GOODBYE, "REASONABLY CALCULATED"; YOU'RE REPLACED BY "PROPORTIONALITY": DECIPHERING THE NEW FEDERAL SCOPE OF DISCOVERY

by David Crump[*]

INTRODUCTION

In December 2015, an amended Rule governing the scope of civil discovery took effect. It limits discovery to matters that are "relevant" and "proportional."[1] The Rule contains a surprising number of unknown territories. This article is an effort to advance the understanding of those unknowns, although there is probably no one who can yet explain the subject comprehensively.[2]

The Advisory Committee's notes explain the reasons for the changes. The existing Rule continued to create problems of over-discovery, even though efforts had been made to restrain this tendency.[3] The new requirement of proportionality, the Committee hoped, would reduce the excess.[4]

Part I of the article considers the relevance criterion. This standard appears to have shrunk in importance because the familiar "reasonably calculated" language has disappeared and is not replaced by an alternate definition. Part II looks at the new proportionality requirement, which seems to mark the new limit on discovery. Part III studies the six factors by which the Rule tells the courts to interpret the proportionality standard. Part IV tries to project what happens if the factors are considered together; the problem that they will sometimes point in different directions.

Part V considers court opinions that have used the proportionality requirement, although they do not significantly assist the reader in understanding the six factors. Finally, the conclusion includes the observation that the amended Rule is likely to accomplish, at least to some degree, its purpose, which is to rein in excesses of discovery, but that the six

---

[*] J.D., University of Texas School of Law; A.B. Harvard College. John B. Neibel Professor of Law, University of Houston.

[1] FED. R. CIV. P. 26(b)(1) (as amended 2015) (the "new Rule").

[2] For discussion of the new Rule, *see generally* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015); George Shepherd, *Failed Experiment:* Twombly*,* Iqbal*, and Why Broad Pretrial Discovery Should Be Further Eliminated*, 49 IND. L. REV. 465 (2016); Heaven Chee, *Upcoming Changes to the Federal Rules of Civil Procedure*, THE HOUSTON LAWYER, Nov./Dec. 2015, at 40.

[3] FED. R. CIV. P. 26(b)(1) Advisory Committee's note to 2015 amendment, *reprinted in* FED. CIV. JUD. P. & R., 171-72 (West 2016) [hereinafter Commentary to 2015 Amendment].

[4] *Id.* at 173.

factors probably do not provide much that adds to the proportionality standard.

I. RELEVANCE: DEMOTED IN IMPORTANCE

The new Rule says that all discovery must be "relevant" and "proportional."[5] But these are both new terms—and undeveloped. "Relevant" once had a defined meaning that every lawyer studied in law school: anything that was "reasonably calculated to lead to admissible evidence" was relevant.[6] But the amendment strips this language out of the Rule, without providing any definition at all. We are only told that relevant information does not need to be admissible evidence.[7] As for proportionality, the Rule contains six factors that control the proportionality issue.[8]

The first point to be made is that the criterion of "relevance" is intentionally *demoted* in importance. The Advisory Committee's notes say that the "reasonably calculated" language was deleted because it was "used by some, incorrectly, to define the scope of discovery."[9] In spite of past amendments that set limits defined by such considerations as the balance of benefits and burdens, the "reasonably calculated" language "continued to create problems" of over-discovery.[10] According to the Committee, "district judges have been reluctant to limit" discovery.[11]

Hence, the second point: the primary criterion has become "*proportionality,*" not "reasonable calculation." The Committee suggests that this has been the criterion all along and that all it has done is to "restore[] . . . proportionality factors to their original place,"[12] but instead, the amended Rule implements a real change by its language. The "proportional" terminology was never explicit in the old Rule, and the combination of putting it in the first sentence and demoting the relevance factor seems to signal that we have a significantly changed Rule. The change does not necessarily mean that the Rule will result in a significantly changed practice; but that remains to be seen. Many courts have considered other parts of the older Rule and have been using yardsticks that included the burden-benefit factor that is now part of proportionality, even if not giving it the weight that the Rule does now.[13] The new Rule may not change in all in-

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

6 FED. R. CIV. P. 26(b)(1) (2014) (the "old Rule").

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

8 *Id.*

9 Commentary to 2015 Amendment, *supra* note 3, at 174.

10 *Id.*

11 *Id.* at 172.

