

NEW UTAH RULE 26: A BLUEPRINT FOR PROPORTIONALITY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

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*"If courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution."*¹

As courts grapple with the data explosion and an ever-expanding volume of electronically stored information,² they are more frequently turning

1. John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 460 (2010).

2. Gil Keteltas & John Rosenthal, *Discovery of Electronic Evidence*, in ELECTRONIC EVIDENCE LAW AND PRACTICE 1, 3 (Paul Rice ed., 2d ed. 2008); see also *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 301 (2010) ("It is well documented that the volume of ESI is exploding in every corner of the digital world, increasing the volume of potentially discoverable information."); Greg Muscarella, *Opening the Doors of Predictive Coding*, E-DISCOVERY 2.0 BLOG (June 22, 2012), <http://www.clearwellsystems.com/e-discovery-blog/2012/06/22/opening-the-doors-of-ediscovery-predictive-coding> ("It's no mystery that

to proportionality principles³ to control the costs, burdens, and delays associated with the discovery process.⁴ Courts,⁵ clients,⁶ and counsel⁷ all want proportionality to be the touchstone of discovery. To do so effectively, however, will require a rule change.⁸

In this Article, we propose amendments to the Federal Rules of Civil Procedure to more clearly condition the scope of permissible discovery on principles of proportionality. We also suggest amendments underscoring counsel's duty to engage in proportional discovery. These changes will decrease eDiscovery costs and burdens, discourage abusive practices, and help adapt the rules to evolving technology.

the volume of electronically stored information (ESI) organizations deal with continues to increase exponentially.”).

3. John Jablonski, *Raising the Bar on Proportionality?*, in PRESERVATION AND PROPORTIONALITY 19, 19 (Brad Harris & Ron Hedges eds., 2011), available at <http://www3.legalholdpro.com/rs/zapproved/images/WP-PreservationandProportionality-Nov11.pdf> (“Proportionality is in vogue, despite being more or less ignored since its introduction in the Federal Rules of Civil Procedure in 1983.”).

4. SYMANTEC, INFORMATION RETENTION AND eDISCOVERY SURVEY 4 (2011), available at http://www.symantec.com/about/news/resources/press_kits/detail.jsp?pkid=ediscovery-survey_2011. The survey contains data gathered from the IT and legal departments of 2,000 global enterprises with a minimum of 1,000 employees. *Id.* at 6.

5. RANDALL R. RADER, THE STATE OF PATENT LITIGATION 7 (2012), available at apps.americanbar.org/intelprop/spring2012/coursematerials/docs/E-Discovery_in_Patent_Litigation/TheState_of_PatentLitigation-ChiefJudgeRader.pdf. (“[T]he greatest weakness of the US court system is its expense. . . . [T]he driving factor for that expense is discovery excesses. Electronic recordkeeping in the modern age has multiplied the expense of looking behind every curtain.”).

6. Robert Hardaway, Dustin D. Berger & Andrea Defield, *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 522 (2011) (“Indeed, many civil litigants may find that they cannot sustain the costs of the discovery-related litigation. As a result, these civil litigants will never be able to obtain a judicial resolution of the merits of their case.”).

7. CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 9 (2011) (“‘[L]itigation is too expensive.’ More than three out of four attorneys in every group [surveyed] expressed agreement with this statement.”); see also Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, Keynote Address at the University of Baltimore Law Review Symposium (Mar. 13, 2008), in 37 U. BALT. L. REV. 321, 324-26 (2008) (discussing how law firms must adapt to modern discovery to maintain clients and prevent malpractice).

8. Wayne B. Mason, *LCJ: Providing New Impetus for Reform on Many Levels*, METROPOLITAN COR. COUNS., June 2012, at 1, 1 (“Despite the best intentions, any hope or expectation that [the 2006 Federal Rules] amendments would curb the discovery ‘explosion’ have been disappointed over the last several years. Contrary to the expressed intent of the amendments, discovery burdens, fueled by court decisions based upon indistinct and inadequate guidelines, have increased exponentially. Broad-based rule reform thus has been shown to be essential to help achieve the consistency, uniformity, and predictability that is necessary to reduce the costs and burdens of modern litigation.”).

INTRODUCTION

Discovery has always been expensive. Yet in the digital age, the costs of discovery are spiraling out of control.⁹ Unfortunately, true to Moore's law,¹⁰ discovery will likely become more costly as electronically stored information (ESI) continues on the path of exponential growth.¹¹ As a result, the trend of data growth will likely increase the weighty discovery burdens that litigants—especially organizations—already bear. Consider the following example. In 2008, the average end-user may have owned 100 gigabytes of information.¹² Just four years later, that number is now closer to 1,000,¹³ all of which could be subject to review for discovery purposes in a given action.¹⁴ This calculus is weighty for individual parties, but crushing for enterprises with thousands of employees, each of whom may respectively have a terabyte of potentially discoverable information.¹⁵

9. Carroll, *supra* note 1, at 456 (“A recent study done by the American Bar Association Section found that 82% of the lawyers surveyed . . . agreed discovery is too expensive.”); *accord* Pettit v. Pulte Mortg., LLC, No. 2:11-cv-00149-GMN-PAL, 2011 WL 5546422, at *5 (D. Nev. Nov. 14, 2011) (“Discovery is expensive.”).

10. Moore's Law Inspires Intel Innovation, INTEL, <http://www.intel.com/content/www/us/en/silicon-innovations/moores-law-technology.html> (last visited Nov. 20, 2012) (stating Intel co-founder Gordon Moore predicted that the number of transistors on a chip would double every two years). Essentially, it predicts exponential growth in computing power and an analogous increase in electronic data. *See id.*

11. U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, AN E-DISCOVERY MODEL ORDER 2 (2011), available at http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf [hereinafter MODEL ORDER] (“In recent years, the exponential growth of and reliance on electronic documents and communications has exacerbated such discovery abuses.”).

12. *See* Keteltas & Rosenthal, *supra* note 2, at 5-6.

13. *Id.*; Jablonski, *supra* note 3, at 19-20 n.15.

14. Hardaway, Berger & Defield, *supra* note 6, at 528-29 (“Nor are the discovery horror stories limited to the monumental cases. They now include even simple and routine cases, including divorce cases.”).

15. SYMANTEC, STATE OF INFORMATION GLOBAL RESULTS 5 (2012), available at <http://www.symantec.com/content/en/us/about/media/pdfs/2012-state-of-information-global.en-us.pdf> (“The typical small and mid-sized business (SMB) has 563 terabytes of data across all stores and devices. While that might sound like a lot, it is dwarfed by the volume of information the typical enterprise has: about 100,000 terabytes.”); *see also* Dean Gonsowski, *Review-less E-Discovery Review*, E-DISCOVERY 2.0 BLOG (July 21, 2008), <http://www.clearwellsystems.com/e-discovery-blog/2008/07/21/review-less-e-discovery-review> (“Back in the day, information was viewed in terms [of] banker boxes of information, and even in the most document intensive discovery matters this measuring stick belied the belief that armies of attorneys could conceivably conquer the massive document review problem. But now, we often see clients that process routine matters containing terabytes of information.”).

This trend of growth figures to continue given the proliferation of new communication and storage media.¹⁶ Indeed, it appears that there is or will be a discoverable recordable digital format for everything conceivable: from email,¹⁷ voice over Internet Protocol (VoIP)¹⁸ and social media,¹⁹ to short message service (SMS)²⁰ and instant messages (IM).²¹ Even the GPS in your car could be subject to discovery.²² ESI is not just limited to text or audio data either—it even encompasses data about that data.²³ Meanwhile, all of this electronic detail is archived and stored in an increasing number of smartphones, tablet computers, servers, clouds,²⁴ and databases, often with multiple redundancies and no central index.²⁵ With an average cost of at

16. By 2020, “the amount of digital information created and replicated in the world will grow to an almost inconceivable 35 trillion gigabytes as all major forms of media—voice, TV, radio, print—complete the journey from analog to digital. . . . [In 2009, the digital universe] grew by 62% to nearly 800,000 petabytes. . . . [B]y 2020, our Digital Universe will be 44 TIMES AS BIG as it was in 2009.” JOHN GANTZ & DAVID REINSEL, IDC, THE DIGITAL UNIVERSE DECADE—ARE YOU READY? 1 (2010), *available at* <http://www.emc.com/collateral/analyst-reports/idc-digital-universe-are-you-ready.pdf>.

17. Keteltas & Rosenthal, *supra* note 2, at 4 (quoting *Byers v. Ill. State Police*, No. 99 C 8105, 2002 WL 1264004, at *10 (N.D. Ill. June 3, 2002) (“E-mails have replaced other forms of communication besides just paper-based communication. Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail. Additionally, computers have the ability to capture several copies (or drafts) of the same e-mail, thus multiplying the volume of documents. All of these e-mails must be scanned for both relevance and privilege.”).

18. Hardaway, Berger & Defield, *supra* note 6, at 553.

19. Social media communications are requested for production at least 41% of the time. SYMANTEC, *supra* note 4, at 9.

20. The Symantec Survey groups SMS and IM together. *Id.*; see also Laura M. Holson, *Text Messages: Digital Lipstick on the Collar*, N.Y. TIMES (Dec. 9, 2009), www.nytimes.com/2009/12/09/us/09text.html (discussing the role of text messages in family law).

21. IM and SMS are requested for production at least 44% of the time. SYMANTEC, *supra* note 4, at 9.

22. Craig Ball, *GPS Evidence Might Drive Your Case Home*, L. TECH. NEWS (Oct. 29, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202425606808&GPS_Evidence_Might_Drive_Your_Case_Home&slreturn=20121021120935. *But see* *United States v. Jones*, 132 S. Ct. 945, 949 (2011) (rendering the use of GPS tracking devices on motor vehicles a search under the Fourth Amendment). *Cf.* Hardaway, Berger & Defield, *supra* note 6, at 522-26 (discussing some drastic differences between criminal and civil discovery procedures).

23. Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1, 6 (2007) (asserting that the 2006 amendments to the Federal Rules “arguably impose[d] a modest presumption in favor of preserving and producing relevant metadata”).

24. See generally Dean Gonsowski, *Compliance in the Cloud & the Implication on Electronic Discovery*, in *CLOUD FORENSICS* (Keyun Ruan ed., forthcoming 2013).

25. Keteltas & Rosenthal, *supra* note 2, at 5-6.

least \$18,000 per gigabyte for document review²⁶—not to mention the costs of processing and collection²⁷—discovery of all matters relevant to a claim or defense²⁸ can quickly surpass the value of the controversy.²⁹ In summary, the information explosion has generated and will continue to generate extremely complex and expensive litigation conundrums for organizations.

Despite this changed technological landscape, discovery practice under the Federal Rules of Civil Procedure (Federal Rules or Rules) remains entrenched in the idea of complete and full disclosure of all facts, no matter how remotely related to a claim or defense.³⁰ While this sweeping right of discovery may advance the *just* determination of a case,³¹ it does little to advance the equally important purposes of *speedy* and *inexpensive* determination.³² To achieve all three purposes of the Federal Rules³³ in the digital age, proportionality must be the defining principle underlying the discovery process.³⁴

26. NICHOLAS M. PACE & LAURA ZAKARAS, RAND INSTIT. FOR CIVIL JUST., WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 20 (2012), available at http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

27. Eighteen thousand dollars may actually be a conservative estimate, as some commentators have placed the figure at closer to \$180,000, including locating, formatting, reviewing, and transporting services. David Nuffer & Philip Favro, *Proportionality Demystified: Discover How to Reduce the Costs and Burdens of eDiscovery by Following Proportionality Standards*, INSIDE COUNS. (June 12, 2012, 2:00 PM), <http://www.insidecounsel.com/webseminars/proportionality-demystified-discover-how-to-reduce>; see also Dean Gonsowski, *Morton's Fork, Oil Filters the Nexus with Information Governance*, E-DISCOVERY 2.0 BLOG (May 10, 2012), <http://www.clearwellsystems.com/e-discovery-blog/2012/05/10/mortons-fork-oil-filters-the-nexus-with-information-governance-ediscovery> (evaluating and summarizing several different reports regarding per GB ESI production costs).

28. FED. R. CIV. P. 26(b)(1).

29. See Keteltas & Rosenthal, *supra* note 2, at 8. Given this empirical data, it is not implausible to suggest that in the next ten years, paper discovery could virtually disappear into a growing vortex of eDiscovery. Richard Marcus, *Only Yesterday: Reflections on Rule-making Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 10-11 (2004) (“[O]ver ninety percent of the ‘information’ developed by corporations and governmental agencies is presently electronic and never put into hard copy form. In the future (if not the present) we may expect the ‘paperless’ office. In that setting, what else can civil discovery pursue but electronically-stored materials?” (footnote omitted)).

30. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (explaining that discovery is designed to “make a trial less a game of blindman’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent”).

31. See FED. R. CIV. P. 1 (mandating that the Federal Rules “be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”).

32. See *id.*

33. See *id.*

34. See Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 402-06 (2008) (arguing that

Remarkably, this notion of proportionality is already extant in the Federal Rules.³⁵ The Rules ostensibly require that the benefits of discovery be commensurate with its corresponding burdens.³⁶ Found in Rule 26, proportionality has the potential to alleviate the troubling costs, burdens, and delays associated with eDiscovery.³⁷ Simply put, the proportionality rule empowers courts to restrict the liberal bounds of federal discovery practice.³⁸ For example, discovery *must* be limited where requests are unreasonably cumulative or duplicative,³⁹ the discovery can be obtained from an alternative source that is less expensive or burdensome,⁴⁰ or the burden or expense of the discovery outweighs its benefit.⁴¹ Moreover, proportionality also requires counsel to certify that they will conduct discovery within the parameters of reasonableness.⁴²

While the proportionality rule has been in place for nearly three decades, its use up until recently has been sporadic at best.⁴³ Hidden in the mas-

proportionality provisions governing production should also apply by analogy to preservation); *cf.* *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 516 (D. Md. 2010) (discussing the nationwide concern regarding the lack of a national standard and diverging local standards regarding proportionality applicability to preservation).

35. See FED. R. CIV. P. 26(b)(2)(C).

36. *Id.*

37. Carroll, *supra* note 1, at 460; *see, e.g.*, *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168 (MLC), 2012 WL 1299379, at *7-10 (D.N.J. Apr. 16, 2012) (applying proportionality standards to curtail overly broad discovery requests).

38. FED. R. CIV. P. 26(b)(2)(C).

39. FED. R. CIV. P. 26(b)(2)(C)(i); *see, e.g.*, *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543-44 (4th Cir. 2004) (affirming protective order that prevented discovery deemed duplicative of depositions already taken).

