

NOTE

A DISPROPORTIONATE RESPONSE? THE 2015 PROPORTIONALITY AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26(B)

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INTRODUCTION

When many people think of the American legal system, they think of a lawyer clamoring to “bury her opponent in boxes of documents” and to file a “blizzard of document requests, interrogatories, and deposition notices” in a dilatory effort to gain any trial advantage possible.¹ Popular media outlets frequently highlight anecdotal examples of overwhelming discovery productions, inevitably leading to the conclusion that our system of civil justice is out of control.² Indeed, the fabled “document dump” has become a common trope in American works of fiction.³

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1 See, e.g., W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 901 (1996).

2 See, e.g., Kathy McCabe, *Confidential Data Released as Saugus Legal Fight Grinds On*, BOS. GLOBE (June 5, 2016), <https://www.bostonglobe.com/metro/2016/06/05/blowing-whistle-saugus/EZHyciW0KfosiXLRke6t1H/story.html> (describing discovery production of 49,000 pages of material, including “copies of flu shot reminders and snow removal notices” and inadvertently-disclosed personal information, in an apparent “document dump” intended to “bury . . . in needless material” opposing counsel); Scott Morgan, *Judge Blasts Prosecutors in Wells Fargo Mortgage Insurance Lawsuit*, MREPORT (Apr. 8, 2015), <http://www.themreport.com/news/government/04-08-2015/judge-blasts-prosecutors-in-wells-fargo-mortgage-insurance-lawsuit> (explaining that prosecutors in a civil case were chided for “overwhelming” the defendant with “millions of documents,” giving defendants “no time to review the documents so close to the discovery deadline”).

3 See, e.g., JOHN GRISHAM, SYCAMORE ROW 436 (2013) (“A ‘document dump’ was a common dirty trick . . . , in which [a party] hid discoverable documents until the last possible moment. They then dumped several thousand pages of documents on the oppos-

These societal concerns about the discovery process have not gone unnoticed by federal rulemakers⁴: on December 1, 2015, a set of amendments to the Federal Rules of Civil Procedure took effect.⁵ Among the most significant and contentious of these changes is the Rules' renewed focus on the concept of proportionality in the scope of discovery, added in an effort to curb perceived over-discovery.⁶ Although 2014 Rule 26(b)⁷—the Rule best poised to “rei[n] in the cost, delay and burdens of discovery”⁸—could have been said to invoke the concept of proportionality, it did so in a bifurcated and implicit manner,⁹ substantially undermining any purported ability the 2014 Rule had to make the discovery process more efficient or effective.¹⁰ Additionally, the 2014 Rule allowed for broad subject-matter discovery on a

ing lawyer just before the trial, knowing he and his staff could not possibly dig through them in time.”); MELISSA F. MILLER, *IMPROPER INFLUENCE* 35–36 (2013) (describing a “document dump” as a “classic move” in which a party has waited for the discovery deadline to “deliver of a stack of boxes full of documents,” and the “big firm overwhelms the sole practitioner with paper”).

4 See, e.g., Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure 6–7 (June 14, 2014), <http://www.uscourts.gov/file/18218/> (interpreting a particular survey as finding that “today’s civil litigation system takes too long and costs too much” and noting that almost half of that survey’s respondents “believed that discovery is abused in almost every case”).

5 See *id.*; see also H.R. DOC. NO. 114-33, at 2, 31 (2015) (offering the Supreme Court’s transmission of the 2015 changes to Congress for its approval).

6 See, e.g., Stephen J. MacGillivray & Raymond M. Ripple, *Federal Rules of Civil Procedure Amendments on the Horizon*, R.I. B. J., May/June 2014, at 15, 18–19 (noting that “[t]he proposed amendments have received a mixed and highly contentious response from the public,” with “the most heated debate” focusing largely “on the concept of proportionality . . . and whether [the new rules] will unfairly limit a litigant’s ability to obtain the necessary discoverable information to prepare for trial”).

7 For the sake of clarity, this Note will refer to the Rules as they were in 2014 as “2014 Rules.”

8 Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 517 (2010).

9 See FED. R. CIV. P. 26(b)(1) (2014), *reprinted in* STAFF OF H.R. COMM. ON THE JUDICIARY, 113TH CONGRESS, FEDERAL RULES OF CIVIL PROCEDURE 36 (Comm. Print 2014) [hereinafter 2014 FED. R.] (defining the general scope of discovery and incorporating by reference Rule 26(b)(2)(C)); FED. R. CIV. P. 26(b)(2)(C) (2014), *reprinted in* 2014 FED. R., *supra*, at 37 (tacitly establishing a proportionality rule for discovery by instructing courts to “limit the frequency or extent of discovery . . . if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit”); see also FED. R. CIV. P. 26, Advisory Committee’s Note (1983), *reprinted in* 97 F.R.D. 165, 217 (1983) (providing that one goal of Rule 26(b) is to “guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery”).

10 See generally Netzorg & Kern, *supra* note 8, at 517–24 (explaining that although Rule 26(b) could offer protection against disproportionate discovery, its “protections lie dormant” in practice, and asserting that federal litigation currently operates under a “default rule of broad and liberal discovery”).

showing of good cause,¹¹ which, in theory, broadened the scope of discovery and further blunted any proportionality protections inherent in the Rule.¹²

Conversely, the amended Rule 26(b) explicitly requires all parties to a case—and the presiding judge—to limit the scope of discovery to

any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.¹³

As such, the Advisory Committee has explicitly endorsed proportional discovery.¹⁴ This step addressed some of the discovery issues that the Committee has attributed to the previous structure of Rule 26(b),¹⁵ including courts not applying the proportionality factors¹⁶ and courts applying the factors without the “proportionality” label¹⁷—issues that the Committee believed only furthered the purportedly rampant issue of over-discovery.

This Note argues that the new Rule 26(b) is not likely to substantially further the Committee's professed goals. Specifically, this Note shows that,

11 FED. R. CIV. P. 26(b)(1) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 36 (“For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”).

12 However, such subject-matter discovery was rarely invoked in federal litigation. ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK FOR APR. 10–11, 2014, at 103 (2014) [hereinafter 2014 AGENDA BOOK], <http://www.uscourts.gov/file/15486/> (“The [Advisory] Committee has been informed that [the subject-matter discovery language of Rule 26(b)(1)] is rarely invoked.”).

13 FED. R. CIV. P. 26(b)(1) (2015).

14 The Committee most recently attempted to achieve the same with its 2000 addition of the following sentence to Rule 26(b)(1): “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” FED. R. CIV. P. 26, Advisory Committee's Note (2000), *reprinted in* 192 F.R.D. 340, 390 (2000) (noting that “a sentence has been added calling attention to the [proportionality] limitations . . . [as] courts have not implemented these limitations with the vigor that was contemplated”). The Committee noted that it added “[t]his otherwise redundant cross-reference . . . to emphasize the need for active judicial use” of the proportionality limitations in order “to control excessive discovery.” *Id.* However, this sentence did not achieve its intended effect. *See, e.g.,* Netzorg & Kern, *supra* note 8, at 517 (“[T]he default rule in favor of virtually unlimited discovery of any relevant fact routinely prevails.”).

15 *But see infra* text accompanying notes 71–102.

16 Some believed, especially in the modern world replete with troves of electronically stored information (ESI), that 2014 Rule 26(b) inadequately protected against over-discovery by failing to emphasize the importance of keeping the scope of discovery proportional. *See* THE SEDONA CONFERENCE, COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY 4 & n.9 (2013), <https://thesedonaconference.org/download-pub/1778> (“Notwithstanding the foregoing amendments, courts have not always insisted on proportionality when it was warranted. . . . In the electronic era, it has become increasingly important for courts and parties to apply the proportionality doctrine to manage the large volume of ESI and associated expenses now typical in litigation.”).

17 *See, e.g., id.* at 4 & n.10 (collecting cases).

even if over-discovery is a rampant problem with proportionality as its solution—a contention that is not well supported by empirical evidence—the new Rule 26(b) does little that will effect change in federal civil litigation practice. Part I provides a brief historical perspective of Rule 26 with an emphasis on prior efforts to instill a proportional scope of discovery—albeit without the label—in the litigation process. Part II explores whether or not over-discovery is a prevalent problem, as asserted by the Committee. Part III analyzes the expected impact of the Rule change on parties requesting and resisting discovery in relation to the Committee’s stated goal of curtailing what it sees as rampant over-discovery.

