FOREWORD†

It has now been more than five years since the 2015 amendments to the Rules of Civil Procedure became effective. Those amendments reemphasized the importance of proportionality and certain proportionality factors in connection with the scope of discovery. Given the familiar tension between accessing information in order to prosecute or defend a claim and imposing undue burden or expense, the proportionality amendments generated much discussion and debate.

The Bolch Judicial Institute at Duke Law School takes no institutional positions on these questions. Instead, the Institute has sought to create multiple opportunities for thoughtful practitioners and judges to explore the tensions in the litigation process between accuracy and access to information on the one hand and efficiency and timeliness on the other. The best practices were the subject of several large conferences and were posted for public comment. The drafters worked hard to find areas of consensus. Ultimately, the best practices stand on their own without external authority, and, we hope, will prove persuasive and useful to practitioners and judges. Given the dynamism of litigation it would be surprising if the best practices did not require further revision in a few years. We would be most interested to hear of instances in which these best practices were useful or missed the mark.

Just before the amendments’ effective date, the Institute held a conference of more than 70 practitioners and 15 federal judges. That conference ultimately resulted in an initial draft set of GUIDELINES AND PRACTICES prepared by Judge Lee Rosenthal and Professor Steven Gensler, which was published as GUIDELINES AND PRACTICES FOR IMPLEMENTING THE 2015 DISCOVERY AMENDMENTS TO ACHIEVE PROPORTIONALITY, 99 Judicature, no. 3, Winter 2015, along with several related articles. The Institute planned to regularly revise and update the GUIDELINES AND PRACTICES in light of case-law developments and actual practice.

The Institute undertook to revise the GUIDELINES AND PRACTICES, following a series of programs around the country—held in numerous cities—and organized in collaboration with the ABA Section of Litigation. The purpose of these programs was to hear from lawyers and judges how the amendments were operating. The lessons from these programs, along with new case law, led to the second edition of GUIDELINES AND PRACTICES, in September 2018.

This third edition of the GUIDELINES AND PRACTICES reflects the further experience with the amendments and the guidelines of the past two years. We convened another proportionality conference in June 2019, at which practitioners and judges reviewed and discussed the results of several studies evaluating the amendments. The studies covered a number of issues, including data from bench-bar special-focus groups, surveys of bar organizations and judges, and cost data from outside counsel and Electronically Stored Information (ESI) vendors. These studies and discussions have contributed greatly to our

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1 Annotations prepared by Bill Mo, Duke Law School Class of 2022, and Emma Roberts, Duke Law School Class of 2021, under the oversight of Amelia Ashton Thorn, Assistant Director of Special Projects, Bolch Judicial Institute.
appreciation of the guidelines and to our understanding of how the amendments are working in practice. A small working group led by Judge Paul Grimm, and including practitioners David Kessler and Jennie Anderson, gathered these insights, revised the guidelines, issued them for public comment, and made further revisions in light of the comments. We are grateful for their efforts. As with any group product of this nature, where some consensus must be reached, the drafters and other participants are not individually responsible for any particular statement or provision, and may or may not agree with any particular statement or provision.

We now offer these revised Guidelines in the hope that they will help judges and practitioners by offering balanced, fair, practical, and principled advice about how to navigate the sometimes turbulent waters of proportionality.

This edition of the GUIDELINES AND BEST PRACTICES is posted on the Bolch Judicial Institute website at https://judicialstudies.duke.edu/bolch-duke-guidelines/.

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I. PROPORTIONALITY GUIDELINES

These GUIDELINES for applying the 2015 “proportionality” amendments to the Federal Rules of Civil Procedure discuss what the amendments mean, what they did and did not change, and ways to understand their impact and meaning. The GUIDELINES add some flesh to the bones of the Rule text and Committee Notes and explore how the proportionality amendments intersect with other Rule provisions.

GUIDELINE 1: Rule 26(b)(1) defines the scope of discovery as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Proposed discovery must be both relevant and proportional to be within the scope that Rule 26(b)(1) permits. Information that is within the scope of discovery is discoverable even if it would not be admissible in evidence. The Rule 26(b)(1) amendments do not alter the parties’ discovery obligations or rights, or create new burdens.

Discovery that seeks relevant and nonprivileged information is within the permitted scope of discovery only if it is proportional to the needs of the case.

The 2015 amendments continue to express the longstanding principle that information does not itself have to be admissible in evidence in order to be discoverable. One reason is that gathering that information can itself be valuable in identifying and obtaining admissible evidence. For example, it remains a staple of deposition practice to ask witnesses to testify to what they have heard other persons say, even if the statements would be inadmissible hearsay, because the questioner can use that information to identify and examine the person whose alleged statement was repeated.

The pre-2015 phrase “reasonably calculated to lead to the discovery of admissible evidence” is deleted because it was often misapplied, despite earlier revisions to clarify its meaning. Some lawyers and judges misunderstood the phrase to expand the scope of discovery to include irrelevant information if it was “reasonably calculated to lead to the discovery of” relevant information. That was wrong as the 2015 amendments make clear. The scope of discovery is limited to (1) relevant information (2) proportional to the needs of the case. The new phrasing deletes the “reasonably calculated” phrase and replaces it with a statement clearly rejecting admissibility as a limit on discoverability but just as clearly limiting the scope of discovery to relevant and proportional information.

Lawyers and judges must be careful when quoting older cases defining or describing the scope of discovery because some of the passages from those cases may have been construing rule text that has been superseded. For example, the Supreme Court stated in 1978 that the scope of discovery “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 that is or may be in the case.” Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). At the time of that case, however, the text of Rule 26(b)(1) linked the scope of discovery to “the subject matter involved,” and the Court specifically stated that it was interpreting that “key phrase.” Since then, the 2000 amendments altered the scope to permit subject-matter discovery only upon a showing of good cause and the 2015 amendments eliminated subject-matter discovery completely. Oppenheimer was decided
before the concept of proportionality was added to Rule 26, first in the 1983 amendments adding limits to permissible discovery and explicitly in the 2015 amendments limiting the scope of permissible discovery to both relevant and proportional information.

The statement in *Oppenheimer* that describes the breadth of the relevance inquiry remains intact. In the discovery context, relevance is “construed broadly to encompass any matter that bears on” the matter in question. *Oppenheimer*, 437 U.S. at 351. The difference today is that the relevance inquiry is linked only to claims and defenses—not subject matter—and is joined by proportionality in defining scope.

The rule text no longer specifically states that discovery into the sources of information—discovery into the existence, description, or nature of documents, or the identity of witnesses—is part of the scope of discovery. The Committee Note explains that the language was deleted solely out of a belief that “[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples.” Information about the existence and location of sources of information is relevant because it “bears on” the claims and defenses, and is therefore within the scope of discovery so long as it is proportional to the needs of the case.

**OFFICIAL COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)**

“Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.”

“The former provision for discovery of relevant but inadmissible information that appears ‘reasonably calculated to lead to the discovery of admissible evidence’ is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the ‘reasonably calculated’ phrase to define the scope of discovery ‘might swallow any other limitation on the scope of discovery.’ The 2000 amendments sought to prevent such misuse by adding the word ‘Relevant’ at the beginning of the sentence, making clear that ‘relevant’ means within the scope of discovery as defined in this subdivision . . . .’ The ‘reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that ‘Information within this scope of discovery need not be admissible in evidence to be discoverable.’ Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.”

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*a Oppenheimer* has unfortunately been cited many times since December 1, 2015 for the scope of discovery under Rule 26(b)(1), apparently by practitioners and courts unaware that the 2015 Amendments superseded its broad reading of the rule. It is clear that “the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1),” *In re Bard IVC Filters Prod. Lab. Lit.*, 2016 WL 4943393 (D. Ariz. 2016) (Campbell, J. (chair of the Civil Rules Advisory Committee in 2014–2015)). For this reason, care should be taken when citing *Oppenheimer* to ensure that it is not cited as authority for its discussion of the scope of discovery that was abrogated by the 2015 amendments.
GUIDELINE 2: Rule 26(b)(1) identifies six factors for the parties and the judge to consider in determining whether proposed discovery is “proportional to the needs of the case.”8 As discussed further in GUIDELINE 3, the degree to which any factor applies and the way it applies depend on the facts and circumstances of each case.

OFFICIAL COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)

“The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.”

GUIDELINE 2(A): “Importance of Issues at Stake”—This factor focuses on measuring the importance of the issues at stake in the particular case. 9 This factor recognizes that many cases raise issues that are important for reasons beyond the money (or anything of monetary value) the parties may stand to gain or lose in a particular case.10

An action seeking to enforce constitutional, statutory, or common-law rights, including a case filed under a statute using attorney fee-shifting provisions to encourage enforcement, can serve public and private interests that have an importance beyond any damages sought or other monetary amounts the case may involve.11

GUIDELINE 2(B): “Amount in Controversy”—This factor examines what the parties stand to gain or lose financially in a particular case as part of deciding what discovery burdens and expenses are reasonable for that case.12 The amount in controversy is usually the amount the plaintiff claims or could claim in good faith.

If a specific amount in controversy is alleged in the pleadings and challenged, or no specific amount is alleged and the pleading merely asserts that the amount exceeds the jurisdictional minimum, the issue is approximately how much the plaintiff could reasonably expect to recover based on the claims asserted and allegations made. When an injunction or declaratory judgment
is sought, the amount in controversy includes the pecuniary value of that relief. The amount in controversy calculation can change as the case progresses, the claims and defenses evolve, and the parties and judge learn more about the damages or the value of the equitable relief.

**Official Committee Note, Rule 26 (Dec. 1, 2015)**

“It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors.”

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**Guideline 2(C): “Relative Access to Information”—**This factor addresses the extent to which each party has access to relevant information in the case.\(^{13}\) The issues to be examined include the extent to which a party needs formal discovery because relevant information is not otherwise available to that party.

In a case involving “information asymmetry” or inequality, in which one party has or controls access to significantly more of the relevant information than other parties, the parties with less information or access to it depend on discovery to obtain relevant information. Parties who have more information or who control the access to it are often asked to produce significantly more information than they seek or are able to obtain from a party with less.

The fact that a party has little discoverable information to provide others does not create a cap on the amount of discovery it can obtain. A party’s ability to take discovery is not limited by the amount of relevant information it possesses or controls, by the amount of information other parties seek from it, or by the amount of information it must provide in return. Discovery costs and burdens are often heavier for the party that has or can easily get the bulk of the relevant information in a case.\(^{14}\)

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information, but without the unfairness that can result if the asymmetries are leveraged by any party for tactical advantage. Unfairness can occur when a party with significantly less information imposes unreasonable demands on the party who has voluminous information, such as requiring so much discovery as to outstrip what is reasonable for that case, given the issues and amounts at stake. In such circumstances, Rule 26(b)(2)(B) permits the responding party to object provided it specifies why accessing the requests and information would result in undue burden or cost. Unfairness can also occur when a party with significantly more information takes unreasonably restrictive or dilatory positions in response to the other party’s requests. Both excessive discovery demands and excessive discovery refusals can result in unfairness. For this reason, overbroad, non-specific discovery requests and overbroad, non-specific objections to discovery requests can result in unfairness.

**Official Committee Note, Rule 26 (Dec. 1, 2015)**

“The direction to consider the parties’ relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some
cases involve what often is called “information asymmetry.” One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.”

GUIDELINE 2(D): “Parties’ Resources”—This factor examines what resources are available to the parties for gathering, reviewing, and producing information and for requesting, receiving, and reviewing information in discovery. “Resources” means more than a party’s financial resources. It includes the technological, administrative, and human resources needed to perform the discovery tasks.15

In general, more can be expected of parties with greater resources and less of parties with scant resources, but the impact of the parties’ reasonably available resources on the extent or timing of discovery must be specifically determined for each case.

As with all of the factors, this factor is only one consideration. Even if one party has significantly greater resources, this factor does not require that party to provide all or most of the discovery proposed simply because the party is able to do so. Nor does this factor mean that parties with limited resources can refuse to provide relevant information simply because doing so would be difficult for financial or other reasons.16 A party’s ability to take discovery is not limited by the resources it has available to provide discovery in return.

The basic point is to focus attention on what resources a party reasonably has available for discovery, when it is needed. Evaluating the resources a party can reasonably be expected to expend on discovery may require considering that party’s competing demands for those resources.

OFFICIAL COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)

“So too, consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.”

GUIDELINE 2(E): “Importance of Discovery”—This factor examines the importance of the discovery to resolving the issues in the case.17

One aspect of this factor is to identify what issues or topics are the subject of the proposed discovery and how important those issues and topics are to resolving the overall case. Significant issues may relate to the elements of the claims or defenses or may relate to procedural matters of consequence to the future management of the case, such as class certification.18 Discovery
relating to a central issue or a required element of a claim or defense is more important than discovery relating to a peripheral issue.  

Another aspect is the role of the proposed discovery in resolving the issue to which the discovery is directed. Discovery that is essential to resolving that issue is more important than discovery that is cumulative or only tangentially related to that issue.  

Understanding the importance of proposed discovery may involve assessing what the requesting party is realistically able to predict about what added information the proposed discovery will yield and how beneficial it will be.  

The court might order or suggest that the parties, at the outset of a matter, exchange lists of what each party considers to be the central, dispositive, and contested issues of fact in the matter, to help focus any discussion of discovery requests on issues that that are central to a claim or defense and as to which the parties cannot come to agreement.  

******************GUIDELINE 2(F): “Whether the Burden or Expense Outweighs Its Likely Benefit” —This factor identifies and weighs the burden or expense of the discovery in relation to its likely benefit. There is no fixed burden-to-benefit ratio that defines what is or is not proportional.  

The “importance of discovery factor” discussed in GUIDELINE 2(E) addresses the likely benefits of proposed discovery based on its importance to resolving issues and the importance of those issues to resolving the case.  

In general, proposed discovery that is likely to return important information on issues that must be resolved will justify expending more resources than proposed discovery seeking information that is unlikely to exist, that may be hard to find or retrieve, or that is on issues that may be of secondary importance to the case, that may be deferred until other threshold or more significant issues are resolved, or that may not need to be resolved at all.  

If the information sought is important to resolving an issue, discovery to obtain that information can be expected to yield a greater benefit and justifies a heavier burden, especially if the issue is important to resolving the case or materially advances resolution. If the information sought is of marginal or speculative usefulness in resolving the issue, the burden is harder to justify, especially if the issue is not central to resolving the case or is unlikely to materially advance case resolution.  

This factor focuses on the benefits of the information to be obtained and the burdens or expenses of obtaining that information. It is to be considered along with the other factors, which separately address and take into account the importance of the issues at stake and any resulting benefit to society associated with litigation of those issues.
GUIDELINE 6 separately addresses which party bears the burden of providing specific information about the burdens, expense, or benefits of proposed discovery when proportionality disputes arise.

Rule 26(b)(2)(B) addresses a specific type of burden argument—that discovery should not proceed with respect to a particular source of electronically stored information because accessing information from that source is unduly burdensome or costly. Examples include information stored on outdated or “legacy” technology, or information stored for disaster recovery rather than archival purposes that would not be searchable or even usable without significant effort. Rule 26(b)(2)(B) has specific provisions for discovery from such sources. Those provisions do not apply to discovery from accessible sources, even if that discovery imposes significant burden or cost on the producing party.24

Under Rule 26(b)(2)(B), the party resisting discovery bears the burden of establishing that the information is not reasonably accessible because of undue burden or costs.25 Even if this showing is made, the court may still order the discovery if: (1) the requesting party establishes good cause, considering the Rule 26(b)(2)(C) limits that balance the costs and potential benefits of discovery; or (2) the court allocates some of the costs to the requesting party under Rule 26(c)(1)(B).

OFFICIAL COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)

“The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties’ Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties’ responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court’s responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.”

GUIDELINE 3: Applying the six proportionality factors depends on the informed judgment of the parties and the judge analyzing the facts and circumstances of each case.26 The weight or importance of any factor varies depending on the facts and circumstances of each case.

The parties and the judge must consider each factor to determine the degree to which and the way the factor applies in that case.27 The factors that apply and their weight or importance not
only vary in each case, but can also vary at different times in the same case, changing as the case proceeds.

No proportionality factor has a prescribed or preset weight or significance. No one factor is intrinsically more important or entitled to greater weight than any other. The order in which the proportionality factors appear in Rule 26(b)(1) does not signify preset importance or weight in a particular case. The 2015 amendments reordered the factors to eliminate the argument that amount in controversy was the most important factor simply because it was listed first. But its relocation does not mean that it is no longer an important consideration. If anything, the changes were made to discourage arguments based on the position of the factors in the queue and promote substantive consideration of each factor in light of the others, given the circumstances of each case.

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**GUIDELINE 4:** The 2015 rule amendments do not require a party seeking discovery to show in advance that the proposed discovery is proportional.

The 2015 amendments do not alter the parties’ existing discovery obligations. The obligations unchanged by the amendments include obligations under:

Rule 26(g), requiring parties to consider discovery burdens and benefits before requesting discovery or responding or objecting to discovery requests and to certify that their discovery requests, responses, and objections meet the rule requirements;

Rule 34, requiring parties to conduct a reasonable inquiry in responding to a discovery request; and

Rule 26(c), Rule 26(f), Rule 26(g), and Rule 37(a), among others, requiring parties to communicate with each other about discovery planning, issues, and disputes. The need for communication is particularly acute when questions concerning burden and benefit arise because one side often has information that the other side may not know or appreciate.

The 2015 amendments do not require the requesting party to make an advance showing of proportionality. Unless specific questions about proportionality are raised by a party or the judge, there is no need for the requesting party to make a showing of or about proportionality. The amendments do not authorize a party to object to discovery solely on the ground that the requesting party has not made an advance showing of proportionality. As discussed in **GUIDELINE 5,** the amendments do not authorize boilerplate, generalized objections to discovery on the ground that it is not proportional.

The amendments do not alter the existing principles or framework for determining which party must bear the costs of responding to discovery requests.
OFFICIAL COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)

“Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.”

“Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”

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GUIDELINE 5: The 2015 rule amendments do not authorize boilerplate, blanket, or conclusory objections or refusals to provide discovery on the ground that it is not proportional.

The addition of proportionality to the Rule 26(b)(1) definition of the scope of discovery does not authorize a party to rely on boilerplate, blanket, or conclusory objections.30 To the contrary, Rule 34 is amended to require parties to state with specificity the grounds for objections to discovery requests or to refusals to produce or keep requested documents or electronically stored information. Boilerplate objections or refusals to respond to discovery requests risk violating Rule 26(g). Objections that state with specificity why the proposed discovery is not proportional to the needs of the case are permissible.31 When a party objects with particularity to producing some of the requested discovery, the producing party should produce the discovery that is not objected to or limit the requested discovery to what is not objected to, pending resolution of the objections.32 If good faith negotiations do not resolve the objections, the parties should promptly seek court intervention.

OFFICIAL COMMITTEE NOTE, RULE 34 (DEC. 1, 2015)

“Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters “withheld” anything beyond the scope of the search specified in the objection.”

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GUIDELINE 6: When proportionality disputes arise, the party in the best position to provide information about the burdens, expense, or benefits of the proposed discovery ordinarily will bear the responsibility for doing so. Which party that is depends on the circumstances. The party from whom proposed discovery is sought ordinarily is in a better position to specify and support the burdens and expense of responding, while the party seeking proposed discovery ordinarily is in a better position to specify the likely benefits by explaining why it is seeking and needs the discovery of information relevant to any party’s claim or defense. It is incumbent on the party requesting the data to explain how the expected information will be helpful to the trier of fact in resolving a matter in dispute regarding a pertinent element of a claim or defense.

If a party objects that it would take too many hours, consume unreasonable amounts of other resources, or impose other burdens to respond to the proposed discovery, the party should specify in its responses what it is about the search, retrieval, review, or production process that requires so much work or time or that imposes other burdens.

If a party objects to the expense of responding to proposed discovery, the party should be prepared to support the objection with an informed estimate of what the expenses would be and how they were determined, specifying what it is about the source, search, retrieval, review, or production process that requires the expenses estimated. If additional reasons later are discovered why producing requested information would impose undue burden or expense, the earlier objections should be supplemented, again, with specificity.

If a party requests discovery and it is objected to as overly burdensome or expensive, the requesting party should be prepared to specify why it requested the information and why it expects the proposed discovery to yield that information. Assessing whether the requesting party has adequately specified the likely benefits of the proposed discovery may involve assessing the information the requesting party already has, whether through its own knowledge, through publicly available sources, or through discovery already taken.

A party with inferior access to discoverable information relevant to the claims or defenses may also have inferior access to the information needed to evaluate the benefit, cost, and burden of the discovery sought. Assessing the benefits of proposed discovery may also involve assessing how well the requesting party is able to predict what added information the proposed discovery will yield and how beneficial it will be.

Party cooperation is particularly important in understanding the burdens or benefits of proposed discovery and in resolving disputes. The parties should be prepared to discuss with the judge whether and how they communicated with each other about those burdens or benefits. The parties should also be prepared to suggest ways to modify the requests or the responses, when appropriate, to reduce the burdens and expense or to increase the likelihood that the proposed discovery will be beneficial to the case.
OFFICIAL COMMITTEE NOTE, RULE 1 (DEC. 1, 2015)

“Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.”

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GUIDELINE 7: If a party asserts that proposed discovery is not proportional because it will impose an undue burden, and the opposing party responds that the proposed discovery will provide important benefits, the judge should assess the competing claims under an objective reasonableness standard.

In deciding whether a discovery request is proportional to the needs of the case, only reasonable (or the reasonable parts of) expenses or burdens should be considered. If a party has maintained its records in a way that makes retrieval unreasonably expensive or uses technology or other methods that are unreasonably expensive, these additional, unreasonable expenses should not be considered.

Changes in technology can affect the context for applying the objective reasonableness standard. It is appropriate to consider claims of undue burden or expense in light of the benefits and costs of the technology that is reasonably available to the parties.42

It is generally not appropriate for the judge to order a party to purchase or use a specific technology, or use a specific method, to respond to or to conduct discovery. In assessing discovery expenses and burdens and the time needed for discovery, however, it may be appropriate for the judge to consider whether a party has been unreasonable in choosing the technology or method it is using.43
II. BEST PRACTICES

The following practices suggest useful ways to achieve proportional discovery in specific cases. There is no one-size-fits-all approach. While practices that would advance proportional discovery in one case might hinder it in others, the suggestions may be helpful in many cases and worth considering in most. The suggestions are framed in terms of parties’ as well as judges’ case-management practices and are intended to provide help in carrying out the shared responsibility for discovery proportional to the needs of the case.

**BEST PRACTICE 1:** The parties should engage in early, ongoing, and meaningful discovery planning. The parties should begin to work internally and with opposing parties on relevance and proportionality in discovery requests and responses from the outset, which can be well before a case is filed or served and before the Rule 26(f) meet-and-confer, the Rule 26(f) report, and the Rule 16 conference with the judge. The judge should make it clear from the outset that the parties are expected to plan for and work toward proportional discovery.

The parties and judge share responsibility for ensuring that discovery is proportional to the needs of the case.

The parties are usually in the best position to know which subjects and sources will most clearly and easily yield the most promising discovery benefits. In many cases, the parties use their knowledge of the case to set discovery plans that achieve proportionality. When that does not occur, or when discovery disputes nonetheless arise, judges play a critical role by taking appropriate steps to ensure that discovery is proportional to the needs of the case.

Parties and judges have a variety of practices to work toward proportionality. They include: (1) practices for the parties to identify and work together beginning early in the case to create and implement a discovery and case-management order that works toward proportional discovery; (2) orders that judges issue early in the case communicating the judge’s expectations about how the parties will conduct discovery; (3) ways for parties to identify discovery disputes promptly, attempt to resolve them, and if unsuccessful to bring them to the judge for timely, efficient, and fair resolution; (4) orders that judges issue early in the case setting procedures for the parties to promptly bring discovery disputes and related matters that they cannot resolve to the judge; (5) procedures for the parties to engage the judge promptly and efficiently when discovery and related pretrial disputes make it necessary; and (6) orders that judges issue communicating the willingness to be available when necessary.

The practices that follow provide examples of specific approaches that judges and parties across the country have used to work toward proportionality in discovery, including timely and efficiently resolving discovery disputes.

While the judge has the ultimate responsibility for determining the boundaries of proportional discovery, the process of achieving proportional discovery is most effective and efficient, and the likelihood of achieving it is greatest, when the parties and the judge work together.
OFFICIAL COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)

“Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a selfregulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.” What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there 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.”

“Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).”

BEST PRACTICE 2: As soon as possible and both before and in the Rule 26(f) meet-and-confer, the parties should talk in person or at least by telephone to discuss what the case is about and what information will be needed and to plan for proportional discovery. The parties’ discussions should result in a proposed discovery/case-management plan with enough detail and specificity to demonstrate to the judge that the parties are working toward proportional discovery and to avoid unnecessary delay. The judge should consider issuing an order early in the case that clearly communicates what the judge expects the parties to discuss, to address in their Rule 26(f) report, and to be prepared to discuss at a Rule 16 conference with the judge.

Early discussions between the parties, in person or by telephone, provide the best opportunity to meaningfully discuss what the discovery will be, where it should begin, and how it might relate to the overall case plan. Email or written exchanges alone are much less effective at facilitating detailed discovery planning or establishing a framework for identifying and resolving discovery and other pretrial disputes.

The parties’ discussions, including in the Rule 26(f) meet-and-confer, and their report to the court should cover more than dates for pleading amendments, expert designations, discovery deadlines, motions, and trial, and should go beyond the Rule 26(f) required topics of preservation, protection against privilege waiver, and form of production. If discovery is expected to include the production of electronically stored information, the responding party should be prepared to provide information about its electronic systems and data, including the types of platforms used, and the
location and accessibility of the data, to the extent the information reasonably assists the requesting party in formulating its discovery requests and is not disproportionately costly. The information disclosed should focus on the relevant systems and data necessary for the requesting party to formulate its requests. Absent evidence of discovery abuse or obstructionism, this information should be exchanged or provided informally, to avoid discovery into discovery.

The judge should make clear—by order or other manner the judge chooses—that the parties are expected to have a meaningful discussion and exchange of information during the Rule 26(f) meet-and-confer and what the parties are expected to cover. The judge should also make clear that the Rule 26(f) report will be reviewed and addressed at the Rule 16 conference. Judges following this practice may issue a form order that is routinely sent shortly after the case is filed, often along with an order sent to set the dates to file the Rule 26(f) report or to hold the Rule 16 conference.

In a case in which the judge has a basis to expect that discovery will be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge might consider scheduling a conference call with the parties before they hold their Rule 26(f) meet-and-confer or draft their joint discovery/case-management plan.

If the responding party intends to use technology assisted review (TAR) or discovery techniques such as applying search terms, it should be prepared to propose a protocol that provides transparency and feedback from all parties. Although not required, allowing all parties to provide input on the particular search techniques to be used will facilitate discovery and reduce the potential for disputes. Larger or more complex cases may especially benefit from using TAR.

The parties at all times have an obligation under Rule 34 to conduct a reasonable inquiry in responding to a discovery request. A responding party’s use of technology—whether it be TAR, search terms, or other techniques—to assist in its review, does not relieve the responding party of its duty to produce discovery that is relevant, accessible, and can be produced without TAR or search terms. Relevant documents can often be readily retrieved without using these techniques. Examples of documents that are usually readily available include policy documents, prospectuses, organizational charts, and transactional data. If readily available and responsive, such information should be produced promptly and should not be withheld pending development of an electronic discovery protocol, which, in larger cases, can take months to develop and implement. Producing readily available documents may also aid the parties in developing a protocol. Documents that are known to exist and to be relevant and responsive should not be withheld because they are not identified by using TAR, search terms, and the like.

A protocol on the treatment of privileged materials should also be addressed at the Rule 26(f) meet-and-confer. The information that must be included in a privilege log should be discussed, including metadata. Privilege logs should be provided at the time of the production or as soon thereafter as practicable to identify documents withheld on the privilege ground stated in the responding party’s objections. The information to be included in a privilege log should be discussed. This dialogue can be aided by the producing party disclosing during the early conference the metadata that will be captured in its production so its inclusion in a privilege log can be considered.
Some districts address these practices in their local guidelines or rules.

OFFICIAL COMMITTEE NOTE, RULE 16 (DEC. 1, 2015)

“At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.”

BEST PRACTICE 3: On the judge’s own initiative or on the parties’ request, the judge should consider holding Rule 16(b) case-management and other conferences. Such conferences may be held in person or via videoconference, depending upon the circumstances. If videoconference is not reasonably available, conference call or other electronic means of having a real-time conversation should be considered.

A “live” interactive conference, whether in person or by telephone, videoconference, or other means for having a real-time, interactive conversation, even among multiple parties, provides the judge and the parties the best opportunity to discuss what the discovery will be, where it should focus and why, and how the planned discovery relates to the overall case plan. The parties and the judge should use technology to facilitate live interactive case-management and other conferences and hearings when in-person attendance is not required.

A live interactive conference allows the judge to ask follow-up questions and probe the responses to obtain better information about the benefits and burdens likely to result from the proposed subjects and sources of discovery. A live interactive conference also provides the judge an opportunity to explore related matters, such as whether an expected summary judgment motion might influence the timing, sequence, or scope of planned discovery.

A live interactive case-management conference allows the judge to identify early the relatively few cases that require more extensive case management. The conference provides the court the most effective way to monitor all cases, with little judge or law-clerk time required to determine whether the parties are planning proportional discovery, and to limit more extensive case management to the cases that need it.

In some cases, more than one live case-management conference might be appropriate. In a case in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge and parties should consider whether to schedule periodic live conferences or hearings, which can be canceled if not needed. To avoid
undue delay, the judge should consider including firm discovery due dates in his or her scheduling order by which all responsive documents must be produced and any discovery disputes must be brought to the court for resolution.\textsuperscript{57} When considering these dates, the judge should consider the time and work necessary to collect, search, process, review, format, and produce documents. If deadlines are short or tight, then the same level of accuracy or completeness that longer deadlines would provide may not be practicable.

In cases involving complex, extensive, or disputed electronic discovery, the parties and judge might consider whether to have IT personnel, records management personnel, or electronic discovery consultants attend the case-management conference. Depending on the complexities of the case, the judge may consider requiring a tutorial on the technology being used for discovery in a particular case so he or she may better supervise the development of an ESI protocol and be better prepared to address any disputes that may arise.\textsuperscript{58} But the court seldom will be in a position to know a party’s documents and systems as well as the party itself, and should keep this in mind when resolving disputes regarding the specific procedures that will be used to produce ESI in such complex cases.

Active judicial case management is uniformly cited as an important if not the most important tool for case resolution. Judges should consider scheduling regular status conferences where the parties identify the progress of discovery and identify potential disputes as they arise.\textsuperscript{59}

Some districts address this practice in their local guidelines or rules.

**Official Committee Note, Rule 16 (Dec. 1, 2015)**

“The provision for consulting at a scheduling conference by “telephone, mail, or other means” is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.”