40. FED. R. CIV. P. 26(b)(2)(C)(i); *see, e.g.*, *Grabenstein v. Arrow Elecs., Inc.*, No. 10-cv-02348-MSK-KLM, 2012 WL 1388595, at *6 (D. Colo. Apr. 23, 2012) (rejecting sanctions where plaintiff had obtained the sought-after ESI from an alternative source even though the defendant had violated a regulatory retention obligation).

41. FED. R. CIV. P. 26(b)(2)(C)(iii); *see* *Wood v. Capital One Servs., LLC*, No. 5:09-cv-1445 (NPM/DEP), 2011 WL 2154279, at *13 (N.D.N.Y. Apr. 15, 2011) (denying a motion to compel production of marginally relevant ESI given the nominal amount in controversy vis-à-vis the high costs of production, all while acknowledging that the multinational corporate defendant could afford to produce the requested discovery); *accord* *Thermal Design, Inc. v. Guardian Bldg. Prods.*, No. 08-C-828, 2011 WL 1527025, at *1 (E.D. Wis. Apr. 20, 2011) (“Courts should not countenance fishing expeditions simply because the party resisting discovery can afford to comply.”).

42. FED. R. CIV. P. 26(g) (“[A]n attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry . . . with respect to a discovery request, response, or objection, it 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.”).

43. Ron Hedges, ‘Proportionality’ Under the Federal Rules: An Overview, in PRESERVATION AND PROPORTIONALITY, *supra* note 3, at 5, 5-6; Jordan M. Singer, *Proportionality’s Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 169 (2012) (discussing how the structure of legal education, which typically devotes “relatively little time on discovery,”

sive verbiage of the longest rule of civil procedure,⁴⁴ proportionality has been mostly overlooked since its enactment in 1983. Rightly or wrongly, few have paid it much attention given the liberal scope of discovery first authorized under the Federal Rules. It is only after the broad scope of discovery is delineated that the limitations of proportionality—buried at the end of the provision—are even mentioned.⁴⁵ In like manner, the proportionality certification requirement remains tucked away and largely overlooked at the very end of Rule 26.⁴⁶

To address these drafting deficiencies and better emphasize proportionality in federal discovery practice, we propose that Rule 26 be amended to more clearly condition the permissible scope of discovery on proportionality principles. We also suggest that Rules 26 and 37 be amended to further emphasize counsel's obligation to engage in proportional discovery.

Surprisingly enough, a blueprint for such amendments is already in place in the State of Utah. Effective November 1, 2011, Utah implemented sweeping changes to its civil discovery practice through amended Civil Procedure Rule 26.⁴⁷ Among its many laudable provisions, this new rule includes a clear mandate that proportionality is the standard governing discovery in Utah: "Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party *if the discovery satisfies the standards of proportionality.*"⁴⁸ Furthermore, Utah Civil Procedure Rules 26 and 37 bring needed emphasis to the proportionality certification requirement that is presently lacking in the Federal Rules.⁴⁹

Such amendments to the Rules would more clearly emphasize proportionality as a meaningful principle and place litigants in a better position to realize both the speedy and the inexpensive determination of their case.⁵⁰

contributes to disproportionate discovery abuses); JOHN M. BARKETT, THE 7TH CIRCUIT E-DISCOVERY PILOT PROJECT: WHAT WE MIGHT LEARN AND WHY IT MATTERS TO EVERY LITIGANT IN AMERICA 23-24 (2011), available at http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf.

44. Rule 26 accounts for eight pages of the actual rules' text. FED. R. CIV. P. tbl. of contents. The entire rules portion of the Federal Rules is ninety-six pages long; nearly 10% of the Rules are dedicated to Rule 26. *Id.*

45. FED. R. CIV. P. 26(b)(1) ("Unless otherwise limited by court order, the scope of discovery is as follows: . . . [a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C)."); see also Nuffer & Favro, *supra* note 27.

46. FED. R. CIV. P. 26(g); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008) (observing that Rule 26(g) is perhaps "the most important, but apparently least understood or followed, of the discovery rules").

47. See UTAH R. CIV. P. 26.

48. UTAH R. CIV. P. 26(b)(1) (emphasis added).

49. UTAH R. CIV. P. 26(b)(3), 37(a)(3), 37(b)(2).

50. Philip Favro, *Rule 1 and Information Governance—The Bookends of Cost-Effective e-Discovery*, EDDE J., Summer 2011, at 10, 10, available at

Indeed, recent decisions have demonstrated that certain courts are doing just that: championing proportionality principles to reduce discovery burdens and their attendant evils.⁵¹ In contrast, without amendments to the Federal Rules, circuit and district courts will continue to take the initiative in creating their own rules that promote proportionality.⁵² While these efforts have in some cases been very successful in emphasizing proportionality, they also create diverging standards and practices.⁵³ A top-down amendment approach is the only practical way to uniformly “secure the just, speedy, and inexpensive determination of every action and proceeding.”⁵⁴

This Article will consider these subjects. In Part I, we delve into the proportionality rule and further clarify why amendments to the Federal Rules are needed. In particular, Section I.A discusses the background and text of the rule, including the effect of succeeding amendments. Section I.B examines recent proportionality case law and spotlights several best practices which have emerged from that jurisprudence, all grounded in the principle of proportionality. Section I.C reviews the rules and practices that various circuit and district courts have promulgated to more effectively address proportionality in their jurisdictions. Section I.D analyzes the shortcomings of the current Rules regime and why they justify amending the Federal Rules. In Part II, we discuss the Utah Rules and the feasibility of using certain of those provisions as a blueprint for modifying the Federal Rules. We conclude in Part III with specific proposals to amend the Rules to better address discovery costs in the digital age.

I. STATE OF EXISTING LAW ON PROPORTIONALITY IN DISCOVERY

Proportionality is not a new concept.⁵⁵ Though formally introduced into the Federal Rules in 1983, proportionality finds its origin in Rule 1⁵⁶ and runs implicitly throughout the Federal Rules.⁵⁷ Since its emergence in 1983, proportionality has been expanded and reinforced to give it further effect.⁵⁸

<http://www2.americanbar.org/sections/scitech/ST203001/PublicDocuments/EDDE%20JOURNAL%20-%20volume%20%20issue%203.pdf>.

51. See discussion *infra* Section I.B.

52. See discussion *infra* Section I.C.

53. See Grimm et al., *supra* note 34, at 392 (lamenting the complexities that organizations face with respect to preserving documents given the absence of “clear and universal proportionality guidelines applicable to the pre-litigation duty to preserve”).

54. FED. R. CIV. P. 1.

55. Carroll, *supra* note 1, at 457.

56. FED. R. CIV. P. 1 (stating that the Federal Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”).

57. Hedges, *supra* note 43, at 5 (“Proportionality may be explicit in some of the Rules, but is implied throughout.”).

58. FED. R. CIV. P. 26 advisory committee’s note.

Yet despite such efforts, it is still not apparent to many jurists and lawyers that discovery must be consistent with proportionality standards.⁵⁹ In this Part, we analyze the proportionality standard, demonstrate its effectiveness in reducing the costs and burdens of discovery, and justify the basis for an amendment to better ensure that proportionality becomes the touchstone of federal discovery practice.

A. Proportionality in the Federal Rules of Civil Procedure

1. Rule 1: The Foundation for Proportionality

Federal Rule 1 establishes a compelling directive that is tailor made for proportionality. More than just a vestigial preamble to the Federal Rules, Rule 1 requires the “just, speedy, and inexpensive determination of every action and proceeding.”⁶⁰ While not expressly a proportionality rule, the general principles advanced in Rule 1—particularly cost reduction and expeditious proceedings—are harmonious with the overall purposes of proportional discovery.⁶¹ This is apparent from the number of discovery related cases that recognize the value of the Rule 1 decree in addressing unreasonable eDiscovery expenses and delays.⁶²

Another important aspect of Rule 1 in the context of proportionality is that it places an equal obligation on courts *and* counsel to ensure that its objectives are met.⁶³ This may come as a surprise to some attorneys, who

59. Hedges, *supra* note 43, at 5-6; FED. R. CIV. P. 26 advisory committee’s note (“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.” (citation omitted)).

60. FED. R. CIV. P. 1. First enacted in 1938, some commentators go so far as to call Rule 1 the “Master Rule.” Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 287, 289 n.8 (2010).

61. David Cohen, *Rule 1 Should Guide Us, in PRESERVATION AND PROPORTIONALITY*, *supra* note 3, at 14, 14-15.

62. *See, e.g.*, Lee v. Max Int’l, LLC, 638 F.3d 1318, 1320-21 (10th Cir. 2011) (dismissing plaintiffs’ action after they failed to produce relevant documents in response to previous court orders); *see also* Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1009 (D. Ariz. 2011) (reasoning that “judicial efficiency and the prompt resolution of litigation” supported a terminating sanction given defendants’ evidence destruction and the resulting delays it caused); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (limiting and phasing the scope of discovery to achieve the Rule 1 mandate pending the resolution of a motion to dismiss); Nycomed U.S. Inc. v. Glenmark Generics Ltd., No. 08-CV-5023 (CBA)(RLM), 2010 WL 3173785, at *11 (E.D.N.Y. Aug. 11, 2010) (imposing a \$125,000 monetary sanction on defendants for the “undue delay” caused by their discovery failings).

63. FED. R. CIV. P. 1 advisory committee’s note (“As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.”).

view the adversarial process as a zero-sum game to be won at all costs.⁶⁴ Unfortunately, such a misguided view seems to be the norm in federal discovery. Abuses can unfairly grind an action to a halt as parties “wage litigation”⁶⁵ in an effort to obtain access to all potentially relevant ESI.⁶⁶ Rule 1 teaches that zealous advocacy in discovery must be tempered by the need to reduce costs and expedite matters, both of which are consistent with principles of proportionality.⁶⁷

2. The 1983 Amendments: The Proportionality Rule

The principles underlying Rule 1 were formally introduced into discovery practice in 1983 with a new round of amendments to the Federal Rules.⁶⁸ In particular, Rule 26 was amended to include Rule 26(b)(2)(C)⁶⁹

64. See Singer, *supra* note 43 (arguing that the legal culture is responsible for fostering a distributive discovery paradigm); see also Steven S. Gensler, *Some Thoughts on the Lawyer’s E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 554-56 (2009); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 360-65 (D. Md. 2008); Network Computing Servs. Corp. v. Cisco Sys., Inc., 223 F.R.D. 392, 395 (D.S.C. 2004) (“If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.”) (quoting Krueger v. Pelican Prod. Corp., No. CIV-87-2385-A (W.D. Okla. Feb. 24, 1989)).

65. *Calcor Space Facility, Inc. v. Superior Court*, 61 Cal. Rptr. 2d 567, 570-71 (Ct. App. 1997) (urging courts to aggressively curb “cancerous” discovery abuses, curtail “promiscuous” discovery and insist that “discovery devices be used as tools to facilitate litigation rather than as weapons to wage litigation”).

66. *Bowers v. NCAA*, No. 97-2600 (JBS), 2008 WL 1757929, at *1-2, *4, *6 (D.N.J. Feb. 27, 2008) (drawing on proportionality principles to deny plaintiff’s request for additional discovery of marginally relevant ESI).

67. *Pettit v. Pulte Mortg., LLC*, No. 2:11-cv-00149-GMN-PAL, 2011 WL 5546422, at *6 (D. Nev. Nov. 14, 2011) (“[T]his court will adopt a totality of the circumstances, fact-specific approach and evaluate on a case-by-case basis whether prohibiting, delaying, or limiting discovery is appropriate to secure the just[,] speedy[,] and inexpensive determination of the case while a dispositive motion is pending.”).

68. Arthur Miller described the 1983 Rule 26 changes as the most worrisome of all the amendments and likened them to “a very high stakes poker game.” ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 30 (1984). In his opinion, the proportionality amendments introduced a third rail in civil litigation: the public interest and attendant social costs of prolonged discovery side-litigation. *Id.* The amendments turned the bench into the public’s representative by authorizing judicial intervention to curb abuse that could needlessly absorb court time. See *id.* Miller feared that this intervention and emphasis on cooperation could subvert the adversarial process. See *id.* at 31-35; accord *Kipperman v. Onex Corp.*, 260 F.R.D. 682, 698 (N.D. Ga. 2009) (“The judicial system uses scarce judicial resources that must be diverted from other cases to resolve discovery disputes.”).

69. As amended in 1983, the proportionality rule was then styled as Federal Rule of Civil Procedure 26(b)(1). MILLER, *supra* note 68, at 32-33. The proportionality rule will be referred to herein by its present location in Rule 26(b)(2)(C).

and Rule 26(g).⁷⁰ In so doing, the Advisory Committee was motivated by a growing body of commentators who sought increased judicial involvement to rein in abusive discovery.⁷¹ The reasoning at that time was that increased judicial oversight would be an effective means of addressing “redundant or disproportionate discovery.”⁷²

The proportionality rule was specifically encapsulated in Rule 26(b)(2)(C). In accordance with the rule, courts were to limit discovery requests that were unreasonably cumulative or duplicative.⁷³ In like manner, discovery that could be obtained from an alternative source that was less expensive or burdensome was also to be curtailed.⁷⁴ Finally, courts were counseled to limit discovery whose burden or expense was disproportionate to its benefits.⁷⁵ Through these new powers, courts were to “be more aggressive in identifying and discouraging discovery overuse.”⁷⁶ In particular, they were to be on the watch for lawyers who gamed the system by using discovery for tactical advantage or intimidation.⁷⁷

To ensure compliance with the proportionality rule, a certification requirement that mirrored Rule 11 was enacted in the form of Rule 26(g).⁷⁸ Under Rule 26(g), a lawyer certified by her signature that she would engage in proportional discovery, *i.e.*, that a request, response, or objection complied with proportionality principles.⁷⁹ To properly incentivize counsel, the Advisory Committee inserted a mandatory sanctions trigger for unjustified violations of Rule 26(g).⁸⁰

70. Rule 26(g) was introduced as a corollary to amendments made to Rule 11 to curb discovery abuse by imposing a direct and sanctionable duty. Gensler, *supra* note 64, at 557-59.

71. Singer, *supra* note 43, at 179.

72. FED. R. CIV. P. 26 advisory committee’s note; Marcus, *supra* note 7, at 329; MILLER, *supra* note 68, at 32 (“There is only one way to reduce redundancy and disproportionality, and that way is through the federal judiciary. So we have sold the judges into slavery. It is as simple as that. They are now the gatekeepers.”).

