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## The Quest for “Proportionality” in Electronic Discovery—Moving From Theory To Reality in Civil Litigation

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### I. INTRODUCTION

In the past several years, courts, practitioners, and commentators have devoted increasing attention to the challenges of conducting electronic discovery, particularly in complex civil litigation. For example, litigators in the federal district courts have begun to apply the December 2006 amendments to the Federal Rules of Civil Procedure that, for the first time,

incorporate electronic discovery into those Rules.<sup>1</sup> In addition, in May 2010, the Judicial Conference's Civil Rules Advisory Committee sponsored a conference on civil litigation at Duke University School of Law, where judges, practitioners, and academic experts discussed and debated both the successes and failures of our contemporary civil litigation system.<sup>2</sup> A central critique of that system has been that civil litigation has become too expensive, and that a contributing factor to that problem is the escalating cost of discovery, particularly electronic discovery.<sup>3</sup> In that context, many commentators have urged that principles of "proportionality" need to be applied more aggressively in civil litigation, both to reduce litigation costs and to reduce barriers to bringing and conducting litigation.<sup>4</sup> Some commentators also recommend that proportionality principles be applied before litigation begins, when prospective litigants make decisions about preservation of possibly relevant information.<sup>5</sup> Therefore, the challenge for

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1. See Thomas Y. Allman, *Conducting E-Discovery After the 2006 Amendments: The Second Wave*, 10 Sedona Conf. J. 215, 216-17, 222, 225 (2009); Lee H. Rosenthal, *Electronic Discovery—Is the System Broken? Can It Be Fixed?*, 51 The Advocate (Texas State Bar Litigation Report), Summer 2010, at 8, 9 (2010).

2. THE JUDICIAL CONFERENCE OF THE UNITED STATES, [http://www.uscourts.gov/FederalCourts/Judicial Conference/Proceedings.aspx](http://www.uscourts.gov/FederalCourts/Judicial%20Conference/Proceedings.aspx) (last visited Sept. 21, 2011).

3. See Thomas Y. Allman, *Preservation Rulemaking After the 2010 Conference*, 11 Sedona Conf. J. 217, 220 (2010) (citing a recent survey conducted of various major corporations, and noting that "[a] substantial majority of defense and mixed practice lawyers surveyed by the [American Bar Association] agreed that 'the costs of litigation have risen disproportionately due to e-discovery'" (citation omitted); Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 Denv. U. L. Rev. 227, 228 (2010) [hereinafter Rosenthal, *From Rules of Procedure*] ("It is said that the use or even the threat of broad discovery discourages potential plaintiffs from filing cases and, when cases are filed, encourages settlements, often on terms that do not reflect the strength or weakness of the merits of the claim or defense."); Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation*, 14 Rich. J.L. & Tech., ¶¶ 8-9 (2007-2008) (asserting that, in employment litigation, the risks of one party having "unfair leverage" over the other party "are magnified because electronic discovery costs may quickly dwarf the value of the litigation itself, as measured by potential damages," and claiming that a study had found that "one in five corporate respondents have settled litigation in order to avoid the costs of electronic discovery"); John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. L. Rev. 19, 22 (2010) (remarking that, in recent years, "discovery with regards to electronic information and privilege has grown increasingly burdensome").

4. See *infra* pp. 176-178 and notes 28-44.

5. See *infra* pp. 181-183 and notes 61-72.

litigators and the courts is how to achieve Federal Rule of Civil Procedure 1’s objective of the “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>6</sup>

While the Federal Rules of Civil Procedure may undergo future amendments, and the Duke Conference may engender more ambitious litigation reforms at the federal and state court levels, the challenge for today’s litigants is how to manage complex civil litigation with the various tools currently available. In fact, some commentators have argued that no additional Federal Rules amendments are necessary at this time, and they assert that the existing Federal Rules—if applied and interpreted according to their terms and intent—may achieve considerable efficiencies in civil cases.<sup>7</sup> Other commentators, including The Sedona Conference, the well-respected nonprofit research and educational organization,<sup>8</sup> have urged litigants to adopt a cooperative approach to discovery, emphasizing cooperation as a means of achieving cost-effective discovery.<sup>9</sup>

Part I of this article briefly describes the evolution of proportionality principles, including amended Civil Rule 26(b)(2)(B), which differentiates sources of electronically stored information on the basis of whether or not the information sources are reasonably accessible to produce based, *inter alia*, on undue burden or expense.<sup>10</sup> Part II discusses some of the case law and commentary that discussed or applied Rule 26(b)(2) and the broader proportionality principle.<sup>11</sup> Finally, Part IV recommends specific ways in

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6. Fed. R. Civ. P. 1.

7. Paul W. Grimm & Elizabeth J. Cabraser, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burdens, or Can Significant Improvements Be Achieved Within the Existing Rules?* 32 (2010), available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/47D6E0CDEF6484DA852576EA004A9FDA/\\$File/Judge Grimm, The State of Discovery Practice in Civil Cases.pdf](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/47D6E0CDEF6484DA852576EA004A9FDA/$File/Judge%20Grimm,%20The%20State%20of%20Discovery%20Practice%20in%20Civil%20Cases.pdf); Steven S. Gensler, *A Bull’s Eye View of Cooperation In Discovery*, 10 Sedona Conf. J. 363, 371 n.31 (Supp. 2009) (“I think the Federal Rules give judges the tools needed to balance the need for information in litigation with the costs and burdens of getting that information.”).

8. The Sedona Conference has described its mission as to allow “leading jurists, lawyers, experts, academics and others, at the cutting edge of issues in the area of antitrust law, complex litigation, and intellectual property rights, to come together - in conferences and mini-think tanks (Working Groups) - and engage in true dialogue, not debate, all in an effort to move the law forward in a reasoned and just way.” *TSC Mission*, THE SEDONA CONFERENCE (last visited Sept. 21, 2011), [http://www.thesedonaconference.org/content/tsc\\_mission/show\\_page\\_html](http://www.thesedonaconference.org/content/tsc_mission/show_page_html).

9. See *Sedona Conference Cooperation Proclamation*, THE SEDONA CONFERENCE (July 2008), [www.thesedonaconference.org/content/tsc\\_cooperation\\_proclamation/proclamation.pdf](http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf); Paul W. Grimm, Ilan Weinberger & Lisa Yurwit, *New Paradigm for Discovery Practice: Cooperation*, 43 Md. B. J. 26, 28 (Dec. 2010); Ariana J. Tadler & Kenneth Withers, *Toward A Less Hostile Discovery Process*, Trial, Mar. 2010, at 30, 34.

10. Fed. R. Civ. P. 26(b)(2). See *infra* pp. 174-176 and notes 17-27.

11. See *infra* pp. 176-181 and notes 27-60.

which practitioners can apply proportionality principles.<sup>12</sup>

## II. PROPORTIONALITY – ITS DEVELOPMENT

As a number of commentators have observed, the current debate over whether the burdens and costs of civil discovery have been excessive is actually a long-standing one.<sup>13</sup> On the one hand, the civil discovery rules traditionally have been interpreted and applied to permit broad-ranging discovery.<sup>14</sup> On the other hand, segments of the bar have expressed frequent complaints about the breadth of that discovery, and over time the Federal Rules of Civil Procedure have been adjusted to restrict the scope of discovery.<sup>15</sup> The concept of proportionality in civil discovery can be traced back to a 1983 amendment to Rule 26(b) which, as most recently amended, provides that a court has the authority to limit the “frequency or extent” of discovery if it determines, *inter alia*, that 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.”<sup>16</sup>

The latest example of the federal courts’ ongoing effort to address discovery burdens and costs is reflected in the December 2006 Federal Rules of Civil Procedure Amendments.<sup>17</sup> Prominent among those amendments has been Rule 26(b)(2)(B), which provides that “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”<sup>18</sup> This has frequently been described as the “two-tiered” approach to

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12. See *infra* pp. 181-200 and notes 61-146.

13. Rosenthal, *From Rules of Procedure*, *supra* note 3, at 228-29 (“The drafting and adoption of the Federal Rules of Civil Procedure [in 1938] were accompanied by expressions of deep concern over the liberal discovery they provided.”).

14. See Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any matter not privileged that is relevant to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”).

