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Comments: Trending: Proportionality in Electronic Discovery in Common Law Countries and the United States' Federal and State Courts

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TRENDING: PROPORTIONALITY IN ELECTRONIC DISCOVERY IN COMMON LAW COUNTRIES AND THE UNITED STATES' FEDERAL AND STATE COURTS

I. INTRODUCTION

Electronic discovery is gaining greater attention as its potential to radically change the nature and processes of civil litigation is realized.¹ This potential for change is primarily reflected in the high costs associated with cases involving electronic discovery. One study looking at large scale litigation estimates that cases with electronic discovery can have costs as low as \$17,000 per case, but up to \$27 million, with a median cost of \$1.8 million.² The Federal Judicial Center reports that the median cost for plaintiffs in cases involving electronic discovery is \$30,000 as compared with approximately \$8,000 for a case with no electronic discovery.³ Defendants reported that the median cost was \$40,000 for cases involving electronic discovery and \$15,000 for cases not involving electronic discovery.⁴ In addition, a 2009 study conducted by the American Bar Association found that a majority of plaintiff and defense attorneys believed that electronic discovery has “contributed disproportionately to the increased cost of discovery.”⁵

As a response to the increasing costs and burden of electronic discovery on civil litigation, proportionality should play a more active role in the analysis used by both counsel and courts to resolve electronic discovery issues. The greater use of proportionality

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1. NICHOLAS M. PACE & LAURA ZAKARAS, *WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY* xiii, 1 (2012).
 2. *Id.* at 17. The authors used a “case-study method” and interviewed eight companies on the costs of litigating their case load. A total of fifty-seven cases were analyzed including “traditional lawsuits and regulatory investigations.” *Id.* at xiii.
 3. EMERY G. LEE III & THOMAS E. WILLGING, *FED. JUDICIAL CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 36* (2009). These figures are based on a survey of 2,690 attorneys litigating a civil case in federal court. *Id.* at 78.
 4. *Id.* at 36.
 5. AM. BAR ASS'N SECTION OF LITIG., *MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 7* (2009). The report states that “96% of defense lawyers believe that electronic discovery increases the cost of litigation, compared with 59% of plaintiffs’ lawyers.” *Id.* at 3.

analysis can provide more access to justice and lower discovery costs.⁶

Proportionality analysis is essentially “weigh[ing] the burdens of discovery against the potential benefit of the information to be produced in light of the specific circumstances of the case.”⁷

This comment gives a brief description of the discovery systems in the common law countries of the United Kingdom and Canada and the trend toward using proportionality analysis in those countries. Also, there is a discussion of momentum in both the federal and state courts of the United States to use proportionality analysis to resolve disputes arising in cases involving electronic discovery. Courts and practitioners are encouraged to take note of this international and national momentum toward proportionality analysis as a powerful tool to handle electronic discovery issues. There is particular encouragement for Maryland practitioners and courts to use this valuable tool because despite the existence of a rule⁸ legitimizing the use of proportionality analysis, there are currently no Maryland cases on record that show the utilization of this tool in the context of electronic discovery. This comment also features a discussion of five practical ways to achieve proportionality by using several methods created to address the often burdensome job of handling electronic discovery.

II. THE INTERNATIONAL TREND TOWARD GREATER USE OF PROPORTIONALITY ANALYSIS IN COMMON LAW COUNTRIES: THE UNITED KINGDOM AND CANADA

A. *The United Kingdom*

1. The Discovery System of the United Kingdom

Although the United Kingdom and the United States are both common law countries, the United Kingdom has a very different discovery system.⁹ Under the relatively new Civil Procedure Rules, “[t]here is no automatic disclosure.”¹⁰ Instead, courts determine at

6. See Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 517–18 (2010).

7. The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery* 11 SEDONA CONF. J., 289, 294 (2010).

8. MD. CT. R. § 2-402.

9. See *infra* Parts II.A, III.A.

10. The Civil Procedure Rules came into effect in 1998. PAUL MATTHEWS & HODGE M. MALEK, DISCLOSURE 3, 101 (4th ed. 2012). “The term ‘disclosure,’ which is now used in the Civil Procedure Rules 1998 . . . is in practice synonymous with ‘discovery.’” *Id.*

the first case management hearing whether there will be discovery, and if so, to what extent.¹¹ If “‘standard disclosure’ is ordered,” the parties must produce a “list of documents” to the opposing party or parties indicating “documents which adversely affect, or support, *any* other party’s case.”¹² To make this list, three criteria must be satisfied:¹³ the document must fit the broad definition of document,¹⁴ “the document must be within the scope of the disclosure obligation . . . appropriate to the proceedings” and “the document must be or have been in the ‘control’ of the party from whom the disclosure is sought.”¹⁵ Once the list is produced to the opposing party, “those [documents] that are still in the party’s control and not privileged from production must be produced for inspection and copying by other parties.”¹⁶

When electronic disclosure is involved in cases on the multi-track, there are additional considerations.¹⁷ These are found in Practice Direction 31B, which supplements Civil Procedure Rule 31.¹⁸ The considerations include guidance on when to preserve documents and how to conduct a “reasonable search” for electronic documents.¹⁹ In addition, the Practice Direction encourages parties to engage in early discussion about how to handle electronic disclosure and directs

at 3.

11. *Id.* at 101.
12. *Id.* at 111 (italics in original). Standard disclosure is often ordered in larger cases on the “multi-track.” *Id.* at 144. The case’s track is determined largely by the amount in controversy. GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* 186 (11th ed. 2010). Claims over £15,000 are often placed on the multi-track while cases between £5,000 and £15,000 are placed on the fast track. Often, a more narrow form of discovery is ordered for smaller cases on the fast track. MATTHEWS & MALEK, *supra* note 10, at 144; *see also* Civil Procedure Rules, 1998 S.I. 1998/3132 pt. 31.5(1) (U.K.).
13. MATTHEWS & MALEK, *supra* note 10, at 139.
14. “Document” is defined as “anything in which information of any description is recorded.” *Id.*
15. *Id.*
16. *Id.* at 6.
17. *Id.* at 207. These additional considerations are required for all cases that began after October 1, 2010. *Id.*
18. Civil Procedure Rule Practice Direction 31B. A Civil Procedure Rule is an official rule of the court and a practice direction is an “official statement[] of interpretative guidance.” SLAPPER & KELLY, *supra* note 12, at 187.
19. Practice Direction 31B. The United Kingdom’s civil procedure rules and practice directions can be accessed at the following website, <http://www.justice.gov.uk/courts/procedure-rules/civil/rules>.

parties to fill out the “Electronic Documents Questionnaire” to make this process easier.²⁰

Another vital aspect of the civil litigation system of the United Kingdom that affects how parties formulate discovery plans is that costs are generally awarded to the prevailing party to be paid by the losing party.²¹

2. The Status of Proportionality

a. *The “overriding objective” and other proportional rules*

The doctrine of proportionality is infused in many areas of the United Kingdom’s civil litigation system.²² One of the most important Civil Procedure Rules, also called the “overriding objective,” incorporates the importance of proportionality in order to “deal with cases justly and at a proportionate cost.”²³ Specifically, Civil Procedure Rule 1.1(2)(c) states that in order to deal with a case justly and at proportionate cost, the court must “deal[] with the case in ways which are proportionate (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the case; (iv) to the financial position of each party.”²⁴ A related rule is Civil Procedure Rule 31.3(2)(a), which allows parties to refuse to allow the opposing party to inspect certain documents if doing so would be “disproportionate to the issues in the case.”²⁵

b. *The Justice Jackson reforms and proportionality*

In 2009, Lord Justice Rupert Jackson published a report entitled “Review of Civil Litigation Costs.”²⁶ Justice Jackson noted in the

20. *Id.* at paras. 8–9. An Electronic Documents Questionnaire is a form that allows parties to log the way they searched for documents and give basic information about the documents such as format. *Id.* at para. 10. It also provides the receiving party with the opportunity to request a certain format. *Id.* The questionnaire contains a statement of truth, which requires the attorney completing the questionnaire to certify the truth of the information provided. *Id.* at para. 11.

