Proportionality Today

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Introduction

As amended, Rule 26(b)(1) permits discovery of non-privileged information only if it is *both* "relevant" to the claims or defenses of a party and is also "proportional to the needs" of the case, considering a list of factors.[2]

Thus, Rule 26(b)(2)(C)(iii) now requires a court to limit on its own or by motion the frequency or extent of discovery when proposed discovery is "outside the scope permitted by Rule 26(b)(1)." Subsections (i) and (ii) of Rule 26(b)(2)(C), also part of the "proportionality principle," continue to limit discovery which is unreasonably cumulative or duplicative or which can be obtain from other less burdensome sources. Protective orders based on similar arguments remain available under Rule 26(c).[3]

Most courts have found it appropriate to apply amended Rule 26(b)(1) to pending cases.[4]

Scope of Discovery

A key issue is the impact on the scope of discovery. To some, the amendments narrow the scope of discovery,[5] in contrast to the prior version of the rule in which

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[2] The amended text is found (together with the new Committee Note) at 305 F.R.D. 457, 541 (2015).
[3] Noble Roman's Inc. v. Hattenhauer, 314 F.R.D. 304, 309 (S.D. Ind. March 24, 2016)("[a court] can issue a protective order as a means of enforcing the scope of discovery and its limits expressed in rule 26(b)").
[4] *See, e.g.*, Hong-Ngoc T Dao v. Liberty Life Assurance, 2016 WL 796095 (N.D. Cal. Feb. 23, 2016)(the rule "does not actually place a greater burden on the parties with respect to their discovery obligations, including the obligation to consider proportionality").
[5] Berman, *Reinventing Discovery under the New Federal Rules*, LITIGATION, Vol. 42, No. 3, Spring 2016, (the amendments "change discovery in a big way, largely by narrowing its scope").

proportionality limits were based in a "remote subsection of the Rule" and "little used, despite the best efforts of past amendments."[6] Under this view, courts have been "encouraged" to "put their thumbs on the scale" to achieve a narrower scope.[7] To critics, this is likely to lead to unfair consequences for requesting parties.[8]

A more balanced view, however, is that the amendment restores the scope of discovery to what it was always intended to be, but was lacking when courts and parties ignored proportionality considerations.[9] The intent is to promote "proportional discovery."[10] According to this view, corporate defendants are "mistaken" in their "belief that these changes dictate severe limitations on discovery."[11]

We are among those who cannot say with any confidence "that the relocation of the proportionality factors to Rule 26(b)(1) has caused a different result [in the cases decided under it]."[12] Indeed, a number of courts have gone out of their way to assure litigants that in deciding the motion before it, "the same result would follow regardless of which version of Rule 26 was applied."[13] The reader is invited to keep an open mind on the issue.

We first review the impact of the changes on the assessment of "relevance," bearing in mind that it is "conjoined" to the proportionality principle.[14] We then discuss related issues before providing our assessment of the efficacy of the amendments.

Relevance

Amended Rule 26(b)(1) permits discovery of non-privileged matter that is relevant to any party's claim or defense. Courts need look no further if this threshold test is not met. A party need not "run down a rabbit hole chasing irrelevant information on collateral matters."[15]

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[6] John J. Jablonski and Alexander Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411, 414 (2015)("Jablonski and Dahl").

[7] XTO Energy v. ATD, LLC, 2016 WL 1730171, at *19 (D. N.M. April 1, 2016).

[8] Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1112 (2015)(hereinafter "Moore"); *see also* Richard Moriarty, *And Now For Something Completely Different: Are the Federal Civil Discovery Rules Moving Forward into a New Age or Shifting Backward Into A "Dark" Age?,* 39 AM. J. TRIAL ADVOC. 227, 236 (2015)("Moriarty").

[9] Comments by Hon. John Koeltl (at June, 2016 Seminar, New York City, moderated by the Author).

[10] David G. Campbell, *New Rules, New Opportunities*, 99 JUDICATURE 19, 20 (2015)("'proportional' discovery [is] 'discovery tailored to the reasonable needs of the case'").

[11] Altom M. Maglio, *Adapting to Amended Federal Discovery Rule*, 51- JUL TRIAL 36, 37 (2015).

[12] Herr and Baicker-McKee, *Discovery*, 31 No. 2 FED. LITIGATOR NL 10 (2016).

[13] Cottonham v. Allen, 2016 WL 4035331, at n. 2 (M.D. La. July 25, 2016).

[14] Hon. Elizabeth Laporte and Jonathan Redgrave, *A Practical Guide to Achieving Proportionality Under the New Federal Rule of Civil Procedure 26*, 9 FED. CTS. LAW 19, 53 (2015)("Laporte and Redgrave")("[w]hile new Rule 26(b) literally places 'relevance' and 'proportionality on the same level, the concepts have been conjoined in the Federal Rules since 1983).

[15] O'Boyle v. Sweetapple, 2016 492655, at *5 (Feb. 8, 2016)(not "what [FRCP] 1 and 26(b)(2) envision").

The definition of discovery relevance is unchanged. In *State v. Fayda*, the court quoted from *Oppenheimer Fund* v. *Sanders* to make the point that relevancy is "still" construed "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on" any party's claim or defense."[16]

Decisions on relevance continue to rely heavily on pre-amendment decisions. The Amendments require a "case-specific" determination, bearing in mind that the "ease of production does not trump relevance."[17]

Oppenheimer

The 2015 amendment deleted authority for courts to order subject matter discovery. Also deleted was the statement that relevant information "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." It was replaced by the comment that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." [18]

The *Oppenheimer* decision involved "subject matter" discovery[19] and its continued use to define "relevance" has been criticized as "inconsistent" with the amendment of Rule 26(b)(1)[20] as well as "superfluous."[21] However, at least as far as the Author can determine from the cases decided at this point, the reference has not been misused. Others agree.[22] The logic is arguably on point and transferable. Wright and Miller rely on the same quotation in defining relevance in their leading Treatise.[23]

In *Randolph v. Centene Management*, for example, it citation was irrelevant to the decision on the timing of a Rule 30(b)(6) deposition.[24] However, that said, one court has found that an attorney's citation to "outdated caselaw" on relevance was "inexplicable" and sanctionable.[25]

