No Balance, No Beauty

# In Search of Proportionality in E-Discovery

By Bradley C. Nahrstadt

**We all must work to constrain discovery—lawyers, litigating parties, and judges—and we must undertake it in phases.**

Since the days of Leonardo da Vinci, all great artists have recognized that proportionality is the secret to beauty. According to the great Victorian artist and critic John Ruskin, "In all perfectly beautiful objects there is found the opposition of one part to another and a reciprocal balance."

Unfortunately, today, in the world of electronic discovery, there is no beauty; there is no balance. Many lawyers take a Turkish rug merchant approach to electronic discovery requests, willfully asking for more than they really need while cheerfully knowing that they will then negotiate limits. Still others pepper their otherwise proper and reasonable electronic discovery requests with disproportionately magnifying terms such as "any and all," "concerning," or "in any way relating to, consisting of, referring to, reflecting, evidencing, constituting, or having a logical or factual connection with the information sought."

How does someone deal with these types of requests? How does someone bring some semblance of order and proportionality to the nightmarish morass of electronically stored information (ESI) discovery, not to mention, how does someone rein in ESI discovery-related costs? By applying the principles set forth in Federal Rule of Civil Procedure 26(b)(2)(C), Federal Rule of Civil Procedure 26(g), and the Sedona Conference Principles of Proportionality in Electronic Discovery.

## Federal Rule of Civil Procedure 26(b)(2)(C)

When most lawyers are confronted with discovery requests such as the ones mentioned above, they will typically object to the requests as overbroad and unduly burdensome. They may also cite local e-discovery principles that require reasonably targeted, clear, and specific discovery requests as an additional basis for objections. *See, e.g.*, Seventh Circuit Electronic Discovery Committee, Statement of Principles Relating to the Discovery of Electronically Stored Information Principle 1.03 (rev. Aug. 1, 2010), http://www.7thcircuitbar.org/associations/1507/files/Principles8_10.pdf (last visited Apr. 5, 2011). What they often do not do is cite Federal Rule 26(b)(2)(C)'s propor-

■ Bradley C. Nahrstadt is an equity partner with the litigation firm of Williams Montgomery & John Ltd. in Chicago, Illinois, where he concentrates his practice in the defense of product liability, professional liability, and insurance coverage and bad-faith cases in state and federal courts around the country. He is an active member of the Illinois State Bar Association, the Illinois Association of Defense Trial Counsel, DRI, the American Law Institute, the Council on Litigation Management, the Association of Defense Trial Attorneys, and the Chicago-Lincoln American Inn of Court.

tionality standard when addressing burdensome discovery requests.

> According to Federal Rule 26(b)(2)(C):
> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C).

When raising a proportionality objection to an electronic discovery request, counsel should endeavor to provide a court with specific information about the anticipated costs and burdens associated with providing the requested discovery, as well as the costs associated with the production of information that has already been provided to the other side. Be specific—do not provide a court with broad generalizations and unsupported allegations. *See*, *e.g.*, *Thompson v. U.S. Dep't. of Housing & Urban Dev.*, 219 F.R.D. 93, 99 (D. Md. 2003) (in challenging an ESI request, "a particularized showing, by affidavit or similar submission, is required to present facts supporting the challenge"). In addition to the anticipated cost of responding to the discovery, provide a court with specific information about the number of pages or documents previously produced, the anticipated number of depositions that counsel will take in the case, and the actual expense a client has incurred preserving and producing information in connection with the defense of the case.

Regarding the amount in controversy, consider asking a court to require each side to provide the likely range of provable damages award that a plaintiff could foreseeably receive if he or she prevailed. If a court is unwilling to require that disclosure, and opposing counsel will not work with you to provide a fair estimation of the amount in controversy, support your request for limited, proportional discovery by providing the court with information about verdicts and settlements in similar cases. In the absence of reported verdict or settlement information, provide your reasoned opinion about the likely recoverable damages in the case.

In addition, do not forget to provide a court with specific information that it can use to address the other Federal Rule 26 factors: the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving those questions. *See* Fed. R. Civ. P. 26(b). If your client does not have the resources necessary to engage in the requested discovery, point that out to a court. Let a court know about the relevant public interest or public policy considerations that courts should consider in making a reasoned decision regarding proportionality. Explain, not in generalities, but in specific detail, how the requested discovery will or will not resolve the questions presented by the litigation.

