

Corporate Litigation

The Sedona Conference Issues Helpful and Important Commentary on the Proportionality Concept Applicable to Electronic Discovery

Action Item: The following set of six principles proposed by the Sedona Conference Working Group on Electronic Document Retention and Production should serve as practical guidance for litigants adhering to the proportionality standard now applicable to the e-discovery preservation and production process.

The Sedona Conference Commentary

The Sedona Conference is a nonprofit legal policy research and education organization that has a working group comprised of judges, attorneys, and electronic discovery experts who are dedicated to resolving electronic discovery issues.¹ The Sedona Conference has become a thought leader in the e-discovery space and its “Principles” and “Working Group” guideline papers are routinely cited as authority by courts and litigants across the country in connection with e-discovery disputes.² Since the Federal Rules of Civil Procedure (“FRCP”) were recently amended to significantly overhaul a party’s obligation to preserve, collect, and produce potentially relevant electronically stored information (“ESI”) and to interject the concept of “proportionality” into discovery, both courts and litigants have looked to the Sedona Conference for guidance. The most recent guidance from the Sedona Conference on these issues can be found in the 2016 public comment version of *The Sedona Conference Commentary on Proportionality in Electronic Discovery* (the “Sedona Commentary”).³ This note summarizes the Sedona “principles of proportionality” that should guide litigants throughout the proportionality analysis.

Recent Rule Changes

But first, here is a contextual primer on the relevant FRCP amendments:

- **Rule 26(b)(1)** was amended to emphasize the principle of proportionality, and now states that: “Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense *and proportional to the needs of the case...*”⁴ The rule lists six factors to be considered in determining proportionality—(1) “the importance of the issues at stake in the action,” (2) “the amount in controversy,” (3) “the parties’ relative access to relevant information,” (4) “the parties’ resources,” (5) “the importance of the discovery in resolving the issues, and” (6) “whether the burden or expense of the proposed discovery outweighs its likely benefit.”⁵
- **Rule 37(e)** was amended to address the parties’ obligations with respect to preserving ESI—in particular, by providing judges with a roadmap for remedying and/or punishing the unintentional loss or intentional spoliation of ESI that should have been preserved. The rule now requires parties moving for sanctions to show that ESI “should have been preserved in the anticipation or conduct of litigation,” but was lost because the other party “failed to take reasonable steps to preserve” it, and it “cannot be restored or replaced through additional discovery.”⁶ Upon finding prejudice from

lost ESI, a court may either order strictly-curative measures or impose sanctions (including presuming the information was unfavorable to the party that lost it, providing a negative inference jury instruction, or dismissing the case)⁷ if it finds the intent to deprive the other party of the information's use in the litigation.

The Six Principles

In light of these new rules' significant impact, the Sedona Commentary provides **six principles** to guide litigants throughout the proportionality analysis to be applied throughout the ESI preservation and production process. The principals and a brief summary of each appears below:

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.

- Rule 37(e) now addresses obligations arising prior to commencement. With pre-litigation preservation, litigants should be extra careful in determining what ESI is relevant, and therefore need be preserved. Since the failure to preserve a broad-enough swath of information at the outset can lead to permanent loss, parties are encouraged to convey the full substance of their claims/defenses and the types of information considered to be within the duty to preserve, and conduct a thorough investigation of the existence and location of relevant information, as early as possible.
- The proportionality factors set forth in Rule 26 can be considered in assessing the reasonableness of pre-litigation preservation. Courts analyzing preservation efforts are encouraged to apply the proportionality factors, along with the reasonableness considerations in Rule 37(e), while being mindful of the party's resources (as aggressive preservation efforts can be costly).

- Assuming proportionality, seven steps can be taken to meet preservation obligations: (1) in advance of litigation, having in place reasonable policies addressing legal preservation obligations that may arise; (2) identification of relevant custodians with knowledge of the matters in dispute; (3) discussion with custodians and other appropriate personnel to identify sources of unique ESI and other relevant information, including "non-custodial" sources; (4) preservation of the identified ESI; (5) suspension of information retention policies that might result in the routine deletion of unique relevant ESI; (6) maintenance of relevant ESI in a reasonably accessible format; and (7) documentation of preservation efforts undertaken.
- ESI retention policies and steps taken to preserve ESI should be discussed at the Rule 26(f) conference. Attorney-client privilege and attorney work product protections should not be used to withhold information about the existence, location, and accessibility of relevant information.

