

Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure

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Albert Einstein defined insanity as “doing the same thing over and over again, and expecting different results.”¹ For over thirty years, the federal rules of civil procedure have been serially amended to require federal trial judges to control pretrial discovery in civil cases to ensure that it is “proportional”—meaning that the costs to the parties are not unduly great given what is at stake in the litigation. And, for thirty years, lawyers, bar associations, clients and commentators have complained loudly that the federal judges have not done so. The Supreme Court has approved yet another series of civil rules changes, which took effect on December 1, 2015, that once more direct judges to ensure that discovery is proportional. But if the proportionality requirement already has been in the rules for over thirty years without inducing judges to fulfill their obligation to manage discovery, what makes this latest amendment requiring the exact same thing any more likely to achieve success? In short, why has achieving proportionality been such an elusive goal? Is it possible for judges to manage discovery so that it is proportional? If so, how are they to do so? And, if achieving proportionality is possible, why have judges failed to do so? Is it because they are resistant to doing what the rules require? Or are they willing to try, but they lack the knowledge or training to succeed in the task?

These questions, and their answers, are the focus of this thesis. Based on an analysis of nearly two hundred cases in which federal judges had to resolve discovery disputes, decided between 1983 (when the proportionality requirement first was adopted) and 2014, I conclude that

¹ www.brainyquote.com/quotes/quotes/a/alberteins133991.html

judges can use a surprisingly large and flexible array of tools—alone or in combination—to achieve proportional discovery. Further, I conclude that frequently recurring “warning signs” signal when a case is likely to involve discovery issues that threaten to make proportionality difficult to achieve, and these can alert judges to the need to take action before the discovery costs spiral out of control or excessive delay in completing discovery occurs. Finally, based on a survey of forty-two district judges and sixty-eight magistrate judges, I conclude that the most likely reasons for the lack of success in achieving proportional discovery to date is a reluctance on the part of judges to view themselves as “case managers” as opposed to “dispute resolvers,” and a lack of sufficient training or education for judges to see the benefits and methods of managing discovery to achieve proportionality. In essence, new federal judges traditionally must “figure out for themselves” how to deal with discovery disputes in their cases. For those who come to the bench with substantial prior experience as civil litigators, this may not be too much to expect of them. But for those who come to the bench after a career as a prosecutor, defense counsel, or non-litigator, the task of managing discovery in hundreds of civil cases, while simultaneously handling an equivalent number of criminal cases, can be daunting. My ultimate conclusion is that if the most recent changes to the civil rules are to have their intended result, a judicial education program must accompany their enactment. The program would teach judges the tools and techniques available to monitor and manage discovery in civil cases before problems develop (rather than waiting until a discovery dispute has occurred to become involved), and it would counteract the resistance of many judges to accept the obligation to do so.

I start with a discussion of the criticisms expressed about the current state of things, as reflected in a series of surveys conducted in 2009 by several prominent bar organizations,

followed by a discussion of the civil procedure rules themselves, and the efforts over the last thirty years to require judges to monitor and manage discovery to achieve proportionality. While the obligation to do so is clear, the rules are nearly silent about how the judges are expected to accomplish this vital task, and the bar surveys—though almost uniformly critical of the judges’ failures to do so—similarly offer no helpful insight as to the techniques or procedures they should use to succeed. Then, based upon an analysis of nearly two hundred cases decided in the last thirty years where the parties asked judges to resolve discrete discovery disputes in pending federal cases, I identify a “toolkit” of techniques that a judge can employ—alone, or in combination—to achieve proportionality.

Using examples from the cases, I discuss these techniques, which include such measures as actively monitoring all cases and becoming more actively involved in managing them when needed, encouraging counsel and the parties to cooperate during discovery, adopting informal discovery dispute resolution methods, shifting the costs of discovery from the producing party to the requesting party, phasing discovery, using computer technology and sampling techniques to reduce the cost of reviewing voluminous electronic files, limiting the amount of time parties must spend responding to discovery requests, imposing sanctions for improper behavior, and capping the amount of discovery allowed based on an estimate of the likely range of recovery in a case. I also identify seven “red flags” that provide early warning signs to a judge of the need to intervene in a case to make sure that costs do not spiral out of control. These warning signs include cases involving complex litigation or multiple parties, cases where there is unusually great party or attorney animosity, cases involving discovery of electronically stored information, cases where there are issues regarding spoliation of evidence, *pro se* litigation, and asymmetrical

litigation. In discussing these warning signs, I give examples of how a judge may intervene using the “proportionality toolkit” to keep costs in check.

Finally, based on a survey of United States district and magistrate judges, I offer an explanation why achieving proportionality may have been so difficult, and offer suggestions regarding how to educate judges better about how to use the proportionality tools identified in the case analysis to be more successful at achieving proportionality. My ultimate conclusion is that, by using the techniques I identify, combined with an aggressive education program for judges regarding how to use the “proportionality toolkit” and recognize the warning signs, it will indeed be possible to stop the insanity.

Preliminarily, some perspective will help focus the analysis. In May, 2010, prominent federal and state judges, academics, and attorneys representing all segments of the litigation bar, as well as representatives of bar organizations, government and corporations, attended a conference that the Judicial Conference Advisory Committee on the Civil Rules (“the Advisory Committee”) convened at the Duke University School of Law. The purpose was to take a critical look at the current state of civil litigation in the United States and to identify specific strategies for improvement to enable it to better fulfill the goal of securing “the just, speedy, and inexpensive determination of every [civil] action and proceeding.”² Among the goals of the conference was to evaluate discovery in civil cases in federal court, and particularly to focus on problems associated with discovery of electronically stored information (“ESI”).³ In advance of the Duke Conference, a number of prominent organizations representing a wide variety of

² Fed. R. Civ. P. 1.

³ Emery G. Lee III & Thomas E. Willging, Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules, October, 2009 at 5, *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); Richard Marcus, *How to Steer an Ocean Liner*, 18 Lewis & Clark L. Rev. 615, 624 (2014).

participants in the civil litigation process conducted surveys of their members to obtain their views regarding the effectiveness of the federal civil discovery rules. Among those groups were the ABA Section of Litigation, the American College of Trial Lawyers (in conjunction with the Institute for the Advancement of the American Legal System), the Federal Judicial Center, the Association of Corporate Counsel, and the National Employment Lawyers Association (“NELA”). While there were areas of disagreement among the various surveys about the state of health of the federal civil litigation process, there was wide agreement in 2009 that the process takes too long, is too expensive, and that in too many cases the cost of discovery is disproportionately expensive in relation to the value of the case or the importance of the issues at stake in the litigation.⁴

Those familiar with the federal rules of civil procedure could view this nearly universal agreement only as an indictment of the effectiveness of more than thirty years of rulemaking efforts to ensure that discovery costs were proportionate. This is because the civil rules first

⁴ ABA Section of Litigation Member Survey on Civil Practice: Full Report, 2 (2009) (reporting that 89% of survey respondents believed that litigation costs are not proportional to the value in a small case, and that 40% believe that litigation costs are not proportional to the value in a large case); Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute For the Advancement of the American Legal System at 2, 7 (2009) (reporting that a major theme that emerged from the survey was that the American civil justice system is in need of serious repair, and that “[s]ome deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test” and recommending that changes be adopted to the civil procedure rules to ensure that discovery is proportional); Civil Litigation Survey of Chief Legal Officers and General Counsel belonging to the Association of Corporate Counsel, 1 (2009) (reporting that 90% of respondents reported that the litigation process takes too long, and that 97% felt that it was too expensive and “that litigation costs are commonly out of line with the stakes of the case.” Further reporting that nine out of ten respondents disagreed with the statement that “litigation costs are generally proportionate to the value of the case.”); NELA Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009, 6 (2010) (“[t]here was a universal sentiment among NELA respondents that the discovery process is too costly”). All of these surveys (for ease of reference, collectively referred to as the “Duke Surveys”) may be found at www.uscourts.gov/Rules-Policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

were amended to require proportionate discovery in 1983, and that requirement (although revised and relocated various times within the rules) has been an overarching requirement of the discovery process ever since.⁵ Accordingly, the starting point for the analysis must be the rules themselves. Part One of this thesis will discuss the successive efforts of the civil rulemakers to require proportionate discovery by examining the changes in the rules of civil procedure addressing this requirement, and the accompanying advisory committee notes that illustrate the goals of the rules and amendments. Part Two will discuss the results of an examination of nearly two hundred discovery opinions that federal judges issued during the more than thirty years in which the rules have required proportionate discovery, in which they acknowledged this requirement and resolved discovery disputes with it in mind. The goal of Part Two is to determine whether it is possible for judges to achieve proportional discovery, and, if so, to identify an “inventory” of techniques that can be used to do so. Further, Part Two will identify a number of risk factors that a review of the cases disclosed; these “red flags” presage the possibility of disproportionate discovery and can serve as an early warning of the need for a judge to exert more control over the discovery process. In Part Three, this thesis will discuss the results of surveys of United States district and magistrate judges regarding their attitudes toward handling discovery in civil cases, and the approach they take to doing so. The survey results

⁵ See, e.g., Fed. R. Civ. P. 26(b)(1) (1983) (requiring that “[t]he frequency or extent of use of the discovery methods set forth [in the civil rules] . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) *the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at state in the litigation.*”) (emphasis added).

provide insight into why achieving proportionate discovery has been an elusive goal. Finally, Part Four will offer suggestions as to what ought to be done to improve the situation.

Part One

A. Overview and the 1983 Rule Amendments

The belief that discovery costs in federal court frequently are disproportionate to the value of the case has existed far longer than the thirty years that the civil rules have required proportionality. The first codification of the federal rules of civil procedure occurred in 1938,⁶ and thirteen years thereafter Judge James M. Douglas, chair of the Judicial Conference Section on Judicial Administration, convened a symposium regarding “The Practical Operation of Federal Discovery.”⁷ During the symposium, William Speck reported the results of a field study that the Administrative Office of the United States Courts conducted regarding the use of discovery in the federal courts. Speck reported that the field study found that, after thirteen years of using the federal discovery rules, “generally speaking the lawyers we talked to liked discovery,” but that shortcomings were noted, and “[o]ne of the criticisms is that the expense and time consumed by discovery is out of proportion to the value.”⁸

The first attempt in the federal rules of civil procedure to address directly the proportionality issue in discovery occurred with the 1983 amendments to the civil rules.

⁶ Richard Marcus, *How to Steer an Ocean Liner*, *supra*, note 3, at 618.

⁷ *The Practical Operation of Federal Discovery*, 12 F.R.D. 131 (1951).

⁸ *Id.* at 137. Focusing on the cost of deposition discovery, Speck further illustrated the proportionality concern. He disclosed that the survey revealed that the costs at that time of taking a deposition of 100-150 pages in length in an “ordinary case” would be \$200-300. He observed that “[i]f 100 to 150 pages of depositions are reasonable in a tort case worth \$20,000, then 100,000 to 150,000 pages would be in proportion in a case worth \$20,000,000.” *Id.* at 138. At a cost of between two and three dollars a page, deposition discovery alone would run between \$200,000 and \$300,000 (in 1951 dollars) for a case where \$20,000,000 was at issue.

Specifically, the Advisory Committee amended Fed. R. Civ. P. 26(b) (“Discovery Scope and Limits”) to contain the following language:

The frequency or extent of use of the discovery methods set forth in [the discovery rules] shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion [for protective order]”⁹

Importantly, the Committee placed the new language in the section of Rule 26 that limits the scope of discovery, indicating the Committee’s intent that the newly added factors would restrain at the outset the amount of discovery that the parties could conduct. Rather than adopt bright-line restrictions on the type of permissible discovery and how parties could employ it, the rules opted for providing the parties and judges with a multi-factor analysis of how to tailor the discovery in each case to its needs. Such a flexible approach necessarily requires that the court monitor and manage the case (where needed), as the parties cannot apply the cost-benefit factors identified in the rules in the abstract. The Committee Note accompanying these changes explained why they were added and how the Committee hoped they would govern the conduct of discovery. First, the Committee observed that “[t]he purpose of discovery is to provide a mechanism for making relevant information available to the litigants,” and that “the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of the defensive weapons or evasive responses.”¹⁰ When parties employ such abusive techniques, “this

⁹ Fed. R. Civ. P. 26(b)(1) (1983).

¹⁰ Fed. R. Civ. P. 26 (1983) Advisory Committee Note.

results in excessively costly and time-consuming activities that are *disproportionate* to the nature of the case, the amount involved, or the issues or values at stake.”¹¹ With these words, the Committee introduced the concept of proportionality as a limiting factor on the amount of discovery that the parties should seek, or the court should permit, in a civil case. The Committee Note further discussed the rationale for the changes to the Rule.

First, the Committee amended Rule 26(b)(1) “to add a sentence to deal with the problem with over-discovery,” with the goal of “guard[ing] against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.”¹² Fundamentally, the new rule imposed on the trial judge the duty to guard against disproportionate discovery, as the Committee plainly stated that “[t]he new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse,” noting that “[o]n the whole . . . district judges have been reluctant to limit the use of the discovery devices.”¹³ Thus, the concept of the trial judge as an active participant in the monitoring and, as needed, the management of the discovery process in an individual case was integral to the Committee’s view of how to combat disproportionately expensive or burdensome discovery. Simply put, the Committee recognized that reliance on the parties alone to achieve the proportionality required by the new rules would not be effective. Judges could not delegate the entire discovery process to the parties themselves, but would have to monitor their cases and intervene where needed to manage the discovery process on an individual basis for the rules to succeed. While the parties would have a critical role in designing and executing the discovery, the judge needed to be a part of that

¹¹ *Id.* (emphasis added).

¹² *Id.*

¹³ *Id.*

process—from its inception to its conclusion. The Committee Note further explained how the Committee intended the new rule to operate.

The Committee designed new Rule 26(b)(1)(i) “to minimize the redundancy in discovery” and to “encourage attorneys to be sensitive to the comparative costs of different methods of securing information,” and introduced subdivision (b)(1)(ii) “to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories.”¹⁴ The concomitant amendment of Rule 26(g), which was to govern the signing of discovery requests, responses, and objections, reinforced the notion that the attorneys conducting discovery had an independent duty to ensure that discovery in a case was not disproportionate. The Committee amended that rule to provide:

Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.¹⁵

The Committee Note addressed in significant detail just how Rule 26(g) should regulate attorney conduct during discovery. It stated: “Rule 26(g) imposes an affirmative duty to engage

¹⁴ *Id.*

¹⁵ Fed. R. Civ. P. 26(g) (1983), *Federal Rules of Civil Procedure as of April 28, 1983*, 97 F.R.D. 165, 173.

in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37 [which govern all the discovery devices].”¹⁶ Perhaps recognizing that attorneys might need encouragement to fulfill this responsibility, the Committee observed that “Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions,” noting that it “provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.”¹⁷

Essentially, the discovery rules needed to provide an adequate deterrent for litigants and their lawyers who otherwise might abuse the process. “If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsively and avoid abuse.”¹⁸ Accordingly, the “certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection,” by making “a reasonable inquiry into the factual basis of his response, request, or objection.”¹⁹ A lawyer complies with this duty “if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances,” and in doing so, the lawyer “may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances,” with the court to decide “what is reasonable . . . on the totality of the circumstances.”²⁰

¹⁶ Fed. R. Civ. P. 26(g) (1983) Advisory Committee Note.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Having clearly stated the responsibility of both the trial judge and the litigants' lawyers to ensure proportionate discovery in each case, the Committee Note further addressed how the new Rule 26(b)(1)(iii) would guide them in doing so.

The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.²¹

Rule 26(b)(1)(iii) introduced a highly nuanced series of cost-benefit factors for the lawyers and trial judge the consider in each case to ensure that the discovery conducted was proportionate. Yet the Committee clearly designed it to protect against any mechanistic approach to limiting discovery that would not be appropriate in a particular case, given the substantive issues involved, the importance of the type of litigation, and the resources of the plaintiff and defendant. It was an important innovation, essential to ensuring that judges and lawyers interpreted and applied the discovery rules as a whole in a manner consistent with the goal of Fed. R. Civ. P. 1 that the rules of civil procedure “be construed to secure the just, speedy, and inexpensive determination of every action.”²² Therefore, while Rule (26)(b)(1)(iii) introduced “cost-benefit” analysis to determining how much discovery is appropriate in a given case, allowing consideration of the likely amount of recovery if successful, the parties and judge were not to apply it in an unfair manner. Rather, they were to consider the “value” of a case in light of

²¹ Fed. R. Civ. P. 26(b)(1)(iii) (1983) Advisory Committee Note.

²² Fed. R. Civ. P. 1 (1948), *Amendments to the Rules of Civil Procedure*, 8 F.R.D. 591, 593.

its “philosophic, social or institutional terms.” For example, “Public Policy” cases involving issues such as employment discrimination claims or free speech claims often require extensive discovery, yet may not produce a large-dollar judgment for the successful litigant. Better-financed opponents should not be able to employ delaying tactics to exhaust a financially weak party’s ability to prosecute the action.

The Committee intended the combined effect of the changes to Rules 26(b)(1) and 26(g) to introduce a profound change in the way parties conducted discovery. No longer were they to conduct discovery reflexively; rather, they were to conduct it reflectively. No longer was discovery to be the province of the lawyers alone, conducted without any oversight and susceptible to abuse for tactical advantage or to impose oppressive burden; the trial judge had an independent duty to ensure that it was tailored to be both cost-effective and fair. Properly conducted, planning and executing discovery in a particular case would not be haphazard. Lawyers would need to make a reasonable inquiry of their clients before asking for discovery, responding to a discovery request, or even making an objection to one—and certify by his or her signature that this had been done, under pain of sanctions if not. Judges could no longer sit passively on the sidelines and delegate all discovery responsibilities to the lawyers, becoming involved only when a party presented a dispute for them to resolve; they had an independent duty to monitor the discovery in all their cases and to manage more directly the process where needed to ensure that discovery was fair and proportionate. And no longer could discovery be reduced to competing objectives of asking for everything an imaginative lawyer could want, or providing as little an evasive lawyer could get away with. Instead, the lawyers and the judge had to factor in the type of case, the issues at stake (as measured by the goals of the litigants, as well as the broader societal issues implicated by the case), the relief requested, and the comparative

resources of the parties. In short, the 1983 changes to the discovery rules ambitiously sought to inaugurate a new approach to discovery. The Advisory Committee had announced in stentorian tones what needed to be done. What remained to be seen was whether the judges and lawyers were listening.

B. The 1993 and 2000 Rule Amendments

Just ten years after the Committee amended Rule 26(b)(1) to adopt the proportionality standard, it amended the rule again, in subtle but important ways. First, it divided the paragraph into two numbered sub-paragraphs. The first contained the general discussion of the type of information that is subject to discovery; the second, titled “limitations,” allowed courts to issue orders or adopt local rules to alter the numerical limits on discovery elsewhere contained in the rules, and included the proportionality language with two revisions. First, former Rule 26(b)(1)(iii) became 26(b)(2)(iii), and the Committee revised it to say “the burden or expense of the proposed discovery outweighs its likely benefit,” instead of “the discovery is unduly burdensome or expensive.”²³ Second, the Committee revised Rule 26(b)(2)(iii) to add the following factor: “the importance of the proposed discovery in resolving the issues.”²⁴ The Advisory Committee Note to the 1993 rule change explained the reason for these revisions:

[Rule 26(b)(1) (1983)] is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types

²³ Fed. R. Civ. P. 26(b)(c)(iii) (1993).

²⁴ *Id.*

or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admissions under Rule 36.²⁵

As its Note made clear, the Advisory Committee was concerned about the “information explosion” brought about by the increasing use of computer based information systems instead of “paper based” systems, and the potential for vastly greater discovery costs associated with trying to obtain all “relevant” information when it might be stored on many computers. Accordingly, the message the Committee sent to judges was that they needed to restrict discovery even further if necessary to prevent it from being “oppressive.” The 1993 changes also relocated the proportionality factors to the subsection of Rule 26 discussing limits on the number of depositions, interrogatories and requests for admission that an order or local rule could impose, disassociating them from their original location at the beginning of the Rules, defining the scope of discovery. As will be seen, subsequent amendments to the rule further disassociated the proportionality factors from the language setting out the scope of discovery, a development now reversed by the 2015 changes to the Federal Rules of Civil Procedure that took effect on December 1, 2015.²⁶

²⁵ Fed. R. Civ. P. 26(b)(2) Advisory Committee Note (1993).

²⁶ Memorandum from Judge David G. Campbell, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Committee on Rules of Practice and Procedure, regarding Proposed Amendments to the Federal Rules of Civil Procedure (June 14, 2014), Appendix B to Agenda Item E-19, September, 2014 meeting of The Judicial Conference of the United States Courts, Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (hereinafter “Judge Campbell Memorandum”) at Appendix B-8 (“As this summary illustrates, three previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee—that proportionality is an important and necessary feature of civil litigation in federal courts. And yet one of the primary conclusions of the comments and surveys at the 2010 Duke Conference was that proportionality is still lacking in too many cases. The previous amendments have not had their desired effect. *The Committee’s purpose in returning the proportionality factors to Rule 26(b)(1) is to make them an explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and*

In 2000, the Advisory Committee amended Rule 26(b)(1) (which defines the scope of discovery) to add the following sentence: “All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).”²⁷ As the Advisory Committee Note explained,

a sentence has been added [to Rule 26(b)(1)] calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.²⁸

Thus, the Committee acknowledged that, despite the presence of the proportionality factors as a limitation on the scope of discovery that had existed for seventeen years, they had not produced their intended effect. The courts had failed to implement these limitations with “vigor.”

C. The 2006 Rule Amendments

In 2006, the Advisory Committee changed the Rules of Civil Procedure again to address concerns about the expense and burden that expansive discovery of electronically stored information, or “ESI,” increasingly caused. It amended Rule 26(b)(2) “to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information.”²⁹ As part of these changes, the Committee divided Rule 26(b)(2) into three subparagraphs. The first contained the existing authority for courts to issue orders altering the limits in the rules on the number of depositions and interrogatories, and to issue local rules to limit the number of requests for admissions.³⁰ The second added new language to address issues

resolving discovery disputes.”) (emphasis added), available at www.uscourts.gov/file/14523/download.

²⁷ Fed. R. Civ. P. 26(b)(1) (2000).

²⁸ Advisory Committee Note (2000) (discussing change to Rule 26(b)(1)).

²⁹ Advisory Committee Note (2006) (discussing amendments to Rule 26(b)(2)).

