense of legal claims, "data transfers for the purpose of formal pre-trial discovery procedures in civil litigation may fall under this derogation." *Id.* at 11. It, however, continues

limiting the potential application of this derogation, stating that "[a] data transfer in question may only take place when it is necessary for the establishment, exercise or defense of the legal claim in question…. Whilst there may be a temptation for a data exporter to transfer all possibly relevant personal data in response to a request or for instituting legal procedures, this would not be in line with this derogation or with the GDPR more generally…." *Id.* at 12. The EDPB also refers to the need for such transfers to be occasional and not repetitive, writing that "[s]uch transfers should only be made if they are occasional…. Data exporters would need to carefully assess each specific case." *Id.*

(b) Similarly, other countries have adopted secrecy laws, such as Switzerland's Banking Law and China's State Secrets Law and Cybersecurity Law that limit the ability to access or transfer out of the country certain types of information.

(c) And "blocking statutes" in various countries, including France and Germany, may restrict or prohibit transfer of materials outside of a country.

(d) These laws often authorize strict civil or criminal penalties for violations. The GDPR, for example, authorizes a penalty of 4% of worldwide turnover for certain data privacy violations. These laws, the risk of enforcement, and the lack of definitive guidance on managing simultaneous U.S. discovery or investigation demands raises serious concerns for both requesting and responding parties alike, and U.S. courts and regulators must seek to balance the U.S. interest in and need for fulsome discovery with a nation's interest in safeguarding the privacy of its citizens.

(e) Further details on international laws at issue is beyond the scope of this outline but can be found in other publications of The Sedona Conference including *The Sedona Conference International Litigation Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition).*

B. Part II – Case Law Review, Comity, Regulators

Parties to U.S. litigation have asserted privacy interests in discovery in two separate contexts. First, in the context of U.S. litigation where no party has asserted protection under a non-U.S. statute, protection is generally sought where discovery is aimed at highly sensitive personal data or where discovery seeks non-business data, such as data from private email or social media accounts over which persons can be argued to have an expectation of privacy.

Second, where an international data protection statute is invoked, protection has often been sought over a broader category of discovery known generally as "personal information." Because "personal information" is often found in ordinary business documents of

the type that U.S. courts and litigants have traditionally seen as not implicated by privacy concerns and subject to full discovery, U.S. courts have analyzed such statutory claims under a comity analysis.

1. U.S.-only discovery/data privacy

(a) Consider under a traditional 26(b)(1) proportionality analysis.

(i) Many U.S. courts have found privacy concerns, often framed as the intrusiveness of the request, compatible with a traditional benefit versus burden analysis using the 26(b)(1) proportionality factors. These cases often involve the extent to which a court will allow a party to seek information from private email or social media accounts. Some courts have relied on proportionality factors to fashion an intermediate approach that allows something short of unfettered access to private information while allowing discovery of probative material.

(ii) For example, in *Henson v. Turn, Inc.*, 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018), a consumer class brought claims alleging that the defendant had deceptively installed undeletable tracking cookies onto their electronic devices. Defendants demanded, among other things, that plaintiffs allow defendants to directly inspect their electronic devices, purportedly to determine what cookies had been installed. The court rejected the request as disproportionate under 26(b), observing that "[c]ourts and commentators have recognized that privacy interests can be a consideration in evaluating proportionality, particularly in the context of a request to inspect personal electronic devices." The court found that allowing defendants direct access to plaintiffs' devices risked unnecessarily exposing irrelevant personal data, and found it sufficient for the plaintiffs to search their own devices for discoverable information pursuant to an agreed protocol. The court also found defendants' request for plaintiffs' full browsing histories and cookie data to be disproportionately intrusive and adopting a more limited proposal made by plaintiffs.

(b) Other balancing tests.

(i) On occasion, courts have applied balancing tests developed outside the context of Rule 26(b)'s proportionality analysis to evaluate arguments that privacy interests outweigh discovery needs under the circumstances of the case.

(ii) One such case involved the issue of whether inadvertently produced, intimate and irrelevant text messages between a CEO and another person were protected from discovery under the California State Constitution.

Laub v. Horbaczewski, 331 F.R.D. 516 (C.D. Cal. 2019). The *Laub* court discussed the factors in an appropriate balancing test, which included: "(1) the probable encroachment of the individual's privacy right if the contested action is allowed to proceed, and the magnitude of that encroachment; (2) whether the encroachment of the privacy right would impact an area that has traditionally been off limits for most regulation; (3) whether the desired information is available from other sources with less encroachment of the privacy right; (4) the extent to which the exercise of the individual's privacy rights impinge on the rights of others; and (5) whether the interests of society at large encourage a need for the proposed encroachment." The court found the Constitutional test to support nondisclosure, and also found that given the serious nature of the privacy encroachment versus the clear irrelevance of the information, the material was also protected from discovery under 26(b)(2).

