

The Proportionality Principle after the 2015 Amendments

By: Thomas Y. Allman

Thomas Allman is a former General Counsel and Chair Emeritus of the Sedona Conference® Working Group I.



Rule 26(b)(1) was revised as part of the 2015 Amendments to the Federal Rules of Civil Procedure¹ to promote “proportional discovery”² by the incorporation of proportionality factors, then located in Rule 26(b)(2)(C), into the text of (b)(1), with the factors slightly re-adjusted and a new factor added.³ Rule 26(b)(2)(C)(iii) now requires a court to limit the frequency or extent of discovery when “[iii] the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1).”⁴

¹ Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1 (2015).

² David G. Campbell, *New Rules, New Opportunities*, 99 JUDICATURE 19, 20 (2015) (“‘proportional’ discovery [is] ‘discovery tailored to the reasonable needs of the case’”).

³ The “amount in controversy” factor was moved to second place in the non-hierarchical list and a new factor evoking “the parties relative access to relevant information” was added.

⁴ Subsections (i) and (ii) of Rule 26(b)(2)(C), unchanged by the 2015 Amendments, continue to limit discovery which is unreasonably cumulative or duplicative or which can be obtained from other less burdensome sources and

The revised scope permits discovery of non-privileged information only if it is both “relevant” to the claims or defenses of a party and is also “proportional to the needs” of the case. The renewed emphasis on proportionality, enforced through active case management, reflects a desire to achieve the goals of Rule 1. As Chief Justice Roberts put it in his 2015 Year-End Report, the amended rule “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.”⁵

I. Cases Interpreting the New Rules

The flood of post-December 1 decisions on the scope and implementation of Rule 26(b)(1) and related changes is best summarized in the following categories, although the cases themselves need to be consulted as well.

should also be seen as proportionality limitations.

⁵ See *Year-End Report*, quoted in *Sprint v. Crow Creek Sioux Tribal Court*, 2016 WL 782247 (D. S.D. February 26, 2016).

A. Relevancy

The relevancy of discovery sought to the claims or defenses continues to be the primary issue determining the “scope” of discovery. If the information sought is not relevant, courts need not focus on proportionality. For example, in *LightSquared v. Deere & Co.* the court acknowledged the amended rule but denied the discovery based on a lack of relevance.⁶ Courts refuse to ask a party to “run down a rabbit hole chasing irrelevant information on collateral matters.”⁷

The threshold for discovery relevancy under the amended rule remains relatively low,⁸ in contrast to the enhanced showing of relevance required in some Circuits for purposes of securing an adverse inferences.⁹ Some courts cite the terms of Federal Rules of Evidence 401, under which evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable.¹⁰ Moreover, as Judge Francis

and others have held, relevance is still defined broadly by pre-December 1 case law, including the 1978 Supreme Court decision in *Oppenheimer Fund v. Sanders*,¹¹ which is often cited for that proposition.¹²

B. Proportionality

A limit on the scope of discovery, designed to guard against “redundant or disproportionate discovery,” has been part of the Federal Rules of Civil Procedure since 1983.¹³ After the 2010 Duke Litigation Conference, the Rules Committee acted on its conviction that “discovery in civil litigation would more often achieve the goals of Rule 1 through an increased emphasis on proportionality,” enforced through active case management.¹⁴ Although the initial Draft Committee Note described this as a “change” designed to “limit the scope of discovery,”¹⁵ the final

⁶ *LightSquared v. Deere*, 2015 WL 8675377 (S.D.N.Y. Dec. 10, 2015).

⁷ *O’Boyle v. Sweetapple*, 2016 WL 492655, at *5 (S.D. Fla. Feb. 8, 2016) (quashing subpoena because it is not “what [FRCP] 1 and 26(b)(2) envision”).

⁸ *Kelley v. Apria Healthcare*, 2016 WL 737919, at *4 (E.D. Tenn. Feb. 23, 2016) (finding evidence sought is relevant for discovery purposes but not necessarily admissible at trial).

⁹ *Fed. Nat’l Mortgage Assn. v. SFR Investments*, 2016 WL 778368, at n. 16 (D. Nev. Feb. 25, 2016) (“[d]espite the recent amendments to Rule 26, discovery relevance remains a broad concept”).

¹⁰ *Sumpter v. Metropolitan Life Ins. Co.*, 2016 WL 772552 (S.D. Ind. Feb. 29, 2016) (discovery denied because unlikely to lead to relevant information and because it is not proportional to needs of the case).

¹¹ 437 U.S. 340, 351 (1978) (“relevance to the subject matter involved in the pending action” has been construed broadly).