12 *Id.* at 173.

13 *See, e.g.*, Crosby v. La. Health Serv. and Indem. Co., 647 F.3d 258, 264 (5th Cir. 2011). There, the court allowed limited discovery but decided to "provide a few words of caution." *Id.* It said that

stances what the Committee calls "entrenched . . . practice[s]," some of which the Committee wants to continue—but it may be difficult to separate the desirable entrenched practice from the undesirable.[14]

So, what does "relevant" mean now? The Rule tells us only what it isn't, not what it is.[15] Relevant evidence is not confined to admissible evidence, the Rule says.[16] Presumably, you can still discover hearsay and opinion, for example, because after asking about those issues, a questioner can say to the witness, "Who uttered the hearsay?" or "What supports that opinion?" But the issue remains: how long can the chain be, among question, answer, and admissible evidence? The Rule doesn't say, because the defining language—the "reasonably calculated" phrase—is deleted.[17] A possible conclusion is that "relevant" means more or less what it has always meant. The Committee's notes refer with approval to "entrenched" practices.[18] Some sort of chain between the inquiry and the subject, even if it is long, can perhaps make the inquiry relevant. But that's not what matters. The chain is cut at the point where the discovery is no longer "proportional."[19] This is where the change appears.

What does this mean in real life? Imagine a set of interrogatories that inquire into dozens of types of hard-to-collect statistical information that is to be used by an expert witness. (Any good lawyer can write a question in a few minutes that will take weeks to answer.) In *Burns v. Thiokol Chemical Corporation*,[20] the district court disallowed a set of statistically-based interrogatories that would have been extremely expensive to answer.[21] The Court of Appeals reversed, saying flatly that the information was relevant.[22]

Or, a party may ask for production of millions of electronic documents. In many instances, these items have been ordered to be produced in discovery.[23] What is more, the Rules require "litigation holds"—types of preservation—that are extremely burdensome.[24] Today, one can speculate,

---

district courts must be "mindful of the limitations" in old Rule 26(b), including a "burden . . . expense" balance that was supplemented in the old Rule by some of the factors now in the new Rule. *Id.*

14 Commentary to 2015 Amendment, *supra* note 3, at 173.

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

16 *Id.*

17 Commentary to 2015 Amendment, *supra* note 3, at 174.

18 *Id.* at 173.

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

20 483 F.2d 300 (5th Cir. 1973).

21 Burns v. Thiokol Chem. Corp., 483 F.2d 300, 303-04 (5th Cir. 1973).

22 *Id.* at 307.

23 *See In re* General Motors LLC Ignition Switch Litigation, No. 14-CV-8176, 2015 WL 8130449, at *3 (S.D.N.Y. Dec. 3, 2015) (referring to General Motors' production of nearly three million documents).

24 *See* Craig Ball & Brad Harris, *What's There to Hold On To? An Enlightened Approach to Data Preservation in the Era of the Legal Hold*, CORPORATE COUNSEL, Feb. 14, 2011, http://myfloridalegal.

the answer is, yes, these materials are relevant—still; but discovery is cut off at the point where it no longer is "proportional." And this probably is what the Advisory Committee intended.

II. PROPORTIONALITY: THE NEW TOUCHSTONE

So: proportionality it is. And the Rule says that proportionality rests upon the court's "considering" six factors.[25] They are "[1] the importance of the issues at stake in the action, [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] the [balance of] the burden . . . and benefit."[26]

A couple of these factors should not be factors, or at least they should be consulted rarely. Others are next to impossible to know. Others will cut one way in one case and another way in another. The list of factors, furthermore, appears to be intended to be exclusive, because the Rule does not say that they are "among other factors."[27] Taken literally, the Rule does not allow anything else to be considered.

And that is unfortunate. There are other important factors that courts have mentioned. For example, in *Rowe Entertainment Inc. v. William Morris Agency, Inc.*,[28] the court considered "the specificity of the discovery requests" and "the relative ability of each party to control costs and its incentive to do so."[29] Both of these factors would be easier to determine than some of the six in the Rule—and sometimes, more important.

