

Proportionality in E-Discovery: Reducing Abuses and Expenses by Using Proportionality Tools

THURSDAY, DECEMBER 6, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Anne Kershaw, Founder, **Reasonable Discovery**, Tarrytown, N.Y.

Gretchen N. Marty, eDiscovery Counsel, **Little Mendelson**, Denver

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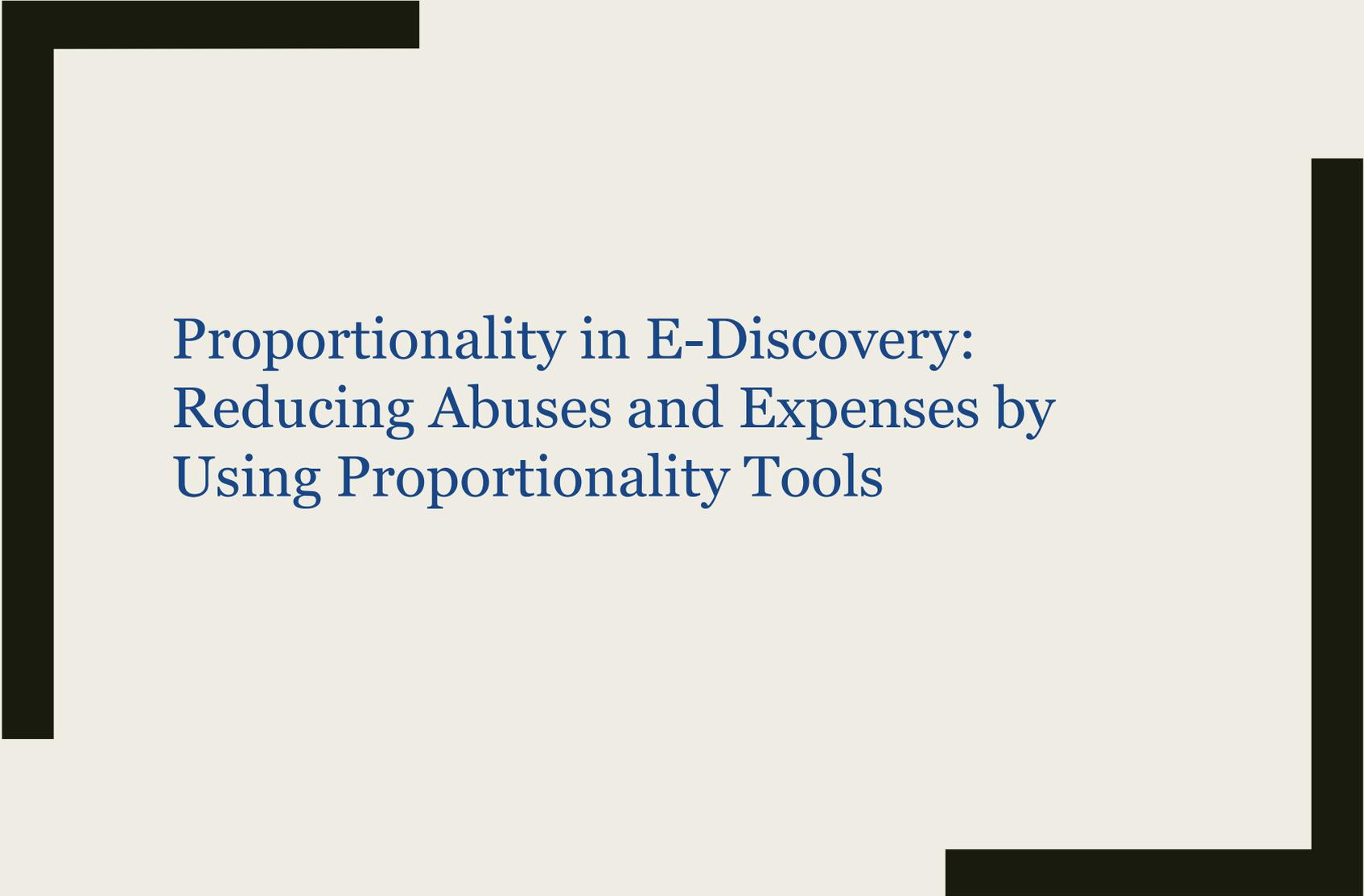
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FACULTY