¹² *Wit v. United Behavioral Health*, 2016 WL 258604 at *10 (N.D. Cal. Jan. 21, 2016) (applying *Oppenheimer* despite the fact that it “constru[ses] language contained in Rule 26 prior to 2015 amendments”); see also *In re ex Parte Application of Porsche Automobil Holding*, 2016 WL 702327, at *9 (S.D.N.Y. Feb. 18, 2016) (collecting cases). See also *Perez v. Department of Homeland Security*, 2016 WL 705904, at *6 (S.D. Cal. Feb. 23, 2016) (relying on *Oppenheimer* in interpreting amended rule).

¹³ Committee Note, Rule 26 Subdivision (b), 97 F.R.D. 165, 217 (1983). The Committee Note described the new provision as intended to limit “disproportionate” discovery of matters which were “otherwise proper subjects of inquiry.”

¹⁴ June 2014 RULES REPORT, II(A)(2)(a).

¹⁵ Committee Note, 16, Initial Proposal, at 296 of 354. The 2013 Initial Proposal is available at

version of the Committee Note more accurately states that it merely “restores the proportionality factors to their original place in defining the scope of discovery.”¹⁶

A number of cases have explicitly denied discovery of otherwise relevant information based on proportionality grounds, involving a variety of contexts. In *Henry v. Morgan’s Hotel Group*, the court refused to enforce subpoenas against former employers as not proportional to the needs of the case where it was not even “remotely apparent” what relevance the information would have to the allegations in the case.¹⁷ In another, discovery requests were denied because they was “precisely the kind of disproportionate discovery that Rule 26 – old or new – was intended to preclude.”¹⁸

In *Wilmington Trust v. AEP Generating*,¹⁹ the court concluded that the “rule of proportionality” would be violated if it ordered an additional search which might produce 200K documents that would have to be searched manually.

C. Burden of Proof

There is also little evidence that the changes in Rule 26(b)(1) have affected the practical burdens of proof involved, as both parties must play a role in addressing

proportionality, depending on the circumstances.

The Committee Note makes it clear that the relocation of the proportionality factors does not “place on the party seeking discovery the burden of addressing all proportionality concerns.”²⁰ Moreover, a party may not “refuse discovery simply by making a boilerplate objection that it is not proportional.”²¹ In *Carr v. State Farm Mutual*, the court held that a party seeking to resist discovery must come forward with “specific information.”²²

The party seeking discovery also may need to “make its own showing of many or all of the proportionality factors” to justify the request.²³ Thus, in *Augustyniak v. Lowe’s*, a party seeking to justify further discovery was required to list what discovery would be sought, why the information was not already available and how the information would demonstrate the point sought to be established.²⁴ In *Wilmington Trust v. AEP Generating*, the court noted that the party had not presented “anything – either evidence or persuasive argument” showing it would materially add to the existing production.²⁵

Each party is expected to provide information uniquely in their possession to the court, which then is expected to reach a “case-specific determination of the

<http://www.ediscoverylaw.com/files/2013/11/>

¹⁶ Committee Note, 19. The original rule is found at 97 F.R.D. 165, 215 (1983)(Rule 26(b)(1)).

¹⁷ 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016).

¹⁸ *Gilead Services v. Merck*, 2016 WL 146574, at *2 (N.D. Cal. Jan. 13, 2016) (“a party seeking discovery . . . must show, before anything else, that the discovery sought is proportional to the needs of the case”).

¹⁹ 2016 WL 860693 (S.D. Ohio March 7, 2016).

²⁰ Committee Note, 19.

²¹ Committee Note, 19.

²² 2015 WL 8010920, at *9 (N.D. Tex. Dec. 7, 2015)

²³ *Id.* at *17.

²⁴ *Augustyniak v. Lowe’s Home Center*, 2016 WL 462346, at *5 (W.D.N.Y. Feb. 8, 2016).

²⁵ 2016 WL 860693 (S.D. Ohio March 7, 2016) (a “responding party still must meet its burden of explaining how costly or time-consuming responding to a set of discovery requests will be”).

appropriate scope of discovery.”²⁶ Amended Rule 37(e) is said to require a similar approach when the proportionality of preservation demands are at issue.²⁷

D. Individual Factors

There is no hierarchy implicit in the order of individual factors listed in Rule 26(b)(1); indeed, the “amount in controversy” was moved to behind “importance of the issues” to avoid any such inference.²⁸ This contrasts with the approach adopted by the court in *Zubulake I*²⁹ in redesigning a list of factors to discourage shifting the costs of production.³⁰ The 2015 Amendments addressed that issue by simply adding a neutral reference to the authority to “allocate costs” to Rule 26(c)(1)(B).³¹

²⁶ Committee Note, 20 (the party requesting discovery “may have little information about the burden or expense of responding” but the producing party may have little information about the importance of the discovery “as understood” by the requesting parties).

²⁷ Committee Note, Rule 37(e), 42 (“a party urging that preservation requests are disproportionate may need to provide specifics”).

²⁸ The Chair of the Duke Subcommittee explained that “placing the amount in controversy first in the list may cause courts to impose inappropriate limits on discovery.” April 2014 Minutes, at lns. 224-226. The Duke Guidelines state that “[n]o one factor is intrinsically more important or entitled to greater weight than any other.” Guidelines, 99 JUDICATURE 47, 54 (2015).

