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Shifting Our Mentality Regarding Discovery: Proportionality and Beyond

Materials

- Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55 (2015)
- Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 20 (2015)
- Duke Law School Center for Judicial Studies, *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, 99 JUDICATURE 47 (2015)
- Hon. Lee H. Rosenthal & Steven S. Gensler, *From Rule Text to Reality: Achieving Proportionality in Practice*, 99 JUDICATURE 43 (2015)
- Ariana J. Tadler, *E-Discovery Bulletin: APB to Requesting Parties: Prepare for Proportionality*, PRACTICAL LAW THE JOURNAL (Dec. 2015/Jan. 2016)
- Tom Allman's Memo Providing a Snapshot of Recent Rule 26(b)(1) cases (Jan. 19, 2016)

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The "Burdens" of Applying Proportionality

Hon. Craig B. Shaffer

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THE "BURDENS" OF APPLYING PROPORTIONALITY

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The songwriters said it best: "everything old is now new again."[1] It would seem axiomatic that the purpose of discovery is to develop the facts underlying the parties' claims and defenses and thus promote the just, speedy, and inexpensive disposition of the action by motion, settlement, or trial.[2] There is a sense, however, both among lawyers and judges that the discovery process is rife with abuse. While discovery abuse takes many forms, the motivation is to gain an unfair advantage or place the opposing party in a disadvantageous position, and thereby achieve an outcome divorced from the ultimate merits of the

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1. Peter W. Allen & Carole Bayer Sager, Everything Old Is New Again (A&M Records 1974).

2. Haeger v. Goodyear Tire and Rubber Co., 906 F. Supp. 2d 938, 941 (D. Ariz. 2012) ("Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice.").

case.[3] Not surprisingly, civil discovery is a recurring topic of discussion and, occasionally, vociferous debate, among judges, lawyers, and litigants.[4] That discussion is shaped by competing perspectives that are remarkably resistant to change. The defense bar paints a dire picture of unrestrained "fishing expeditions" and broad discovery requests that have only a passing connection to the actual claims and defenses of the parties. Plaintiffs' attorneys are equally strident in accusing their opposite numbers of "hiding the ball" with undifferentiated data dumps and delay caused by boilerplate objections and obfuscation.

Critics decry the gamesmanship that typifies modern civil discovery, but rarely single-out their particular side for

3. Edward D. Cavanagh, *Federal Civil Litigation at the Crossroads: Reshaping the Role of the Federal Courts in Twenty-First Century Dispute Resolution*, 93 OR. L. REV. 631, 641 (2015) ("Discovery abuse takes many forms—overdiscovery, failure to comply with legitimate discovery requests, redundant requests, inundating the discovering party with reams of papers, and frivolous objections, for example—and it inevitably creates costly and unproductive satellite litigation.").

4. *See, e.g.*, Michael W. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 19 (1988) ("In comparing theory and practice, one comes to the inescapable conclusion that discovery has simply become an extended field of play in an on-going game of blind man's bluff. Far from offering the salutary benefits of allowing the parties to obtain the fullest possible knowledge of the facts and issues before trial, it more often than not gives impetus and opportunity to the baser litigational instincts of delay, deception and unbridled confrontational advocacy.").

blame.[5] As one observer has noted, "we seem to have reached an impasse" that both sides of the litigation divide bear responsibility for creating.[6]

While these dueling perspectives have long been a part of the civil discovery landscape, empirical studies conducted over the last several decades present a decidedly different picture. Those studies suggest that in the vast majority of civil cases, the discovery process is working well and achieving its intended goals. For all the dire portrayals of a failed civil litigation process, participants at the 2010 Conference on Civil Litigation at the Duke University School of Law coalesced around the view that while "there is need for improvement, the time has not come to abandon [the existing rules] and start over."[7] Conference participants advocated for a civil litigation system char-

5. As one court cynically noted, "a recipe for a massive and contentious adventure in [electronically stored information] discovery would read: 'Select a large and complex institution which generates vast amounts of documents; blend as many custodians as come to mind with a full page of search terms; flavor with animosity, resentment, suspicion and ill will; add a sauce of skillful advocacy; stir, cover, set over high heat, and bring to boil. Serves a district court 2-6 motions to compel discovery or for protection from it.'" Bagley v. Yale University, 307 F.R.D. 59, 61 (D. Conn. 2015).

6. Richard Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. 1691, 1713-14 (June 2014). *Cf.* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1, 5 (Fall 2011) ("In searching for the culprits behind the failure of our existing discovery procedures to promote informed adjudications and reasonable settlements (in a way that is proportional to the matters at stake, the resources of the parties, and the interest of the public), legal professionals must, with chagrin, accept mutual and reciprocal responsibility. It is not always the 'other guy.'").

7. Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 5, *available at* www.uscourts.gov/file/reporttothechiefjusticepdf [hereinafter Report to the Chief Justice].

acterized by an increased emphasis on cooperation and proportionality, and more "sustained, active, hands-on judicial case management."[8] These same objectives are reflected in the proposed amendments to the Federal Rules of Civil Procedure ("Civil Rules" or "Rules") currently under consideration by the United States Congress.[9]

Proportionality principles have been part of the Civil Rules since 1983. For much of the ensuing 32 years, proportionality did not figure prominently in the reported case law or the public debate. The proposed Rules amendments, and particularly the revisions to Rule 26(b)(1), place increased emphasis on proportionality and active case management, and have reenergized the debate surrounding the civil discovery process. But the tenor of that debate should come as no surprise. In fact, the fight over proportionality may say more about how lawyers and judges currently approach the pretrial process (and their reluctance to critically evaluate current practices), than about the proportionality concept itself.[10]

The proportionality factors presently incorporated in Rule 26(b)(2)(C) and Rule 26(g), and proposed for explicit inclusion in an amended Rule 26(b)(1), cannot be applied with absolute certainty or precision. The reported decisions that address proportionality do not establish a bright-line standard or reflect

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8. *Id.* at 4.

9. On April 29, 2015, Chief Justice Roberts forwarded to Congress the proposed Amendments and corresponding Committee Notes to the Federal Rules of Civil Procedure (*available at* http://www.uscourts.gov/file/document/congress-materials) following their adoption by the United States Supreme Court pursuant to 28 U.S.C. § 2072.

10. *Cf.* Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DEN. U. L. REV., 227, 228 (2010) ("The adversarial nature of lawyers and litigants and the incentives of the hourly fee are said to combine to encourage attempts to discover 'any and all' potential evidence and attempts to resist any discovery.").

uniformity in the application of proportionality factors. Indeed, proportionality necessarily presumes *ad hoc* analysis by lawyers and judges. Therefore, it should come as no surprise that reaction to the Rule 26(b)(1) amendments devolved into a debate in which the competing camps aligned along a "more for me" or "less for you" fault line.[11] Critics of the proposed Rule 26(b)(1) condemn the explicit reference to proportionality as an unwarranted restraint on a requesting party's ability to obtain necessary information, as well as an invitation for continued gamesmanship by responding parties. Other commentators have decried the amendment as subjecting requesting parties to a new and often insurmountable burden of proof.

As long as proportionality is dismissed as simply an abstract concept divorced from case-specific circumstances, or an arbitrary and inflexible limitation on discovery, or a trap for the unwary, or as a proxy for some broader challenge to the current civil litigation process, the debate will continue to no useful end.[12] In truth, proportionality principles impose obligations on

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11. Others have suggested that "[d]espite concerns about increasingly burdensome discovery, the proportionality rule has been underused." Milberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules*, 4 FED. CTS. L. REV. 131, 135 (2011) (in enumerating "less drastic alternatives to address the purported concerns of those who histrionically claim discovery is going to break the back of our justice system," the authors include "increasing awareness and reliance on the proportionality standard embodied in [Fed. R. Civ. P.] 26(b)(2)(C).").

12. Social science may provide some useful insight into the underpinnings of the "proportionality" debate. "Status quo bias" recognizes that individuals have a strong tendency to hold to the status quo, simply because the disadvantages of change loom larger than the advantages. *See* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias*, 5 JOURNAL OF ECONOMIC PERSPECTIVES 193, 197-98 (Winter 1991), *available at* http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.5.1.193.

all parties to the litigation, as well as the court, and neither requesting nor producing parties can divorce their decision-making or actions from the proportionality mandate.

Proportionality is, and will remain after December 1, 2015, a part of the civil discovery landscape. Rather than bemoaning that reality, lawyers and jurists should focus on how proportionality can be applied both strategically and proactively.[13] Proportionality principles do not automatically preclude discovery; they simply require lawyers and judges to approach the discovery process more thoughtfully.[14] If, as some commentators suggest, "proportionality requires making good judgments about where and how discovery should begin,"[15] the fruits of those "good judgments" will be revealed in subsequent motion practice or, even better, in the absence of those motions. It necessarily follows that the best way to avoid or ultimately defeat a proportionality challenge is to develop a discovery strategy that substantially reduces the potential for successful objections.

Contrary to the arguments advanced by the warring factions, Rule 26(b)(1), both in its current and amended forms, does

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13. Participants at the Duke Conference reached a very similar conclusion, noting that many of the perceived problems in the civil litigation process "could be substantially reduced by using the existing rules more often and more effectively." *Report to the Chief Justice*; *supra* note 7, at 5.

14. *Cf.* Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 195, 209 (2013) (opining that the 2015 Amendments "will not materially change obligations already imposed on litigants, their counsel, and the court" and suggesting that "a lawyer inclined to approach the Federal Rules from a strategic and practical perspective will not find their clients disadvantaged by the Advisory Committee's proposed revisions").

15. Steven S. Gensler & Lee H. Rosenthal, *Four Years after Duke: Where Do We Stand On Calibrating The Pretrial Process?*, 18 LEWIS & CLARK L. REV. 643, 662 (2014).

not impose a burden of proof or persuasion on either the requesting or producing party. The Rule merely defines the scope of discovery. Other rules, however, do impose burdens of proof or persuasion that may directly implicate proportionality principles and shape the discovery process. When viewed from the vantage point of burdens of proof and persuasion, proportionality principles become more than "talking points" or meaningless objections, but rather elements of an effective and defensible discovery plan that should advance the goals underlying Rule 1.[16]

I. PROPORTIONALITY AND THE 1983 AMENDMENTS

Complaints about the civil discovery process are not new.[17] In response to the dangers of "redundant or disproportionate discovery," the Civil Rules were amended in 1983 to provide trial courts with the "authority to reduce the amount of discovery that may be directed to otherwise proper subjects of

16. FED. R. CIV. P. 1.

17. *See, e.g.*, Edward F. Sherman, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 246 (1982) (noting that discovery abuse in the federal courts is characterized by "over-discovery" through excessive interrogatories, sweeping demands for document production and overly-lengthy depositions, and "discovery avoidance" in an effort "to elude an opponent's discovery requests"); American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207, 213-15 (1981) (warning that "unchecked discovery" may enable a plaintiff "to force early settlement" but also permits defendants to "'outflank' their often less financially resourceful opponents by overwhelming them with burdensome discovery"); American Bar Association Section on Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse (Preliminary Draft)*, 92 F.R.D. 137, 138 (1980) (suggesting that "new studies confirm our view that there remain serious discovery problems demanding immediate correction," including "unnecessary use of discovery, the improper withholding of discoverable information, and misuse of discovery procedures").

inquiry."[18] To that end, the Advisory Committee on Civil Rules (the "Advisory Committee") revised Rule 26(b)(1)[19] to empower the court to limit the frequency or extent of discovery, if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion . . .[20]

In short, the 1983 change to Rule 26(b)(1) sought to instill a more proportionate approach to discovery, while still respecting the parties' right to "discovery that is reasonably necessary

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18. FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendment. *See also* A. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility*, at 30-32 (1984), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/$file/1983amnds.pdf. *Cf.* Advanced Semiconductor Products, Inc. v. Tau Laboratories, Inc., No. 83-20412 RPA, 1986 WL 215149, at *3 (N.D. Cal. Jan. 23, 1986) (observing that drafts of the 1983 amendments to Fed. R. Civ. P. 26 "recognized that significant interests can be damaged by wide open, unrestrained discovery and that it is no longer acceptable to leave notions of common sense out of the calculous about appropriateness of discovery requests").

19. FED. R. CIV. P. 26(b)(1).

20. Proportionality factors are included in Fed. R. Civ. P. 26(b)(2)(C) which assumed its current form in 2006.

to afford a fair opportunity to develop and prepare the case."[21] The accompanying Committee Note admonished litigants to be "sensitive to the comparative costs of different methods of securing information" but also signaled that judges should take a more active role in the discovery process, given "the reality that it cannot always operate on a self-regulating basis."[22] The Advisory Committee understood that the goal of proportionality could be undermined by a judge "who is not conversant with the case."[23]

The 1983 amendments also sought to advance the goal of proportionality with a new Rule 26(g).[24] According to the Advisory Committee, this Rule was intended to "curb discovery abuse" by imposing "an affirmative duty to engage in pretrial discovery in a responsible manner consistent with the spirit and purposes of Rules 26 through 37."[25] Rule 26(g), then and still today, requires a party or attorney to certify that a discovery request, response, or objection is "not interposed for an improper purpose, such as to harass or to cause unnecessary delay or

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21. *Cf.* Leksi, Inc. v. Federal Insurance Co., 129 F.R.D. 99, 103 (D.N.J. 1989) ("[T]he discovery rules embody competing concerns. An effort to determine a discovery dispute must contain an assessment of the potential for developing relevant evidence in addition to an analysis of the relative burdens the discovery may entail.").

22. See Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery through Local Rules*, 30 VILL. L. REV. 767, 789 (1985) (suggesting that the proportionality factors added to Rule 26(b)(1) "contemplate[ ] that the parties will be selective in invoking various discovery devices; parties no longer are free, necessarily, to follow a discovery program that leaves 'no stone unturned'"), *available at* http://digitalcommons.law.villanova.edu/vlr/vol30/iss3/3.

23. *See also* Miller, *supra* note 18, at 36.

24. FED. R. CIV. P. 26(g).

25. FED. R. CIV. P. 26(g) advisory committee's note to 1983 amendment.

needlessly increase the cost of litigation." Addressing the need for proportionality, the Rule 26(g) certification requirement mandates discovery requests that are reasonable and not "unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation."[26] Rule 26(g) was not added to the Civil Rules to "discourage legitimate and necessary discovery," but does obligate counsel to "'pause and consider' the reasonableness of a discovery request or response."[27]

In combination, the 1983 amendment to Rule 26(b)(1) and the addition of Rule 26(g) sought to improve the self-executing nature of civil discovery. As one magistrate judge explained, after the 1983 amendments, it was no longer sufficient for the requesting party to simply show that the desired materials were relevant.

> After satisfying this threshold requirement, counsel *also* must make a common sense determination, taking into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery probe would impose, that the discovery tool selected is the most efficacious of the means that

26. Professor Miller, who in 1983 was the Reporter to the Advisory Committee on Civil Rules, acknowledged that proportionality could not be reduced to a "pure dollar test" because "[e]verybody understands you can have a case where the values at stake transcend the economics of the case." *See* Miller, *supra* note 18, at 33.

27. *See* Cavanagh, *supra* note 22, at 790. *But see* Hon. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 516 (Spring 2013) (suggesting that "lawyers seem to be comprehensively ignorant of the significant limitations that Rule 26(b)(2)(C) imposes on the scope of discovery").

> might be used to acquire the desired information (taking into account cost effectiveness and the nature of the information being sought), and that the timing of the probe is sensible, i.e., that there is no other juncture in the pretrial period when there would be a clearly happier balance between the benefit derived from and the burdens imposed by the particular discovery effort. . . . What the 1983 amendments require is, at heart, very simple: good faith and common sense. . . .
>
> The problem, one senses, is *not* that the requirements the law imposes are too subtle. Rather, the problem is more likely to be that counsel are less interested in satisfying the law's requirements than in seeking tactical advantages. At least in cases involving big economic stakes, good faith and common sense hardly seem to be the dominant forces. Instead, it appears that the root evil in complex civil litigation continues to be the pervasiveness of gaming.[28]

For all the concerns expressed by then-Magistrate Judge Wayne Brazil in 1985, the issue of proportionality did not figure prominently in reported decisions in the years immediately after 1983. Between 1983 and 1994, "[t]he [proportionality] amendment itself seems to have created only a ripple in the case law."[29] While "proportionality" is now mentioned with greater

28. *In re* Convergent Technologies Securities Litigation, 108 F.R.D. 328, 331-32 (N.D. Cal. 1985) (Brazil, M.J.).

29. Marcus, *supra* note 6, at 1717.

frequency in reported decisions,[30] it is this author's experience that the concept is rarely invoked by litigants or their counsel, either at the Rule 16[31] scheduling conference[32] or later in the pretrial process. Indeed, when this author has invited or encouraged counsel to incorporate proportionality principles in their proposed scheduling order, that suggestion typically has been met with stony silence or intransigence from both sides.

Perhaps that should be expected. The mixed reaction to proportionality, much like the broader debate over the current state of civil litigation, likely reflects anecdotal bias[33] fueled by studies that are praised or condemned depending upon the

30. *See* Gensler & Rosenthal, *supra* note 15, at 660 (reporting that their Westlaw search for cases mentioning proportionality in the context of discovery revealed at least 148 cases after January 2010 in which judges invoked proportionality).

31. FED. R. CIV. P.16.

32. This omission is particularly striking since one purpose of the scheduling conference is to "discourage wasteful pretrial activities." *See* FED. R. CIV. P. 16(a)(3).

33. *See* Traci Freling & Ritesh Saini, *Involved but Inaccurate: When High-Stakes Lead to Anecdotal Bias*, at 1, 3-4, *available at* https://cdn1.sph.harvard.edu/wp-content/uploads/sites/1273/2014/02/Risk-Perception-Freling-et-al.1.pdf. The authors of this paper report that "[i]ndividuals often eschew more accurate statistical information in decision making, relying instead upon anecdotal evidence." The paper suggests that "[o]bjectively, statistical information is more informative in that an isolated anecdote can be used to support any position" and that "[a]necdotal information can—and often does—overwhelm statistical information, leading decision makers to overweight its relevance, even in the presence of more reliable statistical data."

reader's particular point of view.[34] The civil discovery process and any consideration of proportionality fall victim to these dueling perspectives.

> In one camp, attorneys who have directly experienced excessive or abusive discovery argue that more stringent proportionality measures are needed, and that even a rare occurrence of excess is too much. In the other camp, empiricists maintain that the problem is more or less restricted to a small number of cases and that changes to the Federal Rules are unnecessary. The result has been a stalemate, in which practitioners with a bad discovery experience are told that the problem is not common enough to raise general concerns, and empiricists are told that their aggregate numbers do not adequately reflect the disruptive effect of disproportionate discovery in real cases.[35]

However, "[e]mpirical research has not provided support for the prevailing view that discovery costs are necessarily the major cost driver in litigation." According to this view, "[t]he [p]ervasive [m]yth of [p]ervasive [d]iscovery [a]buse . . . has

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34. *See Report to the Chief Justice*, *supra* note 7, at 2-4 (summarizing the findings of empirical and other studies available to participants to the Duke Conference). This author takes no position on the methodology or statistical validity of any particular study; those studies speak for themselves. *But see* Danya Shocair Reda, *The Cost-and Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1100, 1102 (2012) (observing that "[t]he bulk of what the Duke Conference labeled 'empirical data' consisted of opinion surveys that reflected the concerns and beliefs among legal professionals" and suggesting that the "attorney impressions captured by the opinion surveys are in conflict with the picture that emerges from available empirical data").

35. Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 153 (2012).

never been supported by a single empirical study of costs, as opposed to beliefs about costs."[36] This same dichotomy is reflected in the strong reactions to the most recent amendments to the Civil Rules.

II. THE 2015 AMENDMENTS

In August 2013, the Advisory Committee released for public comment proposed amendments to the Civil Rules. Those proposals included changes to Rule 26(b)(1). Although the current version of Rule 26(b)(1) acknowledges that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C),"[37] the proposed version explicitly states:

> [u]nless 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

36. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 779, 786-87 (Dec. 2010). *See also* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Discovery*, 172 U. PA. L. REV. 1839, 1850 (June 2014) ("Contrary to the popular narrative, the problem with excessive discovery is—and has always been—more pervasive with respect to a particular slice of 'mega cases,' approximately five to fifteen percent of the caseload."); Hon. John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 540 (Dec. 2010) ("It is plain that, although the cost of discovery in the median case may be reasonable and indeed low, the costs in high-stakes litigation can be enormous.").

37. FED. R. CIV. P. 26(b)(2)(C) (the court "must limit the frequency or extent of discovery otherwise allowed by these rules" if it determines, *inter alia,* that the "burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues").

> 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.[38]

As noted, comparable proportionality factors currently are found in Rule 26(g), and Rule 26(b)(2)(C).

The increased prominence accorded the proportionality factors in the 2015 amendments sparked strong reactions during the public comment period, with commentators suggesting that relocation of the proportionality factors was not required or, conversely, that the proportionality standard was not invoked enough.[39] Many of the written comments received by the Advisory Committee expressed the view that explicitly incorporating proportionality factors in the standard of "relevance" would adversely affect a plaintiff's ability to obtain necessary information and simply invite boilerplate objections. For some opponents, "[t]he proportionality standard will enable defendants to hide behind the excuse of burden or cost, particularly in asymmetrical information cases," encourage defendants to "self-apply the concept of proportionality in responding to discovery requests and . . . monetize the importance of the case," or serve as a "further invitation for large defendants to continue, or in-

38. *See* June 2014 Advisory Committee Report, at Appendix B-30 (emphasis added), attached to the September 2014 Standing Committee Report, *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014.

39. *See* Thomas Y. Allman, *The 2015 Civil Rules Package As Transmitted to Congress*, 16 SEDONA CONF. J. 1 (2015).

crease, their standard objections based on unarticulated burdens."[40] Another written submission to the Advisory Committee warned that the "rules changes would prevent discovery that has been available under the present rules, taking procedure back to the days of trial by ambush, and placing plaintiffs at a further disadvantage."[41] One judge observed that inclusion of the proportionality factors in Rule 26(b)(1) would generate more discovery disputes that "will be less susceptible to principled resolution" because proportionality can only be measured by a subjective standard until discovery is completed or nearly so.[42]

Other critics expressed concern that measuring relevance based on proportionality factors "will shift the burden to the party seeking information."[43] According to this view:

> [t]he proportionality test will shift the burden to the requesting party to show that discovery is justified. Present practice requires the requesting party to show relevance, and then the burden falls

40. *See* Advisory Committee on Civil Rules Agenda Book, April 10-11, 2014, at 185, 194, 195 of 580, *available at* http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014.

41. *Id.* at 167 of 580. Some representatives of the defense bar were equally quick to express dissatisfaction with the current version of the discovery rules. One writer observed that the current rules of discovery give "the plaintiff a serious advantage, because there is no mechanism in place to ensure the claim has at least some merit, and the plaintiff need only prolong discovery to receive a settlement offer." *Id.* at 176 of 580. In a similar vein, another letter to the Committee argued that "[t]o further overcome the gross abuse of justice fostered by current discovery standards, proportionality should require that the benefits of the discovery substantially outweighs its burdens or expense." *Id.* at 217 of 580.

42. *Id.* at 193 of 580.

43. *Id.* at 187 of 580.

> on the responding party to show the reasons to deny discovery of relevant information. Changing the definition of what is discoverable will change the analysis from whether discovery should be limited to whether discovery should be permitted.[44]

Another letter asserted that under the current version of the Civil Rules, "[t]he Rule 26(g) certification is made to the best of the party's knowledge, information and belief formed after a reasonable inquiry." For this commentator, the proposed rule "likely will impose" on the party requesting discovery the burden "to prove the requests are not unduly burdensome or expensive."[45] One letter to the Advisory Committee went so far as to proclaim that "[c]hanging the burden of proof on discovery destroys litigation."[46]

The Advisory Committee responded to these concerns by explaining that the new Rule 26(b)(1) "restores the proportionality factors to their original place in defining the scope of discovery," reinforces the parties' current obligations under Rule 26(g), and "does not change the existing responsibilities of the

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44. *Id.* at 204 of 580. Another commentator expressed the same fear that moving the proportionality factors from Rule 26(b)(2)(C) to Rule 26(b)(1) will change "a shield to a sword, 'shifting the burden to the party seeking information, who may be at a considerable disadvantage when it comes to having the information necessary to carry such a burden.'" *Id.* at 200 of 580.

45. *Id.* at 201 of 580.

46. *Id.* at 211 of 580. Of course, that ominous prediction was not universally shared, as evidenced by another commentator who opined that "the burden of proof is a nonissue. Discovery motions do not get decided on a burden of proof." *Id.* at 233 of 580.

court and the parties to consider proportionality."[47] Just as importantly, the Committee Note makes clear that the revisions to Rule 26(b)(1) "do[ ] not place on the party seeking discovery the burden of addressing all proportionality considerations."

> Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.[48]

The new Rule 26(b)(1), contrary to public perceptions, does not represent a fundamental change in the existing scope of discovery.[49] The current version of Rule 26(b)(1) limits "lawyer-directed" discovery to the "claims and defenses" actually raised

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47. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-39. *Cf.* Willnerd v. Sybase, Inc., No. 1:09-cv-500-BLW, 2010 WL 4736295, at *3 (D. Idaho Nov. 16, 2010) (in employing proportionality factors, "the Court balances [the requesting party's] interest in the documents requested, against the not-inconsequential burden of searching for and producing documents").

48. *Id.*

49. The Advisory Committee's Agenda Book for the meeting in Norman, Oklahoma, on April 11-12, 2013 suggested that "transferring the analysis required by present Rule 26(b)(2)(C)(iii)" to Rule 26(b)(1) would "become a limit on the scope of discovery." *See* Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 83 of 322, *available at* http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2013. That view is not expressed in the current Committee Note transmitted to Congress.

by the parties and further requires that discovery be proportionate in light of the particular circumstances of the pending case.[50] A proportional approach to discovery is measured by the information available to counsel "as of the time" requests, responses, or objections are served.[51] That same standard should apply under the proposed amendment to Rule 26(b)(1).

Counsel's limited access to information, particularly at the outset of the litigation, will inevitably color their approach to discovery. However, claims of ignorance should not absolve an attorney of his or her responsibility to pursue discovery that is proportional to the needs of the case nor excuse discovery requests that bear more resemblance to unguided missiles than thoughtful efforts to obtain truly relevant information. Counsel for the requesting *and* producing parties are subject to the same

50. *Cf.* High Point Sarl v. Sprint Nextel Corp., No. 09-2269-CM-DJW, 2011 WL 4036424, at *19 (D. Kan. Sept. 12 2011) ("Indiscriminate use of blockbuster interrogatories . . . does not comport with the just, speedy, and inexpensive determination of the action."); Grynberg v. Total, S.A., No. 03-cv-01280-WYD-BNB, 2006 WL 1186836, at *6 (D. Colo. May 3, 2006) ("[W]hatever may be said for the virtues of discovery and the liberality of the federal rules, . . . there comes at some point a reasonable limit against indiscriminately hurling interrogatories at every conceivable detail and fact which may relate to a case.") (quoting Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997)).

51. Heller v. City of Dallas, 303 F.R.D. 466, 477 (N.D. Tex. 2014) (suggesting that the court "should avoid taking the benefit of hindsight and instead focus on whether, at the time it was signed, the [request, response or objection] was well grounded in fact" and law) (alteration in original).

Rule 26(g) "stop and think" obligation measured by an objective, rather than a subjective, standard.[52] Both sides risk the imposition of sanctions if their discovery requests, responses, or objections fail to conform to the Civil Rules, run afoul of proportionality principles, or suggest a strategy of gamesmanship.[53]

The amended Rule 26(b)(1) can have a positive impact on the discovery process, but only if lawyers and judges resist the tendency to employ a "business as usual" mindset. So, for example, an interrogatory that incorporates an expansive definition of "relating to," or an already broad request for production that becomes unfathomable by inserting the phrase "including but not limited to," are problematic under existing case law. Those phrases, unless used in very precisely framed requests, will almost certainly invite objections on proportionality

52. *See* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008) (Rule 26(g) "aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party" and "the equally abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis"). *Cf.* Little Hocking Water Association, Inc. v. E.I. DuPont de Nemours & Co., No. 2:09-cv-1081, 2015 WL 1321870, at *9 (S.D. Ohio Mar. 24, 2015) ("A court applies an objective standard when determining whether or not" a party or attorney has complied with Rule 26(g)).

53. *See, e.g.*, HM Electronics, Inc. v. R.F. Technologies, Inc., No. 12cv2884-BAS-MDD, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015) (imposing sanctions under Rule 26(g)(3) on defendants and their counsel for respectively submitting false discovery responses and failing to conduct a reasonable inquiry); Interpreter Services, Inc. v. BTB Technologies, Inc., No. CIV. 10-4007, 2011 WL 6935343, at *6 (D.S.D. Dec. 29, 2011) (holding that "[s]anctions are appropriate under Rule 26(g) when the parties' conduct has 'clearly added unnecessary delay and expense to the litigation'").

grounds.[54] In sum, a "belts and suspenders" approach to discovery may actually leave the requesting party undone. By the same token, a responding attorney who asserts the hackneyed "overbroad" objection and then fails to produce any responsive documents has violated their Rule 26(g) certification obligation and, by implication, proportionality principles.[55]

In short, Rule 26(b)(1), in conjunction with Rule 26(g), recognizes that both sides share a responsibility to engage in a discovery process that is proportionate and focused on the ac-

54. *See, e.g.*, *In re* Urethane Antitrust Litigation, No. 04-MD-1616-JWL-DJW, 2008 WL 110896, at *1 (D. Kan. Jan. 8, 2008) (holding that a discovery request is overly broad and unduly burdensome on its face if it uses an "omnibus term such as 'relating to,' 'pertaining to,' or 'concerning' to modify a general category or broad range of documents or information" because "such broad language 'make[s] arduous the task of deciding which of numerous documents may conceivably fall within its scope'"); Roda Drilling Co. v. Siegal, No. 07-CV-400-GFK-FHM, 2008 WL 2234652, at *2 (N.D. Okla. May 29, 2008) (finding that "many of the parties' requests for production of documents are overbroad, as they request 'all documents' relating to or concerning a subject"). *But see* Giegerich v. National Beef Packing Company, LLC, No. 13-2392-JAR, 2014 WL 1655554, at *2 (D. Kan. Apr. 25, 2014) ("While it may be generally true that phrases such as 'regarding' or 'pertaining to' may require a responding party to 'engage in mental gymnastics to determine what information may or may not be remotely responsive,'" a discovery request is not facially overbroad if it seeks "a sufficiently specific type of information, document, or event, rather than large or general categories of information or documents").

55. *Cf. High Point Sarl*, 2011 WL 4036424, at *10-11 (finding that defendant's "assertion of numerous, repetitive, boilerplate, incorporation-by-reference general objections" were a violation of Rule 26(g)). *See also* Bottoms v. Liberty Life Assur. Co. of Boston, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at *7 (D. Colo. Dec. 13, 2011) (holding that "[o]ne of the purposes of Rule 26(g) was 'to bring an end to the [ ] abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis;" "boilerplate objections" should not suffice to bar discovery) (second alteration in original).

tual claims and defenses in the action. The proportionality mandate incorporated into these Rules assumes even greater significance in light of the proposed amendment to Rule 1,[56] which explicitly acknowledges that the parties and their counsel "share responsibility" with the court to employ the rules to achieve the just, speedy, and inexpensive determination of every action. Notably, the accompanying Committee Note acknowledges that the objectives underlying Rule 1 may be frustrated by the "over-use, misuse, and abuse of procedural tools that increase cost and result in delay," and that effective advocacy is consistent with and depends upon "cooperative and proportional use of procedure."[57]

Proportionality considerations are raised, albeit in a different context, with the new version of Rule 37(e).[58] That Rule states:

> (e) **Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> > (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

56. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-21.

57. *Id*. at Appendix B-21-22.

58. *Id*. at Appendix B-56-57.

> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> > (A) presume that the lost information was unfavorable to the party;
> > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > (C) dismiss the action or enter a default judgment.

The Committee Note accompanying the new Rule 37(e) acknowledges that relief under subsections 1 or 2 is only available if relevant electronically stored information (ESI) was lost after the duty to preserve was triggered and because the party failed to take reasonable steps to preserve the information. "This rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection."[59] In evaluating the reasonableness of the preserving party's efforts, the court should consider proportionality.[60]

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59. *Id.* at Appendix B-61. *But compare In re* Pfizer Ins. Securities Litigation, 288 F.R.D. 297, 317 (S.D.N.Y. 2013) (while acknowledging that a party is not required to preserve all exact duplicate copies of documents, the court suggested that perhaps "documents that may be largely duplicative of . . . custodial productions . . . [may] have a value in of themselves [sic] as compilations") *and* FTC v. Lights of America, Inc., No. SACV 10-1333 JVS (MLGx), 2012 WL 695008, at *5 (C.D. Cal. Jan. 20, 2012) (finding that the FTC's E-Discovery Guidelines that require the preservation of relevant ESI, but also mandate the deletion of duplicates, were consistent with plaintiff's duty to preserve relevant material).

60. *But see* Orbit One Communications, Inc. v. Numerex Corp., 271 F.R.D. 429, 436 n.10 (S.D.N. 2010) (observing that proportionality is an "amorphous" and "highly elastic" concept that may not "create a safe harbor for a party that is obligated to preserve evidence").

> The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. . . . A party urging that preservation efforts are disproportionate may need to provide specifics about those matters in order to enable meaningful discussion of the appropriate preservation regime.[61]

Proportionality considerations also come into play in the court's determination of whether lost ESI can be restored or replaced through additional discovery, which would also obviate the need to consider curative measures under subsection (1) or sanctions under subsection (2). The Committee Note explains that "efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation," and suggests, by way of example, that "substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."[62]

III. THE IMPACT OF PROPORTIONALITY IN THE CONTEXT OF DISCOVERY MOTIONS

If the 2015 amendments become effective on December 1, 2015, continuing the abstract debate about proportionality serves little purpose. The more pertinent question to ask is whether a renewed emphasis on proportionality under Rule

61. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-61-62.

62. *Id.* at Appendix B-62.

26(b)(1) will materially change the discovery process and promote the just, speedy, and inexpensive determination of the pending litigation. Similarly, it is appropriate to consider to what extent proportionality under the new Rule 37(e) will change a party's approach to preservation or prompt reconsideration of the prevailing risk-averse approach of saving everything. These are strategic considerations that will turn on the specific facts and circumstances of a given case.

