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THE “BURDENS” OF APPLYING PROPORTIONALITY

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THE “BURDENS” OF APPLYING PROPORTIONALITY

*Hon. Craig B. Shaffer**

The songwriters said it best: “everything old is now new again.”¹ It would seem axiomatic that the purpose of discovery is to develop the facts underlying the parties’ claims and defenses and thus promote the just, speedy, and inexpensive disposition of the action by motion, settlement, or trial.² There is a sense, however, both among lawyers and judges that the discovery process is rife with abuse. While discovery abuse takes many forms, the motivation is to gain an unfair advantage or place the opposing party in a disadvantageous position, and thereby achieve an outcome divorced from the ultimate merits of the case.³ Not surprisingly, civil discovery is a recurring topic of discussion and, occasionally, vociferous debate, among judges, lawyers, and litigants.⁴ That

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1. Peter W. Allen & Carole Bayer Sager, *Everything Old Is New Again* (A&M Records 1974).

2. *Haeger v. Goodyear Tire and Rubber Co.*, 906 F. Supp. 2d 938, 941 (D. Ariz. 2012) (“Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice.”).

3. Edward D. Cavanagh, *Federal Civil Litigation at the Crossroads: Reshaping the Role of the Federal Courts in Twenty-First Century Dispute Resolution*, 93 OR. L. REV. 631, 641 (2015) (“Discovery abuse takes many forms—overdiscovery, failure to comply with legitimate discovery requests, redundant requests, inundating the discovering party with reams of papers, and frivolous objections, for example—and it inevitably creates costly and unproductive satellite litigation.”).

4. See, e.g., Michael W. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 19 (1988) (“In comparing theory and practice, one comes to the inescapable conclusion that discovery has simply become an extended field of play in an on-going game of blind man’s bluff. Far from offering the salutary benefits of allowing the parties to obtain the fullest possible knowledge of the facts and issues before trial, it more often than not gives impetus and opportunity to the baser litigational instincts of delay, deception and unbridled confrontational advocacy.”).

discussion is shaped by competing perspectives that are remarkably resistant to change. The defense bar paints a dire picture of unrestrained “fishing expeditions” and broad discovery requests that have only a passing connection to the actual claims and defenses of the parties. Plaintiffs’ attorneys are equally strident in accusing their opposite numbers of “hiding the ball” with undifferentiated data dumps and delay caused by boilerplate objections and obfuscation.

Critics decry the gamesmanship that typifies modern civil discovery, but rarely single-out their particular side for blame.⁵ As one observer has noted, “we seem to have reached an impasse” that both sides of the litigation divide bear responsibility for creating.⁶

While these dueling perspectives have long been a part of the civil discovery landscape, empirical studies conducted over the last several decades present a decidedly different picture. Those studies suggest that in the vast majority of civil cases, the discovery process is working well and achieving its intended goals. For all the dire portrayals of a failed civil litigation process, participants at the 2010 Conference on Civil Litigation at the Duke University School of Law coalesced around the view that while “there is need for improvement, the time has not come to abandon [the existing rules] and start over.”⁷ Conference participants advocated for a civil litigation system characterized by an increased emphasis on

5. As one court cynically noted, “a recipe for a massive and contentious adventure in [electronically stored information] discovery would read: ‘Select a large and complex institution which generates vast amounts of documents; blend as many custodians as come to mind with a full page of search terms; flavor with animosity, resentment, suspicion and ill will; add a sauce of skillful advocacy; stir, cover, set over high heat, and bring to boil. Serves a district court 2-6 motions to compel discovery or for protection from it.’” *Bagley v. Yale University*, 307 F.R.D. 59, 61 (D. Conn. 2015).

6. Richard Marcus, “*Looking Backward*” to 1938, 162 U. PA. L. REV. 1691, 1713-14 (June 2014). Cf. Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1, 5 (Fall 2011) (“In searching for the culprits behind the failure of our existing discovery procedures to promote informed adjudications and reasonable settlements (in a way that is proportional to the matters at stake, the resources of the parties, and the interest of the public), legal professionals must, with chagrin, accept mutual and reciprocal responsibility. It is not always the ‘other guy.’”).

7. Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 5, available at www.uscourts.gov/file/reporttothechiefjusticepdf [hereinafter Report to the Chief Justice].

cooperation and proportionality, and more “sustained, active, hands-on judicial case management.”⁸ These same objectives are reflected in the proposed amendments to the Federal Rules of Civil Procedure (“Civil Rules” or “Rules”) currently under consideration by the United States Congress.⁹

Proportionality principles have been part of the Civil Rules since 1983. For much of the ensuing 32 years, proportionality did not figure prominently in the reported case law or the public debate. The proposed Rules amendments, and particularly the revisions to Rule 26(b)(1), place increased emphasis on proportionality and active case management, and have reenergized the debate surrounding the civil discovery process. But the tenor of that debate should come as no surprise. In fact, the fight over proportionality may say more about how lawyers and judges currently approach the pretrial process (and their reluctance to critically evaluate current practices), than about the proportionality concept itself.¹⁰

The proportionality factors presently incorporated in Rule 26(b)(2)(C) and Rule 26(g), and proposed for explicit inclusion in an amended Rule 26(b)(1), cannot be applied with absolute certainty or precision. The reported decisions that address proportionality do not establish a bright-line standard or reflect uniformity in the application of proportionality factors. Indeed, proportionality necessarily presumes *ad hoc* analysis by lawyers and judges. Therefore, it should come as no surprise that reaction to the Rule 26(b)(1) amendments devolved into a debate in which the competing

8. *Id.* at 4

9. On April 29, 2015, Chief Justice Roberts forwarded to Congress the proposed Amendments and corresponding Committee Notes to the Federal Rules of Civil Procedure (*available at* <http://www.uscourts.gov/file/document/congress-materials>) following their adoption by the United States Supreme Court pursuant to 28 U.S.C. § 2072.

10. Cf. Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: ‘Twixt the Cup and the Lip*, 87 DEN. U. L. REV., 227, 228 (2010) (“The adversarial nature of lawyers and litigants and the incentives of the hourly fee are said to combine to encourage attempts to discover ‘any and all’ potential evidence and attempts to resist any discovery.”).

camps aligned along a “more for me” or “less for you” fault line.¹¹ Critics of the proposed Rule 26(b)(1) condemn the explicit reference to proportionality as an unwarranted restraint on a requesting party’s ability to obtain necessary information, as well as an invitation for continued gamesmanship by responding parties. Other commentators have decried the amendment as subjecting requesting parties to a new and often insurmountable burden of proof.

As long as proportionality is dismissed as simply an abstract concept divorced from case-specific circumstances, or an arbitrary and inflexible limitation on discovery, or a trap for the unwary, or as a proxy for some broader challenge to the current civil litigation process, the debate will continue to no useful end.¹² In truth, proportionality principles impose obligations on all parties to the litigation, as well as the court, and neither requesting nor producing parties can divorce their decision-making or actions from the proportionality mandate.

Proportionality is, and will remain after December 1, 2015, a part of the civil discovery landscape. Rather than bemoaning that reality, lawyers and jurists should focus on how proportionality can be applied both strategically and proactively.¹³ Proportionality principles do not automatically preclude discovery; they simply require lawyers and judges to approach the discovery process more

11. Others have suggested that “[d]espite concerns about increasingly burdensome discovery, the proportionality rule has been underused.” Milberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules*, 4 FED. CTS. L. REV. 131, 135 (2011) (in enumerating “less drastic alternatives to address the purported concerns of those who histrionically claim discovery is going to break the back of our justice system,” the authors include “increasing awareness and reliance on the proportionality standard embodied in [Fed. R. Civ. P.] 26(b)(2)(C).”).

12. Social science may provide some useful insight into the underpinnings of the “proportionality” debate. “Status quo bias” recognizes that individuals have a strong tendency to hold to the status quo, simply because the disadvantages of change loom larger than the advantages. See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias*, 5 JOURNAL OF ECONOMIC PERSPECTIVES 193, 197-98 (Winter 1991), available at aeainfo@vanderbilt.edu.

13. Participants at the Duke Conference reached a very similar conclusion, noting that many of the perceived problems in the civil litigation process “could be substantially reduced by using the existing rules more often and more effectively.” *Report to the Chief Justice; supra* note 7, at 5.

thoughtfully.¹⁴ If, as some commentators suggest, “proportionality requires making good judgments about where and how discovery should begin,”¹⁵ the fruits of those “good judgments” will be revealed in subsequent motion practice or, even better, in the absence of those motions. It necessarily follows that the best way to avoid or ultimately defeat a proportionality challenge is to develop a discovery strategy that substantially reduces the potential for successful objections.

Contrary to the arguments advanced by the warring factions, Rule 26(b)(1), both in its current and amended forms, does not impose a burden of proof or persuasion on either the requesting or producing party. The Rule merely defines the scope of discovery. Other rules, however, do impose burdens of proof or persuasion that may directly implicate proportionality principles and shape the discovery process. When viewed from the vantage point of burdens of proof and persuasion, proportionality principles become more than “talking points” or meaningless objections, but rather elements of an effective and defensible discovery plan that should advance the goals underlying Rule 1.¹⁶

14. Cf. Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 195, 209 (2013) (opining that the 2015 Amendments “will not materially change obligations already imposed on litigants, their counsel, and the court” and suggesting that “a lawyer inclined to approach the Federal Rules from a strategic and practical perspective will not find their clients disadvantaged by the Advisory Committee’s proposed revisions”).

15. Steven S. Gensler & Lee H. Rosenthal, *Four Years after Duke: Where Do We Stand On Calibrating The Pretrial Process?*, 18 LEWIS & CLARK L. REV. 643, 662 (2014).

16. FED. R. CIV. P. 1.

I. PROPORTIONALITY AND THE 1983 AMENDMENTS

Complaints about the civil discovery process are not new.¹⁷ In response to the dangers of “redundant or disproportionate discovery,” the Civil Rules were amended in 1983 to provide trial courts with the “authority to reduce the amount of discovery that may be directed to otherwise proper subjects of inquiry.”¹⁸ To that end, the Advisory Committee on Civil Rules (the “Advisory Committee”) revised Rule 26(b)(1)¹⁹ to empower the court to limit the frequency or extent of discovery, if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the discovery is unduly burdensome or expensive, taking into account the

17. See, e.g., Edward F. Sherman, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 246 (1982) (noting that discovery abuse in the federal courts is characterized by “over-discovery” through excessive interrogatories, sweeping demands for document production and overly-lengthy depositions, and “discovery avoidance” in an effort “to elude an opponent’s discovery requests”); American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207, 213-15 (1981) (warning that “unchecked discovery” may enable a plaintiff “to force early settlement” but also permits defendants to “outflank” their often less financially resourceful opponents by overwhelming them with burdensome discovery”); American Bar Association Section on Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse (Preliminary Draft)*, 92 F.R.D. 137, 138 (1980) (suggesting that “new studies confirm our view that there remain serious discovery problems demanding immediate correction,” including “unnecessary use of discovery, the improper withholding of discoverable information, and misuse of discovery procedures”).

18. FED. R. CIV. P. 26(b) advisory committee’s note to 1983 amendment. See also A. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility*, at 30-32 (1984), available at [http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/\\$file/1983amnds.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/$file/1983amnds.pdf). Cf. *Advanced Semiconductor Products, Inc. v. Tau Laboratories, Inc.*, No. 83-20412 RPA, 1986 WL 215149, at *3 (N.D. Cal. Jan. 23, 1986) (observing that drafts of the 1983 amendments to Fed. R. Civ. P. 26 “recognized that significant interests can be damaged by wide open, unrestrained discovery and that it is no longer acceptable to leave notions of common sense out of the calculus about appropriateness of discovery requests”).

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

needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion²⁰

In short, the 1983 change to Rule 26(b)(1) sought to instill a more proportionate approach to discovery, while still respecting the parties' right to "discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case."²¹ The accompanying Committee Note admonished litigants to be "sensitive to the comparative costs of different methods of securing information" but also signaled that judges should take a more active role in the discovery process, given "the reality that it cannot always operate on a self-regulating basis."²² The Advisory Committee understood that the goal of proportionality could be undermined by a judge "who is not conversant with the case."²³

The 1983 amendments also sought to advance the goal of proportionality with a new Rule 26(g).²⁴ According to the Advisory Committee, this Rule was intended to "curb discovery abuse" by imposing "an affirmative duty to engage in pretrial discovery in a responsible manner consistent with the spirit and purposes of Rules 26 through 37."²⁵ Rule 26(g), then and still today, requires a party or attorney to certify that a discovery request, response, or objection is "not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation."

20. Proportionality factors are included in Fed. R. Civ. P. 26(b)(2)(C) which assumed its current form in 2006.

21. *Cf. Leksi, Inc. v. Federal Insurance Co.*, 129 F.R.D. 99, 103 (D.N.J. 1989) ("[T]he discovery rules embody competing concerns. An effort to determine a discovery dispute must contain an assessment of the potential for developing relevant evidence in addition to an analysis of the relative burdens the discovery may entail.").

22. See Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery through Local Rules*, 30 VILL. L.REV. 767, 789 (1985) (suggesting that the proportionality factors added to Rule 26(b)(1) "contemplate[] that the parties will be selective in invoking various discovery devices; parties no longer are free, necessarily, to follow a discovery program that leaves 'no stone unturned'"), available at <http://digitalcommons.law.villanova.edu/vlr/vol30/iss3/3>.