³⁰ Fed. R. Civ. P. 26(b)(2)(A) (2006).

associated with discovery of ESI from sources that are not readily accessible because of undue burden or cost.³¹ The third contained the proportionality language introduced in 1983, and modified in 1993 and 2000.³²

D. The Duke Conference

Despite the 2006 amendments to the Rules of Civil Procedure, complaints persisted from judges, practitioners and a wide variety of bar associations that the costs of discovery in civil cases continued to be disproportionately expensive. The Advisory Committee decided to host a conference to discuss these concerns and identify means to address them. The Committee's report to the Chief Justice succinctly stated its purpose:

The Civil Rules Advisory Committee hosted the 2010 Conference on Civil Litigation at the Duke University School of Law on May 10 and 11 [2010]. The Conference was designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation. More than seventy judges, lawyers, and academics presented and discussed empirical information, analytical papers, pilot projects, and various approaches used by both federal and state judges, in considering ways to address the problems of costs and delays in the federal civil justice system. Over 200 invited participants selected to ensure diverse views, expertise, and experience filled all the space available at the Law School and engaged in two days of panel presentations followed by extensive audience discussion. The result is a large amount of empirical information and a rich array of possible approaches to improving how the federal courts serve civil litigants.³³

The Report to the Chief Justice identified the findings of the Duke Conference regarding the problems associated with the civil discovery process and underscored the failure of prior rulemaking efforts to achieve proportional discovery costs. It noted:

³¹ Fed. R. Civ. P. 26(b)(2)(B) (2006).

³² Fed. R. Civ. P. 26(b)(2)(C) (2006).

³³ Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, Submitted by the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure (hereinafter "Report to the Chief Justice") at 1, *available at* www.uscourts.gov/file/3115/download.

For many years, the Judicial Conference Rules Committees have heard complaints about the costs, delays, and burdens of civil litigation in the federal courts. And for many years, the Rules Committees have worked to address these complaints. That work is reflected in the fact that the Civil Rules, particularly the discovery rules, have been amended more frequently than any others. The more recent changes have been preceded by efforts to obtain reliable empirical information to identify how the rules are operating and the likely effect of proposed changes. Despite these recent rule changes, complaints about costs, delays, and burdens in civil litigation have persisted.³⁴

Importantly, the Duke Conference highlighted the need to base future rulemaking changes on more than anecdotal information, however well regarded the sources, and to consider empirical data as well.³⁵ The empirical data reviewed during the conference included a study that the Federal Judicial Center (“FJC”) performed of more than 3,500 cases that terminated in the last quarter of 2008, which contained “detailed surveys of the lawyers about their experience in the cases.”³⁶ Further, the FJC “also administered surveys for the Litigation Section of the American Bar Association (ABA) and for the National Employment Lawyers Association (NELA),” which the Duke Conference considered.³⁷ In addition, the Institute for the Advancement of the American Legal System (IAALS) submitted a survey of the members of the American College of Trial Lawyers (American College), and the Advisory Committee reviewed empirical information that the Searle Institute at Northwestern Law School and a consortium of large corporations provided regarding the actual costs of conducting discovery in civil litigation, all of which “provided an important anchor for the Conference discussion and will be a basis for further assessment of the federal civil justice system for years to come.”³⁸

³⁴ *Id.*

³⁵ *Id.* at 2.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

Moreover, the providers of information to the Advisory Committee, and the participants at the Duke Conference, represented not just the views of institutional participants in the litigation process, on whom the costs and burdens of discovery often fall the most, but also an extremely diverse group including judges, academics, lawyers from many types of practices, from firms that were large as well as small and representing plaintiffs, defendants, businesses, governments, and public interest organizations.³⁹

The conclusions that the Advisory Committee reached from the Duke Conference included a recognition that “making changes to the Federal Rules of Civil Procedure [alone] is not sufficient to make meaningful improvements” in the civil litigation process.⁴⁰ Rather, “judicial education, legal education, and support provided by the development of materials to facilitate implementing more efficient and effective procedures”⁴¹ needed to accompany future rules changes. Distilled to its essence, the lessons learned from the Duke Conference could be “described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management.”⁴²

While the Advisory Committee acknowledged that rule changes alone would not fully ameliorate the problems that the Duke Conference identified, it concluded that properly focused rule changes could contribute to the needed solutions, and it identified a number of desirable changes. One of them focused on the need to emphasize further the proportionality requirement of Rule 26(b)(2). Specifically, the Advisory Committee observed that “[t]here is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not

³⁹ *Id.*

⁴⁰ *Id.* at 4.

⁴¹ *Id.*

⁴² *Id.*

accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed. Rather the discussion focused on proposals to make the proportionality limit more effective”⁴³ As next will be seen, this recommendation resulted in an additional round of rulemaking changes by the Advisory Committee, which again addressed the provisions of Rule 26(b)(b)(2) that deal with proportionality and the scope of discovery.

E. The 2015 Rule Amendments

The Advisory Committee began its work with the benefit of the lessons learned during the Duke Conference. Judge John Koeltl of the Southern District of New York chaired a subcommittee to develop proposed amendments to the Rules of Civil Procedure to implement the Duke Conference recommendations. To do so the

[s]ubcommittee began with a list of proposals made at the Duke Conference and held numerous conference calls, circulated drafts of proposed rules, and sponsored a mini-conference with 25 invited judges, lawyers, and law professors to discuss possible rule amendments. The Subcommittee presented recommendations for full discussion by the Committee and the Standing Committee during meetings held in 2011, 2012, and 2013 The proposed Duke amendments were published as a package in August 2013 along with . . . other proposed amendments More than 2,300 written comments were received and more than 120 witnesses appeared and addressed the Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. Following the public comment process, the Subcommittee withdrew some proposals, [and] amended others⁴⁴

Among the rule amendments adopted was a change to Rule 26(b)(1)—the “scope of discovery rule”—the essence of which Judge David Campbell, Chair of the Advisory Committee, described as follows:

The proposed amendments to Rule 26(b)(1) include four elements: (1) the factors included in the present Rule 26(b)(2)(C)(iii) [part of the proportionality factors]

⁴³ *Id.* at 8.

⁴⁴ Judge Campbell Memorandum, *supra* note 26, at Appendix B-3.

are moved up to become part of the scope of discovery in Rule 26(b)(1), identifying elements to be considered in determining whether discovery is proportional to the needs of the case; (2) language regarding the discovery of sources of information is removed as unnecessary; (3) the distinction between discovery of information relevant to the parties' claims or defenses and discovery of information relevant to the subject matter of the action, on a showing of good cause, is eliminated; [and] (4) the sentence allowing discovery of information 'reasonably calculated to lead to the discovery of admissible evidence' is rewritten. . . .⁴⁵

With respect to the first of the suggested revisions, the Advisory Committee proposed to amend the first sentence of Rule 26(b)(1) to say:

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.⁴⁶

In a Memorandum to the Standing Committee, submitted in preparation for the September, 2014 meeting of the Judicial Conference of the United States, Judge Campbell described the care with which the Advisory Committee determined to recommend this change. He explained:

[The proposal to relocate the proportionality factors to Rule 26(b)(1)] produced a division in the public comments. Many favored the proposal. They asserted that the costs of discovery in civil litigation are too often out of proportion to the issues at stake in the litigation, resulting in cases not being filed or settlements made to avoid litigation costs regardless of the merits. They stated that disproportionate litigation costs bar many from access to federal courts and have resulted in a flight to other dispute resolution fora such as arbitration. They noted that the proportionality factors currently found in Rule 26(b)(2)(C)(iii) often are overlooked by courts and litigants, and that the proposed relocation of those factors to Rule 26(b)(1) will help achieve the just, speedy, and inexpensive determination of every action Many others saw proportionality as a new limit that would favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy uniform application. They asserted that "proportionality" will become a new blanket objection to all discovery requests. They were particularly concerned that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Some argued that the proposed change is a solution in search of a

⁴⁵ *Id.* at Appendix B-4.

⁴⁶ *Id.* at Appendix B-5.

problem—that discovery in civil litigation already is proportional to the needs of cases After considering these public comments carefully, the Committee remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery . . . will improve the rules governing discovery.⁴⁷

The Advisory Committee reached this conclusion for three reasons. First, the findings of the Duke Conference, based on the empirical studies submitted and the discussions among the experienced participants—representing the views of the entire litigation spectrum—demonstrated widespread consensus that, as currently practiced in federal court, discovery on the whole was disproportionately expensive and burdensome.⁴⁸ Second, the history of nearly thirty years of rulemaking designed to inculcate the proportionality factors into the conduct of discovery in civil cases had been unsuccessful in achieving the intended goal.⁴⁹ Finally, as expansively discussed in the proposed Advisory Committee Note drafted to accompany the proposed change to Rule 26(b)(1) (discussed next), the Advisory Committee carefully addressed the concerns of those opposed to the change, to make clear its intent that courts should not interpret the changes in a manner that would allow the feared abuses to occur.⁵⁰

The Advisory Committee Note to the changes to Rule 26(b)(1) explained that the changes did not impose any new responsibilities on the part of courts or the parties with respect to proportionality, stating that “[r]estoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.”⁵¹ This language addressed concerns expressed during the public

⁴⁷ *Id.* at Appendix B-5–6.

⁴⁸ *Id.* at Appendix B-6–7.

⁴⁹ *Id.* at Appendix B-7–8.

⁵⁰ *Id.* at Appendix B-8.

⁵¹ *Id.* at Appendix B-39.

comment period that the proposed new rule language would place an impossible burden on a requesting party by requiring that party to demonstrate a factual basis for each of the proportionality factors, despite the fact that—without the desired discovery—they would not have the ability to do so. Whichever party had access to the information needed to apply the proportionality factors to a particular discovery dispute would be responsible for providing it to the court. And, the addition of the consideration of “the parties’ relative access to relevant information”⁵² to the factors proposed for Rule 26(b)(1) reinforced this protection against undue burden being placed on requesting parties.

Second, the Advisory Committee Note addressed concerns that parties requested to provide discovery would use the new rule language to stonewall by making blanket, conclusory objections (often referred to as “boilerplate objections”), forcing the requesting party to incur the cost of filing a motion to compel. The Note stated: “Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”⁵³ The Advisory Committee Note added a specific example of how the Committee intended the new rule to be implemented, to illustrate how the parties were to fulfill the “collective responsibility”:

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

⁵² *Id.* at Appendix B-30.

⁵³ *Id.* at Appendix B-39.

the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.⁵⁴

Third, the Advisory Committee Note discussed the rationale for adding “the parties’ relative access to relevant information” as a new proportionality factor, observing that the “new text [is intended] to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii).”⁵⁵ The Note observed that parties often enter litigation with vastly different access to the information that will be needed to resolve the case. It explained that “[s]ome cases involve what often is called ‘information asymmetry.’ One party—often an individual plaintiff—may have little discoverable information . . . [while] [t]he other party may have vast amounts of information, including information that can be readily retrieved.”⁵⁶ In such circumstances, “the burden of responding to discovery lies heavier on the party who has more information, and properly so.”⁵⁷

Fourth, the Advisory Committee Note stressed the importance of active judicial monitoring of the discovery process in all cases, and, where needed, intervention to manage the process to prevent disproportional cost or excessive delay. It stated:

The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important

⁵⁴ *Id.* at Appendix B-40.

⁵⁵ *Id.*

⁵⁶ *Id.* at Appendix B-40–41.

⁵⁷ *Id.* at Appendix B-41.

differences and when the parties fall short of effective, cooperative management on their own.⁵⁸

In short, the abuses that opponents to the new rules feared would occur if the Supreme Court approved the new language should not occur (if judges implement the rules as intended) for two reasons. First, the parties themselves have a duty, imposed by Rule 26(g)(1), to consider proportionality when making discovery requests, responding to them, or objecting to them. Necessarily implicit in this requirement, and reinforced by the requirement of Rule 26(f) that the parties confer early in the case to discuss discovery, is the expectation—indeed necessity—that there be cooperation between the parties. Second, when the parties themselves are unable or unwilling to fulfill their responsibilities, the rule obligates court to step in to manage the discovery to ensure that it is proportional.

Fifth, the Advisory Committee Note stressed the importance of not attempting to measure proportionality solely in terms of the monetary value of the case. It reiterated Note language from earlier versions of Rule 26(b) that explained the importance of considering the substantive issues in a case that involves little prospect of a large monetary recovery for the plaintiff, but nonetheless involves important societal issues. It stated:

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.⁵⁹

⁵⁸ *Id.*

⁵⁹ *Id.* at Appendix B41-42.

Finally, the Advisory Committee Note discussed how the judge and the parties should evaluate the parties' resources in determining whether the discovery sought is disproportionately burdensome or expensive and how the parties may use current and future technological advancements to reduce burden or expense. It stated:

So too, considerations of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.⁶⁰

The Advisory Committee Notes accompanying the 2015 changes to the proportionality requirements of Rule 26(b) demonstrate the care and attention to detail that characterized the Committee's most recent changes. It was under no illusion about the lack of success of earlier attempts to introduce proportionality into the discovery rules, and it took pains to try to identify why those efforts had not succeed, and to adopt measures that—if implemented by the parties and the court—would overcome the earlier failures. Reduced to their essence, the success of the new changes indeed will hinge on the two words and a phrase that the Advisory Committee identified—“cooperation” and “proportionality,” and “sustained, active, hands-on judicial case management.”⁶¹

The Advisory Committee has refined the factors underlying proportionality and provided clear guidance about what is needed to achieve them. But having done so, what is the likelihood that this time—unlike the earlier attempts—the goal will be achieved? It is clear that the judge

⁶⁰ *Id.*

⁶¹ *Id.* at Appendix B-2-3.

holds the key to success for achieving proportionality. If the parties themselves approach discovery cooperatively and take measures to balance need against burden and expense, the judge's role can be supervisory—monitoring rather than directing the process. However, where the parties and their counsel appear unable or unwilling to do so, the Advisory Committee structured the rules to *require* the judge to step up and actively manage the discovery process in cases requiring it. Either way, the rules impose a critical role on the judge.

If the new rules are to succeed, then it is necessary to transition from discussing abstractions such as “cooperation,” “proportionality” and “active and sustained judicial management” to identifying concrete tools that judges and litigants can use to achieve proportionality in individual cases. Expressed differently, the fundamental questions are: Is it possible for judges to monitor and manage discovery so that it is proportional, and, if it is, how should they do so? To answer these questions, it will be necessary to accomplish two goals. First is the identification of specific actions that litigants or the court can take in individual cases to reduce burden and expense, so that the court can be aware of the “tools” that are available to do so. Second is the identification of the types of cases or circumstances that are most likely to lead to disproportionate and burdensome discovery, so that the judge is aware of these “red flags” and can intervene to take measures to address them before discovery costs spiral out of control.

Part Two of this thesis undertakes to address these two questions. By analyzing nearly two hundred cases decided since 1983 in which courts discussed the proportionality requirement and, with this awareness in mind, proceeded to resolve discovery disputes that threatened to make discovery excessively burdensome or expensive, I have identified the tools that parties and judges actually have used. Similarly, by focusing on the types of cases and circumstances that actually have presented proportionality problems for courts to resolve, I have identified the “red

flags” that attorneys, parties and courts must be alert to notice, so that they can address proportionality issues at the onset of the case, when the best opportunities to control discovery are available.

Part Two

A. Overview

To identify cases in which judges demonstrated an awareness of the proportionality requirements of Rule 26(b), I designed computer search terms to capture the different rule number applicable to the proportionality factors between 1983 and 2006, during which time the Committee amended and renumbered the rules.⁶² After trying various combinations of search terms, I selected and used three to search reported and unreported federal cases on the WestlawNext database.⁶³ The searches produced 193 cases, which I then reviewed and indexed to identify the type of judicial officer deciding the case,⁶⁴ the type of case or circumstance that led to the discovery dispute, and the method the judge used to resolve it. In broad terms, the following observations can be made regarding the cases reviewed. First, the vast majority of cases (67%) were decided by United States magistrate judges, an unsurprising result given the frequency with which district judges refer pretrial case management or discovery disputes to them for resolution. In most of the remaining cases (28%), district judges issued the opinion, most often when ruling on objections that the parties raised to initial rulings by magistrate

⁶² Because the 2015 rule changes did not become effective until December 1, 2015, no cases have been decided as of the writing of this thesis applying them.

⁶³ The three search term combinations were: (1) ((RULE FRCP “FED. R. CIV. P.”)/3 26(B)(1) & (CUMULATIVE DUPLICATIVE BURDEN! EXPENS!)) & da(aft 1/1/1983 & bef 12/31/1995) & proportion!; (2) ((RULE FRCP “FED. R. CIV. P.”)/3 26(B)(2) % INSURANCE) & da(aft 1/1/1993 & bef 12/31/2008) & proportion!; and (3) ((RULE FRCP “FED. R. CIV. P.”) 3 26(B)(2)(2)(C)) & da(aft 1/1/2006) & proportion!

⁶⁴ Types included district judge, magistrate judge, bankruptcy judge, and special master.

judges, but also when the district judge resolved the dispute without referring it to a magistrate judge. In a very small number of cases (5%), bankruptcy judges or a special master issued the opinion.

Second, while in each of the cases reviewed, the judge cited to the applicable version of Rule 26 containing the proportionality factors, they most often discussed them in general at the beginning of the decision, when citing to other portions of Rule 26 that govern discovery,⁶⁵ and did not engage in detailed discussion of the proportionality factors when actually resolving the discovery dispute.⁶⁶ In some cases, the judge would cite specifically to one of the proportionality

⁶⁵ For example, they cited the provisions of Rule 26(b)(1) and (5) that limit the scope of discovery to nonprivileged information that is relevant to the subject matter of the litigation (until the rule was changed in 2000 to narrow the scope of discovery to information relevant to the claims and defenses raised in the pleadings, with broader discovery of facts relevant to the subject matter of the dispute only on a showing of good cause), and not subject to work product protection.

⁶⁶ Examples of such cases are: *Equal Emp't Opportunity Comm'n v. FAPS, Inc.*, No. 10-3095, 2012 WL 1656738, at *33 (D.N.J. May 10, 2012) (Defendant objected to producing--during litigation phase--records previously produced during administrative investigation conducted by EEOC. Court cited 26(b)(2)(C) and the doctrine of proportionality generally before denying EEOC's motion to compel, because the discovery would be "unreasonably cumulative."); *Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys.*, No. 10-4126, 2011 WL 2148660, at *11-12 (D.N.J. May 31, 2011) (In addressing discovery dispute, Court cited 26(b)(2)(C) and the doctrine of proportionality in general when describing the scope of discovery, but did not refer to it in detail when ruling on motion); *Int'l Paper Co. v. Rexam, Inc.*, No. 11-6494, 2013 WL 3043638, at *7 (D.N.J. June 17, 2013) (Court cited 26(b)(2)(C)(ii) and the doctrine of proportionality generally, expressed concern that defendant's document production requests raised issues of proportionality, and required defendant to resubmit them after modifying them to address its concerns); *Thompson v. C & H Sugar Co.*, No. 12-CV-00391, 2014 WL 595911, at *2 (N.D. Cal. Feb. 14, 2014) (In discussing the scope of discovery, Court referenced 26(b)(2)(C) and the doctrine of proportionality without any detailed analysis in resolving discovery motions); *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168, 2012 WL 1299379, at *4, 7 (D.N.J. Apr. 16, 2012) (Addressing discovery dispute, Court cited 26(b)(2)(C) and the doctrine of proportionality in general, but did not cite any subsections or particularize how the rule should be used to resolve the dispute); *Carchietta v. Russo*, No. 11-CV-7587, 2014 WL 1789459, at *3-4 (D.N.J. May 6, 2014) (Court discussed 26(b)(2)(C) and proportionality in general as part of the scope of discovery, but did not use the rule to resolve the discovery dispute, which turned on privilege issues); *Teck Metals, Ltd. v. London Mkt. Ins.*, No. CV-05-411, 2010 WL 4813807, at *2 (E. D. Wa. Aug. 25, 2010) (Court cited Rule 26(b)(2)(C)(iii) in discussion

subsections of Rule 26(b), such as Rule 26(b)(2)(C)(i) (which permits limiting discovery if it is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive”);⁶⁷ Rule 26(b)(2)(C)(ii) (which allows the judge to limit discovery if “the party seeking discovery has had ample opportunity to obtain the information by discovery in the action”)⁶⁸ or Rule 26(b)(2)(C)(iii) (which permits the judge to

regarding the scope of discovery without applying it in resolving dispute over interrogatories and document production requests); *Dawson v. Ocean Twp.*, No. 09-6274, 2011 WL 890692, at *12-13 (D.N.J. Mar. 15, 2012) (Court cited Rule 26(b)(2)(C)(i)-(iii) and mentioned doctrine of proportionality as part of discussion of scope of discovery without applying or discussing it further in resolving the discovery dispute); *Best Sign Sys., Inc. v. Chapman*, No. 09-5244, 2012 WL 4505996, at *11 (D.N.J. Sept. 26, 2012) (Court cited Rule 26(b)(2)(C)(i)-(iii) and doctrine of proportionality as part of discussion of scope of discovery, but did not apply it in resolving dispute); *CSX Transp., Inc. v. Gilkison*, No. 5:05CV202, 2012 WL 1354569, at *2-4 (N. D. W. Va. Apr. 18, 2012) (In affirming the ruling of the magistrate judge, court found that magistrate judge properly had considered the doctrine of proportionality and Rule 26(b)(2)(C) in resolving discovery dispute).

⁶⁷ Examples of such cases are: *Equal Emp’t Opportunity Comm’n v. FAPS, Inc.*, No. 10–3095, 2012 WL 1656738, at *33 (D.N.J. May 10, 2012) (Court denied EEOC motion to compel because the same documents previously had been provided by defendant to the EEOC during the administrative investigation phase, and doing so again would be unreasonably duplicative or cumulative, citing 26(b)(2)(C)(i)); *High Voltage Beverages, LLC v. Coca-Cola Co.*, No. 3:08CV367, 2009 WL 2915026, at *2 (W.D.N.C. Sept. 8, 2009) (Court denied plaintiff’s motion to compel defendant to review and produce ESI from an additional 17gb of information (1.5 million pages) considering production that already had been made, because it was unreasonably cumulative, contrary to 26(b)(2)(C)(i), and also found the additional production would contravene 26(b)(2)(C)(ii) and (iii)); *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *11 (N.D. Ill. Sept. 28, 2012) (In antitrust class action case, court found that through encouraging cooperative approach and with active case management there were less burdensome, cumulative and duplicative ways to obtain discovery than sought by plaintiffs, citing 26(b)(2)(C)(i) (as well as (ii) and (iii)).

