

## **Proportionality in eDiscovery:**

# Courts Often Disfavor Full-Disk Imaging, But How Much is Too Much?

By David Horrigan and John Patzakis<sup>1</sup>

**In this Proportionality in eDiscovery update, we continue to see a substantial number of eDiscovery decisions in the United States. However, if the preliminary data is any indication, we may be seeing that the law of proportionality is becoming more settled — and that courts continue to disfavor full-disk imaging.**

## **The Proportionality Problem**

The collection and preservation of electronically stored information (ESI) remains a significant and costly pain point for organizations. Attorney review is often cited as the most expensive part of the eDiscovery process—and it often is—but collection and preservation costs can be dramatic as well.

As attorney Ryan O’Leary, research manager at the international research firm, IDC, has noted, “The preservation of ROT (redundant, obsolete, and/or trivial) data costs organizations millions of dollars each year.”

However, not preserving all your data and not conducting full-disk imaging in litigation matters risks spoliation and sanctions, right?

Not exactly.

In this white paper, we will examine the concept of proportionality in eDiscovery. We’ll look at case law and commentary on proportionality—and possibly save you some money—because it turns out full-disk imaging is not required for most eDiscovery collections. In fact, courts often disfavor the practice.

## **Everything and the Kitchen Sink**

One of the key problems in eDiscovery is that the eDiscovery practitioner’s default process is often full-disk imaging—a forensic examination of an entire computer—when searching for responsive data.

This process is problematic for several reasons. For one, full-disk imaging is burdensome because the process often involves service providers traveling out to the individual custodians, which is very disruptive to employees, not to mention time consuming.

Additionally, as eDiscovery processing and hosting fees are usually calculated on a per-gigabyte basis, costs are increased exponentially. In a word, this is overkill, with much more effective and efficient options now available.

Basically, full-disk imaging gives you everything and the kitchen sink when you may need only one knife to get to the heart of the matter.

Full-disk images capture every bit and byte on a hard drive, including system and application files, unallocated space, and a host of irrelevant user-created data. While full-disk images may be warranted in some limited situations, the expense and burden associated with the practice can be quite extensive, particularly in matters that involve multiple custodians.

It is established law that the duty to preserve evidence, including ESI, extends only to relevant information.<sup>2</sup> However, the vast majority of ESI on a full-disk image will typically constitute irrelevant information.

In addition, newer technologies make full-disk imaging unnecessary in many cases. However, full-disk imaging as a nuclear option appropriate only in certain matters is not a new concept. In fact, courts have noted this overkill for years.

## Courts, Forensics, and Proportionality

In *Deipenhorst v. City of Battle Creek*,<sup>3</sup> a 2006 decision, the court wrote, “Imaging a hard drive results in the production of massive amounts of irrelevant, and perhaps privileged, information.” In *Motorola Solutions v. Hytera Communications Corp.*,<sup>4</sup> decided in 2019, the court likewise noted that “[f]orensic examination of a party’s computers... is no routine matter,” and that “courts must use caution in evaluating requests to inspect an opposing party’s electronic devices or systems for ESI, in order to avoid unduly impinging on a party’s privacy interests.”

Courts have continued to disfavor full-disk imaging. For instance, in November 2021, an Ohio immediate appellate court shared the *Deipenhorst* court’s concerns about full-disk imaging and the attorney-client privilege.

In *Besman v. Stafford*,<sup>5</sup> the appellate court reversed and remanded a trial court’s order of a forensic examination of a law firm computer, holding the trial court erred in failing to take precautions to protect the privileged and confidential information on the device.

In a May 2022 opinion and order in *Jordan Khan Music Co., LLC v. Taglioli*,<sup>6</sup> an action alleging trademark and criminal copyright infringement of software, the court held a forensic examination would violate the proportionality provisions of Fed. R. Civ. P. 26 (b)(1).

*“Generally, courts are reluctant to compel forensic imaging, largely due to the risk that imaging will improperly expose privileged and confidential material contained on the hard drive,”*

- Judge Anita Laster Mays  
for the appellate court  
*Besman v. Stafford*

“Plaintiffs hope that through the forensic examination, they will find evidence of unlicensed and cracked software that Defendants used to skirt paying license fees. They may very well find such evidence through the examinations. But, as Defendants assert, Plaintiffs will also become privy to information far beyond the scope of audio software . . . This does not meet the proportionate standard under Rule 26.”

Even where courts permit the forensic examination of a device, litigants should remember courts may make the requesting party pay the cost of it.

In another May 2022 order, *Whitmire v. Perdue Foods LLC*,<sup>7</sup> the court refused to order an allegedly injured worker in a negligence action to pay for the forensic examination of her mobile phone where the worker had offered to allow her phone to be searched.

“As the record is not clear that the forensic examination was necessary due to Whitmire’s failure to properly conduct a search or disclose discovery, the Court declines to require Whitmire to pay for the forensic examination,” U.S. Magistrate Judge David Christel wrote.

Furthermore, the highly influential Sedona Conference has noted, “Civil litigation should not be approached as if information systems were crime scenes that justify forensic investigation at every opportunity to identify and preserve every detail.”

Sedona went on to say. “Forensic data collection requires intrusive access to desktop, server, laptop, or other hard drives or media storage devices.” While noting the practice is acceptable in some limited circumstances, the organization went on to say, “Making a forensic copy of computers is only the first step of an expensive, complex, and difficult process of data analysis. . . it should not be required unless circumstances specifically warrant the additional cost and burden and there is no less burdensome option available.”<sup>8</sup>

The *Motorola Solutions Court* cited this important Sedona guidance in denying a motion to compel the forensic imaging of computers on a corporate network, and further noted that “given all that forensic inspection entails. . . courts rightly require a showing that such a request is proportional to the needs of the case.”<sup>9</sup>

## How Much is Too Much?

We’ve established that full-disk imaging is not appropriate in most matters, but how much is too much? What is too little, risking you and your client to spoliation sanctions.

