

## **Discovery Strategies in Personal Injury Litigation Under Amended Rules 26(b) and 34(b)**

Drafting or Responding to Interrogatories, Requests for Production  
of Documents or Admission of Facts, and Third-Party Subpoenas

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WEDNESDAY, MAY 2, 2018

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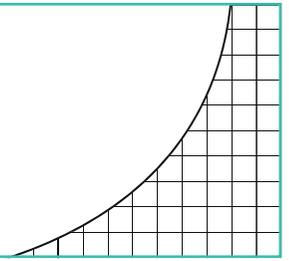
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Today's faculty features:

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*Sedona Conference*

## Proportionality—Using Sedona Principle 8’s Continuum of Sources to Guide Discovery

By PATRICIA A. ANTEZANA

Revised Sedona Conference Principle 8 introduces language regarding data sources that are “readily accessible” and the idea that preservation or production may move through a “continuum of less accessible sources” until the data requested is no longer proportional. Principle 8’s concept of a continuum of sources should apply to custodial data and sources that, in a technological vacuum, are “readily accessible” but become “less accessible” through the lens of proportionality as the costs of discovery increase.

Parties should therefore consider using Principle 8 to negotiate discovery parameters based on the needs of the case to examine where certain discovery falls on the continuum of sources and to help draw the line between proportional and disproportional discovery.

### Principle 8

In October 2017, the Sedona Conference published its Principles, Third Edition: Best Practices, Recommendations and Principles for Addressing Electronic Document Production.

Principle 8 instructs:

*The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.*

In prior editions of the Sedona Conference Principles, Principle 8 provided guidance regarding preservation and production of data from active sources as op-

posed to sources that are not reasonably accessible, like disaster recovery back-up tapes. Revised Principle 8, however, introduces language regarding data sources that are “readily accessible” and the idea that preservation or production may move through a “continuum of less accessible sources” until the data requested is no longer proportional.

Recognizing that “accessibility” is relative, not absolute, Comment 8.a to Principle 8 notes that the “readily accessible” continuum is intended to comprehend Rule 26(b)(1)’s emphasis on proportionality. Sources may be considered less accessible because of increasing burden or cost, or because they are largely duplicative of more accessible sources. Once the cost of preservation and production becomes disproportionate to its benefit in a given matter, additional sources may be considered “not readily accessible.”

While Principle 8 focuses on “primary sources” and “less accessible sources,” its guidance should also assist parties in determining the appropriate scope of discovery in general. What is proportional varies on a case-by-case basis, and parties often struggle with determining how much discovery, including number of custodians and non-custodial sources, is appropriate to meet the needs of the case. The concept of a continuum of sources should also be applicable to custodial data and sources that, in a technological vacuum, are “readily accessible” but become “less accessible” through the lens of proportionality as the costs of discovery increase.

For example, in a case valued at less than \$1 million, preservation and production may need to be limited to a handful of custodians’ data. It is not that the cost of including potential custodians 6-25, for example, is necessarily any more per custodian than for custodians 1-5, it is that the increasing cumulative burden of including additional custodians may rapidly exceed the decreasing marginal benefit based on what is at stake in the case.

Some courts have already analyzed these types of proportionality issues, and a few cases illustrate how guidance from Principle 8 can be extrapolated to encompass the scope of discovery not only through a tech-

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nologically “accessible” lens but also through a proportionally “accessible” lens.

### **Douglas v. Kohl’s Dep’t Stores**

In *Douglas v. Kohl’s Department Stores, Inc.*, 2016 BL 131074 (M.D. Fla. April 25, 2016), the court assessed whether discovery from numerous custodians could be compelled in a case alleging violations of the Telephone Consumer Protection Act (“TCPA”). Plaintiff sought documents that instructed defendant’s employees how to handle requests to stop calling individuals and copies of internal e-mails sent to or received by members of defendant’s board of directors, its vice-president, and/or its compliance directors concerning the TCPA.