## Federal Rule of Civil Procedure 26(g)

Most courts and counsel addressing proportionality issues focus almost exclusively on Federal Rule of Civil Procedure 26(b). However, Federal Rule of Civil Procedure 26(g) also requires parties propounding or responding to discovery requests to conduct a proportionality analysis. Unfortunately, as described by one court, Federal Rule of Civil Procedure 26(g) is "[o]ne of the most important, but apparently least understood or followed, of the discovery rules." *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008). Federal Rule 26(g)(1) specifies that

> [e]very discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name… By signing, an attorney or party certifies that to the best of the person's knowledge, information and belief formed after a reasonable inquiry… with respect to a discovery request, response or objection, it is… neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Fed. R. Civ. P. 26(g)(1).

If a lawyer or a party wrongly certifies a request or a response to a request, violating Federal Rule 26(g) without substantial justification, a court must impose an appropriate sanction, which may include an order to pay reasonable attorneys' fees and expenses caused by the violation. The advisory committee's notes to Federal Rule 26(g) significantly flesh this out:

> Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a *responsible manner* that is consistent with the *spirit and purposes* of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to *stop and think about the legitimacy of a discovery request, a response thereto or an objection*…

Fed. R. Civ. P. 26(g) advisory committee note (emphasis added).

Federal Rule 26(g) charges those responsible for the success or failure of pretrial discovery—judges and lawyers—with approaching the process properly: a lawyer must initiate and respond to discovery responsibly in accordance with the letter and "spirit" of the discovery rules to achieve a proper purpose, and a lawyer must initiate a discovery request proportional to what is at issue in the litigation. If a lawyer does not,

**Counsel should** endeavor to provide a court with specific information about the anticipated costs and burdens associated with providing the requested discovery.

a judge is expected to impose appropriate sanctions to punish and deter.

Use Federal Rule 26(g) to your advantage. Remind your opponent of the obligations imposed under Federal Rule 26(g) to approach discovery responsibly. Meet with the other side and, after discussing the issue in good faith, estimate the likely range of a provable damages award that a plaintiff could foreseeably receive if he or she prevails. Discuss the amount and type of discovery already provided, and then discuss the additional discovery sought by the other side to determine whether you can fulfill the additional legitimate discovery needs without duplicating work and from more convenient, less burdensome, or less expensive sources of proof than those sought by your opponent. Keep in mind that during this portion of the discussion a defendant bears the burden to provide a particularized factual basis to support claims of excessive burden or expense. *See, e.g.*, *Mancia*, 253 F.R.D. at 357. Finally, during this discussion with opposing counsel, attempt to reach an agreement about what additional discovery, from which sources and in what sequence, you will provide so that its cost—to all parties—is proportional to the stakes in the litigation.

**Although the** Federal Rules of Civil Procedure do not apply until litigation begins, courts may invoke their inherent authority to sanction parties for pre-litigation failures to preserve evidence.

### The Sedona Conference Principles of Proportionality in Electronic Discovery

The Sedona Conference is a nonprofit legal policy research and educational organization that sponsors working groups on cutting-edge issues of the law. Judges, attorneys and technologists experienced in electronic discovery and document management matters make up the composition of the Working Group in Electronic Document Retention and Production. In the fall of 2010, the Sedona Conference Working Group in Electronic Document Retention and Production issued some "principles of proportionality" in an effort to provide a framework for the application of the doctrine of proportionality to all aspects of electronic discovery. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 The Sedona Conf. J. 289 (2010).

