

# The Evolution of American Discovery in Light of Constitutional Challenges: The Role of the 2015 Rule Amendments to the Federal Rules of Civil Procedure

by TOM LIN\*

Those civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure . . . .

– Chief Justice John Roberts<sup>1</sup>

[F]orcing a defendant to pay significant discovery expenses (without any contribution from the plaintiff) absent any finding of liability arguably infringes the defendant’s right to due process.

– John Beisner, Jessica D. Miller & Jordan Schwartz<sup>2</sup>

[T]he proposals have the unconstitutional effect of killing legitimate cases, depriving plaintiffs of the right to jury trial.

– Joseph R. Neal, Jr.<sup>3</sup>

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1. Chief Justice Roberts, *2015 Year-End Report on the Federal Judiciary* 3, 6 (Dec. 31, 2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

2. John Beisner, Jessica D. Miller & Jordan Schwartz, *Can E-Discovery Violate Due Process? Part 2*, LEGAL TECH NEWS (June 10, 2013), <http://www.legaltechnews.com/id=1202603323126/Can-EDiscovery-Violate-Due-Process-Part-2?slreturn=20160220045807>.

3. Memorandum from Hon. David G. Campbell, Advisory Comm. on Civil Rules to Hon. Jeffrey S. Sutton, Chair of Comm. on Rules of Practice and Procedure (May 2, 2014) (“[T]he proposals have the unconstitutional effect of killing legitimate cases, depriving plaintiffs of the right to jury trial.”), <http://www.uscourts.gov/file/17931/download>.

## Introduction

The idea of a Federal Rule of Civil Procedure violating constitutional rights may appear nonsensical at first glance because it would be counterintuitive for rulemakers to spend so much time, money, and effort drafting a rule that does not work. However, it is not the means behind the rule that raise constitutional challenges, it is the ends that allegedly result in costly and burdensome effects in combination with other unique elements of American discovery that trigger these issues. Effective December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) was amended to provide:

*Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.<sup>4</sup>*

Compare the amended Rule 26(b)(1) to the old Rule 26(b)(1):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.<sup>5</sup>

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4. FED. R. CIV. P. 26(b)(1) (effective Dec. 1, 2015) (emphasis added to identify amendment).

5. *Id.* (amended Dec. 1, 2015).

American discovery has been a unique feature of litigation in the world even before the adoption of the Federal Rules of Civil Procedure in 1938.<sup>6</sup> In May 2010, more than 180 federal judges, practitioners, and academics gathered for a conference at Duke University School of Law to undertake a comprehensive examination of issues relating to access, fairness, cost, and delay in civil litigation.<sup>7</sup> The Judicial Conference Advisory Committee on Civil Rules<sup>8</sup> sponsored and organized this event to gather empirical data on current litigation practices in federal courts.<sup>9</sup> The conference discussed the need for clarification, regarding the duty to preserve electronic discovery and when discovery sanctions were appropriate because substantial costs were often incurred to preserve information in anticipation for litigation that rarely happens. The goals articulated during the 2010 conference included Rule 26(b)(1)'s revamped scope of discovery, which put a spotlight on the importance of managing cost and proportionality.

Recently, some have raised constitutional attacks on American discovery because of the excessive burdens involved and the "takings" aspect related to the costs of producing requested evidence. The most basic understanding of due process is that "[t]he United States cannot interfere with private rights any more than a State can, except for legitimate governmental purposes. They are . . . prohibited from depriving persons or corporations of property without due process of law."<sup>10</sup> The 2015 amendments responded to these challenges by focusing on the issues that give rise to constitutional arguments by restricting over-discovery and eliminating the need to over-preserve electronically stored information while maintaining access to proportional discovery relevant to the needs of the case.

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6. John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010).

