More than 30 years ago, the civil rules were amended to try to bring proportionality to discovery. But very little changed in practice. On Dec. 1, 2015, new rules with the same goal take effect. In the pages that follow, judges and lawyers outline the changes, discuss the intended impact, and offer guidelines for adapting to this new — and yet familiar — landscape. Are we finally on the right track?
May of 2010, some 200 judges, lawyers, and academicians gathered for two days at the Duke University Law School to evaluate the state of civil litigation in federal court. The conference was sponsored by the Advisory Committee on the Federal Rules of Civil Procedure. Many studies, surveys, and papers were prepared in advance of the conference to aid the discussion. Although the gathering found that federal civil litigation works reasonably well and that a complete overhaul of the system is not warranted, the participants also concluded that several improvements clearly are needed. Four stood out in particular: greater cooperation among litigants, greater proportionality in discovery, earlier and more active case management by judges, and a new rule addressing the preservation and loss of electronically stored information (“ESI”).

The Advisory Committee took the findings of the Duke conference and drafted amendments that address these four areas of focus. The amendments have been approved unanimously by the Advisory Committee, the Standing Committee on the Rules of Practice and Procedure, the Judicial Conference of the United States, and the United States Supreme Court and will take effect on Dec. 1, 2015, unless Congress acts to disapprove them. As Congressional disapproval appears unlikely, judges and lawyers should become familiar with the new rules. The Advisory Committee believes they present a unique opportunity to improve the delivery of civil justice in federal courts.

Participants in the Duke conference recognized that rule amendments alone will do little to improve the civil litigation system. A change in behavior is also required. As a result, over the course of the next several months the Advisory Committee, the Federal Judicial Center (“FJC”), and other groups will be promoting the new rule amendments and their intended improvements. This article is a small step in that direction. If the amendments have their intended effect, civil litigation will become more efficient and less expensive without sacrificing any party’s opportunity to obtain the evidence needed to prove its case.1

THE DUKE CONFERENCE AND DRAFTING OF THE AMENDMENTS

Participants in the Duke conference included federal and state judges from trial and appellate courts around the country, plaintiff and defense lawyers, public interest lawyers, in-house attorneys from business and government, and distinguished law professors. The FJC and other organizations conducted studies and surveys in advance of the conference, and more than 40 papers and 25 compilations of data were presented. Some 70 judges, lawyers, and academics made presentations to the conference, followed by a broad-ranging discussion among all participants.2

The Advisory Committee prepared a post-conference report for Chief Justice John Roberts.3 The report noted that there was no general sense that the 1938 approach to the Federal Rules of Civil Procedure has failed. “While there is need for improvement, the time has not come to abandon the system and start over.”4 The report identified three specific areas of needed improvement: “What is needed can be described in two words — cooperation and proportionality — and one phrase — sustained,
Participants in the Duke conference recognized that rule amendments alone will do little to improve the civil litigation system. A change in behavior is also required.

active, hands-on judicial case management.” The report also noted “significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve [ESI] and the consequences of failing to do so.”

Following the Duke conference, the Advisory Committee appointed a subcommittee to develop rule amendments based on conference presentations and conclusions. The subcommittee compiled a list of all proposed rule amendments made at the conference and then held numerous calls and meetings to winnow and refine the suggestions. Over the course of two years, the subcommittee held many discussions, circulated drafts of proposed rule amendments, and sponsored a mini-conference with judges, lawyers, and technical experts to discuss possible solutions to the litigation challenges presented by ESI.

The proposed amendments were published for public comment in August 2013. Over the next six months, more than 2,300 written comments were received and more than 120 witnesses appeared and addressed the Advisory Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. Following the public comment process, the subcommittees revised the proposed amendments and again presented them to the Advisory and Standing Committees, where they were adopted unanimously. The rule amendments were then approved without dissent by the Judicial Conference of the United States and the Supreme Court.

The amendments affect more than 20 different provisions in the civil rules, but this article will address them in terms of the four areas of focus identified at the Duke conference: cooperation, proportionality, early and active judicial case management, and ESI.

COOPERATION
There was near-unanimous agreement at the Duke conference that cooperation among litigants can reduce the time and expense of civil litigation without compromising vigorous and professional advocacy. In a survey of members of the ABA Section of Litigation completed before the conference, 95 percent of respondents agreed that collaboration and professionalism by attorneys can reduce client costs.

Cooperation, of course, cannot be legislated, but rule amendments and the actions of judges can do much to encourage it. Rule 1 now provides that the civil rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The proposed amendment will add the following italicized language: The rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The intent is to make clear that parties as well as courts have a responsibility to achieve the Rule 1 goals.

The Committee Note to this proposed amendment observes that “discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.”

Sanctions are not the only means of discouraging litigation abuses; judges often have opportunities to remind litigants of their obligation to cooperate. Such admonitions can now be backed with a citation to Rule 1.

PROPORTIONALITY AND OTHER DISCOVERY CHANGES
The Advisory Committee report to the Chief Justice noted “[o]ne area of consensus in the various surveys” conducted before the Duke conference: “that district and magistrate judges must be considerably more involved in managing each case from the outset, to tailor motion practice and shape the discovery to the reasonable needs of the case.”

This wording captures the meaning of “proportional” discovery; it is discovery tailored to the reasonable needs of the case. It affords enough information for a litigant to prove his or her case, but avoids excess and waste. Unwarranted document production requests, excessive interrogatories, obstructive responses to legitimate discovery requests, and unduly long depositions all result in disproportionate discovery costs.

Studies completed in advance of the Duke conference suggested that disproportionate discovery occurs in a significant percentage of federal court cases. An FJC survey of closed federal cases found that a quarter of the lawyers who handled the cases believed that discovery costs were too high for their client’s stake in the case. Other surveys showed greater dissatisfaction. Members in the American College of Trial Lawyers (“ACTL”) widely agreed that today’s civil litigation system takes too long and costs too much, resulting in some deserving cases not being filed and other cases...
The intent of this change is to make proportionality unavoidable. It will now be part of the scope of discovery. Information must be relevant and proportional to be discoverable.
scope of discovery need not be admissible in evidence to be discoverable."

The "reasonably calculated to lead" phrase was never intended to define the scope of discovery. The language was added to the rules in 1946 because parties in depositions were objecting to relevant questions on the ground that the answers would be hearsay and would not be admissible at trial. Inadmissibility was used to bar relevant discovery. The 1946 amendment sought to stop this practice.

Recognizing that the sentence was never designed to define the scope of discovery, the Advisory Committee amended the sentence in 2000 to add the words "relevant information" at the beginning: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Committee Note explained that "relevant means within the scope of discovery as defined in this subdivision [(b)(1)]." Thus, the "reasonably calculated to lead" phrase applies only to information that otherwise falls within the scope of discovery set forth in Rule 26(b)(1); it does not broaden the scope of discovery. As the 2000 Committee Note explained, any broader reading of the "reasonably calculated to lead" phrase "might swallow any other limitation on the scope of discovery."

Despite the original intent of the sentence and the 2000 clarification, lawyers and judges continue to cite the "reasonably calculated to lead" language as defining the scope of discovery. Some even disregard the reference to admissibility, arguing that any inquiry "reasonably calculated to lead" to something helpful is fair game in discovery. The amendment will eliminate this incorrect reading of Rule 26(b)(1) while preserving the rule that inadmissibility is not a basis for opposing discovery of relevant information.

TWO OTHER CHANGES TO RULE 26(b)

The proposed amendments also will delete two existing phrases in Rule 26(b)(1): one that permits discovery relating to the "subject matter" of the litigation on a showing of good cause, and another that permits discovery of "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." The Advisory Committee found that the "subject matter" phrase is rarely if ever used. Parties and courts rightly focus on the claims and defenses in the litigation. The Committee also found that discovery into the existence and location of discoverable information is widely enough accepted that rule language is no longer needed. The Committee Note makes clear that these two changes are not intended to narrow the scope of discovery now permitted under Rule 26(b)(1) and provides some examples of the kinds of discovery still permitted.

OTHER DISCOVERY CHANGES

Rule 26(c)(1)(B) will be amended to include "allocation of expenses" among the terms that may be included in a protective order. This change makes express what the Supreme Court has long found implicit in the rule — that courts may allocate discovery costs when resolving protective order issues. (See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)). The Advisory Committee thought it useful to make the authority explicit on the face of the rule. This is not a change intended to make cost shifting more frequent, nor is it intended to suggest that cost shifting should be considered as part of the proportionality analysis. It simply is a codification of existing protective order authority.

Some have asked the Advisory Committee to consider adoption of a requester-pays system for civil discovery, which would be a significant departure from historical discovery practice. Although the Advisory Committee agreed to consider that idea, the Committee has not acted on it. To make clear that the addition of the "allocation of expenses" language to Rule 26(c)(1)(B) is not an implicit endorsement of a requester-pays system, the Committee Note includes this language: "Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.""

The amendments also include three changes to Rule 34. The first requires that objections to document production requests be stated "with specificity." The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, but requires the party to identify a reasonable time for the production. The third requires that an objection state whether any responsive documents are being withheld on the basis of an objection.

These amendments should eliminate three relatively frequent problems: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting to a document request; responses stating that respon-
sive documents will be produced in due course, without indicating when production will occur and which often are followed by long delays; and responses that state various objections, produce some documents, and yet do not say whether any other documents have been withheld on the basis of the objections. All three practices thwart Rule 1’s goals of speedy and inexpensive litigation.

Further, an amendment to Rule 26(d) will allow parties to deliver Rule 34 document production requests before the Rule 26(f) meeting between the parties. The 30 days to respond will be calculated from the date of the first Rule 26(f) meeting. The purpose of this change is to facilitate discussion of specific discovery proposals between the parties at the Rule 26(f) meeting and with the court at the initial case management conference.

**EARLY, ACTIVE JUDICIAL CASE MANAGEMENT**

The Duke conference included some of the best litigators in the country. When discussing ways to improve civil litigation, these lawyers pled for more active case management by judges. This is an excerpt from the report to the Chief Justice:

Pleas for universalized and invigorated case management achieved strong consensus at the Conference. . . . There was consensus that the first Rule 16 conference should be a serious exchange, requiring careful planning by the lawyers and often attended by the parties. Firm deadlines should be set. Conference participants underscored that judicial case-management must be ongoing. A judge who is available for prompt resolution of pretrial disputes saves the parties time and money. . . . A judge who offers prompt assistance in resolving disputes without exchanges of motions and responses is much better able to keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands.14

Surveys completed before the Duke conference found similar views. More than 70 percent of respondents from the ABA Litigation Section agreed that early intervention by judges helps to narrow issues and reduce discovery. Seventy-three percent agreed that litigation results are more satisfactory when a judge promptly begins managing a case and stays involved.15 The NELA survey reflects the same view. Almost two-thirds of respondents agreed that overall litigation results are more satisfactory when a judge actively manages a case.16

The benefits of early and active case management have been known for years. When Rule 16 was amended in 1983, the Advisory Committee Note included this comment: “Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.”

Of course, Rule 16 already calls for early management of cases by district or magistrate judges. It already contemplates the establishment of a reasonable but efficient schedule for the litigation, with input by the parties in the Rule 26(f) report. And yet lawyers in the surveys and during the Duke conference reported that many federal judges do not actively manage their cases. The rule amendments include four changes aimed at encouraging more active case management.

First, a key to effective case management is the Rule 16 conference where the judge confers with the parties about the needs of the case and sets an appropriate litigation schedule. To encourage case management conferences during which judges and lawyers actually speak with each other, an amendment will delete the language in Rule 16(b)(1) (B) that allows the scheduling conference to be held “by telephone, mail, or other means.” This is mostly a matter of emphasis, because the Committee Note explains that conferences may still be held by any means of direct simultaneous communication, including by telephone. And Rule 16(b)(1)(A) will continue to allow courts to base scheduling orders on the parties’ Rule 26(f) reports without holding a conference. The change in the text is intended to eliminate the express suggestion that setting litigation schedules by “mail” or “other means” is an adequate substitute for direct communication with parties. In most cases, it is not. The amendment is intended to encourage judges to communicate directly with the parties when beginning to manage a case.

Second, the time for holding the scheduling conference will be moved to the earlier of 90 days after any defendant has been served (reduced from 120 days in the present rule) or 60 days after any defendant has appeared (reduced from 90 days). The intent is to encourage earlier intervention by judges. Recognizing that these time limits may not be appropriate in some cases, the amendment allows judges to set a later time for good cause. The amendments also reduce the time for serving a complaint under Rule 4(m) from 120 days to 90 days. Language has been added to the Committee Note recognizing that additional time will be needed in some cases.

Third, the proposed amendments add two subjects to the list of issues to be addressed in a case management order: the preservation of ESI, and agreements reached under Federal Rule of Evidence 502. ESI is a growing issue in civil litigation, and the Advisory Committee believes that parties and courts should address it early. Rule 502 was designed to reduce the expense of producing ESI or other voluminous documents, and the parties and judges should consider its potential application in every case. Parallel provisions are added to the subjects for the Rule 26(f) meeting.

Fourth, briefing and deciding discovery motions can significantly delay litigation. The amendments suggest that the judge and the parties consider at the initial case management conference whether the parties should be required to hold an in-person or telephone conference with the judge before filing discovery motions. Many federal judges require such conferences now, and experience has shown them to be very effective in resolving discovery disputes quickly and
inexpensively. As the report to the Chief Justice noted, “[a] judge who is available for prompt resolution of pretrial disputes saves the parties time and money.”17 The amendment encourages this practice.

These changes are modest, but the Advisory Committee hopes they will encourage earlier and more active case management by judges. No other practice can do as much to improve the delivery of civil justice in federal courts.

RULE 37(e): FAILURE TO PRESERVE ESI

Preservation of ESI is a major issue confronting parties and courts, and the loss of ESI has produced a significant split in the circuits. Some circuits hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith. The Advisory Committee was credibly informed that persons and entities over-preserve ESI out of fear that some might be lost, that their actions might with hindsight be viewed as negligent, and that they might be sued in a circuit that permits adverse inference instructions on the basis of negligence. As the report to the Chief Justice noted, “the uncertainty leads to inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation. . . . Conference participants asked for a rule establishing uniform standards of culpability for different sanctions.”18

The distinguished panel that addressed this issue at the Duke conference suggested that the Advisory Committee draft a rule specifying when a duty to preserve ESI arises, the scope and duration of the duty, and sanctions that can be imposed for breach of the duty. The Committee attempted to write such a rule, but found that it could not identify a precise trigger for the duty to preserve that would apply fairly to the wide variety of cases in federal court. Nor could the Committee specify the scope or the duration of the preservation obligation because both depend heavily on the unique facts of each case.