I. A BRIEF HISTORICAL PERSPECTIVE OF RULE 26 AND THE PROPORTIONAL SCOPE OF DISCOVERY

A. *The Inception of Modern Discovery*

Modern discovery has been available to federal litigants since the adoption of the Federal Rules of Civil Procedure in 1938.¹⁸ Before these Rules, the realm of discoverable information was linked to trial admissibility,¹⁹ which led to a “‘cumbersome’ system of elaborate fact recitation and highly technical code-pleading” at the inception of the litigation.²⁰ This arduous code-pleading process “disadvantaged poor or unsophisticated litigants, often resulting in resolution of claims on pleading technicalities instead of the merits of the case.”²¹ The Federal Rules removed this standard and adopted a far more liberal “notice pleading” standard,²² promoting “citizen access to the courts and . . . the resolution of disputes on their merits.”²³ The resultant “liberalization of discovery” through the adoption of Rules 26–37 left the discovery process with “three distinct purposes,” namely:

(1) To narrow the issues, in order that at the trial it may be necessary to produce evidence only on a residue of matters that are found to be actually disputed and controverted.

(2) To obtain evidence for use at the trial.

18 Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 447 (1991).

19 *Id.*

20 Christopher C. Frost, Note, *The Sound and the Fury or the Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of the Discovery Scope-Narrowing Language in the 2000 Amendments to Federal Rule of Civil Procedure 26(b)(1)*, 37 GA. L. REV. 1039, 1047 (2003) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)).

21 *Id.*

22 See FED. R. CIV. P. 8(a) (2014), reprinted in 2014 FED. R., *supra* note 9, at 12 (A claim for relief must contain “a short and plain statement of the claim showing that the pleader is entitled to relief . . .”).

23 Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 587–88 (2011). See generally Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN. ST. L. REV. 1191, 1201–04 (2010) (offering a historical overview of the notice pleading standard); Miller, *supra*.

(3) To secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured.²⁴

However, although a broad discovery scope may have served these goals, the ensuing years saw a new purported problem emerge: over-discovery.²⁵ Litigants in some trials began spending large sums of money and time on discovery²⁶—sometimes for abusive reasons.²⁷ Because broad discovery was a natural corollary to notice pleading²⁸ and was so engrained in the ethos of American civil procedure,²⁹ it was difficult for many to envision a system that maintained the notice pleading standard while curtailing purported over-discovery.³⁰ Indeed, Fourth Circuit Judge Paul V. Niemeyer wrote in 1998: “Despite any temptation to engage in this debate, the Civil Rules Advisory Committee cannot, in any practical way, now attempt to undo the 1938 experiment of notice pleading coupled with broad discovery because that

24 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2001, at 18 (3d. ed. 2008 & Supp. 2010).

25 See *infra* text accompanying notes 71–102.

26 See, e.g., DNIC Brokerage Co. v. Morrison & Dempsey Commc’ns, Inc., No. 87-3406, 1989 WL 418806, at *4 (C.D. Cal. Sept. 5, 1989), *rev’d*, 960 F.2d 155 (Fed. Cir. 1992) (finding a “clear and flagrant abuse of the litigation process” when counsel “on numerous occasions propounded massive yet unnecessary discovery . . . caus[ing] opposing counsel and the court to engage in time-consuming and expensive efforts to analyze and comprehend thousands of pages of what most often proved to be irrelevant material”).

27 See, e.g., *id.* See generally Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 635, 638 (1989) (describing discovery as “nuclear war” and describing impositional discovery). But see Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1130–40 (2015) (asserting that the Committee’s empirical support regarding disproportionate discovery was “manufactured”); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) (“There is no strong evidence documenting the alleged massive discovery abuse in the federal courts.”). For a more thorough explanation of this disagreement, see *infra* text accompanying notes 71–102.

28 See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 300 (2002) (explaining that to the drafters of the Federal Rules, very broad discovery scope was “a needed complement to notice pleading”); see also John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 517 (2000) (“[T]he information-gathering and issue-defining functions that discovery must perform in a notice-pleading regime require broad and often copious discovery . . .”).

29 See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts . . . is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.”); Karen A. Feagle, *Extraterritorial Discovery: A Social Contract Perspective*, 7 DUKE J. COMP. & INT’L L. 297, 297 (1996) (“The basic philosophy of the U.S. system of discovery is that justice is best served when, prior to trial, litigants in a civil action fully disclose all information potentially pertinent to the claim at issue.”).

30 See, e.g., Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 520 (1998).

formula has become embedded in the infrastructure of American civil procedure.”³¹

B. *Attempting to Curtail Purported Over-Discovery*

Despite these concerns, both the Advisory Committee and the Supreme Court have taken steps that have affected the scope of discovery. The first major recent attempt to circumscribe the scope of discovery came on December 1, 2000.³² Before this date, parties were entitled to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”³³ Such “relevance” was interpreted very broadly, and “the reach of discovery extended to any matter that had a bearing upon . . . any issue in the case.”³⁴ Although requiring a showing of “relevance” could be said to be an early form of discovery scope narrowing, this supposed hurdle precluded only the most extremely inappropriate discovery requests, with one court stating merely that “[d]iscovery of information that has no conceivable bearing on the case” was barred.³⁵

The 2000 Amendments to the Federal Rules, however, significantly modified the language defining the scope of discovery.³⁶ Rather than pegging the relevance question to the *subject matter* at issue, the 2000 version of Rule 26(b)(1) allowed for discovery only regarding a matter “that is relevant to the *claim or defense* of any party.”³⁷ Parties were still permitted to obtain relevant subject-matter discovery—the former default scope—but only with the court’s finding of good cause.³⁸ The Committee therefore created a two-tier discovery process, in which parties were “free to engage in ‘party-controlled’ or ‘attorney-managed’ discovery,” and, when they were “unable to agree as to whether a discovery request [met the] relevancy standard, the responsibility

31 *Id.*

32 However, the original Federal Rules of Civil Procedure included many judicial checks on the scope of discovery by requiring leave of court for discovery devices. *See, e.g.*, FED. R. CIV. P. 26(a) (1938), *reprinted in* 308 U.S. 647, 694 (1938) (allowing depositions “[b]y leave of court after jurisdiction has been obtained over any defendant” and before the answer was served). Many of these judicial checks were removed in the subsequent amendments, contributing to the extremely broad, party-managed discovery to which we have become accustomed. *See, e.g.*, FED. R. CIV. P. 26, Advisory Committee’s Note (1947), *reprinted in* 5 F.R.D. 433, 453 (1946) (“The amendment eliminates the requirement of leave of court for the taking of a deposition [in most circumstances] . . .”).

33 FED. R. CIV. P. 26(b)(1) (1993), *reprinted in* 146 F.R.D. 535, 612 (1993).

34 Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 694 (2002). *See generally* 4 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶¶ 26.06, 26.07[1] & n.4 (2d ed. 1996) (“Relevance is construed broadly, allowing discovery of matters within the knowledge of the party seeking it, of opinions and conclusions, and of matters not directly admissible in evidence.”).

35 *Miller v. Pancucci*, 141 F.R.D. 292, 296 (C.D. Cal. 1992).

36 FED. R. CIV. P. 26(b)(1) (2000), *reprinted in* 192 F.R.D. 340, 388 (2000).

37 *Id.* (emphasis added).

38 *Id.*

shift[ed] to the court.”³⁹ This contentious⁴⁰ change was aimed at “[c]oncerns about costs and delay of discovery,” especially when “parties seek to justify discovery requests that sweep [so] far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the ‘subject matter’ involved in the action.”⁴¹ It sought to address these concerns by “involv[ing] the court more actively in regulating the breadth of sweeping or contentious discovery,” as “involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery.”⁴²

As one can deduce, such a change, in isolation, would likely have had little effect, as litigants and courts would still be required to interpret the word “relevant,” which was one of the main sources of ambiguity in the pre-2000 Rules.⁴³ However, the Committee included a second change to the nature of Rule 26(b) in the 2000 Amendments: the addition of the final sentence of 2014 Rule 26(b) (1),⁴⁴ explicitly subjecting all discovery to the limitations imposed by Rule 26(b) (2) (C).