(iii) In *In re: Xarelto (Rivaroxaban) Prod. Liab. Litig.*, 313 F.R.D. 32 (E.D. La. 2016), plaintiffs in a product liability action sought certain information from the personnel files of likely deponents that might be relevant to the issue of witness bias, such as salary and bonus incentives that favored championing the product at issue. After reviewing the relevant Fifth Circuit case law, the court found that because of the inherently sensitive nature of the information contained with such files, they are discoverable only upon a showing that they contain material highly relevant to the case at hand and were requested with particularity, because the information in personnel records invariably contains a significant privacy interest. The general search for material supporting witness bias could not meet that standard, although the court observed that the same standard would likely be met in actions that claimed wrongful termination or discriminatory practices.

(c) Forensic imaging cases.

(i) U.S. discovery contemplates that each party will be entrusted with the search and production of its own documents, and parties are not typically entitled to search one another's electronic devices. A line of cases has developed evaluating the proportionality of request to image an adversary's electronic device. Recognizing the intrusive nature of the requests, most courts require either (i) a showing of wrongdoing, such as a failure to preserve documents or the withholding of responsive documents; or (ii) a showing that there is a substantial connection between the device at issue and the claims in the case. *Hespe v. City of Chicago*, No. 13 C 7998, 2016 WL 7240754, at *4 (N.D. Ill. Dec. 15, 2016) (discussing standard).

(ii) An example of a case in which the court found that the contents of the device was sufficiently at issue to justify imaging is *IHS Global Ltd.*

v. Trade Data Monitor LLC, No. 2:18-CV-01025-DCN, 2019 WL 7049687, at *4 (D.S.C. Dec. 23, 2019). *IHS Global* concerned a claim that the defendant had misappropriated trade secrets after leaving the employ of the plaintiff. The relevant inquiry was not limited to whether trade secrets could be found on the defendant's device but whether the trade secrets was accessed after he left plaintiffs' employment and the extent to which the protected material was actually used after that date. The needs of the case was found to justify imaging the device in question. The court noted however that it was relying on representations from counsel that they did not intend to take use the imaging to gain unfettered access to the contents of the device and that they would limit their inspection to relevant material.

(iii) In light of the intrusive nature of forensic imaging, courts are more likely to be receptive to requests for privacy safeguards where such relief is granted. In *Dutch Valley Growers Inc. v. Rietveld*, No. 16-2085, 2017 WL 6945661, at *3 (C.D. Ill. Jan. 24, 2017), another trade secret misappropriation case, the court allowed a device to be imaged but under a protocol that would allow the producing party to oversee the imaging and to have an opportunity to have private, privileged, or irrelevant information removed from the imaged version of the device.

2. Cross-border discovery

(a) In the context of cross-border U.S. discovery, privacy interests are most often raised by a responding party that asserts that a non-U.S. statute or regulation protects from disclosure the discovery sought in whole or in part. Often the statutes at issue are enacted by nations that do not have legal systems that allow fulsome discovery by the parties, and thus these statutes often are not designed to accommodate the needs of litigants and courts engaged in such discovery.

(b) At the same time, international data privacy laws are often interpreted by U.S. courts to be broad in scope. For example, the GDPR may impact the ability of parties to produce as part of U.S. discovery ordinary business documents that disclose personally identifiable information, such as an individual's name, job title, email address, and other information not deemed particularly sensitive in the U.S. tradition. *In re Mercedes-Benz Emissions Litig.*, No. 16-CV-881 (KM) (ESK), 2020 WL 487288, at *1 (D.N.J. Jan. 30, 2020) (GDPR's definition of personal data "inherently includes information like an individual's name and job title, information that is generally considered benign in U.S. litigation and must be produced in discovery pursuant to the Federal Rules of Civil Procedure."); *see also AMA Multimedia LLC v. Wanat*, No. CV-15-01674-PHX-ROS, 2016 WL 10591972, at *1 (D. Ariz. Dec. 2, 2016) (interpreting a Polish data

protection statute as barring the production of personally identifying information of third parties, even in redacted form, without consent).

(c) Because of the breadth of their potential application, these statutes have given rise to no shortage of disputes among litigants. Requesting parties fear that these statutes put them at an unfair disadvantage in litigating ordinary disputes against international corporations, while responding parties fear that participation in U.S. discovery puts them at risk of penalties by international regulators. Thus, these disputes are analyzed primarily as a conflict-of-laws issue. As noted above, a comity analysis was outlined for addressing such issues in the landmark *Aerospatiale* decision.

