I. INTRODUCTION

Rules—not mere guidelines—order civil litigation. However, in the context of electronic discovery, judges have been remarkably reluctant to treat these rules as anything more than broad guiding principles, picking and choosing among provisions, sometimes seemingly at random. The result is a piecemeal conglomeration of case-by-case decisions that offers no guidance to parties attempting to plan, conduct, and defend discovery practices. This Comment argues that a new set of rules—in the form of a mandated proportionality analysis used for all discovery planning and discovery disputes—must replace the old jumble of guidelines that entrenches civil litigation in a costly, time-consuming, and inefficient quagmire.
A. Overview of this comment

This Comment will first give an overview of the electronic discovery process and the unique problems it poses in civil litigation. In Parts I.C. and I.D., this Comment will then briefly overview both the Sedona Conference’s Commentaries on Proportionality and the evolution of the Federal Rules of Civil Procedure (Federal Rules). Part I.A addresses a handful of important electronic discovery cases and describes how those early decisions have led to the current need for a proportionality framework. Part II.A addresses a handful of important electronic discovery cases and describes how those early decisions have led to the current need for a proportionality framework. Part III analyzes the proposed amendments to Federal Rule of Civil Procedure 26 in detail. In Part IV, this Comment will then take a closer look at each of the Sedona Conference’s principles of proportionality, including the policy behind each principle and examples of scenarios that implicate those policies. Finally, in Part V, this Comment proposes a factor-based proportionality framework, incorporating both the proportionality principles and the policies underlying the proposed amendments to the Federal Rules. Regardless of whether the amendments to the Federal Rules are adopted in their current proposed form, this framework will allow judges to improve uniformity, consistency, and predictability in electronic discovery litigation, thus facilitating the just and timely resolution of civil suits.

B. E-Discovery Overview and a Few Terms of Art

As technology evolves to permeate nearly every aspect of daily life, the volume of electronically stored information (ESI) implicated in civil litigation has exploded to unfathomable levels. Information is classified as ESI if it is stored in a format that is readable only by a computer. This

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6 See discussion infra Part I.B.
7 See discussion infra Part I.C and I.D.
8 See discussion infra Part II.A.
9 See discussion infra Part III.
10 See discussion infra Part IV.
11 See discussion infra Part V.
includes not only the information an end user of a device sees and uses on a screen, but also metadata: “electronically stored information about the characteristics of the data . . . , which can include information about the file’s origin or validity.”

Metadata is commonly referred to as “data about data.”

Discoverability of metadata is a relatively new development in civil litigation, but such information “is now discoverable and often a significant factor in litigation.”

ESI, and particularly metadata, is notoriously difficult to deal with in the legal context. Compared to traditional data, “electronically stored information is more dynamic as it can be intentionally or negligently destroyed, altered, lost, or dispersed, by action or inaction.”

Additionally, ESI is almost always more voluminous than traditional paper discovery, and it can be stored in a vast array of places, including desktop computer hard drives, laptops, cell phones, and the elusive “cloud.”

An illuminating example of ESI’s multiplication of potentially discoverable information is the number of emails North American businesses send: 2.5 trillion per year.

Moreover, a company of 1,000 employees will generate nearly 2 million emails each year, with each email containing a colossal amount of ESI: sender name, recipients, time and date sent, the subject line, and information about attachments, to name just a few of the metadata “fields” inherent in emails.

14 United States v. Haymond, 672 F.3d 948, 952 n.10 (10th Cir. 2012) (quoting BLACK’S LAW DICTIONARY 1080 (9th ed. 2009)).

15 United States v. Haymond, 672 F.3d 948, 952 n.10 (10th Cir. 2012) (quoting BLACK’S LAW DICTIONARY 1080 (9th ed. 2009)).

16 Ward, supra note 13, at 156.

17 United States v. Haymond, 672 F.3d 948, 952 n.10 (10th Cir. 2012) (quoting BLACK’S LAW DICTIONARY 1080 (9th ed. 2009)).

18 Id.

19 Id.


21 Barnette, supra note 20.

22 A field or data field is “[a] defined area of a storage medium used to record an individual piece of standardized data, such as the author of a document, a recipient, the date of the document, or any other piece of data common to most documents in an image (continued)
Quantifying ESI is even more mind-boggling. ESI is measured in bytes; one byte, for example, could be a single character on this page.\textsuperscript{24} A paragraph on this page contains about one kilobyte of data—or 1,000 times the information contained in a single byte.\textsuperscript{25} The floppy disks of days gone by could hold around 1,000 kilobytes—a megabyte.\textsuperscript{26} The ubiquitous CD holds roughly 500 megabytes, which is 5,000 times more information than a floppy disk.\textsuperscript{27} To put that volume of data in perspective, printing out all the information contained on just two CDs would fill the bed of a pickup truck with paper.\textsuperscript{28} ESI is routinely measured in volumes as high as a terabyte—a trillion bytes\textsuperscript{29}—which, if printed, would use the paper from 50,000 trees.\textsuperscript{30} Today, the vast majority of information only exists in electronic form: over 92\% of information is created and stored electronically,\textsuperscript{31} and some estimate that less than 1\% is ever converted to paper form.\textsuperscript{32}

1. How E-Discovery Works

Electronic discovery (e-discovery) is “[t]he process of identifying, preserving, collecting, preparing, reviewing, and producing electronically stored information . . . in the context of the legal process.”\textsuperscript{33} E-discovery is quickly becoming the norm rather than the exception, even in “routine” civil cases.\textsuperscript{34}
While e-discovery is similar to traditional paper discovery in some ways, ESI’s characteristics (such as volume, decentralized storage, variety of technical formats, and susceptibility to alteration or deletion) require a different approach. The Electronic Discovery Reference Model (EDRM) is an outline of the processes to be used and the steps to be followed in litigation involving ESI. These phases of an e-discovery case provide an important backdrop to the proposals of cooperation and proportionality discussed in this Comment; each phase has its own potential pitfalls and breakdowns that could be eliminated or minimized through application of the principles discussed here.

The first step in the EDRM is identification, which involves “locating potential sources of ESI [and] determining the scope, breadth [and] depth” of those potential sources. The next step is preservation of the previously-identified ESI sources. Litigants must adopt mechanisms to ensure that ESI is not inappropriately deleted or altered, even by routine or inadvertent means such as data backups or user activity. The next step is the collection of the preserved information. This process must be undertaken with great care to avoid any inadvertent spoliation of information. After collection, the next step involves using various

35 Ward et al., supra note 13, at 155.
36 Id. at 155–56.
37 EDRM Stages, EDRM, http://www.edrm.net/resources/edrm-stages-explained (last visited Sept. 11, 2014). Note that the first step is information management—“getting your electronic house in order to mitigate risk [and] expenses should e-discovery become an issue, from initial creation of [electronically stored information] through its final disposition.” Id. While not technically a step in the discovery process itself, good information management can make the following steps more efficient. See id.
38 See, e.g., discussion infra Part V.
39 EDRM Stages, supra note 37.
40 Id.
41 See id.
42 Id.
43 Collection of data, also called “harvesting,” is technically defined as “[t]he process of retrieving or collecting ESI from any media,” including “computer hard drives, file servers, CDs, and backup tapes” so that the ESI can be processed and loaded to storage media or a discovery management application. Glossary, supra note 22, at 25. See also Collection Guide, EDRM, http://www.edrm.net/resources/guides/edrm-framework-guides/collection (last visited Sept. 11, 2014) (“The exigencies of litigation, governmental inquiries, and internal investigations generally require that ESI and its associated metadata should be collected in a manner that is legally defensible, proportionate, efficient, auditable, and targeted.”).
technologies to reduce the volume of information to be reviewed while also converting the data into more usable formats to facilitate that review. In the next step, the culled and processed information is reviewed for relevancy and any potential privilege issues, and it is then analyzed to reveal “key patterns, topics, people, [and] discussion.” Finally, the production step provides the information to the opposing litigant in an appropriate form.

Of course, each of the foregoing steps will not be followed every time, nor will every step be followed in this precise order. Some steps may actually be repeated at various stages in the process depending on the nuances of the litigation and the type and content of the discovery.

It is also important to remember that none of the EDRM steps or processes should exist in a vacuum. Rather, cooperation, communication—both with one’s client and opponent—and decisive, reasoned judicial management are the only ways to ensure that a case is not swallowed up by its own discovery.


45 Glossary, supra note 22, at 14. De-duplication (or “de-duping,” for short) is “[t]he process of comparing electronic records based on their characteristics and removing or marking duplicate records within the data set.” Id. What is considered a “duplicate” can vary depending on the agreement of the parties; for example, the parties can agree that “an exact copy from a different location (such as a different mailbox, server tapes, etc.) is considered to be a duplicate” or that it will be considered to be a unique document. Id. “De-duplication can be selective, depending on the agreed-upon criteria.” Id.

46 EDRM Stages, supra note 37.

47 Id.

48 Id.

49 Id. The final step on the EDRM is presentation of the information to audiences such as a jury; that step is not relevant to this discussion and will therefore be omitted.

50 Id.

51 Id.

52 Id. (“The EDRM diagram represents a conceptual view of the e-discovery process, not a literal, linear or waterfall model . . . . The diagram also portrays an iterative process. One might repeat the same step numerous times . . . . One might also cycle back to earlier steps, refining one’s approach as a better understanding of the data emerges or as the nature of the matter changes.”).

53 See Barnette, supra note 20, at 122 (pointing out the unfortunate truth that because of the increasing use of spoliation motions as weapons in litigation, “cooperation, whatever its
2. The Pitfalls of E-Discovery

Problematically, “[o]ne purpose of discovery—improper and rarely acknowledged but pervasive—is [that] it makes one’s opponent spend money. ESI exacerbates the impact of this improper purpose.”54 The costs of e-discovery can be staggering: one estimate placed e-discovery costs over $4 billion in 2009,55 and studies show that discovery alone can account for 25% to 90% of overall litigation expenditures.56 The tendency for e-discovery disputes to “swallow” the underlying matter has led to many litigants viewing the process as “an alternative method of trying a lawsuit.”57 But using this “alternative method” means that too often, cases are settled as a more financially prudent decision, rather than going through the burden of discovery and ultimately taking the risk of a trial on the merits.58 Because such settlements are now more the norm than the exception, today’s civil litigation environment is a “dramatic shift” away from the policies and processes envisioned by the original Federal Rules.59

The costs of overbroad, poorly planned, or otherwise improper e-discovery are not solely monetary. Every hour that an employee spends on
general merits, is not likely to be a viable solution to the problems of e-discovery, particularly when the incentives—namely to run up costs in order to force a settlement—do not favor cooperation”). See also discussion infra Part V.

54 See Barnette, supra note 20, at 3–4 (quoting Thorogood v. Sears, Roebuck & Co., 624 F.3d 842, 849 (7th Cir. 2010)) (internal quotation marks omitted). See also November Transcript, supra note 20, at 248 (“This amendment would put us back in the position of actually using discovery for the purpose of searching for truth.”).

55 See Barnette, supra note 20, at 3 (citing Jason Krause, EDD Providers Adapt to a Down Economy, L. TECH. NEWS (Oct. 12, 2009), http://www.lawtechnologynews.com/id=1202434394512/EDD-Providers-Adapt-to-a-Down-Economy (accessed by logging into LexisNexis through the link provided by the Law Technology News website)).

