Proportionality Today

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The 2015 Amendments to the Federal Rules reflect a renewed commitment to proportionality across a wide spectrum of litigation issues. This legacy of the 2010 Duke Litigation Conference[2] is also reflected in the Third Edition of the *Sedona Principles*, an iconic resource of e-discovery best practices and commentary.[3]

Discovery

The 2015 amendment to Rule 26(b)(1) makes it clear that discovery of non-privileged information is available only if it is *both* "relevant" to the claims or defenses of a party and is also "proportional to the needs" of the case.[4] It now provides:

> Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

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As relocated to Rule 26(b)(1), the underlined proportionality factors were slightly re-adjusted and a new factor was added to address "information asymmetry." No hierarchy of importance among the factors is intended and parties should seek first

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[1] © 2017 Tom Allman. Mr. Allman is Chair Emeritus of the Sedona Conference® Working Group 1.
[2] John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L. J. 537, 544 (2010).
[3] 19 SEDONA CONF. J. 1 (2018). *See* Thomas Y. Allman, *The Sedona Principles (3rd Ed.): Continuity, Innovation and Course Correction*, 51 AKRON LAW REV. 777, 784-789 (Forthcoming 2018).
[4] This is the first time that phrase "proportional" has been used in the text of the Federal Rules, despite the existence of what have been described as "proportionality principles" in Rule 26(b) since 1983.

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.[5]

Rule 26(b)(2)(C)(iii), the former home of the proportionality factors, was amended so that a court must limit the frequency or extent of discovery when proposed discovery is "outside the scope permitted by Rule 26(b)(1)."

Issues regarding the scope in specific cases may come before the court as a preemptive matter by the producing party under Rule 26(c) (although Rule 26(b)(2)(B) excuses a party from doing so if ESI identified as inaccessible because of burden or cost is involved).[6] Otherwise, if production is simply withheld and discussions lead to no resolution, the requesting party may resort to a motion to compel under Rule 37(a), which provides for automatic sanctions should the refusal to produce be unjustified.

Impact

The likely impact of the move of proportionality into Rule 26(B)(1) was much debated, with criticisms breaking roughly down along requesting/producing party lines. In the view of some courts[7] and academics[8] the "combined effect" of the changes to Rule 26(b)(1) was expected to significantly limit discovery for requesting parties, with some predictions bordering on apocalyptic. The outlook for many on the producing party side, somewhat naively, was eager anticipation of a golden age of reduced costs of discovery.

With two and one-half years of experience, some observations have been made. One scholar has stated that in ruling on discovery disputes in the class action context, "courts continue to conduct nuanced, highly fact-specific analyses, with results that differ little from pre-amendment case law."[9] Another scholar, however, has concluded that there has been a "staggering change in the frequency with which parties and courts are applying proportionality requests to eliminate or narrow discovery not because it is irrelevant, but because it is too burdensome."[10]

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[5] Laporte and Redgrave, *A Practical Guide to Achieving Proportionality*, 9 FED. CTS. L. REV. 19, 50-51 (2015)(distilling and discussion ten best practices for counsel and clients to understand and apply proportionality factors)..

[6] *See* Klein v. Board of Trustees, 2017 WL 8288124 (D. Alaska Dec. 21, 2017)("[i]f the documents are not electronically stored, then it would appear that Rule 26 would require [the producing party] to have sought a protective order under Rule 26(c)").

[7] 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).

[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).

[9] Dean Robert H. Klonoff, *Application of the New "Proportionality " Discovery Rule in Class Actions: Much Ado About Nothing*, Vanderbilt Law Review (Forthcoming 2018), copy at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184576'

[10] Steven Baicker-McKee, *Mountain or Molehill?*, 55 DUQ. L. REV. 307 (2017).

The Author tends to favor the view that the results are little changed from what responsible courts and parties could have been expected to produce. The Committee Note emphasizes that the amendment "does not change" the existing responsibilities of the court and the parties to consider proportionality." As the Committee Note to amended Rule 1 puts it, courts and parties - and their counsel - should engage in cooperative and proportional efforts to achieve cost effective management.[11]

Relevance

Amended Rule 26(b)(1) deletes the statement that the scope of discovery includes information which is "reasonably calculated to lead to admissible evidence" language from the rule.

The Committee Note explains that "[t]he phrase has been used by some, incorrectly, to define the scope of discovery." It was replaced in the Rule by the observation that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."[12] As noted in the case of *In re: Bard IVC Filters Products Liability Litigation,* the revised language is "a more direct declaration of the phrase's original intent."[13] The previously optional court-ordered "subject matter" test for relevance has also been deleted as little used and unnecessary for current purposes.[14]

Former Magistrate Judge Francis initially attracted attention by his insistence 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.[15] Use of that language from *Oppenheimer v. Sanders*, 437 U.S. 340, 551 (1978) was criticized because it referred to a version of the rule authorizing discovery relating to "subject matter."[16]

The Third Edition of the Sedona Principles (2017), on the other hand, suggests that a more appropriate test is whether the information is "expected" to be relevant to the claims or defenses, not merely whether it "may" be relevant.[17]

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[11] Committee Note, Rule 1 (2015) ("[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure").

[12] *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").

[13] 2016 WL 494339, at *1 (D. Ariz. Sept. 16, 2016)(Campbell, J.).

[14] The Committee Note explains that the examples of information listed as justifying the expanded scope would be discoverable if relevant and proportional to the needs of the case.

[15] State Farm v. Fayda, 2015 WL 7871037 at *2 (S.D. N.Y Dec. 3, 2015).