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[16] State Farm v. Fayda, 2015 WL 7871037 at *2 (S.D. N.Y Dec. 3, 2015).
[17] Anthony D'Angelo v. Coatesville Area School District, 2016 U.S. Dist. LEXIS 79644, at n. 2 (E.D. Pa. June 20, 2106)(the information is "irrelevant to Plaintiff's claim of retaliatory discharge").
[18] *Cf*. Gilead Sciences v. Merck & Co., 2016 WL 146574, at *1 (N.D. Calif. Jan. 13, 2016)("no longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence").
[19] 437 U.S. 340, 351 (1978)("relevance to the subject matter involved in the pending action" has been construed broadly).
[20] John M. Barkett, *The First 100 Days (or so) of the 2015 Civil Rules Amendments*, 44, copy at http://www.frcpamendments2015.org/uploads/5/8/6/3/58636421/barkettfirst100days.pdf. (hereinafter "Barkett").
[21] Laporte and Redgrave, *supra*, at 65 (citations to prior legal authority of any vintage are often superfluous because each case stands on its own based on the facts and the need for the particular discovery").
[22] *See, e.g.*, Wit v. United Behavioral Health, 2016 WL 258604 at *10 (N.D. Cal. Jan. 21, 2016)(nothing that Oppenheimer "construe[ses] language contained in Rule 26 prior to 2015 amendments").
[23] 8 FED. PRAC. & PROC. CIV. § 2008 (3rd Ed.)(2016)(using quote from Oppenheimer to explain "the concept of relevancy").
[24] Randolph v. Cantene Management Company, 2016 WL 524259, at *1 (W.D. Wash. Feb. 10, 2016).
[25] Richard J. Fulton v. Livingston Financial LLC, 2016 WL 3976558, at *7 (W.D. Wash. July 25, 2016)(noting that the amendments to Rule 26(b)(1) had "dramatically changed" what information is discoverable).

Proportionality

The most controversial aspect of amended Rule 26(b)(1) is the explicit insertion of the word "proportional" in the definition of the scope of discovery. Thus, in addition to being "relevant" to the claims or defenses of a party, discovery must also be "proportional to the needs" of the case, considering the list of restated and amended factors.

As a minimum, courts must place "greater emphasis on the need to achieve proportionality" in their approaches to discovery.[26] However, while proportionality "has become the new black"[27] the responsibility to consider proportionality concepts has not changed.[28] The amended rule does not "place on the party seeking discovery the burden of addressing all proportionality concerns."

Nor may a party "refuse discovery simply by making a boilerplate objection that it is not proportional." Each party is expected to provide information uniquely in their possession to the court, which then must reach a "case-specific determination of the appropriate scope of discovery."[29]

The Proportionality Factors

The list of factors previously located in Rule 26(b)(2)(C)) has been slightly re-adjusted and with a new factor added.[30] *Gilead v. Merck*[31] explains that the new rule takes the proportionality factors which were explicit or implicit in the former rule[32] and applies them to discovery demands in the first instance in Rule 26(b)(1). They are to be considered along with the remaining limitations located in 26(b)(2)(C).[33]

No hierarchy of importance is specified. One suggestion is to attempt, during the meet and confer process, to seek agreement that "one or more of the Rule 26(b) factors do

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[26] Eramo v. Rolling Stone LLC et al., 2016 WL 304319, n. 2 (Jan. 25, 2016)(Chief Judge Glen E. Conrad).
[27] Vaigasi v. Solow Management Corp., 2016 WL 616386, at *2 (S.D. N.Y. Feb. 16, 2016).
[28] Steel Erectors v. AIM Steel, 312 F.R.D. 673, n. 4 (S.D. Ga. Jan. 4, 2016).
[29] Committee Note (the party requesting discovery "may have little information about the burden or expense of responding" but the producing party may have little information about the importance of the discovery "as understood" by the requesting parties).
[30] Rule 26(b)(1)("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.")
[31] Gilead v. Merck & Co., 2016 WL 146574 (N.D. Cal. Jan. 13, 2016).
[32] The former version (at Rule 26(b)(2)(C)(iii)required courts to assess whether "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." When the initial version of the list was adopted in 1983, the Committee Note spoke of "limiting redundant or disproportionate discovery" of matters which were "otherwise proper subjects of inquiry." Rule Transmittal, 97 F.R.D. 165, 213-217 (1983).
[33] Subsections (i) and (ii)(limiting unreasonably cumulative or duplicative discovery or that which can be obtain from other less burdensome sources).

not apply" or that "only certain factors are in dispute," thus focusing the issue for the courts.[34]

The primary focus is typically on the balance of benefit against burden in deciding if otherwise relevant information is proportional to the needs of the case.[35] This is the "essence of proportionality"[36] In *Vaigasi v. Solow Management*, the court noted that "it is simply inconceivable that the 1,027 items" requested are "proportional" to the needs of a single plaintiff discrimination case involving a job that would not ordinarily general a substantial volume of relevant documentation.[37]

In *Marsden v. Nationwide Biweekly Adm.*, the party was not required to produce all personnel files from other locations in a discrimination case given that the burdens outweighed the likely benefit under the facts of that case.[38]

Many disputes under the amended rule have been resolved with little fanfare. In *Wilson v. Wal-Mart*, the court excluded production of documents because of the burden to collect responsive documents."[39] In *Goes Int'l v. Dodu*, the court noted that it should not be an excessive burden for an entity to produce revenue data, and thus the discovery was proportional, even for an entity located in China.[40] In *O'Connor v. Uber*, the "overbreadth" of the requested discovery" failed to meet "Rule 26(b)'s proportionality test."[41]

Courts are prepared to limit discovery, however, when parties already have enough information to meet their needs in the case.[42] In *Pertile v. GM*, for example, a court in a roll-over case refused to require GM to produce complex modeling software which, although relevant, was not proportional to the needs of the case given the failure to demonstrate that other discovery was not adequate.[43]

Similarly, courts have not been reluctant to reject claims of disproportionality in cases where it was manifestly unwarranted. In *Federal Mortgage Assn. v. SFR Investments*, a District court affirmed a Magistrate Court's order compelling limited discovery by describing objections that the discovery was "disproportionate to the needs of the case" as "simply "hyperbole."

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[34] Laporte and Redgrave, *supra*, at 50.
[35] High Point Sarl v. Sprint Nextel Corp., 2011 WL 4036424, at *15 (D. Kan. Sept. 12, 2011)(the court will "balance the burden on the interrogated party against the benefit to the discovering party of having the information" and the discovery will be allowed unless the hardship is "unreasonable.")
[36] Apple v. Samsung Electronics, 2013 WL 4426512, at *3 (N.D. Cal. Aug. 14, 2013)("it is "senseless to require Apple to go to great lengths to produce data that Samsung is able to do without").
[37] Vaigasi v. Solow Management Corp., *supra*, 2016 WL 616386, at *2 (S.D. N.Y. Feb. 16, 2016).
[38] 2016 WL 471364 (S.D. Ohio Feb. 8, 2016)(although requesting party does not have access to the information, the producing party is in the act of shutting down its business, has limited personnel available to search and the producing party offered to produce files of others terminated for the same conduct).
[39] 2016 WL 526225, at *8 (D. Nev. Feb. 9, 2016)(but allowing evidence of subsequent remedial actions).
[40] 2016 WL 427369 (N.D. Cal. Feb. 4, 2016).
[41] 2016 WL 107461, at *4 (N.D. Cal. Jan. 11, 2016).
[42] Turner v. Chrysler, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016).
[43] Pertile v. GM, 2016 WL 1059450, at *4 (D. Colo. March 17, 2016).