56 November Transcript, supra note 20, at 200. The commenter went on to say that “[t]he reason for this is [that] the amount of material . . . is so great today with electronic discovery.” Id.

57 Barnette, supra note 20, at 4.

58 Id.; See also November Transcript, supra note 20, at 121 (“Our system is a system of trial by litigation and trial by discovery, not trial by jury. We have lost focus.”).

59 Arthur R. Miller, Statement Before the Advisory Committee on Civil Rules, REGULATIONS.GOV 1 (Jan. 9, 2014), http://www.regulations.gov/contentStreamer?objectId=09000064814ee2ae&disposition=attachment&contentType=pdf. Mr. Miller is a well-known and respected figure in civil law; he has been the co-author of the treatise Federal Practice and Procedure for almost fifty years. See id.
litigation holds, document production, or document review is an hour that employee is not spending on his or her regular work. For example, the drug manufacturer, Pfizer employs thirteen full-time contractors and employees who do nothing but manage the company’s discovery. It also uses “a team of dedicated vendors, including thirteen people devoted exclusively to document collection, eight people responsible for the technology side of electronic discovery, and on average 215 people reviewing documents at any given time.” Though small businesses are on the other side of this spectrum, one in three small businesses has been sued or threatened with litigation. According to a survey, the majority of those who faced litigation stated that “their businesses suffered because litigation was very time-consuming, and almost a majority said that litigation caused them to ‘change business practices in ways that do not benefit customers.’” Sweeping e-discovery litigation thus has an even greater effect on small businesses than on large businesses because small businesses have fewer overall resources to reallocate when litigation strikes.

The inordinate costs of over-preservation and over-production are even more vexing when considering the tiny fraction of preserved documents that are produced in litigation, and the even smaller fraction of the produced documents that are used in litigation. For example, in one of Pfizer’s large and complex cases, the company preserved 100 petabytes of information on backup tapes at a cost of roughly $40 million—that data was equivalent to twice the “entire written literary works of all mankind in all languages since the beginning of recorded time.”

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60 A litigation hold, also called a legal hold, “is a communication issued as a result of current or reasonably anticipated litigation . . . that suspends the normal disposition or processing of records.” Glossary, supra note 22, at 31.

61 November Transcript, supra note 20, at 264.

62 Id. at 264–65.

63 Id. at 202.

64 Id.

65 Id. at 264.

66 A petabyte is equivalent to approximately one million gigabytes. Glossary, supra note 22, at 39. See also supra note 25 and accompanying text.

67 A backup tape is a “[m]agnetic tape used to store copies of ESI, for use when restoration or recovery is required. Backup tapes typically use data compression, which increases restoration time and expense, given the lack of uniform standards governing data compression.” Glossary, supra note 22, at 5.

68 November Transcript, supra note 20, at 262–63.
eventually produced 2.5 million documents consisting of approximately 25 million pages.\textsuperscript{69} Notably, \textit{none} of the documents on the backup tapes were ever produced because they were duplicative of the produced documents found in other sources within the company’s information network, thus proving the costly preservation of backup tapes entirely redundant.\textsuperscript{70} Astoundingly, only about 400 of the 2.5 million produced documents were ever marked as exhibits in the 23 trials resulting from the litigation.\textsuperscript{71} Put differently, “for every one document used at trial, about 625,000 additional documents were produced.”\textsuperscript{72}

\textbf{C. Overview of The Sedona Conference’s January 2013 Commentary on Proportionality in Electronic Discovery}

The purpose of the Sedona Conference\textsuperscript{73} Working Group on Electronic Document Retention and Production\textsuperscript{74} (Working Group) “is to develop

\begin{itemize}
  \item \textsuperscript{69} \textit{Id.}
  \item \textsuperscript{70} \textit{Id.} at 263.
  \item \textsuperscript{71} \textit{Id.} at 263–64. Notably, “[o]ver the course of those trials, plaintiffs consistently used the same 400-odd documents, most of which were produced early on in the litigation, notwithstanding [the] continued production of documents.” \textit{Id.} at 264.
  \item \textsuperscript{72} \textit{Id.} at 264.
  \item \textsuperscript{73} The Sedona Conference is a “nonprofit . . . research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights.” \textit{About the Sedona Conference}, THE SEDONA CONF., https://thesedonaconference.org (last visited Sep. 11, 2014).
  \item \textsuperscript{74} \textit{The Sedona Conference Working Group Series}, THE SEDONA CONF., https://thesedonaconference.org/wgs (last visited Sept. 11, 2014). The Sedona Conference describes their Working Group Series as follows:

  The Sedona Conference® Working Group Series® was launched in 2002 and represents the evolution of The Sedona Conference® from a forum for advanced dialogue to an open think-tank confronting some of the most challenging issues faced by our legal system today. The first Working Group . . . was dedicated to the development of guidelines for electronic document retention and production. The impact of its first publication—The Sedona Principles Best Practices Recommendations and Principles Addressing Electronic Document Production—was immediate and substantial. The Principles was cited in the Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after publication of the first draft, and was cited in a seminal e-discovery decision in the Southern District of New York less than a month after that . . . . The rest,

(continued)
principles and best practice recommendations for electronic document retention and production in civil litigation.” 75 The Working Group has published dozens of articles on e-discovery issues, including two “commentaries” on improving proportionality in e-discovery cases. 76 The more recent Commentary on Proportionality in Electronic Discovery 77 (Commentary) was published in January 2013 78 to “provide a framework for applying the doctrine of proportionality to all aspects of electronic discovery.” 79 Though the Federal Rules have been amended numerous times and now incorporate at least a suggestion of a proportionality requirement, 80 the Working Group acknowledges that “courts have not always insisted on proportionality when it was warranted. And, even when courts have applied proportionality concepts, they have not always described them as such.” 81 That reality even more troubling because “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.” 82

Drawing on the current version of the Federal Rules, the Working Group suggests six guiding principles for a meaningful e-discovery

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75 Id.
76 Id.
78 Technically, the 2010 Commentary is a “public comment version” and the 2013 Commentary is the “post-public comment version” that “incorporates many of the suggestions and updates received by the original drafting team.” Id. at i. Notably, the Sedona Conference’s Director of Judicial Education “hesitate[s] to call [the 2010 Commentary] a ‘final’ version, as the ongoing dialogue on proportionality and its practical application to civil litigation will doubtless continue.” Id.
79 Id. at 3.
80 See discussion infra Part III.
81 Commentary, supra note 77, at 4.
82 Id.
proportionality analysis. First, “[t]he burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.” The next principle suggests that “[d]iscovery should generally be obtained from the most convenient, least burdensome and least expensive sources.” Third, “[u]ndue burden, expense, or delay resulting from a party’s action or inaction should be weighed against that party.” Fourth, “[e]xtrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.” Fifth, “[n]onmonetary factors should be considered when evaluating the burdens and benefits of discovery.” Finally, “[t]echnologies to reduce cost and burden should be considered in the proportionality analysis.” Taken together, these six principles are meant to address the central questions at issue in conducting a proportionality analysis in an e-discovery dispute. Even more importantly, the principles are meant to be considered not only by the judges hearing such disputes, but also by the parties themselves in planning their discovery course.

D. The Evolution of Federal Rule of Civil Procedure 26(b)

Federal Rule 1’s overarching litigation policy mandates proportionality in civil discovery: the Federal Rules of Civil Procedure are to be “administered to secure the just, speedy, and inexpensive determination of every action.” Complex, expensive, and lengthy e-discovery disputes are

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83 Id. at 2.
84 Id. at 2. See also FED. R. CIV. P. 26(b)(2)(C)(iii).
85 Commentary, supra note 77, at 2. See also FED. R. CIV. P. 26(b)(2)(C)(i).
86 Commentary, supra note 77, at 2. See also FED. R. CIV. P. 26(b)(2)(C)(ii).
87 Commentary, supra note 77, at 2.
88 Id. (“[T]he importance of issues at stake in the action” should be considered in the proportionality analysis). See also, e.g., FED. R. CIV. P. 26(b)(2)(C)(iii).
89 Commentary, supra note 77, at 2.
90 Id. at 4.
91 Id.
92 Barnette, supra note 20, at 5 (quoting FED. R. CIV. P. 1). See also November Transcript, supra note 20, at 59 (stating that the purpose of the Federal Rules of Civil Procedure is to ensure that all litigants’ rights will be enforced, “whatever those . . . substantive rights turn out to be”).
in stark contrast to Rule 1’s admonition. The proposed changes to the Federal Rules discussed below are an attempt to bring civil practice back to comport with Rule 1’s mandate.

The Federal Rules are an ever-evolving creature, amended “several times to keep pace with the changing demands of courts and parties,” as well as to stay abreast of relentless technological progressions. Specifically, Rule 26 was amended in 1983 to permit judges the discretion to curtail “excessive” discovery; the Advisory Committee notes to that amendment stated that the changes were aimed at “guard[ing] against redundant or disproportionate discovery.” The Advisory Committee also provided the now-familiar basic proportionality test: “the burden or expense of the proposed discovery” should not “outweigh[] its likely benefit[s].” The Advisory Committee envisioned a factor-based proportionality analysis, suggesting that considerations such as the nature and complexity of the lawsuit, the importance of the issues at stake, the resources of the parties, the significance of the underlying issues in the case, and overarching policy goals be weighed when determining the proportionality of discovery requests.

Ten years later, Rule 26 was amended again, this time by the addition of an entirely new paragraph in 26(b)(2). The additional paragraph was supposed to “provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery,” and was motivated in part by “the tremendous increase in the amount of potentially discoverable information caused by the ‘information explosion of recent

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93 Barnette, supra note 20, at 5 (“After five years of case law interpreting the [2006] amendments, some trends are evident—unfortunately, these trends increasingly conflict with Rule 1’s mandate . . . .”). See also November Transcript, supra note 20, at 120 (“[A]n inexpensive resolution without justice is no good. A speedy resolution without justice is no good. [The Federal Rules are] about justice.”).

94 See discussion infra Part III.

95 Commentary, supra note 77, at 3 (quoting Fed. R. Civ. P. 26 advisory committee’s note (1983)).

96 Id.


99 Commentary, supra note 77, at 3.

decades.”" However, the addition fell short of the Advisory Committee’s expectations and did little to curtail those parties seeking production of excessively burdensome discovery. In 2000, the Advisory Committee amended Rule 26 yet again, this time moving the proportionality provision to the same subdivision that provided the general discovery duty. The hope was that the move would make the proportionality rule more visible, and thus more effective, rather than remaining “buried among other discovery provisions.” Finally, in 2006, Rule 26(b)(2) was amended to specifically address the burdens and expense of accessing, preserving, and retrieving ESI deemed “not reasonably accessible.” As this Comment will discuss below, however, even the 2006 amendments did not go far enough to curtail abusive discovery leading to undesirable case outcomes. Thus, the Advisory Committee has proposed another round of changes to the Federal Rules in hopes of reining in discovery practices that many in the field view as out of control.