As is indicated above, some federal judges have been considering proportionality already, under other auspices.[30] For example, my most recent discovery issue before a federal judge was about a case that could have involved as much as 100 million dollars.[31] The judge considered input from both parties and promptly ordered that depositions would not exceed ten per side. He also imposed limits on some other forms of discovery. The judge's thought process remains unrecorded because he made the order on the fly

---

com/alerts.nsf/0/f77fc92f84b401a1852578a4004c3012/$FILE/ALM%20-%20Corporate%20Counsel %20%5B02.14.2011%5D.pdf.

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

26 *Id.* (numbers added for clarity).

27 *Id.*

28 205 F.R.D. 421 (S.D.N.Y. 2002).

29 Rowe Entm't Inc. v. William Morris Agency, Inc. 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

30 Crosby v. La. Health Serv. and Indem. Co., 647 F.3d 258, 264 (5th Cir. 2011).

31 The judge made this ruling during a conference telephone call, and it did not result in a written record. A general description of the case can be found in DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 441-45 (6th ed. 2012) (names and other indicators changed for privacy reasons).

(perhaps appropriately);[32] and he expressly told the lawyers that if they needed more, to come back and ask.[33] But his order obviously had something to do with proportionality, even if it was not justified under that specific term.[34]

Although common practice has resembled proportionality in the past, Congress has decided to expressly list six factors to be considered in the hopes of making judges' decisions potentially more rigid and less ambiguous in nature.

III. ANALYZING THE SIX FACTORS THAT CONTROL PROPORTIONALITY

So, what do the six factors mean? The Supreme Court has said that "the [Advisory] Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted."[35] The Advisory Committee commented on all six of the factors in amended Rule 26(b)(1), as well as on other parts of the Rule. Therefore, it is to the commentary that this article turns next.

First, [1] "*the importance of the issues at stake in the action.*" The Advisory Committee suggests that this provision is intended to expand discovery in cases of little or no monetary impact but "that seek[] to vindicate vitally important personal or public values."[36] That is understandable, but it fails to recognize that in many situations of this kind, one party—usually the defendant, because the plaintiff brings and structures such suits; but sometimes the plaintiff—is being asked to expend private resources to support public values. The problem of public goods and free riders is well known to economists, who usually regard this kind of arrangement as undesirable.[37] This factor ought to be used infrequently, especially when the defendant is a private entity. The separate factor requiring a burden-and-benefit inquiry and other factors are sufficient to allow benefits to be balanced. The benefit, for example, need not be explicitly monetary, and neither does the burden, but this balance is the more appropriate one.

For example, a case may involve a First Amendment issue that will probably control other cases. In this instance, the importance of the issues

---

32 *See infra* Conclusion (explaining why trial judges should not normally explain in detail their rulings during ongoing proceedings).

33 *See* Crump, *supra* note 31 and accompanying text.

34 *See id.*

35 Tome v. United States, 513 U.S. 150, 160 (1995) (plurality opinion) (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 165-66 n.9 (1988)).

36 Commentary to 2015 Amendment, *supra* note 3, at 173.

37 *Cf.* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 381 (17th ed. 2001) (discussing issue in context of nations as free riders on international public goods, an example that is wholly applicable to individuals too); DAVID CRUMP, HOW TO REASON 117 (2d ed. 2014) (discussing issue as to private parties).

in the case is high, as if it involved more dollars than the damages sought. In such a case, the "importance-of-the-issues" factor stands for the idea that it is not the requested relief in such a case that is the measure. But it still should not be used to justify the imposition of crushing costs on a private entity to serve public values.

For example, *Hustler Magazine v. Falwell*[38] is one of the Supreme Court's most important opinions interpreting the First Amendment. It upholds protection for parody, hyperbole, and political criticism.[39] Since the case involved important issues that concerned the public at large,[40] should the private parties have shouldered greater burdens of discovery? Should Jerry Falwell, an individual (although he is an important figure in large organizations) have been forced to pay enhanced amounts so that the rest of us can enjoy the benefits? It seems inappropriate for the importance-of-issues factor to impose public costs in large amounts upon randomly selected individuals.

Most cases will not involve such lofty issues, and this factor will not bear so heavily on those cases. But the point is that even in cases in which the issues are of public importance, the factor should be applied only in a limited way.