23. See also Miller, *supra* note 18, at 36.

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

25. FED. R. CIV. P. 26(g) advisory committee's note to 1983 amendment.

Addressing the need for proportionality, the Rule 26(g) certification requirement mandates discovery requests that are reasonable and not “unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.”²⁶ Rule 26(g) was not added to the Civil Rules to “discourage legitimate and necessary discovery,” but does obligate counsel to “‘pause and consider’ the reasonableness of a discovery request or response.”²⁷

In combination, the 1983 amendment to Rule 26(b)(1) and the addition of Rule 26(g) sought to improve the self-executing nature of civil discovery. As one magistrate judge explained, after the 1983 amendments, it was no longer sufficient for the requesting party to simply show that the desired materials were relevant.

After satisfying this threshold requirement, counsel *also* must make a common sense determination, taking into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery probe would impose, that the discovery tool selected is the most efficacious of the means that might be used to acquire the desired information (taking into account cost effectiveness and the nature of the information being sought), and that the timing of the probe is sensible, i.e., that there is no other juncture in the pretrial period when there would be a clearly happier balance between the benefit derived from and the burdens imposed by the particular discovery effort. . . . What the 1983 amendments require is, at heart, very simple: good faith and common sense. . . .

The problem, one senses, is *not* that the requirements the law imposes are too subtle. Rather, the problem is more likely to be that counsel are less interested in

26. Professor Miller, who in 1983 was the Reporter to the Advisory Committee on Civil Rules, acknowledged that proportionality could not be reduced to a “pure dollar test” because “[e]verybody understands you can have a case where the values at stake transcend the economics of the case.” See Miller, *supra* note 18, at 33.

27. See Cavanagh, *supra* note 22, at 790. But see Hon. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 516 (Spring 2013) (suggesting that “lawyers seem to be comprehensively ignorant of the significant limitations that Rule 26(b)(2)(C) imposes on the scope of discovery”).

satisfying the law's requirements than in seeking tactical advantages. At least in cases involving big economic stakes, good faith and common sense hardly seem to be the dominant forces. Instead, it appears that the root evil in complex civil litigation continues to be the pervasiveness of gaming.²⁸

For all the concerns expressed by then-Magistrate Judge Wayne Brazil in 1985, the issue of proportionality did not figure prominently in reported decisions in the years immediately after 1983. Between 1983 and 1994, "[t]he [proportionality] amendment itself seems to have created only a ripple in the case law."²⁹ While "proportionality" is now mentioned with greater frequency in reported decisions,³⁰ it is this author's experience that the concept is rarely invoked by litigants or their counsel, either at the Rule 16³¹ scheduling conference³² or later in the pretrial process. Indeed, when this author has invited or encouraged counsel to incorporate proportionality principles in their proposed scheduling order, that suggestion typically has been met with stony silence or intransigence from both sides.

Perhaps that should be expected. The mixed reaction to proportionality, much like the broader debate over the current state of civil litigation, likely reflects anecdotal bias³³ fueled by studies that are praised or condemned depending upon the reader's particular

28. *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 331-32 (N.D. Cal. 1985) (Brazil, M.J.).

29. Marcus, *supra* note 6, at 1717.

30. See Gensler & Rosenthal, *supra* note 15, at 660 (reporting that their Westlaw search for cases mentioning proportionality in the context of discovery revealed at least 148 cases after January 2010 in which judges invoked proportionality).

31. FED. R. CIV. P. 16

32. This omission is particularly striking since one purpose of the scheduling conference is to "discourage wasteful pretrial activities." See FED. R. CIV. P. 16(a)(3).

33. See Traci Freling & Ritesh Saini, *Involved but Inaccurate: When High-Stakes Lead to Anecdotal Bias*, at 1, 3-4, available at <http://cdn1.sph.harvard.edu/wp-content/uploads/sites/1273/2014/02/Risk-Perception-Freling-e-al.1.pdf>. The authors of this paper report that "[i]ndividuals often eschew more accurate statistical information in decision making, relying instead upon anecdotal evidence." The paper suggests that "[o]bjectively, statistical information is more informative in that an isolated anecdote can be used to support any position" and that "[a]necdotal information can—and often does—overwhelm statistical information, leading decision makers to overweight its relevance, even in the presence of more reliable statistical data."

point of view.³⁴ The civil discovery process and any consideration of proportionality fall victim to these dueling perspectives.

In one camp, attorneys who have directly experienced excessive or abusive discovery argue that more stringent proportionality measures are needed, and that even a rare occurrence of excess is too much. In the other camp, empiricists maintain that the problem is more or less restricted to a small number of cases and that changes to the Federal Rules are unnecessary. The result has been a stalemate, in which practitioners with a bad discovery experience are told that the problem is not common enough to raise general concerns, and empiricists are told that their aggregate numbers do not adequately reflect the disruptive effect of disproportionate discovery in real cases.³⁵

However, “[e]mpirical research has not provided support for the prevailing view that discovery costs are necessarily the major cost driver in litigation.” According to this view, “[t]he [p]ervasive [m]yth of [p]ervasive [d]iscovery [a]buse . . . has never been supported by a single empirical study of costs, as opposed to beliefs about costs.”³⁶ This same dichotomy is reflected in the strong reactions to the most recent amendments to the Civil Rules.

34. See *Report to the Chief Justice*, *supra* note 7, at 2-4 (summarizing the findings of empirical and other studies available to participants to the Duke Conference). This author takes no position on the methodology or statistical validity of any particular study; those studies speak for themselves. *But see* Danya Shocair Reda, *The Cost-and Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1100, 1102 (2012) (observing that “[t]he bulk of what the Duke Conference labeled ‘empirical data’ consisted of opinion surveys that reflected the concerns and beliefs among legal professionals” and suggesting that the “attorney impressions captured by the opinion surveys are in conflict with the picture that emerges from available empirical data”).

35. Jordan M. Singer, *Proportionality’s Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 153 (2012).

36. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 779, 786-87 (Dec. 2010). See also Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Discovery*, 172 U. PA. L. REV. 1839, 1850 (June 2014) (“Contrary to the popular narrative, the problem with excessive discovery is - and has always been - more pervasive with respect to a particular slice of ‘mega cases,’ approximately five to fifteen percent of the caseload.”); Hon. John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 540 (Dec. 2010) (“It is plain that, although the cost of discovery in the median case may be reasonable and indeed low, the costs in high-stakes litigation can be enormous.”).

II. THE 2015 AMENDMENTS

In August 2013, the Advisory Committee released for public comment proposed amendments to the Civil Rules. Those proposals included changes to Rule 26(b)(1). Although the current version of Rule 26(b)(1) acknowledges that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C),”³⁷ the proposed version explicitly states:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is *relevant to any party’s claim or defense and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.³⁸

As noted, comparable proportionality factors currently are found in Rule 26(g), and Rule 26(b)(2)(C).

The increased prominence accorded the proportionality factors in the 2015 amendments sparked strong reactions during the public comment period, with commentators suggesting that relocation of the proportionality factors was not required or, conversely, that the proportionality standard was not invoked enough.³⁹ Many of the written comments received by the Advisory Committee expressed the view that explicitly incorporating proportionality factors in the standard of “relevance” would adversely affect a plaintiff’s ability to obtain necessary information

37. FED. R. CIV. P. 26(b)(2)(C) (the court “must limit the frequency or extent of discovery otherwise allowed by these rules” if it determines, *inter alia*, that the “burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues”).

38. See June 2014 Advisory Committee Report, at Appendix B-30 (emphasis added), attached to the September 2014 Standing Committee Report, available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014>.

39. See Thomas Y. Allman, 16 SEDONA CONF. J. (forthcoming 2015).

and simply invite boilerplate objections. For some opponents, “[t]he proportionality standard will enable defendants to hide behind the excuse of burden or cost, particularly in asymmetrical information cases,” encourage defendants to “self-apply the concept of proportionality in responding to discovery requests and . . . monetize the importance of the case,” or serve as a “further invitation for large defendants to continue, or increase, their standard objections based on unarticulated burdens.”⁴⁰ Another written submission to the Advisory Committee warned that the “rules changes would prevent discovery that has been available under the present rules, taking procedure back to the days of trial by ambush, and placing plaintiffs at a further disadvantage.”⁴¹ One judge observed that inclusion of the proportionality factors in Rule 26(b)(1) would generate more discovery disputes that “will be less susceptible to principled resolution” because proportionality can only be measured by a subjective standard until discovery is completed or nearly so.⁴²

Other critics expressed concern that measuring relevance based on proportionality factors “will shift the burden to the party seeking information.”⁴³ According to this view:

The proportionality test will shift the burden to the requesting party to show that discovery is justified. Present practice requires the requesting party to show relevance, and then the burden falls on the responding party to show the reasons to deny discovery of relevant information. Changing the definition of what is discoverable will change the analysis from whether

40. See Advisory Committee on Civil Rules Agenda Book, April 10-11, 2014, at 185, 194, 195 of 580, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014>.

41. *Id.* at 167 of 580. Some representatives of the defense bar were equally quick to express dissatisfaction with the current version of the discovery rules. One writer observed that the current rules of discovery give “the plaintiff a serious advantage, because there is no mechanism in place to ensure the claim has at least some merit, and the plaintiff need only prolong discovery to receive a settlement offer.” *Id.* at 176 of 580. In a similar vein, another letter to the Committee argued that “[t]o further overcome the gross abuse of justice fostered by current discovery standards, proportionality should require that the benefits of the discovery substantially outweighs its burdens or expense.” *Id.* at 217 of 580.

42. *Id.* at 193 of 580.

43. *Id.* at 187 of 580.

discovery should be limited to whether discovery should be permitted.⁴⁴

Another letter asserted that under the current version of the Civil Rules, “[t]he Rule 26(g) certification is made to the best of the party’s knowledge, information and belief formed after a reasonable inquiry.” For this commentator, the proposed rule “likely will impose” on the party requesting discovery the burden “to prove the requests are not unduly burdensome or expensive.”⁴⁵ One letter to the Advisory Committee went so far as to proclaim that “[c]hanging the burden of proof on discovery destroys litigation.”⁴⁶

The Advisory Committee responded to these concerns by explaining that the new Rule 26(b)(1) “restores the proportionality factors to their original place in defining the scope of discovery,” reinforces the parties’ current obligations under Rule 26(g), and “does not change the existing responsibilities of the court and the parties to consider proportionality.”⁴⁷ Just as importantly, the Committee Note makes clear that the revisions to Rule 26(b)(1) “do[] not place on the party seeking discovery the burden of addressing all proportionality considerations.”

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.⁴⁸

44. *Id.* at 204 of 580. Another commentator expressed the same fear that moving the proportionality factors from Rule 26(b)(2)(C) to Rule 26(b)(1) will change “a shield to a sword, ‘shifting the burden to the party seeking information, who may be at a considerable disadvantage when it comes to having the information necessary to carry such a burden.’” *Id.* at 200 of 580.

45. *Id.* at 201 of 580.

46. *Id.* at 211 of 580. Of course, that ominous prediction was not universally shared, as evidenced by another commentator who opined that “the burden of proof is a nonissue. Discovery motions do not get decided on a burden of proof.” *Id.* at 233 of 580.

47. See June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-39. Cf. *Willnerd v. Sybase, Inc.*, No. 1:09-cv-500-BLW, 2010 WL 4736295, at *3 (D. Idaho Nov. 16, 2010) (in employing proportionality factors, “the Court balances [the requesting party’s] interest in the documents requested, against the not-inconsequential burden of searching for and producing documents”).

48. *Id.*

The new Rule 26(b)(1), contrary to public perceptions, does not represent a fundamental change in the existing scope of discovery.⁴⁹ The current version of Rule 26(b)(1) limits “lawyer-directed” discovery to the “claims and defenses” actually raised by the parties and further requires that discovery be proportionate in light of the particular circumstances of the pending case.⁵⁰ A proportional approach to discovery is measured by the information available to counsel “as of the time” requests, responses, or objections are served.⁵¹ That same standard should apply under the proposed amendment to Rule 26(b)(1).

Counsel’s limited access to information, particularly at the outset of the litigation, will inevitably color their approach to discovery. However, claims of ignorance should not absolve an attorney of his or her responsibility to pursue discovery that is proportional to the needs of the case nor excuse discovery requests that bear more resemblance to unguided missiles than thoughtful efforts to obtain truly relevant information. Counsel for the requesting *and* producing parties are subject to the same Rule 26(g) “stop and think” obligation measured by an objective, rather than a

49. The Advisory Committee’s Agenda Book for the meeting in Norman, Oklahoma, on April 11-12, 2013 suggested that “transferring the analysis required by present Rule 26(b)(2)(C)(iii)” to Rule 26(b)(1) would “become a limit on the scope of discovery.” See Advisory Committee on Civil Rules Agenda Book, April 11-12, 2013, at 83 of 322, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2013>. That view is not expressed in the current Committee Note transmitted to Congress.

50. Cf. *High Point Sarl v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2011 WL 4036424, at *19 (D. Kan. Sept. 12 2011) (“Indiscriminate use of blockbuster interrogatories . . . does not comport with the just, speedy, and inexpensive determination of the action.”); *Grynberg v. Total, S.A.*, No. 03-cv-01280-WYD-BNB, 2006 WL 1186836, at *6 (D. Colo. May 3, 2006) (“[W]hatever may be said for the virtues of discovery and the liberality of the federal rules, . . . there comes at some point a reasonable limit against indiscriminately hurling interrogatories at every conceivable detail and fact which may relate to a case.”) (quoting *Hilt v. SFC, Inc.*, 170 F.R.D. 182, 186-87 (D. Kan. 1997)).

