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Gregory L. Waterworth

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PROPORTIONAL DISCOVERY'S ANTICIPATED IMPACT AND UNANTICIPATED OBSTACLE

*Gregory L. Waterworth**

I. INTRODUCTION

In the last hours of 2015, Chief Justice Roberts did as he has done each year before: he released a year-end report.¹ Despite the routine of the reports, 2015's seemed different.² The report was not the typical recitation of case statistics and policy determinations.³ The report was a poetic call to action.⁴ It cut to the core of the adversarial nature of litigation by analogizing civil litigators with the duelers of old.⁵ Although not a terribly unique analogy,⁶ the report focused less on the adversarial roles of the individuals and, instead, scrutinized the

* J.D. Candidate, May 2018, University of Baltimore School of Law; B.A., Government and Politics, 2013, University of Maryland. A very special thank you to the tireless and devoted work of the *University of Baltimore Law Review* team and to the faculty that helped create this Comment. The author dedicates this Comment to his loving family, friends, and dog—Norman.

1. JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [hereinafter 2015 YEAR-END REPORT]. The tradition began with Chief Justice Warren Burger in 1970. JOHN G. ROBERTS, JR., 2009 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2009), <https://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf>.
2. *Compare* 2015 YEAR-END REPORT, *supra* note 1, at 13–16 (detailing the caseload of the federal courts), *with* John G. Roberts, Jr., *2003 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. (Jan. 1, 2004) [hereinafter *2003 Year-End Report*], <https://www.supremecourt.gov/publicinfo/year-end/2003year-endreport.aspx> (discussing the relationship between Congress and the Federal Judiciary), *and* JOHN G. ROBERTS, JR., 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2–3 (2005), <https://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf> [hereinafter 2004 YEAR-END REPORT] (outlining the federal judicial budget crisis).
3. *Compare* 2015 YEAR-END REPORT, *supra* note 1 (discussing the 2015 amendments to the Federal Rules of Civil Procedure), *with* *2003 Year-End Report*, *supra* note 2 (discussing the Federal Judiciary's budget, relationship with Congress, caseload, and various agencies), *and* 2004 YEAR-END REPORT, *supra* note 2 (discussing the Federal Judiciary's budget crisis, caseload, and various agencies).
4. *See* 2015 YEAR-END REPORT, *supra* note 1, at 9–10.
5. *Id.* at 11–12 (“We should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result.”).
6. *See* *Lawyers or Modern Day Duelers*, ALBION C. HIST. BLOG (Apr. 18, 2016), <https://mhancockparmer.wordpress.com/2016/04/18/lawyers-or-modern-day-duelers/>.

rules that govern both dueling and litigation.⁷ Chief Justice Roberts highlighted the 2015 amendments to the rules that govern the practice of civil litigation, the Federal Rules of Civil Procedure (the Rules).⁸ The 2015 Year-End Report explained how past “rules amendments [were] modest and technical, even persnickety,” but noted that the 2015 amendments were different.⁹ They “mark[ed] significant change, for both lawyers and judges, in the future conduct of civil trials.”¹⁰

The 2015 amendments marked an attempt by the Advisory Committee on Civil Rules (the Advisory Committee) to address the growing concern that “in many cases civil litigation has become too expensive, time-consuming, and contentious,” and that these growing burdens were ultimately “inhibiting effective access to the courts.”¹¹ A symposium, sponsored by the Advisory Committee to explore these concerns,¹²

identified the need for procedural reforms that would: (1) encourage greater cooperation among counsel; (2) focus discovery—the process of obtaining information within the control of the opposing party—on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information.¹³

In a sense, the needed reforms flowed against the very adversarial nature of litigation that warranted comparison with duels.¹⁴ And if duelers are an apt parallel to litigators, then a litigator’s ammunition is rightfully the tool of discovery.¹⁵ Many contended that modern reliance on electronic discovery proved the language of Rule 26(b)(1), which defines the scope of discovery, to be too broad.¹⁶ Proponents of change believed that this broad language was the

7. See 2015 YEAR-END REPORT, *supra* note 1, at 1–2, 5–9 (providing a discussion on the now-antiquated rules of dueling).

8. *Id.* at 4–9.

9. *Id.* at 4.

10. *Id.* at 5.

11. *Id.* at 4.

12. See *infra* Section II.C.1.

13. 2015 YEAR-END REPORT, *supra* note 1, at 4–5.

14. See *id.* at 3.

15. See *id.* at 1–7.

16. See *infra* Section II.B.

source of increasing litigation time and expense.¹⁷ The Advisory Committee agreed with the proponents of change, and after years of drafting and debate, a new Rule 26(b)(1) was submitted for adoption.¹⁸ The new Rule 26(b)(1) is but a shadow of its former self.¹⁹ In an attempt to curb the much debated growing costs, the new Rule 26(b)(1) supplanted the standards of the former rule²⁰ with only two considerations—relevance and proportionality.²¹

Despite the hopeful tone of the 2015 Year-End Report, it still looked towards the future with healthy skepticism.²² Chief Justice Roberts's report continued with the tale of two Napoleonic French officers who dueled at every given opportunity over a fifteen-year period.²³ The feud stubbornly persisted between the men as the world transformed around them, and the original slight was all but forgotten.²⁴ The tale, just as the goal of the new amended rules, served to cut to the heart of the adversarial nature of civil justice.²⁵ Chief Justice Roberts concluded by calling on "the entire legal community, including the bench, bar, and legal academy, [to] step up to the challenge of making real change,"²⁶ all while warning that "[w]e should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result."²⁷

This Comment will proceed in four parts following this introduction. Part II will provide helpful information necessary to fully appreciate the current Rule 26(b)(1), including a brief history of the rules of discovery,²⁸ an analysis of the former Rule 26(b)(1),²⁹ the circumstances which fostered the calls for amendment,³⁰ and the amendment process.³¹ Part III will detail the new scope of discovery by breaking down the new Rule 26(b)(1),³² discussing proportionality

17. See *infra* Section II.B.

18. See *infra* Section II.C.

19. See *infra* Section III.A.

20. See *infra* Section II.A.2.

21. See *infra* Section III.A.

22. 2015 YEAR-END REPORT, *supra* note 1, at 9.

23. *Id.* at 11–12 (describing Joseph Conrad's novella, *The Duel*).

24. *Id.* at 12.

25. See *id.* at 10–12.

26. *Id.* at 9.

27. *Id.* at 12.

28. See *infra* Section II.A.1.

29. See *infra* Section II.A.2.

30. See *infra* Section II.B.

31. See *infra* Section II.C.

32. See *infra* Section III.A.

in the context of discovery,³³ and providing helpful examples and scholarship on the application of proportionality.³⁴ Part IV will discuss how the courts have applied the new Rule 26(b)(1) in decisions since adoption,³⁵ the problems arising out of the misapplication of old case law,³⁶ and will provide a few guiding cases that correctly applied the new Rule 26(b)(1).³⁷

Lastly, Part V will review the impact of the amendment since adoption, explore what is being done to promote the change, and ultimately detail what needs to occur for the full impact of the amendment to be achieved.³⁸ Ultimately, this Comment will conclude that the continued use of pre-2015 amendments case law to define the terminology of the current Rule 26(b)(1) is inapposite to the goal of the new proportionality standard.³⁹ More specifically, such holdings—especially the definition of “relevance” in *Oppenheimer v. Sanders*—are no longer controlling over the scope of discovery.⁴⁰ Until the higher courts provide holdings which prohibit further misapplication, the full potential of Rule 26(b)(1)’s proportionality standard will remain unknown.⁴¹