The Sedona Conference's six principles for assessing proportionality expand upon the principles found in Federal Rule of Civil Procedure 26(b)(2)(C), (c) and (g) and, in one instance, expands upon their application. The first of the six principles of proportionality is that "[t]he burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation." *Id.* at 291

Although the Federal Rules of Civil Procedure do not apply until litigation begins, courts may invoke their inherent authority to sanction parties for pre-litigation failures to preserve evidence. Under this principle, courts conducting a post-hoc evaluation of a party's pre-suit preservation decisions should evaluate the decisions based on the proportionality factors set forth in Federal Rule 26(b)(2)(C) and the preserving party's good faith and reasonableness considering the knowledge available at the time of preservation. Although case law has not revealed instances of judges applying the proportionality factors of the rules in the pre-litigation context, any party that demonstrates that it acted thoughtfully, reasonably, and in good faith in preserving or attempting to preserve information before litigation should generally be entitled to a presumption of adequate preservation. However, as the principle makes clear, parties must be prepared to demonstrate thoughtful, reasonable, and good faith efforts to preserve. They cannot rely on a "pure heart, empty head."

The second proportionality principle is that "[d]iscovery should generally be obtained from the most convenient, least burdensome, and least expensive sources." *Id.* This principle acknowledges the reality that it is unlikely that any one source is the least burdensome, most convenient, *and* least costly. As a result, the second principle emphasizes that these are all factors that a court should weigh when determining the nature and extent of the discovery to be had.

Depending on the facts available and the stage of the case, you, the other side, and a court may be unable to assess whether limiting discovery is appropriate. If a litigation is in its early stages, the parties may not be fully aware of all of the claims or defenses. Likewise, if a party has requested production of ESI archived several years ago, the responding party may not have a full understanding of the content of the ESI or its potential value to the litigation. Under these circumstances, a court or the parties may find it appropriate to conduct the discovery in phases, starting with discovery of clearly relevant information located in the most accessible and least expensive sources. Conducting discovery in phases will allow the parties to develop the facts of a case sufficiently to determine whether, at a later date, further potentially more burdensome and expensive discovery is necessary or warranted.

Communication and cooperation are the keys to successfully undertaking discovery in phases. Parties must communicate to one another the issues germane to a litigation and the potential repositories of relevant ESI. In addition, parties must cooperate with one another to prepare and propose a phased discovery plan to a court.

The third Sedona Conference proportionality principle is that "[u]ndue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party." *Id.* Under this principle, courts should disregard undue burden or expense that results from a responding party's own conduct or delay. For example, a party's failure to properly preserve a less burdensome source of relevant information should not weigh in favor of limiting that party's obligation to produce information from a more burdensome source.

The third proportionality principle also applies to a party's failure to engage in early, meaningful discussions with an opponent to develop a discovery plan to

avoid potential disputes. Examples of how a party's failure to engage in an early and meaningful meet and confer may weigh against the party in a subsequent proportionality analysis include cases in which (1) a party refuses to consult with an opponent in the development of a key word search protocol and a second search is necessary given the inadequacy of key words initially applied, or (2) a second production of material already produced is necessary because a party fails to confer on form of production and produces ESI in a form that is not reasonably usable.

The fourth proportionality principle of the Sedona Conference is that "[e]xtrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production." *Id.* The fourth principle addresses the practical reality that litigating parties may often not know what information is retrievable from a source until after a great deal of time and effort has been invested in analyzing the data. As a result, in assessing the importance of the information requested and whether the cost is disproportionate to its relevance, courts should consider sampling the proposed source. In addition to sampling, courts should also consider extrinsic information submitted by litigating parties to determine whether requested discovery is sufficiently important to warrant potentially burdensome or expensive discovery. That evidence may include the parties' opinions on the requested information's importance, evidence that a key player created the information, information from previous production establishing an inference that the requested information would be important, and evidence that the information is unique or was created contemporaneously with the key operative facts.

In *Kipperman v. Onex Corp.*, 260 F.R.D. 682, 691 (N.D. Ga. 2009), the court required the defendants to produce two "sample" backup tapes so that the court could weigh the volume and importance of the information located on the tapes against the costs associated with restoring and producing them. After reviewing the results of the sampling, the court determined that the information contained on the backup tapes was sufficiently important to warrant additional discovery. In reaching that determination the court stated, "I don't… declare these to be smoking guns but they certainly are hot and they certainly do smell like they have been discharged lately." *Kipperman*, 260 F.R.D. at 691.

