

Consilio Institute: White Paper

EVERYTHING IN MODERATION: PROPORTIONALITY IN DISCOVERY

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EVERYTHING IN MODERATION: PROPORTIONALITY IN DISCOVERY

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I EVERYTHING IN MODERATION

For discovery, the two most significant amendments to the Federal Rules of Civil Procedure (“FRCP”) of the last two decades occurred in 2006 and 2015. The 2006 amendments marked the official dawn of the age of eDiscovery, incorporating references to electronically-stored information into the rules and their comments. The [2015 amendments](#)¹ revised, among other things, [FRCP 26\(b\)\(1\)](#),² which defines the scope of discovery. The change brought the existing-but-overlooked concept of proportionality front and center in an attempt to combat the runaway cost and scale of discovery in the digital era.

Before the 2015 Amendments

The pre-amendment version of FRCP 26(b)(1) focused on relevance first and foremost, as well as providing examples of the types of information to which requesting parties are entitled. Later in FRCP 26(b), in a section on limitations applicable to this general discovery scope rule, there was a provision that raised the issue of proportionality. Unfortunately, this limitation was generally overlooked by parties

and under-utilized by judges, leading to a lot of disproportional over-discovery (“... [the Committee had been told repeatedly that courts were not using these limitations as originally intended](#)”³). The December 2015 amendments attempted to address this issue head on by elevating and emphasizing this proportionality limitation.

After the 2015 Amendments

The 2015 amendments moved the proportionality limitation, from a later subclause, up to the FRCP 26(b)(1) definition of the scope of discovery itself, making it equal in importance to relevance and updating the list of factors to be considered:

(b) Discovery Scope and Limits.

(1) Scope in General. 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. [emphasis added]

The Committee Notes to the 2015 Amendments⁴ explain this is not an entirely new standard but a reemphasized one:



¹Order (U.S. Apr. 29, 2015), available at [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf).

²Fed. R. Civ. P. 26(b)(1), available at https://www.law.cornell.edu/rules/frcp/rule_26.

³Fed. R. Civ. P. 26(b)(1), Committee Notes on Rules—2015 Amendment, available at https://www.law.cornell.edu/rules/frcp/rule_26.

⁴Ibid.

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. **The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.** [emphasis added]

In general, courts responded to this change by increasing their focus on proportionality and beginning to treat it as a fundamental requirement for obtaining discovery, on par with relevance. Early examples of this shift can be seen in *Gilead Sciences*⁵ (“request is precisely the kind of disproportionate discovery that Rule 26 – old or new – was intended to preclude”) and *Takata Airbags*⁶ (“The recently amended Rule 26(b)(1) of the Federal Rules of Civil Procedure ‘crystallizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.’”).

Proportionality Elsewhere in the Rules

The concept of proportionality also appears elsewhere in the FRCP and in the Federal Rules of Evidence

(“FRE”). In the FRCP, it appears in two additional places relevant to discovery:

- First, [FRCP 26\(b\)\(2\)\(B\)](#)⁷ establishes a specific limitation on the discovery of ESI that is “not reasonably accessible because of undue burden or cost.” This is intended to allow for the realities of dealing with legacy systems and storage media. In practice, the analysis of whether there is “undue burden or cost” looks very similar to proportionality analyses under FRCP 26(b)(1).
- Second, [FRCP 37\(e\)](#)⁸ addresses what happens when spoliation of ESI occurs “because a party failed to take reasonable steps to preserve it.” The Committee Notes from the 2015 amendments make clear that proportionality is a “factor in evaluating the reasonableness of preservation efforts,” including consideration of the parties’ relative resources.

In the FRE, proportionality is incorporated into the [FRE 502\(b\)](#)⁹ analysis associated with determining whether “the holder of the privilege or protection took reasonable steps to prevent disclosure” and “reasonable steps to rectify the error” for the purposes of determining whether the disclosure results in privilege waiver.

ABOUT THIS WHITE PAPER

In this whitepaper, we will review each of the six proportionality factors enumerated in FRCP 26(b)(1), some example cases discussing them, and some other considerations. Additionally, we will review guidance from The Sedona Conference on incorporating proportionality considerations into your discovery processes.

⁵*Gilead Sciences, Inc. v. Merck & Co., Inc.*, No. 5:13-cv-04057-BLF (N.D. Cal. Jan. 13, 2016), available at <https://docs.justia.com/cases/federal/district-courts/california/candoe/5:2013cv04057/269618/211>.