Rulemakers tried to help us figure it out with the 2015 eDiscovery amendments to the Federal Rules of Civil Procedure, most notably, the proportionality amendments to Fed. R. Civ. P. 26(b)(1).

The 2015 amendments to Rule 26(b)(1) established a six-pronged test for determining whether discovery is “proportional to the needs of the case.” The rule provides that parties should consider:

- 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 discovery in resolving the issues, and
- whether the burden or expense of the proposed discovery outweighs its likely benefits.<sup>10</sup>

It’s worth noting that the amount in controversy is not the first prong in the six-pronged test. Some commentators thought it should be. However, others—including public interest groups—argued that substantial discovery could be vital in some actions with smaller monetary value, such as civil rights actions seeking injunctive relief.

Courts have taken the 2015 proportionality amendments to heart and limited the scope of discovery based on Rule 26(b)(1)’s six-pronged test.

For instance, in *Hardy v. UPS Ground Freight, Inc.*,<sup>11</sup> a decision after the 2015 amendments, the court wrote:

Generally, a court will deny a motion to compel forensic imaging of personal electronic devices if the party seeking the image fails to show that it will likely produce the material it seeks, if an alternative, less invasive means of obtaining the evidence exists, or if the motion is not accompanied by a proposal for a protocol appropriately tailored to protect the privacy concerns of the opposing party.

Likewise, in *Henson v. Turn, Inc.*,<sup>12</sup> another case decided after the 2015 amendments, this one involving mobile devices, the court said the “request to inspect the plaintiffs’ mobile devices or for complete forensic images call for information that is not relevant and is disproportional to the needs of the case.” In *Edwards v. Thomas*,<sup>13</sup> the court also disallowed forensic imaging of a mobile phone on proportionality grounds, but directed a targeted collection limited to relevant photos taken on the day of an accident that spawned the lawsuit.

The takeaway from case law and the Federal Rules is that ESI preservation efforts should be reasonable, proportionate, and targeted to only relevant information, as opposed to being overly broad and unduly burdensome.

Courts do require that ESI be collected in a forensically sound manner, which does not mean a full forensic disk image is required, but it generally does entail that metadata is not altered and that a documented chain of custody is maintained.

## Technology to the Rescue

More advanced enterprise-class technology can accomplish remote searches across multitudes of custodians that are narrowly tailored to collect only potentially relevant information while preserving metadata at the same time. This process is better, faster, and dramatically less expensive than manual disk imaging.

In fact, *The Sedona Principles* outline such an alternative to forensic disk imaging:

Automated or computer-assisted collection involves using computerized processes to collect ESI meeting certain criteria, such as search terms, file and message dates, or folder locations. Automated collection can be integrated with an overall electronic data archiving or retention system, or it can be implemented using technology specifically designated to retrieve information on a case-by-case basis.”<sup>14</sup>

The latest in eDiscovery collection technologies feature capabilities such as those described by *The Sedona Principles*. These technologies enable parties to perform targeted and iterative search and collection of the ESI of up to thousands of endpoints over the internal network without disrupting operations. Properly designed, targeted collection methods are sound from an evidentiary standpoint as the collected data is preserved in its native file format with its metadata intact.

These technologies can save you from the two extremes: costly and time-consuming over-preservation and collection on one hand—and the risk of spoliation and sanctions from insufficient preservation and collection on the other, saving you time and money in the process.

So, to answer this white paper’s central question, how much discovery is too much? One thing is established: in most cases, a full-disk image is too much.

Technology has made it possible for properly designed, narrowly tailored, and targeted collection to be the standard for proportional eDiscovery.

## Notes

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2 *Hynix Semiconductor Inc. v. Rambus Inc.*, 591 F. Supp.2d 1038 (N.D. Cal. Jan. 5, 2006) (“The duty to preserve evidence, once it attaches, does not extend beyond evidence that is relevant and material to the claims at issue in the litigation.”) As noted by the *Zubulake* court, “Clearly [there is no duty to] preserve every shred of paper, every e-mail or electronic document, and every backup tape...Such a rule would cripple large corporations.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2004) (“Zubulake IV”).

3 No. 1:05-cv-734 (W.D. Mich. June 30, 2006). In noting that the “imaging of computer hard drives is an expensive process, and adds to the burden of litigation for both parties,” the *Deipenhorst* court declined to require the production of full disk images absent a strong showing of good cause. See also, *Fasteners for Retail, Inc. v. DeJohn et al.*, No 1000333 (Ct.App. Ohio April 24, 2014).

4 365 F. Supp.3d 916 (N.D. IL 2019).

5 No. CV-19-915969-A (Ohio App. 8th Dist., Cuyahoga Co. Nov. 4, 2021).

6 No. 4:21-CV-00045 (E.D. Tex. May 12, 2022).

7 No. 2:21-CV-469 (W.D. Wash. May 20, 2022).

8 The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1 (2018), comment 5.g at pg. 112.

9 *Motorola Solutions*, Id. at 925

10 Fed. R. Civ. P. 26(b)(1).

11 No. 3:17-cv-30162 (D. Mass. July 22, 2019).

12 No. 15-cv-01497 (N.D. Cal. Oct. 22, 2018).

13 Civil No. 4:19-cv-04018. W.D. Ark 2021

14 The Sedona Principles, *supra*, comment 11.c at pg. 168.