²⁹ *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003) (“Zubulake I”).

³⁰ *Id.* at 320, 323 (criticizing giving “equal weight” given to the factors as “uniformly favor[ing] cost shifting” and ordering “weighing the factors in descending order of importance” to conform to presumption against cost-shifting sought by court).

³¹ As amended, Rule 26(c)(1)(B) now provides that a court may specify terms, “including time

The factors listed in Rule 26(b)(1) differ slightly from those listed in Rule 26(g), as well as those included in the 2006 Committee Note relating to production of ESI from inaccessible source under Rule 26(b)(2)(B).³² That list is, in turn, largely ignored since even if production of accessible ESI is ordered for “good cause,” it is not required if not proportional to the needs of the case.³³ No court has placed significance in the differences.

The new factor dealing with asymmetric access to information has received some limited attention in the cases.³⁴ In *Doe v. Trustees of Boston College*, the court interpreted the factor to mean that a party with superior access needed a “stronger showing of burden and expense” to avoid production.³⁵ Similarly, the importance of disparity in resources has been downplayed. In *Salazar v. McDonald’s*,³⁶ the court emphasized that the financial resources available to handle discovery costs

and place or the allocation of expenses, for the disclosure or discovery.”

³² Committee Note, Rule 26(b)(2)(B)(2006), 234 F.R.D. 219, 339 (2006).

³³ See Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1, 23-24 (2007) (because “the factor at the top of the hierarchy will almost always wash out the other factors” and, in any event, its “really a proportionality issue.”); see also Thomas Y. Allman, *The Two-Tiered Approach to E-Discovery, Has Rule 26(b)(2)(B) Fulfilled its Promise?* 14 RICH. J. L & TECH. 7, *63 – 64 (2008) (“undue burden or cost in discovery could have been addressed by the existing limitations on discovery found in Rule 26(b)”).

³⁴ Committee Note, 21 (“In practice, these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so”).

³⁵ *Doe v. Trustees of Boston College*, 2015 WL 9048225 (D. Mass. Dec. 16, 2015).

³⁶ 2016 WL 736213 (N.D. Cal. Feb. 25, 2016).

are essentially irrelevant, citing the Committee Notes.³⁷

E. Preservation

Neither the Committee Notes to Rule 26(b) nor to Rule 37(e) deal with the issue on of the impact of the renewed emphasis on proportionality as a limitation on the scope of discovery under Rule 26(b)(1). Presumably the Committee still believes, as it once stated, that “the outer limit of the duty to preserve” is set by the Rule 26(b)(1) scope of discovery.³⁸ One pre-amendment court conceded that proportionality would be relevant to a retroactive assessment of parties involved in a failure to preserve, but would not, especially in the pre-litigation context, be a very reliable basis for unilateral decision making, given that hindsight may apply.

The Committee deleted any hint that proportionality plays a role in preservation planning. The Initial Draft of the Committee Note made the point that “prospective litigants who call for preservation efforts by others should keep the proportionality principles [in Rule 26(b)(1)] in mind.”³⁹ That was dropped from the final version, which does, however, caution that a party

³⁷ *Id.* (“consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party”).

³⁸ Thomas Y. Allman, *The 2015 Civil Rules Package*, 16 SEDONA CONF. J. at 33 (“the impact of the amended scope of discovery Rule 26(b)(1) is ignored [in] contrast [to] the analogous Committee Note prepared for the (then) proposed Rule 37(f) in 2004”).

³⁹ Draft Committee Note, Rule 37(e) Initial Proposal (at 327 of 354). The original 2013 Rules Package may be found at <http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf>. (last accessed May 15, 2016).

objecting to a demand for preservation on proportionality grounds may need to provide specifics in order to enable meaningful discussions of possible preservation orders.

Not all courts have yet caught the subtle distinction. One prominent commentator flatly states that “[d]emonstrating the ‘relevance’ of missing ESI [that should be preserved] will necessarily implicate proportionality factors.”⁴⁰ However, it is highly unlikely that the author intended to convey that a party, acting in good faith, who ignores the need to preserve relevant evidence on proportionality grounds is thereby exempted from being questioned, with hindsight, about the accuracy and viability of that decision.

F. Case Management

As noted, a related aspect of the renewed emphasis on proportionality is to encourage courts to practice active case management. As the court noted in *Siriano v. Goodman Manufacturing*,⁴¹ the amendments “contemplate active judicial case management.” In that case, the court scheduled a discovery conference to consider phased discovery, while also ordering that the parties engage in “further cooperative dialogue in an effort to come to an agreement regarding proportional discovery.”