[2] The "*amount in controversy.*" Presumably, this factor does not have its familiar meaning, which depends upon the plaintiff's sole definition. The rule is well known, from jurisdictional cases, that the plaintiff's good-faith claim establishes the amount in controversy.[41] Instead, to perform as intended, this factor must refer to the actual amount really at issue.[42] But difficult issues will arise in cases in which the plaintiff says the amount in controversy is millions of dollars and the defendant, denying liability and arguing that there are no damages, says it's zero.

The Advisory Committee sidesteps that issue by saying, "The parties may begin discovery without a full appreciation of the factors that bear on proportionality;" and that understated disclaimer applies doubly to the court, but the Committee provides no answer to the problem.[43] In other words, the judge has choices that might be said to include, on the one hand, a rule of thumb—discount the plaintiff's outermost claims to a realistic level and average with the defendant's—or on the other hand, conduct a mini-trial to evaluate the realistic recovery. Both are undesirable, because the rule of thumb will fit poorly in some cases and holding a mini-trial will

---

38 485 U.S. 46 (1988).

39 Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

40 *Id.*

41 *See, e.g.*, Mas v. Perry, 489 F.2d 1396, 1400 (5th Cir. 1974).

42 Difficult issues will also arise when the requested relief is non-monetary, such as injunctive or declaratory relief. *Cf.* Williams v. Kleppe, 539 F.2d 803, 805 n.1 (1st Cir. 1976) (investigating the amount in controversy underlying the alleged constitutional right to "skinny dip" at a public beach).

43 Commentary to 2015 Amendment, *supra* note 3, at 173.

rob the court of time that could be spent on the merits of this or another case. Also, a premature finding of an amount in controversy may tend to signal partiality, and it may leave the issue as indeterminate as it was before the mini-trial.[44]

In any event, this factor, the amount in controversy, should usually be the biggest factor. Isn't that what "proportion" means? And if the court figures out the "real" amount in controversy, what percentage of that amount is "proportional" to it? Take a suit where the court, in some manner, concludes that the amount in controversy is one million dollars ($1,000,000). What is "proportional"? Is it $50,000, or five percent? Or is it $200,000, which is twenty percent? Since in personal injury tort cases, the litigation expenses tend to exceed the plaintiff's recovery, and since the effort is to decrease litigation costs, one might conclude that the estimated discovery costs should rarely exceed twenty percent (20%) of the amount in controversy. But this calculation is subject to argument.[45]

Then, too, this calculation of proportionality means estimating discovery costs; another calculation that cannot be made easily.[46]

[3] The "*parties' relative access to relevant information.*" In litigation by an individual against a large business organization, this will usually mean the opposite of what most people tend to think. The individual may find it easy to furnish discovery, while the defendant has information in vast amounts and multiple locations. The small plaintiff may actually have an advantage, so that settlement is more attractive to the institutional defendant than might otherwise appear. The Advisory Committee suggests that discovery will involve an "information asymmetry"; the advisory committee's word.[47] The Committee says that the burden then "lies heavier on the party who has more information."[48]

Yes—but then, the Committee further says, "and properly so."[49] This last remark will tilt the playing field, unfortunately, in favor of over-discovery. The reference to a heavier burden in such a situation is a truism, and it would be better if the Committee had left it at that rather than egging

---

44 Imagine, for example, that the plaintiff advances a very high figure, the defendant argues for a near-zero amount, and the judge decides upon the defendant's figure. The judge, and the plaintiff, may rightly view this kind of pretrial ruling as disadvantageous because it compromises the appearance of the judge's impartiality and may inhibit his or her ability to encourage agreement between the parties, including settlement.

45 *See, e.g.*, Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 101-02 (2009) (noting that when discovery costs exceed millions of dollars, "concerns about discovery costs can overwhelm concerns about the merits of the underlying claim . . .").

46 *See* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 769-71 (2010) (discussing a wide range of discovery costs).

47 Commentary to 2015 Amendment, *supra* note 3, at 173.

48 *Id.*

49 *Id.*

on parties that would like to increase the other's costs by saying "and properly so."