⁶*In re Takata Airbag Prods. Liab. Litig.*, MDL No. 2599 (S.D. Fla. Mar. 1, 2016), available at https://ralphosey.files.wordpress.com/2016/12/in_re_takata_airbag_productionirrelevantfamilymembers.pdf.

⁷Fed. R. Civ. P. 26(b)(2)(B), available at https://www.law.cornell.edu/rules/frcp/rule_26.

⁸Fed. R. Civ. P. 37(e), available at https://www.law.cornell.edu/rules/frcp/rule_37.

⁹Fed. R. Evid. 502(b), available at https://www.law.cornell.edu/rules/fre/rule_502.

I SIX PROPORTIONALITY FACTORS

As noted above, the amended FRCP 26(b)(1) included an updated list of factors to be considered when assessing the proportionality of requested discovery. Those six factors are:

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
6. Whether the burden or expense of the proposed discovery outweighs its likely benefit

The Importance of the Issues at Stake

The first factor encourages consideration of how important the matters under dispute are to the broader legal and social context, to the parties involved, or to potential setting of precedent. For example, a products liability case might have public safety implications, or a class action suit might raise an important question about privacy rights. Even for a purely commercial dispute, the stakes could be economically existential for one or both corporate parties. The more significant the issues are, the more discovery could be deemed proportional.

For an example case discussing this issue, see [*First Niagara Risk Mgt., Inc. v. Folino*](#)¹⁰:

The issues at stake are of grave importance to First Niagara, who has allegedly uncovered a plan by one of its top executives to start a competing business and employing former First Niagara employees. The first factor therefore weighs in favor of granting First Niagara's motion.

The Amount in Controversy

The second factor considers the monetary stakes of the case. How much does either party stand to win or lose when the case is resolved? The more money at stake, the more money it could be proportional to spend on discovery. For example, it would not make much sense to spend \$100,000 on discovery for a legal dispute over only \$150,000. Conversely, it would not make much sense to oppose spending \$100,000 on discovery for a legal dispute over \$1,500,000. As we will discuss further below, courts and parties have tools for tailoring discovery to the right size, including testing, sampling, and phased discovery.

For an example case discussing this issue, see [*Oxbow Carbon & Minerals LLC v. Union Pac. R.R.*](#)¹¹:

Here, Oxbow seeks to recover the more than \$50,000,000 in illegal fuel surcharges it alleges were the result of the Defendants' collusion. . . . Meanwhile, Oxbow's estimated cost of complying with Defendants' proposed discovery is approximately \$140,000 Given the very substantial amount of damages that Oxbow seeks to recover in this case, its cost of complying with the discovery request to produce information relevant to Defendants' defense of Oxbow's claims does not strike the undersigned as excessive.

The Parties' Relative Information Access

The third factor considers the potential for an informational imbalance to exist in which one party has significantly greater access to relevant materials than the other. Two commercial entities in a dispute are likely to have similar access to relevant materials, but an individual party will often have less access than a corporate one. It may be necessary to impose

¹⁰*First Niagara Risk Mgt., Inc. v. Folino*, 317 F.R.D. 23 (E.D. Pa. Aug. 11, 2016), available at <https://www.ediscoverylaw.com/wp-content/uploads/2016/10/First-Niagra-Risk-Mgmt-Opinion.pdf>.

¹¹*Oxbow Carbon & Minerals LLC v. Union Pac. R.R.*, Case No. 11-cv-1049 (D.D.C. Sept. 11, 2017), available at https://scholar.google.com/scholar_case?case=9535661083130210393.

an unequal discovery burden in order to correct that informational imbalance. The greater the imbalance, the greater the discovery burden it may be proportional to impose.

For an example case discussing this issue, see [Oxbow Carbon & Minerals LLC v. Union Pac. R.R.](#)¹²:

In considering this factor, courts look for “information asymmetry”—a circumstance in which one party has very little discoverable information while the other party has vast amounts of discoverable information. . . . Indeed, neither party disputes that Koch is in possession of relevant, unique information, and there appears to be no other way for Defendants to obtain this information than moving to compel Oxbow to produce it.