First added to Rule 26(b) in the 1983 Amendments,⁴⁵ these limiting factors, as they read in 2014, directed that the court “must” limit the scope of discovery if:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy,

39 Childers, *supra* note 34, at 697.

40 See generally Niemeyer, *supra* note 30, at 519–20 (outlining the arguments of both the proponents and detractors).

41 FED. R. CIV. P. 26, Advisory Committee’s Note (2000), *reprinted in* 192 F.R.D. 340, 388–89 (2000).

42 *Id.* at 389.

43 Additionally, the Committee noted that “[t]he dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision,” another source of ambiguity in the post-2000 Rules. *Id.* Perhaps this was a factor in why the subject-matter discovery language was rarely invoked: parties simply framed their discovery request as relevant to the *claim* at issue, rather than the *subject matter* at issue. See 2014 AGENDA BOOK, *supra* note 12, at 103 (noting that the subject-matter discovery language of Rule 26(b)(1) “is rarely invoked”). If true, this further weakens any safeguard characteristics the 2000 Amendments may have had.

44 FED. R. CIV. P. 26(b)(1) (2000), *reprinted in* 192 F.R.D. 340, 388 (2000) (“All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii) [2014 Rule 26(b)(2)(C)].”).

45 FED. R. CIV. P. 26(b)(1) (1983), *reprinted in* 97 F.R.D. 165, 214–15 (1983).

the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.⁴⁶

When originally inserting these limitations, the Advisory Committee sought "to deal with the problem of over-discovery" and to "guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper [i.e., 'relevant'] subjects of inquiry."⁴⁷ Touted as a "180-degree shift" from the former, pre-1983, rule—which barely curtailed discovery, if at all—the new factors aimed to obligate judges "to limit discovery" if "the evils of redundancy and disproportionality" became "manifest."⁴⁸ However, the impact of these factors has not been as great as imagined by the 1983 drafters.⁴⁹

The 2000 addition to Rule 26(b)(1) of the sentence specifically calling attention to the factors⁵⁰ had similar goals.⁵¹ However, in the fifteen years since its insertion, it has likewise failed to noticeably curtail discovery.⁵² In

46 FED. R. CIV. P. 26(b)(2)(C) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 37. The factors are largely the same as they originally appeared in 1983. *See* FED. R. CIV. P. 26(b)(1) (1983), *reprinted in* 97 F.R.D. 165, 214–15 (1983).

47 FED. R. CIV. P. 26, Advisory Committee's Note (1983), *reprinted in* 97 F.R.D. 165, 217 (1983).

48 ARTHUR R. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 33 (1984).

49 *Compare id.*, with Letter from Arthur R. Miller, Professor, Harvard Law Sch., to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure 2 (Feb. 10, 2005) [hereinafter Miller Comment Letter], <http://www.uscourts.gov/file/17077> ("[T]he 1983 and 1993 amendments [specifically with regard to the aforementioned factors] do not appear to have brought about the radical shift in practice I foresaw [in 1983] . . ."). *Accord*, FED. R. CIV. P. 26, Advisory Committee's Note (2000), *reprinted in* 192 F.R.D. 340, 390 (2000) ("[C]ourts have not implemented [the] limitations with the vigor that was contemplated.").

50 FED. R. CIV. P. 26(b)(1) (2000), *reprinted in* 192 F.R.D. 340, 388 (2000) ("All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii) [2014 Rule 26(b)(2)(C)].").

51 *Id.*; FED. R. CIV. P. 26, Advisory Committee's Note (2000), *reprinted in* 192 F.R.D. 340, 390 (2000) ("This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of [the factors] to control excessive discovery.").

52 *See, e.g.*, Netzorg & Kern, *supra* note 8, at 517 ("[T]he default rule in favor of virtually unlimited discovery of any relevant fact routinely prevails."). *See generally* Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 515 (2013) (noting that "lawyers will tell you that the [factors imposing] limits on discovery currently found in [Rule 26] have not done much to curb overbroad requests," and that, although the factors could be "very effective means to protect against overbroad and burdensome discovery," they will only do so if they are "actually understood by lawyers and enforced by judges, neither of which, experience suggests, appears to be the case"); *see also* 2014 AGENDA BOOK, *supra* note 12, at 84 ("If the expressions of concern [about over-discovery] reflect widespread disregard of principles that have been in the rules for thirty years [i.e., the proportionality factors], it is time to prompt widespread respect and implementation.").

sum, the 2000 Amendments—attempting to limit the scope of discovery by establishing a two-tier “relevancy” test and by highlighting the implicit proportionality factors already present in the Rule—had little actual impact on the problem of over-discovery.

C. *Laying the Foundation for Proportionality from the Bench*

Perhaps the most profound narrowing of discovery to date came not from the Advisory Committee, but from the bench. With the landmark cases of *Bell Atlantic Corp. v. Twombly*⁵³ and *Ashcroft v. Iqbal*,⁵⁴ the Supreme Court substantially narrowed the extremely liberal notice pleading standard—under which a complaint would survive a motion to dismiss unless “it appear[ed] beyond doubt” that “no set of facts” would entitle the plaintiff to relief—that had been explicitly endorsed since at least 1957.⁵⁵ Instead, the Court explained that plaintiffs’ complaints must now “state facts showing a plausible (i.e., more than a ‘conceivable’) claim.”⁵⁶

This change to the plausibility standard for pleading “necessarily ha[d] an impact on the whole of pretrial procedure,” including—especially, perhaps—on discovery.⁵⁷ And indeed, the Supreme Court expressly considered the expense of contemporary discovery when deciding *Twombly*.⁵⁸ Because of the ever-increasing costs of litigation—often in the form of voluminous discovery—“more rigorous pleading requirements” were needed.⁵⁹ Noting this, the Supreme Court endorsed the plausibility standard with the goal of “preventing unworthy discovery and case-management costs.”⁶⁰ If liberal discovery was a necessary corollary to notice pleading,⁶¹ in the post-*Twombly*/*Iqbal* pleading world, liberal discovery “*only if discovery costs are not excessive*” seems to be the new desired norm.⁶²

53 550 U.S. 544 (2007).

54 556 U.S. 662 (2009).

55 *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (“In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

56 THOMAS D. ROWE ET AL., *CIVIL PROCEDURE* 50 (3d ed. 2012). A full recounting of the history and impact of *Twombly* and *Iqbal* is beyond the scope of this Note. See generally JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 257–67 (5th ed. 2015); ROWE ET AL., *supra*, at 28–67.

57 Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1453 (2008).

58 See *Twombly*, 550 U.S. at 558–59.

59 T.S. Ellis, III & Nitin Shah, *Iqbal, Twombly, and What Comes Next: A Suggested Empirical Approach*, 114 PENN STATIM 64, 66 (2010) (“The decisions . . . are inseparable from their underlying supposition that dramatic increases in the cost of litigation—and especially discovery—justified the judicial imposition of more rigorous pleading requirements.”).

60 Ryan Mize, Note, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1257 (2010).

61 See *supra* note 28.

62 See Chen, *supra* note 57, at 1454.

The extent to which the *Twombly/Iqbal* plausibility standard appreciably limits over-discovery stands open to debate.⁶³ Some, of course, disagree with the decisions on non-discovery grounds,⁶⁴ and others warn that, although the pair of cases may solve some discovery problems, “solutions often create newer and bigger problems.”⁶⁵ However, to many, “the decision represents a justified and long overdue expansion of ‘heightened’ pleading that will not render defendants helpless when faced with discovery costs imposed by futile complaints, particularly in the realm of complex litigation.”⁶⁶ At a minimum, to the extent that the plausibility standard allows more motions to dismiss to succeed, discovery will be curtailed, as the actions will end much earlier.⁶⁷ Likewise, to the extent that the standard forces pre-discovery settlement in cases that otherwise would have moved into discovery, discovery costs will recede.⁶⁸

Perhaps the most noticeable way in which *Twombly* and *Iqbal* will affect modern discovery practice is in their influence on the culture of federal litigation. Despite concerns that traditional notice pleading—and therefore expansive discovery—was an integral part of the entire structure of the Federal Rules of Civil Procedure,⁶⁹ the Supreme Court nevertheless dramatically changed the nature of the federal litigation scheme by introducing the plausibility standard. It is at least conceivable that this shift led to a climate of

63 See, e.g., Ellis & Shah, *supra* note 59, at 67–68 (noting that, although the new standard “could well play a useful role” in avoiding “litigation by extortion”—i.e., avoiding threats of copious discovery to force settlement—*Twombly* and *Iqbal* were decided on perceptions, rather than empirical data, of how to manage discovery, and therefore further study is needed to determine whether or not the decisions will be effective in curtailing over-discovery). Of course, if over-discovery is not as great an issue as commonly believed, nothing would have much of an impact on it, as it simply would not be an issue in a vast majority of cases. See *infra* text accompanying notes 71–102.