[16] San Diego Unified Port District v. National Union, 2017 WL 3877730, at *1 (S.D. Cal. Sept. 5, 2017)("[T]he Oppenheimer definition, like the version of Rule 26(b)(1) that preceded the 2015 amendments, is now relegated to historic significance only").

[17] *Compare* the terminology used in Principle 5 of the Sedona Principles (obligation to preserve extends to information that is "expected to be relevant to claims or defenses") [19 SEDONA CONF. J. 1, 93 2018).to that used in comparable Principle in the Second Edition (2007)("may be relevant to pending or threatened litigation").

Burden of Proof

Amended Rule 26(b)(1) is intended to promote "discovery tailored to the reasonable needs of the case."[18] Moving the proportionality factors to the scope of discovery did not shift the burden to the moving party to establish that its request were proportional, since courts expect both parties to contribute at least some of the answer to the inquiry.[19]

According to the Committee Note, the amended rule does not "place on the party seeking discovery the burden of addressing all proportionality considerations."[20] 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."[21] In *Louisiana Crawfish Producers v. Mallard Basin*, the failure to show that the burden of the plaintiffs' requested discovery outweighs its likely benefit was sufficient.[22]

Objections

Amended Rule 34(b)(2)(B) requires that an objection state "with specificity the grounds for objection" and (b)(2)(C) requires an objection to sate whether any responsive materials are being withheld on the basis of that request. The Committee Note stresses that a party may not "refuse discovery simply by making a boilerplate objection that it is not proportional - it cannot unilaterally decide that there has been enough discovery on a given topic.[23]

In *Mitchell v. Universal Music Group*, the court found that a party's boilerplate objections based on proportionality were waived when "not once in the *eighty* times [the party] claimed the [requests] were not proportional did they bother to explain how they were disproportionate." (emphasis in original).[24]

Early Discussion

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[18] David G. Campbell, *New Rules, New Opportunities*, 99 JUDICATURE 19, 20 (2015).
[19] 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, 67 (2015)("[t]he new rule does not shift the burden of proving proportionality to the party seeking discovery").
[20] Committee Note.
[21] *Id*. (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).
[22] 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). *See also* Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55 (2015).
[23] *Id*. at *2.
[24] 2018 WL 1573233, at *5-6 (W.D. Ky. March 30, 2018)(noting that boilerplate objections also violate the ABA Model Rule 3.4(d) dealing with frivolous discovery requests and failure to make reasonably diligent efforts to comply with proper discovery requests).

Rule 26(d) was amended to permit a party to "deliver" a request under Rule 34 to the opposing party as early as 21 days after the summons and complaint are delivered, without the date of service being deemed any earlier than the first Rule 26(f) Conference. The Committee Note explains this as "designed to facilitate focused discussion" in order to facilitate changes in the requests.

Properly handled, it can help address one of the difficulties inherent in promoting proportional discovery, namely that requests for courts to address proportionality without tailoring by the parties, "requires impossible comparisons between discovery value and cost before parties gather evidence."[25]

Balancing Benefit against Burden

The "essence of proportionality"[26] is the concept of balancing the benefit from discovery against the burdens and costs associated with its accomplishment. In *Solo v. United Parcel Service,*[27] the requested production of package-specific information dating back to 2008 for all shipments covered by a putative class, most of which was stored on backup media, was shown to be extraordinarily burdensome, given the costs of extraction and the need to create software to make the data useable.

The court found that "as against this burden, the relevance of the information as requested is not proportional to the needs of the case at this time."[28] Instead, it ordered statistical sampling, at the cost of the producing party, citing to *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978) to determine if production would, in fact, be warranted. If the parties were not able to agree on a sampling methodology, it indicated it would order production from a much narrower range at the moving party's cost, without prejudice to ordering full production later.[29]

Similarly, in another putative class action, the court refused a discovery request which could be interpreted to require a massive manual search of systems for e-mails, text messages and recordings. It held that it imposed a "burden disproportional to the needs of the case," given that the class had not been certified and individualized issues often predominate.[30]

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

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[25] Scott A. Moss, Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in A Digital Age, 58 Duke L. J. 889 (2009).
[26] 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").
[27] 2017 WL 85832 (E.D. Mich. Jan. 10, 2017).
[28] *Id*. at *3.
[29] The court found that Rule 26(b)(2)(B) inaccessibility standards were met but did not explain if its willingness to nonetheless compel production of a smaller range at the moving parties cost was based on a finding of "good cause" under that Rule. The result could have been reached under amended Rule 26(c)(1)(B)(permitting "allocation" for good cause). *See* discussion, *infra.*
[30] Nece v. Quicken Loans, 2018 WL 1072052 (M.D. Fla. Feb. 27, 2018).

outweighed the likely benefit under the facts of that case.[31] In *Goes Int'l v. Dodu*, the court noted that it should not be an excessive burden for an entity to produce revenue data, even for an entity located in China.[32] In *O'Connor v. Uber*, the "overbreadth" of the requested discovery" failed to meet "Rule 26(b)'s proportionality test."[33]

In *Pertile v. General Motors*, 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.[34]

Public Policy Issues

The "amount in controversy" 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 weight in the court's analysis."[35] 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.[36]

The Committee Note confirms that "many cases in public policy spheres, such as employment practices, free speech, and other matters," discovery 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. In those cases, the "burden of responding to discovery lies heavier on the party who has more information, and properly so."[37]

Doe v. Trustees of Boston College emphasized that a party with superior access needs to show "stronger burden and expense" to avoid production.[38] In *Kelley v. Apria Healthcare*, a court permitted discovery because access by the producing party was "relatively easy" and the potential damages were "significant."[39]

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[31] 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).
[32] 2016 WL 427369 (N.D. Cal. Feb. 4, 2016).
[33] 2016 WL 107461, at *4 (N.D. Cal. Jan. 11, 2016).
[34] Pertile v. General Motors, 2016 WL 1059450, at *4 (D. Colo. March 17, 2016).
[35] Laporte and Redgrave, *supra*, at 61.
[36] 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).
[37] Committee Note.
[38] Doe v. Trustees of Boston College, 2015 WL 9048225 (D. Mass., Dec. 16, 2015).
[39] 2016 WL 737919, at *4 (E.D. Tenn. Feb. 23, 206).