15. Rosenthal, *From Rules of Civil Procedure*, *supra* note 3, at 230 (“The frequent changes [in the Civil Rules] . . . in part, reflect the continued complaints about discovery and the ongoing efforts to locate reasonable limits on the broad discovery that the rules allow.”).

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

17. For more extensive commentary on these amendments, see Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 Yale L. J. Pocket Part 167 (2006).

18. Fed. R. Civ. P. 26(b)(2)(B). For more extensive commentary on this amendment, see Thomas Y. Allman, *The “Two-Tiered” Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 Rich. J.L. & Tech., ¶¶ 62-69 (2007-2008) [hereinafter Allman, *The “Two-Tiered” Approach*]; Theodore C. Hirt, *The “Two-Tier” Discovery Provision of Rule 26(b)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?*, 13 Rich. J.L. & Tech., ¶ 20 (2006-2007) [hereinafter Hirt].

electronic discovery. Under this approach, a party may request “reasonably accessible” sources of discovery (the first-tier sources), but the Rule limits its ability to obtain sources that are not reasonably accessible (the second-tier) sources unless it can establish good cause for the other party to produce those information sources.<sup>19</sup>

Of equal, if not greater importance, are the amendments to Rule 26(f), which impose on parties the duty to “meet and confer” in order to devise a proposed discovery plan, and to provide their views and proposals, *inter alia*, as to “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”<sup>20</sup>

In crafting the 2006 amendments, the Civil Rules Advisory Committee acknowledged the “difficulties in locating, retrieving, and providing discovery of some electronically stored information.”<sup>21</sup> The Committee emphasized that “some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.”<sup>22</sup>

Of central importance to the operation of Rule 26(b)(2)(B) is its provision that, if a party requests discovery of tier two sources that are not accessible without undue burden and expense, the requesting party must establish “good cause” for the discovery, to which the limitations of Rule 26(b)(2) (C) will apply. The court’s authority to limit discovery incorporates pre-existing limits on discovery in Rule 26. In other words, a court may limit “the frequency or extent of use” of discovery methods permitted under the Rules 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 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.<sup>23</sup>

The committee note emphasizes that Rule 26(b)(2)(C) “balance[s]”

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19. See Allman, *The “Two-Tiered” Approach*, *supra* note 18, ¶¶ 13-18; Hirt, *supra* note 18, ¶¶ 5-8.

20. Fed. R. Civ. P. 26(f).

21. Fed. R. Civ. P. 26, advisory committee’s note (2006).

22. *Id.*

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

the costs and potential benefits of discovery.<sup>24</sup> The note explains that whether a court will require a responding party to search and produce information that is not reasonably accessible “depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case.”<sup>25</sup> The “appropriate considerations” may include:

(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.<sup>26</sup>

### III. RECENT SUPPORT FOR THE APPLICATION OF PROPORTIONALITY PRINCIPLES

#### A. *Commentaries*

The Sedona Conference recently issued a highly significant commentary, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, which addresses proportionality issues in considerable detail.<sup>27</sup> That commentary, drafted by the Sedona Conference Working Group on Electronic Document Retention & Production (WG1) (The Sedona Conference Working Group), articulates *The Sedona Conference® Principles of Proportionality (Principles)*, six principles to guide courts and practitioners in applying proportionality to civil litigation.<sup>28</sup> Those principles are as follows: first, “[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.”<sup>29</sup> Second, “[d]iscovery should generally be obtained from the most convenient, least burdensome,

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24. Fed. R. Civ. P. 26(b), advisory committee’s note (2006).

25. *Id.*

26. *Id.*

27. *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289 (2010) [hereinafter *Commentary on Proportionality*]. The author is a member of that Working Group and provided several comments during the drafting process.

28. *Id.* at 291-92.

29. *Id.* at 291.

and least expensive sources.”<sup>30</sup> Third, “[u]ndue burden, expense, or delay resulting from a party’s action or inaction should be weighed against that party.”<sup>31</sup> Fourth, “[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.”<sup>32</sup> Fifth, “[n]onmonetary factors should be considered when evaluating the burdens and benefits of discovery.”<sup>33</sup> Sixth, and finally, “[t]echnologies to reduce cost and burden should be considered in the proportionality analysis.”<sup>34</sup>

The *Principles* are intended to provide “a framework for the application of the doctrine of proportionality to all aspects of electronic discovery.”<sup>35</sup> The *Principles* acknowledge that the 2006 Federal Rules of Civil Procedure amendments were intended to give the courts a greater ability to address the “tremendous increase” in the amount of potentially relevant electronically stored information by applying “proportionality” principles to discovery, but the *Principles* also recognize that courts have not always applied those principles in appropriate cases.<sup>36</sup> The *Principles* emphasize that “[i]n the electronic era, it has become increasingly important for courts *and* parties to apply the proportionality doctrine to manage the large volume of ESI and associated expenses now typical in litigation.”<sup>37</sup> Each principle expands upon this theme in considerable detail, with helpful accompanying analysis and a review of the applicable cases. These principles will be discussed in more detail below.

The Sedona Conference Working Group is not alone in advocating that the courts and litigants should apply “proportionality” principles to discovery in civil litigation. For example, in March 2009, the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System released a report that addressed the role of discovery in the United States civil justice system.<sup>38</sup> Among its recommendations is that electronic discovery “should be limited by proportionality, taking into account the nature and scope of the case,

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 291.

34. *Id.*

35. *Id.* at 292.

36. *Id.* at 293.

37. *Id.*

38. See AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 14 (2009) [hereinafter FINAL ACTL & IAALS REPORT], available at <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20rev%208-4-10.pdf>.

relevance, importance to the court's adjudication, expense and burdens."<sup>39</sup>

In 2010, several law journal articles have urged the courts to apply "proportionality" principles in litigation.<sup>40</sup> Although the authors did not necessarily express the same rationales for their recommendations, the authors agreed that proportionality can be a valuable method of evaluating and resolving discovery disputes.<sup>41</sup> One writer has observed that the greatest value of proportionality is that it "creat[es] a mindset in the court and litigants that discovery needs to be focused on the real issues in the case and that cost is a consideration."<sup>42</sup> Proportionality, at least in theory, enjoys considerable support.<sup>43</sup>

### B. Recent Court Decisions

A number of courts recently have endorsed the application of proportionality principles in the electronic discovery context. For example, in *Tamburo v. Dworkin*,<sup>44</sup> Magistrate Judge Nan R. Nolan cited the *Principles* in addressing the defendants' motion to stay discovery pending the resolution of their motion to dismiss plaintiffs' complaint.<sup>45</sup> In granting that motion in part, Judge Nolan emphasized that the Rule 26 "proportionality test" authorized the court to "limit discovery if it determin[ed] the burden of the discovery outweigh[ed] its benefit."<sup>46</sup> Judge Nolan cited the Sedona Conference *Principles* interpreting Rule 26(b)(2)(C)(iii) as providing the court flexibility and discretion to limit discovery "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."<sup>47</sup>

Judge Nolan ordered a phased discovery schedule, under which the

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39. *Id.*

40. See Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather Than the Exception*, 87 Denv. U. L. Rev. 513, 527-32 (2010) [hereinafter Netzorg & Kern]; John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 Campbell. L. Rev. 455, 460 (2010) [hereinafter Carroll]; Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since 2006*, 14 Rich. J. L. & Tech. 3 (2008). See also Debra Lyn Bassett, *Reasonableness in E-Discovery*, 32 Campbell. L. Rev. 435 (2010) (describing Rule 26(b)(2)).

41. See Netzorg & Kern, *supra* note 40, at 527; Carroll, *supra* note 40, at 455.

42. Carroll, *supra* note 40, at 460.

43. One prominent article questions this premise, concluding "proportionality requires impossible comparisons between discovery value and cost before the parties gather the evidence." Scott A. Moss, *Litigation Discovery Cannot Be Optimal But It Could Be Better: The Economics of Improving Discovery Timing In A Digital Age*, 58 Duke L. J. 889, 890 (2009).

44. *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at \*3 (N.D. Ill. Nov. 17, 2010).