(d) The conflict-of-laws analysis, however, does not displace the requirement inherent in every case that any discovery be proportional to the needs of the case. Nonetheless, most U.S. courts that have evaluated cross-border conflicts involving non-U.S. statutes have not explicitly considered such conflicts as part of a proportionality analysis.

(e) There may be cases where, aside from international data privacy laws, the cross-border nature of the discovery raises additional issues to be considered as matter of proportionality. *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 566 (D. Ariz. 2016) (finding discovery of 18 separate international offices for information spanning a 13-year period to be disproportionately burdensome in light of minimal showing of relevance).

(f) In addition, there may be a dispute over whether the non-U.S. statute actually reaches the discovery requested. The party raising the statute as a bar to discovery has the burden of demonstrating its applicability. *Zamperia, Inc. v. I. E. Park SrL*, 6:13-cv-1807, 2014 WL 12614505, at *5 (M.D. Fla. Nov. 3, 2014) (international law objections not properly supported where Court not provided with sufficient legal authority by objecting party).

3. A discussion and review of the overlap of comity and proportionality issues, and the potential impact of consideration of non-U.S. law issues outside of a comity analysis.

(a) Courts, and most litigants, have often approached international data privacy laws in U.S. discovery as a matter solely of international comity and have not raised any distinct "proportionality" issues arising from the application of international data protection laws.

(b) While this could indicate the importance of educating parties, counsel, and the bench on the potential application of proportionality in this context, the shortage of separate proportionality arguments or analyses perhaps

stems from the fact that there is considerable overlap between the proportionality factors laid out in Rule 26 and the factors most courts use, post-*Aerospatiale*, to determine whether and how to defer to international data privacy laws in the course of U.S. discovery.

(c) For example, the "importance" of the information at issue is a factor common to both a Rule 26 proportionality analysis and a standard international comity analysis. Likewise, demonstrable "burdens" on a party can be considered both as a matter of proportionality and in considering whether adjustments to ordinary U.S. discovery rules should be made based on international comity to data protection laws.

(d) As part of drafting and publishing work product, The Sedona Conference should note the overlap between proportionality and international comity, and the potential for resulting confusion and dilution of international comity standards if the impact of international data privacy laws were considered twice—*i.e.*, once as a matter of international comity under the case law developed since *Aerospatiale* and a second time under a Rule 26 proportionality analysis.

(e) It also is important to consider that, even though certain of the factors overlap, international comity is a specialized area of the law that the courts have developed to address a specialized issue—and that some courts may determine that international data privacy laws should be considered within that area exclusively.

(f) One way to minimize such analytic and doctrinal problems is to pay careful attention to the flow of the analysis, as described in the flowchart below, and ensure any overlapping factors are appropriately considered in both the proportionality and comity contexts.

(g) Comparison of Rule 26 proportionality factors and international comity factors:

Rule 26 Proportionality Factors	**International Comity Factors[1]**
• The importance of the issues at stake in the litigation.	• Importance of the information to the litigation. • The specificity of the request.

[1] Comity factors one through five are derived from the Restatement (Third) of Foreign Relations Law, Section 442. Comity factors six and seven have been developed by courts and are not universally considered. *See, e.g. Proofpoint, Inc. v. Vade Secure, Inc.*, No. 19CV04238MMCRMI, 2020 WL 504962, at *2 (N.D. Cal. Jan. 31, 2020) (discussing factors applied in Ninth Circuit).

• The amount in controversy. • The parties' relative access to relevant information. • The parties' resources. • The importance of the discovery in resolving the issues. • Whether the burden or expense of the proposed discovery outweighs its likely benefit.	• Whether the information originates in the U.S. • Whether alternative means exist to obtain information. • The extent to which noncompliance with the request would undermine important interests of the U.S. and vice versa. • The extent and nature of the hardship that inconsistent enforcement would impose upon a person. • The extent to which enforcement action to ensure compliance with the action can reasonably be expected

4. How parties and U.S. regulators have addressed impact of data protection and secrecy laws.

Parties involved in cross-border investigations and regulatory inquires, both formal and informal, initiated by U.S. governmental entities have managed the competing requirements of international data privacy and secrecy laws and the request or demand for production of documents. Relevant actions may include:

(a) Discussion with regulator about the interpretation of the GDPR in such a context (*e.g.*, do the EU-specific references to "legal obligations" and "law enforcement" apply?).

(b) Demonstrating the potential impact in home country of compliance with U.S. request, e.g., resulting action by data privacy/secrecy authority, data subjects.

(c) Agreeing to produce only after clearance from home country regulator.

(d) Tailor request to meet the core needs of U.S. regulator but minimize home country risk, if demonstrated.