51. *Heller v. City of Dallas*, 303 F.R.D. 466, 477 (N.D. Tex. 2014) (suggesting that the court “should avoid taking the benefit of hindsight and instead focus on whether, at the time it was signed, the [request, response or objection] was well grounded in fact” and law) (alteration in original).

subjective, standard.⁵² Both sides risk the imposition of sanctions if their discovery requests, responses, or objections fail to conform to the Civil Rules, run afoul of proportionality principles, or suggest a strategy of gamesmanship.⁵³

The amended Rule 26(b)(1) can have a positive impact on the discovery process, but only if lawyers and judges resist the tendency to employ a “business as usual” mindset. So, for example, an interrogatory that incorporates an expansive definition of “relating to,” or an already broad request for production that becomes unfathomable by inserting the phrase “including but not limited to,” are problematic under existing case law. Those phrases, unless used in very precisely framed requests, will almost certainly invite objections on proportionality grounds.⁵⁴ In sum, a “belts and

52. See *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (Rule 26(g) “aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party” and “the equally abusive practice of objecting to discovery requests reflexively – but not reflectively – and without a factual basis”). Cf. *Little Hocking Water Association, Inc. v. E.I. DuPont de Nemours & Co.*, No. 2:09-cv-1081, 2015 WL 1321870, at *9 (S.D. Ohio Mar. 24, 2015) (“A court applies an objective standard when determining whether or not” a party or attorney has complied with Rule 26(g)).

53. See, e.g., *HM Electronics, Inc. v. R.F. Technologies, Inc.*, No. 12cv2884-BAS-MDD, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015) (imposing sanctions under Rule 26(g)(3) on defendants and their counsel for respectively submitting false discovery responses and failing to conduct a reasonable inquiry); *Interpreter Services, Inc. v. BTB Technologies, Inc.*, No. CIV. 10-4007, 2011 WL 6935343, at *6 (D.S.D. Dec. 29, 2011) (holding that “[s]anctions are appropriate under Rule 26(g) when the parties’ conduct has ‘clearly added unnecessary delay and expense to the litigation’”).

54. See, e.g., *In re Urethane Antitrust Litigation*, No. 04-MD-1616-JWL-DJW, 2008 WL 110896, at *1 (D. Kan. Jan. 8, 2008) (holding that a discovery request is overly broad and unduly burdensome on its face if it uses an “omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning’ to modify a general category or broad range of documents or information” because “such broad language ‘make[s] arduous the task of deciding which of numerous documents may conceivably fall within its scope’”); *Roda Drilling Co. v. Siegal*, No. 07-CV-400-GFK-FHM, 2008 WL 2234652, at *2 (N.D. Okla. May 29, 2008) (finding that “many of the parties’ requests for production of documents are overbroad, as they request ‘all documents’ relating to or concerning a subject”). But see *Giegerich v. National Beef Packing Company, LLC*, No. 13-2392-JAR, 2014 WL 1655554, at *2 (D. Kan. Apr. 25, 2014) (“While it may be generally true that phrases such as ‘regarding’ or ‘pertaining to’ may require a responding party to ‘engage in mental gymnastics to determine what information may or may not be

suspenders” approach to discovery may actually leave the requesting party undone. By the same token, a responding attorney who asserts the hackneyed “overbroad” objection and then fails to produce any responsive documents has violated their Rule 26(g) certification obligation and, by implication, proportionality principles.⁵⁵

In short, Rule 26(b)(1), in conjunction with Rule 26(g), recognizes that both sides share a responsibility to engage in a discovery process that is proportionate and focused on the actual claims and defenses in the action. The proportionality mandate incorporated into these Rules assumes even greater significance in light of the proposed amendment to Rule 1,⁵⁶ which explicitly acknowledges that the parties and their counsel “share responsibility” with the court to employ the rules to achieve the just, speedy, and inexpensive determination of every action. Notably, the accompanying Committee Note acknowledges that the objectives underlying Rule 1 may be frustrated by the “over-use, misuse, and abuse of procedural tools that increase cost and result in delay,” and that effective advocacy is consistent with and depends upon “cooperative and proportional use of procedure.”⁵⁷

Proportionality considerations are raised, albeit in a different context, with the new version of Rule 37(e).⁵⁸ That Rule states:

- (e) **Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in anticipation or conduct of litigation is lost because a party failed to take reasonable steps

remotely responsive,” a discovery request is not facially overbroad if it seeks “a sufficiently specific type of information, document, or event, rather than large or general categories of information or documents”).

⁵⁵ Cf. *High Point Sarl*, 2011 WL 4036424, at *10-11 (finding that defendant’s “assertion of numerous, repetitive, boilerplate, incorporation-by-reference general objections” were a violation of Rule 26(g)). See also *Bottoms v. Liberty Life Assur. Co. of Boston*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at *7 (D. Colo. Dec. 13, 2011) (holding that “[o]ne of the purposes of Rule 26(g) was ‘to bring an end to the [] abusive practice of objecting to discovery requests reflexively – but not reflectively – and without a factual basis;” “boilerplate objections” should not suffice to bar discovery) (second alteration in original).

⁵⁶ See June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-21.

⁵⁷ *Id.* at Appendix B-21-22.

⁵⁸ *Id.* at Appendix B-56-57.

to preserve it, and it cannot be restored or replaced through additional discovery, the court:

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

The Committee Note accompanying the new Rule 37(e) acknowledges that relief under subsections 1 or 2 is only available if relevant electronically stored information (ESI) was lost after the duty to preserve was triggered and because the party failed to take reasonable steps to preserve the information. "This rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection."⁵⁹ In evaluating the reasonableness of the preserving party's efforts, the court should consider proportionality.⁶⁰

59. *Id.* at Appendix B-61. *But compare In re Pfizer Ins. Securities Litigation*, 288 F.R.D. 297, 317 (S.D.N.Y. 2013) (while acknowledging that a party is not required to preserve all exact duplicate copies of documents, the court suggested that perhaps "documents that may be largely duplicative of . . . custodial productions . . . [may] have a value in of themselves [sic] as compilations") and *FTC v. Lights of America, Inc.*, No. SACV 10-1333 JVS (MLGx), 2012 WL 695008, at *5 (C.D. Cal. Jan. 20, 2012) (finding that the FTC's E-Discovery Guidelines that require the preservation of relevant ESI, but also mandate the deletion of duplicates, were consistent with plaintiff's duty to preserve relevant material).

60. *But see Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 n.10 (S.D.N. 2010) (observing that proportionality is an "amorphous" and "highly elastic" concept that may not "create a safe harbor for a party that is obligated to preserve evidence").

The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. . . . A party urging that preservation efforts are disproportionate may need to provide specifics about those matters in order to enable meaningful discussion of the appropriate preservation regime.⁶¹

Proportionality considerations also come into play in the court's determination of whether lost ESI can be restored or replaced through additional discovery, which would also obviate the need to consider curative measures under subsection (1) or sanctions under subsection (2). The Committee Note explains that "efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation," and suggests, by way of example, that "substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."⁶²

III. THE IMPACT OF PROPORTIONALITY IN THE CONTEXT OF DISCOVERY MOTIONS

If the 2015 amendments become effective on December 1, 2015, continuing the abstract debate about proportionality serves little purpose. The more pertinent question to ask is whether a renewed emphasis on proportionality under Rule 26(b)(1) will materially change the discovery process and promote the just, speedy, and inexpensive determination of the pending litigation. Similarly, it is appropriate to consider to what extent proportionality under the new Rule 37(e) will change a party's approach to preservation or prompt reconsideration of the prevailing risk-averse approach of saving everything. These are strategic considerations that will turn on the specific facts and circumstances of a given case.

Requesting parties fear that discovery decisions made with incomplete information at the outset of the pretrial process will have irrevocable consequences. Similarly, there is a belief that judicial

61. See June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-61-62.

62. *Id.* at Appendix B-62.

officers will bring their own subjective impressions to a discovery process that is necessarily iterative and not susceptible to bright-line standards. These fears, grounded on actual experience or anecdotal bias, are exacerbated by the propensity for recycling discovery practices that are the product of habit, rather than strategic analysis. Although critics incorrectly attack the amended Rule 26(b)(1) for narrowing the scope of discovery or imposing a new “burden of proof” on requesting parties, those criticisms may actually frame a more useful discussion. An attorney intent on formulating a strategic and defensible approach to proportionality should draft discovery requests, or serve responses and objections, that reflect the burdens of proof or persuasion that actually apply to discovery motion practice. In that context, proportionality is no longer an abstract concept, but rather a tool to be evaluated against a specific factual record. An effective lawyer anticipates the burdens of proof and persuasion that will arise in motion practice and then develops a record to sustain his or her burden. In that respect, proportionality becomes an integral part of an overall discovery plan.

The Supreme Court has acknowledged that “[t]he term ‘burden of proof’ is one of the ‘slipperiest member[s] of the family of legal terms.’”⁶³ Although the phrases “burden of proof” and “burden of persuasion” often are used interchangeably, they have decidedly different meanings. “Burden of proof” applies to the party bearing the obligation to come forward with evidence or facts to support a specific position, claim, or defense. This burden may shift between the parties at particular points or with respect to discrete issues. In contrast, the “burden of persuasion” asks which party bears the risk of losing if the evidence is evenly balanced.⁶⁴

As previously noted, Rule 26(b)(1) does not establish burdens of proof or persuasion, but rather “sets the outer boundaries of permissible discovery.”⁶⁵ Rule 26(b)(1), in its present and proposed versions, does not require a party to “prove” anything or impose a

63. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56 (2005) (second alteration in original). *See also* Zhen Rong Lin v. Gonzales, 230 F. App’x 795, 800 n.5 (10th Cir. 2007) (noting that the term “burden of proof” embodies two “distinct concepts” that “may be referred to as (1) the risk of nonpersuasion, sometimes called the ‘burden of persuasion’ and (2) the duty of producing evidence (or the burden of production), sometimes called the burden of going forward with the evidence”).

64. *See* Riether v. United States, 919 F. Supp. 2d 1140, 1148 n.6 (D.N.M. 2012); Gould, Inc. v. A&M Battery & Tire Service, 176 F. Supp. 2d 324, 327 (M.D. Pa. 2001).

65. First Security Savings v. Kansas Bankers Surety Co., 115 F.R.D. 181, 183 (D. Neb. 1987).

“burden of proof” on either the requesting or producing party.⁶⁶ Similarly, proportionality principles are neither a burden nor a responsibility singularly imposed on one side or the other. Rule 26(b)(1), instead, establishes a definition or framework for assessing relevance in a discovery context. Any “burden” ascribed to the amended Rule 26(b)(1) and its reaffirmation of proportionality principles is more properly attributed to bad discovery practices. As Judge Paul Grimm has noted:

It cannot seriously be disputed that compliance with the “spirit and purposes” of these discovery rules requires cooperation to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionality large to what is at stake in the litigation. Counsel cannot “behave responsively” during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.⁶⁷

A. *Rule 37(a)(3)*

Although Rule 26(b)(1) and Rule 26(g) do not impose a “burden of proof” on either the requesting or producing party, the same cannot be said for a motion to compel under Fed. R. Civ. P. 37(a)(3). A party moving to compel discovery responses pursuant to Rule 37(a)(3) bears the initial burden to demonstrate that the requested discovery comports with Rule 26(b)(1).⁶⁸ The current version of Rule 26(b)(1) acknowledges that “[a]ll discovery is subject to the limitations imposed by [the proportionality factors in] Rule

66. WEBSTER’S NEW WORLD COMPACT SCHOOL AND OFFICE DICTIONARY (1995 ed.) defines “prove” as “to establish as true” and “proof” as “evidence that establishes the truth of something” or “a proving or testing of something.”

67. *Mancia v. Mayflower Textile Serv. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008). *See also* Steven S. Gensler & Lee H. Rosenthal, *supra* note 15, at 662 (“The key to achieving proportionality is not the early ability to find some clear line defining where discovery should end. Rather, proportionality requires making good judgments about where and how discovery should begin.”).

68. *See, e.g.*, *Pfizer Inc. v. Apotex Inc.*, 744 F. Supp. 2d 758, 767 (N.D. Ill. 2010) (suggesting that the party moving to compel discovery responses has the burden of proof to demonstrate relevance); *Bayview Loan Servicing, LLC v. Boland*, 259 F.R.D. 516, 518 (D. Colo. 2009) (holding that the party moving to compel discovery has the burden of proof).

26(b)(2)(C).” A lawyer serving interrogatories and requests for production, both now and after December 1, 2015, must certify under Rule 26(g) that their discovery requests are consistent with the Federal Rules and “neither unreasonable nor unduly burdensome or expensive” considering those same proportionality factors.

Courts have generally recognized an “ordinary presumption in favor of broad disclosure.”⁶⁹ The Committee Note to the proposed Rule 26(b)(1) does not repudiate that body of case law. However, it is also well-settled under Rule 37(a)(3) that if a party’s “discovery requests appear facially objectionable in that they are overly broad or seek information that does not appear relevant, the burden is on the movant to demonstrate how the requests are not objectionable.”⁷⁰ That same “facially objectionable” standard should extend to discovery requests that are transparently disproportionate in the context of a particular case. While the moving party’s threshold burden of proof under Rule 37(a)(3) is not particularly high, that burden should not be ignored or discounted. Where a discovery request is facially overbroad, the requesting party must make a showing of relevance and proportionality that is predicated on more than speculation or assumption.⁷¹

The court should not, in deciding a motion to compel under Rule 37(a)(3), evaluate the non-moving party’s discovery responses in a vacuum; a motion to compel necessarily requires the court to hold the moving party’s discovery requests to the same Rule 26(g)

69. *See, e.g.,* Arkansas River Power Authority v. Babcock & Wilcox Power Generation Group, Inc., No. 14-cv-00638-CMA-NYW, 2015 WL 2128312, at *2 (D. Colo. May 5, 2015); *Milburn v. City of York*, No. 1:12-CV-0121, 2013 WL 3049108, at *4 (M.D. Pa. June 17, 2013); *Aguilera v. Fluor Enterprises, Inc.*, No. 2:10-CV-95-TLS-PRC, 2011 WL 1085146, at *2 (N.D. Ind. Mar. 21, 2011).

