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### Bloomberg BNA Insight

The Sedona Conference released the third iteration of its Commentary on Proportionality in Electronic Discovery for public comment on November 30. Kevin Brady, one of the Commentary's Editors-in-Chief and Steering Committee Liaisons, and Philip Favro, a Drafting Team Leader, provide the following perspective.

## Leading the Culture Change on Discovery Practice



BY KEVIN F. BRADY AND PHILIP FAVRO

One of the significant questions surrounding litigation in 2016 is whether the 2015 amendments to the Federal Rules of Civil Procedure (FRCP) are having a measurable impact on discovery practice. It is one thing to change the wording of the rules, it is another to change the culture in which discovery is practiced.

Nevertheless, because the FRCP amendments to Rule 26 raise the profile of proportionality in determining the scope of discovery, many were optimistic that the amendments could effectuate genuine change in entrenched discovery practices.

Indeed, The Sedona Conference Working Group 1 (WG1) on Electronic Document Retention & Production engaged a diverse drafting team in 2015 to study the

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changes to Rule 26 and collaborate on an update to The Sedona Conference *Commentary on Proportionality in Electronic Discovery (Commentary)*. The purpose of the updated *Commentary* is to reflect “the significant and evolving emphasis on proportionality” under the 2015 amendments.

**“Efficient Access” to Information.** One of the principal proponents of the rule amendments is the Honorable John G. Roberts, Chief Justice of the United States. In his “2015 Year-End Report on the Federal Judiciary,” Chief Justice Roberts emphasized the need for a change in discovery culture among counsel and the courts to ensure the reforms enacted by the amendments proved successful. Principal among those reforms is the need for “efficient access in discovery to information needed to prove either a claim or a defense.” A corollary objective, explained the Chief Justice, is the elimination of “wasteful or unnecessary discovery.”

**The Role of Proportionality.** While there are many steps that counsel and the courts can take to accomplish these goals in discovery, the Chief Justice spotlighted proportionality as one of the best tools for doing so. Enshrined in amended FRCP 26(b)(1), proportionality standards emphasize the need for a reasoned and collaborative approach to discovery advocacy. Proportionality has been called the linchpin to successful discovery strategies and the key to efficient and effective litigation practices.

And yet, until recently, relatively few courts and even fewer lawyers were focused on the benefits that proportionality provides to clients in discovery. While that trend fortunately has changed, additional resources are still needed to help the bar and bench adopt proportionate discovery practices and thereby enable “efficient ac-

cess” to information envisioned by the Chief Justice and the drafters of the amended rules.

**The Sedona Conference WG1 Proportionality Commentary.** To this end, on November 30, The Sedona Conference WG1 published for public comment a third iteration of its *Commentary on Proportionality*. Building on the original and updated commentaries on proportionality that Sedona published in 2010 and 2013, the *Commentary* delineates guidance on the reasonable application of the proportionality factors that should enable efficient and effective discovery practices.

The guidance from the *Commentary* also includes practical tips on the application of proportionality factors in the preservation context.

In addition, it encourages the proportionate use of discovery tools to be wielded tactically as a scalpel and not as a sledgehammer.

Finally, the *Commentary* delineates how reasonable metrics, dilatory tactics, nonmonetary resources and technology can all affect the application of proportionality in a given case.

**Preservation Guidance.** An example of the practical guidance the *Commentary* provides is in the area of preserving electronically stored information (ESI).

While the FRCP 37(e) committee note allows parties to address their preservation obligations through the lens of proportionality, the *Commentary* urges prudence in doing so lest relevant ESI be permanently lost.

To decrease that risk, the *Commentary* encourages counsel to discuss openly the information believed to be subject to a preservation duty with litigation adversaries. The *Commentary* also suggests better and more fulsome internal searches so parties can identify more readily the sources of relevant ESI. In summary, the *Commentary* delineates specific methods that parties can adopt to meet their preservation and discovery obligations in a proportionate fashion.

**Comments Invited.** Having observed the process undertaken to prepare this latest iteration of the *Commentary*, we feel strongly that it will prove an effective discovery resource. Indeed, The Sedona Conference encourages lawyers and judges to draw on the *Commentary* to litigate in the cooperative and proportionate fashion contemplated by the Chief Justice.

Sedona also invites the public to submit comments on the *Commentary* to [comments@sedonaconference.org](mailto:comments@sedonaconference.org). The period for public comment extends until January 31, 2017.