II. THE HISTORY OF RULE 26(b)(1)

The 2015 amendments arose out of a concern that the former Rule 26(b)(1) could no longer control the scope of discovery under modern circumstances.⁴² Understanding these circumstances helps to appreciate the intended magnitude of the amendment.⁴³

A. *Rule 26(b)(1) Before the 2015 Amendments*

As previously mentioned, many argued that the costs, time, and contentiousness associated with civil litigation were increasing and

33. See *infra* Sections III.B–C.

34. See *infra* Section III.C.

35. See *infra* Part IV.

36. See *infra* Sections IV.A–B.

37. See *infra* Section IV.C.

38. See *infra* Part V.

39. See *infra* Section V.B.

40. See *infra* Sections IV.A–B, V.B.

41. See *infra* Section V.C.

42. See *infra* Section II.B.

43. See generally FED. R. CIV. P. 26 advisory committee’s notes (2015) (explaining the genesis of the 2015 amendments, how they relate to previous amendments, and how they arose at least partially out of a need to ensure proportionality in light of the advent and proliferation of electronic discovery).

that discovery was a cause.⁴⁴ But not all agreed that a change was in the best interest of justice.⁴⁵ An understanding of the history of Rule 26(b)(1), the former Rule 26(b)(1), and the state of civil litigation under the former Rule 26(b)(1) frame the uniqueness of the 2015 amendments.⁴⁶

1. A Brief History of the Rules of Discovery

Since the passage of the Rules Enabling Act of 1934,⁴⁷ the Supreme Court has had “the power to prescribe general rules of practice and procedure” for the federal courts.⁴⁸ In 1935, the first Advisory Committee was formed to draft the first set of unified rules governing the procedure of the courts.⁴⁹ The first rules were finally adopted by the Court on December 20, 1937,⁵⁰ and were effective on September 16, 1938.⁵¹ Since adoption, the Rules have ebbed and flowed⁵² to best promote the resolution of federal civil cases on their merits.⁵³

Rules 26 through 37 have controlled discovery since their creation.⁵⁴ But the first set of rules, which took on the intensely challenging task of codifying the best practices from English and state courts for federal use,⁵⁵ were understandably imperfect.⁵⁶ This was expected, so a means of amending was also created.⁵⁷ The

44. See *infra* Section II.B.

45. See *infra* Section II.B.

46. See *infra* Sections II.A.1–2, II.B.

47. 28 U.S.C. §§ 2071–2077 (2012).

48. *Id.* § 2072.

49. 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1004, at 23 (2015).

50. *Id.* § 1004, at 27.

51. *Id.* § 1004, at 28.

52. See FED. R. CIV. P. 26 advisory committee’s notes (2015). To be exact, Rule 26 has been amended thirteen times since its adoption. *Id.*

53. Bernadette Bollas Genetin, “Just a Bit Outside!”: *Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts*, 34 REV. LITIG. 655, 656 (2015).

54. See FED. R. CIV. P. 26–37; see also 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2002, at 33–34 (3d ed. 2010) (explaining that Rules 26 through 37 “were intended to take the best of what were then modern English and state practices for discovery and make them available in the federal court”).

55. 8 WRIGHT, *supra* note 54, § 2002, at 33.

56. *Id.* § 2002, at 34.

57. See 28 U.S.C. § 2071(a) (2012); see also *How the Rulemaking Process Works*, U.S. CTS., <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Nov. 11, 2017) (describing the rulemaking process and the amendment process).

discovery rules underwent significant amendments in 1948,⁵⁸ and then again in 1970.⁵⁹ The 1970 amendments drastically rearranged the discovery rules.⁶⁰ Before 1970, Rule 26 arguably only applied to depositions, but after amendment, any confusion was clarified, and Rule 26(b) took its modern place as controlling the scope of discovery.⁶¹ The Advisory Committee's notes from 1970 indicated that Rule 26(b) now "regulate[d] the discovery obtainable through any of the discovery devices."⁶² After taking its controlling role, Rule 26(b)(1) was almost amended in 1980,⁶³ amended in 1983,⁶⁴ technically amended in 2007,⁶⁵ and most recently amended in 2015.⁶⁶ While the exact nature of the amendments to Rule 26(b)(1) have differed, their purpose was always the same—to foster simplicity⁶⁷ and to "rein in popular notions that anything relevant should be produced."⁶⁸

2. The Former Scope of Discovery

Before the 2015 amendments, Rule 26(b)(1) read:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding *any nonprivileged matter that is relevant to any party's claim or defense*—including the existence,

58. 8 WRIGHT, *supra* note 54, § 2002, at 34.

59. *Id.*

60. *Id.* § 2003, at 35.

61. *Id.*

62. FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

63. FED. R. CIV. P. 26 advisory committee's note to 1980 amendment ("The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery. . . . [But] [t]he Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases.").

64. FED. R. CIV. P. 26 advisory committee's note to 1983 amendment ("Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.").

65. *See* FED. R. CIV. P. 26 advisory committee's note to 2007 amendment (explaining that the Advisory Committee intended to make "stylistic" changes when it deleted the word "books" and moved one sentence).

66. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

67. FED. R. CIV. P. 26 advisory committee's note to 2007 amendment.

68. *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 307 (S.D. Ind. 2016).

description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order *discovery of any matter relevant to the subject matter involved in the action*. Relevant information need not be admissible at the trial if the *discovery appears reasonably calculated to lead to the discovery of admissible evidence*. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).⁶⁹

The former rule can be broken down into three distinct parts.⁷⁰ First, it stated that any material was discoverable as long as it was nonprivileged and relevant to any party's claim or defense.⁷¹ This aspect of the former Rule 26(b)(1) is one of the few provisions that carried over into the new Rule 26(b)(1).⁷²

Secondly, the former Rule 26(b)(1) further provided that, “[f]or good cause, the court may order discovery of any matter *relevant to the subject matter* involved in the action.”⁷³ The Court of Appeals for the First Circuit noted that the “subject matter” standard was designed to distinguish basic discovery regarding claims and defenses from a broader scope of allowable discovery.⁷⁴ The standard was originally included in Rule 26(b)(1) “to involve the court more actively in regulating the breadth of sweeping or contentious discovery.”⁷⁵

The third distinct part of the former Rule 26(b)(1) was that it defined that “[r]elevant information need not be admissible at the trial if the *discovery appears reasonably calculated to lead to the discovery of admissible evidence*.”⁷⁶ The Supreme Court detailed how the “reasonably calculated” standard, while acting as a necessary boundary to discovery, prohibits discovery on claims and defenses that have been stricken.⁷⁷ Originally added to Rule 26(b)(1) in 1946, the “reasonably calculated” standard was included by the Advisory

69. FED. R. CIV. P. 26(b)(1) (2010) (emphasis added).

70. See *infra* notes 71–76 and accompanying text.

71. FED. R. CIV. P. 26(b)(1) (2010).

72. See FED. R. CIV. P. 26(b)(1) (2015).

73. FED. R. CIV. P. 26(b)(1) (2010) (emphasis added). This Comment will refer to this provision hereinafter as the “subject matter” standard.

74. *In re Subpoena to Witzel*, 531 F.3d 113, 118 (1st Cir. 2008).

75. *Id.* (quoting FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment).

76. FED. R. CIV. P. 26(b)(1) (2010) (emphasis added). This Comment will refer to this provision hereinafter as the “reasonably calculated” standard.

77. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351–52 (1978). *Oppenheimer* will be discussed in far greater detail later in Sections IV.A–B.