Defendant responded that it had already produced everything in its possession regarding its relationship and communications with plaintiff, as well as all of its policies and procedures relating to compliance with the TCPA. Regarding plaintiff’s request for e-mails sent to or received by its board of directors, vice president, and/or compliance directors, defendant argued that plaintiff had not met her burden to show that the materials sought were relevant and further argued that “the burden of searching for the information sought is abjectly disproportional to the needs of the case.” Defendant explained that a search of e-mails for one compliance director and one vice president resulted in nearly 3,000 e-mails containing the phrase “TCPA.”

In denying plaintiff’s motion to compel, the court concluded that plaintiff had not met her burden to show relevancy and that she failed to demonstrate why the requested e-mails would aid in determining whether defendant continued to call her after she asked it to stop. Importantly, the court also emphasized that defendant had already produced everything in its possession regarding its communications with plaintiff and its policies and procedures relating to compliance with the TCPA.

Using guidance from Principle 8, in hindsight, it can be said that the court’s analysis was based in part on the fact that defendant had already produced documents from primary sources that were readily accessible. There was no need for defendant to move down the continuum of less accessible sources, like the e-mails sent to or received by its board of directors, vice president, or compliance directors, where the burden to search would be disproportionate to the needs of the case.

### **Coll v. Stryker Corp.**

Similarly, in *Coll v. Stryker Corp.*, No. 14-cv-1089KG/SMV, 2017 BL 240024 (D. N.M. July 12, 2017), the court denied plaintiff’s motion to compel where production of underlying source documents would create an undue burden on defendants. Plaintiff claimed that defendants sold three lines of medical devices utilizing inventions by Dr. Auge, the original plaintiff, but defendants failed to provide appropriate compensation for the inventions. Plaintiff argued that defendants and Dr. Auge had entered into agreements under which defendants would utilize Dr. Auge’s inventions in several products and honor Dr. Auge’s ownership rights or pay him for his contributions. Plaintiff claimed that he was entitled to all profits defendants earned in connection with the new products made with Dr. Auge’s inventions.

In discovery, plaintiff asked for invoices or other source documents that supported defendants’ calcula-

tions of expenses incurred and compiled in financial summaries of revenues and expenses provided to plaintiff. Defendants, however, had already produced spreadsheets and charts showing revenues, expenses, and profits from sales of the relevant product lines. Plaintiff argued that, without the source documents, he would be forced to “accept, unquestioned, Defendants’ representation as to the cumulative figures for expenses they would claim to be entitled to deduct from revenues in order to calculate their profits.”

Defendants argued that producing the voluminous source documents would cause an undue burden and that the discovery sought was cumulative in light of the summary financial data already produced. Defendants also stated that their corporate representatives would be prepared to answer questions regarding the expenses and financial information in depositions. Defendants submitted a declaration from one of their directors of finance that outlined the burden of producing the underlying source documents. They also estimated that the number of source documents was in the tens or hundreds of thousands and that it would require many weeks, if not months, for a team of at least 10 employees to make progress on such a collection.

The court applied “the rules of reasonableness and proportionality” and found that plaintiff was not entitled to discovery of the underlying source documents at that time. The court reasoned that the burden of the proposed discovery outweighed its likely benefit, noting also that plaintiff still had options to evaluate the financial data in the form of access to the relevant database (offered by defendants) and opportunities to question defendants’ representatives during depositions.

Using guidance from Principle 8, in hindsight, it can be said that the court’s analysis was based in part on the fact that defendants had already produced summary financial data from more readily accessible sources. There was no need for defendants to move down the continuum of less accessible information, to the source documents, where the additional burden would have been disproportionate to the needs of the case.

### **Amador v. U.S. Bank Nat’l Ass’n**

Courts also expect parties to work together to determine what is proportional to the needs of the case, involving the court only when necessary to establish the scope of discovery that “strikes the correct balance” based on the facts of the case. In *Amador v. U.S. Bank National Association*, No. 16-00600, 2017 BL 398158 (D. Minn. Nov. 6, 2017), the court addressed a number of disputes regarding the scope of permissible discovery of Customer Advice Debit (“CAD”) slips from defendant. Plaintiff alleged that defendant terminated his employment based on unlawful racial discrimination. Defendant claimed that it terminated plaintiff for three legitimate business reasons, including compliance concerns based on plaintiff’s use of CAD slips while he was a branch manager at the bank.