70. *Bettis v. Hall*, No. 10-2457-JAR, 2015 WL 1268014, at *1 (D. Kan. Mar. 19, 2015). *Cf. Presbyterian Manors, Inc. v. Simplex Grinnell, LP*, No. 09-2656-KHV, 2010 WL 3880027, at *7 (D. Kan. Sept. 28, 2010) (“when relevancy is not readily apparent, the proponent has the burden of showing the relevancy of the discovery request”).

71. *Cf. Hill v. Auto Owners Insurance Co.*, No. 14-CV-05037-KES, 2015 WL 1280016, at *7 (D.S.D. Mar. 20, 2015) (in acknowledging the moving party’s obligation to make a threshold showing of relevance, the court noted that “[m]ere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case.”).

standard.⁷² As the Committee Note to the amended Rule 26(b)(1) acknowledges, “[a] party claiming that a request is important to resolve the issues [in the case] should be able to explain the ways in which the underlying information bears on the issues as that party understands them.”⁷³ The same Committee Note cautions that proportional discovery requires a “proper understanding” of what is truly relevant to a claim or defense.⁷⁴ Imposing on a moving party the obligation to frame discovery requests that are facially relevant and proportional, “considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the case,” should not be viewed as onerous or inappropriate. An attorney or party that cannot convincingly explain the relevance of a discovery request under Rule 26(b)(1) would be hard-pressed to show compliance with their self-executing certification obligation under Rule 26(g). As one court has noted in applying the current version of Rule 26(b)(1), “[t]o succeed on a motion to compel, the moving party bears the burden of demonstrating that it is entitled to the requested discovery and has satisfied the proportionality and other requirements of Rule 26.”⁷⁵

Assuming that the discovery requests in question seek facially relevant information under Rule 26(b)(1), the burden of proof under Rule 37(a)(3) then shifts to the non-moving party to support its objections.⁷⁶ “[T]he burden of proof is with the party objecting to the discovery to establish that the challenged production should not be

72. See *Witt v. GC Services Limited Partnership*, __ F.R.D. __, 2014 WL 6910500, at *15 (D. Colo. Dec. 9, 2014).

73. See June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-40. Cf. *Gilmore v. Augustus*, No. 1:12-cv-00925-LJO-GSA-PC, 2014 WL 4354656, at *2-3 (E.D. Cal. Sept. 2, 2014) (under Rule 37(a), the requesting party cannot meet its burden simply by asserting they are dissatisfied with the producing party’s responses; the moving party must demonstrate how specific responses are deficient and why they are entitled to further information or materials).

74. See June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-43.

75. *Rodriguez v. Barrita, Inc.*, No. 09-04057 RS-PSG, 2011 WL 5854397, at *2 (N.D. Cal. Nov. 21, 2011).

76. See, e.g., *Alomari v. Ohio Department of Public Safety*, No. 2:11-cv-00613, 2013 WL 5874762, at *3 (S.D. Ohio Oct. 30, 2013) (“[t]he burden of proof rests with the party objecting to the motion to compel to show in what respects the discovery requests are improper.”).

permitted.”⁷⁷ That burden, in turn, incorporates elements of proportionality. Once a party moving for relief under Rule 37(a) meets their initial “burden of proving the relevance of the requesting information,”

the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.⁷⁸

Commonly asserted “boilerplate” objections that a request is “overbroad” or “unduly burdensome” have always been disfavored and should not suffice to defeat a motion to compel after December 1, 2015.⁷⁹ More importantly, unsubstantiated boilerplate objections violate the letter and spirit of Rule 26(g), and expose objecting counsel to potential sanctions under Rule 26(g)(3).⁸⁰

The same burden of proof should apply to objections framed in terms of the proportionality factors. “While a discovery request can be denied if the ‘burden or expense of the proposed discovery outweighs its likely benefit,’ a party objecting to discovery must

77. *Washington v. Folin*, No. 4:14-cv-00416-RBH-KDW, 2015 WL 1298509, at *3 (D.S.C. Mar. 23, 2015) (quoting *HDSherer LLC v. Natural Molecular Testing Corp.*, 292 F.R.D. 305, 308 (D.S.C. 2013)). *See also* *Griffin v. Beard*, No. 06-2719, 2009 WL 678700, at *10 (E.D. Pa. Mar. 16, 2009) (in rejecting defendants’ relevance objections, the court noted that “[i]t is well settled that ‘[t]he defendant[s] may not determine on [their] own what is relevant for discovery purposes’” and “[w]here there is doubt over relevance . . . the court should be permissive’ in granting the discovery request”); *Garett v. Albright*, No. 4:06-CV-4137-NKL, 2008 WL 681766, at *3 n.6 (W.D. Mo. Mar. 6, 2008) (noting that “[t]he Federal Rules of Civil Procedure do not entitle Defendants to determine what the Plaintiffs will and will not need in terms of clearly relevant evidence.”).

78. *Martinez v. Jones*, No. 3:12-CV-1547, 2015 WL 3454505, at *3 (M.D. Pa. May 29, 2015). *Cf.* *Simpson v. University of Colorado*, 220 F.R.D. 354, 359 (D. Colo. 2004).

79. *Cf.* *O’Hara v. Capouillez*, No. 5:13-cv-119, 2013 WL 6672795, at *2 (N.D. W. Va. Dec. 18, 2013); *EnvTech, Inc. v. Suchard*, No. 3:11-CV-00523-HDM-WGC, 2013 WL 4899085, at *4 (D. Nev. Sept. 11, 2013); *Travelers Indemnity Co. of Conn. v. Philips Medical Systems*, No. 07-23246-CIV, 2008 WL 4534259, at *1 (S.D. Fla. Oct. 7, 2008).

80. *Cf.* *Weems v. Hodnett*, No. 10-cv-1452, 2011 WL 3100554, at *2 (W.D. La. July 25, 2011).

specifically demonstrate how the request is burdensome” or disproportionate.⁸¹ An attorney asserting a proportionality objection should be prepared to sustain their burden of proof by coming forward with facts (typically in the form of an affidavit) showing how the requested discovery is inconsistent with Rule 26(b)(1) or violates opposing counsel’s certification obligations under Rule 26(g).⁸²

B. *Rule 26(c)*

Rule 26(c) provides that the court may, for good cause, “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”⁸³ The

81. *Kleen Products LLC v. Packaging Corporation of America*, No. 10 C 5711, 2012 WL 4498465, at *15 (N.D. Ill. Sept. 28, 2012) (internal citations omitted) (suggesting that an objecting party can demonstrate a disproportionate burden by providing “an estimate of the number of documents that it would be required to provide . . . , the number of hours of work by lawyers and paralegals required, [or] the expense.”). *See also* *Kristensen v. Credit Payment Services, Inc.*, No. 2:12-cv-0528-APG-PAL, 2014 WL 6675748, at *4 (D. Nev. Nov. 25, 2014) (noting that “unsupported allegations of undue burden are improper especially when [the objecting party] has failed to submit any evidentiary declaration supporting these objections”).

82. *Compare* *Sprint Communications Co., L.P. v. Comcast Cable Communications, LLC*, Nos. 11-2684-JWL, 11-2685-JWL, 11-2686-JWL, 2014 WL 1794552, at *4 (D. Kan. May 6, 2014) (rejecting plaintiff’s blanket refusal to produce what it considered to be cumulative or duplicative documents and observing that “Sprint provides no support or foundation for its position that its proposed discovery plan will capture most, if not all of the documents in its possession responsive to defendants’ document requests” and “has not explained the foundation of its belief that the search of additional custodian files would be cumulative, duplicative or *unduly* burdensome”) (emphasis in original) *and* *Eisai, Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168 (MLC), 2012 WL 1299379 (D.N.J. Apr. 16, 2012) (holding that plaintiff’s discovery ran afoul of proportionality standards since its requests were unreasonably cumulative of the over 12 million pages of documents defendants already produced at a cost of \$10 million and given the marginal relevance of the requested materials).

83. FED. R. CIV. P. 26(c)(1). *But compare* *Dongguk University v. Yale University*, 270 F.R.D. 70, 73 (D. Conn. 2010) (noting that “[w]ith regard to the ‘undue burden and expense’ provision, Rule 26(c) operates in tandem with the proportionality limits set forth in Rule 26(b)(2)”) *and* *Rubin v. Hirschfeld*, No. 3:00CV1657, 2001 WL 34549221, at *1 (D. Conn. Oct. 10, 2001) (acknowledging that Rule 26(c) “is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court’s process.”).

party seeking a protective order has the burden of proof,⁸⁴ and cannot sustain that burden or establish the requisite good cause merely by offering conclusory statements.⁸⁵ To obtain relief under Rule 26(c), the moving party “must make ‘a particular and specific demonstration of fact’ in support of its request,” particularly where the moving party is seeking relief based upon a claim of undue burden or expense.⁸⁶ The claim of good cause should be supported by affidavits or other detailed explanations as to the nature and extent of the burden or expense. Rule 26(c), in that respect, sets “a rather high hurdle” for the moving party.⁸⁷ So for example, a motion for protective order should not be granted simply because the moving party asserts that the requested materials are subject to a claim of confidentiality; the moving party must also show that the disclosure of these materials “might be harmful.”⁸⁸ It seems reasonable, however, that a particularized showing should not be required if the requesting party is seeking discovery that is facially irrelevant under Rule 26(b)(1).⁸⁹

The timing of a motion for protective order is significant in the discovery context. Counsel cannot seek relief under Rule 26(c)

84. *See, e.g.,* *Worldwide Home Products, Inc. v. Time, Inc.*, No. 11 Civ. 3633(LTS)(MHD), 2012 WL 1592317, at *1 (S.D.N.Y. May 4, 2012) (noting that “the party seeking Rule 26(c) protection bears the burden of proof and persuasion”).

85. *See, e.g.,* *Norfolk Southern Railway Co. v. Pittsburgh & West Virginia Railroad*, No. 2:11-cv-1588, 2013 WL 6628624, at *1 (W.D. Pa. Dec. 17, 2013); *Equal Employment Opportunity Commission v. Winn-Dixie, Inc.*, No. CA 09-0643-C, 2010 WL 2202520, at *2 (S.D. Ala. May 28, 2010).

86. *Aikens v. Deluxe Financial Services, Inc.*, 217 F.R.D. 533, 536-37 (D. Kan. 2003). *Cf. Trinos v. Quality Staffing Services Corp.*, 250 F.R.D. 696, 698 (S.D. Fla. 2008) (“courts should only limit discovery ‘based on *evidence* of the burden involved, not on a mere recitation that the discovery request is unduly burdensome”) (emphasis in original).

87. *Wymes v. Lustbader*, No. WDQ-10-1629, 2012 WL 1819836, at *4 (D. Md. May 16, 2012).

88. *Cf. Flint Hills Scientific, LLC v. Davidchack*, No. 00-2334-KHV, 2001 WL 1718291, at *2 (D. Kan. Dec. 3, 2001) (holding that a party seeking a protective order must support a claim of confidentiality with a “particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements”).

89. *Cf. Trustees of the Springs Transit Company Employee’s Retirement and Disability Plan v. City of Colorado Springs*, No. 09-cv-0284-WYD-CBS, 2010 WL 1904509, at *5 (D. Colo. May 11, 2010) (holding that the defendant might not be required to make a particularized showing under Rule 26(c) if plaintiff’s discovery requests are facially objectionable) (citing *International Society for Krishna Consciousness, Inc. v. Lee*, 1985 WL 315, at *10 (S.D.N.Y. 1985)).

without first conferring or attempting to confer with opposing counsel in an effort to resolve the dispute without the need for court intervention.⁹⁰ If those discussions are unsuccessful, the motion for protective order should be filed before discovery responses are due.⁹¹ As the court noted in *Maxey v. General Motors Corp.*,⁹² the party seeking protection under Rule 26(c) “should not be allowed to sit back and force the [the other party] to take the initiative to file a Motion to Compel with this court.” “The party seeking the protective order, who has the burden of requesting and supporting it, should also be responsible for initiating the process. Permitting that party to merely note its objections and then sit back and wait for a motion to compel can only serve to prolong and exacerbate discovery disputes.”⁹³

In the event the moving party makes the requisite showing of good cause, the burden of proof under Rule 26(c) then shifts to the party seeking discovery or disclosures. With that shifting burden, the non-moving party must show that the requested discovery is relevant to the claims and defenses in the action and is proportionate

90. See *Williams v. Sprint/United Management Co.*, No. 03-2200-JWL-DJW, 2006 WL 2734465, at *3 (D. Kan. Sept. 25, 2006) (“The parties must make genuine efforts to resolve the dispute by determining precisely what the requesting party is actually seeking; what responsive documents or information the discovering party is reasonably capable of producing; and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention.”); *Gouin v. Gouin*, 230 F.R.D. 246, 247 (D. Mass. 2005) (denied the prevailing party’s request for fees where nothing in the record indicated that plaintiff’s counsel had made any effort to resolve discovery disputes before seeking judicial intervention).

91. Cf. *Seminara v. City of Long Beach*, Nos. 93-56395, 93-56512, 1995 WL 598097, at *4 (9th Cir. Oct. 6, 1995) (noting that although Rule 26(c) does not expressly set limits within which a motion for protective order must be made, there is an implicit requirement that the motion be timely or seasonable).