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.[40] 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."

Search Issues

Challenges to search parameters typically are assessed under proportionality grounds. In *Wilmington Trust v. AEP Generating*, the court refused to order an additional search without "evidence or persuasive argument" as to why ordering such a search would "materially add to [an] existing collection of relevant documents."[41]

In *Wagoner v. Lewis Gale Medical Center,*[42] however, the court permitted a costly search to proceed because the additional costs resulted from the party's "choice" to use a system that automatically deleted information after three days.

In *Mann v. City of Chicago*, the City failed to demonstrate any specific reasons why the burden of searching the Mayor's emails for relevant information on an issue of substantial public significance would outweigh the likely benefit.[43] Similarly, in *Oxbow Carbon & Minerals v. Union Pacific*, the electronic and physical files of the owner and CEO of a corporation which had instituted major antitrust case was not exempt from discovery.[44]

Third Parties

Rule 26(b)(1) limitations based on proportionality consideration applies to all discovery, including discovery from third parties. *In Par Pharmaceutical, v. Express Scripts*, for example, the subpoenaed party was successful in resisting a motion to compel compliance because the disclosure of the patient prescription records was unduly burdensome and "not proportional" to the needs of the underlying litigation.[45]

Courts are reluctant, however, to allow parties to raise proportionality objections based on the burden to be 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

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[40] 2016 WL 736213 (N.D. Cal. Feb. 25, 2016).
[41] 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).
[42] 2016 U.S. LEXIS 91323] (W.D. Va. July 14, 2016).
[43] 2017 WL 3970592, at *5 (N.D. Ill. Sept. 9, 2017)(citing Rule 26(b)(2)(C)(iii), the former location of the benefit/burden mantra prior to its move into Rule 26(b)(1)).
[44] 322 F.R.D. 1 (D.D.C. Sept. 11, 2017)(cost of reviewing and producing Koch's documents [$142K] is not unduly burdensome or disproportionate in a case where Oxbow seeks tens of millions of dollars).
[45] 2018 WL 264840, at *2 (E.D. Miss. Jan. 2, 2018).

since the burden of production would not be faced by the party.[46] In *Noble Roman's v. Hattenhauer,*[47] 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.

Moreover, under Rule 45(d), a court may sanction a party or attorney who fails to comply with the duty to take reasonable steps to avoid imposing undue burden or expense on the party subject to the subpoena. The Sixth Circuit recently approved sanctions under that Rule when counsel failed to take such steps and issued overbroad subpoenas which required extensive review for privileged communications.[48]

Form of Production

As part of the 2006 Amendments, the Federal Rules addressed the form or forms of production of ESI, a task which is complicated by the presence of metadata – information about data - whose value and usefulness varies depending on the circumstances. Rule 34(b)(2)(E)(ii) famously provides that in the absence of a court order or agreement of the parties, the ESI must be produced in either the form or forms in which it is ordinarily maintained or in one which is "reasonably useable."

Principle 12 of the *Sedona Principles* (3rd Ed. 2018) explains that production should be made in one of those forms taking into account "the nature of ESI and the proportional needs of the case."[49] Typically, it is not necessary to produce ESI in its native format tin order for a reviewing party to access, cull, analyze, search and display it. Production of email and document equivalents has become somewhat standardized in the past decade, with a TIFF, Text and Load Files ("TIFF+") format ensuring that the reviewing party has the ability to search static images.[50]

However, where necessary and appropriate, native or near-native format is used in circumstances where metadata or other unique circumstances may be appropriate.[51]

Much depends on early cooperative efforts to reach agreement. However, when that is not possible, and a party believes that a form or forms as requested is unreasonable or not proportional, it may object and, if necessary, seek a protective order under Rule 26(c).[52] If a court must resolve the issue, the 2006 Committee Note to Rule 34 provides

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[46] 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).
[47] 314 F.R.D. 304, (S.D. Ind. March 24, 2016).
[48] In re Modern Plastics Corporation, __ Fed. Appx. __, 2018 WL 1959536 (6th Cir. April 26, 2018).
[49] 19 SEDONA CONF. J. 1, 169 (2018)("The production of [ESI] should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the [ESI] and the proportional needs of the case")..
[50] *Id*. at 172 (Comment 12.b.).
[51] *Id*. at 177 (Comment 12.b.ii)(noting that it may be appropriate to produce spreadsheet files (e.g., Microsoft Excel), portable database files (e.g. Microsoft Access), audio/video files (e.g. WAV, JPG, GIF, MPG, MP3, DMG, etc.) and on occasion, presentation files (e.g., Microsoft PowerPoint) in native format.
[52] *Id*. at 182 (Comment 12.b.iii).