73. FED. R. CIV. P. 26(b)(2)(C)(i).

74. *Id.*

75. FED. R. CIV. P. 26(b)(2)(C)(iii).

76. FED. R. CIV. P. 26 advisory committee’s note.

77. *In re Convergent Technologies Sec. Litig.*, 108 F.R.D. 328, 332 (N.D. Cal. 1985) (“I have emerged from my contacts with these matters with an uneasy sense that the discovery system in large commercial cases more than occasionally may be perverted into an arena for economic power plays, that parties use discovery tools (or cast their responses to discovery requests) not so much to learn what the facts are, but more to muscle one another into attitudes conducive to favorable settlements.”).

78. FED. R. CIV. P. 26(g); *Bottoms v. Liberty Life Assurance Co. of Bos.*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at *4-5 (D. Colo. Dec. 13, 2011).

79. FED. R. CIV. P. 26(g).

80. FED. R. CIV. P. 26(g)(3) (“If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney’s fees, caused by the violation.”).

Contemporary commentary regarding Rule 26(g) makes clear that strict enforcement of the certification provision was the lynchpin for success of the proportionality rule.⁸¹ In the landmark opinion of *Mancia v. Mayflower Textile Services Co.*, the court painstakingly reviewed the purposes underlying Rule 26(g).⁸² More specifically, the court singled out recycled discovery requests and boilerplate objections as evils that Rule 26(g) was designed to eliminate.⁸³ Lamenting that such practices were still all too prevalent in discovery, the court observed that Rule 26(g) was perhaps “the most important, but apparently least understood or followed, of the discovery rules.”⁸⁴ That view, shared by other discovery cognoscenti,⁸⁵ perhaps best explains why the use of such boilerplate is still endemic today and contributes significantly to the costs of discovery.⁸⁶

3. The 2000 Amendments: Proportionality Reiterated

Despite the unequivocal emphasis on proportionality in the 1983 amendments, the Advisory Committee felt compelled to revisit and again spotlight the issue in 2000.⁸⁷ The impetus for doing so was the Committee’s observation that the judiciary had not enforced the proportionality rule “with the vigor that was contemplated” by the 1983 amendments.⁸⁸ To help bring greater attention to the proportionality rule, a sentence was added at the end of Rule 26(b)(1) to reiterate that the permissible scope of discovery was conditioned on proportionality standards:⁸⁹ “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”⁹⁰

Despite the Advisory Committee’s best intentions, the 2000 amendment still has not brought widespread use and acceptance of the proportion-

81. See, e.g., *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-60 (D. Md. 2008).

82. *Id.*

83. *Id.* at 358; see also MILLER, *supra* note 68, at 35 (“So we try to tell the bar: ‘Don’t do this or you are vulnerable to sanctions,’ and we also try to tell the bench: ‘If you see it, stop it.’ So it is sort of a double whammy—we are trying to get it from both ends.”); accord *In re* Convergent Technologies Sec. Litig., 108 F.R.D. 328, 331-32 (N.D. Cal. 1985).

84. *Mancia*, 253 F.R.D. at 357.

85. Gensler, *supra* note 64, at 559 (“For twenty years, judges and lawyers alike paid little attention to Rule 26(g).”).

86. See, e.g., *Anderson v. Reliance Standard Life Ins. Co.*, No. WDQ-11-1188, 2011 WL 4828891, at *2 (D. Md. Oct. 11, 2011); *Bottoms v. Liberty Life Assurance Co. of Bos.*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at *7 (D. Colo. Dec. 13, 2011).

87. FED. R. CIV. P. 26 advisory committee’s note (“The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated.”).

88. *Id.*

89. *Id.* (“This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”).

90. FED. R. CIV. P. 26(b)(1).

ality rule in federal discovery practice.⁹¹ Although there are many factors driving the lack of use, one key reason is that many jurists and practitioners may still not know that the proportionality rule exists.⁹² Nor will they, so long as the conditioning language in Rule 26(b)(1) remains divorced from the overall scope of discovery. Indeed, the limiting sentence, found at the end of the provision and obscured by other intervening conditions, is completely segregated from the section defining the scope of discovery, which reads: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.”⁹³

4. *The 2006 Amendments: Accommodating eDiscovery*

Just six years later, the Advisory Committee again revisited proportionality. Heralding the arrival of the digital age, the 2006 amendments to the Federal Rules sought to accommodate the increasing pressures that ESI had placed on the discovery process. Recognizing the crushing burdens that ESI could pose for many organizations, the Committee implemented multiple measures that could alleviate pain points surrounding the storage and retrieval of ESI.⁹⁴

For example, the Committee clarified that the proportionality rule applied to ESI: “The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.”⁹⁵ The amendments also broadened the scope of the proportionality rule by implementing new Rule 26(b)(2)(B). That provision limits the discovery of ESI that may not be “reasonably accessible because of undue burden or cost.”⁹⁶ While such data could still be subject to discovery, it could not be obtained unless the moving party established a fact-specific showing of good cause and satisfied the protections of the proportionality rule.⁹⁷ Meeting those requirements was by no means a “slam dunk” since, as the Committee observed, the burdens associated with

91. Carroll, *supra* note 1, at 464 (“Thus, it appears that proportionality, which most suggest is a valuable tool for managing discovery, may be very underutilized.”); *see also* Jablonksi, *supra* note 3, at 19.

92. Nuffer & Favro, *supra* note 27 (discussing the lack of instruction regarding proportionality to practitioners); *accord* Singer, *supra* note 43, at 180-82.

93. FED. R. CIV. P. 26(b)(1).

94. “The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information.” FED. R. CIV. P. 26 advisory committee’s note.

95. *Id.*

96. FED. R. CIV. P. 26(b)(2)(B).

97. *Id.*

reviewing ESI for relevance and privilege could tip the scales against ordering the requested discovery.⁹⁸

By shifting the burden of good cause to the party seeking data that was not readily accessible and by requiring courts to consider the burdens placed on the producing party, the Committee implemented an enforcement mechanism that finally had the potential to alleviate certain narrow discovery burdens of organizations.⁹⁹ Subsequent jurisprudence demonstrates that this approach to proportionality has in some cases been successful in pushing parties toward cooperation and compromise on the production of ESI that is difficult to access or proscribing such discovery altogether.¹⁰⁰

B. Lessons from Recent Case Law Developments on Proportionality

While proportionality standards were underused for years after they were first included in the Rules, they have been more widely embraced of late. Indeed, since the 2006 amendments to the Federal Rules, certain circuit and district courts have championed proportionality as a benchmark for resolving troublesome eDiscovery.¹⁰¹ Though some commentators have argued that the proportionality rule has not been effective in this regard, contemporary jurisprudence suggests otherwise.¹⁰² The *Eisai Inc. v. Sanofi-Aventis U.S., LLC*¹⁰³ case is particularly instructive on the impact proportionality principles can have on the discovery process.

In *Eisai*, the court denied the plaintiff's request that the defendants produce ESI from over 200 company representatives.¹⁰⁴ The plaintiff had argued that production from these custodians was necessary to help estab-

98. FED. R. CIV. P. 26 advisory committee's note.

99. See, e.g., *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *7, *13 (N.D.N.Y. Apr. 15, 2011) (denying the plaintiff's motion to compel production based on minimal relevance, inaccessibility of the data, and cost, despite acknowledging that the multi-national corporate defendant could afford to produce the sought information).

100. See, e.g., *Kay Beer Distrib., Inc. v. Energy Brands, Inc.*, No. 07-C-1068, 2009 WL 1649592, at *1, *3 (E.D. Wis. June 10, 2009) (denying the plaintiff's motion to compel for failing to justify with specific facts the \$120,000 cost that the defendant would incur for producing five DVDs of stored ESI); *Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, 272 F.R.D. 350, 359 (W.D.N.Y. 2011) (rejecting the defendant's undue burden argument given its failure to initially interpose objections in response to the written discovery).

101. This includes the Seventh Circuit, the Federal Circuit, the District of Maryland, the Northern District of California, and the District of New Jersey. See discussion *infra* Section I.C.

102. See Singer, *supra* note 43; Jablonski, *supra* note 3.

103. *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168 (MLC), 2012 WL 1299379 (D.N.J. Apr. 16, 2012).

104. *Id.* at *1-2.

lish its antitrust claims against the defendants.¹⁰⁵ The court disagreed, holding that the requested discovery ran afoul of the proportionality rule.¹⁰⁶ As an initial matter, the court found that the discovery did not appear to elicit information that was relevant to the plaintiff's claims.¹⁰⁷ Moreover, the requested discovery was unreasonably cumulative of the over 12 million pages of documents that the defendants had already produced from seventy-five custodians.¹⁰⁸ Finally, given the marginal relevance of the requested materials and that the defendants had already incurred over \$10 million in discovery costs, the court determined that the burdens and the projected expense of the discovery outweighed its likely benefits.¹⁰⁹

The *Eisai* case teaches that the proportionality rule can meaningfully limit the cost and duration of discovery.¹¹⁰ Just as the court in the *Eisai* case used the proportionality rule to curtail unnecessary discovery, savvy courts that are aware of the proportionality rule have done likewise over the past couple of years.¹¹¹ Moreover, several key principles are emerging from this developing body of proportionality jurisprudence.¹¹² These principles, together with the roadmap of best practices they provide, underscore the importance of amending the Federal Rules to more clearly enshrine proportionality as the defining principle of discovery practice.

1. Parties' Efforts in Responding to Discovery Must Be Reasonable

A key message from contemporary proportionality jurisprudence is that discovery responses must satisfy a standard of reasonableness, not perfection.¹¹³ Such a standard, as taught in *Larsen v. Coldwell Banker Real Estate Corp.*, protects entities from the costs and burdens of ensuring that eDiscovery efforts are flawless.¹¹⁴

105. *Id.* at *2.

106. *Id.* at *7-10.

107. *Id.* at *7.

108. *Id.*

109. *Id.* at *9.

110. This was the third discovery motion filed by the plaintiff that the *Eisai* court denied on proportionality grounds. See *Eisai v. Sanofi-Aventis U.S., LLC*, No. 08-4168 (MLC), 2011 WL 5416334, at *1 (D.N.J. Feb. 27, 2012); *Eisai v. Sanofi-Aventis U.S., LLC*, No. 08-4168 (MLC), 2011 WL 5416330, at *1 (D.N.J. Nov. 7, 2011).

111. See, e.g., *Thermal Design, Inc. v. Guardian Bldg. Prods.*, No. 08-C-828, 2011 WL 1527025, at *1-3 (E.D. Wis. Apr. 20, 2011) (denying plaintiff's motion to compel additional production as disproportionately expensive).

112. See discussion *infra* Subsections II.B.1-5.

113. This principle is akin to the axiom that perfection should not be the enemy of good. See VOLTAIRE, *LA BEGUEULE 2* (1772) ("The perfect is the enemy of good.").

114. *Larsen v. Coldwell Banker Real Estate Corp.*, No. SAVC 10-00401-AG (MLGx), 2012 WL 359466, at *8 (C.D. Cal. Feb. 2, 2012) ("To require Defendants to repeat this labor merely because Plaintiffs have identified a few alleged discrepancies in the ESI production is simply unreasonable.").

In *Larsen*, the court rejected the plaintiffs' assertion that the defendants should be made to redo their production of documents.¹¹⁵ The plaintiffs had argued that doing so was necessary to address certain discrepancies—including missing emails, metadata, and mismatched file data.¹¹⁶ The court was not persuaded. The plaintiffs had failed to establish that the discrepancies prevented them from obtaining relevant information.¹¹⁷ The court expressed particular concern that out of 9,000 pages of documents produced by the defendants, the plaintiffs had identified only a few alleged inadequacies.¹¹⁸

The court also reasoned that a “do over” would violate the principles of proportionality in Rule 26(b)(2)(C).¹¹⁹ After reciting the operative proportionality language from Rule 26, the court determined that “the burden and expense to Defendants in completely reproducing its entire ESI production far outweighs any possible benefit to Plaintiffs.”¹²⁰ Balanced against the time and money the defendants had invested on the production, there were simply too few discrepancies to justify the cost of redoing the production.¹²¹

The *Larsen* decision reiterates to litigants that discovery efforts need only be reasonable and proportional,¹²² and not perfect.¹²³ Indeed, the Rules were never intended to exact perfection in the discovery process.¹²⁴ That misguided understanding of federal discovery practice has spawned too

115. *Id.* (holding that “the burden and expense to Defendants in completely reproducing its entire ESI production far outweighs any possible benefit to Plaintiffs”).

116. *Id.* at *6-8.

117. *Id.* at *7 (“Plaintiffs have failed to meet their burden of showing that Defendants’ preservation and production of ESI was inadequate.”).

118. *Id.* (“The few isolated examples cited by Plaintiffs (out of a document production of approximately 9,000 pages) fail to demonstrate that Defendants have not reasonably and in good faith produced the documents required by this Court’s October 25, 2011 Order.”).

119. *Id.*

120. *Id.* at *8.

121. The defendants had already spent over 1,000 hours on that production alone at a cost of hundreds of thousands of dollars. *Id.*

122. *Viet. Veterans of Am. v. CIA*, No. 09 cv 0037 CW (JSC), 2011 WL 4635139, at *3 (N.D. Cal. Oct. 5, 2011) (explaining that “[t]he rules of discovery are rooted in proportionality and reasonableness”).

123. *See, e.g., MGA Entm’t, Inc. v. Nat’l Prods. Ltd.*, No. CV 10-07083 JAK (SSx), 2011 WL 4550287, at *2 (C.D. Cal. Oct. 3, 2011) (denying plaintiffs’ motion to compel production of “documents that do not exist”). *But see PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657 (DNH/RFT), 2007 WL 2687670, at *8-12 (N.D.N.Y. Sept. 7, 2007) (requiring a re-do where relevant attachments were not produced after a software glitch divorced them from their respective emails).