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**Best Practice 4:** The judge should ensure that the parties have considered what facts can be stipulated to or are undisputed and can be removed from discovery.\textsuperscript{60}

Discovery about matters that are not in dispute and to which the parties can stipulate is often inherently disproportionate because it yields no benefit. The judge should ensure—through an order, in a Rule 16 conference, or in another manner—that the parties are not conducting discovery into matters subject to stipulation. The judge should also work with the parties to identify matters that are not in dispute and need not be the subject of discovery, even if there are no formal stipulation issues. Additionally, the judge should encourage the parties to consider stipulating to the authenticity of certain documents, such as business records produced by the parties or emails and social media posts made by individual parties.\textsuperscript{61}

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**BEST PRACTICE 5:** In many cases, the parties will start discovery by producing information relevant to the most important issues in a case, available from the most easily accessible sources. In a case in which the parties have not done so, or in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about relevance or proportionality, the parties and the judge should consider and discuss starting discovery with the subjects and sources that are most clearly proportional to the needs of the case. The parties and the judge can use the results of that discovery to guide decisions about further discovery.

The information available at the start of the case is often enough to allow counsel to discuss with clients and each other the subjects and sources of information that are highly relevant to important issues in the case and can be obtained without undue burden or expense.

Discovery into those subjects and from those sources is usually proportional to the needs of the case because it is likely to yield valuable information with relatively less cost and effort. In many cases, the parties begin discovery on these subjects and sources without judicial involvement and without explicitly labeling it as “proportional” or “focused.” The process is simply the familiar one of making smart choices about the most productive steps to get the information the parties need most and first.

In many cases, discovery is not a major problem. But if the parties have not thought through discovery, or the discovery is likely to be voluminous or complex, or there is likely to be significant disagreement about relevance or proportionality, the judge should encourage the parties to consider starting discovery with production of information central to the most important subjects, available from the most easily accessible sources of that information. The parties and the judge can use this information to guide decisions about further discovery. For example, the parties can use the information to decide whether to pursue or make additional discovery requests or how to frame them. The judge can use the information to help understand and resolve proportionality or other questions that may arise during further discovery. This approach does not foreclose additional discovery or predetermine that it will be required.

The objective of this approach is to identify good places for discovery to begin, deferring until later more difficult questions about where discovery should end. If more discovery is sought, no heightened showing is required. The parties and the judge will have more information to assess proportionality, but the factors and their application do not change simply because some discovery has occurred.

In some cases, the parties may want to start discovery by obtaining enough information to decide whether to file a dispositive motion, to try the case, or to work toward prompt settlement. It may make sense for the parties and the judge to start discovery by seeking information directed to a particular issue, claim, or defense. For example, a case may raise threshold questions such as jurisdiction, venue, or limitations that are best decided early because the answers impact whether and what further discovery is needed. In some cases, this may be clear after initial disclosures are exchanged. In other cases, the parties may want to start by seeking information bearing on damages
to make decisions about settlement value or how aggressively to pursue claims or defenses. In still other cases, discovery of information about a causation issue may be decisive.

In some cases, it may be necessary for the parties to exchange more information to identify where to start discovery. In other cases, with relatively few disputed issues and limited discoverable information available from relatively few sources, setting discovery priorities may not be necessary or useful at all.

A judge who holds a live Rule 16 conference can address with the parties the potential benefits of starting with the production of core discovery and his or her expectations about when that information will be produced. The judge can address concerns that one or more parties will misunderstand the process or engage in inappropriate tactics. The judge might consider discussing with the parties what objections typically would or would not be appropriate. If the parties have reached agreement on starting discovery with the production of the most important information from the most accessible sources, there should be few occasions for objections on relevance or proportionality grounds.

Judges should consider using other tools to facilitate and accelerate the exchange of information on issues central to the case. For example, judges should consider using the initial discovery protocols for employment cases, Fair Labor Standards Act cases, and first-party property insurance disputes, in cases where they apply. Developed jointly by experienced plaintiff and defense attorneys, these protocols are pattern discovery requests that identify documents and information that are presumptively not objectionable and that must be produced at the start of the lawsuit. The self-described purpose of these protocols is to “encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.” The protocols are another way to work toward proportional discovery and have been used effectively in courts around the country. It is expected that similar subject-specific discovery protocols for other practice areas, such as business-interruption or force majeure insurance disputes, will be issued.


**BEST PRACTICE 6:** In a case in which discovery will start with particular subjects or sources of information, the judge should consider including guidance in the Rule 16(b) case-management order.

While starting discovery by seeking less information than the maximum conceivably allowed can advance the goal of proportionality, it can also cause concern to some litigants. Some may worry that it will be used as a tool to restrict discovery, fearing that they will be required to make a special case for proportionality before any additional discovery will be allowed. Others may worry that it will be used as a tool to prolong discovery if additional rounds of discovery are viewed as a given, regardless of how robust the initial efforts were or what information they yielded. Still others may worry that expressing an interest in starting with less-than-maximum discovery will be mischaracterized or misunderstood as a desire for a rigidly phased or staged discovery process. Others may worry that delaying full discovery may lead to efforts to prevent additional discovery altogether. Absent any guidance from the judge, these and other concerns may lead parties to forego or resist setting priorities for discovery even when it would make sense to do so.

The judge should consider taking steps to avoid misunderstanding and provide clarity. The judge might consider including a statement in the Rule 16(b) case-management order acknowledging that the parties are starting with discovery into certain issues or from certain sources and will use the results to guide decisions about further discovery. The order can convey the judge’s willingness to consider additional discovery and to be available when the parties disagree over whether the additional discovery is proportional to the needs of the case. In a case in which discovery is likely to be voluminous or complex, the parties may choose to serve robust discovery requests, taking into account the proportionality factors, followed by discussions or orders that focus on the immediate production of the most important information first, but allowing the parties and the court to prepare a larger discovery plan. This would avoid a party agreeing to serve requests for more limited discovery or from more limited sources being forced to engage in protracted negotiations and motion practice to obtain that discovery, only to face arguments that additional discovery was not contemplated or that multiple productions are unduly burdensome.

After discussing the issues that may affect the timing, scope, completeness, and accuracy of production with the parties, the court should consider providing a reasonable document discovery schedule that provides a deadline for all parties to serve document requests; produce documents, including providing interim deadlines for certain types or volumes of documents; and file any requests for promotion conferences before filing motions to compel or for protection.

The parties might consider asking the judge to divide the discovery period, using an interim deadline for completing early discovery and a later deadline for completing further discovery that is warranted. In particular, if it is necessary to obtain discovery from locations or sources that are not reasonably accessible or are otherwise expensive or burdensome, it may be better to start with the discovery from more easily accessible and less expensive locations or sources to minimize the need to access the more expensive or burdensome. In cases that may involve cross-border discovery, it is generally best to start with domestic discovery and then move to non-U.S. discovery, particularly if necessary to avoid or reduce conflicting with local non-U.S. law.
The parties might also consider asking the judge to schedule a discovery status conference or, in cases where “bifurcated” or “staged” discovery is appropriate, to ask for a report after the early discovery is complete. The point is not to impose rigid “bifurcated” or “staged” discovery in every case, but to work toward and implement a case-specific plan that is tailored to the needs of the case and flexible enough to evolve with the case.

In larger, more complex or contentious matters, judges should consider scheduling regular discovery status conferences (monthly or every other month) to keep discovery moving and to resolve disputes that may stall proceedings. Judges should consider requiring parties to provide joint status reports in advance of these conferences that highlight any issues or concerns that merit court attention. This can help the court understand and avoid lingering problems that may arise at the close of discovery and delay the resolution of the matter.

If discovery starts with particular subjects or sources, the parties and the judge should consider whether this may require some individuals to be deposed more than once, or require the responding party to search a source more than once. The parties and the judge should address and consider ways to avoid repeat work, including by allowing the witness to be deposed on all matters in the case or by allowing a broad search from that source.

If the parties reach agreement on starting discovery with particular subjects or sources, a party stipulation or a court order might specify ways to streamline that discovery, including arranging for the informal exchange of information.

Developing a detailed discovery plan ordinarily should not delay the production of documents the parties agree are responsive to a production request, relevant, accessible, and therefore proportional. Those should be produced. If the parties cannot agree to begin producing documents that have not been objected to before the completion of the discovery plan, they should promptly seek resolution by the court.

**BEST PRACTICE 7:** If there are discovery disputes the parties cannot resolve, the parties should promptly bring them to the judge. The judge should make it clear from the outset that he or she will be available to promptly address the disputes.

Procedures for the parties to promptly engage the judge in resolving discovery disputes that the parties are unable to resolve on their own are important to avoiding the costs and delays that frustrate efficient and cost-effective case management and defeat proportionality. Prompt resolution of discovery disputes prevents them from growing in intensity and complexity and allows discovery, motions, and pretrial preparations to continue rather than entirely stop while the dispute is pending. The judge should consider including in an order issued early in the case a procedure that makes clear the judge’s availability to work with the parties in timely resolving discovery disputes.

Some districts address this practice in their local guidelines or rules.
**BEST PRACTICE 8:** On the judge’s own initiative or on the parties’ request, the judge should consider requiring the parties to request a live conference, whether in-person or by telephone or video conference, with the court, after conferring with opposing parties and before filing a motion seeking to compel or to protect against discovery. Some judges require the parties to request a conference on the basis of limited motions or short briefs. These and similar practices avoid the often unnecessary costs and delays of fully briefed discovery motions.

A live pre-motion or limited-motion conference between the parties and the court is often an effective way to promptly, efficiently, and fairly resolve a discovery dispute at considerably less judge- and law-clerk time than reading fully briefed motions, responses, and replies with attachments and issuing a written opinion. The parties and the judge save time, work, and resources. Fed. R. Civ. P. 16(b)(3)(B)(v) authorizes the judge to adopt such procedures to resolve discovery disputes without formal motions or briefs. Conferences can often be held shortly after the parties inform the judge’s case manager or judicial assistant that a discovery dispute has arisen. The conference lets the parties tell the judge what the party seeking the discovery needs and what the party resisting the discovery is able to produce without undue burden, cost, or expense.

The judge should consider, for example, a procedure by which the parties must submit a one- or two-page joint letter describing the discovery dispute or a conference call with the judge to try to resolve disputes before bringing a formal motion to compel or for protection. Parties and judges report that such procedures resolve the vast number of discovery disputes more quickly and without requiring a noticed or fully briefed motion and response.

The live, interactive conference exchange allows the parties and the judge to productively focus on practical solutions to what are usually practical problems, not disagreements over jurisprudence. The conference exchange often resolves the discovery dispute, either by leading to an agreed resolution or by providing the judge with the information needed to rule fairly and accurately. Discovery can continue, allowing the case to stay on track instead of stopping while the judge reads extensive motions and briefs and writes a written opinion. The parties are saved the cost and delay of filing full motions and briefs, and the judge and her clerks are saved the work and time of reading those motions and briefs and issuing a written opinion.

If the pre-motion or limited-motion conference indicates that some briefing or additional information on specific issues would be helpful, the judge can limit further work to the specific issues that require it.

The judge might consider requiring the party requesting a pre-motion or limited-motion conference on a discovery dispute to send a short communication—often limited to two pages—describing (not arguing) the issues that need to be addressed, and allowing a similarly limited response.

The judge might consider the best way to memorialize the results of the conference. Approaches can vary. Some judges have a court reporter present for the conference and hold it in
the courtroom. Others hold the conference in chambers, sometimes with a court reporter and other times with a law clerk taking notes for a brief minute entry in the court’s docket sheet. Other judges may ask one of the parties to draft and circulate a proposed order. Some cases may be better served by the courtroom formality and others by the more relaxed exchange in chambers.

The judge can include a pre-motion or limited-motion conference requirement and procedure in the case-management order issued under Rule 16(b). The procedure can include provisions for using telephone or video conferences if one or more of the parties cannot attend in person or if it is otherwise efficient, effective, and fair.

Some districts address this practice in their local guidelines or rules.78

OFFICIAL COMMITTEE NOTE, RULE 16 (DEC. 1, 2015)

“Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.”

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BEST PRACTICE 9: When requested discovery would not or might not be proportional if allowed in its entirety, the judge should consider whether it would be appropriate to grant the request in part and defer deciding the remaining issues.

Allowing discovery requests in part can further an iterative process. The discovery allowed may be all that is needed, or it may clarify what further discovery is appropriate.79 Deferring a decision on whether to allow the rest of the discovery requested gives the judge and parties more information to decide whether all or part of it is proportional.

Sampling can be used to determine whether the likely benefits of the requested discovery, or the burdens and costs of producing it, warrant granting all or part of the remaining requests at a later time.80

If a modified request would be proportional, the judge ordinarily should permit the proportional part of the discovery. However, the judge is under no obligation to do so and may rule on the discovery request as made.

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BEST PRACTICE 10: The parties and judge should consider other discovery rules and tools that may be helpful in achieving fair, efficient, and cost-effective discovery. In particular, the parties should consider delivering discovery requests before their Rule 26(f) meet-and-confer.
Other discovery rule changes and tools, not part of the proportionality amendments, should be considered as part of the judge’s and parties’ overall plan for fair, workable, efficient, and cost-effective discovery and case resolution. \(^81\)

Rule 26(d) is amended to allow a requesting party to deliver document requests to another party before the Rule 26(f) conference. The requests are not considered served until the meeting, and the 30-day period to respond does not start until that date. The early opportunity to review the proposed requests allows the responding party to investigate and identify areas of concern or dispute. The parties can discuss and try to resolve those areas at the Rule 26(f) conference on an informed basis. Early delivery also allows the responding party to identify documents that it agrees are responsive. This can aid the parties in developing a discovery plan. If disputes remain, the parties should use the Rule 26(f) report and the Rule 16(b) conference to bring them to the court for early resolution.

As an alternative to the formal mechanism that now exists under Rule 34, some lawyers may prefer to share draft, unsigned document requests, interrogatories, and requests for admission. Both the formal and informal practices prompt an informed, early conversation about the parties’ respective discovery needs and abilities.

Rule 26(c) makes explicit judges’ authority to shift some or all of the reasonable costs of discovery on a good-cause showing, if the party from whom discovery is sought moves for a protective order. \(^82\) A judge may, as an alternative to denying all of the requested discovery, order that some or all of the discovery may proceed on the condition that the requesting party bear some or all of the reasonable costs to respond. The longstanding presumption in federal-court discovery practice is that the responding party bears the costs of complying with discovery requests. \(^83\) That presumption continues to apply. The 2015 amendments to Rule 26(c) make cost-shifting authority explicit but do not change the good-cause requirement or the circumstances that can support finding good cause. \(^84\) While cost-shifting should not be used to allow discovery that is outside the scope of discovery (i.e. a party should not be allowed to purchase discovery to which it is not entitled), in close cases of proportionality the judge may wish to discuss the advisability of cost shifting with the parties.

Rule 37(e) is amended to clarify when and how a judge may respond to a party’s inability to produce electronically stored information because it was lost and the party failed to take reasonable steps to preserve it. It provides a nationally uniform standard for when a judge may impose an adverse inference instruction or other serious sanctions. It responds to the concern that some persons and entities were over-preserving out of fear their actions would later be judged under the most demanding circuit standards. Working toward proportionality in preservation is an important part of achieving proportionality in discovery overall. Other rule amendments emphasize the need for careful attention to preservation issues. Rule 26(f) has been amended to add preservation of electronically stored information to the list of issues to be addressed in the parties’ discovery plan. Rule 16(b) is amended to add preservation of electronically stored information to the list of issues the case-management order may address.

Generally, inadvertent disclosure of privileged material does not operate as a waiver under Federal Evidence Rule 502(b), if reasonable steps were taken to prevent disclosure and reasonable
steps were taken to rectify the error.\textsuperscript{85} Rule 16(b) and Rule 26(f) have been amended to encourage the use of orders under Rule 502(d) of the Federal Rules of Evidence providing that producing information in the litigation does not waive attorney-client privilege or work-product protection, either in that litigation or in subsequent litigation. Nonwaiver orders under Federal Rule of Evidence 502(d) can promote proportionality by reducing the time, expense, and burden of privilege review and waiver disputes.

Questions impacting and approaches to discovery are usually best explored in a live conference between the judge and the parties, preferably before formal discovery-related motions (such as under Rule 26(c) or Rule 37(a)) and accompanying briefs are filed. A Rule 16 or pre-motion conference enables the judge and the parties to examine how the various discovery tools can best be used to create and implement an effective discovery and case-management plan.

\textbf{Official Committee Note, Rule 16 (Dec. 1, 2015)}

“The [Rule 16 scheduling] order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).”

\textbf{Official Committee Note, Rule 26 (Dec. 1, 2015)}

“Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that costshifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”

“Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.”

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“The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large
volumes of electronically stored information. Courts and parties should be willing to consider the
opportunities for reducing the burden or expense of discovery as reliable means of searching
electronically stored information become available."

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OFFICIAL COMMITTEE NOTE, RULE 34 (DEC. 1, 2015)

“Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34
request delivered before the parties’ Rule 26(f) conference is 30 days after the first Rule 26(f)
conference.”

“Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state
whether anything is being withheld on the basis of the objection. This amendment should end the
confusion that frequently arises when a producing party states several objections and still
produces information, leaving the requesting party uncertain whether any relevant and
responsive information has been withheld on the basis of the objections. The producing party
does not need to provide a detailed description or log of all documents withheld, but does need to
alert other parties to the fact that documents have been withheld and thereby facilitate an
informed discussion of the objection. An objection that states the limits that have controlled the
search for responsive and relevant materials qualifies as a statement that the materials have been
“withheld.”

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BEST PRACTICE 11: The parties must frame discovery requests and responses after
considering the burdens and benefits. Rule 34 emphasizes this obligation by
prohibiting general, boilerplate objections to production requests and requiring the
responses to state objections with specificity, to state whether documents are being
withheld on the basis of objections, and to state when discovery will be
completed. When necessary, the parties should ask the judge to enforce these
discovery obligations, and judges should make themselves available to do so
promptly and efficiently.

A judge’s prompt enforcement of the Rule 34 prohibition on conclusory and boilerplate
objections, including to a lack of proportionality, can be a critical part of managing and achieving
discovery that is both proportional and fair. The level of specificity required by the responding
party may depend on the level of particularity of the request. Enforcing requirements for specific
and clear requests and objections can be as important to proportionality as weighing the costs and
burdens of discovery to enforce the Rule 26(b)(1) definition of scope. Similarly, enforcing the
requirements to state when documents will be produced and whether documents are being withheld
on the basis of objections can help ensure proportionality by avoiding uncertainties that often lead
to more objections and disputes.
The Rule 34 requirements are consistent with the Rule 26(g) requirements to consider discovery burdens and benefits before requesting or objecting to discovery and to certify that the requests, responses, and objections meet the rule requirements.

The parties should identify ways to engage the judge when necessary to efficiently enforce the Rule 34 requirements for responding to production requests.

BEST PRACTICE 12: The parties and the judge should consider using technology to help achieve proportional discovery.

Technology can help proportionality by decreasing the burden or expense, or by increasing the likely benefit, of the proposed discovery.

When the discovery involves voluminous amounts of electronically stored information, the parties and judge should consider using technologies designed to categorize or prioritize documents for human review. Because technology evolves quickly, the parties and the judge should not limit themselves in advance to any particular technology or approach to using it. Instead, the parties and the judge should consider what specific technology and approach works best for the particular case and discovery. That said, courts should be aware that they rarely, if ever, will know the details about the parties’ IT systems. For that reason, except in cases of discovery abuse or obstructionism, a court should not impose a particular discovery technology on a party.

1 Scope of Discovery.
- **1st Cir.** Cont’l W. Ins. v. Opechee Constr. Corp., 2016 WL 865232, at *3 (D.N.H. Mar. 2, 2016) (employer is not required to interview former employees for discoverable information because, e.g., it would be disproportional).
Discovery must be relevant.


2. 2d Cir. Marom v. City of N.Y., 2016 WL 7048053, at *2 (S.D.N.Y. Nov. 30, 2016) (court granted discovery request because requested documents were “highly relevant to plaintiffs’ theory of the case,” as they might show required protocol was not followed).

3. 3d Cir. Ruddy v. Polaris Indus., 2019 U.S. Dist. LEXIS 11975, at *3 (M.D. Pa. Jan. 24, 2019) (“Discovery is generally permitted of any items that are relevant or may lead to the discovery of relevant information.”).

4. 4th Cir. Prusin v. Canton’s Pears, LLC, 2016 WL 7408840, at *4 (D. Md. Dec. 22, 2016) (though they contained sensitive information, defendant’s tax returns were relevant, as they might show whether defendant’s minimum wage obligations were offset).

5. 5th Cir. In re Xarelto (Rivaroxaban) Prods., 313 F.R.D. 32, 38 (E.D. La. 2016) (to obtain discovery of employee’s personnel files in advance of depositions, party must demonstrate relevancy on witness-by-witness basis); ING Bank N.V. v. M/V Portland, IMO No. 9497854, 2016 WL 3365426, at *8 n.12 (M.D. La. June 16, 2016) (“Relevance itself, a discrete and separate yet oft merged requirement, remains a relatively low threshold.”); Williams v. U.S. Envtl. Servs., 2016 WL 617447, at *7 (M.D. La. Feb. 16, 2016) (in employment discrimination case, other complaints of discrimination against employer are relevant if limited to: (a) same form of discrimination; (b) same department or agency at which plaintiff worked; and (c) reasonable time before and after discrimination occurred, usually three to five years); Murillo Modular Grp. Ltd. v. Sullivan, 2016 WL 6139096, at *5 (N.D. Tex. Oct. 20, 2016) (discovery of “information relevant to a party’s or witness’s credibility is relevant”); Howard v. Seadrill Americas, Inc., 2016 WL 7012275, at *4 (E.D. La. Dec. 1, 2016) (denying discovery request for phone records because, while they would give information about the exact time a relevant phone call was placed, timing of call was “likely not important to resolving dispute”); Leal v. Wal-Mart Stores, 2017 WL 68528, at *3 (E.D. La. Jan. 6, 2017) (court denied discovery request for all database and pay data for all employees,
regardless of their position, that worked in the same stores as plaintiff over a 14-year period as overly broad and irrelevant); United States v. Wyeth, 2017 WL 191258, at *2–3 (E.D. La. Jan. 13, 2017) (in attorneys’ fees dispute between pharmaceutical company and law firm, court denied discovery of one lawyer’s medical school grades and attendance because it was irrelevant); Waste Mgmt. of La., LLC v. River Birch, Inc., 2017 WL 1429108, at *2 (E.D. La. Apr. 21, 2017) (denying depositions of certain individuals because no evidence suggested that their depositions would be relevant); Waste Mgmt. of La., LLC v. River Birch, Inc., 2017 WL 2271982, at *4 (E.D. La. May 24, 2017) (court denied discovery that, while broadly connected to issues before court, was not relevant to specific claims alleged in complaint); MetroPCS v. Thomas, 327 F.R.D. 600, 609 (N.D. Tex. 2018) (a party may not use third-party discovery to develop new claims or defenses that are not already identified in the pleadings rather than to find support for properly pleaded claims.); Deutsche Bank Nat’l Tr. v. Pink, 2019 U.S. Dist. LEXIS 15732, at *14 (N.D. Tex. Jan. 31, 2019) (the defendant’s discovery is not limited to counter-claim or defense pleaded by the defendant but can be related to any party’s claim.).

- **6th Cir. State Farm Mut. Auto. Ins. v. Universal Health Grp., 2016 WL 6822014, at *2 (E.D. Mich. Nov. 18, 2016) (terms of settlement agreement that are relevant and proportional to needs of case are discoverable): Queen v. City of Bowling Green, 2017 WL 4355689, at *5–8 (W.D. Ky. Sept. 29, 2017) (court limited discovery of party’s employment records and tax returns to period following his destructive discharge; previous records were irrelevant).

- **7th Cir. Southport Bank v. Miles, 2016 WL 7366885, at *3 (N.D. Ill. Dec. 19, 2016) (Plaintiff’s argument that it needs loan policies to veil piercing “seem[s] to be much more relevant to an independent, and as yet unfilled, claim ... than to the more narrow purpose for which these post-judgment proceedings are designed.”); Crabtree v. Angie’s List, Inc., 2017 WL 413242, at *5 (S.D. Ind. Jan. 31, 2017) (Court held that defendant’s “broad request” for plaintiff’s emails, texts, and social media posts “would clearly encompass personal communications” and had “absolutely no relevance to lawsuit.”); Simon v. Northwestern Univ., 2017 WL 467677, at *5 (N.D. Ill. Feb. 3, 2017) (Court limited discovery of after-the-fact-evidence because “[w]hile ‘other acts’ that occur after an event may be relevant to showing ‘knowledge’ or ‘intent’ at the time of the event [for purposes of Evidence Rule 404(b)], there is a steadily diminishing value of relevance ... the further out in time the ‘other acts’ occur.”).

- **8th Cir. Leseman, LLC v. Stratasys, Inc., 2016 WL 1117411, at *5 (D. Minn. Mar. 22, 2016) (in patent infringement lawsuit, magistrate judge correctly denied plaintiff’s motion to compel business records for product that was experimental and limited in use).

- **9th Cir. Deutsche Bank Nat’l Tr. v. SFR Invs. Pool 1, LLC, 2016 WL 3200104, at *1–2 (D. Nev. June 6, 2016) (finding discovery request for, e.g., two years of defendant’s litigation history irrelevant); Am. Auto. Ins. v. Hav. Nut & Bolt, Inc., 2017 WL 80248, at *5, *7 (D. Haw. Jan. 9, 2017) (personnel files of employees and third-party contractors who handled plaintiff’s insurance claim were relevant and therefore permissible, provided that certain information was redacted to protect the individuals’ privacy); Silva v. Allpak Container, LLC, 2017 WL 1179437, at *4 (W.D. Wash. Mar. 30, 2017) (in employment dispute, defendant asserted that it fired plaintiff solely because of company-wide layoffs, and therefore plaintiff’s attendance and veracity in filing worker’s compensation forms were not relevant); Ayala v. County of Riverside, 2017 WL 1734021, at *3 (C.D. Cal. Apr. 28, 2017) (court permitted discovery of personnel files of five defendants within last five years, as they might be relevant to “proving a pattern of failing to investigate and discipline officers for improper use of force,” but denied discovery of personnel files for all employees); Caballero v. Bodega Latina Corp., 2017 WL 3174931, at *1 (D. Nev. July 25, 2017) (“The 2015 amendments did not change this [relevancy] language from the previous version.”); Heyman v. State of Nev., 2017 WL 5559912, at *4–5 (D. Nev. Nov. 17, 2017) (court held that evidence of defendant’s sexual history was not relevant or proportional to needs of the case; defendant’s controlled substance or alcohol use was relevant because they affect a person’s memory of certain events, but plaintiff needed to limit requests to times at issue); V5 Techs. v. Switch, Ltd., 2019 U.S. Dist. LEXIS 224482, at *15–16 (D. Nev. Dec. 20, 2019) (“[T]hough a witness may have improperly declined to answer deposition questions, courts are within their discretion to not compel further deposition testimony on irrelevant matters.”).

- **10th Cir. Gilmore v. L.D. Drilling, Inc., 2017 WL 2439552, at *4 (D. Kan. June 6, 2017) (in suit regarding late delivery of machinery for oil well, court denied discovery of cost to build other wells, as it would “shed no light on whether [p]laintiff’s reason for a late delivery was legitimate,” and also denied broad discovery of all defendant’s email, which “clearly would encompass wholly irrelevant information”); Gordon v. T.G.R. Logistics, Inc., 321 F.R.D. 401, 404 (D. Wyo. 2017) (court granted-in-part discovery request regarding party’s social media account; “it must be the substance of the communication that determines relevance”); Emsminger v. Credit Law Ctr., 2020 U.S. Dist. LEXIS 12337, at *4 (D. Kan. Jan. 24, 2020) (“When the discovery sought appears relevant on its face, the party resisting discovery has the burden to establish the lack of relevance” “when relevance is not apparent on the face ... the party seeking the discovery has the burden to show the relevance.”).
• 11th Cir. O’Boyle v. Sweetapple, 2016 WL 492655, at *5 (S.D. Fl. Feb. 8, 2016) (“Permitting this subpoena to proceed would cause the parties to run down a rabbit hole chasing irrelevant information on collateral matters, resulting in the needless and wasteful expenditure of time and money by the parties.”); Emery v. Allied Pilots Ass’n, 2017 WL 3412234, at *2 (S.D. Fla. Aug. 8, 2017) (in action against insurance company for breach of fair representation in settlement, un-redacted settlement agreement and settlement terms were relevant to whether defendant breached its duty and damages); Runton v. Brookdale Senior Living, Inc., 2018 WL 1083493, at *1 (S.D. Fla. Feb. 27, 2018) (court denied discovery that was unrelated to plaintiff’s complaint, but was only related to her “newly-articulated theory”).

3 Proportional discovery continues to be required.


communications to or from defendant regarding transfer or any prisoner “has unlimited breadth” and is not proportional; defendant complied with discovery request by producing documents related only to plaintiff’s transfer.


- **8th Cir.** *Harper v. Unum Grp.*, 2016 WL 4508238, at *3 (W.D. Ark. Aug. 29, 2016) (court rejected as disproportionate request for records from all employees making disability decisions but allowed separate request limited to five reviewing individuals); *Schultz v. Sentinel Ins.*, 2016 WL 3149686, at *7 (D.S.D. June 3, 2016) (court declined to retreat from earlier position in *Gowan*, noting that “rule [26], and the case law developed under the rule, have not been drastically altered.”); *Gowan v. Mid-Century Insur.*, 2016 WL 126746, at *5 (D.S.D. Jan. 11, 2016) (proportionality requirements are “hardly new”).

- **9th Cir.** *Wit v. United Behavioral Health*, 2016 WL 258604, at *10 (N.D. Cal. Jan. 21, 2016) (amendments “restore[d] and reinforce[d] the focus on proportionality in discovery” but did not change existing responsibilities of court and parties in considering proportionality); *Ciuffitelli v. Deloitte & Touche LLP*, 2016 WL 6963039, at *5 (D. Or. Nov. 28, 2016) (“For Rule 26(b)(1)’s proportionality mandate to be meaningful, it must apply from the onset of the case.”); *Centeno v. City of Fresno*, 2016 WL 7491634, at *7 (E.D. Cal. Dec. 29, 2016) (Court granted discovery request because “the requested discovery goes to the heart of the dispute” and defendant “is the type of litigant that can respond to such a request.”); *Sci. Games Corp. v. AGS LLC*, 2017 WL 3013251, at n.3 (D. Nev. July 13, 2017) (“Because the scope of permissible discovery under Rule 45 parallels the scope of discovery permitted by Rule 26, these proportionality considerations apply to third-party discovery disputes.”); *Does I-XIX v. Boy Scouts of Am.*, 2017 WL 3841902, at *1 (D. Idaho Sept. 1, 2017) (“the 2015 amendment was merely intended to codify principles that have long been implicit in this analysis”); *Moore v. Pflug Packaging & Fulfillment, Inc.*, 2018 WL 1938557, at *2 (N.D. Cal. Apr. 25, 2018) (“In light of Rule 26’s proportionality requirement . . . parties should avoid using broad terms such as “RELATING TO” in discovery requests.”).