7. Richard Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 624 (2014).

8. See Mark R. Kravitz, *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 214, 216 (2010) ("In 1935, the Supreme Court appointed a blue ribbon advisory committee to draft the rules of civil procedure, the first rules adopted under the Rules Enabling Act. Adoption of the Federal Rules of Civil Procedure in September 1938 is often described as the 'Big Bang.' . . . One of those advisory committees is the Civil Rules Advisory Committee, which studies and makes recommendations to the Standing Committee and the Judicial Conference regarding the Federal Rules of Civil Procedure.").

9. *Duke Law Hosts Conference on Litigation in Federal Courts*, DUKE LAW NEWS (May 5, 2010), <https://law.duke.edu/news/4933/>.

10. E. Donald Elliott, *Twombly In Context: Why Federal Rule of Civil Procedure 4(b) is Unconstitutional*, 64 FLA. L. REV. 895, 901 n.20 (2012) (quoting *Sinking-Fund Cases*, 99 U.S. 700, 718–19 (1879)).

For decades now, the drafters of the Federal Rules of Civil Procedure have attempted to refine the rules for civil litigation to facilitate dispute resolutions between adverse parties efficiently and at low costs. However, one common theme remained when the Advisory Committee on Civil Rules convened at the Duke Conference in 2010 to discuss the current state of litigation, which was at the time too expensive, time consuming, contentious, and inhibited effective access to courts.<sup>11</sup> The 2010 conference initiated the rule amendment project discussed in this Note, which includes procedural reforms geared towards: (1) encouraging greater cooperation among counsel; (2) concentrating discovery on material that is “truly” necessary to resolve the case; (3) keeping judges engaged and active in early stages of case management; and (4) addressing the recent need for managing problems between parties with large amounts of electronically stored information.<sup>12</sup> Some recent constitutional challenges to American discovery, specifically the scope of discovery under Rule 26(b)(1), came during the public comment period when the amendment package was proposed. The 2010 conference at Duke University School of Law also addressed criticisms regarding pleading standards because “discovery costs are excessive and cannot effectively be controlled by judges managing cases.”<sup>13</sup> Broad discovery requests are analogous to the generalized pleading standards of the past. Heightened pleading standards dealt with the same type of issues that Rule 26(b)(1)’s scope of discovery intends to eliminate in terms of disposing meritless claims and minimizing costs incurred by defendants that are associated with discovery fishing expeditions.<sup>14</sup>

The 2015 amendments were adopted to resolve the issues that occur in an adversarial system in which the producing party pays for discovery. With the rise of electronic discovery, where parties store data that may become the target of discovery in future litigation, the effort for reform has become more prominent. In *Hickman v. Taylor*, the Supreme Court held that a party has broad latitude in requesting relevant discovery from opposing counsel.<sup>15</sup> Some argue litigants often use discovery tools to harass their opposing parties because the American legal system is

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11. Chief Justice Roberts, *supra* note 1, at 4.

12. *Id.* at 5.

13. Lee H. Rosenthal, *Pleading, for the Future: Conversations After Iqbal*, 114 PENN ST. L. REV. 1537, 1545 (2010).

14. See generally Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

15. *Hickman v. Taylor*, 329 U.S. 496, 513 (1947).

adversarial.<sup>16</sup> The Committee Notes to the 1983 Amendments quoted language from *Hickman* regarding the need for pretrial discovery: “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”<sup>17</sup> In *Hickman*, Justice Murphy stated, “either party may compel the other to disgorge whatever facts he has in his possession.”<sup>18</sup> “But discovery, like all matters of procedure, has ultimate and necessary boundaries.”<sup>19</sup> This Note discusses how big of a role proportionality will play under the 2015 amendments in blunting due process objections based on over-discovery costs and reinforcing those limitations on discovery referred to in *Hickman*.

In addition to emphasizing proportionality, the 2015 amendments also deal with the duty to preserve electronically stored information.<sup>20</sup> The duty to preserve produces considerable expenses because it entails a much larger amount of information compared to storage via paper and adds to the overall costs of litigation.<sup>21</sup> The duty to preserve is also accompanied by judicial reprimands for failing to do so via sanctions.<sup>22</sup> Previously, a basic failure to preserve electronically stored information allowed the requesting party to gain an advantage by receiving a favorable jury instruction or, even better, a judgment in its favor.<sup>23</sup> These additional expenses and burdens are associated in the overall costs of discovery that are claimed by some to amount to constitutional violations.