II. NOTABLE E-DISCOVERY DECISIONS

A. Landmark Cases

The shot heard around the e-discovery world included a series of decisions issued between 2003 and 2005 in an employment discrimination case, Zubalake v. UBS Warburg. Though the Zubalake decisions

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101 Commentary, supra note 77, at 3 (quoting FED. R. CIV. P. 26 advisory committee’s note (1993)).
102 Id.
103 Id.
104 Id. at 4. See also FED. R. CIV. P. 26(b) advisory committee’s note (2006).
105 See, e.g., November Transcript, supra note 20, at 15. See also Barnette, supra note 20, at 120 (“Some five years after the amendments to the Federal Rules governing e-discovery, it is clear that they have not met the goals of promoting uniformity and achieving cost reduction.”).
predate the most recent changes to the Federal Rules, the decisions are still frequently discussed for the e-discovery framework the court established: the need for parties and their lawyers to anticipate litigation and take appropriate steps to preserve potentially discoverable information, the possible imposition of cost-shifting measures where inaccessible ESI is sought, and the availability of harsh sanctions for spoliation109 of discoverable ESI.110

Zubalake 111 at least purported to consider proportionality and set forth a seven-factor analysis for determining whether a discovery request is reasonable.112 Importantly, the court found that the factors suggested by the Federal Rules should not be weighted equally in this rudimentary proportionality analysis.113 Instead, the court reasoned that the factors should be grouped in order of their relative importance and weighed in that order.114 Thus the first and most important proportionality consideration under Zubalake is whether the request is unduly burdensome; the second most important consideration is an analysis of the cost of the discovery; the third most important consideration is the overarching importance of the issues in the litigation; and finally, the last and least important


109 “Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation, or audit. Courts differ in their interpretation of the level of intent required before sanctions may be warranted.” Glossary, supra note 22, at 48.

110 See Barnette, supra note 20, at 1.


112 Barnette, supra note 20, at 17–18. See also Zubalake, 217 F.R.D. at 322. The Court’s factors were:

1. The extent to which the request is specifically tailored to discover relevant information; 2. The availability of such information from other sources; 3. The total cost of the production, compared to the amount in controversy; 4. The total cost of the production, compared to the resources available to each party; 5. The relative ability of each party to control costs and its incentive to do so; 6. The importance of the issues at stake in the litigation; and 7. The relative benefits to the parties of obtaining the information.

Id.


114 Id.
consideration is the importance of the requested discovery to the litigation and the parties.\textsuperscript{115}

The lasting takeaway from the \textit{Zubalake} decisions is the unprecedented use of sanctions in response to perceived inattention to preservation discovery misconduct.\textsuperscript{116} The \textit{Zubalake} suggestion of proportionality has been largely ignored in subsequent cases in favor of practices such as seeking sanctions in a wide variety of often unwarranted situations.\textsuperscript{117} The \textit{Zubalake} decisions focused heavily on defining the duties of preservation, determining when those duties were triggered, and prescribing stiff punishment for failure to preserve.\textsuperscript{118} By hurrying to establish those punitive concepts to give litigating parties more certainty and more incentive to preserve through the fear of sanctions, the \textit{Zubalake} decisions ignored common-sense approaches and marginalized concepts of proportionality.\textsuperscript{119}

Subsequent decisions regarding ESI have been a mishmash of contradictions that provide relatively little substantive guidance to litigants. While some courts have taken care to ensure that broad discovery requests are not permitted,\textsuperscript{120} others have taken a decidedly less active role in ensuring proportionality in discovery.\textsuperscript{121} Some courts are also beginning to

\begin{footnotes}
\item[115] Id. But see infra discussion Part V.B (arguing that the requested discovery should only be permitted if it is important to the claims actually at issue in the case and disfavoring most instances of “discovery on discovery”).
\item[116] See Barnette, supra note 20, at 30.
\item[117] Id.
\item[118] Id. at 24–25 (citing \textit{Zubalake v. UBS Warburg L.L.C.}, 220 F.R.D. 212, 214 (S.D.N.Y. 2003)).
\item[119] See Barnette, supra note 20, at 120–21.
\item[120] See, e.g., John B. v. Goetz, 531 F.3d 448, 458–60 (6th Cir. 2008) (collecting cases) (internal quotations and citations omitted) (citing “[t]he Sedona Principles,” the Sixth Circuit declined to order forensic imagining of computers “where the request [was] extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature”). See also \textit{In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.}, No. MD 05-1720(JG)(JO), 2007 WL 121426, at *4 (E.D.N.Y. Jan. 12, 2007) (rejecting a motion to compel production of ESI where the production would “result in a substantial delay, require the devotion of significant resources, and might not ultimately produce much of the information sought”).
\item[121] See, e.g., Cochran v. Caldera Med., Inc., No. 12-5109, 2014 WL 1608664, at *2 (E.D. Penn., Apr. 22, 2014) (quoting Peskoff v. Faber, 244 F.R.D. 54, 62 (D.C. Cir. 2007)) (“[I]t cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary.”).
\end{footnotes}
recognize the potential value of ESI as an organizational tool. For example, a Pennsylvania District Court held that “[a]lthough ESI is often condemned as overly expensive and unproductive, there are some cases in which its benefits vastly outweigh its costs.” The court went on to state that where “[t]he issues are important, the financial stakes of both discovery and damages are high, and there are important reasons of public policy justifying broad discovery . . . . ESI plays an important part, and must be considered in ruling on discovery disputes.” Still other courts have held that production of ESI should be the exception, rather than the norm.

As the volumes of ESI generated in daily life have multiplied, the costs of its discovery have continued to increase, and the case law has remained a confusing morass of inconsistencies, a “backlash” to the Zubalake discovery framework has been slowly gaining steam. It is now becoming clear—to many litigants, at least—that “[d]iscovery rules that seek the perfection of preserving and producing all potentially pertinent information have become the enemy of the good.”

B. Where are We Now?

Though the legacy of Zubalake unfortunately lives on, some courts are beginning to recognize that more important considerations exist than perfect preservation and production of every potentially relevant byte of

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122 See In re Domestic Drywall Antitrust Litig., No. 2437, 2014 WL 1909260, at *5 (E.D. Penn. May 12, 2014) (“ESI enable parties to use search terms and other methods to quickly identify relevant information and documents produced.”).

123 Id.

124 Id.

125 XL Specialty Ins. Co. v. Bollinger Shipyards, Inc., No. 12-2071, 2014 WL 295053, at *5 (E.D. La., Jan. 27, 2014) (collecting cases) (“[T]he question of whether production in some particular electronic form or format, including native format with useable metadata, would have been open to debate.”).


information. It is increasingly clear that courts must acknowledge that, in most instances, reasonable limitations on the scope of discovery are a necessity to keep the discovery from swallowing the dispute and becoming a means to reach the end of litigation.

Another concern with the current state of e-discovery is the harm that the vast scope and costs of civil discovery do to business efficiency in the United States. For example, one international company’s “U.S. external litigation case costs have been as much as 50 times higher than [its] non-U.S. costs.” An analysis of liability costs across the United States, Canada, and Europe found that the United States had the highest cost by far, comprising 1.66% of the United States’ gross domestic product. Such “oversized” costs necessarily impact whether these companies decide to invest in or transact with American ventures. Even more tellingly, foreign companies increasingly “opt out of the U.S. courts” when drafting contracts.

Private litigants are not the only ones for whom disproportionate e-discovery is problematic. In its written comments on the proposed amendments, the Department of Justice (DOJ) recognized that

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129 Commentary, supra note 77, at 5.
130 Id. at 6.
131 November Transcript, supra note 20, at 124. Mr. Troy went on to cite a 2011 Harvard Business School Survey that “identified cost and delay of the U.S. legal system as an important impediment to business investment in America.” Id. at 125.
132 Id. at 200–01 (citing David L. McKnight & Paul J. Hinton, International Comparisons of Litigation in Europe, the United States and Canada, NERA ECON. CONSULTING 1 (2013), available at http://pdfserver.amlaw.com/cc/NERAStudyOfInternationalLiabilityCosts2013.pdf). The United States’ costs are 2.6 times higher than costs in European countries. Id. at 201.
133 Id.
134 Id. at 124.
135 Id. at 125. See also id. at 132 (“[I]f we have a contract dispute and we can choose a forum in which to litigate, we tend to put in an ADR clause . . . because we think that the courts are too expensive, the courts are too burdensome, the courts take too long. But if we can’t agree to an ADR clause, we will often litigate in the U.K. because again the process is not as burdensome, it’s not as costly, it’s not as random.”).
136 “The Department is the largest and most frequent civil litigant in federal court. At various times, [the DOJ] are plaintiffs, defendants, litigants in complex civil cases, and parties in small matters.” Stuart F. Delery, Comment from the United States Department of Justice, REGULATIONS.GOV 1 (Jan. 28, 2014), http://www.regulations.gov/contentStreamer?objectid=090000648152fad9&disposition=attachment&contentType=pdf. Because of this wide variety of practice, “the Department has a special interest in the continued effective (continued)
government “agencies also have limited resources to apply to individual cases,” and courts should be mindful of those limitations when deciding on the proportionality of a discovery request propounded either to or by the government.137 Indeed, the “protection of the public fisc” may in and of itself “warrant imposing limits on discovery.”138

The DOJ echoed the concerns of many in the private sector as well: proportionality in e-discovery is needed to “assist the district court and the parties in developing discovery that is better tailored to the parties’ needs in a specific case, without wasting the resources of the judiciary or of litigants participating in cases that do not merit high-volume discovery.”139 In sum, the status quo in e-discovery litigation “is completely unacceptable” to every party seeking access to justice through the federal courts.140

Many of the responses to the proposed amendments reflect the understanding that full-blown e-discovery, with its accompanying costs and technical requirements, is inappropriate and entirely unnecessary in many civil cases. For example, at the public hearing held in November 2013 on the proposed changes, defensive civil attorney Jack McCowan141 addressed the proposed changes to Rule 26, stating “I don’t think it can be questioned that the cost of discovery even for companies with significant means drives the settlement of claims that would otherwise be tried before a jury or a judge.”142 He went on to discuss the intense pressure that e-discovery’s mounting costs impose on parties: “I often hear the mediator say isn’t it more expensive to prepare this case to try . . . than the settlement offer that’s now on the table. There’s no question that we hear that all the time, but in my judgment, the driving of the costs of the

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137 Id.
138 Id. at 3.
139 Id.
140 Id.
141 November Transcript, supra note 20, at 43.
142 Id. at 8.
litigation should not be the reason the case is settled.” Indeed, settling cases to avoid costly litigation is problematic, as counsel for the United States Depart of Commerce emphatically stated: “The fact that it can be economically rational for a defendant to settle unmeritorious claims rather than pay the inevitable high cost of having to defend against them raises serious fairness concerns.”

Finally, Mr. McCowan noted that proportionality as a concept is all too often ignored by courts: “Despite the fact that proportionality of discovery is a concept that is already within the rules, the courts in my opinion are still . . . issuing orders that are way too broad.” Such overbroad discovery, he reasoned, leads to overspending both time and money “searching for documents and other products that are almost never placed on an exhibit list at trial.” Even worse, “the damage . . . has already been done in lost productivity of the company, costs associated with the outside vendors who process the documents, and higher fees paid to defense lawyers to try to keep these documents from being disclosed or out of evidence.”

