

Proportionality Today

Thomas Y. Allman¹

Introduction	1
Scope of Discovery	1
Relevance	2
Proportionality	4
Case Management/State Rulemaking	10
Preservation	13
Assessment	15
Appendix A: Key Cases (Alphabetical)	16

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).” Protective orders are also available under Rule 26(c).³

Subsections (i) and (ii) of Rule 26(b)(2)(C) continue to limit discovery which is unreasonably cumulative or duplicative or which can be obtain from other less burdensome sources as part of the “proportionality” principle.

The 2015 amendment also deleted authority for courts to order subject matter discovery for good cause – and the incorrect⁴ assertion that relevant information “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”⁵ The latter was replaced by the observation that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”⁶

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

¹ © 2016 Thomas Y. Allman. Mr. Allman is Chair Emeritus of the Sedona Conference® Working Group 1.

² The amended text and the Committee Note is found 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 Committee Note (“[t]he phrase has been used by some, incorrectly, to define the scope of discovery”).

⁵ *See e.g.*, *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”).

⁶ *See In re: Bard, supra*, at *1 (“a more direct declaration of the phrase’s original intent”).

Introduction

There was – and remains – controversy over whether the scope of discovery under the Federal Rules has “changed” as a result of the cumulative effect of amendments to Rule 26(b)(1). To some commentators⁷ and courts⁸ the scope of discovery has been narrowed; a view shared, ironically, by vociferous critics, of which there are many, to whom the “combined effect” of the changes is to “significantly limit discovery.”⁹

A more balanced view, however, is that the amendment restores the scope of discoverable information to what it was always intended to be, but was lacking when courts and parties ignored proportionality considerations. In the prior version of the rule, proportionality limits were based on a “remote subsection of the Rule” and “little used, despite the best efforts of past amendments.”¹⁰ The changes do not dictate severe limitations on discovery.”¹¹

In effectuating the amended rules, the amendment to Rule 1 makes it clear that courts and parties - and their counsel - are expected to engage in cooperative and proportional efforts to achieve cost effective management.¹²

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 “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.”¹³ A party need not “run down a rabbit hole chasing irrelevant information on collateral matters.”¹⁴

A broad definition of discovery relevance is said to remain, with its focus on the relationship to claims and defenses. In *State v. Fayda*, the court quoted from *Oppenheimer*

⁷ 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”).

⁸ Richard J. Fulton v. Livingston Financial LLC, 2016 WL 3976558, at *7 (W.D. Wash. July 25, 2016)(the amendments “‘dramatically changed’ what information is discoverable”); XTO Energy v. ATD, LLC, 2016 WL 1730171, at *19 (D. N.M. April 1, 2016)(courts are encouraged to “put their thumbs on the scale” to achieve a narrower scope).

⁹ 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).

¹⁰ 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”).

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

¹² Committee Note (“[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure”).

¹³ 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).

¹⁴ O’Boyle v. Sweetapple, 2016 492655, at *5 (Feb. 8, 2016)(not “what [FRCP] 1 and 26(b)(2) envision”).

Fund v. Sanders to¹⁵ 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 However, a party seeking discovery must demonstrate the “logical nexus” if challenged.¹⁷

Oppenheimer

The use of the quotation from *Oppenheimer* to define “relevance” broadly has been criticized as “inconsistent” with the amendment of Rule 26(b)(1) because it was used to construe a version of the rule under which “subject matter” discovery was permissible.¹⁸ However, despite awareness of that fact, courts have continued to use it under the amended rule.¹⁹

The objection to the use of *Oppenheimer* language may indicate a belief that, in the post-amendment context, relevancy is not to be construed as broadly as it has been in the past.²⁰ *In re: Bard IVC Filters Products Liability Litigation* seems to suggest that possibility given its criticism of cases which continue to use the “reasonably calculated” (or its equivalent) phrase as a “definition for the scope of permissible discovery.”²¹

In any event, one thing is clear: “relevancy alone is no longer sufficient – discovery must also be proportional to the needs of the case.”²² We discuss the latter concept separately, mindful of the intimate relationship involved.