Committee to clarify that inadmissible evidence, such as hearsay or lists of potential witnesses, was discoverable.⁷⁸

In summation, the former Rule 26(b)(1) defined the scope of discovery as relevance to claims and defenses, defined relevance as anything “reasonably calculated,” and allowed the scope to be expanded, for good cause, to include anything relevant to the “subject matter” of the issue.⁷⁹ But as technology advanced, so did the strain on the Rule first formulated in 1937.⁸⁰

B. *Was Change Necessary?*

Many perceived that, just as the French Duelers fought until they lost sight of the cause,⁸¹ civil litigation was devolving into a never-ending series of meaningless clashes—never resolving the original slight, but always delaying resolution.⁸² Empirical data⁸³ supporting change to the scope of discovery detailed that in a closed study of 3,550 cases,⁸⁴ the median total reported discovery cost was \$15,000 for a plaintiff and \$20,000 for a defendant.⁸⁵ Further data revealed that the top 5%, or 177 cases, reported a median discovery cost of \$850,000 for plaintiffs and \$991,900 for defendants.⁸⁶ Surveys conducted before 2010 within the Litigation Section of the American Bar Association, the National Employment Lawyers Association, and the American College of Trial Lawyers reflected a “general dissatisfaction” with federal civil procedure, and many of the lawyers surveyed responded that the rules were “not conducive to securing a ‘just, speedy, and inexpensive determination of every action.’”⁸⁷ The

78. See FED. R. CIV. P. 26 advisory committee’s note to 1946 amendment.

79. See *supra* notes 68–78 and accompanying text.

80. See *infra* notes 109–15 and accompanying text.

81. See *supra* notes 22–24 and accompanying text.

82. See, e.g., William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 716 (1989).

83. See *infra* notes 84–89 and accompanying text. Some of the cited surveys, data, and opinions were formulated after the decision was made to explore amending the scope of discovery. Although they were not drafted prior to any notion of amending and they do not perfectly reflect the nature of discovery under the former Rule 26(b)(1) or the legal community’s opinion of the Rule, they offer reflective insight into the state of discovery under the former Rule 26(b)(1).

84. JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 3 (2010), http://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf [hereinafter 2010 DUKE CONFERENCE REPORT] (terminating study in the federal courts by the end of 2008).

85. *Id.*

86. *Id.*

87. *Id.*

corporate and defense-oriented attorneys surveyed generally viewed litigation costs as too high.⁸⁸ And damningly, all projections indicated that the growing reliance on e-discovery will only increase costs and burdens.⁸⁹ Proponents of change emphasized the data concerning the increasing costs and general disfavor of pre-2015 discovery,⁹⁰ but the entire legal community did not support the movement to amend.⁹¹

Professor Arthur Miller, a prominent academic and former Advisory Committee reporter specializing in the Federal Rules of Civil Procedure,⁹² testified before the Senate Subcommittee on Bankruptcy and the Courts of the United States in opposition to amending the scope of discovery.⁹³ Professor Miller argued that the justifications for narrowing the scope of discovery are simply “speculative, not empirically justified, . . . overstated,” and ignore other systemic values, such as access to the judiciary.⁹⁴ To many, narrowing the scope of discovery constituted a “significant turning away from the vision of the original Federal Rules of a relatively unfettered and self-executing discovery regime—a true commitment to ‘equal access to all relevant data.’”⁹⁵ He noted that amendments apply to all discovery, not just the “relatively thin band of complex and ‘big’ cases.”⁹⁶ Professor Miller concluded that while discovery relating to electronically stored information is altering the sphere of discovery, its use by defense interests as justification to narrow

88. *Id.* at 4 (“The participating corporations reported that outside litigation costs account for about 1 in every 300 dollars of U.S. revenue for corporations not in insurance or health care. The respondents also reported that the average discovery costs per major case represent about 30% of the average outside legal fees.”).

89. *Id.*

90. See discussion *infra* Section II.C.1.

91. See *infra* notes 92–97 and accompanying text.

92. *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?: Hearing Before the Subcomm. on Bankr. & the Courts of the S. Comm. on the Judiciary*, 113th Cong. 7 (2013), <https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg89395.pdf>.

93. *Id.* at 41–48 (prepared statement of Arthur R. Miller, Professor, New York University School of Law).

94. *Id.* at 42–43.

95. *Id.* at 43.

96. *Id.* at 45 (citing Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684–86 (1998) (reviewing studies showing that one-third to one-half of all litigations involve no discovery). *But cf.* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (arguing that discovery is “dysfunctional, with litigants utilizing discovery excessively and abusively”).

discovery is just another instance of “Chicken Little crying that the sky is falling. [And] [i]t is not.”⁹⁷

Proponents of change further noted that not only had the nature of discovery been altered, but caseloads increased as well.⁹⁸ Federal caseloads have substantially increased, along with the variety and depth of subject matter.⁹⁹ At the same rate, trials are becoming rare,¹⁰⁰ and discovery costs are disproportionately skyrocketing for complex civil cases.¹⁰¹ One scholar concluded that the rules fostered a system where “discovery often serve[d] less to acquire and disclose information than to manipulate the opponent—to embarrass, exhaust, and frustrate him.”¹⁰²

C. *Making Amends*

The debate within the legal community was fervent enough for the Supreme Court to take notice and call for the issue to be explored.¹⁰³

1. The Duke Conference

Heeding the call of the Supreme Court, the Standing Committee on Rules of Practice and Procedure organized a symposium to explore issues within federal civil litigation.¹⁰⁴ On May 10, 2010, lawyers, judges, and academics from across the country met to “explore the current costs of civil litigation, particularly discovery, and to discuss possible solutions” at what is now known as the Duke Conference.¹⁰⁵ Attendees reviewed and discussed empirical data, scholarly papers, and judicial programs in considering if issues existed within the federal civil justice system.¹⁰⁶ The conference’s report concluded that “[w]hile there is need for improvement [within the Rules], the time has not come to abandon the system and start over.”¹⁰⁷

97. *Id.* at 47.

98. *See infra* notes 99–101 and accompanying text.

99. *See* Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 601 (2010).

100. *See* Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 399 (2011).

101. *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 658 (2013).

102. Schwarzer, *supra* note 82, at 713.

103. *See infra* Section II.C.1.

104. *See* 2015 YEAR-END REPORT, *supra* note 1, at 3–4.

105. 2010 *Civil Litigation Conference*, U.S. CTS., <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (last visited Nov. 11, 2017); 2010 DUKE CONFERENCE REPORT, *supra* note 84, at 1.

106. 2010 DUKE CONFERENCE REPORT, *supra* note 84, at 1.

107. *Id.* at 5.

Attendees faced the challenge of determining how the judiciary could make internal changes quickly enough to keep up with the rapid changes of society and proposed numerous potential changes to the rules, as well as determined points of consensus among the participants.¹⁰⁸

The Duke Conference focused its attention on pleadings, discovery, spoliation, and judicial case management.¹⁰⁹ As for the issues in modern discovery, discussions “extended beyond the costs, delays, and abuses imposed by overbroad discovery demands to include those imposed by discovery responses that do not comply with reasonable obligations.”¹¹⁰ “[O]verbroad and excessive discovery demands,” “stonewalling,”¹¹¹ “document dumps,”¹¹² fishing expeditions,¹¹³ “overly narrow interpretations of . . . requests,” and excessive motions requiring response were all contemplated.¹¹⁴ In all, the attendees uniformly agreed that rule changes were needed.¹¹⁵ The Conference’s report identified that what was “needed can be described in two words—cooperation and proportionality.”¹¹⁶ However, a rule change alone would not suffice.¹¹⁷ A cultural buy-in, supplemented by continued education, pilot programming, and extensive data collection were necessary to foster the needed changes.¹¹⁸

2. “[F]ive years of intense study, debate, and drafting”¹¹⁹

So began the lengthy process of amending the Rules. The Duke Conference generated forty papers and twenty-five data compilations

108. *Id.* at 2, 4–5.