143 Id. at 9. It is worth noting that many others echoed these concerns at the public hearing. Attorney John Pierce, who works for a firm in Alabama, stated:

Too often cases are settled because discovery is expensive and litigation is expensive, and we need a way to bring the focus back to the merits and not money . . . . And it’s not just money, but it’s time and opportunity costs and resources. Preservation and production of discovery material is one of the key elements of those costs.”

Id. at 23. The representative for the Washington Legal Foundation emphasized that “no litigant should be essentially forced to settle an unfounded substantive claim simply because the discovery costs of defending the action on the merits are too high and far too lopsided to permit a just resolution of the dispute.”

144 Id. at 203. Counsel went on to say that “[i]t’s disappointing that the very rules governing federal litigation can be manipulated to make the process itself more costly than a bad outcome on the merits or to make the process costly regardless of the merits.”

145 Id. at 10.

146 Id. at 9–10.

147 Id. See also Transcript of Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules, U.S. Cts. 249 (Feb. 7, 2014), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-02-07.pdf [hereinafter February Transcript] (Counsel for Ford Motor Company stated that “[p]roof that discovery is a problem today can be found in the opposition comments to the proposed rules. They describe a status quo where relevance is not the standard, where proportionality is not the norm, and where parties

(continued)
C. Where are We Going?

As they say, hope springs eternal: many in the legal community are optimistic that this most recent round of proposed amendments, if ultimately adopted, will solve or at least minimize e-discovery abuses. At the November 2013 hearing, attorney McCowan said, “if the proposed changes to Rule 26 that incorporate the concept of proportionality of discovery and eliminate the phrase ‘appears reasonably calculated to lead to the discovery of admissible evidence’ are adopted, I believe a great deal of money and time will be saved and will inure to the benefit of both plaintiffs and defendants.” Counsel for Ford Motor Company echoed the need for proportionality in the discovery rules, saying that frequently, the “proportionality requirements of Rule 26 are ignored or misapplied, and are in great need of strengthening and enforcement. The proposed changes to Rule 26 will strengthen the existing requirements.”

Despite this optimism, a positive outlook is far from assured, especially given courts’ track record of failing to incorporate changes in the discovery rules as envisioned by the Advisory Committee. Indeed, some have questioned whether the proposed changes regarding proportionality are truly necessary, since Rule 26 currently requires requesting parties to ensure and certify that their discovery requests are proportional to the needs of their claims. Put bluntly, “the rules are already there in 26(g), but all of us practicing know that most courts ignore it. Moving it to 26(b)(1) is going to get folks’ attention, and people are going to start controlling discovery, making sure it’s reasonable, making sure that parties get what they need but that costs are also considered.”

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148 See February Transcript, supra note 147, at 253 (“The proposed amendment will facilitate more resolutions on the merits . . . .”).
149 November Transcript, supra note 20, at 9.
150 February Transcript, supra note 147, at 249.
151 See, e.g., infra note 171 and accompanying text.
152 See Miller, supra note 59, at 12. (“One hopes that the current, almost crisis environment concerning e-discovery and its cost and other issues will abate. The subject actually may prove to be a relatively short-term matter that calls for a bit of patience and retooling of discovery methodology by the profession . . . . That seems to be a far preferable pathway than premature rulemaking that may completely miss the mark.”)
153 November Transcript, supra note 20, at 15.
154 Id. at 37.
Attorney Jonathan Redgrave,155 who served as a chair and a chair emeritus of the Sedona Conference’s Working Group on Electronic Document Retention and Production for several years, agreed that courts “quite frankly ignore the proportionality factors altogether” and that such ignorance has led to a mishmash of precedent that provides no meaningful guidance to parties and judges.156

Others in the legal field, particularly the plaintiffs’ bar, fear “immense unintended consequences” if the proposed amendments are implemented.157 One plaintiff’s attorney opined that “almost every discovery request will require a hearing on proportionality. Judicial dockets will be clogged with these proportionality hearings. Far from making the administration of justice more efficient and less expensive, goals I greatly applaud, they will have the exact opposite effect.”158 Others believe that “[t]he cost of discovery is . . . an inflated item” and that “the proportionality question is less of a problem than it is sometimes presented to be.”159 These individuals “urge [the Committee] to be cautious about trying to save on discovery expenses at the cost of making individual rights harder to enforce.”160

However, the current practice of allowing broad discovery “creates an overwhelming burden for corporate litigants and provides little evidentiary benefit to any party at trial.”161 So little of the requested and produced discovery is ever ultimately used at trial,162 and opponents of the proposed

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155 Mr. Redgrave did pref ace his remarks with the caveat that he was speaking only on behalf of himself. Id. at 70.
156 Id. at 73.
157 Id. at 29.
158 Id.
159 Id. at 60–61.
160 Id. at 61. When confronted later in the hearing with questions regarding his position that cost is not a large factor in most civil litigation, Professor Carrington admitted that he was “not pretending to be engaged in daily litigation” and that “I’m a senior citizen. I’m a little over the hill for all of this, and I grant you that I’m not into all of the technology.” Id. at 66.
161 Id. at 125–26 (emphasis added).
162 Id. at 126 ("Fortune 200 companies reported that in 2008 there were an average of 1,000 pages produced in discovery in major cases for every one page used at trial, 1/10th of 1 percent . . . . [I]n one federal multidistrict product litigation that settled recently before trial in 2011, [the defendant corporation] produced 1.2 million documents, yet plaintiffs included only 646 [of those] documents on their exhibits list, less than 5/100ths of 1 percent of the production.").
limitations on discovery assume that all of the sought information will favor the requesting party, which is simply not the case.\textsuperscript{163} Allowing such overbroad discovery also bogs down the litigation, taking an immense amount of time to process, produce, and review.\textsuperscript{164} With the plaintiffs’ bar supporting measures that will decrease the time between case filing and resolution,\textsuperscript{165} it is more appropriate to limit discovery, which would lead to shorter timeframes and more satisfactory resolutions in civil litigation. In short, “[w]hat the opponents to change did not explain, perhaps because they cannot, is how the proposal provisions will so radically change discovery that the changes should be rejected.”\textsuperscript{166}

The key to the future of e-discovery therefore rests on striking the correct balance of these competing needs—a balance that, thus far, has been severely lacking in the discussion. The only way to reach such a balance is through more informed decisions from judges confronted with e-discovery disputes. The field needs more thoughtful, nuanced decisions, rather than overreaching orders commanding the production of vast quantities of expensive and ultimately irrelevant information, or fixating on requiring numerous metadata fields to be perfectly preserved and produced.\textsuperscript{167} Creating such a body of precedent will be a self-perpetuating solution; as e-discovery becomes more predictable and proportionate,

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., id. at 193 (“[T]he opponents of this change really aren’t afraid of proportionality. They’re afraid of not having proportionality …. [P]roportionality means different things to different cases . . . .”).
\item Id. at 128–29.
\item See, e.g., id. at 129. (“[B]oth plaintiffs and defendants, the best lawyers believe that they actually can get to the resolution of a litigation much quicker, much speedier, and by and large they believe that those kinds of . . . focused information exchange can lead to better justice and better resolution. And that’s why even plaintiffs’ lawyers . . . have endorsed a much more focused approach to discovery . . . .”)
\item February Transcript, supra note 147.
\end{enumerate}
\end{footnotesize}
cooperation between the parties will necessarily increase and discovery will become more tailored to the needs of each case.168

Yet every shift in the law must start somewhere, and here, judges must take the first step. Indeed, as Gina Littrell, vice-president of employment litigation for FedEx Express, said at the November 2013 hearing on the proposed amendments, “[i]t’s been suggested we just need to better educate judges on the existing rules. We submit that there is no better education for judges and litigants than moving the [proportionality] requirement to the most prominent part of the rule, and we believe that doing so will result in fewer [discovery] motions.”169

III. THE PROPOSED CHANGES TO FEDERAL RULE OF CIVIL PROCEDURE 26 AND RESPONSES TO THE PROPOSALS

Despite the multiple iterations of Rule 26,170 proportionality remains a fleeting thought in the minds of far too many judges and litigators.171 Thus, the Judicial Conference Advisory Committee on Civil Rules (Committee) has proposed yet another round of changes designed to move proportionality to its rightful position as the guiding principle in resolving e-discovery disputes.172 On August 15, 2013, the Committee posted

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168 See discussion infra Part V.
169 November Transcript, supra note 20, at 15.
170 See discussion supra Part I.D.
171 See, e.g., FED. R. CIV. P. 26 advisory committee’s notes (2000) (“The Committee has been told repeatedly that courts have not implemented these [proportionality] limitations with the vigor that was contemplated.”).
proposed amendments to various Rules of Civil Procedure and requested that the proposed changes be distributed to judges, attorneys, and the public for comment. Unsurprisingly, the proposed changes quickly became a hot topic in the legal world, and the implications of the potential changes to discovery practices have been widely discussed.

Primarily, the most recent revisions are intended to “limit the scope of discovery to what is proportional to the needs of the case.” Furthermore, the proportionality factors are proposed to be moved from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). Though the factors themselves remain unchanged and hopefully familiar, “the change incorporates them into the scope of discovery that must be observed by the parties without court order.” In other words, “the effects of the proposed amendments

173 Proposed Amendments, supra note 107, at 4. (“Committee on Rules of Practice and Procedure has not approved these proposed amendments, except to authorize their publication for comment. The proposed amendments have not been submitted to or considered by the Judicial Conference or the Supreme Court. The proposed amendments would become effective on December 1, 2016, if they are approved, with or without revision, by the relevant Advisory Committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court, and if Congress does not act to defer, modify, or reject them.”) As of December 2014, the proposed amendments are “pending Supreme Court Review.” See Pending Rules Amendments, U.S. CTs., http://www.uscourts.gov/rulesandpolicies/rules/pending-rules.aspx (last visited Dec. 18, 2014).

174 See Proposed Amendments to the Federal Rules of Civil Procedure, REGULATIONS.GOV, http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002 (last visited Sept. 16, 2014) (indicating that as of February 18, 2014, the close of the commenting period, 2,356 comments had been received on the proposed changes). Even the Sedona Conference weighed in, submitting a public comment in November 2013, endorsing the majority of the proposed amendments as having “the potential to advance the state goals of improving early and effective judicial case management, enhancing the means of keeping discovery proportional to the action and advancing cooperation.” The Sedona Conference Working Group 1 Steering Committee, Response by The Sedona Conference Working Group 1 Steering Committee to the Request to Bench, Bar and Public for Comments on Proposed Rules (August 2013), SEDONA CONF. (Nov. 26, 2013), http://www.regulations.gov/contentStreamer?objectId=090000648149ab2d&disposition=attachment&contentType=pdf. The Conference’s comment did, however, suggest additional revisions to the rules, particularly as to the preservation requirements of Rule 26. Id.