- **10th Cir.** *In re Vicki Milholland*, 2017 WL 895752, at *4 n.28 (10th Cir. Bankruptcy Appellate Panel, Mar. 7, 2017) (“For more than thirty years, the Federal Rules of Civil Procedure have stressed the need for courts to actively manage discovery to prevent parties from using it to “wage a war of attrition or as a device to coerce a party, whether financially weak or affluent,’ and have emphasized the concept of proportionality.”); *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *12–19 (D.N.M. Apr. 1, 2016) (describing extensive background of Rule 26 amendments, leading up to 2015 amendments); *Rowan v. Sunflower Elec. Power Corp.*, 2016 WL 2772210, at *3 (D. Kan. May 13, 2016) (“The consideration of proportionality is not new, as it has been part of the federal rules since 1983.”); *Arenas v. Unified Sch. Dist. No. 223*, 2016 WL 6071802, at *4 (D. Kan. Oct. 17, 2016) (“Although proportionality has long been a factor in ruling on discovery motions, the recent amendment to Rule 26 requires courts to be vigilant to concerns of proportionality.”); *Pertile v. Gen. Motors, LLC*, 2016 WL 1059450, at *2 (D. Colo. Mar. 17, 2016) (amendments did not change duty of court to consider proportionality); *Ark. River Power Auth. v. Babcock & Wilson Co.*, 2016 WL 192269, at *4 (D. Colo. Jan. 15, 2016) (amendments did not change responsibilities of court and parties in considering proportionality); *Diesel Power Source v. Crazy Carl’s Turbos*, 2017 WL 57791, at *2 (D. Utah Jan. 5, 2017) (“recent amendments place greater emphasis on this important principle”); *Singh v. Shonrock*, 2017 WL 698472, at *2 (D. Kan. Feb. 22, 2017) (in employment discrimination case, plaintiff-employee’s request to depose employees of co-defendant to determine whether other employees were “disciplined, counseled, and/or nonrenewed” for same failure to follow common policy rubric allegedly giving rise to plaintiff’s termination was not disproportional in light of similar, prior document production and deposition testimony, because witnesses in that prior production and testimony could not “recall such information”); *City of Orem v. Evanston Ins.*, 2017 WL 2841219, at *2 (D. Utah July 3, 2017) (in personal injury lawsuit, discovery request for all of underwriter’s policy writing materials was overly broad and not proportional; court limited discovery to documents used to write defendant city’s policy).

• D.C. Cir. United States ex rel. Shamesh v. CA, Inc., 314 F.R.D. 1, 8 (D.D.C. 2016) (amendments did not change court’s responsibility to consider proportionality but instead moved proportionality factors to make “proportionality considerations unavoidable.”) Cf.

• 9th Cir. Adamov v. Pricewaterhouse Coopers, LLP, 2017 WL 6558133, at *2 (E.D. Cal. Dec. 22, 2017) (“In 2015, a proportionality requirement was added to Rule 26. Under the amended Rule 26, relevance alone will not justify discovery; discovery must also be proportional to the needs of the case.”).

4 Rule does not change parties’ existing discovery burdens.

• 1st Cir. Cont’l W. Insur. v. Opechee Constr. Corp., 2016 WL 865232, at *1 (D.N.H. Mar. 2, 2016) (“[P]arty seeking an order compelling discovery responses over the opponent’s objection bears the initial burden of showing that the discovery requested is relevant. . . . Once a showing of relevance has been made, the objecting party bears the burden of showing that discovery request is improper.”) (citations omitted).


• 3d Cir. Haines v. Cherian, 2016 WL 831946, at * 3 (M.D. Pa. Feb. 29, 2016) (party resisting discovery has burden to show why discovery should be denied).

• 4th Cir. Stone v. Trump, 2020 U.S. Dist. LEXIS 63011, at *13 (D. Md. Apr. 9, 2020) (“Restoring the proportionality calculation to Rule 26(b)(1) did not change the existing responsibilities of the court and the parties to consider proportionality . . . .”)

• 5th Cir. Mir v. L-3 Commc’ns Integrated Sys., L.P., 2016 WL 3959009, at *4 (N.D. Tex. July 22, 2016) (“[A]mendments to Rule 26 do not alter the burdens imposed on the party resisting discovery.”); Hightower v. Grp. 1 Auto., Inc., 2016 WL 3430569, at *3 (E.D. La. June 22, 2016) (“[T]he 2015 amendments to the Rule did not change the law. Permissible discovery extends only to that which is nonprivileged, relevant to claims and defenses in the case and within the Rule’s proportionality limits.”) (emphasis in original); Richmond v. SW Closeouts, Inc., 2016 WL 3090672, at *4 (N.D. Tex. June 2, 2016) (“[T]he amendments to Rule 26(b) do not alter the basic allocation of the burden on the party resisting discovery to – in order to successfully resist a motion to compel – specifically object and show that the requested discovery does not fall within Rule 26(b)(1)’s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable.”); Gondola v. USMD PPM, LLC, 223 F.Supp.3d 575, 579 (N.D. Tex. 2016) (amendments to Rule 26(b) did not alter existing discovery burdens); McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins., 2016 WL 3033544, at *4 (N.D. Tex. Mar. 26, 2016) (“The amendments to Rule 26 do not alter the burdens” set out in Rules 26 and 45); Orchestratech, Inc. v. Trombeta, 2016 WL 1555784, at *24 (N.D. Tex. Apr. 18, 2016) (“But the amendments to Rule 26(b) and Rule 26(c)(1) do not alter the basic allocation of the burden on the party resisting discovery to . . . specifically object and show that the requested discovery does not fall within Rule 26(b)(1)’s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable.”); Harrison v. Wells Fargo Bank, N.A., 2016 WL 1392332, at *4 (N.D. Tex. Apr. 8, 2016) (“[A]mendments to Rule 26 do not alter the burdens imposed on the party resisting discovery”); Celanese Corp. v. Clariant Corp., 2016 WL 1074573, at *3 (N.D. Tex. Mar. 18, 2016) (amendments did not change burdens on party resisting discovery); Robinson v. Dallas Cnty. Coll. Dist., 2016 WL 1273900, at *2 (N.D. Tex. Feb. 18, 2016) (“amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery”); McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins., 2016 WL 98603, at *3 (N.D. Tex. Jan. 8, 2016) (amendments did not alter burdens placed on party resisting discovery; party resisting discovery must show that “requested discovery was overbroad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.”); Nguyen v. Versacom, LLC, 2015 WL 8316436, at *5 (N.D. Tex. Dec. 9, 2015) (amendments did not change burden placed on party resisting discovery to show that discovery request is not relevant, proportional, or “otherwise objectionable”); Keycorp v. Holland, 2016 WL 6277813, at *5 (N.D. 31

- **6th Cir. William Powell Co. v. Nat. Indemnity Co.,** 2017 WL 1326504, at *5 (S.D. Ohio Apr. 11, 2017) (“Commentary from the rulemaking process bolsters the position that the amended rule did not shift the burden of proving proportionality to the party seeking discovery.”) (citation omitted).

- **7th Cir. Design Basics LLC v. Best Built Inc.,** 2016 WL 1060253, at *3 (E.D. Wis. Mar. 15, 2016) (“[A]mendment of Rule 26(b) to make the proportionality requirement explicit does not relieve the responding party of the burden to explain how a discovery request is burdensome.”); Nerium Skincare, Inc. v. Olson, 2017 WL 277634, at *3 (N.D. Tex. Jan. 20, 2017) (“[T]he amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery. . . . [A] party seeking to resist discovery . . . still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation.”).

- **8th Cir. Cor Clearing, LLC v. Calissio Res. Grp.,** 2016 WL 2997463, at *2 (D. Neb. May 23, 2016) (quoting pre-amendment case law for the proposition that a “party seeking discovery must satisfy some threshold showing of relevancy before discovery is required.”) But, “[o]nce that threshold has been met, the resisting party ‘must show specifically how . . . [the request] is not relevant or how the discovery is overly broad, burdensome, or oppressive.”) (citations omitted); Zurich Am. Ins. v. Andrew, 2016 WL 2350115, at *2 (D. Neb. May 4, 2016) (“Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity the information they hope to obtain and its importance to their case.”); Sprint Commc’ns. Co. v. Crow Creek Sioux Tribal Court, 316 F.R.D. 254, 276 (D. S.D. Feb. 26, 2016) (requesting party must show that “requested information falls within the scope of discovery under Rule 26(b)(1). . . . Once the requesting party has satisfied its threshhold showing, the burden then shifts to the party resisting discovery to show specific facts demonstrating that the discovery is irrelevant or disproportional.”); De Rossitte v. Correct Care Sols., Inc., 2018 U.S. Dist. LEXIS 191774, at *9–10 (W.D. Ark. Nov. 9, 2018) (the court affirmed a district order, which, although quoted an older version of Rule 26, considered the correct proportionality factors).

- **9th Cir. Stoba v. Savelogy.com, LLC,** 2016 WL 3356796, at *2 (S.D. Cal. June 3, 2016) (“Once the party seeking discovery establishes that the request meets this broadly-construed relevancy requirement, ‘the party opposing discovery has the burden of showing that the discovery should be prohibited, and the burden of clarifying, explaining or supporting its objections’”); Dao v. Liberty Life Assur. Co., 2016 WL 796095, at *3 (N.D. Cal. Feb. 23, 2016) (“[W]hile the language of the Rule has changed, the amended rule does not actually place a greater burden on the parties with respect to their discovery obligations, including the obligation to consider proportionality, than did the previous version of the Rule.”); Clymore v. Fed. R.R. Admin., 2015 WL 7760086, at *2 (E.D. Cal. Dec. 2, 2015) (party requesting discovery has burden of showing that it has satisfied the requirements of Rule 26); RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc., 2017 WL 2908869, at *7 (D. Nev. July 6, 2017) (“Generally, the party opposing discovery has the burden of showing that it is irrelevant, overly broad, or unduly burdensome. When a request is overly broad on its face or when relevancy is not readily apparent, however, the party seeking discovery has the burden to show the relevancy of the request.”); Fernandez v. Cox, 2017 WL 4873066, at *3 (D. Nev. Oct. 26, 2017) (plaintiff appealed order denying discovery on proportionality grounds and claimed that party seeking discovery does not bear burden of proving proportionality; decision was upheld because Advisory Committee Notes say that restoring proportionality calculation does not change court’s responsibility to consider proportionality).

- **10th Cir. Bd. of Comm’rs of Shawnee Cty. v. Daimler Trucks N. Am., LLC,** 2015 WL 8664202, at *2 (D. Kan. Dec. 11, 2016) (“where the relevance of a particular request is not readily apparent, the proponent of a discovery request must, in the first instance, show the relevance of the requested information to the claims or defenses in the case. Where relevance is apparent, or the proponent of the evidence has shown it is relevant, the burden then shifts to the objectioning party to establish a lack of relevance by demonstrating that the requested discovery either does not come within the scope of relevance as defined by Rule 26(b)(1) or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad discovery.”); Frick v.
The burden of discovery is not limited to issues raised by the pleadings. Discovery is not necessarily limited by the proportionality of the issue, even if not directly related to the malfunction at issue. (Eramo v. Rolling Stone, LLC, 2016 WL 15711, at *10 (E.D.N.Y. Mar. 28, 2018).) The 2015 amendments to rule 26(b)(1) continued . . . narrowing discovery’s substantive scope and injecting courts further into the discovery process. (D.C Cir. United States ex rel. Shamesh v. CA., Inc., 2018 WL 1515711, at *10–11 (E.D.N.Y. Mar. 28, 2018).) (court rejected argument that discovery was not proportional because the claim lacked merit). All proportionality calculations . . . does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality calculations. Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.

Federal rules contemplate liberal discovery.

2d Cir. Am. Fed’n of Musicians v. Sony Music Entm’t, Inc., 2016 WL 2609307, at *3 (S.D.N.Y. Apr. 29, 2016) (“2015 amendments did not alter the underlying concept of relevance, which ‘is a matter of degree, and the standard is applied more liberally in discovery than it is at trial’”) (quoting Vaigasi v. Solow Mgmt. Corp, 2016 WL 616386, at *11 (S.D.N.Y. Feb. 16, 2016)); Harris v. Otis Elevator Co., 2018 WL 1044560, at *2 (W.D.N.Y. Feb. 26, 2018) (Because “relevancy creates a broad vista for discovery,” in a case regarding an elevator malfunction, plaintiff was entitled to discovery of all repairs and maintenance records for the elevator at the time of the issue, even if not directly related to the malfunction at issue); N. Shore–Long Island Jewish Health Sys., Inc. v. Multiplan, Inc., 2018 WL 1515711, at *10–11 (E.D.N.Y. Mar. 28, 2018) (court rejected argument that discovery was not proportional because the claim lacked merit).


5 Federal rules contemplate liberal discovery.

10th Cir. Tanner v. McMurray, 405 F. Supp. 3d 1115, 1182 (D.N.M. 2019) (“The 2015 amendments to rule 26(b)(1) continued . . . narrowing discovery’s substantive scope and injecting courts further into the discovery process.”).

11th Cir. Edmonson v. Velvet Lifestyles, LLC, 2016 WL 7048363, at *7 (S.D. Fla. Dec. 5, 2016) (“Plaintiffs here must make a ‘threshold showing’ and confront reality that ‘mere speculation that information might be useful will not suffice.’”) (quoting Sprint Commc’n’s Co. v. Crow Creek Sioux Tribal Court, 316 F.R.D. 254, 263 (D.S.D. Feb. 26, 2016)); Clark v. Hercules, Inc., 2017 WL 3316311, at *2 (M.D. Fla. Aug. 3, 2017) (“Restoring the proportionality calculation . . . does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality calculations. Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”).

Cf.


5 Federal rules contemplate liberal discovery.


5 Federal rules contemplate liberal discovery.

Proportionality related to relevance.

- 10th Cir. Kennicott v. Sandia Corp., 327 F.R.D. 454, 471−72 (D.N.M. 2018) (concluding that the 2015 amendment did not change the established principle that discovery in employment discrimination cases is broad, and complaints by employees regarding pregnancy discrimination, sexual harassment, hostile work environment, and retaliation were relevant to Plaintiffs’ gender discrimination claim).

- 3d Cir. CDK Glob., LLC v. Tulley Auto. Grp., Inc., 2016 WL 1718100, at *8 (D. N.J. Apr. 29, 2016) (magistrate judge found “a nexus between the requested information” and defendant’s counterclaims after weighing proportionality factors in denying plaintiff’s motion to quash non-party subpoenas); Harrington v. Bergen, 2017 WL 4387373, at *2 (D.N.J. Oct. 3, 2017) (Court upheld magistrate judge’s denial of discovery request; it was not arbitrary, fanciful, or unreasonable for the judge to conclude that relevancy and proportionality requirements in Rule 26 precluded burdensome and speculative inquiry into single, unrelated case” from nine years prior); Nanticoke Lenni-Lenape Tribal Nation v. Porrino, 2017 WL 4155368, at *3 (D.N.J. Sept. 19, 2017) (documents relating to plaintiff’s tribal status, including drafts, were highly relevant to procedural process and equal protection claims; relevance, along with no material burden or expense for production, rendered discovery proportional); Spear v. Westfield Ins., 2017 WL 5454459, at *4 (E.D. Pa. Nov. 14, 2017) (“Even where the documents sought are plainly relevant, Rule 26 requires production to be proportional to the needs of the case.”); Marjam Supply Co. of Fla. v. Pliteq, Inc., 2018 WL 1456614, at *6−7 (S.D. Fla. Mar. 23, 2018) (communications and documents from after the parties stopped doing business were relevant, but the request was not proportional because it had no time limit).
- 6th Cir. Waters v. Drake, 222 F. Supp. 3d 582, 611 (S.D. Ohio 2016) (court found discovery request was not proportional because it was not relevant to plaintiff’s claims); Owens v. Liberty Life Assurance Co. of Boston, 2016 WL 6156182, at *3 (W.D. Ky. Oct. 21, 2016) (rejecting proportionality challenge because magistrate judge significantly narrowed requested scope of discovery to relevant information); Escalera v. Bard Med., 2017 WL 4012966, at *5 (W.D. Ky. Sept. 12, 2017) (court granted discovery request for employees’ sales information where request was relevant to specific claim; therefore, “requests [were] proportional”); Kitchen v. Corizon Health, Inc., 2018 WL 286425, at *4 (W.D. Mich. Jan. 4, 2018) (discovery request denied where requesting party only discussed relevance, but where proportionality was not addressed or demonstrated); Robinson v. Wells Fargo Bank, N.A., 2018 WL 1202826, at *4 (S.D. Ohio Mar. 7, 2018) (because fees were claimed as damages, a fee agreement was relevant and discoverable).
summary of the scope of discovery, where data—albeit less reliable and more limited data—was available elsewhere).

- **11th Cir.** Noveschen v. Bridgewater Assocs., 2016 WL 3902542, at *2 (S.D. Fla. Feb. 22, 2016) (court found discovery request to be relevant, proportional, and not burdensome); Flynn v. Square One Distrib., Inc., 2016 WL 2997673, at *4 (M.D. Fla. May 25, 2016) (court noted that to be discoverable information on development of product warning label must be relevant and proportional); Steel Erectors, Inc. v. AIM Steel Int'l, 312 F.R.D. 673, 676–77 (S.D. Ga. Jan. 4, 2016) (court denied plaintiff’s motion to compel irrelevant material to prevent needless litigation costs, which would defeat Rule 26(b)(1)’s goal of proportionality); Edmonson v. Velvet Lifestyles, LLC, 2016 WL 7048363, at *6 (S.D. Fla. Dec. 5, 2016) (“Proportionality and relevance are ‘conjoined’ concepts; the greater the relevance... the less likely its discovery will be found to be disproportionate.”) (quoting Viagasi v. Solow Mgmt. Corp., 2016 WL 616386, at *14 (S.D.N.Y. Feb. 16, 2016)).

> Cf.

- **2d Cir.** Black v. Buffalo Meat Serv., 2016 WL 6962444, at *5 (W.D.N.Y. Nov. 29, 2016) (Although information was relevant, “relevant is [but] one aspect of what is now discoverable under the amended Rule 26; a key factor is the proportionality of obtaining relevant material.”).


> “Reasonably calculated to lead to admissible evidence” phrase deleted.

- **2d Cir.** Edebeli v. Bankers Standard Ins., 2016 WL 4621077, at *1 (E.D. N.Y. Sept. 6, 2016) (“[R]ationale behind the elimination of [the phrase “reasonably calculated to lead”] is the finding that it ‘has been used by some, incorrectly, to define the scope of discovery.’”) (quoting Viagasi v. Solow Mgmt. Corp., 2016 WL 616386, at * 13 (S.D.N.Y. Feb. 16, 2016)); Sibley v. Choice Hotels Int’l, 2015 WL 9413101, at *2 (E.D.N.Y. Dec. 22, 2015) (“[N]otably absent from the present Rule 26 is the all too familiar, but never correct, iteration of the permissible scope [of] discovery as including all matter that is ‘reasonably calculated to lead to’ the discovery of admissible evidence.”); Pothen v. Stony Brook Univ., 2017 WL 1025856, at *3 (E.D.N.Y. Mar. 15, 2017) (same); Bagley v. Yale Univ., 2015 WL 8750901, at *8 (D. Conn. Dec. 14, 2015) (amendments to Rule 26 deleted “reasonably calculated to lead to admissible evidence’ language); Grief v. Nassau, 2017 WL 3588936, at *3 (E.D.N.Y. Aug. 18, 2017) (“[T]he new Rule disposes of this language, ending the incorrect, but widely quoted, misinterpretation of the scope of discovery.”); Huayuan Chen v. Stony Brook Univ., 2018 WL 1368031, at *5 (E.D.N.Y. Mar. 16, 2018) (“This language was never intended to define the scope of discovery, but was intended only to make clear that discovery is not limited by the concept of admissibility.”).
• **3d Cir.** *Cole’s Wexford Hotel v. Highmark Inc.*, 2016 WL 5025751, at *10 (W.D. Pa. Sept. 20, 2016) (“Supreme Court in *Oppenheimer* did not construe just the term ‘relevant’; rather, the Supreme Court construed the phrase ‘relevant to the subject matter involved in the pending action,’ which is a phrase that no longer appears in amended Rule 26(b)(1). The Court’s definition of ‘relevant to the subject matter involved in the pending action,’ therefore, has no application to the text of amended Rule 26(b)(1), and it would be inappropriate to continue to cite to *Oppenheimer* for the purpose of construing the scope of discovery under amended Rule 26(b)(1).”); *In re Symbol Tech. Inc. Sec. Litig.*, 2017 WL 1233842, at *7, *10–11 (E.D.N.Y. Mar. 31, 2017) (Court noted that although this phrase was deleted, Rule 26 “still permits a wide range of discovery based on relevance and proportionality,” and granted discovery despite plaintiff’s assertion that it would not lead to admissible evidence.).

• **4th Cir.** *In re Am. Med. Sys., Inc.*, 2016 WL 3077904, at *4 (S.D. W. Va. May 31, 2016) (“Although the rule was recently amended to remove language permitting the discovery of ‘any matter’ relevant to the subject matter involved in the action . . . and ‘relevant information . . . reasonably calculated to lead to the discovery of admissible evidence,’ the rule in its current form still contemplates the discovery of information relevant to the subject matter involved in the action, as well as relevant information that would be inadmissible at trial.”) (emphasis in original).

• **5th Cir.** *Mendoza v. Old Republic Ins.*, 2017 WL 636069, at *4–6 (E.D. La. Feb. 16, 2017) (Court allowed, as proportional and relevant, discovery of a handwritten settlement agreement with certain terms scratched out, because it found that agreement was relevant to plaintiffs’ claim that defendants used settlement agreement “to manufacture a right to removal”); *Lafleur v. Leglue*, 2017 WL 2960541, at *8 (M.D. La. July 11, 2017) (“the question as it pertains to the scope of discovery is relevance and proportionality, not admissibility”), (5th Cir. Aug. 30, 2019); *Alston v. Prairie Farms Dairy*; 2017 WL 4274858, at *3 (N.D. Miss. Sept. 26, 2017) (“As do other jurisdictions, the Court adheres to the ‘fishing expedition rule,’ . . . wherein a request for discovery needs to be relevant in light of the case.”).

• **6th Cir.** *Quality Mfg. Sys., Inc. v. R/X Automation Sol., Inc.*, 2016 WL 1244697, at *2 (M.D. Tenn. Mar. 30, 2016) (amendments to Rule 26 deleted “reasonably calculated” phrase); *Raub v. Moon Lake Prop. Owners Ass’n*, 2016 WL 6275392, at *2 (E.D. Mich. Oct. 27, 2016) (the phrase was “deleted to address concerns that the exemption was swallowing the limitations placed on the scope of discovery”).

• **7th Cir.** *Arcelormittal Ind. Harbor LLC v. Amex Nooter, LLC*, 2016 WL 614144, at *5, *7 (N.D. Ind. Feb. 16, 2016) (amendments to Rule 26 removed language that relevant information does not need to be admissible if it “is reasonably calculated to lead to the discovery of admissible evidence,” but settlement documents, inadmissible as evidence under Fed. R. Evid. 408, remain discoverable).

• **9th Cir.** *In re Bard IVC Filters Prods. Liability Litig.*, 2016 WL 4943393, at *2 (D. Ariz. Sept. 16, 2016) (“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.’”); *Centeno v. City of Fresno*, 2016 WL 7491634, at *4 (E.D. Cal. Dec. 29, 2016) (same); *Caballero v. Bodega Latina Corp.*, 2017 WL 3174931, at *2 (D. Nev. July 25, 2017) (referring to “reasonably calculated to lead to admissible evidence” as discovery standard is improper); *Dao v. Liberty Life Assurance Co. of Boston*, 2016 WL 796095, at *2 (N.D. Cal. Feb. 23, 2016) (amendments to Rule 26 deleted language that permitted discovery of any information that “might lead to the discovery of admissible evidence.”); *San Diego Unified Port Dist. v. Nat’l Union Fire Ins. Co. of Pittsburg, Pa.*, 2017 WL 3877732, at *1 (S.D. Cal. Sept. 5, 2017) (court upbraids defendant’s counsel who “appears unaware” of December 2015 rule change, misstating Rule twice and saying that “[w]ith more than 1100 lawyers in 41 offices in the United States, the firm should have received news of the amendments by now”); *Estate of Sandra Vela v. County of Monterey*, 2017 WL 6316737, at *2 (N.D. Cal. Dec. 11, 2017) (On appeal, although trial judge’s “comment regarding the potential impact of production on trial . . . was not an adequate basis for denying production . . . the comment does not appear to have been critical to his ruling,” so ruling was upheld); *Frappied v. Affinity Gaming Black Hawk, LLC*, 2018 WL 1899369, at *6 (D. Colo. Apr. 20, 2018) (Courts previously held that post-termination employment records were reasonably calculated to lead to admissible evidence. Under the new proportionality standard, in an improper termination suit, “such information has limited probative value,” as do disciplinary or attendance records from another employer.); *Physicians Healthsource, Inc. v. Masimo Corp.*, 2019 U.S. Dist. LEXIS 78024, at *12–13 (C.D. Cal. Feb. 27, 2019) (precedents which used the “reasonably calculated” language but whose analysis did not hinge on it remain applicable).

• **10th Cir.** *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *12 (D.N.M. Apr. 1, 2016) (“A district court is not . . . ‘required to permit plaintiff to engage in a ‘fishing expedition’ in the hope of supporting his claim.’”);
11th Cir. Miner, Ltd. v. Keck, 2019 U.S. Dist. LEXIS 111023, at *8 (M.D. Fla. July 3, 2019) (objections that the discovery is not “reasonably calculated to lead to the discovery of admissible evidence” are “boilerplate and not a correct statement of the scope of discovery”).

Cf.

1st Cir. Green v. Cosby, 2015 WL 9594287, at *2 (C.D. Mass. Dec. 31, 2015) (amendments to Rule 26 deleted “reasonably calculated to lead to the discovery of admissible evidence” phrase. “As the Supreme Court has instructed, because discovery itself is designed to help define and clarify the issues, the limits set forth in Rule 26 must be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.”).


3d Cir. Haines v. Cherian, 2016 WL 831946, at *3 (M.D. Pa. Feb. 29, 2016) (“[D]iscovery need not be confined to items of admissible evidence but may encompass that which appears reasonable calculated to lead to the discovery of admissible evidence.”); Dixon v. Williams, 2016 WL 631356, at *2 (M.D. Pa. Feb. 17, 2016) (discoverable information is item that is “relevant or may lead to the discovery of relevant information.”); Wertz v. GEA Heat Exchangers Inc., 2015 WL 8959408, at *1 (M.D. Pa. Dec. 16, 2015) (under Rule 26’s liberal discovery policy, discoverable information is item that is “relevant or may lead to the discovery of relevant information.”).

4th Cir. Townsend v. Nestle Healthcare Nutrition, Corp., 2016 WL 1629363, at *3 (S.D. W. Va. Apr. 22, 2016) (“[R]ule 26(b)(1) does not precisely define relevancy, . . . Although the rule was recently amended to remove language permitting the discovery of ‘any matter relevant to the subject matter involved in the action’, . . . and ‘relevant information . . . reasonably calculated to lead to the discovery of admissible evidence,’ the rule in its current form still contemplates the discovery of information relevant to the subject matter involved in the action, as well as relevant information that would be inadmissible at trial.”); Fid. & Guar. Life Ins. v. United Advisory Grp., 2016 WL 632025, at *4 (D. Md. Feb. 17, 2016) (discoverable information must be “reasonably calculated to lead to the discovery of admissible evidence.”); Moses H. Cone Mem’l Hosp. Operating Corp. v. Conifer Physician Servs., Inc., 2016 WL 430494, at *6 (M.D.N.C. Feb. 3, 2016) (denial of request for tax returns because information would not “reasonably lead to relevant information” pertinent to parties’ claims); White v. Sam’s E., Inc., 2016 WL 205494, at *1 (S.D. W. Va. Jan. 15, 2016) (discoverable information need not be admissible if it is “reasonably calculated to lead to the discovery of admissible evidence.”).

5th Cir. La. Crawfish Producers Ass’n v. W. v. Mallard Basin, Inc., 2015 WL 8074260, at *2 (W.D. La. Dec. 4, 2015) (relevancy means “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”); Stancu v. Hyatt Corp., 2018 WL 888909, at *5 (N.D. Tex. Feb. 14, 2018) (although some Rule 34(a) requests in non-class action lawsuit aimed at pattern-or-practice method of proof may satisfy Rule 26(b), court denied such requests because they were “neither narrowly crafted nor reasonably calculated to obtain evidence to prove claim”).


7th Cir. Murillo v. Kohl’s Corp., 2016 WL 4705550, at *2 (E.D. Wisc. Sept. 8, 2016) (“For the purpose of discovery, relevancy is construed broadly to encompass ‘any matter that bears on, or that reasonably could lead to
other matter[s] that could bear on, any issue that is or may be in the case.’”); Elliott v. Superior Pool Prods., LLC, 2016 WL 29243, at *2 (C.D. Ill. Jan. 4, 2016) (relevancy refers to requirement that discoverable information must be “reasonably calculated to lead to the discovery of relevant information.”); Washenaw Cty. Empls. Ret. Sys. v. Walgreen, 2019 U.S. Dist. LEXIS 198978, at *10–11 (N.D. Ill. Nov. 15, 2019) (the discovery’s relevance to and impact on the inadmissibility of Rule 408 settlement materials remains important: “the closer the discovery’s purpose is to offering the evidence in a manner that would be barred,” the greater the danger of undermining policies of Rule 408 is, and the more likely courts are to find the discovery disproportionate.).

- 8th Cir. Orduno v. Pietrzak, 2016 WL 5853723, at *3 (D. Minn. Oct. 5, 2016) (favorably quoting Oppenheimer passage); Harper v. Unum Grp., 2016 WL 4508238, at *1 (W.D. Ark. Aug. 29, 2016) (“Relevancy under Rule 26 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 that is or may be in the case.”); Schultz v. Sentinel Ins. Co., 2016 WL 3149686, at *3 (D.S.D. June 3, 2016) (“Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings. Relevancy . . . encompass[es] ‘any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’”); Cor Clearing, LLC v. Calissio Res., Inc., 2016 WL 2997463, at *2 (D. Neb. May 23, 2016) (“The United States Supreme Court has held that discovery under Rule 26 should be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’”); Hodges v. Pfizer, 2016 WL 1222229, at *2 (D. Minn. Mar. 28, 2016) (discoverable information is “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case”).

- 9th Cir. Gonzalez v. City of Bakersfield, 2016 WL 4474600, at *2 (E.D. Cal. Aug. 25, 2016) (“Relevancy to a subject matter is interpreted ‘broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case.’”); Gibson v. SDCC, 2016 WL 845308, at *4 (D. Nev. Mar. 2, 2016) (relevant information is “information reasonably calculated to lead to the discovery of admissible evidence.”); Lauris v. Novartis, 2016 WL 7178602, at *2 (E.D. Cal. Dec. 8, 2016) (same).

