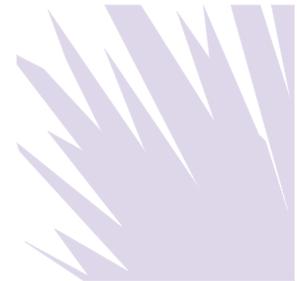


The Sedona Conference Commentary on Proportionality in Electronic Discovery

The Sedona Conference



Recommended Citation:

The Sedona Conference, Commentary on Proportionality in Electronic Discovery, 18 Sedona Conf. J. 141 (2017).

For this and additional publications see: <https://thesedonaconference.org/publications>

The Sedona Conference Journal® (ISSN 1530-4981) is published on an annual or semi-annual basis, containing selections from the preceding year's conferences and Working Group efforts. The Journal is available on a complimentary basis to courthouses and public law libraries and by annual subscription to others (\$95; \$45 for conference participants and Working Group members). Send us an email (info@sedonaconference.org) or call (1-602-258-4910) to order or for further information. Check our website for further information about our conferences, Working Groups, and publications: www.thesedonaconference.org.

Comments (strongly encouraged) and requests to reproduce all or portions of this issue should be directed to:

The Sedona Conference,
301 East Bethany Home Road, Suite C-297, Phoenix, AZ 85012 or
info@sedonaconference.org or call 1-602-258-4910.

The Sedona Conference Journal® designed by MargoBDesignLLC at
www.margobdesign.com or mbraman@sedona.net.

Cite items in this volume to "18 Sedona Conf. J. ____ (2017)."

Copyright 2017, The Sedona Conference.

All Rights Reserved.

THE SEDONA CONFERENCE COMMENTARY ON
PROPORTIONALITY IN ELECTRONIC DISCOVERY*

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

Author:

The Sedona Conference

Editors-in-Chief & Steering Committee Liaisons:

Kevin F. Brady

Ariana J. Tadler

Team Leaders:

Philip Favro

Peter Pepiton

Drafting Team Members:

Bobbi Basile

Alan C. Geolot

Lea Malani Bays

Peter B. Haskel

David R. Cohen

Robert L. Levy

Aaron Crews

Annika K. Martin

Judicial Participants:

Hon. James C. Francis IV

Hon. Craig B. Shaffer

Copy Editor:

Susan McClain

The opinions expressed in this publication, unless otherwise attributed, represent consensus views of the members of The Sedona Conference Working Group 1. They do not necessarily represent the views of any of the individual participants or their employers, clients, or any other organizations to which any of

* Copyright 2017, The Sedona Conference. All Rights Reserved.

the participants belong, nor do they necessarily represent official positions of The Sedona Conference.

We thank all of our Working Group Series Sustaining and Annual Sponsors, whose support is essential to our ability to develop Working Group Series publications. For a listing of our sponsors, just click on the "Sponsors" navigation bar on the homepage of our website.

PREFACE

Welcome to the final, May 2017, version of The Sedona Conference *Commentary on Proportionality in Electronic Discovery*, a project of The Sedona Conference Working Group on Electronic Document Retention & Production (WG1). The Sedona Conference is a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

The public comment version of this third iteration of The Sedona Conference *Commentary on Proportionality in Electronic Discovery* was published in November 2016 to reflect the significant and evolving emphasis on proportionality under the 2015 amendments to the Federal Rules of Civil Procedure. After a 60-day public comment period, the editors reviewed the public comments received and, where appropriate, incorporated them into this final version. We hope that this 2017 version of the *Commentary* will evolve into an authoritative statement of law, both as it is and as it should be. As always, future developments in the law may warrant another iteration of this *Commentary*. Your comments and suggestions regarding future versions may be sent to comments@sedonaconference.org.

On behalf of The Sedona Conference, I thank once again all the drafting team members including Bobbi Basile, Lea Malani Bays, David R. Cohen, Aaron Crews, Alan C. Geolot, Peter B. Haskel, Robert L. Levy, and Annika K. Martin, along with all of our WG1 members whose dialogue and comments contributed to this *Commentary*. The Sedona Conference also thanks The Honorable James C. Francis IV and The Honorable Craig D. Shaffer for serving as Judicial Participants. Finally, we extend a special thanks to Philip Favro and Peter Pepiton for serving as Team Leaders, and to Kevin F. Brady and Ariana J. Tadler for

serving as both Editors-in-Chief and Steering Committee Liaisons.

Craig Weinlein
Executive Director
The Sedona Conference
May 2017

TABLE OF CONTENTS

THE SEDONA CONFERENCE PRINCIPLES OF PROPORTIONALITY....	146
INTRODUCTION.....	147
THE SEDONA CONFERENCE PRINCIPLES OF PROPORTIONALITY WITH COMMENTARY	150
Principle 1:	150
Principle 2:	154
Principle 3:	159
Principle 4:	162
Principle 5:	168
Principle 6:	173

THE SEDONA CONFERENCE
PRINCIPLES OF PROPORTIONALITY

- Principle 1: The burdens and costs of preserving relevant electronically stored information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
- Principle 2: Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive sources.
- Principle 3: Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
- Principle 4: The application of proportionality should be based on information rather than speculation.
- Principle 5: Nonmonetary factors should be considered in the proportionality analysis.
- Principle 6: Technologies to reduce cost and burden should be considered in the proportionality analysis.

INTRODUCTION

Achieving proportionality in civil discovery is critically important to securing the “just, speedy, and inexpensive resolution of civil disputes” as mandated by Federal Rule of Civil Procedure 1. Despite periodic changes in the civil discovery rules since 1983 to address claims of excess, burden, and abuse, some commentators continued to express dissatisfaction with the handling of discovery issues and disputes, especially with respect to electronically stored information (ESI). Much of this continued frustration appeared to be rooted in the perception that preservation and production burdens were not always proportional to the particular lawsuits at issue.

Rules 26(b)(1) and 37(e) were completely revamped in December 2015. The proportionality considerations that were formerly in Rule 26(b)(2)(C)(iii) were moved to Rule 26(b)(1). The 2015 amendment restores the proportionality factors to their original place in defining the scope of discovery. Chief Justice John Roberts wrote in his Year-End Report on the Federal Judiciary that amended Rule 26(b)(1) “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.” Rule 26(b)(1) now provides that “[p]arties 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.”

Proportionality is now one of the factors, together with relevance, determining the scope of discovery. A consideration was added (“the parties’ relative access to relevant information”) to address information asymmetry, and another consideration was moved (“the amount in controversy”) to emphasize that this may not be determinative in terms of whether discovery should be permitted or precluded. Proportionality should be considered in fashioning discovery requests, responses, and objections.