175 Advisory Committee on Federal Rules of Civil Procedure, supra note 172, at 22 (emphasis added).

176 Id.

177 Id. (emphasis added).
would be to reduce the volume of information subject to discovery—a growing concern in light of the ever-increasing amount of data created in this modern technological age—and to better ensure proportionality, a long-established but heretofore under-recognized principle of modern civil discovery.\footnote{178} The proposed amendments thus require that parties keep proportionality in mind from the outset of the discovery process and cooperate with each other to tailor their discovery requests and productions to what is proportional to the case without being specifically ordered to do so by a judge.\footnote{179}

Even more striking are the proposed changes to Rule 26(b)(1)’s now-notorious maxim that inadmissible information but appears “reasonably calculated to lead to the discovery of admissible information” is nonetheless discoverable.\footnote{180} Instead of permitting the discovery of all relevant information—admissible or not—so long as it is merely reasonably calculated to lead to the discovery of admissible information, the proposed amendments further limit the discovery of inadmissible information only “to a matter that is otherwise within the scope of discovery, namely that which is relevant to a party’s claim or defense and proportional to the needs of the case.”\footnote{181} Indeed, the Committee unequivocally states that “[t]he discovery of inadmissible evidence should not extend beyond the permissible scope of discovery simply because it is ‘reasonably calculated’ to lead to the discovery of admissible evidence.”\footnote{182} Thus, “[b]y eliminating that reasonably calculated language,” the proposed changes are “focusing the issue on what is the claim about.”\footnote{183}

\footnote{179} Advisory Committee on Federal Rules of Civil Procedure, \textit{supra} note 172, at 22.
\footnote{180} See, e.g., Or. Precision Indus., Inc. v. Int’l Omni-Pac Corp., 160 F.R.D. 592, 594 (D. Or. 1995) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)) (“The scope of discovery is broad and encompasses any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”) (emphasis added).
\footnote{181} Advisory Committee on Federal Rules of Civil Procedure, \textit{supra} note 172, at 22.
\footnote{182} \textit{Id}.
\footnote{183} November Transcript, \textit{supra} note 20, at 122. Another commenter at the hearing agreed, saying that the Federal Rules should force parties “to focus on the facts that are in dispute, the issues that have been raised by the pleadings, and craft a discovery that is... (continued)
Interestingly, the proposed amendments to Rule 26(b) could potentially breathe new life into Rule 26(g): “[o]ne of the most important, but apparently least understood or followed, of the discovery rules.”184 Rule 26(g)(1) requires attorneys to certify that:

to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry . . . with respect to a discovery request, response, or objection, it is . . . neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.185

By making the “affirmative duty [found in Rule 26(g)] to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37” more explicit and tying that duty to the determination of the proper scope of discovery, the two rules should work together more effectively to “provide[] a deterrent to both excessive discovery and evasion.”186 Furthermore, “imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection” means that attorneys who fail to “stop and think about the legitimacy” of their discovery conduct can be sanctioned for abusing the discovery process in an effort to obtain overly broad and expensive productions.187

As Mr. Redgrave stated at the hearing on the proposed amendments, “This is not a radical change. This is a change that gives meaningful life to the promise of proportionality envisioned by the 1983 amendments.”188 Not only do the proposed amendments honor the history of the Federal Rules, but they also reinforce proportionality as a principle that is to be respected and pursued. Proportionality is still “inherently . . . infinitely necessary for that. This amendment would allow that to happen and would give us the tools to make a decision.” Id. at 246.

186 Commentary, supra note 77, at 6 (quoting Fed. R. Civ. P. 26 advisory committee’s note (1983)).
187 Id.
188 November Transcript, supra note 20, at 72.
elastic upon proper justification,” thereby furthering the existing purposes of the Federal Rules rather than to create new goals.

IV. SEDONA COMMENTARY’S PROPORTIONALITY PRINCIPLES IN PRACTICE

A. Principle 1: Determining the Appropriate Scope of Preservation Requires Weighing the Burdens and Costs of Preserving Potentially Relevant Information Against the Potential Value and Uniqueness of that Information.

The Federal Rules do not apply until a lawsuit is filed. Regardless, “[t]he proportionality principles set forth in the Federal Rules, while not directly applicable, may guide those considering their pre-litigation obligations.”

Once litigation has commenced and a party’s preservation efforts are under a court’s scrutiny, judges should keep in mind not only the bare proportionality factors, but also the preserving party’s good faith and reasonableness. As the saying goes, hindsight is always 20/20, and courts should avoid imposing patently unreasonable expectations upon a party based on after-acquired knowledge or unforeseeable events. Indeed, “hindsight . . . should not carry much weight, if any, because no matter what methods an attorney employed, an after-the-fact critique can always conclude that a better job could have been done.”

189 Id. at 75. See also id. at 80–81 (“[t]he rule doesn’t cut off anyone from the ability to argue and show their need in a particular case . . . . [Y]ou’ve got to deal with it both from a requesting and a responding side, deal with it responsibly, consistent with your duties, and if you can justify it based on that discussion, go to the judge, you can get enormous amounts of discovery if it’s right for that case . . . .”).

190 Commentary, supra note 77, at 7.

191 Id.

192 Id.

193 Id. at 8 (“Courts should not allow hindsight bias to color their analysis of a party’s deliberate, reasonable, and good faith preservation efforts.”). See also February Transcript, supra note 147, at 117 (counsel for General Electric remarked that “[h]aving seen what I have seen now, I know how unbelievably difficult it is, even for the most scrupulous litigant in a large company, to do all this exactly right, particularly as against a hindsight-driven criticism”).

194 Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 226 (E.D. Pa. 2008). The Judge in this case went so far as to “refuse to use hindsight to criticize [the producing party] for mistakes that were made but perhaps unforeseeable.” Id. at 227. See also November Transcript, supra note 20, at 37 (“There’s all kinds of satellite litigation, (continued)
The need to avoid a hindsight-driven analysis of a party’s preservation efforts cuts both ways: even “[a]n understandable desire to minimize the costs of litigation and to be frugal in spending a client’s money cannot be an after-the-fact excuse for” inadequate or “failed” discovery preservation, review, and production. Nonetheless, “[i]n relatively large productions of electronic information under a relatively short time table, perfection or anything close based on the clairvoyance of hindsight cannot be the standard; otherwise, the time and expense required to avoid mistakes . . . would be exorbitant, and complex cases could take years to ready for trial.”

This is when the tension inherent in the current rules and traditional proportionality analyses first becomes clear. If parties need only to be “deliberate, reasonable, and [act in] good faith,” how can an attorney’s careful weighing of the vast array of practical factors facing him at the outset of litigation be viewed as merely an after-the-fact excuse and play no role in a judge’s analysis of whether the preservation ultimately undertaken was reasonable?

Decisions that wrestle with this issue provide only slight illumination instead of a satisfactory answer under the current analytical framework. In sum, there is no consensus as to the necessary steps for conducting a “reasonable” preservation. This lack of clarity is an enormous problem in reasonable, proportionate discovery planning and preservation because after all, over-preservation of information is a key driver of litigation costs. “[W]ithout the clear standards and consistent standards throughout all of the [federal courts],” parties are actually “forced to overpreserve because we’re faced with the risk that in hindsight . . . we will be held to what is referenced as Monday morning quarterbacking about what we . . . should have done in that context.” Clearly, judges need to seriously consider and uniformly apply this principle when and the stakes are so high that parties are afraid to make reasonable judgments. Where do I cut off the preservation? Is it enough to preserve for 100 witnesses, or do I have to preserve for 1,000 because some court is going to second-guess me later and I’m going to be labeled as a spoliator of evidence.”)

197 *Commentary*, supra note 77, at 8.
198 *November Transcript*, supra note 20, at 160–61.
199 *Id.* at 161.
resolving discovery disputes to create more certainty in the context of preservation.

B. Principle 2: Discovery should be Obtained from Sources that are Most Convenient, Least Burdensome, and Least Expensive.

The Working Group based this principle on Rule 26(b)(2)(C)(i), which requires courts to “limit discovery when the requested material can be obtained from sources that are ‘more convenient, less burdensome, or less expensive.’” Although “any one source is unlikely to meet all three criteria,” parties should still consider each factor and ultimately settle on one source that is “optimal.”

The reasons for this principle are obvious: by limiting discovery to less burdensome sources, courts can help parties to “control litigation costs and promote efficiency in accordance with Rule 1.” Additionally, adherence to this principle has the added benefit of protecting parties from abusive discovery requests. When limiting discovery to only reasonably accessible sources, judges should consider several factors in evaluating the parties’ respective positions: the sources in which requested information is stored, the burden and expense of production from those sources, and whether limiting discovery to alternative, less burdensome sources will “reduce the utility of the information sought.”

The classic example of an overly burdensome electronic discovery request is a request for backup tapes. Information on backup tapes is routinely considered “not reasonably accessible” due to the time and expense associated with recovering data from such tapes. In a case where the relevant information stored on backup tapes can be obtained from other, more accessible sources (including hard copies, witness testimony, or even non-party discovery), a court should limit discovery to only those more accessible sources.

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\begin{align*}
200 & \text{Commentary, supra note 77, at 8 (quoting Fed. R. Civ. Pro. 26(b)(2)(C)(i)).} \\
201 & \text{Id.} \\
202 & \text{Id.} \\
203 & \text{Id.} \\
204 & \text{Id.} \\
205 & \text{See id. See also supra note 67.} \\
206 & \text{See Commentary, supra note 77, at 8.} \\
\text{\textit{(continued)}}
\end{align*}
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The Conference’s example may prove helpful:

[T]he producing party may find that large numbers of emails may be more accessible and more easily produced as hard copies; but, because they will not be in electronic form, the requesting party will have to incur the costs of scanning and loading them onto a search platform or conducting a costly manual search. In this situation, it may be appropriate for a court, when it considers a request to limit production, to consider the totality of litigation costs and who should bear certain of those costs.208

The Conference’s example raises an additional point on ESI’s utility in litigation—ESI can actually aid in document organization and review, rather than being merely a complicated aside.209 Processing emails for review and production makes the data easily searchable and sortable by numerous fields, whereas scanning hard copies for review requires both additional technology and extensive human involvement—such as Optical Character Recognition (OCR)210 and subsequent quality control checks—to obtain the same results, and often with significantly lower accuracy.211

letters, and correspondence” to be unduly burdensome because the requests covered a huge swath of information and were not related to any claim or defense at issue in the case); Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co., 270 F.R.D. 465, 466–67 (D.N.D. 2010) (deciding that request to insurance company for information regard all claim determinations and litigation for a ten-year period was unduly burdensome); UPS of Am., Inc. v. The Net, Inc., 222 F.R.D. 69, 70–72 (E.D.N.Y. 2004) (court limited scope of discovery request by ordering the requesting party to personally review the documents on the producing party’s site at the requesting party’s own cost).

208 Commentary, supra note 77, at 8.

209 See, e.g., Julie Brown, EDRM Production Standards, EDRM (Apr. 25, 2014), http://www.edrm.net/resources/standards/production (laying out the various kinds of productions of ESI and providing a chart of the relative benefits and drawbacks for review of each).

210 OCR is defined as:

[T]echnology process that translates and converts printed matter on an image into a format that a computer can manipulate (ASCII codes, for example) and, therefore, renders that matter text searchable. OCR software evaluates scanned data for shapes it recognizes as letters or numerals . . . . Advanced OCR systems can read text in a large variety of fonts, but still have difficulty with handwritten text. OCR technology relies upon the quality of the imaged material, the

(continued)
For these reasons, judges are often reluctant to limit discovery to only certain subsets of sources deemed reasonably accessible by the producing party, particularly when the request to limit discovery occurs early in the litigation. This reluctance is often heightened because parties “may not yet be fully aware of all of the viable claims and defenses or the factual or legal issues” that will prove to be crucial to the outcome of the case. The hesitancy to limit discovery is also further complicated by the parties’ own lack of knowledge about accessing and producing a particular subset of ESI and the difficulty in determining the value of that ESI to the resolution of the litigation.