- 10th Cir. XTO Energy, Inc. v. ATD, LLC, 2016 WL 1730171, at *17 (D.N.M. Apr. 1, 2016) (“Relevancy is still [post-2015 amendments] to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any party’s claim or defense.’”) (quoting State Farm Mut. Auto Ins. v. Fayda, 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015)); Arenas v. Unified Sch. Dist. No. 223, 2016 WL 5122872, at *2 (D. Kan. Sept. 21, 2016) (“Relevancy is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense,” despite acknowledging that amendments deleted the phrase.); Roberts v. C.R. Eng., Inc., 2017 WL 5312116, at *6 (D. Utah Nov. 13, 2017) (“The evidence sought also has an equally plausible purpose of being sought for trial.”).

- D.C. Cir. United States ex rel. Shamash v. CA, Inc., 2016 WL 74394, at *6–7 (D.D.C. Jan. 6, 2016) (amendments to Rule 26 deleted “reasonably calculated to lead to the discovery of admissible evidence” phrase because it was “often misconstrued to define the scope of discovery,” but “relevancy is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense.”) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)).

* Proportionality depends on needs of case.


- 2d Cir. Sky Med. Supply Inc. v. SCS Support Claim Servs., 2017 WL 1133349, at *11 (E.D.N.Y. Mar. 24, 2017) (because claims in insurance dispute were narrow in scope and pertained to three-year time period, requested discovery of sensitive financial information for ten-year period was not proportional because it was overly broad and would present undue burden that would outweigh potential benefits of production); Conley v. Brysgeil, 2018 WL 1960109, at *4 (D. Conn. Apr. 25, 2018) (In an officer brutality case, court ordered production of a video of the incident, even though photos had already been produced); Osucha v. Alden State Bank, 2019 U.S. Dist. LEXIS 214744, at *13–14 (W.D.N.Y. Dec. 12, 2019) (seeking personnel records from all coworkers is not proportional to a harassment case against three specific co-workers when Plaintiff does not allege claims of other affected coworkers or allege a class action).

• 6th Cir. Buchanan v. Chi. Transit Auth., 2016 WL 7116591, at *8 (N.D. Ill. Dec. 7, 2016) (court denied request for records supporting defendant’s claim that leave-notice procedure was “usual and customary,” in FMLA case, because plaintiff “vastly overstated the need” for employees’ records substantiating compliance with notice requirements, burden to retrieve information was substantial, and there were other methods of discovery available to collect same information); In re ClassicStar Mare Lease Litig., 2017 WL 27455, at *3, *4–5 (E.D. Ky. Jan. 3, 2017) (“The particular context—attempting to ‘follow the money’ in collecting a judgment through evaluating the interconnectivity of numerous related entities—indicates to the Court that the creditors here have highly restrained access to the information sought, suggesting subpoenaed production is appropriate.”); Sinigaglio v. Fed. Nat’l Mortgage Ass’n, 2018 WL 1806055, at *2 (D. Minn. Apr. 17, 2018) (for an incident that occurred in 2013, discovery regarding other medical providers for an 11-year span was overly broad; court narrowed discovery to other medical providers between 2010 and 2016).


• 2d Cir. Shipstad v. One Way or Another Prods., LLC, 2017 WL 2462657, at *4 (S.D.N.Y. June 6, 2017) (in motion for sanctions, defendants cannot raise proportionality objections after court granted motion to compel).

• 5th Cir. Wal-Mart v. Tex. Alcoholic Beverage Comm’n, 2016 WL 5922315, at *2 (W.D. Tex. Oct. 11, 2016) (“Sheer number of attorneys who have made appearances in the case (24 by the Court’s count) is a persuasive demonstration of the importance of the issues at stake here, the value of the case, and that the parties have significant resources available to them. Proportionality is thus not at issue in this discovery dispute.”)

• 11th Cir. Nielsen Audio, Inc. v. Clem, 2017 WL 4402518, at *2 (M.D. Fla. Oct. 3, 2017) (because “the nexus of the parties’ dispute is the Tampa market,” the magistrate judge was correct to deny discovery of documents relating to plaintiff’s business throughout the United States).

9 Importance of issues at stake critical in proportionality analysis.

• 3d Cir. Fassett v. Sears Holdings Corp., 2017 WL 386646, at *4 (M.D. Pa. Jan. 27, 2017) (“Although this is not a case involving, for instance, constitutional rights or matters of national significance, to these particular litigants, it [serious bodily injuries] is a matter of grave import.”); Hooper v. Safety-Kleen Sys., Inc., 2017 WL 2720288, at *1 (W.D. Pa. June 23, 2017) (issues at stake were of importance since plaintiff “sustained severe injuries” that “are more than significant and are long-lasting,” and also “incurred hefty medical bills and other losses,” justifying requested deposition of apex executive who had personal knowledge).

• 5th Cir. OJ’s Janitorial & Sweeping Serv., LLC v. Syncom Space Serv., LLC, 2017 WL 3087905, at *3 (E.D. La. July 20, 2017) (court denied discovery request after considering importance of discovery request because it was “unclear how important—if at all”—the requested discovery was or how relevant it was in relation to issues in litigation”).


• 7th Cir. DeLeon-Reyes v. Guevara, 2020 U.S. Dist. LEXIS 47333, at *16 (N.D. Ill. Mar. 18, 2020) (cases involving “murder, kidnapping, police brutality” and wrongful convictions “implicate not only the loss of liberty, but the legitimacy of the criminal justice system”).

• 3d Cir. Liberty Int’l Underwriters Can. v. Scottsdale Ins. Co., 2017 WL 721105, at *4 (D. N.J. Feb. 23, 2017) (“even if facts are ‘vital, highly probative, and directly relevant or go to the heart of an issue,’ this does not justify a privilege waiver”).
10 Proportionality addresses whether discovery would assist in vindicating personal or public values.


- **3d Cir.** Vay v. Huston, 2016 WL 1408116, at *6 (W.D. Pa. Apr. 11, 2016) (court considered public value of vindicating constitutional rights); **CFPB v. Navient Corp.,** 2018 WL 2088760, at *2 (M.D. Pa. May 4, 2018) (Where the case was “a massive piece of litigation which raises multiple important issues that have the potential of impacting thousands, if not hundreds of thousands, of student loan borrowers,” the court was “not inclined to sustain a proportionality objection without a showing that the sought after material is unimportant . . . and the burden or expense . . . is excessive.”).

- **4th Cir.** Santiago v. S. Health Partners, 2016 WL 4435229, at *3 (M.D.N.C. Aug. 19, 2016) (“For proportionality purposes, however, the reduced monetary stakes represents ‘only one factor, to be balanced against other factors.’”).

- **5th Cir.** Cain v. City of New Orleans, 2016 WL 7156071, at *7 (E.D. La. Dec. 8, 2016) (“As to the specific proportionality factors, the issues at stake [due process rights to neutral judge abused when portion of court-imposed fines finance court functions] are important matters of civil rights and public interest.”).

- **D.C. Cir.** Oxbow Carbon & Minerals LLC v. Union Pacific R.R., 2017 WL 4011136, at *4 (D.D.C. Sept. 11, 2017) (court ordered discovery on basis of proportionality, where party resisting discovery stated that favorable ruling would benefit all of America’s shippers and consumers because it would stop “abusive behavior” that prevents competition and “shortchanges the American consumer”).

11 Public policy considerations.


- **2d Cir.** Pothen v. Stony Brook Univ., 2017 WL 1025856, at *3 (E.D.N.Y. Mar. 15, 2017) (denying discovery of non-party’s personnel file due to privacy concerns and because information could be obtained elsewhere); **Carl v. Edwards,** 2017 WL 4271443, at *9 (E.D.N.Y. Sept. 25, 2017) (granting discovery of business documents, but denying request for tax documents because plaintiff failed to meet the higher burden for production of tax documents: (1) relevance; (2) compelling need because information is not obtainable elsewhere).

- **4th Cir.** Chen v. Md. Dept. of Health and Mental Hygiene, 2017 WL 1533988, at *3 (D. Md. Apr. 27, 2017) (in case involving denial of unemployment benefits, court denied discovery of plaintiff’s tax returns and limited discovery of plaintiff’s financial records to records dated after plaintiff’s termination, because both requests were disproportional in light of their minimal relevance and excessive intrusiveness into plaintiff’s private information); **In re Va. Dep’t of Corrections v. Jordan,** 2017 WL 5075252, at *19 (E.D. Va. Nov. 3, 2017) (discovery denied where “Virginia’s ability to secure the drugs necessary to carry out legal injections would be jeopardized, if not totally frustrated, should the supplier of those drugs be disclosed”).

- **5th Cir.** Butler v. Craft, 2017 WL 1429896, at *2, *3 (W.D. La. Apr. 19, 2017) (“[S]trong public policy disfavors disclosure of personnel records because disclosure would invade employees’ privacy, and because firms might cease to frankly criticize and rate employee performance for fear of potential discovery…. Thus, courts must balance the legitimate discovery value of potential impeachment evidence with the legitimate interests of an employer —particularly a non-party employer—in safeguarding sensitive information about employees.”); **Randleman v. La. Sugar Refining, LLC,** 2018 WL 2045396, at *4 (E.D. La. May 2, 2018) (“Discovery of the personnel files of non-party individual employees presents special concerns about [their] privacy rights. . . . The court must balance the interests of the parties in obtaining relevant discovery against the privacy interests of individual non-parties.”); **Tingle v. Herbert,** 2018 WL 1726667, at *7–8 (M.D. La. Apr. 10, 2018) (court denied request for forensic examination of plaintiff’s personnel cell phone because defendant did not address privacy concerns and defendant already had possession of plaintiff’s work cell phone).

- **6th Cir.** Barber v. Heslep, 2017 WL 3097495, at *3 (S.D. W.Va. July 20, 2017) (“[W]hen comparing the potential litigation benefits associated with a release of [plaintiff’s teenage mental health] records against the need to protect their confidentiality, the importance of the records is substantially outweighed by the Plaintiffs[’] right to keep those records confidential [under West Virginia law].”); **NetJets Aviation, Inc. v. NetJets Ass’n of Shared Aircraft Pilots,** 2017 WL 3484101, at *4 (S.D. Ohio Aug. 15, 2017) (“[R]eveling the identities of the individuals posting on the message board may chill associational rights and deter membership due to fears of reprisal. However, producing the documents with all identifying information redacted removes the chilling effect.”); **Annabel v. Frost,** 2017 WL 4349282, at *1 (E.D. Mich. Sept. 30, 2017) (“This request is both irrelevant and non-
discoverable because of institutional security concerns . . . [which] also runs counter to the proportionality standard of Rule 26(b).”).

- **7th Cir.** Perez v. Mueller, 2016 WL 3360422, at *1 (E.D. Wis. May 27, 2016) (in ERISA case by Secretary of Labor, court considered cost of litigation to public in determining proportionality of defendants’ discovery requests.); id. at *3 (court viewed government’s pursuit of litigation over several years at taxpayers’ expense as indicative of important public-policy weight in assessing whether discovery request was proportional to needs of case.); Simon v. Northwestern Univ., 2017 WL 467677, at *2 (N.D. Ill. Feb. 3, 2017) (court noted “the loss of liberty alone” resulting from fabricating false evidence in criminal trial was an “extremely significant” public policy consideration, but found “this case to be of utmost importance” because it questioned “the legitimacy of the criminal justice system.”); Washtenaw Cty. Emples. Ret. Sys. v. Walgreen, 2019 U.S. Dist. LEXIS 198978, at *18 (N.D. Ill. Nov. 15, 2019) (social policies under the inadmissible evidence rules should be considered).

- **8th Cir.** Hurd v. City of Lincoln, 2017 WL 6542123, at *2 (D. Neb. Dec. 21, 2017) (denying deposition of mayor where requesting party had already spent 40 hours depositing witnesses and 6,500 relevant emails were produced, none of which was to or from the mayor; court imposed higher burden for deposing government official and held that requesting party had failed to demonstrate that deposition was necessary in light of that burden).

- **9th Cir.** Anderson v. Pacific Crane Maint. Co., 2017 WL 3534576, at *3 (W.D. Wash. Aug. 17, 2017) (court allowed discovery of privacy material retained by third party asserting that “Defendant can rely on the parties' stipulated protective order …, make redactions as allowable under the rules, or seek protection of the Court”); Amsel v. Gerrard et al., 2017 WL 1383443, at *2 (D. Nev. Apr. 12, 2017) (Tax documents may be discoverable, but “public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns”); Does I-XIX v. Boy Scouts of Am., 2017 WL 3841902, at *4–6 (D. Idaho Sept. 1, 2017) (court granted discovery of records of complaints and claims of sexual assault; even though they “contain sensitive material and implicate significant privacy concerns,” a protective order and redactions “mitigate[s] these concerns”); Acosta v. Wellfleet Comm’ns, LLC, 2017 WL 5180425, at *6–7 (D. Nev. Nov. 8, 2017) (court recognized that although individuals have no privacy right in their bank accounts, privacy may be considered in discovery requests; court ordered discovery of bank account information for businesses associated with defendant’s address only for those businesses that plaintiff could demonstrate were connected to defendant); Stokes v. City of Visalia, 2018 WL 1116548, at *6–7 (E.D. Cal. Feb. 26, 2018) (despite objections, court ordered broad discovery of information that related to the cause of action and damages, but court limited discovery relating to plaintiff’s personal finances).

- **10th Cir.** EEOC v. Centura Health, 2017 WL 3821781, at *10 (D. Co. Sept. 1, 2017) (“The Court is not aware of [precedent] that addresses . . . whether non-charging employees’ privacy interests in their medical information require the EEOC to make a heightened showing of need, or require additional protection . . .”).

- **11th Cir.** Gilmore v. L.D. Drilling, Inc., 2017 WL 3116576, at *2 (D. Kan. July 21, 2017) (court denied discovery of plaintiff’s bank records and credit card statements within four years that reflect purchases at locations that sold alcohol because defendant failed to address proportionality factors other than relevance, and request was overbroad, unduly burdensome, and embarrassment outweighed potential relevance).

- **D.C. Cir.** Buzzfeed v. DOJ, 318 F. Supp. 3d 347, 360–61 (D.D.C. 2018) (“the scope of legal protections afforded to media organizations who publish source documents, especially in matters of significant national and international attention” is an important issue).

   Cf.

- **4th Cir.** Chen v. Md. Dept. of Health and Mental Hygiene, 2017 WL 1533988, at *2 (D. Md. Apr. 27, 2017) (granting in part defendant’s discovery request for plaintiff’s financial records despite plaintiff’s objection that records were private information, in part because plaintiff had already produced some financial information without objection).

- **9th Cir.** Natural-Immunogenics Corp. v. Newport Trial Grp., 2019 U.S. Dist. LEXIS 152610, at *24 (C.D. Cal. Mar. 19, 2019) (“no matter how strong the public interest [is] . . . the Court must draw a line past which discovery is no longer proportional to the needs of the case” based on other proportionality factors).


12 Weight of amount in controversy.

- **2d Cir.** *Greater N.Y. Taxi Ass’n v. City of N.Y.*, 2017 WL 4012051, at *5 (S.D.N.Y. Sept. 11, 2017) (court deemed four additional custodians out of requested eight to be proportional, due to allegations, amount of money at stake—“tens of millions of dollars”—size of enterprise, and value of custodians’ documents).


- **4th Cir.** *TBC, Inc. v. DEI Sales, Inc.*, 2017 WL 4151261, at *7 (D. Md. Sept. 19, 2017) (court held that production time of five days and cost of $5,000 was not unduly burdensome in comparison to amount in controversy; rather, it was “readily accessible and of critical importance to the claims”).

- **5th Cir.** *Fidelis Grp. Holdings, LLC v. Chalmers Auto., LLC*, 2016 WL 6157601, at *3 (E.D. La. Oct. 24, 2016) (“Given that the amount in controversy is barely above [$75,000] . . . the request[s] are disproportionate and beyond the scope discovery”); *Toro v. Coastal Indus.*, 2018 WL 2122881, at *4 (M.D. La. May 7, 2018) (the only proportionality factor that favors defendants is their claim that the weight in controversy is less than $15,000; however, because the other factors favor plaintiff and because plaintiff never limited claim to $15,000, discovery was proportional).


- **9th Cir.** *Gottesman v. Santana*, 2017 WL 5889765, at *6 (S.D. Cal. Nov. 29, 2017) (Defendants argued that “preliminary numbers” showed that amount in controversy was minimal, but requested information was nevertheless relevant because “plaintiff seeks the information at issue, in part, to establish the amount in controversy.”).

13 Relative access to information.

- **1st Cir.** *Cont’l W. Ins. Co. v. Opechee Constr. Corp.*, 2016 WL 865232, at *3 (D. N.H. Mar. 2, 2016) (information requested of former employees was “not proportional to needs of the case . . . given the parties’ relative access to the requested information and their respective resources.”).

- **3d Cir.** *Vay v. Huston*, 2016 WL 1408116, at *5 (W.D. Pa. Apr. 11, 2016) (defendant’s greater access to information weighed in favor of finding extensive discovery to be proportional); *Occidental Chem. Corp. v. 21st Century Fox Am., Inc.*, 2019 U.S. Dist. LEXIS 171916, at *101 (D. N.J. Oct. 3, 2019) (granting Defendant’s request when the data is in Plaintiff’s possession and a substantial amount of them “is in electronic format and can be produced in a matter of weeks”).

- **6th Cir.** *Albritton v. CVS*, 2016 WL 3580790, at *4 (W.D. Ky. June 28, 2016) (court held that information in the sole possession of defendant is a fact weighing in favor of proportionality; the “touchstone” of revised scope of discovery); *Kelley v. Apria Healthcare, Inc.*, 2016 WL 737919, at *4 (E.D. Tenn. Feb. 2, 2016) (court considered defendant’s lack of access to confidential final settlement agreement in ordering production subject to protective order).

- **7th Cir.** *Maui Jim, Inc. v. Smartbuy Guru Enter.*, 2018 WL 894619, at *3 (N.D. Ill. Feb. 14, 2018) (court granted discovery of supply chain information despite confidentiality objections, reasoning that, since parties were engaged in business, requesting party was already familiar with producing party’s supply chain).

- **8th Cir.** *Schultz v. Sentinel Ins.*, 2016 WL 3149686, at *6 (D. S.D. June 3, 2016) (court determined that defendant insurance company’s greater access to proof weighed in favor of finding that plaintiff’s discovery requests were proportional); *Ortiz v. Follin*, 2017 WL 3085515, at *6 (D. Colo. July 20, 2017) (court approved subpoena of documents when no other method was available to obtain discoverable information).

- **10th Cir.** *Digital Ally, Inc. v. Util. Assocs.*, 2016 WL 1535979, at *4 (D. Kan. Apr. 15, 2016) (plaintiff argued that discovery was proportional because information was “easy to search or locate, either electronically or in paper files.”).

- **11th Cir.** *Williams v. Am. Int’l Grp.*, 2016 WL 3456927, at *2 (M.D. Ala. June 21, 2016) (court found proportionality analysis weighed in favor of compelling plaintiff to authorize disclosure of private social security disability records because only plaintiff had access to them).
Ease of access to information.

- **2d Cir.** *Patient A v. Vt. Agency of Human Servs.*, 2016 WL 880036, at *3 (D. Vt. Mar. 1, 2016) (court found plaintiff’s discovery request proportional because defendant healthcare service admitted to possessing some responsive data and was obligated under its contract with the state to “track and report information that [was] responsive to certain elements of the proposed deposition topic.”); *Marom v. City of N.Y.*, 2016 WL 7048053, at *2 (S.D.N.Y. Nov. 30, 2016) (discovery request for eight officers’ memo book entries and 108 documents, which were on “readily accessible database,” was not unduly burdensome); *Winfield v. City of N.Y.*, 2018 WL 840085, at *7 (S.D.N.Y. Feb. 12, 2018) (where party objected that requested depositions were burdensome because they would require depositions of multiple witnesses over several days but each witness would only have certain information, parties agreed to “committee” deposition, where all witnesses would be deposed at once).

- **3d Cir.** *Emp. Ins. Co. of Wasau v. Daybreak Express, Inc.*, 2017 WL 2443064, at *4–5 (D. N.J. June 5, 2017) (court ordered discovery, despite purported burden and expense, because it was relevant and it would not be unduly burdensome, since some of the evidence was previously produced for audit).

- **5th Cir.** *In re: Trevino*, 564 B.R. 890, 918, 921 (S.D. Tex. 2017) (Court denied request that “appear[ed] to be an attempt . . . to shift researching public information from [p]laintiffs to . . . [d]efendants under the guise of the discovery process,” noting that “[p]laintiffs have utterly failed to carry their burden of demonstrating that the requested discovery falls within Rule 26.”); *Hernandez v. Baylor Univ.*, 2017 WL 1628992, at *5 (W.D. Tex. May 1, 2017) (court denied deposition request because information sought could be obtained from other sources).

- **6th Cir.** *Owens v. Liberty Life Assurance Co. of Boston*, 2016 WL 6156182, at *3 (W.D. Ky. Oct. 21, 2016) (Although defendant “does not maintain the requested records nor does it have employees whose job duties are dedicated to performing the claim file analysis required,” discovery was warranted because of information’s relevance.).

- **8th Cir.** *Prime Aid Pharm. Corp. v. Express Scripts, Inc.*, 2017 WL 67526, at *4 (E.D. Mo. Jan. 6, 2017) (Court rejected defendant’s proportionality objection because it “amounts to an assertion that it does not maintain its records in a searchable format,” which is inadequate to establish undue burden.).

- **9th Cir.** *Boy Scouts of Am.*, 2017 WL 3841902, at *4 (D. Idaho Sept. 1, 2017) (although files documenting sexual abuse were posted on Los Angeles Times website, court required defendant to produce and authenticate files, because there was little additional burden and plaintiff asserted website was not complete).

- **11th Cir.** *Pilver v. Hillsborough Cty.*, 2016 WL 4129282, at *3 (M.D. Fla. Aug. 3, 2016) (court found discovery request to be disproportional because it sought information that “can be obtained from some other source that is more convenient, less burdensome, or less expensive,” i.e., records in PACER).

Cf.

- **4th Cir.** *In re NC Swine Farm Nuisance Litig.*, 2016 WL 3661266, at *3 (E.D.N.C. July 1, 2016) (court held defendant did not have possession, custody, or control of information and never reached defendant’s argument that plaintiffs’ request for discovery for documents in control of non-party with parent-subsidiary relationship was not proportional because information could be better accessed through subpoenas to third party).

- **5th Cir.** *Dotson v. Edmonson*, 2017 WL 4310676, at *5 (E.D. La. Sept. 28, 2017) (Notion that “mere access is not possession, custody, or control” governs in discovery disputes where employees (e.g., government employees) can access documents but do not have the authority to disclose them).

Burden on personnel resources.


- **10th Cir.** *Panel Specialists, Inc. v. Tenawa Haven Processing, LLC*, 2017 WL 3503354, at *3 (D. Kan. Aug. 16, 2017) (court denied discovery request in part because it would provide minimal probative value and responding party is “small, family owned corporation,” with only one employee in the office who would be responsible for producing all requested material, for whom doing so would take “significant time”).
Parties’ resources not determinative.

- **9th Cir.** Salazar v. McDonald Corp., 2016 WL 736213, at *4 (N.D. Cal. Feb. 25, 2016) (“Consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party.”); Goes Int’l v. Dodur Ltd., 2016 WL 427369, at *4 (N.D. Cal. Feb. 4, 2016) (“although it is a concern, the defendant’s financial wherewithal is not decisive” in producing requested discovery).
- **11th Cir.** Llanten v. Am. Sec. Ins., 2017 WL 951629, at *4 (M.D. Fla. Mar. 10, 2017) (“The mere fact that compliance with an inspection order will cause great labor and expense or even considerable hardship . . . does not of itself require denial of the motion” to compel).
  Cf.

Importance of discovery to resolving case.

- **2d Cir.** Creighton v. City of N.Y., 2016 WL 1178648, at *1 (S.D.N.Y. Mar. 17, 2016) (“Even where relevance may be established, proportionality considerations concerns look to, inter alia, ‘the importance of the discovery in resolving the issues’ in the case.”).
- **3d Cir.** In re Suboxone Antitrust Litig., 325 F.R.D. 551, 558 (E.D. Pa. 2016) (discovery was proportional where information went to “heart” of one theory of liability).
- **4th Cir.** Holcombe v. Helena Chem. Co., 2016 WL 2897942, at *3 (D. S.C. May 18, 2016) (court permitted two additional interrogatory questions beyond maximum because, e.g., information sought was probative of plaintiff’s liability theory).
- **6th Cir.** D.R. v. Mich. Dept. of Ed., 2017 WL 3642131, at *3 (E.D. Mich. Aug. 24, 2017) (court granted discovery regarding “the only defendant shown to be utilizing and setting the policy” for the program at issue, since this could either advance the claim or demonstrate that other theories should be pursued, and could clarify settlement positions); Schall v. Suzuki Motor of Am., Inc., 2017 WL 4050319, at *6 (W.D. Ky. Sept. 13, 2017) (court granted request to obtain testimony from defendant’s corporate representative because the burden and expense was outweighed by its importance to plaintiff’s claim, and there was no less burdensome or expensive option).
- **7th Cir.** DeLeon-Reyes v. Guevara, 2020 U.S. Dist. LEXIS 47333, at *18 (N.D. Ill. Mar. 18, 2020) (discovery of past facts aiming to demonstrate a pattern of practice is only “tangential to the underlying facts of” the issue).
- **8th Cir.** Today’s Office, Inc. v. Steelcase, Inc., 2019 WL 7833954, at *2 (E.D. Ark. May 13, 2019) (ordering response to interrogatory because the resisting party “has failed to show that any burden or expense in providing the information outweighs the likelihood that disclosure will resolve important issues”).
- **9th Cir.** Leadership Studies, Inc. v. Training and Dev., Inc., 2017 WL 2819847, at *5 (S.D. Cal. June 28, 2017) (“A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them.”); Gramercy Grp. V. D.A. Builders, LLC, 2017 WL 5230925, at *4 (D. Haw. Nov. 9, 2017) (court permitted requested deposition when deposition was only way of accessing information, and information was “crucial to the preparation of the case”); Silcox v. AN/PF Acquisitions Corp., 2018 WL 1532779, at *4 (W.D. Wash. Mar. 29, 2018) (court ordered discovery where “evidence . . . appears scarce and the information may aid in resolution of the matter”); Williams v. County of San Diego, 2019 U.S. Dist. LEXIS 91605, at *24 (S.D. Cal. May 31, 2019) (for a Monell claim seeking emotional distress damages, discovery into plaintiff’s mental health history is important to resolving the issues).
- **10th Cir.** Boone v. Tfi Family Servs., Inc., 2016 WL 3124850, at *2 (D. Kan. June 3, 2016) (denying request for protective order in case involving death of child in custody of family services where, e.g., defendant “failed to establish that its resources or burden of the potential expense outweigh[ed] the undeniably important nature of the issues at stake in this case.”).
11th Cir. Herman v. Seaworld Parks & Entm’t, Inc., 2016 WL 3746421, at *3 (M.D. Fla. July 13, 2016) (denying defendant’s motion to compel disclosure of undisputed, unrelated contracts, as irrelevant and, correspondingly, disproportional because they had “no ‘importance’ or ‘likely benefit’ in resolving” contract dispute). Cf.

7th Cir. AVNET, Inc. v. MOTIO, Inc., 2016 WL 3365430, at *3 (N.D. Ill. June 15, 2016) (denying plaintiffs’ motion to strike expert reports in part and rejecting plaintiff’s argument that expert reports that are duplicative and cumulative of earlier expert reports run counter to purpose of proportionality rule and “would inexorably lead to needless increase in cost of litigation.”); 11th Cir. Bingham v. Baycare Health Sys., 2016 WL 4467213, at *4 (M.D. Fla. Aug. 24, 2016) (“[D]iscovery rules do not expressly limit the sources from whom discovery may be sought [when requested documents from another source have been produced], the rules provide that discovery must be proportional to the needs of the case…and must be limited if the discovery sought is unreasonably cumulative, duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”).

18 Discovery for purposes of class-action certification.

3d Cir. Bell v. Reading Hosp., 2016 WL 162991, at *2 (E.D. Pa. Jan. 14, 2016) (discovery was not disproportionate because information would assist in determining whether final certification of class was appropriate); In re: Riddell Concussion Reduct. Litig., 2016 WL 4119807, at *4 (D.N.J July 7, 2016) (discovery request was proportional because, e.g., information was “relevant to important class certification requirements.”).

4th Cir. Spendlove v. RapidCourt, LLC, 2019 U.S. Dist. LEXIS 220392, at *28 (E.D. Va. Dec. 23, 2019) (“[I]n a class action under the FCRA, documents relating to whether [a party] is subject to the FCRA are clearly relevant and discoverable.”).


7th Cir. Miner v. Gov’t Payment Serv., Inc., 2017 WL 3909508, at *4 (N.D. Ill. Sept. 5, 2017) (The “proportionality standard further supports the notion that pre-certification discovery should not exceed what is necessary to permit the Court to make an informed decision on class certification.”).

8th Cir. Klein v. TD Ameritrade Holding Corp., 2016 WL 7156476, at *2 (D. Neb. Dec. 7, 2016) (court bifurcated merits and class certification discovery and held that discovery of all defendant’s clients and all communications, with no time frame limitation, exceeded scope of class certification issue and was not proportional for purposes of class action certification).

9th Cir. Harris v. Best Buy, 2017 WL 3948397, at *4 (N.D. Cal. Sept. 8, 2017) (in class action, court denied discovery of contact information of all putative class members because “random sampling [was] more appropriate at this juncture”); Martin v. Sysco Corp., 2017 WL 4517819, at *4 (E.D. Cal. Oct. 10, 2017) (“Court has discretion in controlling the scope of pre-certification discovery to balance a plaintiff’s need for discovery to substantiate his class allegations and concerns regarding overly burdensome discovery requests directed on a defendant” where plaintiff aims to support speculative claims); Calleros v. Rural Metro of San Diego, Inc., 2017 WL 4391708, at *3–4 (S.D. Cal. Oct. 3, 2017) (court denied discovery of information for putative class members because plaintiffs offered no evidence of violations in the geographic areas from which they sought information); Ciuffitelli v. Deloitte & Touche LLP, 2016 WL 6963039, at *9 (D. Or. Nov. 28, 2016) (“Limited, focused merits discovery will be allowed while the motions to dismiss are pending” in putative class action.); Carroll v. Wells Fargo & Co., 2016 WL 4696852, at *3 (N.D. Cal. Sept. 8, 2016) (“[C]ourt [found] that the 25% sample [contact information for putative class-action members] requested by Plaintiff [was] fair and proportional to the needs of the case.”); O’Connor v. Uber Techs., Inc., 2016 WL 107461, at *4 (N.D. Cal. Jan. 11, 2016) (defendant’s request for names and contact information of class members, and communications between class members and class counsel was disproportional because discovery lacked importance to resolution of issues); Talavera v. Sun Maid Growers of Cal., 2017 WL 495635, at *4 (E.D. Cal. Feb. 6, 2017) (“[D]iscovery of all putative class member pay, punch, and time information goes to the merits and is beyond the scope of discovery needed in preparing the class certification motion.”); Kimble v. Specialized Loan Serv., LLC, 2018 WL 1693197, at *4–6 (S.D. Cal. Apr. 6, 2018) (court ordered discovery of documents and data stored in electronic databases, and ordered a deposition regarding the databases, when the information was relevant to class certification and where requesting party agreed to limit the dates for the information sought); Magallon v. Robert Half Int’l, 2018 WL 2021346, at *3 (D. Ore. May 1, 2018) (court permitted discovery of signed arbitration agreements, which were “highly relevant to the class membership question); In re Outlaw Labs., 2020 U.S. Dist. LEXIS 39431, at *29, *47 (S.D. Cal. Mar. 5,
2020) (demand letters are important to RICO class action because it “has the potential to factor significantly in numerosity”; damages are also very important for class classification).