124. *Da Silva Moore v. Publicis Groupe & MSL*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412, at *11 (S.D.N.Y. Feb. 24, 2012) (explaining that “the Federal Rules of Civil Procedure do not require perfection”).

many expensive and futile eDiscovery sideshows.¹²⁵ Instead, discovery efforts should be proportional to what is at stake in the litigation. Only then can the just, speedy, and inexpensive determination of every action be realized.¹²⁶

2. Unnecessary Discovery Requests Should Be Eliminated

Bottoms v. Liberty Life Assurance Co. of Boston underscores the corollary principle of eliminating unnecessary discovery.¹²⁷ In *Bottoms*, the court drastically curtailed the written discovery that plaintiff sought to propound on the defendant.¹²⁸ Plaintiff had requested leave in this ERISA action to serve “sweeping” interrogatories and document requests to resolve a very limited issue—whether the defendant had improperly denied her long term disability benefits.¹²⁹ Drawing on the proportionality standards under Rule 26(b)(2)(C), the court characterized the proposed discovery as “patently overbroad” and as seeking materials that were “largely irrelevant.”¹³⁰ The court ultimately ordered the defendant to respond to some aspects of the plaintiff’s interrogatories and document demands, but not before curtailing their nature and scope.¹³¹

The *Bottoms* case emphasizes what the Advisory Committee spotlighted in the 1983 proportionality amendment: litigants should abandon unnecessary discovery.¹³² Consistent with Rule 26(g), this typically requires

125. See *Brigham Young Univ. v. Pfizer, Inc.*, 282 F.R.D. 566, 572 (D. Utah 2012) (denying plaintiffs’ fourth motion for doomsday sanctions since evidence was destroyed pursuant to defendants’ “good faith business procedures”); *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99, 105-06, 113 (D.N.J. 1989) (rejecting several of the plaintiff’s “grossly disproportionate” interrogatories, which it feared would “give rise to a circus of peripheral litigation” and “spawn[] unbearable side litigation”); Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 530-32 (2010) (arguing that the “broad and liberal” default scope of discovery leads to “over-discovery,” thereby pricing litigants out of court and breaking the civil justice system).

126. FED. R. CIV. P. 1; see, e.g., *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *2 (N.D. Ill. Nov. 17, 2010) (framing Rule 26 within the Rule 1 mandate); *Pettit v. Pulte Mortg., LLC*, No. 2:11 cv 00149 GMN PAL, 2011 WL 5546422, at *5 (D. Nev. Nov. 14, 2011) (considering the goal of Rule 1 as the “prime directive” in evaluating discovery).

127. *Bottoms v. Liberty Life Assurance Co. of Bos.*, No. 11 cv 01606 PAB CBS, 2011 WL 6181423, at *7 (D. Colo. Dec. 13, 2011).

128. *Id.* at *8-10.

129. *Id.* at *6 (seeking, among other things, the complete personnel files for every employee involved in the handling of the plaintiff’s benefits claim).

130. *Id.* at *9-10.

131. *Id.*

132. FED. R. CIV. P. 26 advisory committee’s note; see *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008); Philip Favro, *Lessons Learned for 2012: Spotlighting the Top eDiscovery Cases from 2011*, E-DISCOVERY 2.0 BLOG (Jan. 3, 2012), <http://www.clearwellsystems.com/e-discovery-blog/2012/01/03/lessons-learned-for-2012->

counsel to steer away from boilerplate demands or “robotically recycling” requests from previous lawsuits.¹³³ Instead, lawyers should “stop and think” about what discovery is actually needed and then prepare well-tailored requests.¹³⁴ For as *Bottoms* teaches, the obligation to ensure that discovery is both reasonable and proportional principally rests with lawyers and litigants.¹³⁵ The failure to conduct discovery in this fashion could very well lead to sanctions against counsel and client, not to mention increased costs and delays attributable to “over-discovery” and resulting motion practice.¹³⁶

3. Defensible Deletion of Electronically Stored Information Is Acceptable

While courts are drawing on proportionality standards to discourage abusive tactics, they are simultaneously using the rule to acknowledge that organizations may defensibly delete ESI, especially for preservation purposes.¹³⁷ This means that an organization is free to implement good faith, reasonable data retention policies, which discard ESI not subject to a preservation duty.¹³⁸ For example, the court in *E.I. Du Pont De Nemours and Co. v. Kolon Industries, Inc.* refused to sanction the plaintiff manufacturer for eliminating emails pursuant to a good faith document retention policy.¹³⁹ The defendant had argued that drastic sanctions should be imposed on the manufacturer since many of the deleted emails were allegedly rele-

spotlighting-the-top-ediscovery-cases-from-2011; Cecil Lynn III, *2011 The Year in Review*, L. TECH. NEWS (Feb. 2012), <http://www.littler.com/files/press/pdf/Lynn-2011-The-Year-in-Review-Feb-2012.pdf> (“Moreover, many courts emphasized the need for targeted, proportional discovery, rather than broad demands that a party search its entire data and email system for files, irrespective of cost.”).

133. *Bottoms*, 2011 WL 6181423, at *5.

134. *Id.*

135. *Id.* at *5, *8; *see also* FED. R. CIV. P. 1 advisory committee’s note (requiring counsel to also bear the burdens of fulfilling the Rule 1 objectives).

136. FED. R. CIV. P. 26(g) advisory committee’s note.

137. *See also* Philip J. Favro, *Sea Change or Status Quo: Has the Rule 37(e) Safe Harbor Advanced Best Practices for Records Management?*, 11 MINN. J.L. SCI. & TECH. 317 (2010) (discussing the impact of the Federal Rule 37(e) “safe harbor” on defensible deletion of ESI).

138. *See* *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1322 (Fed. Cir. 2011) (approving corporate retention policies adopted for “good housekeeping” purposes). *But see* *Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. C 11 1846 LHK (PSG), 2012 WL 3042943, at *8 (N.D. Cal. 2012) (issuing an adverse inference instruction to remedy the loss of relevant data stemming from the defendant’s failure to suspend its email retention policy after the duty to preserve was triggered).

139. *E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09cv58, 2011 WL 1597528, at *15 (E.D. Va. Apr. 27, 2011).

vant to the defendant's counterclaims.¹⁴⁰ The court disagreed, finding instead that the emails were overwritten pursuant to a reasonable data retention policy before the common law preservation duty was triggered.¹⁴¹

Rejecting the kaleidoscope of relevance as the sole touchstone of preservation, the court reasoned that preservation must be viewed through the lens of proportionality:

"Thus, whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards. . . . [A]ssessment of *reasonableness and proportionality* should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence."¹⁴²

Since the manufacturer was not reasonably aware of the nature of the defendant's counterclaims at the time the emails were destroyed, proportionality standards tipped the scales against sanctioning the manufacturer for not preserving the ESI.¹⁴³

The *Du Pont* case reinforces the notion that a party's preservation obligations turn on proportionality and reasonableness.¹⁴⁴ In addition, it teaches organizations to develop and then follow reasonable retention policies that eliminate data stockpiles before litigation is reasonably anticipated.¹⁴⁵ It also demonstrates the value of deploying a timely and comprehensive litigation hold to ensure that relevant ESI is retained once a preservation duty arises.¹⁴⁶ By following these "'good faith business procedures,'" organiza-

140. *Id.* at *8 (seeking various evidentiary findings against the plaintiff manufacturer or, alternatively, an adverse inference instruction to the jury).

141. *Id.* at *13, *15.

142. *Id.* at *15 (alteration in original) (last emphasis added) (quoting Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 522-23 (D. Md. 2010)).

143. *Id.*

144. See *Pippins v. KPMG LLP*, 279 F.R.D. 245, 255 (S.D.N.Y. 2012) (explaining that "proportionality is necessarily a factor in determining a party's preservation obligations"); *Grabenstein v. Arrow Elecs., Inc.*, No. 10 cv 02348 MSK KLM, 2012 WL 1388595, at *6 (D. Colo. Apr. 23, 2012).

145. See, e.g., *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1322 (Fed. Cir. 2011); see also Matthew Nelson, *Q&A with William P. Butterfield on His Testimony Regarding the Costs and Burdens of eDiscovery Before the House Judiciary Committee's Subcommittee on the Constitution*, E-DISCOVERY 2.0 BLOG (Dec. 22, 2011), www.clearwellsystems.com/e-discovery-blog/2011/12/22/qa-with-william-p-butterfield-on-his-testimony-regarding-the-costs-and-burdens-of-ediscovery-before-the-house-judiciary-committees-subcommittee-on-the-constitution ("A review of sanctions decisions demonstrates that parties are not getting sanctioned where they acted in good faith. Rather, they are being sanctioned for egregious conduct.").

146. See *Viramontes v. U.S. Bancorp*, No. 10 C 761, 2011 WL 291077, at *4-5 (N.D. Ill. Jan. 27, 2011) (denying sanctions motion since the defendant issued a timely litigation hold to preserve relevant documents once a preservation duty attached); cf. *E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 507-10 (E.D. Va. 2011) (issuing

tions can establish a defensible information governance plan that is consistent with principles of proportionality.¹⁴⁷

4. Cooperation Facilitates Effective Discovery

Courts are also using proportionality principles to emphasize the importance of cooperation in ensuring the “just, speedy and inexpensive determination” of discovery.¹⁴⁸ The recent decision in *Pippins v. KPMG* exemplifies this principle.¹⁴⁹

In *Pippins*, the court ordered the defendant accounting firm to preserve thousands of employee hard drives.¹⁵⁰ The firm had argued that the high cost of preserving the drives was disproportionate to the value of the ESI stored on the drives.¹⁵¹ Instead of preserving all of the drives, the firm hoped to maintain a reduced sample, asserting that the ESI on the sample drives would satisfy the evidentiary demands of the plaintiffs’ class action claims.¹⁵²

The court rejected the proportionality argument primarily because the firm refused to permit plaintiffs or the court to analyze the ESI found on the drives.¹⁵³ Without any transparency into the contents of the drives, the court could not weigh the benefits of the discovery against the alleged burdens of preservation.¹⁵⁴ The court was thus left to speculate about the nature of the ESI on the drives, reasoning that it went to the heart of plaintiffs’ class action claims.¹⁵⁵ As the district court observed, the firm may very well have obtained the relief it requested had it engaged in “good faith negotiations” with the plaintiffs over the preservation of the drives.¹⁵⁶

an adverse inference jury instruction as a result of the defendant’s failure to distribute a timely and comprehensive litigation hold after its obligation ripened to retain relevant ESI).

147. See *Brigham Young Univ. v. Pfizer, Inc.*, 282 F.R.D. 566, 573 (D. Utah 2012) (quoting *Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011)).

148. David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J.L. & TECH. 1, 12 (2012); accord FED. R. CIV. P. 26(b)(1) advisory committee’s note (“In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.”).

149. *Pippins v. KPMG LLP*, No. 11 Civ. 0377(CM)(JLC), 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011), *aff’d*, 279 F.R.D. 245 (S.D.N.Y. 2012).

150. *Pippins*, 279 F.R.D. at 247-49.

151. *Id.* at 250.

152. *Id.* at 249-50.

153. *Id.* at 252, 254 (reasoning that “[i]t smacks of chutzpah (no definition required) to argue that the Magistrate failed to balance the costs and benefits of preservation when KPMG refused to cooperate with that analysis by providing the very item that would, if examined, demonstrate whether there was any benefit at all to preservation”).

154. *Id.*

155. *Id.* at 254-56.

156. *Id.* at 254.

The *Pippins* decision reinforces a common refrain that parties seeking the protection of proportionality principles must engage in reasonable, cooperative discovery conduct.¹⁵⁷ Staking out uncooperative positions in the name of zealous advocacy stands in sharp contrast to proportionality standards and the cost cutting mandate of Rule 1.¹⁵⁸ Moreover, such a tactic may very well foreclose proportionality considerations, just as it did in *Pippins*.¹⁵⁹

5. Organizations Need an Information Governance Strategy

Proportionality also encourages organizations to think ahead and develop an effective information governance strategy, a point emphasized in *Salamone v. Carter's Retail, Inc.*¹⁶⁰ In *Salamone*, the defendant retailer filed a motion for a protective order to stave off the collection of thousands of personnel files.¹⁶¹ The retailer argued that proportionality precluded the search and review of the personnel files.¹⁶² In support of this argument, the retailer asserted that the nature, format, location, and organization of the records made their review and production too burdensome.¹⁶³ The retailer complained that it would have to review 130,000 pages of documents spread out across multiple offices and storage sites, which were lacking uniform records management procedures.¹⁶⁴

In denying the motion, the court singled out the retailer's own information retention system as the cause of the claimed disproportionate dis-

157. *Escamilla v. SMS Holdings Corp.*, No. 09 2120 ADM/JSM, 2011 WL 5025254, *5-6 (D. Minn. Oct. 21, 2011) (foreclosing defendant's proportionality argument regarding the financial burdens of certain ordered discovery since those burdens were "self-inflicted" due to the defendant's failure to observe his preservation duties).

158. Some commentators have argued that overaggressive positions are taken not because they are tactically sound, but because attorneys believe that their clients expect such tactics. *See Gensler, supra* note 64, at 540. Nevertheless, clients could be on the hook for sanctions or increased discovery burdens as a result of such conduct. *Id.*

159. It should be noted that the firm's initial motion for protective order was denied without prejudice to allow the firm to negotiate a cooperative preservation arrangement regarding the drives with the plaintiffs. *Pippins*, 279 F.R.D. at 252. The defendant was nonetheless unable to do so, which ultimately led the district court to conclude that the firm was "hoist on its own petard." *Id.* at 256.

160. *See Salamone v. Carter's Retail, Inc.*, No. 09-5856 (GEB), 2011 WL 310701, at *12 (D.N.J. Jan. 28, 2011).

161. *Id.* at *1.

162. *Id.* at *5.

163. *Id.* at *6 (citing *Byrd v. PECO Energy Co.*, No. CIV. A. 97-7892, 1999 WL 89711, at *1-2 (E.D. Pa. Feb. 4, 1999)) (relying on authority the court ultimately distinguished, which involved a large company with many employees that staved off an additional production of documents on proportionality grounds).

164. *Id.* at *6-7.

covery burden.¹⁶⁵ That the retailer, the court reasoned, “maintains personnel files in several locations without any uniform organizational method does not exempt Defendant from reasonable discovery obligations.”¹⁶⁶ After weighing the various factors that comprise the proportionality analysis under Rule 26(b)(2)(C), the court concluded that the probative value of production outweighed the resulting burden and expense on the retailer.¹⁶⁷

Having an intelligent information governance plan in place could have addressed the cost and logistics headaches that the retailer faced. Had the records at issue been digitized and maintained in a central archive, the retailer’s collection burdens would have been significantly minimized.¹⁶⁸ Furthermore, integrating these “upstream” data retention protocols with “downstream” eDiscovery processes could have expedited the review process.¹⁶⁹ The *Salamone* case teaches that an integrated information governance process, supported by effective, enabling technologies, will likely help organizations realize the benefits of proportionality principles.

6. *The Widespread Need for Proportionality*

The aforementioned decisions amply justify the need for more frequent and widespread use of proportionality standards in federal discovery practice. They also illustrate best practices which, if followed, will help lawyers and litigants reduce the costs and burdens of eDiscovery. Grounded in proportional discovery, these cases suggest that real progress can be made toward achieving the tripartite aims of Rule 1.

C. The Role of Pilot Programs, Model Orders, and Local Rules Emphasizing Proportionality

Having observed the benefits of proportionality as reflected in the above referenced cases, certain courts have adopted local rules to emphasize the role of proportionality in managing litigation costs.¹⁷⁰ This Section provides a brief overview of the measures specific circuit and district courts

165. *Id.* at *12.