109. *Id.* at 5–9.

110. *Id.* at 7.

111. “Stonewalling” is a term used to describe the refusal to cooperate or answer questions as a delaying tactic. *Stonewalling*, LAW DICTIONARY, <http://thelawdictionary.org/stonewalling/> (last visited Nov. 11, 2017).

112. “Document dump” is a term used to describe the act of responding to discovery requests with the over-production of a large quantity of data in an attempt “to hide a needle in a haystack.” *Document Dump Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/d/document-dump/> (last visited Nov. 11, 2017).

113. A “fishing expedition” is “[a]n attempt, through broad discovery requests or random questions, to elicit information from another party in the hope that something relevant might be found.” *Fishing Expedition*, BLACK’S LAW DICTIONARY (10th ed. 2014).

114. *See* 2010 DUKE CONFERENCE REPORT, *supra* note 84, at 7.

115. *Id.*

116. *Id.* at 4.

117. *Id.* at 5.

118. *Id.* at 10–12.

119. *See* 2015 YEAR-END REPORT, *supra* note 1, at 4.

on how the expense, time, and contention inhibited the effectiveness of the courts in many cases.¹²⁰ Following the Duke Conference's suggestions, the Advisory Committee began the lengthy process of translating these suggestions into workable amendments to the Rules.¹²¹ A subcommittee presented the first drafts of proposed amendments in 2012.¹²² The Committee held public hearings in Dallas, Phoenix, and Washington D.C., received input from more than 120 witnesses, and reviewed more than 2,300 written comments on the proposed amendments.¹²³ The proposed amendments further passed through the Standing Committee, the Judicial Conference, the Supreme Court, and Congress before their adoption on December 1, 2015.¹²⁴

This change has attracted the critiques of many, and articles pertaining to the 2015 amendments flood scholarly reviews.¹²⁵ Some applauded the amendments as a modern means of addressing e-discovery,¹²⁶ while others concluded that proportionality is an "anti-plaintiff" limit to discovery.¹²⁷ Despite the critiques following the new amendment, one thing was certain—the switch to proportionality review was a large step. The only question that remained was how impactful would the change be?

III. THE NEW SCOPE OF DISCOVERY

A. *The New Rule 26(b)(1)*

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the

120. *Id.*

121. *Id.* at 5.

122. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE 25 (2012), http://www.uscourts.gov/sites/default/files/fr_import/ST09-2012.pdf [hereinafter 2012 COMMITTEE REPORT].

123. 2015 YEAR-END REPORT, *supra* note 1, at 5.

124. *Id.*

125. *See* sources cited *infra* notes 126–27.

126. *See, e.g.,* Trevor Gillum, *The Convergence Awakens: How Principles of Proportionality and Calls for Cooperation Are Reshaping the E-Discovery Landscape*, 23 U. MIAMI INT'L & COMP. L. REV. 741, 745 (2016).

127. *See, e.g.,* Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1086–87 (2015).

parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.¹²⁸

The new Rule 26(b)(1) can be broken into four elements: (1) the addition of proportionality as a key factor defining the scope of discovery and of six proportionality considerations; (2) the removal of the list of discovery sources; (3) the removal of the "subject matter" standard; and (4) the removal of the "reasonably calculated" standard.¹²⁹

The Advisory Committee notes that the new Rule 26(b)(1) restores "proportionality as an express component of the scope of discovery" to "guard against redundant or disproportionate discovery."¹³⁰ The change to proportionality does not place the burdens of all proportionality considerations on the party seeking discovery, nor does it permit the use of simple boilerplate objections stating that a request is not proportional.¹³¹ The new Rule 26(b)(1) further gives six factors to be considered in applying proportionality: (1) "the importance of the issues at stake"; (2) "the amount in controversy"; (3) "the parties' relative access to relevant information"; (4) "the parties' resources"; (5) "the importance of the discovery in resolving the issues"; and (6) "whether the burden or expense of the proposed discovery outweighs its likely benefit."¹³² Not one of the six factors is inherently more impactful on a court's analysis.¹³³ For instance, monetary stakes cannot control the analysis, but must be balanced against the other five factors.¹³⁴

Perhaps as, if not more, striking than the addition of proportionality, was the removal of controlling aspects of the former Rule 26(b)(1).¹³⁵ The first removal was the phrase providing for the discovery of information about documents, tangible items, and

128. FED. R. CIV. P. 26(b)(1) (emphasis added).

129. Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Judge Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice & Procedure app. B-4 (June 14, 2014), http://www.uscourts.gov/sites/default/files/st09-2014-add_0.pdf [hereinafter Summer 2014 Committee Report].

130. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

131. *Id.*

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

133. *See* FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

134. *Id.*

135. *See infra* notes 136–44 and accompanying text.

possible witnesses.¹³⁶ The Committee saw these words as unnecessary because they described a “well entrenched” practice and made the rule verbose.¹³⁷

The Committee further deleted the “subject matter” and “reasonably calculated” standards.¹³⁸ As for the “subject matter” standard, the Advisory Committee expressed that a few factors prompted removal.¹³⁹ First, the provision was rarely invoked.¹⁴⁰ Second, the new proportionality standard would allow for the same result.¹⁴¹ And lastly, the removal of the “subject matter provision” prevented future interpretations that would extend the scope of discovery contrary to the intent of the amendments.¹⁴² The “reasonably calculated” standard was deleted because the standard was “used by some, incorrectly, to define the scope of discovery.”¹⁴³ Furthermore, the notes observe that “use of the ‘reasonably calculated’ phrase to define the scope of discovery ‘might swallow any other limitation on the scope of discovery.’”¹⁴⁴

The new Rule 26(b)(1) removed any past provisions that could arguably expand or redefine the scope of discovery leaving only two considerations: relevance to claims and defenses and proportionality.¹⁴⁵ But the question remains: what is proportionality?

B. *Proportionality Is Not a Stranger to the Rules*

To begin, proportionality is not new to the Federal Rules of Civil Procedure.¹⁴⁶ Many of the very considerations now provided to review proportionality originally resided in Rule 26(b)(1) from 1983 to 1993.¹⁴⁷ In 1993, the considerations were moved to Rule 26(b)(2)(C)(iii), which directed the court to “limit the frequency or extent of use of discovery if it determined that ‘the discovery . . . [was] unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the

136. Summer 2014 Committee Report, *supra* note 129, at app. B-9.

137. *Id.*

138. *Id.* at app. B-9–10.

139. FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.*

146. Summer 2014 Committee Report, *supra* note 129, at app. B-7.

147. *Id.*

litigation.”¹⁴⁸ While initially added to address problems of over-discovery, redundant, or disproportionate discovery, the Advisory Committee Notes indicate that the proportionality considerations failed to have their intended effect.¹⁴⁹

C. *So What Is It Then?*

Although proportionality is not new to the Rules, the concept remains elusive to the bench and bar.¹⁵⁰ In fact, even Black’s Law Dictionary lacks a definition for “proportionality” in the civil context.¹⁵¹ The new Rule 26(b)(1) gives six seemingly exclusive factors for a court to consider when determining the proportionality of a discovery request.¹⁵² The factors can be inapplicable, neutral, or even determinative depending on the specific discovery request or dispute at issue.¹⁵³ Moreover, each factor necessitates a factual-intensive analysis.¹⁵⁴

Despite providing factors, the list leaves many ambiguities due to a stark lack of helpful case law concerning proportionality,¹⁵⁵ and a lack of uniform guidance on reviewing cases through a proportional lens.¹⁵⁶ This ambiguity as to what is actually proportionality may be the largest hurdle the new rule must overcome,¹⁵⁷ but for the purposes of this Comment, a basic understanding of the concept is only necessary for determining how effective the amendment has been at achieving the Advisory Committee’s goals.

148. FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

149. *Id.* (quoting FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment) (explaining that the proportionality considerations instituted in 1983 were intended for the same purposes, but lacked impact).

150. *See, e.g.*, David Crump, *Goodbye, “Reasonably Calculated”; You’re Replaced by “Proportionality”: Deciphering the New Federal Scope of Discovery*, 23 GEO. MASON L. REV. 1093, 1102 (2016); Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 23 (2015).

151. *See Proportionality*, BLACK’S LAW DICTIONARY (10th ed. 2014). The term is defined in the criminal law context as “[t]he principle that the use of force should be in proportion to the threat or grievance provoking the use of force.” *Id.*

152. *See supra* notes 132–34 and accompanying text.

153. Crump, *supra* note 150, at 1097–1101.

154. *See id.*

155. *Id.* at 1102–03.

156. Laporte & Redgrave, *supra* note 150, at 46.

157. *See id.* However, uniformly defining proportional discovery is not the purpose of this Comment.

1. A Helpful Example

A pre-2015 amendment example of proportionality in discovery should serve as a helpful example to illustrate the concept. In *United States v. University of Nebraska at Kearney*,¹⁵⁸ Judge Zwart invoked proportionality when reviewing the discovery requests of the government.¹⁵⁹ In a discrimination case against the university for failure to provide housing for students with emotional assistance animals, the government requested any electronically stored information (ESI) pertaining to an extensive list of search terms.¹⁶⁰ The university argued that if the terms were used “the defendants would need to produce ESI for every person with a disability who sought any type of accommodation from . . . [the university], including students seeking academic accommodations, employees seeking employment accommodations, and the general public seeking accommodations for using . . . [the university’s] non-housing facilities.”¹⁶¹ At the time of the decision, the university had already spent \$122,006 in processing the discovery requests, and the request would ultimately yield 10,997 total documents.¹⁶² In response to the growing costs of the discovery request, the court conducted a, then Rule 26(c)(2)(C), proportionality review.¹⁶³ The court’s analysis hinged on the specific allegations in the case: discrimination by prohibiting emotional assistance animals.¹⁶⁴ Although the requested information had relevance, the burden of obtaining the information “outweigh[ed] its likely benefit.”¹⁶⁵ Accordingly, the court denied the government’s motion to compel discovery because the proportional burden outweighed the benefit.¹⁶⁶ The court reasoned that other less costly discovery tools and means could be used to gather the information, and that the request hindered the “just, speedy, and inexpensive determination” of the case.¹⁶⁷

United States v. University of Nebraska at Kearney serves as a good example of proportional review.¹⁶⁸ The factors considered by Judge Zwart were similar to the six considerations outlined in the

158. No. 4:11CV3209, 2014 WL 4215381 (D. Neb. Aug. 25, 2014).

159. *Id.* at *3.

160. *Id.* at *1.

161. *Id.* at *2.

162. *Id.* at *3.

163. *Id.*

164. *Id.* at *5.

165. *Id.*

166. *Id.*

167. *Id.* at *7.

168. *Id.* at *3–4.

amended Rule 26(b).¹⁶⁹ With a helpful pre-2015 example of proportionality, one can better review the cases that have looked to the new amended Rule 26(b) since its adoption.

IV. THE *OPPENHEIMER* PROBLEM

Proportionality is now a controlling factor over the scope of discovery in all future and pending proceedings, except in those pending proceedings where application of the new rule would not be feasible or would result in injustice.¹⁷⁰ Yet, proportionality is not the only consideration.¹⁷¹ Interestingly, the hurdle Rule 26(b)(1) now faces in achieving its full potential comes not from proportionality, but from its co-consideration—relevance.¹⁷²

A. *Boilerplate Beginnings*

Among the early decisions to incorporate the new Rule 26(b)(1) was *Signatours Corp. v. Hartford* on May 19, 2016.¹⁷³ *Signatours* pertained to a motion to compel the production of documents in a copyright infringement action.¹⁷⁴ Proportionality was not a deciding factor in the case.¹⁷⁵ In fact, the concept was never mentioned except in the court's quotation of the new Rule 26(b)(1).¹⁷⁶ The failure to review both relevance and proportionality under the new Rule 26(b)(1), however, is not why this Comment draws attention to the decision; it is the boilerplate.¹⁷⁷

Black's Law Dictionary defines boilerplate as “[r]eady-made or all-purpose language that will fit in a variety of documents.”¹⁷⁸ The term boilerplate typically describes the usage of ready-made contractual clauses,¹⁷⁹ but has also found a place in judicial standards of review.¹⁸⁰ The practice of utilizing boilerplate standards of review is

169. *See id.* at *3, *5.

170. 28 U.S.C. §§ 2071–2077 (2012).

171. *See* FED. R. CIV. P. 26(b)(1).

172. *See infra* notes 190–210, 265–86 and accompanying text.

173. No. 14-1581 RSM, 2016 WL 2930435, at *2 (W.D. Wash. May 19, 2016).

174. *Id.* at *1.

175. *See id.* at *2–5.

176. *Id.* at *2.

177. *See infra* notes 178–92 and accompanying text.

178. *Boilerplate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

179. *See* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713, 715, 718 (1997).

180. Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 255–58 (2009).

widespread.¹⁸¹ The systemic perception of standards of review as boilerplate may be best exposed in one federal judge's comments as he discussed the role of court clerks in drafting opinions.¹⁸² The judge explained that he would take a clerk's draft and "make substantial revisions to almost every paragraph, and about the only statements of black-letter law that . . . [the judge would] leave untouched . . . [were] boilerplate, such as [the] standard of review."¹⁸³ Comments like this show how many people in the legal community view standards of review, and similar statements of law, as boilerplate.¹⁸⁴

Although not a standard of review in the typical sense,¹⁸⁵ Rule 26(b)(1) is the standard for reviewing discovery requests, and thus the same pressures apply.¹⁸⁶ Standard legal language is a staple of the law, providing balance of power, supporting judicial economy, and standardizing the review of cases.¹⁸⁷ However, *Signatours* provides a clear example of the pitfall of using boilerplate.¹⁸⁸ The new Rule 26(b)(1) was incorporated into the language defining the scope of discovery, but the case law used to explain the terminology was old law created under the former rule.¹⁸⁹ Following the block quote of the new Rule 26(b)(1), *Signatours* continued by stating:

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181. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 752 (2008) (noting that appellate courts often use boilerplate string citations that have been cut and pasted for the standard of review); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 37 (2004) (highlighting the use of boilerplate standards of review in place of reasoned and explained analysis); Peters, *supra* note 180, at 255–58 (explaining that the frequent use of boilerplate language is one of the many issues standards of review face).
182. See Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 188–89 (2006).
183. *Id.*
184. See *id.*
185. See generally Peters, *supra* note 180 (focusing on appellate standards of review and their misuse).
186. See FED. R. CIV. P. 26(b)(1); see also Michael J. Miles, *Proportionality Under Amended Rule 26(b)(1): A New Mindset*, A.B.A. (May 18, 2016), <http://apps.americanbar.org/litigation/committees/pretrial/articles/spring2016-0516-proportionality-amended-rule-26b1-new-mindset.html> (emphasizing the importance of the new Rule 26(b)(1) to the discovery process).
187. Peters, *supra* note 180, at 238–41.
188. *Signatours Corp. v. Hartford*, No. 14-1581 RSM, 2016 WL 2930435, at *2 (W.D. Wash. May 19, 2016).
189. *Compare Estate of Zahn v. City of Kent*, No. C14-1065RSM, 2015 WL 12712764, at *1 (W.D. Wash. Nov. 10, 2015) (applying the pre-2015 Rule 26(b)(1) as the