Proportionality

Amended Rule 26(b)(1) posits that relevant information is discoverable only if it is also “proportional to the needs of the case,” considering the list of restated and amended factors to assist in determining if the discovery. The intent is to promote “proportional

¹⁵ 437 U.S. 340, 351 (1978)(“relevance to the subject matter involved in the pending action” has been construed broadly).

¹⁶ *State Farm v. Fayda*, 2015 WL 7871037 at *2 (S.D. N.Y. Dec. 3, 2015)(Francis, M.J.).

¹⁷ Kate Halloran, *The Path to New Discovery*, 52- TRIAL 26 (2016)(transcript of comments by Hon. Paul W. Grimm).

¹⁸ 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”).

¹⁹ *See, e.g., Wit v. United Behavioral Health*, 2016 WL 258604 at *10 (N.D. Cal. Jan. 21, 2016)(applying the criticized language with full knowledge that *Oppenheimer* “constru[es] language contained in Rule 26 prior to 2015 amendments”).

²⁰ *See Lifeguard Licensing v. Kozak*, 2016 WL 4733157 (S.D.N.Y. Sept. 9, 2016)(Francis, M.J.)(referring to “the broad construction of relevance in the [FRCP]”).

²¹ *In re: Bard IVC Filters Products Liability Litigation*, 2016 WL 4943393, text at *2 and at n. 1 (D. Ariz. Sept. 16, 2016)(Campbell, J)(collecting cases)); *accord, Cole’s Wexford Hotel v. Highmark*, 2016 WL 5025751, at *1(W.D. Pa. Sept. 20, 2016)(Conti, J.)(“discovery requests are not relevant because there is a possibility that the information may be relevant to the general subject matter of the action”).

²² *In re: Bard, supra*, at *2.

discovery.”²³ As a minimum, courts must place “greater emphasis on the need to achieve proportionality” in their approaches to discovery.²⁴

When ESI is involved, Rule 26(b)(2), added in 2006 to limit production from inaccessible sources,²⁵ requires that possible production satisfy proportionality considerations.²⁶ Moreover, according to the Committee Note, the renewed emphasis on proportionality “reinforce[s]” Rule 26(g) obligations by requiring “parties to consider these [proportionality] factors in making discovery requests, responses, or objections.”

However, while proportionality “has become the new black”²⁷ 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.”²⁸

This reflects the fact that Rule 26(b)(1) “does not change” the existing responsibilities of the court and parties to consider proportionality. Commentators argue that “fears of shifting burdens are misplaced”²⁹ 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.³⁰ One prominent jurist has devoted an article to explaining the topic.³¹

Under the decided 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

²³ David G. Campbell, *New Rules, New Opportunities*, 99 JUDICATURE 19, 20 (2015)(“proportional discovery [is] ‘discovery tailored to the reasonable needs of the case’”).

²⁴ *Eramo v. Rolling Stone LLC et al.*, 2016 WL 304319, n. 2 (Jan. 25, 2016)(Chief Judge Glen E. Conrad).

²⁵ Rule 26(b)(2)(B) provides that the court should determine if good cause exists, “considering the limitations of Rule 26(b)(2)(C), the former location of the “proportionality factors” now part of Rule 26(b)(1).

²⁶ *Nelson v. American Family Mutual Insurance*, 2016 WL 3919973, *6 (D. Minn July 18, 2016) court may order production of ESI based on Rule 26(b)(2)(B) if ‘good cause’ shown,” considering proportionality); *see also* *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, at n. 14 (S.D. N.Y. Sept. 10, 2012)(courts that consider “good cause” use same types of factors as involved in proportionality determinations).

²⁷ *Vaigasi v. Solow Management Corp.*, 2016 WL 616386, at *2 (S.D. N.Y. Feb. 16, 2016).

²⁸ 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).

²⁹ Martha J. Dawson and Bree Kelly, *The Next Generation: Upgrading Proportionality for a New Paradigm*, 82 DEF. COUNS. J. 434, 442 (2015)(

³⁰ Laporte and Redgrave, at 67 (“[t]he new rule does not shift the burden of proving proportionality to the party seeking discovery”).