Requesting parties fear that discovery decisions made with incomplete information at the outset of the pretrial process will have irrevocable consequences. Similarly, there is a belief that judicial officers will bring their own subjective impressions to a discovery process that is necessarily iterative and not susceptible to bright-line standards. These fears, grounded on actual experience or anecdotal bias, are exacerbated by the propensity for recycling discovery practices that are the product of habit, rather than strategic analysis. Although critics incorrectly attack the amended Rule 26(b)(1) for narrowing the scope of discovery or imposing a new "burden of proof" on requesting parties, those criticisms may actually frame a more useful discussion. An attorney intent on formulating a strategic and defensible approach to proportionality should draft discovery requests, or serve responses and objections, that reflect the burdens of proof or persuasion that actually apply to discovery motion practice. In that context, proportionality is no longer an abstract concept, but rather a tool to be evaluated against a specific factual record. An effective lawyer anticipates the burdens of proof and persuasion that will arise in motion practice and then develops a record to sustain his or her burden. In that respect, proportionality becomes an integral part of an overall discovery plan.

The Supreme Court has acknowledged that "[t]he term 'burden of proof' is one of the 'slipperiest member[s] of the family of legal terms.'"[63] Although the phrases "burden of proof" and "burden of persuasion" often are used interchangeably, they have decidedly different meanings. "Burden of proof" applies to the party bearing the obligation to come forward with evidence or facts to support a specific position, claim, or defense. This burden may shift between the parties at particular points or with respect to discrete issues. In contrast, the "burden of persuasion" asks which party bears the risk of losing if the evidence is evenly balanced.[64]

As previously noted, Rule 26(b)(1) does not establish burdens of proof or persuasion, but rather "sets the outer boundaries of permissible discovery."[65] Rule 26(b)(1), in its present and proposed versions, does not require a party to "prove" anything or impose a "burden of proof" on either the requesting or producing party.[66] Similarly, proportionality principles are neither a burden nor a responsibility singularly imposed on one side or the other. Rule 26(b)(1), instead, establishes a definition or

63. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56 (2005) (second alteration in original). *See also* Zhen Rong Lin v. Gonzales, 230 F. App'x 795, 800 n.5 (10th Cir. 2007) (noting that the term "burden of proof" embodies two "distinct concepts" that "may be referred to as (1) the risk of nonpersuasion, sometimes called the 'burden of persuasion' and (2) the duty of producing evidence (or the burden of production), sometimes called the burden of going forward with the evidence").

64. *See* Riether v. United States, 919 F. Supp. 2d 1140, 1148 n.6 (D.N.M. 2012); Gould, Inc. v. A&M Battery & Tire Service, 176 F. Supp. 2d 324, 327 (M.D. Pa. 2001).

65. First Security Savings v. Kansas Bankers Surety Co., 115 F.R.D. 181, 183 (D. Neb. 1987).

66. WEBSTER'S NEW WORLD COMPACT SCHOOL AND OFFICE DICTIONARY (1995 ed.) defines "prove" as "to establish as true" and "proof" as "evidence that establishes the truth of something" or "a proving or testing of something."

framework for assessing relevance in a discovery context. Any "burden" ascribed to the amended Rule 26(b)(1) and its reaffirmation of proportionality principles is more properly attributed to bad discovery practices. As Judge Paul Grimm has noted:

> [i]t cannot seriously be disputed that compliance with the "spirit and purposes" of these discovery rules requires cooperation to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionality large to what is at stake in the litigation. Counsel cannot "behave responsively" during discovery unless they do both, which requires cooperation rather that contrariety, communication rather than confrontation.[67]

A. Rule 37(a)(3)

Although Rule 26(b)(1) and Rule 26(g) do not impose a "burden of proof" on either the requesting or producing party, the same cannot be said for a motion to compel under Fed. R. Civ. P. 37(a)(3). A party moving to compel discovery responses pursuant to Rule 37(a)(3) bears the initial burden to demonstrate that the requested discovery comports with Rule 26(b)(1).[68] The

67. Mancia v. Mayflower Textile Serv. Co., 253 F.R.D. 354, 357-58 (D. Md. 2008). *See also* Steven S. Gensler & Lee H. Rosenthal, *supra* note 15, at 662 ("The key to achieving proportionality is not the early ability to find some clear line defining where discovery should end. Rather, proportionality requires making good judgments about where and how discovery should begin.").

68. *See, e.g.*, Pfizer Inc. v. Apotex Inc., 744 F. Supp. 2d 758, 767 (N.D. Ill. 2010) (suggesting that the party moving to compel discovery responses has the burden of proof to demonstrate relevance); Bayview Loan Servicing, LLC v. Boland, 259 F.R.D. 516, 518 (D. Colo. 2009) (holding that the party moving to compel discovery has the burden of proof).

current version of Rule 26(b)(1) acknowledges that "[a]ll discovery is subject to the limitations imposed by [the proportionality factors in] Rule 26(b)(2)(C)." A lawyer serving interrogatories and requests for production, both now and after December 1, 2015, must certify under Rule 26(g) that their discovery requests are consistent with the Federal Rules and "neither unreasonable nor unduly burdensome or expensive" considering those same proportionality factors.

Courts have generally recognized an "ordinary presumption in favor of broad disclosure."[69] The Committee Note to the proposed Rule 26(b)(1) does not repudiate that body of case law. However, it is also well-settled under Rule 37(a)(3) that if a party's "discovery requests appear facially objectionable in that they are overly broad or seek information that does not appear relevant, the burden is on the movant to demonstrate how the requests are not objectionable."[70] That same "facially objectionable" standard should extend to discovery requests that are transparently disproportionate in the context of a particular case. While the moving party's threshold burden of proof under Rule 37(a)(3) is not particularly high, that burden should not be ignored or discounted. Where a discovery request is facially overbroad, the requesting party must make a showing of

69. *See, e.g.*, Arkansas River Power Authority v. Babcock & Wilcox Power Generation Group, Inc., No. 14-cv-00638-CMA-NYW, 2015 WL 2128312, at *2 (D. Colo. May 5, 2015); Milburn v. City of York, No. 1:12-CV-0121, 2013 WL 3049108, at *4 (M.D. Pa. June 17, 2013); Aguilera v. Fluor Enterprises, Inc., No. 2:10-CV-95-TLS-PRC, 2011 WL 1085146, at *2 (N.D. Ind. Mar. 21, 2011).

70. Bettis v. Hall, No. 10-2457-JAR, 2015 WL 1268014, at *1 (D. Kan. Mar. 19, 2015). *Cf.* Presbyterian Manors, Inc. v. Simplex Grinnell, LP, No. 09-2656-KHV, 2010 WL 3880027, at *7 (D. Kan. Sept. 28, 2010) ("when relevancy is not readily apparent, the proponent has the burden of showing the relevancy of the discovery request").

relevance and proportionality that is predicated on more than speculation or assumption.[71]

The court should not, in deciding a motion to compel under Rule 37(a)(3), evaluate the non-moving party's discovery responses in a vacuum; a motion to compel necessarily requires the court to hold the moving party's discovery requests to the same Rule 26(g) standard.[72] As the Committee Note to the amended Rule 26(b)(1) acknowledges, "[a] party claiming that a request is important to resolve the issues [in the case] should be able to explain the ways in which the underlying information bears on the issues as that party understands them."[73] The same Committee Note cautions that proportional discovery requires a "proper understanding" of what is truly relevant to a claim or defense.[74] Imposing on a moving party the obligation to frame discovery requests that are facially relevant and proportional, "considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the case," should not

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71. *Cf.* Hill v. Auto Owners Insurance Co., No. 14-CV-05037-KES, 2015 WL 1280016, at *7 (D.S.D. Mar. 20, 2015) (in acknowledging the moving party's obligation to make a threshold showing of relevance, the court noted that "[m]ere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case.").

72. *See* Witt v. GC Services Limited Partnership, __ F.R.D. __, 2014 WL 6910500, at *15 (D. Colo. Dec. 9, 2014).

73. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-40. *Cf.* Gilmore v. Augustus, No. 1:12-cv-00925-LJO-GSA-PC, 2014 WL 4354656, at *2-3 (E.D. Cal. Sept. 2, 2014) (under Rule 37(a), the requesting party cannot meet its burden simply by asserting they are dissatisfied with the producing party's responses; the moving party must demonstrate how specific responses are deficient and why they are entitled to further information or materials).

74. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-43.

be viewed as onerous or inappropriate. An attorney or party that cannot convincingly explain the relevance of a discovery request under Rule 26(b)(1) would be hard-pressed to show compliance with their self-executing certification obligation under Rule 26(g). As one court has noted in applying the current version of Rule 26(b)(1), "[t]o succeed on a motion to compel, the moving party bears the burden of demonstrating that it is entitled to the requested discovery and has satisfied the proportionality and other requirements of Rule 26."[75]

Assuming that the discovery requests in question seek facially relevant information under Rule 26(b)(1), the burden of proof under Rule 37(a)(3) then shifts to the non-moving party to support its objections.[76] "[T]he burden of proof is with the party objecting to the discovery to establish that the challenged production should not be permitted."[77] That burden, in turn, incorporates elements of proportionality. Once a party moving for

75. Rodriguez v. Barrita, Inc., No. 09-04057 RS-PSG, 2011 WL 5854397, at *2 (N.D. Cal. Nov. 21, 2011).

76. *See, e.g.*, Alomari v. Ohio Department of Public Safety, No. 2:11-cv-00613, 2013 WL 5874762, at *3 (S.D. Ohio Oct. 30, 2013) ("[t]he burden of proof rests with the party objecting to the motion to compel to show in what respects the discovery requests are improper.").

77. Washington v. Folin, No. 4:14-cv-00416-RBH-KDW, 2015 WL 1298509, at *3 (D.S.C. Mar. 23, 2015) (quoting HDSherer LLC v. Natural Molecular Testing Corp., 292 F.R.D. 305, 308 (D.S.C. 2013)). *See also* Griffin v. Beard, No. 06-2719, 2009 WL 678700, at *10 (E.D. Pa. Mar. 16, 2009) (in rejecting defendants' relevance objections, the court noted that "[i]t is well settled that '[t]he defendant[s] may not determine on [their] own what is relevant for discovery purposes'" and "'[w]here there is doubt over relevance . . . the court should be permissive' in granting the discovery request"); Garett v. Albright, No. 4:06-CV-4137-NKL, 2008 WL 681766, at *3 n.6 (W.D. Mo. Mar. 6, 2008) (noting that "[t]he Federal Rules of Civil Procedure do not entitle Defendants to determine what the Plaintiffs will and will not need in terms of clearly relevant evidence.").

relief under Rule 37(a) meets their initial "burden of proving the relevance of the requesting information,"

> the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.[78]

Commonly asserted "boilerplate" objections that a request is "overbroad" or "unduly burdensome" have always been disfavored and should not suffice to defeat a motion to compel after December 1, 2015.[79] More importantly, unsubstantiated boilerplate objections violate the letter and spirit of Rule 26(g), and expose objecting counsel to potential sanctions under Rule 26(g)(3).[80]

The same burden of proof should apply to objections framed in terms of the proportionality factors. "While a discovery request can be denied if the 'burden or expense of the proposed discovery outweighs its likely benefit,' a party objecting to discovery must specifically demonstrate how the request is

78. Martinez v. Jones, No. 3:12-CV-1547, 2015 WL 3454505, at *3 (M.D. Pa. May 29, 2015). *Cf.* Simpson v. University of Colorado, 220 F.R.D. 354, 359 (D. Colo. 2004).

79. *Cf.* O'Hara v. Capouillez, No. 5:13-cv-119, 2013 WL 6672795, at *2 (N.D. W. Va. Dec. 18, 2013); EnvTech, Inc. v. Suchard, No. 3:11-CV-00523-HDM-WGC, 2013 WL 4899085, at *4 (D. Nev. Sept. 11, 2013); Travelers Indemnity Co. of Conn. v. Philips Medical Systems, No. 07-23246-CIV, 2008 WL 4534259, at *1 (S.D. Fla. Oct. 7, 2008).

80. *Cf.* Weems v. Hodnett, No. 10-cv-1452, 2011 WL 3100554, at *2 (W.D. La. July 25, 2011).

burdensome" or disproportionate.[81] An attorney asserting a proportionality objection should be prepared to sustain their burden of proof by coming forward with facts (typically in the form of an affidavit) showing how the requested discovery is inconsistent with Rule 26(b)(1) or violates opposing counsel's certification obligations under Rule 26(g).[82]

B. Rule 26(c)

Rule 26(c) provides that the court may, for good cause, "issue an order to protect a party or person from annoyance,

81. Kleen Products LLC v. Packaging Corporation of America, No. 10 C 5711, 2012 WL 4498465, at *15 (N.D. Ill. Sept. 28, 2012) (internal citations omitted) (suggesting that an objecting party can demonstrate a disproportionate burden by providing "an estimate of the number of documents that it would be required to provide. . . . , the number of hours of work by lawyers and paralegals required, [or] the expense."). *See also* Kristensen v. Credit Payment Services, Inc., No. 2:12-cv-0528-APG-PAL, 2014 WL 6675748, at *4 (D. Nev. Nov. 25, 2014) (noting that "unsupported allegations of undue burden are improper especially when [the objecting party] has failed to submit any evidentiary declaration supporting these objections").

82. *Compare* Sprint Communications Co., L.P. v. Comcast Cable Communications, LLC, Nos. 11-2684-JWL, 11-2685-JWL, 11-2686-JWL, 2014 WL 1794552, at *4 (D. Kan. May 6, 2014) (rejecting plaintiff's blanket refusal to produce what it considered to be cumulative or duplicative documents and observing that "Sprint provides no support or foundation for its position that its proposed discovery plan will capture most, if not all of the documents in its possession responsive to defendants' document requests" and "has not explained the foundation of its belief that the search of additional custodian files would be cumulative, duplicative or *unduly* burdensome") (emphasis in original) *and* Eisai, Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2012 WL 1299379 (D.N.J. Apr. 16, 2012) (holding that plaintiff's discovery ran afoul of proportionality standards since its requests were unreasonably cumulative of the over 12 million pages of documents defendants already produced at a cost of $10 million and given the marginal relevance of the requested materials).

embarrassment, oppression, or undue burden or expense."[83] The party seeking a protective order has the burden of proof,[84] and cannot sustain that burden or establish the requisite good cause merely by offering conclusory statements.[85] To obtain relief under Rule 26(c), the moving party "must make 'a particular and specific demonstration of fact' in support of its request," particularly where the moving party is seeking relief based upon a claim of undue burden or expense.[86] The claim of good cause should be supported by affidavits or other detailed explanations as to the nature and extent of the burden or expense. Rule 26(c), in that respect, sets "a rather high hurdle" for the moving party.[87] So for example, a motion for protective order

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83. FED. R. CIV. P. 26(c)(1). *But compare* Dongguk University v. Yale University, 270 F.R.D. 70, 73 (D. Conn. 2010) (noting that "[w]ith regard to the 'undue burden and expense' provision, Rule 26(c) operates in tandem with the proportionality limits set forth in Rule 26(b)(2)") *and* Rubin v. Hirschfeld, No. 3:00CV1657, 2001 WL 34549221, at *1 (D. Conn. Oct. 10, 2001) (acknowledging that Rule 26(c) "is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's process.").

84. *See, e.g.*, Worldwide Home Products, Inc. v. Time, Inc., No. 11 Civ. 3633(LTS)(MHD), 2012 WL 1592317, at *1 (S.D.N.Y. May 4, 2012) (noting that "the party seeking Rule 26(c) protection bears the burden of proof and persuasion").

85. *See, e.g.*, Norfolk Southern Railway Co. v. Pittsburgh & West Virginia Railroad, No. 2:11-cv-1588, 2013 WL 6628624, at *1 (W.D. Pa. Dec. 17, 2013); Equal Employment Opportunity Commission v. Winn-Dixie, Inc., No. CA 09-0643-C, 2010 WL 2202520, at *2 (S.D. Ala. May 28, 2010).

86. Aikens v. Deluxe Financial Services, Inc., 217 F.R.D. 533, 536-37 (D. Kan. 2003). *Cf.* Trinos v. Quality Staffing Services Corp., 250 F.R.D. 696, 698 (S.D. Fla. 2008) ("courts should only limit discovery 'based on *evidence* of the burden involved, not on a mere recitation that the discovery request is unduly burdensome'") (emphasis in original).

87. Wymes v. Lustbader, No. WDQ-10-1629, 2012 WL 1819836, at *4 (D. Md. May 16, 2012).

should not be granted simply because the moving party asserts that the requested materials are subject to a claim of confidentiality; the moving party must also show that the disclosure of these materials "might be harmful."[88] It seems reasonable, however, that a particularized showing should not be required if the requesting party is seeking discovery that is facially irrelevant under Rule 26(b)(1).[89]

The timing of a motion for protective order is significant in the discovery context. Counsel cannot seek relief under Rule 26(c) without first conferring or attempting to confer with opposing counsel in an effort to resolve the dispute without the need for court intervention.[90] If those discussions are unsuccess-

88. *Cf.* Flint Hills Scientific, LLC v. Davidchack, No. 00-2334-KHV, 2001 WL 1718291, at *2 (D. Kan. Dec. 3, 2001) (holding that a party seeking a protective order must support a claim of confidentiality with a "particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements").

89. *Cf.* Trustees of the Springs Transit Company Employee's Retirement and Disability Plan v. City of Colorado Springs, No. 09-cv-0284-WYD-CBS, 2010 WL 1904509, at *5 (D. Colo. May 11, 2010) (holding that the defendant might not be required to make a particularized showing under Rule 26(c) if plaintiff's discovery requests are facially objectionable) (citing International Society for Krishna Consciousness, Inc. v. Lee, 1985 WL 315, at *10 (S.D.N.Y. 1985)).

90. *See* Williams v. Sprint/United Management Co., No. 03-2200-JWL-DJW, 2006 WL 2734465, at *3 (D. Kan. Sept. 25, 2006) ("The parties must make genuine efforts to resolve the dispute by determining precisely what the requesting party is actually seeking; what responsive documents or information the discovering party is reasonably capable of producing; and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention."); Gouin v. Gouin, 230 F.R.D. 246, 247 (D. Mass. 2005) (denied the prevailing party's request for fees where nothing in the record indicated that plaintiff's counsel had made any effort to resolve discovery disputes before seeking judicial intervention).

ful, the motion for protective order should be filed before discovery responses are due.[91] As the court noted in *Maxey v. General Motors Corp.*,[92] the party seeking protection under Rule 26(c) "should not be allowed to sit back and force the [the other party] to take the initiative to file a Motion to Compel with this court." "The party seeking the protective order, who has the burden of requesting and supporting it, should also be responsible for initiating the process. Permitting that party to merely note its objections and then sit back and wait for a motion to compel can only serve to prolong and exacerbate discovery disputes."[93]

In the event the moving party makes the requisite showing of good cause, the burden of proof under Rule 26(c) then shifts to the party seeking discovery or disclosures. With that shifting burden, the non-moving party must show that the requested discovery is relevant to the claims and defenses in the action and is proportionate to the needs of the case.[94] "If the

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91. *Cf.* Seminara v. City of Long Beach, Nos. 93-56395, 93-56512, 1995 WL 598097, at *4 (9th Cir. Oct. 6, 1995) (noting that although Rule 26(c) does not expressly set limits within which a motion for protective order must be made, there is an implicit requirement that the motion be timely or seasonable).

92. No. 3:95CV60-D-A, 1996 WL 692222 (N.D. Miss. Nov. 18, 1996).

93. *Id*. at *2 (quoting Brittian v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991)). *Cf.* Morock v. Chautauqua Airlines, Inc., No. 8:07-cv-210-T-17-MAP, 2007 WL 4322764, at *1 (M.D. Fla. 2007) ("[a] motion for protective order is generally untimely if it was made after the date the discovery material was to be produced"); Ayers v. Continental Casualty Co., 240 F.R.D. 216 (N.D. W. Va. 2007) (holding that plaintiffs' motion for protective order was untimely where plaintiffs answered the interrogatories in question but waited almost two months to actually move for a protective order).

94. Cranmer v. Colorado Casualty Insurance Co., No. 2:14-cv-645-MMD-VCF, 2014 WL 6611313, at *2 (D. Nev. Nov. 20, 2014) ("When deciding whether to enter an order protecting a party form producing discovery, the court's inquiry primarily focuses on relevance, proportionality, and harm to the producing party.").

party seeking discovery shows both relevance and need, the court must weigh the injury that disclosure may cause . . . against the moving party's need for the information."[95] Based on that proportionality analysis, the court can preclude the requested discovery entirely or allow discovery or disclosure to proceed under specific conditions, including "limiting the scope of disclosure or discovery to certain matters" or specifying the manner in which the requested discovery will be conducted or proceed.

The court also has the discretion under Rule 26(c) to shift the costs of discovery to the party seeking discovery where the moving party has presented facts (rather than mere speculation) to support its claim of undue burden.[96] One court has held that "so long as 'the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance

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95. Election Systems & Software, LLC v. RBM Consulting, LLC, No. 8:11CV438, 2015 WL 1321440, at *5 (D. Neb. Mar. 24, 2015). *Cf*. Bombard v. Volp, 44 F. Supp. 3d 514, 529 (D. Vt. 2014) (in deciding whether "good cause" exists under Rule 26(c), "'the district court must balance the interests involved: the harm to the party seeking the protective order and the importance of disclosure' to the non-moving party"). *See also* Coca-Cola Bottling Company of Shreveport, Inc. v. Coca-Cola Co., 107 F.R.D. 288, 293 (D. Del. 1985) ("[t]he balance between the need for information and the need for protection . . . is tilted in favor of disclosure once relevance and necessity have been shown.").

96. *See, e.g.*, Norfolk Southern Railway Co. v. Pittsburgh & West Virginia Railroad, No. 2:11-cv-1588, 2013 WL 6628624, at *2 (citing CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2008.1 n.26 (3d ed. 2010)). The 2015 Amendments reaffirm the court's authority to allocate discovery costs, but the Committee Note cautions that the proposed Rule 26(c)(1)(B) does not imply "that cost-shifting should become a common practice" or undermine the current assumption "that a responding party ordinarily bears the costs of responding" to discovery. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-44-45.

of the discovery in resolving the issues,' the cost of even accessible ESI's production may be shifted to a party that has not shown its peculiar relevance to the claims and defenses at hand."[97]

C. Rule 26(b)(2)(B)

Burden shifting also arises under Rule 26(b)(2)(B),[98] which provides that a party responding to requests for production "need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[99] This Rule distinguishes between ESI that "is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery," and "information on sources that are accessible only by incurring substantial burdens or costs."[100] If applica-

97. United States ex rel. Carter v. Bridgepoint Education, Inc., 305 F.R.D. 225, 240 (S.D. Cal. 2015). *Cf.* Boeynaems v. LA Fitness International, LLC, 285 F.R.D. 331, 333, 335 (E.D. Pa. 2012) (after noting that "[d]iscovery need not be perfect, but [it] must be fair," the court held that "where the cost of producing documents is very significant, the Court has the power to allocate the cost of discovery, and doing so is fair;" the court observed in passing that "[i]f Plaintiff's counsel has confidence in the merits of its case, they should not object to making an investment in the cost of securing documents from Defendant and sharing costs with Defendant").

98. FED. R. CIV. P. 26(b)(2)(B).

99. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 523 (D. Md. 2010) (suggesting that the reference to "undue burden and expense" in Rule 26(b)(2)(B) incorporates "a proportionality component of sorts").

100. FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to 2006 amendment. *See also* Tyler v. City of San Diego, No. 14-cv-01179-GPC-JLB, 2015 WL 1955049, at *2 (S.D. Cal. Apr. 29, 2015) (acknowledging that "Rule 26(b)(2)(B) should not be invoked as a means to forestall the production of materials that are admittedly relevant and readily accessible").

ble, Rule 26(b)(2)(B) permits a party to move for a protective order or raise the issue of accessibility in response to a motion to compel.

A party invoking the protections of Rule 26(b)(2)(B) bears the initial burden of proof.[101] As with a motion for protective order under Rule 26(c), this burden cannot be sustained with bald generalizations or a conclusory assertion that production will be time-consuming and/or expensive.[102] Instead, "the responding party should present details sufficient to allow the requesting party to evaluate the costs and benefits of searching and producing the identified sources."[103] One court has noted that "while cost and burden are critical elements in determining inaccessibility," the court's analysis under Rule 26(b)(2)(B)

101. *Cf.* Bagley v. Yale University, 307 F.R.D. 59, 66 (D. Conn. 2015) (Rule 26(b)(2)(B) initially places the burden of proof on the party resisting discovery).

102. Cartel Asset Management v. Ocwen Financial Corp., No. 01-cv-01644-REB-CBS, 2010 WL 502721, at *15 (D. Colo. Feb. 8, 2010). *Cf.* Escamilla v. SMS Holdings Corp., No. 09-2120 ADM/JSM, 2011 WL 5025254, at *9 (D. Minn. Oct. 21, 2011) (holding that the defendant's speculative and conclusory cost estimates were insufficient to meet its burden of demonstrating that the cost to restore and search data from electronic archives would create an undue burden or cost).

103. Mikron Industries, Inc. v. Hurd Windows & Doors, Inc., No. C07-532RSL, 2008 WL 1805727, at *1 (W.D. Wash. Apr. 21, 2008). *See also* O'Bar v. Lowe's Home Centers, Inc., No. 5:04-cv-00019-W, 2007 WL 1299180, at *5 n.6 (W.D.N.C. May 2, 2007) (noting that an objection based on Rule 26(b)(2)(B) should be stated with particularity "and not in conclusory or boilerplate language;" "the party asserting that [electronically stored information] is not reasonably accessible should be prepared to specify facts that support its contention").

should focus on "the interplay between any alleged technological impediment" that inhibits accessing ESI and "the resulting cost and burden."[104]

Assuming the producing party can satisfy this threshold showing that responsive information is not reasonably accessible, the burden of proof then shifts to the requesting party to show "good cause" why the court should "nonetheless order discovery from such sources." That finding requires the court to balance the burdens and potential benefits of the requested discovery in light of the proportionality factors set forth in Rule 26(b)(2)(C).

> The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case.[105]

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104. Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 301-02 (S.D.N.Y. 2012). *But compare* W Holding Co., Inc. v. Chartis Ins. Co. of Puerto Rico, 293 F.R.D. 68, 73 (D. Puerto Rico 2013) (rejecting the suggestion that Rule 26(b)(2)(B) is applicable, or that cost-shifting is appropriate, "any time that discovery implicates both (1) electronically stored information and (2) large volumes of data, even where the volume renders review costly") *with* United States ex rel. Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 239 (S.D. Cal. 2015) (for purposes of Rule 26(b)(2)(B), "'inaccessible' simply means that expenditure of resources required to access the contents [of relevant ESI] is itself unreasonable").

105. FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to 2006 amendment. The Committee Note acknowledges that to sustain its burden under Rule 26(b)(2)(C), the requesting party "may need some focused discovery, which may include some sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery."

Among the factors a court may consider in weighing the benefits and burdens of discovery under Rule 26(b)(2)(B) are: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessible sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.[106] In sum, as the court noted in *Peskoff v. Faber*,[107] to obtain discovery pursuant to Rule 26(b)(2)(B), the requesting party "still must meet the most traditional and essential standard of discoverability under the Federal Rules of Civil Procedure; that, on balance, the burden of production is truly justified by its potential relevance."[108]

If the court orders the producing party to produce materials that are not otherwise reasonably accessible, the costs of that production can be shifted to the requesting party pursuant

106. *Id.*

107. 244 F.R.D. 54 (D.D.C. 2007).

108. *Id.* at 59. *Cf. Chen-Oster*, 285 F.R.D. at 302 n.5 ("Courts that have analyzed good cause under Rule 26(b)(2)(B) have generally considered the same types of factors relevant to a proportionality determination under Rule 26(b)(2)(C)."); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 523 (D. Md. 2010) (suggesting that Rule 26(b)(2)(B) includes a "proportionality component of sorts").

to the court's authority under Rule 26(b)(2)(C).[109] However, cost-shifting should be part of a broader proportionality analysis and not imposed by the court simply because production will take time and effort.[110]

D. A Strategic Approach to Discovery Motions

Lawrence Freedman suggests that an effective strategy is based on an ability to see "the future possibilities inherent in the next moves" and furthered by a process in which the combination of ends and means are continually reevaluated.[111]

> If strategy is a fixed plan that set[s] out a reliable path to an eventual goal, then it is likely to be not only disappointing but also counterproductive, conceding the advantage to others with greater

109. *See* FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to 2006 amendment (acknowledging that the court can set conditions on the production of inaccessible electronically stored information, "include[ing] payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible"). *See also* Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 283 (S.D.N.Y. 2003) (while proportionality considerations may override "the presumption . . . that the responding party must bear the expense of complying with discovery requests," the court will order cost-shifting only upon motion by the party responding to a discovery request and the responding party "has the burden of proof on a motion for cost-shifting").

110. *Cf.* Cochran v. Caldera Medical, Inc., No. 12-5109, 2014 WL 1608664, at *3 (E.D. Pa. Apr. 22, 2014) (in declining to shift costs under Rule 26(b)(2)(B) in this product liability action, the court concluded that the burden or expense of plaintiffs' discovery requests were outweighed by the importance of the discovery to plaintiffs' ability to prove their claims and the seriousness of their alleged injuries; the court further observed that "defendant inevitably [would] need to gather the information sought by plaintiffs" given "the over 1,700 claims that have been filed by individuals across the country relating to" the same medical product).

111. LAWRENCE FREEDMAN, STRATEGY: A HISTORY 611 (2013).

> flexibility and imagination. Adding flexibility and imagination, however, offers a better chance of keeping pace with a developing situation, regularly re-evaluating risks and opportunities.[112]

Those same strategic components, flexibility and imagination, will be critical if lawyers are to reap the benefits of proportionality and, more importantly, promote their client's interests while simultaneously advancing the goals of Rule 1. For the requesting party, an effective discovery strategy should facilitate the acquisition of relevant and necessary information while simultaneously limiting opposing counsel's ability to wreak havoc by forcing delay or unproductive costs. Conversely, the responding party's strategic goals are to reduce the cost of finding and producing responsive information, while also developing a defensible position in the event motion practice ensues.

A requesting party can substantially reduce, if not eliminate completely, the likelihood of a proportionality challenge simply by drafting interrogatories or requests for production that are not "facially objectionable" under Rule 26(b)(1). That should not be a daunting challenge under current case law and will not be significantly different after December 1, 2015. Counsel should draft discovery requests predicated on the information they *need* in light of the actual claims and defenses. All too frequently (and particularly in asymmetrical litigation), a requesting party resorts to expansive, blockbuster discovery based on uncertainty and a fear that "something" might be inadvertently overlooked. Counsel also justify broad discovery requests by cynically assuming their opposite number will be evasive and less-than forthcoming in their responses. Yet that prophylactic approach to discovery provides little strategic benefit if those same expansive discovery requests invite objections and mire the requesting party in time-consuming and expensive

112. *Id.* at 610.

motion practice. For the plaintiff intent on reaching an expeditious and favorable outcome to their case, protracted discovery disputes are at the very least an undesirable distraction. Therefore, the requesting party should draft discovery requests that substantially constrain the responding party's ability to derail the pretrial process.

For example, counsel should avoid pattern or stock discovery requests recycled from past lawsuits, even if that approach seems to hold the false promise of cost-savings.[113] Any savings that may be achieved in the drafting process will likely pale in comparison to the subsequent costs of motion practice. Counsel can hardly complain when their formulaic discovery requests are met with boilerplate objections and little else.[114] While those boilerplate objections are seldom effective and may themselves justify Rule 26(g)(3) sanctions, the court should not

113. *Cf.* Robbins v. Camden City Board of Education, 105 F.R.D. 49, 56-57 (D.N.J. 1985) (warning that "the use of multiple pattern interrogatories in more complex litigation can lead to . . . confusion and duplication, . . . especially . . . where the propounding counsel has made little effort to tailor the interrogatories to the facts and circumstances of this case"); Blank v. Ronson Corp., 97 F.R.D. 744, 745 (S.D.N.Y. 1983) (in criticizing counsel for both parties, the court noted that "there is, in the vast expanse of paper, no indication that any lawyer (or even moderately competent paralegal) ever looked at the interrogatories or at the answers. It is, on the contrary, obvious that they have all been produced by some word-processing machine's memory of prior litigation.").

114. *Cf.* Cummings v. General Motors Corp., 365 F.3d 944, 953 (10th Cir. 2004) (in finding no abuse of discretion in the district court's denial of plaintiffs' motion to compel, the appellate panel noted that the litigation had been characterized by "numerous miscommunications and unnecessary disputes caused by Plaintiffs' failure to frame precise discovery requests"); Crown Center Redevelopment Corp. v. Westinghouse Electric Corp., 82 F.R.D. 108, 110 (W.D. Mo. 1979) (suggesting that "lengthy and detailed sets of standard forms of interrogatories" were simply generating "predictably launched counter attacks in the form of objections and motions for protective orders").

evaluate those responses in isolation or overlook obvious deficiencies in the requests that precipitated the discovery dispute.[115] Focused and precisely drafted discovery requests may actually preempt challenges framed in terms of proportionality. At the very least, such discovery requests are more likely to withstand challenge in the context of a Rule 37(a)(3) motion to compel or a Rule 26(c) motion for protective order.[116]

Conversely, a responding party that relies on a cursory or unsubstantiated proportionality objection is not likely to overcome the "ordinary presumption" favoring broad discovery. A judge who was inclined to invoke the "reasonably calculated" mantra[117] in granting motions to compel may give short-shrift to a boilerplate assertion that the requested discovery is disproportionate. That objection will be even less effective if it

115. *Cf.* Finjan, Inc. v. Blue Coat Systems, Inc., No. 5:13-cv-03999-BLF, 2014 WL 5321095, at *2 (N.D. Cal. Oct. 17, 2014) ("one party's discovery shortcomings are rarely enough to justify another's").

116. *See* FED. R. CIV. P. 37(a)(5)(B) (if a motion to compel is denied, the court must order the moving party to pay the reasonable expenses incurred by the non-moving party in opposing the motion, unless the court finds that the motion to compel "was substantially justified or other circumstances make an award of expenses unjust").