C. Part III - Guidelines with Commentary and Analysis.

In this section, the drafting team could set forth a set of best practice guidelines with accompanying analysis and illustrations. Examples of guidelines:

Example Guideline 1: U.S. Courts may appropriately consider the impact of compliance with data protection and secrecy laws as part of a proportionality analysis in determining the appropriate scope of discovery.

(a) Within the Rule 26(b)(1) framework:
(i) The importance of the issues at stake in the action
(ii) The amount in controversy
(iii) The parties' relative access to relevant information.
(iv) The parties' resources
(v) The importance of the discovery in resolving the issues
(vi) Whether the burden or expense of the proposed discovery outweighs its likely benefit

(b) Some factors parties may choose to highlight include:
(i) Data privacy interests of data subjects weighed against importance of other issues at stake.
(ii) Added costs relating to complying with discovery requests due to data privacy obligations, when balancing against the amount in controversy.
(iii) Access to information potentially impacted by limitations on access due to data privacy laws.
(iv) Cost and time to negotiate with Works Councils or confer with home country regulators.
(v) Cost and time for data privacy review and redaction, as deemed appropriate.
(vi) Cost and time for a large scale discovery effort at various international locations.
(vii) Reputational risk relating to violating international data privacy laws in favor of U.S. discovery request.
(viii) Enforcement risk, regardless of the level of enforcement thus far; both for civil and criminal penalties. This issue is taken seriously by EU authorities.

Example Guideline 2: Any comity analysis should be conducted separate from a proportionality analysis, though similar factors may weigh into both.

(a) Courts should take care not to dilute or undermine international comity standards.

Example Guideline 3: When setting forth an argument on the burden of compliance with non-U.S. data privacy or secrecy laws, a party should make such argument with sufficient specificity and detail.

(a) Detailed accounting of potential costs, monetary and otherwise.
(b) Statements from non-U.S. law experts.

Example Guideline 4: Parties should put in place, and courts should encourage, practices that promote compliance with data protection and secrecy laws while also reducing the burden and expense of cross-border discovery.

(a) Protective orders.

(b) Leverage data privacy counsel to find data-related workflows that minimize cross border issues.

Example Guideline 5: Courts may minimize analytic and doctrinal problems relating to overlap of proportionality and comity factors by carefully addressing topics in order.

(a) Rule 26(b)(1) scope is threshold question, including proportionality factors.

(b) These factors could then be considered as part of a comity analysis.

(c) See proposed flowchart in Appendix A.

Example Guideline 6: U.S. governmental regulators and investigators should consider the impact of international data privacy and secrecy laws on any request for documents or other evidence.

V. Proposed Drafting Team

The BG recommends that the Steering Committee appoint a diverse and balanced drafting team, which should include representatives with the following backgrounds and experience:

A. Requesting party representatives. This would include U.S. and international plaintiffs' counsel, regulators, consultants, and other practitioners who regularly seek, either formally or informally, data and information maintained outside the United States that might implicate questions of burden, cost, accessibility, trade secrets, data protection, or other privacy considerations.

B. Producing party representatives. This would include U.S. and international defense counsel and other practitioners who need to work with multinational clients, companies, data subjects, and other parties or entities that need to respond to requests for data and information that would require a court or tribunal to weigh proportionality and comity issues against the burden, cost, scope, accessibility, availability, and privacy interests relating to that data and information. This also includes representatives who can comment on and address the viability of objections to such requests, demonstrable burden, and a survey of case law and practical considerations to consider when responding to requests.

C. In-house, including international. The drafting team should include in-house representatives, ideally from multinational companies, or internationally-based in-house counsel, to address the perspective of how companies and non-attorney business parties view U.S. discovery requests that impact day-to-day activities, data privacy expectations, or involve significant cost, burden, and accessibility factors.

D. U.S. and international regulatory experience. The drafting team should endeavor to identify representatives with regulatory or government experience to provide the perspective of how regulatory and government personnel might balance or consider requests for data outside the United States that implicate proportionality, comity, or data privacy factors. This should also include a representative with EU and Asia-focused experience to discuss how U.S. discovery requests are addressed in those jurisdictions vis-à-vis privacy restrictions and comity considerations.

E. U.S. judges. The U.S judicial viewpoint will be important to include as part of the drafting process, both to interpret applicable U.S. law and to provide a practical perspective on managing cross-border discovery requests.

F. Data privacy counsel. Finally, the drafting team should include data privacy counsel to address privacy and secrecy laws and data subject expectations even if data and information requests are found to be proportional to the needs of a case based on the United States Federal Rules, and how to work with parties, courts, and regulators to address collection of such data.

Appendix A
Proposed Flowchart for Addressing Proportionality and Comity As Part of Cross-Border Discovery