⁶⁸ Examples of such cases are: *High Voltage Beverages, LLC v. Coca-Cola Co.*, No. 3:08CV367, 2009 WL 2915026, at *2 (W.D.N.C. Sept. 8, 2009) (Court denied plaintiffs motion to compel the defendant to review and produce ESI from an additional 17gb (1.5 million pages) citing all three sub-sections of 26(b)(2)(C), including (ii), because defendant already had produced 1.7 million pages of ESI); *Bowers v. Nat’l Collegiate Athletic Ass’n*, No. 97-2600, 2008 WL 1757929, at *4-6 (D.N.J. Feb. 27, 2008) (district judge analyzed all three sub-sections of Rule 26(b)(2)(C) with respect to proportionality and found violations of all, including that plaintiff already had ample opportunity to obtain relevant information from prior discovery, citing Rule 26(b)(2)(C)(ii)).

limit discovery if “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”).⁶⁹ However, even when citing to a specific proportionality factor, the discussion

⁶⁹ Examples of such cases are: *In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, No. 3:12-MD-2391, 2013 WL 1729682, at *3 (N.D. Ind. Apr. 18, 2013) (Court denied plaintiffs’ motion to compel defendant to do predictive coding search of ESI because defendant already had used keyword search, de-duplication and statistical sampling to reduce 19.5 million documents to 2.5 million documents, then used technology assisted review (“TAR”) on those documents to produce documents to plaintiffs, at a cost of \$1.07 million. Plaintiffs wanted TAR used on the entire 19.5 million documents. Court declined, finding it was excessively burdensome given the likely value of doing the additional search. Although court did not specifically cite 26(b)(2)(C)(iii), its analysis was based on it); *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168, 2012 WL 1299379, at *6 (D.N.J. Apr. 16, 2012) (In an antitrust case, the court noted that defendant had produced discovery from 110 custodians, involving 12 million pages, spending 4,200 hours collecting, and 86,000 hours of counsel review at a cost of more than \$10 million. Accordingly, it denied plaintiff’s motion to require defendants to review documents from an additional 175 custodians because, *inter alia*, the burden and expense would outweigh the likely benefit. Court only cited 26(b)(2)(C), but analysis brings it within (iii)); *High Voltage Beverages, LLC v. Coca-Cola Co.*, No. 3:08CV367, 2009 WL 2915026, at *2 (W.D.N.C. Sept. 8, 2009) (Court denied plaintiff’s motion to compel defendant to review an additional 1.5 million documents citing all three sub-sections of 26(b)(2)(C), including (iii) (cost would exceed likely benefits)); *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *9 (N.D. Ill. Sept. 28, 2012) (In a class action antitrust case, the court found that requiring the defendant to answer one particular interrogatory would violate 26(b)(2)(C)(iii) because it would require very detailed information to be compiled about each of 400 employees on a litigation hold list, and the cost would exceed any likely benefit); *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 306 (S.D.N.Y. 2012) (magistrate judge noted that Rule 26(b)(2)(C)(iii) cautions that importance of litigation is not measured by potential amount of monetary recovery, but includes recognition of public interest litigation); *Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 3446761, at *5 (D.N.J. Oct. 20, 2009) (magistrate judge ordered plaintiff to share cost of discovery of ESI from inaccessible source with defendant because, otherwise, cost would exceed likely benefit (citing Rule 26(b)(2)(C) generally, but analysis stems from sub-section (iii)); *Oseman-Dean v. Ill. State Police*, No. 11 C 1935, 2011 WL 6338834, at *6 (N.D. Ill. Dec. 19, 2011) (magistrate judge referenced Rule 26(b)(2)(C)(iii) in explaining why relevance alone, absent analysis of corresponding burden, was insufficient to warrant requested discovery, stating that the rule “mandates that the court not allow the tail to wag the dog in discovery.”).

tended to be cursory, and only a few of the cases reviewed contained an extensive discussion of the proportionality factors.⁷⁰

Third, a review of the methods that the judges actually used to resolve the dispute before them reveals a robust and creative assortment of techniques that they employed to do so, constituting a “proportionality toolkit” of sorts that provides examples that judges can draw on and tailor to their dockets, their local culture, and their cases. These methods will be discussed in detail below, and it is readily apparent that all of them are common-sense, pragmatic measures that judges may employ, individually or in combination, to achieve proportionality in an individual case, enabling the judge to tailor the response to the needs of the case, as guided by the proportionality factors in Rule 26.⁷¹

⁷⁰ One case (decided by the author of this thesis) that did discuss the proportionality requirement in depth was *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. (D. Md. 2008). There, the magistrate judge undertook an extensive examination of the proportionality factors, citing both Rule 26(g)(1) as well as 26(b)(2)(C)(i)-(iii), and explained why cooperation among the parties and counsel was essential to achieving it.

⁷¹ The techniques identified are: (1) active case monitoring and, as needed, management by the judge; (2) appointment of a “judicial adjunct,” such as a magistrate judge, special master, or other neutral to work with the parties to resolve discovery disputes; (3) informing counsel of their duty to cooperate during discovery, and enforcing that duty when counsel are uncooperative; (4) shifting all or part of the costs of discovery from the producing party to the requesting party; (5) adopting informal discovery dispute resolution methods to expedite resolution of discovery disputes, thereby avoiding the costs and delay of extensive briefing; (6) narrowing the scope of discovery when what was sought was excessive; (7) phasing discovery to focus first on the most important, and most accessible information; (8) prohibiting the use of abusive discovery tactics such as the making of generalized, boilerplate objections; (9) reducing the cost of ESI discovery by ordering sampling of large data sets, as opposed to reviewing all of the data in the set; (10) ordering discovery from less burdensome or expensive sources than originally sought; (11) adopting discovery protocols, standing orders or local rules that promote proportionality; (12) directing or permitting the use of technological advances in computer search methodology to lower search and review costs of ESI discovery; (13) estimating the likely range of recovery in a case, as well as foreseeable costs, and providing a dollar cap on the amount of permitted discovery; (14) capping the amount of time to be spent responding to discovery requests; (15) enforcing the Rule 26(g)(1) proportionality certifications made by counsel in initiating discovery, objecting to discovery, or responding to discovery; (16) imposing

While the tools that judges may use to achieve proportional discovery are not themselves complex, the selection of the appropriate tool or tools in a particular case can be, because it requires the judge to have more than superficial knowledge of the issues and facts of the case to apply the tools intelligently and fairly. The cases reviewed support the position that the Committee Notes to the discovery rules took: that the most effective way to achieve proportional discovery is with active, hands-on management of the discovery process by the court.

Finally, reviewing the cases where the parties asked the judges to resolve actual disputes gives helpful insight into the circumstances or types of cases that are most likely to present proportionality problems, thereby allowing judges to be alert at the outset to recognize and take appropriate action to address them as early in the litigation as possible—underscoring once again the importance of active judicial monitoring of all cases, with more direct management of the discovery in individual cases that require it. These potentially troublesome cases will be discussed in detail below.⁷²

B. Techniques that Judges Used to Achieve Proportionality

1. Active Judicial Monitoring and Management of Discovery

Perhaps the single most important technique that judges used to achieve proportionality was to engage in active monitoring of their cases, which enabled them to intervene as soon as

sanctions against lawyers and parties who violate the discovery rules without justification; and (17) encouraging or permitting the use of non-waiver agreements pursuant to Fed. R. Evid. 502.

⁷² The type of cases or circumstances most likely to produce proportionality problems are: (1) complex cases, such as securities cases, class actions, intellectual property cases, and complex commercial cases; (2) cases involving ESI discovery; (3) cases in which there is client animosity that drives the litigation; (4) cases involving over-aggressive or overzealous conduct by attorneys, or in which attorney animosity or misconduct is present; (5) cases in which *pro se* litigants are involved; (6) cases in which issues regarding preservation of evidence and claims of spoliation of evidence are present; and (7) cases involving asymmetrical information, where one party has far more information sought in discovery than the other.

problems arose that could lead to excessively burdensome or costly discovery. Indeed, it may be said that all of the other techniques discussed in this thesis are but subsets of this method, because if a judge is not actively involved during discovery, the judge is not likely to employ any other technique to resolve a dispute that the parties are unable to resolve on their own. That active judicial monitoring of all cases, and more active management of those cases requiring it, is of primary importance is unsurprising, considering the frequency with which it was cited in the various surveys of lawyers that were reviewed by the Civil Rules Committee at the Duke Conference⁷³ and discussed in the Advisory Committee Notes accompanying the changes to Rule 26(b) from 1983 to the present.⁷⁴

⁷³ For example, the ABA Section of Litigation Member Survey on Civil Practice, which was reviewed by the Civil Rules Committee at the Duke Conference, contained the following survey findings: “78% of respondents believe that early intervention by judges helps to narrow the issues, and 72% believe that early intervention helps to limit discovery”; “73% of all respondents believe that when a judicial officer gets involved early and stays involved, the results are more satisfactory to their clients”; and “[d]espite claims of discovery abuse and cost, 61% of respondents believe that counsel do not typically request limitations on discovery under available mechanisms . . . 76% do not believe judges invoke those protections on their own . . . and nearly 60% of respondents believe that judges do not enforce those mechanisms to limit discovery.” Similarly, the Final Report of the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advance of the American Legal System concluded that “Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, ‘Judges need to actively manage each case from the outset to contain costs; nothing else will work.’” Duke Surveys, *supra*, note 4.

⁷⁴ Fed. R. Civ. P. 26(b) Advisory Committee’s Note (1983) (“The rule [change introducing the proportionality factors] contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.”); Fed. R. Civ. P. 26(b)(2) Advisory Committee Note (2000) (“The Committee has been told repeatedly that courts have not implemented . . . [the proportionality factor] limitations with the vigor that was contemplated. . . . This otherwise redundant cross-reference [to the proportionality factors] has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”); Judge Campbell Memorandum, *supra* note 26 (“In its report to the Chief Justice, the Committee observed that “[o]ne area of consensus in the various [Duke] surveys . . . was that district or magistrate judges must be considerably more involved in managing each case

Judges demonstrated active case monitoring and management in many ways, which will be discussed in detail below. Some examples, however, illustrate the creativity that judges intent on achieving proportional discovery displayed. For example, they provided informal guidance to the parties, without actually having to rule, to point them in the direction of how they could achieve reasonable discovery at proportionate cost.⁷⁵ Or, they announced their intention to actively monitor the discovery that they would permit, to reduce burden and keep discovery proportionate.⁷⁶ Another way that courts demonstrated active case management was by adopting informal methods to expedite the resolution of discovery disputes, without the need for full briefing. In that way, they achieved proportionality by reducing both the time needed to resolve the dispute and the cost to the parties of fully briefing the issues.⁷⁷ This method is particularly

from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of the case.”).

⁷⁵ See, e.g., *Teck Metals, Ltd v. London Mkt. Ins.*, No. CV-05-411, 2010 WL 4813807, at *2, *4-5, *9 (E.D. Wa. Aug 25, 2010) (Court was called upon to resolve dispute regarding interrogatory and document production discovery. Citing Rule 26(b)(2)(C), the judge directed counsel to meet and confer and provided them with guidance how to minimize the production burden on the defendant, as well as suggestions regarding the form of production of ESI, and clarified the scope of what was relevant, and suggested the use of a protective order to address defense concerns.); *Bottoms v. Liberty Life Assur. Co. of Boston*, No. 11-cv-01606, 2012 WL 6181423, at *4-5 (D. Colo. Dec. 13, 2011) (In addressing a discovery dispute, the judge discussed Rule 26(g) and Rule 26(b)(2)(C) and the requirement of proportionality, offering specific guidance how the parties could narrow the scope of burdensome interrogatories to achieve proportionality.); *Plascencia v. BNC Mortg., Inc., LLC*, No. 08-56305, 2012 WL 2161412, at *3, *6-8, *11 (Bankr. N.D. Cal. June 12, 2012) (Judge gave guidance to the parties regarding how discovery practice should be conducted, referring counsel to a local rule that required proportionality analysis to be a part of any motion to compel discovery.).

⁷⁶ *Boeynamems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 332 (E.D. Pa. 2012) (In a class action fraud and breach of contract case, the judge noted that the number and nature of discovery disputes in the case required him to conduct “active case management” to keep the scope of discovery appropriate and to reduce the burden of discovery on the defendant.).

⁷⁷ *Eisai Inc. v. Sanofi-Aventis U.S., LLC.*, No. 08-4168, 2012 WL 1299379, at *1 (D.N.J. Apr. 16, 2012) (The court permitted parties to submit informal letters outlining their positions regarding discovery disputes, without needing to submit formal memoranda.); *Raza v. City of New York*, No. 13-CV-3448, 2013 WL 6177392, at *2 (S.D.N.Y. Nov. 22, 2013) (The judge

effective because frequently parties can frame discovery disputes without extensive briefing, which delays resolution of the disputes until the briefing is completed and the judge is able to issue a ruling.

Courts also achieved proportionality by ordering that not all discovery be accomplished at once, but rather, that the discovery be conducted in phases, allowing the parties to focus on the most important facts relevant to the key issues in the case.⁷⁸ Similarly, when discovery involved voluminous document or ESI discovery, judges reduced the costs of reviewing the documents for relevance and privilege by ordering that the parties employ sampling.⁷⁹

Frequently, courts demonstrated active case monitoring and management by intervening as needed to narrow the scope of discovery, promoting a more focused approach to discovery and reducing burden and cost.⁸⁰ And, when the demands of their workloads did not permit them

held a “pre-motion” conference with the parties, attempting to resolve the dispute at the conference without the need for any briefing.).

⁷⁸ *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 300-01 (S.D.N.Y. 2012) (The court noted that phasing discovery would help to keep it proportional.); *Fisher v. Fisher*, No. WDQ-11-1038, 2012 WL 2050785, at *5 (D. Md. June 5, 2012) (Court narrowed the scope of discovery initially sought by plaintiff, initiated phased discovery to focus on most important facts, and informed plaintiff that further discovery would be possible based on the results of the initial discovery.); *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3(N.D. Ill., Nov. 17, 2010) (The court ordered the parties to meet and confer, to develop a phased discovery schedule, reminding them of their duty to cooperate in doing so.).

⁷⁹ *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *5, *18 (N.D. Ill. Sept. 28, 2012) (In class action antitrust case judge encouraged parties to use sampling to reduce the cost of discovery of ESI.); *Quintana v. Clare’s Boutiques, Inc.*, No. 5:13-cv-368, 2014 WL 234219, at *2 (N.D. Cal. Jan 21, 2014) (Judge ordered that plaintiff be permitted discovery of a statistically significant sample of defendant’s records).

⁸⁰ *Equal Emp’t Opportunity Comm’n v. Princeton Healthcare System*, No. 10-4126, 2011 WL 2148660, at *17 (D.N.J. May 31, 2011) (Court found the temporal scope of plaintiff’s discovery request was too broad and abstract, narrowing it to a period of six years initially, with the possibility of an additional four); *Willnerd v. Sybase, Inc.*, No. 1:09-cv-500, 2010 WL 4736295, at *1 (D. Idaho Nov. 16, 2010) (Judge granted plaintiff’s motion to amend the complaint to add another claim, but ruled that that did not “throw open the doors to [unlimited] discovery,” and imposed “tight restrictions” on the additional discovery on the new claim.).

to be personally involved in actively monitoring discovery, judges displayed a willingness to involve others who could, such as a magistrate judge or, if the cost was not excessive and the need justified the appointment, a special master or other neutral.⁸¹ While referrals to magistrate judges are frequent, appointing a special master is infrequently done because of the expense to the parties. Alternatively, appointing a technical expert, such as a computer expert skilled in designing and implementing effective search protocols for large volumes of ESI to assist less technically sophisticated lawyers or parties can be a very effective use of a third party, because the cost of the expert frequently is offset by the reduction in cost to the parties by use of the more efficient and less expensive methods identified by the expert.

As the above examples and those that are discussed below amply show, judges who have shown a willingness to actively monitor and manage the discovery in their cases (or appoint another to do it for them) have shown creativity, flexibility, and resourcefulness limited only by their own ingenuity. The mere knowledge that a judge is willing to make him or herself available to resolve discovery disputes has a deterrent effect against burdensome or disproportionate discovery. Lawyers are less likely to initiate disproportionate discovery or engage in discovery misconduct when they know the judge is watching and willing to be contacted as soon as a problem arises. It is no surprise, therefore, that when lawyers and commentators are asked to identify the most important ingredient to ensuring proportional discovery, they respond: “active management by the trial judge.”⁸²

⁸¹ *Eisai Inc. v. Sanofi-Aventis U.S. LLC*, No. 08-4168, 2012 WL 1299701, at *11 (D.N.J. Apr. 16, 2012). (In antitrust case, judge appointed a special master “to expedite the timely resolution of any existing or prospective disputes regarding the designation of discovery” under a previously entered confidentiality order.); *U.S. v. Educ. Mgmt. LLC*, No. 2:07-cv-461, 2013 WL 3863963, at *1-3 (W.D. Pa. June 23, 2013) (Judge appointed a retired judge as a special master to resolve and narrow the discovery disputes raised by numerous motions.).

⁸² *Supra*, notes 73 and 74.

And, importantly, actively monitoring all their cases but intervening to more directly manage the discovery only for those cases that need it produces great benefits for the judge. Judges who confer with the parties to make their expectations clear about how discovery is to be conducted at the start of each case, monitor all their cases and promptly step in to more actively manage those that require it find that they have fewer disputes, fewer motions to decide, fewer opinions to write, and more time to devote to their other cases. Active judicial monitoring and selective management of the discovery in cases that require it makes sense not just because the rules require it, but because it is entirely within the self-interest of the judge.

2. Encouraging Cooperation among the Parties and Counsel

As noted, the Civil Rules Advisory Committee has recognized that you may distill what is needed to achieve the goals of revised Rule 26(b)(1) to two words and a phrase:

“proportionality,” “cooperation” and “sustained, active, hands-on judicial case management.”⁸³

It follows, then, that one of the most effective ways that judges can ensure proportional discovery is to make sure that counsel and the parties are aware of the benefits of cooperating during discovery and to encourage them to do so.

While there is little doubt that proportional discovery in a case is not possible in the absence of cooperation between the parties and their counsel, the Federal Rules of Civil Procedure do not explicitly require cooperation. A duty to cooperate certainly is implicit in the collective requirements of a number of rules, however. Federal Rule of Civil Procedure 1 stated, prior to December 1, 2015, that the rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” Rule 26(f) requires the parties to “confer as soon as practicable” to discuss the case and attempt “in good faith to

⁸³ Judge Campbell Memorandum, *supra* note 26, at Appendix B-2.

agree on . . . [a] proposed discovery plan,” which they then must submit to the court in a written report. Rule 26(g)(1) requires an attorney or party (if unrepresented) to sign every discovery request, response or objection, and it states that the signature “certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,” the discovery request, response or objection is not “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 in the action.” Additionally, Rule 37 provides a significant number of sanctions that a court may impose for “failure to make disclosures or to cooperate in discovery.”⁸⁴ And, courts long have encouraged counsel and parties to cooperate during the discovery process to achieve proportionality.⁸⁵

⁸⁴ While sanctions are available to deter and punish parties who fail to comply with the discovery rules or orders of the court, judges cannot expect to achieve cooperative discovery through imposition of sanctions alone. Indeed, the Committee Note to newly amended Rule 1 makes it clear that the emphasis on cooperation between the parties when they employ the discovery rules “does not create a new or independent source of sanctions.” Note to Fed. R. Civ. P. 1 (2015). While failure to cooperate, standing alone, is not subject to sanctions, it often leads to conduct that the rules prohibit, which may be sanctionable. Moreover, when cooperation is the goal, sanctions for conduct that violates the rules are effective when they are a last resort—the “stick” that is appropriate only when the use of “carrots” to persuade the parties of the mutual benefits of cooperation has failed. The most effective way to achieve cooperation during discovery is for the judge to be actively involved in monitoring all phases of the discovery process, and to educate the parties at the start of each case how it is to their mutual advantage to reduce expense, delay, and burden by cooperating in the design and execution of focused discovery appropriate for the needs of the particular case.

⁸⁵ See, e.g., *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 360 n.3 (D. Md. 2008) (collecting cases) (“It cannot seriously be disputed that compliance with the ‘spirit and purposes’ of . . . [the] discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot ‘behave responsively’ during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.”).

Furthermore, the 2015 changes to the Federal Rules of Civil Procedure include a revision to Rule 1 and its advisory note to further underscore the importance and value of cooperation.

As explained by Judge David Campbell, Chair of the Civil Rules Advisory Committee:

As already noted, cooperation among parties was a theme heavily emphasized at the Duke Conference. Cooperation has been vigorously urged by many other voices, and principles of cooperation have been embraced by concerned organizations and adopted by courts and bar associations. The Committee proposes that Rule 1 be amended to make clear that parties as well as courts have a responsibility to achieve the just, speedy, and inexpensive resolution of every action. The proposed Committee Note explains that “discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”⁸⁶

Toward that goal, revised Rule 1 now states: “[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts. . . . They should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.” (emphasis added).⁸⁷ Absent cooperation between the parties, the court and the parties cannot “employ” the rules of civil procedure in a manner that fulfills the aspirational goals of Rule 1.

Thus, one of the most effective tools that judges employ to achieve proportional discovery is to ensure that counsel and the parties are aware of the benefits of cooperation, and to encourage them to cooperate.⁸⁸ They do this by exhorting and admonishing the parties to

⁸⁶ Judge Campbell Memorandum, *supra* note 26, at Appendix B-13.

⁸⁷ Fed. R. Civ. P. 1 (2015); *see* Judge Campbell Memorandum, *supra* note 26, at Appendix B-21.

⁸⁸ *See, e.g., Thompson v. C & H Sugar Co.*, No. 12-CV-00391, 2014 WL 595911, at *5-6 (N.D. Cal. Feb. 14, 2014); *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10C5711, 2012 WL 4498465, at *1, *8-9, *12 (N.D. Ill. Sept. 28, 2012); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-61, 364-65 (D. Md. 2008); *Perez v. Mueller*, No. 13-C-1302, 2014 WL 2050606, at *5 (E.D. Wis. May 19, 2014); *SEC v. Collins & Aikman Corp.*, 246 F.R.D. 403, 415 (S.D.N.Y. 2009); *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010); *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985).

cooperate,⁸⁹ educating them about the benefits of cooperation and providing examples of how to cooperate,⁹⁰ and—in the rare circumstances where education and encouragement have not worked—reminding them that uncooperative behavior can lead to conduct that the rules do not permit, which could result in the imposition of sanctions.⁹¹ Judges also promote cooperation by informing the parties about publications that discuss how they can achieve cooperation and the advantages of doing so.⁹²

3. Adopting Informal Discovery Resolution Methods

⁸⁹ *Thompson v. C. & H. Sugar Co.*, No. 12-CV-00391, 2014 WL 595911, at *5-6 (N.D. Cal. Feb. 14, 2014) (Court ordered the parties to meet and confer to agree on search methodology for ESI discovery that it described as “incredibly broad,” and admonished that “this court has emphasized the importance of the parties cooperating to iron out discovery wrinkles on their own.”); *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *1, *8-9, *12 (N.D. Ill. Sept. 28, 2012) (magistrate judge assigned to resolve discovery disputes in contentious antitrust case admonished lawyers on the requirement to cooperate in planning and executing discovery); *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985) (magistrate judge noted the excessive costs in pending commercial litigation and admonished counsel regarding the duty to be cooperative in the conduct of discovery and only seek court intervention in “extraordinary circumstances” involving “significant interests.”).

⁹⁰ *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-61, 364-65 (D. Md. 2008) (magistrate judge extensively discussed origin of duty to cooperate in discovery to achieve proportionality, citing Rules 26(g) and Rule 26(b)(2)(C)(1)-(iii), and provided specific guidance on steps that should be taken to do so.).