Public Policy Issues

The "amount in controversy"[44] factor was moved to second place to reduce any impression that it was the predominant consideration in all cases. The Committee Note confirms 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."

Thus, when a case has public policy implications, the 'amount in controversy' factor may have a lesser weight in the court's analysis."[45] In *Lucille Schultz v. Sentinel Insur. Co.*, for example, a court rejected objections based on the costs of compliance despite the small amount in controversy, citing the other proportionality factors.[46]

Relative Access and Wealth

After public comments, the Committee added a new requirement that courts consider "the parties' relative access to relevant information." The Committee Note explains that "information asymmetry" results when one party may have very little discoverable information but the other may have "vast amounts." In those cases, the "burden of responding to discovery lies heavier on the party who has more information, and properly so."[47]

Doe v. Trustees of Boston College emphasized that a party with superior access needs to show "stronger burden and expense" to avoid production.[48] In *Kelley v. Apria Healthcare* discovery was permitted since access was "relatively easy" potential damages were "significant."[49]

However, the relative *wealth* of parties is not significant. In *Salazar v. McDonald's*, the court held that the comparative financial resources available to handle discovery costs was irrelevant.[50] In *Goes Int'l v. Dodur*, *supra*, the court stated that "[d]iscovery and its costs are neither shield to ward off nor hammer to throttle the opposing party."[51] The Committee Note provides that "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."[52]

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[44] *Cf.* Proposed Arizona Rule 16(a)(3)("Scheduling and Management of Actions") requiring courts to "ensure" that discovery is "appropriate to the needs of the action," considering a list of factors in which "the amount in controversy" is moved far down the list.
[45] Laporte and Redgrave, *supra*, at 61.
[46] 2016 WL 3149686, at *7 (D. S.D. June 3, 2016)(rejecting the argument that proportionality in the new amendments involved considerations not formerly present).
[47] Committee Note.
[48] Doe v. Trustees of Boston College, 2015 WL 9048225 (D. Mass., Dec. 16, 2015).
[49] 2016 WL 737919, at *4 (E.D. Tenn. Feb. 23, 206).
[50] 2016 WL 736213 (N.D. Cal. Feb. 25, 2016).
[51] 2016 WL 427369, at *4 (N.D. Cal. Feb. 4, 2016)
[52] Committee Note.

Cost Shifting

The 2015 Amendment to Rule 26(c) now provides that a protective order may specify "terms, including time and place or the allocation of expenses, for the disclosure or discovery." This codifies an important "discretionary tool that courts can use to facilitate discovery while balancing costs and needs."[53] It makes explicit what has been implicit for some time, namely, that a court has the authority under the protective order rule to shift the costs "as part of enforcing proportionality limits."[54]

The Committee Note explains that this "will forestall the temptation" to contest this authority without implying that "cost-shifting should become a common practice." This should encourage cost-sharing where appropriate.[55]

In *Elkharwily v. Franciscan Health Systems*, a court refused to order production of archived emails from backup media under Rule 26(b)(2), added as part of the 2006 Amendments to presumptively bar production of relevant ESI from inaccessible sources in the absence of good cause. The court apparently agreed that, as the producing party put it, it was an "extremely expensive fishing expedition."

However, the court held that if the requesting party would agree to pay (in advance) for the costs of retrieving and restoring the backup tapes, but not the review costs, it would order t production. It is apparent that the court was in essence accepting a proportionality objection but coupling it with a cost-shifting caveat analogous to the authority now residing in Rule 26(c).[56]

Burden of Proof

A major criticism of the relocation of the factors was that it placed an unfair burden on requesting parties to disprove that the request was disproportionate. After public comments, the Committee Note was revised to state that the amended rule does not "place on the party seeking discovery the burden of addressing all proportionality concerns." Each party is expected to provide information uniquely in their possession to the court, which then must reach a "case-specific determination of the appropriate scope of discovery."[57]

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[53] Laporte and Redgrave, supra, at 57 (noting that courts should perform a proportionality analysis to determine if it is appropriate in light of the Rule 26(b) factors).
[54] FDIC v. Brudnicki, 291 F.R.D. 669, 676 (N.D. Fla. 2013 ("as part of the enforcement of proportionality limits").
[55] Jablonski and Dahl, *supra*, 82 DEF. COUNS. J. 441, 422 (2015).
[56] Rule 26(b)(2)(B) provides that the court should determine if good cause exists, "considering the limitations of Rule 26(b)(20(C), the former location of the "proportionality factors" now part of Rule 26(b)(1).
[57] Committee Note, 20 (the party requesting discovery "may have little information about the burden or expense of responding" but the producing party may have little information about the importance of the discovery "as understood" by the requesting parties).

This reflects the fact that Rule 26(b)(1) "does not change" the existing responsibilities of the court and parties to consider proportionality. A "proponent of a discovery request must, in the first instance, show the relevance of the requested information to the claims or defenses in the case."[58] A party seeking discovery must demonstrate the "logical nexus" if challenged.[59] In *Gilead Sciences, supra*, a failure to do so led a court to deny discovery of "the type of disproportionate demands that Rule 26(b)(1) proscribes."[60]

Commentators argue that "fears of shifting burdens are misplaced"[61] and advise parties not to get "caught up in [the largely] academic dispute" since courts will expect both parties to contribute at least some of the answer to the inquiry.[62] One prominent jurist devoted an article to explaining the topic.[63]

Under the cases since the amendment, if a requesting party seeking discovery makes a prima facie showing of proportionality, the burden then shifts to the objecting party, and courts are not shy about enforcing it. In *Louisiana Crawfish Producers v. Mallard Basin*, the failure to show that the "burden of the plaintiffs' requested discovery outweighs its likely benefit" doomed the objections to the scope of discovery in a NEPA claim.[64]

However, the resisting party must also provide specifics. Amended Rule 34(b)(2)(B) now requires that an objection state "with specificity the grounds for objection" and also state whether any responsive materials are being withheld on the basis of an objection. In *Orchestratehr v. Trombetta*,[65] the court emphasized that the amendment to Rule 34(b)(2) codified the obligation to explain and support objections.