“Relevant information for purposes of discovery is information ‘reasonably calculated to lead to the discovery of admissible evidence’” *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005). “District courts have broad discretion in determining relevancy for discovery purposes.” *Id.* (citing *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)).¹⁹⁰

The court included into the new scope of discovery the very “reasonably calculated” standard that the Advisory Committee purposely removed.¹⁹¹ While *Signatours* may have been one of the first decisions to do this, it has certainly not been the last.¹⁹²

B. *Old Habits Die Hard*

At first glance, the use of *Oppenheimer* does not seem incorrect.¹⁹³ But by scrutinizing *Oppenheimer*, one sees that the holding is not simply defining the term “relevance,” but is defining “relevance” under the scope and language of the former Rule 26(b)(1).¹⁹⁴ *Oppenheimer* involved a class action against an investment fund for artificially inflated pricing and brought to the Supreme Court multiple questions concerning the procedure for handling class actions and allocating the burdens of discovery.¹⁹⁵ One of those issues pertained to the class’s argument that requests to learn of more potential class members fell under the scope of discovery.¹⁹⁶ The Court disagreed with the plaintiff class and held that requests of such information did not fall under discovery, but instead fell under Rule 23(d)’s facilitation of sending notice.¹⁹⁷ In doing so, however, the Court defined the scope of discovery under the 1978 version of Rule 26(b)(1) and noted that “[t]he key phrase in this definition—‘relevant to the *subject matter* involved in the pending action’—has been construed broadly to encompass any matter that bears on, or that *reasonably could lead* to other matter that could bear on, any issue

standard of review), with *Signatours*, 2016 WL 2930435, at *2 (applying the same standard with the post-2015 amended Rule 26(b)(1)).

190. *Signatours*, 2016 WL 2930435, at *2.

191. FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

192. *See infra* Section IV.B.

193. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350–51 (1978).

194. *See id.*

195. *See id.* at 343–44, 349–59.

196. *See id.* at 350–52.

197. *Id.* at 352–56.

that is or may be in the case.”¹⁹⁸ But the “key phrase” to which the Supreme Court construes broadly no longer exists.¹⁹⁹

Judge David Campbell, in *In re Bard IVC Filters Products Liability Litigation*, succinctly explained the nature of using law which defines a prior version of a rule:

Amended Rule 26(b)(1) was adopted pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 et. seq. That statute provides that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” Thus, just as a statute could effectively overrule cases applying a former legal standard, the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1). The test going forward is whether evidence is “relevant to any party’s claim or defense,” not whether it is “reasonably calculated to lead to admissible evidence.”²⁰⁰

Despite the likely abrogation of the *Oppenheimer* standards, many courts continue to cite to it when defining relevance.²⁰¹ The United States District Courts of New York,²⁰² Florida,²⁰³ Kansas,²⁰⁴ Louisiana,²⁰⁵ California,²⁰⁶ and Kentucky²⁰⁷ are creating a large

198. *Id.* at 350–51 (emphasis added) (quoting FED. R. CIV. P. 26(b)(1) (1976)).

199. *See* FED. R. CIV. P. 26(b)(1).

200. 317 F.R.D. 562, 564 (D. Ariz. 2016) (citation omitted) (quoting 28 U.S.C. § 2072(b) (2012)).

201. *See, e.g.*, United States *ex rel.* Shamesh v. CA, Inc., 314 F.R.D. 1, 8 (D.D.C. 2016); Lightsquared Inc. v. Deere & Co., 13 Civ. 8157 (RMB) (JCF), 2015 WL 8675377, at *2 (S.D.N.Y. Dec. 10, 2015); La. Crawfish Producers Ass’n-W. v. Mallard Basin, Inc., No. 6:10-1085 c/w 6:11-0461, 2015 WL 8074260, at *2, *5 (W.D. La. Dec. 4, 2015). A Westlaw case search performed on November 17, 2017, revealed 293 citations of the *Oppenheimer* standard in federal courts to define relevance in the amended Rule 26(b) since its adoption on December 1, 2015. Albeit every case may not be positively citing *Oppenheimer*, but this is still a high number of citations to an abrogated holding.

202. A Westlaw case search performed on November 17, 2017, revealed that nineteen New York Federal District Court orders cite *Oppenheimer* to define the rule’s scope.

203. A Westlaw case search performed on November 17, 2017, revealed that thirty-seven Florida Federal District Court orders cite *Oppenheimer* to define the rule’s scope.

204. A Westlaw case search performed on November 17, 2017, revealed that twenty-three Kansas Federal District Court orders cite to *Oppenheimer* to define the rule’s scope.

205. A Westlaw case search performed on November 17, 2017, revealed that twenty-five Louisiana Federal District Court orders cite to *Oppenheimer* to define the rule’s scope.

206. A Westlaw case search performed on November 17, 2017, revealed that thirty-eight California Federal District Court orders cite to *Oppenheimer* to define the rule’s scope.

portion of jurisprudence that incorporates *Oppenheimer* into the new Rule 26(b)(1).²⁰⁸ Although the incorporation of the *Oppenheimer* standard is not facially inapposite to the amended rule, the continued use of old case law to define relevance is creating a hurdle in realizing the full impact of the new scope of discovery.²⁰⁹ The *Oppenheimer* definition of relevance is one that incorporates the very broad and liberal scope of discovery that the amendment purposefully removed.²¹⁰

C. *Righting the Ship*

Not all courts are applying the old law to the new rule.²¹¹ One of the first decisions to grasp and apply the amended Rule 26(b)(1) as intended was *Sibley v. Choice Hotels International*.²¹² A simple bed bugs case fostered tremendous discovery costs due to the “continual bickering and litigation over minor filing deadlines, and discovery disputes focused on form instead of substance,” which led to “over 70 docket entries in the case. Presently, there are 83 docket entries, and the pending motions to compel and extend discovery are the tenth and eleventh motions interposed.”²¹³

The *Sibley* Court gave a comprehensive, but keen, description of the amendments to 26(b)(1) and noted that “the discretionary authority to allow discovery of ‘any matter relevant to the subject matter involved in the action’ has been eliminated.”²¹⁴ The court then used the new proportionality standard to hold that the extensive discovery requests were disproportional to the needs of the case, denied all motions set forth for consideration, and closed written and document discovery.²¹⁵

When framing the new Rule 26(b)(1), the Advisory Committee could not have asked for a more perfect case than *Sibley* to support the necessity of decreasing the scope of discovery.²¹⁶ If destined “to

207. A Westlaw case search performed on November 17, 2017, revealed that fifteen Kentucky Federal District Court orders cite to *Oppenheimer* to define the rule’s scope.

208. Combined, these states account for approximately 54% of the case law perpetuating the *Oppenheimer* standard. See *supra* notes 201–07.

209. See discussion *infra* Section V.B.

210. See *supra* notes 193–200 and accompanying text.

211. See *infra* notes 212–32 and accompanying text.

212. No. CV 14-634 (JS)(AYS), 2015 WL 9413101, at *2, *7 (E.D.N.Y. Dec. 22, 2015).

213. *Id.* at *1.

214. *Id.* at *2 (quoting FED. R. CIV. P. 26(b)(1) (2010)).

215. *Id.* at *7–8.