⁹¹ *Perez v. Mueller*, No. 13-C-1302, 2014 WL 2050606, at *5 (E.D. Wis. May 19, 2014) (district judge issued order denying defense motion to dismiss and provided guidance regarding conduct of discovery, noting that the court was participating in the Seventh Circuit Electronic Discovery Pilot Program, principle 1.02 (Cooperation) of which stated “[t]he failure of counsel or the parties . . . to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.”).

⁹² *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009) (district judge analyzed discovery disputes stemming from large volume of ESI sought in discovery, discussed the obligation of the parties to confer in developing a discovery plan, and drew their attention to the Sedona Conference Cooperation Proclamation, which urges parties to work in a cooperative rather than adversarial manner to keep discovery costs from becoming burdensome); *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (magistrate judge required parties to meet and confer to agree on a phased discovery plan, and required them to be familiar with the Sedona Conference Cooperation Proclamation.).

When the parties have discovery disputes that they cannot solve without court intervention, the filing and resolution of motions to compel, for protective orders, or seeking sanctions can involve significant time and expense. The ready availability of seemingly limitless discovery opinions (accessible via internet legal research websites such as Westlaw and Lexis) means that even the most mundane discovery dispute can involve excessive briefing—with its attendant costs to the parties. Nonetheless, judges can resolve most discovery disputes with little or no briefing at all, if the parties notify them of the dispute as soon as it arises, and they swiftly intervene. Accordingly, one of the most effective tools that judges use to reduce discovery costs and achieve proportionality is to adopt informal discovery resolution methods that eliminate the need for formal briefing of disputes.⁹³ Examples of informal discovery resolution methods include: allowing the parties to submit brief letters outlining the issues, followed by a telephone conference;⁹⁴ requiring a “pre-motion” conference with parties to address and attempt informally to resolve discovery issues without any briefing at all;⁹⁵ and having informal discovery conferences (in person or by phone) in lieu of in-court hearings.⁹⁶

Informal discovery dispute resolution measures can be particularly effective in promoting proportional discovery, because they permit the judge to intervene in a dispute before it can

⁹³ Indeed, the survey conducted for this thesis of district and magistrate judges indicated that 62% of the district judges had used informal methods to resolve discovery disputes, as did 74% of the magistrate judges. The cases reviewed also supported the efficacy of informal discovery dispute resolution methods. *See, e.g., Eisai Inc. v. Sanofi-Aventis U.S. LLC*, No. 08-4168, 2012 WL 1299379, at *1 (D.N.J. Apr. 16, 2012); *In re Morgan Stanley Mort. Pass-Through Certificate Litig.*, No. 09-CV-02137, 2013 WL 4838796, at *1 (S.D.N.Y. Sept. 11, 2013); *Raza v. City of New York*, No. 13-CV-3448, 2013 WL 6177392, at *2 (S.D.N.Y. Nov. 22, 2013); *Willnerd v. Sybase, Inc.*, No. 09-500, 2010 WL 4736295, at *1 (D. Idaho Nov. 16, 2010).

⁹⁴ *Eisai Inc. v. Sanofi-Aventis U.S. LLC* and *In re Morgan Stanley Mort. Pass-Through Certificate Litig.*, *supra*, note 93.

⁹⁵ *Raza v. City of New York*, *supra*, note 93.

⁹⁶ *Willnerd v. Sybase, Inc.*, *supra*, note 93.

escalate to the filing of motions and counter-motions. Further, when the parties know that if they behave improperly during discovery, they will not be able to do so for long because the judge will become involved promptly, they have less incentive to adopt delaying tactics such as making boilerplate objections, filing clearly deficient answers to interrogatories or document production requests, or misbehaving during a deposition. Moreover, when a judge adopts informal discovery resolution techniques, he or she can “suggest” resolutions without having to enter an actual ruling and give guidance on measures the parties can take, focusing on problem solving, rather than assessing blame or imposing sanctions. And, when a judge makes it clear how he or she expects the parties to conduct discovery during an informal conference or two, they soon learn to resolve disputes on their own, by anticipating what the judge is likely to require and moderating their positions accordingly.

Finally, the use of informal discovery resolution techniques is one of the most effective ways of making efficient use of a judge’s time. It takes far less time to read a two or three page letter outlining a discovery dispute and hold a fifteen minute telephone conference than it does to read a multi-page motion (with memorandum), opposition and reply memorandum, and draft a formal opinion. And, even a judge with a busy trial docket usually can find thirty minutes to an hour on any given day before or after trial, or during a lunch recess to address discovery disputes informally. Thus, judges who adopt informal discovery dispute resolution methods find that they spend less time addressing discovery disputes and more time on the substantive issues in their cases.

The Civil Rules Advisory Committee has recognized the value of encouraging judges to adopt informal procedures to resolve discovery disputes to help minimize cost. The 2015 changes to Fed. R. Civ. P. 16(b) gave courts the authority to “direct that before moving for an

order relating to discovery, the movant must request a conference with the court.”⁹⁷ The accompanying Advisory Committee Note explains the rationale for the new language:

The [scheduling] order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion. . . .⁹⁸

Finally, adopting informal procedures to resolve discovery disputes is one of the most effective ways of implementing active judicial case management because it allows the judge to inject himself or herself very promptly at the first sign of a discovery problem, and—with a minimum amount of delay and cost—take action to resolve the problem before it has a chance to spiral out of control. Because of its efficiency, the judge may use it as frequently as needed to keep a case on course to achieve proportionality.

4. Phasing Discovery

Judges also may keep costs and burdens in check by ordering that discovery occur in stages, with the initial phases focusing on the information most likely to be relevant to resolving the central claims and defenses, with additional phases allowed based on the result of the initial phase.⁹⁹ In one case, the court explained in writing the rationale of its prior oral ruling resolving a series of discovery disputes, and addressed phased discovery as a means to keep discovery proportional, saying:

⁹⁷ Fed. R. Civ. P.16(b)(3)(B)(v) (2015); see Judge Campbell Memorandum, *supra* note 26, at Appendix B-27.

⁹⁸ *Id.* at Appendix B-29.

⁹⁹ See, e.g., *Equal Emp’t Opportunity Comm’n v. Princeton Healthcare Sys.*, No. 10-4126, 2011 WL 2148660, at *11-12 (D.N.J. May 31, 2011); *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 300-01 (S.D.N.Y. 2012); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 365 (D. Md. 2008); *Bosh v. Cherokee Cnty. Governmental Bldg. Auth.*, No. 11-CV-376, 2013 WL 6150799, at *2-3, (E.D. Okla. Nov. 22, 2013); *Fisher v. Fisher*, No. WDQ-11-1038, 2012 WL 2050785, at *5 (D. Md. June 5, 2012); *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010).

I suggested that . . . [counsel] consider ‘phased discovery’, so that the most promising, but least burdensome or expensive sources of information could be produced initially which would enable Plaintiffs to reevaluate their needs depending on the information already provided.¹⁰⁰

Judges often order phasing when parties seek discovery covering a long span of time,¹⁰¹ and ordering phased discovery is a convenient way for a court to achieve proportionality by not having to issue an “all or nothing” ruling, but rather one that meets the legitimate concerns of both the requesting and producing party.¹⁰² Finally, phasing discovery works best if counsel and the parties cooperate to identify the information that the requesting party needs most, and soonest, and which the producing party can obtain from the most readily available sources. Accordingly, judges who order phasing often remind counsel of the need to cooperate to ensure selection of the appropriate initial discovery.¹⁰³

5. Appointment of Judicial Adjuncts

Active judicial monitoring and management of discovery can reduce the amount of time needed to resolve discovery disputes by nipping them in the bud before they multiply in number or complexity. However, in the infrequent circumstance where a judge’s schedule prevents

¹⁰⁰ *Mancia v. Mayflower Textile Servs. Co.*, *supra* note 99, at 365.

¹⁰¹ *See, e.g., Equal Emp’t Opportunity Comm’n v. Princeton Healthcare Sys.*, *supra* note 99 (Plaintiff in class action discrimination case sought document discovery without any temporal limits. Citing Rule 26(b)(2)(C), the court found that the request was too abstract and unlimited and ordered initial discovery for a six year period, advising that depending on the results of the first phase, additional discovery was possible for an additional three years.).

¹⁰² *See, e.g., Chen-Oster v. Goldman Sachs & Co.*, *supra* note 99 (court discussed phasing discovery as a means of achieving proportionality); *Bosh v. Cherokee Cnty. Governmental Bldg. Auth.*, *supra* note 99 (court cited proportionality sections of Rule 26(b)(2)(C)(iii) and discussed how phasing discovery to focus first on a limited number of medical records could achieve it); *Fisher v. Fisher*, *supra* note 99 (court discussed proportionality under all three sub-sections of Rule 26(b)(2)(C), and imposed phased discovery, informing the plaintiff that additional discovery would be possible based on the results of the initial discovery).

¹⁰³ *See Tamburo v. Dworkin*, *supra* note 99 (court ordered the parties to meet and confer to prepare a phased discovery schedule and reminded them of the obligation to cooperate in doing so).

active monitoring and management of discovery, or where a case is so large or complex that it requires a great deal of hands-on management that the judge cannot provide without sacrificing obligations to other cases, the appointment of a “judicial adjunct” such as a magistrate judge, special master or other neutral to help manage the discovery may be an appropriate tool to ensure that the discovery is proportional.¹⁰⁴ District judges most commonly appoint magistrate judges when they are unable or unwilling to monitor and manage discovery personally. Magistrate judges are judicial officers, and involving them does not impose additional expense on the parties. However, some circumstances may warrant the appointment of a special master, despite the cost, such as for multidistrict cases, mass tort litigation, large class action cases or especially complex intellectual property cases. Given the expense involved, Fed. R. Civ. P. 53 requires that in “appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.”¹⁰⁵ It also prohibits the judge from appointing a special master except to perform duties with the parties’ consent or that “some exceptional condition” warrants or to “address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.”¹⁰⁶

A distinction must be drawn, however, between appointment of a true special master under Rule 53 to exercise judicial duties and the more frequent practice that some judges employ

¹⁰⁴ See, e.g., *Eisai Inc. v. Sanofi-Aventis U.S. LLC*, No. 08-4168, 2012 WL 1299701, at *11 (D. N.J. Apr. 16, 2012) (In an antitrust case, the judge, faced with a complicated dispute regarding confidentiality order designations, appointed a special master to “expedite the timely resolution of any existing or prospective disputes regarding the designation of discovery under the confidentiality order.”); *United States v. Educ. Mgmt. LLC*, No. 2:07-cv-461, 2013 WL 3863963, at *1-3 (W.D. Pa. June 23, 2013) (district judge appointed a retired judge as a special master to resolve and narrow discovery disputes raised by numerous motions.).

¹⁰⁵ Fed. R. Civ. P. 53(a)(3).

¹⁰⁶ Fed. R. Civ. P. 53(a)(1)(A) and (C).

of appointing lawyers or experts to assist the parties with resolving discovery-related issues such as discovery of ESI. While they may be referred to as “special masters” in an informal sense, they actually are mediators or facilitators and may even be volunteers who provide their services without cost.

For example, the United States District Court for the Western District of Pennsylvania has been particularly creative in the use of neutral third parties to resolve discovery disputes involving ESI.¹⁰⁷ Having “determined that litigants in this District may benefit from the appointment of Electronic Discovery Special Masters (‘EDSMs’) in appropriate cases, in order to assist in addressing ESI issues that may arise during the litigation,”¹⁰⁸ the court developed criteria for assessing the qualifications of these technical special masters, based on litigation experience (especially involving ESI), training and experience with computers and technology, and training and experience in mediation.¹⁰⁹ When the parties request, or the presiding judge determines that it is necessary, the judge appoints an EDSM from a list of pre-approved candidates and designates the duties to be performed. This may include “developing protocols for the preservation, retrieval or search of potentially relevant ESI; developing protective orders to address concerns regarding the protection of privileged or confidential information; monitoring discovery compliance; [or] resolving discovery disputes.”¹¹⁰ If the EDSM must make findings of fact or conclusions of law they must be presented to the court in the form of a

¹⁰⁷ See Electronic Discovery Information, available at www.pawd.uscourts.gov./electronic-discovery-information (last visited Jan. 21, 2016).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

report and recommendation, with the parties having the opportunity to object, and the court will review them *de novo*.¹¹¹

Appointment of a judicial adjunct to assist a judge in monitoring and managing the discovery practice in cases where the court lacks the time to do so personally can be very effective in keeping discovery costs proportional in cases where the substantive issues, discovery issues, or both, are complex. Because the large dockets that most federal judges have limit the amount of time that a judge can spend on any single case, those that demand far more judicial time than most others are potential candidates for the appointment of a judicial adjunct to assist the trial judge.

6. Cost Shifting

Although the Federal Rules of Civil Procedure are silent about which party must bear the burden and expense of responding to legitimate discovery requests, the Supreme Court clearly articulated what has come to be known as “the American Rule,” stating that “the presumption is that the responding party must bear the expense of complying with discovery requests.”¹¹² But the Court added, importantly, that the responding party “may invoke the district court’s discretion under Rule 26(c) to grant orders protecting him from ‘undue burden or expense’ in doing so, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.”¹¹³ Thus, cost shifting is an available and appropriate tool for judges to use to

¹¹¹ *Id.*

¹¹² *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

¹¹³ *Id.*

guard against the excessive costs and burdens of disproportional discovery requests, and courts have been willing to use this method, though sparingly, when appropriate.¹¹⁴

One instance in which courts have been willing to order cost shifting is when a party seeks discovery of ESI “from sources that the [producing] party identifies as not reasonably accessible because of undue burden or cost.”¹¹⁵ In such circumstances, Rule 26(b)(2)(B) permits the producing party to refuse to provide the ESI, in which case the requesting party then must file a motion to compel its production.¹¹⁶ The burden then shifts to the producing party to “show that the information is not reasonably accessible because of undue burden or cost,” and if done

¹¹⁴ See, e.g., *Thompson v. C & H Sugar Co.*, 12-CV-00391, 2014 WL 595911, at *6 (N.D. Cal. Feb. 14, 2014) (Court ordered cost shifting related to costs associated with reviewing and copying timesheets and payroll data plaintiff sought in employment discrimination case); *Ameriwood Indus., Inc. v. Liberman*, No. 4:06CV524, 2006 WL 3825291, at *5 (E.D. Mo. Dec. 27, 2006) (Court approved discovery of ESI on condition that plaintiff incur the costs associated with creating mirror images of computer hard drives, recovering information from the drives, and translating it into searchable format); *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445, 2011 WL 2154279, at *4 (N.D.N.Y. Apr. 15, 2011) (Court discussed circumstances in which cost shifting would be justified requiring plaintiff to pay for some or all of the defendants’ costs in order to achieve proportionality in discovery); *Cochran v. Caldera Medical, Inc.*, No. 12-5109, 2014 WL 1608664, at *2-3, (E.D. Pa. Apr. 22, 2014) (Court discussed circumstances when cost shifting would be appropriate, noting that generally it is not unless discovery is sought from inaccessible sources); *Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 3446761, at *6 (D.N.J. Oct 20, 2009) (Court discussed proportionality requirement of civil rules and ordered plaintiff and defendant to share cost of ESI discovery from inaccessible source); *Boeynaems v. LA Fitness Int’l, LLC*, 285 F.R.D. 331, 338 (E.D. Pa. 2012) (Court observed that asymmetrical discovery requests made cost allocation fair and appropriate to shift certain discovery costs to plaintiff); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317-24 (S.D.N.Y. 2003) (Court discussed when cost shifting was appropriate in connection with discovery dispute regarding deleted emails, available only from less accessible back-up disks, adopted a widely cited seven factor test to evaluate cost-shifting); *Wiginton v. C.B. Richard Ellis, Inc.*, 229 F.R.D., 572-77 (N.D. Ill. 2004) (court evaluated proportionality factors and used a “marginal utility” test to order partial cost shifting with regard to costs of producing emails from back-up tapes, Plaintiffs ordered to pay 25%, defendants 75%).

¹¹⁵ Fed. R. Civ. P. 26(b)(2)(B).

¹¹⁶ *Id.*

successfully the court may order the discovery from inaccessible sources, but “may specify conditions for the discovery.”¹¹⁷

When a producing party invokes Rule 26(b)(2)(B) successfully, courts have been willing to order complete or partial cost-shifting.¹¹⁸ Because discovery of ESI involves particularly great risks of disproportionality, it is no surprise that courts most often order cost shifting for this type of discovery.¹¹⁹ Courts also have ordered cost shifting in cases involving “asymmetrical discovery”—where the requesting party seeks substantial discovery from the producing party, but has relatively little information that the requesting party seeks in return.¹²⁰ Courts often order cost shifting only after determining that the requesting party already has obtained substantial discovery, but seeks additional burdensome and costly discovery of minimal relevance.¹²¹

Importantly, although courts have not been reluctant to order cost shifting when necessary to achieve proportional discovery, they have been very mindful that the producing

¹¹⁷ *Id.*

¹¹⁸ *See, e.g., Cochran v. Caldera Medical, Inc., supra* note 114, at *2-3 (court noted that cost shifting generally is not appropriate unless discovery is sought from inaccessible sources); *Major Tours, Inc. v. Colorel, supra* note 114, at *6 (court ordered plaintiff and defendant to share cost of discovery of ESI from inaccessible source).

¹¹⁹ *See, e.g., Ameriwood Indus., Inc. v. Liberman, supra* note 114, at *5; *Wood v. Capital One Servs., LLC, supra* note 114, at *4; *Cochran v. Caldera Medical, Inc., supra* note 114, at *2-3; *Major Tours v. Colorel, supra* note 114, at *6; *Zubulake v. UBS Warburg LLC, supra* note 114, at 317-24; *Wiginton v. CB Richard Ellis, Inc., supra* note 114, at 572-77.

¹²⁰ *See Boeynaems v. LA Fitness Int’l, LLC, supra* note 114, at 338.

¹²¹ *See Wood v. Capital One Servs., LLC*, No. 09-1445, 2011 WL 2154279, at *4 (N.D.N.Y. Apr. 15, 2011) (court noted that Plaintiff already had received a “considerable amount” of discovery from interrogatories, and document production requests, and had received approximately 1,500 pages of documents, had deposed for two days a Rule 30(b)(6) witness, and had received more than four hundred pages of emails from the other Defendant, from a computerized search using most of the search terms Plaintiff requested, and had taken a Rule 30(b)(6) deposition of the second Defendant’s designee as well. Accordingly, the court allowed further discovery of marginally relevant information only if Plaintiff agreed to pay all or part of Defendants’ costs).

party generally must bear the cost of discovery, as stated in *Oppenheimer*,¹²² and have not ordered cost shifting without careful analysis of the particular circumstances justifying it. For example, in *Zubulake v. UBS Warburg*,¹²³ the court crafted an often-cited seven factor test to determine when cost-shifting is appropriate when a requesting party seeks ESI from inaccessible, costly and burdensome sources. Those factors are: (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.¹²⁴ A court's careful consideration of these factors balances the need of the requesting party for the information, against the burden on the producing party if compliance is required, and it ensures that the discovery ordered is proportional to what is at issue in the case.

Finally, the 2015 amendments to the Federal Rules of Civil Procedure provide explicit authority for cost shifting. Rule 26(c) now states that, in ruling on a motion for a protective order, the court may order discovery “specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery.”¹²⁵

7. Controlling the Scope of Discovery

Once a scheduling order is issued and discovery proceeds, the process generally takes place without the judge knowing exactly what discovery requests and answers the parties have

¹²² *Supra* note 112.

¹²³ *Supra* note 114, at 317-24.

¹²⁴ *Supra* note 114, at 322.

¹²⁵ Fed. R. Civ. P. 26(c) (2015); *see* Judge Campbell Memorandum, *supra* note 26, at Appendix B-34.

served, unless a dispute arises requiring the court to resolve it. Accordingly, overly-broad or repetitive discovery requests may impose a significant burden on a responding party if the requesting party seeks more discovery than reasonably is necessary. This can occur easily because parties serve document production requests and interrogatories on an adverse party, but do not file them with the court. Similarly, although the 2015 amendments to the federal rules of civil procedure narrowed the scope of discovery,¹²⁶ it long had been broadly defined as permitting discovery of “any nonprivileged matter that is relevant to any party’s claim or defense” and, upon a showing of “good cause,” could be expanded to “discovery of any matter relevant to the subject matter involved in the action.”¹²⁷ And, because parties typically file the most potentially abusive discovery—requests for production of documents and interrogatories—early in the litigation before they have much knowledge about the underlying facts, there often is a tendency for counsel to ask for far broader discovery than they are likely to need as evidence if the case goes to trial. Since requesting parties and producing parties often have radically different views on the appropriate scope of discovery, it is quite frequent to have disputes about the proper scope of discovery. When this occurs, one method that courts have used to keep the discovery proportionate is to narrow the scope of discovery.¹²⁸

¹²⁶ Prior to the 2015 amendments to the Civil Rules, the scope of discovery under Rule 26(b)(1) allowed a party to obtain information that was not privileged or work product protected, if it was “relevant to any party’s claim or defense,” and, thereafter, upon a showing of good cause, the scope of discovery could be expanded to include information more broadly relevant to the “subject matter” involved in the litigation. The 2015 revisions to the scope of discovery permitted by Rule 26(b)(1) eliminates “subject matter” discovery entirely, and limits the scope of discovery to information “relevant to any party’s claims or defenses.” Judge Campbell Memorandum, *supra* note 26, at Appendix B-9.

¹²⁷ Fed. R. Civ. P. 26(b)(1) (2000).

¹²⁸ See, e.g., *Salamone v. Carter’s Retail, Inc.*, No. 09-5856, 2010 WL 310701, at *12 (D.N.J. Jan. 28, 2011); *Equal Emp’t Opportunity Comm’n v. Princeton Healthcare System*, No. 10-4126, 2011 WL 2148660, at *17 (D.N.J. May 31, 2011); *Int’l Paper Co. v. Remax, Inc.*, No. 11-6494, 2013 WL 3043638 at *7 (D.N.J. June 17, 2013); *Barton v. RCI, LLC*, No. 10-3657, 2013 WL

Sometimes courts limit the scope of discovery at the outset, but permit the parties to obtain additional more expansive discovery based on the results of the initial discovery.¹²⁹ This approach has the advantage of encouraging the requesting party to tailor the initial discovery requests to the information most important to its claim or defense. By doing so, if it later seeks additional discovery, it will be able to demonstrate to the court that it should be allowed, based on the relevance of the initial discovery received. This type of sequential, focused discovery is far more likely to be proportional because it begins with what is clearly the most important information in the case. However, to persuade the parties not to ask for overly-broad information at the outset, the judge must convince them that he or she will permit additional discovery if they target their initial requests more narrowly and justify their requests for more based on the results of the first requests. In other instances, the judge simply rules that disputed discovery requests are overbroad, and narrows them without discussing the possibility of allowing more.¹³⁰ Thus, courts display a willingness to prohibit cumulative or duplicative

1338235, at *10-11 (D.N.J. Apr. 1, 2013); *Emerson Elect. Co. v. Le Carbone, S.A.*, No. 05-6042, 2009 WL 435191, at *1-2 (D.N.J. Feb. 18, 2009); *Willnerd v. Sybase, Inc.*, No. 1:09-cv-500, 2010 WL 4736295 (D. Idaho Nov. 16, 2010).