117. In striking the "reasonably calculated" phrase from the proposed Rule 26(b)(1), the Advisory Committee stated that language was never intended to define the scope of discovery. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-44. This author need look no farther than his own decisions to find a misapplication of the "reasonably calculated" standard. *See, e.g.*, *In re* Qwest Communications International, Inc. Securities Litigation, 283 F.R.D. 623, 625 (D. Colo. 2005).

is coupled with a refusal to provide *any* responsive information.[118] As a practical matter, a "disproportionate" discovery request will almost certainly encompass a sub-set of relevant and properly discoverable information.[119] While the responding party is entitled to raise factually supportable challenges, they are required to provide responsive information and materials to the extent the request is not objectionable.[120] A boilerplate objection, even on proportionality grounds, will hardly suffice if the

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118. Both Fed. R. Civ. P. 33(b)(3) and 34(b)(2) require an objecting party to provide responses to the extent an interrogatory or request for production is not objectionable. *Cf.* Freydl v. Meringolo, No. 09 Civ. 07196(BSJ)(KNF), 2011 WL 2566087, at *3 (S.D.N.Y. June 16, 2011) ("'[B]oilerplate objections that include unsubstantiated claims of undue burden, overbreadth and lack of relevancy' while producing 'no documents and answering no interrogatories are a paradigm of discovery abuse.'") (quoting Jacoby v. Hartford Life & Accident Ins. Co., 254 F.R.D. 477, 478 (S.D.N.Y. 2009)) (alteration in original).

119. *Cf.* Bottoms v. Liberty Life Assur. Co. of Boston, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at *7 ("[a]n objection challenging a discovery request as 'overbroad' implicitly concedes that the request encompasses some information that is properly discoverable. The responding party is obligated to reasonably construe the discovery request . . . and cannot evade its [discovery] obligations by summarily dismissing an interrogatory or request for production as 'overbroad.'").

120. *Cf.* Twigg v. Pilgrim's Pride Corp, No. 3:05-CV-40, 2007 WL 676208, at *9 (N.D. W. Va. Mar. 1, 2007) (suggesting that even where a party believes a request for production is facially overbroad, that objection does not relieve the responding party of its obligation to produce documents that are responsive to that portion of the request that does seek relevant information or documents); Watson v. Scully, No. 87 CIV. 0571 (CSH), 1988 WL 73390, at *2 (S.D.N.Y. July 1, 1988) (although plaintiff's document requests were overbroad and sought irrelevant information, "defendant [was] not absolved of all responsibility to produce documents pursuant to these requests" since "[i]t is reasonable to infer that subsumed in plaintiff's overbroad request is a more specific request" that does encompass relevant documents).

court finds that the discovery response is either evasive or incomplete.[121]

If a requesting party serves discovery that is "facially objectionable," the responding party has several options. Counsel could wait the thirty days (plus time for service) permitted under Rules 33(b)(2)[122] and 34(b)(2)(A),[123] and then object, without more, on the grounds that the requested information is neither relevant nor proportional in light of the particular circumstances of the case. A better approach would be for the responding party to assert appropriate objections, but then provide the information that is properly discoverable under a reasonable construction of the requests. Production of relevant information, even in the face of overbroad discovery requests, is consistent with a proportionality objection, but also provides some protection against an award of fees and costs if those objections are unavailing and the motion to compel is granted.[124] The best approach, consistent with Rule 1, would be for the responding party to contact the requesting party immediately after being served those "facially objectionable" discovery requests and attempt to negotiate a more proportionate approach to discovery. If those discussions are successful, the responding party has saved his or her client time and money. If not, the responding party is still left with options one or two, but is actually in a stronger position vis-à-vis the court if motion practice ensues.

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121. *See* FED. R. CIV. P. 37(a)(4) ("For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond.").

122. FED. R. CIV. P. 33(b)(2).

123. FED. R. CIV. P. 34(b)(2)(A).

124. *See* FED. R. CIV. P. 37(a)(5)(A) (if a motion to compel is granted, the court must award the prevailing party reasonable expenses, including attorney's fees, unless the court finds that "the opposing party's nondisclosure, response, or objection was substantially justified" or "other circumstances make an award of expenses unjust").

IV. PROPORTIONALITY IN THE CONTEXT OF PRESERVATION AND SPOLIATION

Unlike other discovery motions, a request for relief under the proposed Rule 37(e) will present new challenges both for moving and non-moving parties. The new Rule 37(e) establishes a uniform framework for addressing the spoliation of ESI while leaving unchanged the existing common law obligation to preserve. The Committee Note accompanying Rule 37(e) acknowledges that litigants are "expend[ing] excessive effort and money on preservation" of ESI, notwithstanding the fact that the loss of ESI from one source "may often be harmless when substitute information can be found elsewhere."[125] Given that reality, proportionality will figure prominently in the application of Rule 37(e) and the corresponding burdens of proof.

While conceding some variation in the current case law, it is generally understood that a party's duty to preserve is triggered when litigation is pending or reasonably foreseeable, and extends to information or materials that the party "knows or reasonably should know" is relevant to the action.[126] The party seeking spoliation sanctions presently bears the burden of

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125. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-58-59.

126. *See, e.g.*, *In re* Pradaxa (Dabigatran Etexilate) Products Liability Litigation, No. 3:12-md-02385-DRH-SCW, 2013 WL 6486921, at *8 (S.D. Ill. Dec. 9, 2013); Quinby v. WestLB AG, 245 F.R.D. 94, 104 (S.D.N.Y. 2006). *But compare* Perez v. Vezer Industrial Professionals, Inc., No. CIV S-09-2850 MCE CKD, 2011 WL 5975854, at *6 (E.D. Cal. Nov. 29, 2011) (holding that the obligation to preserve extends to "unique, relevant evidence that might be useful to an adversary") *with In re* Pfizer Ins. Securities Litigation, 288 F.R.D. 297, 313 (S.D.N.Y. 2013) (holding that "[a] litigant has the 'duty to preserve what it knows, or reasonably should know, is relevant to the action, is reasonably calculated to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request'").

proof[127] to show that the missing evidence was (1) in the opposing party's control, (2) was relevant to a claim or defense in the case, (3) was subject to a duty to preserve, and (4) was destroyed, suppressed, or otherwise withheld.[128] The new Rule 37(e) should not materially change that initial burden of proof. After December 1, 2015, a party seeking relief under Rule 37(e) (either in the form of curative measures under subsection (1) or sanctions under subsection (2)) will be required to make a threshold showing that ESI was lost, that the missing ESI was relevant under Rule 26(b)(1), and the missing ESI was subject to a preservation obligation.

Demonstrating the "relevance" of missing ESI will necessarily implicate proportionality factors, but that hurdle should not be any greater than the threshold showing required under Rule 37(a). The proportionality factors in Rule 26(b)(1), however, militate against an all-encompassing or "blockbuster" preservation demand letter. A demand to "save everything," served in advance of litigation, is not consistent with prevailing case law.[129] More to the point, a boilerplate preservation de-

127. *See, e.g.*, Wilson v. Saint Gobain Universal Abrasives, Inc., No. 213-cv-1326, 2015 WL 1499477, at *10 (W.D. Pa. Apr. 1, 2015); Brown v. Cain, No. 11-00103-SDD-SCR, 2015 WL 893020, at *3 (M.D. La. Mar. 2, 2015).

128. *See, e.g.*, Omogbehin v. Cino, 485 F. App'x 606, 610 (3rd Cir. 2012) (quoting Bull v. United Parcel Service, Inc., 665 F.3d 68, 73 (3rd Cir. 2012).

129. *See* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc, 244 F.R.D. 614, 623 n.10 (D. Colo. 2007) and cases cited therein. *Cf.* Turner v. Resort Condominiums International, LLC, No.1:03-cv-2025-HFH-WTL, 2006 WL 1990379, at *6 (S.D. Ind. Jul. 13, 2006) (holding that a pre-litigation demand letter that requested preservation of all company electronic data was unreasonably overbroad and did not trigger a duty to preserve all such material; the preservation demand "did not accommodate the routine day-to-day needs of a business with a complex computer network and demanded actions [by the defendant] that went well beyond its legal obligations").

mand should not trump a party's obligation to undertake reasonable preservation efforts and will not guarantee the imposition of curative measures under Rule 37(e)(1) or sanctions under Rule 37(e)(2).

A requesting party would be better served by sending a preservation demand that identifies to the extent possible: (1) potential claims or causes of action; (2) the pertinent period of time, key custodians and actors; and (3) particular types or sources of ESI. The tactical advantage of this approach should be obvious. The reasonableness of a party's preservation efforts is measured, at least in part, by the quality and quantity of information that frames those efforts.[130] While an untethered preservation demand may seem advantageous given that counsel likely does not know with certainty "who has what or where relevant information may be located," its "gotcha" value may be negligible given that the preserving party is held to a standard of reasonableness, not perfection.[131] A better preservation

130. *Cf.* John B. v. Goetz, 879 F. Supp. 2d 787, 867 (M.D. Tenn. 2010) (suggesting that a party's duty to preserve should not include "evidence that the party 'had no reasonable notice of the need to retain'").

131. *See* Oto Software, Inc. v. Highwall Technologies, LLC, No. 08-cv-01897-PAB-CBS, 2010 WL 3842434, at *8 (D. Colo. Aug. 6, 2010) ("[i]n complying with its duty to preserve relevant evidence, a litigant 'is not expected to be prescient.'") (quoting Hatfield v. Wal-Mart Stores, Inc., 335 F. App'x 796, 804 (10th Cir. 2009)).

demand, from a strategic perspective, is one that includes an invitation for the responding party to engage in a dialogue addressing the parameters of its preservation obligation.[132]

The party receiving a preservation demand after December 1, 2015, should be equally strategic in formulating its response. An alleged spoliator who spurned a good-faith overture for early discussions regarding preservations may be poorly positioned to successfully challenge the moving party's threshold showing under Rule 37(e).[133] The Committee Note to Rule 37(e) makes the same point. While the Advisory Committee recognizes that the reasonableness of a party's preservation efforts should be evaluated, in part, on proportionality considerations, it also warns that "[a] party urging that preservation requests are disproportionate may need to provide specifics about these

132. *Cf.* Del Campo v. Kennedy, No. C-01-21151 JW (PVT), 2006 WL 2586633, at *2 (N.D. Cal. Sept. 8, 2006) (after noting that defendant had refused to provide more than "vague assurances" that it would discuss a preservation order and the disagreements the parties had already had, the court observed that "the need to meet and confer to develop a document preservation plan is obvious"). *But see* Jardin v. Datallegro, Inc., No. 08-CV-1462-TEG-RBB, 2008 WL 4104473, at *2 (S.D. Cal. Sept. 3, 2008) (in denying plaintiff's motion for an injunction to preserve evidence, the court noted that the parties already were under a duty to preserve relevant evidence; the court also rejected plaintiff's assertion that "defendants [had] acted uncooperatively in failing to respond to plaintiff's letters" and that "[d]efendants' failure to immediately respond . . . [was] not suspicious because those letters did not call for any response").

133. *Cf.* Pippins v. KPMG LLP, 279 F.R.D. 245, 254-255 (S.D.N.Y. 2012) (while acknowledging that "proportionality is necessarily a factor in determining a party's preservation obligations," the court also described as "unreasonable" the defendant's "refusal to do what was necessary in order to engage in good faith negotiations over the scope of preservation with Plaintiffs' counsel").

matters in order to enable meaningful discussion of the appropriate preservation regime."[134]

Conversely, a party's good faith attempts to reach agreement on the scope of preservation, even if unsuccessful, may provide the basis for a preservation order once litigation commences. The Committee Note to Rule 37(e) notes that "[p]reservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important."[135] It seems clear that an attorney seeking a preservation order from the court is in a more advantageous position if they can compare their own good faith efforts to the intransigence of opposing counsel.

Assuming the moving party sustains its initial burden of proof, Rule 37(e) then requires the court to determine whether the relevant ESI was lost "because a party failed to take reasonable steps to preserve it" and, if so, whether the lost ESI "cannot

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134. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-62.

135. *Id.* at Appendix B-60. *Cf.* Giltnane v. Tennessee Valley Authority, No. 3:09-CV-14, 2009 WL 230594, at *3 (E.D. Tenn. Jan. 30, 2009) (in adopting plaintiff's proposed Interim Order Regarding Preservation, the court warned the parties "that any attempt to impede this or related litigation through the spoliation of evidence shall be met with the appropriate sanctions and penalties, up to and including holding the offending parties in contempt of court"); *In re* Zyprexa Products Liability Litigation, No. MDL 1596, 2004 WL 3520248, at *5 (E.D.N.Y. Aug. 18, 2004) (the court's case management order acknowledged the parties' obligation to preserve relevant information and documents and stated that the "parties shall meet and confer on the preservation of documents and shall submit to the Court an agreed order for the preservation of records, or a report identifying the issues in dispute").

be restored or replaced through additional discovery." These elements function as affirmative defenses[136] for which the burden of proof should be placed on the non-moving party.[137] The party seeking relief under Rule 37(e) is rarely in a position to know with certainty what steps the non-moving party took to comply with its preservation obligation, whether those actions were reasonable under the circumstances of the particular case, or whether lost information can be restored or replaced.[138]

As noted, a party is not required to "save everything,"[139] but is expected to undertake preservation efforts that are "both reasonable and proportional to what was at issue in known or

136. *Cf. In re* YRC Worldwide Inc. ERISA Litigation, No. 09-2593-JWL, 2011 WL 1457288, at *4 (D. Kan. Apr. 15, 2011) (defining an affirmative defense as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations . . . are true").

137. *See, e.g.*, Byrne v. CSX Transportation, Inc., 541 Fed. App'x. 672, 674 (6th Cir. 2013) ("the defendant bears the burden of proof as to whether it is entitled to the benefit of an affirmative defense").

138. *Cf.* Schartz v. Rent a Wreck of America, Inc., No. 13-2189, 2015 WL 1020647, at *4 (4th Cir. Mar. 10, 2015) (noting that when "determining whether the normal allocation of the burden of proof should be altered," California courts consider, *inter alia*, "the knowledge of the parties concerning the particular fact" to be proved, "the availability of the evidence to the parties," and "the most desirable result in terms of the public policy in the absence of proof of the particular fact").

139. *Cf.* Schlumberger Technology Corp. v. Greewich Metals, Inc., No. 07-2252-EFM, 2009 WL 5252644, at *7 (D. Kan. Dec. 31, 2009) (noting that "the scope of the duty to preserve evidence is not boundless").

reasonably-anticipated litigation."[140] To that end, "[t]he burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation."[141] The Advisory Committee recognizes that ESI may be lost "despite the party's reasonable efforts to preserve" or "by events outside the party's control."[142] Similarly, a party's litigation experience may color its preservation efforts. As the Committee Note acknowledges, "[c]ourts may . . . need to assess the extent to which a party knew of and protected against" the risk of spoliation.[143]

Proportionality will also come into play in addressing the reasonableness of a party's preservation efforts. The Advisory Committee recognizes that "aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts."[144] The Committee also acknowledges that a party "may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly

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140. *See* Design Basics, LLC v. Carhart Lumber Co., No. 8:13CV125, 2014 WL 6669844, at *6 (D. Neb. Nov. 24, 2014). *See also* Wilson v. Saint-Gobain Universal Abrasives, Inc., No. 213-cv-1326, 2015 WL 1499477, at *11 (W.D. Pa. Apr. 1, 2015) ("[d]etermining whether a party had reason to believe that the evidence in question would be required in litigation is governed by a 'flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry'").

141. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155 (2013).

142. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-61.

143. *Id.*

144. *Id.* at Appendix B-61-62.

forms."[145] In short, a party should undertake preservation efforts that are both reasonable, and defensible; those criteria are not mutually exclusive. More importantly, in view of the burden of proof that may be triggered months, if not years, in the future in the context of a Rule 37(e) motion, a preserving party must approach preservation strategically. Preservation decisions should be documented contemporaneously and then audited regularly for compliance. Similarly, a party's consistent good-faith adherence to a long-standing document retention/destruction policy should provide a benchmark for evaluating the reasonableness of that party's preservation efforts in the context of the particular case. A company should not blindly delegate preservation responsibilities to employees who are then left to exercise unfettered discretion.[146] Finally, counsel should seriously consider whether their litigation hold memoranda should be drafted with a view toward producing that document to the opposing party or the court.[147] Transparency and cooperation with opposing counsel may well be the most persuasive indicia of reasonableness and the best "defense" to a possible Rule 37(e) motion.

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145. *Id.* at Appendix B-62.

146. *Cf.* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.RD. 614, 629 (D. Colo. 2007) (holding that counsel cannot direct employees to preserve all relevant information and then blithely rely upon those same employees to properly exercise their discretion in determining what information to save).

147. *Cf.* Cohen v. Trump, No. 13-CV-2519-GPC (WVG), 2015 WL 3617124, at *7 (S.D. Cal. June 9, 2015) ("[a]lthough a litigation hold letter is likely not discoverable, particularly when it is shown that the letter includes material protected by the attorney-client privilege or the work product doctrine, the basic details surrounding the litigation hold are not"). *See also* Vicente v. City of Prescott, No. CV-11-08204-PCT-DGC, 2014 WL 3939277, at *15 (D. Ariz. Aug. 13, 2014) (directing defendants to produce unredacted versions of two litigation hold letters, after defendants conceded that the letters were not attorney-client communications).

Assuming that the non-moving party did not take reasonable efforts to preserve, the court must then determine if the missing information can be restored or replaced. If it can, then no further action under Rule 37(e) is required and the court never addresses curative measures or sanctions. But if necessary, the non-moving party should bear the burden of proving that missing ESI can be restored or replaced with additional discovery.[148] To sustain that burden, the non-moving party should be required to make a factual showing as to where or from whom the replacement ESI may be obtained, or how the missing ESI can be restored. The non-moving party also should be required to provide reasonable cost estimates for restoring or replacing missing ESI.[149]

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148. *Cf.* K-Con Building Systems, Inc. v. United States, 106 Fed. Cl. 652, 660, 665 (Fed. Cl. 2012) (holding that the "offending party" bears the burden of proof establishing substantial justification or harmlessness).

149. Similar information is required where a responding party claims that information is not reasonably accessible under Rule 26(b)(2)(B). In that instance, the responding party must "provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." *See* FED. R. CIV. P. 26 advisory committee's note to 2006 amendment. *Cf.* Murray v. Coleman, No. 08-CV-6383, 2012 WL 4026665, at *2 (W.D.N.Y. Sept. 12, 2012) (requiring defense counsel, in a Rule 26(b)(2)(B) context, to provide an affidavit stating: "(1) the document/email retention policy used by DOCS currently and during the relevant time periods, (2) the dates of emails 'reasonably accessible' for production in this litigation, (3) the back up or legacy system, if any, used by DOCS to preserve or archive emails that are no longer 'reasonably accessible' and whether responsive documents or data may potentially be found on such back up or legacy systems, (4) whether accessing archived or back up emails would be unduly burdensome or costly and why, and (5) the date when a litigation hold or document preservation notice was put in place by DOCS regarding this matter and either a copy of or a description of the preservation or litigation hold utilized by DOCS.").

In the typical case, it is reasonable to assume that the producing party is "best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information"[150] and, therefore, best positioned to identify alternative sources of ESI.[151] That reality will likely prompt discovery requests directed to this specific issue. The proposed amendment to Rule 26(b)(1) acknowledges that litigants retain the right to seek discovery of information concerning the "existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter," provided that the requested information is "relevant and proportional to the needs of the case."[152] Indeed, the Advisory Committee concedes that "[f]raming intelligent requests for electronically stored information . . . may require detailed information about another party's information systems and other information resources."[153] The moving party should be permitted to conduct focused discovery to the extent they wish to challenge the non-

150. *See, e.g.*, Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 127 n.2 (S.D.N.Y. 2015) (quoting Sedona Principle 6 of *The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production*, *available at* https://thesedonaconference.org/download-pub/81).

151. *Cf.* Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("counsel must become fully familiar with her client's document retention policies as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy.").

152. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-43.

153. *Id.*

moving party's averments as to the potential for restoring or replacing missing ESI or the costs associated with those efforts. In appropriate circumstances, the court could require the alleged spoliator to bear the expense of that additional discovery.[154] This potential for "discovery about discovery" and the shifting of discovery costs may provide further incentive for transparency and cooperation on the part of the alleged spoliator.

Proportionality considerations will also guide the court's determination whether missing ESI can be replaced or restored. The Advisory Committee cautions that "efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims and defenses in the litigation," and that "substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."[155] But on this issue, the Advisory Committee's intent is less than clear.

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154. *See* Mazzei v. The Money Store, No. 01cv5694 (JGK)(RLE), 2014 WL 3610894, at *8 (S.D.N.Y. July 21, 2014) (suggesting that "[w]hen evidence is destroyed, the party who sought the evidence should be compensated for any 'discovery necessary to identify alternative sources of information'") (citing Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 78 (S.D.N.Y. 1991)). *But compare* Zimmerman v. Poly Prep County Day School, No. 09 CV 4586(FB), 2011 WL 1429221, at *35 (E.D.N.Y. Apr. 13, 2011) (while allowing the plaintiffs to take additional discovery in the wake of defendant's negligent failure to maintain relevant records, the court declined to award fees and costs incurred to cover that additional discovery, finding that the "discovery now sought by plaintiffs would, in all likelihood, have been discovery they would have requested even in the absence of the spoliation") *with* Goodman v. Praxair Services, Inc., 632 F. Supp. 2d 494, 523-24 (D. Md. 2009) (suggesting that when ruling on a spoliation motion, a court could "grant discovery costs to the moving party if additional discovery must be performed after a finding that evidence was spoliated").

155. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-62.

The Committee Note suggests that judges may look to "[o]rders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses" in addressing whether missing ESI can be restored or replaced.[156] As noted above, Rule 26(b)(2)(B) places on the responding party the initial burden of showing that the desired ESI is not reasonably accessible because of undue burden or expense, and then requires the requesting party to show that these burdens and costs are justified under the particular circumstances of the case. Even with that good cause showing, however, the court under Rule 26(b)(2)(B) could shift the costs of that discovery to the requesting party. Similarly, Rule 26(c)(1)(B) permits the court, for good cause, to include in a protective order an allocation of expenses.

This author presumes that Rules 26(b)(2)(B) and 26(c)(1)(B) were cited in the Committee Note as examples of how a court may consider proportionality factors in evaluating the burdens and benefits that flow from the additional discovery directed at restoring or replacing lost ESI. Any decision regarding additional discovery, and who ultimately bears the attendant fees and costs, should take into consideration the importance of the missing evidence relative to the claims and defenses in the case; the degree to which available information is comparable to or a ready substitute for the missing evidence; the costs and burdens associated with replacing or restoring the missing evidence; and the relative financial resources of the parties. Where the non-moving party failed to take reasonable steps to preserve, the court should consider whether the missing evidence has marginal value or if equivalent information is available from sources that are reasonably accessible. In that circumstance, it might be appropriate to impose the cost of that discovery on the moving party, particularly if those costs are

156. *Id.*

minimal. The requesting party could pragmatically decide to forego that additional discovery after weighing the relative burdens and benefits. However, the moving party should not be required to absorb the costs of restoration or replacement where the missing evidence is critical and the expense associated with that effort is substantial. In that instance, shifting costs would unfairly reward the party who failed to take reasonable steps to preserve and was not sufficiently informed about its own ESI and information management systems.

V. A PROACTIVE APPROACH TO PROPORTIONALITY

The application of proportionality factors in a given case is not limited to the discovery process and should not be defined in terms of a "perfect fit" or measured by some inflexible quantitative formula. Proportionality principles can impact all phases of the pretrial process and, indeed with respect to preservation decisions, could have a bearing on events that occur even before the lawsuit commences. Like any case management tool, proportionality principles are most effective when they are employed creatively and iteratively by the parties and the court. The following are examples of techniques used by many district and magistrate judges to advance the goal of proportionality.

A. Proportionality and the Rule 26(f) Conference

Although counsel typically considers proportionality principles from their perspective as an advocate, they have equally important responsibilities as case managers. The latter role is re-affirmed in the amended version of Rule 1, which will require the parties (and their attorneys) to employ the Civil Rules to secure the just, speedy, and inexpensive determination

of every action and proceeding.[157] To that end, the Rules envision that the parties will address proportionality issues at the earliest possible opportunity.[158] Rule 26(f) states that the parties should develop a discovery plan that reflects their views and proposals on, *inter alia*, "the subjects on which discovery may be needed," "whether discovery should be conducted in phases or be limited to or focused on particular issues," and "what changes should be made in the limitations on discovery imposed under these rules . . . and what other limitations should be imposed."[159] Rule 37(f) further authorizes the court to award reasonable fees and costs if "a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f)."[160]

Beyond the Rule 26(f) meet-and-confer setting, counsel should be prepared to address proportionality during scheduling conferences with the court. Those discussions should further the goals of "expediting disposition of the action, establishing early and continuing control so that the case will not be protracted because of lack of management, [and] discouraging

157. *Id*. at Appendix B-21-22. *Cf.* Home Design Services, Inc. v. Trumble, No. 09-cv-00964-WYD-CBS, 2010 WL 1435382, at *5 (D. Colo. Apr. 9, 2010) ("[t]he importance of a well-considered case management plan has become even more apparent as the number of cases actually proceeding to trial decreases. Counsel should have an interest in developing a discovery plan and managing the pretrial process with a view toward the most likely litigation outcomes, *i.e.*, settlement or disposition through motion."); *In re* Complaint of Mobro Marine, Inc., No. 3:02-CV-471-J-20TEM, 2003 WL 22006257, at *1 (M.D. Fla. Mar. 24, 2003) (suggesting that "counsel have a professional obligation to develop a cost-effective plan for discovery" and to promote the public's interest in minimizing the costs of litigation).

158. Witt v. GC Services Limited Partnership, __ F.R.D. __, 2014 WL 6910500, at *6 (D. Colo. Dec. 9, 2014).

159. FED. R. CIV. P. 26(f)(3)(B) and (E).

160. FED. R. CIV. P. 37(f).

wasteful pretrial activities."[161] "The court's responsibility, using all the information provided by the parties, is to consider [the proportionality factors] in reaching a case-specific determination of the appropriate scope of discovery."[162] As one court has explained in addressing proportionality, "there comes a point where the marginal returns on discovery do not outweigh the concomitant burden, expense, and bother. The Court's role is to try and find the right balance."[163]

Application of proportionality principles extends beyond simply serving or responding to discovery requests. For example, in a case involving voluminous ESI, the parties can effectively search, analyze, and review that data, while also saving time and money, by employing technology rather than more traditional techniques such as manual review or key-word searching.[164] Those savings are frequently compounded when the parties can agree on the use and actual implementation of technology, and negotiate appropriate search protocols.[165]

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161. FED. R. CIV. P. 16(a)(1), (2), and (3).

162. June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-40.

163. Goodman v. Burlington Coat Factory Warehouse Corp., 292 F.R.D. 230, 233 (D.N.J. 2013).

164. *See, e.g.*, Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 191-92 (S.D.N.Y. 2012) (holding that counsel's selection of an appropriate methodology for reviewing and producing relevant ESI must also take into consideration Rule 1 and the proportionality considerations in Rule 26(b)(2)(C)).

165. *See, e.g.*, Ruiz-Bueno v. Scott, No. 2:12-cv-0808, 2013 WL 6055402, at *3 (S.D. Ohio Nov. 15, 2013) (recognizing the potential for disagreements about proper search tools in an ESI-intensive case, the court noted that a proper Rule 26(f) conference should address "cooperative planning, rather than unilateral decision-making about matters such as 'the sources of information to be preserved or searched; number and identities of custodians whose data will be preserved or collected . . . ; topics for discovery; [and] search terms and methodologies to be employed to identify responsive data . . . .'").

Rule 26(f) also directs counsel to address "issues about claims of privilege or of protection as trial-preparation materials."[166] Experienced attorneys understand the time and expense incurred in preparing privilege logs that all-too frequently become the genesis of discovery disputes or are criticized by the court as inadequate under Rule 26(b)(5).[167] Although Rule 502 of the Federal Rules of Evidence gives the parties (and the court) considerable latitude to adopt procedures to minimize the costs and attendant risks associated with privilege review, that safeguard is typically overlooked by even experienced attorneys. In addition, Rule 29[168] permits the parties to stipulate to modifications of the procedures governing discovery, including the preparation of privilege logs. Unfortunately, such stipulations are rarely employed.[169]

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166. *See* FED. R. CIV. P. 26(f)(3)(D).

167. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 265 (D. Md. 2008) (noting that "[i]n actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or *in camera* review of the documents themselves.").

168. FED. R. CIV. P. 29.

169. *See, e.g.*, Philip J. Favro, *Inviting Scrutiny: How Technologies are Eroding the Attorney-Client Privilege*, 20 RICH. J.L. & TECH. 2, ¶ 151 (2013) (delineating methods for counsel, clients, and courts to reduce privilege log burdens); John M. Facciola & Jonathon M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2010) (suggesting, for example, that parties can agree that a privilege log that will not include exact duplicates or correspondence between the client and litigation counsel sent after the pending lawsuit commenced).

B. Use Phased Discovery to Focus on the Most Important, Most Accessible Information

Proportionality principles presume that all relevant information is not equally important, yet the usual scheduling order is structured around the dates for completing *all* discovery and filing dispositive motions. Given that only a very small percentage of civil cases actually proceed through trial, parties are preparing scheduling orders that are premised on the least likely method of disposition. More to the point, the information that the parties require to make an informed assessment of the case in advance of a settlement conference or mediation is invariably less than the discovery needed to actually try that case.

Although counsel and the court typically consider proportionality from the standpoint of quantitative limits on the scope of discovery, that discussion overlooks a more effective case-management technique that may actually be less confrontational. The court should encourage the parties to consider a phased approach to discovery that focuses first on the most important witnesses, the most accessible ESI and documents, and

those case-dispositive legal issues that can be decided with minimal factual development.[170]

The parties and the court also can promote the goal of proportionality by deferring work and costs that may be unnecessary in the event the case does not proceed to trial. For example, this author frequently defers expert depositions, absent extraordinary circumstances, until after rulings on summary judgment motions when it becomes clear those depositions are actually necessary to prepare for trial. Expert disclosures under Rule 26(a)(2) are designed to accelerate the exchange of basic information, to help focus the discovery process, and to enable the opposing party to identify and retain rebuttal experts.[171] All of those goals can be achieved, without the necessity for depositions, if the parties and their experts fully adhere to their disclosure obligations. If those disclosures are inadequate, the proper

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170. *See, e.g.*, United States ex rel. Emanuele v. Medicor Associates, Inc., No. 10-245, 2014 WL 3747666, at *2 (W.D. Pa. Jul. 29, 2014) (in rejecting defendants' challenge to the temporal scope of the relator's discovery requests, the court found "that the phased discovery process proposed by the special master adequately address[ed] the burden and proportionality issues raised by the defendants"); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (after noting that plaintiffs' claims had been "in constant flux" for over six years, the magistrate judge ordered a phased discovery schedule "to ensure that discovery is proportional to the specific circumstances of [the] case, and to secure the just, speedy, and inexpensive determination of this action"). *See also* The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 297 (2010) (suggesting that early in the discovery process, "the court, or the parties on their own initiative, may find it appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible and least expensive sources. Phasing discovery in this manner may allow the parties to develop the facts of the case sufficiently to determine whether, at a later date, further potentially more burdensome and expensive discovery is necessary or warranted.").

171. *See* Securities and Exchange Commission v. Nacchio, No. 05-cv-00480-MSK-CBS, 2008 WL 4587240 (D. Colo. Oct. 15, 2008).

remedy is not to expend the client's money deposing the other side's expert, but rather to compel a comprehensive disclosure under Rule 37(a)(3)(A). Rule 37(a)(4) provides that an evasive or incomplete disclosure "must be treated as a failure to disclose" and Rule 37(c) mandates that a party that fails to comply with Rule 26(a) or (e) may not use that witness or information for any purpose unless the failure was substantially justified or harmless. A premature expert deposition may simply serve to cure a deficient report at the deposing party's expense.[172]

Admittedly, Rule 26(b)(4) states that "a party may depose any person who has been identified as an expert whose opinions may be presented at trial."[173] However, Rule 26(b)(2)(C) acknowledges the court's authority to alter the limits or manner of conducting discovery. The Committee Note to Rule 26(a)(2) observes that a comprehensive expert report may result in an abbreviated expert deposition or "in many cases . . . may eliminate the need for a deposition."[174] As the court noted in *Salgado v. General Motors Corp.*,[175] "[t]he [expert] report must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush; and moreover the report must be sufficiently complete so as to shorten or decrease the need for expert depositions and thus to conserve resources."[176]

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172. *See* FED. R. CIV. P. 16(b)(4)(E)(i) ("Unless manifest injustice would result, the court must require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D).").

173. FED. R. CIV. P. 26(b)(4).

174. *See* FED. R. CIV. P. 26(2) advisory committee's note to 1993 amendment.

175. 150 F.3d 735 (7th Cir. 1998).

176. *Id.* at 741 n.6.

C. Avoid Self-Inflicted Discovery Costs

Finally, proportionality principles militate against incurring cumulative or duplicative discovery expenses. In cases involving a corporate party, counsel will often serve contention interrogatories, knowing that the answers to those interrogatories should be admissible as statements offered against that corporate entity under Fed. R. Evid. 801(d)(2). Counsel invariably notices the same corporate party for a Fed. R. Civ. P. 30(b)(6) deposition and then serves a deposition notice that lists topics largely duplicative of subjects addressed in those previously answered interrogatories. That same Rule 30(b)(6) witness may later be disposed in their individual capacity. While the Civil Rules certainly permit a party to use all available methods of discovery in any sequence they choose,[177] that freedom of choice may be constrained by Rule 26(b)(2)(C), which requires the court to limit the frequency or extent of discovery otherwise permitted if "the discovery sought . . . can be obtained from some other source that is more convenient, less burdensome, or less expensive," or if "the party seeking discovery has had ample opportunity to obtain the information by discovery in this action." A Rule 30(b)(6) deposition that simply plows over old

177. *See* FED. R. CIV. P. 26(d)(2).

ground or requires the deponent to laboriously recite information previously disclosed in interrogatory responses may be vulnerable to challenge on proportionality grounds.[178]

The defense bar has strongly advocated for an increased emphasis on proportionality, but then frequently employs litigation tactics that undercut that objective. Every plaintiff's attorney (and most judges) are familiar with the standard litany of "affirmative defenses" appended to the end of a defendant's answer to the complaint. It is certainly true that defenses may be waived if they are not raised in a motion or included "in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course."[179] But the author regularly sees answers that list twenty or more affirmative defenses, many of which are plainly inapposite to the claims and circumstances of the particular case. Those "cut and paste" defenses may, however, unintentionally expand the scope of discovery, since Rule 26(b)(1) permits a party to "obtain discovery regarding any

178. *See, e.g.*, United States ex rel. Fago v. M&T Mortgage Corp., 235 F.R.D. 11, 25 (D.D.C. 2006) ("[a]lthough Rule 30(b)(6) requires a designated witness to thoroughly educate him or herself on the noticed topic, there must be a limit to the specificity of the information the deponent can reasonably be expected to provide;" concluded there was "no added benefit to compelling the same information through a Rule 30(b)(6) deposition because, like Rule 30(b)(6) deposition testimony, an interrogatory can be served on and answered by a corporation via its officers and agents"); Tri-State Hospital Supply Corp. v. United States, 226 F.R.D. 118, 126 (D.D.C. 2005) (noting that under Rule 26(c), the court may prevent a party from wasting its opponent's time and thereby causing undue burden or expense; the court observed that a 30(b)(6) deposition should be productive and "not simply an excuse to obtain information that is already known" and indicated it would "entertain, if necessary, any claim that the power to take [the Rule 30(b)(6) depositions] was abused by the manner in which the depositions were conducted, to include the claim that they were nothing more than duplicative of the discovery already provided").