The Parties’ Resources

The fourth factor requires consideration of the financial, technical, and logistical resources available to each party. Discovery can be complex and voluminous, and dramatic differences may exist in the resources available to the parties – particularly when one party is an individual and one is a commercial entity. With the right tools and skills, large volumes of materials can be evaluated efficiently, but without them, it might be prohibitively time-consuming or expensive. The greater the resources available to a party, the greater the discovery burden it may be proportional to place upon them.

For an example case discussing this issue, see [Bourell v. Ronscavage, No. 3:21-CV-01098 \(MPS\) \(D. Conn. June 23, 2023\)](#)¹³:

The parties’ resources. With regard to resources . . . Defendants point out that Plaintiff has two law firms representing him with plenty of resources, who are highly competent and capable of handling discovery in a large case. The Court

finds that this factor weights in favor of disclosure.

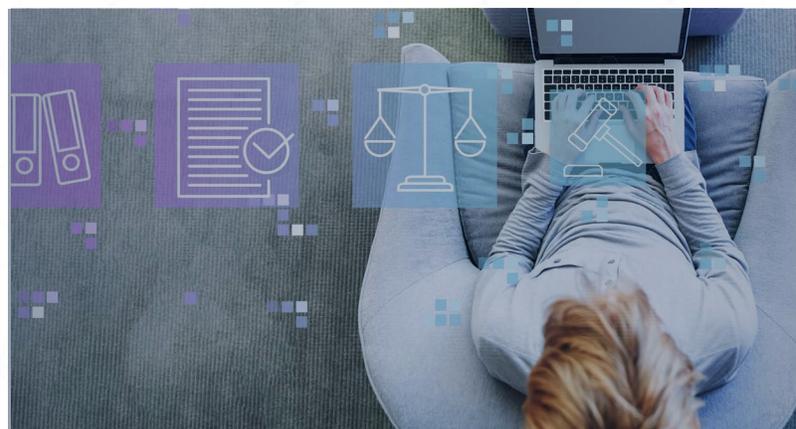
The Importance of the Discovery

The fifth factor requires consideration of how important the particular discovery requested is to resolving the issues. If the requested discovery would be similar to other materials already produced or to other materials that could be more easily or cheaply produced, it might not be important enough to resolving the issues to be proportional. On the other hand, if the requested materials would be unique or potentially significant, it might be important enough to resolving the issues to be proportional. The more the requested discovery would contribute to the efficient resolution of the dispute, the more likely it will be considered proportional.

For example cases discussing this issue, see [Bourell v. Ronscavage, No. 3:21-CV-01098 \(MPS\) \(D. Conn. June 23, 2023\)](#)¹⁴ and [First Niagara Risk Mgt., Inc. v. Folino, 317 F.R.D. 23 \(E.D. Pa. Aug. 11, 2016\)](#).¹⁵

The Burden or Expense

This final factor arguably includes all of the above factors within it. It calls for an overall assessment of the “likely benefit” of the requested discovery and “whether the burden or expense” would outweigh it. This factor does not just require consideration of the financial burdens (both direct and indirect) but also



¹²Ibid.

¹³[Bourell v. Ronscavage, No. 3:21-CV-01098 \(MPS\) \(D. Conn. June 23, 2023\)](#), available at https://app.ediscoveryassistant.com/case_law/50903-bourell-v-ronscavage ¹⁴Ibid.

¹⁴Ibid.

¹⁵See supra note 10.

of broader considerations. Are there public interests to consider? Could there be a significant effect on a particular market or industry? What about burdens on rights of privacy or confidentiality? The greater the burdens of any kind that the discovery would impose, the greater the likely benefit must be to satisfy the proportionality requirement.

One factor to keep in mind for the future is the ongoing evolution of the discovery tools available to practitioners. The widespread acceptance of technology-assisted review and continuous active learning changed the industry's perception of what's reasonably possible in larger matters. New tools

powered by generative AI [may precipitate a similar shift in perception](#)¹⁶ over the next few years.

For an example case discussing this issue, see [SinglePoint Direct Solar LLC v. Solar Integrated Roofing Corp.](#)¹⁷:

A voluminous ESI case is always going to be burdensome. This is an unfortunate reality of ESI heavy, high-dollar commercial cases. However, the Court cannot say, given what is at stake, that the burden of document review is so high as to warrant denying Defendants relevant discovery.