¹²⁹ See, e.g., *Salamone v. Carter Retail, Inc.*, *supra* note 128 (court permitted the plaintiff to obtain additional discovery because plaintiff initially had agreed to a more narrow scope of discovery, and based on the results, additional discovery was permitted because it was not unduly burdensome); *Equal Emp't Opportunity Comm'n v. Princeton Healthcare System*, *supra* note 128 (court found that temporal scope of plaintiff's discovery request was too broad and abstract, narrowing it to a period of six years, but stated that if the results of the initial discovery warranted additional discovery, plaintiff could seek to obtain discovery for an additional four years).

¹³⁰ See, e.g., *Int'l Paper Co. v. Remax, Inc.*, *supra* note 128 (court found that defendant's discovery requests sought relevant information, but were "sweeping[ly] broad;" ordered Defendant to refine and resubmit the requests being "mindful" of the court's concerns about scope and proportionality); *Emerson Elec. Co. v. Le Carbone, S.A.*, *supra* note 128 (citing Rule 26(b)(2)(C), court narrowed the scope of questions to be asked of witness during deposition); *Willnerd v. Sybase, Inc.*, *supra* note 128 (court ruled that permission that had been given to plaintiff to file an amended complaint did not "throw open the doors to . . . [broad additional]

discovery by narrowing the scope of discovery, and this is particularly so when they find that “the party seeking discovery has had ample opportunity to obtain the information by discovery” already taken.¹³¹

8. Prohibition of “Boilerplate” Objections

When lawyers propound interrogatories and document production requests during discovery, the party to whom they are directed must file a written response within thirty days.¹³² Rule 33(b)(4) requires that, if a party responding to an interrogatory objects to it, “the grounds for objecting . . . must be stated with specificity.” Although, until the 2015 amendments, Rule 34 did not explicitly require that objections to document production requests be stated with particularity, courts had read that rule as “*in pari materia*” with Rule 33, to require that objections to document requests also be stated with particularity.¹³³ The 2015 amendments now include an explicit requirement to specify the basis for any objection to a document production request.¹³⁴ This enables the requesting party to re-evaluate the propriety of the request as initially served, and to amend it if necessary to be more focused and less burdensome or expensive. Particularized objections facilitate a cooperative dialogue between counsel and enable them to revise objectionable requests in response to legitimate objections without adding to the cost of discovery by requiring the requesting party to file a motion to compel. In practice, however, it is not unusual for counsel to ignore the obligation to particularize objections, and to

discovery” but ordered that “tight restrictions” were to be imposed on the scope of discovery appropriate with regard to the newly added claim).

¹³¹ Fed. R. Civ. P. 26(b)(2)(C)(ii) (2000).

¹³² Fed. R. Civ. P. 33(b)(2) (interrogatories) and 34(b)(2)(A) (document production requests).

¹³³ See, e.g., *Hall v. Sullivan*, 231 F.R.D. 468, 470 (D. Md. 2005).

¹³⁴ Fed. R. Civ. P. 34(b)(2)(B) (2015); see Judge Campbell Memorandum, *supra* note 26, at Appendix B-51 (“For each item or category [requested], the response must either state that the inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons.”).

respond to each interrogatory and document request with a non-particularized “boilerplate” objection that it was “overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.” The absence of an explanation why the request is objectionable deprives the requesting party of the information needed to determine whether it can be tailored to avoid a legitimate objection, delays the production of discovery needed to move the case forward, and usually leads to the filing of a motion to compel, requiring court resolution of the dispute.

Judges almost uniformly condemn the practice of making boilerplate objections, yet still they persist.¹³⁵ For this reason, judges who make it clear to the parties that boilerplate objections will not be permitted help achieve proportional discovery by preventing an abusive practice that can add to the cost of discovery and undermine cooperation.¹³⁶

9. Ordering Sampling of Voluminous Data Sources to Reduce Cost and Burden

¹³⁵ See, e.g., *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (citing cases that have held that boilerplate objections are inappropriate. The court explained “Rule 26(g) . . . was enacted over twenty-five years ago to bring an end to the . . . abusive practice of objecting to discovery requests reflexively—but not reflectively—and without factual basis. The rule and its commentary are starkly clear: an objection to requested discovery may not be made until after a lawyer has ‘paused and consider[ed]’ whether, based on a ‘reasonable inquiry,’ there is a ‘factual basis [for the] objection.’”).

¹³⁶ See, e.g., *Dawson v. Ocean Twp.*, No. 09-6247, 2011 WL 890692, at *17 (D.N.J. Mar. 14, 2011) (in a police misconduct civil rights case, the court prohibited “generalized” boilerplate objections, stating “the Court notes that ‘it is not sufficient to merely state a generalized objection, instead, the objecting party must demonstrate that a particularized harm is likely to occur if the discovery be had by the party seeking it’”); *Mancia v. Mayflower Textile Servs. Co.*, *supra* note 135; *D.J.’s Diamond Imps., LLC v. Brown*, No. WMN-11-2027, 2013 WL 134082, at *2, *4-10 (D. Md. Apr. 1, 2013) (“[O]bjections to interrogatories must be specific non-boilerplate, and supported by particularized facts where necessary to demonstrate the basis for the objection.”); *Koch v. Koch Indus.*, No. 85-1636-C, 1992 WL 223816, at *1, *5, *9 (D. Kan. Aug. 24, 1992) (“A party will not be able successfully to oppose discovery on bare assertions of burdensomeness, oppressiveness, or irrelevance Instead, the resisting party must show specifically, clearly and factually the basis for its objection Affidavits or evidence may be used, and even may be required in some instances, to demonstrate burden.” (internal citations omitted)).

In large cases such as class actions, intellectual property cases, Fair Labor Standards Act (“FLSA”) collective actions, and antitrust cases, the volume of information that the parties may have to review to respond to document production requests can be staggering, especially if the records to be reviewed are ESI. The costs associated with reviewing a large database of ESI to see which records within it are relevant, or exempt from discovery because they are privileged or work product protected, can add significantly to the costs of discovery and create a real risk that the cost will be disproportionately expensive. In the face of claims of disproportionate cost associated with discovery from large volume data sets, courts have turned to statistical sampling as a method to reduce costs, without unduly sacrificing the ability of the requesting party to obtain relevant information to support its case.¹³⁷

For example, one court observed that, in a diversity class action case asserting state wage and hour claims, the defendant had raised legitimate privacy concerns about allowing the putative plaintiff’s class to have discovery of payroll records of all of its employees. The court

¹³⁷ See, e.g., *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168, 2011 WL 5416330, at *17 (D.N.J. Nov. 7, 2011) (In resolving discovery dispute in antitrust case, the court ordered the supplementation of earlier discovery responses by using “limited mutual sampling” of defendant’s sales force as a means to achieve proportionality); *Kleen Prods. LLC v Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *5-6, *15 (N.D. Ill. Sept. 28, 2012) (In class action antitrust case court encouraged parties to use sampling to reduce cost and burden of searching for ESI of low level custodians of records); *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 304-07 (S.D.N.Y. 2012) (In a class action employment discrimination case, court discussed the benefits of using statistical sampling in connection with document discovery of ESI database to achieve proportionality); *Quintana v. Claire’s Boutiques, Inc.*, No. 5:13-cv-368, 2014 WL 234219, at *2 (N.D. Cal. Jan. 21, 2014) (Court ordered that Plaintiff be permitted discovery of a statistically significant sample of defendant’s records, noting that such sampling advances the goal of proportionality); *Heckler & Koch, Inc. v. German Sport Guns, GmbH*, No. 11-1108, 2014 WL 533270, at *4-5 (S.D. Ind. Feb. 7, 2014) (Court ordered parties to confer to reach agreement regarding appropriate size of sample pool of records that defendant was required to review, in an effort to achieve proportionality); *Cranney v. Carriage Servs., Inc.*, No. 2:07-cv-01587, 2008 WL 245792, at *2-3 (D. Nev. June 16, 2008) (Court cited proportionality requirement in issuing a protective order limiting discovery that defendants could obtain to ten percent of potential opt-in plaintiffs in FLSA collective action.).

noted, however, that the plaintiffs had a legitimate need to conduct discovery of the pay records of the entire putative class to support their claims that the defendant's allegedly wrongful policies and practices were common across the class. The court resolved this dispute by resorting to sampling, ruling that

[t]he right balance is struck by providing Plaintiffs' discovery of a statistically significant sample. In the specific context of class action discovery, sampling advances the goal of proportionality The court therefore ORDERS . . . [defendant] to provide a 20% sample of putative class members' information but the court leaves it to the parties to work out the particulars of how the sample is selected (e.g., cluster sampling stratified sampling, etc.). However, the sampling regime itself may not serve as a basis upon which to challenge the statistical sufficiency of the evidence.¹³⁸

Similarly, in a copyright and trademark case, another court ordered the parties to jointly develop an appropriate sampling of the defendants' records, stating:

The Court recognizes that information concerning replica firearms is potentially relevant to intentional misconduct by . . . [defendants]; however, it is too burdensome to request a list of all replica firearms, along with licensing information. The parties must find a way to manage discovery so that it is meaningful without implementing a scorched-earth policy. To ensure production of relevant information proportional to the needs of the case, Plaintiffs and Defendants are ordered to confer on an appropriately sized sample pool of replica firearms that will satisfy Plaintiffs interrogatory for which Defendants must then produce any responsive documents.¹³⁹

An added benefit of using sampling to reduce discovery costs is that if the court orders the parties to agree on the specific details of how it will be conducted, this promotes cooperation which also helps to keep discovery costs reasonable. In ordering sampling, however, a court must take care to require that the selection of the sample is in accordance with sound statistical

¹³⁸ *Quintana v. Claire's Boutiques, Inc.*, *supra*, note 137, at *2.

¹³⁹ *Heckler & Koch, Inc. v. German Sport Guns, GmbH*, *supra*, note 137, at *4.

methodology, to ensure that the sample obtained truly is representative of the entire population of data.

10. Ordering that Discovery be Made from Less Burdensome or Expensive Sources

The Federal Rules of Civil Procedure permit discovery by multiple means: interrogatories; document production requests; requests to inspect tangible things or to enter onto land to conduct inspections; depositions (by oral examination and written examination); physical and mental examinations; and requests for admissions.¹⁴⁰ Lawyers are nothing if not inventive, and desiring to leave no stone unturned, are prone to seek overlapping discovery by multiple methods. Doing so creates a real possibility of disproportionate costs. Rule 26(b)(2)(C)(i) requires the court, on its own, or responding to a motion, to limit the extent of discovery if it determines that “the discovery sought . . . can be obtained from some other source that is more convenient, less burdensome, or less expensive.”¹⁴¹ Thus, when faced with a case in which a party seeks discovery from a source or by a means that is not cost-efficient, courts are not hesitant to redirect them to less costly or burdensome sources.¹⁴²

11. Use of Protocols, Standing Orders, or Local Rules that Implement Proportionality Requirement

¹⁴⁰ Fed. R. Civ. P. 30, 31, 33, 34, 35 and 36.

¹⁴¹ Fed. R. Civ. P. 26(b)(2)(C)(i).

¹⁴² See, e.g., *Equal Emp’t Opportunity Comm’n v. Princeton Healthcare Sys.*, No. 10-4126, 2012 WL 1623870, at *1, *3, *7, *10, *24 (D.N.J. May 9, 2012) (Court held informal conference call with counsel and brokered agreement to use “less intrusive and time consuming” method of discovering information about class members. The parties agreed to have each member of the putative class fill out a fact sheet, as opposed to having the plaintiff respond to defendant’s burdensome interrogatories. After the parties failed to agree about the content of the questionnaire, the court ordered briefing and ruled that the questionnaire proposed by the defendant, with modifications, would be answered by the plaintiffs.); *Kia Motors Am., Inc. v. Autoworks Distrib.*, No. 06-156, 2007 WL 4372954, at *9 (D. Minn. Dec. 7, 2007) (district judge affirmed an order by a magistrate judge directing that discovery sought by plaintiff be obtained in a less expensive and inconvenient manner than plaintiff had requested.).

As this thesis extensively discusses, the Federal Rules of Civil Procedure require proportionality in the conduct of discovery. But, in addition to the Rules themselves, many United States district courts have adopted local rules to supplement the Federal Rules, and individual district judges have issued standing orders or other directives to refine further how the parties will conduct discovery in their cases. Authority for local rules and judge’s directives appears in Fed. R. Civ. P. 83. With respect to local rules, Rule 83(a) states that, “[a]fter giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice.”¹⁴³ Local rules “must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072¹⁴⁴ . . . and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.”¹⁴⁵ With respect to judge’s directives, Rule 83(b) states:

A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district’s local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in particular case with actual notice of the requirement.¹⁴⁶

Thus, local rules and judges’ directives must not be inconsistent with the Federal Rules of Civil Procedure.

Many district courts have enacted local rules that implement the proportionality requirement in the federal rules by adopting procedures that make discovery more cooperative,

¹⁴³ Fed. R. Civ. P. 83(a).

¹⁴⁴ 28 U.S.C. § 2072(a) grants authority to the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.” The adoption of rules pursuant to this statute “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b).

¹⁴⁵ Fed. R. Civ. P. 83(a).

¹⁴⁶ Fed. R. Civ. P. 83(b).

efficient, and less expensive or burdensome, and by encouraging judges to be available expeditiously and informally to resolve discovery disputes.¹⁴⁷ Others have adopted discovery guidelines, protocols or pilot projects that further implement the requirements of proportional discovery.¹⁴⁸ Judges frequently call the attention of counsel to local rules, guidelines, pilot projects and protocols, and by doing so promote proportional, cost-effective discovery.¹⁴⁹

¹⁴⁷ See, e.g., D. Mass. R. 26.1(a) (providing that each “judicial officer should encourage cost effective discovery by means of voluntary exchange of information among litigants and their attorneys,” such as by exchanging information without the need for formal discovery requests) and R. 26.3 (promoting “efficient completion of discovery” by authorizing judges to “phase and sequence topics which are the subject of discovery”); N.D. Cal. R. 37-1(b) (permitting counsel to request that a presiding judge be available by telephone to resolve a discovery dispute if doing so “would result in substantial savings of expense or time”) and 37-2 (requiring each motion to compel to include a showing that “the proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied”); and D. Md. Loc. R., App’x A, Discovery Guideline 1.a. (stating that “Fed. R. Civ. P. 26 requires that discovery be relevant to any party’s claim or defense; proportional to what is at issue in a case; and not excessively burdensome or expensive as compared to the likely benefit of obtaining the discovery sought”; adding that “[t]he parties and counsel have an obligation to cooperate in planning and conducting discovery to tailor the discovery to ensure that it meets these objectives”).

¹⁴⁸ See, e.g., D. Md. Loc. R. App’x A (adopting comprehensive Discovery Guidelines that explicitly note the requirement for proportional, cost-effective discovery, and the requirement that counsel cooperate during discovery to achieve it); *Travelers Prop. Cas. Co. of Am. v. Cannon & Dunphy, S.C.*, 997 F. Supp. 2d 937, 944 (E.D. Wisc. 2014) (discussing the Seventh Circuit Electronic Discovery Pilot Program (“Seventh Circuit Pilot Program”), in particular principle 1.03, which requires application of the proportionality standard to ESI discovery); and *Swanson v. ALZA Corp.*, No. CV 12-04579-PJH, 2013 WL 5538908, at *2 (N.D. Cal. Oct. 7, 2013) (court referred counsel to N.D. Cal. Guidelines addressing discovery of ESI which contain a requirement that it be proportional).

¹⁴⁹ See, e.g., *Kleen Prods. LLC v. Packaging Corp of Am.*, No 10 C 5711, 2012 WL 4498465, at *3, *6, *18, *19 n.14 (N.D. Ill. Sept. 28, 2012 (magistrate judge ruling on multiple discovery issues in a class action antitrust case discussed ways to achieve proportionality, including cooperation among counsel, and informed counsel of the location of various model orders to assist them in doing so, including reference to the Seventh Circuit Pilot Program); *Travelers Prop. Cas. Co. of Am. v. Cannon & Dunphy, S.C.*, *supra* note 148 (Court discussed importance of proportional discovery, referenced the Seventh Circuit Pilot Program.); *Perez v. Mueller*, No. 13-C-1302, 2014 WL 2050606, at *7 (E.D. Wisc. May 19, 2014) (court referenced its participation in the Seventh Circuit Pilot Project, specifically principle 1.03, which requires proportionality in discovery of ESI); *Plascenca v. BNC Mortg., Inc.*, No. 08-56305, 2012 WL 2161412, at *3, *6, *8, *11 (Bankr. N.D. Cal. June 12, 2012) (bankruptcy judge in adversary action provided guidance to parties on how to conduct discovery, referring them to local rules of

Similarly, some courts have reduced discovery costs by adopting the use of approved pattern discovery request forms (especially for interrogatories and document requests) that are useful for types of frequently filed cases involving similar fact patterns, claims, and defenses. Examples are adverse-action employment discrimination cases, FLSA cases and Fair Debt Collection Practices Act cases.

Use of pre-approved discovery request forms promotes proportionality by eliminating or reducing the wrangling that often occurs when parties spar over the appropriateness of discovery requests, or the clarity of the language used in them. When the requesting party uses court-approved discovery forms, there will be fewer objections to the form of the requests, because the producing party knows that the court will not take kindly to objections to the form of requests the court already has approved.

When individual district courts and judges adopt local rules, guidelines, protocols, pilot programs and case management directives that further implement the proportionality requirement of Rule 26(b), and reference them during their case management conferences and in discovery rulings, they help promote the goals of Rule 26(b) not just in individual cases, but by making the entire bar practicing before that court aware of the courts' expectations. Over time, this can improve the entire culture of how lawyers behave during discovery.

12. Encouraging the Use of Technology to Reduce the Costs of Discovery of ESI

Discovery of ESI can pose particular challenges to achieving proportionality, given the vast amount of electronic information that may be potentially relevant, even in the most modest cases. The Rand Corporation has estimated that, of the three primary cost components of ESI

court and discussing proportionality requirement of N.D. Cal. R 37-2.); *Swanson v. ALZA Corp.*, *supra* note 148, at *2 (magistrate judge referenced the N.D. Cal. Discovery Guidelines for ESI discovery, which require proportionality).

discovery (collection, processing, and review), \$0.73 of each dollar spent is attributed to attorney review, while only \$0.08 is attributed to collection costs, and \$0.19 on processing costs.¹⁵⁰ Rand concluded that, “[i]f e-discovery production costs are ever to be addressed in any meaningful way, then the legal community must move beyond its current reliance on eyes-on review.”¹⁵¹ The technique with the most promise for meaningfully reducing costs of ESI discovery is known as “computer-categorized review—predictive coding.”¹⁵²

Predictive coding

is a process by which the computer does the heavy lifting in deciding whether documents are relevant, responsive, or privileged [It] automatically . . . [assigns] a rating (or *proximity score*) to each document to reflect how close it is to the concepts and terms found in examples of documents attorneys have already determined to be relevant, responsive or privileged. This assignment becomes increasingly accurate as the software continues to learn from human reviewers about what is and what is not of interest. This score and the self-learning function are the two key characteristics that set predictive coding apart from the less robust analytical techniques.¹⁵³

Rand concluded that, while “[t]here are few published reports of predictive coding in actual discovery productions that provide sufficiently detailed cost comparisons with human-review approaches,”¹⁵⁴ this new technology holds the most promise for reducing the costs of ESI discovery.¹⁵⁵

¹⁵⁰ Nicholas M. Pace & Laura Zakaras, *Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery*, 41, Rand Corporation, 2012, available at www.rand.org/pubs/monographs/MG1208.html (hereinafter “Rand Report”).

¹⁵¹ Rand Report, *supra* note 150, at 59.

¹⁵² *Id.* Predictive coding also is referred to as “computer-assisted review,” *Da Silva Moore v. Publicis Groupe & MSL Group*, 287 F.R.D. 182, 183 (S.D.N.Y. 2012), or “technology assisted review” (frequently abbreviated as “TAR”).

¹⁵³ Rand Report, *supra* note 150, at 59.

¹⁵⁴ *Id.* at 67.

¹⁵⁵ *Id.* at 66-69.

Because predictive coding is such a new technology, and the studies of its effectiveness in reducing ESI discovery costs as compared with traditional attorney-review are still few in number, it is understandable that parties may be reluctant to adopt its use (and benefit from its concomitant cost savings) until confident that courts will accept it as an appropriate alternative to more expensive traditional review procedures.¹⁵⁶ Thus, this new technology has not yet played a prominent role in making ESI discovery costs more proportional. That, however, is beginning to change, as more courts speak approvingly of the use of predictive coding or TAR.¹⁵⁷ As more

¹⁵⁶ *Da Silva Moore v. Publicis Groupe & MSL Group*, *supra* note 152, at 182-83 (The court began its decision by quoting an article previously written by the judge in which he stated “[t]o my knowledge, no reported case (state or federal) has ruled on the use of computer-assisted coding. While anecdotally it appears that some lawyers are using predictive coding technology, it also appears that many lawyers (and their clients) are waiting for a judicial decision approving of computer-assisted review.”)

¹⁵⁷ *Id.* at 183 (“This judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases.”); *Hinterberger v. Catholic Health System, Inc.*, No. 08-CV-380S(F), 2013 WL 2250603, at *1-3 (W.D.N.Y. 2013) (Court discussed long dispute between plaintiff and defendant over proper method by which defendant would undertake production of voluminous emails sought by plaintiff. The court noted that it had suggested to the parties that they confer in an effort to agree on the use of predictive coding to accomplish the ESI production, and that the parties disagreed on how predictive coding would be used, but not on the usefulness of the method. The court declined to grant plaintiff’s motion to compel the defendant to meet and confer with plaintiff to agree on an ESI discover protocol, because Defendant expressed its willingness to do so, as long as the discussion included defendant’s desire to use predictive coding to search for ESI.); *Dynamo Holdings Lt’d P’ship v. Comm’r of Internal Revenue*, 143 T.C. No. 9, 2014 WL 4636526 (U.S. Tax Ct., Sept. 17, 2014) (Court overruled Respondent’s request that Petitioners produce ESI on backup tapes or produce the tapes themselves under a “clawback” agreement that prevented waiver of attorney client privilege or work product protection. Alternatively, the Court approved Petitioners’ request that they avoid the need to undertake burdensome and expensive pre-production review of voluminous ESI to preclude disclosure of privileged or protected information, by using predictive coding to identify information responsive to the discovery request, as opposed to document-by-document review. Court extensively discussed how predictive coding worked and its approval of this method of reducing burden and expense); *In re Actos Products Liability Litigation*, MDL No. 6:11-md-2299, 2012 WL 7861249, at *3-8 (W.D. La. July 27, 2012) (Court approved agreement reached by parties to use predictive coding to search voluminous ESI); *Rio Tinto PLC v. Vale S.A.*, No. 14Civ.3042 (RMB), 2015 WL 872294, at *1-3 (S.D.N.Y. March 2, 2015) (Court noted that predictive coding more recently has been referred to as “technology

courts approve the use of this promising technology, and more studies demonstrate its appropriateness, and the savings it can achieve, lawyers and clients will overcome their reluctance to use it, and the cost of ESI discovery will decline.