[4] The "*parties' resources.*" This factor might suggest a Robin Hood approach, by which costs are imposed on rich business entities to benefit poor individuals. Some law students exposed to the Rule apparently tend to think so in answering questions on an examination.[50] Not only is this implication contrary to the thrust of the Rule, but it also is undercut by the Committee's own statement that "consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests to a wealthy party."[51] One might expect the present regime in which contingent fee attorneys finance litigation for penniless parties to continue, and in such a situation, relatively poor individuals do have resources, although the Rule should be interpreted to protect those finances, too, from over-discovery.

The Committee helpfully adds that a judge must be "even-handed" and that the real objective is to "prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."[52] This factor of parties' resources should be rarely used, because the objective of preventing a war of attrition is well targeted by other factors, but if that is what the factor symbolizes, it would be best if judges considered the parties' resources factor as a caution against wars of attrition rather than as a Robin Hood rule.

[5] The "*importance of the discovery in resolving the issues.*" This factor is addressed more to the issue than to the discovery.[53] That is to say, the court will have to consider how significantly resolution of the targeted element of the case is likely to resolve the litigation. This will not always be easy, but courts have done it in the past.[54] In a day when plaintiffs bring multiple claims, sometimes even dozens of claims, and defendants do the same with defenses, the court may have to wade through a blizzard of issues to decide which ones are important. It is not uncommon for a party to resist discovery on the ground that these are just wild allegations with no support and huge discovery costs while the opponent argues, instead, that discovery will support the allegations.[55] The court will need to consider the proper balance of these arguments.

Finally, [6] "*whether the burden or expense of the discovery outweighs its likely benefit.*" The Committee says that a party asserting an undue bur-

---

50 Many of the author's own students reasoned in this way in responding to an examination during December 2015 (examination answers are on file with author).

51 Commentary to 2015 Amendment, *supra* note 3, at 173.

52 *Id.* (quoting the Advisory Committee's Commentary to the 1983 Rules).

53 *Id.* at 173-74.

54 *See*, *e.g.*, Crosby v. La. Health Serv. and Indem. Co., 647 F.3d 258, 262-64 (5th Cir. 2011) (limiting discovery to defined issues). Although this case was decided prior to the amendment, its ruling relied on the burden-benefit factor similar to the new Rule.

55 *See generally* Commentary to 2015 Amendment, *supra* note 3, at 173.

den "ordinarily has far better information . . . with respect to that part of the determination."[56] And "[a] party claiming that a request is important to resolve the issues should be able to explain" how that is so.[57] In other words, this factor will require a process similar to that which some courts have used to consider whether to grant protective orders about trade secrets. For example, in *Centurion Industries, Inc. v. Warren Steurer and Associates*,[58] the court of appeals described the method for resolving such an issue: "To resist discovery, . . . a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful."[59] If these requirements are met, the burden shifts to the party seeking discovery to establish that "the [information] is relevant and necessary to the action."[60] A similar balancing of burden and benefit is called for by this proportionality factor for discovery.

Implicit in these descriptions is the requirement that the respective parties quantify the alleged harm and the alleged need—just how much harm and how much need?—because the next step is that the judge must "balance the need . . . against the . . . injury."[61] In weighing the burden and benefit of discovery, quantifying the cost and benefit will be difficult, but the parties ought to describe these items as thoroughly as possible and, at least in some cases, give their best estimates in monetary terms.

The court will often be left with the unsatisfying task of balancing incommensurable amounts. Or, as Justice Scalia once said, judges will be guessing "whether a particular line is longer than a particular rock is heavy."[62] But balancing of this kind is familiar to the courts.

IV. COMBINING THE FACTORS

The six factors interact with each other in strange ways. Using them will resemble playing chess with pieces that move autonomously around the board.

For example, intractable problems arise when the economics of the amount-in-controversy factor are combined with the cost-benefit factor.[63] Professors Jonah Gelbach and Bruce Kobayashi have described sever-

---

56 *Id.*
57 *Id.*
58 665 F.2d 323 (10th Cir. 1981).
59 Centurion Indus., Inc. v. Warren Steurer and Assocs. 665 F.2d 323, 325 (10th Cir. 1981) (footnote omitted).
60 *Id.*
61 *See* Commentary to 2015 Amendment, *supra* note 3, at 173.
62 Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).
63 *See supra* Pt. III of this article (describing factors (2) and (6)).