³¹ Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA CONF. J. 55 (2015).

discovery outweighs its likely benefit” doomed the objections to the scope of discovery in a NEPA claim.³²

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 *Orchestrated v. Trombetta*,³³ 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.”³⁴ 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 established.³⁵ A similar result obtained as to burdens in seeking to quash third party subpoenas in *Saller v. QVC*.³⁶

The Factors

The former version of the proportionality factors, then located 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.” *Gilead v. Merck*³⁷ explains that the new rule takes the proportionality factors which were explicit or implicit in the former rule and applies them to discovery demands in the first instance in Rule 26(b)(1).

As relocated, their order has been slightly re-adjusted and a new factor dealing with relative accessibility has been added.³⁸ No hierarchy of importance among the factors is intended, despite the deliberate re-arrangement of their order. Parties should seek agreement that “one or more of the Rule 26(b) factors do not apply” or that “only certain factors are in dispute,” thus focusing the issue for the courts.³⁹

Most disputes under the amended rule have been resolved with little fanfare. The primary focus is typically on the balance of benefit against burden in deciding if otherwise

³² 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).

³³ 2016 WL 1555784, at *26 (N.D. Tex. April 18, 2016)

³⁴ *Eramo v. Rolling Stone*, 314 F.R.D. 205, 209-210 (W.D. Va. Jan. 25, 2016).

³⁵ *Augustyniak v. Lowe’s Home Center*, 2016 WL 462346, at *5 (W.D. N.Y. Feb. 8, 2016).

³⁶ 2016 U.S. LEXIS 82895 (E.D. Pa. June 24, 2016).

³⁷ *Gilead v. Merck & Co.*, 2016 WL 146574 (N.D. Cal. Jan. 13, 2016).

³⁸ 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.”)

³⁹ Hon. Elizabeth D. Laporte and Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 50 (2015).

relevant information is proportional to the needs of the case.⁴⁰ This is the “essence of proportionality”⁴¹ 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.⁴²

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.⁴³ 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.⁴⁴ In *O’Connor v. Uber*, the “overbreadth” of the requested discovery” failed to meet “Rule 26(b)’s proportionality test.”⁴⁵

Courts are prepared to limit discovery, however, when parties already have enough information to meet their needs in the case.⁴⁶ 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.⁴⁷

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.”

Public Policy Issues

The “amount in controversy”⁴⁸ factor was moved to second place in the amended list to reduce any impression that it was the predominant consideration in all cases. When a case has public policy implications, the ‘amount in controversy’ factor may have a lesser

⁴⁰ *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.”)

⁴¹ *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”).

⁴² *Vaigasi v. Solow Management Corp.*, *supra*, 2016 WL 616386, at *2 (S.D. N.Y. Feb. 16, 2016).

⁴³ 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).

⁴⁴ 2016 WL 427369 (N.D. Cal. Feb. 4, 2016).

⁴⁵ 2016 WL 107461, at *4 (N.D. Cal. Jan. 11, 2016).

⁴⁶ *Turner v. Chrysler*, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016).

⁴⁷ *Pertile v. GM*, 2016 WL 1059450, at *4 (D. Colo. March 17, 2016).

⁴⁸ *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.

weight in the court’s analysis.”⁴⁹ 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.⁵⁰

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.”

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.”⁵¹

Doe v. Trustees of Boston College emphasized that a party with superior access needs to show “stronger burden and expense” to avoid production.⁵² In *Kelley v. Apria Healthcare*, a court permitted discovery because access by the producing party was “relatively easy” and the potential damages were “significant.”⁵³

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.⁵⁴ In *Goes Int’l v. Dodur*, the court stated that “[d]iscovery and its costs are neither shield to ward off nor hammer to throttle the opposing party.”⁵⁵ 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.”⁵⁶

Cost Shifting

Amended 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.”⁵⁷ It makes explicit what has been implicit for some

⁴⁹ Laporte and Redgrave, *supra*, at 61.

⁵⁰ 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).

⁵¹ Committee Note.

⁵² *Doe v. Trustees of Boston College*, 2015 WL 9048225 (D. Mass., Dec. 16, 2015).

⁵³ 2016 WL 737919, at *4 (E.D. Tenn. Feb. 23, 2016).

⁵⁴ 2016 WL 736213 (N.D. Cal. Feb. 25, 2016).