64 See Mize, *supra* note 60, at 1247 (“Some view [*Twombly*] as an unwarranted extension of the plausibility doctrine . . .”). See generally Miller, *supra* note 23, at 593–99.

65 John P. Sullivan, *Do the New Pleading Standards Set Out in Twombly and Iqbal Meet the Needs of the Replica Jurisdictions?*, 47 SUFFOLK U. L. REV. 53, 53 (2014).

66 Mize, *supra* note 60, at 1247.

67 However, this premise only holds true if the dismissals are with prejudice (as opposed to dismissals with leave to amend the complaint). Many motions to dismiss are granted without prejudice. See Ellis & Shah, *supra* note 59, at 69–70.

68 It is not clear, however, that *Twombly* and *Iqbal* actually cause fewer cases to go to discovery through more settlements. Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2277 (2012) (The “settlement-prevented” cases that the author measured “would not reach discovery under either pleading regime . . .”). See generally *id.* at 2315–24.

69 See, e.g., Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (stating that “it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in [that] case with the liberal system of ‘notice pleading’ set up by the Federal Rules”). See generally James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1277–80 (2010) (describing the Federal Rules of Civil Procedure, as a whole, in the context of notice pleading, as opposed to code pleading); *supra* notes 28–29.

change in which the Advisory Committee felt empowered to take direct action against what it saw as over-discovery by explicitly referencing proportionality and incorporating the proportionality factors into the principal text of Rule 26(b). Perhaps Judge Niemeyer was right in 1993⁷⁰—the Advisory Committee *itself* was not prepared to take the first step towards a full-throated endorsement of a proportional scope for discovery, but with the Supreme Court’s modification of the notice pleading standard as a catalyst, the Committee decided to tackle the issue.

II. INTERLUDE—DO WE IN FACT NEED PROPORTIONALITY TO CURTAIL PURPORTED OVER-DISCOVERY?

The foregoing Part assumed that over-discovery is, in fact, an issue that needs to be addressed. However, is over-discovery actually an issue? Is there rampant “abuse and frivolous litigation and the need for cost reduction,” or are such cries merely part of the “constant drumbeat of rhetoric[,] . . . [u]rban legends[,] and cosmic anecdotes”?⁷¹ This debate is not a new one. Indeed, Justice Powell, dissenting from the 1980 Amendments to the Federal Rules, noted that “[t]here are wide differences of opinion within the profession as to the need for reform.”⁷² Justice Powell believed that the 1980 Amendments did too little to address “the acute problems associated with discovery,” noting that the Rules “invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds.”⁷³ The 1980 Committee, however, in withdrawing its amendment to Rule 26—which would have narrowed the scope of discovery—noted that “[a] number [of commenters] disputed the assumption that there was general abuse of discovery,” and was not convinced empirical evidence supported the contention that discovery abuse was rampant.⁷⁴

The debate certainly continues today. Proponents of the 2015 Amendment package believed that the modifications to the scope of discovery “would constitute a significant improvement to the rules governing discovery” and would help to curb widespread over-discovery.⁷⁵ Critics of the package largely believed that it was “a solution in search of a problem—that discovery in civil litigation already [was] proportional to the needs of cases.”⁷⁶

70 Niemeyer, *supra* note 30, at 520 (“Despite any temptation to engage in this debate, the Civil Rules Advisory Committee cannot, in any practical way, now attempt to undo the 1938 experiment of notice pleading coupled with broad discovery because that formula has become embedded in the infrastructure of American civil procedure.”).

71 Miller, *supra* note 23, at 598.

72 Transmission to Congress of the 1980 Amendments to the Federal Rules of Civil Procedure (Powell, J., dissenting), *reprinted in* 85 F.R.D. 521, 522 (1980).

73 *Id.*

74 *Id.* at 541–42.

75 2014 AGENDA BOOK, *supra* note 12, at 82.

76 *Id.* at 81.

The Advisory Committee falls into the former category. It considered several studies over the course of its deliberations in order to better understand the allegations of pervasive over-discovery in the federal litigation system.⁷⁷ The Committee asserted that the surveys collectively showed practitioners' "great[] dissatisfaction with the costs and extent of civil discovery."⁷⁸ It noted that one survey primarily concluded that "today's civil litigation system takes too long and costs too much, resulting in some deserving cases not being brought and others being settled to avoid the costs of litigation," with "[a]lmost half of . . . respondents believ[ing] that discovery is abused in almost every case."⁷⁹ The Committee emphasized one survey's conclusion that "[p]roportionality should be the most important principle applied to all discovery,"⁸⁰ with other surveys finding that "judges do not enforce proportionality limitations on their own."⁸¹

The Committee also commissioned the Federal Judicial Center (FJC) to perform a large survey of a broad cross-section of attorneys of record on federal cases terminating in 2008.⁸² The Committee wrote of the FJC study:

Although the FJC study found that a majority of lawyers thought that the discovery in a specific case they handled generated the "right amount" of information, and more than half reported that the costs of discovery were the "right amount" in proportion to their client's [sic] stakes in the closed cases, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients' stakes in the case. . . . The FJC study revealed agreement among lawyers representing plaintiffs, defendants, and both about equally, that the rules should be revised to enforce discovery obligations more effectively.⁸³

In sum, the Committee was "convinced that . . . emphasizing proportionality in Rule 26(b)(1) [would] help achieve the just, speedy, and efficient resolution of civil cases."⁸⁴

However, such conclusions drew heavy criticism from numerous observers. First, opponents of the amendment package largely asserted that the

77 See *id.* at 82–83.

78 *Id.* at 83.

79 *Id.*; see EMERY G. LEE III & THOMAS E. WILLGING, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 71 (2009) [hereinafter 2009 FJC REPORT], [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

80 2014 AGENDA BOOK, *supra* note 12, at 83 (quoting AM. COLL. OF TRIAL LAW. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 7 (2009), http://iaals.du.edu/sites/default/files/documents/publications/actl-iaals_final_report_rev_8-4-10.pdf).

81 2014 AGENDA BOOK, *supra* note 12, at 83; see CORINA D. GERETY & BRITTANY K.T. KAUFFMAN, SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS: 2008–2013, at 46–47 (2014), http://iaals.du.edu/sites/default/files/documents/publications/summary_of_empirical_research_on_the_civil_justice_process_2008-2013.pdf.

82 2009 FJC REPORT, *supra* note 79, at 5, 77–78.

83 2014 AGENDA BOOK, *supra* note 12, at 82–83; see 2009 FJC REPORT, *supra* note 79, at 27–28, 61–62.

84 2014 AGENDA BOOK, *supra* note 12, at 82.

surveys—aside from the FJC survey—upon which the Committee relied were not “empirical research studies” at all. Rather, detractors asserted, the (non-FJC survey) research and surveys conducted on behalf of the Advisory Committee “consisted of opinion surveys, not studies of actual case files. This is problematic because people’s perceptions are subject to a variety of psychological biases that distort objective reality.”⁸⁵ In fact, Professor Patricia Moore states that:

Had the opinion surveys (other than the FJC study) . . . been the subject of a *Daubert* motion to strike, it is likely that the judges on the Committee would [have] found the surveys unreliable and inadmissible. . . . Almost none of [the] conditions for a reliable survey was present in the opinion surveys.⁸⁶

The Committee’s response to such criticism of survey methodology is that the objectors “seem to draw from a particularized concept of what constitutes empirical research,” and that if “more rigorous work comparing the actual results in terms of cost, time, and outcome of applying different discovery regimes to cases” supporting “accurate measurements” was to be attempted, the delay in “[a]waiting work of that character could easily paralyze all reform.”⁸⁷ Although such concerns may be true, the Committee’s justification does not squarely address the legitimate criticisms raised by observers as to the studies’ methodologies.