At present, parties appear increasingly receptive to using TAR to search for privileged or work product protected information to prepare a privilege-log as Fed. R. Civ. P. 26(b)(5)(a) requires. However, TAR is just as effective for segregating relevant from irrelevant documents when reviewing a large set of electronically stored information to find the documents responsive to a particular production request. Judges can promote proportionality by discussing the benefit of TAR during case management conferences and by helping parties understand the many ways in which it can reduce both the cost and time needed to conduct ESI discovery.

13. Evaluate Proportionality by Estimating the Range of Plausible Recovery and Costs of Discovery

Although some cases filed in federal court do not seek recovery of money damages—such as those only asking for declaratory relief, or seeking to protect civil rights or freedom of expression—most cases aim to recover money. For the former, it is not feasible to estimate the plaintiff’s range of likely recovery if successful, as compared to the foreseeable cost of discovery to arrive at a “dollar” amount of proportional discovery. For the latter, however, such an approach may provide a good “thumbnail” estimate of how to limit discovery to that which is proportional to what is at issue in the litigation. Expressed simply, there is little debate that the parties should not spend \$500,000.00 on discovery to resolve a case where the maximum likely recovery will not exceed \$250,000.00.

assisted review” or “TAR,” noted its growing approval by courts, and approved the TAR protocol agreed to by parties to assist the search of voluminous ESI.).

And, while lawyers may feel that they lack sufficient information at the start of a case to make precise calculations of either the likely recovery or the total cost of discovery, few experienced lawyers file suit in federal court without some careful thought as to the likely recovery. If the action is based on diversity jurisdiction, a lawyer cannot file suit in federal court unless the case meets the jurisdictional minimum of \$75,000.00 in controversy.¹⁵⁸ Similarly, an attorney asserting a claim must disclose “a computation of each category of damages claimed . . . [as well as] materials bearing on the nature and extent of injuries suffered” as an initial disclosure that usually is due before formal discovery commences.¹⁵⁹ And, most experienced lawyers can predict the reasonably foreseeable range of discovery expenses, at least of the discovery that they intend to seek from an adverse party. Estimating the range of likely recovery if successful and the foreseeable range of discovery expenses provides a useful way for the parties and the court to assess whether “the burden or expense of . . . 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,” as Fed. R. Civ. P. 26(b)(2)(C)(iii) requires.

By evaluating likely recovery and foreseeable expense, the court and the parties can arrive at a “discovery budget” for a particular case. And, courts that take seriously their responsibility to monitor the discovery in a case to ensure proportionality can assist the lawyers by suggesting a discovery budget, or directing them to prepare one if they are not willing to do it on their own. For example, one court approached this task as follows:

I noted during the hearing that I had concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively

¹⁵⁸ 28 U.S.C. § 1332(a).

¹⁵⁹ Fed. R. Civ. P. 26(a)(1)(A)(iii).

modest amounts of wages claimed for each. Because the record before me lacked facts to enable me to make a determination of overbreadth or burden under Rule 26(b)(2)(C), I ordered counsel to meet and confer in good faith and do the following. First, I asked Plaintiffs and Defendants each to estimate the likely range of provable damages that foreseeably could be awarded if Plaintiffs prevail at trial. In doing so, I suggested that the Plaintiffs assume for purposes of this analysis that their pending motion to certify a FLSA collective action would be granted, because doing so allows the parties to gauge the “worst case” outcome Defendants could face. I then ordered that counsel for Plaintiffs and Defendants compare these estimates and attempt to identify a foreseeable range of damages, from zero if Plaintiffs do not prevail, to the largest award they likely could prove if they succeed. I also asked Plaintiffs’ counsel to estimate their attorneys’ fees. While admittedly a rough estimate, this range is useful for determining what the “amount in controversy” is in the case, and what is “at stake” for purposes of Rule 26(b)(2)(C) proportionality analysis. The goal is to attempt to quantify a workable “discovery budget” that is proportional to what is at issue in the case.¹⁶⁰

While estimating foreseeable recovery and discovery expenses to develop a discovery budget may not be effective in every case, it is a helpful tool for judges to use in those cases where the plaintiff seeks a money recovery.

14. Capping Time/Money Spent on Discovery

Federal Rule of Civil Procedure 26(b)(2)(C) requires the court to limit the “frequency or extent of discovery otherwise allowed” if necessary to achieve proportionality. Courts can do this by limiting the number of interrogatories, document requests, or depositions that may be taken, or the amount of time that each deposition may take.¹⁶¹ Similarly, a court can reduce the

¹⁶⁰ *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008).

¹⁶¹ *Fisher v. Fisher*, No. WDQ-11-1038, 2012 WL 2050785, at *5 (D. Md. June 5, 2012) (court discussed proportionality and expressed disappointment that the failure of the parties to provide accurate estimates of the amount of time and money already spend on discovery prevented it from limiting additional discovery by imposing “strict limitations on future discovery in the form of caps on the amount of time or money that the parties may expend” as a possible way to reduce cost and expense); *Turner v. City of Detroit*, No. 11-12961, 2012 WL 4839139, at *1 (E.D. Mich. Oct. 11, 2012) (court directed that the deposition of the mayor be limited to two hours to reduce burden on the defendant); *Marens v. Carrabba’s Italian Grill, Inc.*, 196 F.R.D. 35, 40-42 (D. Md. 2000) (court discussed proportionality requirement, narrowed scope of document discovery to five year time frame and ordered that amount of time defendant was required to

burden and expense of document discovery by capping the amount of time that the producing party must spend responding,¹⁶² or ordering that the requesting party share all or part of the costs.¹⁶³ By imposing numerical or cost limits on discovery, a court can facilitate phased discovery—requiring the parties to focus first on information most likely to affect the outcome of the case and conditioning further discovery on a showing that the results of the initial limited discovery justifies more, given the proportionality factors.

15. Enforcing Rule 26(g)(1) Certifications

Federal Rule of Civil Procedure 26(g)(1)(B)(iii) requires that every discovery disclosure, request, response or objection must be “signed by at least one attorney of record in the attorney’s own name—or by the party personally, if unrepresented—and must state the signer’s address, e-mail address, and telephone number.” This signature “certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,” a discovery request, response, or objection is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”¹⁶⁴ The Rules Committee intended Rule 26(g) to ensure that parties “engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37,” and to “provide[] a deterrent to both excessive discovery and

spend searching for responsive documents was limited to 40 hours, permitting plaintiff to seek additional discovery if plaintiffs paid the actual cost of defendant’s additional search time)

¹⁶² *Marens v. Carrabba’s Italian Grill, Inc.*, *supra* note 161.

¹⁶³ *Marens v. Carrabba’s Italian Grill, Inc.*, *supra* note 161; *Zeller v. South Cent. Emergency Medical Servs., Inc.*, No. 1:13-CV-2584, 2014 WL 2094340, at *8, *10 (M.D. Pa. May 20, 2014) (Court ordered that plaintiff and defendant would share the cost of restoring and searching plaintiff’s emails, but capped the plaintiff’s maximum contribution to \$1,500.00.).

¹⁶⁴ Fed. R. Civ. P. 26(g)(1)(B)(iii).

evasion” that “obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.”¹⁶⁵

This language is very similar to the proportionality language found in Fed. R. Civ. P. 26(b)(2)(C)(iii).¹⁶⁶ Thus, the certification requirement of Rule 26(g) imposes on lawyers and their clients a duty to consider proportionality in connection with all discovery requests, responses and objections that they make. The problem is, however, that Rule 26(g) is one of the “least understood or followed[] of the discovery rules,” and thus in practice has little moderating effect on the behavior of lawyers and clients during discovery.¹⁶⁷ Judges who are aware of the requirements of Rule 26(g) can insist that the lawyers and parties adhere to it (and thereby promote proportional discovery), and they can impose sanctions authorized by Rule 26(g) if the lawyers and parties do not.¹⁶⁸

¹⁶⁵ Fed. R. Civ. P. 26(g) Advisory Committee Note (1983).

¹⁶⁶ Fed. R. Civ. P. 26(b)(2)(C)(iii) states that “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

¹⁶⁷ *Mancia v. Mayflower Textile Servs. Co.* 253 F.R.D. 354, 357 (D. Md. 2008). There is some mystery about why Rule 26(g)(1) is so little understood, followed, or enforced. Its lack of use may be attributed in part to its location—it is placed deep within a very long and complex rule, and is easily overlooked. In addition, although Rule 26(g) (3) requires that a court “must” impose an “appropriate sanction” on an attorney or party who violates the rule, these sanctions seldom are imposed by courts. This may be because Rule 26(g)(1) was added to the Rules in 1993, at the same time that changes were made to Rule 11 (which allows sanctions for filing or maintaining a claim or defense without a sufficient factual or legal basis for doing so) to “[place] greater constraints on the imposition of sanctions” under that rule, to “reduce the number of motions for sanctions presented to the court.” Fed. R. Civ. P. 11 Advisory Notes (1993). The signal to constrain the imposition of Rule 11 sanctions and reduce the number of motions seeking them that are filed with the courts may have had a concomitant effect on judges’ willingness to impose Rule 26(g)(3) sanctions, despite the fact that Rule 11 “explicitly is inapplicable to discovery.” Fed. R. Civ. P. 11(d).

¹⁶⁸ See, e.g., *Morris v. Lowe’s Home Ctrs., Inc.*, No. 1:10CV388, 2012 WL 5347826, at *4-5 (M.D. N.C. July 9, 2014) (Court addressed obligation of a party to make reasonable inquiry into factual bases for discovery response, discussing Rule 26(g) and noting that the record “does not make clear whether Defendant satisfied its obligations” under Rule 26(g).); *Cartel Asset Mgmt.*

16. Reducing Discovery Costs through use of Red. R. Evid. 502

Another method judges use to promote proportional discovery involves encouraging the parties to take advantage of Fed. R. Evid. 502, a remarkably helpful (but far too infrequently used) rule that can reduce the costs of review and production of ESI substantially.¹⁶⁹ Rule 502 can be especially helpful to lower the costs of ESI discovery by eliminating the threat of waiver of attorney client privilege or work product protection if a party inadvertently produces such privileged or protected information in response to a document production request.¹⁷⁰ To accomplish this, counsel can enter into non-waiver agreements, such as “clawback” or “quick-peek” agreements, which provide that production of privileged or protected information to an adversary during discovery does not waive the protection afforded those materials, and the producing party may demand its return if it did not intend to produce it.¹⁷¹

One of the major purposes of Rule 502 was to

v. Ocwen Fin. Corp., No. 01-cv-01644, 2010 WL 502721, at *10, *17-18 (D. Colo. Feb. 8, 2010) (Court extensively discussed proportionality requirements and obligations imposed by Rule 26(g), finding that the Defendant failed to comply with those requirements and ordering it to show cause why sanctions should not be imposed as a result of this failure.); *Mancia v. Mayflower Textile Servs. Co.*, *supra* note 167, at 357-61 (court extensively discussed requirements of Rule 26(g) and how it achieves proportionality, and ordered counsel to take further steps to comply with the rule).

¹⁶⁹ Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Krauter, *Federal Rule of Evidence 502: Has it Lived Up to Its Potential?*, XVII Richmond Journal of Law and Technology 2 (2010) (“The enactment of Federal Rule of Evidence 502 . . . in 2008 was intended to provide a vehicle to reduce the anxiety and costs associated with privilege review, but to date it has not lived up to its promise. The explanation for why Rule 502 has fallen short may have to do with the reality that a disappointingly small number of lawyers seem to be aware of the rule and its potential, despite the fact that the rule is over two years old.”) (hereinafter “JOLT Article”).

¹⁷⁰ Fed. R. Evid. 502(b).

¹⁷¹ Fed. R. Evid. 502(e) (providing that non-waiver agreements are binding on the parties to the agreement), and 502(d) (authorizing a court to order that attorney client privilege or work product protection is “not waived by disclosure connected with the litigation pending before the court—in which case the disclosure is also not a waiver in any other federal or state proceeding”).

respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.¹⁷²

Judges are able to facilitate the costs savings envisioned by Rule 502 by issuing orders pursuant to Rule 502(d), which states: “A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.” Issuing a Rule 502(d) order encourages counsel to enter into non-waiver agreements under Rule 502(e), which then permits them to forego costly pre-production “eyes-on” review by an attorney or paralegal of each record that falls within the scope of a document production request. It encourages them instead to use predictive coding, TAR or other computer assisted review, at much lower cost.¹⁷³

Critically, the parties cannot achieve the protections against waiver of privilege or work product protection, and attendant cost savings during ESI discovery, unless they are willing to enter into Rule 502(e) agreements, and courts are willing to give them the maximum possible protection by approving the agreement with a Rule 502(d) order.¹⁷⁴ Courts that encourage counsel to enter these agreements and then approve them in a 502(d) order can significantly

¹⁷² Fed. R. Evid. 502 Advisory Committee Note.

¹⁷³ “Rule 502(d) allows federal courts to limit the circumstances in which production of privileged or protected information constitutes a waiver. In this way, section (d) enables the courts to advance the goals of Rule 502—reduction of the expense of pre-production review for privileged and protected information and [adoption of] predictable uniform standards concerning waiver of privilege or protection—through court orders.” JOLT Article, *supra* note 169, at 55.

¹⁷⁴ *See, e.g., John B. v. Goetz*, 879 F. Supp. 2d 787, 837 (M.D. Tenn. 2010) (Court found that the parties had agreed to a “clawback” agreement that permitted the defendants to produce voluminous ESI without the need to undertake a time-consuming comprehensive privilege review prior to production. Under the agreement, the Defendant could assert privilege claims post-production if disclosure of privileged matter was unintentional.).

promote proportionality in discovery where ESI is sought, which occurs with increasing frequency in contemporary litigation.

17. Imposing Sanctions for Discovery Abuse

Judges have vast authority to impose monetary and other sanctions against parties and attorneys that violate the discovery rules or abuse the discovery process. Acting in response to a motion or on his or her own authority, the judge may sanction a party or lawyer who fails to appear at a scheduling or other pretrial conference, is unprepared to participate in the conference, or does so in bad faith, or who fails to obey a scheduling or pretrial order.¹⁷⁵ A judge also may sanction a lawyer or party that violates Rule 26(g)'s certification requirement before making a discovery request, objection, answer, or disclosure.¹⁷⁶ Rule 37 contains six sub-sections that permit the court to impose sanctions against a lawyer or party that fails to provide required discovery; is evasive or incomplete in responding to discovery requests; violates an order compelling discovery; fails to disclose or supplement an earlier discovery answer or response, or to admit facts an adversary asks to be admitted; fails to attend its own deposition, serve answers to interrogatories or respond to a request for inspection; fails to provide requested ESI; or fails to participate in the framing of a discovery plan.¹⁷⁷ The sanctions that the court may impose include monetary sanctions requiring the payment of reasonable attorney's fees and costs that the party improperly denied discovery incurred, as well as the so-called "case dispositive" sanctions such as directing the fact-finder to take designated facts as established; prohibiting a disobedient party from supporting or opposing designated claims or defenses, or from introducing designated

¹⁷⁵ Fed. R. Civ. P. 16(f).

¹⁷⁶ See discussion *supra* at pages 66-68; Fed. R. Civ. P. 26(g)(3); *Branhaven, LLC v. Beeftek, Inc.*, 288 F.R.D. 386 (D. Md. 2013) (court imposed sanctions for egregious violations of Rule 26(g) certifications).

¹⁷⁷ Fed. R. Civ. P. 37.

matters into evidence; striking pleadings (in whole or part); dismissing the action (in whole or in part); rendering a default judgment against the disobedient party; or treating the failure to obey a discovery order as a contempt of court.¹⁷⁸ Furthermore, a judge has inherent authority, upon a finding of bad faith or willful violations of the discovery rules, to impose monetary and other sanctions.¹⁷⁹ Finally, Congress has authorized courts to sanction an attorney who unreasonably and vexatiously multiplies the proceedings in a case.¹⁸⁰

Despite this broad authority to sanction, judges properly are cautious in exercising it without a substantial justification. This is because discovery works best and most proportionately when the parties participate in the process cooperatively. Once one party seeks sanctions against another, the ability to initiate or maintain a cooperative approach becomes difficult, if not impossible. When faced with improper conduct during discovery the most effective thing a judge can do is to become more directly involved in managing the process, issuing clear orders as to what is expected, and informing the parties and counsel that—if disobeyed—sanctions may be imposed, then reminding them of the importance (and benefits) of cooperating in discovery.¹⁸¹ Such a “carrot and stick” approach works better than indiscriminate imposition of sanctions every time a party or lawyer fails to fulfill a discovery obligation or comply “to the letter” with a court order. Further, once a judge imposes sanctions, this actually can work against keeping

¹⁷⁸ Fed. R. Civ. P. 37(b)(2).

¹⁷⁹ Paul W. Grimm, Charles S. Fax, & Paul Mark Sandler, *Discovery Problems and Their Solutions*, 331 (3d ed. 2013).

¹⁸⁰ 28 U.S.C. § 1927.

¹⁸¹ See, e.g., *Dongguk University v. Yale*, 270 F.R.D. 70, 80 (D. Conn. 2010) (In issuing orders addressing significant discovery violations the judge cautioned “[c]ounsel are on notice that failure to comply with court orders may result in sanctions including, but not limited to, costs and fees, preclusion of evidence or causes of action, and appropriate sanctions up to and including dismissal of the case or entry of default judgment”, but added “[t]he Court hopes that counsel can work cooperatively to conduct discovery efficiently and minimize the expense and inconvenience to both parties.”).

costs proportionate, if doing so undermines cooperation, or emboldens the party that was not sanctioned to look for further opportunities to discredit an adversary by filing more discovery sanction motions. Thus, sanctions remain a useful tool for achieving proportionality when appropriate, but are best used sparingly, and only when there are no other viable options and the misconduct is extreme.

C. Factors that Increase the Likelihood of Disproportionate Discovery

As the foregoing discussion demonstrates, the answer to the question “Is it possible for judges to manage discovery to ensure that it is proportional?” is an unqualified “Yes.” Abundant tools exist for judges to use to achieve this important goal. Having discussed these tools, the final analysis necessary to appreciate fully how best to achieve proportional discovery is to identify the “risk factors” or “red flags” that indicate that a judge should intervene to ensure that discovery does not spiral out of control. In this regard, Rule 26(f) requires the parties to “confer as soon as practicable,” but no later than, twenty-one days before a scheduling conference with the presiding judge.¹⁸² Rule 16(b), in turn, requires the presiding judge to issue a scheduling order after having received the parties’ Rule 26(f) report, or “after consulting with the parties’ attorneys and any unrepresented parties at a scheduling conference.”¹⁸³ Rule 16(b) previously permitted the judge to consult with the parties (if unrepresented) or their attorneys at a face-to-face scheduling conference, “or by telephone, mail, or other means,” but this later language was eliminated by the 2015 changes because the Advisory Committee believed that “[a] scheduling

¹⁸² Fed. R. Civ. P. 26(f)(1).

¹⁸³ Fed. R. Civ. P. 16(b)(1)(B). Rule 16 permits courts to exempt certain categories of cases that are unlikely to involve discovery (such as social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions) from the requirement that the court issue a scheduling order or consult with the parties before issuing a scheduling order. *See, e.g.*, Advisory Committee Note to Fed. R. Civ. P. 16(b) (1983).

conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.”¹⁸⁴ It is at this initial scheduling conference with the attorneys (or unrepresented parties) that the judge is in the best position to evaluate whether there are risk factors for disproportionate discovery, and discourage them.¹⁸⁵ As with the tools that judges use to achieve proportionality, identifying the risk factors that threaten cost-effective discovery also involves common-sense considerations. The key is to do so early on, then monitor each case as it progresses, intervening as necessary to keep costs proportional.

1. Complex Cases

It does not require Napoleonic insight to realize that complex cases pose greater risks of disproportionate discovery than those that are not. An antitrust case will be more complex than a diversity jurisdiction automobile tort case. The key is for a judge to realize the types of cases that most frequently cause discovery disputes, and to monitor those cases carefully to minimize this possibility. The research done for this thesis showed that securities fraud cases,¹⁸⁶ class actions,¹⁸⁷ trademark, patent and other intellectual property cases,¹⁸⁸ commercial disputes,¹⁸⁹

¹⁸⁴ Advisory Committee Note to Fed. R. Civ. P. 16(b), as amended effective December 1, 2015; see Judge Campbell Memorandum, *supra* note 26, at Appendix B-27.

¹⁸⁵ Fed. R. Civ. P. 16(a)(3).

¹⁸⁶ See, e.g., *SEC v. Collins*, 256 F.R.D. 403 (S.D.N.Y. 2009); *In re Morgan Stanley Mortg. Pass-Through Certificate Litig.*, No. 09-CV-02137, 2013 WL 4838796 (S.D.N.Y. Sept. 11, 2013).

¹⁸⁷ See, e.g., *John B. v. Goetz*, 879 F. Supp. 2d 787 (M.D. Tenn. 2010); *In Re Morgan Stanley Mortg. Pass-Through Certificate Litig.*, *supra* note 186; *Ingersoll v. Farmland Foods, Inc.*, No. 10-6046-CV, 2011 WL 1131129 (W.D. Mo. Mar. 28, 2011).

¹⁸⁸ See, e.g., *Heckler & Koch, Inc. v. German Sport Guns, GmbH*, No. 11 -1108, 2014 WL 533270 (S.D. Ind. Feb. 7, 2014) (trademark); *Nola Spice Designs, LLC v. Hayden Enters.*, No. 12-2512, 2013 WL 3974535 (E.D. La. Aug. 2, 2013) (trademark); *Sprint Commc'ns Co. v. Comcast Cable Commc'ns*, No. 11-2684, 2014 WL 1794552 (D. Kan. May 6, 2014) (patent).

¹⁸⁹ See, e.g., *Performance Sales & Mktg. v. Lowes Cos.*, No. 07- -140, 2012 WL 4061680 (W.D.N.C. Sept. 14, 2012) (commercial dispute); *In re Convergent Tech. Sec. Litig.*, 108 F.R.D.

trade secrets litigation,¹⁹⁰ and multi-district litigation¹⁹¹ frequently have discovery disputes that can lead to disproportionate discovery costs. This suggests that judges assigned these types of cases should hold face-to-face scheduling conferences with the parties to discuss how to keep costs proportional, followed by monitoring to ensure further direct court involvement if needed.