- **11th Cir.** *Hankinson v. R.T.G. Furniture Corp.*, 2016 WL 1182768 (S.D. Fla. Mar. 28, 2016) (court determined that discovery of non-party online and out-of-state affiliates was not proportional at pre-class-action certification stage).

19 Discovery related to central issue or a required element of a claim or defense more important than discovery related to peripheral issue.

- **2d Cir.** *Jenkins v. Miller*, 2019 U.S. Dist. LEXIS 187121, at *13 (D. Vt. Oct. 29, 2019) (discovery of medical records is important “[g]iven that the issue of emotional distress is central to the case”).


- **9th Cir.** *Van v. Language Line Servs.*, 2016 U.S. Dist. LEXIS 26440, at *12 (N.D. Cal. Mar. 2, 2016) (party was not required to answer requests for production that sought “low-probative-value information”).

- **10th Cir.** *Ellis v. Hobbs Police Dep’t*, 2019 U.S. Dist. LEXIS 124890, at *9 (D. N.M. July 26, 2019) (while the existence of an “unlawful or improper act” is essential to a whistleblower claim and thus facts about racially discriminatory policing during parties’ employment are important, “it is neither necessary nor sufficient for them to prove discriminatory policing prior to their employment.”)

- **11th Cir.** *Flynn v. Square One Distrib., Inc.*, 2016 WL 2997673, at *4 (M.D. Fla. May 25, 2016) (“[R]equested information must also satisfy the proportionality requirement meaning it must be more than tangentially related to the issues that are actually at stake in the litigation.”).

20 Marginal utility discovery.


- **2d Cir.** *Woodward v. Afify*, 2017 WL 279555, at *7–8 (W.D.N.Y. Jan. 23, 2017) (innate “misbehavior reports written by defendant [officials] about other inmates while arguably relevant, do not appear to be highly probative of the allegations in this lawsuit” and outweigh burden); *Armstrong Pump, Inc. v. Hartman*, 2016 WL 7208753, at *3 (W.D.N.Y. Dec. 13, 2016) (discovery reached “point of diminishing returns” after six years of discovery and production of approximately 1.5 million pages of documents); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2016 WL 6779901, at *3 (S.D.N.Y. Nov. 16, 2016) (Request for “all” information, in addition to more than 1.5 million documents previously produced to various regulatory agencies in connection with investigations of manipulating benchmark interest rate, was too expansive to meet marginal utility requirement.);


- **4d Cir.** *Johnson v. Ford Motor Co.*, 2016 WL 4577419, at *3 (S.D. W. Va. Sept. 1, 2016) (court limited discovery to disclosure only of source code implicated by plaintiffs’ defect theory); *Dvoskin v. Bank of Am.*, 2016 WL 3955932, at *2 (D. Md. July 22, 2016) (court denied plaintiffs’ request for additional discovery because plaintiffs failed to show that discovery would contradict evidence already produced); *Eramo v. Rolling Stone, LLC*, 314 F.R.D. 205, 209 (W.D. Va. Jan. 25, 2016) (party resisting discovery may show that requested information is not relevant or is “of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption of broad discovery”).

- **5th Cir.** *Garcia v. Prof’l Contract Serv., Inc.*, 2017 WL 187577, at *2 (W.D. Tex. Jan. 17, 2017) (denying defendant’s request for “fishing expedition” of past employee records from another former employer because defendant already had ten years of employment data, and records from company that plaintiff left voluntarily would likely be irrelevant).

- **6th Cir.** *Raymond James & Assoc’s. v. 50 N. Front St. TN, LLC*, 2020 U.S. Dist. LEXIS 55261, at *7 (W.D. Tenn. Mar. 30, 2020) (when marginal utility is low, courts should step in to limit discovery).

8th Cir. Klein v. Affiliated Grp., Inc., 2019 U.S. Dist. LEXIS 48019, at *34 (D. Minn. Mar. 22, 2019) (the discovery’s benefit is minimal when it can only produce an unknown number of persons potentially willing to testify for an issue which is often determined as a matter of law and which the Plaintiff can testify about).

9th Cir. Abbott v. Wyo. Cty. Sheriff’s Office, 2017 WL 2115381, at *2 (W.D.N.Y. May 16, 2017) (at some point “discovery yields only diminishing returns and increasing expenses” and marginal utility must be considered under proportionality requirement); IDS Prop. & Cas. Ins. Co. v. Fellows, 2017 WL 202128, at *4–5 (W.D. Wash. Jan. 18, 2017) (Because defendant had already produced approximately 6,000 emails, court held discovery of all emails regarding single employee’s reputation was “negligibly relevant, potentially privileged, and unduly burdensome,” and thus disproportional); Lauris v. Novartis, 2016 WL 7178602, at *4 (E.D. Cal. Dec. 8, 2016) (e-discovery of apex executives was burdensome and unlikely to yield non-duplicative relevant information because of extensive discovery of key custodians); In re Bard IVC Filters Prod. Liab. Litig., 2016 WL 4943393, at *4 (D. Ariz. Sept. 16, 2016) (court found burden incurred in providing ESI from custodians in foreign countries for last 13 years outweighed benefit of “marginally relevant” evidence); Dobro v. Allstate Ins., 2016 WL 4595149, at *8 (S.D. Cal. Sept. 2, 2016) (“[A]ssertion that some of the 10,082 files may contain relevant claims was insufficient to justify the extremely time- and labor-intensive search.”); Santoyo v. Howmedica Osteonics Corp., 2016 WL 2595199, at *3 (W.D. Wash. May 5, 2016) (“In light of the slight relevance at this point, the amount in controversy, and the vast amount of discovery sought,” court granted protective order denying discovery request); Stewart v. Jovanovich, 2017 WL 4269780, at *2 (D. Mont. Sept. 25, 2017) (where “sole issue” was whether defendant fired plaintiff for submitting grievances, court denied discovery of defendant’s relationship with other staff as “improper fishing expedition”).

10th Cir. Ark. River Power Auth. v. Babcock & Wilson Co., 2016 WL 192269, at *4 (D. Colo. Jan. 15, 2016) (“Once the discovery sought appears relevant, the party resisting discovery has the burden to establish lack of relevance or that the information is of such marginal relevance that the potential harm occasioned by the discovery outweighs the benefit of production.”); Coleman v. Reed, 2016 WL 4523915, at *2 (W.D. Okla. Aug. 22, 2016) (despite no evidence that truck driver was using cell phone at time of traffic accident, court granted, but limited, discovery request of data records of cell phone tower records, which could “potentially calculate his driving speeds” and use of phone); Lawson v. Spirit Aerosystems, 2020 U.S. Dist. LEXIS 66892, at *14 (D. Kan. Apr. 16, 2020) (denying request to depose high-level executives when much of the information sought from them is “tangential” to the disputes at hand and the “views of specific individuals on that topic are of `marginal (if any) relevance’”).

11th Cir. Steel Erectors, Inc. v. AIM Steel Int’l, 312 F.R.D. 673, 677 (S.D. Ga. Jan. 4, 2016) (court denied discovery request, which was “based solely on plaintiff’s speculation” that information was relevant in face of contrary evidence in discovery responses).

Cf.

2d Cir. Gonzalez v. Allied Concrete Indus., Inc., 2016 WL 4444789, at *4 (E.D.N.Y. Aug. 23, 2016) (court denied request to disclose ATM receipts and cell phone records as potential evidence showing plaintiffs’ whereabouts in FLSA case claiming overtime compensation because request was too speculative).

21 Burden or expense outweighing benefits of discovery.


2d Cir. Homeward Residential, Inc. v. Sand Canyon Corp., 2017 WL 4676806, at *7 (S.D.N.Y. Oct. 17, 2017) (court denied discovery of party’s internal documents regarding state of the economy, even though they might be relevant to willful blindness theory, because searching would produce thousands of documents and would require producing party to search for irrelevant articles that make references to real estate prices).

Note that “gargantuan, enormously costly and plainly unreasonable and labor intensive” given defendants’ more than 4,000
members from 1993 to the present were burdensome; court ordered documents and ESI only for an additional 3
directors).

(4th Cir. Dumas v. O’Reilly Auto. Stores, 2017 WL 2573956, at *4 (M.D. La. June 13, 2017) (court denied discovery in employment discrimination action of all gender discrimination, harassment, and retaliation concerns, complaints, or comments made to defendant during 6-year timeframe because it would be “gargantuan, enormously costly and plainly unreasonable and labor intensive” given defendants’ more than 4,000
stores).

(6th Cir. Rockwell Med., Inc. v. Richmond Bros., Inc., 2017 WL 1361129, at *2–3 (E.D. Mich. Apr. 14, 2017) (denying, as disproportional, discovery requests because burden and expense of proposed discovery “is immense and doubtlessly outweighs its likely benefit, even assuming that all other factors favor Plaintiff—and it is not obvious that they do”); Arthur J. Gallagher & Co. v. Anthony, 2016 WL 2997599, at *1 (N.D. Ohio May 24, 2016) (court denied plaintiff’s motion for expedited responses to subpoena duces tecum from third party because request was overly broad and plaintiff “had ample opportunity to conduct discovery with [third party]… and this late request for expedited production of text messages, cell phone records, and metadata would be unduly burdensome to produce”); Marsden v. Nationwide Biweekly Admin., Inc., 2016 WL 471364, at *1–2 (S.D. Ohio Feb. 8, 2016) (expenditure of significant financial and personnel resources to comply with unsupported discovery request outweighed benefits of production); Siriano v. Goodman Mfg., Co., 2015 WL 8259548, at *6 (S.D. Ohio Dec. 9, 2015) (court should limit scope of discovery only when compliance would “prove unduly burdensome, not merely expensive or time-consuming”); Murillo v. Dillard, 2017 WL 471570, at *3 (W.D. Ken. Feb. 3, 2017) (in dispute regarding whether 24 depositions of impoverished migrant workers would occur in Mexico or Kentucky, court held that defendants’ “preference for conducting the depositions in forum is substantially outweighed by the difficulty and expense that [p]laintiffs would incur in order to appear for their depositions in Kentucky”).


(8th Cir. Vallejo v. Ament, Inc., 2016 WL 2986250, at *4 (D. Neb. May 20, 2016) (court affirmed magistrate judge’s finding that plaintiff’s discovery request was disproportional based on “a variety of factors — including the volume of reports Plaintiff’s requests would return, the amount of irrelevant information likely to be included, and the number of employees who would have to be questioned”); Perez v. KDP Hosp., LLC, 2016 WL 2746926, at *3 (W.D. Mo. May 6, 2016) (in FLSA case, court denied defendants’ request for immigration status of informers and claimants because “potential damage and prejudice” outweighed relevance of information).

assessment considers the burden of responding to the discovery, not the burden of presenting affirmative defenses.”

- **10th Cir.** *Echon v. Sackett*, 2016 WL 943485, at *2 (D. Colo. Jan. 27, 2016) (defendants’ discovery requests were overbroad because defendants did not provide court with information about people and entities from whom discovery was sought, requests were not limited to claims or defenses, and some requests were “outright offensive”); *Gilmore v. L.D. Drilling, Inc.*, 2017 WL 3116576, at *2 (D. Kan. July 21, 2017) (“As for proportionality, clearly the embarrassment, harassment and annoyance of the request outweigh any potential relevance.”)

- **11th Cir.** *In re Blue Cross Blue Shield Antitrust Litig.*, 2017 WL 2889679, at *2 (N.D. Ala. July 6, 2017) ( “[G]iven the likelihood that most of the responsive documents . . . will be subject to some privilege or work-product protection, the burden and expense of searching for the remaining non-privileged responsive documents outweighs the potential benefit.”).


- **9th Cir.** *Wilson v. Wal-Mart*, 2016 WL 526225, at *3 (D. Nev. Feb. 9, 2016) (defendant’s argument that videotaping worksite was burdensome was not persuasive); *Gottesman v. Santana*, 2017 WL 5889765, at *6 (S.D. Cal. Nov. 29, 2017) (in a case with multiple defendants, combined burden and expense that all defendants will face is unpersuasive; it is “not surprising” that each defendant will spend considerable time and effort responding to discovery requests).

22 **If burden and cost modest, balance strikes in favor of requesting party.**

- **5th Cir.** *Mr. Mudbug, Inc. v. Bloomin' Brands, Inc.*, 2017 WL 448575, at *3 (E.D. La. Feb. 1, 2017) (court granted motion to compel facility-site inspections when “[p]laintiff did not object to the inspection” and request was found “reasonably specific, relevant and proportional”); *Holcombe v. Advanced Integration Tech.*, 2018 U.S. Dist. LEXIS 135493, at *14 (E.D. Tex. Aug. 10, 2018) (granting discovery request when “the burden is small, if not negligible, for a large company like AIT.”).

- **7th Cir.** *Castelino v. Rose-Hulman Inst. of Tech.*, 2018 WL 1140389, at *4 (S.D. Ind. Mar. 2, 2018) (court ordered production of Facebook data because there was “virtually no cost associated with obtaining and forwarding” it, and because objecting party had failed to explain why its production was not proportional).

23 **Proportionality considerations include effects on non-parties.**

- **1st Cir.** *Johansen v. Liberty Mut. Grp.*, Inc., 2017 WL 6045419, at *2 (D. Mass. Dec. 6, 2017) (third party ordered to produce information relating to its contractual agreement with defendant because it was relevant to defendant’s potential vicarious liability).

- **2d Cir.** *Grabis v. Navient Sols., LLC*, 2018 Bankr. LEXIS 3665, at *17 (Bankr. S.D.N.Y. Nov. 20, 2018) (“When discovery is sought from third parties, the Court must also weigh the probative value of the information against the burden of production on the non-party.”).


- **6th Cir.** *Perrigo Co. v. United States*, 294 F. Supp. 3d 740, 741 (W.D. Mich. 2018) (court denied discovery of information from a third-party drug manufacturer because the heart of the case was about business dealings and transactions within the distributor, and “courts have an obligation to ensure requests to third parties are not unduly burdensome”); *Hammock v. Rogers*, 2018 U.S. Dist. LEXIS 169217, at *6 (N.D. Ohio Oct. 1, 2018) (“[A] subpoena directed to a non-party may not impose an undue burden, such as when it is facially overbroad or would cause the non-party target to incur an unwarranted expense or inconvenience.”).

- **7th Cir.** *In re Morning Song Bird Food Litig.*, 2018 WL 1948807, at *2 (S.D. Ind. Apr. 25, 2018) (“While nonparty status is a significant factor in the proportionality analysis, nonparties still must demonstrate significant expense before receiving protection from discovery.”) (internal quotation omitted).
8th Cir. Klein v. Affiliated Grp., 2019 U.S. Dist. LEXIS 48019, at *37 (D. Minn. Mar. 22, 2019) (denying discovery considering “the invasion of privacy of non-party North Memorial patients, the burden on non-party North Memorial” together with burdens on Defendants).

9th Cir. D.F. v. Sikorsky Aircraft Corp., 2016 WL 3360515, at *7 (S.D. Cal. June 13, 2016) (court did not require third party to produce privilege log or otherwise “assemble a formal, detailed privilege claim” while questioning whether associated burden and expense outweighed benefits); Delgado v. Tarabochia, 2018 WL 2088207, at *2 (W.D. Wash. May 4, 2018) (court granted discovery of third-party information only where defendants identified a specific need to confirm events and showed that the requested information would do so).

10th Cir. Charles Schwab & Co. v. Highwater Wealth Mgmt., LLC, 2017 WL 4278494, at *3 (D. Colo. Sept. 27, 2017) (Although Rule 26 generally imposes a heavier burden when discovery sought relates to a non-party, the court did not impose a higher burden because the non-party’s actions “are central to both the claims and counterclaims.”); Nat’l R.R. Passenger Corp. v. Cimarron Crossing Feeders, LLC, 2017 WL 4770702, at *5 (D. Kan. Oct. 19, 2017) (court denied discovery because, among other reasons, it would subject paying Amtrak customers to significant delays while trains were inspected).

11th Cir. Williams v. Am. Int’l Grp., 2016 WL 3156066, at *2 (M.D. Ala. June 3, 2016) (discovery of non-parties’ HIPPA-protected health information was disproportional considering limited relevance of information); In re Blue Cross Blue Shield Antitrust Litig., 2017 WL 2889679, at *3 (N.D. Ala. July 6, 2017) (“as rule 45 is a type of discovery device, discovery requests under it must also comply with the proportionality requirement of Rule 26(b)(1)”; Roche Diagnostics Corp. v. Priority Healthcare Corp., 2019 U.S. Dist. LEXIS 177798, at *14–15 (N.D. Ala. Feb. 12, 2019) (the court and parties should avoid unnecessary burdens on non-parties, and non-party discovery must be “necessary, narrowly focused, and easily responded to without unnecessary burden or expense.”) (quoting In re Blue Cross Blue Shield Antitrust Litigation (MDL No. 2406), 2017 WL 2889679, at *2 (N.D. Ala. July 6, 2017)).

24 Rule 26(b)(2)(B) inapplicable to accessible sources even with significant burdens.

8th Cir. Duhigg v. Goodwill Indus., 2016 WL 4991480, at *3 (D. Neb. Sept. 16, 2016) (court erroneously conflates determination of accessible information under Rule 26(b)(2)(B) with burden analysis under Rule 26(b)(1)).

25 Specific objections of undue burdens to establish that EIS is not reasonable accessible.

5th Cir. Hall v. Rent-A-Center, 2018 U.S. Dist. LEXIS 152040, at *7 (E.D. Tex. Aug. 31, 2018) (considering “factors such as the complexity of the ESI and the nature of the media on which the ESI is stored”).

7th Cir. In re Broiler Chicken Antitrust Litig., 2018 U.S. Dist. LEXIS 125044, at *20 (N.D. Ill. July 26, 2018) (the resisting party should identify or quantify the burden of producing EIS instead of objecting broadly about basic unfairness).


26 Court’s informed judgment in managing discovery during public health emergency (the COVID-19 pandemic).

2d Cir. Sinceno v. Riverside Church in the City of N.Y., 2020 U.S. Dist. LEXIS 47859, at *1 (S.D.N.Y. Mar. 18, 2020) (ordering all depositions be taken “via telephone, videoconference, or other remote means” and be “recorded by any reliable audio or audiovisual means” in the face of COVID-19 emergency).


6th Cir. Scott v. Abernathy Motorcycle Sales, Inc., 2020 U.S. Dist. LEXIS 59563, at *8–9 (W.D. Tenn. Apr. 3, 2020) (“In light of the current public health crisis concerning Covid-19, counsel are ordered to confer about a mutually agreeable date for taking the deposition . . . and all alternative means of safely conducting and recording the deposition.”)

7th Cir. Lipsey v. Walmart, 2020 U.S. Dist. LEXIS 48353, at *6, *9 (N.D. Ill. Mar. 20, 2020) (courts should “demonstrate flexibility and sensitivity . . . in the face of a serious public health emergency and the threat it poses to the health and public safety of litigants”; for example, the court requires the party seeking depositions of medical professionals to disclose deponents’ involvement in response to COVID-19 crisis and the deponent’s relative importance to the case); DeVine v. XPO Logistics Freight, 2020 U.S. Dist. LEXIS 45739, at *7 (N.D. Ill. June 6, 2017).
Mar. 17, 2020) (construing broadly the concept of “burden” to consider the cost to society that “[a]ll hands cannot be on deck if some of them are at a law office sitting for a deposition”).


• 11th Cir. Benavides v. Garland, 2020 U.S. Dist. LEXIS 90686, at *12–13 (S.D. Ga. May 20, 2020) (the risk of transmitting COVID-19 into the facility and the costs of additional protective measures are factors that make the request for in-person inspection burdensome)

Cf.

• 1st Cir. United States v. Akula, 2020 U.S. Dist. LEXIS 113734, at *10–11 (D. Mass. June 29, 2020) (refusing to grant defendant’s release for preparing a defense because “the government turned over most automatic discovery several months before COVID-19 restrictions went into effect and Defendant and counsel had an opportunity to begin reviewing discovery and discussing case strategy together before restrictions went into effect” and the court believes that the present barriers to attorney-client meeting are likely to be lowered soon).


• 5th Cir. Solis v. United Med. Clinic, P.A., 2020 U.S. Dist. LEXIS 93974, at *9 (W.D. Tex. May 28, 2020) (“While sympathetic to the challenges presented . . . due to COVID-19, the Federal Rules of Civil Procedure, the Local Rules . . . and court orders remain in effect, and extensions to deadlines must be properly sought”; a general argument that “COVID-19 has slowed things down” is not sufficient justification for delay).

• 10th Cir. Ad Astra Recovery Servs. v. Heath, 2020 U.S. Dist. LEXIS 77619, at *17–18 (D. Kan. Apr. 29, 2020) (extending “the deadline to take two remaining depositions because of logistical complications associated with the COVID-19” is insufficient to establish “good cause to warrant . . . significant, months-long delay in seeking to enforce the November subpoenas”).

27 Court’s failure to reference proportionality.


• 9th Cir. Brightedge Tech., Inc. v. Searchmetrics GMBH., 2017 WL 5171227, at *1–2 (N.D. Cal. Nov. 8, 2017) (although defendant argued that discovery request was not relevant or proportional, court ordered discovery on basis of international privacy law).

28 No preset priority among proportionality factors.

• 2d Cir. Guadalupe v. City of New York, 2016 U.S. Dist. LEXIS 83872, at *6 (S.D.N.Y. June 24, 2016) (“[T]he proportionality factors . . . will not each carry the same relative weight in every context.”).


• 8th Cir. Doe v. Bd. of Trs., 2018 U.S. Dist. LEXIS 149051, at *3 (D. Neb. Aug. 31, 2018) (“Courts must examine each case individually to determine the weight and importance of the proportionality factors.”).

• 10th Cir. Sinclair Wyo. Ref. Co. v. Infraassure Ltd., 2016 U.S. Dist. LEXIS 197213, at *11 (D. Wyo. Nov. 7, 2016) (“Additional factors may be considered, and the Court has discretion to weight certain factors more heavily given the discrete concerns in each case.”).
20 Requesting party does not have responsibility to make advance showing of proportionality.

- **2d Cir. State Farm Mut. Auto. v. Fayda**, 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015) (citing Committee Note to 2015 amendment that explains that rule “does not place on the party seeking discovery the burden of addressing all proportionality considerations”).


30 Boilerplate objections insufficient.


- **4th Cir. Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC**, 2016 WL 4287929, at *2 (E.D.N.C. Aug. 15, 2016) (“[N]othing more than boilerplate objections: they fail to specify why the requested documents are not relevant to a party’s claim or defense and not proportional to the needs of the case.”); **Ashmore v. Williams**, 2017 WL 2437082, at *4 (D.S.C. June 6, 2017) (“Defendants’ proportionality objections are mere boilerplate language and such ‘boilerplate’ language in a discovery objection cannot overcome the broad scope of discovery as contemplated by Rule 26.”); **Mt. Hawley Ins. v. Adell Plastics, Inc.**, 2017 WL 3621184, at *3 (D. Md. Aug. 22, 2017) (“Like the boy who cried wolf, a party that reiterates the same nonspecific objections to every response obscures whatever legitimate objections might exist, and hinders the Court’s ability to discern and resolve areas of true dispute on a timely basis.”).


- **6th Cir. Martin v. Posey**, 2017 WL 412876, at *2 (S.D. Ohio Jan. 31, 2017) (“Fed. R. Civ. P. 26(b)(1)’s inclusion of the proportionality factors enforces the collective obligation to consider proportionality in discovery disputes; it does not, however, permit a party to refuse discovery simply by making a boilerplate objection that the information requested is not proportional.”); **In re Haynes**, 2017 WL 3559509, at *6–7 (E.D. Tenn. Aug. 11, 2017) (extensive discussion criticizing boilerplate objections); **Certain Underwriters at Lloyd’s v. Morrow**, 2017 WL 4532240, at *3 (W.D. Ky. Oct. 10, 2017) (“As neither movant has provided rebuttal … other than broad generalization, neither movant has made a compelling case that the information subpoenaed lacks relevance.”).

- **7th Cir. Baires Blue Cross Blue Shield of Minn. v. State Farm Mut. Auto. Ins.**, 2016 WL 4591905, at *5 (E.D. Wis. Sept. 2, 2016) (“[B]oilerplate objections such as relevancy and ‘not proportional’” are insufficient); **In re
Broiler Chicken Antitrust Litig., 2018 U.S. Dist. LEXIS 125044, at *20 (N.D. Ill. July 26, 2018) (objecting “in broad generalities about the basic unfairness” of the request without “identifying or quantifying the burden in either time or cost” is not sufficient).

• 8th Cir. Schultz v. Sentinel Ins., Ltd., 2016 WL 3149686, at *7 (D. S.D. June 3, 2016) (”[B]oilerplate ‘general objections’ fail to preserve any valid objection at all because they are not specific to a particular discovery request.”); Sprint Commc’ns. Co. v. Crow Creek Sioux Tribal Court, 316 F.R.D. 254, 264 (D.S.D. Feb. 26, 2016) (“Amended Rule 34(b) now prohibits boilerplate objections.”); Wollesen v. W. Cent. Cooperative, 2018 WL 785863, at *8 (D. Iowa Feb. 8, 2018) (denying discovery because party used boilerplate objection, so court “simply lacks the information” to find that requested discovery was irrelevant).

• 9th Cir. Gibson v. SDCC, 2016 WL 845308, at *6 (D. Nev. Mar. 2, 2016) (boilerplate objections insufficient to show discovery should not be allowed); Choquette v. Warner, 2017 WL 2671263, at *3 (W.D. Wash. June 21, 2017) (court held that defendants’ requests for admission were relevant, despite plaintiff’s objections, and “warned” plaintiff that if “the Court again finds . . . boilerplate objections, and/or a lack of good faith in responding, the consequence will be the imposition of sanctions”); Anderson v. Pacific Crane Maint. Co., 2017 WL 3534576, at *2 (W.D. Wash. Aug. 17, 2017) (court granted discovery request where objections contained boilerplate language, noting “Defendant can and should do better”).

• 10th Cir. Duffy v. Lawrence Memorial Hosp., 2016 WL 7386413, at *2–3 (D. Kan. Dec. 21, 2016) (Court rejected boilerplate objections because they provide no explanation for the objection and they “leave the reader confused as to whether the answers are complete and all requested documents are identified.”).

• 11th Cir. Polycarpe v. Seterus, Inc., 2017 WL 2257571, at *3 (M.D. Fla. May 23, 2017) (court overruled objections that were clearly boilerplate due to their phrasing and because they used certain terms “with little or no elaboration”); Clark v. Hercules, Inc., 2017 WL 3316311, at *10 (M.D. Fla. Aug. 3, 2017) (court denied boilerplate objections “plaintiff must answer an interrogatory, to the extent it is not objected to, separately and fully in writing under oath.”). 

Cf.

• 3d Cir. Haines v. Cherian, 2016 WL 831946, at *7 (M.D. Pa. Feb. 29, 2016) (court sustained boilerplate objection that request was overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence).

31 Objection to discovery request must be specific.

• 2d Cir. Fischer v. Forrest, 2017 WL 773694, at *1 (S.D.N.Y. Feb. 27, 2017) (“It is time, once again, to issue a discovery wake-up call to the Bar in this District” to state grounds for objecting to discovery request with specificity under Rule 34).


• 5th Cir. Allen-Pieroni v. Sw. Corr., LLC, 2016 WL 1750325, at *4 (N.D. Tex. May 2, 2016) (“[P]arty seeking to resist discovery on these grounds still bears the burden of making a specific objection and showing that the discovery fail[ed] the proportionality calculation mandated by Rule 26(b) by coming forward with specific information to address” the proportionality factors.); Harper v. City of Dallas, 2017 WL 3674830, at *6 (N.D. Tex. Aug. 25, 2017) (same); Orchestratehr, Inc. v. Trombetta, 2016 WL 1555784, at *24 (N.D. Tex. Apr. 18, 2016) (same); Holmes v. N. Tex. Health Care Laundry Coop. Ass’n, 2016 WL 1366269, at *5 (N.D. Tex. Apr. 6, 2016) (party resisting discovery “bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b)”); Robinson v. Dallas Cty. Cmty. Coll. Dist., 2016 WL 1273900, at *3 (N.D. Tex. Feb. 18, 2016) (“[P]arty resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable.”); TNA Aus. Pty Ltd. V. PPM Techs., LLC, 2018 WL 2010277, at *14 (N.D. Tex. Apr. 30, 2018) (party objected to discovery request on the grounds that it was unduly burdensome because it would cost over $10,000 in attorney time; however, because party did not explain how or why it cost that much, party “has not substantiated any alleged undue burden”).

• 6th Cir. Commerce and Indus. Ins. v. Century Surety Co., 2017 WL 946984, at *2 (S.D. Ohio Mar. 10, 2017) (because specific objections are required, “[p]laintiff’s general objection that discovery is unnecessary is without merit”).

• 7th Cir. In re Broiler Chicken Antitrust Litig., 2018 U.S. Dist. LEXIS 125044, at *22 (N.D. Ill. July 26, 2018) (estimate of costs should be “itemized [or] broken down for the Court to understand how it was calculated”).

• 8th Cir. Sprint Commc’ns. Co. v. Crow Creek Sioux Tribal Court, 316 F.R.D. 254, 263 (D. S.D. Feb. 26, 2016) (objecting party must “state with specificity the grounds for objecting, including the reasons” and “whether any
responsive materials are being withheld"; Murphy v. Piper, 2017 WL 5633096, at *4 (D. Minn. Nov. 22, 2017) (in upholding magistrate judge’s discovery order, court noted that if requested information is not reasonably available, producing party must “articulate why that is the case with respect to the particular information being requested”).

- **9th Cir. In re Outlaw Labs, 2020 U.S. Dist. LEXIS 39431, at *29–30 (S.D. Cal. Mar. 5 2020)** (denying an objection because it “does not explain how the documents are kept, if they are searchable electronically,” or otherwise explains why the burden is significant enough).