45. *Id.*

46. *Id.*

47. *Id.*



parties were limited to written discovery, and also ordered the parties to conduct an “in-person meet and confer to prepare a phased discovery schedule,” and to “actively engage in cooperative discussions to facilitate a logical discovery flow.”<sup>48</sup> Judge Nolan also directed the parties to “focus their efforts” on completing their Rule 26(a) initial disclosure requirements before proceeding with other discovery.<sup>49</sup> Finally, Judge Nolan stated the parties “should prioritize their efforts on discovery that is less expensive and burdensome.”<sup>50</sup>

In a second recent noteworthy decision, *Cartel Asset Management v. Ocwen Financial Corp.*,<sup>51</sup> the Magistrate Judge Craig B. Shaffer emphasized that, under the Rules, the court had discretion “to tailor discovery to the circumstances of the case at hand, to adjust the timing of discovery, and apportion costs and burdens in a way that is fair and reasonable.”<sup>52</sup> The judge explained: “Rule 26(b)(2)(B) provides a useful mechanism to address the unique challenges of electronic discovery,” but he also cautioned that the Rule “should not be exploited as a vehicle for gamesmanship,” or as a method “to forestall the production of materials that are admittedly relevant and readily accessible.”<sup>53</sup> In *Cartel Asset Management*, the parties disagreed over the temporal scope of plaintiffs’ discovery requests, and ultimately the court determined that the defendants justified their objection to producing information earlier than a specified date.<sup>54</sup> In the course of his ruling, however, the magistrate judge criticized the defendants for being non-specific as to the potential burden of producing allegedly inaccessible electronic information on backup tapes, and also observed that “[n]either side has approached discovery with a spirit of cooperation or efficiency,” but, instead, the discovery had “devolved into a series of complaints and counter-accusations.”<sup>55</sup>

Finally, in *Young v. Pleasant Valley School District*,<sup>56</sup> Judge James M. Munley applied Rule 26(b)(2) in denying the plaintiffs’ demand for the restoration and production of the school district’s backup tapes for its e-mail system.<sup>57</sup> The court explained that the school district had

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-cv-01644-REB-CBS, 2010 WL 502721 (D. Colo. Feb. 8, 2010).

52. *Id.* at \*9.

53. *Id.* at \*19.

54. *Id.* at \*27.

55. *Id.* at \*\*15-16, 26.

56. *Young v. Pleasant Valley School District*, No. 3:07cv854, 2008 WL 2857912 (M.D. Pa. July 21, 2008).

57. *Id.* at \*2.

demonstrated it would be costly to rebuild a discontinued server, and the court observed that, although skeptical of the district's cost estimate, it recognized that the \$5,000 expenditure would be a significant one.<sup>58</sup> The court also concluded that the information sought from the e-mails, while relevant, likely could be obtained from more accessible sources, and it observed that the "resources of the parties involved and the amount in controversy in this case are relatively small," noting that the dispute did not involve a large corporation "that could produce the material in question using a minuscule fraction of its budget."<sup>59</sup>

These cases illustrate how district courts can apply Rule 26(b)(2) and proportionality principles to achieve reductions in the costs and burdens of electronic discovery. The decisions reflect the individual judges' careful efforts to review the parties' contentions, and more importantly, their documentation, concerning both the relevance of the information requested and the costs and burdens of retrieving it for possible production. The cases also show that a court's ability to apply proportionality to discovery demands is dependent on the clarity of the parties' submissions and the court's ability to weigh the alleged importance of the discovery against the other relevant factors of Rule 26(b).

#### IV. APPLYING PROPORTIONALITY PRINCIPLES: THE CHALLENGE

The admonition that proportionality principles should be applied in civil litigation will remain an abstraction unless those principles can be practically applied in specific cases. The Sedona Conference Working Group's *Principles* provide a useful framework for courts and litigants to consider as they encounter electronic discovery issues. It is, therefore, helpful to discuss the salient provisions of the *Principles* in order to derive some practical lessons for the application of proportionality in litigation.

##### A. *Pre-litigation Proportionality Analysis*

"Proportionality" can be addressed even before the actual litigation begins. Most of the commentary on "proportionality" has discussed that concept in the context and confines of litigation, but several authors have extended that discussion to the pre-litigation context.<sup>60</sup> The Sedona

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58. *Id.*

59. *Id.*

60. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010) (explaining that the "assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence"); Paul W. Grimm, Michael D. Berman, Conor R. Crowley, & Leslie Wharton, *Proportionality in the Post-*

Conference Working Group has given particular prominence to the relevance of proportionality in the pre-litigation context, emphasizing 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.”<sup>61</sup> The Working Group explains that the burdens and costs of the preservation of potentially relevant electronic discovery must be weighed against the “potential value and uniqueness” of the information.<sup>62</sup> The Working Group also recognizes that the Federal Rules of Civil Procedure do not apply until litigation has begun, but the Working Group notes that the courts have invoked their inherent authority to sanction parties for “pre-litigation preservation failures.”<sup>63</sup> Acknowledging there are no decisions applying the Rule’s “proportionality” factors to the pre-litigation context, the *Principles* state, “parties who demonstrate that they acted thoughtfully, reasonably, and in good faith in preserving or attempting to preserve information prior to litigation should generally be entitled to a presumption of adequate preservation.”<sup>64</sup>

Similarly, in an innovative approach on to how to address electronic discovery burdens, Chief Magistrate Judge for the District of Maryland, Judge Paul W. Grimm, and several prominent co-authors, recommend that a proportionality analysis should apply to a prospective party’s duty to preserve potentially relevant information when it reasonably anticipates litigation.<sup>65</sup> These writers observe that, because the Civil Rules apply only to pending lawsuits, and not to pre-litigation activities, “prudent counsel and cautious litigants may feel compelled to expend enormous sums to preserve [electronically stored information] that need not be preserved, will never be produced in discovery, and that may greatly exceed the economic value of the claims presented.”<sup>66</sup> Recognizing that such conduct is not only uneconomic, but also inconsistent with the principles of Rule 26 as applied in discovery, the authors express their concern that the “absence of clear proportionality guidelines” in the pre-litigation context “may permit coercive demands and settlements” on the part of both plaintiffs and defendants.<sup>67</sup> The authors recommend that a party faced with the challenge

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*hoc Analysis of Pre-litigation Preservation Decisions*, 37 U. Balt. L. Rev. 381 (2008) [hereinafter Grimm et al.].

61. *Commentary on Proportionality*, *supra* note 27, at 291.

62. *Id.* at 296.

63. *Id.*

64. *Id.*

65. Grimm et al., *supra* note 60, at 399-402.

66. *Id.* at 384.

67. *Id.* at 402.

of preserving potentially relevant information based on a reasonable anticipation of litigation should be able to apply the principles of Rule 26(b)(2)(B) and Rule 26(b)(2)(C) to its preservation obligation.<sup>68</sup> In the authors' judgment, that party should be able to undertake what it reasonably believes to be proportional preservation activities, including the decision not to preserve non-reasonably accessible information sources.<sup>69</sup> The authors also observe that the party may reasonably conclude that its preservation obligation should not exceed the value of the potential litigation.<sup>70</sup> One prominent district judge also has observed that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."<sup>71</sup>

The views of these commentators serve as useful reminders that proportionality can, and indeed, should be pursued, if at all possible, before litigation even begins. The challenge, however, is whether a prospective party to litigation can be pro-active in addressing preservation issues relating to proportionality. There are a number of ways this issue can be addressed.

First, a prospective plaintiff, who presumably has concluded that he or she has a meritorious legal claim against a prospective defendant, can send a demand letter to that individual or entity describing the legal claim and the core information, it believes, must be preserved if litigation ensues. A demand letter that provides an identification of electronic discovery sources that likely will contain information central to the dispute may assist both parties in narrowing potential disputes over discovery. Even if a detailed description of all potentially relevant sources is not yet feasible, the demand letter at least can be a starting point for the parties' dialogue on addressing proportionality issues. There also may be situations in which, by law or contract, the prospective party plaintiff must file a formal notice of claim with the prospective defendant. In those cases, the allegedly wronged party has an opportunity to describe not only its legal claim, but also the sources of information relevant to that claim.

The Sedona Conference Working Group's *Principles* also recommend that a party that responds responsibly to a pre-litigation preservation demand should not later become the subject of sanctions on account of

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68. *Id.* at 408-10.

69. *Id.* at 405.

70. *Id.* at 410.