that a court is not limited to the forms initially chosen by either party in situations in which there is no party agreement.[53]

Thus, in a recent Supreme Court of Texas decision (*In re State Farm Lloyds*), the Court observed that the "trial court retains discretion to order discovery in a format that is appropriate to the circumstances," endorsing (as appropriate for Texas) a Federal Court decision which had endorsed production of searchable static images in similar circumstances.[54] In so doing, the Court observed that in both Texas and Federal Courts "proportionality is the polestar" in resolving disputes over the form of production of e-discovery.[55]

The Sedona Conference® *Database Principles Commentary* emphasizes that a "disproportionate" effort should not be required in efforts to produce information from databases "even if a lesser response" does not provide the same degree of access.[56]

Inaccessible ESI

Rule 26(b)(2)(B), added in 2006 ("Specific Limitations on Electronically Stored Information"), presumptively limits production of ESI from sources which are identified as not reasonably accessible because of undue burden or cost. The ultimate determination as to whether production from such sources must go forward is based on a showing by the requesting party that the production is not barred by proportionality considerations.

It is not necessary for a party that has identified the ESI as inaccessible to seek a protective order in order to refuse to produce the ESI.[57] However, as noted in *Chen-Oster v. Goldman, Sachs & Co.*, "the cost or burden [upon which the party relies] must be associated with some technological feature that inhibits accessibility" and the party refusing to produce must demonstrate that feature to survive a motion to compel.[58]

Rule 26(b)(2)(B) was not amended in 2015, and the decisive role of proportionality has continued even after the proportionality factors were moved from Rule 26(B)(2)(C)(iii) into Rule 26(b)(1), slightly rearranged and modified by the addition of a new factor. The former location, now states that a court must on its own or on motion limit discovery which is "outside the scope permitted by Rule 26(b)(1)."

Because the balance between benefit and burden - the essential calculus of "proportionality" - is now the ultimate arbiter of discovery generally, some courts after the

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[53] Committee Note (2006), 234 F.R.D. 219, 364-365 (2006).
[54] 60 Tex. Sup. Ct. J. 1114, 520 S.W. 3d 595 (2017).
[55] *Id.* at 615.
[56] Sedona Conference® *Database Principles: Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 SEDONA CONF. J. 171, 215 (2014).
[57] Klein v. Board of Trustees, 2017 WL 8288124 (D. Alaska Dec. 21, 2017)("[i]f the documents are not electronically stored, then it would appear that Rule 26 would require [the producing party] to have sought a protective order under Rule 26(c)").
[58] 285 F.R.D. 294, 300 (S.D.N.Y.2012).

2015 amendments avoid the formal assessment of showing that "good cause" exists to overcome a finding of inaccessibility.

For example, in *ADM v. Chemoil*, where the issue was the necessity to compel a party to go to the expense of restoring backup media in an effort to find deleted emails, the court held that ADM had shown that the "costs of an additional search outweigh the need for the discovery," *i.e,* that they were disproportionate to the possible benefits involved. In reaching that decision, the court relied upon the existence of other copies of the emails, the likelihood that the search would be fruitless and the fact that the same information was likely secured through other, less burdensome ways, such as the depositions that had been conducted.

The Court in ADM had introduced its analysis by quoting Rule 26(b) as defining the "scope" of discovery in Rule 26(b)(1), but "also mak[ing] clear that the scope of discovery has limits," particularly as it relates to [ESI]," citing Rule 26(b)(2). However, it explained that even if ADM met its "burden" of showing inaccessibility, 'the court may require production of the information upon a showing of good cause. That is, *the Court may still order ADM to execute the search if it finds that the need for the discovery outweighs the burden and costs of production.*" (emphasis added). It never bothered to formally determine that the source (disaster recovery tapes) was inaccessible but that "good cause" existed to overcome it.

The approach to the issue of "good cause" in ADM – assuming that inaccessibility could have been shown, but that a lack of proportionality doomed it from having decisive effect - speared the court from the unnecessary complications of the "good cause" approach under Rule 26(b)(2)(B) which theoretically requires considerations of factors listed in the 2006 Committee Note.[59] Moreover, as explained in *Chen-Oster v. Goldman, Sachs & Co.*, these "good cause" factors are the same types as those involved in proportionality determinations.[60]

In *North Shore v. Multiplan*, involving requests for production from certain databases, the court *first* analyzed whether, in general terms, the information sought was proportional to the needs of the case under Rule 26(b)(1) which it quoted without reference to limitations based on inaccessibility under Rule 26(B)(2)(B). It quickly excluded several classes of data as not proportional to the needs of the case. (It later circled back and found that the production would not be proportional to the needs of the case under Rule 26(b)(1) and thus precluded under Rule 26(b)(2)(C)(iii).)[61]

It then turned to Rule 26(b)(2)(B), which it described, along with Rule 26(b)(2)(C) as providing "limitations of Rule 26 on otherwise discoverable information." The court

[59] The Committee Note identifies "appropriate considerations" in considering if "good cause" exists to include "(1) the specificity of the discovery request; (2) the quantify of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems like to have existed but is no longer available on more easily access sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues and (7) the parties' resources.

[60] 285 F.R.D. 294, at n. 14 (S.D. N.Y. Sept. 10, 2012).