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.

- The court should use the information gathered from the parties and consider the Rule 26 proportionality factors to reach a case-specific determination of the proper scope of discovery. Because discovery often requires a nuanced and/or iterative approach, parties are encouraged to confer about their respective sources of discovery, and cooperate in the early stages to reduce the later burden of production. It may be appropriate to conduct discovery in phases (e.g., focus initially on certain key custodians or key time periods that are less burdensome to collect) so that parties can determine the facts of the case to decide how to effectively and efficiently go about subsequent discovery.

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

- Most courts issue orders establishing discovery deadlines—including setting outer limits on particular discovery phases (e.g., fact/expert), or substantial completion of discovery. Court-imposed deadlines reduce incentives to manipulate or inappropriately prolong the discovery process with burdensome requests or inappropriate objections.
- Courts should consider whether a responding party’s claimed undue burden or expense arose from its own action or inaction, and whether the issue could have been raised sooner. A court may sanction a party for failing to participate in good faith in developing and submitting a proposed Rule 26(f) discovery plan—in fact, the failure to engage in early, meaningful discussions to develop a discovery plan and avoid possible disputes may impact the outcome of a court’s proportionality determination. A responding party’s failure to notify of its withholding of relevant ESI based on proportionality should weigh against the responding party. But any burden, expense, or delay attributable to retention policies serving “reasonable organization or commercial purposes,” should not be held against the party claiming burden.

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

- The court may limit relevant discovery which is not sufficiently important to warrant production—e.g., information that is duplicative, cumulative, or not reasonably accessible.
- In determining proportionality, courts should consider if producing the information outweighs its likely benefits for resolving disputed factual issues. While, outcome-determinative information will have to be produced, the need for marginally beneficial information might have to be

proved with extrinsic information (e.g., reasoned statements regarding the likely importance of the information, whether it was created by “key players,” whether prior discovery permits an inference that it is likely to be important or unique, or whether its creation was contemporaneous with key facts). The producing party may similarly submit extrinsic evidence (e.g., affidavits, estimates of expenses) demonstrating the disproportionate effort needed to produce the information.

- In some circumstances, courts may order sampling of the requested information (e.g., extrapolation based on random sampling, or statistical sampling of the larger universe) to determine whether it warrants discovery. If used, sampling should be transparent, and disclosure of the entire sample will be appropriate.
- “Burden or expense” arguments need to be supported with concrete applicable qualitative metrics, not by unsupported assertions. Sufficient metrics include, without limitation, the number of hits and projected volume of potentially responsive documents, and the cost of processing, performing data analytics, and review.

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

- The nonmonetary considerations mentioned in the proportionality factors include, without limitation, the importance of the issues at stake, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving issues, and whether the burden of the proposed discovery outweighs its likely benefit. Some cases may have importance far beyond the monetary amount involved (e.g., cases concerning constitutional or statutorily created rights, public policy concerns).

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

- The responding party chooses the ESI technology it uses. Sophisticated search tools and databases, which have significantly lowered the cost of identifying potentially relevant information, bear directly on the proportionality analysis. While there is no obligation to maximize efficiencies at the expense of other legitimate organizational goals, at a minimum, the e-discovery means employed must be adequate. A party who refuses to consider using reasonably available technology (within that party’s resources) will have a hard time showing disproportionality or undue burden.
- E-discovery technology should be used as part of the early case assessment to help facilitate agreement on targeting collections or searches using certain date ranges, platforms, data sources, file types, or custodians. Such cooperation can potentially result in cost savings by limiting unnecessary discovery. Individuals with expertise or knowledge of the technological methods at issue should be utilized throughout the meet and confer process and in court conferences.

Conclusion

The above six principles should help litigants better understand their E-discovery obligations and expectations. Considering and/or applying these principles throughout the preservation and production process should help parties prepare for, and, in some cases avoid, the challenges of abiding by the new proportionality standard.

1. See Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2d ed. 2007) (hereinafter “Sedona Principles”).
2. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008) (citing Sedona Principles); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612-13 (S.D. Tex. 2010) (same).
3. See Sedona Conference WG1, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, (November 2016, Public Comment Version).
4. Fed.R.Civ.P. 26(b)(1).
5. *Id.*
6. Fed.R.Civ.P. 37(e).
7. Fed.R.Civ.P. 37(e)(2)(A-C).

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