2. Cases Where ESI Discovery is Sought

As the discussion of techniques that judges use to achieve proportionality demonstrated, there are many challenges associated with ESI discovery that can lead to disproportionately high costs. Given the ever-increasing variety of digital devices parties use, their tendency to use multiple devices (desktop computer, laptop computer, tablet, smart phone), and the seemingly endless storage capacity available on computers, removable storage devices (“zip drives” or external hard drives) and in the “cloud,” it is easy to see that a request to discover ESI “related” to a litigation event can involve unimaginably large amounts of data. The costs associated with reviewing ESI to locate what information must be produced, and implementing and monitoring a litigation hold to prevent spoliation or loss of ESI can be enormous. And, as the discussion above about the use of TAR and non-waiver orders pursuant to Fed. R. Evid. 502 illustrates, ESI discovery can complicate a case and result in disproportionately high costs. For these reasons, cases where parties seek extensive ESI can create a greater risk of burdensome costs,¹⁹² and

328 (N.D. Cal. 1985) (large commercial case characterized by court as involving “economic combat”).

¹⁹⁰ See, e.g., *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-cv-01644, 2010 WL 502721 (D. Col. Feb. 8, 2010) (misappropriation of trade secrets).

¹⁹¹ See, e.g., *In re Actos Products Liability Litigation*, MDL No. 11-2299, 2012 WL 7861249 (W.D. La. July 27, 2012) (multi-district products liability).

¹⁹² See, e.g., *SEC v. Collins*, 256 F.R.D. 403 (S.D.N.Y. 2009) (ESI discovery estimated to involve in excess of 1.7 million documents); *David v. Signal*, No. 08-1220, 2010 WL 2723180 (E.D. La. July 6, 2010) (ESI discovery, including email); *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445, 2011 WL 2154279 (N.D.N.Y. Apr. 15, 2011) (Review costs associated with ESI discovery estimated to exceed \$5 million); *Klein Prods. LLC v. Packaging Corp. of Am.*, No. 10

judges who actively monitor their cases to ensure proportional discovery are well served by addressing these issues early in the discovery process. By doing so, the judge can discuss cost saving measures such as using Rule 502 non-waiver orders, employing TAR to reduce the cost of ESI review, sampling, and phased discovery. Also, where a party seeks ESI from inaccessible sources, the judge can discuss cost-shifting.

3. Cases Involving Excessive Client Animosity

Nearly all litigation involves client animosity to some degree, as the events that lead to lawsuits seldom have benign effects on the parties. In most cases, the lawyers are able to manage their clients so that the animosity does not get out of control, and they can initiate discovery for legitimate information gathering purposes, rather than to impose burden, cost, or to harass an adversary. Indeed, Rule 26(g)'s certification requirement prohibits initiation of discovery requests or serving discovery objections or responses for such improper purposes.¹⁹³ However, there are instances where client animosity exceeds the ability (or willingness) of the lawyers or parties (particularly if self-represented) to control it, where the judge must intervene to prevent the use of discovery for improper purposes. If the judge fails to do so, the costs of discovery can

C 5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012) (ESI discovery sought, leading to dispute regarding search methodology); *Thompson v. C & H Sugar Co.*, No. 12-CV-00391, 2014 WL 595911 (N.D. Cal. Feb. 14, 2014) (Involving dispute over search terms to be used for ESI discovery); *In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, No. 3:12-MD-2391, 2013 WL 1729682 (N.D. Ind. Apr. 18, 2013) (ESI discovery sought, estimated 2.5 million pages and costs of \$1-3 million involved); *Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331 (E.D. Pa. 2012) (Millions of pages of ESI sought by plaintiff during discovery); *John B. v. Goetz*, 879 F. Supp. 2d 787 (M.D. Tenn. 2010) (ESI discovery sought, estimated 15 million pages involved); *Moore v. Publicis Groupe*, 868 F. Supp. 2d 137 (S.D.N.Y. 2012) (ESI sought, court discussed the use of TAR to achieve proportional costs given extensive ESI demanded by plaintiffs); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) (extensive issues associated with ESI discovery presented to the court for resolution); and *Hopson v. Mayor & City Council of Balt.*, 232 F.R.D. 228 (D. Md. 2005) (many ESI discovery issues required court resolution).

¹⁹³ Fed. R. Civ. P. 26(g)(1)(B)(ii).

escalate as repetitive disputes blossom into filing endless discovery motions, discovery demands seek information that is outside the scope of permissible discovery, or legitimate discovery requests are met with frivolous, boilerplate objections and refusals to produce requested information.¹⁹⁴

¹⁹⁴ See, e.g., *Kleen Products v. Packaging Corp.*, No. 10 C 5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012) (antitrust class action case marked by client animosity and characterized by uncooperative discovery leading to many discovery disputes requiring court intervention); *Best Sign Sys., Inc. v. Chapman*, No. 09-5244, 2012 WL 4505996 (D.N.J. Sept. 26, 2012) (Case involving allegations that former employee violated non-disclosure of confidential information agreement, discovery disputes reflective of client animosity); *Oseman-Dean v. Ill. State Police*, No. 11 C 1935, 2011 WL 6338834 at *1 (N.D. Ill. Dec. 19, 2011) (Employment discrimination case where client animosity resulted in seven separate discovery hearings and, despite court urging, the plaintiff “resisted any significant narrowing [of her discovery requests] requiring the court to conduct hearings on the parties’ disputes about almost every one of plaintiff’s many discovery requests.”); *Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 80 (D. Conn. Aug 17, 2010) (Litigation between two universities over alleged failure to verify credentials of art history professor allegedly leading to “destruction” of plaintiff university’s reputation and its public humiliation and “deep shame.” In resolving numerous discovery disputes court had to admonish counsel that failure to comply with court orders could result in sanctions); *D.J.’s Diamond Imps. v. Brown*, No. WMN-11-2027, 2013 WL 1345082, at *1, 4 (D. Md. Apr. 1, 2013) (Case alleging tortious interference with contracts based on allegations that defendant used “threats of physical harm, intimidation and unfulfilled promises” to interfere with plaintiff’s contract rights resulted in acrimonious discovery disputes, for which court imposed sanctions.); *Cleversafe, Inc. v. Amplidata, Inc.*, No. 11 C 4890, 2014 WL 2609654 at *1 (N.D. Ill. June 11, 2014) (Court characterized case as a “complicated and highly adversarial patent case” where both plaintiff and defendant accused each other “of manipulation and gamesmanship” during conduct of discovery.); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010) (Copyright, patent infringement and unfair competition suit characterized by extreme client animosity and involved purposeful violation of discovery orders by defendant, resulting in sanctions for discovery misconduct, including purposeful spoliation of evidence); *Maxtena, Inc. v. Marks*, 289 F.R.D. 427, 434-5 (D. Md. 2012) (Contract dispute where client animosity resulted in discovery disputes requiring court intervention. Court observed that “[h]ampered by their long history of mistrust and a quickly deteriorating relationship between their attorneys, neither party presents a truly reasonable view of the proper scope of . . . [contested] financial valuation” discovery.); *Bowers v. Nat’l Collegiate Athletic Ass’n*, No. 97-2600, 2008 WL 1757929 (D. N.J. Feb. 27, 2008) ((Decade long case fueled by plaintiff’s animosity led to large number of discovery disputes and court findings of abusive discovery tactics.); *Heckler & Koch, Inc. v. German Sport Guns, GmbH*, No. 1:11-cv-1108, 2014 WL 533270 (S.D. Ind. Feb. 7, 2014) (Party animosity led to filing of more than 40 discovery motions requiring court resolution); and *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. 328 (N.D. Cal. 1985) (Court observed how discovery in

When a court becomes aware that excessive client animosity is at play, prompt intervention can prevent the case from spiraling out of control, resulting in disproportionately high discovery costs. For example, the court can prohibit parties from filing discovery motions until after participating in a telephone or in-person conference with the judge, impose page limitations and reduce time deadlines for briefing discovery motions, require phased discovery that conditions future discovery on the results of more narrow initial discovery, discuss (and where appropriate impose) cost shifting, and, where warranted, impose sanctions. Further, judges who conduct in person or telephonic discovery conferences with the parties are in a position to gauge the relationship between them, and to make clear at the outset their expectation that the parties will cooperate during the conduct of discovery, as well as to make clear the consequences of improper discovery behavior.

Finally, in cases where there is excessive client animosity, and the clients are represented by counsel, the judge can order the clients themselves to be present in court or chambers when discovery issues are being discussed or disputes decided. Hearing a judge's comments can be a valuable way to make sure that the clients themselves hear and understand the court's views (and the consequences of disregarding them). This is particularly useful if the judge suspects that the lawyers are not really trying to control client animosity or are even generating more billable time by encouraging it.

4. Cases Involving Attorney Animosity, Misconduct, Over-Zealousness or Over-Aggressiveness

As where there is excessive client animosity, when counsel behave over-zealously, over-aggressively or engage in other litigation misconduct, discovery costs and burdens can become

large commercial case was “perverted into an arena for economic power plays” and degenerated into “irresponsible, unethical, and unlawful” conduct.).

disproportionate.¹⁹⁵ While lawyers have an ethical responsibility to act as advocates for their clients, which includes the “use of legal procedure for the fullest benefit of the client’s cause,” there is a concomitant duty “not to abuse legal procedure.”¹⁹⁶ Further, both substantive and procedural law “establish[] the limits within which an advocate may proceed”¹⁹⁷ (which includes the discovery rules). And, while some lawyers attempt to justify misconduct during discovery as something that the adversary system requires, this is a flawed view of that system. As one court has observed:

A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is . . . hindering the adjudication process, and making the task of the “deciding tribunal not easier but more difficult,” and violating his or her duty of loyalty to the “procedures and institutions” the adversary system is intended to

¹⁹⁵ See, e.g., *Equal Emp’t Opportunity Comm’n v. Princeton Healthcare Sys.*, No. 10-4126, 2012 WL 1623870 (D.N.J. May 9, 2012) (Overzealous advocacy of counsel contributed to discovery disputes and costs.); *Cartel Asset Mgmt. v. Ocwen Nin. Corp.*, No. 01-cv-01644, 2010 WL 502721 (D. Col. Feb. 8, 2010) (Contentiousness of the litigation was caused in part by the failure of counsel to comply with discovery obligations imposed by Fed. R. Civ. P. 26(g)(1).); *Cleversafe, Inc. v. Amplidata, Inc.*, No. 11 C 4890, 2014 WL 2609654 at *1 (N.D. Ill. June 11, 2014) (Highly adversarial conduct by counsel characterized by reciprocal claims of manipulation and gamesmanship during discovery that court had to resolve.); *Moore v. Publicis Groupe*, 868 F. Supp. 2d 137 (S.D.N.Y. 2012) (Discovery disputes and costs fueled in part by over-aggressive conduct of counsel); *Summerfield v. City of Chicago*, 613 F. Supp. 2d 1004 (N.D. Ill. 2009) (Court commented on improper discovery conduct of counsel.); and *Maxtena, Inc. v. Marks*, 289 F.R.D. 427 (D. Md. 2012) (Animosity between counsel contributed to filing of multiple duplicative motions, needlessly driving up cost of litigation.).

¹⁹⁶ Ellen J. Bennett, Elizabeth J. Cohen & Martin Whittaker, *Annotated Model Rules of Professional Conduct* 309 (7th ed. 2011) (citing Comment 1 to Model Rule 3.1, *Meritorious Claims and Contentions*).

¹⁹⁷ *Id.*

serve. Thus rules of procedure, ethics, and even statutes make clear that there are limits to how the adversary system may operate during discovery.¹⁹⁸

Judges who take seriously the duty to ensure proportional discovery can act in many ways to guard against discovery abuse at the hands of misbehaving lawyers. As noted in the discussion above, they can adopt local rules, standing orders, protocols and guidelines that set forth expectations for conduct of counsel during discovery; they can encourage cooperation between counsel during discovery; and they may sanction lawyers for violating Rule 26(g)(1)(B)'s certifications requirements or impose monetary sanctions against a misbehaving attorney pursuant to Rule 37. Further, by making the court's behavioral expectations for counsel known at the initial scheduling conference, adopting informal discovery dispute resolution methods and holding conferences in person or by phone during the discovery process, they can detect attorney misconduct as soon as possible after it becomes manifest and intervene before it gets out of control.

5. Litigation Involving *Pro Se* Parties

When one or more parties in federal litigation are proceeding without an attorney (*pro se*), the likelihood of increased discovery costs and risk of disproportionate discovery increases substantially. This is because *pro se* litigants seldom have legal training, are less likely to understand (or even read) the discovery rules, often are emotionally invested in their case, and do not regard themselves as officers of the court who have obligations beyond the advancement of their own goals. *Pro se* litigants are more likely to seek overly broad discovery from their adversaries and less likely to fully comply with their discovery obligations that the rules

¹⁹⁸ *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362-63 (D. Md. 2008) (internal citations omitted) (referencing Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162, 1216 (1958)).

impose.¹⁹⁹ Cases involving *pro se* litigants also are far more likely to require disproportionately greater involvement by the court to keep discovery from spiraling out of control. Accordingly, judges should bear this in mind from the very beginning of the case and initiate procedures that will allow the court to monitor the discovery process and intervene as quickly as possible when necessary. Such procedures may include frequent status conferences (in person or telephonic), informal procedures to resolve discovery disputes (such as pre-motion conferences, and limiting discovery motions to brief “letter motions”), and requiring that the parties conduct depositions in a courtroom so that if disputes arise, the judge can rule on them immediately.

6. Cases Involving Issues of Spoliation of Evidence

¹⁹⁹ See, e.g., *F.T.C. v. Dutchman Enters., LLC*, No. 09-141, 2010 WL 3034521 at *1, *3, *7 (D.N.J. Aug. 2, 2010) (In an action for deceptive marketing practices, the FTC sued a corporation and its president (individually). The president represented himself, the corporation was unrepresented. The court noted that the defendants failed to provide Rule 26(a)(1) disclosures and failed to respond to legitimate discovery requests from the FTC, claiming that they were operating under “handicaps” because they were not represented by counsel. The court ruled that “[d]efendants’ alleged time and resource handicaps resulting from their *pro se* status cannot relieve them of their obligations” under the discovery rules and ordered them to provide the information requested. In doing so, the court rejected “[d]efendants continuous assertion that they have been unable to review all of their documents and records due to the fact that they are proceeding *pro se*” and ordered further review and production of requested records. Finally, the court rejected the defendants’ objections to discovery requests from the FTC based on the failure of the defendants to seek a protective order, and failure to particularize any harm that would occur if the discovery was provided.); *N’jie v. Cheung*, No. 09-919 (SRC), 2010 WL 3259793, at *1-9 (D.N.J. Aug. 16, 2010) (*Pro Se* plaintiffs sued defendant (who was represented) alleging multiple causes of action relating to alleged breach of an option-to-buy clause in a lease agreement. Multiple discovery disputes arose due to failure of plaintiffs to comply with the scheduling order issued by the court, file status reports as required, or respond to legitimate discovery requests from the defendant, all of which required the court to hold multiple status conferences, concluding “this matter has proceeded in an unacceptably slow fashion and the Court has no confidence that the parties will resolve the outstanding issues or be able to move forward without judicial intervention.” Although the court concluded that the plaintiffs still had many unfulfilled discovery obligations, it found that extending the time to complete discovery would not be fruitful because of the inability of the parties to work with one another. Accordingly, the court entered an order closing fact discovery.).

“Spoliation is destroying, significantly altering, or failing to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”²⁰⁰ The duty to preserve evidence commences when a party “is on notice that evidence is relevant to pending litigation, or when it should have known that evidence would be relevant to future litigation.”²⁰¹ Spoliation issues can be particularly troublesome when ESI is not preserved, because “[o]nce a party’s duty to preserve is triggered, it must take action to prevent the loss of evidence by, *inter alia*, suspending its routine document retention or destruction policy and implementing a litigation hold.”²⁰² The purpose of a litigation hold is to “preserve paper and electronic documents in a manner that allows relevant documents to be collected and searched; the hold’s obligations must be communicated to employees without over-relying on employees to select responsive documents.”²⁰³

If a party fails to preserve evidence that is relevant to pending or foreseeable litigation, courts “have the power to sanction litigants for spoliation of evidence under . . . [Fed. R. Civ. P.] 37(b) and under their inherent authority to control litigation,” provided the court finds that the failure to preserve was accompanied by a level of culpability that, depending on the law of the jurisdiction that governs the litigation, ranges from “bad faith/known destruction, gross negligence . . . [to] ordinary negligence.”²⁰⁴ Similarly, sanctions that courts may impose for spoliation range along a continuum from awarding attorneys’ fees and costs, ordering that certain facts are to be taken as having been proved, precluding the introduction of evidence, giving the

²⁰⁰ Paul W. Grimm, Charles S. Fax & Paul Mark Sandler, *Discovery Problems and Their Solutions* 382 (3d ed. 2013).

²⁰¹ *Id.*

²⁰² *Id.* at 383.

²⁰³ *Id.* at 384.

²⁰⁴ *Id.* at 384-85.

jury an adverse inference instruction, to case-dispositive sanctions (such as dismissal, default, and striking pleadings, claims or defenses).²⁰⁵ Courts generally will refrain from imposing the most serious spoliation sanctions, however, unless there are “extraordinary circumstances” such as extreme culpability, and the irreparable loss of highly relevant evidence that a party cannot obtain from other sources.²⁰⁶

Prior to the December 1, 2015 Rule amendments, the law of spoliation as it applied to the discovery process varied widely, depending on the jurisdiction where the action was pending. This caused great uncertainty among litigants as to what standard they would have to meet to avoid sanctions.²⁰⁷ The new revisions to the civil rules, however, adopted a uniform national standard applicable to the duty to preserve ESI in civil cases, currently found in Fed. R. Civ. P. 37(e), which states:

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.²⁰⁸

²⁰⁵ *Id.* at 385.

²⁰⁶ *Id.* at 385-86.

²⁰⁷ “Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These [different standards] have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.” Advisory Note to Fed. R. Civ. P. 37(e) (2015); *see* Judge Campbell Memorandum, *supra* note 26, at Appendix B-58.

²⁰⁸ Fed. R. Civ. P. 37(e) (2015).

The presence of spoliation issues in a civil case can increase the cost and burdens of discovery dramatically, leading to disproportionate discovery. This is because ESI can so readily be deleted, over-written, altered, destroyed, or lost when new digital devices replace outdated hardware or software. When one party accuses another of spoliation of evidence in a civil case, this almost inevitably leads to requests to expand discovery to focus on the circumstances leading to the loss of the information, the state of mind of the party that failed to preserve it, and whether the lost or destroyed evidence may be recovered (from examination of back-up sources, or forensic examination of digital devices). Such expanded discovery can increase the cost of discovery exponentially, lead to complex motions practice, and consume a significant amount of the court's time to resolve.²⁰⁹ Courts can mitigate the adverse consequences of spoliation issues in discovery by holding in-person or telephonic conferences with counsel at the start of a case, discussing the duty to preserve in those conferences, and directing the parties to confer regarding steps that they should take to ensure appropriate preservation of essential evidence,²¹⁰ particularly ESI.

²⁰⁹ See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010) (Failure of defendant to preserve evidence and spoliation issues pervaded the litigation, significantly increasing the cost, consuming the resources of the court and resulted in imposition of severe sanctions, including contempt of court.); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) (Spoliation issues led to many discovery disputes and consumed significant amount of the court's time to resolve); *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (Spoliation issues contributed greatly to complexity of discovery, costs and disputes requiring court resolution.); *Major Tours, Inc. v. Colorel*, 720 F. Supp. 2d 587 (D. N.J. 2010) (Spoliation issues complicated conduct of discovery.); *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. 2000) (Spoliation issues complicated the conduct of discovery.).

²¹⁰ For example, Fed. R. Civ. P. 16(b)(3)(B)(iii) (2015) permits the court to include in a scheduling order requirements providing for "preservation of electronically stored information," and Rule 26(f)(3)(C)(2015), which governs the discovery plan that the parties are to submit for approval to the court after they have met and conferred at the beginning of the case, "must state the parties' views and proposals on . . . any issues about . . . preservation of electronically stored information, including the form or forms in which it should be produced."

In appropriate cases, where it is evident from the start that there may be issues about the preservation and production of ESI, the court may find it helpful to order that an IT representative or ESI discovery vendor representative for each party be present at one or more discovery conferences. ESI preservation and spoliation issues are by their nature very technical. Lawyers and clients may not be sufficiently knowledgeable about the technological issues in the case to make properly informed decisions about what should be done for this discovery. Having technical experts present in these circumstances can promote proportionality by identifying the appropriate preservation and production procedures and tailoring them to the needs of the particular case so that cost and burden is kept under control.

Further, at the first hint of a preservation problem, the court can intervene to ensure that any spoliation-related discovery is appropriate for the pending case, and prevent it from becoming the sole focus of the case at the expense of developing the substantive issues that will affect its resolution.

7. Cases Involving Asymmetrical Litigation

In cases where the parties each have similar amounts of information potentially subject to discovery, each party is less likely to initiate excessive or burdensome discovery requests, for fear that the opposing party will respond in kind. The threat of “mutually assured destruction” operates to moderate discovery requests at the outset. This is not the case in litigation where one party has significantly less discoverable information than the other, and the party with the lesser amount may be tempted to serve overly broad and expensive discovery requests on an opponent without fear of retaliation. Examples of such cases can include employment discrimination cases (where the plaintiff may have relatively little information subject to discovery as compared to the defendant company that took the allegedly adverse action), products liability cases (where the

plaintiff seeks discovery of massive amounts of information from the defendant regarding the development and marketing of the allegedly defective product, while having comparatively little information that the defendant will require in discovery), FLSA cases (where the defendant has most of the evidence regarding hours worked and wages paid), civil rights cases, and consumer fraud cases.

When one party in a case has little information but wants much from its adversary, the chances of disproportionately burdensome or expensive discovery increase greatly.²¹¹ When this occurs, courts can intervene to mitigate the burden and expense by employing the techniques discussed above, including phasing discovery, use of sampling, TAR or computer-assisted review, and, where necessary and warranted, cost allocation or shifting to the requesting party.