[61] *Id*. at *14.

refused to find that the producing party had shown that the remaining requests involved data which was not reasonable accessible because of undue burden or cost.[62] It criticized the producing party for not addressing the "cost, hardship, or burden of production," but instead focusing on the unreliability and incompleteness of data it could produce.[63]

The opinion is unfortunate in one respect. In discussing "Proportionality" under Rule 26(b)(1) first, and focusing on the limited number of requests that are not proportional, it implies that requests *which are* proportional and discoverable need not be produced if they are also inaccessible.[64] This cannot be so. That would make logical sense only if one construed the proportionality calculus under Rule 26(b)(1) to *exclude* consideration of the burdens and costs of accessing the information, which is not consistent with the Rule. As it turned out, by *not* finding that the data was not reasonable accessible under Rule 26(b)(2), the court avoided this inconsistent result.[65]

Cost-Shifting and Allocation

Courts have long understood that in ruling on motions challenging the frequency and necessity of production based on proportionality grounds, a careful use of cost-shifting can reduce disproportionate burdens. This can be done with the usual risks of guessing as to the likely value of the discovery or, in some cases, sampling can be ordered. The logic is that if a fraction of the potential sources is sampled, the parties and the courts will be in a better position to estimate whether the rest contains promising evidence. Where appropriate, this can be coupled with cost-shifting.

The traditional rule is that each party bears the costs of its own production as emphasized in *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 357 (1978). However, Rule 26(c) has long authorized courts to issue protective orders designed to protect a party from "undue burden or expense," including the specifying cost shifting, based on addressing disproportionate discovery. In the 2003 *Zubulake* decision,[66] a court spelled out a seven factor test to assist courts dealing with that type of decision after sampling of the contents of backup tapes convinced it to order that the full number of tapes be restored. [67]

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[62] *Id*. at *13.

[63] The court concluded that the party need to make "a more thorough showing that production would be unduly burdensome or costly." *Id.* at *14.

[64] *Id*. at *12 ("[h]aving determined that certain information , , , , with the exceptions identified above, is discoverable under Fed. R. Civ. P. 26(b)(1), the court not turns its attention to the limitations of Rule 26 on otherwise discoverable information."

[65] Comment 2.e. of the Sedona Principles (3rd Ed. 2018), 19 Sedona Conf. J. 1, 69-70, makes the point that "proportionality" is not limited to the burden of accessing ESI – it may include the burden of collecting, reviewing, hosting, and producing the ESI

[66] Zubulake v. UBS Warburg, 216 F.R.D. 280, 284 (2003)("Zubulake III").

[67] The factors utilized in making its decision were "(1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information." Applying Rule 26(c), it also ordered that the plaintiff absorbe some of the costs.

The 2015 Amendments clarified the availability of this process under the protective order rubric by amending Rule 26(c)(1)(B) so that an order may specify the terms, including the time and place "or the allocation of expenses, for the disclosure or discovery." This tool applies to all forms of production. The Committee Note explains that while courts have long had that authority, the amended Rule 26(c) "forestalls" the temptation by some to contest this authority without implying that "cost-shifting should become a common practice." According to the Note, "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."

In 2006, Rule 26(b)(2)(B) was added to provide that when good cause for production is shown from inaccessible sources of ESI, the court "may specify conditions for the discovery."[68] Thus, a court can hold that ESI which is sought in a case can be deemed both proportional despite its inaccessibility and yet some or all of the costs of gaining accessed may be shifted under that Rule. Some courts allude to shifting costs of production as being appropriate "as part of enforcing proportionality limits."[69]

According to the Committee Note (2006), "[a] requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery."[70]

In *Elkharwily v. Franciscan Health Systems,* however, a court which refused to order production of archived emails from backup media because of inaccessibility nonetheless ordered production 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.[71]

In *Hawa v. Coatsville Area School Board*, a court agreed that data was found in an inaccessible source but refused to shift costs because the school board had greater resources and the expense were not excessive in comparison to the amount in controversy and the importance of the issues; in short, because were not disproportionate or undue under the circumstances.

Since the 2015 Amendments, some courts, and the Third Edition of the Sedona Principles, have tended to rely on the allocation formulation to the exclusion of authority under Rule 26(b)(2)(B) to "specify conditions" for court-ordered discovery from sources of ESI which are not reasonably accessible.[72]

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[68] One reason for including cost shifting for discovery of inaccessible ESI in Rule 26(b)(2)(B) was "concerns" about the ability to do so under the then-version Rule 26(c). Report to Standing Comm., *supra,* at 146 ("Rule 26(c) might not be equal to the task"]

[69] FDIC v. Brudnicki, 291 F.R.D. 669, 676 (N.D. Fla. 2013 ("as part of the enforcement of proportionality limits" found (then) in Rule 26(b)(2)(C)).

[70] 234 F.R.D. 219, 287 at 339 (2006).

[71] 2016 WL 4061575 (W.D. Wash. July 29, 2016).

[72] According to the Overview of Main Changes, this reflects "the amended Federal Rules' treatment of cost allocation and its interplay with the proportionality analysis under amended Rule 26(b)(1)." 19 SEDONA CONF. J. 1 at 48.

For example, in *North Shore v. Multiplan, supra*, the court indicated that it would entertain some sort of cost allocation where non-proportional information was intertwined with data whose production was proportional and had been ordered by the court.[73] It ignored the cost-shifting mechanism available to it under Rule 26(b)(2)(B), and instead quoted from a case which noted that a party may "invoke the district court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense,' including orders conditioning discovery on the requesting party's payment of the costs of discovery."

Accordingly, it indicated that it would consider the *Zubulake* factors in regard to the "comingled with non-discoverable data pertaining to other providers," and directed that estimates of the cost to produce the authorized production be furnished so it could determine if any cost-shifting was appropriate and what the apportion ate should be.

