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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.<sup>2</sup>

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

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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.

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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.<sup>3</sup> At that time, Rule 26(b)(1)(iii) was amended to “address the problems of discovery that is disproportionate to the individual lawsuit”<sup>4</sup> 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 21<sup>st</sup> century. It is now beyond dispute that gathering and reviewing all available potentially relevant electronic data is a practical

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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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> Indeed, the concept of proportionality existed in practice long before being officially embodied in the Federal

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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/](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.<sup>10</sup> 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.<sup>11</sup> 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.”<sup>12</sup>

The 1980 amendments to the Federal Rules acknowledged some of these concerns, but fell short of addressing the widespread practice of discovery abuse.<sup>13</sup> 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

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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).<sup>14</sup> 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<sup>15</sup>, 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.<sup>16</sup> In dispute, however, was whether the relative resources of the parties should also be taken into consideration.<sup>17</sup> 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[.]”<sup>18</sup>

The 1983 Amendments to the Federal Rules were enacted in response to the many, continued, and frequent calls for reform.<sup>19</sup> In promulgating the 1983 Amendments, the Advisory Committee noted that “[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems.”<sup>20</sup> 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.”<sup>21</sup> 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.*



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discovery.<sup>22</sup>

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<sup>23</sup> 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<sup>24</sup>, 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.<sup>25</sup>

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

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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.<sup>26</sup> This included a requirement that counsel make a reasonable inquiry into the factual basis of a discovery request or response.<sup>27</sup> 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).<sup>28</sup>

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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).<sup>29</sup>

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.”<sup>30</sup> Although the rule change was met with some fanfare, its effect on discovery practice appears to have been muted.<sup>31</sup>

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.<sup>32</sup> 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<sup>®</sup> 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.”<sup>33</sup> Federal and state courts began to address proportionality through local rules and ESI Guidelines.<sup>34</sup> 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. Conesco 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](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.”<sup>35</sup> Although changes to the Federal Rules in 2000 and 2006 and the enactment of Federal Rule of Evidence 502 in 2008<sup>36</sup> 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.”<sup>37</sup> 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.<sup>38</sup> 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.”<sup>39</sup> 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[.]”<sup>40</sup> 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

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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.”<sup>41</sup>

After the conclusion of the Duke Conference, a subcommittee was “formed to implement and oversee further work on [the resulting] ideas.”<sup>42</sup> However, it was not until the spring of 2012 that the subcommittee presented initial drafts of the proposed rules to the full advisory committee.<sup>43</sup> 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.”<sup>44</sup> The subcommittee submitted the amendments to the full Committee, which approved the proposed amendments for public comment.<sup>45</sup> The rules were published for comment on August 15, 2013, and three public hearings were scheduled.<sup>46</sup> 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.”<sup>47</sup>

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

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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.<sup>48</sup>

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,”<sup>49</sup> to “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable,”<sup>50</sup> in order to eliminate any confusion that the former language defined the scope of discovery.<sup>51</sup> (The current rules section, proposed rules section, and amended proposed rules section on the scope of discovery are reproduced below for your convenience.<sup>52</sup> Although the

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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.<sup>53</sup>)

The Committee further detailed the reasoning for its overhaul of Rule 26(b) in the Notes.<sup>54</sup> 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.”<sup>55</sup> 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.”<sup>56</sup> 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.<sup>57</sup> A keyword search for “proportionality” returned nearly 600 of the comments.<sup>58</sup> 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](http://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.<sup>59</sup> Some commenters were concerned about discovery abuse. Judge Scheindlin<sup>60</sup> stated the proposed amendments would “increase costs and engender delay.”<sup>61</sup> 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.<sup>62</sup> She was joined in this critique by other commenters.<sup>63</sup> 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].”<sup>64</sup> Additionally, they pointed out that the proportionality factors already existed in 26(g) and requesting parties had to certify they

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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.<sup>65</sup> 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.”<sup>66</sup> 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[.]”<sup>67</sup>

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.<sup>68</sup> 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.”<sup>69</sup> 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.<sup>70</sup> During one

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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.<sup>71</sup> 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].”<sup>72</sup> 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.’”<sup>73</sup>