71. *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)(citation omitted).

those efforts.<sup>72</sup> Judge Grimm and his co-authors agree—they observe that parties who act in good faith in applying proportionality principles to their preservation obligation should be able to challenge unreasonable demands to preserve electronically stored information, and also should be able to resist discovery sanctions based on those demands.<sup>73</sup>

Pre-litigation discussions about preservation merit serious consideration, and may have some potential in reducing discovery costs. At the same time, courts and litigants need to be realistic about the level of cooperation—or even the opportunity to cooperate—that may occur at this incipient stage of the dispute process.<sup>74</sup> A written notice of claim may provide an opportunity to shape the scope of preservation and eventual discovery, but that notice also may be too preliminary in its description of the claim to be of much value to the other party in identifying potentially relevant information sources. For example, the notice may lack any detail concerning relevant information or, if it does, the notice may over-state the universe of potentially relevant sources. From a strategic perspective, the party sending a notice or demand letter also may advocate its presumptive entitlement to broad discovery and will not want to miss identifying potentially relevant information sources. As a result, the party receiving the notice of claim or demand letter may face considerable uncertainty in responding to these preservation demands. That uncertainty, however, should not discourage the parties from exploring potentially valuable efforts to define the scope of preservation and potential discovery.<sup>75</sup>

### B. *The Pleadings Stage*

After litigation begins, the parties can begin to explore the feasibility of agreeing to proportional discovery. That first stage of the litigation, i.e., the time at which the complaint is filed to the close of the pleadings, provides an immediate opportunity for the parties to identify the scope of

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72. *Commentary on Proportionality*, *supra* note 27, at 296.

73. Grimm et al., *supra* note 60, at 411.

74. Because there is no litigation pending, the parties cannot secure an adjudication of their disagreements over preservation. See *Texas v. City of Frisco*, No. 4:07cv383, 2008 WL 828055, at \*2-4 (E.D. Tex. Mar. 27, 2008) (declining to issue a declaratory judgment concerning parties' preservation dispute, holding that there was no ripe or justiciable controversy).

75. One district court recently remarked that “reasonableness and proportionality” principles, as applied to an entity’s computer backup tapes, “may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.” *Orbit One Commc’ns., Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010). See also *Pippins v. KMPG LLP*, No 11 Civ.0377 (CM), 2011 WL 4701849, at \*6 (S.D.N.Y. Oct. 7, 2011)(agreeing with the observation in the *Orbit One* decision).

relevant discovery. Early communication about the scope of the case may lead to some agreements.

At this first stage of the litigation, however, the parties may have little knowledge of what information will be relevant to the claims or defenses that have been described in the pleadings. The complaint and answer each may state, in only the most general terms, the relevant facts. While some level of generality may be adequate to put a party on notice of the claims made against it (or the affirmative defenses to recovery available to that party), to the extent the pleadings express the relevant facts in only a general fashion, that lack of specificity inevitably will complicate the parties' understanding of the scope of electronic discovery implicated in the case. An immediate challenge for the litigants, therefore, is whether, and how, they can use the specificity in the pleadings to discuss a reasonable scope to their discovery.

This article does not take a position in the current debate concerning the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*<sup>76</sup> and *Ashcroft v. Iqbal*,<sup>77</sup> which interpreted Federal Rule of Civil Procedure 8 to require that the factual allegations in pleadings must be non-conclusory and that district courts must examine whether those non-conclusory allegations, accepted as true, plausibly state a claim for relief.<sup>78</sup> Whatever position one takes on that issue,<sup>79</sup> it should be uncontroversial to suggest that, from the vantage point of litigation that may engender substantial discovery disputes over the preservation, identification, and collection of electronically stored information, greater specificity in the pleading should be encouraged wherever feasible. The specificity of a pleading, e.g., the degree to which a complaint or answer describes the factual context for the party's position, may educate the parties and the court concerning the potential scope of the case and what sources of electronically stored information may be relevant.

A significant challenge may be how to encourage the parties to provide that specificity. In many cases, it may be unreasonable to expect much specificity at the pleadings stage. The plaintiff may lack knowledge

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76. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

77. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

78. *Iqbal*, 129 S.Ct. at 1950; *Twombly*, 550 U.S. at 557.

79. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules*, 60 DUKE L. J. 1, 18-30 (2010) (criticizing the decisions); Robert D. Owen & Travis Mock, *The Plausibility of Pleadings After Twombly & Iqbal*, 11 Sedona Conf. J. 181, 188 (2010) (predicting that the heightened pleading standard articulated in *Twombly* and *Iqbal* may "indirectly limit discovery by incentivizing parties to plead more facts," but the decisions also may "have the perverse effect of strengthening some plaintiffs' demands for comprehensive discovery" because the decisions "link[] discovery management to pleadings standards").

of much of the information that will be relevant to his or her complaint.<sup>80</sup> The defendant’s answer, including any affirmative defenses, also may reflect its lack of knowledge of the plaintiff’s claims, particularly in situations in which the defendant has not had extensive dealings or any pre-existing relationship with the plaintiff.<sup>81</sup> The most prominent obstacle to incorporating proportionality at this stage therefore may be the parties’ lack of knowledge about the information that is central or relevant to the disposition of the litigation, which may include their asymmetrical knowledge or control over that information.

Judges and litigants should be encouraged to consider whether they can develop practical ways to address proportionality at this early stage of the litigation.<sup>82</sup> Informal exchanges of information about the parties’ claims may be feasible in some situations, taking into account problems the parties may encounter in analyzing the other party’s position at that stage in the proceedings. Realistically, however, the parties may have only a limited ability to evaluate the stakes in the litigation, or unreasonable expectations about its outcome, until after the pleadings are joined. Informal exchanges of information may facilitate the parties’ ability to cooperate, but, realistically speaking, the “meet and confer” process, discussed below, ultimately may be the first time that the parties will address proportionality issues.

### C. *The “Meet and Confer” Process*

The Rule 26(f) “meet and confer” process may be the most feasible opportunity for the parties to address “proportionality” issues.<sup>83</sup> In that setting, the parties can begin the process of identifying and, if feasible, limiting the issues in the litigation. When the 2006 Civil Rules amendments went into effect, there was some expectation that the counsel would engage in a comprehensive meeting, and as a result, they would be able to provide the court with either their agreements on the scope of discovery, or the issues upon which they disagreed and wanted the court to

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80. See Miller, *supra* note 79, at 51 n.200 (arguing that the pleading stage “is far too early for courts to make reasoned decisions on the cost-benefit value of proceeding to discovery in many cases”).

81. A corollary problem is the possible reluctance of either party to be descriptive in its pleading out of concern that the other party will be able to identify an admission in the case.

82. See Rebecca Kourlis, *Reinvigorating Pleadings*, 87 *Denv. U. L. Rev.* 245, 278 (2010) (recommending that “[p]leadings that require the recitation of facts directly bearing on the elements of a claim or affirmative defense will better address current problems of pervasive cost and delay by commencing the issue-narrowing process at the start of the case”).

83. Fed. R. Civ. P. 26(f).

resolve.<sup>84</sup>

There is concern that some parties do not take seriously their obligation to “meet and confer” or that some parties view the “meet and confer” process as an unreasonable imposition on them by the court, to which, therefore, only minimal attention will be given.<sup>85</sup> As one judge recently observed in an analogous circumstance, “[c]ivil litigation, particularly with the advent of expansive e-discovery, has simply become too expensive and too protracted to permit superficial compliance with the ‘meet and confer’ requirement . . . .”<sup>86</sup>

Some parties may engage in a single meet and confer session, and having developed a proposed pretrial order for the district court, they may consider their work of defining the scope of discovery as essentially completed. In a case presenting complex electronic discovery issues, however, a single meet and confer session may be unrealistic.<sup>87</sup> In addition, the parties’ preliminary understandings or agreements as to the scope of discovery may prove to be inaccurate, or the parties may determine they need to reconsider their agreements based, for example, on knowledge they acquire after the discovery process is under way.<sup>88</sup> There is no reason to “freeze” in place a preliminary agreement or understanding of what electronic discovery will be conducted if the parties’ assumptions turn out to be inaccurate with the acquisition of additional knowledge or experience with the parties’ electronic discovery sources.

Where parties have engaged in more than a *pro forma* meet and confer, and have conscientiously conferred about the issues in their case, they may be able to identify, in some depth, the scope of the potential discovery. To the extent the parties can informally agree on that scope,

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84. Fed. R. Civ. P. 26(f), advisory committee’s note (2006).