21. Civil Procedure Rules, 1998, S.I. 1998/3132 pt. 44.2(2)(a) (U.K.).

22. RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 30 (2009).

23. Civil Procedure Rules, 1998, S.I. 1998/3132 pt. 1.1 (U.K.). Rule 1.1 is very similar in function to the United States Federal Rules of Civil Procedure Rule 1, which states that all rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1; *see* MATTHEWS & MALEK, *supra* note 10, at 439 (discussing the use of proportionality in the United Kingdom’s Civil Procedure Rules).

24. Civil Procedure Rules, 1998, S.I. 1998/3132 pt. 1.1(2)(c)(i)–(iv)(U.K.).

25. *Id.* at pt. 31.3(2)(a); MATTHEWS & MALEK, *supra* note 10, at 439.

26. JACKSON, *supra* note 22.

foreword that, “[i]n some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.”²⁷ In his report, Justice Jackson specifically addresses the disproportionate costs of electronic discovery,²⁸ and recommends that parties discuss electronic discovery issues earlier in the case, that parties keep “in mind the overriding principle of proportionality” when formulating searches and that both counsel and judges should receive more training to deal with electronic discovery issues.²⁹ Justice Jackson also suggested that proportionality should play a greater role in the way courts award costs.³⁰

Several of these suggested reforms were implemented in the form of amendments to the Civil Procedure Rules and Practice Directions effective April 1, 2013,³¹ and are primarily focused on proportionate costs.³² One of the most significant amendments was adding “and at proportionate cost” to the overriding objective of Civil Procedure Rule 1.1.³³ In addition, the new rules require parties to exchange “cost budgets . . . within 28 days after service of the defen[s]e” or if no date is specified, seven days before the first case management conference.³⁴ The court then has the discretion to make a “costs

27. *Id.* at i.

28. *Id.* at 365–68.

29. *Id.* at 365–67.

30. *Id.* at 38.

31. This date has been referred to as the “big bang” date. Lord Justice Rupert Jackson, Judiciary of Eng. & Wales, Controlling the Costs of Disclosure: Seventh Lecture in the Implementation Programme paras. 1.4, 2.3, 4.2–4.3, Speech at the LexisNexis Conference on Avoiding and Resolving Construction Disputes (Nov. 24, 2011), *available at*

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/controlling-costs-disclosure.pdf>. For a full list of the amendments to the Civil Procedure Rules effective April 1, 2013, please visit

<http://www.legislation.gov.uk/uksi/2013/262/made>.

32. Justice Ramsey, Judiciary of Eng. & Wales, Costs Management: A Necessary Part of the Management of Litigation: Sixteenth Lecture in the Implementation Programme, Speech at the Law Society Conference (May 29, 2012), *available at* <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/costs-management-sixteenth-implementation-lecture-300512.pdf>; see Simon Brown, *Costs Control: Costs Management & Docketed Judges: Are You Ready for the Big Bang Next Year Asks HH Judge Simon Brown QC*, 162 NEW L.J. 498, 498 (2012).

33. Civil Procedure Rules, 1998, S.I. 1998/3132 pt. 1.1(2)(c)(i)–(iv) (U.K.).

34. Ramsey, *supra* note 32, at para. 7; see also Civil Procedure Rules, 2013, S.I. 2013/3132 pt. 3.13 (U.K.).

management order” but must consider the cost budgets of both of the parties.³⁵ The court must also consider “whether the budgeted costs fall within the range of reasonable and proportionate costs.”³⁶ Once the “costs management order” is in place, the parties have the incentive to abide by it because the judge may consider it in his costs order made at the end of the case.³⁷ In addition to the costs management order, the April 1, 2013 amendments created the authority for courts to make costs capping orders.³⁸

With regard to how costs are assessed at the end of a case, a new Civil Procedure Rule 44.3(5) was added stating:

Costs incurred are proportionate if they bear a reasonable relationship to: (a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) any wider factors involved in the proceedings, such as reputation or public importance.³⁹

In addition to the new Civil Procedure Rules and Practice Directions, the implementation of Justice Jackson’s reforms also require that judges across the United Kingdom are trained to effectively carry out these “case management” reforms.⁴⁰

c. Reforms put into action through pilot programs

A pilot program implementing Justice Jackson’s cost management reforms has begun “in all business courts around the country.”⁴¹ Judge Simon Brown, presiding over the Birmingham Mercantile Court, has participated in the pilot program since 2009 and noted that although the initial response to the pilot was not very positive,

35. Ramsey, *supra* note 32, at para. 8; *see also* Civil Procedure Rules, 2013, S.I. 2013/3132 pt. 3.17(1) (U.K.).

36. Ramsey, *supra* note 32, at para. 11.

37. *Id.* at para. 13; *see also* Civil Procedure Rules, 2013, S.I. 2013/3132 pt. 3.18 (U.K.).

38. Civil Procedure Rules, 2013, S.I. 2013/3132 pts. 3.19-3.20 (U.K.).

39. Lord Neuberger of Abbotsbury, Master of the Rolls, Proportionate Costs: Fifteenth Lecture in the Implementation Programme para. 7, Speech at the Law Society Conference (May 29, 2012), *available at* <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf>.

40. Simon Brown, *Costs Control: Embracing Technology: Are You Ready for the Big Bang Next Year, Asks HH Judge Simon Brown QC* (pt. 3), 162 *NEW L.J.* 1223, 1224 (2012).

41. Brown, *Costs Control: Costs Management & Docketed Judges*, *supra* note 32, at 498.

[a]s the pilot continued, the feedback was that the clients—the court’s customers—positively appreciated this form of case management as it removed one of the great uncertainties in litigation at an early stage, [i.e.] how much was it likely to cost them . . . to go on if they won or lost.⁴²

Judge Brown’s opinion in *Mortgage Agency Services Number Four v. Alomo Solicitors*, a case concerning mortgage fraud, clearly considers and utilizes Justice Jackson’s proportionate cost management reforms.⁴³ The parties were in disagreement over whether “the [d]efendants should pay the costs on an indemnity basis and, if so, from what date.”⁴⁴ The court noted that the costs budget of the claimant was exceeded tremendously because of the “blizzard of issues raised by the [d]efendant” and that this was “quite disproportionate and off putting for any [c]laimant requiring access to justice.”⁴⁵ There is also mention of the “overriding objective.”⁴⁶ The court considered all of this and ordered that the defendants pay costs on an indemnity basis.⁴⁷ Basically, there was a ruling against the defendants because of their conduct.⁴⁸ This case incorporates analysis in line with many of Justice Jackson’s proportionate cost reforms.