al of these problems.[64] Imagine that plaintiff's estimated recovery with existing discovery is $100,000. But plaintiff has requested further discovery, and if that discovery is provided, the plaintiff's estimated recovery will increase to $150,000. But the cost to defendant of the additional discovery is $100,000. The defendant's loss is double the potential gain hoped for by plaintiff. In such a situation, plaintiff will naturally favor imposing the additional costs on defendant, even though they exceed the potential addition in recovery. Parties seeking discovery might be motivated to export, or in economic terms to "externalize," such an expense,[65] even though the externality is not economically efficient.[66]

In such a situation, what is the amount in controversy? Is it $100,000 or $150,000? And does the cost-benefit factor require the plaintiff to lose the additional $50,000 because it is not economically efficient? And meanwhile, what is the impact of the other factors on this question? For example, the court must also weigh the parties' relative access to relevant information and the parties' resources. These latter factors seem to suggest that the cost should be imposed on the defendant anyway.

Of course, the questions are never so neat. The imaginary figures will not be precise; in fact, they will be guesstimates. And the plaintiff's benefit from additional discovery, instead of being a given, will be contingent. The plaintiff's estimated increase might be subject to 3-to-2 odds of prevailing (only a 40 percent chance of obtaining $50,000 more)—and that assumes we can accurately estimate the odds. Should the court then consider the plaintiff's mathematical expectation and peg the amount in controversy at $120,000? Should it do similar kinds of additions or discounts to the costs of the additional discovery?

When the balancing factors produce this kind of uncertainty, they lose a great deal of their value. Perhaps the mushiness of the analysis means that a holistic judgment of proportionality, rather than a focus on the factors, is more appropriate.

V. (UNHELPFUL) COURT DECISIONS THUS FAR

The reported decisions as of this writing are mostly by district courts, and they are not very helpful to an understanding of the factors that are supposed to control the proportionality requirement. For the most part, they

---

64 *See* Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 9-11, in Penn. Law: Legal Scholarship Repository (2014).

65 *See id.*

66 In fact, it is neither Pareto optional nor Kalder-Hicks efficient. *See* DAVID CRUMP, HOW TO REASON, 90, 92 (2015) (covering basic economics).

simply pronounce that a given discovery request is, or is not, proportional.[67] Some of these decisions quote the factors, but they do not interpret or individually apply them.[68]

The decisions do contain some holdings that imply suggestions about the use of the factors. For example, the old fashioned kind of request that covers "all documents" pertaining to a given subject raises more suspicion than a request directed to a particular file.[69] Similarly, in *Moore v. Lowe's Home Centers, LLC*,[70] the court enforced discovery of particular personnel records, while disallowing a secondary search of emails using 88 specific new terms as "overly broad and not proportional."[71] But the court did not refer to any of the six factors. Perhaps the opinion can be read as a response to "the importance of the discovery in resolving the issues," because the court, in denying the broader request, pointed out that the requestor had not indicated what the additional search would show.[72] And perhaps it also refers to "the parties' access to relevant information," because the court observed that the requestor had failed to show that the relevant information could not be obtained by other means.[73] Of course, the "amount in controversy" and the "burden . . . benefit" factors may have implicitly affected these considerations too.[74]

The decisions actually raise more questions than they answer. For example, it is difficult to apply the proportionality standard to electronically stored information (ESI). In *Moore,* the court determined that a secondary search with 88 word terms was not proportional, but it did not consider the cost or benefit of such a search.[75] It may not be obvious from a description of the search itself whether the process would be quick or prolonged. What is "proportional" in an electronic search remains to be adequately described, and cases like *Moore* will not help much.

---

67 *See, e.g.,* Theidon v. Harvard Univ., No. 15-cv-10809-LTS, 2016 WL 447447, at *4 (D. Mass. Feb. 4, 2016); Eramo v. Rolling Stone LLC, 314 F.R.D. 205, 211 (W.D. Va. 2016); Steel Erectors, Inc. v. AIM Steel Int'l, 312 F.R.D. 673, 676-77 (S.D. Ga. 2016); Carr v. State Farm Mut. Auto. Ins. Co., 312 F.R.D. 459, 471 (N.D. Tex. 2015); Zbylski v. Douglas Cty. Sch. Dist., No. 14-cv-01676-MSK-NYW, 2015 WL 9583380, at*18 (D. Colo. Dec. 31, 2015).