166. *Id.*

167. *Id.*

168. SYMANTEC, *supra* note 4, at 14 (“By taking a proactive approach to information retention and eDiscovery, top-tier organizations see . . . important benefits. . . . [I]t allows them to save time and money gained by responding more quickly to eDiscovery demands. Respondents using best practices reported a 64 percent faster response time with a 2.3 times higher success rate when responding to eDiscovery requests.”).

169. See Nuffer & Favro, *supra* note 27.

170. David Canfield, *An Overview of State E-Discovery Rules*, INSIDE COUNS. (Mar. 15, 2012), <http://www.insidecounsel.com/2012/03/15/an-overview-of-state-e-discovery-rules> (“[T]he time is ripe to consider the role of states in e-discovery rule development—resilient adopters or trail-blazing innovators—or perhaps a bit of both?”).

have taken to implement the proportionality rule in their jurisdictions. We lead off with a discussion of the Seventh Circuit's eDiscovery Pilot Program, which emphasizes proportionality as a discovery hallmark.¹⁷¹ Next, we consider the elements of proportionality inherent in the Model eDiscovery Order recently promulgated by the Federal Circuit.¹⁷² We then discuss the relevant local rules and practices regarding proportionality adopted by federal district courts in Maryland, California, and New Jersey.¹⁷³ Finally, we address the impact of these grassroots efforts on developing proposed amendments to the Federal Rules.¹⁷⁴

1. *The Seventh Circuit eDiscovery Pilot Program*

The Seventh Circuit launched the nation's first eDiscovery Pilot Program (Program) in 2009 with the express goal of encouraging proportionality in discovery.¹⁷⁵ To ensure compliance with proportionality standards, the Program directs litigants to consider the limitations of Federal Rule 26(b)(2)(C) when preparing a discovery plan.¹⁷⁶ In addition, parties are directed to propound requests and responses that are "reasonably targeted, clear, and as specific as practicable."¹⁷⁷

Preservation, however, is where the Program really emphasizes the importance of proportionality.¹⁷⁸ The parties are urged to work together at the outset and during the case to ensure that preservation efforts are "reasonable and proportionate."¹⁷⁹ This includes cooperative efforts to limit "discovery about discovery," which can "contribute to the unnecessary expense and delay" in litigation.¹⁸⁰ To that end, any disputes over preservation must be thoroughly vetted during the meet and confer process, and governed by the standards set forth in the proportionality rule.¹⁸¹ Finally, in an effort to avoid needless wrangling over inaccessible data, the Program goes beyond Rule 26(b)(2)(B) and delineates specific categories of ESI¹⁸² that

171. See *infra* Subsection I.C.1.

172. See *infra* Subsection I.C.2.

173. See *infra* Subsection I.C.3.

174. See *infra* Section I.D.

175. 7TH CIR. ELEC. DISCOVERY COMM., PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION, at princ. 1.01-.03 (2010), available at http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.

176. *Id.* at princ. 1.03.

177. *Id.*

178. *Id.* at princ. 2.04 (Scope of Preservation).

179. *Id.* at princ. 2.04(a).

180. *Id.* at princ. 2.04(b).

181. *Id.* at princ. 2.04(e).

182. Such ESI includes:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives; (2) random access memory (RAM) or other ephemeral data; (3) on-line access data such

“are not discoverable in most cases.”¹⁸³ Any effort to obtain discovery of those categories of ESI must be rigorously analyzed through the lens of Rule 26(b)(2)(C).¹⁸⁴

With proportionality as one of the primary objectives of the Program, this top-down approach has successfully impacted discovery practices throughout the Seventh Circuit.¹⁸⁵ Sixty-seven percent of litigants surveyed agreed that the proportionality rule played a significant role in the development of their discovery plans.¹⁸⁶ Perhaps as a direct result, 85% of judges who participated in the Program reported a corresponding decrease in the number of discovery disputes they were asked to resolve.¹⁸⁷

These reported results are precisely the type of empirical data that demonstrates how proportionality can achieve real cost savings in eDiscovery.¹⁸⁸ Such results, however, are derived from a framework applicable only in the Seventh Circuit.¹⁸⁹ While other geographic circuits may develop similar concepts,¹⁹⁰ there is still nothing that resembles the Program elsewhere. For the time being, the Program’s efforts to emphasize proportionality remain confined to the district courts located in Illinois, Wisconsin, and Indiana.

2. The Federal Circuit’s Model eDiscovery Order

Another laudable, “localized” effort to more effectively implement proportionality has been undertaken through the Federal Circuit’s Model

as temporary internet files, history, cache, cookies, etc.; (4) data in metadata fields that are frequently updated automatically, such as last-opened dates; (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

Id. at princ. 2.04(d).

183. *Id.*

184. *Id.* at princ. 2.04(e).

185. *Id.* at princ. 1.03. The other principal drivers are cooperation and the Rule 1 mandate. *See id.* at prins. 1.01-.02.

186. SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: FINAL REPORT ON PHASE TWO 58 (2012), available at <http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf>.

187. *Id.* at 68.

188. *See* Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (directing the parties to observe the Program’s guidelines that discovery be conducted in reasonable and proportional manner).

189. Allison Walton, *7th Circuit Electronic Discovery Pilot Program and the Principles on ESI*, E-DISCOVERY 2.0 BLOG (Aug. 25, 2011), <http://www.clearwellsystems.com/e-discovery-blog/2011/08/25/7th-circuit-electronic-discovery-pilot-program-and-the-principles-on-esi>.

190. *Id.*

eDiscovery Order (Order, Model Order).¹⁹¹ Released in the fall of 2011, the Model Order specifically seeks to reduce the cost of discovery in patent litigation.¹⁹² Yet the Order also has the more ambitious agenda of improving the entire U.S. civil litigation system.¹⁹³

The Model Order emphasizes proportionality standards and compliance with the tripartite purposes of Rule 1 through cost-shifting.¹⁹⁴ More specifically, cost-shifting is imposed for disproportionate ESI discovery, particularly for over-discovery of email.¹⁹⁵ Given the high costs associated with the production of email¹⁹⁶ and the infrequent use of such evidence at trial,¹⁹⁷ the Order places sweeping restrictions on its discovery. As an initial matter, the Order provides for the phasing of discovery to ensure that core patent documentation is exchanged before email productions can occur.¹⁹⁸ When email productions are finally permitted, such discovery is limited as a matter of right to a few custodians with targeted search terms.¹⁹⁹

Given its recent origin, it remains to be seen whether the Order will have the desired impact on patent litigation.²⁰⁰ Nevertheless, it does have the potential to influence leading lawyers and litigants given the number of high profile²⁰¹ and heavy traffic districts that participate in the Federal Circuit's companion pilot program.²⁰²

191. See MODEL ORDER, *supra* note 11.

192. RADER, *supra* note 5. The Order is derived from Chief Judge Randall Rader's recent "State of Patent Litigation" address. *Id.*

193. Mark Michels, *The Patent Pilot Program Sets Sail*, CORP. COUNS. (Jan. 27, 2012), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202541860803&The_Patent_Pilot_Program_Sets_Sail.

194. MODEL ORDER, *supra* note 11, nos. 1, 3.

195. *Id.* nos. 3-4. It furthermore recognizes and rewards meaningful attempts at compliance. *Id.* no. 4.

196. See, e.g., *Thermal Design, Inc. v. Guardian Bldg. Prods.*, No. 08-C-828, 2011 WL 1527025, at *1, *3 (E.D. Wis. Apr. 20, 2011) (denying the plaintiff's motion to compel discovery of emails given the exorbitant production costs and the lack of good cause).

197. RADER, *supra* note 5, at 8 ("I saw one analysis that concluded that .0074% of the documents produced actually made their way onto the trial exhibit list . . . [F]or all the thousands of appeals I've evaluated, email appears even more rarely as relevant evidence.").

198. *DCG Sys., Inc. v. Checkpoint Technologies, LLC*, No. C-11-03792 PSG, 2011 WL 5244356, at *1-2 (N.D. Cal. Nov. 2, 2011) (interpreting and applying the Model Order rules regarding email).

199. MODEL ORDER, *supra* note 11, nos. 9-11.

200. See Peter Zura, *Report: District Courts with the Most Patent Filings 2009*, 271 PAT. BLOG (Jan. 20, 2010, 12:34 PM), <http://271patent.blogspot.com/2010/01/report-district-courts-with-most-patent.html>.

201. The Northern District of California has hosted two recent headline grabbing lawsuits: *Oracle America, Inc. v. Google Inc.* (regarding allegations of copyright and patent infringement regarding aspects of Java; heard in the Northern District of California by Judge William Alsup) and *Apple Inc. v. Samsung Electronics Co.* (regarding alleged infringement of smartphone and tablet computer patents; heard in the Northern District of California by Judge Lucy Koh). See *Oracle America, Inc. v. Google Inc.*, U.S. D. Ct., N.D. CAL.,

By way of example, in *DCG Systems, Inc. v. Checkpoint Technologies, LLC*, a federal magistrate from the Northern District of California directed that the Model Order be used in that case to restrain the amount of email discovery.²⁰³ Entered over the objections of the plaintiff, the court cited the need for the Model Order's strictures to guard against disproportionate discovery.²⁰⁴ While conceding that the Order's limits may ultimately be unnecessary, the court reasoned they should be imposed "to address what has to date been a largely unchecked problem."²⁰⁵

Both the *DCG* case and the Model Order highlight the drastic measures that certain courts will take to address the problem of disproportionate discovery.²⁰⁶ They also underscore the need for emphasizing compliance with the proportionality rule. Yet there is no certainty at this time that the Model Order's restrictive approach for implementing proportionality will be successful in patent disputes or more generally in federal discovery practice.

3. District Courts That Have Implemented Local Proportionality Rules

The foregoing efforts to draw attention to the proportionality rule are not just limited to circuit courts. District courts have also developed local rules to better emphasize proportionality. This Subsection provides a brief overview of these local rules and practices. It also highlights some of the decisions from those districts dealing with proportionality. Finally, we call attention to provisions that might be useful in a proposed amendment to Rule 26.

<http://cand.uscourts.gov/wha/oraclevgoogle> (last visited Nov. 20, 2012); *Apple Inc. v. Samsung Electronics Co., Ltd.*, U.S. D. Ct., N.D. Cal., <http://cand.uscourts.gov/lhk/applevsamsung> (last visited Nov. 20, 2012).

202. Karen Redmond, *District Courts Selected for Patent Pilot Program*, U.S. COURTS (June 7, 2011), http://www.uscourts.gov/news/newsview/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx. Key patent-heavy district courts include: Central District of California, Northern District of California, and Eastern District of Texas. Craig Anderson, *Central District Struggles in Its Role as Top Patent Venue*, DAILY J. (Apr. 7, 2010), http://www.milbank.com/images/content/4/9/4940/DailyJournal_MScarsi_4710.pdf.

203. *DCG Sys., Inc.*, 2011 WL 5244356, at *2.

204. *Id.*; see also RADER, *supra* note 5, at 8.

205. *DCG Sys., Inc.*, 2011 WL 5244356, at *2. *But see* Ralph Losey, *Good, Better, Best: A Tale of Three Proportionality Cases—Part Two*, E-DISCOVERY TEAM (Apr. 15, 2012, 4:40 PM), <http://e-discoveryteam.com/2012/04/15/good-better-best-a-tale-of-three-proportionality-cases-part-two> (criticizing the *DCG* court's approach to keyword searching while praising its efforts to promulgate proportionality).

206. *See In re Google Litig.*, No. C 08-03172 RMW (PSG), 2011 WL 6113000, at *3 (N.D. Cal. Dec. 7, 2011) (applying aspects of the Model Order to protect a non-party from unduly burdensome document requests propounded under a Rule 45 subpoena).

a. The District of Maryland

The United States District Court for the District of Maryland has stood apart as a pioneering leader in discovery reform for a number of years.²⁰⁷ The court has developed several local resources to help guide parties' efforts, especially in the realm of eDiscovery. These resources include an eleven page set of "Discovery Guidelines" attached to the court's local rules²⁰⁸ and a twenty-eight page "Suggested Protocol for Discovery of Electronically Stored Information" (Discovery Protocol).²⁰⁹ At least one jurist has even published a four page set of "Discovery Procedures" regarding discovery practice in his courtroom.²¹⁰

As a general theme, these local court materials emphasize the importance of proportionality, cooperation, and reasonableness in accomplishing the objectives of Rule 1.²¹¹ What is most striking, however, is that the court unequivocally conditions the permissible scope of discovery on proportionality standards: "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 like-*

207. Marcus, *supra* note 7, at 321 ("Maryland has leading examples of two other sources of direction on e-discovery—district court guidance and state court rulemaking . . ."). Maryland's "Suggested Protocol for Discovery of Electronically Stored Information" has been in effect since 2007. See *Suggested Protocol for Discovery of Electronically Stored Information* ("ESI"), U.S. D. CT., D. MD., <http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf> (last visited Nov. 20, 2012) [hereinafter *Protocol*]. In contrast, the Seventh Circuit's Program was initiated in 2009 and the Federal Circuit's Model Order in 2011. See 7TH CIR. ELEC. DISCOVERY COMM., *supra* note 175; MODEL ORDER, *supra* note 11.

208. D. MD. LOCAL R. APP. A, available at <http://www.mdd.uscourts.gov/localrules/localrules.pdf>.

209. *Protocol*, *supra* note 207.

210. Anderson v. Reliance Standard Life Ins. Co., No. WDQ-11-1188, 2011 WL 4828891, at *3-6 (D. Md. Oct. 11, 2011). These local rules are required reading for counsel who appear before that particular jurist, U.S. Magistrate Judge Paul Grimm. *Id.* at *2 ("Counsel should familiarize themselves with (1) this Court's Discovery Guidelines, paying particular attention to Guideline 1; (2) the attached Discovery Procedures that I use for cases assigned to me, which modify the Court's Local Rules; and (3) *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008)."). Judge Grimm is one of the most visible jurists to comment on discovery. Apart from several law review articles, he has co-authored a book on discovery and teaches a discovery class at the University of Baltimore School of Law. *Chief Magistrate Judge Paul W. Grimm*, U.S. D. CT., D. MD., www.mdd.uscourts.gov/publications/JudgesBio/grimm.htm (last visited Nov. 20, 2012).