To avoid these problems, the Sedona Conference explicitly endorses “phased discovery” that proceeds under a rolling production plan. Phased discovery gives parties the “opportunity to identify issues early in the production” and allows for such problems to be addressed before all data has been processed and produced. By catching problems early, expenses and delay associated with reprocessing and reproducing discovery are eliminated. Rolling productions also allow discovery to be prioritized by processing critical custodians’ information or a certain type of data first. Once this prioritized data is processed and reviewed, it may become clear that additional discovery is unnecessary due to conversion accuracy of the software, and the quality control process of the provider.

Glossary, supra note 22, at 37.

Id. See also Brown, supra note 209 (showing that paper or image-only productions lack a database or searchable text for review).

Commentary, supra note 77, at 8.

Id.

Id. at 8–9. See also November Transcript, supra note 20, at 274 (“We cannot now the value of a piece of information until we get the information.”).

Commentary, supra note 77, at 9.

Id. See also Production Guide, EDRM (Nov. 4, 2010), http://www.edrm.net/resources/guides/edrm-framework-guides/production (defining a rolling production as “a negotiated schedule for producing data in stages rather than all at once. This production option might be negotiated in circumstances in which there are large volumes of data to be reviewed and produced in a short timeframe.”).

Production Guide, supra note 216.

Id.

Id.
duplication or even because the processed discovery shifts the theory of the case.220

C. Principle 3: A Party’s Action or Inaction that Caused Undue Burden, Expense, or Delay should be Weighed Against that Party.

Though this principle has numerous applications in the discovery process,221 perhaps the most meaningful is the requirement for parties “to engage in early, meaningful discussions designed to develop a discovery plan and avoid potential disputes.”222 Failure to engage in planning at the meet-and-confer stage of litigation “may shape a subsequent proportionality analysis” and can be weighed against the party who refused to fully participate in discovery planning.223 This principle also has key implications for analyzing a party’s conduct once a dispute has arisen: such disputes should be “promptly” raised with the court, but only after good-faith attempts to resolve the issue without the court’s involvement.224 Furthermore, when determining whether the discovery sought is appropriate and proportional, “the court may consider the time at which the issue arose and whether the moving party could have raised the issue earlier.”225 Ultimately, however, the question will come down to whether the producing party’s claim of undue burden or expense “[grew] out of the . . . party’s own action or inaction.”226

The obvious aim of this principle is to encourage early discovery planning among litigants to give parties “sufficient time to explore compliance with the discovery requests and bring any disputes before the court for resolution.”227 Engaging in early planning may lead to more efficient resolution of cases with “less ancillary litigation”228 and create more meaningful dialog at Rule 26(f) conferences.229 Importantly, early discovery planning eliminates amendment opponent’s concern that discovery will be unduly limited under the amended Federal Rules.

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221 See Commentary, supra note 77, at 9–10.
222 Id. at 10.
223 Id.
224 Id. at 9.
225 Id.
226 Id.
227 Id.
228 November Transcript, supra note 20, at 14–15.
229 Id. at 21.
Discovery can be properly tailored to the needs of the case while still taking into account the potential burden of broad discovery on the producing party because “in the early scheduling conferences . . . [t]here’s a relief valve built in that allows you raise that [concern] with the judge early on.”

Furthermore, early requests and planning by the parties could “substantially assist litigation so that when the parties come to court and discuss the discovery plan, they would have a set of discovery requests in hand” because the plan could be tailored to those precise requests. Early requests also help to clarify the scope of discovery by bringing to the forefront of the discussions the “actual real-life issues” facing the parties, as opposed to “theoretical” problems, which certainly make effective planning more difficult.

The Sedona Conference focuses on disputes arising out of a party’s claim that producing requested information will be unduly burdensome on the basis of the ESI’s inaccessibility, but it references several additional scenarios in which this third principle may come into play. In each scenario raised, the Conference suggests that resolving disputes over the actual burden of producing requested information is necessarily “fact-intensive” and subject weighing “whether the producing party complied with its discovery obligations, the degree of culpability involved, and the prejudice to the requesting party” against the degree to which the party’s own behavior led to the claimed burden.

For example, the Advisory Committee points to a situation in which the sole reason the information sought is inaccessible is the producing party’s “failure to preserve relevant information in an accessible format at the outset of litigation.” The Sedona Conference endorses the Advisory Committee’s position that judges should consider whether relevant information “seems likely to have existed” at the outset of the litigation “but is no longer available on more easily accessed sources;” judges should then weigh that consideration against the party claiming excessively expensive or otherwise burdensome production of that information.

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230 Id. at 24–25.
231 Id. at 289.
232 Id.
233 Commentary, supra note 77, at 9–10.
234 Id. at 9–10.
235 Id. at 10.
236 Id. (quoting Fed R. Civ. P. 26 advisory committee’s note (2006)).
D. Principle 4: When Determining Whether Requested Discovery is Sufficiently Important to Warrant the Burden or Expense of its Production, Parties should use Extrinsic Information and Sampling.

The Sedona Conference encourages judges to order sampling of requested discovery and to consider extrinsic evidence when the producing party has raised an undue burden or expense argument.\textsuperscript{237} Such analyses are intended to determine whether the “information sought, while relevant, is not sufficiently important to warrant the burden and expense of its production.”\textsuperscript{238}

Data sampling is a “process of testing a database or a large volume of ESI for the existence or frequency of relevant information” and is helpful to determine what sources should reasonably be searched or preserved.\textsuperscript{239} Sampling can sometimes take the form of “discovery about discovery,”\textsuperscript{240} or what the Committee Notes refer to as “focused discovery,” and it allows the litigants “to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation.”\textsuperscript{241}

Similarly, extrinsic information submitted by the parties can also help judges make a reasoned, well-founded determination of proportionality once a party raises an undue burden defense.\textsuperscript{242} Extrinsic evidence considered in this analysis can be anything from the “parties’ opinions regarding the likely importance of the requested information” to “whether the information was created by ‘key players’” in the litigation to the degree to which the requested information is unique.\textsuperscript{243} Again, “any attempt to evaluate the importance of requested information will be fact-specific and thus will vary from case to case.”\textsuperscript{244}

With this principle, the Sedona Conference aims to limit burdensome discovery productions to only information that is important to the

\begin{itemize}
  \item \textsuperscript{237} See Commentary, supra note 77, at 11.
  \item \textsuperscript{238} Id.
  \item \textsuperscript{239} Glossary, supra note 22, at 46.
  \item \textsuperscript{240} Charles Yablon & Nick Landsman-Roos, Discovery About Discovery Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information, 34 Cardozo L. Rev. 719, 723 (2012).
  \item \textsuperscript{241} Commentary, supra note 77, at 11 n.35 (citing Fed R. Civ. P. 26 advisory committee’s note (2006)).
  \item \textsuperscript{242} Id. at 12.
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} Id.
\end{itemize}
resolution of disputes actually at issue in the litigation. But making such a determination based solely on a propounded discovery request and the producing party’s resulting objection is “particularly challenging since it may be impossible to evaluate the requested information until it is actually produced.”

Thus, in cases where it is unclear whether the information sought is outcome-determinative or otherwise important to the litigation, sampling and reviewing extrinsic evidence are cost-efficient methods that courts should employ before determining that the “requested information is sufficiently important to warrant potentially burdensome or expensive discovery.”

Sampling can be helpful in evaluating discovery requests that the producing party contends are excessively burdensome, such as those that seek information that is “duplicative, cumulative, or not reasonably accessible.” For example, in a case referenced by the Sedona Conference, *Kipperman v. Onex Corporation*, the responding party was required to produce sampled backup tapes in response to a discovery request. The court then compared the amount and importance of the information contained on the tapes versus the cost of restoring and producing that information. After reviewing the sampled information, the court colorfully concluded that further discovery on backup tapes was warranted: “I don’t . . . declare these [tapes] to be smoking guns but they certainly are hot and they certainly do smell like they have been discharged lately.” Because the responding party asserted that “the value of the information on the tapes was dubious at best,” sampling of the evidence at issue was an excellent method to determine whether the discovery request was as unreasonable as the responding party claimed or as reasonable as the requesting party argued.

245 Id. at 11.
246 Id.
247 Id.
248 Id.
250 Id.
251 Commentary, supra note 77, at 12 (citing Kipperman v. Onex Corp., 260 F.R.D. 682, 690 (N.D. Ga. 2009)).
252 Kipperman, 260 F.R.D. at 691.
253 Id. at 689.
E. Principle 5: When evaluating the burdens and benefits of discovery, nonmonetary factors should be considered.

The Working Group asserts that “[t]he Federal Rules recognize that proportionality encompasses nonmonetary considerations.”254 Specifically, factors such as the “needs of the case,” discovery already conducted in the case, the monetary amount at issue, and the importance of the issues at stake in the action.255 The Advisory Committee explained that “the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.”256

Here, the Sedona Conference attempts to address widespread concerns that any limitation on discovery may have a highly negative impact on litigants seeking to enforce constitutional or statutory rights,257 and it specifically endorses the idea that nonmonetary factors—the nature and importance of the right at issue and relevant public policy considerations—“may favor broader discovery.”258 On the other hand, “nonmonetary factors,” such as those mentioned above, “are usually irrelevant” in many kinds of civil actions that are “essentially private disputes.”259 Therefore, in cases where there is an absence of any “relevant public interest or public policy considerations . . . discovery should be restricted.”260

The Working Group emphasized this point by citing a handful of cases where judges analyzed the proportionality of a specific discovery request and applied nonmonetary considerations.261 In *Hunter v. Ohio Indemnity*

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254 Commentary, supra note 77, at 12.
255 Id. (citing FED. R. CIV. PRO. 26(g)(1)(B)(iii); FED. R. CIV. PRO. 26(b)(2)(C)(iii)). See also FED. R. CIV. PRO. 26 advisory committee’s note (1983) (providing that factors to be considered should include the “nature and complexity” of the litigation, the “importance of the issues at stake,” a financially weak litigant’s ability or lack of ability to withstand extensive opposition to a proposed discovery plan, or ability to respond to requests under such a plan, to name a few).
256 FED. R. CIV. PRO. 26 advisory committee’s note (1983).
257 See, e.g., November Transcript, supra note 20, at 270 (“[A]llowing defendants to rely on the amount in controversy as a factor determining the scope of discovery [means] they will use it as an opportunity to minimize the significance of civil rights cases which often don’t involve large sums of money or primarily seek injunctive relief.”).
258 Commentary, supra note 77, at 13.
259 Id.
260 Id.
261 Id.
the court declined to order a deposition where the proposed deponent had “virtually no knowledge of any issues specific to the coverage at issue, and is caring for a spouse with a life threatening illness.” Compelling such a deposition, the court said, “would be inhumane as well as unproductive.” Such a decision demonstrates what the Working Group is clearly advocating for: judges to freely consider any relevant factor advanced by the parties in undertaking a proportionality analysis.