⁵⁵ 2016 WL 427369, at *4 (N.D. Cal. Feb. 4, 2016)

⁵⁶ Committee Note.

⁵⁷ Laporte and Redgrave, *supra*, at 57 (noting that courts should perform a proportionality analysis to determine if cost-shifting is appropriate in light of the Rule 26(b) factors).

time, namely, that a court has the authority under the protective order rule to shift the costs “as part of enforcing proportionality limits.”⁵⁸

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.⁵⁹

The clarified authority under Rule 26(c) supplements the authority to use cost-shifting under Rule 26(b)(2)(B), which relates solely to ESI. In *Elkharwily v. Franciscan Health Systems*, a court refused to order production of archived emails from backup media under Rule 26(b)(2) given the inaccessibility involved. 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 the production.⁶⁰

Similarly, in *Navajo Nation Human Rights v. San Juan County*, a court found that since the data sought on an emergency basis was duplicative of information available from other sources, it would order at the movants expense based on principles of proportionality and Rule 26(b).⁶¹

Search Issues

Courts routinely apply proportionality considerations to assess the degree of search efforts required for compliance with production requests. In *Wilmington Trust v. AEP Generating*, 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.”⁶²

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.⁶³

In *Wagoner v. Lewis Gale Medical Center*,⁶⁴ however, the court refused to bar a costly search resulting from the party’s “choice” to use a system that automatically deleted information after three days. In *Capetillo v. Primecare Medical*, the court ordered a

⁵⁸ FDIC v. Brudnicki, 291 F.R.D. 669, 676 (N.D. Fla. 2013 (“as part of the enforcement of proportionality limits”).

⁵⁹ Jablonski and Dahl, *supra*, 82 DEF. COUNS. J. 441, 422 (2015).

⁶⁰ 2016 WL 4061575 (W.D. Wash. July 29, 2016).

⁶¹ 2016 WL 3079740 (D. Utah May 31, 2016).

⁶² 2016 WL 860693, at *2 (S.D. Ohio March 7, 2016)(noting a failure to identify gaps in production or difficulty in proving element of claims without additional documents).

⁶³ 2016 U.S. Dist. LEXIS 58378 (D.Del. May 3, 2016).

⁶⁴ 2016 U.S. LEXIS 91323] (W.D. Va. July 14, 2016).

modification of a similar demand and spelled out practical methods of producing the records sought.⁶⁵

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.⁶⁶ A different result obtained in *Townsend v. Nestle Healthcare Nutrition*.⁶⁷

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.⁶⁸

In *Noble Roman's v. Hattenhauer*,⁶⁹ 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.

Case Management/State Rulemaking

“Whether proportionality moves from rule text to reality depends in large part of judges.”⁷⁰ As noted in *Robertson v. People Magazine*, the rule “serves to exhort judges to exercise their preexisting control over discovery more exactly.”⁷¹

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.”⁷² Authority to hold conferences by mail was deleted from Rule 16(b)(1) in favor of “simultaneous

⁶⁵ 2016 WL 3551625 (E.D. Pa. June 29, 2016).

⁶⁶ 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).

⁶⁷ 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).

⁶⁸ *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”).

⁶⁹ 314 F.R.D. 304, (S.D. Ind. March 24, 2016).

⁷⁰ 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).

⁷¹ 2015 WL 9077111, at *2 (S.D. N.Y. Dec. 16, 2015)

⁷² Rosenthal and Gensler, *supra*, at 44 (2015).

communication, including by telephone.”⁷³ This is intended to encourage conferences “during which judges and lawyers actually speak with each other.”⁷⁴

Amended Rule 16(b)(3)(B)(v) also encourages pre-motion conferences, a standard practice in some jurisdictions,⁷⁵ 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.⁷⁶

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).⁷⁷

After “fierce” objections at the public hearings, especially by counsel representing individual claimants, those proposals were withdrawn in favor of reliance on active case management.⁷⁸ In *Steuben Foods v. Oystar*, for example, the court lifted the presumptive limitations in relying on the parties to cooperate to ensure that only “that discovery (including depositions) which is reasonably necessary” would be conducted.⁷⁹

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.⁸⁰

Phased Discovery

Phased discovery is a useful option. In *Siriano v. Goodman Manufacturing*,⁸¹ a court scheduled a discovery conference to consider the benefits from its use while

⁷³ *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)

⁷⁴ Campbell, *supra*, 99 JUDICATURE at 23 (2015).