The fifth Sedona Conference proportionality principle is that "[n]on-monetary factors should be considered when evaluating the burdens and benefits of discovery." *Id.* What role should factors other than money, such as "the importance of the issues at stake in the litigation," play in a proportionality analysis? In many civil actions that are essentially private disputes, such as breach of contract actions or tort claims, non-monetary factors may be completely irrelevant. On the other hand, if a civil action at issue is derived from constitutional or statutorily created rights, such as those rights created by Title VII, the Americans with Disabilities Act, or the Civil Rights Act, factors other than money may favor much broader discovery. Any proportionality analysis should consider the nature of the right at issue, any other relevant public interest or public policy considerations, and whether, under the particular circumstances of the case, a court should place some limits on discovery. *See, e.g., Disability Rights Council of Greater Washington v. Washington Metro. Transit Auth.*, 242 F.R.D. 139, 148 (D.D.C. 2007) (in an action for injunctive relief under the Americans with Disabilities Act, the court denied the defendant's request to limit discovery of back-up tapes given "the importance of the issue at stake and the parties' resources.").

Finally, the sixth Sedona Conference proportionality principle is that "[t]echnology to reduce cost and burden should be considered in the proportionality analysis." *Id.* According to the sixth principle, applying technology to quickly isolate essential information serves the goal of proportionality by creating efficiencies and cost savings. The Sedona Conference encourages parties "to meet and confer regarding technological approaches to preservation, selection, review and disclosure that reduce overall costs, better target discovery, protect privacy and confidentiality, and reduce burdens." *Id.* at 301. This principle recognizes that in considering arguments related to cost and burden, a court may request that litigating parties provide detailed information regarding the retrieval of electronic information, the use of review tools, and key word searches. To the extent that a party is familiar with the available technology and its attendant costs, it will have an advantage in asserting and responding to arguments regarding burden and cost.

## The Sedona Conference Principles of Proportionality in Action

Just recently, late in 2010, Magistrate Judge Nan Nolan of the United States District Court for the Northern District of Illinois authored an e-discovery-related opinion that invokes important principles of phased discovery, proportionality, and cooperation. *See Tamburo v. Dworkin*, No.

**The Sedona Conference Principles of Proportionality***

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.

* The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 The Sedona Conf. J. 298, 291 (2010).

04C3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010). Magistrate Judge Nolan referenced the Sedona Conference Commentary on Proportionality in Electronic Discovery in bringing some order to discovery disputes arising from six year old intentional tort claims. *Id.* It can—and should—serve as a blueprint for any lawyer seeking proportional discovery.

**Conducting discovery** in phases will allow the parties to develop the facts of a case sufficiently to determine whether, at a later date, further potentially more burdensome and expensive discovery is necessary or warranted.

On May 11, 2004, John Tamburo and others filed their original complaint against the defendants alleging violations of the federal antitrust laws and various state law tort claims. The plaintiffs' claims arose from a dispute over the contents of a dog-pedigree software program that the plaintiffs developed by lifting data from the defendants' websites. *Id.* at *1. The plaintiffs claimed that those websites were in the public domain. The plaintiffs further claimed that the defendants used the Internet to retaliate against the plaintiffs for copying the defendants' online data. Specifically, the plaintiffs alleged that the individual defendants "engaged in a concerted campaign of blast emails and postings on their websites accusing Plaintiffs of stealing their data and urging dog enthusiasts to boycott Plaintiffs' products." *Id.* The plaintiffs claimed that the e-mails and Internet postings "were defamatory, tortiously interfered with Plaintiffs' software business and constituted a civil conspiracy." *Id.*

The defendants filed motions to dismiss the plaintiffs' original complaint, which were granted. *Id.* The plaintiffs subsequently filed several amended complaints, each of which was dismissed in turn. On August 24, 2006, the plaintiffs filed a sixth amended complaint. *Id.* The defendants filed a motion to dismiss the sixth amended complaint. On October 9, 2007, the district judge granted the motion, dismissing the antitrust claims against all of the defendants and specifically finding that the court lacked personal jurisdiction over certain defendants. *Id.* at *4. On appeal, the Seventh Circuit Court of Appeals affirmed the district court's dismissal of all counts against one of the defendants for lack of personal jurisdiction and affirmed the dismissal of the antitrust claims against all of the defendants. *Tamburo v. Dworkin,* 601 F.3d 693, 710–11 (7th Cir. 2010). The Seventh Circuit, however, reversed the district court's dismissal of the claims against the remaining individual defendants, originally dismissed for lack of personal jurisdiction, and remanded the case for further proceedings for the remaining state law tort claims. *Id.*

