

VIII.C | PROPORTIONALITY

The discovery of ESI should be proportional to the amount in controversy, the nature of the case and the resources of the parties. Rule 26(b)(2)(c) imposes a duty on the parties to balance the need for the discovery with the burdens of production. Rule 26(b)(2)(B) expressly provides that a party does not have to provide discovery of ESI that is not reasonably accessible because of undue burden or cost except on motion and order of the Court. The Sedona Conference has published six principles to guide the Court and counsel in applying the concept of proportionality to civil litigation:

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

¹ *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 *Sedona Conf. J.* 289 (2010).