85. See Patrick Oot, Anne Kershaw & Herbert L. Roitblatt, *Mandating Reasonableness in a Reasonable Inquiry*, 87 Denv. U. L. Rev. 533, 539 (2010) (citing the findings of a Federal Judicial Center survey that “only one in three respondents reported that their [Rule] 26(f) conference to plan discovery included a discussion” of electronically stored information, that over half of the respondents reported that the conference did not include that discussion, and that “only one in five court-ordered discovery plans” included provisions relating to electronically stored information); Emery G. Lee III, *Effectiveness of the 2006 Rules Amendments*, 11 Sedona Conf. J. 191, 195 (2010) (citing Federal Judicial Center survey as indicating that Rule 26(f) has had some, albeit not dramatic, effect on counsel conferring about electronic discovery issues).

86. *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-cv-01644-REB-CBS, 2010 WL 502721, at \*13 (D. Colo. Feb. 8, 2010) (Magistrate Judge Craig B. Shaffer describing the parties’ obligation, under Rule 26(c), to meet and confer prior to bringing a discovery dispute to the court for resolution).

87. See Rosenthal, *From Rules of Procedure*, *supra* note 3, at 241.

88. Agreements on search methodologies, for example, may be an iterative process. See Jason R. Baron & Edward C. Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 Sedona Conf. J. 229, 234 (2010).



describe the relevant electronic sources, and resolve other questions without undertaking the formal process of service and response of discovery documents, the parties will have saved considerable time and resources.<sup>89</sup>

#### D. *Judicial Involvement*

Early discussion of “proportionality” issues is critical to the parties’ ability to agree on discovery that will be proportional or cost-effective. Just as important, however, is the commitment of the judge (or magistrate judge) to oversee the “meet and confer” process. Judge Lee H. Rosenthal, the former Chair of the Judicial Conference’s Standing Committee, has explained “early and continuing judicial involvement in the cases that need it—which corresponds to the cases involving electronic discovery and that are more complex and involve higher stake—is important.”<sup>90</sup> Judge Rosenthal also has observed that more active judicial involvement will educate the court concerning the parties’ informal efforts to resolve electronic discovery issues.<sup>91</sup> As former Magistrate Judge John Carroll also emphasized, “[p]roportionality only works if the intervention is early and by a judge willing to perform the managerial role contemplated by the discovery rules.”<sup>92</sup> Judge Carroll identifies a straight-forward solution to this problem: “require either by protocol or local rule that there be a discussion of proportionality before the discovery plan required by Rule 26(f) is submitted to the court.”<sup>93</sup> His recommendation is not radical. The *Manual for Complex Litigation* recommends that a court “assess the materiality and relevance of proposed discovery” when it crafts a discovery plan, and the *Manual* specifically cites Rule 26(b)(2)’s proportionality principle.<sup>94</sup>

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89. See Steven S. Gensler, *A Bull’s Eye View of Cooperation in Discovery*, 10 Sedona Conf. J. 363, 370 (2009) (“Lawyers could greatly streamline the discovery process by freely sharing information about what sources they have and where they are kept, rather than forcing each other to serve interrogatories or take depositions to gather this type of foundational information. Similarly, many discovery disputes, while legitimate, do not warrant costly briefing. Lawyers should continue to consider whether they can arrive at the same result that the judge will supply—or something close to it—by agreement.”).

90. Rosenthal, *supra* note 1, at 11 (Judge Rosenthal also explains “[a] judge’s routine and rote activity in a single pretrial conference is not sufficient. More judicial involvement is needed to tailor the discovery to the reasonable needs of the case, to achieve proportionality. And second, when lawyers cooperate in discovery, which often requires judicial involvement to achieve, costs and disputes both decrease.”).

91. Rosenthal, *From Rules of Procedure*, *supra* note 3, at 241 (“the judge could learn whether the meet-and-confer conference was a meaningful exchange, or merely a perfunctory discussion about deadlines”).

92. Carroll, *supra* note 40, at 461.

93. *Id.* at 462.

94. See MANUAL OF COMPLEX LITIGATION (FOURTH), § 11.41 (2010).

Courts can develop or nurture a local culture in which counsel for the parties are encouraged to engage in comprehensive or thorough “meet and confer” sessions. The most recent court initiative is the Seventh Circuit’s Electronic Discovery Pilot Program, which began in October 2009.<sup>95</sup> That court has explicitly identified proportionality as a key principle of its program.<sup>96</sup> A number of district courts, by either local rule or protocol, also have implemented Rule 26(f) by imposing specific requirements on the parties to confer concerning electronic discovery.<sup>97</sup>

In their oversight of the parties’ “meet and confer” process, however, the courts need to strike the appropriate balance between a level of involvement that could become overly intrusive judicial activism into the parties’ discovery planning, or its opposite—a complete “hands off” approach in which a judge becomes wholly removed from the litigation. For example, if a judge becomes too involved in discovery planning, the parties may perceive that involvement as judicial intrusion into the parties’ development of the case or, even more problematic, as a judicial evaluation of the merits of the case. The judge’s involvement also may be perceived as pressuring one or the other party into a settlement by influencing the nature or scope of the discovery that proceeds. On the other hand, if the judge does not become involved in the process, the parties will be without the court’s guidance on how they may resolve their disputes informally. The irony then would be that the judge, while remaining uninvolved during the early phase of the case, inadvertently is only delaying the involvement that he or she wanted to avoid.

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95. See Seventh Cir. Elec. Discovery Comm., *Seventh Circuit Electronic Discovery Pilot Program Interim Report on Phase Two* (May 1, 2011), available at <http://www.discoverypilot.com/sites/default/files/Phase%20Two%20-%20Interim%20Report.pdf>; Seventh Cir. Elec. Discovery Comm., *Principles Relating to the Discovery of Electronically Stored Information*, in Seventh Circuit Electronic Discovery Pilot Program, (Oct. 1, 2009), available at <http://www.7thcircuitbar.org/associations/1507/files/Statement1.pdf> [hereinafter *Seventh Circuit Principles*]. For an extensive analysis of the Program, see Tina B. Solis, *A Discussion of the Seventh Circuit’s Electronic Discovery Pilot Program and Its Impact On Early Case Assessment*, 30 N. Ill. U. L. Rev. 563 (2010).

96. *Seventh Circuit Principles*, supra note 95, Principle 1.03 (Discovery Proportionality), at 11 (“The proportionality standard set forth in [Rule 26(b)(2)(C)] should be applied in each case when formulating a discovery plan”).

97. See, e.g., Administrative Order No. 174 (M.D. Tenn. July 9, 2007); Default Standard for Discovery of Electronically-Stored Information (“E-Discovery”) (N.D. Oh.); Suggested Protocol for Discovery of Electronically-Stored Information (“ESI”) (D. Md.); Guidelines for Discovery of Electronically Stored Information (ESI) (D. Kan.). These are available via <http://www.ediscoverylaw.com> (maintained by the K & L Gates law firm). See Pilot Project Regarding Case Management Techniques for Complex Civil Cases, S.D.N.Y. Oct. 2011 available at <http://www.nysd.uscourts.gov> (specifying procedures, including limitations on electronic discovery, for cases designated for inclusion in a pilot project on case management techniques).

There are several mechanisms by which a court can monitor the progress of discovery, yet not intervene prematurely. First, the court can direct the parties to submit periodic status reports, optimally in letter format, describing the ongoing discovery and advising the court of the prospect that a dispute may occur. The discipline imposed by a periodic reporting requirement might encourage greater communications between counsel. Second, the court can convene periodic telephone conference calls during which counsel will report on discovery issues and identify any discovery disputes. Either method may result in the court gaining a better understanding of the parties’ progress and the likelihood of future discovery disputes.

A more draconian alternative may be a court’s incorporation into its Rule 16 case management order of a firm set of deadlines for the completion of specific discovery projects. To craft such an order, however, the court will need to have a sufficient understanding of the discovery to be completed by each of the parties. Even assuming that level of knowledge, a court’s imposition of these kinds of incremental deadlines may be unrealistic. Moreover, the establishment of court-ordered deadlines could result in both motions practice and the amendment of the initial order to reflect the parties’ acquired understanding of the scope of the discovery that must go forward. Creating staggered deadlines also may introduce into the parties’ planning an artificial set of targets or objectives, which, if not met, may then become obstacles to progress, or even sources of dispute. On balance, this type of judicial oversight may be both unnecessary and even counter-productive, and therefore reserved for a small number of cases that present unique case management or other issues.