Defendant claimed use of the CAD slips was discouraged and employees were directed to use them primarily to correct teller error. Plaintiff claimed, however, that other employees similarly used CAD slips to transfer funds from one account to another account of a customer who was not physically present to sign for the transfer. Plaintiff moved to compel production of all CAD slips from defendant’s Minnesota branches for the

five years preceding plaintiff's motion, excluding CAD slips used to correct teller error.

Weighing the proportionality considerations, the court reasoned that other branch managers' use of CAD slips under similar circumstances was of significant importance, but also that defendant's concerns regarding the burden and expense of producing the slips for a five-year period for all Minnesota branches was also important. Balancing its concerns, the court permitted some discovery of CAD slips and instructed the parties to agree on a sampling protocol to locate CAD slips unrelated to teller error for a two-year period. Unable to agree on a sampling protocol, the parties agreed to use a questionnaire to determine if defendant's other branch managers used CAD slips similarly to plaintiff.

After two branch managers, one of whom trained plaintiff, responded that they used CAD slips for purposes other than correcting teller error, plaintiff sought additional discovery focused on the two managers and an assistant manager who had used CAD slips similarly to plaintiff. The magistrate judge ordered focused additional discovery of documents from another litigation related to the assistant manager's use of CAD slips and depositions of the two branch managers, which revealed that the two branch managers used CAD slips similarly to the way plaintiff used them.

Plaintiff then sought CAD slips used for top-tier customers at the branch where those two managers worked and CAD slips used for any other customer at a Minnesota branch for a two-year period. Defendant opposed production, arguing that producing the CAD slips would be unduly burdensome and expensive because its systems did not track how a CAD slip was used, it would have to access each customer account and review all CAD slips, thousands of documents would have to be reviewed by hand, and the CAD slips would show nothing that was not already revealed in depositions. In addition, defendant argued that the CAD slips would be of only limited benefit to plaintiff.

The court found that requiring defendant to search for and produce CAD slips contained in a limited number of accounts was not disproportionate to the needs of the case and granted plaintiff's request for CAD slips not related to teller error and not previously produced contained in all top-tier accounts at the relevant branch for the requested two-year period and for CAD slips prepared for one specific customer referenced in depositions.

The court focused on what was relevant—whether plaintiff was treated differently over alleged misuse of CAD slips—and the burden of searching for CAD slips without limitations. Limiting discovery of CAD slips to those in top-tier accounts at one branch over a two-year period and those used for a single client struck the correct balance. The court reasoned that the information sought mattered to both sides, and the likely benefit of the information was not outweighed by the burden of producing CAD slips involving limited accounts at one branch for a specific time period.

Using guidance from Principle 8, in hindsight, it can be said that the requested discovery, as revised, was “readily accessible” likely yielding relevant information while remaining proportional to the needs of the case. The parties jockeyed back and forth on the continuum of sources, even pursuing depositions before agreeing to collect additional documents, until the court determined the scope of discovery of CAD slips that would “strike the correct balance” to locate relevant information without overly burdening defendant.

## Conclusion

These three cases illustrate how the concept of Principle 8's continuum of sources can be used to find the limits of discovery from additional custodians or sources. In *Douglas* and *Coll*, the courts denied motions to compel discovery from e-mail custodians and additional sources where the burden of the proposed discovery outweighed its likely benefit. In those cases, using Principle 8's guidance, the e-mail custodians and the additional sources would have fallen down on the continuum of “readily accessible” sources due to their cumulative or tangential nature and disproportionate costs.

In *Amador*, the court worked to “strike the correct balance” between obtaining relevant evidence and the burden on defendant to collect and review that evidence. Using Principle 8's guidance, the broader request for CAD slips was not proportional because the costs to collect and review the CAD slips made them “not readily accessible.” The temporal, custodial, and geographic limitations placed on the request for CAD slips, however, transformed the request into one that was proportional. Principle 8 should therefore be used to negotiate discovery parameters based on the needs of the case to examine where certain discovery falls on the continuum of sources and to help draw the line between proportional and disproportional discovery.