⁷⁵ Roundtable Discussion, *The Nut and Bolts [of the 2015 Amendments]*, 99 JUDICATURE 26, 32 (2015)(Koeltl, J.)(discussing benefits of practice pursuant to local rule and resulting reduction in discovery motions).

⁷⁶ 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.

⁷⁷ See generally Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 20-22 (2015).

⁷⁸ Advisory Committee Report, June 14, 2014, 305 F.R.D. 457, 514 (2015).

⁷⁹ 2015 WL 9275748 (W.D. N.Y. Dec. 21, 2015).

⁸⁰ 2016 WL 814627, at *2 (N.D. Cal. March 12, 2016).

⁸¹ 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015)

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 one of the claims in the case.⁸²

Database Production

One of the most difficult of all production tasks is to secure 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.⁸³

In *Labrier v. State Farm*, a party which had engaged in discovery delay and other misconduct was compelled to answer interrogatories seeking information which required the producing party to create specialized software.⁸⁴

State Rulemaking

Despite opposition by academics opposed to emulating the Federal principles, a number of states have acted to enhance use of proportionality.⁸⁵ These states include Colorado (2015),⁸⁶ Iowa (2015), Illinois (2014),⁸⁷ Minnesota (2013),⁸⁸ New Hampshire (2013) and Utah (2011).⁸⁹ Arizona is about to do so as well.⁹⁰ Massachusetts eschewed

⁸² 2016 WL 155031 (D. Nev. Jan. 12, 2016)(“[a]t this stage in litigation, sequenced discovery will benefit both parties”).

⁸³ Sedona Conference® *Database Principles: Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 SEDONA CONF. J. 171, 215 (2014).

⁸⁴ *Labrier v. State Farm*, 2016 WL 2689513 (W.D. Mo. May 9, 2016).

⁸⁵ See, e.g., 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.

⁸⁶ 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).

⁸⁷ 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.C.T. RULE 201.

⁸⁸ 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”).

⁸⁹ 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).

⁹⁰ Effective January 1, 2017. See <https://www.azcourts.gov/Portals/20/2016%20Rules/R-16-0010.pdf>

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 & Sanctions

As the Author noted in 2007, it is 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.”⁹¹ 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.⁹²

However, neither Rule 26(b) nor Rule 37(e) nor the respective Committee Notes⁹³ describe the impact of the relocated proportionality factors on the *scope* of the duty to preserve. The amendments to Rule 26(b) surely play a role, however.⁹⁴ As the Rules Committee noted in a report to the Standing Committee 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.”⁹⁵

From a practical standpoint, however, a unilateral proportionality determination that relevant information need not be preserved carries risks, especially in the pre-litigation context.⁹⁶ 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.”⁹⁷

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

⁹¹ 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”).

⁹² Committee Note, Rule 37(e)(2015), 41 (“[a]nother factor in evaluating the reasonableness of preservation efforts is proportionality”).

⁹³ 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.

⁹⁴ 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”).

⁹⁵ Thomas Y. Allman, *supra*, 16 SEDONA CONF. J. at 33.

⁹⁶ 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)]).

⁹⁷ Committee Note, 39.

the opportunity to negotiate protocols embodying such limitations.⁹⁸ One example is *Martinelli v. Johnson & Johnson*, where the parties agreed to a protocol requiring discussions of any disputes over whether preservation requirements “are, or not, relevant and proportional to Rule 26(b)(1).”⁹⁹

The Seventh Circuit E-Discovery Principles list types of ESI which are presumptively not proportional absent specific identification of an intent to seek their production: (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 data more accessible elsewhere; and (6) other forms of ESI whose preservation requires extraordinary affirmative measures.¹⁰⁰

Preservation Orders

Proportionality considerations should be considered in drafting court orders mandating preservation. In *Swetlic Chiropractic v. Foot Levelers*,¹⁰¹ a court applied proportionality principles as articulated by the Sixth Circuit in *John B. Goetz* to limit the scope of a preliminary injunction mandating preservation.¹⁰²

In contrast, the court in *Shein v. Cook*, issued an unlimited *ex parte* preservation orders¹⁰³ despite 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.”¹⁰⁴

Sanction Selection

A long-standing general principle is that the choice of spoliation sanctions should be guided by the “concept of proportionality” between offense and sanction.¹⁰⁵ That principle is restated in various ways in amended Rule 37(e) and the related Committee Note.