Proportionality considerations often may be relevant to rules that do not explicitly adopt the term “proportionality.” Examples include whether ESI is “not reasonably accessible,” Fed. R. Civ. P. 26(b)(2)(B); if discovery is “unreasonably cumulative or duplicative,” Rule 26(b)(2)(C)(i); whether a “party seeking discovery has had ample opportunity to obtain the information by discovery in the action,” Rule 26(b)(2)(C)(ii); and whether production of trial preparation material would cause “undue hardship,” Rule 26(b)(3)(A)(ii). In addition, case law construing these other rules may be instructive in addressing Rule 26(b)(1) proportionality issues.

Amended Rule 37(e) applies if ESI “that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it.” In determining the reasonableness of the preservation steps taken, courts may consider, among other things, the proportionality of the preservation efforts. Although Rule 37(e) applies only to ESI, the court should also be able to consider proportionality in connection with the preservation of non-ESI sources of information.

The amendments to Rules 26(b)(1) and 37(e) are intended to modify how civil litigation is handled going forward. The committee notes make clear the increased emphasis on the role of

proportionality in discovery. The practical ramifications of including the proportionality factors in the scope of discovery are evolving and many questions remain concerning how practitioners and judges will adjust. Those questions became the main drivers behind the initiative to revisit at this time *The Sedona Conference Commentary on Proportionality in Electronic Discovery*.

While WG1 hopes that all states will eventually adopt proportionality rules for discovery, WG1 acknowledges that this is not the situation in 2017. Therefore, parties and practitioners planning or facing litigation that could be filed in state court need to consult state laws to ensure they comply with applicable pre-litigation preservation duties.

THE SEDONA CONFERENCE
PRINCIPLES OF PROPORTIONALITY WITH COMMENTARY

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

Comment 1.a: Although the Federal Rules of Civil Procedure (“Rules,” or “Federal Rules”)¹ do not apply until litigation has commenced, the provisions of Rule 37(e) address spoliation of ESI where preservation duties arise before the commencement of litigation. As the advisory committee note to Rule 37(e) suggests, proportionality principles may be considered in evaluating the reasonableness of pre-litigation preservation efforts of all parties.² It is important to note that in applying principles of proportionality to preservation, a miscalculation can lead to the permanent loss of relevant information. In contrast, a miscalculation during production can usually be cured. In particular, at the preservation stage parties should be wary of applying too narrow a definition of what constitutes relevant ESI. Parties often can reduce the risk of loss of relevant information with

1. Although these Principles generally reference the Federal Rules and federal case law, it is the hope and expectation of WG1 that the Principles will also serve as a useful guide to courts and litigants involved in state court litigation, except where applicable state rules or law are inconsistent with the Principles set forth herein.

2. FED. R. CIV. P. 37(e) advisory committee’s note. *See also* Lord Abbett Mun. Income Fund, Inc. v. Asami, No. C-12-03694, 2014 WL 5477639, at *3 (N.D. Cal. Oct. 29, 2014) (noting that “the proportionality principle applies to the duty to preserve potential sources of evidence”). Although proportionality applies to all stages of the discovery process, Principle 1 focuses on the preservation stage of that process.

steps such as the following: (i) earlier or more complete disclosure about the substance of their claims and defenses; (ii) communication about the types of information each party considers to be within the duty to preserve; and (iii) earlier or more thorough investigation of the existence and location of relevant information.

Comment 1.b: Courts conducting a post hoc analysis of a party's preservation decisions should do so in light of the proportionality factors set forth in Rule 26, and the reasonableness of the preserving party's efforts, as provided in Rule 37(e).³ This analysis should, in turn, depend on the date when the preservation obligation arose and the knowledge available to that party at the time when the information was, or could have been, preserved.⁴ As reflected in the advisory committee note, the court, when analyzing these issues, "should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including government parties) may have limited staff and resources to devote to those efforts."⁵ The note further

3. See Hon. Craig D. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55, 102 (2015) (discussing the application of the Rule 26(b)(1) proportionality factors in the preservation context).

4. The committee note states that, "[c]ourts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant." See *Marten Transp., Ltd. v. Plattform Advert., Inc.*, No. 14-cv-02464, 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016) (finding that the duty to preserve did not extend to certain internet search history because, at the time the duty to preserve arose, there was no reason to believe the plaintiff knew or should have known the information would be relevant). In many cases, the duty to preserve will arise first for the plaintiff, as it is the party bringing the action and thus knows there is a reasonable likelihood of litigation prior to any party being sued.

5. As the committee note states, "[t]he court should also be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts." Compare *Best Payphones Inc. v. City of New York*, No. 1-CV-3924, 2016 WL 792396, at *5 (E.D.N.Y. Feb. 26, 2016) (finding that a party was not

provides that “[a] party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms.” In any motion under Rule 37(e), it may also be appropriate to consider, as part of a proportionality analysis, each party’s preservation actions regarding the information at issue.

Steps that can be taken by each party to meet its preservation obligations, where proportional, include:

- i. in advance of litigation, having in place reasonable policies addressing legal preservation obligations that may arise;⁶
- ii. identification of relevant custodians with knowledge of the matters in dispute;
- iii. discussion with custodians and other appropriate personnel to identify sources of unique ESI and other information relevant to the matter, including “non-custodial” sources;
- iv. preservation of the identified ESI;
- v. suspension of information retention policies that would otherwise result in the routine deletion of unique relevant ESI;

unreasonable in his preservation efforts when he was under the mistaken belief that he was preserving his emails by keeping his emails “new”), *with U.S. ex rel. Guardiola v. Renown Health*, No. 12-cv-0295, 2015 WL 5056726, at *4–5 (D. Nev. Aug. 25, 2015) (urging companies to consider implementing “sensible” retention policies to avoid the costs and burdens of addressing ineffective preservation practices).

6. Within this *Commentary*, the term “policies” means formal protocols that organizations have developed and follow to address matters relating either to information retention or preservation for litigation purposes. “Policies” also refers to practices developed in the absence of written protocols that organizations observe for information retention or preservation purposes.

- vi. maintenance of relevant ESI in a reasonably accessible format; and
- vii. documentation of preservation efforts undertaken.