Anne Kershaw

Founder

Reasonable Discovery



Gretchen N. Marty

eDiscovery Counsel

Littler Mendelson

Anne Kershaw



Anne Kershaw is an e-discovery and records management specialist, serving as a testifying and consulting expert. Her company, Reasonable Discovery, LLC, offers next generation e-discovery and data investigation services, finding, explaining and defending whatever needs to be found for e-discovery, compliance and information governance purposes.

Reasonable Discovery, LLC, under Anne's leadership, provides strategists who use litigation expertise and mastery of current technologies to provide clients with flexible, powerful solutions for collecting, interrogating and managing data.

Gretchen Marty



Gretchen Marty is eDiscovery counsel for Littler Mendelson. Reinforcing the firm's commitment to providing its clients with leading-edge solutions in the rapidly developing area of eDiscovery, Gretchen provides focused guidance on information governance and electronic discovery matters to Littler's lawyers and their clients, including:

- Case and client-specific advice about meeting preservation obligations
- "Meet and confer" obligations
- Efficient and effective data harvesting strategies
- Data culling and cost reduction
- Review and production and implementation of cost-shifting
- Motion practice

Gretchen frequently speaks at eDiscovery conferences and conducts training seminars for new Littler lawyers on eDiscovery "best practices," to ensure that the firm offers its clients consistent and competent counsel in the field of eDiscovery.

- Rule 26(b)(1)

- Why Proportionality is Important

 - *In Re Broiler Chicken*

 - *Guerrero v. Wharton*

 - *Oracle v. Google*

 - *Carr v. State Farm*

 - *Salazar v. McDonald's*

- Arguing and Achieving Proportionality

 - *Strategy Important*

 - *Phased Discovery*

 - *Cost-Shifting*

- Technology Tools

 - *Validating what has been produced (using documents produced)*

 - *Convincing the Judge that producing more adds no value*

 - *Showing the value of phased, iterative discovery*

Federal Rule of Civil Procedure 26(b)(1)

(b) Discovery Scope and Limits.

(1) *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 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 the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Why Proportionality is Important

- *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2018 WL 3586183, at *4 (N.D. Ill. July 26, 2018)
 - *Agri Stats does not appear to have provided a revised cost estimate since EUCPs agreed to exclude certain categories of documents and information and revised their search terms. Rather, Agri Stats takes the position that custodial searches before October 3, 2012 are not proportional to the needs of the case—full stop—so it apparently has not fully analyzed the cost impact of EUCPs' revised search terms or narrowed document and data categories.*

Why Proportionality is Important

- *Guerrero v. Wharton*, No. 216CV01667GMNNJK, 2017 WL 7314240, at *4 (D. Nev. Mar. 30, 2017)
 - *Defendant's contentions on this front are based primarily on boilerplate assertions unsupported by any factual showing. For example, Defendant asserts without elaboration or factual support that producing the documents would cause him an “undue burden.” Docket No. 24 at 5. Such generalized and unsupported statements are not sufficient. See, e.g., Nationstar Mortgage, LLC v. Flamingo Trails No. 7 Landscape Maintenance Assoc., 316 F.R.D. 327, 334 (D. Nev. 2016).*

Why Proportionality is Important

- *Oracle Am., Inc. v. Google Inc.*, No. 10CV03561WHADMR, 2015 WL 7775243, at *2 (N.D. Cal. Dec. 3, 2015)
 - *Neither party submitted a proper analysis of the Rule 26 proportionality factors. For example, Oracle provided some information about each of the requested custodians to demonstrate relevance. However, Oracle did not fully address any of the proportionality factors, including the importance of the requested discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Similarly, Google argues that the requested discovery is cumulative, but does not assert that the information that Oracle seeks is irrelevant, or too expensive to produce.*