Observers also challenged the Committee’s interpretation of the FJC study.⁸⁸ The Committee seemed to downplay many of the FJC’s findings, instead focusing on the “quarter of attorneys [who] viewed discovery costs in their cases as too high relative to their clients’ stakes in the case,” ultimately concluding that litigants agree that the “rules should be revised to enforce discovery obligations more effectively.”⁸⁹ However, Professor Moore and others asserted that, “[i]f anything, the FJC’s closed-case study prepared for the Duke Conference indicates that lawyers have internalized the concept of proportionality in discovery. . . . The FJC’s findings cannot reasonably be

85 Moore, *supra* note 27, at 1131; see also Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1099–1102 (2012) (describing the surveys as part of a “cost-and-delay narrative” that “reflected the concerns and beliefs among legal professionals,” but that fall squarely outside of the realm of empirical research).

86 Moore, *supra* note 27, at 1131.

87 2014 AGENDA BOOK, *supra* note 12, at 115.

88 These observers do, however, acknowledge that the FJC study was empirical in nature. See Moore, *supra* note 27, at 1131 (“The FJC’s study was by far the best-designed and most probative, because it randomly selected attorneys of record on all cases that closed in the last quarter of 2008.” (footnote omitted)); Reda, *supra* note 85, at 1108 (“That the closed-case study methodology goes some way to alleviating the flaws of attorney opinion surveys is suggested by some of the findings of the 2009 FJC study itself.”); see also HELEN HERSHKOFF ET AL., JOINT COMMENTS ON PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE 3 (2014) [hereinafter 2014 JOINT COMMENTS LETTER], http://www.lfcj.com/uploads/3/8/0/5/38050985/joint_professor_comment_2.5.14.pdf (acknowledging that the FJC study was “a careful and exhaustive study”).

89 2014 AGENDA BOOK, *supra* note 12, at 82, 83.

interpreted as an overall failure of lawyers and judges to apply proportionality.”⁹⁰ Others noted that the FJC study “fail[ed] to demonstrate that disproportionality is a systemic problem,” and that its findings “undercut the conventional wisdom, repeated in headlines and sound bites, that discovery costs are far-and-away the most significant part of total litigation costs in federal cases.”⁹¹ The Committee’s response to such criticism was simply that it “does not agree that the FJC survey or other surveys prepared for the conference suggest no need for change.”⁹²

An additional disagreement, of many,⁹³ with the Committee’s 2015 proportionality amendments was that (1) “most cases involve minimal or no discovery,” and (2) “the minority of cases in which discovery costs are high will not be affected by the proposed amendments.”⁹⁴ Opponents of the amendments pointed out that empirical research supported “the view that the federal civil system is highly effective in most cases, that total costs develop in line with stakes, and that discovery volume and cost is proportional to the amount at stake.”⁹⁵ Indeed, the Committee appeared to accept this assertion, writing that “[t]he proposal to amend Rule 26(b)(1) ‘will not affect most cases.’ But it will force discussions among the parties and with the court in complex cases. That is the intent, and much good can be accomplished without significant harm.”⁹⁶ However, this logic does not seem to support such comprehensive reform, and only serves to bolster allegations that the amendment package was “a solution in search of a problem.”⁹⁷

Finally, Professor Arthur R. Miller—who originally helped to insert the concept of proportionality into the Federal Rules as former reporter to the Advisory Committee during the 1983 amendments—now appears to disapprove of the proportionality amendments on an access-to-justice basis. Professor Miller laments the “[d]ecisions and rules amendments [that] have erected a series of procedural stop signs that narrow citizen access to court,”⁹⁸ and warns that new Rule 26(b) “is a significant difference from what

90 Moore, *supra* note 27, at 1113 (citation omitted). This is despite the fact that the FJC study’s “researchers were very careful to frame their research to find cases that involved as much discovery as possible. Thus, they systematically excluded from their study any cases in which discovery was unlikely to take place,” leaving “a study that likely *over-represented* how much discovery takes place in a typical civil case in federal court.” 2014 JOINT COMMENTS LETTER, *supra* note 88, at 3 (emphasis added).

91 2014 JOINT COMMENTS LETTER, *supra* note 88, at 3; *see also* Reda, *supra* note 85, at 1089 (“The 2009 FJC study rang false. It did not support anything that attorneys knew about the civil justice system.” (footnote omitted)).

92 2014 AGENDA BOOK, *supra* note 12, at 82.

93 For a thorough discussion of opponents’ arguments against the Committee’s amendments, *see generally* 2014 JOINT COMMENTS LETTER, *supra* note 88; Moore, *supra* note 27; Reda, *supra* note 85.

94 *See* 2014 JOINT COMMENTS LETTER, *supra* note 88, at 2–4.

95 Reda, *supra* note 85, at 1089.

96 2014 AGENDA BOOK, *supra* note 12, at 132.

97 *Id.* at 81.

98 *Id.* at 173.

the limited 1983 amendment intended.”⁹⁹ Professor Miller believes that the 2015 Amendments “turn away from the original vision of a relatively unfettered and self-executing discovery regime,” and instead believes that “promoting cooperation between and among counsel” is the best technique to “promote our public policies.”¹⁰⁰ Further, Professor Miller noted that “there is not yet any showing that the amendments made in 1983, 1993, and 2000 to narrow discovery have had any effect.”¹⁰¹

In sum, there was a clear disagreement between outside observers and the Advisory Committee on whether or not the proportionality amendments were actually needed. It is unclear that there is substantial evidence supporting the common cry of broad over-discovery and discovery abuses in the American litigation system. Critics justly pointed out numerous concerns with the empirical methods behind the surveys relied upon by the Advisory Committee to justify the need for proportionality in discovery.

Regardless of whether over-discovery is actually as prevalent as asserted by the Committee, the fact remains that the proportionality amendments to Rule 26(b) have taken effect. Therefore, the following Part will analyze—assuming arguendo that over-discovery should be curtailed through a proportional scope of discovery—whether or not the 2015 Amendments to Rule 26 in fact achieve the goal of curbing over-discovery and whether or not the Amendments use the appropriate means to do so.

III. THE 2015 AMENDMENTS TO RULE 26

A. *Subject-Matter Discovery*

The 2015 Amendments to Rule 26(b) made two major changes: first, subject-matter discovery, even with good cause, was wholly removed.¹⁰² After the 2000 Amendments—in which the default scope of discovery was changed from relevant subject-matter discovery to matters relevant to the claim at issue, with subject-matter discovery allowed only for good cause¹⁰³—federal litigants very rarely invoked the subject-matter discovery language.¹⁰⁴ Because parties were able, of course, to frame their discovery requests in whatever manner they chose, it is very likely that, in the vast majority of cases, they simply termed most (if not all) requests as relevant to the claim at

99 Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 324 n.140 (2014).

100 2014 AGENDA BOOK, *supra* note 12, at 173.

101 *Id.* Interestingly, Justice Powell, advocating for proportionality in 1980, invoked access to justice to promote the opposite view. See Transmission to Congress of the 1980 Amendments to the Federal Rules of Civil Procedure (Powell, J., dissenting), reprinted in 85 F.R.D. 521, 523 (1980) (“[A]ll too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants.”).

102 FED. R. CIV. P. 26(b)(1) (2015).

103 See *supra* text accompanying notes 32–39.

104 2014 AGENDA BOOK, *supra* note 12, at 103.

issue—especially in light of the Advisory Committee’s 2000 acknowledgment that “[t]he dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision.”¹⁰⁵ Indeed, the 2015 Duke Conference Subcommittee recognized that “[p]arties should be able to justify reasonable discovery as relevant to the claims or defenses” in lieu of subject-matter discovery.¹⁰⁶ In light of this, it comes as no surprise that “[e]limination of ‘subject matter’ discovery has not generated much excitement,” and it is unlikely that much, if any, impact will be seen from this deletion.¹⁰⁷

B. Proportionality

Second, and more significantly, the proportionality factors were labeled as such and were moved into the main text of Rule 26(b). Although the word “proportional” appeared nowhere in 2014 Rule 26(b),¹⁰⁸ the factor in 2014 Rule 26(b)(2)(C)(iii)¹⁰⁹ was generally accepted to be a rough measure of whether the discovery requested was proportional.¹¹⁰ Located in a separate subpart of Rule 26(b) since their introduction in 1983, the Committee later sought to emphasize these factors in the 2000 Amendments by adding to Rule 26(b)(1) a sentence specifically directing parties’ attention to them.¹¹¹ This attempt was largely ignored by parties and the courts.¹¹² By using the label “proportional” and by moving the factors themselves into the discovery scope section of Rule 26(b), the Committee has made its change that most clearly “underlines the importance of the concept [of proportionality] and discourages parties and courts from expanding the scope of discovery beyond what is proportional.”¹¹³

The scope of discovery is now styled as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case,” in consideration of the proportionality factors: “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative

105 FED. R. CIV. P. 26 Advisory Committee’s Note (2000), *reprinted in* 192 F.R.D. 340, 389 (2000).

106 2014 AGENDA BOOK, *supra* note 12, at 120.