- **10th Cir. Zoobuh, Inc. v. Better Broadcasting, LLC, 2017 WL 1476135, at *4–5 (D. Utah Apr. 24, 2017)** (even though defendant claimed that discovery would be costly, court held that defendant failed to demonstrate that it would incur an undue burden because it did not provide “some quantification . . . of the material in its possession that [was] responsive” and thus did not provide court with any concrete indicator of burden production); N.U. v. Wal-Mart, 2016 WL 3654759, at *2 (D. Kan. July 8, 2016) (granting plaintiff’s motion to compel in part because defendant relied on “conclusory assertions that the scope of the requests [was] too broad without adequately demonstrating that responding to the requests would pose an undue burden or that the scope of the requests encompass[ed] irrelevant information”); Digital Ally, Inc. v. Util. Assocs., Inc., 2016 WL 1535979, at *4 (D. Kan. Apr. 15, 2016) (court overruled defendant’s objections to discovery requests because defendant failed to expound upon objections to discovery’s proportionality and relevance); Fish v. Kobach, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) (“Objections based on undue burden must be clearly supported by an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.”); EEOC v. Centura Health, 2018 WL 1616807, at *2 (D. Colo. Apr. 4, 2018) (because the standard of review on appeal is “clearly erroneous and contrary to law,” party objecting to discovery must offer specific evidence that a discovery request is not proportional or is unduly burdensome).

- **11th Cir. Bellenger v. Accounts Receivable Mgmt., 2019 U.S. Dist. LEXIS 153672, at *4 (S.D. Fla. Sept. 10, 2019)** (“[O]bjections . . . must be stated with specificity, including the reasons for the objection, and . . . whether any responsive materials are being withheld . . . .”)

32 **Partial objection requires good-faith efforts to produce unobjectionable discovery.**

- **2d Cir. JCDecaux Airport, Inc. v. Tom Sawyer Prods., 2020 U.S. Dist. LEXIS 23697, at *5–6 (S.D.N.Y. Feb. 11, 2020)** (defendants’ objecting to some requests but failing to produce any documents responsive to unobjected requests are “noncompliance with their discovery obligations”).

33 **Court may rely on counsel’s representations.**

- **5th Cir. Tri Invs., Inc. v. United Fire & Cas. Co., 2019 U.S. Dist. LEXIS 128337, at *6 (S.D. Tex. May 24, 2019)** (the court reasoned that only information related to pre-loss inspection is relevant and denied Defendant’s request relying on Defendant’s counsel’s representation that Defendant did not conduct any pre-loss inspection).

- **6th Cir. Burfitt v. Bear, 2016 WL 5848844, at *3 (S.D. Ohio Oct. 10, 2016)** (court accepted government-counsel’s representation that discovery requested by prisoner was burdensome particularly because it posed security risk).


  Cf.

- **2d Cir. Sky Med. Supply Inc. v. SCS Support Claim Servs., Inc., 2016 WL 4703656, at *11 (E.D.N.Y Sept. 7, 2016)** (based on counsel’s representation that no documents existed, court required “affidavit setting forth (1) the specific details of the search undertaken for these materials; (2) what was discovered as a result of the search; and (3) to the extent the Nationwide Defendants maintain[ed] that no responsive materials were found, the defendants’ particularized explanation as to why no materials were uncovered”).


- **9th Cir. Goro v. Flowers Foods, Inc., 334 F.R.D. 275, 285 (S.D. Cal. 2018)** (while a counsel’s “declaration could be used to establish relevancy,” “[t]he Court declines to blindly accept counsel's opinion” or estimation).
Burden of persuasion.

- **2d Cir.** Black v. Buffalo Meat Serv., Inc., 2016 WL 4363506, at *6 (W.D.N.Y. Aug. 16, 2016) (“Prior to the 2015 amendments, defendants would have to show that the requests were unduly burdensome; now, the issue is whether the quantity of requests for relevant material is such that it is out of proportion to the scope of the case.”); Sky Med. Supply Inc. v. SCS Support Claim Servs., Inc., 2016 WL 4703656, at *2 (E.D.N.Y Sept. 7, 2016) (“[P]arty seeking discovery must make a prima facie showing that the discovery sought is more than merely a fishing expedition.”); Certain Underwriters at Lloyd’s v. Nat’l R.R. Passenger Corp., 2016 WL 7017356, at *5 (E.D.N.Y. Nov. 30, 2016) (same); Edelball v. Bankers Standard Ins., 2017 WL 3037408, at *2 (E.D.N.Y. July 17, 2017) (same).


- **4th Cir.** Santiago v. S. Health Partners, 2016 WL 4435229, at *2 (M.D. N.C. Aug. 19, 2016) (amended Rule 26 does not “require shifting the burden of persuasion” from “the parties resisting discovery[, who continue to] bear the burden of persuasion in a discovery dispute”); Eramo v. Rolling Stone, LLC, 314 F.R.D. 205, 209 (W.D. Va. Jan. 25, 2016) (party who moves to compel discovery has initial burden of showing that information is discoverable; party resisting discovery then has burden of proving that court should not grant motion to compel. Party resisting discovery may show that requested information is not relevant or is “of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption of broad discovery”).

- **5th Cir.** Holcombe v. Advanced Integration Tech., 2018 U.S. Dist. LEXIS 135493, at *4 (N.D. Tex. August 10, 2018) (the proportionality rule relies on each party’s “unique understanding of the proportionality,” and the party being requested for discovery is in better position to prove burden or expense).


- **7th Cir.** Todd v. Ocwen Loan Servicing, 2020 U.S. Dist. LEXIS 52212, at *7 (S.D. Ind. Jan. 30, 2020) (“[I]t is the [resisting party’s] burden to prove the discovery request improper[,]”).


- **10th Cir.** Ark. River Power Auth. v. Babcock & Wilson Co., 2016 WL 192269, at *4 (D. Colo. Jan. 15, 2016) (party seeking discovery has burden of establishing that “information sought is relevant to a claim or defense in the case. Once the discovery sought appears relevant, the party resisting discovery has the burden to establish lack of relevance or that the information is of such marginal relevance that the potential harm occasioned by the discovery outweighs the benefit of production”); Arenas v. Unified Sch. Dist. No. 223, 2016 WL 5122872, at *2 (D. Kan. Sept. 21, 2016) (“Moving the proportionality provisions to Rule 26 does not place on the party seeking discovery the burden of addressing all proportionality considerations.”); Hibu Inc. v. Peck, 2017 WL 2472548, at *3 (D. Kan. June 8, 2017) (Court denied defendant’s requested discovery of all increases and decreases in revenue for every print directory and all digital products in every market nationwide from 2012 to present; “[i]t is Defendant’s burden to demonstrate the relevance of all such information, and Defendant has not met that burden.”).

- **11th Cir.** Bright v. Frix, 2016 WL 1011441, at *1 (M.D. Fla. Jan. 22, 2016) (party who moves to compel discovery has initial burden of proving that requested information is relevant).
35 Explaining helpfulness of requested information for claims or defenses.

- **4th Cir. United States v. White.** 2016 U.S. Dist. LEXIS 67739, at *9–10 (D. Md. May 19, 2016) (requiring the requesting party to “present facts showing that the requested information will actually help prove his defense, not merely that it might help prove his defense”) (emphasis added).

- **6th Cir. Reed v. Gulf Coast Enters.,** 2016 U.S. Dist. LEXIS 955, at *20–21 (W.D. Ky. Jan. 6, 2016) (“[T]he affidavit or declaration [filed in support of the request] must state exactly how and why the information sought will help him in opposing summary judgment, either by raising a genuine dispute of material fact or by demonstrating that the summary judgment movant is not entitled to judgment as a matter of law.”).


- **9th Cir. United States v. Tippens,** 2016 U.S. Dist. LEXIS 184174, at *39 (W.D. Wash. Nov. 30, 2016) (denying motion to compel because the requested information is not relevant or helpful to the defense).


36 Consideration of burdens other than expense typically incurred in discovery.

- **2d Cir. In re XPO Logistics, Inc.,** 2017 WL 2226593, at *9 (S.D.N.Y. May 22, 2017) (Court denied discovery of employees’ compensation, since it would not be proportional and “providing . . . personnel information beyond that which is already publicly available would be highly intrusive.”).


- **4th Cir. Conn. Gen. Life Ins. v. Advanced Surgery Ctr. of Bethesda, LLC,** 2016 WL 7115952, at *3 (D. Md. Dec. 7, 2016) (court recognized potential burden of conferring with counsel from dozens of other cases who would need to concur with disclosure of certain deposition transcripts subject to confidentiality orders, but rejected the burdensome-claim, absent showing of “allege[d] specific facts that indicate the nature and extent of the burden”); **Fish v. Air & Liquid Sys. Corp.,** 2017 WL 697663, at *18 (D. Md. Feb. 21, 2017) (relying in part on an overbroad date range, concerns about privacy regarding discovery of employee information, and likely work product protection, court denied request for information on auto manufacturer’s record retention policy, when plaintiff had not identified “any document or group of documents at issue.”).

- **5th Cir. Biggio v. H2O Hair, Inc.,** 2016 WL 7116025, at *3 (E.D. La. Dec. 7, 2016) (disposition questions concerning employment histories of nonparties, including allegedly detrimental personnel actions taken against them, may reveal information relevant to their retaliation and willful misconduct claims, but court must balance parties’ interests in obtaining permissible discovery against privacy interests of individual nonparties); **In re Xarelto (Rivaroxaban) Prods.,** 313 F.R.D. 32, 38 (E.D. La. 2016) (request for employees’ personnel files maintained by HR department, as opposed to employees’ custodial files, raised privacy concerns and required “individualized showing of relevancy, proportionality, and particularity”); **McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins.,** 2016 WL 2609994, at *11 (N.D. Tex. May 6, 2016) (court denied plaintiff’s motion to squash subpoena for deposition finding that payment of attorney’s fees in connection with deposition is “not an undue burden under the circumstances”).

- **6th Cir. Allstate Ins. Co. v. Papanek,** 2018 WL 300170, at *5 (S.D. Ohio, Jan. 5, 2018) (court did not accept review by individual employees of their cell phones and instead required lawyers to search the devices and review information); **Murillo v. Dillard,** 2017 WL 2417953, at *2 (W.D. Ky. June 2, 2017) (court denied defendant’s motion for protective order regarding depositions that plaintiff transient workers had requested to be made in Mexico, noting burden of plaintiffs to travel and attend deposition in U.S.); **Raub v. Moon Lake Prop. Owners Ass’n,** 2016 WL 6275392, at *3 (E.D. Mich. Oct. 27, 2016) (Property owner’s discovery request of property owners’ association’s computer and phone records, including passwords, GPS locations, text messages, photos, and voicemails, for past ten years in a case alleging retaliation for filing ADA complaint was “breathtakingly broad, burdensome, and intrusive.”).

- **7th Cir. Johnson v. Soo Line R.R.,** 2019 U.S. Dist. LEXIS 146051, at *7–8 (N.D. Ill. Aug. 27, 2019) (courts need to balance the high sensitivity of tax return information and the burden of its production on the tax reporting system against its relevance to the case.); **Crabtree v. Angie’s List, Inc.,** 2017 WL 413242, at *3 (S.D. Ind. Jan. 31, 2017) (Court denied request for forensic examination of plaintiffs’ election devices to get GPS data when defendant already had plaintiffs’ cell phone records and log-ins data, finding that such request was “not
proportional to the needs of the case because any benefit the data might provide is outweighed by Plaintiffs’ significant privacy and confidentiality interests.

- **9th Cir. Dobro v. Allstate Ins., 2016 WL 4595149, at *8 (S.D. Cal. Sept. 2, 2016) (“Court [found] that the requested procedure [seeking written consent from affected individuals to disclose certain information] would inappropriately impact the privacy rights of numerous third-party insureds and [was] not proportional to the needs of this case.”); Gonzales v. City of Bakersfield., 2016 WL 4474600, at *2 (E.D. Cal. Aug. 25, 2016) (“Court [found] that the privacy interests [disclosure of police personnel files were] outweighed by the need for disclosure.”); Ambel v. Gerrard, 2017 WL 1383443, at *4 (D. Nev. Apr. 12, 2017) (Court denied defendants’ request for plaintiffs’ financial information to show hours worked, because “[d]efendants’ credibility argument does not overcome [p]laintiffs’ privacy interests in their financial records.”); Shuckett v. DialAmerica Mktg., 2018 U.S. Dist. LEXIS 15402, at *43 (S.D. Cal. Sept. 10, 2018) (considering resisting party’s “interest in protecting the confidentiality of its data and other trade secrets” while noting that some confidential information must be disclosed to resolve the case).

- **10th Cir. Gordon v. T.G.R. Logistics, Inc., 2017 WL 1947537, at *3 (D. Wyo. May 10, 2017) (extensive discussion of discovery of social media information explaining court’s ruling narrowing party’s request for entire Facebook account history, stating that “[j]ust because the information can be retrieved quickly and inexpensively does not resolve the issue. Courts have long denied discovery of information which was easy to obtain but which was not discoverable.”).


- **D.C. Cir. Buzzfeed v. DOJ, 318 F. Supp. 3d 347, 359 (D.D.C. 2018) (considering “the cumulative effect of allowing some form of discovery” against the federal government, such as whether it will “open the floodgates to other discovery demands that would place a strain on government resources”). Cf.

- **11th Cir. Kadiyala v. Pupke, 2019 U.S. Dist. LEXIS 133449, at *11–13 (S.D. Fla. Aug. 8, 2019) (granting discovery of the settlement agreement between the plaintiff and a former defendant, because “[p]arties cannot insulate a document from discovery merely because they decide to label it as confidential” and the settlement agreement bears upon the credibility of the former defendant’s testimony).

37 Affidavits or other evidentiary proof showing burden with specificity required.


- **4th Cir. Scott Hutchison Enter. v. Cranberry Pipeline Corp., 2016 WL 5219633, at *3 (S.D. W. Va. Sept. 20, 2016) (collection of cases that require specific proof); Ashmore v. Allied Energy, Inc., 2016 WL 301169, at *3 (D.S.C. Jan. 25, 2016) (court denied defendant’s claim that discovery was not proportional because defendant failed to “submit any documentation that either established the proposed cost of production or a cost estimate for an alternative form of production”).

- **5th Cir. McKinney/Pearl Rest. Partners v. Metro. Life Ins., 2016 WL 98603, at *3 (N.D. Tex. Jan. 8, 2016) (party resisting discovery must show that "requested discovery was overbroad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.").

- **7th Cir. In re Broiler Chicken Antitrust Litig., 2018 U.S. Dist. LEXIS 125044, at *22–23 (N.D. Ill. July 26, 2018) (the cost estimation to show burden should be revised accordingly after the request was narrowed down).

- **8th Cir. Vallejo v. Amgen, Inc., 2016 WL 2986250, at *3, n.6 (D. Neb. May 20, 2016) (court retained discretion to find discovery request not proportional when neither party provided “substantial and reasonable guidance” forcing court “to wade through generalized and conflated arguments of need, burden, and relevance”).

- **9th Cir. Santoyo v. Howmedica Osteonics Corp., 2016 WL 2595199, at *3 (W.D. Wash. May 5, 2016) (court noted that party resisting discovery should provide more specific proof of cost of discovery beyond estimates based on lawyer’s similar prior litigation experiences); Shuckett v. DialAmerica Mktg., 2018 U.S. Dist. LEXIS 15402, at *26 (S.D. Cal. Sept. 10, 2018) (allowing discovery because the resisting party “did not submit any evidence to substantiate [its] objection, such as a declaration setting forth an estimate of the time and expense”).

- **10th Cir. Fish v. Kobach, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) (“Objections based on undue burden must be clearly supported by an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.”); Parker v. Delmar Gardens of Lenexa, Inc., 2017 WL 1650757, at *5 (D. Kan. May 2, 2017) (although acknowledging potential abuse in employment discrimination action arising from subpoenas to
past and current employers, court held that plaintiff could not rely on “conclusory claims of annoyance, harassment, and embarrassment” because “courts tend to resolve the issue on the side of the broad nature of discovery”); Pipeline Prods. v. Madison Cos., 2018 U.S. Dist. LEXIS 102993, at *7–8 (D. Kan. June 20, 2018) (opposing party should “provide sufficient detail in terms of time, money and procedure in responding to the requested discovery,” although failure to do so is not fatal when “the discovery request is unduly burdensome on its face”).

• 11th Cir. In re Subpoena Upon NeJame Law, P.A., 2016 WL 1599831, at *5 (M.D. Fla. Apr. 21, 2016) (requested discovery was seemingly overbroad, but court nonetheless ordered it because party failed to provide evidence of any burden in retrieving, reviewing, or producing it); Mann v. XPO Log. Freight, Inc., 2017 WL 3054125, at *8 (D. Kan. July 19, 2017) (discovery granted when defendant “failed to present evidentiary support [including affidavit] or detailed argument to demonstrate burden” when objecting to discovery).

38 Party requesting discovery may need to make specific showing of proportionality to refute objections.

• 2d Cir. Blodgett v. Siemens Indus., Inc., 2016 WL 4203490, at *3 (E.D.N.Y. Aug. 9, 2016) (court denied discovery request because requesting party failed to provide any “basis beyond speculation to believe that relevant information [was] likely to be uncovered as a result of requiring Defendant to undertake an additional search for the proposed three month period”).

• 5th Cir. Carter v. H2R Rest. Holdings, LLC, 2017 WL 2439439, at *4 (N.D. Tex. June 6, 2017) (“The party seeking discovery, to prevail on a motion to compel or resist a motion for a protective order, may well need to make its own showing of many or all of the proportionality factors . . .’’); McKinney/Pearl Rest. Partners v. Metro. Life Ins., 2016 WL 98603, at *3 (N.D. Tex. Jan. 8, 2016) (in opposition to resisting party’s showing, party seeking discovery “may well need to make its own showing of many or all of the proportionality factors, including the importance of the issues at stake in the litigation, the amount in controversy, the parties’ relative access to relevant information’’); Keycorp v. Holland, 2016 WL 6277813, at *5 (N.D. Tex. Oct. 26, 2016) (requesting party “may well need to make its own showing of the proportionality factors’’); Zoch v. Daimler, 2018 WL 1306659, at *4 (E.D. Tex. Mar. 13, 2018) (in a products liability suit, court denied discovery relating to a safer alternative design where production would be costly and where plaintiff provided only “limited and conclusory statements” that “failed to justify his requests’’); Marable v. DOC, 2019 U.S. Dist. LEXIS 164768, at *11 (N.D. Tex. Sept. 26, 2019) (the court denied a motion to compel because after the resisting party made specific objections that the request was overly burdensome, the party moving to compel did not make specific showing of relevance and proportionality).

• 6th Cir. Martin v. Posey, 2017 WL 412876, at *4 (S.D. Ohio Jan. 31, 2017) (Where plaintiff asked for additional requests for admissions due to “defendants’ inconsistent answers,” court denied such requests because plaintiff “has not shown why he needs more requests for admission or how any additional requests will help him obtain the information he needs to prosecute his claims.”); State Farm Mut. Auto. Ins. v. Pointe Physical Therapy, 2017 WL 2616938, at *7 (E.D. Mich. June 12, 2017) (court granted discovery request because requesting party made sufficient proportionality showing for each of proportionality factors in contrast with responding party’s inadequate showing); Anwar v. Dow Chem. Co., 2017 WL 5895117, at *8 (6th Cir. Nov. 30, 2017) (Appellate court denied discovery where “district court granted limited discovery, and [requesting party] fail[ed] to show that the information would change any result or that the depositions she sought to take were within the district court’s limited discovery parameters.”).


• 8th Cir. Quinonez-Castellanos v. Performance Contractors, Inc., 2017 WL 3430511, at *5–6 (N.D. Iowa Aug. 9, 2017) (court limited discovery of discrimination practices only of worksites of company where supervisor allegedly practiced discrimination against employees).

upheld because the Advisory Committee Notes say that restoring the proportionality calculation does not change the court’s responsibility to consider proportionality).

- **10th Cir.** *EEOC v. Centura Health*, 2017 WL 3821781, at *7 (D. Co. Sept. 1, 2017) (court rejects defendant’s argument that burden of reviewing thousands of hard copies of documents is burdensome, because defendant failed to explain why converting documents to electronic data by means of OCR would not be effective and inexpensive); *Xmission, L.C. v. Adknowledge, Inc.*, 2016 WL 6108556, at *3 (D. Utah Oct. 19, 2016) (request denied for information “that was mooted and resolved over a year ago” because plaintiff “does little to explain[] the relevance of these discovery requests to the current litigation”).

  Cf.

- **6th Cir.** *In re Haynes*, 2017 WL 3559509, at *8 (E.D. Tenn. Aug. 11, 2017) (“[T]he amended rule did not shift the burden of proving proportionality to the party seeking discovery.”).

  39 Unsupported assertions by the requesting party insufficient.


- **5th Cir.** *Smith v. Shelter Mut. Ins.*, 2017 WL 2990287, at *6 (M.D. La. July 13, 2017) (court granted discovery request when requesting party “argue[d] in extensive detail that the information sought . . . [was] relevant” and the objecting party merely stated that information was “presently irrelevant”).

- **9th Cir.** *Dao v. Liberty Life Assurance Co. of Boston*, 2016 WL 796095, at *5 (N.D. Cal. Feb. 23, 2016) (court found that plaintiff failed to show the value of her case that exceeded actual damages and therefore burden and expense of broad discovery outweighed its likely benefits); *Intellichef Mobilisa, Inc. v. Honeywell Int’l Inc.*, 2017 WL 4221091, at *2 (W.D. Wash. Sept. 21, 2017) (motion to compel was incomplete and therefore inadequate because party did not explain how “the information sought in each disputed RFP is relevant.”); *Holt v. Noble House Hotels & Resort, Ltd.*, 2018 U.S. Dist. LEXIS 145566, at *16–17 (S.D. Cal. Aug. 24, 2018) (speculative reasons for seeking discovery are not enough).

  40 Inferior access to information.

- **5th Cir.** *Duwall v. BOPCO, L.P.*, 2016 WL 1268343, at *3 (E.D. La. Apr. 1, 2016) (court denied plaintiff’s request to inspect and test barge equipment despite inferior access to information when Rule 34 inspection had already occurred and plaintiff retained engineering expert).

  41 Party cooperation.

- **2d Cir.** *New Falls Corp. v. Soni*, 2020 U.S. Dist. LEXIS 94747, at *30 (E.D.N.Y. May 29, 2020) (“counsel for both parties are reminded of their obligation under Local Rule” to cooperate with each other).

- **3d Cir.** *Rotex Global, LLC v. Gerard Daniel Worldwide, Inc.*, 2019 U.S. Dist. LEXIS 177017, at *1 (M.D. Pa. Oct. 11, 2019) (“We also underscored for all counsel our view that they should work cooperatively to tailor discovery to the needs of the case and noted that clear communications between counsel are essential . . . .”).


- **7th Cir.** *DeVine v. XPO Logistics Freight*, 2020 U.S. Dist. LEXIS 45739, at *7–8 (N.D. Ill. Mar. 17, 2020) (“[P]arties shall attempt to reach agreement as to whether all of those depositions need to proceed, or whether some of them are superfluous or unnecessary. Or, alternatively, if the parties continue to be interested in settlement, they may reach an agreement to defer remaining . . . depositions pending a settlement conference.”).


June 13, 2016) (in light of third-party’s cooperation and good-faith attempts to provide requested information, court declined to require submission of formal privilege log or affidavit evidence to support privilege claim); Martinelli v. Johnson & Johnson, 2016 WL 1458109, at *1 (E.D. Cal. Apr. 13, 2016) (parties agreed to ESI protocol, which provided that “counsel’s zealous representation of them [was] not compromised by conducting discovery in a cooperative manner”); Roberts v. Clark County Sch. Dist., 312 F.R.D. 594, 603 (D. Nev. Jan. 11, 2016) (Chief Justice Robert’s Year-End report stated that lawyers representing adverse parties “have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes”); Wichansky v. Zowine, 2016 U.S. Dist. LEXIS 37065, at *5 (D. Ariz. Mar. 22, 2016) (“[P]arties share the responsibility’ to achieve Rule 1’s goal, and emphasizes that ‘effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use’ of the rules of procedure. The parties should cooperate during trial to minimize delay and wasted time.”); Roberts v. Clark Cty. Sch. Dist., 312 F.R.D. 594, 603 (D. Nev. Jan. 11, 2016) (Chief Justice Robert’s year-end Report said that “Rule 1 was expanded . . . to emphasize ‘the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation’”).

• 10th Cir. Digital Ally, Inc. v. Util. Assocs., Inc., 2016 WL 1535979, at *2 (D. Kan. Apr. 15, 2016) (parties “engaged in discussions to resolve the issues of whether the information sought was, in fact, responsive to the previous discovery and whether Defendant was required to produce it. Those communications between the parties led to resolution of six categories of requests”).

• 11th Cir. Whelpley v. Comenity Bank, 2019 U.S. Dist. LEXIS 85152, at *29 (M.D. Fla. Mar. 6, 2019) (ordering parties to cooperate to reset depositions as soon as practicable).

42 Technology can affect proportionality analysis.

• 2d Cir. BAT LLC v. TD Bank, N.A., 2018 U.S. Dist. LEXIS 127387, at *27 (E.D.N.Y. July 30, 2018) (finding that discovery of information not reasonably accessible is disproportional, because “it is maintained offline as inactive data, access to which requires special technology and resources”).

• 9th Cir. Bank of Am., N.A. v. Auburn & Bradford at Providence Homeowners’ Ass’n, 2016 U.S. Dist. LEXIS 104827 (D. Nev. Aug. 1, 2016) (motion for protective order granted, requiring Rule 30(b)(6) deposition to be video-conferenced in Dallas, location of corporate designees, to avoid unnecessary expense).

43 Limiting review when party fails to maintain automated statistical reporting system to respond to discovery request.


• 6th Cir. Suzette Scott-Warren v. Liberty Life Assur. Co. of Boston, 2016 WL 5661774, at *5 (W.D. Ky. Sept. 29, 2016) (because defendant did not possess aggregate data on insurance claims, court limited number of claims to be reviewed manually).


44 Planning and prioritization of discovery.

• 3d Cir. U.S. ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co., 2016 WL 5799660, at *13 (3d Cir. 2016) (“The instant matter . . . requirement[a] the active involvement of the District Court, in conjunction with counsel and their clients, to limit the expense and burden of discovery while still providing enough information to allow CFI to test its claims on the merits.”)

• 9th Cir. Loop AI Labs Inc v. Gatti, 2016 WL 1273914, at *1 (N.D. Cal. Feb. 5, 2016) (court ordered parties to “prioritize determining what can be provided without controversy first, and then produce that material expeditiously, rather than using formalistic discovery disputes and objections at the margins as an excuse to delay any production”).

45 Ordering parties to meet-and-confer.


• 3d Cir. Lux Global Label Co. v. Shacklett, 2020 U.S. Dist. LEXIS 62200, at*19 n.2 (E.D. Pa. Apr. 8, 2020) (ordering parties to meet-and-confer to “submit a joint proposed order setting forth a different timeline” if the current deadlines are not workable due to COVID-19).
Courts and parties share responsibility for ensuring discovery is proportional.


* 6th Cir. Lubahn v. Absolute Software, 2017 WL 6461863, at *4 (E.D. Mich. Dec. 19, 2017) (court denied depositions due to improper notice, but noted that neither party addressed proportionality and said that a “ruling on a motion to compel discovery must also address the proportionality factors”).


* 9th Cir. Salazar v. McDonald’s Corp., 2016 WL 736213, at *2 (N.D. Cal. Feb. 25, 2016) (“Under the Court’s reading, the revised rule places a shared responsibility on all parties to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts.”); Goes Int’l, AB v. Dodur Ltd., 2016 WL 427369, at *4 (N.D. Cal. Feb. 4, 2016) (“[P]arties and the court have a collective responsibility to consider proportionality of all discovery and consider it in resolving discovery disputes.”).

* 10th Cir. Frick v. Henry Indus., Inc., 2016 WL 6966971, at *3 (D. Kan. Nov. 29, 2016) (court noted that amendments to Rule 26(b) “reinforced the need for parties, and the Court when necessary, to focus on the avoidance of undue expense to parties”).

Lawyers should rely on common-sense concept of proportionality.


Court should consider proportionality in absence of motion.

1st Cir. Hull v. Ferrell, 2016 Bankr. LEXIS 913, at *7 (Bankr. D. Me. Mar. 23, 2016) (“The Court may, on its own initiative, limit discovery that is beyond the scope of permissible discovery.”).

2d Cir. Woodward v. Holtzman, 2018 U.S. Dist. LEXIS 179756, at *25 n.9 (W.D.N.Y. Oct. 18, 2018) (“Although Defendants do not explicitly rely on Rule 26(b)(1)’s proportionality requirement, courts have an independent duty to assess whether a disputed discovery request does so.”).


4th Cir. Beasley v. Novant Health, Inc., 2016 WL 4435230, at *4 (M.D.N.C. Aug. 19, 2016) (court granted defendant’s motion to compel discovery production request but limited time period because it was “disproportionate to the needs of this routine employment case”).


7th Cir. Arcelormittal Ind. Harbor, LLC v. Amex Nooter, LLC, 2016 WL 4077154, at *4 (N.D. Ind. July 8, 2016) (“Court's consideration of the controlling, applicable Federal Rule of Civil Procedure on the issue directly before the Court does not constitute making ‘a decision outside the adversarial issues presented by the parties.’”).

8th Cir. Foster v. Litman, 2020 U.S. Dist. LEXIS 811, at *6 (D. Minn. Jan. 3, 2020) (“A court upon a motion or on its own” should limit discovery that is not proportional).

9th Cir. Williams v. Grant Cty., 2017 WL 3671166, at *2 (D. Or. Aug. 25, 2017) (plaintiff did not resist discovery or oppose motion to compel; court granted motion to compel after reviewing defendant’s requests and finding them relevant and proportional).

10th Cir. Rowan v. Sunflower Elec. Power Corp., 2016 WL 2772210, at *3–4 (D. Kan. May 13, 2016) (even if parties did not mention proportionality, court has “obligation to limit the frequency or extent of discovery” where, e.g., it is disproportional); Ad Astra Recovery Servs. v. Heath, 2019 U.S. Dist. LEXIS 160898, at *10–11 (D. Kan. Sept. 18, 2019) (the court has “an independent obligation to sua sponte consider the issue of proportionality,” even though it has overruled a proportionality objection in a previous hearing.).
11th Cir. Costa v. Metropolitan Life Ins., 2018 WL 1635642, at *5 (M.D. Fla. Apr. 5, 2018) (Court limited
discovery because it was not “disproportional to what is necessary,” even though producing party did not object
on those grounds).

Cf.

11th Cir. City of Jacksonville v. Shoppes of Lakeside, Inc., 2016 WL 3447383, at *4 n.8 (M.D. Fla. June 23,
2016) (parties did not address proportionality and court found no reason to limit discovery on its own based on
proportionality).

Court should communicate its availability to resolve discovery disputes.

(“The parties may seek judicial assistance in the event they reach any impasse, and the Court will attempt
to resolve any such disputes expeditiously, mindful of the timetable. The parties are reminded, however, that the
Court strongly discourages raising discovery disputes that reasonable attorneys would avoid or resolve
amicably.”).

declaring the court’s willingness to rule promptly on requests and oppositions for depositions made under the
protocol imposed by the court).