Why Proportionality is Important

- *Carr v. State Farm Mut. Auto. Ins. Co.*, 312 F.R.D. 459, 469 (N.D. Tex. 2015)
 - *But the amendments to Rule 26(b) and Rule 26(c)(1) do not alter the basic allocation of the burden on the party resisting discovery to –in order to prevail on a motion for protective order or successfully resist a motion to compel – specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of proper discovery (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable. See McLeod, 894 F.2d at 1485; Heller, 303 F.R.D. at 483–93.*

Why Proportionality is Important

- *Salazar v. McDonald's Corp.*, No. 14-CV-02096-RS (MEJ), 2016 WL 736213, at *4 (N.D. Cal. Feb. 25, 2016)
 - *The Court appreciates that discovery is often costly, but Defendant has not put forward an adequate argument about why discovery should be delayed, and even seems to arbitrarily risk the increase of discovery costs overall. See Goes Int'l, 2016 WL 427369, at *4 (“[A]lthough it is a concern, the defendant's financial wherewithal is not decisive.”); Fed. R. Civ. P. 26(b) advisory comm. notes (2015 amendments) (“[C]onsideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party.”).*

PROPORTIONALITY UNDER 26(B)(1)

- The word “proportional” was added to the text of the Rule itself in 2015.
- The Committee Notes make it clear that the concept of proportionality was embodied in the Rules since the 1983 Amendments:

*Restoring the proportionality calculation to Rule 26(b)(1) **does not change the existing responsibilities of the court and the parties to consider proportionality**, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.*

Proportionality Factors

- Proportionality factors were added to the text of the Rule itself:
 - 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 the discovery in resolving the issues, and
 - Whether the burden or expense of the proposed discovery outweighs its likely benefit.

No Sea Change Yet...

Robertson v. People Magazine [2015 WL 9077111] (S.D. N.Y. Dec. 16, 2015). In rejecting overbroad requests for production without prejudice to submitting a more narrowly drawn request, the Court noted that “the 2015 amendment does not create a new standard; it rather serves to exhort judges to exercise their preexisting control over discovery more exactingly.”

Lucile Schultz v. Sentinel [2016 WL 3149686] (D. S.D. June 3, 2016). In a decision compelling production of documents and ESI in a personal action relating to hail damage under a homeowners policy, a court granted virtually unlimited broad discovery into the investigation and handling of claims by the Hartford for the past decade given the allegations of “bad faith.” The court dismissed the argument that the 2015 Amendments to Rule 26(b)(1) were restrictive since “[t]he rule, and the case law developed under the rule, have not been drastically altered [and] [a]ny case decided after 1983 would necessarily have included consideration of the proportionality requirement.”

...But a Change in the Wind

- **Noble Roman's v. Hattenhauer** [314 F.R.D. 304] (S.D. Ind. March 24, 2016). Courts may issue a protective order under Rule 26(c) to limit discovery via subpoena to ensure the discovery is proportional to the needs of case, even if the party objecting is not the producing party (“has sufficient legitimate interests of its own”). While the discovery sought in this case may be relevant, it “fail[s] the proportionality test” as “discovery run amok” since it asks for information which is too far afield from the contested issues in the case. The party failed to demonstrate that the discovery is “in any way’ proportional to the needs of the case.”
- **Gilead Science v. Merck & Co.** [2016 WL 146574 (N.D. Cal. Jan. 13, 2016)(Grewal, M.J.). The court found it disproportionate to require a party to go through the cost and delay inherent in producing information which “bear[s] no indication of any nexus to the disputes” in the case. The court described the new rule as merely taking factors “explicit or implicitly” in the former requirements and making them apply “in the first instance” to discovery demands. It explains that what should change is “mindset” since “[n]o longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence.” Instead, a party seeking discovery must show “before anything else that the discovery sought is proportional to the needs of the case.”

(un) Intended Consequences?