In *Eramo v. Rolling Stone*, the court required the resisting party to show the discovery was of "such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption of broad discovery."[66] In *Augustyniak v. Lowe's*, a requesting party was required to list discovery to be sought, why it was not already available and how the information would demonstrate the point sought to be

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[58] Board of Commissioners v. Daimler Trucks North America, 2015 WL 8664202, at *2 (D. Kan. Dec. 11, 2015)(finding that relevance exists and that Daimler failed to demonstrate the expense of discovery, as limited, outweighed its likely benefits).
[59] Kate Halloran, *The Path to New Discovery*, 52- TRIAL 26 (2016)(transcript of comments by Hon. Paul W. Grimm).
[60] 2016 WL 146574, at*2 (N.D. Cal. Jan. 13, 2016)(rejecting criticism that requesting party is being asked to take producing party's word that there is no nexus).
[61] Martha J. Dawson and Bree Kelly, *The Next Generation: Upgrading Proportionality for a New Paradigm*, 82 DEF. COUNS. J. 434, 442 (2015)(
[62] Laporte and Redgrave, at 67 ("[t]he new rule does not shift the burden of proving proportionality to the party seeking discovery").
[63] Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionalit*y, 16 SEDONA CONF. J. 55 (2015).
[64] 2015 WL 8074260, at *5 (W.D. La. Dec. 4, 2015)(where the discovery was essential and there was no evidence it would cause undue expense).
[65] 2016 WL 1555784, at *26 (N.D. Tex. April 18, 2016)
[66] Eramo v. Rolling Stone, 314 F.R.D. 205, 209-210 (W.D. Va. Jan. 25, 2016).

established.[67] A similar result obtained as to burdens in seeking to quash third party subpoenas in *Saller v. QVC*.[68]

Search Issues

Courts have been asked to apply proportionality considerations to limit the degree of search efforts required for compliance with production requests. In *Wagoner v. Lewis Gale Medical Center*,[69] the court refused to bar a burdensome and costly search of where the costs resulted from the party's "choice" to use a system that automatically deleted information after three days. Citing *Zubulake*, the court also refused to find the source inaccessible under Rule 26(b)(2)(B) because it did not require the type of reconstruction needed to restore backup tapes.

In *Wilmington Trust v. AEP Generating*, however, the court refused to order an additional search because a moving party "violate[s] the rule of proportionality" by failing to provide "evidence or persuasive argument" why ordering such a search would "materially add to [an] existing collection of relevant documents."[70]

Similarly, in *AVM Techs v. Intel*, the court refused to order Intel to undertake a further search of databases given that Intel did not have a comprehensive text-searchable database and the moving party had not demonstrated that production to date was inadequate.[71] In *Capetillo v. Primecare Medical*, the court ordered a modification of a similar demand and spelled out practical methods of producing the records sought.[72]

Third Parties

Proportionality considerations apply when discovery is sought from third parties. Courts are reluctant to allow parties to raise proportionality objections if based on the burden suffered by non-parties absent a showing of special interest. In *CDK v. Tulley Automotive Group*, a party lacked a basis under the amended rule to object since the burden of production would not be faced by the party.[73] A different result obtained in *Townsend v. Nestle Healthcare Nutrition*.[74]

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[67] Augustyniak v. Lowe's Home Center, 2016 WL 462346, at *5 (W.D. N.Y. Feb. 8, 2016).
[68] 2016 U.S. LEXIS 82895 (E.D. Pa. June 24, 2016).
[69] 2016 U.S. LEXIS 91323] (W.D. Va. July 14, 2016).
[70] 2016 WL 860693, at *2 (S.D. Ohio March 7, 2016)(noting a failure to identify gaps n production or difficulty in proving element of claims without additional documents).
[71] 2016 U.S. Dist. LEXIS 58378 (D.Del. May 3, 2016).
[72] 2016 WL 3551625 (E.D. Pa. June 29, 2016).
[73] 2016 WL 1718100, at *9 (D. N.J. April 29, 2016)(citing Green v. Cosby, 2016 WL 1086716, at *7 (E.D. Pa. Mar.21, 2016).
[74] 2016 WL 1629363, at *3 (S.D. West. Va. April 22, 2016)(although not explicit in Rule 45, its limitations on scope are in addition to the grounds for objection inherent in Rule 26 since the scope of discovery is the same).

In *Henry v. Morgan's Hotel Group,* however, third-party subpoenas were quashed at the request of the plaintiff because of the possible harm to the plaintiff in the ability to find future employment.[75]

In *Noble Roman's v. Hattenhauer,*[76] the court issued a protective order against a subpoena under Rule 26(c) to ensure that it was proportional to the needs of case, although the party objecting was not the producing party. The court held that the subpoena "fail[ed] the proportionality test" and constituted an example of "discovery run amok" which was too far afield from the contested issues in the case.

Rule 26 (g)

The 2015 Committee Note stresses that the amendment to Rule 26(b)(1) "reinforces" the obligations of parties and their counsel under Rule 26(g) to adhere to proportionality principles when preparing discovery requests, responses or objections. [77] Rule 26(g)(1)(B)(iii) requires that discovery be proportional to what is at issue.[78] Discovery pleadings must be neither "unreasonable nor unduly burdensome or expensive, considering the needs of the case."[79]

Case Management/State Rulemaking

"Whether proportionality moves from rule text to reality depends in large part of judges."[80] As noted in *Robertson v. People Magazine*, the rule "serves to exhort judges to exercise their preexisting control over discovery more exactingly."[81]

The 2015 Amendments "include an expanded menu of case-management tools to make it easier for lawyers and judges to tailor discovery to each case."[82] Authority to hold conferences by mail or other means was deleted from Rule 16(b)(1) in favor of "simultaneous communication, including by telephone."[83] This is intended to encourage conferences "during which judges and lawyers actually speak with each other."[84]

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[75] Henry v. Morgan's Hotel Group, 2016 WL 303114, at *3 (S.D. N.Y. Jan. 25, 2016); *but compare* Jennifer Saller v. QVC, *supra*, 2016 U.S. Dist. LEXIS 82895 (June 24, 2016)("Henry is distinguishable on the facts").
[76] 314 F.R.D. 304, (S.D. Ind. March 24, 2016).
[77] Committee Note.
[78] 253 F.R.D. 354, 359 (2008)(noting that boilerplate objections not based on particularized facts is prima facie evidence of a Rule 26(g) violation).
[79] *See, e.g.,* Witt v. GC Services, 307 F.R.D. 554 (D. Colo. Dec. 9, 2014)(imposing monetary sanctions for failure to adhere to Rule 26(g) requirements).
[80] Lee H. Rosenthal and Steven S. Gensler, *Achieving Proportionality in Practice,* 99 JUDICATURE, 43, 44 (2015) (noting that judges must make it clear to parties that they must work toward proportionality and be themselves willing and available to work with parties , including resolving discovery disputes quickly and efficiently)(Rosenthal and Gensler).
[81] 2015 WL 9077111, at *2 (S.D. N.Y. Dec. 16, 2015
[82] Rosenthal and Gensler, *supra,* at 44 (2015).
[83] *Id.* (noting that Rule 16(b)(1)(A) also continues to allow courts to base scheduling orders on Rule 26(f) reports without holding a conference)
[84] Campbell, *supra,* 99 JUDICATURE at 23 (2015).