211. The express purpose of the Protocol "is to facilitate the just, speedy, and inexpensive conduct of discovery involving ESI." *Protocol*, *supra* note 207, para. 1. This sentiment is repeated in the local rules: "The purpose of these Guidelines is to facilitate the just, speedy, and inexpensive conduct of discovery." D. MD. LOCAL R. APP. A, at Guideline 1.a; *cf.* FED. R. CIV. P. 1.

ly benefit of obtaining the discovery being sought.”²¹² This statement is set forth in the opening paragraph of the Discovery Guidelines, confirming that proportionality is the touchstone of discovery in the District of Maryland.

Another prominent feature of these local discovery resources is the importance the court places on the Rule 26(g) certification requirement.²¹³ Like the proportionality rule itself, the certification requirement is prominently featured in the first Discovery Guideline.²¹⁴ The rules leave no doubt that counsel are expected to comply with the certification requirement: “[C]ounsel and parties are expected to be familiar with the requirements of the Rule.”²¹⁵

In a further attempt to direct the parties to engage in proportional discovery, the court painstakingly details various cooperative efforts the parties should take to develop an effective discovery plan.²¹⁶ This includes using the Rule 26(f) conference to consider the estimated costs and burdens of reviewing potentially relevant ESI.²¹⁷ The parties are also directed to phase their document productions to ensure that the proverbial “low hanging fruit” of accessible ESI is first produced before efforts are made to discover ESI that is not reasonably accessible.²¹⁸ Finally, parties are again instructed to make their document productions consistent with Rule 26(b)(2)(C).²¹⁹

As a result of Maryland’s early embrace of eDiscovery and the emphasis its jurists have placed on proportionality,²²⁰ the court has developed a robust jurisprudence that supports the objectives of its local discovery rules.²²¹ Indeed, many of the leading cases²²² and scholarship on proportion-

212. D. MD. LOCAL R. APP. A, at Guideline 1.a (emphasis added).

213. *Id.* at Guideline 1.e.

214. *Id.* at Guideline 1.a.

215. *Id.* at Guideline 1.e.

216. Cecil Lynn III, *Maryland District Court Establishes Suggested Protocol for E-Discovery*, DIGITAL DISCOVERY & E-EVIDENCE (Apr. 1, 2007), http://www.lexisnexis.com/applieddiscovery/NewsEvents/PDFs/200704_BNA_Maryland.pdf.

217. *Protocol*, *supra* note 207, para. 8(H), (K).

218. *Id.* para. 8(M).

219. *Id.*

220. *See An Interview with Judge Paul Grimm, Chief United States Magistrate Judge*, DISCOVERY BRAIN (Oct. 18, 2011), discoverybrain.com/interview/an-interview-with-judge-paul-grimm-chief-united-states-magistrate-judge-1-of-3.

221. *See, e.g.*, *Anderson v. Reliance Standard Life Ins. Co.*, No. WDQ-11-1188, 2011 WL 4828891 (D. Md. Oct. 11, 2011); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

222. For example, the *Mancia v. Mayflower* case alone is cited to by at least forty-three other decisions and 126 secondary sources. *KeyCite*, WESTLAWNEXT, <http://next.westlaw.com> (search 253 F.R.D. 354; then follow “Citing References” tab) (last visited Nov. 20, 2012); Dean Gonsowski, *Top 5 Cases that Shaped Electronic Discovery in 2008*, E-DISCOVERY 2.0 BLOG (Dec. 12, 2008), www.clearwellsystems.com/e-discovery-blog/2008/12/12/top-5-cases-that-shaped-electronic-discovery-in-2008.

ality originate from the district.²²³ Perhaps the most noteworthy proportionality case in the country—*Mancia v. Mayflower Textile Services Co.*—was issued from the District of Maryland in 2008.²²⁴

In *Mancia*, the court used a fairly routine discovery dispute to spotlight proportionality principles.²²⁵ The parties had reached an impasse regarding the defendants' responses to several written discovery requests.²²⁶ In response to the plaintiffs' motions to compel, the court highlighted the importance of the Rule 26(g) certification requirement in reducing abusive discovery practices.²²⁷ After meticulously reviewing the Rule's purpose and its interplay with the proportionality rule,²²⁸ the court declined to render a decision on the pending motions.²²⁹ Instead, the parties were directed to cooperatively meet and confer by following the same guidelines delineated above from the local discovery resources.²³⁰

The *Mancia* case is generally considered required reading for every lawyer that practices in the District of Maryland.²³¹ It is not the only case from the District used as a vehicle for educating lawyers and litigants about the virtues of proportionality.²³² The court in *Victor Stanley, Inc. v. Creative Pipe, Inc.* discussed at length the role that the proportionality rule could play in limiting costs associated with ESI preservation.²³³ And in *Anderson*

223. See generally Carroll, *supra* note 1; Marcus, *supra* note 7; Grimm et al., *supra* note 34.

224. *Mancia*, 253 F.R.D. 354. But see *In re Convergent Technologies Sec. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985) (emphasizing that the 1983 proportionality amendments had substantially altered the calculus of liberal discovery under the Federal Rules).

225. *Mancia*, 253 F.R.D. at 357-62.

226. *Id.* at 355-57.

227. *Id.* at 357 (“If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to *act responsibly and avoid abuse.*”).

228. *Id.* at 358-63.

229. *Id.* at 364-66.

230. *Id.*

231. *Anderson v. Reliance Standard Life Ins. Co.*, No. WDQ-11-1188, 2011 WL 4828891, at *2 (D. Md. Oct. 11, 2011). Judge Grimm's own “Discovery Procedures” are attached to *Anderson*. *Id.* at *3. The “Discovery Procedures” incorporate and reinforce the Guidelines, the Protocol, and *Mancia*. D. MD. LOCAL R. APP. A; *Protocol*, *supra* note 207; *Mancia*, 253 F.R.D. 354.

232. Monica Bay, *Paul Grimm: The Ultimate Answer to E-Discovery Conflict May Lie with the Next Generation of Lawyers*, L. TECH. NEWS (Jan. 31, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202479175208&slretu rn=20121018174516> (“As he did in *Mancia v. Mayflower*, Grimm used the original *Victor Stanley, Inc. v. Creative Pipe* ruling to educate an audience far wider than the litigants.” (citation omitted)).

233. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010) (“[W]ith few exceptions . . . courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case[;] this should not be the case because Fed. R. Civ. P. 26(b)(2)(C) cautions that *all per-*

v. *Reliance Standard Life Insurance Co.*, the court again used a common discovery motion to educate the parties and their counsel on the importance of conducting focused, proportional discovery.²³⁴

The *Mancia*, *Victor Stanley*, and *Anderson* decisions represent a growing body of uniform case law requiring parties to conduct discovery consistent with the proportionality rule. That the District of Maryland has been successful in doing so is directly attributable to its local discovery resources, which unequivocally and obviously require compliance with proportionality.²³⁵ Some aspects of Maryland's local eDiscovery rules may accordingly be worth replicating in amendments to the Federal Rules.

Any such amendments, however, must be simple and straightforward to ensure successful implementation. While a local jurisdiction perhaps has the luxury of promulgating voluminous procedures and practices, the Federal Rules cannot be cluttered with forty-three additional pages of rules and requirements surrounding this issue. A proposed change to the proportionality rule would have to be more concise.

b. The Northern District of California

Unlike the District of Maryland, the Northern District of California (NDCA) does not have an elaborate and comprehensive set of rules to encourage litigants to engage in proportional discovery.²³⁶ Instead, the NDCA extends the Rule 26(g) attorney certification requirement by local rule into discovery motion practice.²³⁷ Under NDCA Local Rule 37-2, the moving

missible discovery must be measured against the yardstick of proportionality." (emphasis added)).

234. *Anderson*, 2011 WL 4828891, at *3-4 (assigning counsel a discovery reading list including the Federal Rules, the Local Rules, Appendix A to the Local Rules, the Protocol, and the *Mancia* case, as well as laying out proportionality and cooperation principles).

235. "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 being sought." D. MD. LOCAL R. APP. A, at Guideline 1.a. The Protocol, although never expressly mentioning "proportionality," directs counsel to cooperatively discuss "the nature of the claim, the amount in controversy, agreements of the parties, the relative ability of the parties to conduct discovery of ESI, and such other factors as may be relevant," which are, in essence, the components of proportionality. *Protocol*, *supra* note 207, para. 1.

236. At the time this Article went to print, the Northern District of California promulgated a more detailed framework for addressing proportionality in its local rules. That framework, entitled "Guidelines Relating to the Discovery of Electronically Stored Information," emphasizes the role of proportionality in addressing the costs and burdens of eDiscovery. See N.D. CAL., GUIDELINES FOR THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION 1.03, 2.01-2.02 (2012), available at http://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines.pdf.

237. "For each such [motion to compel], the moving papers must detail the basis for the party's contention that it is entitled to the requested discovery and must show how the

party must demonstrate that the requested discovery satisfies proportionality principles and any other applicable elements of Federal Rule 26(b)(2) when pursuing a motion to compel.²³⁸

Such a certification requirement, absent from the present iteration of Federal Rule 37,²³⁹ has been helpful in making litigants in the NDCA observe proportionality standards.²⁴⁰ For example, in *Vietnam Veterans of America v. Central Intelligence Agency*, the court highlighted the plaintiffs' failure to comply with the proportionality rule as the basis for denying certain discovery and limiting the breadth of other requests.²⁴¹ Particularly troublesome to the court was the plaintiffs' failure to first review the defendants' existing productions, which raised the question of whether the additional discovery was cumulative or duplicative of the one million plus pages of documents the defendants already produced.²⁴² Given these circumstances, the plaintiffs' request for "limitless additional discovery at significant cost" failed the proportionality test and Local Rule 37-2.²⁴³

The *Vietnam Veterans* decision is one of many opinions from the NDCA that have applied the local certification requirement to emphasize the importance of proportionality.²⁴⁴

Another such case is *Plascencia v. BNC Mortgage, Inc.*, in which the court concluded that several discovery requests were disproportionate since they were "too broad, ill-defined, and not fine-tuned."²⁴⁵ And in *Crossbow Technology, Inc. v. YH Technology*,²⁴⁶ the court pointedly reminded the defendant to comply with Local Rule 37-2 if it decided to pursue further motion practice.²⁴⁷

As the above cases demonstrate, the NDCA certification requirement is bringing needed emphasis to the proportionality rule. Such a proportional-

proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied." N.D. CAL. CIV. LOCAL R. 37-2, available at <http://www.cand.uscourts.gov/localrules/civil#MTC>.

238. *Id.*

239. FED. R. CIV. P. 37.

240. *Viet. Veterans of Am. v. Cent. Intelligence Agency*, No. 09 cv 0037 CW (JSC), 2011 WL 4635139 (N.D. Cal. Oct. 5, 2011).

241. *Id.* at *4, *7, *14.

242. *Id.* at *3.

243. *See id.*

244. *See, e.g., Plascencia v. BNC Mortg., Inc. (In re Plascencia)*, No. 08-56305-ASW, 2012 WL 2161412, at *3 (Bankr. N.D. Cal. June 12, 2012) (finding that Local Rule 37-2 applied in the discovery phase of an adversary proceeding of a bankruptcy action); *Crossbow Tech., Inc. v. YH Tech.*, No. C-03-04360 SI (EDL), 2007 WL 926876, at *2 (N.D. Cal. Mar. 26, 2007).

245. *Plascencia*, 2012 WL 2161412, at *11.

246. *Crossbow Tech.*, 2007 WL 926876, at *1 (denying without prejudice the defendant's motion to compel given the failure of both parties to meaningfully engage in the meet and confer process).

247. *Id.* at *2.

ity certification would be a welcome addition to Federal Rule 37 for at least two reasons. First, a Rule 37 certification would provide litigants with an additional warning beyond Rule 26 of their obligation to engage in proportional discovery. Second, a certification would remind courts and counsel that consistent with Rule 26(g), the party seeking discovery always has the burden of showing that it satisfies the proportionality rule.

c. The District of New Jersey

Unlike the District of Maryland and the NDCA, the District of New Jersey has not taken any formal effort to promulgate local rules that spotlight aspects of the proportionality rule. Instead, New Jersey has developed a rich body of case law that emphasizes proportional discovery. The *Eisai v. Sanofi-Aventis*²⁴⁸ and *Salamone v. Carter's Retail*²⁴⁹ decisions, respectively discussed in Part I,²⁵⁰ are quintessential examples of the importance New Jersey has placed on the proportionality rule.

These and other proportionality cases²⁵¹ from New Jersey generally rely on three earlier opinions,²⁵² all of which established proportionality as the benchmark for curtailing overly broad discovery. The first of these opinions, *Leksi, Inc. v. Federal Insurance Company*,²⁵³ issued in 1989, was visionary in its use of the then-extant proportionality provisions of Rule 26.²⁵⁴ The *Leksi* court reasoned that the "1983 amendment to Rule 26(b)(1)" tempered the importance of relevance and "emphasized that discovery must be proportional . . . [and] tailored to the case at hand."²⁵⁵ Relying on that rationale, the court both limited and rejected several of the plaintiff's "grossly disproportionate" interrogatories.²⁵⁶ Had it not done so, the court expressed grave concern that such discovery would spawn a "circus" of collateral litigation.²⁵⁷

248. *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168 (MLC), 2012 WL 1299379 (D.N.J. Apr. 16, 2012).

249. *Salamone v. Carter's Retail, Inc.*, No. 09-5856 (GEB), 2011 WL 310701 (D.N.J. Jan. 28, 2011).

250. See discussion *supra* Section I.B, Subsection I.B.5.

251. See, e.g., *Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys.*, No. 10-4126 (PGS), 2012 WL 1623870, at *22-25 (D.N.J. May 9, 2012) (finding that the defendant satisfied the proportionality rule by demonstrating the relevance of the requested documents and that their production would not be unduly burdensome).

252. *Bowers v. NCAA*, No. 97-2600 (JBS), 2008 WL 1757929, at *4-5 (D.N.J. Feb. 27, 2008); *Pub. Serv. Enter. Grp. Inc. v. Phila. Electric Co.*, 130 F.R.D. 543, 551 (D.N.J. 1990); *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99, 105 (D.N.J. 1989).

253. *Leksi*, 129 F.R.D. 99.

254. *Id.* at 105.

255. *Id.*

256. *Id.* at 113.

257. *Id.* at 105-06, 113.