216. See FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment (“The present amendment again reflects the need for continuing and close judicial involvement in

deal with the problem of over-discovery,”²¹⁷ then *Sibley* would serve as one of the first cases of over-discovery reined in by the new Rule 26(b)(1).²¹⁸ Many other courts would follow *Sibley*’s lead, adopting not only the words of the new rule, but framing them in the Advisory Committee’s intent.²¹⁹ Two decisions that help to outline and guide the application of the new Rule 26(b)(1) were both signed in September 2016.²²⁰

1. *In re Bard IVC Filters Products Liability Litigation*

The first guiding case is Judge David G. Campbell’s decision in *In re Bard IVC Filters Products Liability Litigation*.²²¹ Judge Campbell’s decision is not just enlightening because of its analysis, but because he is also the Chair of the Advisory Committee on the Rules of Civil Procedure that spearheaded and designed the 2015 amendments.²²² The decision focuses on a dispute between the parties as to the “discoverability of certain electronically stored information . . . generated by foreign entities.”²²³ Judge Campbell breaks his analysis into two parts: relevance and proportionality under the new rule.²²⁴ As for relevance, the decision reiterates that the “reasonably calculated” standard no longer has any bearing on discovery.²²⁵ The decision continues, in frustration, by listing multiple decisions that are still citing to this old standard,²²⁶ and even points out two decisions that turned to the old standard within the Ninth Circuit.²²⁷ Judge Campbell concluded that the amended rule

the cases that do not yield readily to the ideal of effective party management. . . . [T]here will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.”).

217. *Id.*

218. *See Sibley*, 2015 WL 9413101, at *7 (applying the new Rule 26(b)(1) proportionality standard in their denial of extensive discovery requests by the plaintiff).

219. *See, e.g., Arcelormittal Ind. Harbor LLC v. Amex Nooter, LLC*, No. 2:15-CV-195-PRC, 2016 WL 614144, at *4 (N.D. Ind. Feb. 16, 2016); *Wilson v. Wal-Mart Stores, Inc.*, No. 2:15-cv-1791-RCJ-VCF, 2016 WL 526225, at *8 (D. Nev. Feb. 9, 2016); *Siriano v. Goodman Mfg. Co., L.P.*, No. 2:14-cv-1131, 2015 WL 8259548, at *6 n.5 (S.D. Ohio Dec. 9, 2015).

220. *See infra* notes 221–32 and accompanying text.

221. 317 F.R.D. 562 (D. Ariz. 2016).

222. Genetin, *supra* note 53, at 671.

223. *In re Bard*, 317 F.R.D. at 563.

224. *Id.* at 563–66.

225. *Id.* at 563–64.

226. *Id.* at 564 n.1.

227. *Id.* at 564.

abrogated the old standard and any case law created by its interpretation.²²⁸

2. *Cole's Wexford Hotel, Inc. v. Highmark Inc.*

The second guiding case is *Cole's Wexford Hotel, Inc. v. Highmark Inc.*²²⁹ *Cole's Wexford's* importance in the adoption of the new 26(b)(1) stems from its comprehensive historical analysis of the rule and ultimate conclusion that *Oppenheimer* is no longer controlling.²³⁰ *Cole's Wexford* follows the suggestion by a special master that the court deny plaintiffs' requests for materials concerning approved insurance rates and the actual amounts charged by the insurer defendant.²³¹ The multi-paged historical breakdown of Rule 26(b), followed by an in-depth analysis on the continued application of old case law in defining the new Rule 26(b)(1), will hopefully serve as a guide to other courts reviewing requests under the new scope.²³²

V. HAVE WE ACTUALLY GOTTEN "SOMETHING DONE"?²³³

The Duke Conference correctly concluded that amendments to the Rules were not the only solution, but must be supplemented with education.²³⁴ Continued judicial education on Rule 26(b)(1), as well as judicial case management, have a major role in correcting the *Oppenheimer* problem.²³⁵ But judicial education alone will not be enough, and high court guidance is needed to set the scope of discovery straight.²³⁶

A. *Education and Pilot Programs*

Education and pilot programs are crucial in achieving the goals of the amendments.²³⁷ Most programs are already underway.²³⁸ The Duke Conference Report suggested training, drafting manuals, and developing practice guides to help facilitate the change.²³⁹ Following

228. *See id.*

229. 209 F. Supp. 3d 810 (W.D. Pa. 2016), *on reconsideration sub nom.* *Cole's Wexford Hotel, Inc. v. UPMC*, No. 10-1609, 2017 WL 432947 (W.D. Pa. Feb. 1, 2017).

230. *Id.* at 817–23.

231. *Id.* at 812.

232. *See id.* at 817–23.

233. 2015 YEAR-END REPORT, *supra* note 1, at 11.

234. 2010 DUKE CONFERENCE REPORT, *supra* note 84, at 4.

235. *See id.*

236. *See infra* Section V.C.

237. 2010 DUKE CONFERENCE REPORT, *supra* note 84, at 4.

238. *See infra* notes 239–49 and accompanying text.

239. 2010 DUKE CONFERENCE REPORT, *supra* note 84, at 4, 10.

the Duke Conference, the Duke Law School Center for Judicial Studies published and has maintained its “Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality.”²⁴⁰ The American Bar Association Section of Litigation partnered with the Duke Law Center for Judicial Studies to conduct a seventeen-city series of symposiums, called the “Rules Amendments Roadshow,” to help educate the bench and bar on the amendments.²⁴¹ In addition to the symposium series, the Roadshow provided resources concerning the amendments on their website, and even created podcasts.²⁴² Moreover, the Federal Judicial Center continues to conduct workshops on the discovery amendments.²⁴³

Multiple pilot programs to test new ideas on case management and discovery are growing and more district judges are heeding the call of the Supreme Court to participate.²⁴⁴ Two pilot programs were unanimously recommended by the Committee on Rules of Practice and Procedure to be sent to the Judicial Conference for approval.²⁴⁵ The first is a Mandatory Initial Discovery Pilot Program, which will “test a system of mandatory initial discovery requests to be adopted in each participating court.”²⁴⁶ The second is the Expedited Procedures Pilot Program, designed to increase judicial education and use of procedural and logistical tools to increase the speed of litigation.²⁴⁷ Both programs began in spring 2017 and will last for

240. See, e.g., Duke Law Ctr. for Judicial Studies, *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, JUDICATURE, Winter 2015, at 47, 49; Duke Law Ctr. for Judicial Studies, *Revised Guidelines & Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, JUDICATURE, Winter 2016, at 21, 21–22.

241. See Hello “Proportionality,” Goodbye “Reasonably Calculated”: *Reinventing Case Management and Discovery Under the 2015 Civil Rules Amendments*, RULES AMENDMENTS ROADSHOW, <http://www.frcpamendments2015.org/> (last visited Nov. 11, 2017).

242. *Id.*; *Resources*, RULES AMENDMENTS ROADSHOW, <http://www.frcpamendments2015.org/resources.html> (last visited Nov. 11, 2017).

243. See *Minutes of the June 6, 2016, Meeting of the Committee on Rules of Practice and Procedure*, in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY 2017 AGENDA BOOK 23, 31–32 (2017), http://www.uscourts.gov/sites/default/files/2017-01-standing-agenda_book_0.pdf.

244. See JOHN G. ROBERTS, JR., 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2016), <https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf>.

245. *Minutes of the June 6, 2016, Meeting of the Committee on Rules of Practice and Procedure*, *supra* note 243, at 31.