Amended Rule 16(b)(3)(B)(v) also encourages pre-motion conferences, a standard practice in some jurisdictions,[85] by authorizing a scheduling order to require such a conference before moving for an order relating to discovery. And early "delivery" of potential requests for production prior to the Rule 26(f) conference is authorized by Rule 26(d) to facilitate early and meaningful discussions about the requests, including proportionality.[86]

In doing so, the amendment to Rule 1 makes it clear that parties - and their counsel[87]- are expected to engage in cooperative and proportional efforts to achieve cost effective management.[88]

Discovery Devices

The Rules Committee initially proposed, for proportionality reasons, to lower the presumptive limits on use of discovery devices. Rule 30, for example, would have been amended to decrease the number of oral depositions allowed without leave from 10 to 5. Similar reductions were proposed for written depositions (Rule 31) and Rule 33 would have permitted only 15, not 25 interrogatories, while a new limit (25) would have been placed on requests to admit (Rule 36).[89]

After "fierce" objections, especially by practitioners representing individual claimants, those proposals were withdrawn in favor of reliance on active case management.[90]

In *Sender v. Franklin Resources,* for example, the court concluded that the number of proposed depositions was not proportionate to the needs of the case and crafted an order providing for a single Rule 30(b)(6) deposition.[91] In *Steuben Foods v. Oystar*, the court lifted the existing limitations, while relying on the parties to cooperate to ensure that only "that discovery (including depositions) which is reasonably necessary" would be conducted.[92]

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[85] Roundtable Discussion, *The Nut and Bolts [of the 2015 Amendments*], 99 JUDICATURE 26, 32 (205)(Koeltl, J.)(discussing benefits of practice pursuant to local rule and resulting reduction in discovery motions).
[86] Rule 26(d) permits a request under Rule 34 to be delivered more than 21 days after the summons and complaint are served but is considered to be served at the first Rule 26(f) conference. Rule 34(b)(2)(A) is modified to reflect that the time to respond is 30 days after that conference is that delivery option is taken.
[87] Ronald J. Hedges, *The 'Other' December 1 Amendments to the [FRCP]*, Section of Litigation, Pretrial Practice & Procedure (Spring 2016)(while Rule 1 is not intended to be source of sanctions it should be cited by attorneys to call on their adversaries to cooperate in regard to discovery demands).
[88] Committee Note ("[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure").
[89] *See generally* Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 20-22 (2015).
[90] Advisory Committee Report, June 14, 2014, 305 F.R.D. 457, 514 (2015).
[91] 2016 WL 814627, at *2 (N.D. Cal. March 12, 2016).
[92] 2015 WL 9275748 (W.D. N.Y. Dec. 21, 2015).

Phased Discovery

Phased discovery is a useful option. In *Siriano v. Goodman Manufacturing,*[93] a court scheduled a discovery conference to consider the benefits from the use of phased discovery, while encouraging "further cooperative dialogue in an effort to come to an agreement regarding proportional discovery." In *Wide Voice v. Sprint*, the court "sequenced" discovery to prioritize on one of the five claims in the case.[94]

Database Production

One of the most difficult of all production tasks is to secure requested database information under circumstances where the configuration does not permit it without extraordinary efforts. The Sedona Conference® *Database Principles Commentary* emphasizes that a "disproportionate" effort should not be required "even if a lesser response" does not provide the same degree of access.[95]

In *Labrier v. State Farm*, a party which had engaged in discovery delay and other misconduct, was compelled to answer interrogatories seeking the information over objections based on the necessity to create specialized software to do so.[96]

State Rulemaking

Despite opposition by some academic critics, a number of states have acted to enhance use of proportionality.[97] These states include Colorado (2015),[98] Iowa (2015), Illinois (2014),[99] Minnesota (2013),[100] New Hampshire (2013) and Utah (2011).[101]

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[93] 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015)
[94] 2016 WL 155031 (D. Nev. Jan. 12, 2016)("[a]t this stage in litigation, sequenced discovery will benefit both parties").
[95] Sedona Conference® *Database Principles: Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 SEDONA CONF. J. 171, 215 (2014).
[96] Labrier v. State Farm, 2016 WL 2689513 (W.D. Mo. May 9, 2016).
[97] Stephen B. Burbank & Sean Farhang, 2016 Pound Forum for State Appellate Court Judges [*Who Will Write Your Rules - Your State Court or the Federal Judiciary*?], Los Angeles, July 23, 2016.
[98] Colo. R.C.P. 1, 16(b)(6)("Evaluation of Proportionality Factors"); 26(b)(1)&(2)("relevant to the claim or defense of any party and proportional to the needs of the case, considering [list of factors identical to the federal rule] and making use of discovery devices "subject to the proportionality factors [listed]")(effective July 1, 2015).
[99] Illinois linked proportionality considerations to preservation obligations. The Committee Comments to Rule 201(c) (3) ("Proportionality) incorporate a list of categories of ESI that "should not be discoverable" and stress that "[i]f any party intends to request the preservation . . .of potentially burdensome categories of ESI, then that intention should be addressed at the initial case management conference. Committee Comments (May 29, 2014), IL.R.S.CT. RULE 201.
[100] Minn. Civil Rules 1 (2013)("costs [must be] proportionate to the amount in controversy and complexity and importance of the issues" and listing factors to consider); 26.02(b)(discovery "must comport with the factors of proportionality" and ESI from inaccessible sources requires a showing of 'good cause and proportionality").
[101] UTAH R. C.P. 26(b)(2011)(discovery must satisfy "the standards of proportionality" listed; Rule 37(a) (requesting party must certify "discovery sought is proportional" and has burden of demonstrating proportionality).

Arizona is about to do so as well.[102] Massachusetts eschewed immediate adoption of the proportionality portions of the 2015 Amendments in order to determine the outcome of the case law in the Federal Courts.

