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Proportionality: The Earlier, The Better

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Debates regarding the scope and proportionality of discovery are a time-honored tradition. Rather than discovery acting as a roadmap to the important issues of a case, it often acts more like an obstacle course within a seemingly unending maze.

The use of discovery as a tactical weapon to delay or obfuscate prompted the 1983 amendments to the Federal Rules of Civil Procedure (FRCP). In the Notes of the Advisory Committee regarding amended Rule 26, the committee complained that "excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems."[1] The use of such tactics, they warn, "result in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake."[2] Although the term "proportionality" was never used in the 1983 FRCP Rule 26 amendments, the intent to "deal with the problem of over-discovery," with the objective to "guard against redundant or disproportionate discovery,"[3] was clear.

The concept of discovery that is proportional to the needs of the case was re-emphasized in 2015, where subsequent amendments to the FRCP harkened back to the comments of three decades prior. Once again, the Notes of the Advisory Committee explain that the "present amendment restores the proportionality factors to their original place in defining the scope of discovery."[4] Unequivocally, these revisions mean that proportionality in discovery is here to stay.

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When to Begin

If "over-discovery" is an ill to be avoided, then one of its symptoms is certainly *over-preservation*. For a corporate defendant, the burden of discovery commences whenever a trigger to preserve is initiated. When a credible probability of trouble arises, legal holds are broadly distributed to potential custodians with instructions to preserve any potentially relevant content. From this extensive collection of preserved data, a smaller set is eventually culled, from which relevant documents are subsequently produced. Meanwhile, the original widespread group of custodians labors under their legal hold obligations, data storage fees accumulate, and the difficulty and expense of managing vast quantities of data are exacerbated by its sheer volume. If, however, proportionality is applied from the outset, the burden and costs associated with data preservation and collection can be defensibly reduced. This is not some scheme to hide, delete, or otherwise obfuscate relevant information. On the contrary, if immediate use of proportionality is embraced and applied, relevant information will be located early in the process, and neither side is tasked with wading through irrelevant or marginally relevant information in the search for truth.

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[1] Fed. R. Civ. P. 26(a), Committee Notes on Rules – 1983 Amendments.
[2] Ibid.
[3] Ibid.
[4] Fed. R. Civ. P. 26(b)(1), Committee Notes on Rules – 2015 Amendments.

Proportionality starting in the preservation phase is being increasingly embraced by both the judiciary and industry leaders. While various professional associations, such as the Sedona Conference, have published guidelines, cases such as *Small v. University Medical Center*[5] suggest that litigants are still struggling with this principle. In the Small case, the lack of early proportionality caused the defendant to lose track of collection, resulting in deleted relevant data sources, and thus, significant monetary sanctions imposed by the court.

This writing will focus on the practical aspects of how to apply proportionality, providing a framework to move the process from legal hold to preparedness and effectual negotiation during the Rule 26(f) conference.

Leveraging Proportionality
What is the status quo?

The Sedona Conference outlines specific guidelines intended to inform those who are issuing legal holds as to what constitutes a trigger of the duty to preserve. Guideline 1 states that, "reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation."[6]

This early mandate for issuing a legal hold means that the claims and defenses may not yet be articulated, leaving organizations in a situation where they must try to predict which employees are most likely to have relevant knowledge and which data sources might contain relevant information. Consequently, a broad net is often cast at this preliminary stage; a net that rarely contemplates whether individual custodians and data sources can be evaluated and released. The process of scoping thus begins. Legal hold notices are issued to all potentially relevant custodians, triggering their duty to preserve relevant content within their control and to refrain from any deletion or disposition of relevant devices or sources. In tandem with the issuance of a legal hold, it is common practice to distribute a data usage survey or questionnaire where each custodian is asked specific questions about their potential involvement and where relevant content may reside.

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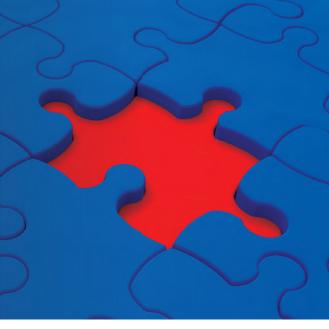
These survey responses become the foundation in developing an inventory of potentially relevant locations and sources, after which preservation and collection activities ensue. Although this process identifies sources and the existence of data in general, it rarely targets the relevancy of the information as it relates to the claims and defenses that are at issue. Once discovery commences, a significant volume of what was preserved and collected is moved forward for early case assessment, searching, processing and review, which inherently exacerbates the overall burden.

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[5] *Daniel Small, et al. v. University Medical Center, et al.*, No.: 2:13-cv-00298-APG-PAL, 2014 U.S. Dist LEXIS 114406 (D. Nev. Aug. 18, 2014), 31.
[6] *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process,* A Project of The Sedona Conference Working Group on Electronic Document Retention & Production (WG1) – August, 2010.

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The Solution:
Rightsize Discovery

It is during this early stage that a proportionality mindset provides the greatest benefit. It is essential to create a framework that identifies people and data sources that are most relevant to the claims and defenses at issue. The question is, how best can this be accomplished, and how can technology be leveraged to simplify the process?

Step 1
Assess and Rank Custodian Relevance

The first step to an early proportionality mindset is to quickly release custodians who are not relevant to the matter, which greatly reduces the overall preservation obligation. This can be accomplished by making use of Human Resources (HR) information, such as dates of employment, department, and timeframe in relevant position(s), to identify candidates for early release. Alternatively, if this information is not readily available through existing HR systems, pertinent questions to gather this data should be included on an assessment survey. In addition, the survey should include fact-based questions as a mechanism to rank custodian relevancy. For example, in an intellectual property claim, a simple yes/no question might be:

Were you involved in any of the non-scientific aspects pertaining to patent research, preparation, and filing relating to the product at issue?