The Advisory Committee did conclude that helpful guidance could be provided on the sanctions to be imposed when ESI is lost. The circuit split could be resolved, and the rules regulating sanctions could provide parties with some guidance when making preservation decisions.

The new Rule 37(e) does not purport to create a duty to preserve ESI. It instead recognizes the existing common-law duty to preserve information when litigation is reasonably anticipated. Thus, the new rule applies when “electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.” The rule calls for reasonable steps, not perfection, in efforts to preserve ESI.

If reasonable steps are not taken and ESI is lost as a result, the rule directs the court to focus first on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in the new rule limits a court’s powers under Rules 16 and 26 to order discovery to achieve this purpose.

If the ESI cannot be restored or replaced, Rule 37(e)(1) provides that the court, “upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice.” This provision deliberately preserves broad trial court discretion. It does not attempt to draw fine distinctions as to the various measures a trial court may use to cure prejudice under (e)(1), but it does limit those measures in three general ways: There must be a finding of prejudice to the opposing party, the measures imposed by the court must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures addressed in subdivision (e)(2).

Rule 37(e)(2) limits the application of several specific sanctions to cases in which “the party acted with the intent to deprive another party of the information’s use in the litigation.” The sanctions subject to this limitation include presuming that the lost information was unfavorable to the party that lost it, instructing the jury that it may or must presume the information was unfavorable to that party, and dismissing the action or entering a default judgment.

Subdivision (e)(2) eliminates the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. Adverse inference instructions historically have been based on a logical conclusion: If a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the party that destroyed it. Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad-faith loss of the information. (See, e.g., Aram 싸운 v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) (“The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.”) (citations omitted).)
Other circuits permit adverse inference instructions on a showing of negligence. They reason that an adverse inference restores the evidentiary balance, and that the party that lost the information should bear the risk that it was unfavorable. (See, e.g., Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002).) While this rationale has some equitable appeal, the Advisory Committee had several concerns about its application to ESI. First, negligently lost ESI may have been favorable or unfavorable to the party that lost it — mere negligence does not reveal the nature of the lost information. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that may well become more frequent as ESI multiplies. Third, as we already have seen, permitting an adverse inference for mere negligence creates powerful incentives to over-presence, often at great cost. Fourth, because ESI is ubiquitous and often is found in many locations, the loss of ESI generally presents less risk of severe prejudice than may arise from the loss of a single tangible item or a hard-copy document.

These reasons caused the Advisory Committee to conclude that the circuit split should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on pretrial motions or when ruling in bench trials, and adverse inference jury instructions, will be limited to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation. Subdivision (e)(2) extends this logic to the even more severe measures of dismissal or default. The Advisory Committee thought it incongruous to allow dismissal or default in circumstances that would not justify an adverse inference instruction.

**ONE OTHER CHANGE — ABROGATION OF RULE 84**

The Federal Rules of Civil Procedure are followed by an appendix of forms, and Rule 84 provides that the forms “suffice under these rules.” Many of the forms are out of date, the process for amending them is cumbersome, and the Advisory Committee found that they are rarely used. In addition, many alternative sources of civil forms are readily available, including forms created by commercial publishing companies and forms created by a Forms Working Group at the Administrative Office of the United States Courts, which are available on the federal courts website. The proposed amendments will abrogate Rule 84 and eliminate the appendix of forms. The Forms Working Group plans to expand the range of forms available on the federal courts website, and the Committee Note makes clear that this change is not intended to signal a change in pleading standards under Rule 8.

**CONCLUSION**

The American system of civil justice is in many respects the best in the world, but in federal courts it has become too expensive, too time-consuming, and largely unavailable to average citizens and small businesses. The system needs improvement. The proposed amendments on cooperation, proportionality, case management, and the loss of ESI are intended to reduce the cost and delay of civil litigation. They are not intended to accelerate litigation at the cost of justice, deny parties the evidence needed to prove their cases, or create new obstacles to legitimate discovery. The amendments should be applied by courts and parties in an even-handed effort to achieve the goals of Rule 1 — the just, speedy, and inexpensive determination of every action.

The new rules will have no effect, however, unless judges and lawyers also change. Lawyers can increase their cooperation without sacrificing the finest of their legal advocacy skills. They can make the system more accessible by seeking and providing reasonable and proportional discovery. Judges can actively manage cases by intervening early, entering reasonable and proportional case management orders, remaining engaged throughout the life of the case, ruling promptly on discovery disputes and other motions, and setting firm trial dates.

The coming rule amendments provide a new opportunity for all of us to improve our practices, refine our skills, and achieve the just, speedy, and inexpensive determination of every action.

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1. This paper represents the author’s views and not those of the Advisory Committee, although it does borrow from materials prepared by the Committee’s superb reporters, Profs. Ed Cooper and Rick Marcus. A more complete description and the actual text of the amendments can be found at http://www.uscourts.gov/file/18218/download.
3. The report to the Chief Justice (“Advisory Committee Report”) can be found at www.uscourts.gov/file/reporttothechiefjusticepdf.
4. Id. at 5.
5. Id. at 4.
6. Id. at 8.
7. Conference Materials, ABA Section of Litigation Member Survey at 3.
11. Conference Materials, ABA Section of Litigation Member Survey at 9.
15. Conference Materials, ABA Litigation Section Member Survey at 3.
How did these new amendments to the civil rules come about? Why now? How will they succeed when past efforts have failed? DUKE LAW DEAN DAVID F. LEVI leads a discussion with some of the leaders behind the changes.

THE PANEL:

JUDGE DAVID G. CAMPBELL, U.S. District Court for the District of Arizona, served as chair of the Advisory Committee on Civil Rules until October 2015.

JUDGE JOHN G. KOELTL of the U.S. District Court for the Southern District of New York is a former member of the Advisory Committee.

CHILTON VARNER is a partner at King & Spalding, a past member of the Committee, and former president of the American College of Trial Lawyers.

JUDGE DEREK P. PULLAN of the Utah Fourth Judicial District is a proportionality pioneer who helped overhaul Utah’s civil procedure rules in 2011.

DEAN DAVID F. LEVI is the former chief judge of the U.S. District Court for the Eastern District of California and a past chair of the Advisory Committee on Civil Rules (2000–2003).

The views expressed by the panelists are their own and do not necessarily reflect those of the Advisory Committee, other organizations with which the panelists are affiliated, or the publisher.
Judge Campbell, since you were the chair of the Committee, could you briefly summarize the salient amendments? What brings us here?

Campbell: The current amendment proposals can be traced back to a conference that the Civil Rules Committee sponsored in 2010. About 200 lawyers, judges, and law professors came together at the Duke University Law School to evaluate the effectiveness of the Federal Rules of Civil Procedure. Papers were written in advance, studies were performed and two days of vigorous discussion were held.

The conclusions of the conference could be summarized as follows: the civil rules and civil litigation work reasonably well, but improvement is needed in four areas: increased cooperation among litigants, greater proportionality in discovery, earlier and more active case management by judges, and guidance on the preservation and loss of electronically stored information.

Judge Koeltl, you were very involved in this process. What would you add?

Koeltl: One of the important things about the Duke Conference was there was a shared view — among plaintiffs’ lawyers, defense lawyers, public interest lawyers, clients, academics — that there were some problems in the system. The system didn’t have to be completely revised with a whole new set of rules, but we could do better. Every statistical survey that was conducted showed a measurable level of dissatisfaction because the costs of litigation were disproportionate to what was involved in the litigation. The consequences were such that cases were settled that shouldn’t settle, or that settled for amounts that were inappropriate. That was a view shared by plaintiffs’ lawyers, defendants’ lawyers, and the other participants.

Ms. Varner, from your perspective as a leading trial lawyer and litigator, would you agree there is a fairly broad consensus?

Varner: I think so. Certainly, an organization with which I’m familiar, the American College of Trial Lawyers, did an exhaustive survey of its membership, which is drawn from civil and criminal attorneys, plaintiffs’ and defendants’ attorneys, public defenders, and government attorneys, and concluded that probably the biggest problem with modern civil litigation is its disproportionate cost that increasingly hampers access.

Judge Pullan, do these rules proposals resonate with you? Are these the same areas that law reformers and judges are concerned about in the state courts?

Pullan: I think those factors are the driving force behind change on the state level as well. There was a sense in Utah that the federal rules were designed for high-value, ‘Cadillac litigation,’ when what happens in state courts is more ‘VW litigation.’ We ought to re-examine why we have a system of rules that is one-size-fits-all. We certainly are interested in the proportionality question, and Utah has been operating under a proportionality framework since 2011. So we have probably more experience in the application of that concept than most other states.

Case management was a harder sell on the state side just because of the high volume of cases per judge. Active judicial case management would require a cultural shift in the judiciary. But I think that’s coming. We are rolling out a pilot project for early, active case management for Jan. 1. More and more judges are coming to understand that the earlier they are involved in managing cases the more time is saved on the back end. So I think those factors all drive what is happening in Utah and in many states across the country.

I suspect you’re seeing an uptick in pro se litigants as well, and so that introduces a whole new factor, in that you’ve got people who don’t know the rules at all. Would it be fair to say that one of the goals here was to make the rules somewhat more flexible? The Federal Judicial Center did a study several years ago and found that many cases have very little discovery. Is it fair to look on these rules as being equally useful in the case with limited discovery as they are in the most complex case?

Koeltl: From my perspective the answer to that is yes. The amendments should be viewed holistically. They’re meant to encourage the lawyers to cooperate at their initial conference. They’re geared to allow early delivery of requests for documents and other kinds of information so they can be discussed early. They’re geared to encourage the judge to meet with the lawyers early on at the initial conference. If all of those things happen, each case can be structured in the way that is most reasonable for that case.

Judge Koeltl, you took on the scope of discovery, which was an old topic and had been extremely controversial in my time on the Committee but here seemed less controversial. Among other changes, you eliminated from the scope language the sentence that stated ‘relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.’ You put this language back into the rule in a different place. Why this change?

Koeltl: We were persuaded by the history of that language that it was never intended to define the scope of discovery. That sentence goes back in some form to 1946. It was put in as an answer to an objection that you couldn’t get discovery if it wasn’t admissible in evidence. So, you couldn’t ask at a deposition a question if the answer was hearsay, because that wouldn’t be admissible at trial. Going back to 1946, the drafters said, no, that’s not a fair objection to discovery. But that salutary purpose
The concern about this particular language is part of a larger concern that this package of amendments may turn off the discovery spigot. That is not what this package of amendments is intended to do.

— Chilton Varner

morphed over the years to be misused as the definition of the scope of discovery. So if you could make an argument that the discovery was reasonably calculated to lead to the discovery of admissible evidence, lawyers and judges said, well, then it’s discoverable now. But the language was never intended to be a statement of the scope of discovery.

In 2000, the rule was amended to say ‘relevant’ information need not be admissible to be discoverable, and the drafters thought that would make it clear to people that it was not intended to be a definition of the scope of discovery. But we were told, and the research that was done for us indicated, that the sentence was still being used as a means to define the scope of discovery. If you could make an argument that the discovery you were looking for could lead to the discovery of admissible evidence, then that was within the scope of discovery. That was wrong. That was never the intent of that sentence. So we reformulated it to go back to its true meaning, and the final sentence of the amended rule will now say: ‘Information within the scope of discovery need not be admissible in evidence to be discoverable.’ So it’s clear that the lack of admissibility is not a fair objection. On the other hand, that doesn’t define the permissible scope of discovery.

Many lawyers thought this was the definition of scope. Has there been any pushback from the bar on that change?

Varner: There has been some consternation and concern amongst the bar. This particular sentence that was eliminated from the rule on scope of discovery may be a red flag that is symptomatic of other concerns that have been voiced about the package of amendments. I bet that anyone in this conversation could repeat by memory the language in the current rule, which will be moved elsewhere when the amendments become effective. Certainly that sentence has been quoted in every brief that has sought additional discovery, for as long as any of us can remember. It was a mantra that was part of the introduction to any discovery motion seeking additional discovery.

I think, however, the debate has provided more heat than light. The concern about this particular language is part of a larger concern that this package of amendments may turn off the discovery spigot. That is not what this package of amendments is intended to do. In particular, I think the relocation of the language, as well as the proportionality discussion in the new rules, just says we need to take a careful look at whether the initial discovery opens the spigot full blast or whether there may be something less that could still produce a sensible and just result. In some cases, I think there may be circumstances that say the full spigot is deserved; but that certainly is not true of all cases – by any means.

The amendments are valuable because they make us sit down at the start of the case and make some reasoned decisions as to where we start with discovery. In a number of cases that won’t be where that discovery ends; the scope of discovery will be amended and modified as the case progresses and the parties and the court learn more. But I believe that the amendments will prove useful for both sides, and I personally support the relocation of the language we have been talking about.

Let’s go to proportionality. Judge Pullan, you are one of the leading figures in what I’ll call the ‘proportionality movement,’ certainly in Utah where I think what you did is in part the model for the federal rules. What is it that you were trying to do with proportionality, and what do you see as the benefits and difficulties of that approach?

Pullan: A lot of John’s discussion about proportionality and what drove the changes happened in the state of Utah. The real problem is that with the amount of retained data growing exponentially, we can no longer work in a system that permits discovery of everything in every case. In 2008, the average end user may have owned about 100 GB of information. In 2012 that number was closer to 1,000 GB. That’s just one average end user. Obviously corporations retain vast amounts beyond that. What that led to was an environment where civil discovery was costing far too much and taking way too long.

If you stopped a person on the street and said, “How would you describe the civil justice system?”, I doubt they would say, “It’s just, speedy, and inexpensive.” What we were finding, as John said, is that cases with merit were not filed because they didn’t meet a rational cost-benefit analysis, and specious cases would settle to avoid the threat of a discovery bill. There was a general sense in the bar that we needed to do something to make our discovery efforts proportional to what was at stake in the litigation. It was a necessary change to restore balance and to achieve the objectives of Rule 1.
Judge Campbell, proportionality first appeared in the rules some 30 years ago and was supposed to respond to some of the litigation excesses of the 1970s. Over the years, through the amendment process, the Committee has tried to highlight proportionality to draw judges’ attention to it. Why does the Committee think it will have better success this time?