#### *E. Narrowing the Issues*

An additional challenge in achieving proportionality in discovery is how to differentiate between the central issues or claims in the litigation and the issues that are tangential or peripheral. One reasonable approach may be to determine, if only in a preliminary manner, whether specific counts of the complaint, counterclaim, or the comparable affirmative defenses can be resolved without resorting to discovery. Similarly, to the extent the parties can identify the scope of the legal claims, *e.g.* how far back in time information will be relevant and whether information sources in specific offices or locations can be excluded as not relevant to the claims or defenses, they can facilitate identification of the relevant information

sources.<sup>98</sup> Early judicial resolution of discrete legal or factual issues may result in efficiencies.<sup>99</sup>

To achieve that objective, the judge or magistrate judge may encourage the parties to prepare and exchange statements of position, in which they briefly explain their legal theories of relief, and more importantly, how specific sources of electronically stored information will support their theories. The statements they exchange must be sufficiently descriptive to give them a basis to evaluate their contrasting discovery positions.<sup>100</sup> A useful way to proceed might be to match the elements of the legal claim against the likely sources of information, whether in physical (hard copy) or electronic format, that are likely to yield the critical information that would support the elements of the plaintiff's claims. The same "exercise" would be conducted from the defendant's vantage point, identifying information sources likely to support its defenses to those claims. As an additional refinement, each requesting party could be required to "rank" the sources of information as to the greatest possible relevance to its case. The responding party, in turn, could "rank" those sources by level of accessibility.

The parties' exchange of these annotated statements of position might focus their efforts on the most pertinent sources of information. This approach would be consistent with the recommendation in the Manual for Complex Litigation that attorneys "should confer and submit a tentative statement of disputed issues in advance, agreed on to the extent possible."<sup>101</sup> It would refine that approach by expecting the parties to commit themselves to an additional effort at linking the issues in the case to an agreed scope of specific discovery, or at least begin that process. The Task Force on Discovery and Civil Justice of the American College of Trial

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98. See, e.g., *Caldara v. N.J. Transit Rail Op., Inc.*, No. 09-657(SRC)(MAS), 2010 WL 1912656, at \*3 (D. N.J. May 7, 2010) (determining that the scope of deposition discovery was to be limited geographically and temporally); *Rosenbaum v. Becker & Poliakoff, P.A.*, No. 08-CV-81004, 2010 WL 623699, at \*9 (S.D. Fl. Feb. 23, 2010) (applying Rule 26(b)(2)(B) to impose temporal scope on electronic discovery requests); *Takacs v. Union Cnty.*, No.08-711 (KSH)(MAS), 2009 WL 3048471, at \*2 (D. N.J. Sept. 23, 2009) (determining plaintiffs' document discovery demands were not proportional to the needs of the case).

99. See FINAL ACTL AND IAALS REPORT, *supra* note 38, at 7 ("Courts should be encouraged to stage discovery to insure that discovery related to potentially dispositive issues is taken first so that those issues can be isolated and timely adjudicated").

100. See U.S. DIST. COURT E. DIST. OF PA., SAMPLE REPORT OF RULE 26(F) MEETING 1 (2006) available at <http://www.paed.uscourts.gov/documents/procedures/savpol5.pdf> (requiring counsel to set forth "concisely the factual background that the parties contend support their claims and defenses," summarize their discussion of "primary issues, threshold issues and those issues on which the parties will need to conduct discovery," and identify "what information each party needs in discovery as well as when and why").

101. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.33 (2004).

Lawyers and the Institute for the Advancement of the American Legal System also has endorsed the concept that “early disclosure of known facts that will support claims and affirmative defenses is preferred, whether those facts appear in the initial pleadings, early exchanges between counsel or discussions with the court. The purpose of doing so is to inform and shape discovery obligations, especially in the digital age.”<sup>102</sup>

We should recognize several possible drawbacks to this approach. First, the party’s representations as to its theories of liability or defense, or the nature of its expected proof to support those theories, may expose it to a later challenge by the opposing party. The opposing party could argue that the representations defeat the party’s case, i.e., the factual representations of the party’s legal claims are insufficient to withstand dismissal under the applicable legal standard or constitute admissions undermining those claims. Second, the opposing party could argue that the other party’s representations must bind it to a specific legal theory or a set of material facts, thereby precluding it from altering its position as the litigation proceeds. Finally, even if neither party makes those arguments, each party nevertheless may find the process to be either of marginal use to clarifying the scope of discovery in the first instance, or that the preliminary statements will be rendered obsolete by later discovery. Obviously, to the extent the parties are less specific in identifying their claims or the supporting information sources, the less productive this procedure will be in narrowing the scope of the case or achieving efficiencies in discovery.

While there may be no entirely satisfactory solution to these problems, the court and parties could agree that a party’s first statement of position may be “without prejudice” to its being able to advance a different legal or factual claim later in the litigation. But, interests of finality, particularly in discovery, counsel against there being an indefinite meaning to the statements of position.

#### *F. Evaluating Proportionality Disputes*

When a court is confronted with the issue of whether or not to limit what could be potentially burdensome or expensive discovery, it must have some way of assuring itself that the requested discovery will be sufficiently valuable to justify the expenditure of the parties’ resources. Stated another way, the court also may be properly skeptical of uncorroborated assertions that discovery will be unduly burdensome or sweeping assertions that the discovery will yield highly-relevant or unique information supporting the

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102. FINAL ACTL AND IAALS REPORT, *supra* note 38.

party's claim.<sup>103</sup> The Sedona Conference Working Group recognizes this problem and recommends 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.”<sup>104</sup>

Although it may be difficult in some cases for the parties to agree on what discovery is “sufficiently important,” to justify the burden and expense of its production,<sup>105</sup> the Working Group urges discovery “should be limited if the burden or expense of producing the requested information is disproportionate to its importance to the litigation.”<sup>106</sup> The Working Group acknowledges that a court may have difficulty in making that assessment, since it “may be impossible to review the content of the requested information until it is produced.”<sup>107</sup>

The Working Group also emphasizes that, at least in some cases, it will be clear that the requested evidence is important, or even “outcome-determinative.”<sup>108</sup> In such cases, the court may be able to determine that more extensive discovery will be necessary. The court, however, will need the parties' input in order to evaluate the nature or scope of that discovery. For example, sampling techniques may prove to be helpful to determining the importance of evidence that is difficult to identify or produce.<sup>109</sup> The Working Group emphasizes the parties and the court should take advantage of available technology in their efforts. Its *Principle 6* expressly states “[t]echnologies to reduce cost and burden should be considered in the proportionality analysis.”<sup>110</sup> In cases involving a potentially large universe of electronically stored information, the use of search terms agreed to by the parties may be able to narrow the scope of the discovery.<sup>111</sup>

The Sedona Conference Working Group also urges that the parties provide “extrinsic information” about their electronically stored information

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103. See, e.g., *Rodriguez-Torres v. Gov't Dev. Bank of Puerto Rico*, 265 F.R.D. 40, 43 (D. P.R. 2010) (applying Rule 26(b)(2)(B) and finding that plaintiffs' assertion that e-mails would produce highly-relevant information was without basis); *Starbucks Corp. v. ADT Sec. Servs., Inc.*, No. 08-cv-900-JCC, 2009 WL 4730798, at \*5-6 (W.D. Wash. Apr. 30, 2009) (finding that defendant failed to establish that requested information was not reasonably accessible, observing that its declarant had provided exaggerated estimates of the costs and burdens of production).

104. *Commentary on Proportionality*, *supra* note 27, at 291, 299.

105. *Id.* at 299.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 299.

110. *Id.* at 291, 301.

111. See *FTC v. Church & Dwight Co.*, 747 F.Supp.2d 3, 8 (D.D.C. 2010) (Magistrate Judge John M. Facciola cites *Principle 6* in recommending that the parties explore the use of agreed search terms to reduce the burden of discovery).

sources.<sup>112</sup> Its commentary does not explain how the parties should provide their views on that issue, but it suggests that the parties should consider the information created by “key players” and created contemporaneously with the “key facts” in the case as likely sources to consider.<sup>113</sup>

In developing this type of information, the parties will want to approach the issue, insofar as is possible, in a cooperative and non-adversarial manner. The court may be able to encourage that perspective by encouraging them to provide informal submissions, or to discuss the issues at a conference with the court and without engaging in motions practice.