107 *Id.*

108 FED. R. CIV. P. 26(b) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 36–39.

109 “[T]he burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” FED. R. CIV. P. 26(b)(2)(C) (2014), *reprinted in* 2014 FED. R., *supra* note 9.

110 See FRIEDENTHAL ET AL., *supra* note 56, at 422 (“Rule 26(b)(2)(iii) requir[es] discovery to be proportional to the needs of the case.”); ROWE ET AL., *supra* note 56, at 125 (“Rule 26(b)(2)(C) limits discovery when it is . . . disproportionate because ‘the burden or expense of the proposed discovery outweighs its likely benefit.’” (quoting FED. R. CIV. P. 26(b)(2)(C) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 37)).

111 See *supra* text accompanying notes 43–52.

112 See *supra* note 52.

113 2014 AGENDA BOOK, *supra* note 12, at 126.

access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."¹¹⁴ Such language is a dramatic turn from the former scope of "any nonprivileged matter that is relevant to any party's claim or defense."¹¹⁵

Moving the proportionality factors from Rule 26(b)(2)(C) to the definition of the scope of discovery in Rule 26(b)(1) changed the process by which parties invoke the concept of proportionality (in current parlance, "the burden or expense of the proposed discovery outweighs its likely benefit,"¹¹⁶ and/or "undue burden"¹¹⁷) as a shield against a discovery request. Formerly, when a request for discovery was made, the requesting party had one purported hurdle to clear: relevancy. However, "in reality the bar of relevancy is set so low as to present virtually no burden at all."¹¹⁸ Of course, the requesting party also wrote the request for discovery, and could "remain intentionally vague and speak in the broadest of terms with discovery demands" in order to "craft discovery requests that are at least germane to the case on [their] face," further obviating any protections relevancy may have offered.¹¹⁹

After receiving such a "relevant" request, a party was required to provide the requested discovery.¹²⁰ But what if the party believed that the request was disproportionate? The 2014 Rules allowed her to seek a protective order from the court under Rule 26(c), shielding her from the alleged "undue burden or expense" she had detected.¹²¹ However, the resisting party "b[ore] a

114 FED. R. CIV. P. 26(b)(1) (2015).

115 FED. R. CIV. P. 26(b)(1) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 36.

116 FED. R. CIV. P. 26(b)(2)(C)(iii) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 37.

117 FED. R. CIV. P. 26(c)(1) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 39.

118 Netzorg & Kern, *supra* note 8, at 520.

119 *Id.* In fact, a requesting party's burden was generally merely to ensure that "the discovery sought appear[ed] relevant on its face." *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 684 (D. Kan. 2004) (citing *McCoy v. Whirlpool Corp.*, 214 F.R.D. 642, 643 (D. Kan. 2003)). If this low bar was met, the burden then shifted to the resisting party "to establish the lack of relevance." *Id.* (citing *McCoy*, 214 F.R.D. at 643). The burden, therefore, was largely on the resisting party to *disprove* relevancy, rather than on the requesting party to prove it. *See, e.g., id.*

120 *See, e.g., id.* FED. R. CIV. P. 32(b)(1) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 37 ("The interrogatories must be answered . . ."); FED. R. CIV. P. 34(b)(2)(A) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 53 ("The party to whom the request [for production] is directed must respond in writing within 30 days after being served.").

121 FED. R. CIV. P. 26(c)(1) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 39; *see also* FED. R. CIV. P. 26(b)(2)(C) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 37 (noting that the court must limit unduly burdensome requests "[o]n motion or on its own"). Of course, the party could have elected to make an objection *vis-à-vis* the proportionality factors in Rule 26(b)(2)(C) instead of moving for a protective motion. *See, e.g.,* FED. R. CIV. P. 33(b)(4) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 52 (suggesting objections as responses to interrogatories); FED. R. CIV. P. 34(b)(2)(C) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 53 (suggesting objections as responses to requests for production). Under the Rules, it is the resisting party's choice which method to use. *See* FED. R. CIV. P. 33

heavy burden,” and was required to make a substantial good cause showing before a court granted a protective order, particularly on proportionality grounds.¹²²

Specifically, in order to receive a Rule 26(c) protective order, as in 2014, a party resisting discovery today

must make “a particular and specific demonstration of fact” in support of its request and may not rely upon “stereotyped and conclusory statements.” This typically means that the party seeking a protective order based on undue burden or expense must submit affidavits or other detailed explanation as to the nature and extent of the claimed burden or expense.¹²³

The resisting party has the burden “to show some plainly adequate reason for the [protective order];” merely showing “some inconvenience and expense does not suffice to establish good cause for issuance of a protective order.”¹²⁴ Further, the resisting party must meet this high, fact-intensive bar for *every* request she is resisting—including, for example, every interrogatory from which she wants protection.¹²⁵

Once a resisting party meets this high bar, moreover, she faces perhaps the most significant hurdle to vault: judicial reluctance to grant protective orders. Although 2014 Rules 26(b)(2)(C) and 26(c) provided judges with vast power to do so, “the courts [had] been reluctant to utilize the tools available to control runaway discovery,” for two major reasons:

First, ever since the federal rules introduced modern discovery provisions, allowing parties to present claims for which they otherwise would have had no evidence and revolutionizing the way in which cases are prepared for trial, there has been a cultural climate favoring liberal disclosure and look-

Advisory Committee’s Note (1970), *reprinted in* 48 F.R.D. 487, 522 (1970) (“[T]he responding party who believes that some parts or all of the interrogatories are objectionable may choose to seek a protective order under . . . Rule 26(c) or may serve objections . . .”). Either form is subject to roughly the same analysis. *See infra* notes 123–25 and accompanying text. Whichever form the resisting party chooses, it is important she “not remain completely silent when [she] regards discovery as improper,” lest she lose her opportunity to make the objection. *See* 8A WRIGHT ET AL., *supra* note 24, § 2035, at 154.

122 Netzorg & Kern, *supra* note 8, at 519–20.

123 *Aikens v. Deluxe Fin. Servs., Inc.*, 217 F.R.D. 533, 536–37 (D. Kan. 2003) (footnotes omitted) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981)).

124 *Twin City Fire Ins. Co. v. Emp’rs Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989); *see also* *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (“Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test . . . Moreover, the harm must be significant, not a mere trifle.”).

125 *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296–97 (E.D. Pa. 1980) (explaining that boilerplate objection as to burden was not enough for a protective order; rather, the resisting party “must show specifically how, despite the broad and liberal construction afforded the federal discovery rules, each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive . . . by submitting affidavits or offering evidence revealing the nature of the burden” (citations omitted)); *see also* Netzorg & Kern, *supra* note 8, at 522 (“Courts with crowded dockets seem to prefer—or are simply more accustomed to—resolution of discovery disputes by an itemized analysis of each disputed discovery request and the sufficiency of the specific objection.”).

ing with disfavor on efforts to limit it. Second, judges and magistrates, who are often assigned tasks relating to disputes over discovery, are too often out of touch with the cases during the pretrial stage to make meaningful decisions about discovery; it is the parties who are aware of the real issues involved.¹²⁶

With these barriers in place, it is not altogether surprising that, despite the protections written into 2014 Rule 26 in an attempt to wrangle over-discovery, “[s]till largely missing [was] any assessment of whether the discovery sought [was] proportional in its broader context, considering the needs of the case, the amount in controversy, the significance of the issues, and the resources of the parties.”¹²⁷

New Rule 26 attempts to remove many of these purported barriers to proportional discovery.¹²⁸ By directly limiting its scope to that discovery which is proportional to the needs of the case, the Advisory Committee has explicitly endorsed proportional discovery in the text of the Rules, something it has not done in the past. Therein may lie a powerful aspect of the 2015 discovery amendments: district court judges and magistrate judges may be less hesitant to limit discovery—less committed to the traditional notion of extremely liberal discovery—with an overt, unambiguous, and unavoidable commitment on the part of the Advisory Committee (and therefore, at least tacitly, the Supreme Court¹²⁹) to proportionality. Instead of the “dormant” undue burden protections formerly in effect, judges may now feel empowered (obligated, perhaps) to use their broad discovery power and discretion to carry out the proportionality directive in new Rule 26(b)(1).¹³⁰

Apart from this cultural “rebranding” of sorts, however, it is unclear—assuming, as the Committee asserts, that over-discovery is a pervasive problem and that proportionality is the solution¹³¹—that the proposed Rule goes far enough to substantively address the problem. Because of the way in which the Advisory Committee inserted the proportionality language, the question of which party will bear the burden of (dis)proving proportionality of discovery requests is ambiguous. As the Committee simply inserted the “proportional to the needs of the case” language after the “relevant to any party’s claim or defense” language, a reasonable interpretation is that courts are to treat such proportionality as they have treated relevancy.