Comment 1.c: Rule 26(f) includes preservation as an issue to be discussed during the Rule 26(f) conference. It may be appropriate for all parties to discuss their respective information retention policies and the steps they have taken to preserve relevant information; however, neither a party's information retention policies nor its litigation preservation policies should routinely be the subject of collateral discovery. The parties should be cognizant of attorney-client privilege and attorney work product, but these protections should not be used to withhold information regarding the existence, location, and accessibility of relevant information. A party may also decide to initiate discussions regarding preservation with the opposing party prior to discovery, which may be especially important if the party is in receipt of a preservation demand. Such a dialogue creates an opportunity to agree on the appropriate scope of preservation. Although it is preferable for the parties to reach such agreements, if the parties are unable to do so, a judge can be asked to impose a preservation order.⁷

7. The committee note to Rule 37(e) states:

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

Principle 2: *Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive sources.*

Comment 2.a: Although the scope of discovery can be broad, it is not unlimited.⁸ All discovery is subject to the proportionality factors incorporated in Rules 26(b)(1), 26(b)(2)(C), and 26(g)(1)(B).⁹ Proper application of those proportionality factors focuses on the actual claims and defenses in the case, and how and to what degree requested discovery bears on those claims and defenses. In the end, “[t]he court’s responsibility, using all the information provided by the parties, is to consider [all the

8. Compare *Siriano v. Goodman Man. Co. L.P.*, No 2:14-cv-1131, 2015 WL 8259548, at *11 (S.D. Ohio Dec. 9, 2015) (“The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad . . . [and] is more liberal than the trial setting, as Rule 26(b) allows discovery ‘regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.’”), with *Cole’s Wexford Hotel, Inc. v. Highmark Inc.*, No. 10-1609, 2016 WL 5025751 (W.D. Pa. Sept. 20, 2016) (holding that “the scope of discovery is limited to matter that is relevant to claims or defenses and is proportional to the needs of a case” and finding reliance on case law that construed the scope of discovery to be “relevant to the subject matter involved in the pending action” to be “misplaced” and having “no application” after the enactment of the 2015 amendments). See also *In re Bard IVC Filters Products Liability Litigation*, No. MDL 15-02641-PHX DGC, 2016 WL 4943393 (D. Ariz. Sept. 16, 2016) (explaining that the 2015 amendments to Rule 26(b)(1) “abrogated cases” that applied previous versions of the rule and that the “test going forward is whether evidence is ‘relevant to any party’s claim or defense,’ not whether it is ‘reasonably calculated to lead to admissible evidence.’”).

9. *Carr v. State Farm Mut. Auto. Ins. Co.*, No. 3:15-cv-1026-M, 2015 WL 8010920 (N.D. Tex. Dec. 7, 2015) (discussing standards under amended Rule 26(b)); *Noble Roman’s, Inc. v. Hattenhauer Distrib. Co.*, No. 1:14-cv-01734-WTL-DML, 2016 WL 1162553, at *3 (S.D. Ind. Mar. 24, 2016) (limits and breadth of discovery under Rule 26 also apply to Rule 45 third party subpoenas).

proportionality factors] in reaching a case-specific determination of the appropriate scope of discovery.”¹⁰

Comment 2.b: Weighing the accessibility¹¹ and associated expense and burden of discovering relevant information, as well as the discovery needed in a given case, requires a nuanced and often iterative approach.¹² Although any one source of information is unlikely to be the most convenient, least burdensome, and least expensive, proportionate discovery is not defined by a “perfect fit” and cannot be reduced to a simple quantitative formula. For this reason, it is important that the parties confer regarding available sources and make meaningful disclosures about the types of information found in those sources.¹³ Cooperation in the meet and confer process can focus discovery on

10. FED. R. CIV. P. 26 advisory committee’s note.

11. This *Commentary* does not address the relationship between proportionality and the “Specific Limitations on Electronically Stored Information” that apply to sources of ESI that are not reasonably accessible under Federal Rule of Civil Procedure 26(b)(2)(B). See The Sedona Conference, *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, THE SEDONA CONFERENCE (July 2008), <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Preservation%20Management%20and%20Identification%20of%20Sources%20of%20Information%20that%20are%20Not%20Reasonably%20Accessible>.

12. See, e.g., *Siriano v. Goodman Man. Co. L.P.*, No 2:14-cv-1131, 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015) (ordering discovery conference to discuss phasing and directing parties to “engage in further cooperative dialogue in an effort to come to an agreement regarding proportional discovery”); *Sender v. Franklin Res., Inc.*, No. 11-cv-03828-EMC (SK), 2016 WL 814627, at *2 (N.D. Cal. Mar. 2, 2016) (ordering single Rule 30(b)(6) deposition to cover enumerated topics in lieu of written discovery and five depositions “where it is debatable whether the deponents are the appropriate individuals”).

13. See Ariana J. Tadler, *APB To Requesting Parties: Prepare for Proportionality*, PRACTICAL LAW (Nov. 15, 2015) (encouraging transparency during the

finding relevant ESI from the most readily available sources and thereby reduce the burden of production.

For example, the responding party may have already collected, searched, processed, and reviewed a significant amount of ESI for a similar litigation or government investigation.¹⁴ If the requesting and responding parties in a new matter addressing similar issues agree on a targeted production from the information already produced, this ESI collection presumably can be produced expeditiously and without undue burden. If the responding party has confidentiality or other concerns regarding the ESI to be produced in the new matter, after early resolution of such concerns, the resulting ESI production can be made without undue burden.¹⁵

Comment 2.c: In the early stages of litigation, application of the proportionality factors may be complicated by the parties' and the court's lack of information. It may be difficult to determine all of the claims and defenses or the factual or legal issues

Rule 26(f) conference since a responding party frequently has "better information (and sometimes the only information) to support claims of undue burden or expense"); Philip J. Favro & Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 954 (2012) ("[P]arties seeking the protection of proportionality principles must engage in reasonable, cooperative discovery conduct.").

14. *In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301 (S.D.N.Y. 2002) (lifting PSLRA stay to allow discovery in subsequent civil litigation of documents previously provided to governmental entities).