OTHER PROPORTIONALITY ISSUES

In addition to the listed factors, there are other issues it's important for legal practitioner to bear in mind. In particular, practitioners should bear in mind the importance of the ESI protocol, the challenges associated with newer sources, and the importance of specificity in proportionality arguments.

Importance of the ESI Protocol

In addition to considering the six factors enumerated by the rule, courts will typically give great weight to any ESI protocol that the parties negotiated for the case and had formalized via court order. Just as contract counterparties are typically held to a bad deal they made, parties opponent in litigation are typically held to a process agreement they made – even if it has produced a marginally disproportionate result.

For an example case discussing this issue, see [McCormick & Co. v. Ryder Integrated Logistics](#)¹⁸:

While the Discovery Order did not march through each of these standards, it clearly took them into account, finding that the costs of

the review were proportional to the needs of the case. . . . **Further—and again—the parties agreed to this review by the plain language of the ESI Protocol.** [emphasis added]

Proportionality of Discovery from Newer Sources

Obtaining discovery from newer source types is an area in which proportionality and burden arguments are often made. Just as recovery of data from a legacy system may be prohibitively difficult or expensive, so to can collection and processing of data from very new systems.

Most recently, these arguments were made about collection and processing of data from collaboration tools like Slack and Teams. As technical solutions for this new challenge became available, courts took that into account in assessing the proportionality of discovery from such tools. For an example case discussing this issue, see [Benebone v. Pet Qwerks, et al.](#)¹⁹:

¹⁶Cassandra Coyer, "Generative AI and Federal Rules of Civil Procedure: Is It Meant To Be?," LEGALTECH NEWS, <https://www.law.com/legaltechnews/2023/10/13/generative-ai-and-federal-rules-of-civil-procedure-is-it-meant-to-be/> (Oct. 13, 2023).

¹⁷*SinglePoint Direct Solar LLC v. Solar Integrated Roofing Corp.*, No. CV-21-01076-PHX-JAT (D. Ariz. March 21, 2023), available at https://app.ediscoveryassistant.com/case_law/48532-singlepoint-direct-solar-llc-v-solar-integrated-roofing-corp.

¹⁸*McCormick & Co. v. Ryder Integrated Logistics, Inc.*, No. JKB-22-01115 (D. Md. March 08, 2023), available at https://app.ediscoveryassistant.com/case_law/48857-mccormick-co-v-ryder-integrated-logistics-inc.

¹⁹*Benebone v. Pet Qwerks, et al.*, No. 8:20-cv-00850-AB-AFMx (C.D. Cal. Feb. 18, 2021), available at https://app.ediscoveryassistant.com/case_law/32595-benebone-v-pet-qwerks.

Based on the evidence presented in the parties' briefing and at the hearing, the Court finds that requiring **review and production of Slack messages by Benebone is generally comparable to requiring search and production of emails** and is not unduly burdensome or disproportional to the needs of this case – if the requests and searches are appropriately limited and focused. [emphasis added]

The Importance of Specificity in Proportionality Arguments

Courts base their proportionality decisions on fact-specific analyses. Consequently, courts are not persuaded by abstract arguments on proportionality. Just claiming a general burden or a hypothetical cost is not sufficient. Instead, arguments need to feature

specific details about the materials, about the technical issues, or about the costs and the time required. These specific should be supported by affidavits and other exhibits. Courts have repeatedly declined to accept vague, generalized claims unsupported by specifics.

For an example case discussing this issue, see [Page v. Bragg Comtys., LLC](#)²⁰:

While Defendants argue that the discovery would be unduly burdensome, cost prohibitive, and harassing, **they have presented nothing to support these assertions. . . . This court has previously rejected unsubstantiated claims** that discovery would pose an undue burden and was not proportional to the needs of the case. [emphasis added]

THE SEDONA CONFERENCE COMMENTARY ON PROPORTIONALITY

The Sedona Conference

After the 2015 amendments to the federal rules reprioritized proportionality, [the Sedona Conference](#) decided it was time to revisit the topic to provide [updated guidance](#)²¹ to practitioners:

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*.

A public comment version was published in November 2016, and the final version was published in May 2017.

The Sedona Conference Principles of Proportionality

The Sedona Conference Commentary enumerates six core principles related to proportionality in eDiscovery:

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

²⁰Page v. Bragg Comtys., LLC, No. 5:20-CV-336-D (E.D.N.C. Dec. 15, 2022), available at https://app.ediscoveryassistant.com/case_law/46366-page-v-bragg-comtys-llc.