B. Canada

1. The Discovery System of Canada

Canada’s discovery system has a similar structure to that of the United Kingdom.⁴⁹ In relation to “documentary disclosure,” “each party must serve upon the other parties a sworn affidavit of documents . . . relevant to any matter in issue in the action that are or have been in the party’s possession, control or power.”⁵⁰ After

42. *Id.* at 498–99.

43. *See* *Mortg. Agency Servs. No. Four Ltd. v. Alomo Solicitors*, [2011]EWHC (QB) B22, [1], [7], [22] (Eng.).

44. *Id.* at [10].

45. *Id.* at [22].

46. *Id.* at [23].

47. *See id.* at [32].

48. *See id.*

49. In this comment, the Rules of Civil Procedure for the province of Ontario will be used.

50. LINDA S. ABRAMS & KEVIN P. MCGUINNESS, *CANADIAN CIVIL PROCEDURE LAW* 1014 (2d ed. 2010); *see also* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.02–03 (Can.) (governing document disclosure).

producing those affidavits, each party may inspect the documents on the list so long as they are not covered by some privilege.⁵¹

In regards to electronic discovery, the Civil Procedure Rules were amended on January 1, 2010, to require that parties consider electronic discovery when preparing their discovery plans.⁵²

In Canada, the costs of civil litigation including partial to full attorney's fees and other costs are usually borne by the losing party.⁵³

2. Civil Procedure Rules with Proportionality Elements

As of January 2010, the Civil Procedure Rules of Ontario incorporate the proportionality principle in their foundational rule.⁵⁴ Rule 1.04(1.1) states, “[i]n applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”⁵⁵

In 2007, Judge Osbourne published a report that encouraged parties to use the Sedona Canada Principles of Electronic Discovery.⁵⁶ The Sedona Canada principles are “grounded in the concepts of proportionality and reasonableness.”⁵⁷ As a result, the Civil Procedure Rules of Ontario were amended in January 2010 to reflect the idea of proportional discovery.⁵⁸ Rule 29.2.03(1) “provide[s] the

51. ABRAMS & MCGUINNESS, *supra* note 50, at 1015.

52. *Id.* at 1043; *see also* Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 29.1.03 (referring parties to the “Sedona Canada Principles Addressing Electronic Discovery” to guide their discussion).

53. ABRAMS & MCGUINNESS, *supra* note 50, at 1398 (“The English/Canadian approach to the award of costs encourages parties to pursue apparently meritorious claims (and defen[s]es) to a successful conclusion by securing to them a reasonable prospect of reimbursement . . .”).

54. *Id.* at 213–14.

55. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 1.04(1.1). The provinces of British Columbia as well as Quebec have also incorporated proportionality in their foundational Civil Procedure Rule. ABRAMS & MCGUINNESS, *supra* note 50 at 214–15. The Canadian Supreme Court has also ruled that proportionality should play a central role in Quebec courts’ decision-making. *Marcotte v. City of Longueuil*, 2009 CanLII 65, 67 (Can.).

56. COULTER A. OSBOURNE, CIVIL JUSTICE REFORM PROJECT: SUMMARY OF FINDINGS & RECOMMENDATIONS 62–64 (2007).

57. E-DISCOVERY IN CANADA 3 (Susan Wortzman & Susan Nickle eds., 2d ed. 2011); *see* THE SEDONA CONFERENCE, THE SEDONA CANADA COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCLOSURE & DISCOVERY 6–7 (2010) [hereinafter THE SEDONA CONFERENCE, SEDONA CANADA COMMENTARY]; THE SEDONA CONFERENCE, THE SEDONA CANADA PRINCIPLES: ADDRESSING ELECTRONIC DISCOVERY 7, 11 (2008) [hereinafter THE SEDONA CONFERENCE, SEDONA CANADA PRINCIPLES].

58. E-DISCOVERY IN CANADA, *supra* note 57, at 92.

court with the following factors to consider when deciding whether a party must answer a question or produce a document in discovery[:]"⁵⁹ time and expense needed to respond properly, whether the production of the document would cause "undue prejudice" to the producing party or "unduly interfere with the orderly progress or the action," and finally, if the information is "readily available" to the requesting party.⁶⁰

The implemented reforms have also "bolstered the courts' discretion to enforce the rule of proportionality in the discovery process."⁶¹ A court may "refuse to order production" if "records being sought are of marginal probative value and disclosure could prejudice the producing party."⁶²

3. Cases Discussing Proportionality

There are many cases in Canada that analyze discovery issues using proportionality and that make specific reference to the centrality of proportionality as stated in the Sedona Canada principles.⁶³

One case that directly addresses an electronic discovery dispute is *Corbett v. Corbett*.⁶⁴ In this case, as a part of the settlement, a particular defendant was required to disclose "documents in [their] possession, power or control that are relevant to the issues in this litigation" including "certain electronic documents."⁶⁵ After the defendant did not "disclose[] a significant number of emails which had passed between them and their former co-defendants," plaintiff filed a motion to compel.⁶⁶ The court ultimately granted their motion and based its rationale largely on the Sedona Canada Principles including the central concept of proportionality.⁶⁷ In fact, the court

59. *Id.*

60. *Id.*

61. *Id.* at 93.

62. *Id.* at 96.

63. *E.g.*, *Kariouk v. Pombo*, 2012 CanLII 939 para. 57 (Can. ONSC) (describing the purpose of The Sedona Conference principles articulated in THE SEDONA CONFERENCE, SEDONA CANADA COMMENTARY, *supra* note 57); *In re Hollinger Inc.*, 2012 CanLII 5107 para. 102 (Can. ONSC) (describing the creation of The Sedona Conference principles).

64. 2011 ONSC 1602.

65. *Id.* at paras. 3, 5.

66. *Id.* at paras. 21, 23.

67. *Id.* at para. 35.

creates an entire section dedicated to how the defendant violated the Sedona Canada Principles.⁶⁸

III. THE UNITED STATES OF AMERICA'S USE OF PROPORTIONALITY ANALYSIS

A. *The Federal System*

1. Discovery in Federal Courts

The discovery system of the United States is based on the principles found in Federal Rules of Civil Procedure 26–37.⁶⁹ Rule 26 requires both parties to make initial disclosures which include locations of documents, including electronically stored information (ESI), and potential witnesses that *support* the producing parties' case.⁷⁰ The majority of discovery, however, is generated by the parties' use of requests for production of documents,⁷¹ depositions,⁷² and interrogatories.⁷³ Although the tools allow the parties to participate in extensive fact-gathering, the parties may not use these discovery tools in an unlimited fashion.⁷⁴ The overarching principles of relevance, privilege, and proportionality *should* be applied to determine the legitimacy of each discovery request.⁷⁵

The "American Rule" also contributes to the way parties formulate the extent of discovery.⁷⁶ This is the concept that parties ordinarily

68. *Id.* at paras. 26–31. The court states that the defendant violated the Sedona Canada principle to meet and confer early in the case to discuss discovery issues, including electronic discovery, and because the defendant failed to participate in this process, confidence was largely lost in the defendant and no proportionate discovery plan was ultimately created. *Id.*

69. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2002 (3d ed. 2010).