15. *In re Bayer Phillips Colon Health Probiotic Sales Practices Litig.*, No. 11-cv-3017, at 2-3 (JLL) (JAD) (D.N.J. May 7, 2015) (finding that confidential or irrelevant documents were not subject to production simply because they were previously provided to government; parties to meet and confer to reach agreement on document issues with plaintiffs having the right to seek to compel production of additional documents in absence of an agreement).

that will ultimately be critical in the litigation. Therefore, a proportional approach to discovery must be measured by the information available to the parties “as of the time” requests, responses, or objections are served.¹⁶ A requesting party may lack sufficient information to understand the burden or expense associated with responding to discovery, while a responding party may not fully appreciate the importance of the discovery to the ultimate disposition of the case. In any event, a proportionate assessment of the needs of the case requires more than conjecture or unfounded assertions.¹⁷

For these reasons, 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 available from the most accessible and least expensive sources.¹⁸ Thus, it may be appropriate for parties to focus initially on the ESI of certain key custodians or certain key time periods that may be less burdensome to collect and search. Phasing may allow the parties to develop the facts of the case sufficiently to determine

16. See *Lifeguard Licensing Corp., v. Kozak*, 15 Civ. 8459 (LGS)(JCF), 2016 WL 3144049, at *3 (S.D.N.Y. May 23, 2016) (observing that amended “Rule 26(b)(1) makes no distinction between claims and defenses; to be discoverable, information must be ‘relevant to a party’s claim or defense.’ And the plain language of the Rule does not provide for discovery of ‘likely,’ ‘anticipated,’ or ‘potential’ claims or defenses.”).

17. *Salazar v. McDonald’s Corp.*, No. 14-cv-02096-RS(MEJ), 2016 WL 736213 (N.D. Cal. Feb. 25, 2016) (rejecting defendant’s generalized arguments regarding cost and burden); *Cargill Meat Solutions Corp. v. Premium Beef Feeders, LLC*, No. 13-cv-1168-EFM-TJJ, 2015 WL 3937410 (D. Kan. June 26, 2015) (rejecting arguments of undue burden based on “unsupported estimate” of cost and “unsubstantiated” claims that discovery is cumulative and duplicative).

18. *Doyle v. Gonzalez*, No. CV-10-0030-EFS, 2011 WL 611825 (E.D. Wash. Feb. 10, 2011) (phasing discovery based on city’s limited financial resources with court ordering searches of city’s servers based on 31 terms rather than 10 proposed by city).

how to efficiently and effectively target subsequent discovery.¹⁹ In addition, phasing discovery may allow the parties to focus first on the information that will be most helpful in assessing litigation risk and facilitating settlement discussions, or on case-dispositive legal issues that can be decided with minimal factual development.²⁰ An agreement to engage in phased discovery should not preclude a party from later seeking additional relevant discovery, nor impose on the requesting party a heightened burden under Rule 26(b)(1).²¹ In short, phased discovery should be viewed as a way to promote the objectives of Rule 1.²²

19. *United States ex rel. Oughatiyan v. IPC the Hospital Company, Inc.*, No. 09 C 5418, 2015 WL 4249195 (N.D. Ill. July 14, 2015) (ordering phased discovery in nationwide False Claims Act case, which alleged wrongdoing from January 2003 to the present, that focused initially on defendant's operations in seven states and for the period from 2014 through date of Government complaint); *Barrera v. Boughton*, No. 3:07-cv-1436 (RCN), 2010 WL 3926070 (D. Conn. Sept. 30, 2010) (granting in part plaintiff's motion to compel with phasing of ESI discovery by ordering review of electronic information from three individuals for period shorter than that sought by plaintiffs and longer than that proposed by defendants).

20. *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (citing *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289 (2010), court ordered parties in longstanding case to meet and confer on phasing of discovery "to identify which claims are most likely to go forward and concentrate their discovery efforts in that direction before moving on to other claims").

21. *Strauch v. Compu. Sci. Corp.*, No. 3:14 CV 956 (JBA), 2015 WL 7458506 (D. Conn. Nov. 24, 2015) (allowing defendant to use its proposed search terms for production but without prejudice to plaintiffs seeking additional documents if they found production to be insufficient); *Gardner v. Continental Cas. Co.*, No. 3:13 CV 1918 (JBA), 2016 WL 155002, at *3 (D. Conn. Jan. 13, 2016) (citing *Strauch*, court ordered parties to discuss various document review approaches, without prejudice to plaintiffs renewing their motion if parties did not reach agreement).

22. Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED.

Parties who wish to conduct phased discovery must communicate with one another about the issues relevant to the litigation and make meaningful disclosures about the repositories—both accessible and inaccessible—that may contain relevant information.²³ Moreover, the parties must cooperate with one another to prepare and propose to the court a phased discovery plan.

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

Comment 3.a: Although the Federal Rules do not set forth specific deadlines for completing discovery, courts often set discovery deadlines in accordance with their own scheduling orders or local rules. Courts may also control the sequence of fact and expert discovery, set specific dates for completion of document production, or limit the time period in which parties can raise discovery disputes. Setting deadlines for substantial completion of discovery (or certain phases of discovery) can reduce incentives for a party to manipulate or inappropriately prolong the discovery process with burdensome requests or inappropriate objections.

Comment 3.b: Propounding discovery requests at the early stages of the litigation allows parties time to explore compliance with the discovery requests, consider proportionality issues,

CTS. L. REV. 19 (2015) (touting the virtues of phasing as a “practical solution” to particular challenges in the discovery process).

23. *In re Bard IVC Filters Products Liability Litigation*, No. MDL 15-02641-PHX DGC, 2016 WL 4943393 (D. Ariz. Sept. 16, 2016) (observing that the “proportionality requirement” mandates “input from both sides” in order to yield success in discovery).

and bring any disputes before the court for resolution.²⁴ Indeed, Rule 26(d)(2) permits a party to propound document requests prior to the Rule 26(f) meeting between the parties to enable counsel to use that conference to identify and attempt to resolve potential discovery disputes.²⁵ This process allows time for meaningful good faith discussions regarding discovery and facilitates discussion of the proportionality factors by the parties. Results of the Rule 26(f) meeting should be embodied in the Rule 26(f)(3) discovery plan, which serves as a useful tool for the parties to address the numerous discovery issues set forth in the Rule. Attention to these issues at an early stage can help shape the discovery process, give the parties the opportunity to resolve e-discovery issues, and allow the court to provide guidance and rulings on issues that the parties cannot resolve.

Comment 3.c: 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 grew out of the responding party's own action or inaction.²⁶ In addition, the court may consider the time at which the issue arose and whether the requesting party should have raised the issue earlier.²⁷

24. Similarly, parties should also take into account the proportionality factors in connection with sending or responding to a preservation letter.

25. Although parties are now permitted to serve document requests prior to the Rule 26(f) conference, for purposes of compliance with response timing, the requests are considered served on the date of the first Rule 26(f) conference.

26. United States *ex rel.* Guardiola v. Renown Health, No. 3:12-cv-00295-LRH-VPC, 2015 WL 5056726, at *4-6 (D. Nev. Aug. 25, 2015) (citing defendant's storage practices in finding that email was reasonably accessible and ordering its retrieval and production).

27. Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 506-08 (D. Md. 2009) (spoliation motion "should be filed as soon as reasonably possible after discovery of the facts that underlie the motion"); Cottle-Banks v. Cox

Although a party's conduct is not *per se* a proportionality factor, failure to engage in early, meaningful discussions designed to develop a discovery plan and avoid potential disputes may properly affect the outcome of any proportionality determination that a court makes. This is appropriate because 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)." ²⁸

Comment 3.d: Information retention policies may also affect the proportionality analysis. Where a party's information retention policies serve reasonable organizational or commercial purposes, burden, expense, or delay attributable to such policies should not be held against the party claiming burden. ²⁹ Conversely, where information retention policies do not serve such purposes, associated arguments of burden, expense, or delay should be discounted. ³⁰

Comment 3.e: The failure to notify the requesting party that relevant ESI is being withheld on the basis of proportionality

Comms., Inc., No. 10-cv-2133-GPC (WVG), 2013 WL 2244333, at *16 (holding as untimely a spoliation motion filed nine months after issue arose).

28. FED. R. CIV. P. 37(f). See *Skepkek v. Roper & Twardowsky, LLC*, No. 11-4102-KHV, 2014 WL 289470, at *3 (D. Kan. Jan. 27, 2014) (refusing to impose sanctions in part because both parties at fault for failing to adequately confer at Rule 26(f) conference regarding ESI production).

29. See *Solo v. United Parcel Service Co*, No. 14-12719, 2017 WL 85832 (E.D. Mich. Jan. 10, 2017) (reasoning the defendant had a "valid business reason . . . for storing older data on backup tapes" and declining to order its production).

30. See *United States ex rel. Guardiola v. Renown Health*, No. 3:12-cv-00295-LRH-VPC, 2015 WL 5056726, at *4-*6 (D. Nev. Aug. 25, 2015) (rejecting a responding party's claims of inaccessibility, undue burden, and undue cost given its reliance on disaster recovery tapes for common law preservation purposes).

should also be weighed against the responding party. The parties should engage in discussions regarding the limits of the search proposed or performed for responsive information to address the scope of such discovery.³¹

Comment 3.f: The resolution of these and other disputes can be fact-intensive, requiring the court to assess whether the requesting and responding parties complied with their discovery obligations, the degree of culpability involved, and the prejudice to the moving party.

Principle 4: The application of proportionality should be based on information rather than speculation.

Comment 4.a: Rule 26(b)(1) provides that in considering whether to limit discovery that may be disproportionately burdensome or expensive, courts should consider “the importance of the discovery in resolving the issues.” In other words, the court may limit discovery if the information sought, while relevant, is not sufficiently important to warrant its production.³² This issue often arises when discovery requests seek information that is duplicative, cumulative, or not reasonably accessible.³³

31. FED. R. CIV. P. 34 advisory committee’s note.

32. An alternative to limiting burdensome or expensive discovery is to shift its cost to the requesting party. *See* FED. R. CIV. P. 26(c)(1)(B); *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.”); *McPeck 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.”).

33. FED. R. CIV. P. 26(b)(2)(C)(i). *See also* *Mckinney/Pearl Rest. Partners, L.P., v. Metro. Life Ins. Co.*, No. 3:14-cv-2498-B, 2016 WL 98603, at *3 (N.D.

Comment 4.b: When asked to limit discovery on the basis of proportionality, courts should consider the likely benefits of the information sought for resolving factual issues in dispute. Discovery must be limited if producing the requested information is disproportionate to its likely benefits, considering the Rule 26(b)(1) proportionality factors. Performing this kind of assessment can be particularly challenging because it may be difficult to evaluate the importance of the requested information until it is actually produced.³⁴

Tex. Jan. 8, 2016) (“[J]ust as was the case before the December 1, 2015 amendments, under Rules 26(b)(1) and 26(b)(2)(C)(iii), a court can—and must—limit provider discovery that it determines is not proportional to the needs of the case . . . and must do so even in the absence of a motion.”); *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168, 2012 WL 1299379, at *7–10 (D.N.J. Apr. 16, 2012) (applying proportionality standards to curtail discovery requests that sought marginally responsive information that was duplicative of ESI already produced in discovery). Courts may also employ sampling for the purpose of evaluating a request to shift costs. *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.”).

34. See FED. R. CIV. P. 26(b)(2) advisory committee’s note (“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.”); and *Oracle v. Google*, No. 10-cv-03561-WHA (DMR), 2015 WL 7775243, at *2 (N.D. Cal. Dec. 3, 2015) (Both parties failed to provide sufficient information to address the proportionality factors, so the court had to make its “best judgment based on limited information before it.”).

In some cases, it may be clear that the information requested is important or perhaps even outcome-determinative.³⁵ In other cases, extrinsic information may be required to demonstrate the importance of the information sought or the effort required in order to produce it.³⁶

Extrinsic information can take many forms and may include affidavits, estimates of the expenses to be incurred based upon experiences from prior litigation, industry experiences, or another basis supported by research or analysis performed. Such information may include the parties' reasoned statements regarding the likely importance of the requested information, whether the requested information was created by "key players,"³⁷ whether prior discovery permits an inference that the requested information is likely to be important,³⁸ whether the creation of the information requested was contemporaneous with

35. See *Covad Comms. 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).

36. *Ashmore v. Allied Energy*, No. 8:14-cv-00227-JMC, 2016 WL 301169, at *3 (D.S.C. Jan. 25, 2016) ("Defendant did not submit any documentation (i.e., statement of work or invoice) that either establishes the proposed cost of production or a cost estimate for an alternative form of production (such as by disc or hard drive). Moreover, there is no information before the court regarding Defendant's resources or financial condition to assess its ability to fund the cost of the document production. . . . Without the aforementioned cost/financial information, the court concludes that Defendant cannot demonstrate that the document production to Plaintiff is unduly burdensome, unreasonable, or oppressive.") (citations omitted).

37. *Zubulake*, 217 F.R.D. at 317 ("[E]mail constituted a substantial means of communication among UBS employees.").

38. *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 WL 3825291, at *3 (E.D. Mo. Dec. 27, 2006) ("In light of the Samsung email, the Court finds

key facts in the case,³⁹ or whether the information requested is unique.⁴⁰ Any attempt to evaluate the importance of requested information will be fact-specific and vary from case to case.