There is an emerging consensus that courts should place “greater emphasis on the need to achieve proportionality” in their

⁴⁰ Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA CONF. J. 55, 102 (2015); accord Hon. Joy Flowers Conti and Richard N. Lettieri, *E-Discovery Ethics: Emerging Standards of Technological Competence*, 62-NOV. FED. LAW. 28, 31 (2015) (“[p]roportionality is a guiding principle [under the amendments] in determining the breadth and extent of the preservation required”).

⁴¹ 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015).

approaches to discovery.⁴² This is consistent with Chief Justice Roberts's emphasis in his Year-End Report that courts needed to be actively involved in guiding decisions respecting the scope of discovery.⁴³

In *Robertson v. People Magazine*, the court stated that the rule "serves to exhort judges to exercise their preexisting control over discovery more exactly."⁴⁴ In *Sender v. Franklin Resources*, the court held that while the scope of discovery is broad under the amended rule, the issue "does not require the duplication of testimony by deposing five people and written discovery on the subject."⁴⁵

Increased judicial case management has also been the theme of third-party comments. The Duke Center for Judicial Studies convened interested observers to compile a list of *Guidelines and Principles* "aimed at provid[ing] greater guidance on what the amendments are intended to mean and how to apply them effectively."⁴⁶ Early, ongoing and meaningful discovery planning and the use of judicial pre-packaged lists of topics for Rule 26(f) conferences are recommended. Other suggestions involve staging discovery so that sources "most clearly proportional" to the needs of the case should be utilized.

This is analogous to the "two-tier" system of discovery of ESI originally given as justification for the 2006 Amendment to Rule 26 presumptively limiting discovery of ESI from inaccessible sources.

⁴² *Eramo v. Rolling Stone LLC*, 2016 WL 304319 (W.D. Va. Jan. 25, 2016).

⁴³ *See Year-End Report*, *supra* n. 2.

⁴⁴ 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015).

⁴⁵ 2016 WL 814627, at *2 (N.D. Cal. March 2, 2016).

⁴⁶ *Guidelines and Practices*, Duke Center for Judicial Studies, available at 99 JUDICATURE 47 (2015).

Two sitting Magistrate Judges have also contributed thoughtful articles with specific suggestions for improved case management in support of proportionality and adherence to Rule 1.⁴⁷

II. Conclusions

The primary impact of the amended rule is the heightened visibility of the proportionality factors.⁴⁸ As Judge Pittman put it in *Vaigasi v. Solow Management*, proportionality "has become the new black."⁴⁹ In *Duvall v. BopCo*, the court decisively rejected on proportionality grounds a testing protocol whose risks and burdens were not justified by the amount in controversy.⁵⁰

However, courts are not reluctant to resist claims of disproportionality. In one such case, the court described the argument based on disproportionality as mere "hyperbole" despite the recent amendments.

In contrast, relevance is "still" to be construed "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on" any

⁴⁷ Shaffer, *supra* n. 40, 16 SEDONA CONF. J. 55 (2015); Hon. Elizabeth Laporte and Jonathan Redgrave, *A Practical Guide to Achieving Proportionality Under the New Federal Rule of Civil Procedure 26*, 9 FED. CTS. LAW 19 (2015).

⁴⁸ In addition to the cases cited below in the text, other decisions include: *Sarma v. Wells Fargo*, 2016 WL 41003 (M.D. N.C. Feb. 2, 2016); *Wilson*, 2016 WL 526225; *Vaigasi v. Solow Management Corp.*, 2016 WL 616386 (S.D.N.Y. Feb. 16, 2016); *Curtis v. MetLife*, 2016 WL 687164 (N.D. Tex. Feb. 19, 2016); *Bentley v. Highlands Hospital*, 2016 WL 762686 (E.D. Ky. Feb. 23, 2016); *Sumpter*, 2016 WL 772552; *Merlin v. Crawford*, 2016 WL 814580 (D. Colo. March 2, 2016); *Sender*, 2016 WL 814627.

⁴⁹ *Vaigasi*, 2016 WL 616386, at *2 (holding the large volume of document requests to be "far out of proportion to [the party's] claims").

⁵⁰ *Duvall v. Bopco*, 2016 WL 1268343 (E.D. La. April 1, 2016).

party's claim or defense.⁵¹ This conclusion exists despite the deletion of reference to the discoverability of information as "reasonably calculated to lead to admissible evidence"⁵² which has led some courts to conclude that "no longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence."⁵³

The reason is subtle but fairly obvious. Proportionality trumps relevance, it does not modify or replace it. In *Pertile v. GM*, for example, a court in a roll-over case refused to require GM to produce complex modeling software which, although relevant, was not proportional to the needs of the case given the failure to demonstrate that other discovery was not adequate.⁵⁴

It is difficult, based solely on the cited reasoning in the opinions to date, to identify any difference in result which can be directly correlated to the relocation of the propor-

tionality factors into Rule 26(b)(1).⁵⁵ The amended rule does not actually place a greater burden on the parties or the courts to consider proportionality.⁵⁶ As one commentator put it, "[w]e could not locate a single case where we could say with any confidence that the amendment to Rule 26(b)(1) caused a court to rule that the discovery in question was unauthorized."⁵⁷