70. FED. R. CIV. P. 26(a)(1).

71. FED. R. CIV. P. 34.

72. FED. R. CIV. P. 30–31.

73. FED. R. CIV. P. 33.

74. THOMAS D. ROWE ET AL., CIVIL PROCEDURE 118 (2d ed. 2008).

75. *Id.*; *see also* FED. R. CIV. P. 26(b)(1) (indicating that the scope of discovery is limited by the principles of relevance, privilege, and proportionality). *But cf.* Henry S. Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 60–61 (2007) (noting that courts have largely ignored the proportionality principle contained in the Federal Rules of Civil Procedure).

76. *See* *Traveler's Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 448 (2007) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975)); *see also* FED. R. CIV. P. 54(d)(1).

are required to pay their own costs, including attorney's fees and discovery costs, even if they "win" the case.⁷⁷

2. The Status of Proportionality Analysis

a. *Reforms to the Federal Rules of Civil Procedure*

The United States' source of the concept of proportionality in the context of discovery is found in Federal Rule of Civil Procedure Rule 26(b)(2).⁷⁸ In particular, Rule 26(b)(2)(C)(iii) states that:

the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues.⁷⁹

In addition, Rule 26(b)(2)(B), a 2006 amendment to the Federal Rules, provides specific guidance on electronically stored information.⁸⁰ The Rule allows parties the opportunity to deny discovery that is "not reasonably accessible because of undue burden or cost."⁸¹ As a response to a motion to compel, this Rule endows the court with the discretion to "order discovery from such sources if the requesting party shows good cause."⁸² It also allows courts to place conditions on the discovery in question.⁸³ The application of this Rule is now commonly known as the "two-tiered" approach.⁸⁴

77. See *Traveler's Cas. & Sur. Co. of Am.*, 549 U.S. at 448 (citing *Alyeska Pipeline Serv. Co.*, 421 U.S. at 247); see also FED. R. CIV. P. 54(d)(1) (indicating that all costs, except attorney's fees, are generally awarded to the prevailing party).

78. The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, *supra* note 7, at 292.

79. FED. R. CIV. P. 26(b)(2)(C)(iii).

80. FED. R. CIV. P. 26(b)(2)(B).

81. *Id.*

82. *Id.*

83. *Id.*

84. Theodore C. Hirt, *The Quest for "Proportionality" in Electronic Discovery: Moving from Theory to Reality in Civil Litigation*, 5 FED. CTS. L. REV. 171, 174-75 (2011). The first tier is that the party should produce "reasonably accessible" information. *Id.* at 175. If not "reasonably accessible," the requesting party can only receive the information if they can show good cause. *Id.*

A related Federal Rule of Civil Procedure is Rule 26(g)(1)(B)(iii), which requires that an attorney's signature on any discovery-related court document signifies a certification of the fact that the documents were not "unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."⁸⁵

b. Courts Using Proportionality Analysis as a Way to Resolve Electronic Discovery Disputes

Although underutilized by parties and courts,⁸⁶ proportionality analysis has been used to resolve several different problems that are fairly unique to cases involving electronic discovery.⁸⁷

One of the "most vexing issues in electronic discovery . . . [is] the issue of data preservation and its flip side, spoliation."⁸⁸ Parties must preserve documents even prior to the commencement of litigation if "a party 'has notice that the evidence is relevant to the litigation or . . . should have known that the evidence may be relevant to future litigation.'"⁸⁹ This rule is "not controversial"; however, conflict often arises when determining what to preserve and how to preserve it, particularly when electronic discovery is involved.⁹⁰

The court in *Rimkus Consulting Group, Inc. v. Cammarata* stated 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."⁹¹

85. FED. R. CIV. P. 26(g)(1)(B)(iii). Federal Rule of Civil Procedure 26(g) was enacted in 1983 with identical language. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008) (Grimm, Chief Mag.). Therefore, the concept of proportionality in the United States' discovery system is not new, but has been around at least since the 1980s.

86. John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 464 (2010); Netzorg & Kern, *supra* note 6, at 522.

87. Milbreg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not In Our Rules...*, 4 FED. CTS. L. REV., 131, 141, 143 (2011).

88. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Decisions*, 37 U. BALT. L. REV. 381, 385 (2008) (quoting Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 188 (2006)).

89. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

90. *Rimkus*, 688 F. Supp. 2d at 613.

91. *Id.* More commentary on the use of proportionality analysis in preservation conflicts is found in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 516–17, 522–24 (D. Md. 2010) (Grimm, Chief Mag.).

Thus, proportionality analysis can serve a role in determining what electronic documents to preserve.⁹²

Other common electronic discovery disputes involve the scope of production of documents and which party will pay for that production.⁹³ The case that embodies both of these issues and one of the most famous cases in the electronic discovery realm is *Zubulake v. UBS Warburg*.⁹⁴ In this case, the plaintiff wanted the defendant to produce a large number of e-mails on the defendant's back-up tapes,⁹⁵ but the defendant objected on the ground that the costs to satisfy the request would be "prohibitive."⁹⁶ The court found that the plaintiff had a right to the documents but because of the cost, employed a cost-shifting analysis.⁹⁷ Although not determined in the *Zubulake* opinion, the court announced a seven-factor test to determine whether the costs should be shifted.⁹⁸ Several factors of this test incorporated proportionality principles, including factor three, "[t]he total cost of production, compared to amount in controversy," and factor four, "[t]he total cost of production, compared to the resources available to each party."⁹⁹

A more recent and more thorough proportionality analysis in relation to scope and costs of electronic discovery is found in *Chen-Oster v. Goldman, Sachs and Company*.¹⁰⁰ In this case, the plaintiffs allege gender discrimination in the employment context and thus want to review the defendant's electronic employment databases for relevant information.¹⁰¹ Defendant objected on the basis that producing these documents would take too much time and expense.¹⁰² The court then performed a proportionality analysis considering the legal importance of the documents to the case, as well as the social importance of the outcome of the case, as compared with the burden

92. See also *Pippins v. KPMG LLP*, 279 F.R.D. 245, 250, 252, 255–56 (S.D.N.Y. 2012) (holding by a district court judge that the defendant must preserve 250 hard drives because the defendant did not produce even a sample of hard drives to properly conduct a proportionality analysis and, therefore, there was a presumption of relevance).

93. See, e.g., *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003).

94. 217 F.R.D. 309 (S.D.N.Y. 2003).

95. *Id.* at 313.