The deletion of the relevancy language and the effect on access to information also generated controversy.<sup>74</sup> 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[.]”<sup>75</sup> Those in favor of the changes argued that it would force both sides to focus on the issues instead of “gotcha tactics”<sup>76</sup> 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 mechanically 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.<sup>77</sup> 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.”<sup>78</sup> 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.”<sup>79</sup> 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.”<sup>80</sup>

Another point of contention was which party would bear the burden of proof in a dispute. Judge Scheindlin and others<sup>81</sup> were concerned the amendments were “burdensome and unfair” because they did “not specify which party bears the burden of proof.”<sup>82</sup> 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.”<sup>83</sup>

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*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

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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.”<sup>84</sup> 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.”<sup>85</sup> 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.”<sup>86</sup>

## 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.”<sup>87</sup> The Standing Committee also reported that the proposed rules were “largely unchanged from those published for public comment.”<sup>88</sup>

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.<sup>89</sup> 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.”<sup>90</sup> In addition, the Committee added a new factor: “the parties’ relative access to relevant information.”<sup>91</sup> 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.”<sup>92</sup> 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,”<sup>93</sup> 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.”<sup>94</sup> 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.”<sup>95</sup>

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<sup>96</sup>:

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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

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.<sup>97</sup>

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<sup>98</sup> 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

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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<sup>99</sup>, we anticipate that the new rules will become effective on December 1, 2015.

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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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup>

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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<sup>103</sup> 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*<sup>104</sup> 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[.]"<sup>105</sup> 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.<sup>106</sup> "[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.<sup>107</sup>

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<sup>108</sup>, but rather of their fractured and frequently incomplete application by parties and their counsel.<sup>109</sup> 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

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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.

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*Achieving Proportionality*

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**PROPORTIONALITY MATRIX**

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

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

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

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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.<sup>111</sup> 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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<sup>111</sup>. 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[.]”<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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.”<sup>115</sup> 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<sup>116</sup>, and their own causes, by making

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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 encompass[ed] 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<sup>117</sup> 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

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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.<sup>118</sup> Additionally, the *Sedona Conference*<sup>®</sup> *Commentary on Proportionality in Electronic Discovery* is a useful resource for considering alternative approaches for managing discovery.<sup>119</sup> 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.<sup>120</sup> 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.]"<sup>121</sup> The court also undertook a proportionality

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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*<sup>®</sup> *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.<sup>122</sup> 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[.]"<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> 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.<sup>126</sup> 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."<sup>127</sup> 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.<sup>128</sup>

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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.<sup>129</sup> 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.<sup>130</sup>

#### **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.”<sup>131</sup> Indeed, when analyzing the costs and benefits of a

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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.”<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

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.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> 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.”<sup>138</sup>

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.<sup>139</sup> 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.”<sup>140</sup> 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.<sup>141</sup>

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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.<sup>142</sup> 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.<sup>143</sup> 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.”<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup> Rather than requiring perfection

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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.<sup>147</sup> 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.<sup>148</sup> In short, perfection is not the standard.

Notwithstanding this recognition that reasonableness – not perfection – is the standard<sup>149</sup>, 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.”<sup>150</sup>

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.<sup>151</sup> 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.”<sup>152</sup> The plaintiffs moved for reconsideration and this time offered 18 emails, obtained through third parties, but not produced by the

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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[,]”<sup>153</sup> 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.<sup>154</sup>

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.<sup>155</sup> 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

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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](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.<sup>156</sup> 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.<sup>157</sup>

In practice, this means no longer citing to *Oppenheimer Funds*<sup>158</sup> 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.<sup>159</sup> In many instances, particularized representations by counsel can

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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.'"<sup>160</sup> 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."<sup>161</sup> 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."<sup>162</sup> 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.<sup>163</sup>

**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.<sup>164</sup> 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.<sup>165</sup>

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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.<sup>166</sup> 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.”<sup>167</sup> 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.

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*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.<sup>168</sup> 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.<sup>169</sup> 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

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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).<sup>170</sup>

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.”<sup>171</sup> “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.”<sup>172</sup> Efforts should be made to “minimiz[e] cost and intrusiveness and the downtime of the computers involved.”<sup>173</sup> 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.*”<sup>174</sup>

While at least one court has acknowledged the difficulties inherent in applying proportionality factors to preservation decisions,<sup>175</sup> 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.<sup>176</sup>

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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). See 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.<sup>177</sup> 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.