Comment 13.a. of the *Sedona Principles* (3rd Ed. 2018) endorses a very limited subset of situations in which cost-shifting is deemed appropriate under Rule 26(c)(1)(B), such as when there is uncertainty about the proportionality of the discovery sought.[74] If the discovery is clearly proportional, it should be allowed without cost allocation and if it is clearly not proportional, the request should be denied.

Rule 26(g)

Rule 26(g), enacted at the same time as the first articulation of the proportionality principles in Rule 26(b) requires that parties and counsel must consider proportionality in making discovery requests, responses, or objections.[75] It was intended to address "costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake."[76]

In doing so, it took "the proportionality concept from Rule 26(b)(2)(B) and covert[ed] it into a direct duty on the lawyers."[77] Thus, in *Witt v. GC Services*, the court found that defense counsel failed to adequately adhere to the proportionality requirements and entered a nominal sanction payable to opposing counsel.[78]

The Rules Committee, as part of the 2015 Amendments, also provided in the Committee Note that the restoration of proportionality factors to Rule 26(b)(1) "reinforces

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[73] North Shore v. Multiplan, ___F.Supp.3d ___, 2018 WL 1515711 (E.D.N.Y. March 28, 2018).
[74] Comment 13.a., 19 SEDONA CONF. J. 1, 187 (2018)(if "the result of the proportionality analysis is not clear cut, the court has discretion to allocate some or all of the costs to the requesting party")..
[75] Rule 26(g) certifies by signing the discovery pleadings that they are "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the case. Rule 26(g)(1)(B)(iii).
[76] Committee Note, 97 F.R.D. 165, 216 (1983).
[77] Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. Ky. L. Rev. 521, 547 (2009).
[78] 307 F.R.D. 554, 572 (D. Colo. Dec. 9, 2014).

the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections."[79]

Preservation

It has long been argued 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."[80] One reason is that "the duty to preserve is coextensive with the party's discovery obligations," making it logical to apply proportionality by analogy on the pre-litigation duty to preserve.[81] Accordingly, the amended to Rule 26(b)(1), explicitly limiting the scope of the duty to that which is proportional, has consequences.[82]

As noted in *Washington v. Wal-Mart*, the "extent of any preservation duty is, as in other discovery contexts, proportional to the facts of the case."[83] In *Washington*, the court noted that it would be "unreasonable to demand the preservation of an uncertain amount of footage over an uncertain area" based on a phone call and letter that did not reference or threaten litigation."

If a party is shown to have taken reasonable steps to preserve ESI which should have been preserved, no measures for loss of ESI are available under Rule 37(e), as amended in 2015. The Committee Note to amended Rule 37(e) acknowledges that proportionality considerations play a role in determining if "reasonable steps" have been taken in implementing the duty to preserve.[84] Even more explicit references to proportionality in that context were included in the initial draft of the Rule.[85]

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[79] Committee Note

[80] Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9 ¶26 (2007).

[81] Hon. Paul W. Grimm, Michael D. Berman, Conor R. Crowley and Leslie Wharton, *Proportionality in the Post-Hoc analysis of Pre-Litigation Preservation Decisions*, 37 BALT. L. REV. 381, 404-405, 410 (Spring 2008).

[82] FTC v. DirecTV, 2016 WL 7386133, at *5 (N.D. Cal. 2016)("[a]fter the 2015 amendments to Rule 26(b)(1), the requesting party is only entitled to discover information that is relevant to the parties' claims or defenses, and that is proportional to the needs of the case").

[83] 2018 WL 2292762, at *4 (W.D. La. May 17, 2018).

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

[85] (Proposed) Rule 37(e)(2)(D)(2013) ("[factors to consider in determining whether a party failed to preserve discoverable information that should have been preserved include] the proportionality of the preservation efforts to any anticipated or ongoing litigation"). The draft Committee Note then explained that "a party need not honor an unreasonably broad preservation demand, but instead should make its own determination about what is appropriate preservation in light of what it knows about the litigation." The final version of the Committee Note (2015) explains that [a] party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime;" *see also* Ronald J. Hedges, *What Might Be 'Reasonable Steps' to Avoid Loss of Electronically Stored Information,* 18 DDEE 143 (March 1, 2018)(discussing evolution of drafts of the Committee Note).

Similarly, Arizona, in enacting a revised Rule conforming to the 2015 has explicitly provided that courts should consider proportionality factors in its assessment of whether a party has undertaken reasonable steps to preserve.[86]

Finally, *Principle* 5 of the Sedona Principles (3rd Edition 2018) has been amended to provide that it is "unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant [ESI]." (new matter underlined).[87] This is with Principle 1 of The Sedona Conference® *Commentary on Proportionality in Electronic Discovery* (2017)("[t]he burdens and costs of preserving relevant [ESI] should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation."[88]

Proportionality principles were also a core component of the decision tree analysis advocate by the Sedona Conference® Commentary on *Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible* (July 2008)(" NRA Commentary").[89] The NRA Commentary notes, for example, that "an employee's local drive may not warrant forensic imaging in a straightforward commercial dispute, whereas it could be crucial to (and thus need to be preserved" in a trade secret case." [90]

Pre-Litigation Decisions

Commentators – and *Orbit One*[91]– have famously cautioned against unilateral decisions that that relevant information need not be preserved after a duty to preserve attaches can be problematic. As the Sedona *Commentary on Proportionality* notes, "a miscalculation [in preservation] can lead to the permanent loss of relevant information."[92] In *Orbit One*, Judge Francis suggested that "until a more precise definition" is created by rule, a party is "well-advised" to retain all relevant documents in existence at the time the duty to preserve attaches.