Campbell: Well, you’re right that the concept of proportionality has been in the rules since 1983. The current version of Rule 26(b)(2)(C)(iii) specifies when a court can limit discovery. It includes various proportionality factors that will be relocated under the new amendments. In addition, the current version of Rule 26(g) (1)(B)(iii) addresses a lawyer’s obligation when issuing or responding to discovery requests, and it too includes proportionality factors. But these proportionality factors seem to have been overlooked by most litigants and many judges. So we are moving the factors that are now in Rule 26(b)(2)(C)(iii) right into the scope of discovery in Rule 26(b)(1). The language which sets the scope of discovery will now require both that requested information be relevant to the claims and defenses and that it be proportional to the needs of the case considering these various identified factors. We think this will locate proportionality factors in a place where they cannot be missed, by judges or lawyers, because they will be right in the definition of what is discoverable in civil litigation.

Along with that we’re making some other changes, such as taking out the reference to information reasonably calculated to lead to the discovery of admissible evidence. So there will really be just one sentence in the Federal Rules of Civil Procedure that establishes the scope of discovery, and that sentence will now include both relevancy and proportionality.

Is there any concern, Judge Koeltl, that, with so much emphasis on proportionality, the cases that formerly went through the system without much muss or fuss will now get dragged into a debate over proportionality that maybe would not have occurred before?

Koeltl: I don’t think that will happen. In the cases where there has not been a problem of overuse of discovery or problems of cost and delay, there would be no reason to have a dispute over proportionality. Surveys indicated that the mean number of depositions in closed cases was around three for the defendants and the plaintiffs. You’ll have a lot of cases where the issue simply won’t come up. Where the issues do come up, there are holistic ways of dealing with it, with reasonable lawyers in conferences with judges at the initial Rule 16 conferences.

I’m optimistic that the rules will not cause disputes where there shouldn’t be disputes. Where there are problems of overuse or misuse of discovery, then there will be ways of dealing with it. For those who haven’t had the problems before, they shouldn’t have the problems in the future. For those many people who have experienced discovery problems in the past, they should find the rules as a salutary way of dealing with those problems.

Judge Pullan, I’d be interested in your views. I’m certain you were quite focused on this question in Utah.

Pullan: The same concern was raised in the Utah bar about whether we would have satellite litigation over the proportionality standard. We’ve been operating under a proportionality framework since November 2011, and we have not seen that happen.

That’s important information to have, and very helpful. Now let’s talk about the proportionality factors. They were reordered; one was added. Ms. Varner, how does it strike you now? Are the first factors the most important?

Varner: My personal reaction when I looked at the reordering was that I thought it was appropriate to move to the end that language about whether the burden or expense of the proposed discovery outweighs its likely benefit, because that’s probably in shorthand the best description of proportionality’s goal. But I think the first five factors appearing before that language at least give the court and the parties some issues to talk about. They raise some questions that should be addressed, and they will probably help provide a roadmap for how to reach the burden-benefit determination that’s described in that sixth factor. So I approve of the relocation.

I think the proposed rule represents a clarification, rather than a sweeping sea change. The fact that the proportionality factors bear significant resemblance to what was already in the rule beforehand is useful in dealing with some of the pushback about these amendments representing major changes that favor one side or the other. I look at these factors as our best effort to come up with a system whereby we try to reduce cost and encourage efficiency. I don’t think any one of the factors is more important than any other. Certainly not all cases will call for application of all the factors. But this sets out a reasoned way for going about trying to determine what is proportional, particularly at the outset of the case when you may not have all the information and the claims may not yet be clearly defined.

Judge Campbell, was it envisioned that judges would go through each one of the factors in every case? Or can they consider that this is helpful guidance — that one factor might be dispositive and they wouldn’t necessarily discuss the others?

Campbell: It is not expected that judges would need to go through each factor in making decisions, or that the parties will need to do so in making arguments. This is very much intended to be, at least from my perspective, in the form of helpful guidance. There may be cases where some of the factors are simply not relevant. I think most of the factors will be relevant most of the time, and parties will have to think about them, but we
are not suggesting that all factors will need to be considered in every case, nor are we suggesting that they appear in some order of priority such that the first is more important than the fourth. This is really intended to inform the discussion that we hope will occur between parties and judges when scope of discovery needs to be decided.

The Committee added a new factor, and I gather this was your creation, Judge Pullan, and that is the parties’ relative access to relevant information. Could you talk about that?

Pullan: One concern that was raised in Utah is that there are certain case types where one side has access to most if not all of the information related to the case. I think a good example of that is a case involving wrongful termination of an employee. Product liability cases also can be that way. On the state level, certainly divorce actions can sometimes be like that. That “relative access to information” provision was intended to address this problem. Utah had adopted a framework in which discovery requests were limited based on the amount in controversy. The Rules Committee felt that those limits would work an injustice where a party lacked access to relevant information about the case.

So that would be applied by a court to perhaps liberalize discovery for the requestor, in consideration of the fact that one party is not in a position to consult its own files because all the information is with the other side?

Campbell: That’s right. We heard from a lot of plaintiff and employment litigation lawyers expressing just that view. They were concerned that if all the discovery is flowing in one direction, then the defense will argue that that fact alone shows the discovery is disproportionate. This provision is intended to rebuff that notion. In some cases, one side possesses most of the relevant information and necessarily will do most of the responding to discovery. That fact does not make the discovery disproportionate.

Certainly if a requesting party can’t show that the discovery has a likely benefit, can’t show that it’s reasonable or important, or if there are other sources that are less expensive, then that request is not likely to meet the proportionality standard.

— Derek Pullan

How about the parties’ resources? That was there already, and it was a somewhat controversial position. How does the Committee think that will work?

Koeltl: You can conceive of situations where the burden of the discovery will be unusually severe because the person, whether individually or corporate, lacks resources, and where the discovery ends up being unusually burdensome. You can think about financial resources, you can think about technological resources where there are demands for information that will require technological resources that a party may not have.

The public entities told us that they were concerned about their own resources, because even though it’s often thought that public entities have unlimited resources, in fact they have limited resources, and the number of requests for information that they get can be quite extensive. So you have to take into account what their resources really are to be able to respond to a request.

Could it cut the other way, too? If you have very considerable resources and you’re asking for a lot of discovery, the judge might say, ‘You have the resources to get this information in another way.’ Or, we should talk about cost shifting or cost sharing?

Koeltl: Well, there’s always the possibility of cost shifting to the extent that the information that’s being sought is not really critical or key information, so that the assumption that the party producing the information will pay for it may not apply.

A judge could well say, ‘Look, if the requestor is really interested in that information – I don’t think that information is really critical to the case – but if you really want it and you have the resources you can pay to get that information.’ On the other side, a party who has limited resources can say, ‘I don’t have the resources to get all that information. Do you want to come and inspect my files?’ – rather than produce. You can do that.

Judge Campbell, do you want to address cost shifting? This is the first time the rules explicitly discuss cost shifting, even though the concept has been there for some time.

Campbell: I think I can state with absolute confidence that the Committee does not view the amendment to Rule 26(c)(1)(B), which will make the possibility of cost allocation explicit in the rule, as working any sort of significant change in how discovery is to proceed in civil cases.

The Supreme Court held in 1978 that courts could use Rule 26(c) to shift discovery costs where appropriate. The amendment merely makes that authority explicit, and the Committee note makes clear that this is
not intended to signal some sort of change to a requestor-pays approach to discovery. It's merely to bring the rule into conformity with what the Supreme Court has said for a long time. In virtually all cases, if discovery is relevant and proportional to the needs of the case, the party producing the information will pay for the cost of production. The Committee note says exactly that. In order to invoke this cost-shifting language, or any of the other protections that exist in Rule 26(c)(1), a party must satisfy the Rule 26(c)(1) requirement of showing good cause. Cost shifting is now and should be in the future a rare occurrence.

I'd like to go back to proportionality. At the beginning of a case the parties may be uncertain about what the discovery is or what the dispositive issues are going to be. Are there any burden of proof defaults that will give guidance to the court when the information is unclear or when a judge says, “Gee, there’s just not all that much here.” Does one side still have the burden of proof as before? Or do these proportionality rules change that? Judge Pullan, your thoughts?

Pullan: Utah adopted a model in which the requesting party always has the burden of demonstrating proportionality. When I testified before the federal rules Committee in Arizona, I was asked about that decision. The proposed federal rule did not go that far. But, in practical effect, I think the outcome ultimately is the same: The requirement that the requesting party show proportionality really is a statement about which party goes first when the issue of proportionality arises. Certainly if a requesting party can’t show that the discovery has a likely benefit, can’t show that it’s reasonable or important, or if there are other sources that are less expensive, then that request is not likely to meet the proportionality standard. The responding party is going to be in a better position to talk about burden and expense, other sources of information, perhaps relative access. But in the end a judge has to decide, “Does this request meet the proportionality standard under the rule?” So I think the burden of proof question – Utah placed it squarely on the shoulders of the requesting party – is really just a reminder: Ultimately, parties need to show that what they are asking for is proportional to what is at stake in the litigation.

How did the Rules Committee handle this question of burden?

Campbell: We addressed it specifically in the Committee note. I’ll just read one sentence of that note: “Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.” The note goes on to say that it’s a collective discussion that needs to occur as to whether or not discovery is proportional, and that various parties will have information probative of the various factors that go into that decision.

Koeltl: What you said is exactly right. The advisory Committee note makes it clear that if there is a dispute with respect to proportionality and it comes before the court, the parties’ responsibilities would be the same as they have been since 1983. So it was explicit that the changes in the rule were not intended to change the burdens in the discovery dispute. Normally the party seeking the discovery would have to make the showing of why the information is relevant, and if a party objects to the discovery on the grounds that it’s overly burdensome, that party will have to show that it’s overly burdensome. Then, ultimately it will be for the court to make the decision. But that isn’t changed from where it’s been since 1983.

I think that’s very helpful. Ms. Varner, do you anticipate any confusion about this in the bar?

Varner: I think it’s good to have had a lot of robust discussion about proportionality. It’s good that many different views have been aired. But I bet that once the package of amendments becomes effective, it won’t take federal judges very long to become comfortable with the proportionality analysis. The factors have been there when previous disputes erupted. The factors have been considered by courts before. I think it’s probably going to work out better than a lot of the critics have predicted.

Let’s talk about some of the case-management techniques. When I was on the Committee, we thought Evidence Rule 502 might be the most important amendment that any of us had worked on, that it might really change litigation and make it much more efficient. But it doesn’t seem to have had that effect.

Varner: I’m happy to speak from the point of view of the practitioner on that one. I think that Rule 502 offers immense potential advantages in efficiency and cost savings. But you’re right, David, that the claw-back provisions initially met with a rather chilly reception. I’ve discussed this with people on the Rules Committee, and I think the main concern amongst lawyers was this: We appreciate that you’re giving us a chance to claw back any inadvertently produced information, but we don’t want that information to be seen by the adversary or potentially by the court in the first place. So all the manual, meticulous, expensive document-by-document reviews continued, even after the adoption of Rule 502.

Now having said that, I would say that I have seen a softening if not a breaking of the ice more recently, and certainly in the mass-tort area where I do a lot of my work, a Rule 502 provision is becoming more and more routine as part of the initial Rule 16 order. I think, however, a number of judges still remain wary, if not ignorant, of the rule. I think they worry about satellite litigation, so perhaps the rule has not been involved as often as hoped.

But I am seeing an increase in the use of the rule. I think the potential for Rule 502...
502 remains great. As a practical matter, its application still remains limited.

Perhaps there’s some hope there.

Now, what about other management techniques? The rule is very favorable to active management — probably mostly in the more time-consuming cases but not exclusively. Some judges make themselves available for informal telephonic discovery conferences that can be held on shortened time. How does the bar view that kind of management and availability?

Varner: I think the bar agrees that this is a great case-management tool. I first encountered it maybe 20 years ago, when Judge Stanley Marcus, now on the 11th Circuit Court of Appeals, was a district court judge in the Southern District of Florida. He had a standing announcement to all who appeared before him that he was available Wednesday mornings at 8 o’clock by phone to discuss any discovery dispute before a motion would be filed. It worked like a charm. I talked to other practitioners, and I don’t see a real difference between the plaintiffs’ and the defendants’ bar on this question. Both sides believe that it is the exception for a discovery dispute to be decided on “the law.” I think such motions are more fact-sensitive, and a conference gives the judge an opportunity to try to figure out what he or she needs to know in order to make a good ruling on that dispute.

Are any of our judges here making themselves available for that kind of an informal telephone conference in advance of a motion?

Campbell: I do it in all of my cases. I have a two- or three-sentence description of the issue that my judicial assistant types up for me when she gets the call from the parties to set the conference call. I’ll get on the phone with the parties — on the record — and the issue usually will be resolved in about 30 minutes. Nobody will have spent any time briefing the issue, I won’t have to spend time reading briefs or writing an order, and my prompt decision will allow the case to move forward on schedule. I think it’s far and away the best approach to resolving a discovery dispute.

There’s a small percentage of disputes that require briefing, and when they do I require the parties to file simultaneous memoranda within three or four days of the call, addressing the issues that have been identified in the call, and then I rule. It not only allows discovery issues to be resolved quickly and cases to stay on schedule, but also acquaints me with the case more fully. So when I get to the summary judgment stage or when I get to the trial, I’m generally better informed about the issues in the case and the parties and even how the lawyers have behaved — all of which makes me a better trial judge.

Koeltl: We have a local rule in the Southern District of New York that before bringing a discovery motion, not only do you have to have a meet-and-confer, as required under the federal rules, but you have to ask for a pre-motion conference before the judge. We don’t get discovery motions without the lawyers having asked for a pre-motion conference. Some of the lawyers give us letters; some don’t. I do those conferences, and I’m available during depositions for telephone calls.

The pre-motion conference has reduced the number of discovery motions that we have in the district to a very, very small number. I can usually dispose of the dispute either in court, at the conference, or over the phone. And that’s it. I have a Rule 16 conference in almost every case — usually personally, sometimes by telephone — and I issue the scheduling order. Sometimes the parties ask, “Judge, if we have discovery disputes, should we take them to the magistrate judge?” And I say no. I really prefer that you bring them to me because I like to see who’s being reasonable and who’s not being reasonable. As a result of that, often people find they can act reasonably without having to bring the dispute to me. So it’s an enormous benefit to require the pre-motion conference.

Pullan: We don’t have a pre-motion conference requirement. But in connection with Utah’s proportionality rule change we adopted a requirement that any discovery disputes be presented in the form of a “statement of discovery issues.” This requirement is now in Utah Rule 37. Whenever there’s a dispute regarding discovery, one side files a four-page memo. Seven days later the other side files a four-page objection. Most judges decide these disputes by telephone, and parties get an answer within generally 10 days to two weeks.