For example, the Note stresses that the “remedy should fit the wrong” and “severe measures” should not be used when the information lost was “relatively unimportant or

⁹⁸ 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).

⁹⁹ 2016 WL 1458109 (E.D. Cal. April 13, 2017).

¹⁰⁰ Seventh Circuit Principles (Principle 2.04(d))(Scope of Preservation), SEVENTH CIR. PILOT PROGRAM, copy at <http://www.discoverypilot.com/>.

¹⁰¹ 2016 WL 1657922 (S.D. Ohio April 27, 2016).

¹⁰² 531 F.3d 448, 459 (6th Cir. 2008); cf. *Micolo v. Fuller*, 2016 WL 158591 (W.D. N.Y. Jan. 13, 2016).

¹⁰³ *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).

¹⁰⁴ Committee Note, Rule 26(f)(2006”), at 234 F.R.D. 219, 323 (2006).

¹⁰⁵ *Vitamins Online v. Heartwise*, 2016 WL 3747582, at *5 (D. Utah July 11, 2016)(collecting cases).

lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.”

Assessment

The Rules Committee and the Chief Justice in his 2015 Year-End Report expect that courts and parties will place “increased reliance on the common-sense concept of proportionality.”¹⁰⁶ Certainly, “[t]he days of struggling to establish the force of an unnamed principle [proportionality] buried deep in the rules are over.”¹⁰⁷ The large number of decisions citing to “proportionality” eloquently bear witness to acceptance of that fact.

It is not clear to the Author, however, whether the relocation of the proportionality factors to Rule 26(b)(1) has – or has not – led to different results in the cases decided under the amended rule. Others have reached similar conclusions.¹⁰⁸ Some courts have gone out of their way to assure litigants before them that “the same result would follow regardless of which version of Rule 26 was applied.”¹⁰⁹

There also remains confusion over the threshold test to be applied in assessing if information is “relevant to any party’s claim or defense.” The widespread criticism over use of the *Oppenheimer* test (which related to an earlier version of the rule) may well reflect an unspoken consensus that a broad construction of relevance is no longer acceptable. The author doubts that this is the case; the “heavy lifting” needed to apply common sense limits to discovery is best undertaken by proportionality principles, which are up to the task.

However, even with a renewed and effective emphasis on proportionality, there remains serious doubts if the 2015 Amendments alone will actually reduce the costs of discovery, as many had hoped. Aggressive and thorough (read: expensive) discovery is too ingrained to expect it to fade away. Thought leaders point to the need for a change in the “litigation culture,”¹¹⁰ requiring cooperative efforts among counsel.¹¹¹ That may not be enough. Whether cost reduction under the current rules is a “bridge too far” remains to be seen.

¹⁰⁶ See Year-End Report of Chief Justice, available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

¹⁰⁷ *Id.*

¹⁰⁸ *Accord* Herr and Baicker-McKee, *Discovery*, 31 No. 2 FED. LITIGATOR NL 10 (2016).

¹⁰⁹ *Cottonham v. Allen*, 2016 WL 4035331, at n. 2 (M.D. La. July 25, 2016).

¹¹⁰ Rosenthal and Gensler, *supra*, 99 JUDICATURE at 45(2015); Campbell, *supra* at 19 (“[a] change in behavior is also required”).