Comment 4.c: In some circumstances, the courts may order sampling of the requested information to determine whether it is sufficiently important to warrant discovery.⁴¹

To the extent the parties decide to use sampling, they should consider how the process should be performed, considering the needs of the case, in order to obtain accurate and persuasive information. For example, will an extrapolation based on random sampling or statistical sampling of the larger universe be sufficient?⁴² The parties should also consider whether disclosure of

that other deleted or active versions of emails may yet exist on defendants' computers.").

39. *Ameriwood Indus., Inc.*, 2006 WL 3825291, at *5 ("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.").

40. See FED. R. CIV. P. 26(b)(2)(C)(i) (providing that courts must limit discovery that is "unreasonably cumulative or duplicative").

41. See FED. R. CIV. P. 26(b)(2) advisory committee's note ("[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."); *Quintana v. Claire's Boutiques, Inc.*, No. 5:13-cv-00368-PSG, 2014 WL 234219, at *2 (N.D. Cal. January 21, 2014) (explaining that sampling advances the goal of proportionality under the Rules).

42. In *Larson v. AT&T Mobility LLC*, 687 F. 3d 109 (3rd Cir. 2012), the U.S. Court of Appeals for the Third Circuit overturned a district court decision on the grounds that it would be unreasonable for defendant Sprint to search its billing records in order to identify class members for individual notice under Fed. R. Civ. P. 23 in a class action against cellular-phone-service providers alleging that providers' contractual flat-rate early termination fee was an il-

the entire sample is appropriate, particularly since disclosure could result in the production of non-relevant information.⁴³ For example, in order to demonstrate the absence of unique responsive information, a party may consider providing a description or examples of the irrelevant documents to the requesting party in order to provide that party with equal knowledge as to what would be yielded from a search of those sources.⁴⁴ This transparency is especially important if cost-sharing has been raised.⁴⁵ In addition, sampling can be used to demonstrate the rate of responsive information, to extrapolate the volume (and therefore costs) associated with reviewing the potentially responsive ESI. Further, using sampling to demonstrate the rate of responsive

legal penalty. The court cited Principle 4 of The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289 (2010), and noted that the availability of statistical sampling of Sprint's billing records as a means to provide an estimate of the number of class members who could be identified; and once that estimate was made, the Court could weigh the "anticipated results, costs and amount involved" and determine whether a full search of Sprint's databases would be reasonable. *Id.* at 130–31.

43. See *In re Biomet M2a Magnum Hip Implant Products Liability Litig.*, No. 3:12-MD-2391, 2013 WL 6405156, at *2 (N.D. Ind. Aug. 21, 2013) (declining to order the production of non-responsive documents). See also Hon. John M. Facciola & Philip J. Favro, *Safeguarding the Seed Set: Why Seed Set Documents May Be Entitled To Work Product Protection*, 8 FED. CTS. L. REV. 1 (2015) (explaining that a sample may constitute work product in certain instances).

44. *In re Lithium Ion Batteries Antitrust Litig.*, 2015 U.S. Dist. LEXIS 22915, at *51–56 (N.D. Cal. Feb. 24, 2015) (ordering a protocol that requires random sampling for disputed search terms and disclosing to requesting party all nonprivileged documents in the sample).

45. Fed. R. Civ. P. 26(c)(1)(B) expressly provides that courts may issue protective orders "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery." While courts may expressly allocate expenses between the parties, this "does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding." FED. R. CIV. P. 26 advisory committee's note.

information can support an argument that a data source is or is not likely to contain responsive information.

Comment 4.d: The responding party may demonstrate that the burden or expense of producing the requested information outweighs its potential importance. Burden and expense should be supported by hard information and not by unsupported assertions.⁴⁶ For example, if a party claims that a search would result in too many documents, the party should run the search and be prepared to provide the opposing party with the number of hits and any other applicable qualitative metrics.⁴⁷ If the party claims that the search results in too many irrelevant hits, the party may consider providing a description or examples of irrelevant documents captured by the search.⁴⁸ Quantitative metrics in support of a burden and expense argument may include

46. See *Mckinney/Pearl Rest. Partners, L.P., v. Metro. Life Ins. Co.*, No. 3:14-cv-2498-B, 2016 WL 98603, at *4 (N.D. Tex. Jan. 8, 2016) (A party seeking to resist discovery on proportionality grounds bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation by “coming forward with specific information to address—insofar as that information is available to it—[the proportionality considerations].”); see also *Herrera-Velazquez v. Plantation Sweets, Inc.*, No. CV614-127, 2016 WL 183058, n.6 (S.D. Ga. Jan. 14, 2016) (The burdens to show lack of proportionality has not fundamentally changed in Rule 26 compared to the earlier version of Rule 26 and so “a party seeking to resist discovery must come forward with specific information.”) (citing *Carr v. State Farm Mutual Auto Ins. Co.*, No. 3:15-cv-1026-M, 2015 WL 8010920, at *6 (N.D. Tex. Dec. 7, 2015)).

47. *Finisar Corp v. Nistica Inc.*, No. 13-cv-03345-BLF (JSC), 2014 U.S. Dist. LEXIS 172414 (N.D. Cal. Dec 12, 2014) (“The Court expects that if a party insists that a search term results in too many hits, the party will have run the search and will be able to provide the opposing party with the number of hits and specific examples of irrelevant documents captured by the search. Blanket statements that certain search terms are unduly burdensome do not constitute meeting and conferring in good faith.”).

48. *Id.*

the projected volume of potentially responsive documents. It may also encompass the costs associated with processing, performing data analytics, and review, taking into consideration the anticipated rate of review and reviewer costs, based upon reasonable fees and expenses.⁴⁹

Principle 5: Nonmonetary factors should be considered in the proportionality analysis.

Comment 5.a: The Federal Rules recognize that the proportionality analysis encompasses important nonmonetary considerations. This includes “the importance of the issues at stake in the action,” “the parties’ relative access to relevant information,” “the parties’ resources,” “the importance of the discovery in resolving the issues,” and “whether the burden . . . of the proposed discovery outweighs its likely benefit.”