This expedited process was intended to address the problem of discovery grinding to a halt every time someone filed a motion to compel. Under the previous rules, by the time you got the issue fully briefed and argued two months had passed. The new Rule 37 process has been the death knell of the motion to compel in Utah. I don’t see them anymore, and I think most Utah judges would agree with that. We are resolving discovery disputes four months earlier in the process of litigation than we were just three years ago. That has been confirmed empirically in a study done by the National Center for State Courts, called Civil Justice Initiative, Utah: Impact of Revisions to Rule 26 on Discovery Practice in the Utah District Court.

I agree with John: The mere fact that a judge is readily available by telephone to resolve discovery disputes means that attorneys and parties are no longer posturing on these questions and taking unreasonable positions.

May I congratulate John Rabiej, our Judicial Center director here at Duke, for his work with judges and lawyers after the Duke Conference. He convened a group to start working on guidelines and best practices, and one of the practices they suggest is that where there’s any doubt about the discovery or it’s unclear how far it should go, the party should focus on the information that is most promising. Begin there, and if they need more after that, they’ll have a better idea of
what they need and the court will be better informed. How does that strike you as a best practice, Judge Pullan?

Pullan: I think there’s real wisdom in that process. It’s essentially the idea that we ought to capture low-hanging fruit first, at less cost. The fear that low-hanging fruit may be all I get should not be a concern because subsequent requests will be more narrowly tailored and more likely to comply with the proportionality framework. The fear that there will always be a second and third round of discovery is similarly unfounded because subsequent requests cannot be cumulative or unduly burdensome. So both sides will continue to benefit from the proportionality framework but also garner the cost-savings of focusing on that low-hanging fruit first.

Campbell: I agree with what Derek has said. I also want to emphasize that focusing everyone on the low-hanging fruit first will work only if the parties are assured that they can get the higher fruit later if it is necessary for the case.

Koeltl: I agree also. I just want to add an endorsement for the discovery protocols for employment discrimination cases, which were developed over the course of a year with input from both plaintiffs’ and defendants’ lawyers. They provide for core discovery at the beginning of the case. They were negotiated by very experienced lawyers for plaintiffs and defendants to arrive at a group of discovery requests at the beginning of the litigation so that parties on both sides will produce — within 30 days of the time that the defendant has made an answer or motion to dismiss — the core discovery that reasonable lawyers know they will have to produce in any event. The result is that the parties have the most important discovery early in the case, and they can analyze it and determine whether this is a case that should be settled early and what additional discovery they need. If it’s a case that they decide should go to trial, then they can focus subsequent discovery.

Ms. Varner, Rule 37(e) is very complicated. We won’t try to do it justice today. One question: The rule tries to provide a safer safe harbor where electronically stored information is lost not due to any malicious intent. Does the rule help in any way at the beginning of the case when you have to advise the client on the nature of the litigation hold for electronic information?

Varner: I think the amendment does clarify the situation. There was a circuit court split on this question as well, so I think the work of the Committee is valuable in offering clearer guidance. Only time will tell whether the “intent to deprive the adversary” is the right prescription, but I support that as an improvement over the prior rule.

I think in advising clients, there will be a real value to the whole proportionality piece. You can advise clients that it would be appropriate for them, when trying to determine what materials ought to be maintained and preserved, to go through a proportionality diagnosis to try to measure the uniqueness and the importance of the information against the burden and expense of retaining it. For a corporation in today’s environment, as Judge Pullan noted earlier, the amount of information generated on a daily basis is staggering. The expense of retaining everything once there is a threat of litigation or litigation in fact, is even more chilling. So this is a material, practical problem for litigants, whether it be the U.S. government or a large corporation. You have to make those decisions early on. I applaud the clarification. We’ll now have to go to work to see what effect it has.

Judge Campbell, the Committee is saying goodbye to the forms. Many are venerable, but many have not been kept up to date for a long time and are anachronisms. I think the Committee felt it was just too big a job to try to keep the forms up to date and to take the forms that were out of date and rewrite them entirely. But we’re in an era where we have a lot of pro se litigants. Will there be other ways in which pro se litigants can get access to forms and boilerplates that will be helpful to them as they try to litigate in federal court?

Campbell: Yes. The Administrative Office of the United States Courts has an existing set of forms that are available online and available through links on most of the district court websites. That set of forms is actually going to be expanded at the request of the Rules Committee, and some excellent judges have been added to the group to develop those forms, including Judge Koeltl. There are also many local court websites that have forms, particularly for those cases that often have pro se litigants, and there are lots of commercially available forms that are generally accessible without cost in local libraries or on the Internet.
But the reality is that the forms that now are attached to the civil rules haven’t been used by pro se litigants. In 12 years on the bench I have never seen anybody use any of the forms attached to the civil rules other than those required for waiver of service of process. Before we decided to abolish the forms, we talked to not only lawyers and law firms, but also public interest litigation firms, legal aid offices – and we could not find anybody that used the forms. They are simply outdated, as you note, David. We don’t think that this change will inhibit any litigant moving forward in federal court.

Judge Koeltl, are there benefits to taking the forms out of the enabling-act process and maybe permitting a more nimble process for generating forms and keeping them up to date?

Koeltl: Sure. The forms that are attached to the federal rules now have to go through the Rules Enabling Act process, which generally takes about five years is how long it takes these amendments to get through. So it would be a long and complicated process to amend the forms that are attached to the rules. The Administrative Office has the ability to publish new forms quickly, and the forms we are thinking about include forms that are actually much more used by pro se litigants than the forms attached to the federal rules now. For example, there are no model forms for employment discrimination cases, civil rights cases under Section 1983, or under the Bivens decision. So the forms that would be most helpful to pro se litigants are simply not there. We hope that the Administrative Office will now be publishing those kinds of forms.

There are some people, mainly academics, who were opposed to the removal of the forms, I think on the hope that the Committee would use the process to revise or overrule the Supreme Court’s decisions in Iqbal and Twombly. If the Committee were interested in amending the rules having to do with what it takes to state a claim and certain kinds of claims, I take it the Committee can still do that if it thought that was wise or appropriate?

Campbell: I agree with that. Anybody familiar with the process we went through in deciding to eliminate the forms knows that it was never the intent of the Committee to have the elimination of the forms somehow signal a change in pleading standards or an acquiescence in Iqbal and Twombly. It just didn’t have anything to do with the Rule 8 and Rule 9 pleading requirements. In fact, the Committee note to the Rule 84 abrogation will say the abrogation of forms is not intended to signal any change in pleading practice or pleading requirements.

One last question: Here we are, you’ve done this marvelous, big piece of work. What’s left to be done? If you could drive a further reform, what would it be? Or have we achieved perfection?

Campbell: I don’t think any of us assumes we achieved perfection. As Chilton suggested a minute ago, this is a work in process. These amendments will need to be adjusted as we learn more from their application. One of the things the Civil Rules Committee and the Standing Committee chaired by Judge Jeffrey Sutton are now looking into is the creation of pilot projects that will test other innovations designed to make litigation more efficient. That will include projects looking at local district programs that enhance disclosures required under Rule 26 up front, that would set shorter schedules for getting cases to trial, and that would consider channeling cases depending on their complexity into more complex or simpler procedures.

The thought is that if we can get district courts to experiment with changes we’ll have more information with which to make a proposal, in addition to the very valuable experience that comes out of the states like Utah. The Committee is very much interested in continuing to look for improvements.

Koeltl: The most important thing to me is the implementation of these rule amendments. They’re certainly not the end of the process. Proportionality has been in the rules since 1983 but hasn’t been followed. One of the purposes behind putting all of these rule amendments together was to let judges and lawyers know that something important has happened, and they really should attempt to understand what these changes are. So there’s a process of judicial education and legal education for the bar to have people understand the way in which all of these amendments work and what they’re intended to accomplish. The amendments will only be as good as the implementation. If I had my way, a lot of effort will be placed on education for judges and continuing legal education for the bar.

Pullan: In the same way that this movement toward proportionality requires a cultural change in the way members of the bar litigate civil cases, a cultural change within the judiciary is also afoot. We must persuade judges that early and active case management is an infinitely more efficient way to process their civil litigation calendars. Changing entrenched practices takes time and consistent effort. But I see that happening in Utah. Pilot projects focused on case management can provide persuasive evidence for reluctant state jurists.

Varner: I think the Committee has bitten off about as much as we can chew for now. I agree that the implementation process is going to be critical and deserves the support and engagement of the bar. The Committee has done terrific work on a complex project. I say congratulations, and we’ll look forward to the culture shift that Judge Pullan talks about.
Rule 37(e)

THE NEW LAW OF ELECTRONIC SPOLIATION

By Gregory P. Joseph

Prior to the adoption of this rule, the Circuits had split on the question whether negligence in the destruction of relevant evidence was sufficient, in at least some circumstances, to support the sanction of an adverse inference. The First, Second, Sixth, Ninth, and, in at least one circumstance, the D.C. Circuits had all concluded that negligence could be sufficient.\(^1\) As discussed below, Rule 37(e) changes this result when the evidence lost consists exclusively of electronically stored information ("ESI"), but does not change the law as to tangible evidence.

Moreover, all Circuits required a showing of prejudice before an adverse inference instruction could issue as a sanction for loss of evidence. Rule 37(e) also changes this result, requiring no showing of prejudice as a prerequisite to issuance of an adverse instruction.

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EFFECTIVE DEC. 1, 2015, FEDERAL RULE OF CIVIL PROCEDURE 37(e) WILL CHANGE DRAMATICALLY THE LAW OF SPOLIATION.

\(^1\) See, e.g., In re Boart Longyear Co., Inc. Litigation, 690 F.3d 1292 (D.C. Cir. 2012).
inference instruction if intent to deprive the adverse party of the lost evidence is established.

Following is a discussion of the principal aspects of the Rule 37(e).

INTRODUCTORY CLAUSE

Electronic vs. Tangible Evidence (“If Electronically Stored Information”) Rule 37(e) applies only to ESI. It does not apply to tangible evidence. This distinction is critical. To the extent the rule changes the law of spoliation (as it does in several Circuits), different rules will apply to spoliation of electronic, as opposed to tangible, evidence. This has sometimes outcome-determinative impact.

Intent Requirement. Prior to Rule 37(e), five Circuits (First, Second, Sixth, Ninth, and sometimes D.C.) allowed an adverse inference instruction sanction absent an intent to spoliate. Rule 37(e) requires intent before an adverse inference or certain other specified sanctions may issue. But, while the Rule significantly restricts the availability of certain harsh sanctions absent intent, other severe sanctions remain at the court’s disposal.

Rule vs. Inherent Power. The law of spoliation developed as an application of the inherent power of the court. Within its scope, this rule displaces inherent power. Therefore, to the extent that two branches of spoliation law apply to ESI vs. tangible evidence after Dec. 1, 2015, they derive from different sources of authority and in several Circuits have different requirements.

evidence is obtained from a third party, then no sanctions or curative measures are awardable under Rule 37(e) because no evidence “is lost,” a prerequisite to judicial action under the first sentence of the Rule. There may be sanctions available under other powers, such as Rule 37(b) if the misconduct violated a discovery order; Rule 26(g) if the spoliator served a false discovery response in the course of its attempted spoliation; 28 U.S.C. § 1927 if the misconduct unreasonably and vexatiously multiplied the proceedings (as by causing the issuance of a subpoena on the third party that would not otherwise have been necessary); and the inherent power of the court for the bad faith litigation misconduct in the course of the attempted spoliation. But these sanctions would presumably not include the sanctions listed in Rule 37(e)(2)(A)–(C).

If the same party were to set out to destroy tangible evidence with the same malign intent but the evidence were to survive, the party’s unsuccessful spoliation would be subject to sanction under the inherent power of the court — and perhaps other sanctions powers — without any limitation imposed by Rule 37(e). Just as attempted but unsuccessful subornation of perjury evidences consciousness of guilt or culpability, intentional but unsuccessful spoliation may evidence consciousness of guilt or culpability and in appropriate circumstances may legitimately give rise to an adverse inference instruction, dismissal, or entry of a default judgment.

Consider now the intentional but incompetent spoliator who sets out to destroy all tangible and electronic evidence, but the evidence is restored or replaced, as by service of a subpoena on a third party. No curative measures or sanctions are available for spoliation of the electronic evidence because no ESI “is lost,” as required by the introductory language of Rule 37(e). For the attempted destruction of tangible evidence, however, the Rule does not preclude issuance of harsh sanctions under the inherent power of the court or other sanctions powers. This can be viewed as an incongruous result where the tangible evidence is merely a print-
out of the ESI. There is little reason, however, to protect the malevolent spoliator from sanctions that the court, in its discretion, deems appropriate in the circumstances.

“SHOULD HAVE BEEN PRESERVED” Rule 37(e) does not set forth a standard for preservation. It does not alter existing federal law concerning whether evidence should have been preserved or when the duty to preserve attached. This is determined by the common law test: Was litigation pending or reasonably foreseeable? In the words of the Advisory Committee Note, “Rule 37(e) is based on the common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve attaches.” Nor does the rule tell you when that duty arose.

Independent of the common-law obligation, statutes, rules, internal policies, or other standards may impose preservation obligations. Is disregard of an independent obligation to preserve enough to warrant a spoliation sanction? The Advisory Committee Note says this is to be determined on a case-by-case basis (“The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and . . . does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.”).

There are multiple ways that disregard of an independent obligation to preserve may be relevant to a spoliation decision under Rule 37(e).

First, disregard of the independent obligation may give rise to an inference of intentionality, if, for example, it can be shown that the spoliating party was aware of the obligation and customarily honored it.

Second, if a party fails to preserve evidence in disregard of an independent obligation and the adverse party harmed by the loss of evidence is within the class of persons protected by the statute, rule, or other standard imposing that obligation, that fact may lead the court to conclude that litigation by the injured person was reasonably foreseeable and spoliation sanctions are therefore appropriate.

“IS LOST” Rule 37(e) curative measures or sanctions are available only if ESI that should have been preserved “is lost.” The Advisory Committee Note provides that: “Because electronically stored information often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere.” This states the unremarkable proposition that loss from one location causes no prejudice if the ESI can be found elsewhere (prejudice is a prerequisite for curative measures under subdivision (e) (1)).

But the more important point is that information that is “found elsewhere” is not “lost” at all — because this precludes any curative measures or sanctions under either subdivision (e)(1) or (e)(2). This accords both with common sense and with prior law. See, e.g., Carlson v. Fewins, No. 13-2643, 2015 U.S. App. LEXIS 16149 (6th Cir. Sept. 11, 2015) (no spoliation where only backups of 911 recordings were destroyed and other copies remained).