- Front loaded the discovery process, which creates unnecessary “discovery-about-discovery.”
- eDiscovery Pilot Programs and various local Model Orders and ESI requirements (see, e.g., Western District of Washington).
- Some jurisdictional developments cut against the grain of proportionality, or at least, against the principle of measured responses in discovery, by creating tighter timelines for broader discovery (see, e.g., Mandatory Initial Disclosure Pilot Program currently in effect in D. Ariz. and N.D. Ill.).

Proportionality in Preservation

■ Case Law:

- *Al Otro Lado, Inc. v. Nielsen*, No. 317CV02366BASKSC, 2018 WL 4488765, at *7 (S.D. Cal. Sept. 17, 2018)
- *Washington v. Wal-Mart Louisiana LLC*, NO. 16-1403, 2018 WL 2292762 (W.D. La. May 17, 2018)
- *Pippins v. KPMG LLP*, 279 F.R.D. 245, 254 (S.D.N.Y. 2012)
- *In the Matter of the Complaint of Specialist LLC*, No. 16-CV-2515 (KMK), 2016 WL 6884919, at *4 (S.D.N.Y. Nov. 22, 2016)

■ Pitfalls:

- *How do you quantify the burden?*
- *Business Resources*

■ Best Practices?

- *Reasonableness*
- *Sampling*

Strategies for Achieving Proportionality

- METRICS
- SAMPLING
- REASONABLENESS
- FACT-BASED INQUIRY
- “IMPORTANCE”
- SPECIFICITY IN OBJECTIONS
- PHASING
- COST SHIFTING
- RECORD

Technology Tools

Proportionality Challenge #1

- Making the argument; How do you prove the relative usefulness (or uselessness) of data without collecting it?
 - In all of the cases in which the court denied a party's request to limit discovery, the requesting party failed to provide evidence that the requested discovery would be:
 - Duplicative;
 - Available from a better source;
 - Irrelevant and/or disproportional to the needs of the case.

Technology Tools

Proportionality Challenge #2

- How do you prove that what has been produced is enough?
- How do you validate your production, without getting into discovery of discovery?

A New Approach to E-Discovery

For the first challenge – making the argument- providers are giving us a new approach:

- First – place the proportionality argument around costs of review and production, and risk of confusion;
- Find a professional services provider who, like Reasonable Discovery, LLC, leverages cloud computing and collects the documents for free;
 - this way we can get the documents in a place where we can measure what we have, for little or no cost.

A New Approach to E-Discovery

For the first challenge – making the argument- providers are giving us a new approach:

- Use lawyers who know how to use the technology to provide the metrics needed to show what makes sense and what doesn't make sense.
- Since we have the document collection, we can use screen share meetings to show adversaries and judges what is proportional and why.

Proportionality Calculator

Estimates					
Quantity		Cost		Proportionality Check	
Documents	112,163	Processing		Amount at Stake	\$3,000,000
Size	10 GB	• At \$20.00 per GB	\$197	Budget	\$500,000
Pages	448,652	Printing	\$67,298		
Boxes	187	Legal Review	\$336,750		
Legal Review Days	449				

[Show Assumptions](#)

[Hide Assumptions](#)

Pages per document	4	Processing cost per GB	\$20.00
Pages per box	2,400	Reviewer throughput per day	250 docs
Printing cost per page	\$0.15	Reviewer cost per day	\$750

[Edit Assumptions](#)

New Approach to E-Discovery

For the second challenge – validating the production - providers are giving us a new approach:

- Cloud computing space and document review software are provided at cost (\$5-10 per gig);
- A lawyers who knows how to use search/find software features, finds what needs to be found and keeps a record of how they did it (\$200 p/h);
- Using screen share meetings, we show adversaries and judges how we found what we produced and why we know that its right.