¹¹¹ 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 4077154] (N.D. Ind. July 8, 2016) On motion for reconsideration, court affirmed earlier decisions permitting discovery as proportional especially since the exact information cannot be secured through other means and the burdens of production are low. In doing so, the court rejected argument that it used the amended rule to broaden the scope of discovery contrary to the intent, which was to narrow discovery. The court explained that the purpose of the amended rule was to narrow the scope caused by incorrect use of “reasonably calculated” to be “more broad than intended.”
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 though 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. **Cole’s Wexford Hotel v. Highmark** [2016 WL 5025751] (W.D. Pa. Sept. 20, 2016). In antitrust action, court accepted Special Master to deny discovery of various rates but criticizes as use of a post-amendment decisions in which court relied upon *Oppenheimer* in support of a broad construction of the term “relevant” in part because that quote was in regard to subject matter and is thus “misplaced” and “inappropriate.” (at *10). The Court appeared to imply that a mere “possibility” of relevance to claims and defenses is not sufficient (at *1)(“discovery requests are not relevant because there is a possibility that the information may be relevant to the general subject matter of the action”).
6. **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”]).

7. **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.
8. **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.
9. **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.
10. **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).
11. **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 too often ignored by

the same Magistrate Judge, see *Apple v. Samsung*, 2013 WL 4426512, at *3 (N.D. Cal. Aug. 14, 2013)].

12. **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.
13. **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.
14. **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.”
15. **In re Bard IVC Filters Products Liability Litigation** [2016 WL 4943393] (D. Ariz. Sept. 16, 2016). In an opinion by the former Chair of the Rules Committee, communications by subsidiaries of party regarding products at issue need not be produced because only “marginally relevant” and the burden and expense of production outweighs the possible benefit of finding an inconsistent communication. It is not clear is the ruling turns on lack of relevance or proportionality or both. The court criticizes post-amendment cases which use “reasonably calculated” phrase “as a definition for the scope of permissible discovery” (*2) given its deletion from amended Rule 26)(b)(1). While use of *Oppenheimer* test by some courts (“bears on, or that reasonably could bear on”) is not mentioned, one possible implication is that its use is no longer acceptable after the 2015 Amendments, which require a test with less conjecture.
16. **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.
17. **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.

18. **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”).
19. **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.
20. **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.
21. **Lucile Schultz v. Sentinel** [2016 WL 3149686] (D. S.D. June 3, 2016). In a decision compelling production of documents and ESI in a personal action relating to hail damage under a homeowners policy, a court granted virtually unlimited broad discovery into the investigation and handling of claims by the Hartford for the past decade given the allegations of “bad faith.” The court dismissed the argument that the 2015 Amendments to Rule 26(b)(1) were restrictive since “[t]he rule, and the case law developed under the rule, have not been drastically altered [and] [a]ny case decided after 1983 would necessarily have included consideration of the proportionality requirement.”
22. **Mylan Pharmaceuticals 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.

23. **Noble Roman’s v. Hattenhauer** [314 F.R.D. 304] (S.D. Ind. March 24, 2016). Courts may issue a protective order under Rule 26(c) to limit discovery via subpoena to ensure the discovery is proportional to the needs of case, even if the party objecting is not the producing party (“has sufficient legitimate interests of its own”). While the discovery sought in this case may be relevant, it “fail[s] the proportionality test” as “discovery run amok” since it asks for information which is too far afield from the contested issues in the case. The party failed to demonstrate that the discovery is “in any way” proportional to the needs of the case.”
24. **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).
25. **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 exactly.”
26. **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.
27. **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.
28. **State Farm v. Fayda**, M.D. [2015 WL 7871037] (S.D. N.Y. Dec. 3, 2015)(Francis, M.J). 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 to encompass any matter that could bear on’ any party’s claim or defense” citing *Oppenheimer Fund v. Sanders*, 437 US 340, 351 (1978). [The full quotation however, made reference to “the key phrase in this definition – “relevant to the subject matter involved in the pending action” before stating how it was to be construed. For that, the use of the partial phrase has been heavily criticized]. However, in **Lifeguard Licensing Corp. v. Kozak**, 2016 WL 4733157 (S.D.N.Y. Sept. 9, 2016), citing the “broad construction of relevance in the [FRCP],” Judge Francis again cited the excerpt from *Oppenheimer* in deciding a challenge to production.

29. **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.
30. **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].
31. **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.
32. **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.
33. **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

September 28, 2016

Page 21 of 21

apply, since “sequenced discovery will benefit both parties.” To the extent that discovery as to that count included other counts, it was permitted.