Comment 5.b: Regarding “the importance of the issues at stake in the action,” the committee note to Rule 26(b)(1) states:

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that

49. Compare *Bridgestone Americas, Inc. v. Int’l Bus. Mach. Corp.*, No. 3:13-cv-1196, 2014 WL 4923014 (M.D. Tenn. July 22, 2014) (granting plaintiff’s request to use technology-assisted review as a discovery search methodology over defendant’s objection given the number of documents to be reviewed and the anticipated cost of conducting that review), with *Labrier v. State Farm Fire & Cas. Co.*, No. 2:15-cv-04093-NKL, 2016 WL 2689513 (W.D. Mo. May 9, 2016) (rejecting defendant’s assertions of undue burden based on time and cost given that the sought after discovery is “at the very heart of this litigation”).

many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.⁵⁰

Thus the rule recognizes that cases may have importance far beyond the monetary amount involved. For example, cases concerning constitutional or statutorily created rights (such as those brought under 42 U.S.C. § 1983 or Title VII)⁵¹ may warrant discovery that otherwise might not be indicated based on the amount in controversy which could be relatively minimal.⁵²

50. FED. R. CIV. P. 26(b)(1) advisory committee’s note.

51. *Doe v. Trustees of Boston College*, No. 15-10790-DJC, 2015 WL 9048225 (D. Mass. Dec. 16, 2015) (citing committee note regarding “vitally important personal or public values” in gender bias case under Title IX); *Morales v. Turman*, 59 F.R.D. 157, 159 (E.D. Tex. 1972) (quoting *United States v. Kohler*, 9 F.R.D. 289, 291 (D. Pa. 1949)) (“When important civil rights are in issue in complex litigation of widespread concern, a court must make every effort to enhance the fact-finding process” and the “court’s discretion must be guided by ‘considerations of policy and of necessity, propriety and expediency in the particular case at hand.’”).

52. *See, e.g., McHenry v. Chadwick*, 896 F.2d 184, 189 (6th Cir. 1990) (finding in a civil rights case that “the value of the rights vindicated goes beyond the actual monetary award, and the amount of the actual award is not controlling”); *see also In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 228, 232 (E.D. Pa. 2014) (finding that in some cases, such as antitrust cases, ESI’s benefits “vastly outweigh its costs,” because “the issues are important, the financial stakes of both discovery and damages are high, and there are important reasons of public policy justifying broad discovery in antitrust cases, regardless of the result. Some of the landmark antitrust cases of the last 50 years

Similarly, nonmonetary relief, such as an injunction or declaratory relief, may also factor into the proportionality analysis when appropriate.⁵³ Public interest or public policy considerations, such as deterrence or wholesale change in business or industry practices, may weigh in favor of broader discovery. In other cases, nonmonetary factors may weigh in favor of limiting discovery, such as when the discovery, for example, is used to wage a war of attrition, to coerce a party, or to infringe on the privacy rights of third parties.⁵⁴

Comment 5.c: Another nonmonetary factor directs parties and courts to consider the “parties’ relative access to information.” As the committee note states:

[t]he direction to consider the parties’ relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called “information asymmetry.” One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be

have resulted in changes in normative corporate behavior. Given contemporary tools of discovery, ESI plays an important part, and must be considered in ruling on discovery disputes.”).

53. See, e.g., *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968) (“In dollars Employee’s claim for past due wages may be tiny. But before [this Court], it is enough on which to launch a full scale inquiry into the charged unlawful motivation in employment practices. It is even more so considering the prayer for injunction as a protection against a repetition of such conduct in the future.”).

54. *United States v. Univ. of Nebraska at Kearney*, No. 4:11CV 3209, 2014 WL 4215381 (D. Neb. Aug. 25, 2014) (denying discovery requested by the plaintiff because it was overly broad and would impact the privacy interests of students).

readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.⁵⁵

Cases involving “information asymmetry” may be particularly appropriate for creative use of the proportionality principles to ensure that a party has access to the discovery to allow it to present its case while at the same time avoiding unnecessary discovery. For example, if the parties can agree on certain stipulated facts, then there may be no need for discovery on those stipulated facts.⁵⁶

Comment 5.d: A party’s nonmonetary resources may also affect a proportionality analysis.⁵⁷ A party’s resources, or lack

55. FED. R. CIV. P. 26(b)(1) advisory committee’s note.

56. Alternatively, the parties might consider other creative means to address “information asymmetry.” In the employment context, for example, the parties might consider use of the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, *available at* <https://www.fjc.gov/sites/default/files/materials/2017/DiscEmpl.pdf>.

57. *See* *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 305–06 (S.D.N.Y. 2012) (“Goldman Sachs has ample resources to respond in discovery. Indeed, at its direction, Aon Hewitt is regularly performing special projects on the PeopleSoft database similar to the search requested by the plaintiffs.”); *Major Tours, Inc. v. Colorel*, CIV. 05-3091 JBSJS, 2009 WL 3446761, at *4 (D.N.J. Oct. 20, 2009), *aff’d*, 720 F. Supp. 2d 587 (D.N.J. 2010) (protecting NJ agency from production based on several proportionality factors, but mainly because “[g]iven the complexity and scope of this litigation, it is apparent that defendants have already spent hundreds of thousands of dollars in time and money on the defense of the case. No party, including the State, has an unlimited litigation budget to pay for document production efforts that in all likelihood are of marginal benefit.”); *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001) (explaining its hesitance to require the government to restore backup tapes and ordering test search on data subset to determine likelihood that more complete restoration would be productive).

thereof, may encompass any number of items including, but not limited to, personnel, technology, intellectual property, health, and overall financial strength (or weakness).⁵⁸ The monetary aspect of a party's resources are appropriately considered in terms of Principle 2, but courts and practitioners should also be mindful that nonmonetary aspects of a party's resources could present distinct factors that serve to justify the requested discovery,⁵⁹ limit the extent of the discovery sought,⁶⁰ or influence questions regarding cost allocation, among other things.⁶¹ For example, it may not be appropriate in some instances to require a party—be it an individual, business, or government entity—to divert its personnel and other assets to discovery tasks at the expense of the party's intended purposes.⁶²

Comment 5.e: The final nonmonetary factors—"the importance of the discovery in resolving the issues" and "whether

58. However, assertions of inadequate resources should be used carefully and only in good faith. *Williams v. Santiago*, CIV A. 04-4841, 2006 WL 1737574, at *3 (E.D. Pa. June 22, 2006) (rejecting party's claim of inadequate resources as potentially a "calculated stratagem" in declining to set aside default judgment).

59. See *Croman Corp. v. United States*, 94 Fed. Cl. 149, 153 (2010) (declining to reopen discovery over argument that government trial counsel's limited resources had unfairly limited government's discovery during now-expired discovery period).

60. *Hunter v. Ohio Indem. Co.*, No. 06-3524, 2007 WL 2769805, at *1 (N.D. Cal. Sept. 21, 2007) (denying effort to depose individual with minimal knowledge of case who was principal caregiver to spouse with life-threatening illness).

