

Texas Adopts Federal eDiscovery Standards to Keep Costs Appropriate:

“Proportionality is the Polestar”

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MODERN DISCOVERY is eDiscovery. There is little dispute with the rise of electronically stored information (“ESI”), discovery costs have skyrocketed. Unfortunately, modern litigants are often slow to adopt effective approaches to



eDiscovery, making it a costly, clunky, and cumbersome marathon. Luckily, a recent opinion by the Texas Supreme Court has set the stage for speeding things up, keeping costs appropriate, and reducing confusion. Texas is now wisely aligned with the federal approach to proportionality and form of production. This should, eventually, make eDiscovery less expensive.

The Texas Supreme Court now requires discovery to be limited in scope and geared toward the ultimate objective of obtaining a just, fair, equitable and impartial adjudication for litigants “with as great expedition and dispatch at the least expense as may be practicable.” What this means is discovery can no longer be disproportionate to the size or needs of the case. While there is no bright-line definition of proportionality, the court offered seven factors:

1. **Likely benefit of the requested discovery.** If the benefits of the requested form are negligible, nonexistent, or merely speculative, then any enhanced efforts or expense attending the requested form of production is undue and sufficient to deny the requested discovery. At the same time, a particularized need for the proposed discovery will weigh heavily in favor of allowing the request, but it may warrant cost-shifting for any “extraordinary steps” required.

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- Benjamin Franklin



2. **The needs of the case.** In evaluating whether a particular form of production is required, the court should consider not only the relative importance of the information to the central issues in the case, but also availability of that information from some other source that is more convenient, less burdensome, or less expensive. The requested information's relevance should be obvious or at least linked, more or less concretely, to a claim or defense. Hypothetical needs, surmise, and suspicion should be afforded no weight.
3. **The amount in controversy.** Accessibility—or relative inaccessibility—of electronic data contributes to increased costs and burdens associated with electronic discovery. Technological changes have greatly increased the volume of documents and things that can be discoverable in a lawsuit. Litigants with resources and motive to do so could potentially drive up the cost of litigation, effectively pricing their opponents out of court and delaying disposition. For these reasons, the amount in controversy plays a pivotal role in determining whether production in a specified form is justified given the burden or expense required to meet the demand.
4. **The parties' resources.** Whether the producing party has the means to produce in the requested format is a significant proportionality consideration. Beyond financial resources, a court must also consider whether the requesting party has the technological resources to make proper use of ESI in the form requested. "A high-powered luxury sports car is useless to someone who lacks a license to drive it."
5. **Importance of the issues at stake in the litigation.** While legal disputes are always important to those who are litigating them, the precedential value of a case may be more significant for one side than the other, justifying an outlay of time and expenses that would otherwise be unwarranted. Likewise, cases in public policy spheres or other areas may involve small amounts of money but may seek to vindicate important personal or public values.
6. **The importance of the proposed discovery in resolving the litigation.** Discovery must bear at least a reasonable expectation of obtaining information that will aid the dispute's resolution. Reasonable discovery does not countenance a "fishing expedition."
7. **Any other articulable factor bearing on proportionality.** While the above factors were derived from the discovery rules, there may be others courts should consider, depending on the case.

With these seven factors in mind, the Texas Supreme Court has given litigants the blueprint for collaborating on speedy and appropriate eDiscovery. A full copy of the opinion, *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017) is available [here](#).