96. *Id.*

97. *Id.* at 317–20.

98. *Id.* at 322.

99. *Id.*

100. *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294 (S.D.N.Y. 2012).

101. *Id.* at 295–97.

102. *Id.* at 303. The defendant gave specific time estimates for proper production. *Id.*

that would be imposed on the defendant.¹⁰³ Ultimately, the court decided that the defendant's time estimates were largely "overblown" and therefore did not overcome the importance of the documents to the plaintiffs' case.¹⁰⁴ Thus, the defendant was ordered to produce the data.¹⁰⁵ This case demonstrates that proportionality analysis can serve a role in resolving electronic discovery disputes over the scope of production.¹⁰⁶

3. Amendments to the Federal Rules of Civil Procedure

Currently, there are two pending amendments to the Federal Rules of Civil Procedure that if passed, would bring greater attention to the use of proportionality analysis in discovery.¹⁰⁷ The first suggested amendment is to change Federal Rule of Civil Procedure 26(b)(1) from, "*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"¹⁰⁸ to:

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 amount in controversy, the importance of the issues at stake in the action, 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 benefit¹⁰⁹

103. *Id.* at 305–07.

104. *Id.* at 306–07.

105. *Id.* at 308.

106. *See id.* at 303–08; *see also* Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (using a proportionality analysis to solve a discovery issue).

107. The Sedona Conference, *Achieving Proportionality in E-Discovery Webinar*, THE SEDONA CONF. (Jan. 9, 2013), <https://thesedonaconference.org/conference/2013/sedona-conference@-commentary-proportionality-electronic-discovery>. This webinar was an expansion on the recently released version of The Sedona Conference's Commentary on Proportionality. *See* The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, *supra* note 7, at 289.

108. FED. R. CIV. P. 26(b)(1).

109. ADVISORY COMMITTEE ON CIVIL RULES, REPORT TO THE STANDING COMMITTEE, May 8, 2013, *available at*

The second potential amendment to the Rules is to add a proportionality factor to the Rule 37(e) test to determine whether a party “failed to preserve discoverable information.”¹¹⁰

If proportionality were made more prominent in the Rules perhaps parties and courts would use the tool more often.¹¹¹

B. The State Court System

1. A Review of Rules and Decisions from Several States Utilizing Proportionality Analysis

Currently, forty-two states have rules that directly address electronic discovery.¹¹² Some of these states have incorporated the proportionality rule found in Federal Rule of Civil Procedure 26(b)(2)(C).¹¹³ As a result, several cases have arisen in state courts around the country that use proportionality analysis to resolve electronic discovery disputes.¹¹⁴

In the case, *Analog Devices, Inc. v. Michalski*, the North Carolina Superior Court of Guilford County provides an excellent example of the way proportionality analysis can be used to resolve a complex electronic discovery dispute.¹¹⁵ The plaintiff is a circuit manufacturer suing the defendants, two former employees and a corporate competitor of the plaintiff, for “misappropriation of trade secrets.”¹¹⁶ The discovery dispute arose when the defendants requested “production of e-mails of the originators of the trade secrets at issue relating to the development of those trade secrets.”¹¹⁷ The plaintiffs failed to produce them and in response, defendants filed a motion to

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf>.

110. The Sedona Conference, *Achieving Proportionality in E-Discovery Webinar*, *supra* note 107.

111. *See id.*

112. *See generally Current Listing of States that have Enacted E-Discovery Rules*, K & L GATES, <http://www.ediscoverylaw.com/promo/state-district-court-rules/> (Apr. 1, 2014) (listing the states that have enacted statutory rules regarding e-discovery).

113. *See, e.g.*, MD. CT. R. § 2-402 (incorporating the proportionality rule). *See generally Current Listing of States that have Enacted E-Discovery Rules*, *supra* note 112 (listing the states that have incorporated the proportionality rule).

114. *E.g.*, *Brokaw v. Davol, Inc.*, C.A. No. PC 07-5058, 2011 R.I. Super. LEXIS 23 (R.I. Super. Ct. Feb. 15, 2011) (illustrating how Rhode Island’s alteration to Rule 26 caused a court to use a proportionality analysis).

115. *Analog Devices, Inc. v. Michalski*, No. 01 CVS 10614, 2006 WL 3287382, at *13–16 (N.C. Super. Ct. Bus. Ct. Guilford Cnty., Nov. 1, 2006).

116. *Id.* at *1–2.

117. *Id.* at *2, *13–14.

compel.¹¹⁸ To determine whether to grant or deny the motion, the court primarily looked to North Carolina Rule of Civil Procedure 26(b)(1), which is nearly identical to Federal Rule of Civil Procedure 26(b)(2)(B).¹¹⁹ The court analyzed every piece of the rule including the burden and expense on the plaintiff, the potential value of the documents to the case, the amount in controversy, whether the ruling would be “outcome determinative” and finally, the “importance of the issues at stake in this litigation.”¹²⁰ The court states that, “[u]ltimately, the analysis comes down to a comparison of the relative costs of production by Plaintiff to Defendants’ need for the information that may result.”¹²¹ On this basis, the court found that the information contained on the back-up tapes holding the e-mails in question were important enough to overcome the cost burden by the plaintiff.¹²² However, the “potential cost of production combined with the great uncertainty as to the contents of the requested documents is too great to require Plaintiff to bear the full burden of production on its own.”¹²³ Therefore, the court ordered that the costs be split equally between the two parties.¹²⁴

The Texas Supreme Court case, *In re Weekley Homes, L.P.*, demonstrates the use of proportionality analysis in the context of accessibility of electronic discovery.¹²⁵ In this case, the plaintiff, a lot warehouser, sued a real estate developer on claims of breach of contract and several other claims.¹²⁶ During the discovery process, the plaintiff requested that the hard drives of all of the defendant’s employees’ computers be searched for relevant emails by an independent forensic expert.¹²⁷ The defendant objected at the motion to compel hearing stating that this was an overly intrusive method to retrieve information; however, plaintiff’s motion to compel was granted by the trial court.¹²⁸ On petition for mandamus relief, the Supreme Court of Texas ultimately decided that the trial court abused its discretion when it granted plaintiff’s motion to compel.¹²⁹ As part

118. *Id.* at *2.

119. *Id.* at *6–7, *11.

120. *Id.* at *14–15.

121. *Id.* at *15.

122. *Id.* at *15–16.

123. *Id.* at *16.

124. *Id.*

125. *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 321–322 (Tex. 2009).

126. *Id.* at 311–12.

127. *Id.* at 313.

128. *Id.*

129. *Id.* at 321.

of its opinion, the court laid out the steps that a trial court should take when faced with a motion to compel electronic discovery.¹³⁰ One step of the proposed process is that Texas trial courts should analyze the production request for compliance with Texas Rule of Civil Procedure 192.4(b) which is nearly identical to Federal Rule of Civil Procedure 26(b)(2)(C).¹³¹ The court states, “[i]f the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, again subject to Rule 192.4’s discovery limitations.”¹³²

2. Maryland

Maryland Court Rule section 2-402 incorporates proportionality analysis in determining the scope of discovery.¹³³ Specifically, Maryland Rule 2-402(b)(1) is almost identical to Federal Rule of Civil Procedure 26(b)(2)(C) which states that the court may limit the scope of discovery on the basis that the requested discovery is disproportionate to its burden.¹³⁴ In addition, section 2-402(b)(2)

130. *Id.* at 321–22.