179. FED. R. CIV. P. 12(h)(1)(B).

nonprivileged matter that is relevant to any party's claim *or defense.*" Rule 26(a)(1)(A)(i) and (ii) also require a party to automatically disclose the name of each individual likely to have discoverable information, and to copy or describe by category all documents or ESI that the disclosing party may use to support its defenses. A plaintiff can hardly be criticized for requesting additional interrogatories in order to address the factual underpinnings or legal merits of defendant's laundry list of defenses, particularly because the plaintiff (and the court) are entitled to presume that each of those affirmative defenses have a good faith basis in law and fact.[180]

VI. CONCLUSION

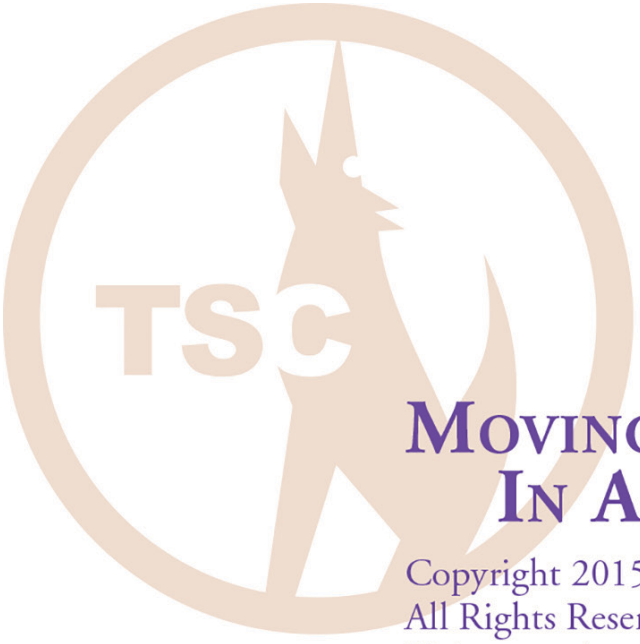
Proportionality has been and will remain a part of the civil discovery process. For that reason, lawyers and judges must move beyond the abstract debate over proportionality. While the proportionality requirements in an amended Rule 26(b)(1) will not materially change the discovery obligations that already govern requesting and producing parties, it is disingenuous to suggest that the proportionality factors will be easily applied in every case, particularly at the outset of the litigation. Parties inevitably embark on the discovery process with

180. Under Fed. R. Civ. P. 11(b), by signing an answer, an attorney is certifying to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the answer "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," that the "defenses and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law," and "the factual contentions have evidentiary support . . . or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.").

less than complete information.[181] But that problem already exists under the current version of the Civil Rules. The solution is not to abandon proportionality as a guiding discovery principle, but rather for lawyers and jurists to find alternative and creative ways to incorporate proportionality factors in an overall discovery plan and in their pre-litigation preservation decisions.[182] The challenge for lawyers is to view proportionality, not as an opportunity for gamesmanship or as a constraint on legitimate discovery, but rather as a means to achieve the objectives underlying Rule 1.

181. *Cf.* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-40.

182. *See generally* Philip J. Favro & Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933 (2012) (discussing generally the efforts undertaken by circuit, district, and state courts to increasingly promote the salutary impact of proportionality standards in the discovery process).



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A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26

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I. ABSTRACT

The exponential growth of electronically stored information and the challenges it imposes on parties in civil litigation have increased the need for counsel to understand and effectively navigate proportionality arguments. Yet, few attorneys have mastered this aspect of civil discovery.[2]

Achieving proportionality in civil discovery is critically important to securing the just, speedy, and inexpensive resolution of civil disputes, consistent with the edict of Federal Rule of Civil Procedure 1. Despite periodic changes in the civil discovery rules since 1980 to address claims of excess, burden, and abuse – as well as to provide explicitly for electronic discovery – respected authorities continue to express dissatisfaction with the handling of discovery issues and disputes. Arguably, much of this continued frustration is rooted in the perception that preservation and production burdens are not proportional to the lawsuits that generate the discovery. The authors submit that much of this frustration stems from the failure of attorneys to master the proportionality concepts embedded in the civil rules.

In this article, the authors explore the evolution of proportionality in the civil rules and jurisprudence, as well as the criticism engendered by the ongoing failure of parties and their counsel to properly implement those rules, which in turn impeded the development of a coherent and predictable body of case law, frustrating practitioners and their clients. The authors conclude that the failed promise of proportionality is rooted in the absence of the consistent and explicit consideration and presentation of proportionality arguments and objections. In this context, the authors recognize the renewed call for greater attention to proportionality in new state rules of civil procedure adopted in Minnesota and Utah since the beginning of 2012, as well as the emphasis on proportionality in proposed changes to the Federal Rules that, absent congressional action under the Rules Enabling Act, will become effective as of December 1, 2015. This renewed consensus regarding the critical role of proportionality in civil discovery underscores the need for attorneys to master proportionality

2. The guidance developed in this article is equally applicable under the existing Federal Rules as well as analogous state rules governing discovery under state law.

arguments.

The authors propose a new approach to mastering proportionality: a uniform set of practical considerations drawn from the current and proposed civil rules that attorneys should address when considering proportionality issues in discovery. This proposed approach necessarily requires a focused and standardized application of this methodology to assess, raise, and argue proportionality in discovery disputes. The authors contend this methodology will increase counsels' certainty when framing arguments. Moreover, the authors further contend that this methodology will leave less room in discovery disputes for extended forays into purely ideological debate while providing much needed consistency for courts in understanding and addressing the disputes. If adopted, this methodology could standardize the approach to proportionality in discovery in the same manner that the factors enumerated in Rule 23(a) have led to a largely standardized approach to class certification briefing and decisions.

Finally, the authors submit ten "*best practices*" drawn from their studies, analysis, and years of experience. These are intended to present practical ways to consider and apply proportionality in civil litigation.

The authors believe that the true promise of any proportionality rules can only be realized by a change in practice (and culture) that must be learned and enforced.

II. INTRODUCTION

The concept of proportionality in discovery was formally embedded in the Federal Rules of Civil Procedure in 1983.[3] At that time, Rule 26(b)(1)(iii) was amended to "address the problems of discovery that is disproportionate to the individual lawsuit"[4] and the perceived tendency of litigants to abuse the discovery process in order to attain a tactical advantage. The amended Rule 26 required courts to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." The new language sought to bring about more tailored discovery – both in terms of requests and responses. The contemporaneous adoption of Rule 26(g), which paralleled the proportionality language of Rule 26(b), also sought to change the conduct of parties and their counsel in discovery. Of particular importance, this provision imposed an affirmative duty on counsel to engage in pretrial discovery in a responsible manner that was consistent with the spirit and purposes of Rule 1 and Rules 26 through 37. This affirmative duty is backed by the explicit availability of sanctions for abuse.

Notwithstanding this watershed moment in the evolution of the Federal Rules, many litigants have seemingly been unable to master these proportionality concepts. As a result, the parameters of proportional discovery remain ill-defined. The lack of systematic application of proportionality by counsel when engaging in discovery, and by courts in ruling on discovery disputes, has impeded real change in the way in which discovery is perceived and experienced.

The failure to master proportionality in discovery led to more acute problems with the exponential increase in electronic data discovery at the beginning of the 21st century. It is now beyond dispute that gathering and reviewing all available potentially relevant electronic data is a practical

3. Unless otherwise noted, all further references to the Rules or the Federal Rules are to the Federal Rules of Civil Procedure.

4. FED. R. CIV. P. 26, Advisory Committee Notes (1983) ("The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.").

impossibility in most cases.[5] However, no generally accepted and consistent approach for paring down and targeting discovery requests in a fair and proportional manner has emerged. Notably, although the Federal Rules were amended in 2006 to address the unique burdens of electronic discovery, a fair and consistent methodology for discerning proportionality remains elusive. Recognizing the continued dissatisfaction with the discovery process, especially with respect to the perception that burdens and costs are frequently not commensurate with the needs of a case, the Federal Advisory Committee on Rules of Practice and Procedure turned its attention again to the concept of proportionality in 2010.[6] As evidenced by the discussions amongst scholars and practitioners, the new proposed rule that is set for enactment in December 2015 underscores the need to understand the concept of proportionality and find a practical approach for litigants to apply it consistently.[7]

The writers accordingly propose a two-part framework that practitioners can adopt to help them master the elusive concept of proportionality. First, we recommend that practitioners adopt a uniform assessment matrix to consider proportionality (whether as a requesting or responding party) – a "proportionality matrix." The matrix would function in a similar manner to the Rule 23(a) factors that parties and courts apply when assessing the appropriateness of certifying a class. Like all such devices, the proportionality matrix only provides an analytical framework, as each case is different; whether a particular discovery request is proportional will depend on an analysis of the particular factors applicable in that case. A more rigorous and structured approach to proportionality disputes by counsel should lead to more consistent results, increasingly meaningful judicial guidance over time, and more predictable outcomes for clients.

Second, we identify a number of best practices to guide the assessment and decision-making process of counsel engaging in discovery

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5. "[P]erfection in preserving all relevant electronically stored information is often impossible." Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, Rules App. B-61 at 41 (Sept. 2014). *See infra* pp. 41-43 and notes 136, 140.

6. Although this article recognizes the impact of the proposed amendments to FED. R. CIV. P. 26(b), the authors believe that the proportionality methodology set forth herein is equally consistent, appropriate, and applicable under the current civil rules.

7. The U.S. Supreme Court adopted the proposed amendments and transmitted the revised Federal Rules to Congress for final approval on April 29, 2015. Absent Congressional legislation to reject, modify or defer the rules pursuant to the *Rules Enabling Act*, the proposed amendments will become effective December 1, 2015. References to "proposed Rules" or "new rules" in this article refer to the proposed amendments that are scheduled to take effect in December 2015.

efforts. None of these considerations is talismanic, but they reflect our joint distillation of experience into common sense explanations of proportionality and how to understand its application in civil discovery.[8]

To provide background for these two sections, we first briefly examine the origins of the concept of proportionality in the U.S. civil discovery system, from the 1970s through the current refocused attention on the topic. We specifically address the genesis and development of the proposed Rule 26(b)(1), to discern how its amendment will help achieve the promise of proportionality. We then assess the failed promise of current Rule 26(b)(2)(C) (and its predecessors) (1983-2015), concluding that much of the lost opportunity can be traced to two factors: (i) the failure to apply the elements of proportionality analysis on a sufficiently granular level that focuses on the value of the discovery at issue in light of Rule 1 considerations; and (ii) the absence of a meaningful, consistent approach due to the disparate way in which litigants currently frame and address proportionality arguments.

III. A BRIEF HISTORY OF PROPORTIONALITY IN THE FEDERAL RULES (PART I: 1937-1983)

The doctrine of proportionality has always been available to courts to limit discovery to that which is relevant and necessary for effective litigation of the issues in a case.[9] Indeed, the concept of proportionality existed in practice long before being officially embodied in the Federal

8. The authors expect that practitioners will also consult other emerging guidance for courts and litigants regarding proportionality. For instance, the Duke Law Center for Judicial Studies is publishing a document entitled Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality (hereinafter "Guidelines and Practices") (Duke Law School Center for Judicial Studies (Final Version on File with Authors). The final version will be posted on the Duke Law Center website, https://law.duke.edu/sites/default/files/centers/judicialstudies/judicature-99-3_guidelines.pdf/ and published in 99 JUDICATURE No. 3, ___ (Winter 2015). This document identifies high level "guidelines" regarding the new Rule 26(b)(1) and its proportionality factors as well as suggested practices for effective judicial case-management.

9. *See, e.g.*, Welty v. Clute, 1 F.R.D. 446, 446-47 (W.D.N.Y. 1940) (finding a second deposition of plaintiff unnecessary given the availability of other discovery); Waldron v. Cities Serv. Co., 361 F.2d 671, 673 (2d Cir. 1966), *aff'd*, 391 U.S. 253 (1968) ("The plaintiff . . . may not seek indefinitely . . . to use the [discovery] process to find evidence in support of a mere 'hunch' or 'suspicion' of a cause of action."); Jones v. Metzger Dairies, Inc., 334 F.2d 919, 925 (5th Cir. 1964) ("Full and complete discovery should be practiced and allowed, but its processes must be kept within workable bounds on a proper and logical basis for the determination of the relevancy of that which is sought to be discovered."); Dolgow v. Anderson, 53 F.R.D. 661, 664 (E.D.N.Y. 1971) ("A trial court has a duty, of special significance in lengthy and complex cases where the possibility of abuse is always present, to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense.").

Rules. In many ways, Rule 1 itself is a reflection of the balancing of interests that are required – "*just*," "*speedy*," and "*inexpensive*" – and this mandate has been in place since 1937.[10] For functional and utilitarian reasons, courts in the modern era have long employed some version of proportionality to resolve discovery disputes.

Despite the primacy of the issue, the Federal Rules did not initially provide any guidance regarding the proper scope of "*proportional*" discovery beyond the aspirational goals of Rule 1. By the mid-1970s, however, it became evident that lawyers could exploit the broad provisions of the Federal Rules to make the discovery process as slow and laborious as possible. In short, "*mastery*" of discovery too often came to mean evading any measure of proportionality – for both requesting and responding parties. Worse, this gaming of the system disproportionately affected parties of limited means and imposed an increasingly profound hardship on courts tasked with mediating complicated, contentious, and unnecessary discovery disputes. In 1976, an ABA task force was established to address the unfair use of the discovery process.[11] The ABA committee concluded that discovery abuses broke down into three common complaints: (1) "discovery was too costly[;]" (2) "discovery procedures were being misused[;]" and (3) discovery was subject to "overuse."[12]

The 1980 amendments to the Federal Rules acknowledged some of these concerns, but fell short of addressing the widespread practice of discovery abuse.[13] Indeed, numerous commentators and legal organizations expressed concern that the 1980 amendments had failed to address the full scope of the problem, or to acknowledge the disproportionate effect abuse of the process had on litigants of limited means (or, conversely, on the ability of a single plaintiff to inflict disproportionate discovery costs on

10. The most notable change in the 77 years since adoption was the 1993 Amendment, which the Advisory Committee Note describes as follows: "The purpose of this revision, adding the words 'and administered' to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned." FED. R. CIV. P. 1, Advisory Committee Notes (1993).

11. ABA, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 192 (1976).

12. Frank F. Flegal & Steven M. Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U. L. REV. 597, 598 (1981) (citing to ABA, *Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure* 6-11 (1979) (unpublished)).

13. *Id.* at 616; *But see*, Proposed Amend to Federal Rules of Civil Procedure , 85 F.R.D. 521 (1980) (Powell, J., dissenting) (recommending against adoption of amendments because they did not go far enough to curb discovery abuse, including protecting persons of limited means against excessive discovery costs).

large corporations).[14] Although little consensus emerged regarding how, precisely, the fledgling idea of "proportionality" might be attained, it was generally agreed that fairness and efficiency in complex litigation depended upon the development of more precise rules for eliciting relevant information in a balanced and efficient manner[15], and that a critical component of the analysis must be an assessment of whether sought-after information was embarrassing, oppressive, or unduly burdensome. This inquiry would also take into account the nature and complexity of the case, the amount in controversy or other values at stake, and the extent to which discovery had already taken place.[16] In dispute, however, was whether the relative resources of the parties should also be taken into consideration.[17] In particular, some commentators were concerned that considering the financial means of the parties might lead to the granting of discovery requests that would otherwise be considered burdensome and oppressive simply because providing the requested information would not impose a significant burden on a large party "such as the government, a major corporation, or a wealthy individual[.]"[18]

The 1983 Amendments to the Federal Rules were enacted in response to the many, continued, and frequent calls for reform.[19] In promulgating the 1983 Amendments, the Advisory Committee noted that "[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems."[20] Notably, the Advisory Committee removed the following sentence from Rule 26(b): "Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these [discovery] methods is not limited."[21] The stated purpose of eliminating the final sentence of the rule was to urge the court to identify and limit needless

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14. *See, e.g*., Maurice Rosenberg & Warren King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 BYU L. REV. 579; 580-81 (1981); ABA, *Second Report of the Special Committee for the Study of Discovery Abuse* (1980).

15. *See, e.g*., Flegal *supra* note 11, at 608 ("No one can seriously disagree, we think, with the principle that the discovery that is allowable ought to be measured against the needs of the particular case.").

16. *Id*., at 608-09 (citing ABA, *Second Report of the Special Committee for the Study of Discovery Abuse* 16a, at 2a, (1980)).

17. Rosenberg *supra* note 13, at 590 (suggesting adding a factor to Rule 26 requiring consideration of "the resources reasonably expected to be available to the parties or persons involved[.]").

18. Flegal *supra* note 11, at 610.

19. Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery through Local Rules*, 30 VILL. L. REV. 767, 780- 81 (1985).
available at http://digitalcommons.law.villanova.edu/vlr/vol30/iss3/3.

20. FED. R. CIV. P. 26, Advisory Committee Notes (1983).

21. *Id*.

discovery.[22]

The language of the new rule in 1983 (then denominated as Rule 26(b)(1) and, as of December 2015, denominated as 26(b)(2)(C) with modifications) provided:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

The Advisory Committee Notes to the 1983 Amendments[23] indicate that subsection (iii) was designed to address the problem of disproportionate discovery and list factors to be considered when determining proportionality: the nature and complexity of the lawsuit, the importance of the issues at stake, the parties' resources[24], and the significance of the substantive issues. The Committee Notes also explicitly state that public policy concerns such as employment practices and free speech may have importance beyond the monetary amount at stake, and the proportionality calculus should include this consideration.[25]

At the same time that Rule 26(b)(1)(iii) was added to the Federal Rules in 1983, Rule 26(g) also was added. The rule imposed an affirmative duty upon attorneys to engage in civil discovery in a manner consistent with Rules 1 and 26-37. The Rule provided

> . . . by signing a discovery response or objection, an

22. *See id*.

23. FED. R. CIV. P. 26, Advisory Committee Notes (1983).

24. The Advisory Committee did not adopt language finding that courts should consider the *relative* resources of the parties. Although the 1983 Amended Rule made reference to "the parties' resources" as a consideration, the Rule did not require or discuss comparing the resources of the parties *against each other*. FED. R. CIV. P. 26(b)(2)(C)(iii).

25. *Id*.

> attorney is certifying that it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

The Advisory Committee noted that Rule 26(g) was designed to make an attorney "pause and consider" the reasonableness of a discovery request or response.[26] This included a requirement that counsel make a reasonable inquiry into the factual basis of a discovery request or response.[27] As is clear from the text, 26(g)(1)(B) tracked the notions of proportionality reflected in Rule 1 and the contemporaneously added Rule 26(b)(1).[28]

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26. FED. R. CIV. P. 26, Advisory Committee Notes (1983).

27. *Id.*

28. Today, Rule 26(g) largely tracks the language implemented in 1983. The full text of the rule provides:

> (g) Signing Disclosures and Discovery Requests, Responses, and Objections.
>
> (1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
>
> (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
>
> (B) with respect to a discovery request, response, or objection, it is:
>
> (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
>
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.
>
> (2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.
>
> (3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

IV. A BRIEF HISTORY OF PROPORTIONALITY IN THE FEDERAL RULES (PART II: 1983-PRESENT)

The 1983 Amendments brought about varied and specific changes. Despite the wide recognition of abuse both before and after codification, however, few courts were confronted with specific questions regarding the proper application of the newly amended rules. Even fewer courts appeared to enforce proportionality concepts with the powers available in Rule 26(g), and parties and their lawyers seemingly ignored the precepts of Rule 26(g).[29]

In 1993, further amendments to Rule 26(b)(2) added two more factors to the proportionality analysis: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." The 1993 Advisory Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery * * *." The Note also stated that the changes in Rule 26(b)(2) were designed "to enable the court to keep tighter rein on the extent of discovery."[30] Although the rule change was met with some fanfare, its effect on discovery practice appears to have been muted.[31]

As a result, neither courts nor litigants had attained any mastery over proportionality arguments before the tsunami of electronically stored information added layers of complexity to an already confused system of discovery in the late 1990s. Not only was such electronically stored information nearly limitless in scope, but it was also increasingly difficult to retrieve and produce because of its volume, its persistence, and the financial burden of review. Thus, while the need for a proportionality approach had become even more urgent, the ability to develop this approach had become more complicated in light of the explosion of electronically stored information.

In response to these new challenges, Rule 26(b)(2)(B) was added in 2006 to address the issue of electronically stored information which was deemed "not reasonably accessible" due to the costs and burdens associated with its retrieval. The Advisory Committee recognized that although information may not be reasonably accessible, it nevertheless could be

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29. *See* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357-63 (D. Md. 2008) (in-depth discussion of the history of Rule 26(g) and its impact..).

30. FED. R. CIV. P. 26, Advisory Committee Notes (1993).

31. A search of Westlaw's ALLFEDS database only reflected 120 cases between 1993 and 2006 that cite the rule after it was renumbered as 26(b)(2)(iii) (and before it was renumbered to its present day nomenclature of 26(b)(2)(C)(iii) in 2006).

necessary and relevant to pending litigation. Accordingly, the Advisory Committee wrote in the Notes to this amendment that the costs and burdens of retrieving not reasonably accessible information are properly considered as part of the proportionality analysis of discovery.[32] The concept of proportionality was implicitly recognized as a key factor in both preservation and discovery, but no other rule change in 2006 addressed the proportionality provisions.

Not long after the 2006 amendments became effective, and against the backdrop of continued frustration with the scope of civil discovery and discovery disputes, discussions regarding civil discovery scope and limitations arose anew. As The Sedona Conference® urgently noted in 2007: "Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case," because "[o]therwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation."[33] Federal and state courts began to address proportionality through local rules and ESI Guidelines.[34] Then, in 2010, the United States Judicial Conference's Advisory Committee on Civil Rules sponsored a conference at Duke University School of Law (the "Duke Conference") that framed many of the questions that have now percolated into the package of 2015 rules amendments.

The 2010 Duke Conference proclaimed that its goal was to focus on

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32. *See* FED. R. CIV. P. 26(b), Advisory Committee Notes (2006).

33. *The Sedona Principles, Second Edition: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2d ed. 2007), 17 Cmt. 2.b.; *accord, e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 522 (D. Md. 2010) (The duty to preserve "is neither absolute, nor intended to cripple organizations.... [T]he scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation." (internal citations and quotation marks omitted)); Kay Beer Distrib., Inc. v. Energy Brands, Inc., No. 07-C-1068, 2009 WL 1649592, at *4 (E.D. Wis. June 10, 2009) (the "mere possibility of locating some needle in the haystack of ESI ... does not warrant the expense [defendant] would incur in reviewing it"); S. Capitol Enters., Inc. v. Conseco Servs., L.L.C., No. 04-705-JJB-SCR, 2008 WL 4724427, at *2 (M.D. La. Oct. 24, 2008) ("the likely benefit ... is outweighed by the burden and expense of requiring the defendants to renew their attempts to retrieve the electronic data.").

34. *See, e.g.*, N.D. Cal. Guidelines for the Discovery of Electronically Stored Information, Guideline 2.02(a) (addressing one of the topics the parties should discuss at the Rule 26(f) conference: "The sources, scope and type of ESI that has been and will be preserved – considering the needs of the case and other proportionality factors – including date ranges, identity and number of potential custodians, and other details that help clarify the scope of preservation"), *available at* http://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines.pdf; Delaware Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI") (stating that "Proportionality… includes identifying appropriate limits to discovery, including limits on custodians, identification of relevant subject matter, time periods for discovery and other parameters to limit and guide preservation and discovery issues."), *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf.

solutions "to secure the just, speedy, and inexpensive determination of every action and proceeding" and to contain "the current costs of civil litigation, particularly discovery."[35] Although changes to the Federal Rules in 2000 and 2006 and the enactment of Federal Rule of Evidence 502 in 2008[36] were devised to keep up with changing technology and litigation landscapes, "the Advisory Committee determined that it was time again to step back, to take a hard look at how well the Civil Rules [were] working, and to analyze feasible and effective ways to reduce costs and delays."[37] In addition to reviewing materials from previous rule amending committees, the Duke Conference gathered an "unprecedented array of empirical studies and data" to aid the debate.[38] Although the focus of the conference was on changes to the Federal Rules, there was a general consensus that "there [was] a limit to what rule changes alone [could] accomplish" and "[w]hat [was] needed [could] be described in two words — cooperation and proportionality — and one phrase — sustained, active, hands-on judicial case management."[39] After noting that "the proportionality provisions of Rule 26(b)(2) . . . have not accomplished what was intended[,]" the Committee's "discussion focused on proposals to make the proportionality limit more effective[.]"[40] Although the conference did not end with a specific proposal for Rule 26, it did "focus[] on proposals to make the proportionality limit more effective and at the same time . . . address the

35. *See* Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure, 2010 Conference on Civil Litigation Website *available at* http://www.uscourts.gov/RulesandPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx (last visited January 30, 2015).

36. *See* Explanatory Note on Evidence Rule 502 ("This new rule has two major purposes: . . . It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.")

37. Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation*, at 2 *available at* http://www.uscourts.gov/file/reporttothechiefjusticepdf (last visited Jan. 30, 2015).

38. *Id*. at 1. The data showed that the average median cost for discovery in cases that lasted over 4 years and were tried was $15,000 for plaintiffs and $20,000 for defendants. *Id*. at 3. The data, however, also showed that cases in the top 5% of the survey, where both plaintiffs and defendants requested electronically stored information, had an average median cost of $850,000 for plaintiffs and $991,900 for defendants. *Id*. Other material and surveys relied upon at the conference reflected a "general dissatisfaction with current civil procedure" and the need for involvement of district or magistrate judges at the outset of each case "to tailor the motions practice and shape the discovery to the reasonable needs of that case." *Id*. at 3-4.

39. *Id*. at 4.

40. *Id*. at 8.

need to control both over-demanding discovery requests and under-inclusive discovery responses."[41]

After the conclusion of the Duke Conference, a subcommittee was "formed to implement and oversee further work on [the resulting] ideas."[42] However, it was not until the spring of 2012 that the subcommittee presented initial drafts of the proposed rules to the full advisory committee.[43] The Committee stated that the draft "received a very favorable response" despite the subcommittee's "intense disagreement as to whether any rule amendments [were] warranted, and almost as much disagreement about what those amendments should be."[44] The subcommittee submitted the amendments to the full Committee, which approved the proposed amendments for public comment.[45] The rules were published for comment on August 15, 2013, and three public hearings were scheduled.[46] The subcommittee divided its proposal into three sets, the second of which centered on the reconfiguration of Rule 26(b) and sought "to enhance the means of keeping discovery proportional to the action."[47]

The proposed Rule 26 modifies the existing rule in several respects. For example, the new text omits a court's ability "to order discovery of 'any matter relevant to the subject matter involved in the action[,]'" and notes that this provision was rarely used. The new rule instead focused on the five factor proportionality analysis contained in Rule 26(b)(2)(C)(iii) (which was transferred to Rule 26(b)(1)), that requires discovery to be: proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden

41. *Id.*

42. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure* 5 (Mar. 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST03-2011.pdf

43. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure* 24-25 (Sept. 2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2012.pdf

44. *Id*.

45. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure* 18 (Sept. 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2013.pdf

46. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure – Request for Comment* (2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0001.

47. *Id*. at 260.

or expense of the proposed discovery outweighs its likely benefit.[48]

Additionally, the proposed language called for amending the last sentence of Rule 26(b)(1), from "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence,"[49] to "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable,"[50] in order to eliminate any confusion that the former language defined the scope of discovery.[51] (The current rules section, proposed rules section, and amended proposed rules section on the scope of discovery are reproduced below for your convenience.[52] Although the

48. *Id*. at 264-65.

49. FED. R. CIV. P. 26.

50. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure* 21 (Sept. 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2013.pdf.

51. The Committee noted, "many cases continue to cite the 'reasonably calculated' language as though it defines the scope of discovery" although it was originally added to allow the discovery of non-admissible, but relevant evidence, such as hearsay. *See* The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure – Request for Comment* 266 (2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0001.

52. FED. R. CIV. P.(b)(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 including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Proposed Rule 26(b)(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 amount in controversy, the importance of the issues at stake in the action, 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;

Amended Proposed Rule 26(b)(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

Committee Notes are not reproduced below, they provide a wealth of information and context; the authors highly recommend the reader consult the Notes extensively.[53])

The Committee further detailed the reasoning for its overhaul of Rule 26(b) in the Notes.[54] The Committee stated that "[p]roportional discovery relevant to any party's claim or defense" was more than sufficient to replace the authorization of a court to order "discovery of any matter relevant to the subject matter involved in the action."[55] Additionally, the Notes expounded on the removal of "reasonably calculated," stating that although the language was omitted, "[d]iscovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery."[56] Indeed, the combined revisions now put inadmissible and admissible evidence under the same proportionality limitations.

The proposed rule changes proved polarizing, and the Committee received over 2,300 written comments.[57] A keyword search for "proportionality" returned nearly 600 of the comments.[58] Those opposing the rule changes feared that the new rules would increase the amount of discovery disputes; would over-emphasize the amount in controversy,

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> 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.

53. The proposed 2015 Advisory Committee Notes, pending approval, can be found in Memorandum from Hon. David G. Campbell, Advisory Committee on Civil Rules, to Hon. Jeffrey S. Sutton, Chair of Committee on Rules of Practice and Procedure, May 2, 2014. Further references to "FED. R. CIV. P. 26, Advisory Committee Notes (2015)" will refer to this document, *available at* www.uscourts.gov/file/17931/download?token=VGtuwb34.

54. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure – Request for Comment* 296 (2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0001.

55. *Id*. at 296-97.

56. *Id*. at 297.

57. Comments *available at* http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002. Some of these comments were of duplicate content submitted by different commenters. For perspective, when "Rule 45, the subpoena rule, and a conforming amendment to Rule 37, the rule dealing with failure to cooperate in discovery," were circulated for comment in August 2011, the Committee received 25 comments. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure* 19 (Sept. 2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2012.pdf.

58. The number does not include comments submitted in non-character recognizable formats. Comments *available at* http://www.regulations.gov/#!docketBrowser;rpp=25;po=350;s=proportionality;D=USC-RULES-CV-2013-0002.

leading to denial of necessary discovery; would result in information being withheld; and could unfairly allocate the burden of proof.[59] Some commenters were concerned about discovery abuse. Judge Scheindlin[60] stated the proposed amendments would "increase costs and engender delay."[61] She was concerned that the "rule invite[d] producing parties to withhold information based on a unilateral determination that the production . . . [wa]s not proportional to the needs of the case[,]" thereby increasing motion practice in the courts resulting in delay and higher costs to litigants.[62] She was joined in this critique by other commenters.[63] Commenters in favor of the changes argued there was already an overabundance of discovery disputes, the amount in controversy was not determinative, early discussions would be energized, and the burden of proof was insignificant. This faction predicted that the migration of the proportionality factors would not lead to any more litigation than that already taking place in the current landscape and "may actually serve to diminish the number of disputes" because it would "encourage meaningful discussion[s]."[64] Additionally, they pointed out that the proportionality factors already existed in 26(g) and requesting parties had to certify they

59. Generally, the plaintiffs' bar opposed the amendments and the defense bar favored the amendments. Comments included more arguments, but they are beyond the scope of this paper.

60. Judge Scheindlin has been a member of the Federal Judiciary for over 25 years and has been one of the more well-known and influential members of the bar on eDiscovery and ESI issues.

61. *See* Shira A. Scheindlin, Comment to *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS, 2 (Jan 14, 2014), http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0398.

62. *Id*. at 2-3. The Judge elaborated, stating that "[a]ddressing five factors in every motion will be burdensome and may not be particularly informative to the court in making an assessment of proportionality" prophesizing that "[t]he requesting party will say the case is worth one million dollars, and the producing party will say it is worth ten thousand dollars." *Id*. at 3. She believed the proposed proportionality analysis would be a "nightmare for the court," and went on to list actions a court may be forced to take in order to confront the proportionality analysis. *Id*. at 3-4. Several times she questioned how a court could make the proportionality determination at the outset of the case and said "[t]he proposal [was] not realistic." *Id*. at 4.

63. *See* Ariana Tadler, Comment to *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS, 4 (Feb 19, 2014), http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-2173.("[T]he 'moving up' of the concept of proportionality and the ordered articulation of the factors to be considered in Rule 26 will lead to discovery disputes which an already overtaxed judicial system cannot handle."); *see id*., Cmt. by David Starnes (Feb. 18, 2014) ("No human has the ability to fairly determine the importance of the issues at stake in the litigation during discovery."); *see id*., Cmt. by Dean Kawamoto (Feb. 18, 2014) ("Having to reach conclusions regarding the 'importance' of a federal case, particularly when discovery is just beginning, will be an indeterminate if not arbitrary process.").

64. *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 63 (Jan. 9, 2014) (Statement of John Beisner).

were met in every case.[65] In the comment he submitted, one of the authors called the fears excessive and unlikely to materialize "if parties make an effort to have early discussions" and "continue the emerging practice of more meaningful Rule 26(f) conferences to reach agreement on the scope of discovery under the new rules as there is no greater incentive to fight after the rules change than before it."[66] Others echoed these thoughts and added that proportionality, through its encouragement of early action, would help remedy the "needless burden and expense of complying with initial overbroad discovery requests[.]"[67]

The "amount in controversy" factor spawned heavy debate. Plaintiffs' attorneys questioned its position as the first factor in the list of factors to be considered.[68] They expressed concern that courts would give too much weight to this factor in their analyses and disproportionately discount other factors in cases with smaller monetary stakes but enforcing important rights, such as employment discrimination, civil rights, or First Amendment claims. The Tennessee Employment Lawyers Association commented that by "reducing the scope of discovery on [the amount in controversy] basis, the rules are creating the potential for litigation classes based on the plaintiffs' socio-economic standing."[69] Those in favor of the rule argued that the amount in controversy was "obviously . . . something the plaintiff is going to be declaring in the case" and would not be an issue.[70] During one

65. *Id*. at 64. *See* FED. R. CIV. P. 26(g).