F. Principle 6: Available Technologies that Reduce Cost and Burden should be Weighed in the Proportionality Analysis.

This principle is designed to encourage “the application of technology to quickly isolate essential information” with the goal of creating “efficiencies and cost savings.” The Working Group encourages parties to “meet and confer regarding technological approaches to preservation, selection, review, and disclosure.” Such technology has the potential to “reduce overall costs, better target discovery, protect privacy and confidentiality, and reduce burdens.” Notably, using technology effectively to harness the ESI created by technology requires “[p]arties or their counsel [to] have a general understanding of the technology available to reduce the cost and burden of electronic discovery in accordance with the proportionality doctrine.” While the Working Group recognizes that technology evolves quickly, and staying current of changes a challenge, it believes that a better-educated bar and bench is the key to developing a cohesive body of precedent and reducing disproportionate discovery practices. After all, because “courts may ask the parties to provide detailed information about the retrieval of electronic information, the use of review tools, and key word searches” when deciding whether a propounded discovery request is overly costly or burdensome, “[p]arties familiar with the available technological tools and their costs will have an edge in asserting, or responding to, arguments concerning cost and burden.”

263 Id. at *1.
264 Id.
265 Commentary, supra note 77, at 13.
266 Id.
267 Id.
268 Id. at 14.
269 Id.
270 Id.
With this principle, the Working Group attempts to respond to the nearly inconceivable explosion of ESI in today’s world by encouraging litigants “to quickly isolate essential information” to create “efficiencies and cost savings.”

Some view technology as the best counterpoint to dealing with increasing volumes of ESI:

There is every reason to believe that information retrieval science and the technology itself will prove reduce costs, accelerate the e-discovery process, and enhance the accuracy of retrieval . . . a combination of statistics, linguistics, and computer science can produce these desirable results through the development of customized discovery protocols that can employ sampling and iterative search engines.

While technology may not be a final solution to the problem of ESI and disproportionate discovery, it does have a place in the proportionality analysis.

Unfortunately, fighting technology with technology remains an uphill battle. As one commenter at the hearing explained the problem, “I convinced my firm to invest in . . . technology-assisted review, with the idea that this would help cut down the costs . . . . But having made that investment, we’re finding that we frequently can’t use it because we can’t get the other side to agree.”

Frustratingly, the commenter “can’t even convince case teams to try, or they know it’s impractical because they’re facing cases in . . . different jurisdictions . . . and they know they’d have to get all [the] judges or . . . multiple opposing counsel, to agree to be able to use this technology.”

Even worse, the bias against technology-assisted review is likely to remain entrenched so long as disproportionate discovery remains unchecked: “Plaintiffs have very little incentive to agree to that technology if it’s going to reduce the burden on the defendant because . . . that [burden] is great leverage for them . . . and that leads to

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271 Id. at 13 (The Working Group states that “the volume of ESI is exploding in every corner of the digital world, increasing the volume of potentially discoverable information”).

272 Id.

273 Miller, supra note 59, at 12. See also In re Domestic Drywall Antitrust Litig., MDL No. 2437, 2014 WL 1909260, at *5 (E.D. Pa. 2014) (“There is no question that the availability of ESI has promoted a beneficial improvement in the productivity of lawyers.”).

274 November Transcript, supra note 20, at 36.

275 Id.
settlements.”

Thus, such technology requires a much higher amount of buy-in from both the bench and bar before its true utility can be demonstrated.

V. SUGGESTED PROPORTIONALITY ANALYSIS

As discussed above, developing a well-reasoned body of law regarding proportionality is crucial to solving the e-discovery crisis. In turn, a “consistent mandated approach to proportionality” is essential to move away from the current default practice of “too much discovery.” The framework set forth here is a step in that direction, and encouraging careful and meaningful consideration of six important factors will also allay concerns about unfairly limiting discovery.

A factor-based framework also eliminates the concern that the Federal Rules are only for the extremes of civil litigation: “[C]hanging the default rules for all civil litigation to address a problem that occurs in only 30 percent of the cases is not the solution.” But the beauty of a factor-based framework is that a consideration of specific factors, while common to all cases, is tailored to each specific dispute. Finally, by weighing factors as opposed to mandating elements, courts avoid the problem of restrictive, overly formal rules. Instead, they are given a flexible tool with

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276 Id.

277 See, e.g., supra note 169 and accompanying text. See also Barnette, supra note 20, at 120–21 (“While the relevant Federal Rules are now uniform, their application varies widely . . . . [T]he most critical shortcoming of the amended Rules is their failure to restrain the exploding costs of e-discovery.” (emphasis added)).

278 November Transcript, supra note 20, at 74. Indeed, one commenter at the hearing stated that the proposed rule changes actually would “impose[] a multifactor proportionality determination” when analyzing whether requested discovery is reasonable, though he expressed concern that the analysis would “place a heavy burden” on the requesting party. Id. at 104. His concern was that the changes, as written, would “subject potentially every discovery request to scrutiny” under an analysis that is “open to interpretation” and lead to even more delay in complex civil litigation. Id. at 104–05. The proportionality analysis suggested here is a direct response to these types of concerns. Id.

279 See, e.g., id. at 137–38 (“Plaintiffs would never have been able to prove their case if the defendants had been able to hide behind the burden of cost of producing relevant documents . . . .”). See also id. at 149–50 (“[W]e are tremendously concerned about the proposals to narrow discovery and limit the use of discovery devices. These measures will cause serious problems in constitutional litigation and contrary to their intent will in most cases profoundly increase discovery disputes and therefore litigation costs.”).

280 Id. at 153.
which to administer justice.\textsuperscript{281} By addressing these concerns, a proportionality framework will lead not only to more reasoned, predictable outcomes, but also will gain the buy-in of the bench and the bar, further improving the quality and reliability of e-discovery decisions.

\textit{A. First, Determine the Importance of the Issues at Stake in the Action.}

This first prong should encompass a consideration of the dispute underlying the litigation. Though somewhat disconcerting, it remains a true fact that not all litigation is created equal; thus, the resolution of e-discovery disputes should follow that same rationale.\textsuperscript{282} Considering the case’s complexity is also important, which includes taking into account factors such as the parties’ asymmetry of information, the density of the factual allegations, and the intricacy of the governing body of law.\textsuperscript{283}

There are two primary considerations here: the relative importance of the general policy implications that the litigation raises, and the relative merit of the claims specific to the lawsuit. First, the plaintiffs’ bar has been particularly vocal in opposing any limitations on discovery, and often argues that such limitations are particularly problematic in the civil rights context.\textsuperscript{284} The concern is that without “adequate” discovery—which, in reality, means extensive, exhaustive, and expensive discovery with each of those burdens being borne by the producing party—most litigation involving civil rights abuses will not survive a dispositive motion.\textsuperscript{285}

Indeed, one plaintiff’s attorney with extensive experience in civil rights litigation said at the hearing, “The committee’s aim to make civil

\textsuperscript{281} \textit{Id.} at 186–87 (“The more restrictive our rules, the more we rely on their formalism, the less accountable our government, our government actors, and our corporate and individual citizens need be. The more restrictive our rules, the more at risk the most vulnerable citizens are. The more restrictive our rules, the fewer tools at our disposal to prevent corruption or other law violations and to pursue remedies where bad acts have already occurred.”).

\textsuperscript{282} See, e.g., Delery, \textit{supra} note 136, at 3 (recognizing that there are many civil disputes “that do not merit high-volume discovery”).

\textsuperscript{283} November Transcript, \textit{supra} note 20, at 105 (“[T]he proportionality concept is unworkable at the outset of a complex [anti-trust] case characterized by asymmetric information. Where one party has all the information, discovery will necessarily appear disproportional until the evidence is discovered and used to prove the claims.”). Such cases can sometimes also involve law from numerous jurisdictions, further complicating each step of litigation, not just discovery. \textit{Id.} at 104.

\textsuperscript{284} \textit{Supra} note 157 and accompanying text.

\textsuperscript{285} See November Transcript, \textit{supra} note 20, at 115.
litigation more accessible for average citizens is laudable, but limiting discovery in civil rights cases will have the opposite effect. It can effectively shut the courthouse doors to victims of serious police misconduct.”

By taking into account the fundamental importance of the issues in the case, courts would alleviate the concern that those who have meritorious civil rights claims—or others who may be at a disadvantage under traditional litigation standards—will not be able to recover solely because they are unable to access the information they need to prove their claim. The proposed amendments do not purport to undermine such access.

The second consideration under this prong is the likelihood of the requesting party’s success on the merits of the case. This consideration

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286 Id. Others expressed concern that:

[A]s discrimination has become more subtle and sophisticated, civil rights plaintiffs face an even higher burden as they are often required to establish discrimination through circumstantial evidence. Thus, civil rights plaintiffs use the discovery process to ferret out and expose discriminatory policies, practices, and actions.

The addition of this proportionality requirement to Rule 26(b)(1) will only exacerbate the information asymmetry between plaintiffs and defendants in civil rights cases and will give defendants a multitude of opportunities to squirrel out of their obligation to produce relevant and necessary discovery.

287 Id. at 269. In sum, the concern of many in the plaintiffs’ bar is that “in employment and civil rights case[s], defendants typically are in possession of the facts that plaintiffs need to support their claims, and the proposed rules we believe would further this imbalance by adding additional limits to plaintiffs’ access to information.” Id. at 175–76.

288 At the hearing, Judge Koeltl stated, in response to assertions that the proposed changes would harm the ability of plaintiffs to procure the information they need to prove their case, the proposed changes:

[Re]quire[] a discussion as to what a reasonable request is in terms of this case. And you would also expect that in the context of a civil rights case that the interests involved, which are part of the factors to be considered, would be taken into account by the parties and certainly by the judge.

288 See Delery, supra note 136, at 3 (“We believe that the Committee intends to recognize that, even where the amount in controversy is low, the importance of the issues may justify a larger quantum of discovery.”) (internal quotation marks omitted).
should play a key role in deciding whether the sought discovery should be preserved and produced.289 Similar frameworks already exist in the law; for example, in determining whether to issue a preliminary injunction, courts require a party to show that the underlying litigation is likely to succeed on its merits. 290 Thus, where the requesting party’s claims have already survived a motion to dismiss or other attack at the pleadings stage, more expansive discovery is likely appropriate.291 However, where doubt exists as to the validity of the claims, discovery should be ordered with significantly more caution.292

B. Second, Determine how Important the Discovery Sought is to Resolving the Issues Identified Above.

This factor incorporates much of the rationale of Principles 1 and 4 of the Working Group’s Commentary and goes to the heart of the debate over the proper scope of discovery under the Federal Rules. Even if the proposed changes to the Federal Rules are adopted—which would require that a party seeking discovery show that it is truly relevant to an issue in the case—courts should take care to undertake a reasoned analysis of such relevance. Furthermore, the staggeringly-high costs of e-discovery practice, contrasted with the minute amount relevant information obtained for such cost, underscore the importance of this factor,293 as do both the

289 Indeed, testimony at the hearing indicated that parties do consider the objective merit of the claims at issue when planning for and conducting discovery: “And if we thought the case was something that was likely to survive a motion to dismiss . . . we started work immediately on” the received discovery request, regardless of when the responses to the discovery would technically be due under the Federal Rules. November Transcript, supra note 20, at 92.

290 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”). See also Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 731 (8th Cir. 2008) (requiring a showing of “substantial likelihood” before an injunction will be issued blocking the effect of a federal statute).