9th Cir. In re AutoZone, Inc., 2016 WL 4136520 (N.D. Cal. May 16, 2016) (asking parties to set status
conference if parties were unable to come to a resolution); Timothy v. Oneida Cty., 2016 WL 2910270, at *5 (D.
Idaho May 18, 2016) (court explained that it would be “available for a short conference with counsel in an effort
to create more meaningful guidelines” after parties conferred on discovery disputes).

Approaches to timely and efficiently resolving discovery disputes.

opportunities” to “meet and confer and resolve [discovery disputes] amicably”).

6th Cir. Waters v. Drake, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016) (court listed tools to implement
proportionality amendments, including: “case management conferences early in the litigation; requiring parties to
submit joint discovery plans; the judge being available to timely resolve disputes; regular discovery conferences
or hearings; stays of discovery to resolve pure legal issues; the use of affidavits to determine whether more costly
avenues of discovery, such as depositions, would be justified; and the rolling submission of information produced
during discovery to the court so that it can better evaluate the need for additional discovery in light of the
parties to “engage in further cooperate dialogue in an effort to come to an agreement regarding proportional
discovery.”)

7th Cir. Amarei v. City of Chi., 2016 WL 3693425, at *1, n.1 (N.D. Ill. July 12, 2016) (court lamented that
discovery disputes resolved by mutual party consent at court hearing could have been resolved before hearing if
the parties had held proper meet-and-confer meeting).

9th Cir. 24/7 Customer, Inc. v. Liveperson, Inc., 2016 WL 4054884, at *3 (N.D. Cal. July 29, 2016) (court denied
request to compel response to interrogatory on grounds that response was premature because “benefit [was] not
only minimal, but [was] surely outweighed by the burden imposed by responding to 122 claims when the claims
[were] in the process of being whitelisted”); Medicinova Inc. v. Genzyme Corp., 2017 WL 2829691, at *6
(S.D. Cal. June 29, 2017) (denying discovery request partly because “no effort was made by plaintiff during the
parties’ meet and confer sessions to narrow the scope of these requests to the types of documents most likely to
elicit ‘a complete picture of the facts’”).

Discovery requests can be made before Rule 26(f) meet-and-confer under Rule 26(d).

before Rule 26(f) meeting based on standing order, which is seemingly inconsistent with Rule 26(d)(1) that permits
such exclusion but only on court order in individual case; nonetheless, amended Rule 26(d)(2) permits early
submission of Rule 34 request to produce documents).

court may authorize discovery before the Rule 26(f) meeting for ‘good cause,’ meaning simply that the need for
discovery outweighs any possible prejudice to the party . . . .”).

Cf.
• 7th Cir. Chambers v. Sue Puff & Phoenix Inst., 2020 U.S. Dist. LEXIS 85448, at *5 (N.D. Ind. May 15, 2020) (“Plaintiffs could not conduct discovery until after they conferred as required in Rule 26(f).”).

• 8th Cir. Foster Cable Servs. v. DeVille., 368 F. Supp. 3d 1265, 1271 (W.D. Ark. 2019) (“[P]arties generally cannot conduct formal discovery before conferring pursuant to Rule 26(f).”).

52 Face-to-face discussions with opposing counsel better than email exchanges.

• 2d Cir. Acosta v. Puccio, 2019 U.S. Dist. LEXIS 80709, at *9–10 (D. Conn. May 14, 2019) (“Judge Shea interprets the good faith conference obligation of the Federal Rules and Local Rules to require counsel to confer either face-to-face or by telephone; exchanges of correspondence are not sufficient . . . to satisfy counsel’s good faith conference obligations.”).


• 6th Cir. In re Ex Parte Caterpillar Inc., 2020 U.S. Dist. LEXIS 70913, at *44–45 (M.D. Tenn. Apr. 21, 2020) (ordering lead counsel for all parties to meet in person and file a joint statement to certify this in-person meeting and good faith effort).

• 7th Cir. Infowhyse GmbH v. Fleetwood Grp., 2016 WL 4063168, at *1 (N.D. Ill. July 29, 2016) (local rule required parties to “make ‘good faith attempts to resolve differences’ over discovery issues through ‘consultation in person or by telephone’” for Rule 26(f) meet-and-confers).

• 8th Cir. Schmidt v. Audrain County Crisis Intervention Servs., 2019 U.S. Dist. LEXIS 129423, at *2 (E.D. Mo. Aug. 2, 2019) (local rule “requires movant’s counsel to confer in person or by telephone with opposing counsel in good faith or make reasonable efforts to do so”).

• 9th Cir. Williams v. Perdue, 2020 U.S. Dist. LEXIS 62038, at *3 (W.D. Wash. Apr. 8, 2020) (local rule provides that “[a] good faith effort to confer . . . requires a face-to-face meeting or a telephone conference.”).

• 10th Cir. Mafille v. Kaiser-Francis Oil Co., 2019 U.S. Dist. LEXIS 73428, at *1–2 (N.D. Okla. May 1, 2019) (“Counsel are required to personally meet face-to-face in a sincere good faith effort to resolve differences.”).


53 Input on search techniques from all parties.

• 2d Cir. In re Porsche Automobil Holding SE, 2016 U.S. Dist. LEXIS 20012, at *32 (S.D.N.Y Feb. 18, 2016) (“[P]arties are encouraged strongly to discuss narrowing custodians and search terms for retrieval of electronically stored information where possible.”).

• 5th Cir. Johnson v. Holliday, 2016 U.S. Dist. LEXIS 129633, at *5–6 (M.D. La. Sept. 22, 2016) (ordering “Plaintiff’s counsel to propose custodians and search terms . . . for the parties to confer in good faith . . . and . . . to notify the Court whether the parties have agreed upon such custodians and terms”).

• 9th Cir. Albert v. Lab. Corp. of Am., 2020 U.S. Dist. LEXIS 16979, at *2 (W.D. Wash. Jan. 31, 2020) (“In the ESI Agreement, the parties agreed to cooperate to determine the appropriate search terms before any effort to search for ESI using search terms is undertaken.”).

• 10th Cir. Entrata, Inc. v. Yardi Sys., 2018 U.S. Dist. LEXIS 185744, at *5 (affirming the magistrate court’s order which required that “parties are to work together in good faith to identify and negotiate a reasonable set of search terms and/or other search methodology to be used in searches of ESI. If the parties are unable to agree . . . the parties will submit competing proposals . . .”).

54 Duty to produce readily available documents before using technology.

• 9th Cir. Castellar v. McAleenan, 2020 U.S. Dist. LEXIS 49942, at *72 (S.D. Cal. Mar. 20, 2020) (compelling production of written policies and practices because “[i]t is unreasonable to ask to search emails that may discuss them without providing detail for that request”).

55 Known and relevant documents not identified by search terms.

• 2d Cir. Agerbrink v. Model Serv. LLC, 2017 U.S. Dist. LEXIS 33249, at *13 (S.D.N.Y. Mar. 8, 2017) (“[T]he fact that a party has located a single relevant document that the adversary failed to produce hardly demonstrates that the search was flawed. The standard for evaluating discovery is reasonableness, not perfection.”).
7th Cir. Landfill v. County of Clark, 2019 U.S. Dist. LEXIS 225406, at *23 (S.D. Ind. Sept. 26, 2019) (permitting depositions “to the extent reasonably necessary to determine the existence of information or documentation that is available but was not searched or produced”).

Cf.

7th Cir. Senior Lifestyle Corp. v. Key Ben. Adm’rs, Inc., 2019 U.S. Dist. LEXIS 160592, at *23 (S.D. Ind. Sept. 20, 2019) (refusing to compel production of arguably reasonably available documents that were not identified by agreed search terms because the requesting party failed to request them over a year knowing that they were not produced by search terms and discovery should not be reopened at this late time).

Meet-and-confer regarding the privilege log.

2d Cir. Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc., 331 F.R.D. 218, 236 (E.D.N.Y. Apr. 11, 2019) (the court granted Defendant’s leave to amend the privilege log to add investigatory materials possessed by Morgan Lewis instead of declaring waiver of privilege in part because Plaintiff “failed to meet and confer with respect to this category of documents”).


7th Cir. RTC Indus. v. Fasteners for Retail, Inc., 2019 U.S. Dist. LEXIS 174737, at *10 (N.D. Ill. Mar. 15, 2019) (ordering “meet and confer regarding the level of detail that both parties believe should be included in their privilege log entries so their privilege claims can be adequately assessed”).


9th Cir. Natural-Immunogenics Corp. v. Newport Trial Grp., 2018 U.S. Dist. LEXIS 228114, at *13 (C.D. Cal. Apr. 23, 2018) (“As a result of the meet and confer process, Defendants agreed ‘to identify the privilege log entries that relate to the ProMaxal litigation,’ and produced a revised 56-page privilege log that eliminated work-product protection for 177 documents.”) (citation omitted).

10th Cir. Abouelenein v. Kan. City Kan. Cmty. Coll., 2020 U.S. Dist. LEXIS 39060, at *8–9 (D. Kan. Mar. 6, 2020) (the court refused defendants’ argument that the plaintiff “had an additional burden to confer regarding the privilege log” and waived objections when failing to confer, and ordered the parties to confer regarding the privilege log issues “[i]n the interest of efficiency, and to hopefully resolve some of these outstanding issues”).


Importance of firm discovery due date.


2d Cir. Jenkins v. Miller, 2020 U.S. Dist. LEXIS 2234, at *7–8 (D. Vt. Jan. 7, 2020) (“The Court also recognizes the importance of moving along the discovery process with a finalized set of deadlines, especially considering the numerous changes in the discovery schedule that have occurred . . . [T]o minimize further back-and-forth regarding discovery, the Court orders Defendants and Plaintiffs to submit one modified proposed discovery schedule . . . which should reflect any proposed changes to the current discovery deadlines.”)

Cf.

3d Cir. Jeddo Coal Co. v. Rio Tinto Procurement (Sing.) Ptd Ltd., 2018 U.S. Dist. LEXIS 57803, at *24 (M.D. Pa. Apr. 5, 2018) (although the court recognized the interest in following deadlines and moving the case forward, it found the extension of discovery deadlines necessary).

Technology tutorial.

5th Cir. DSS Tech. Mgmt. v. Taiwan Semiconductor Mfg. Co., 2016 U.S. Dist. LEXIS 141623, at *18–21 (E.D. Tex. Oct. 12, 2016) (holding that “the cost of preparing a technology tutorial to assist the Court” is not “necessarily incurred” expenses and needs not be shared by the other party).
The parties encouraged to stipulate to the authenticity of certain documents.


59 **Regular status conference.**


- **7th Cir.** *Jones v. UPR Prods.*, 2016 U.S. Dist. LEXIS 148811, at *5 (N.D. Ill. Oct. 27, 2016) (“If counsel experiences difficulty in setting depositions or in securing the cooperation and assent of his opposition, immediate action must be taken. Further delay without action will not be permitted. To ensure that this will not happen, the court will convene a status conference monthly for counsel to report to the court on the progress of discovery.”)

60 **Parties encouraged to agree on facts when appropriate to eliminate discovery.**


- **10th Cir.** *Feltz v. Bd. of Cty. Comm’rs*, 2020 U.S. Dist. LEXIS 74444, at *7 (N.D. Okla. Apr. 28, 2020) (“[T]he parties agreed to attempt to reach factual stipulations and obviate or reduce the need for fact discovery.”).

61 **Parties encouraged to stipulate to authenticity of certain documents.**

- **2d Cir.** *Demirovic v. Ortega*, 2017 U.S. Dist. LEXIS 170206, at *29 (E.D.N.Y. Oct. 13, 2017) (plaintiffs’ stipulation to “to the authenticity of certain documents that these two witnesses might otherwise be called upon to authenticate” reduces the need for their testimony and allows the court to bar the defendants “from calling them as witnesses at trial”).

- **5th Cir.** *Adams v. City of New Orleans*, 2017 U.S. Dist. LEXIS 74996, at *17–18 (E.D. La. May 17, 2017) (stipulation to . . . the authenticity of documents must be voluntary and the court cannot order a party to do so).

- **6th Cir.** *Narjes v. Absolute Health Servs.*, 2018 U.S. Dist. LEXIS 109219, at *2 (N.D. Ohio June 29, 2018) (“The parties stipulate to the authenticity of the documents produced by each party in discovery, without waiving their rights to object to the admissibility of any produced documents based on relevancy or otherwise . . . .”).

- **9th Cir.** *McKee v. Audible, Inc.*, 2017 U.S. Dist. LEXIS 217391, at *9 n.2 (C.D. Cal. Oct. 26, 2017) (“It is the Court’s view that the parties should be able to stipulate to the authenticity and accuracy of the [documents]. If the Court is mistaken in this regard, and Plaintiffs can show good cause as to why such a stipulation is impossible without formal discovery, the Court would permit very limited discovery on the issue.”).

- **10th Cir.** *Lifetime Prods. v. Russell Brands, LLC*, 2016 U.S. Dist. LEXIS 80272, at *3 (D. Utah June 20, 2016) (admitting to the authenticity of the documents makes authentication depositions unnecessary).

- **11th Cir.** *Lane v. Philbin*, 2017 U.S. Dist. LEXIS 154694, at *36 (M.D. Ga. Sept. 22, 2017) (“[T]he Court encourages the parties to expedite the trial process by stipulating to the authenticity of documents prior to trial.”).

62 **Party requested targeted discovery.**


Targeted discovery.

- **2d Cir.** *Sibley v. Choice Hotels Int’l*, 2015 WL 9413101, at *2 (E.D.N.Y. Dec. 22, 2015) (court defined disputed issues and provided for “limited targeted discovery” that was “proportional to the needs of the case”).
- **3d Cir.** *Fassett v. Sears Holdings Corp.*, 2017 WL 386466, at *1 (M.D. Pa. Jan. 27, 2017) (“[I]n a products liability suit . . . faithful adherence to amended Rule 26(b)(1)’s renewed proportionality mandate is furthered considerably by implementation of a sliding scale analysis: material corresponding to alternative designs or components that exhibit significant similarities to the design or component at issue should be discoverable in the greatest quantities and for the most varied purposes; however, material corresponding to alternative designs or components that share less in common with the contested design or component should be incrementally less discoverable—and for more limited purposes—as those similarities diminish.”); *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 2016 WL 5799660, at *12 (3d Cir. Oct. 5, 2016) (“It will be up to the District Court and counsel to determine an appropriately limited discovery plan, perhaps reviewing the documents and duties paid on a representative sample of the shipments identified by CFI.”); *In re XPO Logistics, Inc.*, 2017 WL 2226593, at *11 (S.D.N.Y. May 22, 2017) (court denied broad discovery of employee compensation records, instead ordering “targeted discovery” regarding assets and business plans).
- **5th Cir.** *ING Bank N.V. v. MV Portland, IMO No. 9497854*, 2016 WL 3365426, at *10 (M.D. La. June 16, 2016) (granting motion to compel disclosures limited to determining jurisdiction where party failed to produce evidence that discovery would be unnecessarily burdensome or futile).
- **9th Cir.** *Oracle Am., Inc. v. Google, Inc.*, 2015 WL 7775243, at *2 (N.D. Cal. Dec. 3, 2015) (because parties represented that they needed “limited targeted discovery” and failed to address proportionality factors, court allowed plaintiff to choose ten additional custodians from its original list of 22 custodians to search for relevant information); *O’Connor v. Uber Techs.*, 2016 WL 107461, at *4 (N.D. Cal. Jan. 11, 2016) (court denied defendant’s overly broad discovery request, noting however, that defendant would have been entitled to targeted discovery).
- **11th Cir.** *MSPA Claims 1, LLC v. Kingsway Amigo Ins.*, 2018 U.S. Dist. LEXIS 221262, at *14 (S.D. Fla. Sept. 28, 2018) (requiring more targeted requests “after an initial class representative deposition[] that allows for class discovery in a more efficient manner”).

Identifying discoverable information available at beginning of case.

- **6th Cir.** *Waters v. Drake*, 2016 WL 4264350, at *18 (S.D. Ohio Aug. 12, 2016) (“[t]he adoption of certain protocols or measures will advance” discovery amendments, including “rolling submission of information produced during discovery to the court so that it can better evaluate the need for additional discovery in light of the discovered facts”).
- **8th Cir.** *Design Basics LLC v. Ahmann Design, Inc.*, 2016 WL 4251076, at *4 (N.D. Iowa Aug. 10, 2016) (before permitting additional discovery, plaintiff limited to eight-hour inspection of defendant’s paper files in banker boxes, containing 1,100 custom home-design plans over 23-year period, for evidence that defendant had engaged in copyright infringement).
- **10th Cir.** *Meeker v. Life Care Ctrs. of Am., Inc.*, 2016 WL 1403335, at *7 (D. Colo. Apr. 11, 2016) (court explained that had defendant identified information available at beginning of case, “the court could have used its judicial resources expended in the informal discovery conferences discussing and evaluating concrete facts about the burdens and benefits of the requested discovery, instead of generalities”).

Court may order focused discovery.

- **2d Cir.** *Sky Med.I Supply Inc. v. SCS Support Claim Servs., Inc.*, 2016 WL 4703656, at *14 (E.D.N.Y Sept. 7, 2016) (“[o]nce the production of items (1) and (2) have been completed and have been assessed by the Plaintiff, if and only if the Plaintiff can establish ‘good cause’ for any further production may the Plaintiff come back to the Court with a further motion.”).
- **5th Cir.** *Hahn v. Hunt*, 2016 WL 1587405, at *3 (E.D. La. Apr. 20, 2016) (court limited discoverable information from third party, including information from his deposition, to materials relevant to disputed issues)
• 6th Cir. Arthur J. Gallagher & Co. v. Anthony, 2016 WL 4076819 (N.D. Ohio June 22, 2016) (limiting scope of subpoena for production of documents from third party); Wilmington Tr. Co. v. AEP Generating Co., 2016 WL 860693, at *3 (S.D. Ohio Mar. 7, 2016) (court ordered defendants “to search the records of the four persons they believe to be the most likely to have such records”); Smith v. Old Dominion Freight Line, Inc., 2017 WL 2371825, at *7, *8 (W.D. Ky. May 31, 2017) (court limited discovery regarding changes to defendant’s policies and driving history to specific date range, January 1, 2010, to April 12, 2016).

• 7th Cir. Robinson v. Gateway Tech. Coll., 2016 WL 344959, at *4 (E.D. Wis. Jan. 26, 2016) (“To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.”); In re Broiler Chicken Antitrust Litig., 2017 U.S. Dist. LEXIS 160411, at *4 (N.D. Ill. Sept. 28, 2017) (“The Court will continue to apply the benefit-burden balancing approach . . . that has guided other discovery decisions in this case . . . . The Court understands that ordering full document production at this juncture would significantly ratchet up costs for all parties.”).

• 8th Cir. In re Fluoroquinolone Prods. Liab. Litig., 2016 WL 4045414, at *1 (D. Colo. July 20, 2016) (court limited search in MDL action to existing databases and central repositories, but left open possibility of searching individual custodial files “if the information available in these structured databases turns out to be insufficient”).

• 9th Cir. Lauris v. Novartis, 2016 WL 7178602, at *5 (E.D. Cal. Dec. 8, 2016) (court denied request to expand discovery without prejudice, noting that if, after the ordered discovery, the parties still disagreed, court would revisit scope of discovery); Estate of Cruz-Sanchez v. United States, 2018 WL 2193415, at *4 (S.D. Cal. May 14, 2018) (court limited request for “all documents” that “support or refute” claims of understaffing to “information about staffing, including staffing numbers and a description of the types of persons present” in the areas where plaintiff was present); Albert v. Lab. Corp. of Am., 2020 U.S. Dist. LEXIS 16979, at *8, n.2 (W.D. Wash. Jan. 31, 2020) (advising the producing party to first gather documents that is reasonably accessible and then identify data sources to run search terms, because discovery should “go first for what is most important, then follow up (if needed) with the information of lesser value”).


• 11th Cir. Cerrato v. Nutribullet, LLC, 2017 WL 3608266, at *2–3 (M.D. Fla. Aug. 22, 2017) (in products liability suit, plaintiff’s requested discovery of all accident reports and consumer complaints relating to product “contain or the circumstances of the incident in the materials requested” was overly broad).

66 Early focused discovery may make full discovery request unnecessary.


• 5th Cir. Hernandez v. Baylor Univ., 2017 WL 1628992, at *5 (W.D. Tex. May 1, 2017) (“approach is often referred to as “focused” discovery, and it has two main benefits: (1) focusing on the most important information from the most accessible sources naturally keeps those efforts well within the proportionality requirement; and (2) the information obtained be very helpful in determining what further discovery efforts would be proportional to the needs of the case”).


• 7th Cir. Hindia v. Sheriff of Cook Cty., 2019 U.S. Dist. LEXIS 167673, at *18 (N.D. Ill. Sept. 30, 2019) (evidence that “indisputably shows” the agreement was signed voluntarily “will eliminate the need for discovery or further litigation over the issue of duress”).

• 8th Cir. Schultz v. Sentinel Ins., 2016 WL 3149686, at *12 (D.S.D. June 3, 2016) (court compelled search of insurance claim file database to retrieve claims “first made within the last ten years” in lieu of broader request).

• 9th Cir. Wide Voice, LLC v. Sprint Commc’ns. Co., 2016 WL 155031, at *2 (D. Nev. Jan. 12, 2016) (“The parties and court should consider sequencing discovery to focus on those issues with the greatest likelihood to resolve the case, and the biggest bang-for-the buck at the outset, with more discovery, later, as the case deserves.”).

• 11th Cir. Bennett v. Langford, 796 Fed. Appx. 564, 566 (11th Cir. 2019) (denying a discovery request when “further discovery would not be helpful” given that sufficient discovery has been done).
67 Court may order sequenced discovery.
- 1st Cir. Primarque Prod. v. Williams West & Witt's Prod. Co., 2016 WL 6090715, at *4 (D. Mass. Oct. 18, 2016) (To avoid “unnecessarily duplicative or cumulative discovery” and to minimize burden, court permitted discovery of records beyond ninety-day period only if no evidence was found in initial discovery.).
- 2d Cir. In re Whole Foods Mkt. Grp., Inc., 397 F. Supp. 3d 406, 412 (S.D.N.Y. July 17, 2019) (the court approved a two-phase discovery plan, in which an anticipated motion for summary judgment followed the first-phase discovery and if plaintiff survived summary judgment, the second-phase discovery would be conducted).
- 7th Cir. Smith v. OSF Healthcare Sys., 933 F.3d 859, 861 (7th Cir. 2019) (vacating the summary judgment for defendants considering that “plaintiff was pursuing discovery in a diligent, sensible, and sequenced manner”).

68 Establishing ESI-production protocols.
- 4th Cir. Indus. Packaging Supplies, Inc. v. Davidson, 2019 U.S. Dist. LEXIS 58642, at *3 (“This ESI Protocol, and any properly executed modifications hereof, shall . . . exclusively govern the parties’ review and examination of Defendants’ electronic data storage devices and services.”).
- 5th Cir. Brand Serv., LLC v. Irex Corp., 2017 WL 67517, at *3 (E.D. La. Jan. 6, 2017) (court ordered parties “to develop an ESI protocol that contemplates key word searches so as to control costs and to keep discovery proportional to the needs of this case”); Mr. Mudbug, Inc. v. Bloom in’ Brands, Inc., 2017 WL 111268, at *3 (E.D. La. Jan. 11, 2017) (defendant’s second request for documents in PDF or Word format canceled its initial request for documents in their original format, so plaintiff properly complied with defendant’s discovery request by providing PDF documents).
- 7th Cir. In re Broiler Chicken Antitrust Litig., 2018 U.S. Dist. LEXIS 125044, at *17–18 (N.D. Ill. July 26, 2018) (ordering a party to “comply with the ESI Protocol, including the temporal scope of the legitimate discovery now sought”).
- 8th Cir. Enter. Fleet Mgmt., Inc. v. Guinn, 2018 WL 2068291, at *4 (E.D. Mo. May 3, 2018) (court ordered parties to meet-and-confer to narrow ESI search terms and to agree on a procedure to avoid duplication of a prior search).
9th Cir. Martinelli v. Johnson & Johnson, 2016 WL 1458109, at *1 (E.D. Cal. Apr. 13, 2016) (court established protocols to “facilitate the just, speedy, and inexpensive completion of discovery of ESI and hardcopy documents and to promote, whenever possible, the early resolution of disputes, including any disputes pertaining to scope or costs regarding the discovery of ESI without Court intervention”); Am. Auto. Ins. v. Haw. Nut & Bolt, Inc., 2017 WL 80248, at *5 (D. Haw. Jan. 9, 2017) (“The parties should put their respective IT representatives in contact to see if an understanding can be reached about the format in which ESI can be produced, as well as the related metadata.”); Kellgren v. Petco Animal Supplies, Inc., 2017 WL 979045, at *5 (S. D. Cal. Mar. 13, 2017) (denying, as disproportional, plaintiff’s request to expand ESI search terms because plaintiffs did not show “that a sampling of responsive information” was “insufficient for them to pursue their theory of the case”).


69 Court should be clear about initial limitations on discovery and opportunities to follow-up discovery when setting initial boundaries of scope of discovery.

2d Cir. Sky Med. Supply Inc. v. SCS Support Claim Servs., Inc., 2016 WL 4703656, at *8 (E.D.N.Y Sept. 7, 2016) (parties were directed to “focus on the claims that we know about right now that deal specifically with the damages that you’re claiming” but if more discovery becomes necessary, “then we’ll worry about a second wave of discovery”); Black v. Buffalo Meat Serv., 2017 WL 2720080, at *6 (W.D.N.Y. June 23, 2017) (court denied full discovery of documents regarding which it had previously granted limited discovery).

3d Cir. In re Domestic Drywall Antitrust Litig., 2016 WL 4414640, at *2 (E.D. Pa. Aug. 18, 2016) (“[D]iscovery fence’ [initial boundary set for discovery] must be flexible to account for changes in the focus by the parties brought on by additional discovery or their own investigation.”).

5th Cir. Hernandez v. Baylor Univ., 2017 WL 1628992, at *5 (W.D. Tex. May 1, 2017) (“as Plaintiff has not yet gathered the ‘low hanging fruit,’ this Court finds it would be inappropriate to allow her to pursue information from less convenient, less relevant sources … But Plaintiff has more than ten months to continue discovery. In the future, if she believes the circumstances warrant, she may request that this Court lift the protective order.”); Cain v. City of New Orleans, 2016 WL 7156071, at *7 (E.D. La. Dec. 8, 2016) (court expressly recognizes that plaintiffs are entitled “to file a new motion seeking particularly identified additional responsive materials,” if defendant’s original discovery production is insufficient).

9th Cir. FTC v. Hite Media Grp., LLC, 2018 U.S. Dist. LEXIS 220830, at *14 (D. Ariz. July 23, 2018) (“After the mandatory initial discovery responses [required by the Court] have been provided, additional discovery may proceed . . . as set forth in a case management order to be entered by the Court.”).

70 Preference for discovery in more accessible or domestic locations over more expensive or foreign locations.

1st Cir. Benner v. Wells Fargo Bank, 2017 U.S. Dist. LEXIS 221635, at *8 (D. Me. Mar. 9, 2017) (“[F]actors that may be considered when determining the contested location of a deposition . . . include: ‘[t]he location of counsel for the parties in the foreign district[,] the number of corporate representatives a party is seeking to depose[,] the likelihood of significant discovery disputes arising that would necessitate resolution by the foreign court; whether the persons sought to be deposed often engage in travel for business purposes; whether defendant has filed a permissive counterclaim; and the equities with regard to the nature of the claim and the parties’ relationship.’”) (quoting Smith v. Shoe Show of Rocky Mount Inc., 2001 U.S. Dist. LEXIS 8618, at *3 (D. Ma. 2001)).

2d Cir. In re del Valle Ruiz, 939 F.3d 520, 533 (2d Cir. 2019) (“[W]e . . . [hold] that a district court is not categorically barred from allowing discovery . . . of evidence located abroad. That said, we note that a court may properly, and in fact should, consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery.”)

3d. Cir. United States v. Coburn, 2020 U.S. Dist. LEXIS 26822, at *36–37 (D.N.J. Feb. 14, 2020) (“[A]lthough certain of these locations are abroad, and not [*37] so readily accessible as domestic ones . . . defendants may tailor their pretrial investigation and defenses accordingly.”).

71 Joint status report required before conferences.


6th Cir. In re Nat’l Prescription Opiate Litig., 2018 U.S. Dist. LEXIS 90155, at *69 (N.D. Ohio Apr. 11, 2018) (ordering counsel to “confer before each status conference and submit a joint status report three (3) business days before the conference”).

9th Cir. Coleman v. Brown, 2018 U.S. Dist. LEXIS 111313, at *16 (E.D. Cal. July 3, 2018) (modifying a previous order that “requires the parties to file a joint status report not later than thirty days prior to the status conference” to require discussion of certain specific matters in the report, including “[t]he status of defendants’ Staffing Proposal” and remaining disputes about it, “[w]hether defendants will timely achieve compliance,” and “[i]f defendants will not timely achieve compliance, the parties' respective positions on enforcement.”).

72 Deposing same individual twice.

2d Cir. Williams v. Fire Sprinkler Assoc., 2017 WL 1156012, at *3 (E.D.N.Y. Mar. 27, 2017) (“Directing deposition to be continued, based on de minimus loss of time (11 minutes fewer than 7 hours) is not warranted and is not in accord Rule 26(b)(1)’s requirement that the Court balance relevance with proportionality.”).

3d Cir. Goddard Sys. v. Gondal, 2019 U.S. Dist. LEXIS 100370, at *6–7 (D. Del. June 14, 2019) (“[I]n considering whether to grant a party’s request that a witness be deposed for a second time in a case, the Court should consider whether that request is consistent with the dictates of Rule 26(b)(2).”).

4th Cir. Dudley v. City of Kinston, 2020 U.S. Dist. LEXIS 77178, at *11–13 (E.D.N.C. Apr. 30, 2020) (granting second deposition because it is not “unreasonably cumulative or duplicative” and supported by the proportionality factors).

5th Cir. Noel v. St. Paul Fire & Marine Ins., 2019 U.S. Dist. LEXIS 4076, at *2–5 (W.D. La. Jan. 2, 2019) (applying proportionality test to a second-time deposition, the court denied deposition on topics which defendants had ample opportunity to ask in the first deposition but granted deposition on topics learned after the first deposition).

6th Cir. Boerste v. Ellis, LLC, 2019 U.S. Dist. LEXIS 118935, at *18–19 (W.D. Ky. July 17, 2019) (the court granted reopening depositions given the importance of the testimony on the incident but also “place[d] limits on the scope of the reopened deposition given that Plaintiff has already had an opportunity to ask some questions . . . in their initial depositions” in order to “prevent the reopened depositions from being unreasonably cumulative and duplicative”)

7th Cir. Babjak v. Arcelormittal USA, LLC, 2016 WL 4191050, at *1 (N.D. Ind. Aug. 9, 2016) (proposed deposition of individual under Rule 30(b)(6) after being deposed as fact witness was not duplicative and did not violate Rule 26 proportionality requirements “because depositions given by individuals on their own behalf and depositions given by organizations’ designees are qualitatively different”).