In *Pippins v. KPMG*, the District Court affirmed a refusal to give a blanket exemption by way of a protective order from preservation of hard drives based on the argument that the burden of doing so outweighed the possible benefits. The District court

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[86] Ariz. Rule 37g)(1)(C)(ii)("Factors that a court should consider [include] the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the parties' resources and technical sophistication, and the amount in controversy").
[87] 19 SEDONA CONF. J. 1, 93 (2018).
[88] 18 SEDONA CONF. J. 141 (2017).
[89] The Sedona Conference® Commentary on *Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible* (July 2008), 10 SEDONA CONF. J. 281 (2009).
[90] NRA Commentary, *supra* at 291 - 293.
[91] Orbit One Communications v. Numerex, 271 F.R.D. 429, 436, n. 10 (S.D.N.Y. Oct. 26, 2010)("reasonableness and proportionality . . . cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order. Proportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low."
[92] Sedona *Commentary on Proportionality, supra*, at Comment 1.a ("In contrast, a miscalculation during production can usually be cured. In particular, at the preservation stage parties should be wary of applying too narrow a definition of what constitutes relevant ESI").

conceded that proportionality was necessarily a factor and that preservation and production were necessarily interrelated but explained that without information necessary – KPNG had refused to allow any examination of drives – it was premature to make a ruling based on the existing record.[93]

As noted by *Orbit One, supra*, hindsight allows a party or court to criticize an over-reliance on proportionality in making unilateral preservation decisions, even when in the pre-litigation context. The Committee Note to Rule 37(e), however, observes that courts should not be "blinded to this reality by hindsight arising from familiarity with an action as it is actually filed."[94]

Best practice guidance such as the Seventh Circuit E-Discovery Principles emphasize that preservation of certain types of ESI presumptively not proportional. This includes (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.[95]

Early Discussion

Wherever possible, parties should take advantage of opportunities to discuss preservation issues which may be disputed.[96] This is particularly true at the "front-end" where notice of the intent to seek or not to preserve based on proportionality grounds may be important.

Rule 27(f)(3)(C) and Rule 16(b)(3)(B)(iii) were amended in 2015 to encourage parties to meet and confer and for courts to enter (as part of scheduling orders) any agreements on preservation, which the Committee Note predicts may become more common.[97] Sedona advocates that the parties make meaningful disclosures about the types of information found in ESI sources.[98]

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[93] 2011 WL 4701849 (S.D. N.Y. 2011), *aff'd* 279 F.R.D. 245 (S.D.N.Y. 2012).
[94] Committee Note, Rule 37(e)(2015).
[95] Seventh Circuit Electronic Discovery Committee, *Principles* (Principle 2.04(d))(Scope of Preservation), SEVENTH CIR. PILOT PROGRAM, copy at http://www.discoverypilot.com/.
[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, 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).
[98] Sedona *Commentary on Proportionality, supra*, 155.

In *Martinelli v. Johnson & Johnson*, the parties agreed to a protocol requiring discussions of any disputes over whether preservation requirements "are, or are not, relevant and proportional to Rule 26(b)(1)."[99]

Proportionality principles are also relevant to cessation of preservation of ESI. In *Lord Abbett Municipal Income Fund v. Asami*, a court endorsed a decision to dispose of certain computers whose contents were only speculated to contain relevant information during an appeal.[100] The Court observed that the District "recognizes that the proportionality principle applies to the duty to preserve potential sources of evidence," citing Local Guidelines for the Discovery of Electronically Stored Information.

Sanctions

A traditional limit on sanction selection in most Circuits is an assessment of the proportionality of the measures imposed.[101] The Committee Note to amended Rule 37(3), 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." In *Newman v. Gagan*, for example, a court observed that it was "not proportionate" to the non-moving parties actions to enter a default judgment.[102]

In *Kllipsch Group v. ePRO E-Commerce*, the Second Circuit rejected application of an objection based on proportionality to a $2.7 award of attorney's fees and costs as a sanction for discovery misconduct in a case which was likely to result, at the most, in about $20K in damages. The Circuit Court approved the award because it resulted from the excessive costs caused by the noncompliance of the sanctioned party.[103]

Case Management

"Whether proportionality moves from rule [26(b)] text to reality depends in large part on judges."[104] As noted in *Robertson v. People Magazine*, the rule "serves to exhort judges to exercise their preexisting control over discovery more exactingly."[105] The 2015

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[99] 2016 WL 1458109 (E.D. Cal. April 13, 2016).
[100] 2014 WL 5477639 (N.D. Cal. 2014).
[101] A sanction must be "a proportionate response to the circumstances." Watkins v. Nielsen, 405 F.Appx. 42, 44 (7th Cir. 2010).
[102] 2016 U.S. Dist. LEXIS 123168, at *18 (N.D. Ind. May 10, 2016).
[103] 880 F.3d 620, 635 (2nd Cir. Jan. 25, 2018)("[t]he proportionality that matters here is that the amount of the sanctions was plainly proportionate – indeed it was exactly equivalent – to the costs ePRO inflicted on Klipsch in its reasonable efforts to remedy ePRO's misconduct).
[104] Lee H. Rosenthal and Steven S. Gensler, *Achieving Proportionality in Practice*, 99 JUDICATURE, 43, 44 (2015) (judges must be themselves willing and available to work with parties, including resolving discovery disputes quickly and efficiently).
[105] 2015 WL 9077111, at *2 (S.D. N.Y. Dec. 16, 2015

Amendments "include an expanded menu of case-management tools to make it easier for lawyers and judges to tailor discovery to each case."[106]

Rule 16 Conferences

The Amendments deleted the authority to hold conferences by mail from Rule 16(b)(1) in favor of "simultaneous communication, including by telephone."[107] This is intended to encourage conferences "during which judges and lawyers actually speak with each other."[108] In addition, the importance of including proportionality disputes, including those involving preservation, form of production and scope of discovery is re-emphasized in the "discovery plan" requirement.