92. No. 3:95CV60-D-A, 1996 WL 692222 (N.D. Miss. Nov. 18, 1996).

93. *Id.* at *2 (quoting *Brittian v. Stroh Brewery Co.*, 136 F.R.D. 408, 413 (M.D.N.C. 1991)). Cf. *Morock v. Chautauqua Airlines, Inc.*, No. 8:07-cv-210-T-17-MAP, 2007 WL 4322764, at *1 (M.D. Fla. 2007) (“[a] motion for protective order is generally untimely if it was made after the date the discovery material was to be produced”); *Ayers v. Continental Casualty Co.*, 240 F.R.D. 216 (N.D. W. Va. 2007) (holding that plaintiffs’ motion for protective order was untimely where plaintiffs answered the interrogatories in question but waited almost two months to actually move for a protective order).

to the needs of the case.⁹⁴ “If the party seeking discovery shows both relevance and need, the court must weigh the injury that disclosure may cause . . . against the moving party’s need for the information.”⁹⁵ Based on that proportionality analysis, the court can preclude the requested discovery entirely or allow discovery or disclosure to proceed under specific conditions, including “limiting the scope of disclosure or discovery to certain matters” or specifying the manner in which the requested discovery will be conducted or proceed.

The court also has the discretion under Rule 26(c) to shift the costs of discovery to the party seeking discovery where the moving party has presented facts (rather than mere speculation) to support its claim of undue burden.⁹⁶ One court has held that “so long as ‘the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues,’ the cost of even accessible ESI’s production may be shifted to a party

94. *Cranmer v. Colorado Casualty Insurance Co.*, No. 2:14-cv-645-MMD-VCF, 2014 WL 6611313, at *2 (D. Nev. Nov. 20, 2014) (“When deciding whether to enter an order protecting a party from producing discovery, the court’s inquiry primarily focuses on relevance, proportionality, and harm to the producing party.”).

95. *Election Systems & Software, LLC v. RBM Consulting, LLC*, No. 8:11CV438, 2015 WL 1321440, at *5 (D. Neb. Mar. 24, 2015). *Cf. Bombard v. Volp*, 44 F. Supp. 3d 514, 529 (D. Vt. 2014) (in deciding whether “good cause” exists under Rule 26(c), “the district court must balance the interests involved: the harm to the party seeking the protective order and the importance of disclosure’ to the non-moving party”). *See also Coca-Cola Bottling Company of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 293 (D. Del. 1985) (“[t]he balance between the need for information and the need for protection . . . is tilted in favor of disclosure once relevance and necessity have been shown.”).

96. *See, e.g., Norfolk Southern Railway Co. v. Pittsburgh & West Virginia Railroad*, No. 2:11-cv-1588, 2013 WL 6628624, at *2 (citing Charles Alan Wright, et al., *FEDERAL PRACTICE AND PROCEDURE* §2008.1 n.26 (3d ed. 2010)). The 2015 Amendments reaffirm the court’s authority to allocate discovery costs, but the Committee Note cautions that the proposed Rule 26(c)(1)(B) does not imply “that cost-shifting should become a common practice” or undermine the current assumption “that a responding party ordinarily bears the costs of responding” to discovery. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-44-45.

that has not shown its peculiar relevance to the claims and defenses at hand.”⁹⁷

C. *Rule 26(b)(2)(B)*

Burden shifting also arises under Rule 26(b)(2)(B),⁹⁸ which provides that a party responding to requests for production “need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”⁹⁹ This Rule distinguishes between ESI that “is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery,” and “information on sources that are accessible only by incurring substantial burdens or costs.”¹⁰⁰ If applicable, Rule 26(b)(2)(B) permits a party to move for a protective order or raise the issue of accessibility in response to a motion to compel.

A party invoking the protections of Rule 26(b)(2)(B) bears the initial burden of proof.¹⁰¹ As with a motion for protective order under Rule 26(c), this burden cannot be sustained with bald generalizations or a conclusory assertion that production will be

97. *United States ex rel. Carter v. Bridgepoint Education, Inc.*, 305 F.R.D. 225, 240 (S.D. Cal. 2015). *Cf. Boeynaems v. LA Fitness International, LLC*, 285 F.R.D. 331, 333, 335 (E.D. Pa. 2012) (after noting that “[d]iscovery need not be perfect, but [it] must be fair,” the court held that “where the cost of producing documents is very significant, the Court has the power to allocate the cost of discovery, and doing so is fair;” the court observed in passing that “[i]f Plaintiff’s counsel has confidence in the merits of its case, they should not object to making an investment in the cost of securing documents from Defendant and sharing costs with Defendant”).

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

99. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010) (suggesting that the reference to “undue burden and expense” in Rule 26(b)(2)(B) incorporates “a proportionality component of sorts”).

100. FED. R. CIV. P. 26(b)(2)(B) advisory committee’s note to 2006 amendment. *See also Tyler v. City of San Diego*, No. 14-cv-01179-GPC-JLB, 2015 WL 1955049, at *2 (S.D. Cal. Apr. 29, 2015) (acknowledging that “Rule 26(b)(2)(B) should not be invoked as a means to forestall the production of materials that are admittedly relevant and readily accessible”).

101. *Cf. Bagley v. Yale University*, 307 F.R.D. 59, 66 (D. Conn. 2015) (Rule 26(b)(2)(B) initially places the burden of proof on the party resisting discovery).

time-consuming and/or expensive.¹⁰² Instead, “the responding party should present details sufficient to allow the requesting party to evaluate the costs and benefits of searching and producing the identified sources.”¹⁰³ One court has noted that “while cost and burden are critical elements in determining inaccessibility,” the court’s analysis under Rule 26(b)(2)(B) should focus on “the interplay between any alleged technological impediment” that inhibits accessing ESI and “the resulting cost and burden.”¹⁰⁴

Assuming the producing party can satisfy this threshold showing that responsive information is not reasonably accessible, the burden of proof then shifts to the requesting party to show “good cause” why the court should “nonetheless order discovery from such sources.” That finding requires the court to balance the burdens and potential benefits of the requested discovery in light of the proportionality factors set forth in Rule 26(b)(2)(C).

The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those

102. *Cartel Asset Management v. Ocwen Financial Corp.*, No. 01-cv-01644-REB-CBS, 2010 WL 502721, at *15 (D. Colo. Feb. 8, 2010). *Cf.* *Escamilla v. SMS Holdings Corp.*, No. 09-2120 ADM/JSM, 2011 WL 5025254, at *9 (D. Minn. Oct. 21, 2011) (holding that the defendant’s speculative and conclusory cost estimates were insufficient to meet its burden of demonstrating that the cost to restore and search data from electronic archives would create an undue burden or cost).

103. *Mikron Industries, Inc. v. Hurd Windows & Doors, Inc.*, No. C07-532RSL, 2008 WL 1805727, at *1 (W.D. Wash. Apr. 21, 2008). *See also* *O’Bar v. Lowe’s Home Centers, Inc.*, No. 5:04-cv-00019-W, 2007 WL 1299180, at *5 n.6 (W.D.N.C. May 2, 2007) (noting that an objection based on Rule 26(b)(2)(B) should be stated with particularity “and not in conclusory or boilerplate language;” “the party asserting that [electronically stored information] is not reasonably accessible should be prepared to specify facts that support its contention”).

104. *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 301-02 (S.D.N.Y. 2012). *But compare* *W Holding Co., Inc. v. Chartis Ins. Co. of Puerto Rico*, 293 F.R.D. 68, 73 (D. Puerto Rico 2013) (rejecting the suggestion that Rule 26(b)(2)(B) is applicable, or that cost-shifting is appropriate, “any time that discovery implicates both (1) electronically stored information and (2) large volumes of data, even where the volume renders review costly”) *with* *United States ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 239 (S.D. Cal. 2015) (for purposes of Rule 26(b)(2)(B), “‘inaccessible’ simply means that expenditure of resources required to access the contents [of relevant ESI] is itself unreasonable”).

burdens and costs can be justified in the circumstances of the case.¹⁰⁵

Among the factors a court may consider in weighing the benefits and burdens of discovery under Rule 26(b)(2)(B) are: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessible sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.¹⁰⁶ In sum, as the court noted in *Peskoff v. Faber*,¹⁰⁷ to obtain discovery pursuant to Rule 26(b)(2)(B), the requesting party "still must meet the most traditional and essential standard of discoverability under the Federal Rules of Civil Procedure; that, on balance, the burden of production is truly justified by its potential relevance."¹⁰⁸

If the court orders the producing party to produce materials that are not otherwise reasonably accessible, the costs of that production can be shifted to the requesting party pursuant to the

105. FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to 2006 amendment. The Committee Note acknowledges that to sustain its burden under Rule 26(b)(2)(C), the requesting party "may need some focused discovery, which may include some sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery."

106. *Id.*

107. 244 F.R.D. 54 (D.D.C. 2007).

108. *Id.* at 59. *Cf. Chen-Oster*, 285 F.R.D. at 302 n.5 ("Courts that have analyzed good cause under Rule 26(b)(2)(B) have generally considered the same types of factors relevant to a proportionality determination under Rule 26(b)(2)(C)."); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010) (suggesting that Rule 26(b)(2)(B) includes a "proportionality component of sorts").

court's authority under Rule 26(b)(2)(C).¹⁰⁹ However, cost-shifting should be part of a broader proportionality analysis and not imposed by the court simply because production will take time and effort.¹¹⁰

D. A Strategic Approach to Discovery Motions

Lawrence Freedman suggests that an effective strategy is based on an ability to see “the future possibilities inherent in the next moves” and furthered by a process in which the combination of ends and means are continually reevaluated.¹¹¹

If strategy is a fixed plan that set[s] out a reliable path to an eventual goal, then it is likely to be not only disappointing but also counterproductive, conceding the advantage to others with greater flexibility and imagination. Adding flexibility and imagination, however, offers a better chance of keeping pace with a developing situation, regularly re-evaluating risks and opportunities.¹¹²

Those same strategic components, flexibility and imagination, will be critical if lawyers are to reap the benefits of proportionality and, more importantly, promote their client's interests while simultaneously advancing the goals of Rule 1. For the requesting party, an effective discovery strategy should facilitate the acquisition

109. See FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to 2006 amendment (acknowledging that the court can set conditions on the production of inaccessible electronically stored information, “include[ing] payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible”). See also *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 283 (S.D.N.Y. 2003) (while proportionality considerations may override “the presumption . . . that the responding party must bear the expense of complying with discovery requests,” the court will order cost-shifting only upon motion by the party responding to a discovery request and the responding party “has the burden of proof on a motion for cost-shifting”).

110. Cf. *Cochran v. Caldera Medical, Inc.*, No. 12-5109, 2014 WL 1608664, at *3 (E.D. Pa. Apr. 22, 2014) (in declining to shift costs under Rule 26(b)(2)(B) in this product liability action, the court concluded that the burden or expense of plaintiffs' discovery requests were outweighed by the importance of the discovery to plaintiffs' ability to prove their claims and the seriousness of their alleged injuries; the court further observed that “defendant inevitably [would] need to gather the information sought by plaintiffs” given “the over 1,700 claims that have been filed by individuals across the country relating to” the same medical product).

111. Lawrence Freedman, *STRATEGY: A HISTORY* 611 (2013).

112. *Id.* at 610.

of relevant and necessary information while simultaneously limiting opposing counsel's ability to wreak havoc by forcing delay or unproductive costs. Conversely, the responding party's strategic goals are to reduce the cost of finding and producing responsive information, while also developing a defensible position in the event motion practice ensues.

A requesting party can substantially reduce, if not eliminate completely, the likelihood of a proportionality challenge simply by drafting interrogatories or requests for production that are not "facially objectionable" under Rule 26(b)(1). That should not be a daunting challenge under current case law and will not be significantly different after December 1, 2015. Counsel should draft discovery requests predicated on the information they *need* in light of the actual claims and defenses. All too frequently (and particularly in asymmetrical litigation), a requesting party resorts to expansive, blockbuster discovery based on uncertainty and a fear that "something" might be inadvertently overlooked. Counsel also justifies broad discovery requests by cynically assuming their opposite number will be evasive and less-than forthcoming in their responses. Yet that prophylactic approach to discovery provides little strategic benefit if those same expansive discovery requests invite objections and mire the requesting party in time-consuming and expensive motion practice. For the plaintiff intent on reaching an expeditious and favorable outcome to their case, protracted discovery disputes are at the very least an undesirable distraction. Therefore, the requesting party should draft discovery requests that substantially constrain the responding party's ability to derail the pretrial process.