131. *Id.* at 317.

132. *Id.* at 322 (citations omitted).

133. MD. CT. R. § 2-402; see J. Mark Coulson, *Maryland Courts No Longer Safe Haven for E-Discovery Resisters*, 43 MD. B.J. 32, 35 (Nov.–Dec. 2010).

134. MD. CT. R. § 2-402(b)(1). There are several differences between the Maryland Rule and the Federal Rule. The Maryland Rule is as follows:

In a particular case, the court, on motion or on its own *initiative and after consultation with the parties*, by order *may limit or modify these rules on the length and number of depositions, the number of interrogatories, the number of requests for production of documents, and the number of requests for admissions*. The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules if it determines that (A) the discovery sought is unreasonably cumulative or duplicative or *is obtainable* from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the burden or *cost* of the proposed discovery outweighs its likely benefit, taking into account the *complexity of the case*, the amount in controversy, the parties' resources, the importance of the issues at stake in the *litigation*, and the importance of the *proposed* discovery in resolving the issues.

Compare id. (differences in italics), with FED. R. CIV. P. 26(b)(2)(C).

provides a mechanism for proportionality analysis specifically targeted at electronically stored information.¹³⁵

Although Maryland court rules incorporate this very valuable tool, no current Maryland case on record has discussed or analyzed the proportionality rule. As can be seen in federal as well as state court cases, proportionality should be used by both courts and parties as a tool to either solve electronic discovery disputes or as a way to prevent them.¹³⁶

IV. ADDITIONAL SOURCES ADVOCATING PROPORTIONALITY ANALYSIS

A. *The Seventh Circuit Electronic Discovery Pilot Program*

The Seventh Circuit Electronic Discovery Pilot Program was created in May 2009 to “provide fairness and justice to all parties while reducing the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure.”¹³⁷ The program is comprised of experienced attorneys from varying fields and it implements the principles that those attorneys create in pilot programs in federal district courts across the Seventh Circuit.¹³⁸ The pilot program completed its third phase in May 2013.¹³⁹

One of the principles that the Pilot Program developed is Principle 1.03 which encourages parties to incorporate the proportionality analysis found in Federal Rule of Civil Procedure 26(b)(2)(C) into the formation of discovery plans.¹⁴⁰ The phase two report states that the program adopted this principle because it is “vital to achieving the goals” of reducing the cost and burden of electronic discovery and promoting cooperation between parties.¹⁴¹ Also, the report notes

135. MD. CT. R. § 2-402(b)(2). This rule is almost identical to FED. R. CIV. P. 26(b)(2)(B).

136. See *Ex parte* Cooper Tire & Rubber Co., 987 So. 2d 1090, 1106 (Ala. 2007) (requiring a proportionality test for evaluating an electronic discovery request); see also *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (applying a three-step analysis to determine the scope and cost of electronic discovery).

137. *Final Report on Phase Two, May 2010 – May 2012*, SEVENTH CIRCUIT ELEC. DISCOVERY PILOT PROGRAM 1 (2012), <http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf>.

138. *Id.* at 1, 51–52.

139. INTERIM REPORT ON PHASE THREE, SEVENTH CIRCUIT ELEC. DISCOVERY PILOT PROGRAM (2013), http://www.discoverypilot.com/sites/default/files/phase_three_interim_report.pdf.

140. *Id.* at 6.

141. *Final Report on Phase Two*, *supra* note 137, at 66, 69–70, 72.

that proportionality analysis “too often is not observed or is not invoked appropriately in connection with ESI discovery.”¹⁴²

In the surveys sent to attorneys and judges after phase one and two of the pilot program, there were favorable responses to the principle.¹⁴³ One particularly telling statistic noted in the report is that “sixty-three percent (63%) of judge respondents reported that the proportionality standards set forth in Fed. R. Civ. P. 26(b)(2)(C) played a significant role in the development of discovery plans.”¹⁴⁴ Additionally, the report states that “[o]ne judge . . . reported that the proportionality and meet and confer requirements were aspects of the Pilot Program Principles found most useful.”¹⁴⁵ Another judge stated, “the emphasis on cooperation and proportionality cut down the discovery disputes.”¹⁴⁶ According to the report, “[a]ttorney respondents frequently identified the focus on proportionality as the most useful aspect of the Principles.”¹⁴⁷

B. *The Sedona Conference*

The Sedona Conference is a non-profit organization that is “dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights.”¹⁴⁸ The well-respected organization has published a commentary designed specifically to address proportionality in electronic discovery.¹⁴⁹ In its report, the Sedona Conference promotes six principles of proportionality:

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

142. *Id.* at 72.

143. *Id.* at 72–73.

144. *Id.* at 73.

145. *Id.*

146. *Id.* at 73–74.

147. *Id.* at 72.

148. *About Us*, THE SEDONA CONF., <https://thesedonaconference.org/aboutus> (last visited Apr. 1, 2014).

149. The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, *supra* note 7. This commentary has been cited in “eight federal court decisions, [fifteen] law review articles [and] seven legal treatises” since its initial publication in 2010. *Id.* at i.

2. Discovery should generally be obtained from the most convenient, least burdensome and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.¹⁵⁰

The report offers a history and background of the concept of proportionality in the context of discovery and also gives courts and parties meaningful guidance on how to apply the principles of proportionality.¹⁵¹

V. FIVE PRACTICAL WAYS TO INCORPORATE PROPORTIONALITY ANALYSIS INTO LITIGATION STRATEGIES

The principle of proportionality and the use of proportionality analysis is a trend gaining popularity not only in this country's court systems but also in the common law world.¹⁵² However, it is not enough to simply talk about the trends and not discuss the ways that practitioners and courts can apply these trends to their caseload. Some of the devices used to achieve proportionality in discovery, and particularly electronic discovery, are predictive coding, phasing of discovery, sampling, cost-shifting, and cooperation.¹⁵³

150. *Id.* at 2.

151. *Id.* at 3–14.

152. T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465, 466 (2005).

153. *See infra* Part V.A–E.

A. Predictive Coding

Predictive coding, also called technology-assisted review,¹⁵⁴ is a “software-based approach that uses sophisticated algorithms to locate relevant materials—in lieu of document-by-document review or a mechanical application of search terms.”¹⁵⁵ These “sophisticated algorithms” are created by an attorney who manually reviews some documents in the collection and “codes” them in the software as “responsive, non-responsive, privileged, or any other subcategory required.”¹⁵⁶ Then, the software goes through the rest of the documents and pulls those documents that are consistent with the manual coding.¹⁵⁷

In February 2012, the Southern District of New York officially recognized predictive coding as “an acceptable way to search for relevant ESI in appropriate cases.”¹⁵⁸ The discovery dispute in this case centered on the “plaintiffs['] reluctance to utilize predictive coding to try to cull down the’ approximately three million electronic documents from the agreed-upon custodians.”¹⁵⁹ Ultimately, the court ordered the parties to abide by the ESI protocol agreed upon by both parties which included the use of predictive coding.¹⁶⁰ In the opinion’s conclusion section, the court urges members of the bar to “seriously consider[.]” using predictive coding as a tool to handle

154. William W. Belt et al., *Technology-Assisted Document Review: Is It Defensible?*, 18 RICH. J.L. & TECH. 10, ¶ 6 n.22 (2012), <http://jolt.richmond.edu/v18i3/article10.pdf>.