Proportionality Pricing

- This new approach to discovery – using lawyers who use the search/find features in software everyday – is allowing e-discovery to be completed quickly and for 1/100th of the cost of a traditional discovery process.
- The new approach to discovery eliminates discovery motions.
- This new approach to discovery provides an affordable expert who can explain to anyone asking how and why the relevant documents were found.
- The story of how we found the documents is much more defensible than measurements of recall and precision (which are never 100%)

Email Name Container

William Daniels

Will.Daniels@conosco.com

WDaniels@conosco.com

Daniels.Will@conosco.com

/O=CONOSCO/OU=FIRST ADMINISTRATIVE
GROUP/CN=RECIPIENTS/CN=WDANIELS

William T. Daniels

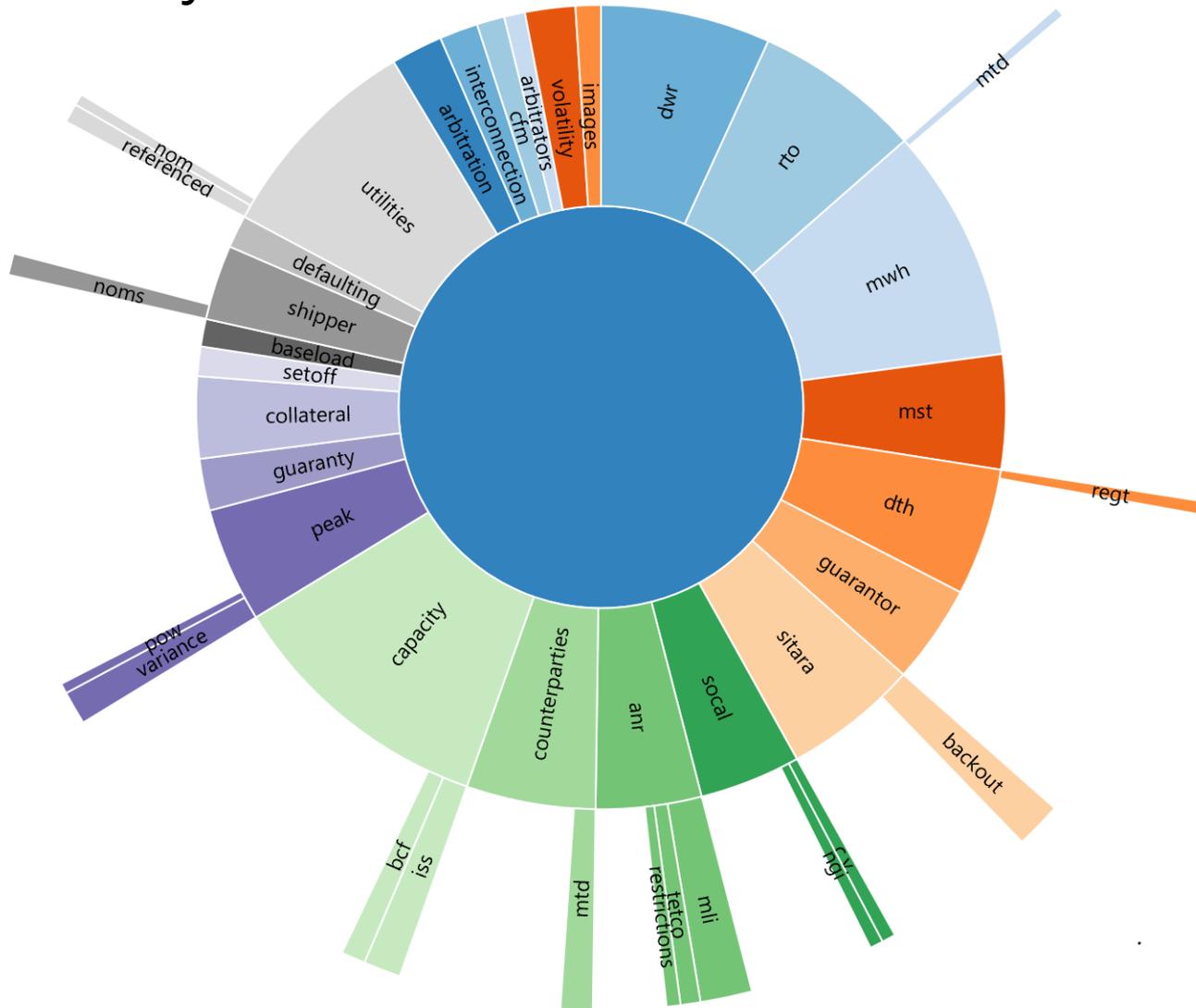
Bill@conosco.com

Billy@gmail.com

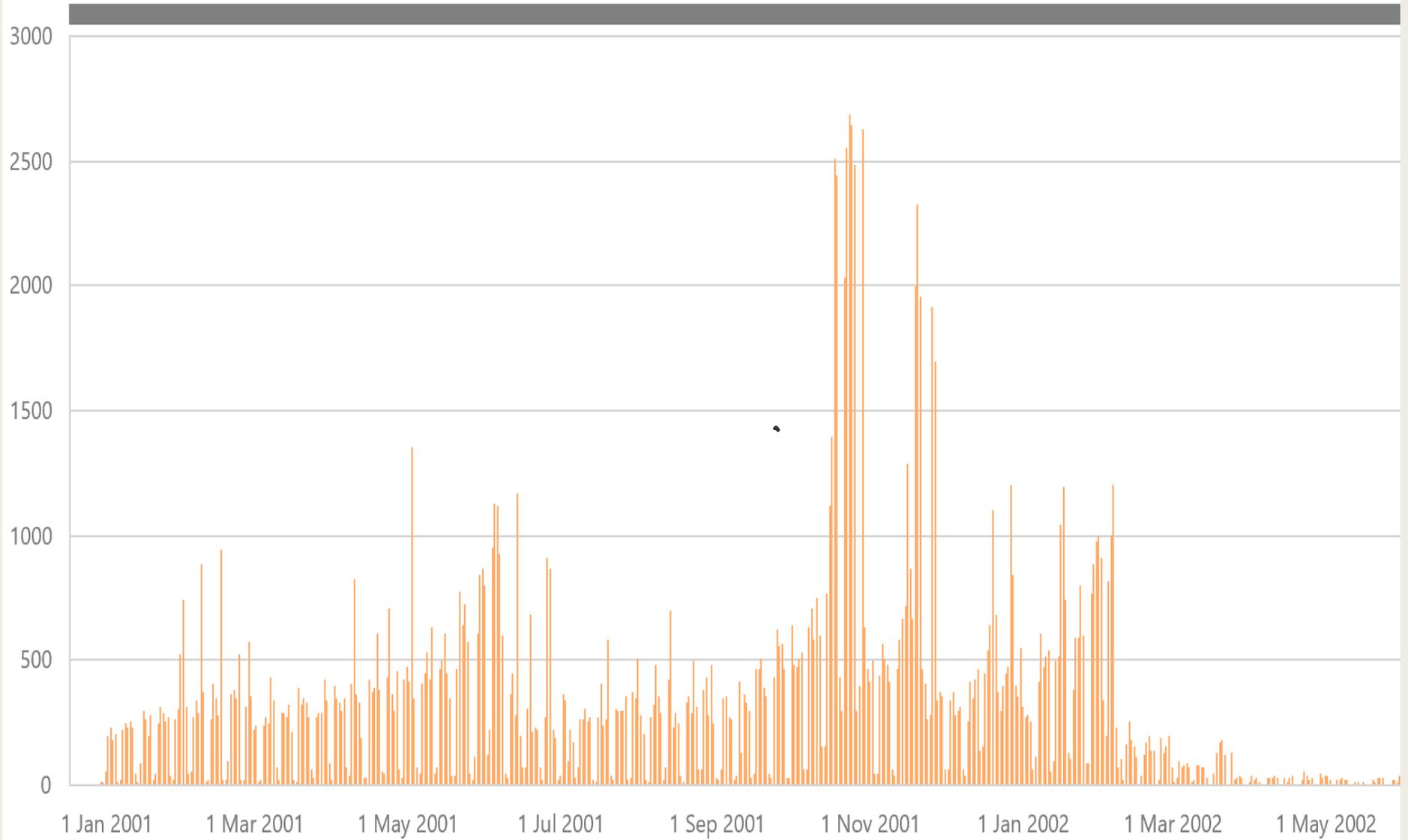