9th Cir. Salazar v. McDonald’s Corp., 2016 WL 736213, at *4 (N.D. Cal. Feb. 25, 2016) (court denied request for second deposition because it was made too late in litigation, acknowledging that “second deposition may have made sense months ago”); Cisco Sys. v. Arista Networks, Inc., 2016 WL 632000, at *2 (N.D. Cal. Feb. 17, 2016) (court denied request to depose witnesses exceeding ten permitted by rule because defendant failed to show particularized need); Youngevity Int’l Corp. v. Smith, 2017 WL 4777318, at *6 (S.D. Cal. Oct. 23, 2017) (reopening four individuals’ depositions was unduly burdensome and requesting party had not demonstrated that further questioning would lead to relevant information).

10th Cir. Merlin v. Crawford, 2016 WL 814580, at *3 (D. Colo. Mar. 2, 2016) (court denied defendants’ motion to depose non-party witnesses second time so as to videotape their testimony for use at trial because burden outweighed likely benefits).
73 Chief Justice Roberts urges greater judicial-case management.


- **3d Cir.** *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 2016 WL 5799660, at *12 (3d Cir. Oct. 5, 2016) (quotes Chief Justice’s statement that: “‘key here is careful and realistic assessment of actual need’ that may ‘require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery’”).


- **5th Cir.** *In re Xarelto (Rivaroxaban) Prods.*, 2020 U.S. Dist. LEXIS 50440, at *13 (E.D. La. Mar. 24, 2020) (“[T]he Court employed ‘hands-on’ management to ensure that discovery was being conducted promptly and that the litigation was proceeding effectively.”).

- **6th Cir.** *Waters v. Drake*, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016) (agreeing with Chief Justice’s report, “court believes that implementation of the new discovery rules will require improved case management by district judges, a culture of cooperation among lawyers, and active and early involvement by judges to fashion discovery that is proportional to the needs of the case”); *Babcock Power, Inc. v. Kapsalis*, 2017 WL 2837019, at *27 (W.D. Ky. June 30, 2017) (citing Chief Justice’s report, court noted that “[d]iscovery in this matter has been anything but speedy and inexpensive”).

- **7th Cir.** *Noble Roman’s, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 308 (S.D. Ind. Mar. 24, 2016) (amendments designed to emphasize judicial management of discovery process, “especially for those cases in which the parties do not themselves effectively manage discovery”); *Bankdirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, 2018 WL 946396, at *6 (N.D. Ill. Feb. 20, 2018) (citing Chief Justice Roberts’s report, and saying that “the instant matter is a prime example of the need for such controlled discovery” (citation omitted)).


- **10th Cir.** *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *18 (D. N.M. Apr. 1, 2016) (Chief Justice Roberts explained that proportionality “assessment may, as a practical matter, require ‘judges to be more aggressive in identifying and discouraging discovery overuse by emphasizing the need to analyze proportionality before ordering production of relevant information’”); *United States v. Talmage*, 2017 WL 1047315, at *2 (D. Utah Mar. 17, 2017) (same); *Tanner v. McMurray*, 405 F. Supp. 3d 1115, 1184–85 (D. N.M. 2019) (citing Justice Roberts’s year-end Report to indicate that “the proportionality concept seeks to ‘eliminate unnecessary or wasteful discovery,’ and to impose ‘careful and realistic assessment of actual need,’” which make federal judges “enlightened guardians” of discovery).

- **11th Cir.** *Allen v. MK Centennial Mar. B.V.*, 2018 U.S. Dist. LEXIS 91707, at *2–3 (M.D. Fla. June 1, 2018) (the court’s website describes its “Active Case Management” procedures and explains that the 2015 amendments “respond to finding that early intervention by judges helps to narrow issues and reduce discovery” and “emphasize the importance of early, hands-on, and continuing case management”).

- **D.C. Cir.** *United States ex rel. Shamesh v. CA., Inc.*, 314 F.R.D. 1, 8 (D.D.C. Jan. 6, 2016) (Rule 26 proportionality factors “encourage judges to be more aggressive in identifying and discouraging discovery overuse and to make proportionality considerations unavoidable”).
Preference for pre-motion conference over motion practice.

- **6th Cir.** United States v. Quicken Loans Inc., 2017 WL 2306444, at *8 (E.D. Mich. May 26, 2017) (court noted that “ESI [was] a huge trove of discoverable material in the case,” but that the “rules encourage the court to address discovery in the less formal setting of a conference”).
- **7th Cir.** Rackemann v. LISR, Inc., 2018 U.S. Dist. LEXIS 112467, at *8 (S.D. Ind. July 6, 2018) (recognizing “a good faith effort to obtain discovery without court action” under Rule 37(a)(5)(A)(ii) when parties had held several meet-and-confer conferences and “an informal discovery conference with the Court” before filing motion).
- **8th Cir.** Perez v. KDP Hosp., LLC, 2016 WL 2746926, at *1 (W.D. Mo. May 6, 2016) (court held teleconference to hear argument on disputed discovery issues).
- **10th Cir.** Meeker v. Life Care Ctrs. of Am., Inc., 2016 WL 1403335, at *7 (D. Colo. Apr. 11, 2016) (court held several informal discovery conferences).
- **11th Cir.** Endurance Am. Speciality Ins. v. Quran Bolder Mgmt., LLC, 2018 U.S. Dist. LEXIS 230766, at *21 (N.D. Ga. Aug. 27, 2018) (“Prior to the filing of a discovery motion . . . the parties should . . . request a conference with the Court . . . to submit their discovery disputes to the Court before formal motions . . .”).

Cf.

- **5th Cir.** La. Crawfish Producers Ass’n W. v. Mallard Basin, Inc., 2015 WL 8074260, at *3 (W.D. La. Dec. 4, 2015) (court ordered that “all proposed specific discovery requests not agreed to by the Defendants shall first be presented to the Magistrate Judge with a request and justification for the allowance of the discovery.” Defendants had not followed practice ordered by judge).

Pre-motion conference informal letter in lieu of motion and brief.

- **2d Cir.** Guzik v. Albright, 2019 U.S. Dist. LEXIS 49468, at *6, n.3 (S.D.N.Y. Feb. 8, 2019) (pursuant to Local Civil Rule 37.2, “no motion under Rules 26 through 37 . . . shall be heard unless counsel for the moving party has first requested an informal conference with the Court by letter-motion . . . and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.”).
- **9th Cir.** Loop Al Labs Inc. v. Gatti, 2016 WL 1273914, at *1 (N.D. Cal. Feb. 5, 2016) (court ordered parties to submit briefs of “no more than 5 pages regarding the Court’s authority to require the parties to bear the cost of a discovery Special Master absent the parties’ agreement to do so”); Salazar v. McDonald’s Corp., 2016 WL 736213, at *1 (N.D. Cal. Feb. 25, 2016) (parties filed joint letter addressing failure to respond to discovery requests).
- **10th Cir.** Kokot v. Maxim Healthcare Servs., 2019 U.S. Dist. LEXIS 179304, at *11 n.7 (D. Colo. Aug. 15, 2019) (“The hope of such informal conferences is to avoid full briefing on discovery disputes that are otherwise amenable to compromise.”).
Rule 16(b)(3)(v) contemplates discovery conference requested before motion filed.


- 8th Cir. Duhigg v. Goodwill Indus., 2016 WL 4991480, at *2 (D. Neb. Sept. 16, 2016) (although court was amendable to holding pre-motion discovery conference as provided under Rule 16, opportunity to hold discovery conference passed because party filed motion to compel prior to request for conference).

- 9th Cir. Bonner v. Cty. of Los Angeles, 2017 U.S. Dist. LEXIS 225561, at *7 (C.D. Cal. May 19, 2017) (“Rule 16 was also amended to provide that a scheduling order may require that, before moving for an order relating to discovery, the movant must request a conference with the court.”) (citing Fed. R. Civ. P. 16(b)(3)(B)(v)).

A brief joint letter before motion to compel or for protection.


Local rules governing pre-motion conferences.


- 3d Cir. Bolus v. Carmicella, 2020 U.S. Dist. LEXIS 32539, at *8 (M.D. Pa. Feb. 26, 2020) (Local Rule 26.3 provides that “Counsel for movant in a discovery motion shall [certify] that counsel has conferred with counsel for the opposing party in a good faith effort to resolve . . . issues raised by the motion without the intervention of the court, together with a detailed explanation why such agreement could not be reached.”).

- 4th Cir. Coleman v. Wake Cty. Bd. of Educ., 2019 U.S. Dist. LEXIS 112513, at *2 (denying motion to compel without prejudice because the movant failed to “comply with the Federal Rule and Local Rule requiring her to first confer . . . before filing her motion to compel”).


- 7th Cir. Acheron Med. Supply, LLC v. Cook Med. Inc., 2016 WL 5466309, at *5 (S.D. Ind. Sept. 9, 2016) (court cited Local Rule 37-1(a), which states: “counsel are encouraged to contact the chambers of the assigned Magistrate Judge to determine whether the Magistrate Judge is available to resolve the discovery dispute by way of a telephone conference or other proceeding prior to counsel filing a formal discovery motion”).


- 9th Cir. Loftis v. Ramos, 2018 WL 1444859, at *5 (S.D. Cal. Mar. 20, 2018) (“The wholesale failure to meet and confer, in person, in detail about . . . the discovery requests at issue is evident. As such, the parties have failed to comply” with local rules).
Granting discovery request in part may satisfy proportionality requirement.

Court may order random sampling.

10th Cir. Benavides v. Greenwich Hotel Ltd., 2017 WL 1051184, at *4 (D. Conn. Mar. 20, 2017) (in dispute over whether hotel’s service charge was tip that employees were entitled to receive, court granted plaintiff’s discovery request in part to limit production to only documents that would show how hotel calculated service charge).

9th Cir. Sigui v. M+M Comm’n, Inc., 2017 WL 1025789, at *2 (D. R.I. Mar. 15, 2017) (court ordered limited sampling of documents to determine whether further production was warranted and required discovery teleconference with the Court before parties resorted to further discovery motion practice.)

2d Cir. Certain Underwriters at Lloyd’s v. Nat’l R.R. Passenger Corp., 2016 WL 7017356, at *7 (E.D.N.Y. Nov. 30, 2016) (after primary custodians produced substantial discovery, court approved parties’ proposed solution to select a few additional custodians to test plaintiff’s theory that they possessed relevant non-duplicative documents).

Occidental Chem. Corp. v. 21st Century Fox Am., Inc., 2019 U.S. Dist. LEXIS 171916, at *101 (D.N.J. Oct. 3, 2019) (“[T]he production of all Sampling Data is important for Defendants to determine whether additional site sampling will be needed.”).

Doe v. Shenandoah Valley Juvenile Ctr. Comm’n, 2018 U.S. Dist. LEXIS 235755, at *3–4 (W.D. Va. Nov. 30, 2018) (sending requests for admissions to a sample of 20 non-class members out of 238 individuals “is relevant and proportional to the needs of the case, which involves significant constitutional questions.”).

Boudreaux v. Schlumberger Tech Corp., 2016 U.S. Dist. LEXIS 119354, at *9–10 (W.D. La. Aug. 31, 2016) (holding that “random sampling would not prejudice [the requesting party] in the preparation of its defenses” unless the requesting party can demonstrate that “random sampling will cause the representative discovery to be statistically insignificant such that [its] due process rights . . . will be threatened”).

Solo v. United Parcel Serv. Co., 2017 WL 85832, at *3 (E.D. Mich. Jan. 10, 2017) (court ordered sampling but noted that if parties were unable to agree on sampling methodology, plaintiff would have the option of requesting that defendant produce certain information from the relevant time period).

City of Rockford v. Mallinckrodt ARD, Inc., 326 F.R.D. 489, 493 (N.D. Ill. 2018) (random sampling is a process “making the known unknown a known known.”).

Bowman v. Dometic Corp., 2016 U.S. Dist. LEXIS 180605, at *18 (holding that a 10% random sampling would provide “sufficient representative information concerning what information is contained in those files”).

Rule 26’s demand for proportionality”); Talavera v. Sun Maid Growers of Cal., 2017 WL 495635, at *5 (E.D. Cal. Feb. 6, 2017) (court ordered ten percent random sampling of defendant’s pay, punch, and time records of all employees for relevant time period for class-action certification, in addition to discovery of records for 142 employees who opted into the case).

- **10th Cir.** Ad Astra Recovery Servs. v. Heath, 2019 U.S. Dist. LEXIS 160898, at *7 (D. Kan. Sept. 18, 2019) (ordering a sampling of ten recordings chosen by the requesting party from the total fifty or more when the court and the parties cannot determine how important the recordings are to resolving the issues).

- **11th Cir.** Becker v. Pro Custom Solar LLC, 2020 U.S. Dist. LEXIS 34390, at *6 (M.D. Fla. Feb. 20, 2020) (ordering production of “a representative sample” prior to the 30(b)(6) deposition or a declaration of the lack of feasibility to do so, because such sampling is not only relevant and proportional but also “likely to facilitate an efficient 30(b)(6) examination”).

  Cf.

- **11th Cir.** Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp., 2018 U.S. Dist. LEXIS 218632, at *6 (S.D. Fla. Dec. 21, 2018) (“In light of the extensive length of the discovery process to date, the impasse between the parties on this issue, and the rapidly approaching discovery deadlines, the Court will not waste any further time in the hope that the parties will agree to a reasonable sampling and production procedure . . . Rather, the Court will order Defendants to produce the entirety of the documents requested by Plaintiff, but will . . . require Plaintiff to pay all of the reasonable and necessary costs of Defendants' production.”) (citation omitted).

  **81 Alternative discovery tools may be less expensive.**

- **2d Cir.** Chevron Corp. v. Donziger, 425 F. Supp. 3d 297, 303 n.30 (S.D.N.Y. 2019) (“Predictive coding is a widely used e-discovery tool that . . . produce[s] more accurate results while saving time and expense as compared to manual review.”).

- **4th Cir.** In re American Med. Sys., Inc. Pelvic Repair Systems Prod. Liability Litig., 2016 WL 4411506, at *4 (S.D. W. Va. Aug.17, 2016) (court rejected plaintiff’s argument that cost and burdens incurred in orally deposing non-party witnesses, instead of deposing witnesses under Rule 31 with written questions, were significantly greater); Brown v. Mountainview Cutters, LLC, 2016 WL 3045349, at *4 (W.D. Va. May 27, 2016) (court quashed defendant’s subpoena duces tecum as being overly broad and instead ordered plaintiff to produce answers to interrogatories, which was “the least burdensome source” for information).

- **6th Cir.** Hammock v. Rogers, 2019 U.S. Dist. LEXIS 25153, at *12–13 (the motion to take oral depositions should be denied if alternative methods of discovery, such as “written depositions, interrogatories, requests for admission, and requests for production,” are available and sufficient, at least when the movant is a prisoner who cannot fund the oral depositions requested).

- **7th Cir.** Fair Hous. Ctr. of Cent. Ind., Inc. v. Welton, 2019 U.S. Dist. LEXIS 97071, at *20–21 (S.D. Ind. June 10, 2019) (denying requests for production when the less burdensome discovery procedure, deposition, has not been exhausted).

- **9th Cir.** Ballentine v. Las Vegas Metro. Police Dep’t, 2016 WL 2743504, at *7 (D. Nev. May 9, 2016) (“Where responsive information can be provided more accurately and with less burden through one method of discovery, that method should be used.”).

- **10th Cir.** Hinzo v. N.M. Corr. Dep’t, 2016 WL 3156071, at *4 (D. N.M. May 19, 2016) (court determined that plaintiff’s request to interview prison staff and inmates was acceptable method of gathering factual information to be used in forming and offering an expert opinion” in lieu of depositions).

- **11th Cir.** Benavides v. Gartland, 2020 U.S. Dist. LEXIS 90686, at *13–14 (S.D. Ga. May 20, 2020) (“Given the availability of alternative discovery methods that are less burdensome and safer [during the COVID-19 crisis], Petitioners’ request for an in-person inspection . . . is disproportionate to the needs of the case.”).

  Cf.

- **9th Cir.** Gilbert v. Money Mut., LLC, 2016 WL 3196605, at *7 (N.D. Cal. June 9, 2016) (denying motion to depose attorney only where party did not establish that discovery had not, or could not, be obtained by other means); HSBC Bank USA v. Green Valley Pecos Homeowners Ass’n, Inc., 2016 WL 6915301 (D. Nev. Nov. 21, 2016) (“The general statement . . . regarding a party’s right to pursue less efficient or duplicative discovery avenues can no longer be justified under amended Rule 26(b) given its greater emphasis on the need for proportionality in discovery.”).

Court may order cost-shifting.

- **1st Cir. Levy v. Gutierrez, 2019 U.S. Dist. LEXIS 52528, at *16–18 (D.N.H. Mar. 28, 2019)** (“Rule 45 mandates cost-shifting where a non-party’s compliance . . . would result in significant expense”; the non-party’s delay in objecting within 14 days after the subpoena is served does not waive the right to seek cost-shifting “given the good faith efforts by [the non-party] to meet, confer, and negotiate a discovery agreement within the subpoena's compliance period”).

- **2d Cir. Schachter v. Sunrise Senior Living Mgmt., 2020 U.S. Dist. LEXIS 15336, at *17 n.6 (D. Conn. Jan. 30, 2020)** (“The cost shifting issue is not ripe until the parties identify the parameters of the search and obtain an estimate of the cost.”).

- **3d Cir. Lux Global Label Co. v. Shacklett, 2020 U.S. Dist. LEXIS 62200, at *20 n.4 (E.D. Pa. Apr. 8, 2020)** (“For ESI, cost-shifting may be appropriate when the data sought is relatively inaccessible.”).


- **5th Cir. Butler v. Craft, 2017 WL 1429896, at *6 (W.D. La. Apr. 19, 2017)** (discovery requested by plaintiffs, which would have required defendant to “analyze, redact, and produce” records “simply to explore events which occurred more than a decade ago and which have little or no probative value,” would significantly burden defendant and thus would “grossly disproportionate to the benefits of allowing discovery,” even though plaintiffs offered to reimburse defendants).

- **6th Cir. In re Onglyza Saxagliptin & Kombiglyze Xr Saxagliptin & Metformin Prods. Liab. Litig., 2020 U.S. Dist. LEXIS 91005, at *68 (“[C]ost-shifting . . . is only permitted where the producing party can show that production is unduly burdensome.”).**

- **7th Cir. Knauf Insulation, LLC v. Johns Manville Corp., 2015 WL 7089725, at *3 (S.D. Ind. Nov. 13, 2015)** (court ordered plaintiff to bear costs of responding to discovery request from 38 email custodians if search did not yield at least 500 relevant documents).

- **8th Cir. Darmer v. State Farm Fire & Cas. Co., 2020 U.S. Dist. LEXIS 60079, at *10 (D. Minn. Apr. 6, 2020)** (granting cost-shifting to the plaintiff for additional depositions which were needed because of the lack of key documents caused by the plaintiff’s “violations of the Discovery order and . . . bad faith conduct”).

- **9th Cir. Arias v. Ruan Transp. Corp, 2017 WL 1427018, at *5–6 (E.D. Cal. Apr. 21, 2017)** (court granted defendant’s motion for second deposition and shifted cost to plaintiff, not including defendant’s attorney’s fees, because plaintiff had withheld relevant documents and needed to be deposed again).

- **11th Cir. In re Hornbeam Corp., 2019 U.S. Dist. LEXIS 179576, at *6–7 (S.D. Fla. Sept. 27, 2019)** (courts “have recognized Rule 45’s cost shifting as mandatory upon a finding that the costs incurred [on non-party] are significant” and “have used a balancing approach to examine the equities in each particular case in order to determine how much cost to shift from the non-party to the requesting party”).

- **D.C. Cir. Oxbow Carbon & Minerals LLC v. Union Pacific R.R., 2017 WL 4011136, at *7 (D.D.C. Sept. 11, 2017)** (court acknowledged amended Rule 26(c)(1)(B) permitting cost shifting but refused to order cost shifting because resisting party “failed to rebut the presumption . . . that it should bear the cost of complying with proposed discovery”).

  Cf.


- **6th Cir. Brown v. Mohr, 2017 WL 2832631, at *4 (S.D. Ohio June 30, 2017)** (court denied pro se plaintiff’s request for his medical records because plaintiff previously had access to them, and the apparent purpose of plaintiff’s request was to shift cost to defendant).


Presumption that responding party bears costs of complying with discovery requests.

- **2d Cir. Black Love Resists in the Rust v. City of Buffalo, 334 F.R.D. 23, 30 (W.D.N.Y. Dec. 19, 2019)** (generally, the responding party bears all costs of discovery production, but the court may order cost-shifting if “the court orders production notwithstanding undue burden or expense for the responding party”).


- **4th Cir.** *Ashmore v. Allied Energy, Inc.*, 2016 WL 301169, at *2 (D.S.C. Jan. 25, 2016) (“In determining whether to shift the costs of discovery to the requesting party, factors to consider include: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.”).


- **7th Cir.** *Knauf Insulation, LLC v. Johns Manville Corp.*, 2015 WL 7089725, at *3 (S.D. Ind. Nov. 13, 2015) (“[P]resumption is that the responding party pays for discovery requests.”).

- **9th Cir.** *ExamWorks v. Baldini*, 2020 U.S. Dist. LEXIS 103366, at *44 (E.D. Cal. June 11, 2020) (noting the presumption that the responding party should bear the discovery expense and the possibility to “overcome the presumption through discovery motion practice”).

- **10th Cir.** *United States ex rel. Edalati v. Sabharwal*, 2020 U.S. Dist. LEXIS 103857, at *14 (D. Kan. June 15, 2020) (“Because of the presumption that the responding party should bear the expense of complying with the requests, [the responding parties] have the burden to establish the discovery expense would be excessive enough to justify cost-shifting.”).


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**Proportionality distinct from grounds for issuing Rule 26(c) protective order.**

- **2d Cir.** *Uni-Sys., LLC v. U.S. Tennis Ass’n*, 2017 WL 4081904, at *6 (E.D.N.Y. Sept. 13, 2017) (court granted discovery of source code, despite proportionality objection, because code was important and readily available, and objecting party failed to address why protective order would be insufficient).

- **5th Cir.** *Carr v. State Farm Mut. Auto. Ins.*, 312 F.R.D. 459, 466 (N.D. Tex. Dec. 7, 2015) (“[T]he amendments do not change the essential text of Rule 26(c)(1), which the Fifth Circuit has interpreted to place the burden on the moving party to specifically show good cause and a specific need for protection.”).


- **7th Cir.** *Taylor v. Gilbert*, 2019 U.S. Dist. LEXIS 7884, at *4 (N.D. Ill. Jan. 16, 2019) (“Even if the discovery is relevant and proportional, [the resisting party] still can prevail if he shows there is good cause to enter a protective order . . . .”)


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*Cf.*

- **4th Cir.** *Prusin v. Canton’s Pearls, LLC*, 2016 WL 7408840, at *2 (D. Md. Dec. 22, 2016) (“[I]f the discovery sought has no bearing on an issue of material fact—i.e., if it is not relevant—a protective order is proper.”) (citation omitted) (internal quotation omitted); *Jos. A. Bank Clothiers, Inc. v. J.A.B.-Columbia, Inc.*, 2017 WL 75746, at *1, *3 (D. Md. Jan. 6, 2017) (granting in part plaintiff’s motion for a protective order because requested discovery would be unduly burdensome under Rule 26(b)).


- **10th Cir.** *Feltz v. Bd. of Cty. Comm'rs*, 2020 U.S. Dist. LEXIS 74444, at *43 (N.D. Okla. Apr. 28, 2020) (“The Court finds good cause for a protective order preventing further oral or written discovery . . . . on grounds of lack of relevance and proportionality to the needs of the case.”)

- **11th Cir.** *Blaine v. N. Brevard County Hosp. Dist.*, 2019 U.S. Dist. LEXIS 106257, at *5 (M.D. Fla. Apr. 26, 2019) (“The protective order is due to be granted to this extent with good cause because the requested discovery is not proportional to the needs of this case.”).
Avoid waiver by reasonable steps to prevent disclosure and rectify inadvertent disclosure of privileged materials.

- **2d Cir. Desouza v. Park West Apts., Inc.,** 2018 U.S. Dist. LEXIS 14526, at *6–7 (finding no reasonable steps to prevent disclosure when the defendants “placed the communication in a public file to which [the other party] had a right of access” before the litigation and only prevented copying the exhibit and did not prevent reading the document after the litigation was filed; finding no reasonable steps to rectify the disclosure when the defendants “waited over a month before filing the motion to strike” after realizing the disclosure).

- **4th Cir. In re Zetia (Ezetimibe) Antitrust Litig.,** 2019 U.S. Dist. LEXIS 206524, at *33–34 (E.D. Va. July 16, 2019) (“Parties may also reach private agreements regarding the effect of disclosure, and these agreements will be enforced by the court . . . The burden is on the party resisting discovery to show that privilege was not waived.”).

- **7th Cir. Carmody v. Bd. of Trs. of the Univ. of Ill.,** 893 F.3d 397, 406 (7th Cir. 2018) (finding the disclosure “inadvertent” when “there is no indication that defendants intended to waive the privilege to produce the document”).

- **10th Cir. United States v. Brewington,** 2018 U.S. Dist. LEXIS 30425, at *5, *10–11 (D. Colo. Feb. 26, 2018) (“In determining whether a party ‘took reasonable steps to prevent disclosure,’ courts have looked to the processes put in place to prevent such production and the implementation of those processes”; “allowing the government to perform a privilege review,” instead of acting personally to rectify the inadvertent disclosure, “is consistent with maintaining his privilege.”).

Resisting party must state if documents being withheld.

- **1st Cir. Pollack v. Seamus Crowley Constr., Inc.,** 2019 U.S. Dist. LEXIS 141247, at *4 n.1 (D. Mass. Apr. 15, 2019) (finding a later request to be timely because no discovery deadline was set and responses to previous requests “did not clearly state whether they were withholding relevant documents or representing that no such documents existed”).

- **2d Cir. Fischer v. Forrest,** 2017 U.S. Dist. LEXIS 28102, at *2 (S.D.N.Y. Feb. 28, 2017) (ordering that “[a]n objection must state whether any responsive materials are being withheld on the basis of that objection[ and ]specify the time for production”).


- **4th Cir. Futreal v. Ringle,** 2019 U.S. Dist. LEXIS 4140, at *17 (E.D.N.C. Jan. 7, 2019) (“[A]ttorneys should unambiguously state when they have withheld documents responsive to discovery requests based on a privilege or the work-product doctrine.”).

- **5th Cir. Fidelis Grp. Holdings, LLC v. Chalners Auto., LLC,** 2016 WL 6157601, at *6 (E.D. La. Oct. 24, 2016) (“[M]erely responding ‘Defendants will provide such documents that exist’ does not identify which documents are responsive; Keycorp v. Holland, 2016 WL 6277813, at *11 (N.D. Tex. Oct. 26, 2016) (“[R]esponding to a document request or interrogatory ‘subject to’ and ‘without waiving’ objections is not consistent with the Federal Rules or warranted by existing law.”).


- **7th Cir. Crabtree v. Angie’s List, Inc.,** 2017 WL 413242, at *4 (S.D. Ind. Jan. 31, 2017) (parties “have no obligation to affirmatively state that they are not withholding documents”).

- **8th Cir. Sprint Commc’ns. Co. v. Crow Creek Sioux Tribal Court,** 316 F.R.D. 254, 263 (D. S.D. Feb. 26, 2016) (objecting party must “state with specificity the grounds for objecting, including the reasons” and “whether any responsive materials are being withheld”).

- **9th Cir. Brown v. Dobler,** 2015 WL 9581414, at *4 (D. Idaho Dec. 29, 2015) (party must state if there are documents withheld because of objections to discovery requests).

- **10th Cir. Echon v. Sackett,** 2016 WL 943485, at *4 (D. Colo. Jan. 27, 2016) (party must state if there are documents withheld because of objections to discovery requests; Hibou Inc. v. Peck, 2016 WL 4702422, at *4 (D. Kan. Sept. 8, 2016) (court found “conditional objections [invalid, which] occur when a party asserts objections, but then provides a response ‘subject to’ or ‘without waiving’ the stated objections”).

- **11th Cir. Kleinman v. Wright,** 2020 U.S. Dist. LEXIS 4241, at *26 (S.D. Fla. Jan. 10, 2020) (“[Rule] 34(b)(2)(C) requires that objections to discovery specifically state the basis that the discovery is being withheld.”).
Specific and clear requests and objections.

- 5th Cir. Butowsky v. Folkenflik, 2019 U.S. Dist. LEXIS 215338, at *7 (E.D. Tex. Jan. 9, 2019) (“To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.”).


- 9th Cir. Luken v. Christensen Grp. Inc., 2017 U.S. Dist. LEXIS 189131, at *3 (W.D. Wash. Nov. 15, 2017) (local rule 26(f) provides that “to further the application of the proportionality standard in discovery, discovery requests and related responses should be reasonably targeted, clear, and as specific as possible.”).


 Technology assisted review (“TAR”).

- 2d Cir. Hyles v. N.Y.C., 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016) (although court believed that TAR was “the best and most efficient search tool” and that “there may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR,” it declined to compel defendant to use it instead of keyword searching).


- 7th Cir. Story v. Fiat Chrysler Auto., 2018 U.S. Dist. LEXIS 183805, at *8 (N.D. Ind. Oct. 26, 2018) (encouraging parties to consider TAR as an “appropriate and useful way[ ] to narrow the volume of an otherwise overly-broad request”).

- 9th Cir. FTC v. Hite Media Grp., LLC, 2018 U.S. Dist. LEXIS 220830, at *22–23 (D. Ariz. July 23, 2018) (ordering parties to confer and attempt to agree on “appropriate ESI searches, including custodians and search terms, or other use of technology assisted review” when “the existence of ESI is disclosed or discovered”).

- 10th Cir. Lawson v. Spirit Aerosystems, 2020 U.S. Dist. LEXIS 106817, at *1 (D. Kan. June 18, 2020) (granting the use of TAR to assist review on about 322,000 documents when “using traditional ESI methods involving custodians and search terms . . . repeatedly yielded low responsiveness rates,” but requiring the requesting party to pay “costs and expenses for the TAR process”).

- 11th Cir. Digital Assurance Certification, LLC v. Pendolino, 2017 WL 4342316, at *9 (M.D. Fla. Sept. 29, 2017) (“In discussing proportionality and the discovery of ESI, the Middle District’s Discovery Handbook cites” the Sedona Conference’s proportionality principles, including that “technologies to reduce cost and burden should be considered in the proportionality analysis.”).

Cf.

- 7th Cir. Cry, of Cook v. Bank of Am. Corp., 2019 U.S. Dist. LEXIS 182379, at *11 (N.D. Ill. Oct. 22, 2019) (using TAR to aid ESI collection does not eliminate “concerns about the burden of ESI discovery” because there are still significant burdens from processing, review, and production, which provides proportionality basis for denying further ESI request).