In turn, that pre-trial conferernce process is hopefully enhanced by the ability to make an 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.[109]

Pre-Motion Conferences

Amended Rule 16(b)(3)(B)(v) was also amended to encourage use of pre-motion conferences[110] before moving for an order relating to discovery.

In the end, the willingness of courts to intervene and decide what is and is not proportional to the needs of the case is required. A classic example from the *Disposable Contact Lens Antitrust Litigation decision*, involved court intervention in a dispute over discovery by ordering that "two additional custodians of the Class Plaintiffs choosing are warranted."[111]

A Road Not Taken

The Rules Committee initially proposed, based on proportionality considerations, 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

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[106] Rosenthal and Gensler, *supra*, at 44.
[107] *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)
[108] Campbell, *supra*, 99 JUDICATURE at 23 (2015).
[109] 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.
[110] 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).
[111] In re Disposable Contact Lens Antitrust Litigation, 2016 WL 6518660, at *3 (M.D. Fla. Nov. 1, 2016).

would have permitted only 15, not 25 interrogatories, while a new limit (25) would have been placed on requests to admit (Rule 36).[112]

After fierce objections at the public hearings, especially by counsel representing individual claimants, to certain proposals, the Committee decided to withdraw the proposals in favor of reliance on active case management.[113]

This appears to be working. 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.[114] In *Sender v. Franklin Resources*, 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.[115]

Phased Discovery

Phased discovery is a useful option to encourage proportionality. In *Siriano v. Goodman Manufacturing*,[116] a court scheduled a discovery conference to consider the benefits from its use 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 one of the claims in the case.[117]

State Rulemaking

A number of states have acted to enhance use of proportionality by making changes in their civil rules based on the 2015 Amendments or reflecting similar concepts.[118] These states include Arizona,[119] Colorado (2015),[120] Iowa (2015), Illinois (2014),[121] Minnesota

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[112] *See generally* Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 20-22 (2015).
[113] Advisory Committee Report, June 14, 2014, 305 F.R.D. 457, 514 (2015).
[114] 2015 WL 9275748 (W.D. N.Y. Dec. 21, 2015).
[115] 2016 WL 814627, at *2 (N.D. Cal. March 12, 2016).
[116] 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015).
[117] 2016 WL 155031 (D. Nev. Jan. 12, 2016)("[a]t this stage in litigation, sequenced discovery will benefit both parties").
[118] *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.
[119] *See* https://www.azcourts.gov/Portals/20/2016%20Rules/R-16-0010.pdf.
[120] 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).
[121] 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

(2013),[122] New Hampshire (2013), Rhode Island (2017), Utah (2011),[123] Vermont (2017)[124] and Wyoming (2017).[125] 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.

As noted *supra*, federal principles of proportionality have recently been utilized by the Texas Supreme Court as a basis for interpreting the "electronic-discovery practices under the Texas Rule of Civil Procedure." The Court held in *State Farm Lloyds* that the proportionality principles under the federal rules were not inconsistent with the Texas rules nor with the case law interpreting them.[126]

Conclusion

The Chief Justice in his 2015 Year-End Report stated his expectation that courts and parties will place "increased reliance on the common-sense concept of proportionality."[127] He noted that "[t]he days of struggling to establish the force of an unnamed principle [proportionality] buried deep in the rules are over."[128] The large number of decisions citing to "proportionality" since then eloquently bear witness to acceptance of that fact.

It is not clear, however, if the relocation of the proportionality factors to Rule 26(b)(1) has caused different outcomes in the cases decided under the amended rule as compared to those rendered prior to it. 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."[129]

Moreover, there remains serious doubts if the 2015 Amendments have actually reduced the costs of discovery, as many had hoped. Aggressive and thorough discovery may be too ingrained in current practice to expect it to fade away. Thought leaders point

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ESI, then that intention should be addressed at the initial case management conference. Committee Comments (May 29, 2014), ILL. R.S.CT. RULE 201.

[122] 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").

[123] 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).

[124] Vermont Supreme Court, July Term, 2017.

[125] Supreme Court, Wyoming, Second Order, October Term, 2016, adopted February 2, 2017.

[126] In re State Farm Lloyds, 520 S.W.3d 595, 60 Tex. Sup. Ct. J. 114 (S.C. Tex. May 26, 2017)(concluding that requesting party's demand for native production is subject to proportionality considerations and does not authorize a unilateral choice).

[127] *See* Year-End Report of Chief Justice, available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[128] *Id.*

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

to the need for a change in the "litigation culture"[130] requiring cooperative efforts among counsel.[131]

[130] Rosenthal and Gensler, *supra*, 99 JUDICATURE at 45(2015); Campbell, *supra* at 19 ("[a] change in behavior is also required ").
[131] Lawrence F. Pulbram, *Discovery Rules Have Changed But Will We?,* ABA Litigation, Vol. 42, No. 3, Spring 2016, 21.