126 FRIEDENTHAL ET AL., *supra* note 56, at 421–22 (footnote omitted); *see also* Netzorg & Kern, *supra* note 8, at 522 (“In short, the ‘strong preference for broad production’ continues to dominate.”).

127 Netzorg & Kern, *supra* note 8, at 522.

128 *But see supra* text accompanying notes 71–101 (discussing whether amending Rule 26(b) in an attempt to achieve proportionality is necessary).

129 *See* Rules Enabling Act, Pub. L. No. 100-702, § 2072(a), 102 Stat. 4642, 4648 (codified as amended at 28 U.S.C. § 2072(a) (2012) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure . . .”).

130 *But see* 2014 AGENDA BOOK, *supra* note 12, at 125 (“[I]ncreased prominence [of the proportionality factors] also may be resisted by judges who will see this as imposing a new obligation on them rather than a shared obligation of the parties and the court.”).

131 *See supra* text accompanying notes 71–101.

If courts do elect to treat proportionality as they have relevancy, a basic proportionality framework can be established. First, the requesting party will serve discovery requests upon the resisting party. The resisting party, believing the request to be disproportionate to the needs of the case, considering the proportionality factors, will either object (in which case the requesting party will file a motion to compel) or file a Rule 26(c) motion for a protective order. In either case, the request will be subject to a two-part analysis. First, the court will determine whether the request is proportionate on its face.¹³² Here, the requesting party will have the burden of showing the proportionality of the request.¹³³ Thereafter, the burden will shift to the resisting party to show that the request is not proportional.¹³⁴

The issue with this framework is that courts are accustomed to the bulk of the burden falling on the resisting party to show that the request is outside of the scope of discovery.¹³⁵ Since relevancy is such a low bar to the requesting party, only the most egregious discovery requests are filtered by the first-step analysis of relevancy on the face of the request.¹³⁶ Of course, this low bar is set in the context of the “broad scope of relevance as defined under Rule 26(b)(1).”¹³⁷ In one scenario, then, courts will look to the factors listed in proposed Rule 26(b)(1) to establish the scope of proportionality, and the initial screen of proportionality “on the face” of the discovery request will not be as easily defeated as that for relevancy. In this case, the goals of proportionality would likely be well served, as the burden will rest with the requesting party to show that her request is proportional to the needs of the case. However, it is entirely possible that courts will trend towards the practice of filtering only the most extremely inappropriate requests in the first (“on its face”) stage, and instead will shift the burden to the resisting party to provide “an itemized analysis of each disputed discovery request and the sufficiency of the specific objection.”¹³⁸

Requiring the resisting party to bear the burden of showing a disproportionate request will likely do little to discourage disproportionate discovery requests—assuming, as the Committee did, that they are prevalent.¹³⁹ If one

132 Cf. *Ficep Corp. v. Haas Metal Eng'g, Inc.*, No. 14-243, 2015 WL 566988, at *2 (D. Kan. Feb. 11, 2015) (“A request for discovery should be allowed ‘unless it is clear [on its face] that the information sought can have no possible bearing’ on the claim or defense of a party.” (quoting *Stewart v. Mitchell Transp.*, No. 01-2546, 2002 WL 1558210, at *4 (D. Kan. July 11, 2002))).

133 Cf. *McCoy v. Whirlpool Corp.*, 214 F.R.D. 642, 643–44 (D. Kan. 2003).

134 Cf. *id.*

135 See Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 975 (arguing that Federal Rule of Civil Procedure 26(c) contains a “quirk” that “unfairly shifts [the] burden to the responding [i.e., resisting] party”); see also *supra* notes 122–28.

136 See *supra* notes 121–22 and accompanying text.

137 *McCoy*, 214 F.R.D. at 643.

138 Netzorg & Kern, *supra* note 8, at 522.

139 See *supra* text accompanying notes 74–105.

of the major issues with today's discovery system is "impositional discovery"¹⁴⁰ or "litigation by extortion,"¹⁴¹ requiring the very party that needs protection from (threats of) a deluge of discovery requests to overcome a tacit presumption of proportionality does not seem to address the problem squarely. Such a presumption would not disincentivize disproportionate discovery requests.

Both opponents of the proportionality amendments and the Advisory Committee itself seem to prefer the latter scenario in which the resisting party bears the burden of showing that a request is disproportionate.¹⁴² It is clearly sensible for opponents to disagree with any burden shifting, as they do not agree with the Committee that over-discovery is rampant in the federal litigation system—a new burden upon requesting parties, therefore, would be unjustified and would "encourage a higher degree of litigation over the scope of discovery and increase costs both for litigants and the court system."¹⁴³ The Committee's reason for opposing the burden shift, however, is less convincing. Asserting that Rule 26(g)—which requires requesting parties to certify that their requests are "neither unreasonable nor unduly burdensome or expensive"¹⁴⁴—"already imposes on the requesting party the responsibility to ensure that the request is not unreasonably burdensome or expensive," the Committee rejects any implication that new Rule 26 has or should have a new burden upon the requesting party.¹⁴⁵ However, this raises the question: If Rule 26(g), as it existed in 2014, was so well-poised to address the proportionality issue by ensuring that parties do not request disproportionate discovery, why amend Rule 26 in the first place?

The Advisory Committee seems to have considered this during deliberations, and explicitly asserts that new Rule 26 does *not* "shift the burden of proving proportionality to the party seeking discovery."¹⁴⁶ Indeed, the Committee Note to be published alongside new Rule 26 states: "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."¹⁴⁷ The Committee seems to have embraced ambiguity over clarity: it is unclear whether or not the Advisory Committee intends for courts to place the initial burden of showing (dis)proportionality of disputed requests on the requesting or resisting party. The Committee Note simply states that "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and

140 Easterbrook, *supra* note 27, at 638.

141 Ellis & Shah, *supra* note 59, at 67–68.

142 See, e.g., 2014 AGENDA BOOK, *supra* note 12, at 123; 2014 JOINT COMMENTS LETTER, *supra* note 88, at 9.

143 2014 JOINT COMMENTS LETTER, *supra* note 88, at 9.

144 FED. R. CIV. P. 26(g)(1)(B)(iii) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 41.

145 2014 AGENDA BOOK, *supra* note 12, at 123.

146 *Id.* at 84.

147 *Id.* at 101.

consider it in resolving discovery disputes.”¹⁴⁸ This ambiguous placement of the burden may lead to inconsistent applications of the new Rule. Even if the Committee chose to leave the burden on the resisting party to prove disproportionality, it should have at least clarified this by affirmatively stating which side bears the burden.

Moreover, if it truly believes over-discovery to be a rampant problem,¹⁴⁹ alternative burden models exist that could, in theory, create a uniformly strong disincentive for disproportionate discovery requests. For example, in a comprehensive proportionality overhaul of Utah Rule 26—which influenced the 2015 Federal Rule Amendments¹⁵⁰—that state’s Advisory Committee included a separate subsection of Rule 26 entitled “Burden.” This subsection instructs: “The party seeking discovery always has the burden of showing proportionality and relevance.”¹⁵¹ Utah’s Committee expressly acknowledged that it was changing the burden of proof, writing:

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. . . . Today, the party seeking discovery . . . has the burden of showing that the request is “relevant to the claim or defense of any party” and that the request satisfies the standards of proportionality.¹⁵²

In essence, Utah’s Committee has “inver[t]ed” the “incentive structure of discovery,” as “[t]he requesting party is no longer essentially *entitled* to the discovery, but must instead show a *need* for the discovery.”¹⁵³ This explicit defining of the burden ensures a uniform application of proportionality throughout Utah. Further, it theoretically provides strong incentives for parties to weigh carefully the costs versus the benefits of a discovery request *before* making the request, as they know that they bear the burden of a showing of proportionality. Indeed, one commentator suggests that this burden clarification is one of “only three changes likely to have a positive effect on the discovery process” out of the numerous modifications made to the Utah rules.¹⁵⁴

148 *Id.*

149 *See supra* text accompanying notes 74–105.