66. *See* Jonathan M. Redgrave, Comment to *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS, 6 (Feb 16, 2014), http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1608.

67. *See* Robert H. Shultz, Jr., Comment to *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS, 2 (Feb 19, 2014), http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-2048.

68. *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 16-25 (Jan. 9, 2014) (Statement by Joe Garrison); *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 91 (Jan. 9, 2014) (Statement by Kaspar Stoffelmayr); *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 156 (Jan. 9, 2014) (Statement by Elise Sanguinetti).

69. *See* Bruce W. Ashby, Comment to *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS, 2 (Feb 16, 2014), http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1568. The comment also cited an example of a worker who suffered egregious racial harassment that we will not reprint here, but only had a claim amount of $6,000. *Id*.

70. *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 65 (Jan. 9, 2014) (Statement of John Beisner).

of the public hearings, after a member of the National Employment Lawyers Association argued that the "amount in controversy" should not be included in the factors, Judge Koeltl indicated his support for the factors when he noted they were not new and wondered aloud that "if judges had been able for 30 years to be able to look at the rule and to interpret it fairly . . . why do we expect that judges faced with exactly those same considerations . . . would now begin to interpret them differently or establish priorities" which didn't exist then.[71] The commenter acceded and, although he still felt the factor should be discarded, he asked that the Committee "at least move it down [in the analysis]."[72] Those in favor of the proportionality amendments noted that the proportionality analysis "is inherently and infinitely elastic[,]" allowing judges to tailor discovery to the needs of the case. For example, in an individual civil rights case with nominal damages, the proposed rule nonetheless would allow "for discovery that far exceeds the 'amount in controversy.'"[73]

The deletion of the relevancy language and the effect on access to information also generated controversy.[74] Many plaintiffs' attorneys opposing the change raised concerns that the replacement of the relevancy standard with proportionality would restrict their ability to access information in cases with information asymmetry. They argued it was "critical that plaintiffs have the relevance tool" and that without it "defendants w[ould] be able to hide behind the excuse of burden or cost[.]"[75] Those in favor of the changes argued that it would force both sides to focus on the issues instead of "gotcha tactics"[76] and that it sensibly

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71. *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 24 (Jan. 9, 2014) (Question by Judge Koeltl in response to statement by Joe Garrison). Judge Koeltl had organized and led the Duke Conference. *See also Preliminary Draft of Proposed Amendments to the Federal Rules of Civil* Procedure, No. USC-Rules-CV-2013-00002, Cmt. by Jonathan M. Redgrave, 5 (Feb. 16, 2014) ("[T]he underlying premise posed by some commentators that the federal judiciary, under the amended rule, will mechanistically deny needed discovery to individuals does a disservice to the language of the proposed rule and the trusted discretion that will remain vested in our district court judges and magistrate judges.")

72. *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 25 (Jan. 9, 2014).

73. *See* Redgrave *supra* note 65 at 4-5.

74. We only focus on *some* of the arguments made. Additional comments and oral testimony, are available on the federal courts website: http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002 (last visited April 16, 2014).

75. *See* David Hersh, Comment to *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS (Feb 18, 2014), http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1728.

76. *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on*

defined the scope of the discovery.[77] They argued that by scoping discovery with "proportionality" and using it as "an affirmative responsibility" of the parties, the revised rule "would compel parties to simply do a better job at the inception of litigation of analyzing and focusing their claims and defenses, for the purpose of conducting discovery that is narrowed and tailored to truly advance the resolution of the case."[78] Another commenter stated that narrowing the scope of discovery was paramount to curing the imbalance where parties with virtually no information to be discovered used the rule to make "arguments that even the broadest requests may lead to 'relevant' evidence" and then leveraged the broad requests into "nuisance settlements."[79] Still others pointed to the ambiguous effect that the current language had on the determination of what needed to be preserved and opined that "litigants need to be able to look to the allegations of the complaint rather than speculating about what ancillary information may need to be preserved for future unforeseen and unanticipated requests."[80]

Another point of contention was which party would bear the burden of proof in a dispute. Judge Scheindlin and others[81] were concerned the amendments were "burdensome and unfair" because they did "not specify which party bears the burden of proof."[82] Her interpretation of the amendments was "that if a producing party makes a 'proportionality' objection, the burden of proof w[ould] be on the requesting party to show that the requested information is proportional to the needs of the case."[83]

Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules, 178 (Jan. 9, 2014) (Statement of Paul Weiner).

77. *See* Mollie C. Nichols, Comment to *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS, 3 (Feb 12, 2014), http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0801.

78. *Id*.

79. *See* David R. Cohen, Comment to *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS, 2 (Feb 19, 2014), http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-2174.

80. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-00002, Cmt. by Edward T. Collins, Allstate Insurance Company, 3 (Feb. 14, 2014).

81. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-00002, Cmt. by Ariana Tadler, 4 (Feb. 19, 2014) ("I, along with many other critics, believe that the proposed changes to Rule 26 will result in a shifting of the burden . . . to the requesting party, who is likely unable to meet that burden."); *see Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-0002, Cmt. by Bill Robins III, 2 (Feb. 18, 2014) ("the plaintiff is placed at an extreme disadvantage because the plaintiff would carry the burden of proof[.]").

82. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-201300002, Cmt. by Hon. Shira A. Scheindlin, 3 (Jan. 13, 2014).

83. *Id*. But Judge Scheindlin noted comments by certain Committee members suggested

She called the proposition "dubious" and expressed hope that "the Committee would clearly state in the rules or notes that the burden is on the objecting party."[84] Defenders of the proposed changes did not think that the change would cause a substantial hardship to either side. One commenter chose to characterize the issue as a "balancing of the interests with both parties contributing information that w[ould] allow the court . . . to decide what level of discovery ought to be allowed."[85] His comments were echoed by others who agreed that the rule does not "create any sort of rigid, one-sided burden . . . . it's a discussion to which both parties have to contribute."[86]

V. 2015 – PROPOSED RULE 26(B)(1) AND PROPORTIONALITY

Finally, after four years, three hearings, and thousands of comments, the Standing Committee submitted proposed rules to the United States Judicial Conference in May of 2014. The Standing Committee was resolute that "proportional discovery will decrease the cost of resolving disputes without sacrificing fairness."[87] The Standing Committee also reported that the proposed rules were "largely unchanged from those published for public comment."[88]

Nonetheless, the amended Rule proposal was a response to many of the commenters' concerns. In the main text of the Rule, the Committee moved "the amount in controversy" factor from the first position, and inserted "the importance of the issues at stake in the action" in its place.[89] This was done to "add[] prominence to the importance of the issues and avoid[] any implication that the amount in controversy is the most important concern."[90] In addition, the Committee added a new factor: "the parties' relative access to relevant information."[91] This was added to "address[] the reality that some cases involve an asymmetric distribution of

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"that some believe the burden of proof will fall on the producing (or objecting) party rather than on the requesting party[.]" *Id*.

84. *Id*.

85. *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 34 (Jan. 9, 2014) (Statement of Timothy A. Pratt).

86. *Id*. at 64-65 (Statement of John H. Beisner).

87. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE*, Rules app. B-8 (Sept. 2014) [hereinafter SUMMARY OF SEP. REPORT].

88. *Id*. at 14.

89. *Id*. at Rules app. B-8.

90. *Id*.

91. *Id*.

information" and oftentimes "one party must bear greater burdens in responding to discovery than the other party bears."[92] In reaction to comments about the burden of proof, the Committee added to its notes that "the change does not place on the party seeking discovery the burden of addressing all proportionality considerations,"[93] and that "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."[94] The Notes explained that "parties may begin discovery without a full appreciation of the factors that bear on proportionality" and outlined the responsibilities that the respective parties may have. For instance, "[a] party claiming undue burden or expense ordinarily has far better information . . . with respect to that part of the determination" while "[a] party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as the party understands them."[95]

The full text of Amended Rule 26(b)(1) as it now stands, and is highly likely to become effective, is as follows:

(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.

The following text will be removed from current Rule 26(b)(1), although the Committee Note clarifies that the deletion of the first phrase is not substantive[96]:

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92. *Id.*

93. *Id.* at Rules app. B-39. Additionally, the Committee noted, "[t]he Note now explains that the change does not place a burden of proving proportionality on the party seeking discovery . . . ." *Id.* at Rules app. B-8.

94. *Id.* at Rules app. B-39.

95. *Id.* at Rules app. B-40.

96. The Committee Notes clarify that discovery about the location of relevant information and the identity of parties who know about it should continue to be permitted as required. *Id.* at Rules app. B 43. "Discovery of such matters is so deeply entrenched in practice that it is no

> including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

The text of Rule 26(b)(2)(C)(i) and (ii), meanwhile, will remain largely unchanged:

> (2) Limitations on Frequency and Extent.
>
> (A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
>
> (B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.
>
> (C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the

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longer necessary to clutter the long text of Rule 26 with these examples." *Id*.

> action; or
>
> (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Rule 26 (c)(1)(B) was also amended to recognize more explicitly that cost allocation is among the subjects that may be included in a protective order:

> **(c) Protective Orders.**
>
> (1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *
>
> (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

Similarly, Rule 26(g) remains in its current formulation.[97]

Although the final Advisory Committee Note to Rule 26 is extensive, understanding the context of the Amendments is critical to achieving the goals of more proportional civil discovery. The entire text[98] is provided in the Appendix to this article for reference and analysis and we encourage a full reading of the text. In summary, the Committee Note:

(1) Addresses the history of proportionality in the rules;
(2) Explicitly references and reinforces the connection between Rule 26(b) and Rule 26(g);
(3) Reviews the intent of the 1983 and 1993 amendments;
(4) Emphasizes that the rule amendment was not intended to "change the existing responsibilities of the court and the parties to consider proportionality" or affect the burden of addressing proportionality consideration;
(5) Addresses the omission of the prior language "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter" as unnecessary;
(6) Discusses the deletion of the provision "authorizing the

97. Rule 26 was also amended to provide for early service of discovery requests, specifically identifying the availability of cost shifting to courts in addressing the scope of discovery, and allowing for parties to stipulate to the staging or sequencing of discovery by the parties.

98. SUMMARY OF SEP. REPORT, supra note 86, at Rules app. B-36-46; COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *Report of the Advisory Committee on Civil Rules*, Part IA at 21-26 (May 2, 2014).

court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action;"

(7) Addresses the reasoning behind the deletion of the phrase allowing for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence[;]"

(8) Reflects the amendment to Rule 26(c)(1)(B) to include an express recognition of protective orders that allocate expenses for disclosure or discovery;

(9) Notes that Rule 26(d)(2) is added to allow a party to "deliver" Rule 34 requests to another party more than 21 days after that party has been served with process even though the parties have not yet had a required Rule 26(f) conference (specifying that the requests will not be deemed "served" until the first Rule 26(f) conference, and that the time to respond will not commence until the first Rule 26(f) conference);

(10) Notes that Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case specific sequences of discovery;

(11) Reflects that Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan — issues about preserving electronically stored information and court orders under Evidence Rule 502; and

(12) Points out that the published text of Rule 26(b)(1) was revised after the public comment period to place "the importance of the issues at stake" first in the list of factors and to add a new factor relating requiring consideration of "the parties' relative access to relevant information."

The United States Supreme Court approved the new rules and submitted them to Congress for final approval on April 29, 2015. Although Congress could modify, reject, or defer the proposed new rules pursuant to the Rules Enabling Act[99], we anticipate that the new rules will become effective on December 1, 2015.

99. 28 U.S.C.A. § 2074 (West).

VI. THE FAILURE TO MASTER PROPORTIONALITY – (1983-PRESENT)

Despite the years of research and analysis that preceded the addition of specific proportionality factors in the rules, and the many efforts undertaken in the rules and otherwise since 1983, the current literature and public discourse regarding the present rules proposals reflect continued dissatisfaction with civil discovery. Interestingly, comments submitted as part of the public comment period associated with the proposed amendments to the Federal Rules reflect frustration by both requesting and responding parties.[100] Many of the complaints (such as discovery being overly burdensome or objections being obtuse) mirror assessments of discovery in other fora, and express a genuine concern that unfocused discovery in the electronic age can make litigation unaffordable for all but the most affluent parties.[101] Moreover, there is often a perception among parties and counsel that, in the end, courts consider one proportionality factor as paramount—the amount in controversy—to the exclusion of other important factors, such as the public interest in the issues at stake and the asymmetry of access to relevant information needed to prove valid claims.

There thus exists a striking disconnect between the goal of proportionality embedded in the Federal Rules and the imbalanced reality of modern discovery. While not entirely a failure of the rules, this disconnect is attributable in part to the failure to address proportional discovery, a concept that is easy to articulate in general terms, yet can be difficult to implement in practice. The current Federal Rules (and associated Advisory Committee Notes) do not give specific direction to litigants and courts on how to properly consider the factors listed. Litigants and courts have factors, but no systematic approach for breathing life into those factors and ensuring that all applicable factors are considered. Accordingly, we lack the benefit of coherent and predictable case law.[102]

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100. *See* Am. Coll. of Trial Lawyers Task Force on Discovery & Inst. for the Advancement of the Am. Legal Sys., Interim Report & 2008 Litigation Survey of the Fellows of the Am. Coll. of Trial Lawyers, at B-1 (2008) (noting majority of respondents believe that discovery has become a tool to "bludgeon" parties into settlement).

101. *See* Ralph C. Losey, E-DISCOVERY: CURRENT TRENDS AND CASES 30 (Am. Bar Ass'n 2008) ("There is a danger that only the rich will be able to afford the costs of e-discovery inherent in the lawsuits of today and tomorrow." quoting Ralph C. Losey regarding *Gartner Research Note: Costs of E-Discovery Threatens to Skew Justice Sys*., which summarized the 2007 Georgetown Law Center symposium panel that included, *inter alia*, Justice Breyer.).

102. There is relatively sparse case law on the subject. Indeed, despite the attention to proportionality surrounding the 1983 amendments, there were relatively few published cases in the following decade that addressed the proportionality factors in FED. R. CIV. P. 26(b)(1)(iii). A search of Westlaw's ALLFEDS database only reflected 22 cases between 1983 and 1993 that cite the rule before it was renumbered, and not all of those decisions contain a substantive discussion.

Without a concrete approach to achieve consistency in application, courts are left with vague arguments by the parties who cite to disparate cases. Unsurprisingly, courts sometimes default to granting discovery. Reflexively, attorneys over-request, over-object, and advise clients to over-preserve[103] because of uncertainty as to how proportionality will or will not play out in any given case. And to date, there has been little downside to such behavior. Effectively, Rules 26(b)(1), 26(b)(2)(C), and 26(g) lose their teeth and in the end fail to achieve their stated purpose in any meaningful way.

Maxtena Inc. v. Marks[104] is illustrative and provides further insight into the challenges of applying consistent and effective proportionality analysis. The parties in this case had agreed to limit discovery in the initial phase to "issues relating to the valuation" of the company, and to delay "merits-based discovery" to allow mediation to proceed. Despite reaching

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And the published case law that later emerged offers no "test" *per se* where proportionality is the main object of dispute. *See, e.g.*, Young v. Pleasant Valley Sch. Dist., No. 3:07CV854, 2008 WL 2857912, at *1 (M.D. Pa. July 21, 2008); *see also* Spieker v. Quest Cherokee, LLC, No. 07-1225-EFM, 2008 WL 4758604 at *1, *3 (D. Kan. Oct. 30, 2008) (assessing a request to limit discovery in a class action and rejecting "defendant's argument that the 'amount in controversy' is limited to the *named plaintiffs'* claims . . . . [D]efendant's simplistic formula for comparing the *named plaintiffs'* claims with the cost of production is rejected."); Metavante Corp. v. Emigrant Sav. Bank, No 05-CV-1221, 2008 WL 472236, at *1,*4 (E.D. Wis. Oct. 24, 2008) ("In viewing the totality of the circumstances, including the amount in controversy in this case, the party resources, and the issues at stake, the court concludes that the burden [of production] does not outweigh the value of the material sought."); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 364 (D. Md. 2008) ("I noted during the hearing that I had concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs, and the relatively modest amounts of wages claimed for each.") (Grimm, C.J.); Patterson v. Avery Dennison Corp., 281 F.3d 671, 681 (7th Cir. 2002) (upholding the district court's denial of a motion to compel the deposition of a "high-ranking executive" in a single plaintiff employment discrimination case where the deposition would have placed burdens on the company the plaintiff was permitted to take other depositions of company employees, the plaintiff did not avail herself to other less burdensome discovery tools, and there was a relatively small amount in controversy in this case).

103. Orbit One Commc'ns v. Numerex Corp., 271 F.R.D. 429 (S.D.N.Y. 2010), illustrates how our collective failure to master proportionality can lead to uncertainties and, as a result, to over-preservation. In *Orbit One*, the defendant sought sanctions based upon the plaintiff's alleged failure to preserve relevant information. As a first step in its analysis, the court considered whether the information was subject to a preservation obligation, and noted that although other courts had found that "reasonableness and proportionality" should guide preservation, the court conceded "this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle." *Id.* at 436-37. Accordingly, although the court recognized the "highly elastic" nature of the proportionality analysis, it concluded that a party would be well-advised to save "all relevant documents" until a "more precise definition is created by rule." *Id.* (citing Zubulake v. UBS Warburg LLC, 229 F.R.D. 212, 215 (S.D.N.Y. 2003) for "all relevant documents" reference); *see also id.* at 436, n.10 for "highly elastic" reference.

104. 289 F.R.D. 427 (D. Md. 2012).

this agreement, however, Marks issued dozens of nonparty subpoenas, the vast majority of which, Maxtena argued, were irrelevant to the valuation issues. Upon being asked to rule on the parties' competing discovery motions, the *Maxtena* quoted Judge Paul Grim when emphasizing that "all permissible discovery must be measured against the yardstick of proportionality[.]"[105] But instead of analyzing all the Rule 26(b)(2) factors, the party seeking broader discovery in the initial stage ignored the Rule 26(b) cost-benefit balancing factors that were designed to achieve proportionality in discovery.[106] "[B]ecause the parties were not able to find a middle ground on their own," they put the onus on the court to decide the motion "with an eye toward proportionality" without guidance from the parties on this key point.[107]

Ultimately, our analysis of the existing case law, recent commentaries, and anecdotal evidence gathered through years of practice and conflict resolution lead us to conclude that the frustration with the current application of the proportionality rules is not primarily a product of the current Federal Rules[108], but rather of their fractured and frequently incomplete application by parties and their counsel.[109] In particular, arguments by the parties, as reflected in reported decisions, do not fully account for all the relevant proportionality factors, focusing instead upon only one or two elements considered in isolation. Similarly, we discerned a tendency for counsel to argue about "discovery" in general terms, as opposed to arguing about the specific discovery at issue (*e.g.*, particular depositions, document requests, or specific objections). The myopic focus on only some considerations to the exclusion of other vital concerns under the proportionality analysis, as well as the failure to focus proportionality arguments on the specific discovery requests, objections and disputes at issue in a consistent manner, effectively precludes the development of reasoned guidance for future cases. Additionally, the absence of developed guidance for practitioners has the unfortunate effect of creating uncertainty for parties who seek to invoke proportionality or counter baseless claims of

105. *Id.* at 434 (quoting Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 523 (D. Md. 2010)).

106. *Id.* at 434-35.

107. Maxtena, 289 F.R.D. at 435 (citing Fisher v. Fisher, 2012 WL 2050785, at *5 (D. Md. June 5, 2012)).

108. *See generally* John L Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 Campbell Law Review 455 (2010) *available at* http://law.campbell.edu/lawreview/articles/32-3-455.pdf.

109. *See generally* Theodore C. Hirt, *The Quest for "Proportionality" in Electronic Discovery—Moving From Theory To Reality in Civil Litigation*, 5 FED. CTS. L. REV. 171 (2011).

lack of proportionality, and leaving courts with a sense of unease that leads to caution in applying the principle in the context of discovery disputes.

VII. A PROPORTIONALITY MATRIX METHODOLOGY: A GUIDE FOR ACHIEVING MASTERY OVER PROPORTIONALITY ASSESSMENTS AND ARGUMENTS

Achieving a standardized approach to proportionality will further the goal of inexpensive and speedy resolution of litigation. Thus, applying a consistent proportionality methodology to guide meet and confers, arguments, and decisions across all cases is a step towards realizing the promise of proportionality in more cases and fulfilling the intent of the Federal Rules.

We submit that counsel (and their clients) would be well served by following a standard protocol to assess the existing (and future) Rule 26(b)(1) and 26(b)(2)(C) proportionality factors in any given matter where proportionality is an issue. We further suggest that this methodology be applied to each discrete discovery dispute involving application of the proportionality concept. We recognize that many courts and parties will reject any rigid approach to issues of judgment such as proportionality and thus may shy away from any strict formulaic approach to decision-making. The proposed approach is not intended as a rigid formula but rather a protocol for embodying best practices that preserves needed judicial flexibility while offering greater predictability, transparency, and accountability for counsel, parties, and courts.

The matrix below identifies the essential proportionality factors found in the civil discovery rules and also reflects our analysis of how proportionality objections and arguments have been successfully argued. The matrix is intended to make the "yardstick" discussed in the *Victor Stanley* case more tangible so that counsel and courts can use it as a measuring tool.

Counsel should candidly assess, for each discovery request or dispute at issue, how the factors weigh either for or against the discovery. In some circumstances, a factor may not be applicable; in others, it may be neutral. In some cases, a factor may be determinative, whereas in other cases the factor may have equal or less weight than other factors. But all factors should be considered in this process. Where appropriate, counsel should provide detailed factual analysis for the assessment of each factor to explain how the assessment fits into the greater context of the case.

This candid assessment should be shared with clients to help determine the appropriate requests, responses, and objections in discovery.

Counsel should also measure their Rule 26(g) obligations against their matrix analysis.

PROPORTIONALITY MATRIX

FACTOR	*FACTOR ASSESSMENT (i.e. not applicable, +, -, or neutral)*	*DETAILED EXPLANATION (i.e. explain why the factor is not applicable, weighs in favor of or against the proposed discovery, or is neutral)*
Importance of the issues at stake in the action		
Amount in controversy		
Parties' relative access to relevant information		
Parties' resources		
Importance of the discovery at issue in resolving the issues		
Whether the burden and/or expense associated with the discovery sought outweighs its likely benefit		
Whether the discovery sought is unreasonably cumulative or duplicative		
Whether the discovery sought can be obtained from some other source that is more convenient, less burdensome, or less expensive		
Whether the party seeking discovery had		

ample opportunity to obtain the information by discovery in the action		
Whether the discovery sought can be staged and/or tiered[110] *to reduce the burden and then proceed further incrementally only as needed*		
Whether the discovery is directed to non-parties		
Whether the discovery sought affects the rights of non-parties (e.g., privacy, trade secrets, etc.)		

We believe that standardizing proportionality assessments will guide parties towards more consistent expectations of what to address in meet and confer sessions, as well as in briefing before courts. Much like the recitation of the elements for the certification of class actions, the uniform consideration of all relevant Rule 26(b) factors provides increased certainty as to what arguments need to be covered. It can also lead to a more effective discussion with clients regarding the merits of the proposed discovery and whether seeking it, or objecting to it, is meritorious and likely to succeed if challenged, providing greater guidance for clients.

Parties should consider disclosing their assessment of the factors during the meet and confer process required before motion practice. The parties may be able to agree that one or more of the Rule 26(b) factors do not apply; or may be able to agree that only certain factors are in dispute, crystalizing the dispute for the court instead of forcing the court to wade

110. "Staging" refers to a case management provision whereby certain discovery proceeds while other discovery is abated. For example, a court can order discovery to proceed on a threshold jurisdictional issue while staying other discovery. "Tiering" refers to a case management provision whereby the scope of discovery varies by source. By way of example, it may be necessary in some cases to collect, process and review the data present on available hard drives and mobile devices for "key player" custodians, but collect only relevant emails from other custodians.

through generalized and conflated arguments of need, burden, and relevance. Courts will likewise be presented with more uniform arguments regarding proportionality that will better enable judicial guidance.

VIII. TEN BEST PRACTICES FOR COUNSEL (AND CLIENTS) TO BETTER UNDERSTAND AND APPLY PROPORTIONALITY FACTORS TO CIVIL DISCOVERY DISPUTES

Based upon our respective experiences, we have distilled a list of ten practical observations to better focus counsel and clients on proportionality. Adopting these best practices will help practitioners effectively use our proportionality matrix.

1. ***Focus on the specific discovery at issue (micro-level analysis) and avoid arguments about discovery in general (macro-level analysis).***
2. ***Recognize that proportionality and relevance are conjoined considerations for civil discovery.***
3. ***Understand that proportionality is a consideration that can support a multi-faceted approach to discovery.***
4. ***Respect that non-parties have greater protections from discovery and that burdens on non-parties will impact the proportionality analysis.***
5. ***Raise discovery scope and proportionality issues early in the litigation and continue to address and revisit them as needed.***
6. ***Do not consider the "amount in controversy" factor to be determinative with respect to the proportionality of discovery requests or responses.***
7. ***Do not approach discovery disputes with the notion that discovery is perfect or that it will result in the production of "any and all" relevant documents or information.***
8. ***Do not address proportionality arguments by citing superseded case law, rotely reciting the rules, or making unsupported assertions of burden.***
9. ***Do not get caught up in an academic dispute regarding the "burden of proving" proportionality as courts will expect that each side of the dispute will have something to contribute, although not necessarily equally, and the most reasonable position will likely prevail.***
10. ***Do not forget that proportionality considerations also apply to preservation decisions and disputes.***

Each of these Best Practices is explained in greater detail below.

This list is not comprehensive or exclusive. However, careful consideration of these Best Practices can serve as a guide to applying proportionality concepts, which will help counsel provide better advice to their clients and better advocacy before courts.

1. Focus on the specific discovery at issue (micro-level analysis) and avoid arguments about discovery in general (macro-level analysis).

In practice, the application of proportionality in discovery must focus on the individual requests and objections at issue. These are the figurative trees in the discovery forest that must be examined individually to assess whether the particular discovery should proceed as requested, with modifications, or not at all.

Therefore, counsel is best served by considering and presenting arguments that are tailored to the specific discovery at issue as opposed to arguments based on sweeping generalities about the discovery in the case.[111] For instance, instead of asking for all of a custodian's data, requestors should narrow those demands to the data that is relevant, including appropriate limitations such as subject matter and time frame parameters. Be prepared to explain and back up your analysis. Simply asking for everything and stating that you "don't know" what your adversary has so you do not know how to limit a request is an abdication of the requesting party's Rule 26(g) responsibilities. You at least know the elements of your claims or defenses. Of course, engaging in a cooperative dialog with opposing counsel to try to educate yourself about what data is kept can help narrow the requests, but independent of that information you still have a duty to intelligently target your requests.

Similarly, as a responding party, instead of simply objecting to relevant but overbroad discovery, offer a proportional alternative, especially where there has not been extensive discovery on the issue. The alternative can be offered without prejudice to the requesting party seeking additional discovery, and without conceding that more will be forthcoming. Likewise, seeking a blanket protective order against "overbroad" discovery is unlikely to succeed on proportionality grounds. Rather, look at the specific discovery requests and explain why, with evidence as needed, the particular discovery is not needed, is unduly expensive, or is burdensome.

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111. *See*, Carroll, *supra* note 108 at 466 ("[E]ngaging in a *specific* proportionality analysis that asks, 'Is this particular approach to discovery worth the cost given the information which it will produce?' is a much more helpful inquiry that focuses the parties on the most efficient way to manage discovery in a particular case.") (emphasis added).

A court will likely side with the litigant that makes a reasoned argument focused on the relevant specifics of the discovery dispute rather than take the "all or nothing" approach. By way of illustration, in *Kellogg Brown & Root Services,* the court agreed with the defendant that the request at issue would impose a significant burden on the defendant for "only potentially, marginally relevant information[.]"[112] However, the court most likely reached this conclusion because the plaintiff made a generic request for "all documents related to" certain topics, and the defendant guided the court to proportionality by stating that such a request would have covered all government entities and anyone who was working or had worked for them.[113] The court found the plaintiff sought "information that [was] potentially marginally relevant, but otherwise cumulative, duplicative, overbroad, and unduly burdensome," lacked a time limitation, and would have covered somewhere between eight and ten years of information.[114] The court accepted the defendant's argument that included specific elements of the burden, and rejected the plaintiff's generic request that lacked "any definitive parameters."[115] In many cases, however, it will be more persuasive to suggest a more tailored alternative to an overly broad request, rather than insist on producing nothing.

2. Recognize that proportionality and relevance are conjoined considerations for civil discovery.

While new Rule 26(b) literally places "relevance" and "proportionality" on the same level, the concepts have been conjoined in the Federal Rules since 1983. Aside from the obvious tautology, the application of the concept of proportionality often turns on how "central" (or relevant) the proposed discovery may be to overcome any number of objections that are associated with the discovery at issue.

Practitioners should aid judges[116], and their own causes, by making

112. Kellogg Brown & Root Servs., Inc. v. United States, 117 Fed. Cl. 1, 6 (2014).

113. *Id.* at 6-9 (Explaining the plaintiff actually made numerous "all documents related to requests" that the court denied); *Id*. at 7-8 (Showing one "request encompasse[d] all government entities, and all of their current and former employees who served at all levels of government" and lacked "any temporal limitation[.]".)

114. *Id.* at 8.

115. *Id.*

116. *See* Proposed Rule 1: The rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." *See also* Transcript of Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 215, ll. 13-18 (Jan. 9, 2014) (Statement of Pullan, J.) ("[P]roportional discovery will represent a cultural shift on how we look at civil litigation. And that cultural change has to happen within the

requests, motions to compel or motions for protective orders with arguments clearly articulating the relevance (or lack thereof) to claims and defenses. By centering the dispute on the claims and defenses, practitioners will force the opposing side to address the key question of why the information subject to discovery is, or is not, needed and how it may, or may not, be used at trial. Core discovery will virtually always be proportional. This "centering" exercise is critical because, in the end, the further discovery strays from the core claims and defenses, the less likely it is that the discovery will be allowed. In turn, the other aspects of the proportionality analysis come into prominence the further away the discovery strays from what the parties truly need.

3. Understand that proportionality is a consideration that can support a multi-faceted approach to discovery.

Proportionality often is invoked to support a motion to compel or a motion for protective order in its entirety when it would be better directed at a discrete issue in the motion. Invoking proportionality and expecting a "thumbs up" or "thumbs down" ruling is not always realistic, and counsel should consider whether alternative approaches to the discovery can yield practical solutions for all parties and the court.

Examples of alternative approaches can include (a) staging or tiering of discovery to allow discovery of "key" persons, issues[117] or sources first, and then proceed further only as needed; (b) sampling or exemplar productions; (c) productions limited to information "sufficient to show;" (d) providing for cost-sharing for some or all of the discovery; or (e) providing for cost-shifting of discovery based on an existing or future consideration. Parties also should consider ways to limit discovery costs, such as using Technology Assisted Review or implementing clawback agreements by obtaining Rule 502(d) stipulated orders to reduce the costs of privilege review. Counsel is well advised to consider carefully whether alternative

judiciary as well. And any change of this nature, there has to be a committed education effort to the bench."); Transcript of Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules at 15, ll. 21-25 (Nov. 7, 2013) (Statement of Littrell) ("[T]here is no better education for judges and litigants than moving the proportionality requirement to the most prominent part of the rule, and we believe that doing so will result in fewer motions.").

117. For example, parties may ask courts to limit discovery to threshold legal issues that may dispose of the entire case, such as a statute of limitations, standing, or jurisdictional issues that can be resolved with little or no discovery. While mindful of the potential efficiency of such staging, courts sometimes are loath to order discovery limitations lest they become self-fulfilling prophecies or stall the case without actually narrowing any issues.

approaches are available and should be offered affirmatively or in response to inquiries from the court. Of course, viable alternatives should also be discussed between counsel for the parties in the course of the meet and confer sessions predicate to motions practice.

Many of the options for managing discovery in large-scale litigation are reflected and discussed more fully in the Manual for Complex Litigation.[118] Additionally, the *Sedona Conference® Commentary on Proportionality in Electronic Discovery* is a useful resource for considering alternative approaches for managing discovery.[119] In many garden-variety cases (whether big or small), however, counsel will handle discovery routinely without needing to debate the application of proportionality principles, much less invoke secondary authorities. But there likewise will be cases (of all sizes) where the application of proportionality may be more difficult or disputed. It is these cases that will benefit most from the application of a standardized approach to guide the discussions and resolution, including consideration of alternatives to a strict allowance or disallowance of discovery.

United States v. Nebraska-Kearney provides a useful illustration of proportionality principles in application, although the court's resolution of the discovery dispute itself could be debated.[120] The case involved a student who was not allowed to live with her emotional assistance animal in student housing. The Equal Employment Opportunity Commission (EEOC) filed suit under the Fair Housing Act to enforce students' right to live with such animals when they were needed to accommodate the students' mental disabilities. In discovery, the EEOC proposed search terms directed at *all* documents related to *any* alleged discrimination against, and *all* requests for reasonable accommodations of disabilities. The University objected to the breadth of the request, contending that it was not appropriate or proportional to extend discovery beyond the issue of student accommodation with respect to housing. The court found that the discovery was "on its face, overly broad, not 'reasonably calculated to lead to the discovery of admissible evidence,' [Rule 26(a)(1)], and inconsistent with 'the just, speedy, and inexpensive determination' of this case as required under [Rule 1.]"[121] The court also undertook a proportionality

118. *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION 49-104 (Stanley Marcus, J. et al eds., 4th ed. 2004).

119. *See, e.g.*, *The Sedona Conference® Commentary on Proportionality in Electronic Discovery* (Jan. 2013).

120. United States v. Univ. of Neb. at Kearney, 2014 WL 4215381 (D. Neb. Aug. 25, 2014).

121. *Id.* at *5.

analysis and concluded on that alternative ground that the government requests were excessive.[122] The EEOC contended that, in order to show the defendant's "discriminatory attitude or practices on an institutional level[,]" it needed documents about any requests for accommodation by any people with disabilities, not limited to housing or students, including requests for academic accommodation, accommodations for employees, and accommodations for the general public. The court found that the extensive breadth of the EEOC requests was not well grounded as there was no "showing that such evidence may even exist[.]"[123] The defendants had already produced all documents responsive to requests for reasonable accommodation in university housing and spent over $100,000 in doing so. The evidence before the court reflected that the EEOC's proposal would cost at least another $150,000.[124]

The court's decision to limit ESI discovery did not, however, mean that the EEOC was without means by which it could further explore the potential existence of information that could or should be produced in the case to be considered in the resolution of the claims or defenses.[125] Instead, the Court stated that discovery was multi-faceted and other means existed to ensure that discovery could be fairly completed but in a cost-effective manner.[126] Specifically, the court opined that "[s]earching for ESI is only one discovery tool," is not a "replacement for interrogatories, production requests, requests for admissions and depositions, and should not be ordered solely as a method to confirm the opposing party's discovery is complete."[127] The court also stated that "absent any evidence that the defendants hid or destroyed discovery and cannot be trusted to comply with written discovery requests, the court is convinced ESI is neither the only nor the best and most economical discovery method for obtaining the information. . ." In the end, the court denied further ESI discovery, limiting the government to non-ESI requests.[128]

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122. *Id.* at *7.