As noted below, the rule also precludes any curative measures or sanctions if the ESI can “be restored or replaced through additional discovery.” Given the rule’s structure, ESI that can be restored would appear to be “lost,” even if only temporarily lost. Once restored, it is no longer “lost.” But “replaced” information remains “lost,” as replacement describes substitution, not identity (Dictionary.com definition of “Replace: 1. to . . . substitute for (a person or thing); 2. to provide a substitute or equivalent in the place of.”).

“A PARTY” Rule 37(e) applies only to ESI “lost because a party failed to take reasonable steps to preserve it.” Thus, the rule applies only to parties. The rule does not by its terms apply to spoliation by a relevant nonparty — or sanctions to be imposed on a party as a result of spoliation by a third party. If the third party is the agent or otherwise under

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THE TEXT OF RULE 37(e)

Effective Dec. 1, 2015, Federal Rule of Civil Procedure 37(e) provides:

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

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.
the control of the party, logic dictates that the party is the actor within the meaning of Rule 37(e) and the rule therefore authorizes the imposition of curative measures or sanctions. This is consistent with prior spoliation case law, under which a party’s responsibility for third-party spoliation is a function of the party’s “control” over the spoliating third party. “Control” is often, but not always, determined by the breadth with which the phrase “possession, custody and control” in Rule 34 is construed.\footnote{For example, the defendant in \textit{Gordon Partners v. Blumenthal (In re NTL, Inc. Sec. Litig.)}, 244 F.R.D. 179 (S.D.N.Y. 2007), did not have physical custody of the ESI that was lost, but it was subjected to an adverse inference because that information had been in its control years earlier. It then entered bankruptcy and relinquished control over the ESI to a new entity formed in the bankruptcy process. This new entity — which had control of the documents but was not a defendant — failed to preserve the ESI. A securities fraud class action had been commenced before NTL, Inc., went into bankruptcy. Two entities emerged — the liability for the lawsuit was left with one of them (NTL Europe, the defendant), but all documents and ESI went to the other (New NTL).} The Court found that defendant NTL Europe “failed to take reasonable steps to preserve” the ESI that is lost. This is an objective test. Subjective states of mind such as good faith or intentionality (prevailing tests for adverse inference instructions under preexisting law) are not relevant as to this threshold determination.\footnote{An appellate court held that document destruction was not reasonably expected of a defendant, an isolated omission, and not reasonably expected of a defendant, an isolated omission, and not a “plan” or “scheme” that “constitute an inadequate litigation disposition.” See, e.g., \textit{Resendez v. Smith’s Food & Drug Ctrs., Inc.}, No. 2:15-cv-00061-JAD-PAL, 2015 U.S. Dist. LEXIS 34037, *18–*19 (D. Nev. Mar. 16, 2015) (adverse inference instruction for destruction of video evidence in slip-and-fall case: “I . . . categorically reject [Defendant] Smith’s arguments in its written opposition that spoliation sanctions are not required because this is not a perfect world and employees do not always follow policies. A failure to follow internal policies and procedures does not, in and of itself, amount to spoliation of evidence. However, . . . Smith’s was on notice that Plaintiff had retained counsel to pursue a claim for damages resulting from personal injuries she sustained in the store . . . ten days after the accident. . . . Smith’s arguments that this is not a perfect world and employees do not always follow policy represent a cavalier disregard of its legal preservation duties.”).} Subdivision (e)(2) applies a subjective test — intentionality — as a prerequisite to imposing any of four specific sanctions (presuming the lost information was unfavorable to the spoliator; issuing an adverse inference instruction; or entering a default judgment or dismissal), but the subjective state of mind identified in subdivision (e)(2) is not reached unless, in the first instance, the party failed to satisfy the objective test of taking reasonable steps to preserve. There is no need to inquire into state of mind in conducting the objective test of determining whether “reasonable steps to preserve” were taken.

\textbf{“REASONABLE STEPS”}

Curative measures or sanctions can be imposed under Rule 37(e)(1) or (2) only if a party “failed to take reasonable steps to preserve” the ESI that is lost. This is an objective test. Subjective states of mind such as good faith or intentionality (prevailing tests for adverse inference instructions under preexisting law) are not relevant as to this threshold determination. A higher degree of awareness of preservation obligations is reasonably expected of sophisticated parties.

Because the rule requires only “reasonable steps to preserve,” curative measures or sanctions may not be warranted, the Advisory Committee Note observes, if the ESI “is not in the party’s control” or is “destroyed by events outside the party’s control” (e.g., a flood). The Note cautions, however, that the court may “need to assess the extent to which a party knew of and protected against” the risk of loss of the evidence.

As is always the case, what is “reasonable” is a fact-specific determination. The Advisory Committee Note emphasizes that “proportionality” should be considered in evaluating the reasonableness of preservation efforts, and that the “court should be sensitive to party resources.”

\textbf{“CANNOT BE RESTORED OR REPLACED”}

No curative measures or sanctions may issue under Rule 37(e) if the ESI can be “restored or replaced through additional discovery.”
“Restored” connotes replication of the original (Dictionary.com: “1. to bring back into existence, use, or the like”). The Advisory Committee Note refers to the possibility of the court’s ordering production of otherwise inaccessible (e.g., backup) data.

“Replaced” suggests an alternative that produces equivalent information (Dictionary.com: “1. to . . . substitute for (a person or thing); 2. to provide a substitute or equivalent in the place of”). Preexisting case law recognizes that the existence of alternate equivalent evidence may overcome any prejudice or need for sanctions. See, e.g., Vistan Corp. v. Fadei USA, Inc., 547 F. App’x 986 (Fed. Cir. 2013) (destruction of one of many identical, allegedly infringing machines after adverse party examined it caused no prejudice and did not constitute actionable spoliation).

The Advisory Committee “emphasize[s] that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information. . . . [S]ubstantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.” This is part and parcel of the proportionality emphasis of the 2015 discovery rules amendments, which added the concept of proportionality to the scope of discoverability in Rule 26(b)(1).

**SUBDIVISION (e)(1) PREJUDICE**

Before any curative measures may be ordered under subdivision (e)(1), the court must find “prejudice to another party from loss of the [electronically stored] information.” Prejudice has always been a factor in assessing whether spoliation sanctions are appropriate. See, e.g., McLeod v. Wal-Mart Stores, Inc., 515 F. App’x 806, 808 (11th Cir. 2013) (“In determining whether spoliation sanctions are warranted, courts consider five factors: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the spoliating party acted in good or bad faith; and (5) the potential for abuse if the evidence is not excluded.”) (internal quotation marks and brackets deleted); McCauley v. Bd. of Com’rs for Bernalillo Cty., 603 F. App’x 730 (10th Cir. 2015) (no abuse of discretion in denying spoliation sanction absent demonstration of sufficient prejudice).

**BURDEN OF PROOF ON THE ISSUE OF PREJUDICE**

The degree of prejudice is a function in part of the importance of the lost information in the litigation. Determining the importance of the information may be difficult given that the information is by definition unavailable. Therefore, whether the burden of proof is placed on the proponent or opponent of sanctions is an important, potentially dispositive issue — and one that Rule 37(e) does not address. “The rule does not place a burden of proving or disproving prejudice on one party or the other,” leaving “judges with discretion to determine how best to assess prejudice in particular cases” (Advisory Committee Note to Rule 37(e)).

The questions of burden of proof and how to determine whether the loss of evidence was prejudicial are not new. The courts have developed a number of approaches that assist in determining prejudice — including:

- the more intentional the destruction of the evidence, the more reliable the inference that the evidence would have been harmful to the spoliator’s position;
- destruction of evidence during the pendency of litigation may alone suffice to support the inference that the evidence was destroyed because it was harmful; and
- the more central to the case the spoliated evidence is (e.g., the product at issue in a products liability action) — the more prejudicial its loss is often deemed to be.

**“MEASURES NO GREATER THAN NECESSARY TO CURE THE PREJUDICE”**

Subdivision (e)(1) provides that, upon finding prejudice, the court “may order measures no greater than necessary to cure the prejudice.” This is akin to the least-severe-sanction requirement of Rule 11(c)(4).9

There is one clear limitation on curative measures under subdivision (e)(1). They cannot include the four severe sanctions imposable only on a finding of intent under subdivision (e) (2) — namely, presuming that the lost information was unfavorable to the non-preserving party; issuing a mandatory or permissive adverse inference instruction; or dismissing the action or entering a default judgment.

That, however, does not mean that serious sanctions may not be imposed as curative measures under subdivision (e)(1), including, for example:

- directing that designated facts be taken as established for purposes of the action;
- prohibiting the nonpreserving party from supporting or opposing designated claims or defenses;
- barring the nonpreserving party from introducing designated matters in evidence;
- striking pleadings;
allowing the introduction of evidence concerning the failure to preserve (see, e.g., Dicker v. GE Healthcare Inc., 770 F.3d 378 (6th Cir. 2014) (declining to impose punitive sanctions or issue adverse inference instruction but permitting testimony from sanctions hearing to be introduced at trial); Dalcour v. City of Lakewood, 492 F. App’x 924 (10th Cir. 2012) (allowing witnesses to be questioned about missing evidence));

• allowing argument on the failure to preserve;

• giving jury instructions other than adverse inference instructions “to assist [the jury] in its evaluation of” testimony or argument concerning the failure to preserve (Advisory Committee Note to Rule 37(e)).

Most of these are identified in the Advisory Committee Note to Rule 37(e), which also cautions that “[c]are must be taken . . . to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2).”

SUBDIVISION (e)(2)
INTENT TO DEPRIVE ANOTHER PARTY OF THE INFORMATION’S USE
Four of the most severe sanctions — presuming that the lost information was unfavorable to the nonpreserving party; issuing a mandatory or permissive adverse inference instruction; dismissal of the action; or entering a default judgment — can be imposed only “upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation” (Rule 37(e)(2)).

Subdivision (e)(2) therefore changes the law in several Circuits that allowed the issuance of adverse inference instructions arising from the loss of ESI due to negligence (the First, Second, Sixth, Ninth and sometimes the D.C. Circuit — see note 1).

The law is changed in these Circuits only insofar as the failure to preserve ESI is concerned — Rule 37(e) has no effect on these Circuits’ spoliation law as it pertains to tangible evidence.

JUDGE OR JURY ISSUE
A fundamental question under subdivision (e)(2) is whether the determination of intent is a question for the judge or jury. The Advisory Committee Note is opaque on this issue. It observes that intent will be a question for the court on a pretrial motion, at a bench trial, or when deciding whether to give an adverse inference instruction, but then adds: “If a court were to conclude that the intent finding should be made by a jury, the court’s instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury finds that the party acted with the intent to deprive another party of the information’s use in the litigation.” Nowhere does the Advisory Committee indicate why or when the issue is appropriately left to the jury.

The issue of intent in Rule 37(e)(2) would appear to be a jury issue under Federal Rule of Evidence 104(b) if the court makes the preliminary determination under Rule 104(a) that a reasonable jury could find by a preponderance of the evidence that the nonpreserving party acted with the intent to deprive its adversary of the use of the evidence. Rule 104 provides:

a. In General. The court must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

b. Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

A party’s destruction of evidence is relevant if the party’s intent is to deprive its opponent of access to the evidence — in criminal parlance, it is evidence of consciousness of guilt. That is the premise of the law of spoliation and the reason adverse inference instructions are given. This is explicitly acknowledged in the Advisory Committee Note to Rule 37(e)(2) (“Adverse-inference instructions were developed on the premise that a party’s intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence.”).

Therefore, the question whether evidence was destroyed with the intent of rendering it unavailable to an adverse party is a question of conditional relevance for the jury under Rule 104(b). There is caselaw applying Rule 104 in the context of spoliation evidence, leaving to the jury the question whether the spoliating act occurred. See, e.g., United States v. Maddox, 944 F.2d 1223, 1230 (6th Cir. 1991) (“Rule 104(b) addresses the question of ‘conditional relevancy.’ By its terms, the rule involves a situation in which ‘the relevancy of evidence depends upon the fulfillment of a condition of fact . . . .’ Fed. R. Evid. 104(b). We have previously held that spoliation evidence, including evidence that the defendant threatened a witness, is generally admissible because it is probative of consciousness of guilt”; holding it was appropriate to allow the jury to hear the spoliation-related testimony); Paice LLC v. Hyundai Motor Co., No. MJG-12-499, 2015 U.S. Dist. LEXIS 108477 (D. Md. Aug. 18, 2015) (court held hearing under Rule 104 to ascertain whether, as a preliminary matter, the plaintiff offered sufficient evidence of spoliation to present the issue to the jury).

INTENT VS. BAD FAITH
Subdivision (e)(2) requires a showing of “intent to deprive another party of the information’s use,” not a showing that the party acted in “bad faith.” It is difficult to conceive of a situation in which a party could in good faith take an intentional act to deprive another party of relevant evidence, but the distinction between intentionality and bad faith is one that the case law draws. There is a practical benefit to this: Once intent is proven, no further showing of state of mind is necessary. See, e.g. Moreno v. Taw Cty. Bd. of Comm’rs, 587 F. App’x 442, 444 (10th Cir. 2014) (“to warrant
an adverse inference instruction, a party must submit evidence of intentional destruction or bad faith”); Turner v. United States, 736 F.3d 274, 282 (4th Cir. 2013) (“Although the conduct must be intentional, the party seeking sanctions need not prove bad faith.”).

SEVERE SANCTIONS LISTED ARE DISCRETIONARY

Subdivision (e)(2) provides that, upon the showing of intent, the court “may” — not must — impose any of the four severe sanctions listed, specifically: presuming that the lost information was unfavorable to the non-preserving party; issuing a mandatory or permissive adverse inference instruction; or dismissing the action or entering a default judgment. Use of the word “may” is permissive, not mandatory, vesting discretion in the court as to whether any of these sanctions is appropriate in the circumstances. See Advisory Committee Note to Rule 37(e)(2) (“The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) [sic — no measures are specified in subdivision (e)(1)] would be sufficient to redress the loss.”).

NO PREJUDICE REQUIREMENT

Although the sanctions listed in subdivision (e)(2) are severe — indeed, potentially outcome-determinative — there is no requirement that the adverse party actually be prejudiced by the spoliating conduct, as there is in subdivision (e)(1). This is a change in the law. Under preexisting law, spoliation sanctions — especially the four most severe sanctions listed in subdivision (e)(2) — could issue only on a showing of prejudice. See, e.g., Rives v. LaHood, 2015 U.S. App. LEXIS 4838 (11th Cir. Mar. 25, 2015 (“A party moving for spoliation sanction must establish, among other things, that the destroyed evidence was relevant to a claim or defense such that the destruction of that evidence resulted in prejudice”) (internal quotation marks and brackets deleted); McCauley v. Board of Comm’rs for Bernalillo Cnty., 2015 U.S. App. LEXIS 3361 (10th Cir. Mar. 2, 2015) (no abuse of discretion in denying spoliation sanction absent demonstration of sufficient prejudice); Gutman v. Klein, 2013 U.S. App. LEXIS 5438 (2d Cir. Mar. 20, 2013) (“A sanction for spoliation of evidence ‘should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.”); Hallmark Cards, Inc. v. Murley, 703 F.3d 456, 461 (8th Cir. 2013) (“a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction.”)