Section I of this Note introduces the recent constitutional attacks on American discovery due to both the burdens in producing and the taking of private property. Section II compares the American legal system’s management of discovery to other legal systems. This section also explains

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16. See generally Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 328–29 (2013).

17. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1983 amendments; *Hickman*, 329 U.S. at 507.

18. *Hickman*, 329 U.S. at 508.

19. *Id.* at 507–08 (“[L]imitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.”).

20. FED. R. CIV. P. 37(e).

21. Richard Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827, 1844 (2008).

22. FED. R. CIV. P. 37(e).

23. Joshua E. Roberts, *Duties Involving the Preservation of Electronically Stored Information*, SPORTS & FITNESS INDUSTRY ASSOCIATION (Nov. 29, 2011), [https://www.sfia.org/press/389\\_Duties-Involving-The-Preservation-Of-Electronically-Stored-Information](https://www.sfia.org/press/389_Duties-Involving-The-Preservation-Of-Electronically-Stored-Information).

how the differences in cost-shifting, the existence of the contingency fee, and broad discovery motivates the due process argument. Section III lays out the history of Rule 26 starting from the introduction of proportionality in 1983 and past amendments leading up to 2015. Section IV highlights the intentions and motivations behind the 2015 amendments by discussing the elevation of proportionality and the reordering of factors that guide the proportionality calculations. Section V explains the impact of the amendment to Rule 26(b)(1) with early judicial interpretations and how its restrictive goals impact due process arguments for responding parties. The majority of decisions since December 2015 dealt with measuring proportionality and figuring out what to do after it is measured—none of which involved a party’s constitutional rights. Section VI discusses how electronically stored information production relates to proportionality and explores the consequences imposed on parties that have to preserve any and all information stored in the course of litigation. This Note concludes that American discovery has not in the past—and certainly will not under the 2015 amendments—violate any constitutional rights.

### I. Constitutional Challenges to American Discovery

The Supreme Court has stated that rules should be construed in ways that “avoid potential constitutional issues.”<sup>24</sup> Despite the Court’s view on rules, some scholars still continue to argue that forcing a litigant to respond to a broad and voluminous discovery request has the potential to violate the litigant’s right to due process.<sup>25</sup> Likewise, individuals often argue that a litigant’s access to potentially relevant information, helpful to his or her case, violates that individual’s right to a jury trial if restricted.<sup>26</sup> Prior to the most recent amendments, plaintiffs were often accused of propounding costly and broad discovery requests on defendants without, and before, any finding of liability because of a system in which the producer pays the cost of production.<sup>27</sup> These constitutional arguments have intensified the debate of where rulemakers should draw the line when reforming discovery tools. Finding the proper balance between these two interests is one example of what makes rulemaking so difficult due to competing views.<sup>28</sup>

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24. Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit (Part II)*, 104 NW. U. L. REV. COLLOQUY 330, 331 (2010).

25. Beisner, *supra* note 2.

26. *See supra* note 3.

27. *Id.*

28. *See* Marcus, *supra* note 7, at 626.