Daniels.William@conosco.us.com

Daniels.Will@conosco.com

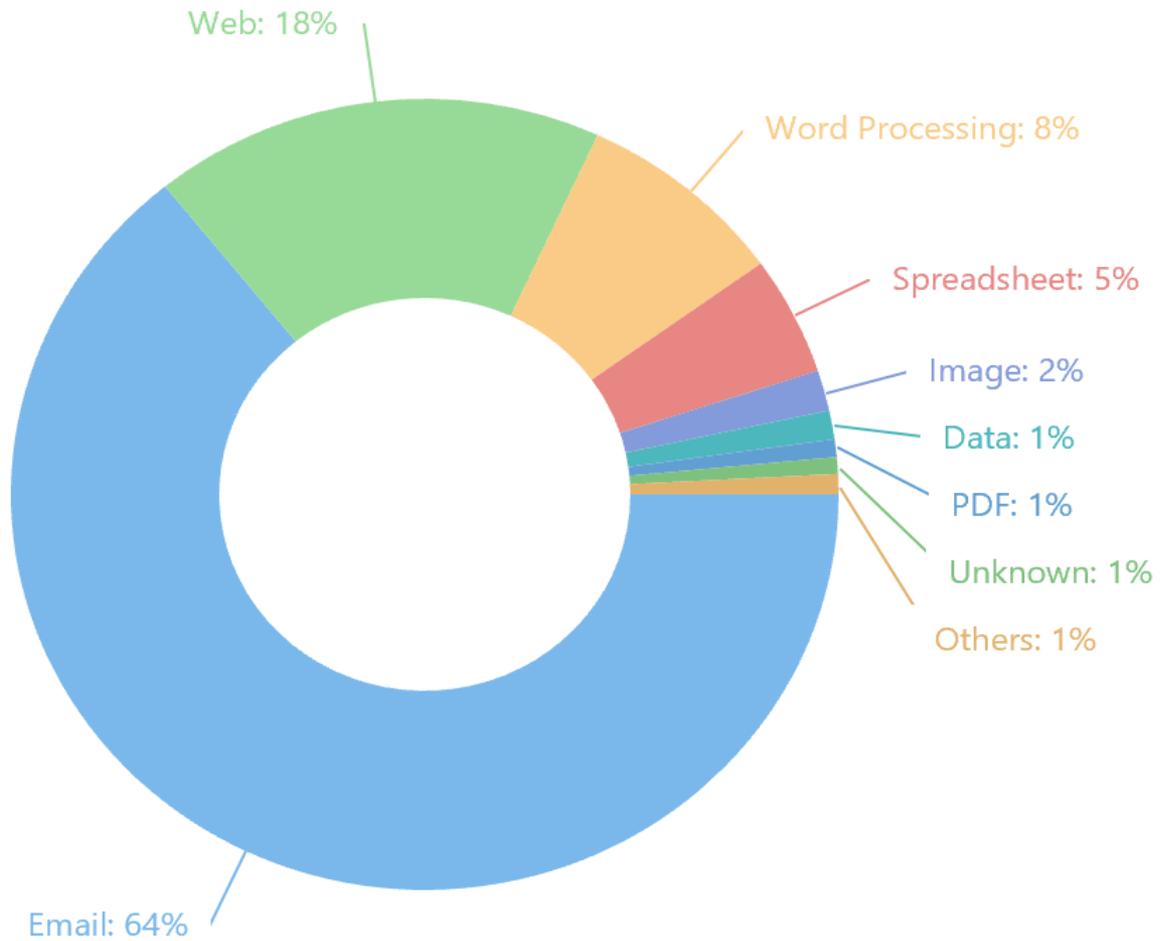
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Date Analysis



Document Type





SEARCH
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EXPLAIN &
DEFEND

Proportionality “Checklist”

- Preservation
- Determination of Scope
- Assessment of Available Data
- Defensible Collection
- Culling
- Review
- Production

ABOVE ALL ELSE:

REASONABLENESS