The absence of a prejudice requirement may at first seem somewhat counterintuitive since both of these are requirements for the presumably less severe sanctions of subdivision (e)(1). But it is consonant with the case law enforcing the inherent power of the court to sanction abusive litigation practices undertaken in bad faith, which is the power pursuant to which spoliation sanctions are historically sanctioned. The fact that the abusive litigation conduct did not succeed in disrupting the litigation does not preclude the imposition of an inherent power appropriate sanction if the conduct was intended to do so. See, e.g., Enmon v. Prospect Capital Corp., 675 F.3d 138, 145 (2d Cir. 2012) (“We read Chambers [v. NASCO, Inc., 501 U.S. 32 (1991)] to mean that sanctions may be warranted even where bad-faith conduct does not disrupt the litigation before the sanctioning court. This accords with our sanctions jurisprudence, which counsels district courts to focus on the purpose rather than the effect of the sanctioned attorney’s activities.”). The court is vested with broad discretion to fashion an appropriate inherent power sanction to redress litigation abuse. In all events, the absence of prejudice is clearly an important factor in the court’s determination whether any sanction is appropriate and, if so, which one.
LEAST SEVERE SANCTION NOT REQUIRED

Unlike subdivision (e)(1), there is no requirement in subdivision (e)(2) that the court impose the least severe sanction. That does not mean that the court will or should impose a sanction more severe than necessary. Were it to do so, the sanction would by definition be unfair and unlikely to be sustained on appeal. The Advisory Committee Note to Rule 37(e)(2) counsels that “the remedy should fit the wrong,” and this is precisely what was required under preexisting inherent power sanctions case law. See, e.g., Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311 (Fed. Cir. 2011) (in imposing a sanction for spoliation, the court “must select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.”); Jackson v. Murphy, 468 F. App’x 616, 619 (7th Cir. 2012) (“The severity of a sanction should be proportional to the gravity of the offense.”); Ross v. Am. Red Cross, 2014 U.S. App. LEXIS 1827 (6th Cir. Jan. 27, 2014) (“Because failures to produce relevant evidence fall along a continuum of fault — ranging from innocence through the degrees of negligence to intentionalness, the severity of a sanction may, depending on the circumstances of the case, correspond to the party’s fault” (internal quotations and citations omitted)); Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, LLC, 774 F.3d 1065 (6th Cir. 2014) (“The severity of sanction issued is determined on a case-by-case basis, depending in part on the spoliating party’s level of culpability.”).
In November 2014, a year before the 2015 discovery amendments could become effective, the Duke Center for Judicial Studies started a project to provide guidance for judges and lawyers on ways to implement the amendments, to put flesh on the proportionality bones and to provide a practical and realistic framework to make proportionality work in practice. The result of those efforts, Guidelines and Practices to Implement the 2015 Proportionality Amendments, is published for the first time in this issue of Judicature.

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Unless judges actively manage the cases they preside over to keep discovery both within the defined scope and consistent with the parties’ right to get the information within that scope, these rule amendments are no more likely to succeed than the predecessors.

This publication coincides with the effective date of the rule changes and with efforts by many to provide the bench and bar with information about the rule changes, what they mean, and ways to implement them in individual cases.

The 2015 rule amendments mark a “new” chapter in the history of discovery practice. If the amended rules achieve their intended purposes, this chapter may come to be known for its emphasis on, and commitment to, proportionality. As of Dec. 1, 2015, Rule 26(b)(1) defines the scope of discovery as nonprivileged information that is relevant to the parties’ claims and defenses and “proportional to the needs of the case.” For the first time, the word “proportional” is in the rule text. The provisions on proportionality are moved to become part of the definition of permissible discovery, as opposed to limits on otherwise permissible discovery.

But as new chapters and rule changes go, these are hardly seismic shifts. The proportionality concept became part of the rules over 30 years ago, in 1983, when Rule 26(b) was amended to require judges to limit discovery to ensure that the benefits outweighed the costs and Rule 26(g) was added to require lawyers to certify that their discovery requests or objections were neither unreasonable nor unduly burdensome or expensive. Indeed, the Advisory Committee has taken pains to emphasize that it does not view the 2015 proportionality amendments as imposing any new duties or obligations. Rather, the intended change is to elevate awareness and get lawyers, litigants, and judges to pay more attention to the duties they have had for over three decades.

And there lies the proverbial rub. Lawyers and judges have had proportionality obligations since 1983, but few lawyers or judges made proportionality a focus of discovery, and fewer still expressly invoked or applied the proportionality limits. Some academics and thoughtful judges have questioned whether proportionality is sufficiently defined or understood to achieve the stated goals. As discovery has become e-discovery and even more expensive, burdensome, and complex, the complaints have grown. The rule amendments require us to answer a nagging question. Why should these rule amendments, so modestly introduced, work when prior efforts to achieve discovery that is consistently both fair and reasonable — proportional — have failed?

A SENSE OF URGENCY

One reason for optimism is that the proportionality amendments are expressly linked to existing and new case-management tools intended to promote and facilitate early, active judicial case management. The 2015 rule amendments recognize that changing the words used in the rules will accomplish nothing unless lawyers and judges effectively implement the changes. The 2015 rule amendments include an expanded menu of case-management tools to make it easier for lawyers and judges to tailor discovery to each case and to resolve discovery disputes efficiently and promptly, without full-scale motions and briefs. The Committee Notes emphasize the important link between the proportionality changes to the scope of discovery in Rule 26(b)(1) and the case-management provisions in Rules 16, 26(f), and 34.

Another reason for optimism is a growing sense of urgency among lawyers and judges. In 1983, the bench and bar seemed to greet the proportionality amendments with a collective shrug and went about their business as usual. The years of public discussion and debate leading up to the 2015 amendments reflect a growing concern that our civil justice system needs to adjust or risk losing its ability to serve its vital purposes. At the same time, electronic discovery and increasing cost-consciousness by clients provide an incentive for lawyers to exchange the information each side needs without all the costs and burdens of discovery built on the “demand everything and object to everything” model.

Which brings us to the elephant in the courthouse. Proportionality begins with the parties and lawyers who apply and invoke it, but it ends with judges
who enforce it. Whether proportionality moves from rule text to reality depends in large part on judges. Judges who make clear to the parties that they must work toward proportionality, Judges who are willing and available to work with parties to achieve what the Advisory Committee has described as the goal of making proportionality an explicit part of discovery in all cases.\(^4\) Judges who are willing and available to resolve discovery disputes quickly and efficiently when needed. Unless judges actively manage the cases they preside over to keep discovery both within the defined scope and consistent with the parties’ right to get the information within that scope, these rule amendments are no more likely to succeed than the predecessors.

Trial judges, this is our chance to make a difference. It is also our chance to fail.

**MODEST INVESTMENT, GREAT DIVIDENDS**

The good news is that lawyers and their clients are not alone in having strong incentives to work toward proportionality. Enforcing proportionality by engaging in active case management can make a trial judge’s work easier and better. Requiring the lawyers to talk to each other, then to the court, about what the discovery in the case will involve allows the parties to reach agreement when they can, reducing the number of disputes or narrowing them. Requiring the lawyers to talk to each other about discovery planning also allows the parties to identify areas that are unclear or the subject of disagreement and to promptly bring these areas to the court for resolution. Good case management allows the judge to rule on disputed discovery issues fairly, efficiently, and promptly, sparing the judge the need to slog through lengthy motions to compel or for protection (often accompanied by even longer briefs and voluminous attachments) and writing opinions, often on issues that don’t involve matters of jurisprudence as much as practical problems ill-suited to the motion-and-brief presentation.

Judges who engage in early, active discovery management often find that it takes relatively little of their time and work. This modest investment pays the great dividend of saving the judge and the judge’s clerks from spending much more time later solving problems that could have been avoided. And the work that is avoided tends to be the type that is tedious and slow, and that can often bring the case to a halt.

Active case management is not only vital to making discovery reasonable for each case, it also can be gratifying for the judge. It allows trial judges to be creative in working through what are usually practical problems to devise reasonable and fair solutions that keep the case on track, on time, and (for the parties) on budget.

It may be true that most do not think of case management as among the most satisfying or important parts of judging. Ask a trial judge why he or she chose to become a judge, and the judge is not likely to mention case management. But we are not talking about case management in the dismissive, belittling sense used by some academics and others to describe judges’ lower selves (the higher selves being the more pure and exalted jurisprudential being). The interactive exchanges we have described are as important, as highly valued, and as demanding of judicial discretion and judgment as any work judges do.\(^3\) And it is work that is unique to the trial judges. By the time a case gets to the appellate courts, case management is a lost opportunity. Case management is an important part of what sets the trial judges’ work apart. No one else can do it. The more trial judges — an enormously talented and creative lot — work on these tasks, the closer we will all get to achieving proportionality in practice.

All of this provides reason for optimism. The 2015 amendments envision, and are being met by, prompt and energetic work by bench and bar to change litigation culture and make the rule changes a part of everyday practice. Self-interest, institutional interests, client interests, and a shared commitment to moving beyond aspiration and rule to reality may all converge to achieve proportionality.

This does not mean we should hang a banner declaring mission accomplished. History teaches us that hard work lies ahead to make these rule changes a benefit for our system, not for any particular type of litigant or case. The *Guidelines and Practices* are part of that work. They are the result of many months of discussion, experimentation, and refinement involving teams of lawyers on both sides of the “v.,” practicing in a number of areas, working together to define and clarify and make concrete what proportionality looks like in particular cases and how to achieve it. With the many dedicated lawyers who worked on the *Guidelines and Practices*, the reporters will continue to listen and learn. We will monitor developments in the courts and hear from the judges and lawyers who apply the 2015 amendments and, we hope, the *Guidelines and Practices*, in their own cases. The *Guidelines and Practices* publication is intended to be a living document that changes and grows as we all discover new and better ways to achieve proportionality in discovery and help fulfill the goals of Rule 1.

**TO BETTER SERVE THE GOALS OF RULE 1**

On Jan. 20, 1984, Prof. Arthur Miller stood before an audience of federal judges to explain the amendments that had taken effect on Dec. 1, 1983. As the Reporter for the Civil Rules Advisory Committee, he was uniquely suited to the task. He explained that the rulemakers were motivated by a belief that, in too many cases, litigation was conducted in a way that frustrated the goals of Rule 1. He emphasized that the discovery amendments were part of a larger package of amendments, designed to work together in an effort to better serve the goals of Rule 1. He explained that a major goal of the package of amendments in general — and the amendments to Rule 26(b) in particular — was to combat the problem of disproportionate discovery. And he concluded by stressing the critical role that judges would play, using their new case-management powers under amended Rule 16:
There is an important interrelationship between the management philosophy of rule 16 and the anti-redundancy and anti-disproportionality policies of rule 26. The latter can be effective only if the judges educate themselves about their cases and attempt to manage them throughout the discovery process. The two rules must be utilized together.\(^1\)

All of that could just have easily been said — and has been said — about the 2015 amendments. Is it deja vu, all over again?

It is hard to know why the bench and bar did not embrace proportionality in discovery in 1983. Perhaps the scheme was just a bit too different from what they were used to and how they had been trained. In a time long before email and smartphones, perhaps the consequences of persisting with “business as usual” were not sufficiently grave to fully spark the desired change. But that was decades ago. The Guidelines and Practices themselves show that many lawyers and judges are committed to working to make reasonableness — proportionality — in discovery real. There is good reason for optimism, and there is good work to do.

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1. See Fed. R. Civ. P. 26 advisory committee’s note (2015) (“Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.”).

2. See, e.g., John L. Carroll, Proportionality In Discovery: A Cautionary Tale, 52 CAMPBELL L. REV. 455, 461 (2010) (“Used improperly, the proportionality analysis can be at best a meaningless exercise and at worst a tool to deny civil litigants access to information to which they are entitled.”); Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 DUKE L.J. 561, 603-04 (2001) (arguing that proportionality limits are impractical because the trial judge is not in a good position to assess whether the desired information is worth the cost); Orbit One Communications, Inc. v. Naciones Corp., 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (stating, in the preservation context, that a proportionality standard “may prove too amorphous” to provide meaningful guidance to parties).

3. See Fed. R. Civ. P. 26 advisory committee’s note (2015) (“The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management.”); id. (explaining that the new Rule 34 mechanism allowing for pre-Rule 26(f) exchange of document requests “is designed to facilitate focused discussion during the Rule 26(f) conference”).

4. See Fed. R. Civ. P. 26 advisory committee’s note (2015) (“The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”)


GUIDELINES and PRACTICES for IMPLEMENTING the 2015 DISCOVERY AMENDMENTS to ACHIEVE PROPORTIONALITY

The Duke Law Judicial Studies Center Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality explain amendments to Federal Rule of Civil Procedure 26(b) that take effect on Dec. 1, 2015, and recommend useful, practical, and concrete implementing procedures and practices that build on the amendments’ framework.

More than 2,000 comments were submitted during the Civil Rules Advisory Committee’s six-month rulemaking public-comment period, expressing concerns about the ambiguity of certain factors enumerated in the proportionality standard (“needs of the case,” “burden or expense outweighs benefit,” “parties’ resources,” “importance of issues,” and “importance of discovery”). Other comments raised concerns about the significance of reordering the factors and applying certain factors too early in litigation.

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Eight of the practitioners assumed greater responsibility as team leaders:

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Hon. Lee H. Rosenthal
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because they change and evolve during the course of a lawsuit, while others suggested that the amendments shifted the burden of proof.

The Center held a conference on the new amendments with more than 70 practitioners and 15 federal judges Nov. 13-14, 2014, in Arlington, Virginia, as the first step in a drafting process that aimed to provide greater guidance on what the amendments are intended to mean and how to apply them effectively. From the beginning it was understood that, although some disagreed with all or some of the rule changes, the project’s goal was not to revisit the choices made during the rulemaking process, but to take the amended rules as the starting point for guidelines to help apply them in specific cases.

Many discovery proportionality practices and procedures were raised and discussed at the conference. At its conclusion, 40 practitioners and judges volunteered to serve on teams, leading to guidelines implementing the new rule amendments.