Preservation

It has long been obvious that "[j]ust as the duty to produce is tempered by the principle of proportionality, so should courts take the same approach in regard to preservation decisions."[103] Amended Rule 37(e) now provides a "safe harbor" for parties that take "reasonable steps" and the Committee Note acknowledges that proportionality considerations play a role in determining if "reasonable steps" have been taken in implementing the duty to preserve.[104]

However, neither Rule 26(b) nor Rule 37(e) nor the respective Committee Notes[105] describe the impact of the relocated proportionality factors on the duty to preserve. The proportionality factors surely play a role, however.[106] The scope of the information and things subject to preservation must be both relevant and "proportional to the needs of the case." As the Committee stated during the 2006 rule-making cycle, "the outer limit of the duty to preserve "is set by the Rule 26(b)(1) scope of discovery."[107]

From a practical standpoint, however, a unilateral proportionality determination that relevant information need not be preserved carries risks, especially in the pre-litigation context.[108] It is always easy, in retrospect, to pick apart and criticize an over-reliance on it retrospectively. The Committee Note observes that courts should not be "blinded to this reality by hindsight arising from familiarity with an action as it is actually filed."[109]

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[102] Arizona has chosen, instead, to refer to "ensuring that discovery is appropriate to the needs of the action" in stating how a court must manage a civil action. *See, e.g.*, Proposed Rule 16(a)(3), Rules of Civil Procedure for the Superior Courts of Arizona (May, 2016). The [proposed] 2017 Comment notes that this is to avoid "undue emphasis on one factor (e.g. the amount in controversy)."

[103] Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9 ¶26 (2007); *accord*, The Sedona Conference® COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY, 11 SEDONA CONF. J. 289 (2010) (updated 2013)(the "burdens and costs of preserving" should be weighed when "determining the appropriate scope of preservation").

[104] Committee Note, Rule 37(e)(2015), 41 ("[a]nother factor in evaluating the reasonableness of preservation efforts is proportionality").

[105] The Committee Note regarding the initial proposal for Rule 37(e) suggested that because Rule 26(b)(1) made "proportionality a central factor in determining the scope of discovery," parties demanding preservation should "keep these proportionality principles in mind." This linkage was not mentioned in the final Committee Note.

[106] Hon. Joy Flowers Conti, *E-Discovery Ethics: Emerging Standards of Technological Competence*, 62-NOV. FED. LAW. 28, 31 (2015)("[p]roportionality is a guiding principle [under the amendments] in determining the breadth and extent of the preservation required").

[107] Thomas Y. Allman, *supra*, 16 SEDONA CONF. J. at 33.

[108] Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55, 104 (2015)("[a]n alleged spoliator who spurned a good-faith overture for early discussions regarding preservation may be poorly positioned to successfully challenge the moving party's threshold showing under Rule 37(e)"[citing Pippins v. KPNG, 279 F.R.D. 245, 254-255 (S.D. N.Y. 2012)]).

[109] Committee Note, 39.

The amendments to Rule 27(f)(3)(C) and Rule 16(b)(3)(B)(iii) encourage parties to reach agreements on limiting preservation based on proportionality principles as well as the opportunity to negotiate protocols embodying such limitations.[110] One such example is found in the Seventh Circuit E-Discovery Pilot Project, under which proportionality in presumptive materials for preservation are explicitly listed.[111]

Thus, Principle 2.04 (Scope of Preservation) lists "(1) deleted, slack, fragmented, or unallocated data (2) random access memory ("RAM"); (3) on-line data such as temporary internet files, history, cache, cookies, etc.; (4) metadata fields updated automatically; (5) backup data substantially duplicative of date more accessible elsewhere; and (6) other forms of ESI whose preservation requires extraordinary affirmative measures as presumptively not required to be preserved, absent specific identification of an intent to seek its production.

Preservation Orders

In *Swetlic Chiropractic v. Foot Levelers*,[112] a court applied proportionality principles articulated by the Sixth Circuit in *John B. Goetz* to limit the scope of a preliminary injunction mandating preservation.[113] In contrast, the court in *Shein v. Cook*, held that Rule 37(e) authorized it to issue an unlimited *ex parte* preservation orders.[114] In doing so, the court ignored the 2006 Committee Note that "[a] preservation order entered over objections should be narrowly tailored [and][e]x parte preservation orders should issue only in exceptional circumstances.[115]

Sanction Selection

A long-standing general principle is that the choice of sanctions should be guided by the "concept of proportionality" between offense and sanction.[116]

The Committee Note to Rule 37(e) stresses that the "remedy should fit the wrong" and "severe measures" should not be used when the information lost was "relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss."

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[110] Committee Note, Rule 37(e), 37 (preservation orders may become more common and once litigation commences if agreement is not possible, judicial guidance may be important, especially if promptly sought).
[111] Seventh Circuit Principles (Principle 2.04(d)). SEVENTH CIR. PILOT PROGRAM, copy at http://www.discoverypilot.com/.
[112] 2016 WL 1657922 (S.D. Ohio April 27, 2016)(
[113] 531 F.3d 448, 459 (6th Cir. 2008)); *cf.* Micolo v. Fuller, 2016 WL 158591 (W.D. N.Y. Jan. 13, 2016).
[114] Schein v. Cook, 2016 WL 3212457, at *5 (N.D. Cal. June 10, 2016)(granting ex parte order on theory that it is reasonable to do so since Rules 26(a) and 37(e) requires preservation and non-destruction).
[115] Committee Note, Rule 26(f)(2006"), at 234 F.R.D. 219, 323 (2006).
[116] Vitamins Online v. Heartwise, 2016 WL 3747582, at *5 (D. Utah July 11, 2016)(collecting cases).

Assessment

As the Chief Justice put it in his 2015 Year-End Report, amended Rule 26(b) "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality."[117] While the amendments "do not change" the existing responsibilities to consider proportionality, "[t]he days of struggling to establish the force of an unnamed principle buried deep in the rules are over."[118] The large number of decisions citing to "proportionality" eloquently bear witness to acceptance of that fact.

It is not clear, however, if the renewed emphasis on proportionality will actually reduce the costs of discovery, as many had hoped. Thought leaders also point to early case management - a process that not all courts agree is feasible - and the need for a change in the "litigation culture,"[119] requiring cooperative efforts among counsel.[120]

Whether this is a "bridge too far' – or not – remains to be seen.

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[117] *See* Year-End Report of Chief Justice, available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.
[118] *Id.*
[119] Rosenthal and Gensler, *supra*, 99 JUDICATURE at 45(2015); Campbell, *supra* at 19 ("[a] change in behavior is also required ").
[120] Lawrence F. Pulbram, *Discovery Rules Have Changed But Will We?*, ABA Litigation, Vol. 42, No. 3, Spring 2016, 21.