123. *Id.* at *5.

124. *Id.*

125. *See id*. (The *Kearney* Court stated that it "considered the issues actually being litigated in this case" when evaluating the appropriate scope of discovery, the authors caution that cases involving important rights (such as rights against prohibited discrimination) warrant careful and full consideration. *But see*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, SUMMARY OF SEP. REPORT at B-8 (Sept. 2014) (Parties as well as courts would benefit from a fuller discussion in such cases of the importance of the rights at issue when engaging in the overall proportionality analysis for discovery).

126. *Id*. at *7 (court stated that its decision was based in part on an effort "to promote 'the just, speedy, and inexpensive determination' of th[e] case[.]")

127. *Id.* at *6.

128. *Id.* at *7.

One of the alternative approaches listed above is to stage discovery and conduct "core" discovery first. Discovery that focuses on the information required by Rule 26(a) Disclosures and targeted discovery that goes to the admissible evidence reflecting elements of proof for claims and defenses (that is sought from an appropriately limited number of key players or key locations) will most always be proportional. Absent a threshold issue that may dispose of the entire case, counsel often will be well-served to devote their time and resources to the core issues first, then evaluate what more is needed in their case.

Another alternative approach is cost allocation. Practically, counsel for both requesting and responding parties, from individuals to the largest government agencies and corporations, should assess the potential implications and availability of cost allocation. Cost allocation is a discretionary tool that courts can use to facilitate discovery while balancing the costs and needs.[129] Along with other alternative means to target discovery, such as staging (timing), tiering of sources (categorization), and data sampling, cost allocation can provide a meaningful way for parties to agree on what is the most needed discovery. However, usually the producing party bears its own costs.[130]

4. Respect that non-parties have greater protections from discovery and that burdens on non-parties will impact the proportionality analysis.

Rule 45 affords non-parties a higher protection in terms of the burden that can be imposed upon them and states that the "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."[131] Indeed, when analyzing the costs and benefits of a

129. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-201300002, cmts. by Federal Magistrate Judges Association, 9 (Feb. 5, 2014). The 2015 amendments to the civil rules explicitly include cost allocation in the terms that a court can include in a Rule 26(c) protective order. The Advisory Committee notes that this power is not new, and also cautions that the revised language is not intended to disturb the traditional American Rule that each party is responsible for its own costs in responding to discovery. The clear takeaway is that cost reallocation should never be automatic, although it remains an option for courts to consider in establish a discovery framework in any given case. Courts should not order cost reallocation without performing a full proportionality analysis to determine whether it is appropriate in that instance given the Rule 26(b) factors. Further, the court retains the authority to condition or limit any cost reallocation approach under consideration.

130. FED. R. CIV. P. 26, Advisory Committee Notes (2015) at 58 ("Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding").

131. FED. R. CIV. P. 45(d)(1).

production by a non-party in *Guy Chem. Co. v. Romaco AG*, the court stated that "[t]he most crucial factor . . . is the fact that [the producing party] is a non-party."[132] Although the court eventually ordered production, it was conditioned upon plaintiff paying the entire cost. Other courts have imposed similar conditions based on their reluctance to impose significant costs of litigation onto a non-party.[133] Rule 45 also commands the court to "enforce this duty [to not impose an undue burden or expense upon a non-party] and impose an appropriate sanction" upon the requesting party.[134]

Counsel should leverage the other practices recommended in this article and apply proportionality concepts in the unique circumstance of non-party discovery. Although Rule 45 does not require a conference with a non-party before requesting information, the requesting party should make a reasonable inquiry into that person's or entity's resources and processes in order to avoid making unduly burdensome requests and to be well-positioned should a dispute be presented to the court.[135] As a requesting party, be prepared to directly communicate with counsel for the non-party to assess and adjust requests to meet the proportionality standards. This type of practice may help avoid objections that are commonly made because of the short 14-day response time that is required of a subpoenaed non-party. Courts are much less hesitant to shift costs and/or deny discovery where a non-party is involved, so requestors should take appropriate precautions (including appropriate offers to minimize or control costs) in order to avoid cost shifting or sanctions.[136] In representing a non-party, ensure that you are aware of the protections that the Rule provides and seek to enforce the proportionality provisions as appropriate.

5. Raise discovery scope and proportionality issues early in the litigation and continue to address and revisit them as appropriate.

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132. 243 F.R.D. 310, 313 (N.D. Ind. 2007).

133. *See* N. Carolina Right to Life, Inc. v. Leake, 231 F.R.D. 49, 52 (D.D.C. 2005) (Subpoena quashed due to undue burden); *In re* Auto. Refinishing Paint, 229 F.R.D. 482, 496 (E.D. Pa. 2005) (Placing "several limitations and restrictions on Plaintiffs' requests for production[.]"). Although, some courts have stated that "undue burden is not read differently for nonparties." St. Jude Med. S.C., Inc. v. Janssen-Counotte, 2015 WL 1299753, at *12 (D. Or. Mar. 23, 2015) ("[W]e will not read 'undue burden' differently just because a non-party was subpoenaed" but recognizing "the special need to protect [non-parties.]") (citing Mount Hope Church v. Bash Back!, 705 F.3d 418, 429 (9th Cir. 2012).)

134. FED. R. CIV. P. 45(d)(1).

135. Drics v. Duffy, No. 1:14-cv-01192-SEB-MJD, 2014 WL 5323737, at *6 (S.D. Ind. Oct. 16, 2014) (Court found requestor's "failure to engage in *any* party discovery that might narrow his request to [non-party] does not comply with Rule 45(d)(1)'s requirement[.]").

136. *See* The Sedona Conference®, *The Sedona Conference Commentary on Non-Party Production and Rule 45 Subpoenas* (Apr. 2008).

Current Rule 26(f) and its accompanying Advisory Committee Note make clear that parties are expected to confer meaningfully at the outset of civil litigation with respect to the nature and scope of discovery.[137] This expectation will be amplified with the new proposed rule, which is "intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse."[138]

As a practical matter, and especially with respect to requesting parties, the closer you get to trial, the less discovery you can demand. In order to get the most out of discovery requests, litigants should serve them as promptly as possible at the beginning of the litigation or shortly after new information comes to light that requires additional investigation.[139] In fact, under the proposed Rule 26(d)(2), parties will be allowed to deliver Rule 34 requests before the Rule 26(f) conference. Although the requests will not be deemed "served" for purposes of determining the deadline for responding to them, formulating and reviewing the requests in advance of the Rule 26(f) conference will "facilitate focused discussion during the Rule 26(f) conference."[140] When disputes arise, courts will often assess the initial and continued diligence of parties during the discovery phase to assess whether additional discovery will be allowed.[141]

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137. FED. R. CIV. P. 26, Advisory Committee Notes (2006). *See also* John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMP. L. REV. 455, 461 (2010) (noting that "Early Discussion of Proportionality is Important").

138. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, Rules Appendix B-38 (Sept. 2014).

139. *See* Ford Motor Co. v. Edgewood Props., 257 F.R.D. 418, 426 (D.N.J. 2009) ("One may reasonably expect that if document production is proceeding on a rolling basis where the temporal gap in production is almost half a year apart, a receiving party will have reviewed the first production for adequacy and compliance issues for a reason as obvious as to ensure that the next production of documents will be in conformity with the first production or need to be altered. It was incumbent on Edgewood to review the adequacy of the first production so as to preserve any objections. The Court is not dictating a rigid formulation as to when a party must object to a document production. Reasonableness is the touchstone principle, as it is with most discovery obligations. The simple holding here is that it was unreasonable to wait eight months after which production was virtually complete."); Southeastern Mech. Servs., Inc. v. Brody, No. 808-CV-1151-T-30EAJ, 2009 WL 997268, at *2-3 (M.D. Fla. Apr. 14, 2009) (denying motion to compel as untimely where court found three month delay in filing motion after learning of responding party's potential production deficiencies was unreasonable); Bellinger v. Astrue, No. CV-06-321 (CBA), 2010 WL 1270003, at *7 (E.D.N.Y. Apr. 1, 2010) (denying motion to compel where plaintiff offered "no reason for propounding" broad search terms "long after the initial searches were conducted and the results culled" and finding that "[r]equiring another round of extensive searches and review of the results by defendant's counsel at this stage of the case would be needlessly burdensome and cumulative").

140. FED. R. CIV. P. 26, Advisory Committee Notes (2015) at 26.

141. Dowling v. Cleveland Clinic Found., 593 F.3d 472 (6th Cir. 2010) (Plaintiffs

6. Do not consider the "amount in controversy" factor to be determinative with respect to the proportionality of discovery requests or responses.

Too often the "amount in controversy" factor has been given disproportionate influence in determining whether discovery should be allowed or denied. Simply saying that a case is "big" or "small" in terms of estimated damages can be important, but it is no more important than the other proportionality factors.[142] For example, a civil rights case may involve small damages but implicate an important legal right, and obtaining broad discovery may be critical to proving the claim.[143] Conversely, a

engaged in no formal discovery for approximately one year after filing their lawsuit, including after defendants filed a motion for summary judgment. Although the district court granted defendants' motion for summary judgment, it vacated its order and granted plaintiffs a two-month extension of time in which to conduct discovery to address the evidence in defendants' motion. Plaintiffs continued to eschew formal discovery, instead sending vague and informal emails requesting deposition dates and information. When their informal approach did not work, plaintiffs requested additional time to conduct discovery. The district court denied plaintiffs' request and reinstated its ruling for defendants. The Tenth Circuit affirmed on appeal, finding no abuse of discretion by the district court: plaintiffs had been dilatory in seeking formal discovery, despite having sufficient time to do so.); Bellevue v. Prudential Ins. Co. of America, 23 Fed. App'x 809, 810 (9th Cir. 2001) (denying motion for additional discovery when the plaintiff offered "no excuse or justification for why he did not initiate discovery[.]"); Davis S R Aviation, LLC v. Rolls-Royce Deutschland Ltd. & Co., No. A-10-CV-367LY, 2012 WL 175966 (W.D. Tex. Jan. 20, 2012) (The court denied the defendant's motion to compel discovery. The motion came from a dispute that arose after the court's deadline for discovery but within the time frame called for by the parties' agreement to extend discovery. The court noted the only harm the defendant claimed it was suffering from was because the trial was scheduled to take place in two weeks. The court placed blame on the defendant, noting that it did not "engage in the discovery process until more than a month after the close of the discovery period," it knew of the issues months before the close of discovery, and had the discovery request been made during the court scheduled time for discovery, the defendant would have been able to raise the issues.); Jordan v. City of Detroit, 557 Fed. App'x 450, 455 (6th Cir. 2014) (upholding discovery sanctions issued and denial of additional time for discovery by the trial court, quoting the district court's "apt[]" description that "[t]he lack of diligence on the part of counsel for both parties during the discovery period certainly makes the requests for sanctions and protective orders less persuasive than they would have been if the issues had been timely brought to the court's attention."); *Id.* at 456 (noting that plaintiff was "dilatory" with discovery efforts).

142. *See* John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMP. L. REV. 455, 466 (2010) (noting, "the focus on the value of discovery in producing useful information is a better approach than trying to limit discovery based on the value of the case.")

143. For instance, in *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139, 148 (D.D.C. 2007), an action for injunctive relief under the Americans with Disabilities Act, the court denied the defendant's request to limit discovery of back-up tapes, despite the high cost of production, because of "the importance of the issue at stake and the parties' resources[.]" Specifically, the court noted that:

> Plaintiffs are physically challenged citizens of this community who need the access to public transportation that WMATA is supposed to provide. That persons who suffer from physical disabilities have equal transportation resources to work and to enjoy their lives with their fellow citizens is a crucial concern of this community.

billion dollar lawsuit could turn on a relatively small set of discoverable facts, such as the terms negotiated and used in a key contract. Whether the claims at issue include a fee shifting provision that is applied asymmetrically in favor of prevailing plaintiffs (*e.g.*, Titles II and VI of the Federal Civil Rights Act; 42 U.S.C. § 1988), will be a strong indication of the importance of the public policy implications of the case, and of the lesser weight the "amount in controversy" factor may have in the court's analysis. The Advisory Committee Notes emphasize that "[i]t is also important to repeat the caution that the monetary stakes are only one factor. . . . [Many substantive areas] may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values."[144] Importantly, the amended Rule 26(b)(1) was specifically edited after the public comment period. The "amount in controversy" factor was moved from the first to the second factor, and "the importance of the issues at stake" was moved up to the first factor.

The proposed Rule also explicitly directs courts to consider the parties' relative access to information. Although discovery may place a heavier burden on the party who has more information, "information asymmetry" is not in and of itself a basis for granting or denying discovery.[145]

All of the proportionality factors should be assessed to determine which ones apply (and whether they weigh in favor or against the proposed discovery); no one factor is determinative *ab initio*.

7. Do not approach discovery disputes with the notion that discovery is perfect or that it will result in the production of "any and all" relevant documents or information.

With the advent of electronic discovery, it is now more likely than ever that we will see flaws and imperfections in both preservation and production efforts, at least in hindsight.[146] Rather than requiring perfection

> Plaintiffs have no substantial financial resources of which I am aware and the law firm representing them is proceeding pro bono. . . . I will therefore order the search of the backup tapes Plaintiffs seek.

Id.

144. FED. R. CIV. P. 26, Advisory Committee Notes (2015) at 24.

145. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, Rules Appendix B-8, B-40-41 (Sept. 2014).

146. Whether the flaws and imperfections are in fact more pronounced with electronic discovery, or whether they are simply more visible, is open to debate. *See*, e.g., Jason R. Baron,

in the preservation process, however, courts require litigants to engage in good faith and reasonable efforts to identify, preserve, and produce evidence relevant to a dispute.[147] In addition, several courts and other authorities recognize that a litigant's discovery efforts should be reasonable and proportionate to the particular matter in the context of this less-than-perfect world.[148] In short, perfection is not the standard.

Notwithstanding this recognition that reasonableness – not perfection – is the standard[149], there are numerous instances where a producing party

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Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search, XVII RICH. J.L. & TECH. 9, 27-28 (2011) (describing available quality control and testing methods, and noting that conducting review with clustering software showed error rates were equal to or less than error rates for manual review); Moore v. Publicis Groupe, 287 F.R.D. 182, 190 (S.D.N.Y. 2012) ("[W]hile some lawyers still consider manual review to be the 'gold standard,' that is a myth, as statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review").

147. *See, e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am., LLC, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) ("Courts cannot and do not expect that any party can meet a standard of perfection . . . .courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party"), *abrogated on other grounds by* Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012).

148. *See, e.g.*, Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done--or not done--was *proportional* to that case and consistent with clearly established applicable standards."); Design Basics, LLC v. Carhart Lumber Co., No. 8:13CV125, 2014 WL 6669844, at *3 (D. Neb. Nov. 24, 2014) (denying plaintiff's motion to image every single one of defendant's computers: "plaintiff failed to show good cause why additional computer data must be collected from the defendant. Taking into consideration the factors listed in Fed.R.Civ.P. 26(b)(2)(C), the court is convinced that allowing imaging of every computer or data storage device or location owned or used by the defendant, including all secretaries' computers, is not reasonable and proportional to the issues raised in this litigation"). *See also*, The Seventh Circuit's Proposed Standing Order Relating to the Discovery of Electronically Stored Information, Principle 2.04 (a) ("Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves."); *The Sedona Principles, Second Edition: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2d ed. 2007), 17 PRINCIPLE 2 ("When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in FED. R. CIV. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy."); *The Sedona Guidelines for Managing Information and Records in the Electronic Age, Second Edition* (2007), Comment 5.e. ("[t]he scope of what is necessary to preserve will vary widely between and even within organizations depending on the nature of the claims and information at issue.").

149. Datel Holdings Ltd. v. Microsoft Corp., 84 Fed. R. Evid. Serv. 1294, at *4 (N.D. Cal. Mar. 11, 2011) ("In relatively large productions of electronic information under a relatively short

fails to produce some information and the requesting party reflexively requests more discovery on the road to spoliation or sanctions motions practice. In this context, parties frequently argue that "more documents must exist" because the production seems small or for some other largely speculative or overly generalized reason. Yet, as recognized by the court in *Hubbard v. Potter* when it denied additional discovery, if "the theoretical possibility that more documents exist sufficed to justify additional discovery, discovery would never end."[150]

Even when litigants can demonstrate that the responding party did not produce information it would have been expected to produce (e.g., where a third party produces documents sent to or by the responding party), courts should not automatically allow parties to engage in formal discovery efforts to determine whether the opposing party has fulfilled its discovery obligations (i.e., to conduct "discovery on discovery"), without something more. For example, in *Freedman v. Weatherford Int'l*, a shareholder derivative suit where the organization was accused of bad accounting practices, the plaintiffs initially had asked for reports of search terms and productions made in connection with prior investigations surrounding the accounting practices; the plaintiffs hoped to compare the current and earlier productions to show deficiencies in the defendant's current production.[151] The court initially denied the motion because plaintiffs did not offer "an adequate factual basis for their belief that the current production [wa]s deficient."[152] The plaintiffs moved for reconsideration and this time offered 18 emails, obtained through third parties, but not produced by the

time table, perfection or anything close based on the clairvoyance of hindsight cannot be the standard; otherwise, the time and expense required to avoid mistakes to safeguard against waiver would be exorbitant, and complex cases could take years to ready for trial."); Freedman v. Weatherford Int'l Ltd., 12-Civ-2121 (LAK) (JCF), 2014 WL 4547039, at *3 (S.D.N.Y. Sept. 12, 2014) (quoting Moore v. Publicis Groupe, 287 F.R.D. 182, 191 (S.D.N.Y. 2012)); Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 306 (S.D.N.Y. 2012) ("the standard for the production of ESI is not perfection"); Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am., LLC, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010), *abrogated on other grounds by* Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012); Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc., *et al*., 11-Civ-6189 (DLC), 2014 WL 584300, at *2 (S.D.N.Y. Feb. 14, 2014) ("All that can be legitimately expected is a good faith, diligent commitment to produce all responsive documents uncovered when following the protocols to which the parties have agreed, or which a court has ordered."); Philips Electrs. N. Am. Corp. v. BC Technical, 773 F. Supp. 2d 1149, 1196 (D. Utah 2011) (citing Pension Comm.); Zest IP Holdings, LLC v. Implant Direct Mfg., LLC, Civ. No. 10-541-GPC (WVG), 2013 WL 6159177, at *10 (S.D. Cal. Nov. 25, 2013) ("The Federal Rules of Civil Procedure do not require perfection or guarantee that every possible responsive document will be found and/or produced."); Webb v. CBS Broad., Inc., No. 08-C-6241, 2010 WL 2104179, at *6 (N.D. Ill. May 25, 2010) (citing Pension Comm.).

150. Hubbard v. Potter, 247 F.R.D. 27, 29 (D.D.C. 2008).

151. Freedman v. Weatherford Int'l Ltd., 2014 WL 4547039 (S.D.N.Y. Sept. 12, 2014).

152. *Id.* at *1 (internal citations omitted).

defendant, as evidence of an incomplete production. However, the plaintiffs admitted that of the 18 emails, only three at most would have been identified by the additional search terms that had been used in the investigations, while defendant asserted that the additional searches would have identified only one additional unproduced documents. Stating that "the Federal Rules of Civil Procedure do[] not require perfection[,]"[153] the court noted that the defendant had already reviewed millions and produced hundreds of thousands of documents, and it was "unsurprising that some relevant documents may have fallen through the cracks. But most importantly, the plaintiffs' proposed exercise [was] unlikely to remedy the alleged discovery defects." The court ultimately denied plaintiffs' motion for reconsideration based on the "dubious value" of the requested relief.[154]

Instead of engaging in costly and potentially wasteful formal discovery of this type, parties will be better served by informally exchanging information regarding custodians, databases and other sources of information. Many courts encourage or require the parties to engage in such discussions during their Rule 26(f) conferences.[155] Increased transparency will be facilitated where the parties agree that such disclosures will not constitute waiver of applicable attorney work product protections. However, the notion of transparency should not be morphed into an opportunity for unending questions and fishing expeditions as the same rules of relevance and proportionality should guide these exchanges themselves, which should be focused on advancing substantive discovery efforts (and the case) rather than looking for "gotcha" moments.

8. Do not address proportionality arguments by citing superseded case law, rotely reciting the rules, or making unsupported assertions of burden.

Counsel should be mindful that the changes in the civil rules in 2015 will preclude blind reliance on prior authority. For example, the scope of

153. *Id.* at *3 (quoting Moore v. Publicis Groupe, 287 F.R.D. 182, 191 (S.D.N.Y. 2012)). *See also*, Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 306 (S.D.N.Y. 2012) ("the standard for the production of ESI is not perfection.").

154. *Id.* at *3.

155. *See*, e.g., N.D. Cal. ESI Checklist for use during Rule 26(f) meet and confer process, *available at* http://www.cand.uscourts.gov/eDiscoveryGuidelines; D. Del., Default Standard for Discovery, Including Discovery of [ESI], *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf; N.D. Oh., Civil Local Rules, Appx. K, Default Standard for Discovery of [ESI], *available at* http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/AppendixK.pdf; D. Maryland, Suggested Protocol for Discovery of [ESI], *available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf.

discovery will not be defined, if it ever was, by the language that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence," and the case law that relies on that phrase to define the scope of discovery will simply become inapplicable.[156] The revised rules and accompanying comments from the Advisory Committee make clear that the scope of discovery is not, and for years has not been intended to be, defined by the phrase thus, reliance on older cases to frame the scope of discovery is suspect even today.[157]

In practice, this means no longer citing to *Oppenheimer Funds*[158] and the many other cases that follow its discussion regarding the scope of discovery allowed under the civil rules. Indeed, citations to prior legal authority of any vintage are often superfluous because each case stands on its own based on the facts and need for the particular discovery at issue. We further caution counsel to shy away from extensive citation of case law and to instead focus on applying the rules (and their intent, as clarified by the Committee Notes) to the facts and circumstances of the particular discovery dispute at issue.

Similarly, counsel should avoid rote citations to the Rules. The accompanying Advisory Committee Notes, which shed light on the intent behind the revisions, are invaluable additions to the 2015 amendments. Counsel should be familiar with the Notes and be able to cite to them frequently to support the proper application of the rules. As is often the case, the devil – or in this instance, the angel – is in the details of these Notes.

When making a burden argument, counsel must understand that simple assertions of burden unsupported by facts will likely not sway the court.[159] In many instances, particularized representations by counsel can

156. FED. R. CIV. P. 26(b)(1).

157. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, Rules App. at B-9-10 (Sept. 2014.) ("The final proposed change in Rule 26(b)(1) deletes the sentence which reads: 'Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.' . . .This change is intended to curtail reliance on the 'reasonably calculated' phrase to define the scope of discovery. The phrase was never intended to have that purpose.")

158. Oppenheimer Fund, Inc. v Sanders, 437 U.S. 340 (1978).

159. *See* Cartel Asset Mgmt. v. Ocwen Fin. Corp., 2010 WL 502721, at *15 (D. Colo. Feb. 8, 2010) (Court refused to conclude data was inaccessible without "specific information indicating how [] Defendants store electronic information, the number of back-up or archival systems that would have to be searched in the course of responding . . . or Defendants' capability to retrieve information stored in those back-up or archival systems."); Smith v. Bayer Material Science, LLC, 2013 WL 3153467, at *1 (N.D. W. Va. June 19, 2013) ("Any objection to

suffice but they must be reasonably reliable. If you are making representations as counsel, make sure that they are well-informed and avoid hyperbole or exaggeration. In other cases, however, cost estimates from the client or vendors as well as particularized showings of burden often will be important and should be submitted by declarations from witnesses with personal knowledge thereof. An argument about the expense of production should include an estimate clearly outlining the proposed steps and the associated expenses. Litigants may choose to present multiple proposals to the court with varying features of production as evidence of a significant burden, or as alternative forms of production. Itemizing expenses, including time and cost will help bolster arguments and proposals.

An illustrative case is *Cochran v. Caldera Med., Inc.*, where the court rejected the defendant's argument for cost sharing when defendant "merely state[d] that an unnamed vendor ha[d] estimated that it would cost $500,000.00 'to collect, process and review the paper and electronic documents necessary to respond to plaintiffs' discovery demands.'"[160] The court found that, "this assertion, unsupported by any invoice or detailed proposal, [was] insufficient to satisfy defendant's burden. For instance, the court [could not] determine what portion of these projected costs [were] attributable to retrieving accessible data, or to time reviewing the documents for privilege materials, both of which tasks are typically not subject to cost-sharing."[161] The court noted that it could order cost-sharing, but only upon finding that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[162] Because the court concluded that the discovery plaintiffs sought was highly relevant – even "critical" – to their case, and because of the

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discovery requests must be lodged with some specificity so the requesting party, and the Court if it becomes involved, can ascertain the basis for the objection. Accordingly, generalized, boilerplate objections that regurgitate the language from Rule 26—irrelevant, overly broad, and unduly burdensome—are highly disfavored and will usually result in a waiver of the objection.").

160. Cochran v. Caldera Med., Inc., 2014 WL 1608664, at *2 (E.D. Pa. Apr. 22, 2014) (internal citations omitted).

161. *Id.; see also* Thompson v. U.S. Dept. of Housing and Urban Dev., 219 F.R.D. 93, 98 (D. Md. Dec. 12, 2003) ("Conclusory or factually unsupported assertions by counsel that the discovery of electronic materials should be denied because of burden or expense can be expected to fail."); Escamilla v. SMS Holdings Corp., 2011 WL 5025254, *5 (D. Minn. Oct. 21, 2011) ("[C]onclusory and vague" statements from defendant about his financial status and his inability to pay for discovery of electronic information did not support burdensome proportionality argument.).

162. Cochran v. Caldera Med., Inc., 2014 WL 1608664, at *3 (quoting FED. R. CIV. P. 26(b)(2)(C)(iii)).

seriousness of the injuries alleged by plaintiffs, it declined to find that the burden or expense of the discovery outweighed its likely benefit.[163]

9. Do not get caught up in an academic dispute regarding the "burden of proving" proportionality as courts will expect that each side of the dispute to contribute at least some of the answer to the proportionality inquiry, and the most reasonable position will likely prevail.

Much has been written in terms of the new Rule 26(b) formulation of proportionality factors when it comes to assessing which party may bear the "burden of proof" on a factor.[164] Indeed, many commenters who objected to the reformulated rule voiced concern that the new language would set off intractable disputes where requesting and responding parties would assert that the other had the duty to "prove" that the discovery in question was or was not proportional.[165]

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163. *Id.*

164. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-0002, Cmt. by Ariana Tadler, 4 (Feb. 18, 2014) ("I, along with many other critics, believe that the proposed changes to Rule 26 will result in a shifting of the burden . . . to the requesting party, who is likely unable to meet that burden."); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-0002, Cmt. by Bill Robins, 2 (Feb. 18, 2014) ("the plaintiff is placed at an extreme disadvantage because the plaintiff would carry the burden of proof[.]"); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-0002, Cmt. by Hon. Shira A. Scheindlin, 3 (Jan 13, 2014); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-0002, Cmt. by David Starnes (Feb 18, 2014) ("This proposal is a terrible, regressive idea! It will shift the burden of proof for discovery on the plaintiff, while the defendant controls most of the information related to the proportionality inquiry."); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-0002, Cmt. by Karen Winters (Feb. 16, 2014) ("it is critical that plaintiffs have the relevance tool to allow them to request the information required to meet their burden of proof."). This list is not exhaustive.

165. *See supra p. [21-22, 45] notes [76-79, 148]; see also Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 104-05 (Nov. 7, 2013) (Statement of Dan Hedlund, Gustafson Gluek) (The proposal "is open to interpretation and will subject potentially every discovery request to scrutiny."); *see id*. at 106 (Feb. 7, 2014) (Statement of Mark Chalos, Tennessee Association for Justice) ("the proposed rule as it sits today is unclear where the burden lies . . . . The concern that we have is that the rule as it is drafted in the proposed amendment gives yet another battleground. . . "); *see id*. at 250, 256 (Jan. 9, 2014) (Statement of Paul Avelar, Institute for Justice); *see id*. at 265, 269 (Jan. 9, 2014) (Statement of Patrick Paul, Snell & Wilmer*); see id*. at 280 (Jan. 9, 2014) (Statement of Jennie Lee Anderson, Andrus Anderson*);see id*. at 283-296 (Jan. 9, 2014) (Statement of Lea Bays, Robbins, Geller, Rudman & Dowd); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USC-Rules-CV-2013-0002, Cmt. by Charles P. Yezbak, III and Melody Fowler-Green, 2 (Feb. 19, 2014) ("The proposed changes also provide no guidance regarding whether the requestor or producer has the burden of proof regarding the proportionality analysis . . . . [This] will generate wasteful and time-consuming motions practice."); *Preliminary Draft of Proposed*

We believe that this issue can become an unnecessary distraction for parties and counsel. The new rule does not shift the burden of proving proportionality to the party seeking discovery. [166] The parties will be expected to collectively provide the court with sufficient information to allow it to make informed decisions, and that certain parties will be expected to provide more information about certain topics: "[a] party claiming undue burden or expense ordinarily has far better information – perhaps the only information – with respect to" why a request is unduly burdensome; and a "party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them."[167] The party that can best support its position, and can offer the alternative that produces the key information most cost-effectively, likely will prevail.

Combined with the existing language in Rule 26(g), we believe that the message to counsel from the Advisory Committee is clear: assessing and applying proportionality in civil discovery is a joint responsibility of all counsel for all parties. On some issues a party seeking discovery may need to show why the request is proportional and, on others, the party resisting discovery may need to do the same. The facts and circumstances will vary but the court, if called upon, will examine the proposed discovery in light of those circumstances and order discovery that is proportional consistent with Rule 1.

Amendments to the Federal Rules of Civil Procedure, No. USC-Rules-CV-2013-0002, Cmt. by Steven Skalet, 3 (Feb. 18, 2014) (The "allocation of the burden of proof on the proportionality issue will be critical. But the proposed rule is silent, and we have no idea on which party courts will place the burden.").

166. In this regard, we recommend a close reading of the commentary in the May 2, 2014 memorandum to the Standing Committee:

"The Committee has listened carefully to concerns expressed about the move of the proportionality factors to Rule 26(b)(1) — that it will shift the burden of proving proportionality to the party seeking discovery, that it will provide a new basis for refusing to provide discovery, and that it will increase litigation costs. None of these predicted outcomes is intended, and the proposed Committee Note has been revised to address them. The Note explains that the change does not place a burden of proving proportionality on the party seeking discovery and explains how courts should apply the proportionality factors. The Note also states that the change does not support boilerplate refusals to provide discovery on the ground that it is not proportional, but should instead prompt a dialogue among the parties and, if necessary, the court. And the Committee remains convinced that the proportionality considerations — which already govern discovery and parties' conduct in discovery — should not and will not increase the costs of litigation. To the contrary, the Committee believes that more proportional discovery will decrease the cost of resolving disputes in federal court without sacrificing fairness."

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Report to the Standing Committee* 8 (May 2, 2014) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2014.pdf.

167. FED. R. CIV. P. 26, Advisory Committee Notes (2015) at 23.

As a practical matter, counsel should complete the proportionality matrix analysis with a view as to how a court would view the issue objectively, without any deference to any supposed "burden of proof." Indeed, we expect that courts will be unimpressed with disputes regarding the burden of proof and instead will continue to focus on a common-sense application of the rules to determine what makes sense in each case.[168] This places a premium on counsel being able to articulate positions that resonate with proportionality (whether for or against the discovery at issue) independent of any arguable burden allocation.

10. Do not forget that proportionality considerations also apply to preservation decisions and disputes.

Many authorities have noted that if the Federal Rules are to have any chance of being "administered to secure the just, speedy, and inexpensive determination of every action and proceeding," then any retrospective analysis of preservation decisions should recognize the application of the concepts of proportionality as well.[169] Thus, while the Federal Rules generally do not apply to pre-litigation decisions and conduct, it is important to understand that proportionality assessments are made daily with respect to evidence preservation efforts and their reasonableness will inform any retrospective consideration in the context of sanctions under

168. We are cognizant of ample case law discussing the various burdens that may be involved in motions to compel and motions for protective orders and do not suggest that the law and standards are automatically displaced by the civil rules. Instead, we are offering a practical observation that effective advocacy will not focus on those burden assessments but more so on the competent analysis and articulation of what is and is not reasonable and proportionate in any given circumstance.

169. *The Sedona Principles, Second Edition: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2d ed. 2007), 34 Cmt. 5.g. ("Even though it may be technically possible to capture vast amounts of data during preservation efforts, this usually can be done only at great cost. Data is maintained in a wide variety of formats, locations and structures. Many copies of the same data may exist in active storage, backup, or archives. Computer systems manage data dynamically, meaning that the data is constantly being cached, rewritten, moved and copied. For example, a word processing program will usually save a backup copy of an open document into a temporary file every few minutes, overwriting the previous backup copy. In this context, imposing an absolute requirement to preserve all information would require shutting down computer systems and making copies of data on each fixed disk drive, as well as other media that are normally used by the system. Costs of litigation would routinely approach or exceed the amount in controversy. In the ordinary course, therefore, the preservation obligation should be limited to those steps reasonably necessary to secure evidence for the fair and just resolution of the matter in dispute."). Stated otherwise, "[w]hether preservation . . . is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done--or not done--was *proportional* to that case and consistent with clearly established applicable standards." Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (emphasis in original).