Similar fact-based questions can be assigned rankings according to importance, or each question can be weighted differently based on their relevance to the claims and defenses. A question, such as the example above, could even be configured to trump all others. The relevancy assessment questions can also be modified to correspond to a particular business unit or job function. Based upon a calculated relevancy ranking, custodians are then prioritized from highly relevant to not relevant, with the latter being released from the hold. This early method of ranking greatly reduces the overall legal hold obligation.

Obviously, the best way to complete this type of calculation is with the use of technology. A custodian's relevancy can be generated automatically based on the answers provided during the survey process. Based on the scope and complexity of a matter, follow-up attorney interviews with custodians provide a mechanism to not only vet their responses and the corresponding ranking, but also to demonstrate a defensible approach with attorney oversight.

Step 2
Assess and Score Data Source Burden / Effort

The second component of the assessment relates to the scoring of various custodial and non-custodial data sources. Certainly, the difficulty of collection varies based on the technical aspects associated with each data source. Thus, each should be ranked based upon its complexity, from low effort to highly burdensome. Additionally, an individual custodian may have multiple data sources that fall within different burden categories.

The ranking mechanism can be multi-faceted based on the needs of the case. It may be scored based on the data source itself, or driven by specific criteria or conditions relating to a custodian. For example, collection of a computer from a European custodian might be ranked as more difficult based on their geographic location, as well as the consent and transfer approvals which are driven by EU privacy directives.

Data sources ranked as relevant and highly burdensome should be assessed to determine the uniqueness of the data and whether the same information could possibly be located elsewhere. If the data is unique, the difficulty of moving the data through discovery should be weighed against the proportionality of the amount in controversy, along with the importance of the discovery in resolving the issues. Parties can also negotiate alternative options, such as sampling or cost shifting, to mitigate the burden for the producing party.

The early survey responses and attorney interview can be used as a mechanism to verify and document where relevant data exists. Once again, technology can assist in managing the process by recording subsequent decisions relating to preservation and collection, thereby providing centralized documentation of all actions taken.

Proportional Discovery Assessment® A Case Study

222
Custodians

63
Custodians (28%) released

130
Custodians (59%) remained under hold; limited data collected

29
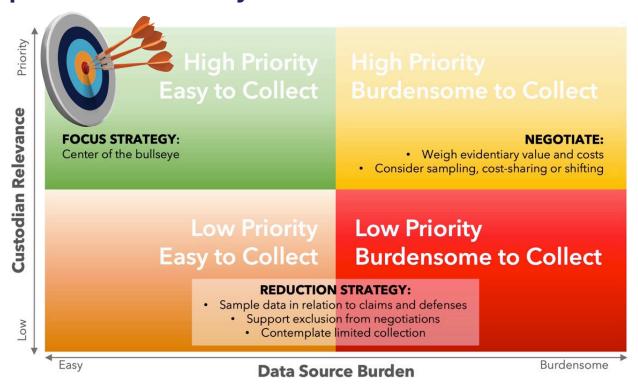Custodians (13%) identified as highly relevant; all data collected

Step 3
Develop a Preservation / Collection Roadmap

After assimilating and scoring both the custodians and all data sources, a proportional ranking assessment is created from these data points. This process guides and informs the discovery strategy through the identification of high priority custodians and data sources, as well as partitioning and quantifying the marginally relevant custodians and highly burdensome data sources. This assessment ultimately informs the disclosure and negotiation approach with other parties.

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The "High Priority Custodians / Easy Data Source" classification in the upper left quadrant pinpoints the priority group to identify and collect. Isolating this group early and focusing on disclosure and production for these custodians provides a win-win for both parties, because the approach results in early calibration of the most relevant custodians and their data. Further analytics can also be performed within each quadrant to inform future negotiations downstream.

An important benefit of employing technology throughout the process is that it easily provides the necessary metrics and reporting to enable a defensible discovery approach. For example, reports can be generated for all custodians organized by their relevancy ranking, with a subclassification of their data sources (plotted on a level of difficulty scale). This report serves as a cornerstone of negotiations and forms the foundation of a roadmap for prioritization of custodians and the corresponding preservation and collection activities.

Key Components to a Repeatable, Defensible Approach

The early and consistent application of proportionality to an overall discovery strategy provides numerous benefits, as it:

Creates a defensible and transparent process for negotiations through consistent documentation of all custodian survey responses and attorney assessment decisions

Accelerates early custodian release to circumvent over-preservation and collection

Leverages technology to capture data points, which inform future strategies and quantify burden and effort

Uses real-time metrics and cost estimation to support Rule 26(f) negotiations relating to phasing, sampling, or variances in production approach, based on custodian relevancy and data source collection scoring

Defines a consistent set of parameters and captures work product that can be applied across a company's litigation portfolio

The continued exponential growth in electronic data storage and communication makes it critical for companies facing litigation or governmental investigations to adopt a proportionality strategy early in the process. It is not enough to focus efforts on cost savings during the processing aspect of the Electronic Discovery Reference Model.[7] By this time, the bulk of the data being processed has often been gathered using little thought or planning during the identification, preservation, and collection stages.

The investment of forethought and the application of a structured approach in the early stages help funnel only the most relevant data, thus allowing you to drink from a water fountain rather than a firehose. This measured strategy results in the greatest reduction in time and costs associated with discovery, while creating a defensible, transparent process and facilitating cooperation in negotiations.

By applying a disciplined approach supported by documented and quantifiable metrics, the intention of the FRCP amendments can finally be fulfilled. Finally, the last piece of the proportionality puzzle is solved.

[7]*https://edrm.net/resources/frameworks-and-standards/edrm-model/*