It was evident at the conference that lawyers practicing in different areas of law viewed the amendments from different perspectives and had different views on how the amendments should be applied. To make sure that these different perspectives were considered in the drafting process, four teams of volunteers were formed with roughly 10 practitioners and judges on each team, divided by practice: (1) personal injury/products liability; (2) commercial litigation; (3) employment/civil rights; and (4) complex litigation. Two leaders, one plain-tiff practitioner and one defense practitioner, were designated for each team.

The Hon. Lee H. Rosenthal and Prof. Steven Gensler agreed to be the project’s reporters. In late March 2015, the reporters provided the four teams a 75-page study, detailing background information about the 2015 rules amendments and proposing approaches for implementing the proportionality amendments. To a large extent, the study built on approaches adopted as best practices by judges who have been strong proponents of the “proportionality principles” for many years. Key points in the study were identified and set out in a stand-alone, 12-page set of guidelines and practices.

The study and the draft guidelines and practices were circulated to the 40 volunteers to get a general sense of the group’s thinking. After reviewing the comments, the reporters revised the guidelines and practices and produced the Second Draft in late May.

The four teams circulated proposed edits among themselves and held one or more conference calls in June/July. They submitted joint comments, which were circulated among the four teams. In late July, the reporters revised the draft to account for the comments, deferring consideration of inconsistent or disputed suggestions for further comment from the teams.

On July 31, 2015, the Third Draft was circulated to the teams and sent to 300 practitioners active in the area. The Third Draft was also posted for three weeks on the Center’s website in case others were interested and wished to comment. Thirty-three individuals and organizations, primarily representing lawyers practicing employment discrimination law, submitted comments and proposed edits, all of which were considered by the reporters.

The reporters prepared a Fourth Draft and met with the eight team leaders and an additional judge in a one-day drafting session in Dallas on August 28 to refine the draft and address lingering disagreements. The Fifth Draft was forwarded to the volunteers on Sept. 4, 2015.

The Guidelines and Practices are the culmination of a process that began in November 2014. Although the Duke Law Judicial Studies Center retained editorial control, this iterative drafting process provided multiple opportunities for the volunteers on the four teams to confer, suggest edits, and comment on the guidelines and practices. Substantial revisions were made during the process. Many compromises, affecting matters on which the 40 volunteer contributors hold passionate views, were also reached. But the Guidelines and Practices should not be viewed as representing unanimous agreement, and individual volunteer contributors may not necessarily agree with every guideline and practice. In addition, the Guidelines and Practices may not necessarily reflect the official position of Duke Law School as an entity or of its faculty or of any other organization, including the Judicial Conference of the United States.

The Guidelines and Practices were completed after an intensive one-year effort involving the bench, bar, and academy intended to meet the immediate need of the bench and bar for guidance on amendments taking effect in December 2015. Recognizing that case law and case-management techniques quickly evolve, the Guidelines and Practices will be periodically updated. The updating will be informed by separate regional conferences held by the Center with smaller groups of judges and practitioners evaluating the Guidelines and Practices. A major conference will follow in 18 to 24 months, and the Guidelines and Practices will be revised in light of bench and bar actual experience.

By bringing together the strengths of prominent judges, practitioners, and law professors to bear on important issues affecting the civil litigation system, the Center is fulfilling its mission to improve the administration of justice.
I. The Guidelines

These guidelines for applying the 2015 “proportionality” amendments to the Federal Rules of Civil Procedure discuss what the amendments mean, what they did and did not change, and ways to understand their impact and meaning. The guidelines add some flesh to the bones of the rule text and Committee Note and explore how the amendments intersect with other rule provisions. The guidelines are, of course, not part of the rules and have no binding effect. They are a resource for judges, lawyers, and litigants who must understand the amendments and their impact to use and comply with the rules governing discovery.
Rule 26(b)(1) defines the scope of discovery as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Proposed discovery must be both relevant and proportional to be within the scope that Rule 26(b)(1) permits. The Rule 26(b)(1) amendments, however, do not alter the parties’ existing discovery obligations or create new burdens.

**GUIDELINE 1**

Rule 26(b)(1) identifies six factors for the parties and the judge to consider in determining whether proposed discovery is “proportional to the needs of the case.” As discussed further in Guideline 3, the degree to which any factor applies and the way it applies depend on the facts and circumstances of each case.

**GUIDELINE 2(A): “Importance of Issues at Stake”**

This factor focuses on measuring the importance of the issues at stake in the particular case. This factor recognizes that many cases raise issues that are important for reasons beyond any money the parties may stand to gain or lose in a particular case.

**GUIDELINE 2(B): “Amount in Controversy”**

This factor examines what the parties stand to gain or lose financially in a particular case as part of deciding what discovery burdens and expenses are reasonable for that case. The amount in controversy is usually the amount the plaintiff claims or could claim in good faith.

**COMMENTARY**

A case seeking to enforce constitutional, statutory, or common-law rights, including a case filed under a statute using attorney fee-shifting provisions to encourage enforcement, can serve public and private interests that have an importance beyond any damages sought or other monetary amounts the case may involve.

**GUIDELINE 2**

Discovery that seeks relevant and nonprivileged information is within the permitted scope of discovery only if it is proportional to the needs of the case.

As used in Rule 26(b)(1), proportionality describes:
(a) the six factors to be considered in allowing or limiting discovery to make it reasonable in relationship to a particular case;
(b) the criteria for identifying when the discovery meets that goal;
(c) the analytical process of identifying the limits, including what information is needed to decide what discovery to allow and what discovery to defer or deny; and
(d) the goal itself.

If a specific amount in controversy is alleged in the pleadings and challenged, or no specific amount is alleged and the pleading is limited to asserting that the amount exceeds the jurisdictional minimum, the issue is how much the plaintiff could recover based on the claims asserted and allegations made. When an injunction or declaratory judgment is sought, the amount in controversy includes the pecuniary value of that relief. The amount-in-controversy calculation can change as the case progresses, the claims and defenses evolve, and the parties and judge learn more about the damages or the value of the equitable relief.
GUIDELINE 2(C): “Relative Access to Information”
This factor addresses the extent to which each party has access to relevant information in the case. The issues to be examined include the extent to which a party needs formal discovery because relevant information is not otherwise available to that party.

COMMENTARY

In a case involving “information asymmetry” or inequality, in which one party has or controls significantly more of the relevant information than other parties, the parties with less information or access to it depend on discovery to obtain relevant information. Parties who have more information or who control the access to it are often asked to produce significantly more information than they seek or are able to obtain from a party with less.

The fact that a party has little discoverable information to provide others does not create a cap on the amount of discovery it can obtain. A party's ability to take discovery is not limited by the amount of relevant information it possesses or controls, by the amount of information other parties seek from it, or by the amount of information it must provide in return. Discovery costs and burdens may be heavier for the party that has or can easily get the bulk of the essential proof in a case.

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information, but without the unfairness that can result if the asymmetries are leveraged by any party for tactical advantage. Unfairness can occur when a party with significantly less information imposes unreasonable demands on the party who has voluminous information. Unfairness can also occur when a party with significantly more information takes unreasonably restrictive or dilatory positions in response to the other party's requests.

GUIDELINE 2(D): “Parties’ Resources”
This factor examines what resources are available to the parties for gathering, reviewing, and producing information and for requesting, receiving, and reviewing information in discovery. “Resources” means more than a party's financial resources. It includes the technological, administrative, and human resources needed to perform the discovery tasks.

GUIDELINE 2(E): “Importance of Discovery”
This factor examines the importance of the discovery to resolving the issues in the case.

COMMENTARY

One aspect of this factor is to identify what issues or topics are the subject of the proposed discovery and how important those issues and topics are to resolving the case. Discovery relating to a central issue is more important than discovery relating to a peripheral issue. Another aspect is the role of the proposed discovery in resolving the issue to which that discovery is directed. If the information sought is important to resolving an issue, discovery to obtain that information can be expected to yield a greater benefit and justifies a heavier burden, especially if the issue is important to resolving the case or materially advances resolution. If the information sought is of marginal or speculative usefulness in resolving the issue, the burden is harder to justify, especially if the issue is not central to resolving the case or is unlikely to materially advance case resolution.

Understanding the importance of proposed discovery may involve assessing what the requesting party is realistically able to predict about what added information the proposed discovery will yield and how beneficial it will be.
GUIDELINE 2(F): Whether the Burden or Expense Outweighs Its Likely Benefit

This factor identifies and weighs the burden or expense of the discovery in relation to its likely benefit. There is no fixed burden-to-benefit ratio that defines what is or is not proportional. When proportionality disputes arise, the party in the best position to provide information about the burdens, expense, or benefits of the proposed discovery ordinarily will bear the responsibility for doing so. Which party that is depends on the circumstances. In general, the party from whom proposed discovery is sought ordinarily is in a better position to specify and support the burdens and expense of responding, while the party seeking proposed discovery ordinarily is in a better position to specify the likely benefits by explaining why it is seeking and needs the discovery.

COMMENTARY

In general, proposed discovery that is likely to return important information on issues that must be resolved will justify expending more resources than proposed discovery seeking information that is unlikely to exist, that may be hard to find or retrieve, or that is on issues that may be of secondary importance to the case, that may be deferred until other threshold or more significant issues are resolved, or that may not need to be resolved at all.

If a party objects that it would take too many hours, consume unreasonable amounts of other resources, or impose other burdens to respond to the proposed discovery, the party should specify what it is about the search, retrieval, review, or production process that requires the work or time or that imposes other burdens.

If a party objects to the expense of responding to proposed discovery, the party should be prepared to support the objection with an informed estimate of what the expenses would be and how they were determined, specifying what it is about the source, search, retrieval, review, or production process that requires the expense estimated.

If a party requests discovery and it is objected to as overly burdensome or expensive, the requesting party should be prepared to specify why it requested the information and why it expects the proposed discovery to yield that information. Assessing whether the requesting party has adequately specified the likely benefits of the proposed discovery may involve assessing the information the requesting party already has, whether through its own knowledge, through publicly available sources, or through discovery already taken.

A party with inferior access to discoverable information relevant to the claims or defenses may also have inferior access to the information needed to evaluate the benefit, cost, and burden of the discovery sought. Assessing the benefits of proposed discovery may also involve assessing how well the requesting party is able to predict what added information the proposed discovery will yield and how beneficial it will be.

Party cooperation is particularly important in understanding the burdens or benefits of proposed discovery and in resolving disputes. The parties should be prepared to discuss with the judge whether and how they communicated with each other about those burdens or benefits. The parties should also be prepared to suggest ways to modify the requests or the responses to reduce the burdens and expense or to increase the likelihood that the proposed discovery will be beneficial to the case.

Rule 26(b)(2)(B) addresses a specific type of burden argument—that discovery should not proceed with respect to a particular source of electronically stored information because accessing information from that source is unduly burdensome or costly. Examples might include information stored using outdated or “legacy” technology or information stored for disaster recovery rather than archival purposes that would not be searchable or even usable without significant effort. Rule 26(b)(2)(B) has specific provisions for discovery from such sources. Those provisions do not apply to discovery from accessible sources, even if that discovery imposes significant burden or cost.

GUIDELINE 3

Applying the six proportionality factors depends on the informed judgment of the parties and the judge, analyzing the facts and circumstances of each case. The weight or importance of any factor varies depending on the facts and circumstances of each case.

COMMENTARY

The significance of any factor depends on the case. The parties and the judge must consider each factor to determine the degree to which and the way the factor applies in that case. The factors that
apply and their weight or importance can vary at different times in
the same case, changing as the case proceeds.
No proportionality factor has a prescribed or preset weight or
significance. No one factor is intrinsically more important or enti-
tled to greater weight than any other.
The order in which the proportionality factors appear in the Rule
text does not signify preset importance or weight in a particular
case. The 2015 amendments reordered some of the factors to
defeat any argument that the amount in controversy was the most
important factor because it was listed first.

GUIDELINE 4

The Rule 26(b)(1) amendments do not require a party
seeking discovery to show in advance that the proposed
discovery is proportional.

COMMENTARY

The 2015 amendments to Rule 26(b)(1) do not alter the parties’
ingexisting obligations under the discovery rules. The obligations
unchanged by the amendments include obligations under:
Rule 26(g), requiring parties to consider discovery burdens and
benefits before requesting discovery or responding or objecting
to discovery requests and to certify that their discovery requests,
responses, and objections meet the rule requirements;
Rule 34, requiring parties to conduct a reasonable inquiry in
responding to a discovery request; and
Rule 26(c), Rule 26(f), Rule 26(g), and Rule 37(a), among
others, requiring parties to communicate with each other about
discovery planning, issues, and disputes. The need for communi-
cation is particularly acute when questions concerning burden and
benefit arise because one side often has information that the other
side may not know or appreciate.
The 2015 amendments do not require the requesting party to
make an advance showing of proportionality. Unless specific ques-
tions about proportionality are raised by a party or the judge, there
is no need for the requesting party to make a showing of or about
proportionality. The amendments do not authorize a party to object
to discovery solely on the ground that the requesting party has not
made an advance showing of proportionality.
The amendments do not authorize boilerplate objections or
refusals to provide discovery on the ground that it is not propor-
tional. The grounds must be stated with specificity. Boilerplate
objections are insufficient and risk violating Rule 26(g). Objections
that state with specificity why the proposed discovery is not propor-
tional to the needs of the case are permissible.
The amendments do not alter the existing principles or frame-
work for determining which party must bear the costs of respond-
ing to discovery requests.

GUIDELINE 5

If a party asserts that proposed discovery is not propor-
tional because it will impose an undue burden, and the
opposing party responds that the proposed discovery
will provide important benefits, the judge should assess
the competing claims under an objective reasonableness standard.

COMMENTARY

In deciding whether a discovery request is proportional to the
needs of the case, only reasonable (or the reasonable parts of)
expenses or burdens should be considered.
Changes in technology can affect the context for applying the
objective reasonableness standard. It is appropriate to consider
claims of undue burden or expense in light of the benefits and
costs of the technology that is reasonably available to the parties.
It is generally not appropriate for the judge to order a party to
purchase or use a specific technology, or use a specific method, to
respond to or to conduct discovery. In assessing discovery expenses
and burdens and the time needed for discovery, however, it may
be appropriate for the judge to consider whether a party has been
unreasonable in choosing the technology or method it is using.
II. The Practices

The following practices suggest useful ways to achieve proportional discovery in specific cases. There is no one-size-fits-all approach. While practices that would advance proportional discovery in one case might hinder it in others, the suggestions may be helpful in many cases and worth considering in most. Although many of these suggestions are framed in terms of judges’ case-management practices, they are intended to provide helpful guidance to lawyers and litigants as well.
The parties should engage in early, ongoing, and meaningful discovery planning. The judge should make it clear from the outset that the parties are expected to plan for and work toward proportional discovery. If there are disputes the parties cannot resolve, the parties should promptly bring them to the judge. The judge should make it clear from the outset that he or she will be available to promptly address the disputes.