For example, counsel should avoid pattern or stock discovery requests recycled from past lawsuits, even if that approach seems to hold the false promise of cost-savings.¹¹³ Any savings that may be achieved in the drafting process will likely pale in comparison to the subsequent costs of motion practice. Counsel can hardly complain

113. *Cf. Robbins v. Camden City Board of Education*, 105 F.R.D. 49, 56-57 (D.N.J. 1985) (warning that "the use of multiple pattern interrogatories in more complex litigation can lead to . . . confusion and duplication, . . . especially . . . where the propounding counsel has made little effort to tailor the interrogatories to the facts and circumstances of this case"); *Blank v. Ronson Corp.*, 97 F.R.D. 744, 745 (S.D.N.Y. 1983) (in criticizing counsel for both parties, the court noted that "there is, in the vast expanse of paper, no indication that any lawyer (or even moderately competent paralegal) ever looked at the interrogatories or at the answers. It is, on the contrary, obvious that they have all been produced by some work-processing machine's memory of prior litigation.").

when their formulaic discovery requests are met with boilerplate objections and little else.¹¹⁴ While those boilerplate objections are seldom effective and may themselves justify Rule 26(g)(3) sanctions, the court should not evaluate those responses in isolation or overlook obvious deficiencies in the requests that precipitated the discovery dispute.¹¹⁵ Focused and precisely drafted discovery requests may actually preempt challenges framed in terms of proportionality. At the very least, such discovery requests are more likely to withstand challenge in the context of a Rule 37(a)(3) motion to compel or a Rule 26(c) motion for protective order.¹¹⁶

Conversely, a responding party that relies on a cursory or unsubstantiated proportionality objection is not likely to overcome the “ordinary presumption” favoring broad discovery. A judge who was inclined to invoke the “reasonably calculated” mantra¹¹⁷ in granting motions to compel may give short-shrift to a boilerplate assertion that the requested discovery is disproportionate. That objection will be even less effective if it is coupled with a refusal to

114. *Cf. Cummings v. General Motors Corp.*, 365 F.3d 944, 953 (10th Cir. 2004) (in finding no abuse of discretion in the district court’s denial of plaintiffs’ motion to compel, the appellate panel noted that the litigation had been characterized by “numerous miscommunications and unnecessary disputes caused by Plaintiffs’ failure to frame precise discovery requests”); *Crown Center Redevelopment Corp. v. Westinghouse Electric Corp.*, 82 F.R.D. 108, 110 (W.D. Mo. 1979) (suggesting that “lengthy and detailed sets of standard forms of interrogatories” were simply generating “predictably launched counter attacks in the form of objections and motions for protective orders”).

115. *Cf. Finjan, Inc. v. Blue Coat Systems, Inc.*, No. 5:13-cv-03999-BLF, 2014 WL 5321095, at *2 (N.D. Cal. Oct. 17, 2014) (“one party’s discovery shortcomings are rarely enough to justify another’s”).

116. *See* FED. R. CIV. P. 37(a)(5)(B) (if a motion to compel is denied, the court must order the moving party to pay the reasonable expenses incurred by the non-moving party in opposing the motion, unless the court finds that the motion to compel “was substantially justified or other circumstances make an award of expenses unjust”).

117. In striking the “reasonably calculated” phrase from the proposed Rule 26(b)(1), the Advisory Committee stated that language was never intended to define the scope of discovery. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-44. This author need look no farther than his own decisions to find a misapplication of the “reasonably calculated” standard. *See, e.g., In re Qwest Communications International, Inc. Securities Litigation*, 283 F.R.D. 623, 625 (D. Colo. 2005).

provide *any* responsive information.¹¹⁸ As a practical matter, a “disproportionate” discovery request will almost certainly encompass a sub-set of relevant and properly discoverable information.¹¹⁹ While the responding party is entitled to raise factually supportable challenges, they are required to provide responsive information and materials to the extent the request is not objectionable.¹²⁰ A boilerplate objection, even on proportionality grounds, will hardly suffice if the court finds that the discovery response is either evasive or incomplete.¹²¹

If a requesting party serves discovery that is “facially objectionable,” the responding party has several options. Counsel could wait the thirty days (plus time for service) permitted under Rules 33(b)(2)¹²² and 34(b)(2)(A),¹²³ and then object, without more, on the grounds that the requested information is neither relevant nor

118. Both Fed. R. Civ. P. 33(b)(3) and 34(b)(2) require an objecting party to provide responses to the extent an interrogatory or request for production is not objectionable. *Cf.* *Freydl v. Meringolo*, No. 09 Civ. 07196(BSJ)(KNF), 2011 WL 2566087, at *3 (S.D.N.Y. June 16, 2011) (“[B]oilerplate objections that include unsubstantiated claims of undue burden, overbreadth and lack of relevancy’ while producing ‘no documents and answering no interrogatories are a paradigm of discovery abuse.’”) (quoting *Jacoby v. Hartford Life & Accident Ins. Co.*, 254 F.R.D. 477, 478 (S.D.N.Y. 2009)) (alteration in original).

119. *Cf.* *Bottoms v. Liberty Life Assur. Co. of Boston*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at *7 (“[a]n objection challenging a discovery request as ‘overbroad’ implicitly concedes that the request encompasses some information that is properly discoverable. The responding party is obligated to reasonably construe the discovery request . . . and cannot evade its [discovery] obligations by summarily dismissing an interrogatory or request for production as ‘overbroad.’”).

120. *Cf.* *Twigg v. Pilgrim’s Pride Corp.*, No. 3:05-CV-40, 2007 WL 676208, at *9 (N.D. W. Va. Mar. 1, 2007) (suggesting that even where a party believes a request for production is facially overbroad, that objection does not relieve the responding party of its obligation to produce documents that are responsive to that portion of the request that does seek relevant information or documents); *Watson v. Scully*, No. 87 CIV. 0571 (CSH), 1988 WL 73390, at *2 (S.D.N.Y. July 1, 1988) (although plaintiff’s document requests were overbroad and sought irrelevant information, “defendant [was] not absolved of all responsibility to produce documents pursuant to these requests” since “[i]t is reasonable to infer that subsumed in plaintiff’s overbroad request is a more specific request” that does encompass relevant documents).

121. *See* FED. R. CIV. P. 37(a)(4) (“For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond.”).

122. FED. R. CIV. P. 33(b)(2).

123. FED. R. CIV. P. 34(b)(2)(A).

proportional in light of the particular circumstances of the case. A better approach would be for the responding party to assert appropriate objections, but then provide the information that is properly discoverable under a reasonable construction of the requests. Production of relevant information, even in the face of overbroad discovery requests, is consistent with a proportionality objection, but also provides some protection against an award of fees and costs if those objections are unavailing and the motion to compel is granted.¹²⁴ The best approach, consistent with Rule 1, would be for the responding party to contact the requesting party immediately after being served those “facially objectionable” discovery requests and attempt to negotiate a more proportionate approach to discovery. If those discussions are successful, the responding party has saved his or her client time and money. If not, the responding party is still left with options one or two, but is actually in a stronger position vis-à-vis the court if motion practice ensues.

IV. PROPORTIONALITY IN THE CONTEXT OF PRESERVATION AND SPOILIATION

Unlike other discovery motions, a request for relief under the proposed Rule 37(e) will present new challenges both for moving and non-moving parties. The new Rule 37(e) establishes a uniform framework for addressing the spoliation of ESI while leaving unchanged the existing common law obligation to preserve. The Committee Note accompanying Rule 37(e) acknowledges that litigants are “expend[ing] excessive effort and money on preservation” of ESI, notwithstanding the fact that the loss of ESI from one source “may often be harmless when substitute information can be found elsewhere.”¹²⁵ Given that reality, proportionality will figure prominently in the application of Rule 37(e) and the corresponding burdens of proof.

While conceding some variation in the current case law, it is generally understood that a party’s duty to preserve is triggered when litigation is pending or reasonably foreseeable, and extends to information or materials that the party “knows or reasonably should

124. See FED. R. CIV. P. 37(a)(5)(A) (if a motion to compel is granted, the court must award the prevailing party reasonable expenses, including attorney’s fees, unless the court finds that “the opposing party’s nondisclosure, response, or objection was substantially justified” or “other circumstances make an award of expenses unjust”).

125. See June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-58-59.

know” is relevant to the action.¹²⁶ The party seeking spoliation sanctions presently bears the burden of proof¹²⁷ to show that the missing evidence was (1) in the opposing party’s control, (2) was relevant to a claim or defense in the case, (3) was subject to a duty to preserve, and (4) was destroyed, suppressed, or otherwise withheld.¹²⁸ The new Rule 37(e) should not materially change that initial burden of proof. After December 1, 2015, a party seeking relief under Rule 37(e) (either in the form of curative measures under subsection (1) or sanctions under subsection (2)) will be required to make a threshold showing that ESI was lost, that the missing ESI was relevant under Rule 26(b)(1), and the missing ESI was subject to a preservation obligation.

Demonstrating the “relevance” of missing ESI will necessarily implicate proportionality factors, but that hurdle should not be any greater than the threshold showing required under Rule 37(a). The proportionality factors in Rule 26(b)(1), however, militate against an all-encompassing or “blockbuster” preservation demand letter. A demand to “save everything,” served in advance of litigation, is not consistent with prevailing case law.¹²⁹ More to the point, a boilerplate preservation demand should not trump a party’s obligation to

126. *See, e.g., In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, No. 3:12-md-02385-DRH-SCW, 2013 WL 6486921, at *8 (S.D. Ill. Dec. 9, 2013); *Quinby v. WestLB AG*, 245 F.R.D. 94, 104 (S.D.N.Y. 2006). *But compare* *Perez v. Vezer Industrial Professionals, Inc.*, No. CIV S-09-2850 MCE CKD, 2011 WL 5975854, at *6 (E.D. Cal. Nov. 29, 2011) (holding that the obligation to preserve extends to “unique, relevant evidence that might be useful to an adversary”) *with In re Pfizer Ins. Securities Litigation*, 288 F.R.D. 297, 313 (S.D.N.Y. 2013) (holding that “[a] litigant has the ‘duty to preserve what it knows, or reasonably should know, is relevant to the action, is reasonably calculated to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request”).

127. *See, e.g., Wilson v. Saint Gobain Universal Abrasives, Inc.*, No. 213-cv-1326, 2015 WL 1499477, at *10 (W.D. Pa. Apr. 1, 2015); *Brown v. Cain*, No. 11-00103-SDD-SCR, 2015 WL 893020, at *3 (M.D. La. Mar. 2, 2015).

128. *See, e.g., Omogbehin v. Cino*, 485 F. App’x 606, 610 (3rd Cir. 2012) (quoting *Bull v. United Parcel Service, Inc.*, 665 F.3d 68, 73 (3rd Cir. 2012)).

129. *See Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 623 n.10 (D. Colo. 2007) and cases cited therein. *Cf. Turner v. Resort Condominiums International, LLC*, No.1:03-cv-2025-HFH-WTL, 2006 WL 1990379, at *6 (S.D. Ind. Jul. 13, 2006) (holding that a pre-litigation demand letter that requested preservation of all company electronic data was unreasonably overbroad and did not trigger a duty to preserve all such material; the preservation demand “did not accommodate the routine day-to-day needs of a business with a complex computer network and demanded actions [by the defendant] that went well beyond its legal obligations”).

undertake reasonable preservation efforts and will not guarantee the imposition of curative measures under Rule 37(e)(1) or sanctions under Rule 37(e)(2).

A requesting party would be better served by sending a preservation demand that identifies to the extent possible: (1) potential claims or causes of action; (2) the pertinent period of time, key custodians and actors; and (3) particular types or sources of ESI. The tactical advantage of this approach should be obvious. The reasonableness of a party's preservation efforts is measured, at least in part, by the quality and quantity of information that frames those efforts.¹³⁰ While an untethered preservation demand may seem advantageous given that counsel likely does not know with certainty "who has what or where relevant information may be located," its "gotcha" value may be negligible given that the preserving party is held to a standard of reasonableness, not perfection.¹³¹ A better preservation demand, from a strategic perspective, is one that includes an invitation for the responding party to engage in a dialogue addressing the parameters of its preservation obligation.¹³²

The party receiving a preservation demand after December 1, 2015, should be equally strategic in formulating its response. An alleged spoliator who spurned a good-faith overture for early discussions regarding preservations may be poorly positioned to successfully challenge the moving party's threshold showing under

130. *Cf. John B. v. Goetz*, 879 F. Supp. 2d 787, 867 (M.D. Tenn. 2010) (suggesting that a party's duty to preserve should not include "evidence that the party 'had no reasonable notice of the need to retain'").

131. *See Oto Software, Inc. v. Highwall Technologies, LLC*, No. 08-cv-01897-PAB-CBS, 2010 WL 3842434, at *8 (D. Colo. Aug. 6, 2010) ("[i]n complying with its duty to preserve relevant evidence, a litigant 'is not expected to be prescient.'") (quoting *Hatfield v. Wal-Mart Stores, Inc.*, 335 F. App'x 796, 804 (10th Cir. 2009)).

132. *Cf. Del Campo v. Kennedy*, No. C-01-21151 JW (PVT), 2006 WL 2586633, at *2 (N.D. Cal. Sept. 8, 2006) (after noting that defendant had refused to provide more than "vague assurances" that it would discuss a preservation order and the disagreements the parties had already had, the court observed that "the need to meet and confer to develop a document preservation plan is obvious"). *But see Jardin v. Datallegro, Inc.*, No. 08-CV-1462-TEG-RBB, 2008 WL 4104473, at *2 (S.D. Cal. Sept. 3, 2008) (in denying plaintiff's motion for an injunction to preserve evidence, the court noted that the parties already were under a duty to preserve relevant evidence; the court also rejected plaintiff's assertion that "defendants [had] acted uncooperatively in failing to respond to plaintiff's letters" and that "[d]efendants' failure to immediately respond . . . [was] not suspicious because those letters did not call for any response").

Rule 37(e).¹³³ The Committee Note to Rule 37(e) makes the same point. While the Advisory Committee recognizes that the reasonableness of a party's preservation efforts should be evaluated, in part, on proportionality considerations, it also warns that "[a] party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime."¹³⁴

Conversely, a party's good faith attempts to reach agreement on the scope of preservation, even if unsuccessful, may provide the basis for a preservation order once litigation commences. The Committee Note to Rule 37(e) notes that "[p]reservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important."¹³⁵ It seems clear that an attorney seeking a preservation order from the court is in a more advantageous position if they can compare their own good faith efforts to the intransigence of opposing counsel.