Appendix: Key Cases (Alphabetical)

1. **Arcelormittal Indiana Harbor v. Amex Nooter [**2016 WL 614144] (N.D. Ind. Feb. 16, 2016) Motion to compel production of settlement related documents found to be relevant for purposes of discovery, rejecting earlier case law relying upon "reasonable calculated" language in former rule for definition of scope of discovery. Court also found no reason to deny discovery based on proportionality factors especially since the exact information cannot be secured through other means and the burdens of production are low**.**

2. **Anthony Henry v. Municipality of Anchorage** [2016 WL 277114] (D. Alaska May 13, 2016) Court did not cite to amendments to Rule 26(b)(1) in barring discovery as overbroad and burdensome."

3. **Bagley v. Yale** [2016 WL 3264141, at *12] (D. Conn. June 14, 2016)(as rev. June 15). In allowing discovery of third-party files under amended Rule 26(b)(1), the court held that the test for relevance is Rule 401 of the FRE which provides in part that "evidence is relevant" if "it has any tendency to make a fact more or less probably than it would be without the evidence." At another point, the Court finds certain information was not relevant because its discovery was "unlikely to lead to relevant and admissible evidence." *Id.* at *8.

4. **Board of Commissioners v. Daimler Trucks North America** [2015 WL 8664202] (D. Kan. Dec. 11, 2015). The court found that requesting party met its burden to show that relevance exists in requests for information about substantially similar truck fires even thought it might not be admissible at trial and that Daimler failed to demonstrate that the expense of discovery, as limited, outweighed its likely benefits.

5. **David Wit v. United Behavioral Health** [2016 WL 258604] (N.D. Cal. Jan, 21, 2016). The court, in the absence of proportionality objections, granted requests for communications based on "low threshold for relevance of Rule 26." Court relies on Oppenheimer v. Sanders 437 US 340 (1978) for the observation that relevance has "traditionally' been construed broadly, citing its construction of the rule prior to the 2015 amendments ["relevant to the subject matter"]).

6. **Doe v. Trustees of Boston College** [2015 WL 9048225] (D. Mass. Dec. 16, 2015). College ordered to produce all statements of gender bias by decision makers and college officials in a position to influence decision makers due to their superior access to the information "which necessitates a stronger showing of burden and expense" under the relevant factors in assessing proportionality. The information is important to vindication of important personal or public values, as noted in the Committee Notes to the amended rule.

7. **Elkharwily v. Franciscan Health Systems** [2016 WL 4061575] (W.D. Wash. July 29, 2016). The court refused to order production of archived emails at the expense of a producing party for "good cause" under Rule 26(b)(2), since the producing party met its burden of showing that undue expense was involved (the party claimed it would cost $158K to 'retrieve, restore and review the backup tapes'). The court quoted amended Rule 26(b)(1), including the proportionality factors, but held that since the email was "discoverable" it would order its production if the requesting party agreed, in advance to pay the costs of retrieval and restoration, but not review. Rule 26(b)(1)(2006) cross references the proportionality factors [at their former location] as part of "good cause," but the court does not explain the interplay involved.

8. **Eramo v. Rolling Stone** [314 F.R.D. 205] (W.D. Va. Jan. 25, 2016). The court held that a subpoena issued to a third party (who was the subject of an article by defendant) for discovery of communications with the third party relevant to the article were relevant and proportional under amended Rule 26(b)(1), as limited in the opinion. In a footnote, the court held that as a result of the 2015 Amendments, it had put "greater emphasis on the need to achieve proportionality" in determining whether to grant the motion even though moving the factors to Rule 26(b)(1) had not changed the existing responsibilities of the court and the parties to consider proportionality.

9. **Fulton v. Livingston Financial LLC** [2016 WL 3976558 (W.D. Wash. July 25, 2016). Court sanctioned counsel for citing outdated case law pertaining to relevance under Rule 26(b)(1).

10. **Gilead Science v. Merck & Co**. [2016 WL 146574 (N.D. Cal. Jan. 13, 2016)(Grewal, M.J.). The court found it disproportionate to require a party to go through the cost and delay inherent in producing information which "bear[s] no indication of any nexus to the disputes" in the case. The court described the new rule as merely taking factors "explicit or implicitly" in the former requirements and making them apply "in the first instance" to discovery demands. It explains that what should change is "mindset" since "[n]o longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence." Instead, a party seeking discovery must show "before anything else that the discovery sought is proportional to the needs of the case." [For an earlier leading decision describing "proportionality" as all to often ignored by the same Magistrate Judge, see Apple v. Samsung, 2013 WL 4426512, at *3 (N.D. Cal. Aug. 14, 2013)].

11. **Goes Int'l v. Dodu** [2016 WL 427369] (N.D. Cal. Feb. 4, 2016) Court rejected proportionality objection to production of U.S. revenue data since the court noted that it should not be an excessive burden for an entity to produce even for a relatively small entity located in China. The financial resources issue is minimal since it does not foreclose requests "to an impecunious party, nor justify unlimited discovery" of a wealthy one.

12. **Hong-Ngoc T Dao v. Liberty Life Assurance** [2016 WL 796095] (N.D. Cal. Feb. 23, 2016). The court quotes the Committee Note stating that restoring the proportionality factors does not change the existing responsibilities of the court and parties to consider proportionality and concludes that "while the language of the Rule has changed," it is neither unjust nor inequitable to apply it to pending discovery disputes since it "does not actually place a greater burden" on the parties with respect to their discovery obligation.

13. **Hunt v. Goodwill Industries** [2016 WL 3568598] (M.D. Tenn. July 1, 2016). Refusing to deny requirement to respond to interrogatory by defining "proportionate to the needs of the case" as equivalent to a required showing of "overly broad or unduly burdensome."

14. **In re Blue Cross Blue Shield [2015 WL 9694792] (N.D. Ala. Dec. 9, 2015).** Refusing discovery of expert reports from other litigation which is only marginally relevant until and unless the expert is identified for pending case. Notes that discovery of "matters" is not fact based and that omission of subject matter jurisdiction "was not necessarily intended" to restrict the scope of discovery.

15. **Jeff Michael Gaudet v. GE Industrial Services** [2016 WL 2594812] (E.D. La. May 5, 2016). Order of inspection affirmed over objection that the discovery sought was duplicative or could be obtained by a less burdensome or expensive source, as required by Rule 26(b)(2)(C). Court approved delay of cost allocation, if any, until after the inspection, noting that amendment to Rule 26(c) approving authority to cost allocated should be exception, not the rule, and apply only in appropriate circumstances.