68 *See, e.g.*, *Steel Erectors, Inc.,* 312 F.R.D. at 676, n.4; *Carr*, 312 F.R.D. at 464-66.

69 *See* FED. R. CIV. P. 26(b)(5) Advisory Committee's note to 1993 amendment; Kissing Camels Surgery Center, LLC v. Centura Health Corp., No. 12-cv-03012-WJM-NYW, 2016 WL 277721, at *2 (D. Colo. Jan. 22, 2016); *Carr,* 312 F.R.D. at 470.

70 2016 No. 14-1459 RJB, 2016 WL 687111 (W.D. Wash. Feb. 19, 2016).

71 Moore v. Lowes Home Ctrs., LLC, 2016 No. 14-1459 RJB, 2016 WL 687111, at *5 (W.D. Wash. Feb. 19, 2016).

72 FED. R. CIV. P. 26(b)(1); *see Moore*, 2016 WL 687111, at *2.

73 FED. R. CIV. P. 26(b)(1); *see Moore*, 2016 WL 687111, at *2, 6-7.

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

75 FED. R. CIV. P. 26(b)(1); *see Moore*, 2016 WL 687111, at *5.

Also, there are questions about how proportionality impacts the duty to preserve electronic evidence.[76] The duty to preserve can cause enormous burdens.[77] Presumably, a party's preservation duty extends to less evidence than it did under the earlier rule,[78] but it was unclear then, and is unclear now, what the limits are. Questions about sanctions also exist. In *Zbylski v. Douglas County School District*,[79] the court illustrated these questions when it considered proportionality in denying a spoliation instruction but granted attorney's fees and carried a request for preclusion along with the case.[80]

Finally, there is the question whether the objecting party must carry the burden of specifying and proving a failure of proportionality. It seems clear from the cases that the objector must complain and must do so specifically.[81]

CONCLUSION

And so, the factors contain hidden ambiguities. They depend, according to the Advisory Committee, on recognition of an entrenched practice, even though they are intended to change that practice.[82] In some instances, they point in opposing directions; in other instances, they should be considered only rarely, if at all; and in still other situations, they require the courts to estimate numbers that are difficult to estimate at all, much less accurately. Trial judges should internalize the idea of proportionality by studying the factors, but they probably should react without explicitly measuring each factor one by one, because they will be acting on instinct anyway, as did the judge mentioned above who decreed ten depositions during a conference telephone call.[83] Courts of appeal will have more leisure to tell us what the six factors mean and, indeed, what proportionality means, if they can.

The elimination of the definition of relevance without any replacement is potentially troublesome. It probably will result in practice featuring a general impression of earlier practice with relevance. But perhaps, there will be no confusion about relevance since the issue is demoted so that proportionality is the key. The shift toward proportionality uses an undefined

---

76 *See* FED. R. CIV. P. 37(e) (creating and limiting sanctions for failure to preserve electronic data); *Moore*, 2016 WL 687111, at *4.

77 *See* Ball & Harris, *supra* note 24 (discussing the preservation burden).

78 If electronic discovery is limited in its breadth, as by new Rule 26(b)(1), presumably the duty to preserve electronic information is decreased also.

79 No. 14-cv-01676-MSK-NYW, 2015 WL 9583380 (D. Colo. Dec. 31, 2015)

80 Zbylski v. Douglas Cty. Sch. Dist., No. 14-cv-01676-MSK-NYW, 2015 WL 9583380, at *18 (D. Colo. Dec. 31,2015).

81 *See, e.g.*, *Carr*, 312 F.R.D. at 463.

82 *See* Commentary to 2015 Amendment, *supra* note 3 at 173.

83 *See* CRUMP ET AL, *supra* note 31 and accompanying text.

term controlled by factors that in some instances have little to do with "proportional[ity] to the needs of the case."[84] The courts will need to recognize that the balance does not usually mean an equal weighing of the six factors, and they will find some factors intractable.

Still, the changes are positive overall. It undoubtedly is true, as the Advisory Committee says, that the old Rule had encouraged over-discovery, and add-on limits buried lower in the Rule had not had the desired effect. It is better if the law says straightforwardly what it means, and the new Rule is a step in that direction.

---

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