On June 28, 2010, the plaintiffs filed a seventh amended complaint. *Tamburo*, 2010 WL 4867346, at *1. Understandably, after six years of motion practice, the plaintiffs were eager to engage in some discovery and, after filing the seventh amended complaint, they sought the production of the defendants allegedly tortious e-mails and other electronically stored information. On August 13, 2010, the defendants filed a motion to dismiss the seventh amended complaint. *Id.* At the same time, they moved to stay all discovery in the case pending the resolution of the motion to dismiss. *Id.*

Magistrate Judge Nolan began her analysis by considering the defendants' motion for a stay of all discovery. *Id.* at *1—*2. She recognized that a stay of discovery is appropriate in some cases but not, as here, if a "garden-variety" motion to dismiss is pending. *Id.* at *2. Although Magistrate Judge Nolan did not entertain a total stay of discovery, she did voice a profound reluctance to have the parties invest still more time and even more money on discovery if the apparently quite marginal case might still be doomed to dismissal. And here is where a judge brought the doctrine of proportionality into play to do justice. According to Magistrate Judge Nolan,

> The Rule 26 proportionality test allows the Court to "limit discovery if it determines that the burden of the discovery outweighs its benefit." "The 'metrics' set forth in Rule 26(b)(2)(C)(iii) provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources." "If courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution."
>
> Here, the Court notes that while this action has been pending for over six years, Plaintiffs' claims have been in constant flux—they are on their Seventh Amended Complaint—and the pending motion to dismiss may alter the scope of discovery. Accordingly, to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action, the Court orders a phased discovery schedule. During the initial phase, the parties shall serve only written discovery on the named parties. Nonparty discovery shall be postponed until phase two, after the parties have exhausted seeking the requested information from one another.

*Tamburo*, 2010 WL 4867346 at *3 (internal citations and quotations omitted.)

After declaring that the parties were to engage in a phased discovery schedule, she set forth the specifics of her plan. Her order demonstrates an understanding that proportionality must have a scope dimension and a time dimension. Her order also demonstrates a keen understanding that proportionality requires cooperation, even if that cooperation is forced by an order of court:

> Within the next two weeks, the parties shall conduct an in-person meet and confer to prepare a phased discovery schedule. The parties are expected to be familiar with the Case Management Procedures regarding discovery on the

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> Court's website, the Seventh Circuit's Electronic Discovery Pilot Program's Principles Relating to the Discovery of Electronically Stored Information, and the Sedona Conference Cooperation Proclamation, available at www.thesedonaconference.org. The parties are ordered to actively engage in cooperative discussions to facilitate a logical discovery flow. For example, to the extent that the parties have not completed their initial disclosures pursuant to Rule 26(a), or if their initial disclosures require updating, the parties should focus their efforts on completing their Rule 26(a) requirement before proceeding to other discovery requests. Second, the parties should identify which claims are most likely to go forward and concentrate their discovery efforts in that direction before moving on to other claims. Third, the parties should prioritize their efforts on discovery that is less expensive and burdensome. Finally, nothing in this Order shall prejudice the parties from conducting all forms of discovery after the pending motion to dismiss has been ruled upon.

*Tamburo*, 2010 WL 4867346 at *3 (internal citations and quotations omitted.)

The just, speedy, and inexpensive resolution of disputes promised by Federal Rule of Civil Procedure 1 requires litigating parties to cooperate and requires federal court judges to enforce proportionality. All discovery that a court allows must be proportional to the specific case. That proportionality includes all aspects of a case: the amount of money at issue, the respective burdens on the parties, including time and business disruptions, the public policies implicated by the dispute, and the overall status and history of the case.

The message of the Federal Rules, the Sedona Conference principles of proportionality, and the *Tamburo* decision is that we must constrain discovery—lawyers, litigating parties, and judges—and we must undertake it in phases. Discovery must be proportional. It must be based on cooperation, not a "take no prisoners, scorch the earth" philosophy. The sooner that we all realize this, the sooner we can return to a legal system that resolves disputes based on the facts and not on the size of the checkbooks. FD