Nonetheless, many believe that the proportionality relocation has had, at the margins, an appreciable and very real impact on parties and the courts in close cases. The Author shares this view although, in the main, the results are more often no different than might be expected under the previous rule. In *Garner v. St. Clair College*, for example, the Magistrate Judge stated that it made no difference as to whether old or new rules applied,⁵⁸ a conclusion in which the District Judge joined after review on appeal.⁵⁹

⁵¹ *State Farm v. Fayda*, 2015 WL 7871037 at *2 (S.D.N.Y. Dec. 3, 2015).

⁵² Committee Note, 24. The Chair of the Duke Subcommittee explained that "[m]any lawyers and courts continue to treat this provision as expanding, and indeed defining, the scope of discovery." April 2014 Minutes, Ins. 298-300.

⁵³ *Gilead Sciences*, 2016 WL 146574, at *1. Not all courts are aware of the deletion. *See, e.g., Vailes v. Rapides Parish School Board*, 2016 WL 744559, at *3 (W.D. La. Feb. 22, 2016) ("relevancy of a discovery request depends upon whether it is 'reasonably calculated' to lead to admissible evidence").

⁵⁴ *Pertile v. GM*, 2016 WL 1059450, at *4 (D. Colo. March 17, 2016) (placing burden on party seeking discovery to establish relevance and necessity for production of proprietary trade secret information); *accord Turner v. Chrysler*, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016) (lane departure software used in Europe not sufficiently relevant to justify burdens).

⁵⁵ Committee Note, 19 ("[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery").

⁵⁶ *See, e.g., Dao v. Liberty Life Assurance Corp.*, 2016 WL 796095 (N.D. Cal. Feb. 23, 2016) (Laporte, M.J.).

⁵⁷ David Herr and Steven Baicker-McKee, *Discovery*, 31 No. 2 Fed. Litigator NL 10 (2016).

⁵⁸ *Garner v. St. Clair College*, 2016 WL 146691, at n. 1 (S.D. Ill. Jan. 13, 2016), affirmed 2016 WL 1059238 (S.D. Ill. March 17, 2016).

⁵⁹ *Id.* at n. 3.

Appendix: Rule 26(b)(1) Decisions

Case	Cir.	Dispute	Result	Impact of New Rule
Oracle v. Google, 2015 WL 7775243 (N.D. Cal Dec.3, 2015)	9th	Number of custodians	Court orders 10 add'l custodians based on "best judgment"	Neither party submitted a proper analysis
State Farm v. Fayda, 2015 WL 7871037 (S.D.N.Y. Dec.3 2015)	2nd	Discovery of minor Financial records	Not disproportional since relevancy not rebutted (*4)	Relevance is "any matter that bears on or could lead to other matter that bears on" claims or defenses
Louisiana Crawfish Producers Assn. v. Mallard Basin, 2015 WL 8074360 (W.D. La. Dec. 4, 2015)	5th	Motion for entry and inspection in NEPA action	Not disproportional to needs of case	same as to broad relevance, also citing <i>Oppenheimer</i> (*2)
Carr v. State Farm, 2015 WL 8010920 (N.D. Tex. Dec. 7, 2015)	5th	Objections to discovery of plaintiff in PI case	Documents are discoverable and proportional to needs of case	Existing allocations of burdens to show undue burden or lack of proportionality have not changed (*6)
<i>In re</i> Blue Cross Blue Shield, 2015 WL 9694792 (N.D. Ala. Dec. 9, 2015)	11th	Clarification of scope of discovery order re expert reports	While reports may be relevant they are not proportional since only tangentially important to issues	Omission of "subject matter" not intended to restrict scope of discovery
Siriano v. Goodman Mfg, 2015 WL 8259548 (S.D. Ohio Dec. 9, 2015)	6th	Motion to compel info about warranty claims	Granted after reviewing proportionality factors; "cooperative dialogue" ordered	While discovery costs could be significant, new factor shows lopsided burdens does not equal disproportionality (n.5)
LightSquared v. Deere & Co., 2015 WL 8675377 (S.D. N.Y. Dec. 10, 2015)	2nd	Disagreements over discoverability of various items	Production ordered as relevance established (no discussion of proportionality)	Relevance is "still" to be construed broadly citing <i>Oppenheimer</i> despite deletion of subject matter

Appendix: Continued.