²¹The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141 (2017), available at https://thesedonaconference.org/publication/Commentary_on_Proportionality_in_Electronic_Discovery.

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.

For each of these principles, several comments are then provided to explore the meaning and implication of the principle in practice. These comments are annotated with citations to relevant cases and commentaries.

The guidance, in general, is consistent with the case law we reviewed above and the key points from that case law that we identified. The Commentary also provides practical guidance beyond those points, and I want to highlight a few key pieces of that additional guidance on the role of proportionality during preservation, the importance of knowledge at the time, the benefits of early disclosure and dialogue, the application of testing and sampling, and the advantages of phased or iterative discovery.



The Role of Proportionality during Preservation

The first Principle in the Commentary addresses how proportionality should be taken into account during preservation, before litigation has commenced and the Federal Rules of Civil Procedure have become applicable. The [2015 Advisory Committee Notes to amended Rule 37\(e\)](#)²² suggest that proportionality should be a factor in assessing the reasonableness of pre-litigation preservation efforts. The Sedona Conference Commentary fully endorses this analysis, but it wisely still suggests caution in preserving too narrowly at this early stage of the litigation process:

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. [emphasis added]

The Importance of Knowledge at the Time

In discussing the standards to be applied in assessing proportionality and discovery decisions, the Commentary recognizes how parties' understanding of cases evolves over time and emphasizes the importance of assessing decisions after the fact based on the knowledge that was available to the party at the time:

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.

...

²²Fed. R. Civ. P. 37(e), Committee Notes on Rules—2015 Amendment, available at https://www.law.cornell.edu/rules/frcp/rule_37.

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. 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. [footnotes omitted; emphasis added]

The Benefits of Early Disclosure and Dialogue

Throughout the Commentary, the preservation, cost, and process benefits of early disclosure and dialogue between the parties are repeatedly emphasized, for example:

Parties often can reduce the risk of loss of relevant information with 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

...

Propounding discovery requests **at the early stages of the litigation** allows parties time to explore compliance with the discovery requests, consider proportionality issues, and bring any disputes before the court for resolution.

...

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. [emphasis added]

Moreover, Principle 3 states that “[u]ndue burden,

expense, or delay resulting from a party’s action or inaction should be weighed against that party.” As the Comments to that Principle explain:

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).” [footnote omitted; emphasis added]

The Application of Testing and Sampling

Throughout the Commentary, the many applications and potential benefits of running test searches, reviewing examples, and conducting formalized sampling are all also emphasized:

In some circumstances, **the courts may order sampling** of the requested information **to determine whether it is sufficiently important** to warrant discovery.

...

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

...

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. [footnotes omitted; emphasis added]

The Advantages of Phased or Iterative Discovery

Finally, the Commentary makes the case for approaching discovery in a phased or iterative way to allow for process refinement and revision as the matter progresses and more is learned:

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. . . . **Phasing may allow the parties to develop the facts of the case sufficiently to determine how to efficiently and effectively target subsequent discovery.** 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. . . . **In short, phased discovery should be viewed as a way to promote the objectives of Rule 1.** [footnotes omitted; emphasis added]

KEY TAKEAWAYS

There are five key takeaways from this white paper to remember:

- 1 Since the 2015 amendments to the FRCP, courts and parties have increased their focus on proportionality, beginning to treat it as a fundamental requirement for obtaining discovery, on par with relevance.
- 2 FRCP 26(b)(1) enumerates a list of six factors to be considered when courts assess the proportionality of requested discovery:
 - a. The importance of the issues at stake in the action
 - b. The amount in controversy
 - c. The parties' relative access to relevant information
 - d. The parties' resources
 - e. The importance of the discovery in resolving the issues
 - f. Whether the burden or expense of the proposed discovery outweighs its likely benefit
- 3 In addition to those six factors, courts give great weight to any ESI protocol that the parties negotiated and included in the discovery order.
- 4 When making proportionality arguments to the court, specifics must be provided about the materials, the challenges, and the costs, and those specifics must be supported by affidavits or other evidence.
- 5 The potential for proportionality disputes can be reduced by following the Sedona Conference's suggestions for early disclosure and dialogue, for liberal use of sampling and testing, and for the negotiation of phased or iterative discovery.

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