Assuming the moving party sustains its initial burden of proof, Rule 37(e) then requires the court to determine whether the relevant ESI was lost "because a party failed to take reasonable steps to preserve it" and, if so, whether the lost ESI "cannot be restored or

133. *Cf. Pippins v. KPMG LLP*, 279 F.R.D. 245, 254-255 (S.D.N.Y. 2012) (while acknowledging that "proportionality is necessarily a factor in determining a party's preservation obligations," the court also described as "unreasonable" the defendant's "refusal to do what was necessary in order to engage in good faith negotiations over the scope of preservation with Plaintiffs' counsel").

134. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-62.

135. *Id.* at Appendix B-60. *Cf. Giltneane v. Tennessee Valley Authority*, No. 3:09-CV-14, 2009 WL 230594, at *3 (E.D. Tenn. Jan. 30, 2009) (in adopting plaintiff's proposed Interim Order Regarding Preservation, the court warned the parties "that any attempt to impede this or related litigation through the spoliation of evidence shall be met with the appropriate sanctions and penalties, up to and including holding the offending parties in contempt of court"); *In re Zyprexa Products Liability Litigation*, No. MDL 1596, 2004 WL 3520248, at *5 (E.D.N.Y. Aug. 18, 2004) (the court's case management order acknowledged the parties' obligation to preserve relevant information and documents and stated that the "parties shall meet and confer on the preservation of documents and shall submit to the Court an agreed order for the preservation of records, or a report identifying the issues in dispute").

replaced through additional discovery.” These elements function as affirmative defenses¹³⁶ for which the burden of proof should be placed on the non-moving party.¹³⁷ The party seeking relief under Rule 37(e) is rarely in a position to know with certainty what steps the non-moving party took to comply with its preservation obligation, whether those actions were reasonable under the circumstances of the particular case, or whether lost information can be restored or replaced.¹³⁸

As noted, a party is not required to “save everything,”¹³⁹ but is expected to undertake preservation efforts that are “both reasonable and proportional to what was at issue in known or reasonably-anticipated litigation.”¹⁴⁰ To that end, “[t]he burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.”¹⁴¹ The Advisory Committee recognizes that ESI may be lost “despite the party’s reasonable efforts to preserve” or “by

136. *Cf. In re YRC Worldwide Inc. ERISA Litigation*, No. 09-2593-JWL, 2011 WL 1457288, at *4 (D. Kan. Apr. 15, 2011) (defining an affirmative defense as “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s . . . claim, even if all the allegations . . . are true”).

137. *See, e.g., Byrne v. CSX Transportation, Inc.*, 541 Fed. App’x. 672, 674 (6th Cir. 2013) (“the defendant bears the burden of proof as to whether it is entitled to the benefit of an affirmative defense”).

138. *Cf. Schartz v. Rent a Wreck of America, Inc.*, No. 13-2189, 2015 WL 1020647, at *4 (4th Cir. Mar. 10, 2015) (noting that when “determining whether the normal allocation of the burden of proof should be altered,” California courts consider, *inter alia*, “the knowledge of the parties concerning the particular fact” to be proved, “the availability of the evidence to the parties,” and “the most desirable result in terms of the public policy in the absence of proof of the particular fact”).

139. *Cf. Schlumberger Technology Corp. v. Greewich Metals, Inc.*, No. 07-2252-EFM, 2009 WL 5252644, at *7 (D. Kan. Dec. 31, 2009) (noting that “the scope of the duty to preserve evidence is not boundless”).

140. *See Design Basics, LLC v. Carhart Lumber Co.*, No. 8:13CV125, 2014 WL 6669844, at *6 (D. Neb. Nov. 24, 2014). *See also Wilson v. Saint-Gobain Universal Abrasives, Inc.*, No. 213-cv-1326, 2015 WL 1499477, at *11 (W.D. Pa. Apr. 1, 2015) (“[d]etermining whether a party had reason to believe that the evidence in question would be required in litigation is governed by a ‘flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry’”).

141. The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155 (2013).

events outside the party's control."¹⁴² Similarly, a party's litigation experience may color its preservation efforts. As the Committee Note acknowledges, "[c]ourts may . . . need to assess the extent to which a party knew of and protected against" the risk of spoliation.¹⁴³

Proportionality will also come into play in addressing the reasonableness of a party's preservation efforts. The Advisory Committee recognizes that "aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts."¹⁴⁴ The Committee also acknowledges that a party "may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms."¹⁴⁵ In short, a party should undertake preservation efforts that are both reasonable, and defensible; those criteria are not mutually exclusive. More importantly, in view of the burden of proof that may be triggered months, if not years, in the future in the context of a Rule 37(e) motion, a preserving party must approach preservation strategically. Preservation decisions should be documented contemporaneously and then audited regularly for compliance. Similarly, a party's consistent good-faith adherence to a long-standing document retention/destruction policy should provide a benchmark for evaluating the reasonableness of that party's preservation efforts in the context of the particular case. A company should not blindly delegate preservation responsibilities to employees who are then left to exercise unfettered discretion.¹⁴⁶ Finally, counsel should seriously consider whether their litigation hold memoranda should be drafted with a view toward producing that document to the opposing party

142. See June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-61.

143. *Id.*

144. *Id.* at Appendix B-61-62.

145. *Id.* at Appendix B-62.

146. *Cf.* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 629 (D. Colo. 2007) (holding that counsel cannot direct employees to preserve all relevant information and then blithely rely upon those same employees to properly exercise their discretion in determining what information to save).

or the court.¹⁴⁷ Transparency and cooperation with opposing counsel may well be the most persuasive indicia of reasonableness and the best “defense” to a possible Rule 37(e) motion.

Assuming that the non-moving party did not take reasonable efforts to preserve, the court must then determine if the missing information can be restored or replaced. If it can, then no further action under Rule 37(e) is required and the court never addresses curative measures or sanctions. But if necessary, the non-moving party should bear the burden of proving that missing ESI can be restored or replaced with additional discovery.¹⁴⁸ To sustain that burden, the non-moving party should be required to make a factual showing as to where or from whom the replacement ESI may be obtained, or how the missing ESI can be restored. The non-moving party also should be required to provide reasonable cost estimates for restoring or replacing missing ESI.¹⁴⁹

147. *Cf.* *Cohen v. Trump*, No. 13-CV-2519-GPC (WVG), 2015 WL 3617124, at *7 (S.D. Cal. June 9, 2015) (“[a]lthough a litigation hold letter is likely not discoverable, particularly when it is shown that the letter includes material protected by the attorney-client privilege or the work product doctrine, the basic details surrounding the litigation hold are not”). *See also* *Vicente v. City of Prescott*, No. CV-11-08204-PCT-DGC, 2014 WL 3939277, at *15 (D. Ariz. Aug. 13, 2014) (directing defendants to produce unredacted versions of two litigation hold letters, after defendants conceded that the letters were not attorney-client communications).

148. *Cf.* *K-Con Building Systems, Inc. v. United States*, 106 Fed. Cl. 652, 660, 665 (Fed. Cl. 2012) (holding that the “offending party” bears the burden of proof establishing substantial justification or harmlessness).

149. Similar information is required where a responding party claims that information is not reasonably accessible under Rule 26(b)(2)(B). In that instance, the responding party must “provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.” *See* FED. R. CIV. P. 26 advisory committee’s note to 2006 amendment. *Cf.* *Murray v. Coleman*, No. 08-CV-6383, 2012 WL 4026665, at *2 (W.D.N.Y. Sept. 12, 2012) (requiring defense counsel, in a Rule 26(b)(2)(B) context, to provide an affidavit stating: “(1) the document/email retention policy used by DOCS currently and during the relevant time periods, (2) the dates of emails ‘reasonably accessible’ for production in this litigation, (3) the back up or legacy system, if any, used by DOCS to preserve or archive emails that are no longer ‘reasonably accessible’ and whether responsive documents or data may potentially be found on such back up or legacy systems, (4) whether accessing archived or back up emails would be unduly burdensome or costly and why, and (5) the date when a litigation hold or document preservation notice was put in place by DOCS regarding this matter and either a copy of or a description of the preservation or litigation hold utilized by DOCS.”).

In the typical case, it is reasonable to assume that the producing party is “best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information”¹⁵⁰ and, therefore, best positioned to identify alternative sources of ESI.¹⁵¹ That reality will likely prompt discovery requests directed to this specific issue. The proposed amendment to Rule 26(b)(1) acknowledges that litigants retain the right to seek discovery of information concerning 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,” provided that the requested information is “relevant and proportional to the needs of the case.”¹⁵² Indeed, the Advisory Committee concedes that “[f]raming intelligent requests for electronically stored information . . . may require detailed information about another party’s information systems and other information resources.”¹⁵³ The moving party should be permitted to conduct focused discovery to the extent they wish to challenge the non-moving party’s averments as to the potential for restoring or replacing missing ESI or the costs associated with those efforts. In appropriate circumstances, the court could require the alleged

150. *See, e.g.,* Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 127 n.2 (S.D.N.Y. 2015) (quoting Sedona Principle 6 of *The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production*, available at <https://thesedonaconference.org/download-pub/81>).

151. *Cf. Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (“counsel must become fully familiar with her client’s document retention policies as well as the client’s data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm’s recycling policy.”).

152. *See* June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-43.

153. *Id.*

spoliator to bear the expense of that additional discovery.¹⁵⁴ This potential for “discovery about discovery” and the shifting of discovery costs may provide further incentive for transparency and cooperation on the part of the alleged spoliator.

Proportionality considerations will also guide the court’s determination whether missing ESI can be replaced or restored. The Advisory Committee cautions that “efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims and defenses in the litigation,” and that “substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.”¹⁵⁵ But on this issue, the Advisory Committee’s intent is less than clear.

The Committee Note suggests that judges may look to “[o]rders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses” in addressing whether missing ESI can be restored or replaced.¹⁵⁶ As noted above, Rule 26(b)(2)(B) places on the responding party the initial burden of showing that the desired ESI is not reasonably accessible because of undue burden or expense, and then requires the requesting party to show that these burdens and costs are justified under the particular circumstances of the case. Even with that good cause showing, however, the court under Rule 26(b)(2)(B) could shift the costs of that discovery to the

154. See *Mazzei v. The Money Store*, No. 01cv5694 (JGK)(RLE), 2014 WL 3610894, at *8 (S.D.N.Y. July 21, 2014) (suggesting that “[w]hen evidence is destroyed, the party who sought the evidence should be compensated for any ‘discovery necessary to identify alternative sources of information’”) (citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 78 (S.D.N.Y. 1991)). *But compare* *Zimmerman v. Poly Prep County Day School*, No. 09 CV 4586(FB), 2011 WL 1429221, at *35 (E.D.N.Y. Apr. 13, 2011) (while allowing the plaintiffs to take additional discovery in the wake of defendant’s negligent failure to maintain relevant records, the court declined to award fees and costs incurred to cover that additional discovery, finding that the “discovery now sought by plaintiffs would, in all likelihood, have been discovery they would have requested even in the absence of the spoliation”) *with* *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 523-24 (D. Md. 2009) (suggesting that when ruling on a spoliation motion, a court could “grant discovery costs to the moving party if additional discovery must be performed after a finding that evidence was spoliated”).

155. See June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-62.

156. *Id.*

requesting party. Similarly, Rule 26(c)(1)(B) permits the court, for good cause, to include in a protective order an allocation of expenses.

This author presumes that Rules 26(b)(2)(B) and 26(c)(1)(B) were cited in the Committee Note as examples of how a court may consider proportionality factors in evaluating the burdens and benefits that flow from the additional discovery directed at restoring or replacing lost ESI. Any decision regarding additional discovery, and who ultimately bears the attendant fees and costs, should take into consideration the importance of the missing evidence relative to the claims and defenses in the case; the degree to which available information is comparable to or a ready substitute for the missing evidence; the costs and burdens associated with replacing or restoring the missing evidence; and the relative financial resources of the parties. Where the non-moving party failed to take reasonable steps to preserve, the court should consider whether the missing evidence has marginal value or if equivalent information is available from sources that are reasonably accessible. In that circumstance, it might be appropriate to impose the cost of that discovery on the moving party, particularly if those costs are minimal. The requesting party could pragmatically decide to forego that additional discovery after weighing the relative burdens and benefits. However, the moving party should not be required to absorb the costs of restoration or replacement where the missing evidence is critical and the expense associated with that effort is substantial. In that instance, shifting costs would unfairly reward the party who failed to take reasonable steps to preserve and was not sufficiently informed about its own ESI and information management systems.

V. A PROACTIVE APPROACH TO PROPORTIONALITY

The application of proportionality factors in a given case is not limited to the discovery process and should not be defined in terms of a “perfect fit” or measured by some inflexible quantitative formula. Proportionality principles can impact all phases of the pretrial process and, indeed with respect to preservation decisions, could have a bearing on events that occur even before the lawsuit commences. Like any case management tool, proportionality principles are most effective when they are employed creatively and iteratively by the parties and the court. The following are examples of techniques used by many district and magistrate judges to advance the goal of proportionality.