Case	Cir.	Dispute	Result	Impact of New Rule
Board of Commissioners v. Daimler Trucks NA, 2015 WL 8664202 (D. Kan. Dec. 11, 2015)	8th	Defects in other aspects of trucks at issue	Production ordered	Rule 1 & 26 applied to pending motion and requires court to consider factors
Bagley v. Yale, 2015 WL 8750901 (D. Conn. Dec. 14, 2015)	2nd	Information on comparators in HR dispute”	Full discovery ordered since central to proving pretext	Relevance is “still” construed broadly despite deleting “reasonably calculated” (*8)
Doe v. Trustees, 2015 WL 9048225 (D. Mass. Dec. 16, 2015)	1st	Statements re prior sexual assaults of other students	Production ordered	Info is relevant to claims and proportional to needs of the case
Wertz v. GEA Heat Exchangers, 2015 WL 8959408 (M.D. Pa. Dec.16, 2015)	3rd	Depos in excess of case management order	One add’l depo granted	Rule restores factors to original place but does not change any of existing responsibilities
Robertson v. People Magazine, 2015 WL 9077111 (S.D.N.Y. Dec. 16, 2015)	2nd	Motion to compel editorial decisions in HR case	Requests are “burdensome and disproportionate”	Amended rule “exhorts” judges to exercise preexisting control “more exactly”
Brown v. Dobler, 2015 WL 9581414 (D. Ida. Dec. 29, 2015)	11th	Other prisoner incidents	Most requests relevant but some too broad	Objections should state whether documents being withheld [per Rule 34(b)]
Green v. Cosby, 2015 WL 9594287 (C.D. Mass. Dec. 31, 2015)	1st	Motion to limit subpoena to non-party	Denied as broad discovery and non-marital privilege for depo	While the new rule eliminates “reasonably calculated,” its equivalent is available due to <i>Oppenheimer</i>

Appendix: Continued.

Case	Cir.	Dispute	Result	Impact of New Rule
Steel Erectors v. AIM Steel Int'l Inc., 2016 WL 53881 (S.D. Ga. Jan. 4, 2016)	11th	Motion to compel info about parent	Refused as not proportional	"restoring" proportionality does not change obligations
Elliott v. Superior Pool Products, 2016 WL 29243 (C.D. Ill. Jan. 4, 2016)	5th	Motion to compel over 100 requests	Scope of requests are clearly improper	Cites Laporte article; shows confusion over meaning of 'relevant'
US v. CA, Inc., 2016 WL 74394 (D. D.C. Jan. 6, 2016)	DC	Motion to compel US to give details of claims	Not relevant or proportionate (*11)	Relevance detm'd by <i>Oppenheimer</i> test
McKinney/Pearl Rest. Partners v. Metropolitan Life, 2016 WL 98603 (N.D. Tex. Jan 8, 2016)	5th	Motions to compel re discovery over objections	Rulings applying rule and discussion applying <i>Carr</i> and Note	Just and practicable to apply new Rule which does not alter burdens or responsibilities
O'Connor v. Uber Technologies, 2016 WL 107461 (N.D. Cal. Jan.11, 2016)	9th	Details behind paralegal affidavit	Motion is "wildly overbroad"	Motion failed to meet the "proportionality test" of the new rule
Gowan v. Mid-Century Insur., 2016 WL 126746 (D. S.D. Jan. 11, 2016)	8th	Motion for protective order re depo testimony	Protective order refused (Farmers stalled to get to invoke proportionality)	The proportionality factors in the rule are "hardly new" – most in rules for 32 years
Roberts v. Clark County Schools, 2016 WL 123320 (D. Nev. Jan. 11, 2016)	9th	Motion to compel	Denied as grossly disproportionate	Chief Justice Report suggests increased reliance on common-sense proportionality
Chrismar Systems v. Cisco Systems, 2016 WL 126556 (N.D. Cal. Jan.12, 2016)	9th	Obj. to broad discovery as disproportionate to needs of case	Motion to compel denied and Cisco need only furnish examples	Rule "balances" proportionality needs of case considering burdens involved

Appendix: Continued.

Case	Cir.	Dispute	Result	Impact of New Rule
Garner v. St. Clair Co, 2016 WL 146691 (S.D. Ill. Jan.13, 2016)	7th	Broadened motion to compel comparator information	Production was sufficient and proportional	No difference in result depending upon whether former or new rule applied (n. 1)
Gilead Services v. Merck, 2016 WL 146574 (N.D. Cal. Jan. 13, 2016)	9th	In patent dispute, motion to compel based on suspicion of veracity	Motion denied as type of proportionality rule intended to prohibit	New rule uses factors already implicit in rule to “fix” scope of discovery demands in first instance
Herrera v. Plantation Sweets, 2016 WL 183058 (S.D. Ga. Jan. 14, 2016)	11th	Motion to compel HR data	Granted	New rule “elevates” proportionality factors but burdens of proof have not changed (n.1)
Kissing Camels Surgery Ctr. v. Centura Health, 2016 WL 277721 (D. Colo. Jan. 22, 2016)	10th	Ruling on objections to data dump	Requiring partial linkage of Bates # to Request in prior production	Omnibus requests and boilerplate objections both improper
Wit v. United Behavioral Health, 2016 WL 258604 (N.D. Cal. Jan. 21, 2016)	9th	Rulings on privilege objections	Relevance clear even if admissibility may later be denied (new rule) (*10-11)	Relevance construed broadly under <i>Oppenheimer</i> even though language from Rule prior to 2015 Amendments
Brinker v. Normandin’s, 2016 WL 270957 (N.D. Cal. Jan. 22, 2016)	9th	Rulings on privilege objections	Small number of documents w/o valid claims must be produced	burden of production is proportional to needs
Brinker v. Normandin’s, 2016 WL 270957 (N.D. Cal. Jan. 22, 2016)	9th	Motion to compel	Granted because burden is small	The production would be proportional to the needs of the case