61. See *Strauch v. Compu. Sci. Corp.*, Civ. Action No. 3:14-cv-00956, 2015 WL 7458506, at *3 (D. Conn. Nov. 24, 2015) (discussing alternative test methods outside of the proportionality context).

62. *McPeck v. Ashcroft*, 202 F.R.D. at 33–35 (balancing DOJ's need to perform public tasks against litigation needs); *Major Tours*, 2009 WL 3446761, at *4 (citing limited state resources in ruling against request for review of backup and archived emails).

the burden . . . of the proposed discovery outweighs its likely benefit” — are discussed in the commentaries to Principle 2 and Principle 4.

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

Comment 6.a: As the volume of ESI continues to increase so does the volume of discoverable information. The responding party generally selects the technology to identify relevant information.⁶³ This can lead to significant cost savings in furtherance of proportionality. The advent of more sophisticated search methodologies has created avenues to reduce the burdens associated with identification, review, and production of relevant documents.⁶⁴ However, there is no obligation to maximize electronic discovery efficiencies at the expense of other legitimate organizational goals.

63. *Hyles v. New York City*, 10-cv-3119, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016) (“Under Sedona Principle 6, the City as the responding party is best situated to decide how to search for and produce ESI responsive to Hyles’ document requests. . . . it is not up to the Court, or the requesting party (Hyles), to force the City as the responding party to use TAR when it prefers to use keyword searching.”). *But see* Order Re: Implementation of Predictive Coding Regimen, *Indep. Living Ctr. of S. Cal. v. City of L.A.*, 2:12-cv-00551-FMO-PJW, at *1 (C.D. Cal. June 26, 2014) ECF No. 375 (ordering the use of technology-assisted review to search more than 2 million documents after “little or no discovery was completed” before the discovery cutoff and the parties had ongoing disputes after “months of haggling” over search terms that yielded large numbers of documents for review).

64. *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950(AT)(JCF), 2014 WL 716521, at *1 (S.D.N.Y. Feb. 18, 2014) (describing how advanced search methodologies can “elide[] the search process with substantive determination of relevance and [have] the advantage of saving resources for the producing party”); *Malone v. Kantner Ingredients, Inc.*, Case No. 4:12-CV-3190, 2015 WL 1470334, at *3 n.7 (D. Neb. Mar. 31, 2015) (“Predictive coding is now promoted (and gaining acceptance) as not only a

The responding party may end up selecting one or more technologies that meet its overall needs. The fact that a technology is not the ideal fit for a particular case should not be held against that party unless the technology is inadequate. For example, one technology may excel in reading rare file formats while another may efficiently group email into discussion threads or families, or deduplicate similar files more effectively. A responding party who refuses to consider the use of an appropriate technology to reduce e-discovery burdens, even when it is reasonably available and within that party's resources, will have a difficult time making any later claim based on disproportionality or undue burden caused by that refusal.⁶⁵

Comment 6.b: Courts will increasingly consider available technology in the proportionality analysis.⁶⁶ However, courts should leave the choice of technological methods to the re-

more efficient and cost effective method of ESI review, but a more accurate one.”).

65. *See, e.g.*, *Harris v. Subcontracting Concepts, LLC*, Case No. 1:12-MC-82, 2013 WL 951336, at *5 (S.D.N.Y. Mar. 11, 2013) (rejecting a burden argument on the grounds that “[w]ith the advent of software, predictive coding, spreadsheets and similar advances, the time and cost to produce large reams of documents can be dramatically reduced”).

66. *See, e.g.*, *Chevron Corp. v. Snaider*, 78 F. Supp. 3d 1327, 1341 n.9 (D. Col. Jan. 15, 2015) (noting that, in addressing burden, defendant did “not address the likelihood that in a case such as this computer-assisted review would no doubt be invoked, and while that is costly, it is much more efficient than assigning individuals to review a large volume of paperwork”); *Deutsche Bank National Trust Co. v. Decision One Mortgage Co., LLC*, No. 13-L-5823, 2014 WL 764707, at *1 (Ill. Cir. Ct. Jan. 28, 2014) (stating that “if the parties agree that predictive coding would be appropriate in this case, they are encouraged to use that tool”).

sponding party so long as the methods are reasonable and appropriate to meet the needs of the case.⁶⁷ While technology may create efficiencies and cost savings, it is not a panacea and there may be circumstances when the costs of technology outweigh the benefits of its use.

Comment 6.c: Early test searches or early case assessment technology might facilitate agreement on targeting collections or searches using certain date ranges, platforms or sources, file types, or custodians. In addition, the parties may need to negotiate whether or which search methods might be necessary to further assist in identifying relevant ESI.⁶⁸ Preliminary steps of this sort may help the parties agree on cooperative discovery efforts and potentially yield savings by, for example, eliminating the need for some searches or date ranges, identifying custodians, or refining search terms to more effectively target and retrieve relevant information.⁶⁹

67. *Hyles v. New York City*, 10-cv-3119, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016) (relying on Principle 6 of *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, Second Edition* (THE SEDONA CONFERENCE, 2007, available at <https://thesedonaconference.org/publication/The%20Sedona%20Principles>) to deny plaintiff's request that defendant use technology-assisted review to help identify and produce responsive ESI).

68. *See, e.g., Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 506 n.71 (S.D.N.Y. Aug. 15, 2013) (describing recently developed technology using metadata to help address certain matters in the case).

69. *See, e.g., The Sedona Conference, Commentary on Achieving Quality in the E-Discovery Process*, 15 SEDONA CONF. J. 265, 288 (2014) ("A practitioner may use metrics, such as the number of included or excluded documents by keyword or filtering criteria, to evaluate the outcome. Examining keywords that return high and low numbers of 'hits' can uncover issues with how the search was constructed, the choice of terms, or even issues with the data."); *Vasudevan Software, Inc. v. MicroStrategy Inc.*, No. 11-cv-06637-RS-PSG; 2012 WL 5637611, at *5 (N.D. Cal. Nov. 15, 2012) (requiring the parties to meet and confer regarding search term hit counts for each custodian and

Parties should consider involving individuals with expertise or knowledge of the technological methods at issue to help in this process. Further efficiencies may be realized by including such individuals in the meet and confer process and in court conferences.

term); *In re* Lithium Ion Batteries Antitrust Litig., 2015 U.S. Dist. LEXIS 22915, at *51–56 (N.D. Cal. Feb. 24, 2015) (allowing language to be included in search protocol calling for random sampling of documents that hit on disputed search terms and disclosing to requesting party all nonprivileged documents in the sample).