A. *Proportionality and the Rule 26(f) Conference*

Although counsel typically considers proportionality principles from their perspective as an advocate, they have equally important responsibilities as case managers. The latter role is re-affirmed in the amended version of Rule 1, which will require the parties (and their attorneys) to employ the Civil Rules to secure the just, speedy, and inexpensive determination of every action and proceeding.¹⁵⁷ To that end, the Rules envision that the parties will address proportionality issues at the earliest possible opportunity.¹⁵⁸ Rule 26(f) states that the parties should develop a discovery plan that reflects their views and proposals on, *inter alia*, “the subjects on which discovery may be needed,” “whether discovery should be conducted in phases or be limited to or focused on particular issues,” and “what changes should be made in the limitations on discovery imposed under these rules . . . and what other limitations should be imposed.”¹⁵⁹ Rule 37(f) further authorizes the court to award reasonable fees and costs if “a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f).”¹⁶⁰

Beyond the Rule 26(f) meet-and-confer setting, counsel should be prepared to address proportionality during scheduling conferences with the court. Those discussions should further the goals of “expediting disposition of the action, establishing early and continuing control so that the case will not be protracted because of lack of management, [and] discouraging wasteful pretrial

157. *Id.* at Appendix B-21-22. *Cf.* Home Design Services, Inc. v. Trumble, No. 09-cv-00964-WYD-CBS, 2010 WL 1435382, at *5 (D. Colo. Apr. 9, 2010) (“[t]he importance of a well-considered case management plan has become even more apparent as the number of cases actually proceeding to trial decreases. Counsel should have an interest in developing a discovery plan and managing the pretrial process with a view toward the most likely litigation outcomes, *i.e.*, settlement or disposition through motion.”); *In re* Complaint of Mobro Marine, Inc., No. 3:02-CV-471-J-20TEM, 2003 WL 22006257, at *1 (M.D. Fla. Mar. 24, 2003) (suggesting that “counsel have a professional obligation to develop a cost-effective plan for discovery” and to promote the public’s interest in minimizing the costs of litigation).

157. See June 2014 Advisory Committee Report, *supra* note 38, at Appendix Fed. R. Civ. P. 37(f).

158. Witt v. GC Services Limited Partnership, __ F.R.D. __, 2014 WL 6910500, at *6 (D. Colo. Dec. 9, 2014).

159. FED. R. CIV. P. 26(f)(3)(B) and (E).

160. FED. R. CIV. P. 37(f).

activities.”¹⁶¹ “The court’s responsibility, using all the information provided by the parties, is to consider [the proportionality factors] in reaching a case-specific determination of the appropriate scope of discovery.”¹⁶² As one court has explained in addressing proportionality, “there comes a point where the marginal returns on discovery do not outweigh the concomitant burden, expense, and bother. The Court’s role is to try and find the right balance.”¹⁶³

Application of proportionality principles extends beyond simply serving or responding to discovery requests. For example, in a case involving voluminous ESI, the parties can effectively search, analyze, and review that data, while also saving time and money, by employing technology rather than more traditional techniques such as manual review or key-word searching.¹⁶⁴ Those savings are frequently compounded when the parties can agree on the use and actual implementation of technology, and negotiate appropriate search protocols.¹⁶⁵

Rule 26(f) also directs counsel to address “issues about claims of privilege or of protection as trial-preparation materials.”¹⁶⁶ Experienced attorneys understand the time and expense incurred in preparing privilege logs that all-too frequently become the genesis of discovery disputes or are criticized by the court as inadequate

161. FED. R. CIV. P. 16(a)(1), (2) and (3).

162. June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-40.

163. *Goodman v. Burlington Coat Factory Warehouse Corp.*, 292 F.R.D. 230, 233 (D.N.J. 2013).

164. *See, e.g., Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 191-92 (S.D.N.Y. 2012) (holding that counsel’s selection of an appropriate methodology for reviewing and producing relevant ESI must also take into consideration Rule 1 and the proportionality considerations in Rule 26(b)(2)(C)).

165. *See, e.g., Ruiz-Bueno v. Scott*, No. 2:12-cv-0808, 2013 WL 6055402, at *3 (S.D. Ohio Nov. 15, 2013) (recognizing the potential for disagreements about proper search tools in an ESI-intensive case, the court noted that a proper Rule 26(f) conference should address “cooperative planning, rather than unilateral decision-making about matters such as ‘the sources of information to be preserved or searched; number and identities of custodians whose data will be preserved or collected . . . ; topics for discovery; [and] search terms and methodologies to be employed to identify responsive data’”).

166. *See* FED. R. CIV. P. 26(f)(3)(D).

under Rule 26(b)(5).¹⁶⁷ Although Rule 502 of the Federal Rules of Evidence gives the parties (and the court) considerable latitude to adopt procedures to minimize the costs and attendant risks associated with privilege review, that safeguard is typically overlooked by even experienced attorneys. In addition, Rule 29¹⁶⁸ permits the parties to stipulate to modifications of the procedures governing discovery, including the preparation of privilege logs. Unfortunately, such stipulations are rarely employed.¹⁶⁹

B. Use Phased Discovery To Focus On The Most Important, Most Accessible Information

Proportionality principles presume that all relevant information is not equally important, yet the usual scheduling order is structured around the dates for completing *all* discovery and filing dispositive motions. Given that only a very small percentage of civil cases actually proceed through trial, parties are preparing scheduling orders that are premised on the least likely method of disposition. More to the point, the information that the parties require to make an informed assessment of the case in advance of a settlement conference or mediation is invariably less than the discovery needed to actually try that case.

Although counsel and the court typically consider proportionality from the standpoint of quantitative limits on the scope of discovery, that discussion overlooks a more effective case-management technique that may actually be less confrontational. The court should encourage the parties to consider a phased

167. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008) (noting that “[i]n actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or *in camera* review of the documents themselves.”).

168. FED. R. CIV. P. 29.

169. See, e.g., Philip J. Favro, *Inviting Scrutiny: How Technologies are Eroding the Attorney-Client Privilege*, 20 RICH. J.L. & TECH. 2, ¶ 151 (2013) (delineating methods for counsel, clients, and courts to reduce privilege log burdens); John M. Facciola & Jonathon M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2010) (suggesting, for example, that parties can agree that a privilege log that will not include exact duplicates or correspondence between the client and litigation counsel sent after the pending lawsuit commenced).

approach to discovery that focuses first on the most important witnesses, the most accessible ESI and documents, and those case-dispositive legal issues that can be decided with minimal factual development.¹⁷⁰

The parties and the court also can promote the goal of proportionality by deferring work and costs that may be unnecessary in the event the case does not proceed to trial. For example, this author frequently defers expert depositions, absent extraordinary circumstances, until after rulings on summary judgment motions when it becomes clear those depositions are actually necessary to prepare for trial. Expert disclosures under Rule 26(a)(2) are designed to accelerate the exchange of basic information, to help focus the discovery process, and to enable the opposing party to identify and retain rebuttal experts.¹⁷¹ All of those goals can be achieved, without the necessity for depositions, if the parties and their experts fully adhere to their disclosure obligations. If those disclosures are inadequate, the proper remedy is not to expend the client's money deposing the other side's expert, but rather to compel a comprehensive disclosure under Rule 37(a)(3)(A). Rule 37(a)(4) provides that an evasive or incomplete disclosure "must be treated as a failure to disclose" and Rule 37(c) mandates that a party that fails to comply with Rule 26(a) or (e) may not use that witness or information for any purpose unless the failure was substantially

170. See, e.g., *United States ex rel. Emanuele v. Medicor Associates, Inc.*, No. 10-245, 2014 WL 3747666, at *2 (W.D. Pa. Jul. 29, 2014) (in rejecting defendants' challenge to the temporal scope of the relator's discovery requests, the court found "that the phased discovery process proposed by the special master adequately address[ed] the burden and proportionality issues raised by the defendants"); *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (after noting that plaintiffs' claims had been "in constant flux" for over six years, the magistrate judge ordered a phased discovery schedule "to ensure that discovery is proportional to the specific circumstances of [the] case, and to secure the just, speedy, and inexpensive determination of this action"). See also *The Sedona Conference, The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 297 (2010) (suggesting that early in the discovery process, "the court, or the parties on their own initiative, may find it appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible and least expensive sources. Phasing discovery in this manner may allow the parties to develop the facts of the case sufficiently to determine whether, at a later date, further potentially more burdensome and expensive discovery is necessary or warranted.").

171. See *Securities and Exchange Commission v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2008 WL 4587240 (D. Colo. Oct. 15, 2008).

justified or harmless. A premature expert deposition may simply serve to cure a deficient report at the deposing party's expense.¹⁷²

Admittedly, Rule 26(b)(4) states that "a party may depose any person who has been identified as an expert whose opinions may be presented at trial."¹⁷³ However, Rule 26(b)(2)(C) acknowledges the court's authority to alter the limits or manner of conducting discovery. The Committee Note to Rule 26(a)(2) observes that a comprehensive expert report may result in an abbreviated expert deposition or "in many cases . . . may eliminate the need for a deposition."¹⁷⁴ As the court noted in *Salgado v. General Motors Corp.*,¹⁷⁵ "[t]he [expert] report must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush; and moreover the report must be sufficiently complete so as to shorten or decrease the need for expert depositions and thus to conserve resources."¹⁷⁶

C. *Avoid Self-Inflicted Discovery Costs*

Finally, proportionality principles militate against incurring cumulative or duplicative discovery expenses. In cases involving a corporate party, counsel will often serve contention interrogatories, knowing that the answers to those interrogatories should be admissible as statements offered against that corporate entity under Fed. R. Evid. 801(d)(2). Counsel invariably notices the same corporate party for a Fed. R. Civ. P. 30(b)(6) deposition and then serves a deposition notice that lists topics largely duplicative of subjects addressed in those previously answered interrogatories. That same Rule 30(b)(6) witness may later be disposed in their individual capacity. While the Civil Rules certainly permit a party to use all available methods of discovery in any sequence they choose,¹⁷⁷ that freedom of choice may be constrained by Rule 26(b)(2)(C), which requires the court to limit the frequency or extent of discovery otherwise permitted if "the discovery sought . . . can be obtained from some other source that is more convenient, less

172. See FED. R. CIV. P. 16(b)(4)(E)(i) ("Unless manifest injustice would result, the court must require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D).").

173. FED. R. CIV. P. 26(b)(4).

174. See FED. R. CIV. P. 26(2) advisory committee's note to 1993 amendment.

175. 150 F.3d 735 (7th Cir. 1998).

176. *Id.* at 741 n.6.

177. See FED. R. CIV. P. 26(d)(2).

burdensome, or less expensive,” or if “the party seeking discovery has had ample opportunity to obtain the information by discovery in this action.” A Rule 30(b)(6) deposition that simply plows over old ground or requires the deponent to laboriously recite information previously disclosed in interrogatory responses may be vulnerable to challenge on proportionality grounds.¹⁷⁸

The defense bar has strongly advocated for an increased emphasis on proportionality, but then frequently employs litigation tactics that undercut that objective. Every plaintiff’s attorney (and most judges) are familiar with the standard litany of “affirmative defenses” appended to the end of a defendant’s answer to the complaint. It is certainly true that defenses may be waived if they are not raised in a motion or included “in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.”¹⁷⁹ But the author regularly sees answers that list twenty or more affirmative defenses, many of which are plainly inapposite to the claims and circumstances of the particular case. Those “cut and paste” defenses may, however, unintentionally expand the scope of discovery, since Rule 26(b)(1) permits a party to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Rule 26(a)(1)(A)(i) and (ii) also require a party to automatically disclose the name of each individual likely to have discoverable information, and to copy or describe by category all documents or ESI that the disclosing party may use to support its defenses. A plaintiff can hardly be criticized for requesting additional interrogatories in order to address the factual underpinnings or legal merits of defendant’s laundry list of

178. *See, e.g.,* United States ex rel. Fago v. M&T Mortgage Corp., 235 F.R.D. 11, 25 (D.D.C. 2006) (“[a]lthough Rule 30(b)(6) requires a designated witness to thoroughly educate him or herself on the noticed topic, there must be a limit to the specificity of the information the deponent can reasonably be expected to provide;” concluded there was “no added benefit to compelling the same information through a Rule 30(b)(6) deposition because, like Rule 30(b)(6) deposition testimony, an interrogatory can be served on and answered by a corporation via its officers and agents”); *Tri-State Hospital Supply Corp. v. United States*, 226 F.R.D. 118, 126 (D.D.C. 2005) (noting that under Rule 26(c), the court may prevent a party from wasting its opponent’s time and thereby causing undue burden or expense; the court observed that a 30(b)(6) deposition should be productive and “not simply an excuse to obtain information that is already known” and indicated it would “entertain, if necessary, any claim that the power to take [the Rule 30(b)(6) depositions] was abused by the manner in which the depositions were conducted, to include the claim that they were nothing more than duplicative of the discovery already provided”).

179. FED. R. CIV. P. 12(h)(1)(B).

defenses, particularly because the plaintiff (and the court) are entitled to presume that each of those affirmative defenses have a good faith basis in law and fact.¹⁸⁰

VI. CONCLUSION

Proportionality has been and will remain a part of the civil discovery process. For that reason, lawyers and judges must move beyond the abstract debate over proportionality. While the proportionality requirements in an amended Rule 26(b)(1) will not materially change the discovery obligations that already govern requesting and producing parties, it is disingenuous to suggest that the proportionality factors will be easily applied in every case, particularly at the outset of the litigation. Parties inevitably embark on the discovery process with less than complete information.¹⁸¹ But that problem already exists under the current version of the Civil Rules. The solution is not to abandon proportionality as a guiding discovery principle, but rather for lawyers and jurists to find alternative and creative ways to incorporate proportionality factors in an overall discovery plan and in their pre-litigation preservation decisions.¹⁸² The challenge for lawyers is to view proportionality, not as an opportunity for gamesmanship or as a constraint on legitimate discovery, but rather as a means to achieve the objectives underlying Rule 1.

180. Under Fed. R. Civ. P. 11(b), by signing an answer, an attorney is certifying to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the answer “is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation,” that the “defenses and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law,” and “the factual contentions have evidentiary support . . . or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”).

181. Cf. June 2014 Advisory Committee Report, *supra* note 38, at Appendix B-40.

182. See generally Philip J. Favro & Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933 (2012) (discussing generally the efforts undertaken by circuit, district, and state courts to increasingly promote the salutary impact of proportionality standards in the discovery process).