The second²⁵⁸ and third²⁵⁹ of these seminal New Jersey cases further substantiate the proportionality principles emphasized in *Leksi*. In *Public Service Enterprise Group Inc. v. Philadelphia Electric Co.*, the court held that several of the defendant's interrogatories violated the proportionality rule because the requested information was already in the defendant's possession, was available from public sources, and was in any event marginally relevant to the litigation.²⁶⁰ And in *Bowers v. National Collegiate Athletic Association*, the court denied the plaintiff's motion to compel production of a Rule 30(b)(6) witness and related documents given the nominal relevance of the discovery and the plaintiff's ample opportunity to obtain the information previously.²⁶¹

The *Leksi*, *Public Service*, and *Bowers* cases all confirm the long standing and consistent nature of New Jersey's proportionality jurisprudence. Yet despite the success of this approach in New Jersey, it has not proven successful in most of the rest of the country. Indeed, delineating the contours of proportionality on a case-by-case basis has so far been ineffective in creating a national proportionality rule that is clear and enforceable.

D. Analysis of the Limitations of the Current Rules Regime

1. *The Rules as Drafted Are Fatally Flawed*

Clearly, the proportionality rule in Federal Rule 26 has the potential to reduce the onerous costs and burdens of eDiscovery. Indeed, recent jurisprudence, together with the grassroots efforts of circuit and district courts, demonstrate that proportionality should be the touchstone of federal discovery. Yet without an amendment, this is unlikely to occur nationwide.

As detailed throughout this Article, the proportionality regime from the Federal Rules has failed to emerge as a meaningful standard. First and most importantly, the current rule fails to state with sufficient clarity that proportionality is the standard upon which discovery is predicated. Unless all parties concerned are placed on notice with an unequivocal statement that discovery is to be proportional, many courts and counsel will likely stick to the view that there are few bounds to liberal federal discovery.²⁶²

Such a mistaken notion has engendered the second problem with the current proportionality framework. The Rule 26(g) certification requirement

258. *Pub. Serv. Enter. Grp. Inc. v. Phila. Electric Co.*, 130 F.R.D. 543, 551-52 (D.N.J. 1990).

259. *Bowers v. NCAA*, No. 97-2600 (JBS), 2008 WL 1757929, at *4 (D.N.J. Feb. 27, 2008).

260. *Pub. Serv. Enter. Grp. Inc.*, 130 F.R.D. at 551-52.

261. *Bowers*, 2008 WL 1757929, at *4-6.

262. Hedges, *supra* note 43, at 5-6 (observing that the proportionality rule "may be the most underutilized of the [Federal] Rules").

remains largely forgotten.²⁶³ Indeed, many lawyers and judges have no idea that a certification requirement specific to discovery exists outside of Federal Rule 11. This lack of understanding, coupled with the failure to conduct discovery consistent with the aims of Rule 26(g), is one of the principal reasons why discovery expenses are vaulting into the stratosphere.²⁶⁴

A third and critical problem with the current Rule 26 is essentially an outgrowth of the neglected certification requirement, as well as a quirk of the Rules. Rule 26(g) clearly requires the requesting party to bear the burden of preparing proportional discovery.²⁶⁵ Confusingly, however, Rule 26(c) forces a responding party to bear the burden of defeating disproportionate discovery by filing a motion for a protective order.²⁶⁶ As a result, Rule 26(c) unfairly shifts to the responding party the affirmative obligation that Rule 26(g) imposes on the requesting party to prepare proportional discovery. The *Dongguk University v. Yale University* case is particularly instructive on this issue.²⁶⁷

In *Dongguk*, the plaintiff filed a motion for protective order to quash several categories of questioning under a Rule 30(b)(6) deposition.²⁶⁸ The plaintiff had argued that the objectionable topics were unreasonably cumulative and duplicative of other discovery the defendant had already obtained.²⁶⁹ Though it eventually sided with the plaintiff as to several of the categories in question, the court nonetheless held that the plaintiff had the burden of proof since it was the moving party under Rule 26(c).²⁷⁰ Nowhere in its analysis of the Rule 26 proportionality rule did the court recognize that the defendant, as the party seeking the deposition, had the burden of establishing that the discovery was proportional.²⁷¹

Contrary to the *Dongguk* holding, the responding party should not be obligated to first show that the requested discovery is disproportionate. Such burden shifting inappropriately relieves the demanding party of its Rule 26(g) obligation to prepare cogent and concise discovery requests.²⁷² Indeed, unless the Rule 26(g) “stop and think” mandate²⁷³ is observed, Justice Rob-

263. See *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 356-57 (D. Md. 2008).

264. See *id.* at 359.

265. FED. R. CIV. P. 26(g)(1)(B)(ii)-(iii).

266. FED. R. CIV. P. 26(c); see *Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 72 (D. Conn. 2010).

267. *Dongguk Univ.*, 270 F.R.D. 70.

268. *Id.* at 72.

269. *Id.*

270. *Id.* at 74.

271. *Id.* at 73.

272. FED. R. CIV. P. 26(g)(1)(B)(ii)-(iii).

273. FED. R. CIV. P. 26(g) advisory committee’s note.

ert Jackson's famous declaration will continue unfulfilled since counsel will continue to engage in discovery "without wits."²⁷⁴

2. Local Efforts Cannot Adequately Address the Rules' Deficiencies

These fatal flaws cannot be properly solved through the grassroots efforts of circuit or district courts. While these courts have adopted certain provisions that are praiseworthy and in some cases merit incorporation into the Federal Rules, these provisions only address lawsuits arising in their respective circuits and districts. Various other courts have not made an effort to address the limitations in the Federal Rules. Without uniform implementation of proportionality standards, discovery becomes a game of chance or, more troubling, parties have an incentive to go forum shopping.²⁷⁵

Furthermore, it is doubtful that a uniform body of proportionality jurisprudence could develop over time from the existing Rules regime. A similar "wait and see" approach was rightfully rejected during the last decade in favor of amending the Federal Rules to address the technological advances affecting federal discovery practice.²⁷⁶ A case-by-case approach was unworkable in that instance given that the decisions affecting discovery were typically issued by trial courts and did not carry precedential value.²⁷⁷ Moreover, the inconsistency between the different districts issuing discovery orders had created a quagmire of confusion for litigants.²⁷⁸

Similarly, federal discovery practice should not be forced to rely on the adjudicative process to address the shortcomings of the instant rules regime for proportionality. The same reasoning that forced the hand of the Advisory Committee to implement the ESI amendments is equally applicable in this instance. Indeed, given the varying local rules and practices that are now evolving, the opportunity for divergence in proportionality jurisprudence is ripe.

Simply put, discovery under the Rules should be subject to a clear proportionality framework. This will better enable the purposes of Rule 1 to

274. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either *without wits* or on wits borrowed from the adversary." (emphasis added)).

275. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 231-32 (7th ed. 2008) (discussing the "evils of forum shopping").

276. See Robert Douglas Brownstone, *Collaborative Navigation of the Stormy e-Discovery Seas*, 10 RICH. J.L. & TECH. 53, para. 29 (2004).

277. *Id.*; accord YEAZELL, *supra* note 275, at 461.

278. YEAZELL, *supra* note 275, at 461.

be fulfilled, benefiting all parties in this era of eDiscovery. All of this suggests the need for amendments to the Federal Rules.²⁷⁹

II. UTAH RULE 26—A BLUEPRINT FOR REFORM

Among the various measures enacted to address the deficiencies with the current proportionality regime,²⁸⁰ none seems more impressive or influential than the new civil discovery rules the State of Utah implemented in 2011.²⁸¹ The dramatic changes that Utah made to its rules of civil procedure have vaulted proportionality into its rightful place as the benchmark for discovery practice in that state. Like the District of Maryland, Utah has plainly delineated to its lawyers and litigants that “[p]roportionality is the principle governing the scope of discovery.”²⁸² Perhaps even more striking, Utah’s objective surrounding its new proportionality rules is expressly focused on the bottom line: “[T]he cost of discovery should be proportional to what is at stake in the litigation.”²⁸³

Such a regime, focused on reducing the costs and burdens of discovery, certainly merits consideration as a blueprint for reforming the Federal Rules. In this Part, we review the new amendments to the Utah Rules of Civil Procedure (Utah Rules).²⁸⁴ In particular, we examine the provisions that redefine both the permissible scope of discovery and the burden of proof during discovery. We also discuss how Utah has achieved greater proportionality by expanding initial disclosure requirements and limiting discovery based on parties’ damages claims. Finally, we emphasize the specific provisions that could be incorporated into an amendment to the Federal Rules.

279. The Advisory Committee apparently recognizes the limitations of the current proportionality framework and is considering various proposals to better emphasize proportionality in Federal Rule 26(b)(1). See ADVISORY COMMITTEE ON CIVIL RULES 327-31 (Nov. 1-2, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf>.

280. Marcus, *supra* note 7, at 337.

281. “[T]he Federal Rules aggregated virtually all of the discovery devices being used in the various states in a way that no single state had ever done.” Gensler, *supra* note 64, at 523-24.

282. UTAH R. CIV. P. 26 advisory committee’s note.

283. *Id.*

284. In addition, Utah has adopted amended rules to curb the costs of expert discovery. UTAH R. CIV. P. 26(a)(4) (requiring initial expert disclosures, limiting expert discovery to a written report or a deposition not to exceed four hours, and imposing accelerated deadlines for completion of expert discovery).

A. Redefining the Scope of Discovery and Burden of Proof During Discovery

1. *Proportionality Expressly Determines the Scope of Discovery*

Like the Federal Rules, the former Utah Rules²⁸⁵ broadly defined the scope of permissible discovery.²⁸⁶ If a discovery request sought relevant evidence or was reasonably likely to lead to the discovery of admissible evidence, the request was permitted.²⁸⁷

That broad scope of discoverable material undermined important objectives of the civil rules.²⁸⁸ The Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure (the Committee) observed: "*These broad standards* may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they *did little to advance* two equally important objectives of the rules of civil procedure—the *speedy and inexpensive resolution of every action*."²⁸⁹

To remedy this problem, Utah redefined the scope of permissible discovery.²⁹⁰ Today, Utah litigants "may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality."²⁹¹ This simple yet profound change has effectively brought proportionality to the forefront of discovery practice.

To eliminate any confusion regarding the nature of the "standards of proportionality," the Utah Rules delineate the boundaries of proportionality in the following subsection.²⁹² As a baseline, the standards include those found in Federal Rule 26(b)(2)(C).²⁹³ In addition, Utah Rule 26 requires that discovery be "reasonable."²⁹⁴ Reasonableness is based on nearly the same standards articulated in Federal Rule 26(b)(2)(C)(iii), *i.e.*, the needs of a given case, the amount in controversy, the parties' resources, the complexity and importance of the issues and the role of the discovery in addressing such issues.²⁹⁵ Last but not least, Utah requires that discovery expressly

285. The "former Utah Rules" refer to the Utah Rules of Civil Procedure in effect prior to November 1, 2011.

286. UTAH R. CIV. P. 26(b)(1) (amended 2008) (current version at UTAH R. CIV. P. 26(b)(1) (2011)).

287. *Id.*

288. UTAH R. CIV. P. 26 advisory committee's note.

289. *Id.* (emphasis added).

290. UTAH R. CIV. P. 26(b)(1).

291. *Id.*

292. UTAH R. CIV. P. 26(b)(2).

293. UTAH R. CIV. P. 26(b)(2)(B), (D)-(F).

294. UTAH R. CIV. P. 26(b)(2)(A).

295. *Id.*

comply with the cost-cutting mandate of Utah Rule 1 and thereby “further the just, speedy and inexpensive determination of the case.”²⁹⁶

These proportionality standards are certainly not new to Utah. They echo the long-standing, but often overlooked principles in Federal Rules 26(b)(2)(C) and 26(g).²⁹⁷ The difference in Utah is that these principles have teeth, as they now expressly define the scope of discoverable material.

2. Ensuring the Burden of Proof Remains with the Party Seeking Discovery

One of the most important changes to the Utah Rules relates to the burden of proof in discovery disputes. Under the former Utah Rules and despite the existence of a lawyer proportionality certification requirement in former Utah Rule 26(g), the party objecting to discovery typically carried the burden of proving that the request was unduly burdensome or expensive.²⁹⁸ Just like the current Federal Rules regime, this usually occurred when the objecting party sought a protective order.²⁹⁹ To remedy this incongruity, new Utah Rule 26 now includes a specific provision placing the burden of proving proportionality on the requesting party: “(b)(3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.”³⁰⁰

That the requesting party always bears this burden is true whenever the issue of proportionality is raised, whether in a motion for protective order, a motion to compel, or some other context.³⁰¹

Finally, to further emphasize this notion, Utah added an equivalent provision under Utah Rule 37(b)(2).³⁰² It also provided yet another redun-

296. UTAH R. CIV. P. 26(b)(2)(C).

297. Hedges, *supra* note 43, at 5-6; *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008).

298. UTAH R. CIV. P. 26(c) (amended 2008) (current version at UTAH R. CIV. P. 26(c) (2011)).

299. *Id.*

300. UTAH R. CIV. P. 26(b)(3).

301. Under the former Utah Rules, a motion to compel or motion for protective order brought discovery to an expensive and screeching halt. Under the new Utah Rules, discovery motions do not toll the days to complete standard discovery. UTAH R. CIV. P. 26 advisory committee’s note. This created the need for an expedited process to decide discovery motions. Three judicial districts in Utah adopted a local rule requiring succinct briefing and expedited decision of discovery motions. *See, e.g.*, JUD. COUNCIL R. JUD. ADMIN. 10-1-306, available at <http://www.utcourts.gov/resources/rules/ucja/ch10/10-1-306.htm>. For the rule adopted in the Third Judicial District, see *id.* The Utah Judicial Council is considering adopting this rule state-wide. *See* JUDICIAL COUNCIL MEETING MINUTES no. 6 (Dec. 12, 2011), available at <http://www.utcourts.gov/admin/judcncl/min-2011/min12-11.pdf>.

dancy on the burden issue in Utah Rule 37(a)(3).³⁰³ Similar to NDCA Local Rule 37-2, this Utah provision requires that a motion to compel be accompanied by a certification that the discovery in question is proportional under Utah Rule 26.³⁰⁴ All of these measures leave no doubt as to the party who bears the burden of establishing proportional discovery.

3. Remedies for Non-Compliance

To protect responding parties from disproportionate discovery and ensure compliance with its rules, Utah has empowered its courts with a range of corrective powers under Utah Rule 37.³⁰⁵ In particular, courts are specifically authorized to shift the costs of over-discovery from the responding party to the requesting party.³⁰⁶ Furthermore, such cost-shifting goes far beyond what is expressly authorized under Federal Rules 26(c)(3) and 37(a)(5).³⁰⁷

B. Additional Changes to Ensure Proportional Discovery

1. Expanded Initial Disclosures and Penalties for Non-Compliance

To achieve the objectives of proportionality described above, the Utah Advisory Committee implemented several additional changes to the Utah Rules. One such change included an expansion of the parties' initial disclosure obligations under Utah Rule 26.³⁰⁸ This change was especially important to achieve proportionality. Discovery tends to be more focused and thus more cost-effective when parties know more about the case earlier.