Appendix: Continued.

Case	Cir.	Dispute	Result	Impact of New Rule
Henry v. Morgan's Hotel Group, 2016 WL 303114 (S.D.N.Y. Jan 25, 2016)	2nd	Motion to Quash subpoena	Granted as irrelevant and not proportional as "gate-keeper" (n.2)	Judges should aggressively discourage discovery abuse
Ashmore v. Allied Energy, 2016 WL 301169 (D. S.C. Jan. 25, 2016)	11th	Motion to shift costs of \$400K in a \$250 K case to plaintiff	Denied. No documentation or info re resources to fund	Party has burden under <i>Oppenheimer</i> to show undue burden by affidavit
Torcasio v. New Canaan, 2016 WL 299009 (D. Conn. Jan. 25, 2016)	2nd	Motion to compel Int. Answ. over objection	Orders response because it could lead to admissible evidence	Typical case applying deleted standard
Krantz v. State Farm, 2016 WL 320148 (M.D. La. Jan. 25, 2016)	5th	Motion to limit Rule 30(b)(6) topics	Places specific limits on topics	Limits imposed to ensure "question on topics proportional to needs
Lester v. City of Lafayette, 2016 WL 303960 (10th Cir. Jan. 26, 2016)	10th	Award of fees under Rule 37	Reversed because court erred in not discussing relevancy	Depends on whether relevant and proportional to needs
<i>In re Xarelto</i> Products Liab. Litig., 2016 WL 311762 (E.D. La. Jan. 26, 2016)	5th	Motion to compel personnel files	Denied because of lack of particularity	Rule requires individualized showing of proportionality
Turner v. Chrysler Group, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016)	6th	Motion to compel search of older records	Limited to that readily available	While easy to state proportionality factors, application is difficult
Sarma v. Wells Fargo, 2016 WL 41003 (M.D. N.C. Feb 2, 2016)	4th	Motion to Quash third-party subpoena involving travel	Granted because party has not explained per Comm. Note	Party should be able to explain the ways the info bears on the issues.

Appendix: Continued.

Case	Cir.	Dispute	Result	Impact of New Rule
Hadfield v. Newpage Corp., 2016 WL 427924 (W.D. Ky. Feb. 3, 2016)	6th	Motion to compel other severance agreements	Granted because relevance threshold is low	Relevance of the discovery under new rule is construed by <i>Oppenheimer</i>
Caves v. Beechcraft Corp., 2016 WL 355491 (N.D. Okla. Jan. 29, 2016)	10th	Motion to compel	Denied because of ongoing Federal investigation	Discovery must be proportionate to “case and issues”
Goes Int’l v. Dodur Ltd, 2016 WL 427369 (N.D. Cal. Feb 4, 2016)	9th	Dispute over discovery of sales of Chinese video game producer	Relevant to claim for damages and easy to secure	Not disproportionate as resources not decisive; court open to staging discovery
Doty v. PPG Indus., 2016 WL 429890 (W.D. Wash. Feb. 4, 2016)	9th	Motion to compel over boilerplate obj.	Discovery is broad if more probable FRE 401	Cites old rule; relevance is construed by <i>Oppenheimer</i>
Marsden v. Nationwide, 2016 WL 471364 (S.D. Ohio Feb. 8, 2016)	6th	Motion to compel answers to interrogatories	Denied as overbroad given limited resources to search personnel files	Proportionality factors outweigh likely benefit under rule (citing <i>Siriano</i>)
O’Boyle v. Sweetapple, 2016 WL 492655 (S.D. Fla. Feb. 8, 2016)	11th	Motion to quash subpoena	Granted	C.J. Roberts cited re “unnecessary or wasteful discovery” (n.2)
Augustyniak v. Lowe’s Home Centers, 2016 WL 462346 (W.D. N.Y. Feb. 8, 2016)	2nd	Discovery Plan	Further justification of discovery needed	Courts should aggressively apply proportionality first
Wilson v. Wal-Mart, 2016 WL 526225 (D. Nev. Feb. 9, 2016)	9th	Motion to compel 3 rd party investigations of slip and fall	Denied	Benefit of the proposed discovery outweighed by expense and burden

Appendix: Continued.