287 See, e.g., Delery, supra note 136, at 3.

292 Id.

293 Supra notes 68–72 and accompanying text.
increasingly pervasive use of e-discovery as a weapon in litigation\textsuperscript{294} and the emerging practice of discovery on discovery.\textsuperscript{295}

Under this factor, courts should ensure that the requested discovery is not being sought for an improper purpose, such as a desire to spend the opposing party into settlement.\textsuperscript{296} In other words, the requesting party should be able to make at least a threshold showing that the discovery is related to a claim or defense actually at issue in the case, thereby focusing the request on the actual needs of the case.\textsuperscript{297} This factor is in line with the provisions of the proposed amendments to the Federal Rules, which would limit the scope of discovery to matters that are “relevant to a party’s claim or defense and proportional to the needs of the case.”\textsuperscript{298}

Once an initial showing is satisfied, judges should then require a showing that the evidence sought is likely to be of some use in determining the merits of the case. Too much of the evidence discovered under the current framework never sees the inside of a courtroom,\textsuperscript{299} and judges should therefore be extremely cautious in ordering large productions without a heightened showing from the requesting party.

Burden of proof is also an important consideration in determining how important requested discovery is to a claim, and should be the final concern under this factor. This final step is a substantial check on the proper application of this factor; even if the requesting party has not made the required showing indicating that the evidence it seeks is significant to its case, it remains true that parties cannot always know the value of evidence until they see the requested discovery, and neither can a judge.\textsuperscript{300} Thus, in cases where there is significant asymmetry of information, courts should be mindful of which party bears the ultimate evidentiary burden when ordering production; requests from a party bearing a high evidentiary

\textsuperscript{294} Barnette, supra note 20, at 122.
\textsuperscript{295} See supra note 241 and accompanying text.
\textsuperscript{296} See November Transcript, supra note 20, at 247–48.
\textsuperscript{297} Id. at 146 (“Any lawyer . . . has the intellectual acumen to focus their requests and to ask good questions.”).
\textsuperscript{298} Proposed Amendments, supra note 107, at 10.
\textsuperscript{299} See November Transcript, supra note 20, at 126. (explaining that only a tiny fraction—5/100ths of 1 percent—of the discovered evidence in major litigation involving Fortune 200 companies is ever used at trial).
\textsuperscript{300} See sources cited supra note 214.
burden must be considered carefully in order to avoid cutting off a claimant’s only chance to prove the case.  

C. Third, Determine if a Less Burdensome Method (i.e. Technology) or Source for the Requested Information Exists.

Drawing upon the Working Groups Principles 2 and 6, the third factor emphasizes that despite the pervasiveness and usefulness of ESI in litigation, discovery with little attention to ESI will often suffice. Courts should take an active role in to curtail discovery preservation and production obligations that are “unreasonably cumulative, duplicative, or that can be obtained from a more convenient, less burdensome, or less expensive source” as well as discovery that is “disproportionate to the needs of the case.”

Because a determination of the utility and proportionality of ESI is often difficult to make early in discovery planning, however, a key consideration for courts should be the use of rolling productions. Rolling productions should be the norm rather than the exception under this proportionality analysis. Indeed, the Working Group took pains to clearly articulate its position that rolling or phased productions are for the good of all parties and offered the following suggestion: “[T]he court, or the parties on their own initiative, may find it appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible and least expensive source.” The Commentary goes on to say that such a phased discovery plan “may allow the parties to develop the facts of the case sufficiently to determine whether . . . further discovery that is more burdensome and expensive is, nevertheless, warranted.” By focusing discovery efforts on the so-called “low hanging fruit” that is likely to be extremely responsive and highly

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301 Burden of proof is especially important to consider in areas where the burden is evolving to place a higher expectation on plaintiffs. See November Transcript, supra note 20, at 103.
302 SEDONA CONF., supra note 174, at 6.
303 Commentary, supra note 77, at 11. The Commentary also supports the use of sampling or the review of extrinsic evidence by courts making a determination whether the sought discovery “is sufficiently important to warrant the burden or expense of its production potentially burdensome or expensive discovery.” Id.
304 Id. at 10.
305 Id. at 9 (emphasis added).
306 Id.
probative, parties can avoid situations where only tiny slivers of enormous and costly pies of documents are used to advance or defend a claim.

The utility of a rolling production also clearly illustrates that courts must avoid falling into the trap of assuming that the solution to the problem of highly technical discovery is additional highly technical preservation, collection, and production of ESI.307 As discussed above, because there remain significant obstacles to the use of technologies, such as computer-assisted review, courts cannot presume that such technology is available to all parties.308 Frequently, the solution to a complex collection of ESI is to keep it simple: unless a party can show a compelling need for a technical collection and processing, parties and courts should consider something less than the perfect preservation and production of every metadata field.309

D. Fourth, Consider the Parties’ Resources.

At a minimum, this prong should be used to consider cost-shifting where the requested discovery is particularly costly in absolute terms. However, nonmonetary resources should also be a part of the analysis,310 and courts must avoid using this factor to make decisions based solely upon the amount in controversy.311 Furthermore, courts should take care to avoid putting “low-wage litigants at a distinct disadvantage.”312 This factor does not mean that “the scope of permissible discovery shrinks in proportion to the monetary value of [the] claims”313—indeed, “absolute wealth . . . is not the relevant factor.”314 What this factor does mean, however, is that courts should be ever-mindful of the “real-world

307 See, e.g., February Transcript, supra note 147, at 189 (counsel for Shell Oil noting that “[t]echnology is not the answer to the problem that technology has created.”).
308 See supra note 273 and accompanying text.
309 Esenberg, supra note 127.
310 November Transcript, supra note 20, at 222 (“One of the problems we have in civil rights cases is that there’s a tendency to view the value or the burden of discovery in monetary terms only. And that means in practical effect is that an employee who’s earning minimum wage or slightly above and is getting paid 20- or $25,000 a year and has lost their job for discriminatory reasons, their claim is worth less in monetary terms maybe than somebody who’s earning $100,000 or $200,000 a year.”).
311 Barnette, supra note 20, at 15–16.
312 November Transcript, supra note 20, at 176.
313 Id. at 177.
implications\textsuperscript{315} of high discovery costs. In other words, it is important to consider not just the objective cost in dollars and cents, but also the effect of those costs on the parties themselves,\textsuperscript{316} and those costs’ proportionality to the monetary, social, and personal value of the case.

Courts should consider cost-shifting measures under this factor, but it should be the final step in the analysis of the parties’ resources relative to the issues in the case. Courts should discard the presumption that the producing party bears the costs of preserving, collecting, and producing any and all discovery—no matter how voluminous, complex, or costly—that the requesting party seeks.\textsuperscript{317} Instead, the presumption should be in favor of cost-shifting where burdensome discovery is nonetheless found to be proportionate to the needs of the case, particularly where a vast difference exists in either the relative financial position of the parties or an unequal distribution of the information between the parties.\textsuperscript{318}

E. Finally, Consider the Conduct of the Requesting Party: Has the Party’s Action or Inaction Caused Undue Burden, Expense, or Delay?

This final prong may be the most important in ensuring that discovery orders are proportionate. Although it necessarily incorporates the factors of the Commentary’s Principle 3,\textsuperscript{319} it goes further by mandating a consideration of a party’s overarching duty to engage in responsible discovery under Federal Rules 1 and 26(g).\textsuperscript{320} Even if all other factors point toward allowing the requested discovery, the requesting party may not be entitled to the information if it has delayed the litigation or otherwise made the discovery process more burdensome on the opposing

\textsuperscript{315} November Transcript, \textit{supra} note 20, at 200.

\textsuperscript{316} For example, several commenters at the hearing mentioned the “psychic pain” and other non-quantifiable effects that protracted litigation inflicts on parties and their counsel. \textit{See}, \textit{e.g.}, \textit{id.} at 204.


\textsuperscript{318} \textit{Id.}

\textsuperscript{319} \textit{See} discussion \textit{supra} Part IV.C. The Commentary’s factors for weighing party conduct are “whether the producing party complied with its discovery obligations, the degree of culpability involved, and the prejudice to the requesting party.” Commentary, \textit{supra} note 77, at 9.

\textsuperscript{320} \textit{See} discussion \textit{supra} notes 92–93. Rule 1 requires that the Federal Rules be “administered to secure the just, speedy, and inexpensive determination of every action.” \textit{FED. R. CIV. P. 1. See also} discussion \textit{supra} note 184.
Discussion of this factor should always start from the outset of litigation and begin with an examination of the parties’ early planning and cooperation. While many early e-discovery cases focused on willful or even intentional conduct aimed at destroying ESI and other evidence, most of the problematic conduct in discovery litigation is not at all related to destroying evidence. Unfortunately, the current discovery practice of attempting to force a settlement by demanding costly discovery has eliminated much of the incentive for parties to cooperate. Furthermore, this practice is not likely to disappear without significant judicial intervention, especially because “[l]awyers will expand discovery to the outside limits.” Thus, courts should consider whether the requests propounded are so overly broad and excessively burdensome as to indicate that the requesting attorney has failed to comply with the mandates of Federal Rule 26(g). Courts must begin to impose this Rule’s existing affirmative duty to encourage parties to “engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of” the Federal Rules if the current trend toward disproportionate discovery is to be halted.

Once parties appreciate the need to conduct discovery responsibly, cooperation will increase because the parties will be driving the decision of what discovery is reasonable by weighing for themselves the various proportionality factors. For discovery to become a party-driven system, the parties must be able to predict and rely on a consistent body of law. Thus, the ultimate goal of cooperation and little judicial involvement may

321 See discussion supra Part IV.C.
322 See discussion supra note 53. The Working Group encourages parties to meet and confer cooperatively, especially regarding “technological approaches to” e-discovery, and also stresses the importance of counsel’s own understanding of the available technology. See discussion supra notes 265–67.
324 See, e.g., discussion supra Part I.B.2. Such intentional conduct is, of course, reprehensible and, if shown, should be subjected to sanctions such as those imposed by the Zubulake decisions.
325 See discussion supra Part I.B.2.
326 November Transcript, supra note 20, at 250.
327 See discussion supra notes 185–86.
328 Id.
329 See, e.g., discussion supra note 153.
be a distant goal, but it is within reach if the proportionality framework set forth here is widely adopted.

VI. CONCLUSION

Regardless of whether the proposed changes to the Federal Rules are adopted as proposed, modified in some manner and then adopted, or not adopted at all, proportionality must become a guiding principle in all civil litigation. The current body of e-discovery precedent is a desolate no-man’s land, requiring a highly technical manner of preservation and production of any information potentially relevant to even a tangential or shadowy claim, giving no meaningful guidance to parties or judges. The dearth of precedent has also created, exacerbated, and perpetuated a system of disproportionate costs and dysfunctional use of discovery as a litigation weapon rather than an efficient, narrowly-tailored, and information-finding tool.

The adoption of a mandatory proportionality analysis, consisting of discrete factors and considerations under those factors, will begin to shape e-discovery law into a useful, predictable, and defensible body of law that will ultimately help parties prepare, plan, conduct, and produce discovery in the course of civil litigation of all kinds. A mandatory proportionality analysis will also ensure that proportionality takes its rightful place as the touchstone of e-discovery precedent.