Some commentators advocate that litigants prepare and exchange estimates concerning the amount in controversy so they can evaluate what is at stake in the litigation and assess what discovery will be proportional to the case.<sup>114</sup> The reality, however, may be that many litigants (or at least their counsel) do not fully understand the value of the case at the beginning stages of litigation. The damages arising out of a simple breach of contract case also may be easier to evaluate than the damages that result from a complicated negligence case, particularly one arising out of a disastrous incident. In addition, where the effects of the defendant’s wrongful conduct may not be known until some point in the future, the parties’ evaluation of a case will necessarily be imperfect. Finally, in a case involving non-monetary relief, it may be unrealistic to expect the parties to develop such estimates.<sup>115</sup>

### G. “Multi-tiered” Discovery

One of the innovative features of the December 2006 Civil Rules amendments was the explicit recognition that parties requesting electronic discovery should focus their requests on information sources that are the most accessible, the most convenient, and the least expensive.<sup>116</sup> The Sedona Conference Working Group’s *Principle 2* also endorses this approach: “[D]iscovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.”<sup>117</sup> The

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112. *Commentary on Proportionality*, *supra* note 27, at 300.

113. *Id.*

114. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (directing the parties to attempt “to identify a foreseeable range of damages, from zero if Plaintiffs do not prevail, to the largest award they likely could prove if they succeed,” from which the court could estimate what was “at stake” in the case within the meaning of Rule 26(b)(2)’s proportionality analysis).

115. *See infra* pp. 198-200 and notes 138-146; *see* Carroll, *supra* note 40, at 465 (questioning whether a “discovery budget” is practical in such cases).

116. *See* Allman, *The “Two-Tiered” Approach*, *supra* note 18, at ¶¶ 19-24.

117. *Commentary on Proportionality*, *supra* note 27, at 291, 296.

Working Group explains that the courts must limit discovery “when the requested material can be obtained from sources that are ‘more convenient, less burdensome, or less expensive’” as specified in Rule 26(b)(2)(C)(i).<sup>118</sup> Its commentary explains that the “parties should carefully weigh these factors when determining which source is optimal.”<sup>119</sup>

The Working Group’s commentary does not try to describe how the litigants will determine what sources of electronically stored information will be “optimal” to investigate. At the early stages of litigation, it may be difficult for parties to “rank” or assign a value to specific sources of information. The Working Group recognizes that “[i]f the litigation is in its early stages, the parties may not yet be fully aware of all of the viable claims and defenses or factual or legal issues that will ultimately be important to the outcome of the litigation.”<sup>120</sup>

In the December 2006 Rules amendments, the Civil Rules Advisory Committee also recognized it may be difficult to define the first tier sources with any reasonable exactitude.<sup>121</sup> The Advisory Committee suggested parties could identify those information sources based on whether they were in active use by the business or other entity, as opposed to being inactive, or legacy sources, of information.<sup>122</sup>

The task of describing first tier information sources could be a particularly difficult challenge for individuals or entities that do not have well-organized records management systems or that have not developed inventories of their information sources.<sup>123</sup> It also will be difficult for entities that do not litigate frequently to identify the “optimal” sources of potentially relevant information. To the extent this evaluation is simply guesswork, the ultimate value of the information may be limited.

A common sense view is that the parties should and will decide to investigate the feasibility of first identifying and producing the most accessible information sources. Similarly, the parties should be able to agree that the least accessible information sources will be investigated, if at all, after other sources have been identified, collected, and produced. The

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118. *Id.* at 296 (quoting FED. R. CIV. P. 26(b)(2)(C)(i)).

119. *Id.* at 297.

120. *Id.*

121. Fed. R. Civ. P. 26(b), advisory committee’s note (2006).

122. *Id.*

123. See Brandon M. Kimura & Eric K. Yamamoto, *Electronic Discovery: A Call for a New Rules Regime for the Hawai’i Courts*, 32 U. Haw. L. Rev. 153, 178 (2009) (“based on recent federal court e-discovery experience, businesses’ early creation of detailed [electronically stored information] management policies is crucial. Generally, the greater the detail of parties’ [electronically stored information] preservation protocols (i.e. specifying the individuals and computer systems involved), the more productive the Rule 26(f) discovery conference . . . and the fewer the e-discovery problems later”).



Sedona Conference® Working Group suggests that backup media will fit within this latter category.<sup>124</sup> An important task for the litigants therefore will be to try to come to some agreement on what sources may be identified first. To the extent that they are able to do so, their duty to preserve potentially relevant information will be clarified, if not wholly resolved.

In considering this issue, the parties may usefully compare their accessible sources to the information they may identify as their “initial disclosures” as provided in Civil Rule 26(a)(1).<sup>125</sup> Under that rule, the parties must identify, *inter alia*, “a description by category and location of, all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”<sup>126</sup> In *Tamburo v. Dworkin*, for example, the magistrate judge directed the parties to fulfill their Rule 26(a)(1) obligations before engaging in formal discovery.<sup>127</sup>

Accordingly, if the parties can single out first for potential collection and production those sources of information, they will have accomplished two related objectives. First, the parties will have identified the evidence upon which they may rely to establish their respective claim or defense and, second, they will have implicitly agreed to make that evidence available for the other party’s review or inspection.

A related challenge for litigants may be how to determine what falls between the two categories of “most accessible” and “least accessible” sources of electronic information. An agreement on “phased” discovery may be a practical way to resolve that problem. Courts have endorsed phased discovery to resolve discovery disputes, particularly as to discovery that appears to be overly broad.<sup>128</sup> The Seventh Circuit’s Electronic Discovery Pilot Program also includes among the issues to be discussed in the parties’ “meet and confer” process “the potential for conducting discovery in phases or stages as a method for reducing costs and burden.”<sup>129</sup>

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124. *Commentary on Proportionality*, *supra* note 27, at 299-300. *See, e.g.*, *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390, at \*11-13 (S.D. Fla. Nov. 16, 2009) (applying Rule 26(b)(2)(B) analysis to discovery of backup tapes).

125. *See Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at \*3 (N.D. Ill. Nov. 17, 2010) (magistrate judge directs that the parties fulfill their Rule 26(a)(1) obligations before engaging in formal discovery).

126. Fed. R. Civ. P. 26(a)(1).

127. *See Tamburo*, 2010 WL 4867346, at \*3.

128. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.423 (2010); *Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 WL 3926070, at \*3 (D. Conn. Sept. 30, 2010) (ordering a search of the ESI of three named individuals, using specific search terms, and limited in temporal scope).

129. *Seventh Circuit Principles*, *supra* note 95, Principle 2.01(a)(4), at 12.

“Phased” discovery is not necessarily going to achieve proportional discovery. Parties must exercise care in its planning and execution. For example, the parties should evaluate the information sources that will be identified, collected, and produced in the first phase of discovery. Their focus should be on the information most relevant to the claims or defenses. Although a party requesting discovery may be reluctant to “assign” an artificial priority to the relevance of some information categories—especially if that party knows little about the other party’s information sources—some ranking is inevitable. As noted earlier, a court’s inviting the parties to submit statements of their position with offers of proof may help clarify the scope of the discovery and how it should proceed. The information that is most central to their claims or defenses will be addressed in the first phase.

In applying proportionality principles, it also is important to keep in mind that, under Rule 26(b)(2)(B), a party that is required to produce “second tier” information after a showing of “good cause” by the requesting party may do so subject to conditions prescribed by the court.<sup>130</sup> The Committee Note explains conditions may include “limits on the amount, type, or sources of information” or also may include “payment by the requesting party of part or all of the reasonable costs” of obtaining information from the sources.<sup>131</sup>

A final issue to consider is the party’s duty to preserve potentially responsive information that is properly classified as within the “second tier.”<sup>132</sup> The requesting party has an understandable interest in being assured that those less accessible information sources are not deleted while the litigation proceeds. On the other hand, the party with control or custody of those sources bears the real costs of maintaining that information and the uncertainty of when it will be able to delete or destroy the information.