Case	Cir.	Dispute	Result	Impact of New Rule
Randolph v. Centene Mgt. Co., 2016 WL 524259 (W.D. Wash. Feb. 10, 2016)	9th	Re timing and scope of Rule 30(b)(6)	Postponed until after ruling on class certification	Cites old rule and orders meet and confer before any further discussion
ArcelorMittal v. Amex Nooter LLC, 2016 WL 614144 (N.D. Ind. Feb. 16, 2016)	7th	Motion to compel re settlement neg.	Information sought it proportional	Burden is low and resources irrelevant
Vaigasi v. Solow Management, 2016 WL 616386 (S.D. N.Y. Feb. 16, 2016)	2nd.	Motion to compel over 1000 RFP in single pltf case	Inconceivable that all requests are proportional to needs	While some cases require balancing factors, not this one
Cisco v. Arista Networks, 2016 WL 632000 (N.D. Cal. Feb. 17, 2016)	9th	Need for add'l depositions	Permitted in part	Particularized need as implicitly required under amended rule
Dao v. Liberty Life Assr., 2016 WL 796095 (N.D. Cal. Feb. 223, 2006)	9th	Objections are boilerplate and review costs disproportionate to \$2000 claim	Denied w/o prejudice but legality of clause should be resolved first	Not unjust to apply new rule since no greater obligations
Salazar v. McDonald's Corp., 2016 WL 736213 (N.D. Cal. Feb. 25, 2016)	9th Cir.	Modifying letter agreement	Excessive review costs are subject to protective orders	Per Committee Note, the resources of parties is not decisive
Sprint v. Crow Creek Sioux Tribal Court, 2016 WL 782247 (S.Dak. Feb. 2, 2016)	8th	Motion to compel	Amended Rule 33 now specifically refers to proportionality	Propounding party must make threshold showing of relevance
Curtis v. MetLife, 2016 WL 687164 (N.D. Tex. Feb. 19, 2016)	5th	Motion to compel	Party seeking discovery must comply with Rule 26(g)	Not proportional to needs considering the factors involved
Kelley v. Apria Healthcare, 2016 WL 737919 (E.D.Tenn. Feb. 23, 2016)	6th	Motion to compel	Settlement agreements can be relevant and not admissible	Production ordered after "weighing" factors in Rule 26(b)(1)

Appendix: Continued.

Case	Cir.	Dispute	Result	Impact of New Rule
Bentley v. Highlands Hospital, 2016 WL 762686 (E.D. Ky. Feb. 23, 2016)	6th	Motion to compel	Granted in part and denied in part	Judges should be more aggressive in discouraging “marginally relevant” discovery
Fed. Nat’l Mortgage Assn. v. SFR Investments, 2016 WL 778368 (D. Nev. Feb. 25, 2016) “disproportionate” to needs is hyperbole	9th	Discovery order allowing depo questioned	Order affirmed	Argument that discovery is
Sumpter v. Met Life, 2016 WL 772552 (S.D. Ind. Feb. 29, 2016)	7th	Motion to compel	Denied as not relevant as unlikely to lead to relevant evidence	Discovery not proportional to the needs of the case
Sender v. Franklin Res. 2016 WL 814627 (N.D. Cal. March 2, 2016)	9th	Letter motion seeking further discovery	Denied in light of availability of existing and other discovery	Not proportional to needs of case to under duplicative discovery
Wilmington Trust v. AEP Generating, 2016 WL 860693 (March 7, 2016)	6th	Motion to compel add’l search after review team disbanded	Both parties must address proportionality	Ordering additional search would “violate the rule of proportionality”
Freeman v. Atchison, 2016 WL 1059219 (S.D. Ill. March 17, 2016)	7th	Motion to compel	Denied on basis of prior Rule 26(b)(1)	Dicta: scope of discovery “narrowed” in 2015
Barry v. Medtronic, 2016 WL 1056783 (E.D. Pa. March 17, 2016)	3rd	Motion to Quash Subpoena	Granted since requires research (“enormous and expensive”)	Subpoena quashed as “unduly burdensome and disproportionate to needs”
Pertile v. GM, 2016 WL 1059450 (D. Colo. March 17, 2016)	10th	Motion to compel	Despite being relevant compelling production is not proportional	Access to FEA models is not “so central” in light of production of ESI and documents

Appendix: Continued.

Case	Cir.	Dispute	Result	Impact of New Rule
Duvall v. Bopco, 2016 WL 1268343 (E.D. La. April 1, 2016)	5th	Motion to compel inspection per protocol	Denied as to aspects deemed disproportionate	Proportionality bars risks and burdens not proportionate to amount at issue
MP Nexlevel v. CVIN, 2016 WL 1408459 (E.D. Cal. April 11, 2016)	9th	Motion to compel info about other projects	Low relevance indicates fishing expedition rather than following lead	Given burdens – even if electronic search – discovery not required