Amended Rule 37(e).[170]

In terms of preservation considerations once litigation arises, the *Manual for Complex Litigation* recognizes that the scope of data preservation must be carefully limited to what is proportional, as "[a] blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operation."[171] "Because such an order may interfere with the normal operations of the parties and impose unforeseen burdens," courts must carefully consider "the need for a preservation order and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant matter without imposing undue burdens."[172] Efforts should be made to "minimiz[e] cost and intrusiveness and the downtime of the computers involved."[173] Preservation orders should "*exclude* specified categories of documents or data whose cost of preservation *outweighs substantially* their relevance in the litigation, *particularly . . . if there are alternative sources for the information.*"[174]

While at least one court has acknowledged the difficulties inherent in applying proportionality factors to preservation decisions,[175] much of the seminal eDiscovery law, from the *Zubulake* line of cases forward, has implicitly or explicitly recognized that it is neither possible, nor legally required, to apply the same level of rigor to preservation and collection activities across every person or system that may possess relevant information. Additionally, and as noted with respect to civil discovery generally elsewhere in this article, perfection is not the standard by which preservation efforts are measured.[176]

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170. A comprehensive examination of Amended Rule 37 is beyond the scope of this Article. For a thorough overview of the history and contents of Amended Rule 37(e), *see* Thomas Y. Allman, *The 2015 Civil Rules Package As Transmitted To Congress*, Fall 2015 Sedona Conference® Journal (pending publication), at 16-25.

171. Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 11.442, at 73 (2004).

172. *Id.*

173. *Id.*

174. *Id.* at 74 (emphasis added).

175. Orbit One Communications v. Numerex Corp., 271 F.R.D. 429 (S.D.N.Y. 2010).

176. *See* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am., LLC, 685 F. Supp. 2d 456, 461 (S.D. N.Y. 2010) ("Courts cannot and do not expect that any party can meet a standard of perfection [regarding electronic discovery]"), *abrogated in part on other grounds* by Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 162 (2d Cir. 2012). S*ee also*, Federal Housing Finance Agency v. HSBC North America Holdings Inc., 2014 WL 584300, at *2 (S.D.N.Y. Feb. 14, 2014) ("Parties in litigation are required to be diligent and to act in good faith in producing documents in discovery. The production of documents in litigation such as this is a herculean undertaking, requiring an army of personnel and the production of an extraordinary volume of documents. Clients pay counsel vast sums of money in the course of this undertaking,

Whether counsel is prospectively identifying the appropriate preservation steps that should be undertaken, or retrospectively analyzing whether past preservation efforts were reasonable, it is critical to evaluate proportionality in light of the facts known regarding the nature, type, and number of claims that are (or may be) brought, and the nature of the information that is (or may be) relevant to the existing or reasonably anticipated litigation.[177] Approaching the issue in a methodical fashion allows the court to best understand the context in which the decisions are being (or were) made, thereby yielding more consistent application of legal principles and more consistent outcomes. Contextualization is especially important for any retrospective analysis in light of significant changes in technologies, standards and expectations over time.

In short, arguments and presentations regarding preservation issues should be realistic and incorporate the proportionality concepts embodied in the civil rules, even when analyzing pre-litigation conduct that is being assessed later.

If information is lost, proposed Rule 37(e) will reduce the possibility that less than perfect efforts to preserve electronically stored information will lead to case-altering consequences. The proposed rule limits courts' authority to sanction a party for evidence that was "lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery" by requiring a finding not only that the loss occurred, but of prejudice to the other party, or that the party that lost the information "acted with the intent to deprive another party of the information's use in the litigation."

IX. CONCLUSION

With the ever-increasing volumes of electronically stored information in litigation, the need for proportionality in discovery has never been more

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both to produce documents and to review documents received from others. Despite the commitment of these resources, no one could or should expect perfection from this process. All that can be legitimately expected is a good faith, diligent commitment to produce all responsive documents uncovered when following the protocols to which the parties have agreed, or which a court has ordered."); Philips Electronics North America Corp. v. BC Technical, 773 F. Supp. 2d 1149, 1196 (D. Utah 2011) (citing *Pension Comm.*); Zest IP Holdings, LLC v. Implant Direct Mfg., *LLC*, 2013 WL 6159177, at *10 (S.D. Cal. Nov. 25, 2013) ("The Federal Rules of Civil Procedure do not require perfection or guarantee that every possible responsive document will be found and/or produced."); Webb v. CBS Broadcasting, Inc., 2010 WL 2104179, at *6 (N.D. Ill. May 25, 2010) (citing *Pension Comm.*).

177. The Federal Judicial Center's June 2012 publication *Managing Discovery of Electronic Information: A Pocket Guide for Judges (Second Edition)* specifically notes at page 28 that "…preservation steps required should be reasonable and proportional to the particular case."

acute. And yet, for more than thirty years, litigants and courts have had rules relating to proportionality. We have had no shortage of proportionality rules; we have been unable to achieve mastery over the rules we have.

This article contends that the application of a consistent methodology to assess proportionality is a best practices approach that can lead litigants to increased competence in their application of this hitherto elusive concept. This standardized approach to proportionality steers parties away from a myopic focus on only one or two factors and compels consideration of all the factors that impact proportionality. If this systematic approach is adopted, both parties and courts will see more consistent and more practical application of proportionality in discovery. We also anticipate that routine citation and discussion of the factors in decisions will help yield a body of law over time that brings greater predictability and guidance to parties and counsel. Finally, we urge counsel to consider the practical observations framed in this article to guide them in making reasoned and targeted requests, objections, responses and arguments regarding proportionality in any particular case.

X. APPENDIX

RULE 26 ADVISORY COMMITTEE NOTE (2015)

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). * * * On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to

keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery * * *."

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

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.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the

court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free

speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense.

The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. Until then, the scope of discovery reached matter "relevant to the subject matter involved in the pending action." Rule 26(b)(1) was amended in 2000 to limit the initial scope of discovery to matter "relevant to the claim or defense of any party." Discovery could extend to "any matter relevant to the subject matter involved in the action" only by court order based on good cause. The Committee Note observed that the amendment was "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." But even with court supervision, discovery should be limited to matter relevant to the parties' claims or defenses, recognizing that the parties may amend their claims and defenses in the course of the

litigation. The uncertainty generated by the broad reference to subject matter is reflected in the 2000 Note's later recognition that "[t]he dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision." Because the present amendment limits discovery to matter relevant to any party's claim or defense, it is important to focus more carefully on that concept. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision * * *." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding

party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan — issues about preserving electronically stored information and court orders under Evidence Rule 502.

Gap Report

The published text of Rule 26(b)(1) is revised to place "the importance of the issues at stake" first in the list of factors to be considered in measuring proportionality, and to add a new factor, "the parties' relative access to relevant information." The proposal to amend Rule 26(b)(2)(A) to adjust for the proposal to add a presumptive numerical limit on Rule 36 requests to admit is omitted to reflect withdrawal of the Rule 36 proposal. The result restores the authority to limit the number of Rule 36 requests by local rule. The proposal to amend Rule 26(b)(2)(C) to adjust for elimination of the local-rule authority is withdrawn to reflect restoration of that authority. Style changes were made in Rule 26(d)(1), deleting the only proposed change, and in 26(d)(2). The Committee Note was expanded to emphasize the importance of observing proportionality by recounting the history of repeated efforts to encourage it. Other new material in the Note responds to concerns expressed in testimony and comments, particularly the concern that restoring proportionality to the scope of discovery might somehow change the "burdens" imposed on a party requesting discovery when faced with a proportionality objection.

GUIDELINES *and* PRACTICES *for* IMPLEMENTING *the* 2015 DISCOVERY AMENDMENTS *to* ACHIEVE PROPORTIONALITY

VOLUME 99 NUMBER 3 WINTER 2015

JUDICATURE

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The Duke Law Judicial Studies Center *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality* explain amendments to Federal Rule of Civil Procedure 26(b) that take effect on Dec. 1, 2015, and recommend useful, practical, and concrete implementing procedures and practices that build on the amendments' framework.

More than 2,000 comments were submitted during the Civil Rules Advisory Committee's six-month rulemaking public-comment period, expressing concerns about the ambiguity of certain factors enumerated in the proportionality standard ("needs of the case," "burden or expense outweighs benefit," "parties' resources," "importance of issues," and "importance of discovery"). Other comments raised concerns about the significance of reordering the factors and applying certain factors too early in litigation

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because they change and evolve during the course of a lawsuit, while others suggested that the amendments shifted the burden of proof.

The Center held a conference on the new amendments with more than 70 practitioners and 15 federal judges Nov.13-14, 2014, in Arlington, Virginia, as the first step in a drafting process that aimed to provide greater guidance on what the amendments are intended to mean and how to apply them effectively. From the beginning it was understood that, although some disagreed with all or some of the rule changes, the project's goal was not to revisit the choices made during the rulemaking process, but to take the amended rules as the starting point for guidelines to help apply them in specific cases.

Many discovery proportionality practices and procedures were raised and discussed at the conference. At its conclusion, 40 practitioners and judges volunteered to serve on teams, leading to guidelines implementing the new rule amendments.

It was evident at the conference that lawyers practicing in different areas of law viewed the amendments from different perspectives and had different views on how the amendments should be applied. To make sure that these different perspectives were considered in the drafting process, four teams of volunteers were formed with roughly 10 practitioners and judges on each team, divided by practice: (1) personal injury/products liability; (2) commercial litigation; (3) employment/civil rights; and (4) complex litigation. Two leaders, one plaintiff practitioner and one defense practitioner, were designated for each team.

The Hon. Lee H. Rosenthal and Prof. Steven Gensler agreed to be the project's reporters. In late March 2015, the reporters provided the four teams a 75-page study, detailing background information about the 2015 rules amendments and proposing approaches for implementing the proportionality amendments. To a large extent, the study built on approaches adopted as best practices by judges who have been strong proponents of the "proportionality principles" for many years. Key points in the study were identified and set out in a stand-alone, 12-page set of guidelines and practices.

The study and the draft guidelines and practices were circulated to the 40 volunteers to get a general sense of the group's thinking. After reviewing the comments, the reporters revised the guidelines and practices and produced the Second Draft in late May.

The four teams circulated proposed edits among themselves and held one or more conference calls in June/July. They submitted joint comments, which were circulated among the four teams. In late July, the reporters revised the draft to account for the comments, deferring consideration of inconsistent or disputed suggestions for further comment from the teams.

On July 31, 2015, the Third Draft was circulated to the teams and sent to 300 practitioners active in the area. The Third Draft was also posted for three weeks on the Center's website in case others were interested and wished to comment. Thirty-three individuals and organizations, primarily representing lawyers practicing employment discrimination law, submitted comments and proposed edits, all of which were considered by the reporters.

The reporters prepared a Fourth Draft and met with the eight team leaders and an additional judge in a one-day drafting session in Dallas on August 28 to refine the draft and address lingering disagreements. The Fifth Draft was forwarded to the volunteers on Sept. 4, 2015.

The *Guidelines and Practices* are the culmination of a process that began in November 2014. Although the Duke Law Judicial Studies Center retained editorial control, this iterative drafting process provided multiple opportunities for the volunteers on the four teams to confer, suggest edits, and comment on the guidelines and practices. Substantial revisions were made during the process. Many compromises, affecting matters on which the 40 volunteer contributors hold passionate views, were also reached. But the *Guidelines and Practices* should not be viewed as representing unanimous agreement, and individual volunteer contributors may not necessarily agree with every guideline and practice. In addition, the *Guidelines and Practices* may not necessarily reflect the official position of Duke Law School as an entity or of its faculty or of any other organization, including the Judicial Conference of the United States.

The *Guidelines and Practices* were completed after an intensive one-year effort involving the bench, bar, and academy intended to meet the immediate need of the bench and bar for guidance on amendments taking effect in December 2015. Recognizing that case law and case-management techniques quickly evolve, the *Guidelines and Practices* will be periodically updated. The updating will be informed by separate regional conferences held by the Center with smaller groups of judges and practitioners evaluating the *Guidelines and Practices.* A major conference will follow in 18 to 24 months, and the *Guidelines and Practices* will be revised in light of bench and bar actual experience.

By bringing together the strengths of prominent judges, practitioners, and law professors to bear on important issues affecting the civil litigation system, the Center is fulfilling its mission to improve the administration of justice.

John K. Rabiej
Director, Duke Law School Center for Judicial Studies

Malini Moorthy
Chair, Center Advisory Council

Sept. 10, 2015

I. The Guidelines

These guidelines for applying the 2015 "proportionality" amendments to the Federal Rules of Civil Procedure discuss what the amendments mean, what they did and did not change, and ways to understand their impact and meaning. The guidelines add some flesh to the bones of the rule text and Committee Note and explore how the amendments intersect with other rule provisions. The guidelines are, of course, not part of the rules and have no binding effect. They are a resource for judges, lawyers, and litigants who must understand the amendments and their impact to use and comply with the rules governing discovery.

GUIDELINE 1

Rule 26(b)(1) defines the scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Proposed discovery must be both relevant and proportional to be within the scope that Rule 26(b)(1) permits. The Rule 26(b)(1) amendments, however, do not alter the parties' existing discovery obligations or create new burdens.

COMMENTARY

Discovery that seeks relevant and nonprivileged information is within the permitted scope of discovery only if it is proportional to the needs of the case.

As used in Rule 26(b)(1), proportionality describes:

(a) the six factors to be considered in allowing or limiting discovery to make it reasonable in relationship to a particular case;
(b) the criteria for identifying when the discovery meets that goal;
(c) the analytical process of identifying the limits, including what information is needed to decide what discovery to allow and what discovery to defer or deny; and
(d) the goal itself.

GUIDELINE 2

Rule 26(b)(1) identifies six factors for the parties[1] and the judge to consider in determining whether proposed discovery is "proportional to the needs of the case." As discussed further in Guideline 3, the degree to which any factor applies and the way it applies depend on the facts and circumstances of each case.

GUIDELINE 2(A): "Importance of Issues at Stake"

This factor focuses on measuring the importance of the issues at stake in the particular case. This factor recognizes that many cases raise issues that are important for reasons beyond any money the parties may stand to gain or lose in a particular case.

COMMENTARY

A case seeking to enforce constitutional, statutory, or common-law rights, including a case filed under a statute using attorney fee-shifting provisions to encourage enforcement, can serve public and private interests that have an importance beyond any damages sought or other monetary amounts the case may involve.

GUIDELINE 2(B): "Amount in Controversy"

This factor examines what the parties stand to gain or lose financially in a particular case as part of deciding what discovery burdens and expenses are reasonable for that case. The amount in controversy is usually the amount the plaintiff claims or could claim in good faith.

COMMENTARY

If a specific amount in controversy is alleged in the pleadings and challenged, or no specific amount is alleged and the pleading is limited to asserting that the amount exceeds the jurisdictional minimum, the issue is how much the plaintiff could recover based on the claims asserted and allegations made. When an injunction or declaratory judgment is sought, the amount in controversy includes the pecuniary value of that relief. The amount-in-controversy calculation can change as the case progresses, the claims and defenses evolve, and the parties and judge learn more about the damages or the value of the equitable relief.

GUIDELINE 2(C): "Relative Access to Information"

This factor addresses the extent to which each party has access to relevant information in the case. The issues to be examined include the extent to which a party needs formal discovery because relevant information is not otherwise available to that party.

COMMENTARY

In a case involving "information asymmetry" or inequality, in which one party has or controls significantly more of the relevant information than other parties, the parties with less information or access to it depend on discovery to obtain relevant information. Parties who have more information or who control the access to it are often asked to produce significantly more information than they seek or are able to obtain from a party with less.

The fact that a party has little discoverable information to provide others does not create a cap on the amount of discovery it can obtain. A party's ability to take discovery is not limited by the amount of relevant information it possesses or controls, by the amount of information other parties seek from it, or by the amount of information it must provide in return. Discovery costs and burdens may be heavier for the party that has or can easily get the bulk of the essential proof in a case.

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information, but without the unfairness that can result if the asymmetries are leveraged by any party for tactical advantage. Unfairness can occur when a party with significantly less information imposes unreasonable demands on the party who has voluminous information. Unfairness can also occur when a party with significantly more information takes unreasonably restrictive or dilatory positions in response to the other party's requests.

GUIDELINE 2(D): "Parties' Resources"

This factor examines what resources are available to the parties for gathering, reviewing, and producing information and for requesting, receiving, and reviewing information in discovery. "Resources" means more than a party's financial resources. It includes the technological, administrative, and human resources needed to perform the discovery tasks.

COMMENTARY

In general, more can be expected of parties with greater resources and less of parties with scant resources, but the impact of the parties' reasonably available resources on the extent or timing of discovery must be specifically determined for each case.

As with all of the factors, this factor is only one consideration. Even if one party has significantly greater resources, this factor does not require that party to provide all or most of the discovery proposed simply because it is able to do so. Nor does it mean that parties with limited resources can refuse to provide relevant information simply because doing so would be difficult for financial or other reasons. A party's ability to take discovery is not limited by the resources it has available to provide discovery in return.

The basic point is what resources a party reasonably has available for discovery, when it is needed. Evaluating the resources a party can reasonably be expected to expend on discovery may require considering that party's competing demands for those resources.

GUIDELINE 2(E): "Importance of Discovery"

This factor examines the importance of the discovery to resolving the issues in the case.

COMMENTARY

One aspect of this factor is to identify what issues or topics are the subject of the proposed discovery and how important those issues and topics are to resolving the case. Discovery relating to a central issue is more important than discovery relating to a peripheral issue. Another aspect is the role of the proposed discovery in resolving the issue to which that discovery is directed. If the information sought is important to resolving an issue, discovery to obtain that information can be expected to yield a greater benefit and justifies a heavier burden, especially if the issue is important to resolving the case or materially advances resolution. If the information sought is of marginal or speculative usefulness in resolving the issue, the burden is harder to justify, especially if the issue is not central to resolving the case or is unlikely to materially advance case resolution.

Understanding the importance of proposed discovery may involve assessing what the requesting party is realistically able to predict about what added information the proposed discovery will yield and how beneficial it will be.

GUIDELINE 2(F): Whether the Burden or Expense Outweighs Its Likely Benefit

This factor identifies and weighs the burden or expense of the discovery in relation to its likely benefit. There is no fixed burden-to-benefit ratio that defines what is or is not proportional. When proportionality disputes arise, the party in the best position to provide information about the burdens, expense, or benefits of the proposed discovery ordinarily will bear the responsibility for doing so. Which party that is depends on the circumstances. In general, the party from whom proposed discovery is sought ordinarily is in a better position to specify and support the burdens and expense of responding, while the party seeking proposed discovery ordinarily is in a better position to specify the likely benefits by explaining why it is seeking and needs the discovery.

COMMENTARY

In general, proposed discovery that is likely to return important information on issues that must be resolved will justify expending more resources than proposed discovery seeking information that is unlikely to exist, that may be hard to find or retrieve, or that is on issues that may be of secondary importance to the case, that may be deferred until other threshold or more significant issues are resolved, or that may not need to be resolved at all.

If a party objects that it would take too many hours, consume unreasonable amounts of other resources, or impose other burdens to respond to the proposed discovery, the party should specify what it is about the search, retrieval, review, or production process that requires the work or time or that imposes other burdens.

If a party objects to the expense of responding to proposed discovery, the party should be prepared to support the objection with an informed estimate of what the expenses would be and how they were determined, specifying what it is about the source, search, retrieval, review, or production process that requires the expense estimated.

If a party requests discovery and it is objected to as overly burdensome or expensive, the requesting party should be prepared to specify why it requested the information and why it expects the proposed discovery to yield that information. Assessing whether the requesting party has adequately specified the likely benefits of the proposed discovery may involve assessing the information the requesting party already has, whether through its own knowledge, through publicly available sources, or through discovery already taken.

A party with inferior access to discoverable information relevant to the claims or defenses may also have inferior access to the information needed to evaluate the benefit, cost, and burden of the discovery sought. Assessing the benefits of proposed discovery may also involve assessing how well the requesting party is able to predict what added information the proposed discovery will yield and how beneficial it will be.

Party cooperation is particularly important in understanding the burdens or benefits of proposed discovery and in resolving disputes. The parties should be prepared to discuss with the judge whether and how they communicated with each other about those burdens or benefits. The parties should also be prepared to suggest ways to modify the requests or the responses to reduce the burdens and expense or to increase the likelihood that the proposed discovery will be beneficial to the case.

Rule 26(b)(2)(B) addresses a specific type of burden argument – that discovery should not proceed with respect to a particular source of electronically stored information because accessing information from that source is unduly burdensome or costly. Examples might include information stored using outdated or "legacy" technology or information stored for disaster recovery rather than archival purposes that would not be searchable or even usable without significant effort. Rule 26(b)(2)(B) has specific provisions for discovery from such sources. Those provisions do not apply to discovery from accessible sources, even if that discovery imposes significant burden or cost.

GUIDELINE 3

Applying the six proportionality factors depends on the informed judgment of the parties and the judge, analyzing the facts and circumstances of each case. The weight or importance of any factor varies depending on the facts and circumstances of each case.

COMMENTARY

The significance of any factor depends on the case. The parties and the judge must consider each factor to determine the degree to which and the way the factor applies in that case. The factors that

apply and their weight or importance can vary at different times in the same case, changing as the case proceeds.

No proportionality factor has a prescribed or preset weight or significance. No one factor is intrinsically more important or entitled to greater weight than any other.

The order in which the proportionality factors appear in the Rule text does not signify preset importance or weight in a particular case. The 2015 amendments reordered some of the factors to defeat any argument that the amount in controversy was the most important factor because it was listed first.

GUIDELINE 4

The Rule 26(b)(1) amendments do not require a party seeking discovery to show in advance that the proposed discovery is proportional.

COMMENTARY

The 2015 amendments to Rule 26(b)(1) do not alter the parties' existing obligations under the discovery rules. The obligations unchanged by the amendments include obligations under:

Rule 26(g), requiring parties to consider discovery burdens and benefits before requesting discovery or responding or objecting to discovery requests and to certify that their discovery requests, responses, and objections meet the rule requirements;

Rule 34, requiring parties to conduct a reasonable inquiry in responding to a discovery request; and

Rule 26(c), Rule 26(f), Rule 26(g), and Rule 37(a), among others, requiring parties to communicate with each other about discovery planning, issues, and disputes. The need for communication is particularly acute when questions concerning burden and benefit arise because one side often has information that the other side may not know or appreciate.

The 2015 amendments do not require the requesting party to make an advance showing of proportionality. Unless specific questions about proportionality are raised by a party or the judge, there is no need for the requesting party to make a showing of or about proportionality. The amendments do not authorize a party to object to discovery solely on the ground that the requesting party has not made an advance showing of proportionality.

The amendments do not authorize boilerplate objections or refusals to provide discovery on the ground that it is not proportional. The grounds must be stated with specificity. Boilerplate objections are insufficient and risk violating Rule 26(g). Objections that state with specificity why the proposed discovery is not proportional to the needs of the case are permissible.

The amendments do not alter the existing principles or framework for determining which party must bear the costs of responding to discovery requests.

GUIDELINE 5

If a party asserts that proposed discovery is not proportional because it will impose an undue burden, and the opposing party responds that the proposed discovery will provide important benefits, the judge should assess the competing claims under an objective reasonableness standard.

COMMENTARY

In deciding whether a discovery request is proportional to the needs of the case, only reasonable (or the reasonable parts of) expenses or burdens should be considered.

Changes in technology can affect the context for applying the objective reasonableness standard. It is appropriate to consider claims of undue burden or expense in light of the benefits and costs of the technology that is reasonably available to the parties.

It is generally not appropriate for the judge to order a party to purchase or use a specific technology, or use a specific method, to respond to or to conduct discovery. In assessing discovery expenses and burdens and the time needed for discovery, however, it may be appropriate for the judge to consider whether a party has been unreasonable in choosing the technology or method it is using.

II. The Practices

The following practices suggest useful ways to achieve proportional discovery in specific cases. There is no one-size-fits-all approach. While practices that would advance proportional discovery in one case might hinder it in others, the suggestions may be helpful in many cases and worth considering in most. Although many of these suggestions are framed in terms of judges' case-management practices, they are intended to provide helpful guidance to lawyers and litigants as well.

PRACTICE 1

The parties should engage in early, ongoing, and meaningful discovery planning. The judge should make it clear from the outset that the parties are expected to plan for and work toward proportional discovery. If there are disputes the parties cannot resolve, the parties should promptly bring them to the judge. The judge should make it clear from the outset that he or she will be available to promptly address the disputes.

COMMENTARY

The judge and the parties share responsibility for ensuring that discovery is proportional to the needs of the case.

The parties are usually in the best position to know which subjects and sources will most clearly and easily yield the most promising discovery benefits. In many cases, the parties use their knowledge of the case to set discovery priorities that achieve proportionality. When that does not occur, judges play a critical role by taking appropriate steps to ensure that discovery is proportional to the needs of the case.

Judges have many practices available to work toward proportionality. They include: (1) orders issued early in the case communicating the judge's expectations about how the parties will conduct discovery; (2) setting procedures for the parties to promptly identify disputes and attempt to resolve them, and if they cannot do so to bring them to the judge for prompt consideration; (3) setting procedures to enable the parties to engage the judge promptly and efficiently when necessary; and (4) communicating the judge's willingness to be available when necessary.

The practices that follow provide examples of approaches that judges and parties have used to timely and efficiently resolve discovery disputes, ranging from objections to overly expansive requests to objections to obstructive or dilatory responses.

While the judge has the ultimate responsibility for determining the boundaries of proportional discovery, the process of achieving proportional discovery is most effective and efficient, and the likelihood of achieving it is greatest, when the parties and the judge work together.

PRACTICE 2

The judge should consider issuing an order in advance of the parties' Rule 26(f) conference that clearly communicates what the judge expects the parties to discuss at the conference, to address in their Rule 26(f) report, and to be prepared to discuss at a Rule 16 conference with the judge.

COMMENTARY

The Rule 26(f) conference is a critical first step in achieving proportionality. The judge should make clear – by order or other manner the judge chooses – that the parties are expected to have a meaningful discussion and exchange of information during the Rule 26(f) conference and what the parties are expected to cover. The judge should also make clear that the Rule 26(f) report will be reviewed and addressed at the Rule 16 conference. Judges following this practice often issue a form order that is routinely sent shortly after the case is filed, along with the order sent to set the date to file the Rule 26(f) report or to hold the Rule 16 conference.

In a case in which the judge has a basis to expect that discovery will be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge might consider scheduling a conference call with the parties before they hold their Rule 26(f) conference.

Some districts address these practices in their local guidelines or rules.

PRACTICE 3

The judge should consider holding a "live" Rule 16(b) case-management conference, in person if practical, or by conference call or videoconference if distance or other obstacles make in-person attendance too costly or difficult.

COMMENTARY

A "live" interactive conference provides the judge and the parties the best opportunity to meaningfully discuss what the discovery

will be, where it should focus and why, and how the planned discovery relates to the overall case plan. A live interactive conference allows the judge to ask follow-up questions and probe the responses to obtain better information about the benefits and burdens likely to result from the proposed subjects and sources of discovery. A live interactive conference also provides the judge an opportunity to explore related matters, such as whether an expected summary judgment motion might influence the timing, sequence, or scope of planned discovery.

The parties and the judge should take advantage of technology to facilitate live interactive case-management and other conferences and hearings when in-person attendance is impractical.

In some cases, more than one live case-management conference might be appropriate. In a case in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge and parties should consider whether to schedule periodic live conferences or hearings, which can be canceled if not needed.

Some districts address this practice in their local guidelines or rules.

PRACTICE 4

The judge should ensure that the parties have considered what facts can be stipulated to or are undisputed and can be removed from discovery.

COMMENTARY

Discovery about matters that are not in dispute and to which the parties can stipulate is often inherently disproportionate because it yields no benefit. The judge should ensure – through an order, in a Rule 16 conference, or in another manner – that the parties are not conducting discovery into matters subject to stipulation. The judge should also work with the parties to identify matters that are not in dispute and need not be the subject of discovery, even if no formal stipulation is issued.

A live interactive case-management conference provides an excellent opportunity for the judge to raise these questions with the parties.

PRACTICE 5

In many cases, the parties will initially focus discovery on information relevant to the most important issues, available from the most easily accessible sources. In a case in which the parties have not done so, or in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about relevance or proportionality, the parties and the judge should consider initially focusing discovery on the subjects and sources that are most clearly proportional to the needs of the case. The parties and the judge should use the results of that discovery to guide decisions about further discovery.

COMMENTARY

The information available at the start of the case is often enough to allow the parties to identify subjects and sources of discovery that are both highly relevant and accessible without undue burden or expense. Discovery into those subjects and from those sources is usually proportional to the needs of the case because it is likely to yield valuable information with relatively less cost and effort. In many cases, the parties initially focus discovery on these subjects and sources without judicial involvement and without explicitly labeling it as "proportional" or "focused."

If the parties have not thought through discovery, or the discovery is likely to be voluminous or complex, or there is likely to be significant disagreement about relevance or proportionality, the judge should encourage the parties to consider initially focusing discovery on the information central to the most important subjects, available from the most easily accessible sources of that information. The parties and the judge can use the information obtained to guide decisions about further discovery. For example, the parties can use the information to decide whether to make additional discovery requests or how to frame them. The judge can use the information to help understand and resolve proportionality or other questions that may arise during further discovery.

The objective of this approach is to identify good places for discovery to begin, deferring until later more difficult questions about where discovery should end. This approach is sometimes described as conducting discovery into the "low-hanging fruit" and using that information to decide whether more is needed and what that should be.

The parties are usually in the best position to determine whether and how to focus discovery in their cases. In some cases, it is sufficient and preferable for the judge simply to verify that the parties have adequately planned for discovery. In other cases, the judge may need to explore options with the parties to help work toward reaching an agreement.

It may make sense for the parties and the judge to focus early discovery on a particular issue, claim, or defense. For example, a case may raise threshold questions such as jurisdiction, venue, or limitations that are best decided early because the answers impact whether and what further discovery is needed. In some cases, this may be clear after initial disclosures are exchanged. In other cases, it may be necessary for the parties to exchange more information to identify whether and where early discovery might focus.

If the parties have conducted focused early discovery and more discovery is sought, no heightened showing is required. The parties and the judge will have more information to assess proportionality, but the factors and their application do not change simply because some discovery has occurred.

A judge who holds a live Rule 16 conference can address with the parties the potential benefits of focusing early discovery and his or her expectations about how the parties will conduct it. The judge can address concerns that one or more parties will misunderstand the process or engage in inappropriate tactics. The judge might consider discussing with the parties what objections typically would or would not be appropriate. If the parties have reached agreement on how to focus early discovery to get the most important information from the most accessible sources, there should be few occasions for objections on relevance or proportionality grounds.

Judges should consider using other tools designed to facilitate and accelerate the exchange of core information. For example, judges should consider using the Initial Discovery Protocols for Employment Cases Alleging Adverse Action in cases where they apply. Developed jointly by experienced plaintiff and defense attorneys, these protocols are pattern discovery requests that identify documents and information that are presumptively not objectionable and that must be produced at the start of the lawsuit. The self-described purpose of these protocols is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." The protocols are another way to work toward proportional discovery and have been used effectively in courts around the country. It is expected that work will be undertaken to develop similar subject-specific discovery protocols for other practice areas.

PRACTICE 6

In a case in which discovery will initially focus on particular subjects or sources of information, the judge should consider including guidance in the Rule 16(b) case-management order.

COMMENTARY

While focusing early discovery can advance the goal of proportionality, it can also cause concern to some litigants. Some may worry that it will be used as a tool to restrict discovery, fearing that they will be required to make a special case for proportionality before any additional discovery will be allowed. Others may worry that it will be used as a tool to protract discovery if additional rounds of discovery are viewed as a given regardless of how robust the initial efforts were or what information they yielded. Still others may worry that expressing an interest in focusing early discovery will be mischaracterized or misunderstood as a desire for a rigidly phased or staged discovery process. Absent any guidance from the judge, these and other concerns may lead parties to forego or resist focusing early discovery even when it would make sense to do so.

The judge should consider taking steps to avoid misunderstanding and provide clarity. The judge might consider including a statement in the Rule 16(b) case-management order acknowledging that the parties are initially conducting discovery into certain issues or from certain sources and will use the results to guide decisions about further discovery. The judge might consider dividing the discovery period, using an interim deadline for completing early discovery and a later deadline for completing further discovery that is warranted. Whether the judge formally divides the discovery period or simply guides the parties to focus their early discovery, the judge might find it helpful to schedule a discovery status conference or ask for a report after the early discovery is complete.

If discovery is focused on particular subjects or sources, the parties and the judge should consider whether this may require some individuals to be deposed more than once, or require the responding party to search a source more than once. If so, the parties and the judge should address the issues, whether by adjusting the discovery to avoid repeat efforts, expressly leaving open the possibility of limited additional discovery from the same witness or source, or specifying other appropriate steps.

If the parties reach agreement on subjects or sources for early focused discovery, a party stipulation or a court order might also specify ways to streamline that discovery, including arranging for the informal exchange of information.

PRACTICE 7

The judge should consider requiring the parties to request a conference before filing a motion relating to discovery, including a motion to compel or to quash discovery or seeking protection from discovery.

COMMENTARY

A live pre-motion conference is often an effective way to promptly, efficiently, and fairly resolve a discovery dispute. The conference often resolves the dispute, either by leading to an agreed resolution or by providing the judge with the information needed to rule. The case remains on track, the parties are saved expense, and the parties and judge are saved the work and time associated with formal motion practice that is often unnecessary. If the pre-motion conference indicates that some briefing or additional information on specific issues would be helpful, the judge can focus further work on the specific issues that require it.

The judge might consider requiring the party requesting a pre-motion conference on a discovery dispute to send a short communication – often limited to two pages – describing (not arguing) the issues that need to be addressed and allowing a similarly limited response.

The judge can include a pre-motion conference requirement and procedure in the case-management order issued under Rule 16(b). The procedure can include provisions for using telephone and video conferences if one or more of the parties cannot attend in person.

Some districts address this practice in their local guidelines or rules.

PRACTICE 8

When proposed discovery would not or might not be proportional if allowed in its entirety, the judge should consider whether it would be appropriate to grant the request in part and defer deciding the remaining issues.

COMMENTARY

Allowing the proposed discovery in part can further an iterative process. The discovery allowed may be all that is needed, or it may clarify what further discovery is appropriate. Deferring a decision on whether to allow the rest of the proposed discovery gives the judge and parties more information to decide whether all or part of it is proportional.

Sampling can be used to determine whether the likely benefits of the proposed discovery, or the burdens and costs of producing it, warrant granting all or part of the remaining request at a later time.

If a modified request would be proportional, the judge ordinarily should permit the proportional part of the discovery. However, the judge is under no obligation to do so and may rule on the discovery request as made.

PRACTICE 9

The parties and judge should consider other discovery rules and tools that may be helpful in achieving fair, efficient, and cost-effective discovery.

COMMENTARY

Other discovery rule changes and tools, not part of the proportionality amendments, should be considered as part of the judge's and parties' overall plan for fair, workable, efficient, and cost-effective discovery and case resolution.