#### *H. When Can Proportionality Be Applied?*

The Sedona Conference Working Group recommends that the parties pay early attention to proportionality issues by being pro-active in discovery, i.e., the “undue burden, expense, or delay resulting from a

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130. Fed. R. Civ. P. 26(b)(2)(B).

131. Fed. R. Civ. P. 26(b) advisory committee’s note (2006). See Vlad Vainberg, *When Should Discovery Come With A Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. Pa. L. Rev. 1523, 1568-72 (2010) (suggesting that, instead of cost-shifting, courts should deny “expensive production of barely relevant discovery from storage”).

132. See Fed. R. Civ. P. 26(b) advisory committee’s note (2006) (explaining that a party has the duty to preserve “second tier” information).

party’s action or inaction should be weighed against that party.”<sup>133</sup> Its *Principles* urge the parties to begin the discovery process early; the premise of this advice is that the parties can “sequence” their discovery and propound discovery “at the early stages” of the litigation.<sup>134</sup>

This is unquestionably helpful advice. It may reflect the concern that some parties unduly delay propounding discovery. Some parties may delay discovery out of genuine ignorance about how to proceed with the process, while other parties may determine that discovery costs should not be incurred until the feasibility or prudence of settlement is adequately explored.

A countervailing concern, however, is that early engagement in electronic discovery may result in a premature rush to demand information sources without adequate planning or understanding of the scope of the discovery demanded. This also could become a more serious problem if the parties’ discovery must be completed under compressed deadlines set out in the court’s Rule 16(b) order.

The Sedona Conference Working Group addresses the problem of the party’s failure to preserve relevant accessible information. As it explains, “A failure to preserve relevant information in an accessible format at the outset of litigation should be weighed against a party seeking to avoid the resultant burden of restoring the information.”<sup>135</sup> The Working Group cites case authority holding that a party who fails to preserve that information may be required to produce it even though it is no longer in a readily accessible format.<sup>136</sup> Given this case authority, the party with control over “second tier” information sources will be responsible for raising this issue early in the discovery process and, if it does not do so, it may face the consequences later. As a result, the accessibility issue needs to be raised at the Rule 26(f) “meet-and-confer.” In that context, judicial involvement, including the setting of specific deadlines for the resolution of these issues, may be useful.

### *I. Nonmonetary Factors*

Cases that involve nonmonetary issues, including actions to enforce constitutional or statutory rights, pose an additional challenge to any attempt to evaluate the respective costs and benefits of discovery in litigation. The Sedona Conference Working Group has addressed this

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133. *Commentary on Proportionality*, *supra* note 27, at 291, 293.

134. *Id.* at 298.

135. *Id.*

136. *Id.*

issue. Its *Principle 5* states that nonmonetary factors “should be considered when evaluating the burdens and benefits of discovery.”<sup>137</sup> Its commentary notes the Civil Rules already recognize that proportionality “encompasses nonmonetary considerations,” citing provisions that require a party promulgating discovery to consider, *inter alia*, “the importance of the issues at stake in the action.”<sup>138</sup> The *Principles* also explain “[a]ny proportionality analysis should consider the nature of the right at issue and any other relevant public interest or public policy considerations, and whether, under the particular circumstances of the case, there should be restrictions on discovery.”<sup>139</sup>

The Sedona Conference Working Group attempts to strike a neutral position on the question of whether a plaintiff who pursues claims founded on a constitutional or statutory right may be able to demand *more* discovery than in a case *not* founded on such a right, although it implies that, in the former case, nonmonetary factors may favor that broader discovery.<sup>140</sup> Arguably, therefore, a plaintiff could contend its effort to vindicate its rights should be a significant factor that supports more discovery. The Working Group’s commentary cites a recent district court case, involving a suit against a public agency, for that proposition.<sup>141</sup>

Although important issues may be at stake in a case, that does not mean more discovery is presumptively appropriate. For example, consider a lawsuit in which the plaintiffs demand a prospective injunction against a municipal agency based on the agency’s alleged violations of a constitutional right. Plaintiffs’ counsel may urge that broad, and presumptively unlimited, discovery is appropriate against the agency, or even against the rest of the municipal government. Counsel may also argue only broad discovery can identify the origin of the illegal or unconstitutional policy or practice, its scope or extent, the employees of the defendant agency responsible for that policy or practice, and any past or current effects of that policy or practice on the citizens injured by it. If the plaintiffs’ financial resources are limited, their counsel will argue the full costs of discovery must be incurred by the defendants.

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137. *Id.* at 291.

138. *Id.* at 300 (citing Fed. R. Civ. P. 26(g)(1)(B)(ii), 26(b)(2)(C)(iii)).

139. *Commentary on Proportionality*, *supra* note 27, at 301.

140. *Id.*

141. *Id.* (citing Disability Rights Council of Greater Washington v. Washington Met. Trans. Auth., 242 F.R.D. 139, 148 (D.D.C. 2007)). In that case, the court denied the agency’s request to limit its restoration of e-mail backup tapes, noting that the agency had not put in place a litigation hold as to the e-mails when they existed on an active system and had not yet been overwritten. *Id.* at 146-47. The Court emphasized the unique value of this information to plaintiffs in establishing their case. *Id.* at 148.

Faced with those arguments, a court may conclude more discovery will proceed, but that could be an overly simplistic response. The defendant agency can argue that plaintiffs’ factual claims are inherently weak, that the challenged policies are constitutional under settled law, or that there were only a few incidents of alleged illegality and that the proposed discovery sweeps too widely. More importantly, the agency could argue the costs of the discovery will be a burden on its operations, or will require the diversion of its funds and resources from other public programs or operations. In *Young v. Pleasant Valley School District*, for example, the court cited the cost that the school district would incur to comply with plaintiffs’ proposed discovery, specifically distinguishing the district’s situation from that of a for-profit corporation.<sup>142</sup> In an earlier employment discrimination case, *McPeek v. Ashcroft*,<sup>143</sup> the court also recognized the costs that a federal agency would incur in restoring backup tapes of its e-mail system and, to resolve that issue, it authorized a limited sampling of potentially relevant tapes.<sup>144</sup>

While there are no easy answers to this problem, proportionality principles remain relevant to the analysis of non-monetary cases. The court’s evaluation of whether “good cause” exists to grant a request for burdensome “two tier” discovery should take into account all of the Rule 26(b)(2)(C) factors.<sup>145</sup>

## V. CONCLUSION: THE PROSPECTS FOR PROPORTIONALITY

The Sedona Conference Working Group’s *Principles* are a welcome addition to the current discussion about discovery costs and burdens. Hopefully, the *Principles* will be studied and applied by judges, as in the *Tamburo v. Dworkin* case, to address and resolve discovery disputes.<sup>146</sup>

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142. *Young v. Pleasant Valley Sch. Dist.*, No. 3:07cv854, 2008 WL 2857912, at \*3 (M.D. Pa. July 21, 2008). See also *Major Tours, Inc. v. Colorel*, No. 05-3091 (JBS/JS), 2009 WL 3446761, at \*4-6 (D.N.J. Oct. 20, 2009), *aff’d*, 720 F. Supp. 2d 587, 621 (D.N.J. 2010) (magistrate judge notes limited litigation budget of state agency in applying Rule 26(b)(2)(c) factors and directing cost-sharing for production of backup tapes).

143. *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003) (based on sampling conducted on backup tape, refusing to direct restoration of more than one additional tape); *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001).

144. See *McPeek*, 202 F.R.D. 31, 34.

145. See *Major Tours, Inc.*, 2009 WL 3446761, at \*4; *Johnson v. Neiman*, No. 4:09CV00689 AGF, 2010 WL 4065368, at \*2 (E.D. Mo. Oct. 18, 2010).

146. *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at \*3 (N.D. Ill. Nov. 17, 2010).

That guidance can serve as a valuable perspective on proportionality issues, but the *Principles* will be of limited value if counsel for the parties are not willing to cooperate with each other, or are reluctant to be candid about their claims or defenses in the litigation. Increased judicial management and an active engagement in a case may also result in efficiencies.

The development of “best practices” to implement proportionality principles will be no simple matter. Anyone considering more discovery reform should be leery of trying to prescribe a “one size fits all approach” to civil litigation. Nevertheless, there is considerable reason to be optimistic about the future of proportionality in civil litigation.