150 *See, e.g.*, 2014 AGENDA BOOK, *supra* note 12, at 85, 124, 133; *see also* PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS 4 (2015), [https://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report\(2015\).ashx](https://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report(2015).ashx) (“[T]he revisions adopted by the Utah district courts have generated a great deal of national interest. Many court policymakers including the federal Advisory Committee on Civil Rules are considering similar reforms . . .”).

151 UTAH R. CIV. P. 26(b)(3). The burden will always lie with the party seeking discovery, regardless of how the issue is raised—whether through an objection, a motion to compel, or a motion for a protective order. Favro & Pullan, *supra* note 135, at 971.

152 UTAH R. CIV. P. 26, Advisory Committee Note (quoting UTAH R. CIV. P. 26(b)(1)).

153 Marc Therrien, Note, *Talkin’ ‘Bout a Revolution?: Utah Overhauls Its Rules of Civil Discovery*, 2011 UTAH L. REV. 669, 691.

154 *Id.* at 693.

However, whether or not such a burden-shifting regime would effectively mitigate purported over-discovery depends, somewhat circularly, on the prevalence and severity of over-discovery. The significance of the burden of persuasion is “limited to those cases in which the trier of fact is actually in doubt,”¹⁵⁵ i.e., in those cases in which the scope of the discovery request is neither clearly proportionate nor clearly disproportionate to the needs of the case. If clear, massive over-discovery is indeed rampant,¹⁵⁶ therefore, a Utah-style burden-shifting measure would likely have little impact, as the burden of the proposed discovery would clearly outweigh the expense in these cases—obviating any effect the burden may have.

It is unclear precisely why the (Federal) Committee declined to at least clearly define who bears the burden of persuasion under new Rule 26.¹⁵⁷ Regardless of the reason, failure to define the burden directly will likely lead to non-uniform application of the new Rule and confusion among litigants.¹⁵⁸ Further, without a precise allocation of the burden to the requesting party, it is extremely likely that the burden will revert back to the resisting party,¹⁵⁹ clearly foreclosing a Utah-style approach to the burden. Although the Committee allocates the responsibility for proportional discovery to all of the parties and the court collectively,¹⁶⁰ it remains to be seen if this is a sensible approach to proportional discovery or an empty directive to stay the course.¹⁶¹ Naturally, however, if there is not widespread over-discovery to

155 JOHN WILLIAM STRONG, *McCORMICK ON EVIDENCE* § 337, at 569 (4th ed. 1992).

156 See *supra* text accompanying notes 74–105.

157 There is some indication that the (Federal) Committee wished to relieve the “fear that transposing [the proportionality factors] into the scope of discovery will change the allocation of burdens between the requesting party and the resisting party.” 2014 AGENDA BOOK, *supra* note 12, at 125. To be sure, numerous published comments expressed such concerns. *E.g., id.* at 200 (“Placing on plaintiffs the burden of proving proportionality is harsh; their resources are generally more limited than defendants’ resources.”); *id.* at 223 (“The proposed rule imposes a multifactor proportionality standard that will place a heavy burden on the party seeking discovery to satisfy proportionality.”).

158 *E.g., id.* at 206 (“The rule does not specify which party bears the burden of proof. ‘[I]t would be very helpful if the Committee would clearly state in the rule or notes that the burden is on the objecting party.’” (alteration in original)).

159 See Favro & Pullan, *supra* note 135, at 975; Therrien, *supra* note 153, at 690–91.

160 FED. R. CIV. P. 26, Advisory Committee’s Note (2015).

161 The proportionality factors have been largely ignored since their introduction in 1983. See Grimm & Yellin, *supra* note 52, at 515 (noting that proportionality limitations will only be effective at curtailing over-discovery if they are “actually understood by lawyers and enforced by judges, neither of which, experience suggests, appears to be the case”); see also 2014 AGENDA BOOK, *supra* note 12, at 84 (“If the expressions of concern [about over-discovery] reflect widespread disregard of principles that have been in the rules for thirty years [i.e., the proportionality factors], it is time to prompt widespread respect and implementation.”). Such bold assertions were made with regard to the 1983 Amendments, which had little effect on over-discovery. See Miller, *supra* note 48, at 33 (touting the 1983 Amendments as a “180-degree shift” from the former rule, and stating that judges would now be required “to limit discovery” if “the evils of redundancy and disproportionality” became “manifest”); Miller Comment Letter, *supra* note 49, at 2 (“[T]he 1983 and 1993

begin with,¹⁶² the point is moot, as there is nothing to change; litigants would have already internalized proportionality regardless of a weak or a forceful directive from the Committee.¹⁶³

Apart from the addition of the overt proportionality references to Rule 26(b), the Committee may have infused proportionality into the discovery process through another means: it has revised Rule 26(c) to “make explicit the authority to enter a protective order that allocates the costs of responding to discovery” to the requesting party.¹⁶⁴ Although this power previously existed under Rule 26(c),¹⁶⁵ it was not apparent from the text of Rule 26(c)—the Rule (non-exhaustively) lists eight remedies available to a court, and does not explicitly include cost sharing among them.¹⁶⁶ Under new Rule 26(c), however, the court is plainly granted the cost-sharing authority, as it may “specify[] terms, including time and place *or the allocation of expenses*, for the disclosure or discovery.”¹⁶⁷ This may be the most powerful proportionality aspect of the Rule Amendments, as it could ensure that the costs of especially prolific discovery requests are internalized by the requesting party.¹⁶⁸

In sum, the Advisory Committee has created an imperfect solution to a problem that may not be as rampant as it asserts. This solution—the imposition of proportionality requirements through Rule 26—now applies to all federal litigation, regardless of size or actual discovery expense of any one case. This may be a classic case of “trying to cure the symptoms rather than the disease”: the Committee does not curtail the breadth or costs of the few outlandishly expensive cases; rather it creates a Rule of broad application that, as shown, will likely have little effect on the very cases at which it is aimed.¹⁶⁹ A better approach, perhaps, would be to attack the few “diseased”

amendments [specifically with regard to proportionality] do not appear to have brought about the radical shift in practice I foresaw [in 1983] . . . ”).

162 See *supra* text accompanying notes 74–105.

163 See Moore, *supra* note 27, at 1113.

164 2014 AGENDA BOOK, *supra* note 12, at 60.

165 See, e.g., *Costantino v. City of Atlantic City*, 152 F. Supp. 3d 311, 335–36 (D.N.J. 2015) (collecting cases prior to the 2015 Rule amendment); see also *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317–24 (S.D.N.Y. 2003) (developing cost-sharing factors).

166 See FED. R. CIV. P. 26(c)(1) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 39.

167 FED. R. CIV. P. 26(c)(1)(B) (2015) (emphasis added).

168 Ironically, however, the Committee has downplayed the importance of costs in new Rule 26(b) by changing the order of the proportionality factors. Compare FED. R. CIV. P. 26(b)(2)(C)(iii) (2014), *reprinted in* 2014 FED. R., *supra* note 9, at 37 (explaining that the court must consider whether “the burden or expense of the proposed discovery outweighs its likely benefit”), with FED. R. CIV. P. 26(b)(1) (2015) (moving said consideration to the end of an eighty-six-word sentence). This factor is no longer offset in its own subsection, as it was in prior Rule 26, and so is now less prominent—indeed, it is the last factor in a long list of considerations for the court.

169 See Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 858 (2015).

cases and directly curtail their expenses, leaving the remaining inherently proportional cases to be.¹⁷⁰

CONCLUSION

This Note has argued that the Advisory Committee, which promulgated the 2015 Amendments to Federal Rule of Civil Procedure 26(b), inadequately addressed numerous concerns alleging that over-discovery is not as rampant as the Committee believes it to be. This failure to sufficiently address such criticism, in turn, weakens the 2015 Amendments and raises questions of why the Amendments are necessary. Further, even if over-discovery is a pervasive problem in the federal system of litigation, the Committee did not act forcefully enough to enact any actual change in federal litigants' behavior, further obviating any apparent effect the Amendments will have on the costs of discovery or purportedly rampant discovery abuses.

170 See generally *id.* (proposing and explaining one method of directly controlling the amount of money spent on discovery).