155. Timothy J. Chorvat & Laura E. Pelanek, *Electronically Stored Information in Litigation*, 68 BUS. LAW. 245, 253 (Nov. 2012).

156. Nicholas Barry, *Man Versus Machine Review: The Showdown Between Hordes of Discovery Lawyers and a Computer-Utilizing Predictive-Coding Technology*, 15 VAND. J. ENT. & TECH. L. 343, 354 (2013); see Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH. 9, ¶ 7 (2011), <http://jolt.richmond.edu/v17i3/article9.pdf>.

157. Barry, *supra* note 1566, at 354.

158. *Moore v. Publicis Grp.*, 287 F.R.D. 182, 183 (S.D.N.Y.2012).

159. *Id.* at 184.

160. *Id.* at 187. ESI Protocol is attached as an exhibit to the opinion. *Id.* at 187, 193–204. For additional guidance, the United States District Court for the District of Maryland has created a sample ESI protocol that is available on their website. *Suggested Protocol for Discovery of Electronically Stored Information (“ESI”)*, U.S. DIST. COURT FOR THE DIST. OF MD., <http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf> (last visited Apr. 1, 2014).

cases involving a large volume of electronic discovery because of its potential to save time and money.¹⁶¹

B. Phased Discovery

Phased discovery allows parties to produce “the most promising, but least burdensome or expensive sources of information . . . initially . . . [and] reevaluate their needs depending on the information already provided.”¹⁶² Essentially, “the court, or the parties on their own initiative, may find it appropriate to conduct discovery in phases.”¹⁶³ The first phase should include “clearly relevant information located in the most accessible and least expensive sources.”¹⁶⁴ If the parties are not satisfied with the information culled from the first phase, they can pursue “more burdensome and expensive discovery” in later phases.¹⁶⁵

Several courts have used phased discovery as a method to more effectively manage cases with electronic discovery.¹⁶⁶ For example, in *Tamburo v. Dworkin*, the court notes that “to ensure that discovery is proportional to the specific circumstances of this case and to secure the just, speedy, and inexpensive determination of this action, the Court orders a phased discovery schedule.”¹⁶⁷

161. See *Moore*, 287 F.R.D. at 193; see also Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, ¶ 61 (2011), <http://jolt.richmond.edu/v17i3/article11.pdf>. The combination of costs saved combined with the tendency to retrieve more relevant results than manual review as suggested by Grossman and Cormack, indicate that predictive coding can be an impetus for proportionality. *Id.*

162. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 365 (D. Md. 2008); see *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (ordering phased discovery as an efficient and cost effective method of discovery comporting with proportionality). The requirement that parties discuss the potential for phased discovery is found in Federal Rule of Civil Procedure 26(f)(3)(B). See also *Moore*, 287 F.R.D. at 192 (stating the importance of cooperation among counsel during the discovery process).

163. The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, *supra* note 7, at 297.

164. *Id.*

165. *Id.* The Sedona Conference further suggests that phased discovery could help facilitate settlements because the most salient information will be discovered early in the litigation. *Id.*

166. See, e.g., *Moore*, 287 F.R.D. at 185–86; *Tamburo*, 2010 WL 4867346, at *3.

167. *Tamburo*, 2010 WL 4867346, at *3.

C. Sampling

When an electronic discovery dispute arises, sampling may be one effective remedy to help the judge to more fairly and accurately resolve the dispute at a relatively low cost to the parties.¹⁶⁸ The process involves “the sampling of a small portion of the requested information prior to ruling on the underlying dispute.”¹⁶⁹ This approach is explicitly authorized by the Federal Advisory Committee to the 2006 Federal Rules of Civil Procedure “e-discovery amendments.”¹⁷⁰ Sampling is particularly relevant when the judge must conduct proportionality analysis under Federal Rule of Civil Procedure 26(b)(2)(C) because it allows the judge to get a glimpse of the potential relevance or importance of the documents without the expense of producing the entire response to the discovery request.¹⁷¹

This tool can not only be used to resolve motions to compel, but samples of requested documents have been used to begin a predictive coding process¹⁷² and serve as a quality assurance measure so that privileged documents are not being produced for a production created by agreed-upon search terms.¹⁷³

The decision to order sampling primarily is “within the discretion of the judge . . . [but] there is nothing to prevent a party from suggesting to a judge that sampling might be useful in resolving a pending discovery issue.”¹⁷⁴

168. Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 *CARDOZO L. REV.* 719, 723–24 (2012). According to the article, “[s]ince 1999, there have been at least forty reported cases in which sampling has been considered or utilized.” *Id.* at 723.

169. *Id.* at 722.

170. *Id.*; see also FED. R. CIV. P. 26(b)(2)(B) (authorizing the court to order discovery of ESI).

171. See Yablon & Landsman-Roos, *supra* note 168, at 732–33.

172. *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 303–04 (S.D.N.Y. 2012). A sample of the requested documents considered relevant to the request is used to train the computer program conducting the predictive coding to pick up more relevant documents in the collection. *Id.* at 304.

173. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257 (D. Md. 2008). Sampling should be done on document collections before produced to assure that what the search terms produced is not privileged. See *id.*

174. Yablon & Landsman-Roos, *supra* note 168, at 741.

D. Cost-Shifting

Ordinarily, the party producing discovery must pay the costs related to production.¹⁷⁵ However, as discovery becomes more electronic and therefore more costly and burdensome to manage, some courts have issued cost-shifting orders so that the requesting party pays some or all of the costs of the production.¹⁷⁶ Courts have primarily used an order authorized by Federal Rule of Civil Procedure 26(c) to shift the costs of discovery if doing so would “protect[] [respondents] from ‘undue burden or expense.’”¹⁷⁷

As discussed earlier in this comment, the seminal case on cost-shifting is *Zubulake v. UBS Warburg LLC* which provides that “cost-shifting “should be considered *only* when electronic discovery imposes an ‘undue burden or expense’ on the responding party.”¹⁷⁸ If this first condition is satisfied, the court announces a seven-factor test to determine whether cost-shifting is appropriate, which includes many of the proportionality analysis factors listed in Federal Rules of Civil Procedure 26(b)(2)(B)–(C).¹⁷⁹

Several recent decisions have employed the *Zubulake* approach to cost-shifting.¹⁸⁰ In *Boeynaems v. LA Fitness International, Inc.*, the court determined that the plaintiff should pay the costs of discovery because class certification was pending at the time and “plaintiffs . . . asked for very extensive discovery, compliance with which will be very expensive.”¹⁸¹ The Southern District of New York denied cost shifting in *Pippins v. KPMG LLP*, because “the party seeking the cost-shifting” did not adequately show that the back-up tapes requested to be preserved were of “marginal relevance” and were unduly burdensome to preserve.¹⁸²

Cost-shifting is another way to control the volume of electronic discovery that a party requests because in light of recent case law,

175. Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 97 (2007), <http://jolt.richmond.edu/v13i3/article11.pdf>.