COMMENTARY

The judge and the parties share responsibility for ensuring that discovery is proportional to the needs of the case.

The parties are usually in the best position to know which subjects and sources will most clearly and easily yield the most promising discovery benefits. In many cases, the parties use their knowledge of the case to set discovery priorities that achieve proportionality. When that does not occur, judges play a critical role by taking appropriate steps to ensure that discovery is proportional to the needs of the case.

Judges have many practices available to work toward proportionality. They include: (1) orders issued early in the case communicating the judge’s expectations about how the parties will conduct discovery; (2) setting procedures for the parties to promptly identify disputes and attempt to resolve them, and if they cannot do so to bring them to the judge for prompt consideration; (3) setting procedures to enable the parties to engage the judge promptly and efficiently when necessary; and (4) communicating the judge’s willingness to be available when necessary.

The practices that follow provide examples of approaches that judges and parties have used to timely and efficiently resolve discovery disputes, ranging from objections to overly expansive requests to objections to obstructive or dilatory responses.

While the judge has the ultimate responsibility for determining the boundaries of proportional discovery, the process of achieving proportional discovery is most effective and efficient, and the likelihood of achieving it is greatest, when the parties and the judge work together.

The judge should consider issuing an order in advance of the parties’ Rule 26(f) conference that clearly communicates what the judge expects the parties to discuss at the conference, to address in their Rule 26(f) report, and to be prepared to discuss at a Rule 16 conference with the judge.

COMMENTARY

The Rule 26(f) conference is a critical first step in achieving proportionality. The judge should make clear — by order or other manner the judge chooses — that the parties are expected to have a meaningful discussion and exchange of information during the Rule 26(f) conference and what the parties are expected to cover. The judge should also make clear that the Rule 26(f) report will be reviewed and addressed at the Rule 16 conference. Judges following this practice often issue a form order that is routinely sent shortly after the case is filed, along with the order sent to set the date to file the Rule 26(f) report or to hold the Rule 16 conference.

In a case in which the judge has a basis to expect that discovery will be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge might consider scheduling a conference call with the parties before they hold their Rule 26(f) conference.

Some districts address these practices in their local guidelines or rules.

The judge should consider holding a “live” Rule 16(b) case-management conference, in person if practical, or by conference call or videoconference if distance or other obstacles make in-person attendance too costly or difficult.

COMMENTARY

A “live” interactive conference provides the judge and the parties the best opportunity to meaningfully discuss what the discovery
will be, where it should focus and why, and how the planned discovery relates to the overall case plan. A live interactive conference allows the judge to ask follow-up questions and probe the responses to obtain better information about the benefits and burdens likely to result from the proposed subjects and sources of discovery. A live interactive conference also provides the judge an opportunity to explore related matters, such as whether an expected summary judgment motion might influence the timing, sequence, or scope of planned discovery.

The parties and the judge should take advantage of technology to facilitate live interactive case-management and other conferences and hearings when in-person attendance is impractical. In some cases, more than one live case-management conference might be appropriate. In a case in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge and parties should consider whether to schedule periodic live conferences or hearings, which can be canceled if not needed.

Some districts address this practice in their local guidelines or rules.

**PRACTICE 4**

The judge should ensure that the parties have considered what facts can be stipulated to or are undisputed and can be removed from discovery.

**COMMENTARY**

Discovery about matters that are not in dispute and to which the parties can stipulate is often inherently disproportionate because it yields no benefit. The judge should ensure – through an order, in a Rule 16 conference, or in another manner – that the parties are not conducting discovery into matters subject to stipulation. The judge should also work with the parties to identify matters that are not in dispute and need not be the subject of discovery, even if no formal stipulation is issued.

A live interactive case-management conference provides an excellent opportunity for the judge to raise these questions with the parties.

**PRACTICE 5**

In many cases, the parties will initially focus discovery on information relevant to the most important issues, available from the most easily accessible sources. In a case in which the parties have not done so, or in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about relevance or proportionality, the parties and the judge should consider initially focusing discovery on the subjects and sources that are most clearly proportional to the needs of the case. The parties and the judge should use the results of that discovery to guide decisions about further discovery.

**COMMENTARY**

The information available at the start of the case is often enough to allow the parties to identify subjects and sources of discovery that are both highly relevant and accessible without undue burden or expense. Discovery into those subjects and from those sources is usually proportional to the needs of the case because it is likely to yield valuable information with relatively less cost and effort. In many cases, the parties initially focus discovery on these subjects and sources without judicial involvement and without explicitly labeling it as “proportional” or “focused.”

If the parties have not thought through discovery, or the discovery is likely to be voluminous or complex, or there is likely to be significant disagreement about relevance or proportionality, the judge should encourage the parties to consider initially focusing discovery on the information central to the most important subjects, available from the most easily accessible sources of that information. The parties and the judge can use the information obtained to guide decisions about further discovery. For example, the parties can use the information to decide whether to make additional discovery requests or how to frame them. The judge can use the information to help understand and resolve proportionality or other questions that may arise during further discovery.

The objective of this approach is to identify good places for discovery to begin, deferring until later more difficult questions about where discovery should end. This approach is sometimes described as conducting discovery into the “low-hanging fruit” and using that information to decide whether more is needed and what that should be.
The parties are usually in the best position to determine whether and how to focus discovery in their cases. In some cases, it is sufficient and preferable for the judge simply to verify that the parties have adequately planned for discovery. In other cases, the judge may need to explore options with the parties to help work toward reaching an agreement.

It may make sense for the parties and the judge to focus early discovery on a particular issue, claim, or defense. For example, a case may raise threshold questions such as jurisdiction, venue, or limitations that are best decided early because the answers impact whether and what further discovery is needed. In some cases, this may be clear after initial disclosures are exchanged. In other cases, it may be necessary for the parties to exchange more information to identify whether and where early discovery might focus.

If the parties have conducted focused early discovery and more discovery is sought, no heightened showing is required. The parties and the judge will have more information to assess proportionality, but the factors and their application do not change simply because some discovery has occurred.

A judge who holds a live Rule 16 conference can address with the parties the potential benefits of focusing early discovery and his or her expectations about how the parties will conduct it. The judge can address concerns that one or more parties will misunderstand the process or engage in inappropriate tactics. The judge might consider discussing with the parties what objections typically would or would not be appropriate. If the parties have reached agreement on how to focus early discovery to get the most important information from the most accessible sources, there should be few occasions for objections on relevance or proportionality grounds.

Judges should consider using other tools designed to facilitate and accelerate the exchange of core information. For example, judges should consider using the Initial Discovery Protocols for Employment Cases Alleging Adverse Action in cases where they apply. Developed jointly by experienced plaintiff and defense attorneys, these protocols are pattern discovery requests that identify documents and information that are presumptively not objectionable and that must be produced at the start of the lawsuit. The self-described purpose of these protocols is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." The protocols are another way to work toward proportional discovery and have been used effectively in courts around the country.

It is expected that work will be undertaken to develop similar subject-specific discovery protocols for other practice areas.

In a case in which discovery will initially focus on particular subjects or sources of information, the judge should consider including guidance in the Rule 16(b) case-management order.

**COMMENTARY**

While focusing early discovery can advance the goal of proportionality, it can also cause concern to some litigants. Some may worry that it will be used as a tool to restrict discovery, fearing that they will be required to make a special case for proportionality before any additional discovery will be allowed. Others may worry that it will be used as a tool to protract discovery if additional rounds of discovery are viewed as a given regardless of how robust the initial efforts were or what information they yielded. Still others may worry that expressing an interest in focusing early discovery will be mischaracterized or misunderstood as a desire for a rigidly phased or staged discovery process. Absent any guidance from the judge, these and other concerns may lead parties to forego or resist focusing early discovery even when it would make sense to do so.

The judge should consider taking steps to avoid misunderstanding and provide clarity. The judge might consider including a statement in the Rule 16(b) case-management order acknowledging that the parties are initially conducting discovery into certain issues or from certain sources and will use the results to guide decisions about further discovery. The judge might consider dividing the discovery period, using an interim deadline for completing early discovery and a later deadline for completing further discovery that is warranted. Whether the judge formally divides the discovery period or simply guides the parties to focus their early discovery, the judge might find it helpful to schedule a discovery status conference or ask for a report after the early discovery is complete.

If discovery is focused on particular subjects or sources, the parties and the judge should consider whether this may require some individuals to be deposed more than once, or require the responding party to search a source more than once. If so, the parties and the judge should address the issues, whether by adjusting the discovery to avoid repeat efforts, expressly leaving open the possibility of limited additional discovery from the same witness or source, or specifying other appropriate steps.

If the parties reach agreement on subjects or sources for early focused discovery, a party stipulation or a court order might also specify ways to streamline that discovery, including arranging for the informal exchange of information.
The judge should consider requiring the parties to request a conference before filing a motion relating to discovery, including a motion to compel or to quash discovery or seeking protection from discovery.

COMMENTARY

A live pre-motion conference is often an effective way to promptly, efficiently, and fairly resolve a discovery dispute. The conference often resolves the dispute, either by leading to an agreed resolution or by providing the judge with the information needed to rule. The case remains on track, the parties are saved expense, and the parties and judge are saved the work and time associated with formal motion practice that is often unnecessary. If the pre-motion conference indicates that some briefing or additional information on specific issues would be helpful, the judge can focus further work on the specific issues that require it.

The judge might consider requiring the party requesting a pre-motion conference on a discovery dispute to send a short communication — often limited to two pages — describing (not arguing) the issues that need to be addressed and allowing a similarly limited response.

The judge can include a pre-motion conference requirement and procedure in the case-management order issued under Rule 16(b). The procedure can include provisions for using telephone and video conferences if one or more of the parties cannot attend in person.

Some districts address this practice in their local guidelines or rules.

When proposed discovery would not or might not be proportional if allowed in its entirety, the judge should consider whether it would be appropriate to grant the request in part and defer deciding the remaining issues.

COMMENTARY

Allowing the proposed discovery in part can further an iterative process. The discovery allowed may be all that is needed, or it may clarify what further discovery is appropriate. Deferring a decision on whether to allow the rest of the proposed discovery gives the judge and parties more information to decide whether all or part of it is proportional.

Sampling can be used to determine whether the likely benefits of the proposed discovery, or the burdens and costs of producing it, warrant granting all or part of the remaining request at a later time.

If a modified request would be proportional, the judge ordinarily should permit the proportional part of the discovery. However, the judge is under no obligation to do so and may rule on the discovery request as made.

The parties and judge should consider other discovery rules and tools that may be helpful in achieving fair, efficient, and cost-effective discovery.

COMMENTARY

Other discovery rule changes and tools, not part of the proportionality amendments, should be considered as part of the judge’s and parties’ overall plan for fair, workable, efficient, and cost-effective discovery and case resolution.

Rule 34 is amended to allow a requesting party to deliver document requests to another party before the Rule 26(f) conference. The requests are not considered served until the meeting, and the 30-day period to respond does not start until that date. The early opportunity to review the proposed requests allows the responding party to investigate and identify areas of concern or dispute. The parties can discuss and try to resolve those areas at the Rule 26(f) conference on an informed basis. If disputes remain, the parties should use the Rule 26(f) report and the Rule 16(b) conference to bring them to the court for early resolution.

As an alternative to the formal mechanism that now exists under Rule 34, some lawyers may prefer to share draft, unsigned document requests, interrogatories, and requests for admission. Both the formal and informal practices prompt an informed, early conversation about the parties’ respective discovery needs and abilities.

Rule 34 is also amended to prohibit boilerplate objections to requested discovery, including objections to proportionality, and to require the responding party to state whether documents are being withheld on the basis of objections. A judge’s prompt enforcement of these requirements can be very helpful in managing discovery.

Rule 26(c) makes explicit judges’ authority to shift some or all of the reasonable costs of discovery on a good cause showing if a party from whom discovery is sought moves for a protective order.
A judge may, as an alternative to denying all of the requested discovery, order that some or all of the discovery may proceed on the condition that the requesting party bear some or all of the reasonable costs to respond. The longstanding presumption in federal-court discovery practice is that the responding party bears the costs of complying with discovery requests. That presumption continues to apply. The 2015 amendments to Rule 26(c) make that authority explicit but do not change the good cause requirement or the circumstances that can support finding good cause.

Rule 37(e) is amended to clarify when and how a judge may respond to a party’s inability to produce electronically stored information because it was lost and the party failed to take reasonable steps to preserve it. It provides a nationally uniform standard for when a judge may impose an adverse inference instruction or other serious sanctions. It responds to the concern that some persons and entities were over-preserving out of fear their actions would later be judged under the most demanding circuit standards. Working toward proportionality in preservation is an important part of achieving proportionality in discovery overall. Other rule amendments emphasize the need for careful attention to preservation issues. Rule 26(f) has been amended to add preservation of electronically stored information to the list of issues to be addressed in the parties’ discovery plan. Rule 16(b) is amended to add preservation of electronically stored information to the list of issues the case-management order may address.

Rule 16(b) and Rule 26(f) have been amended to encourage the use of orders under Rule 502(d) of the Federal Rules of Evidence providing that producing information in the litigation does not waive attorney-client privilege or work-product protection, either in that litigation or in subsequent litigation. Nonwaiver orders under Federal Rule of Evidence 502(d) can promote proportionality by reducing the time, expense, and burden of privilege review and waiver disputes.

Questions impacting and approaches to discovery are usually best explored in a live conference between the judge and the parties, preferably before formal discovery-related motions (such as under Rule 26(c) or Rule 37(a)) and accompanying briefs are filed. A live Rule 16 or pre-motion conference enables the judge and the parties to examine how the various discovery tools can best be used to create and implement an effective discovery and case-management plan.

COMMENTARY

Technology can help proportionality by decreasing the burden or expense, or by increasing the likely benefit, of the proposed discovery.

When the discovery involves voluminous amounts of electronically stored information, the parties and judge should consider using technologies designed to categorize or prioritize documents for human review.

Because technology evolves quickly, the parties and the judge should not limit themselves in advance to any particular technology or approach to using it. Instead, the parties and the judge should consider what specific technology and approach works best for the particular case and discovery.

1 These guidelines and practices use the word “parties” to cover lawyers and represented litigants, although many of the practices apply usefully to cases involving unrepresented litigants as well.