# Pretrial Discovery Proportionality: Ethics & Practice

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# Revised FRCP Proportionality

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and **proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit**. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1) (as amended 2015).


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# Elements of Proportionality

**– FRCP 26(b)(1)**

1. The importance of the issues at stake in the action
2. The amount in controversy
3. The parties' relative access to relevant information
4. The parties' resources
5. The importance of the discovery in resolving the issues
6. Whether the burden or expense of the proposed discovery outweighs its likely benefit.


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# General Observations -
## Restoration

Committee Notes on Rule 26 – 2015 Amendments

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


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# General Observations -

## No change in Rules intended (Not sure this is so)

Committee Notes on Rule 26 – 2015 Amendments

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


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# General Observations –
## No boilerplate objections

Committee Notes on Rule 26 – 2015 Amendments

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


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# General Observations –
## Not Just eDiscovery

Rule 26(b)(1) applies to ALL pretrial discovery, not just electronic discovery


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# Proportionality Outside Rule 26

When rules impose standard of reasonableness in discovery:

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_____

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Haskel, *Multiple Proportionality Syndrome and Pretrial Discovery, Second Looks Column*, MUNICIPAL LAWYER MAGAZINE (April 2016), available online from http://www.imla.org/publications/magazine-archives?term=proportionality&catid=&author=Haskel&startDate=&endDate = (IMLA membership required for access the IMLA archives)


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# Ethical Obligations – ABA Model Rules of Professional Conduct 1.01

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.


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# Ethical Obligations – ABA Model Rules of Professional Conduct 1.03

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.


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# Ethical Obligations – ABA Model Rules of Professional Conduct 1.01 Comment [8]

Rule 1.1 Competence

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.


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# Ethical Obligations – ABA Model Rules of Professional Conduct 1.03(b)

Rule 1.6 Confidentiality Of Information

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * *

(6) to comply with other law or a court order

*[e.g., Pretrial Conference & Disclosure Mandates]*


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# Objections under Rule 26(b)(1)

## The importance of the issues at stake in the action

- Pleadings asserting importance of issues (e.g., preliminary injunction motion) can backfire at discovery stage & statements here can hurt at trial (statement against interest)
- Need to establish unimportance to all parties
- Use imagination
- Not absolute unimportance – compared to cost of discovery
- Types of Importance: Quantitative ($), Principles, Future Consequences (collateral estoppel, injunction, or precedent)


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# Objections under Rule 26(b)(1)

**The amount in controversy**

- Somewhat self-explanatory, BUT
- Compare amount to client's or adversary's discretionary budget or available assets
- Need expert affidavit to quantify – can backfire later; can use adversaries counter-affidavits later
- Don't forget important non-monetary issues


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# Objections under Rule 26(b)(1)

## The parties' relative access to relevant information

- Asymmetry problem
- Is technical ability relevant? (Cost of expert assistance to access sounds on importance of issues factor)
- Did party cause lack of accessibility?
- How does FOIA impact this factor? Does a party routinely access similar information? Is a party under a duty to preserve & produce similar information?


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# Objections under Rule 26(b)(1)

**The parties' resources**

- Play the public interest card (protect the public fisc)
- Favors the poorer party
- Discovery about discovery is disfavored, but can you try to discovery adversaries' assets to address this factor? Even exempt assets?
- Insurance coverage


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# Objections under Rule 26(b)(1)

**The importance of the discovery in resolving the issues**

- What are the material facts in dispute?
- Is a party hiding facts?
- Are stipulations or admissions available to reduce expensive discovery?
- Might early partial summary judgment or measures such as staged discovery, statistical testing, or sneak peaks minimize discovery efforts?


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# Objections under Rule 26(b)(1)

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

- Need experts to quantify burden & expense
- Risk: work done to quantify materially reduces expense of actually conducting the discovery
- "Likely benefit" ≈ Importance of issues
- How to measure non-monetary "benefit"?


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# Sedona Conference Commentary

- The Sedona Conference, Commentary on Proportionality in Electronic Discovery (May 2017), free PDF Download from https://thesedonaconference.org/download-pub/5289 (free registration required).


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# Sedona Conference Commentary Principles

Principle 1: The burdens and costs of preserving relevant electronically stored information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.


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# Sedona Conference Commentary Principles

Principle 2: Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive sources.


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# Sedona Conference Commentary Principles

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

Comment 3.d: Information retention policies may also affect the proportionality analysis. Where a party's information retention policies serve reasonable organizational or commercial purposes, burden, expense, or delay attributable to such policies should not be held against the party claiming burden.29 Conversely, where information retention policies do not serve such purposes, associated arguments of burden, expense, or delay should be discounted.30 (text of footnotes omitted).


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# Sedona Conference Commentary Principles

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


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# Sedona Conference Commentary Principles

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


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# Sedona Conference Commentary Principles

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


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# Questions or Comments?





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# Thank you!








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