16. **Labrier v. State Farm** [2016 WL 2689513] (W.D. Mo. May 9, 2016). After objecting to giving direct access to data bases, party also objected to supplying information via interrogatories, as recommended by Special Master. Court found that the evidence sought was highly relevant and not available elsewhere and ordered responses despite objection that the party might have to develop unique software to respond ("computer programming" that it "does not have or does not normally use for this purpose").

17. **Lightsquared v. Deere** [2015 WL 8675377] (S.D. N.Y. Dec. 10, 2015) Granting motion for targeted discovery based on search for information about surviving claims but declining request for search for additional custodial searches for failure to establish relevance of the request and ordering parties to submit joint discovery plan on related issues. The court relied on Oppenheimer Fund v. Sanders, 437 US 340, 351 (1978) for the statement that relevance is to be construed broadly.

18. **Louisiana Crawfish Producers Association-West v. Mallard Basin, Inc.** [2015 WL 8074260] (W.D. La. Dec. 4, 2015). In rejecting objections to order allowing entry on to private land to survey and photograph in connection with a NEPA claim, the Court held that it could not conclude that the requested discovery was disproportional to the

needs of the case where the discovery was essential and there was no evidence it would cause undue expense.

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

20. **Mylan Pharmaecuticals v. Celgene Corporation** [2016 WL 2943813] (D. N.J. May 20, 2016). Magistrate ruling finding that limited relevance was outweighed by the burdens involved affirmed. It is "just and practicable" for a District Judge to review bench ruling of Magistrate Judge issued prior to December 1, 2016 under former rule under the amended rule's terms because proportionality and burden arguments were part of the prior Rule 26.

21. **Noble Roman's v. Hattenhauer** [314 F.R.D. 304] (S.D. Ind. March 24, 2016). Court hold that it may issue a protective order under Rule 26(c) to limit discovery via subpoena to ensure the discovery is proportional to the needs of case, even if the party objecting is not the producing party ("has sufficient legitimate interests of its own"). While the discovery sought may be relevant, it "fail[s] the proportionality test" as "discovery run amok" since it asks for information which is too far afield from the contested issues in the case.

22. **Pertile v. GM**, [2016 WL 1059450] (D. Colo. March 17, 2016). Court declined to order production of ESI relating to finite element analysis used to simulate real world conditions in accidents which did not necessarily reflect the vehicle as manufactured in the roll-over accident at issue. The information could be relevant but given that plaintiffs have not shown that reports on what was actually known about the results were insufficient, the attempt to compel production of the models was not proportional, given other burdens (including potential harm to trade secrets).

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

24. **Sharma v. BMW of North America** [2016 WL 1019668] (N.D. Cal. March 15, 2016). Courts required production of document retention policies as relevant and proportional

to needs of the case since it will involve minimal burdens but upheld objections to requiring production of technical materials in hands of parent company where subsidiary not shown to have legal control.

25. **Siriano v. Goodman Manufacturing** [2015 WL 8259548] (S.D. Ohio Dec. 9, 2015). After narrowing claims, court granted motion to compel discovery directly related to the remaining claims despite burdens involved since it was unlikely the information was available from other sources and alternative methods of discovery with lesser degrees of burden had not been proposed. The court noted that it was appropriate that disproportionality did not necessarily result from lopsided burdens of production. The court also endorsed use of phased discovery as part of active case management and cited Rule 1 in requiring the parties to engage in cooperative dialogue to develop a plan for proportional discovery.

26. **State Farm v. Fayda**, M.D. [2015 WL 7871037] (S.D. N.Y. Dec. 3, 2015)(Francis, M.J.)[Leading case for use of "Oppehheimer" dicta on relevance] Court granted motion to compel production of relevant bank records and tax returns despite objection based on proportionality where objecting party provided no evidence of burden. The amended rule is intended to encourage courts to be more aggressive in discouraging discovery overuse and courts need to analyze proportionality before ordering production. The court also noted that "relevance is still to be 'construed broadly" using an internal quote from *Oppenheimer Fund v. Sanders*, 437 US 340, 351 (1978). [That quote was" "the key phrase in this definition – "relevant to the subject matter involved in the pending action" – has be "construed broadly to encompass any matter that bears on, or that reasonably could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." The sentence in existing Rule 26(b)(1) striken by the 2015 Amendments read that "~~[r]elevant information need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence.~~"] For an interesting comparison of the handling of the same issue by the same Magistrate Judge before the Amendments, *see* Fort Worth Emploees Retirement Fund, 297 F.R.D. 99, 102 (S.D. N.Y. Dec. 16, 2013)(relevance is "an extremely broad concept" and the requested documents "must at least" appear to be "reaonsonably calculated to lead to the discovery of admissible evidence").

27. **Steuben Foods v. Oystar Group** [2015 WL 9275748] (W.D. Pa. Dec. 21, 2015). Court lifted limits on number and duration of depositions relying "instead" on the obligations emphasized by amended Rules 1 and 26(b) for the parties to cooperate by conducting only discovery reasonably necessary for prosecution and defense of the claims, taking into account that regularly scheduled monthly conferences would be held. The court also adopted, as an "equitable balance" compromise limits on the numbers of custodians to be subject to emails production requests.

28. **T-Mobile USA v. Huawei Device USA** [2016 WL 1597102] (W.D. Wash. April 20, 2016). Motion for protective order under **Rule 26(c)** granted because information

sought is unrelated to current dispute over testing robot technology and falls thus outside the scope of discovery under **Rule 26(b)** [Court ignored the argument by successful movant that the other party was seeking to discovery if another basis for a claim existed].

29. **Uppal v. Rosalind Franklin Univ. [**124 F.Supp.3d 811, 814-815] (N.D. Ill. Aug. 26, 2015). Refusing to determine if third party has standing to move to quash subpoena but denying quashing it because of the implicit requirement of proportionality (which will explicitly appear in the amended rule) in Rule 26(b)(2)(C)(iii); *ie,* where "the proposed discovery 'outweighs its likely benefit' – where the book is not worth the candle – it ought not be allowed.

30. **Wagoner v. Lewis Gale Med. Ctr**. [2016 U.S. LEXIS 91323] (W.D. Va. July 14, 2016). Court refused to bar search of 30K email or shift costs on proportionality standards where the party "chose" to use a system that automatically deleted information after three days. Court also rejected the use of personnel to search own computers. Citing *Zubulake,* refused to find the source inaccessible because it did not require the type of reconstruction in backup tapes.

31. **Wide Voice v. Sprint Communications** [2016 WL 155031] (D. Nev. Jan. 12, 2016). While denying a motion to stay discovery, the court ordered the parties to prioritize discovery on the contract claim (one of five counts) as to which the motion did not apply, since "sequenced discovery will benefit both parties." To the extent that discovery as to that count included other counts, it was permitted.