D. Implications of the Case Analysis

As the cases have revealed, federal judges display a remarkable degree of flexibility and ingenuity in using more than a dozen distinctly identifiable methods of managing discovery (alone or in combination) to balance the need of the requesting party against cost to the producing party, while taking into consideration what is at stake in the litigation. This is

²¹¹ See, e.g., *Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 341-42 (E.D. Pa. 2012). (In a class action consumer fraud case, the court found that the discovery requests were asymmetrical and to prevent against excessively burdensome and costly discovery from the defendant allocated discovery costs to the plaintiff rather than defendant. The court noted that “[t]he Court is persuaded, it appearing that Defendant has borne all of the costs of complying with Plaintiffs’ discovery to date, that the cost burdens must now shift to Plaintiffs, if Plaintiffs believe that they need additional discovery. In other words, given the large amount of information Defendant has already provided, Plaintiffs need to assess the value of additional discovery for their class action motion. If Plaintiffs conclude that additional discovery is not only relevant, but important . . . then Plaintiffs should pay for that additional discovery from this date forward.”); *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294 (S.D.N.Y. 2012) (Court noted that class action gender discrimination case in which plaintiffs sought extensive discovery of ESI from defendants on the issue of class certification created the risk of disproportionately burdensome and expensive discovery demands on defendants. To mitigate this and ensure proportionality, the court discussed the use of sampling and phased discovery.).

precisely what the proportionality requirement in the Rules of Civil Procedure requires them to do. So, if proportionality is achievable, and the tools to do so readily discernible, why have lawyers, bar associations and even judges themselves continued to complain (as reflected by the survey results reported at the beginning of this thesis) that judges are not monitoring and managing cases to achieve proportionality? As the case analysis in Part Two demonstrates, it is not because judges lack the tools to do so, or because there are not sufficient warning signs to enable a judge to determine at an early phase of the litigation that there are problems with a case that threaten to make discovery costs disproportionate. The answer must lie with judges themselves—their attitudes towards their obligation to manage discovery proportionately, their experience with civil discovery before becoming a judge, and the state of their knowledge of how to go about monitoring and managing discovery proportionately. To test this hypothesis, I administered a survey to United States district and magistrate judges designed to reveal their attitudes toward discovery, their awareness of the requirement to manage discovery to achieve proportionality, their approach to handling discovery disputes, the techniques they actually use when doing so, the level of their experience with discovery in civil cases before becoming a judge, and whether they had received training on how to manage discovery after becoming a judge. As will be shown in Part Three, the results of these surveys suggest reasons why the perception that judges are not fulfilling their obligation to manage discovery proportionately persists.

Part Three

In June and July 2015, I administered a survey to United States district and magistrate judges attending educational workshops sponsored by the Federal Judicial Center, the research

and educational branch of the United States Courts.²¹² The judges filled out the survey at the end of an educational session about discovery, and participation was voluntary and anonymous. The district judge workshop was for judges sitting in Fourth Circuit courts, which consists of the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina. A total of forty-two judges filled out the survey. The magistrate judge workshop was for judges sitting throughout the United States. A total of sixty-eight judges filled out the survey. The surveys were essentially the same, except that I asked district judges an additional question relevant only to them—whether they handled discovery disputes in their cases themselves, or referred them to magistrate judges. Also, based on the responses to the question directed to district judges regarding their training, I refined the question regarding the training in discovery that magistrate judges had received. I asked both district and magistrate judges about: (1) the frequency with which they balanced the interests of the party requesting discovery against the burdens and expenses to the party from whom discovery is requested (to assess their awareness of the proportionality requirement); (2) their approach to handling discovery in civil cases (whether they actively managed the discovery process, or waited until there was a dispute before becoming involved); (3) the specific techniques they had used when resolving discovery disputes (to determine which of the proportionality factors discussed in Part Two they had actually used); (4) whether they had received training about how to monitor and manage discovery since becoming a judge; and (5) their experience level with civil discovery prior to becoming a judge. The results of the survey are discussed below.

²¹² “The Federal Judicial Center is the education and research agency for the federal courts. Congress created the FJC in 1967 to promote improvements in judicial administration in the courts of the United States.” Federal Judicial Center, *available at* www.fjc.gov (last visited Jan. 22, 2016)..

When asked whether they refer discovery disputes to magistrate judges for resolution or keep them for themselves, 19% of the district judges said they always keep them, 26% said they always refer their discovery disputes to magistrate judges, and 55% said they sometimes keep discovery disputes to resolve themselves, and sometimes refer them. Thus, 81% of the district judges stated that they refer discovery disputes to magistrate judges for resolution (always or sometimes) and only 19% always keep them for themselves. This is consistent with the results of the case analysis in Section Two, where magistrate judges decided 67% of the reported cases that discussed the proportionality factors when resolving discovery disputes, and district judges decided only 28% of those cases.²¹³ The fact that magistrate judges are deciding so many discovery disputes may suggest that district judges are insufficiently experienced with the details of discovery practice in civil cases to fully appreciate the proportionality requirement, or the benefit of actively monitoring and managing cases to achieve it. It may also raise questions about the optimal use of magistrate judges and whether they are becoming specialists in discovery, while district judges are becoming more removed from it.

I asked both district and magistrate judges how likely they were when deciding a discovery dispute (whether district judges kept it for themselves, or initially assigned it to a magistrate judge, and became involved when ruling on objections to the magistrate judge's order) to balance the interests of the party requesting the discovery against the burdens and expenses to the party from whom discovery is requested, and I gave them the following choices: always, frequently, occasionally, seldom, and never. Of the district judges, 38% responded that they always balanced need against cost, 48% said that they did so frequently, 13% said they did so occasionally, and approximately 1% that they seldom did. For magistrate judges, 42% said

²¹³ *Supra*, at page 28.

they always balanced need against cost, 51% said they did so frequently, and 7% said they seldom did. The possible implications of these responses are mixed. The “good news” is that 86% of the district judges and 93% of the magistrate judges were aware of the proportionality requirement, as they always or frequently took it into consideration when resolving discovery disputes. The “bad news” is that fewer than half of the judges responding always considered proportionality factors in resolving discovery disputes, despite the fact that the Rules require them to do so in all cases.

I asked the judges which of two choices best described their approach when the parties asked them to rule on a discovery dispute—“I actively manage the discovery process in my cases,” or “I become involved in the discovery process when the parties have a dispute that results in the filing of a motion.” Of the district judges, 18% said they actively managed the discovery process in their cases, while 82% said that they waited until a discovery dispute had blossomed into a motion to become involved in the process. Of the magistrate judges, 39% responded that they actively managed the discovery process in their cases, and 61% said that they waited for a discovery motion to become involved. These responses seem especially telling, as they indicate that both district and magistrate judges primarily view themselves as “dispute resolvers” rather than “active managers” of the discovery process, with this view being far more prevalent (82%) for district judges. Given the importance that the rulemakers have placed on active judicial monitoring and management to achieve the objective of proportional discovery,²¹⁴ the survey responses suggest that much more needs to be done to educate judges about the benefits of active case management in achieving proportionality, and their obligation to do so.

²¹⁴ See, e.g., *supra* page 33 (Active Judicial Monitoring and Management of Discovery).

I asked both district and magistrate judges to identify which of the measures identified in Part Two of this thesis as tools to achieve proportionality they had used when ruling on a discovery dispute (themselves, or when ruling on objections to a magistrate judge's discovery ruling). Eighty-six percent of district judges and 93% of magistrate judges had encouraged or ordered the parties to cooperate during discovery; 80% of district judges and 75% of magistrate judges had imposed sanctions on parties for failure to properly fulfill discovery obligations; 76% of district judges and 88% of magistrate judges had ordered that the scope of discovery be narrowed; 69% of district judges and 79% of magistrate judges had ordered that discovery be conducted in phases; 62% of district judges and 69% of magistrate judges had ordered cost shifting from the producing party to the requesting party; 62% of district judges and 74% of magistrate judges had adopted informal methods of resolving discovery disputes; 57% of the district judges and 62% of magistrate judges had adopted discovery protocols, local rules, or standing orders governing the discovery process; 55% of district judges and 41% of magistrate judges had prohibited the parties from making boilerplate objections; 45% of district judges and 59% of magistrate judges had ordered the use of computer search methodology for discovery of voluminous ESI; 36% of district judges and 60% of magistrate judges had ordered that discovery be obtained from a less burdensome source; 33% of district judges and 63% of magistrate judges had ordered sampling when discovery was sought from voluminous sources; 26% of district judges and 53% of magistrate judges had issued non-waiver orders pursuant to Fed. R. Evid. 502; 1% of district judges and 10% of magistrate judges had capped the amount of time a party had to spend on discovery; and 1% of district judges and 18% of magistrate judges had ordered the use of special masters or other neutrals to assist the parties during discovery.

Several observations may be made from these responses. First, for most of the proportionality techniques identified in Part Two of this thesis, more than 50% of both district and magistrate judges had employed them, suggesting that regardless of whether they view themselves as active managers of the discovery process or more passive dispute resolvers when discovery motions are filed, judges widely are using many of the proportionality tools in resolving discovery disputes. The flip side is that judges may not be sufficiently aware of many useful proportionality techniques (or how best to use them), and this suggests that with education and encouragement, greater use (and correspondingly more proportionality) may occur. The responses also show that, with the exception of imposing sanctions and prohibiting boilerplate objections, magistrate judges have more frequently used the proportionality techniques identified in Part Two than district judges. Given the greater frequency with which magistrate judges have to manage discovery and resolve discovery disputes, this is not surprising, but it does underscore the need for greater training of district judges if the goal of proportional discovery is to be achieved. Finally, the responses provide useful information to the Federal Judicial Center when planning future educational programs on discovery for district and magistrate judges by identifying the most useful techniques to focus on, as well as those which appear to be underused.

I asked both district judges and magistrate judges about the training they had received since becoming a judge regarding management of discovery in civil cases. Specifically, I asked the district judges if they had received training about discovery from any source, whether the FJC or another organization. Fifty-five percent responded that they had, while 45% said they had not. Based on these responses, I refined the question before giving it to the magistrate judges, whom I asked how many had received training from the FJC “regarding how to handle

civil discovery in a manner designed to achieve proportionality (balancing the need of the requesting party against the cost and burden to the producing party), considering what is at stake or at issue in the litigation.” Only 25% of the magistrate judges responded that they had received such training, while 75% responded that they had not. The refined question about discovery training that I posed to the magistrate judges provides more useful information than the less specific question I asked the district judges, because it focused on education from the organization principally charged with educating federal judges, as well as on the specific type of training that could be expected to have the greatest effect on improving the management of discovery to ensure proportionality. The responses from the district judges suggest that while somewhat more than half have had some form of discovery training, nearly half have not. For the magistrate judges, who more often have to deal with management of discovery, three quarters had not received any training from the FJC regarding the proportionality requirement that the rules impose on federal judges. These responses suggest that much more needs to be done with judicial education if greater proportionality is to be achieved.

Finally, I asked both district and magistrate judges about the level of their experience with discovery in civil cases before becoming a judge. Sixty-two percent of the district judges and 66% of the magistrate judges reported “extensive” prior experience, 21% of district and 13% of magistrate judges reported “some” prior experience, 12% of district judges and 13% of magistrate judges reported “little” prior experience, and 5% of district judges and 6% of magistrate judges reported no prior experience with discovery in civil cases before becoming a judge. Overall, the vast majority of federal judges come to the court with at least some discovery experience. Some have extensive experience. This is reassuring, as the intricacies of the discovery rules and practice can be quite challenging for one with no prior exposure to them to

learn (let alone master), and expecting new judges to be able to manage discovery effectively and to achieve proportionality with no prior experience with this complicated area is asking a lot. Nonetheless, the responses are a reminder that there are federal judges who come to the bench without sufficient prior experience with the civil discovery process who would benefit from educational programs designed to teach them the fundamentals of this process and, more particularly, the importance of proportionality and the tools to achieve it.

The surveys conducted for this thesis provide useful insight about the attitudes of district and magistrate judges regarding discovery in general, and the obligation to manage discovery to ensure proportionality specifically. They were helpful in part because research failed to reveal any similar surveys conducted of federal judges concerning their attitudes towards discovery, and none of the surveys that were studied during the Duke Conference were directed at judges themselves. That said, it must be acknowledged that a survey of only 110 federal judges cannot be regarded as fully representative of the views and experiences of the more than 1200 district and magistrate judges who constitute the federal trial judiciary.²¹⁵ Nevertheless, a sampling of nearly 10% of the federal judiciary can provide useful insight regarding their approach to handling the discovery process in civil cases, their knowledge of the proportionality requirement, their experience with the tools for achieving proportionality, and their level of familiarity with discovery practice before becoming judges, at least for the purpose of beginning to understand the reasons why it has been so difficult to persuade the federal trial judges to fully embrace the notion of actively managing discovery to achieve proportionality. In the final section of this

²¹⁵ There are 678 United States district judges. See “Federal judges and how they get appointed,” in “How the Federal Courts Are Organized,” at www.fjc.gov/federal/courts.nsf. There are 531 United States magistrate judges. See “A Guide to the Federal Magistrate Judge System,” at www.fedbar.org.

thesis, I will draw some conclusions from the research of the cases discussed in Part Two and the survey of judges in Part Three, and offer some thoughts about further action that may be advisable if the goal of achieving proportional discovery in civil cases is to be realized.

Part Four: Concluding Thoughts

As shown in Part One of this thesis, since the codification of the federal rules of civil procedure in 1938, the Civil Rules Advisory Committee has struggled with how to balance the goals of making sure that litigants are able to obtain sufficient factual information about a case to ensure that it is tried, settled or disposed of during summary judgment on its merits, without imposing excessive burden or cost on the party from whom discovery is sought. The means that the Committee adopted for achieving this delicate balance was the proportionality requirement, first introduced into the rules in 1983. The Committee recognized at the inception of the proportionality requirement that its success would depend on the willingness of federal judges to “be more aggressive in identifying and discouraging discovery overuse.”²¹⁶ By 2000, when the Committee amended the Rules again to reinforce the proportionality requirement, it acknowledged that it had “been told repeatedly that courts have not implemented” the proportionality limitations on overbroad discovery “with the vigor that was contemplated.”²¹⁷ By 2010, following the Duke Conference, the Committee had concluded that rule changes alone

²¹⁶ Fed. R. Civ. P. 26(b) (1983) Advisory Committee Note. In 1984, the year following the adoption of the proportionality requirement, Chief Justice Burger addressed the American Bar Association to provide his assessment of “The State of Justice” in the United States. Notably, his comments addressed discovery abuse as a significant cause of dissatisfaction with the state of things in civil litigation. In discussing what changes were needed to turn things around, he emphasized the need for discovery reform, stating “[w]hat this means is that, under the 1983 [civil] rule changes, judges must not remain aloof from what is going on in a case simply because the parties have not presented themselves in the four walls of the courtroom to begin a trial. The 1983 amendments require that judges take a more active role in overseeing the pretrial proceedings.” Chief Justice Warren E. Burger, *The State of Justice*, 70 A.B.A.J. 62, 65 (1984).

²¹⁷ Advisory Committee Note (2000) (discussing change to Rule 26(b)(1)).

would not succeed in making “meaningful improvements” in reducing the cost of discovery in civil cases.²¹⁸ Rather, the Committee recognized that the rules needed to be augmented by education programs for judges to teach them to take more aggressive action to prevent overbroad discovery.²¹⁹ When the Committee proposed the 2015 amendments to the Civil Rules, it noted that the success of the new rules would require three essential ingredients: cooperation, proportionality and “sustained, active, hands-on judicial case management,” and it again recognized the need for educating judges about the importance of active case management to enable the new rules to succeed.²²⁰ And, as shown in the discussion at Part Two B.1,²²¹ active judicial case management is the most important of all the tools for achieving proportionality that the cases analyzed in Part Two identify. It does not seem an exaggeration to say that without active “hands on” judicial monitoring of the discovery process in all cases, and intervention to manage more actively those cases that require it, the goal of achieving proportional discovery never will be achieved—indeed thirty years of rulemaking efforts without apparent success seems to have established this rather firmly.

It also seems clear based on the results of the case analysis in Part Two that, when judges are willing to become involved in the discovery process, there are abundant tools available for them to use to do so. And, the survey results show that most of these tools have enjoyed widespread use by federal judges. If parties and judges can achieve proportional discovery through the use of the tools the judges have at their disposal, then the widely held view that the serial changes to the Rules to require proportionality have not been successful must in large part

²¹⁸ *Supra*, note 33.

²¹⁹ *Supra*, note 33, at 4.

²²⁰ Judge Campbell Memorandum, *supra* note 26, at Appendix B 2-3.

²²¹ *Supra*, page 33 (Active Judicial Monitoring and Management of Discovery).

be attributed to the reluctance of the judges to embrace the notion that they must become active in the management of the discovery process from its inception, and not passively wait until there is a dispute, and then resolve only that particular dispute.

The survey results show that the attitudes of a substantial number of federal judges (82% of district judges and 61% of magistrate judges) do not appear to be in sync with the expectation of the Rules that they actively monitor and manage the discovery process to achieve proportionality. What the survey does not show, however, is why so many judges feel this way, and there are many possible explanations that may account for it.

It may be that some judges simply are opposed to the idea that they must be responsible for management of the discovery process—are just philosophically opposed to doing so—and will not find persuasive efforts to convince them otherwise. As one federal judge recently expressed:

The job of a judge is to adjudicate—to decide disputes presented by litigants. Performing that task fairly and efficiently of course involves management of the docket; but management of discovery in individual cases ordinarily should be left to the lawyers Absent a dispute for the judge to decide, the judge should trust the lawyers and thus leave them free to manage their cases as they see fit, for competent case management involves considerations that are beyond the ken of the judge and outside the province of the rules by which a judge's decisions should be governed.²²²

As a practical matter, regardless of what the Rules may say, a federal judge who does not accept the notion that he or she must actively manage the discovery process has considerable power to simply decline to do so, and there is little that can be done about it.

²²²*Point-Counterpoint: Doing Discovery Right, Judge Leon Holmes and Magistrate Judge Craig Shaffer Compare the Merits of Proactive Versus Passive Pretrial Judicial Discovery Management, Judicature*, Summer 2015 at 67-73 (Comments of Judge Leon Holmes).

It may also be that some judges are not opposed to actively managing the discovery in their cases, but simply are overwhelmed by the number of cases that they have and do not have the time to do more than wait for a dispute, and then resolve it (themselves, or by referring it to a magistrate judge or other judicial adjunct). It takes time to actively monitor the discovery process. The judge must review the pleadings to see what is at issue in the case, confer with the lawyers (either in person or telephonically), and then determine what discovery, and in what sequence, is appropriate given what is at stake in the litigation. Where the lawsuit seeks only money damages, and it is easy to predict the range of probable outcomes, this task can be done quickly. But if the case is complex, involves many parties (who may not be inclined to cooperate), or what is at stake is not monetary, deciding on an appropriate discovery plan at the beginning of a case can be a difficult and time-consuming thing for a judge to do. Without training on how to do so efficiently, and the proper tools to use, an overworked judge may simply be unable to actively manage the process.

It may also be that some judges do not actively manage the discovery in their cases because they have never received training to do so. Even judges with extensive experience in civil discovery before they become judges do not necessarily appreciate the benefits of active management of discovery. After all, as lawyers, they were used to managing the discovery in their own cases, and may have practiced before judges who did not become involved in discovery until there was a dispute. Without training to show them the benefits of active management of discovery, and the tools for doing so, it is unrealistic to expect them to develop that approach all on their own. And, as the survey reveals, nearly half of the district judges have had no training at all since becoming a judge on how to manage the discovery process, and nearly three-quarters of the magistrate judges—who handle most of the discovery disputes in

federal court—have had no training at all in the proportionality requirement or how to manage cases to achieve it.

Judges are appointed with varying experience as attorneys. The number of judges who were prosecutors or defense counsel in criminal cases, or engaged in administrative law or commercial law fields that did not give them experience in civil discovery before being appointed will vary over time. There must be a consistent emphasis during judicial education programs on the importance of achieving proportional discovery and the management tools available to do so effectively. Waiting until the discovery rules have been amended to implement judicial education about how best to monitor and manage discovery will be far less effective in achieving the goal of proportionality than consistent education on this topic on an ongoing basis with adjustments in emphasis depending on the experience mix of the judges being trained.

There are several significant take-away points that this thesis raises. First, we really do not know why it is that the judges have been reluctant to embrace the notion of actively managing the civil discovery process, and this is a matter that is deserving of further exploration. If active management is essential to achieving proportionality, and if the judges are resistant to doing so, learning the reasons why seems essential to figuring out how to effectively address the problem. Without further study, rulemakers will have to continue to amend the rules based on anecdotal information, rather than specific data. If the goal of achieving proportionality is worth the time and effort that has been spent on it (without yet achieving success), then surely it is worth the additional time and expense to better understand the reasons why so many judges resist active management of the discovery process. The Federal Judicial Center, which is the research and education branch of the federal judiciary, should consider a comprehensive survey of federal

judges to better learn about their attitudes and practices regarding discovery. Once judges have been given the tools for achieving proportionality, they must be encouraged to use them, if only because it is in their own self-interest to do so. Judges who actively monitor discovery in all their cases, and who swiftly intervene to more directly manage cases where problems develop, find that they have fewer discovery disputes overall, resolve those they do have more quickly, and thereby have more time to devote to the substantive issues in their cases.

Second, there is a clear need for more extensive education of judges in how to effectively manage discovery to achieve proportionality. The number of judges who have had little or no training regarding proportionality is significant, and initial training for newly appointed judges and continuing education for others seems essential to achieving the goal of proportionality. Because there are so many effective tools to achieve proportional discovery, training that is aimed at showing judges how to do so should be a priority. Moreover, it should not be relegated to optional “break-out” sessions at judicial training programs, but instead should be required training of sufficient length and detail to give judges a strong foundation in exactly how to effectively manage discovery. Such education ideally should include practice using the proportionality tools in realistic case settings that allow the judges to appreciate the warning signals that discovery needs individualized management and to use the tools identified in Part Two of this thesis. Further, developing sample orders, protocols, local rules and guidelines, as well as written and recorded reference tools that judges may access on the website of the Federal Judicial Center would allow judges to follow up live training sessions with additional educational materials that would make it easier for them to master the skill of active management of discovery.

Finally, there are ninety-four federal judicial districts in the United States.²²³ Each court reflects the experience, culture, and customs of the judges and lawyers of that district. Many courts and judges likely have developed protocols, local rules, guidelines, and standard procedures that have proven effective in the management of discovery in civil cases. A systematic effort to identify what courts already have been doing that actually works should be undertaken so that the successes of those courts may be shared with others, educational programs may be tailored with this experience in mind, and materials may be archived for judges in other locations to use.

If the changes to the Civil Rules adopted in 2015 are to finally break the cycle of unsuccessful amendments to the rules to achieve proportionality, then the rule changes must be simply the first of many steps taken to achieve the goal. More study of the reasons why judges resist active management of discovery will suggest better ways to overcome this reluctance. More extensive and practical education of judges as to how they may use the many tools to achieve proportionality and recognize the warning signs that threaten to undermine it also will ensure that judges know about the tools they need, how they may be employed most effectively, and why it is in their self-interest to do so. And harvesting the experience of judges and courts that already have figured out effective means to promote proportional discovery and making it available for other judges and courts will go a long way towards ensuring that, a decade from now, future members of the Civil Rules Advisory Committee are not again going through the amendment process to say—once more—that judges need to ensure that discovery is proportional. This thesis has shown that tools exist to achieve proportional discovery. What

²²³ See Court Role and Structure, available at www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Jan. 22, 2016).

remains is to see whether the research, resources and educational effort needed to overcome judicial reluctance to adopt active hands-on management of discovery can be mustered to get the job done. Only if this occurs will it be possible to “stop the insanity.”