The topic of pleading standards went through similar scrutiny in the aftermath of *Bell Atlantic Corp. v. Twombly*,<sup>29</sup> *Ashcroft v. Iqbal*,<sup>30</sup> and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*<sup>31</sup> These decisions were motivated by the need for gatekeeping in order to encourage individuals to file meritorious claims and allows for efficient resolution of those claims.<sup>32</sup> Justice Stevens dissented in *Twombly* and criticized the majority for arriving at its decision in order to protect wealthy corporations.<sup>33</sup> Similar to the public comments for the 2015 amendments, *Twombly* and its progeny discussed the proper balance between the rights of litigants and whether the correct line should be drawn in favor of defendants to shield the burdensome discovery costs of litigation from implausible claims.<sup>34</sup> *Twombly* addressed a fiercely debated topic regarding “the threat [that] discovery expenses will push cost-conscious defendants to settle even anemic cases before reaching proceedings [on the merits].”<sup>35</sup> The plausibility standard set forth in *Twombly* is what proportionality is to the scope of discovery after December 1, 2015. The concerns discussed back then are analogous to the remedy the 2015 amendments attempt to reinforce as shown by Justice Stevens dissenting in *Twombly* where [parties] need “careful case management, including strict control of discovery . . . .”<sup>36</sup> *Twombly* and *Iqbal* created controversy in the legal field, but the underlying public policy consideration was that notice pleading<sup>37</sup> was no longer sufficient to safeguard defendants against the costly burdens associated with discovery and litigation. Similarly, the previous scope of discovery that resulted in broad over-discovery is no longer sufficient to

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29. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”).

30. *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) (holding that a plaintiff cannot plead a defendant’s intent “generally” without reference to its factual context in order for a claim to survive a motion to dismiss and an entitlement to discovery).

31. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007) (holding that a plaintiff alleging fraud must plead facts rendering an inference of scienter at least as likely as any plausible opposing inference and must prove by a preponderance of the evidence at trial).

32. Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 246 (2010).

33. *See Twombly*, 550 U.S. at 598 (Stevens, J., dissenting).

34. Z. W. Julius Chen, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1433 (2008).

35. *Twombly*, 550 U.S. at 559 (lamenting the threat that discovery expenses might sometimes compel defendants to settle even unmeritorious cases).

36. *Id.* at 573.

37. Notice pleading, as set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), was the standard before the Court adopted the more strict plausibility standard in *Twombly*.

safeguard litigants against the excessive expenses associated with modern litigation.

Pleading standards faced arguments from two sides. In the past, plaintiffs claimed that discovery was indispensable to make their case while defendants claimed that discovery was used to oppress and abuse the legal system.<sup>38</sup> Similarly, there were two opposing views regarding the scope of discovery in the public comment period of the 2015 amendments. In order to appreciate each side's constitutional arguments, one must understand the debate as overstating the issues. One side of the argument is the challenge in favor of broad discovery because of the constitutional right to a jury trial. The constitutional right to a jury trial does not imply a constitutional right to discovery. Plaintiffs often argue for broad discovery to get the real evidence helpful to their cases. However, since there is no constitutional right to discovery in criminal cases, which can involve the most severe deprivations of life and liberty, it follows that there also is no constitutional right to discovery in civil cases.<sup>39</sup> The Compulsory Process Clause comes closer but only in criminal cases. The Sixth Amendment reads, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."<sup>40</sup> The Supreme Court has held that the right to present a witness is not absolute and a discovery sanction precluding such witnesses are constitutional.<sup>41</sup>

#### A. Constitutional Right to a Jury Trial

Although there is no constitutional right to discovery, the restriction of access to relevant evidence has been argued by some to have the effect of depriving a litigant of the ability to reach a jury.<sup>42</sup> The history of the Seventh Amendment demonstrates the flaws of this argument. In England, the right to a civil jury trial existed for common law courts, rather than courts of equity.<sup>43</sup> Colonial America adopted many of the English practices in both criminal and civil law when it first set up governments, but by 1787

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38. Richard A. Epstein, *Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 192 (2010).

39. See Imre Stephen Szalai, *A Constitutional Right to Discovery? Creating and Reinforcing Due Process Norms Through the Procedural Laboratory of Arbitration*, 15 PEPP. DISP. RESOL. L.J. 337, 338 (2015) (arguing that "the underpinnings for a due process-like norm involving a right to discovery in the civil context have begun to take root").

40. U.S. CONST. amend. VII.

41. *Taylor v. Illinois*, 484 U.S. 400, 400-01 (1988).