246. *Id.*

247. See *id.*

three years.²⁴⁸ So far, ten districts have expressed some degree of interest in one or both of the pilot programs.²⁴⁹ Despite the multiple educational opportunities, the impact seems curbed and misapplications continue.²⁵⁰

B. A Curbed Impact

Although it is incredibly difficult to definitively say, the new Rule 26(b)(1) seems to be narrowing the scope of discovery.²⁵¹ A comprehensive analysis of the first six months of proportionality provided many insights into application of the new Rule 26(b)(1).²⁵² First, as time progressed, so did the frequency of proportionality analyses.²⁵³ In the first two months of proportionality, the concept was only reviewed in thirty-five cases.²⁵⁴ After 180 days of proportionality, 142 opinions had applied the concept.²⁵⁵ That is a three-fold increase in application.²⁵⁶ Such an increase could have several explanations; one possibility is that the timeframe has allowed for more parties to brief the issue of proportionality.²⁵⁷ Another explanation may be that the longer the proportionality is controlling, the more familiar the bench and bar will become with the concept, and the more likely the bench will be to frame their decisions using a proportionality lens.²⁵⁸

Second, despite increased application of proportionality, available data suggests a minimal increase in discovery restrictions under the concept.²⁵⁹ One report by the *Federal Litigator* suggests that

248. *Report of the Advisory Committee on Civil Rules*, in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY 2017 AGENDA BOOK, *supra* note 243, at 49, 63.

249. *Report of the Subcommittee on Pilot Projects*, in ADVISORY COMMITTEE ON CIVIL RULES NOVEMBER 2016 AGENDA BOOK 205, 209 (2016), http://www.uscourts.gov/sites/default/files/2016-11-civil-agenda_book_0.pdf. The ten districts are the Eastern District of Kentucky, Eastern District of Pennsylvania, Western District of Michigan, Southern District of Ohio, District of Arizona, Northern District of Illinois, Southern District of Texas, Eastern District of Louisiana, Northern District of Texas, and the District of Montana. *Id.* at 209.

250. *See infra* Sections V.B–C.

251. *See supra* Section III.A.

252. *See Six-Month Update on Proportionality*, FED. LITIGATOR, Oct. 2016, at 7, paras. 1–2.

253. *Id.* at paras. 6–7.

254. *Id.* at para. 6.

255. *Id.* at para. 8.

256. *See id.* at paras. 6, 8.

257. *See id.* at para. 9.

258. *Id.* at paras. 9–10.

259. *Id.* at paras. 6, 8.

proportionality is not making the “splash” many foresaw.²⁶⁰ Taking a six-month sample size of federal discovery decisions pre-amendment, the report found that courts restricted at least one aspect of discovery in 56% of cases.²⁶¹ Post-amendment, courts have restricted some aspect of a discovery request in just 61% of cases.²⁶² Despite arguably drastic alterations to the scope of discovery, in the first six months, courts have only narrowed discovery by 5%.²⁶³ So while some cases are likely being decided differently under the new standard, the impact has not been as large as expected.²⁶⁴

The difficulty is that one cannot determine if courts are truly reaching different results because of proportionality, or are just reaching the same result as they would have prior to the amendments, but for different reasons.²⁶⁵ Furthermore, the extent of the rule remains unknown because data concerning the time and costs of litigation are unavailable. But one thing is certain, while invocation of proportionality has not drastically altered the scope of discovery,²⁶⁶ its impact has also been hindered by the continued use of old case law defining a broad scope of relevance.²⁶⁷

C. *Guidance from Above*

Despite the educational programming and perceived narrowing of the scope of discovery,²⁶⁸ Rule 26(b)(1) has yet to achieve its full potential.²⁶⁹ Slow institutional progression of the judiciary and educational programming aside, one thing is certain—the continued use of old case law defining a broad scope of discovery will hinder success.²⁷⁰ Proportionality needs the aid of the appellate courts. As of right now, the “relevance” and “proportionality” standards of the new Rule 26(b)(1) are dichotomously applied.²⁷¹ Old case law

260. *Id.* at paras. 1, 5–6.

261. *Id.* at para. 8.

262. *Id.*

263. *Id.* at paras. 3–5, 8.

264. *See id.* at paras. 5–6, 8.

265. *Id.* at para. 10.

266. *See supra* notes 259–64 and accompanying text.

267. *See supra* Sections IV.A–B.

268. *See supra* Sections V.A–B.

269. *See supra* Sections IV.A–B, V.B. It would be unrealistic to have expected a full realization of potential in such a short period of time. *See Six-Month Update on Proportionality*, *supra* note 252, at para. 9 (noting that the effect of the amendments may be more noticeable once they are “less fresh and in the forefront of everyone’s consciousness”).

270. *See supra* Sections IV.A–B.

271. *See supra* Sections III.A, IV.A–C.

details “relevance” as broad and liberal.²⁷² But proportionality is fluid, both restricting and broad depending on the case.²⁷³ The Advisory Committee did not intend a disjointed application, but designed the new Rule to focus discovery and ultimately reduce costs.²⁷⁴ This sentiment becomes most apparent in Judge Campbell’s *In re Bard* decision.²⁷⁵ If the Advisory Committee intended for *Oppenheimer* to retain its control over the scope of discovery, the Chairman would have utilized the holding.²⁷⁶ Instead, Judge Campbell dismissed the use of *Oppenheimer* as an “[o]ld habit[.]” and cited to ten cases that incorrectly used the old case law in August 2016 alone.²⁷⁷

The courts, however, should not be solely faulted for this misapplication. Many factors could have led to this misapplication,²⁷⁸ but perhaps the most obvious is the silence of the Advisory Committee’s notes. The notes detail proportionality and the removed standards, but provide little guidance on “relevance” under the new 26(b)(1).²⁷⁹ The silence inevitably led courts to case law. Judicial education is key in proper application, but the full intent of the Advisory Committee will not be realized until new case law is created.²⁸⁰ Until higher courts determine if *Oppenheimer* and its ilk are still applicable, the split in Rule 26(b)(1)’s application will continue to grow. And as the split grows, the Rule’s full effect on costs and time will remain unfulfilled.

VI. CONCLUSION

Proportionality is making inroads, but its full potential to rein in costs and time remains unknown. On one hand, there has not been enough time to gather meaningful data on any impact to the cost or time of discovery.²⁸¹ But on the other, one does not need data to determine the hurdle inhibiting the intended narrowing. Cases like *Oppenheimer*, that define relevance through the language of the former Rule 26(b)(1), provide for a broad and liberal scope of

272. See *supra* Section IV.B.

273. See *supra* Sections III.B–C.

274. See *supra* Section III.A.

275. See *supra* Section IV.C.1.

276. See *supra* Section IV.C.1.

277. *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 564 n.1 (D. Ariz. 2016).

278. See *supra* Sections IV.A–B.

279. See FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

280. See *supra* Sections IV.C–V.B.

281. See *supra* Section V.B.

discovery.²⁸² The inclusion of proportionality and the removal of former standards in the new Rule 26(b)(1) were all in an effort to narrow the scope of discovery.²⁸³

For better or for worse, the Advisory Committee intended the new rule to narrow the scope of discovery.²⁸⁴ Continued education of the bench and bar will foster the needed environment for the new scope to take hold,²⁸⁵ but at the end of the day the reasons why Chief Justice Roberts's analogized litigators to duelers still exist.²⁸⁶ As long as litigators can still argue that "relevance" is very broad, they will. The continued use of the old case law by the district courts will only fuel this debate and will hopefully expedite this question's inevitable determination by the appellate courts. Without this necessary guidance, the split will grow and the full potential of Rule 26(b)(1) will remain lost.

282. *See supra* Section IV.B.

283. *See supra* Sections III.A, V.B.

284. *See supra* notes 130–34 and accompanying text.

285. *See supra* notes 234–50 and accompanying text.

286. *See supra* notes 5, 14–15, 81–82 and accompanying text.