Rule 34 is amended to allow a requesting party to deliver document requests to another party before the Rule 26(f) conference. The requests are not considered served until the meeting, and the 30-day period to respond does not start until that date. The early opportunity to review the proposed requests allows the responding party to investigate and identify areas of concern or dispute. The parties can discuss and try to resolve those areas at the Rule 26(f) conference on an informed basis. If disputes remain, the parties should use the Rule 26(f) report and the Rule 16(b) conference to bring them to the court for early resolution.

As an alternative to the formal mechanism that now exists under Rule 34, some lawyers may prefer to share draft, unsigned document requests, interrogatories, and requests for admission. Both the formal and informal practices prompt an informed, early conversation about the parties' respective discovery needs and abilities.

Rule 34 is also amended to prohibit boilerplate objections to requested discovery, including objections to proportionality, and to require the responding party to state whether documents are being withheld on the basis of objections. A judge's prompt enforcement of these requirements can be very helpful in managing discovery.

Rule 26(c) makes explicit judges' authority to shift some or all of the reasonable costs of discovery on a good cause showing if a party from whom discovery is sought moves for a protective order.

A judge may, as an alternative to denying all of the requested discovery, order that some or all of the discovery may proceed on the condition that the requesting party bear some or all of the reasonable costs to respond. The longstanding presumption in federal-court discovery practice is that the responding party bears the costs of complying with discovery requests. That presumption continues to apply. The 2015 amendments to Rule 26(c) make that authority explicit but do not change the good cause requirement or the circumstances that can support finding good cause.

Rule 37(e) is amended to clarify when and how a judge may respond to a party's inability to produce electronically stored information because it was lost and the party failed to take reasonable steps to preserve it. It provides a nationally uniform standard for when a judge may impose an adverse inference instruction or other serious sanctions. It responds to the concern that some persons and entities were over-preserving out of fear their actions would later be judged under the most demanding circuit standards. Working toward proportionality in preservation is an important part of achieving proportionality in discovery overall. Other rule amendments emphasize the need for careful attention to preservation issues. Rule 26(f) has been amended to add preservation of electronically stored information to the list of issues to be addressed in the parties' discovery plan. Rule 16(b) is amended to add preservation of electronically stored in formation to the list of issues the case-management order may address.

Rule 16(b) and Rule 26(f) have been amended to encourage the use of orders under Rule 502(d) of the Federal Rules of Evidence providing that producing information in the litigation does not waive attorney-client privilege or work-product protection, either in that litigation or in subsequent litigation. Nonwaiver orders under Federal Rule of Evidence 502(d) can promote proportionality by reducing the time, expense, and burden of privilege review and waiver disputes.

Questions impacting and approaches to discovery are usually best explored in a live conference between the judge and the parties, preferably before formal discovery-related motions (such as under Rule 26(c) or Rule 37(a)) and accompanying briefs are filed. A live Rule 16 or pre-motion conference enables the judge and the parties to examine how the various discovery tools can best be used to create and implement an effective discovery and case-management plan.

PRACTICE 10

The parties and the judge should consider using technology to help achieve proportional discovery.

COMMENTARY

Technology can help proportionality by decreasing the burden or expense, or by increasing the likely benefit, of the proposed discovery.

When the discovery involves voluminous amounts of electronically stored information, the parties and judge should consider using technologies designed to categorize or prioritize documents for human review.

Because technology evolves quickly, the parties and the judge should not limit themselves in advance to any particular technology or approach to using it. Instead, the parties and the judge should consider what specific technology and approach works best for the particular case and discovery.

[1] These guidelines and practices use the word "parties" to cover lawyers and represented litigants, although many of the practices apply usefully to cases involving unrepresented litigants as well.

From Rule Text to Reality

ACHIEVING PROPORTIONALITY IN PRACTICE

By Lee H. Rosenthal and Steven S. Gensler

In November 2014, a year before the 2015 discovery amendments could become effective, the Duke Center for Judicial Studies started a project to provide guidance for judges and lawyers on ways to implement the amendments, to put flesh on the proportionality bones and to provide a practical and realistic framework to make proportionality work in practice. The result of those efforts, *Guidelines and Practices to Implement the 2015 Proportionality Amendments*, is published for the first time in this issue of *Judicature*.

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> “Unless judges actively manage the cases they preside over to keep discovery both within the defined scope and consistent with the parties’ right to get the information within that scope, these rule amendments are no more likely to succeed than the predecessors.

This publication coincides with the effective date of the rule changes and with efforts by many to provide the bench and bar with information about the rule changes, what they mean, and ways to implement them in individual cases.

The 2015 rule amendments mark a “new” chapter in the history of discovery practice. If the amended rules achieve their intended purposes, this chapter may come to be known for its emphasis on, and commitment to, proportionality. As of Dec. 1, 2015, Rule 26(b)(1) defines the scope of discovery as nonprivileged information that is relevant to the parties’ claims and defenses and “proportional to the needs of the case.” For the first time, the word “proportional” is in the rule text. The provisions on proportionality are moved to become part of the definition of permissible discovery, as opposed to limits on otherwise permissible discovery.

But as new chapters and rule changes go, these are hardly seismic shifts. The proportionality concept became part of the rules over 30 years ago, in 1983, when Rule 26(b) was amended to require judges to limit discovery to ensure that the benefits outweighed the costs and Rule 26(g) was added to require lawyers to certify that their discovery requests or objections were neither unreasonable nor unduly burdensome or expensive. Indeed, the Advisory Committee has taken pains to emphasize that it does not view the 2015 proportionality amendments as imposing any new duties or obligations.[1] Rather, the intended change is to elevate awareness and get lawyers, litigants, and judges to pay more attention to the duties they have had for over three decades.

And there lies the proverbial rub. Lawyers and judges have had proportionality obligations since 1983, but few lawyers or judges made proportionality a focus of discovery, and fewer still expressly invoked or applied the proportionality limits. Some academics and thoughtful judges have questioned whether proportionality is sufficiently defined or understood to achieve the stated goals.[2] As discovery has become e-discovery and even more expensive, burdensome, and complex, the complaints have grown. The rule amendments require us to answer a nagging question. Why should these rule amendments, so modestly introduced, work when prior efforts to achieve discovery that is consistently both fair and reasonable — proportional — have failed?

A SENSE OF URGENCY

One reason for optimism is that the proportionality amendments are expressly linked to existing and new case-management tools intended to promote and facilitate early, active judicial case management. The 2015 rule amendments recognize that changing the words used in the rules will accomplish nothing unless lawyers and judges effectively implement the changes. The 2015 rule amendments include an expanded menu of case-management tools to make it easier for lawyers and judges to tailor discovery to each case and to resolve discovery disputes efficiently and promptly, without full-scale motions and briefs. The Committee Notes emphasize the important link between the proportionality changes to the scope of discovery in Rule 26(b)(1) and the case-management provisions in Rules 16, 26(f), and 34.[3]

Another reason for optimism is a growing sense of urgency among lawyers and judges. In 1983, the bench and bar seemed to greet the proportionality amendments with a collective shrug and went about their business as usual. The years of public discussion and debate leading up to the 2015 amendments reflect a growing concern that our civil justice system needs to adjust or risk losing its ability to serve its vital purposes. At the same time, electronic discovery and increasing cost-consciousness by clients provide an incentive for lawyers to exchange the information each side needs without all the costs and burdens of discovery built on the “demand everything and object to everything” model.

Which brings us to the elephant in the courthouse. Proportionality begins with the parties and lawyers who apply and invoke it, but it ends with judges

who enforce it. Whether proportionality moves from rule text to reality depends in large part on judges. Judges who make clear to the parties that they must work toward proportionality. Judges who are willing and available to work with parties to achieve what the Advisory Committee has described as the goal of making proportionality an explicit part of discovery in all cases.[4] Judges who are willing and available to resolve discovery disputes quickly and efficiently when needed. Unless judges actively manage the cases they preside over to keep discovery both within the defined scope and consistent with the parties' right to get the information within that scope, these rule amendments are no more likely to succeed than the predecessors.

Trial judges, this is our chance to make a difference. It is also our chance to fail.

MODEST INVESTMENT, GREAT DIVIDENDS

The good news is that lawyers and their clients are not alone in having strong incentives to work toward proportionality. Enforcing proportionality by engaging in active case management can make a trial judge's work easier and better. Requiring the lawyers to talk to each other, then to the court, about what the discovery in the case will involve allows the parties to reach agreement when they can, reducing the number of disputes or narrowing them. Requiring the lawyers to talk to each other about discovery planning also allows the parties to identify areas that are unclear or the subject of disagreement and to promptly bring these areas to the court for resolution. Good case management allows the judge to rule on disputed discovery issues fairly, efficiently, and promptly, sparing the judge the need to slog through lengthy motions to compel or for protection (often accompanied by even longer briefs and voluminous attachments) and writing opinions, often on issues that don't involve matters of jurisprudence as much as practical problems ill-suited to the motion-and-brief presentation.

Judges who engage in early, active discovery management often find that it takes relatively little of their time and work. This modest investment pays the great dividend of saving the judge and the judge's clerks from spending much more time later solving problems that could have been avoided. And the work that is avoided tends to be the type that is tedious and slow, and that can often bring the case to a halt.

Active case management is not only vital to making discovery reasonable for each case, it also can be gratifying for the judge. It allows trial judges to be creative in working through what are usually practical problems to devise reasonable and fair solutions that keep the case on track, on time, and (for the parties) on budget.

It may be true that most do not think of case management as among the most satisfying or important parts of judging. Ask a trial judge why he or she chose to become a judge, and the judge is not likely to mention case management. But we are not talking about case management in the dismissive, belittling sense used by some academics and others to describe judges' lower selves (the higher selves being the more pure and exalted jurisprudential being). The interactive exchanges we have described are as important, as highly valued, and as demanding of judicial discretion and judgment as any work judges do.[5] And it is work that is unique to the trial judges. By the time a case gets to the appellate courts, case management is a lost opportunity. Case management is an important part of what sets the trial judges' work apart. No one else can do it. The more trial judges — an enormously talented and creative lot — work on these tasks, the closer we will all get to achieving proportionality in practice.

All of this provides reason for optimism. The 2015 amendments envision, and are being met by, prompt and energetic work by bench and bar to change litigation culture and make the rule changes a part of everyday practice. Self-interest, institutional interests, client interests, and a shared commitment to moving beyond aspiration and rule to reality may all converge to achieve proportionality.

This does not mean we should hang a banner declaring mission accomplished. History teaches us that hard work lies ahead to make these rule changes a benefit for our system, not for any particular type of litigant or case. The *Guidelines and Practices* are part of that work. They are the result of many months of discussion, experimentation, and refinement involving teams of lawyers on both sides of the "v.," practicing in a number of areas, working together to define and clarify and make concrete what proportionality looks like in particular cases and how to achieve it. With the many dedicated lawyers who worked on the *Guidelines and Practices*, the reporters will continue to listen and learn. We will monitor developments in the courts and hear from the judges and lawyers who apply the 2015 amendments and, we hope, the *Guidelines and Practices*, in their own cases. The *Guidelines and Practices* publication is intended to be a living document that changes and grows as we all discover new and better ways to achieve proportionality in discovery and help fulfill the goals of Rule 1.

TO BETTER SERVE THE GOALS OF RULE 1

On Jan. 20, 1984, Prof. Arthur Miller stood before an audience of federal judges to explain the amendments that had taken effect on Dec. 1, 1983. As the Reporter for the Civil Rules Advisory Committee, he was uniquely suited to the task. He explained that the rulemakers were motivated by a belief that, in too many cases, litigation was conducted in a way that frustrated the goals of Rule 1. He emphasized that the discovery amendments were part of a larger package of amendments, designed to work together in an effort to better serve the goals of Rule 1. He explained that a major goal of the package of amendments in general — and the amendments to Rule 26(b) in particular — was to combat the problem of disproportionate discovery. And he concluded by stressing the critical role that judges would play, using their new case-management powers under amended Rule 16:

There is an important interrelationship between the management philosophy of rule 16 and the anti-redundancy and anti-disproportionality policies of rule 26. The latter can be effective only if the judges educate themselves about their cases and attempt to manage them throughout the discovery process. The two rules must be utilized together.[6]

All of that could just have easily been said — and has been said — about the 2015 amendments. Is it deja vu, all over again?

It is hard to know why the bench and bar did not embrace proportionality in discovery in 1983. Perhaps the scheme was just a bit too different from what they were used to and how they had been trained. In a time long before email and smartphones, perhaps the consequences of persisting with "business as usual" were not sufficiently grave to fully spark the desired change. But that was decades ago. *The Guidelines and Practices* themselves show that many lawyers and judges are committed to working to make reasonableness — proportionality — in discovery real. There is good reason for optimism, and there is good work to do.

[1] *See* Fed. R. Civ. P. 26 advisory committee's note (2015) ("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.").

[2] *See, e.g.*, John L. Carroll, *Proportionality In Discovery: A Cautionary Tale*, 32 Campbell L. Rev. 455, 461 (2010) ("Used improperly, the proportionality analysis can be at best a meaningless exercise and at worst a tool to deny civil litigants access to information to which they are entitled."); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603-04 (2001) (arguing that proportionality limits are impractical because the trial judge is not in a good position to assess whether the desired information is worth the cost); *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (stating, in the preservation context, that a proportionality standard "may prove too amorphous" to provide meaningful guidance to parties).

[3] *See* Fed. R. Civ. P. 26 advisory committee's note (2015) ("The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management."); *id.* (explaining that the new Rule 34 mechanism allowing for pre-Rule 26(f) exchange of document requests "is designed to facilitate focused discussion during the Rule 26(f) conference").

[4] *See* Fed. R. Civ. P. 26 advisory committee's note (2015) ("The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.")

[5] Lawyers certainly view active judicial case management as an important and highly valuable part of what judges do. When asked what would make the existing federal pretrial process work better, lawyers consistently singled out more and better judicial case management. *See* Steven S. Gensler & Lee H. Rosenthal, *Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process*, 18 Lewis & Clark L. Rev. 643, 647-48 (2014) (discussing results of surveys prepared for the 2010 Duke Conference on Civil Litigation); Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation 10, available at http://www.uscourts.gov/file/reporttothechiefjusticepdf ("Pleas for universalized and invigorated case management achieved strong consensus at the Conference.").

[6] Arthur Milller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility 35-36 (Federal Judicial Center 1984).

APB to Requesting Parties: Prepare for Proportionality

The most recent amendments to the Federal Rules of Civil Procedure (FRCP) follow a lengthy and contentious debate, particularly on the appropriate scope of discovery. While the renewed focus on proportionality might seem unruly and even unfair for requesting parties, counsel can navigate the revised rules successfully and help shape decisional authority by being well prepared, strategic, and agile.

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The explosive growth of electronically stored information (ESI) has permanently changed the discovery landscape, with the concept of proportionality now taking center stage. The amendments to the FRCP, which take effect on December 1, 2015, include changes that transfer the proportionality factors previously found in Rule 26(b)(2)(C)(iii) to the scope of discovery in Rule 26(b)(1) with some modifications.

Many advocates, particularly those who represent plaintiffs, argue that these rule changes favor corporate defendants, by restricting the scope of discovery to alleviate the purported skyrocketing costs and burdens associated with preserving and producing ESI at the expense of achieving justice. Evidence of these alleged increasing costs, at least to the extent they pertain exclusively to discovery, is questionable.

Indeed, one study, conducted by the Federal Judicial Center and completed shortly before the most recent amendment process began, found that discovery worked well and at a modest cost

in most federal cases. (*Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules, 27-31 (2009)*; see also *Patricia W. Hatamyar Moore, The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees, 83 U. Cin. L. Rev. 1083, 1085 (2015)*; *Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 286, 363 (2013)*.)

Rather than fixating on the inadequacies or unnecessary breadth of the amendments, or the frustrations surrounding the rulemaking process, counsel should arm themselves for the future by preparing thoughtfully and strategically for the imminent implementation of the revised rules. This article explores:

- The redefined scope of discovery under amended Rule 26(b)(1).
- Emerging efforts to influence how proportionality is interpreted, which generally reflect a defense perspective.
- Tactical tips for requesting parties and their counsel navigating the new discovery landscape.

REDEFINED SCOPE OF DISCOVERY

While counsel should carefully review the entire rules package, requesting parties in particular should pay immediate attention to the modified scope of discovery under amended Rule 26(b)(1). The revised rule permits only discovery that is "relevant to any party's claim or defense and proportional to the needs of the case."

The concept of proportionality in discovery is not new, and has been included in the FRCP since 1983, but it is more prominent under the recent amendments. Former Rule 26(b)(2)(C) permitted a court issuing a protective order to limit the frequency or extent of discovery based on certain proportionality factors that are now incorporated in amended Rule 26(b)(1). These factors are:

- The importance of the issues at stake in the case.
- The amount in controversy.
- The parties' relative access to relevant information.
- The parties' resources.
- The importance of the discovery in resolving the case.
- Whether the burden or expense of the discovery outweighs its likely benefit.

(*FRCP 26(b)(1)* (adding the factor requiring courts to consider the parties' relative access to information, and reordering the factors to list the importance of the issues at stake in an action first).)

The advisory committee note cautions that moving and reordering the proportionality factors "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" (*2015 Advisory Committee Note to FRCP 26(b)(1)*).

By moving the proportionality factors into Rule 26(b)(1), the court and counsel must consider these issues at the outset of a case, as they focus on the scope of preservation and production, rather than simply in connection with a motion for a protective order. Further, the changes reinforce the parties' Rule 26(g) obligation to consider the proportionality factors in propounding discovery requests, responses, or objections.

UNBALANCED GUIDANCE

Some practitioners who had strong views throughout the amendment process and were not satisfied with the extent of the rule changes have continued their efforts to construct a new paradigm with a narrower scope of discovery. For example, some commentators have suggested that amended Rule 26(b)(1) provides courts with more ammunition to rein in overly broad discovery requests and to address the "misconception within the legal community that the rules allow for broad (and sometimes seemingly limitless) discovery." (*Brian K. Cifuentes, Proportionality: The Continuing Effort to Limit the Scope of Discovery, Metropolitan Corp. Couns., 17:21 (Mar. 2015)*; see also *Martha J. Dawson & Bree Kelly, The Next Generation: Upgrading Proportionality for A New Paradigm, 82 Def. Couns. J. 434 (2015)*.)

Others have gone further, suggesting that proportionality supports a cost-shifting rule that requires "a requester to pay some or all of the expenses resulting from its requests." These commentators have advised that this type of cost allocation "would also encourage practical cooperation among the parties." (*John J. Jablonski & Alexander R. Dahl, The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation, 82 Def. Couns. J. 411, 422 (2015)*.) The general rule that the producing party pays remains intact, at least for now (but see *FRCP 26(c)(1)(B)* (a protective order may allow for expenses to be allocated)).

It is similarly unsurprising that articles and seminars detailing best practices and proposed guidelines have emerged in attempts to influence how proportionality is interpreted. Most recently, the Duke Law Center for Judicial Studies released guidelines (Proportionality Guidelines) intended to foster proportional discovery (see *Duke Law Center for Judicial Studies, Discovery Proportionality Guidelines & Practices, 99 Judicature No. 3, 47-60 (Winter 2015)*). Working in tandem with the American Bar Association (ABA), the Duke Law Center for Judicial Studies embarked on a multi-city roadshow to discuss some of the new discovery rules, and specifically Rule 26(b)(1), and introduce the Proportionality Guidelines before the rules even became effective.

The Proportionality Guidelines were the result of a year-long drafting process that inspired tenacious advocacy by all sides. Notably, few, if any, of the roadshow panelists participated in the drafting process. Therefore, they lack the context necessary to educate courts and counsel on the most contentious aspects of the Proportionality Guidelines and the extent to which certain recommendations and best practices reflect compromises reached after vigorous debate.

For example, after much persistence by the plaintiffs' lawyers involved in the drafting process, the Proportionality Guidelines state the Rule 26(b)(1) amendments "do not alter the parties'

existing discovery obligations or create new burdens," including on the issue of cost-shifting (*Proportionality Guidelines, at 51, 54, 60*). However, the ABA's promotional materials for the roadshow declare that the amendments usher in "the most significant changes to discovery and case management practices in more than a decade" (see *americanbar.org*; see also *Andrew J. Kennedy, Significant Changes to Discovery and Case Management Practices, ABA Litigation News (Oct. 14, 2015)* (describing the new amendments as "the most significant change to federal civil practice in the last decade" and suggesting that proportionality "signals a sea change in the scope of discovery")).

If roadshow presenters seek to weaponize the Proportionality Guidelines to advocate for even greater restrictions than those proffered by the actual rule, they could undermine the collaborative and neutral advice that the Proportionality Guidelines purport to provide and thus limit their usefulness. In any event, the rule amendments and corresponding committee notes are the best and most reliable resources at this stage.

BEST PRACTICES FOR REQUESTING PARTIES

As one prominent magistrate judge advises, proportionality does not automatically preclude discovery. Instead, the proportionality factors "require lawyers and judges to approach the discovery process more thoughtfully." That means developing a discovery strategy that reduces the potential for successful proportionality objections. (*Hon. Craig B. Shaffer, The "Burdens" of Applying Proportionality, 16 Sedona Conf. J. __, 4 (forthcoming 2015)*.)

In other words, it is best to formulate a plan early. Requesting parties must develop strategies to ensure they can access the information they need and generate evidence to prove their case, while also complying with the proportionality factors. In particular, requesting parties' counsel should:

- Read the rules and the corresponding committee notes.
- Propose specific, targeted discovery requests.
- Guard against boilerplate objections.
- Discuss discovery scope and objections at the Rule 26(f) meet and confer to develop a proper discovery plan.
- Review guidance from the court.
- Seek assistance from more experienced counsel, if necessary.

READ THE RULES AND NOTES

Too often, lawyers (and even some judges) fail to read a rule's corresponding committee note. Instead, they focus on the text of the rule in isolation in an effort to influence decisional authority. The advisory committee spent many months refining amended Rule 26(b)(1) and drafting a note to provide guidance to counsel and the court on the intent and scope of the rule. Rule 26(b)(1) and its note should be read in conjunction with the other discovery rules and their notes, including, in particular, Rule 26(g).

TARGET SPECIFIC INFORMATION

Counsel must retire discovery requests that call for "all documents concerning, relating, referring, or corresponding to" a subject. These requests are certain to prompt a proportionality challenge and likely do not conform to required standards, including Rule 26(g) (see *Shaffer, The "Burdens" of Applying Proportionality, at 15, 32* ("counsel should avoid pattern or stock discovery requests recycled from past lawsuits even if that approach seems to hold false promises of cost-savings")).

Instead, counsel should:

- **Draft pointed and strategic requests.** Counsel should consider the types of information needed to prove the party's case and use clearly defined terms and detailed, targeted language when requesting that information. Counsel also should be prepared to articulate why that information is needed.
- **Specify the form of production.** Document requests should include clear definitions and technical specifications as to the form in which the information should be produced.
- **Deliver discovery requests as soon as permissible.** Under amended Rule 26(d)(2), parties may deliver Rule 34 document requests before the Rule 26(f) conference with opposing counsel. These early document requests place opposing counsel on notice of the types of information the requesting party will be seeking and should facilitate a cooperative dialogue to discern the extent of any objections.

REJECT BOILERPLATE OBJECTIONS

Amended Rules 26(b)(1), 26(g), and 34(b)(2)(C) make clear that parties may not make boilerplate objections stating that discovery requests are not proportional (see *FRCP 26(g); 2015 Advisory Committee Notes to FRCP 26(b)(1), 34(b)(2)(C)* (an objection must be stated with specificity)). Counsel must therefore read an adversary's responses and objections to discovery requests with a keen eye, and analyze her own requests with the same scrutiny.

When counsel receives boilerplate objections, she should promptly send a letter identifying any and all portions of the responses and objections that are noncompliant, and demand a revised set by a specified date. If opposing counsel does not comply, counsel should prepare to approach the court to resolve the matter. Counsel is best positioned to approach the court when she has a concrete record showing she has been proactive, engaged opposing counsel in a dialogue, and demonstrated a willingness to be flexible.

PREPARE FOR RULE 26(f) CONFERENCES

While additional guidance on applying the individual proportionality factors is anticipated, it is important for counsel to bear in mind that the factors will be applied differently across cases and, depending on the facts of a case, different factors might bear different weight. For example, a civil rights case may lend itself to a different analysis than a product liability case. Therefore, when preparing for a Rule 26(f) conference and formulating a discovery plan, counsel should think strategically about how each of the factors might affect the proportionality analysis. Counsel also should remember that amended Rule 26(b)(1) neither shifts the proportionality burden to the requesting party, nor directs that the burden resides exclusively with the producing party.

Counsel should come to the initial Rule 26(f) conference prepared to address what her client is seeking and why, or to elicit answers and information that will enable counsel to articulate those points in a discovery plan or during a court appearance.

When addressing the scope of discovery during the Rule 26(f) conference, counsel should:

- **Discuss objections based on burden and expense in detail.** If an adversary objects to the breadth or scope of counsel's discovery requests, counsel should use the Rule 26(f) conference as an opportunity to tease out the specific basis for the objections. Responding parties often have better information (and sometimes the only information) to support claims of undue burden or expense. Conversely, requesting parties are better positioned to explain why a request is important to resolve the issues and the ways in which the underlying information bears on those issues. (See *2015 Advisory Committee Note to FRCP 26*.)
- **Be wary of attempts to limit discovery to overly restrictive "core" issues.** Counsel should prioritize discovery requests to highlight information needed to prove her client's case, but should not, without experience and strategic purpose, agree to limit discovery to core issues. (Perhaps, in time, protocols for certain early core discovery, such as those used in employment cases, will become the norm. In most types of cases, however, these consensus-driven protocols do not currently exist.) While some phased or tiered discovery might be reasonable and acceptable in certain cases, core discovery might be an adversary's disguised attempt to impose additional restrictions on discovery that are not contemplated by amended Rule 26(b)(1).
- **Discuss preservation.** Rule 26(f) conferences should be iterative throughout the course of a litigation, and counsel should expect to address discovery issues on multiple occasions. However, counsel should vet any issues pertaining to preservation and production at the initial Rule 26(f) conference to prepare the discovery plan and avoid potential spoliation. Indeed, before the Rule 26(f) conference, counsel should identify issues warranting a discussion about preservation.
- **Document cooperative efforts.** Amended Rule 1 and the corresponding committee note contemplate cooperation among parties. Being cooperative from the outset can only serve counsel well. Counsel should document the steps taken to cooperate to assist a court, when reviewing the discovery plan or a discovery dispute, with evaluating the history of discussions among counsel in a way that pure argument might not show.
- **Consider strategic compromises.** Counsel should determine the extent to which she would modify requests, while reserving all rights, to demonstrate a willingness to cooperate (see, for example, *Hon. Elizabeth D. LaPorte & Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26, 9 Fed. Cts. L. Rev. 20, 68 (2015)* ("The party that can best support its position, and can offer the alternative that produces key information most cost-effectively, likely will prevail.")). This might involve offering alternatives, such as:
  - summary information with the right to seek greater detail or the underlying documents;
  - excerpts from a database or the creation of a report with certain data points, in contrast to all data points; or
  - a reduced number of custodians based on a transparent exchange of information on those custodians' knowledge and actions, with the right to expand the number.

In most cases, a discussion or dispute about proportionality should be the exception, not the norm.

REVIEW JUDICIAL GUIDANCE

Many courts and individual judges are attuned to the issues relating to proportionality. Some judges have established guidelines or best practices, and some have even opined on the application of proportionality (see, for example, *Shaffer, The "Burdens" of Applying Proportionality*; *LaPorte & Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*; *Hon. Paul W. Grimm et al., Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions, 37 U. Balt. L. Rev. 381, 383 (2008)*).

Counsel should become familiar with these resources and refer to them when conferring with adversaries and before approaching the court.

SEEK ASSISTANCE

A lawyer must recognize when she needs assistance and seek out seasoned advisors who are well-equipped to litigate proportionality disputes based on their experience with the rulemaking process or otherwise. When counsel is unprepared, inexperienced, or uninformed, there can be consequences beyond the immediate client or case. Counsel's missteps might inadvertently create bad law in the developing area of proportionality.

By enlisting the services of a more knowledgeable lawyer who has credibility in the field of discovery (including among adversaries and judges) and can help craft practical arguments, counsel can help to shape the law in a fair and reasoned way.

The views expressed in this article are those of the author and not necessarily those of Milberg LLP or its clients.

Rule 26(b)(1)

Case	Cir.	Dispute	Result	Impact of New Rule
Oracle v. Google, 2015 WL 7775243 (ND Cal Dec.3, 2015)	9th	Number of custodians	Court orders 10 add'l custodians based on "best judgment"	**"neither party submitted a proper analysis" of the "proportionality factors"**
State Farm v. Fayda, 2015 WL 7871037 (SDNY Dec.3 2015)(**Francis,MJ**)	2nd	Discovery of minor Financial records	Not disproportional since relevancy not rebutted (*4)	**Relevance is "any matter that bears on or could lead to other matter that bears on" claims or defenses [(*2)]**
Louisiana Crawfish v. Mallard Basin, 2015 WL 8074360 (W.D. La. Dec. 4, 2015)	5th	Motion for entry and inspection in NEPA action	Not disproportional to needs of case	[**same as to broad relevance, also citing *Oppenhemer*] (*2)**
Carr v. State Farm, 2015 WL 8010920 (ND Tex. Dec. 7, 2015)	5th	Objections to discovery of plaintiff in PI case	Documents are discoverable and proportional to needs of case	**Existing allocations of burdens to show undue burden or lack of proportionality have not changed (*6)**
Siriano v. Goodman Mfg, 2015 WL 8259548 (S.D.Ohio Dec.9,2015)	6th	Motion to compel info about warranty claims	Granted after reviewing proportionality factors; "cooperative dialogue" ordered	**While discovery costs could be significant, new factor shows lopsided burdens does not equal disproportionality (n.5)**
Lightsquared v. Deere & Co., 2015 WL 8675377 (Dec. 10, 2015)(**Francis, MJ)**	2nd	Cut-off for discovery of documents from add'l custodians	Production ordered as relevance established	**While discovery no longer extends to subject matter, relevance is still to be construed broadly citing *Oppenheimer* (*2)**
Board v. Daimler, 2015 WL 8664202 (D.Kan.Dec11,2015)	8th	Defects in other aspects of trucks at issue	Production ordered	**Rule 1 & 26 applied to pending motion and requires court to consider factors**
Bagley v. Yale, 2015 WL 8750901 (D.Conn. Dec.14, 2015)	2nd	Information on comparators in HR dispute"	Full discovery ordered since central to proving pretext	**Applying Francis, MJ logic in *State Farm* that relevance is "still" construed broadly despite deleting**

				"reasonably calculated" (*8)
Doe v. Trustees, 2015 WL 9048225 (D.Mass.Dec. 16, 2015)	1st	Statements re prior sexual assaults of other students	Production ordered	**Result vindicate personal or public values**
Wertz v. GEA, 2015 WL 8959408 (M.D. Pa. Dec.16, 2015)	3rd	Depos in excess of case management order	One add'l depo granted	**Rule restores factors to original place but does not change any of existing responsibilities**
Robertson v. People Magazine, 2015 WL 9077111 (S.D. N.Y. Dec. 16, 2015)	2nd	Motion to compel editorial decisions in HR case	Requests are "burdensome and disproportionate"	**Amended rule "exhorts" judges to exercise preexisting control "more exactingly"**
Brown v. Dobler, 2015 WL 9581414 (D.Ida. Dec. 29,2015)	11th	Other prisoner incidents	Most requests relevant but some too broad	**Objections should state whether documents being withheld [per Rule 34(b)]**
Green v. Cosby, 2015 WL 9594287 (C.D. Mass. Dec. 31, 2015)	1st	Motion to limit subpoena to non-party	Denied as broad discovery and non-marital privilege for depo	**While the new rule eliminates "reasonably calculated," its equivalent is available due to *Oppenheimer***
Steel Erector v. AIM Steel, 2016 WL 53881 (S.D. Ga. Jan 4, 2016)	11th	Motion to compel info about foreign parent in domestic contract claim	Refused as not proportional given non-involvement of parent	**Amendments do not change definition of relevance and "restoring" proportionality does not change obligations**
Elliott v. Superior Pool Products, 2016 WL 29243 (C.D. Ill. Jan 4, 2016)	5th	Motion to compel by pro se litigaant on 100 requests	Scope of document production is clearly improper	**Relevance and proportionality related, citing La Porte article; relevance means reasonably calculated test**
US v. CA, Inc., 2016 WL 74394 (D.C. Jan. 6, 2016)	DC	Motion to compel US to give details of claims under False Claims Act	Would not reasonably lead to infor bearing on defense and disproportionate (*11)	**Relevance and proportionality govern but relevance still detmd by *Oppenheimer even though reasonably calculated deleted (*7)***
McKinney v. Metropolitan Life, 2016 WL 98603 (N.D. Tex. Jan 8, 2016)	5th	Motions to compel re ediscovery over objections	Rulings applying rule and discussion applying *Carr*	**Its just and practicable to apply new Rule which does not alter burdens or responsibilities**

			and Note	
O'Connor v. Uber, 2016 WL 107461 (N.D. Cal. Jan.11,2016	9th	Details behind paralegal affidavit	Motion is "wildly overbroad"	**Motion failed to meet the "proportionality test" of the new rule**
Gowan v. Mid-Century Insur., 2016 WL 126746 (S.D. Jan. 11, 2016)	8th	Motion for protective order re depo testimony	Protective order refused (Farmers stalled to get to invoke proportionality)	**The proportionality factors in the rule are "hardly new" – most in rules for 32 years**
Chrismar Systems v. Cisco Systems, 2016 WL 126556 (N.D. Cal. Jan.12, 2016)	9th	Obj. to broad discovery as disproportionate to needs of case	Motion to compel denied and Cisco need only furnish examples	**The new rule "balances" proportionality needs of case considering burdens involved**
Garner v. St. Clair Co, 2016 WL 146691, S.D. Ill. Jan.13, 2016	7th	Broadened motion to compel comparator information	Motion to compel denied as earlier production sufficient and proportional	**There would be no difference in result depending upon whether former or new rule applied (n. 1)**
Gilead Services v. Merck, 2016 WL 146574 (N.D. Cal. Jan13,2016)(**Grewald, MJ**)	9th	In patent dispute, motion to compel based on suspicion of veracity	Motion denied as type of proportionality rule intended to prohibit	**New rule uses factors already implicit in rule to "fix" scope of discovery demands in first instance**
Herrera v. Plantation Sweets, 2016 WL 183058 (SD Ga, Jan. 14, 2016)	11th	Motion to compel HR data	Granted	**New rule "elevates" proportionality factors but burdens of proof have not changed (n.1)**