176. *Id.* ¶ 100.

177. *Id.* (second alteration in original). In fact, the Federal Advisory Committee Notes to Federal Rule of Civil Procedure 34 contemplate shifting costs to the requesting party as a way to “protect respondent against undue burden or expense.” FED. R. CIV. P. 34 advisory committee note.

178. 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (emphasis in original).

179. FED. R. CIV. P. 26(b)(2)(B)–(C); *Zubulake*, 217 F.R.D. at 322.

180. *See, e.g.*, *Boeynaems v. LA Fitness Int’l, LLC*, 285 F.R.D. 331, 336 (E.D. Pa. 2012).

181. *Id.* at 341.

182. *Pippins v. KPMG LLP*, 279 F.R.D. 245, 252, 255–56 (S.D.N.Y. 2012).

“unduly burdensome or expensive” discovery requests could result in cost-shifting to the requesting party.¹⁸³

E. Cooperation

Cooperation is essential to each of the above tools and ultimately in achieving proportionality in discovery.¹⁸⁴

Cooperation in litigation should begin as early as possible in the case. One of the first and most important cooperation opportunities occur at the Rule 26(f) conference where the parties can cooperate to form a mutually agreeable discovery plan.¹⁸⁵ A part of this discovery plan could include a “discovery budget” that informs the other parties as well as the presiding judge of the potential costs of discovery versus the potential recovery in the matter.¹⁸⁶ Cooperation should continue throughout the pre-trial discovery phase as discovery disputes arise to avoid unnecessary motions which is costly to the parties and the court.¹⁸⁷

If parties choose not to cooperate, the Federal Rules of Civil Procedure provide several means for the court to enforce cooperation.¹⁸⁸ First, the court can “order the attorneys . . . to appear for one or more pretrial conferences for such purposes as . . . discouraging wasteful pretrial activities.”¹⁸⁹ The court may also limit discovery *sua sponte* under Federal Rule of Civil Procedure 26(b)(2)(C) if the discovery is becoming too burdensome.¹⁹⁰ Sanctions under Rule 37 may also be imposed if parties fail to cooperate causing unduly burdensome discovery.¹⁹¹ In addition, a

183. *Zubulake*, 217 F.R.D. at 318, 324.

184. *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 146 (S.D.N.Y. 2009) (“Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.”).

185. Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within the Existing Rules?*, 12 SEDONA CONF. J. 47, 51 (2011); David J. Waxse, *Cooperation – What Is It and Why Do It?*, 18 RICH. J.L. & TECH. 8, ¶ 20 (2012), <http://jolt.richmond.edu/v18i3/article8.pdf>.

186. Grimm, *supra* note 185, at 59–61.

187. *See id.* at 63 (suggesting the use of “Susman’s checklist” which is a list of agreements, created by a “prominent” and “seasoned” litigator, that should be made between parties early in the litigation to avoid later discovery disputes); *see also* Waxse, *supra* note 185, ¶ 14.

188. FED. R. CIV. P. 16(a)(3); FED. R. CIV. P. 26(b)(2)(C); Waxse, *supra* note 185, ¶ 19.

189. FED. R. CIV. P. 16(a)(3); Waxse, *supra* note 185, ¶ 19.

190. FED. R. CIV. P. 26(b)(2)(C); Waxse, *supra* note 185, ¶ 19.

191. FED. R. CIV. P. 37; *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 585 (D. Md.2010).

federal statute, 28 U.S.C. § 1927 authorizes a court to impose costs upon parties that “so multipl[y] the proceedings . . . unreasonably and vexatiously.”¹⁹² At the Duke Civil Litigation Conference in 2010, the group came to the “consensus” that “[i]f counsel understand that courts expect their cooperation, it is more likely to occur” and that “[l]awyers are more cooperative when they know that the judge is watching.”¹⁹³

For additional information, the Sedona Conference has published two articles that give practical guidance to litigating attorneys¹⁹⁴ and the courts¹⁹⁵ on how to incorporate cooperation into the discovery process.¹⁹⁶

IV. CONCLUSION

The existence of electronic discovery in any case has the potential to increase the burden and expense of litigation.¹⁹⁷ However, proportionality analysis is a way to resolve this issue. It can be used to determine the scope of discovery, what to preserve, how to make or respond to a motion to compel and more.¹⁹⁸ Proportionality analysis is increasingly being used in common law countries like the United Kingdom and Canada.¹⁹⁹ The United States’ federal and state

192. 28 U.S.C. § 1927 (2006).

193. Waxse, *supra* note 185, ¶ 1, 23.

194. *See generally* THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION GUIDANCE FOR LITIGATORS AND IN-HOUSE COUNSEL (2011), *available at* <https://thesedonaconference.org/download-pub/465> (discussing how cooperation between opposing counsel at the outset of a case is beneficial to the overall goals of the discovery process).

195. *See generally* THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION: RESOURCES FOR THE JUDICIARY (2011), *available at* <https://thesedonaconference.org/download-pub/425> (discussing recommendations judges should consider in order to reduce the cost and issues related to electronic discovery).

196. *See supra* notes 194–95. These two publications are progeny of the Cooperation Proclamation originally published by The Sedona Conference in 2008 that encouraged parties to cooperate as a function of following the Federal Rules of Civil Procedure and as a responsible “officer of the court.” The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 332–33 (Supp. Fall 2009); THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), *available at* <https://thesedonaconference.org/download-pub/1703> (last updated Oct. 31, 2012). As of October 31, 2012, over 100 active and retired federal and state judges have endorsed the proclamation. *Id.* at 4–12.

197. John T. Yip, *Addressing the Costs and Comity Concerns of International E-Discovery*, 87 WASH. L. REV. 595, 595–96 (2012); Carroll, *supra* note 86, at 456.

198. *See supra* Part III..

199. *See supra* Part II.

court systems have adopted several rules and court decisions pursuing proportionality analysis.²⁰⁰ However, the tool is still largely underutilized as a strategy to overcome electronic discovery issues.²⁰¹ There are several *practical* ways to achieve proportionality, particularly in electronic discovery, and they include: predictive coding, phasing, sampling, cost-shifting and most importantly, creating and maintaining cooperation between parties.²⁰² The proportionality principle and use of proportionality analysis, particularly in the context of electronic discovery, has the potential to revolutionize the way parties and courts handle the often burdensome process.²⁰³

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200. See *supra* Parts III.A.2.a, B.1.

201. See Carroll, *supra* note 86, at 456–57, 460–64.

202. See *supra* Part V.

203. See Carroll, *supra* note 86, at 460; see *supra* Part I.

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