Under these expanded initial disclosures, parties must unilaterally disclose:

302. UTAH R. CIV. P. 37(b)(2) ("If the motion raises issues of proportionality under Rule 26(b)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.").

303. UTAH R. CIV. P. 37(a)(3).

304. *Id.*

305. UTAH R. CIV. P. 26(b)(3) ("To ensure proportionality, the court may enter orders under Rule 37."); UTAH R. CIV. P. 37(c).

306. UTAH R. CIV. P. 37(c), (c)(10) ("The court may make any order . . . to achieve proportionality under Rule 26(b)(2), including . . . that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires.").

307. See *Peskoff v. Faber*, 251 F.R.D. 59, 60 (D.D.C. 2008) (holding that cost shifting applies only where not reasonably accessible data is sought under Federal Rule 26(b)(2)); *Zubulake v. UBS Warburg LLC (Zubulake III)*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (emphasizing that "cost-shifting is potentially appropriate only when *inaccessible* data is sought").

308. UTAH R. CIV. P. 26(a)(1).

- “[E]ach fact witness the party may call in its case-in-chief and,” except for an adverse party, “a summary of the witness’s expected testimony,”³⁰⁹
- “[A] copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief . . . ;”³¹⁰
- “[A] computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered,”³¹¹ and
- “[A] copy of all documents to which a party refers in its pleadings.”³¹²

The plaintiff’s initial disclosures are due “within 14 days after service of the first answer.”³¹³ The defendant’s initial disclosures are due “within 28 days after the plaintiff’s first disclosure or after that defendant’s appearance, whichever is later.”³¹⁴ A party cannot seek discovery from any source until its initial disclosures have been made.³¹⁵

Utah encourages the development of initial disclosures tailored to distinct areas of practice. For example, Utah Rules 26.1 and 26.2 create required disclosures tailored to domestic relations and personal injury cases, respectively.³¹⁶

Certainly, “[n]ot all information will be known at the outset of a case.”³¹⁷ Discovery is intended to identify potential witnesses and uncover

309. UTAH R. CIV. P. 26 advisory committee’s note. Parties are not required to interview witnesses or disclose a “detailed description[] of everything a witness might say at trial.” *Id.* Rather, they must disclose “basic information concerning the subjects about which the witness is expected to testify” so that the other side can “determine the witness’s relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought.” *Id.*

310. UTAH R. CIV. P. 26(a)(1)(B).

311. UTAH R. CIV. P. 26(a)(1)(C).

312. UTAH R. CIV. P. 26(a)(1)(E).

313. UTAH R. CIV. P. 26(a)(2)(A). An amendment is pending that would make the plaintiff’s initial disclosures due within fourteen days after filing of the first answer. *See* UTAH R. CIV. P. 26(a)(2)(A) (Proposed Draft May 24, 2012), *available at* <http://www.utcourts.gov/resources/rules/comments/2012-08/URCP026.pdf>.

314. UTAH R. CIV. P. 26(a)(2)(B). An amendment is pending that would make the defendant’s initial disclosures due forty-two days after filing of the first answer to the complaint or within twenty-eight days after the defendant’s appearance, whichever is later. *See* UTAH R. CIV. P. 26 (Proposed Draft 2012), *available at* <http://www.utcourts.gov/resources/rules/comments/2012-08/URCP026.pdf>.

315. UTAH R. CIV. P. 26(c)(2).

316. Rule 26.1 requires financial declarations be submitted by each party. UTAH R. CIV. P. 26.1. Rule 26.2 requires disclosures from the plaintiff regarding medical history and loss of work, while requiring insurance and investigative information from the defendant. UTAH R. CIV. P. 26.2.

317. UTAH R. CIV. P. 26 advisory committee’s note.

relevant evidence. Accordingly, parties have a continuing duty to supplement initial disclosures.³¹⁸

Failure to disclose or supplement timely comes with a stiff penalty. The party failing to disclose may not use the witness or document in its case-in-chief at trial. This “make[s] the disclosure requirement meaningful” and “discourage[s] sandbagging.”³¹⁹

The penalty for failing to disclose or supplement timely is imposed under Rule 26.³²⁰ Unlike a Rule 37 sanction, it does not require a showing of fault, willfulness, or persistent dilatory conduct. Exclusion of undisclosed evidence is not automatic and may be avoided. However, the burden is on the non-disclosing party to show good cause or that the failure to disclose was harmless.³²¹

2. Limiting Discovery as a Matter of Right

Another aspect of the revised Utah Rules designed to facilitate proportional discovery is the limitation on the amount of discovery to which a party is entitled as a matter of right based on specific amounts in controversy.³²² Expressly defining the amount of discovery deemed proportional creates certainty for parties and “limit[s] the need . . . [for] judicial oversight,” factors that could help drive down discovery costs.³²³

To accomplish this objective, Utah divided civil litigation into three tiers.³²⁴ For each tier, Utah Rule 26(c) permits an amount of “standard discovery” deemed to be proportional.³²⁵ For those matters involving damages of \$300,000 or more, parties may propound twenty interrogatories, twenty document requests and twenty requests for admissions.³²⁶ Total fact deposition time is restricted to a mere thirty hours.³²⁷ For matters between \$50,000 and \$300,000, those figures are halved.³²⁸ And for matters under \$50,000, only five document requests and requests for admissions are allotted to the parties.³²⁹ Fact depositions are curtailed to three hours total per side, while interrogatories are eliminated.³³⁰

318. UTAH R. CIV. P. 26(d).

319. UTAH R. CIV. P. 26 advisory committee’s note.

320. UTAH R. CIV. P. 26(d)(4).

321. *Id.*

322. UTAH R. CIV. P. 26(c).

323. UTAH R. CIV. P. 26 advisory committee’s note.

324. UTAH R. CIV. P. 26(c)(3).

325. UTAH R. CIV. P. 26(c)(3), (5).

326. UTAH R. CIV. P. 26(c)(5).

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

If these limits turn out to be too restrictive, parties may request “extraordinary discovery” under Utah Rule 26(c)(6).³³¹ However, any such request must demonstrate that the discovery sought is “necessary and proportional” under the rules.³³² In addition, the parties must certify that the requesting party has reviewed and approved a discovery budget.³³³

C. Incorporating Provisions from the Utah Rules into Amendments to the Federal Rules

The Utah Rules provide several instructive components regarding proportionality that could be incorporated into amendments to the Federal Rules. The most obvious provision is the straightforward conditioning statement from Utah Rule 26(b)(1) that all discovery must satisfy proportionality principles. Another key aspect is the Utah Rule 37(a)(3) proportionality certification requirement, which would bring needed attention to counsel’s Federal Rule 26(g) obligation to engage in proportional discovery. Finally, the language from Utah Rules 26(b)(3) and 37(b)(2) clarifying that the requesting party always has the burden of establishing that its discovery is proportional would help address an existing quirk in Federal Rule 26(c) that unfairly shifts that burden to the responding party.

Including these provisions in amendments to the Federal Rules has the potential to bring real improvement to current federal discovery practice. They would make proportionality the unequivocal standard governing discovery under the Rules.

III. THE PROPOSED AMENDMENTS

In this Part, we propose three specific amendments to the Federal Rules to address the current deficiencies with the proportionality framework. These amendments are principally drawn from elements of the new Utah Rules of Civil Procedure. Nevertheless, they also include aspects from local rules and practices promulgated by individual circuit and district courts. In addition to these amendments, we also suggest that other aspects from the Utah Rules be considered in connection with the discussion to make the Federal Rules more proportionality-focused.

A. Proposed Amendment to Federal Rule of Civil Procedure 26(b)(1)

The first amendment essentially shifts around the wording of Rule 26(b)(1) to ensure that standards of proportionality expressly narrow the

331. UTAH R. CIV. P. 26(c)(6).

332. *Id.*

333. *Id.*

permissible scope of discovery. Our suggested language for Rule 26(b)(1) is as follows in italics, with deletions in strikethrough:

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense *if the discovery satisfies the proportionality limitations imposed by Rule 26(b)(2)(C) and Rule 26(g)(1)(B)(iii)*—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. ~~All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

This straightforward amendment enshrines proportionality squarely within the sentence defining the scope of discovery, elevating it out of obscurity. It more clearly conditions the scope of discovery on the Rule 26(b)(2)(C) proportionality rule. Moreover, it adds an important cross-reference to the Rule 26(g) attorney certification requirement. By identifying Rule 26(g)(1)(B)(iii) in this location, critical emphasis would finally be placed on the affirmative duty of lawyers to engage in proportional discovery.

B. Proposed Amendment to Federal Rule of Civil Procedure 37(a)(1)

The second amendment modifies Rule 37(a)(1) to include a proportionality certification requirement in connection with Rule 37 discovery motions. Our proposed language for Rule 37(a)(1) is as follows in italics:

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action *and that the discovery being sought satisfies the proportionality limitations imposed by Rule 26(b)(2)(C) and Rule 26(g)(1)(B)(iii).*

This simple addition to the Rule 37 certification requirement would force counsel to once again re-examine its discovery to ensure that it is proportional before proceeding with motion practice. While a similar provision has already proven successful in the NDCA, the instant amendment would go one step further by again reminding counsel of its obligation to conduct discovery within the bounds of proportionality.

C. Proposed Amendment to Federal Rule of Civil Procedure 26(c)

The third amendment changes Rule 26(c)(1) by requiring that the party seeking discovery demonstrate that it satisfies the proportionality rule. Our suggested language for Rule 26(c)(1) is as follows in italics:

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. *If the motion raises the proportionality limitations imposed by Rule 26(b)(2)(C) and Rule 26(g)(1)(B)(iii), the party seeking the discovery has the burden of demonstrating that the information being sought satisfies those limitations.* The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following

This basic amendment would ensure that the requesting party always has the burden of proving that the requested discovery is proportional. Moreover, it would eliminate the tension between Rule 26(g)(1)(B)(iii), which places this burden on the party seeking discovery, and Rule 26(c), which unfairly shifts that burden to the party seeking protection. And just as with the second suggested amendment, the instant proposal would again provide an important repetition of the Rule 26(g) requirement to engage in proportional discovery.

D. Other Potential Amendments to the Federal Rules

While we believe the foregoing amendments are absolutely essential to ensuring the proliferation of proportionality, there are other aspects from the Utah Rules that also merit consideration to help further a proportionality-driven discovery regime. One such feature is Utah's cost-shifting provision.³³⁴ By providing courts with specific authority under Federal Rule 37(a)(5) to generally shift the costs of disproportionate discovery, judges would have additional power to curb abusive practices. Not only has Utah adopted such an approach, but the Federal Circuit's Model Order also relies extensively on cost-shifting to encourage reasonable and proportional discovery.³³⁵ Expressly vesting federal judges with such power would undoubtedly advance these twin aims of enlightened discovery.

Another Utah measure that warrants consideration in the Federal Rules is the notion of expanding parties' Rule 26(a) initial disclosure obligations.³³⁶ Requiring parties to disclose—and not merely identify—

334. UTAH R. CIV. P. 37(c)(10).

335. MODEL ORDER, *supra* note 11, nos. 3-4.

336. UTAH R. CIV. P. 26 (a)(1).

documents supporting their positions at trial *before* the Rule 26(f) conference might provide them with greater insight into the positions held by the other side. This has the potential to foster a more productive Rule 26(f) planning session, which the Seventh Circuit and the District of Maryland have identified as a key step for ensuring proportional discovery.³³⁷ By stiffening the penalties for non-compliance as the Utah Rules have done, parties would be incentivized to provide full disclosure of required information.

Finally, the Federal Rules should consider imposing some type of limitation on the amount of discovery a party is entitled to as a matter of right—the standard discovery deemed proportional based on the amount in controversy, case type, or some other workable criteria. Without any limitation on the number of requests, parties have traditionally had little incentive to shoot with a discovery rifle, rather than a shotgun. With limitations, however, boilerplate interrogatories and document requests would be replaced with targeted requests.³³⁸ Such discovery “boundaries” would also force lawyers and clients to take more seriously the “stop and think” requirement from Rule 26(g).³³⁹ Not only could this lead to better prepared discovery requests, it might also cause discovery to focus on the merits instead of costly eDiscovery sideshows like those feared by the *Leksi* court.³⁴⁰

Coupling standard discovery limits with an “extraordinary discovery” option simply mandates the staging of discovery.³⁴¹ This enables lawyers, parties, and judges—prepared with the information learned in standard discovery—to make informed decisions about what additional discovery is necessary and proportional. Some form of this option would be a substantial improvement over the current rules where discovery decisions (including judicial oversight) often occur in a factual vacuum characteristic of litigation in its infancy.

337. See 7TH CIR. ELEC. DISCOVERY COMM., at princ. 2.05-2.06, *supra* note 175; *Protocol*, *supra* note 207, para. 6-9.

338. See *Calcor Space Facility, Inc. v. Superior Court*, 61 Cal. Rptr. 2d 567, 570-71 (Ct. App. 1997) (encouraging litigants to use discovery devices in a manner that is “well calibrated; the lancet is to be preferred over the sledge hammer”).

339. FED. R. CIV. P. 26 advisory committee’s note (explaining that Rule 26(g) “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”).

340. *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99, 105-06, 113 (D.N.J. 1989).

341. See *DCG Sys., Inc. v. Checkpoint Technologies, LLC*, No. C-11-03792 PSG, 2011 WL 5244356, at *1 (N.D. Cal. Nov. 2, 2011) (noting that the Federal Circuit’s Model Order provides for mandatory phasing of discovery in patent litigation).

CONCLUSION

The amendments we have proposed could be painful medicine for lawyers who are used to conducting litigation under the current framework. Nevertheless, these changes are necessary to address the unrestrained costs and current shortcomings of the Federal Rules. Our proposed amendments represent a simple and prudent way of emphasizing that counsel and clients alike must engage in proportional discovery.

Keeping the big picture in mind, these reforms are necessary to ensure that cases are decided on their merits. Discovery is perhaps the most critical phase of litigation. It provides an opportunity to evaluate the merits of claims and defenses, teeing matters up for disposition through settlement, summary judgment, or trial. Yet the skyrocketing costs of discovery have hijacked that grand vision. Many litigants cannot afford to prosecute meritorious claims to trial, while others settle specious lawsuits to avoid the discovery bill. We should act boldly now to correct this unfair and unacceptable situation. To do so, the Federal Rules must be modified to ensure that discovery is proportional to what is at stake in the litigation. Only then will the elusive vision of Rule 1 be realized.