42. See *supra* note 3 (The proposed rules "are completely one-sided, as in, they only favor major corporations. The real purpose is to try and prevent cases from going before a jury.").

43. Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573 (2003).



the proposed Constitution only contained a right to a jury trial in criminal cases.<sup>44</sup> The Constitution was ratified in 1789 and eventually incorporated amendments containing a guarantee to a civil jury trial. The Seventh Amendment reads, “the right of trial by jury shall be *preserved* . . . .”<sup>45</sup> Its adoption in 1791 was meant to preserve the then-existing right of a jury trial at common law. Although courts at equity afforded some discovery in the eighteenth century, common law courts did not have a guaranteed right to discovery at all.<sup>46</sup> To disregard the history of the Seventh Amendment would mean that the federal courts were violating the Constitution before the adoption of the Federal Rules of Civil Procedure in 1938. The federal courts did no such thing and an entitlement to discovery is neither a constitutional right, nor is it analogous to a right to a jury trial.

## B. Burdens in Responding

The other side of the constitutional argument is that due process is violated when there is an uncompensated duty to respond to discovery. Litigants requesting discovery may tend to overvalue the information they seek and undervalue the costs incurred by the responding party in the American system.<sup>47</sup> It follows that litigants responding to discovery will do the inverse by undervaluing the information sought by the requesting party and overstating the costs associated with production. Responding parties argue that “it is expensive to have to find and turn over reams of materials, and particularly galling when most of that material never reappears in the case.”<sup>48</sup> Although the plaintiffs’ view is that broad requests are necessary to get the real evidence, defendants endorse the view that “‘cost shifting’ may be *constitutionally* required in situations where courts allow plaintiffs to conduct ‘fishing expedition[s]’ [for] discovery . . . .”<sup>49</sup> Likewise, Professor Martin Redish argues that the discovery process is analogous to the theory of *quantum meruit* where a party is legally entitled to a reimbursement for any benefits he confers on someone else at that person’s request.<sup>50</sup> Under this interpretation, the discovery process is a quasi-contract between litigants, and it would be “morally untenable to allow the

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44. *Id.* at 583.

45. U.S. CONST. amend. VII (emphasis added).

46. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 919 (1987).

47. Richard Marcus, “*Looking Backward*” to 1938, 162 U. PA. L. REV. 1691, 1721 (2014).

48. *Id.*

49. Elliott, *supra* note 10, at 951 (emphasis added); see Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 775 (2011).

50. Redish & McNamara, *supra* note 49, at 777.

requesting party to retain the benefits of its opponent's labor without, at the very least, reimbursing the costs of discovery incurred by the producing party."<sup>51</sup> The 2015 amendments sought to control over-discovery by restricting the scope and reinforcing proportionality, thereby deflating these constitutional arguments.

Attorneys continue to rely on protective orders pursuant to Rule 26 to fight against the problem of over-broad discovery requests. Under Rule 26(c), a party can move for a protective order to forbid disclosure, specify terms, prescribe the discovery in a method different than the form requested, limit inquiry to certain matters, choose who will be present while discovery occurs, seal a deposition unless ordered open later by court order, protect trade secrets and confidential research, and seal other information.<sup>52</sup> The notion that the 2015 amendments do not do enough is unfounded because protective orders are still a viable option to prevent excessive litigation costs.

### C. Unconstitutional Takings

The Supreme Court dealt with a similar due process issue in 1991 when deciding *Connecticut v. Doehr*.<sup>53</sup> The Court in *Doehr* unanimously struck down a Connecticut statute because it unconstitutionally authorized prejudgment attachment of real estate property as security in pending civil litigation when there was enough probable cause without any finding of guilt.<sup>54</sup> Some have argued that the statute in *Doehr* is analogous to the due process argument of allowing parties to request discovery before judicial scrutiny of the pleadings.<sup>55</sup> In *Doehr*, the Court rejected Connecticut's argument that its statute was constitutional because it only allowed attachment when it met the same factual showing as the Federal Rules of Civil Procedure's pleading standard of stating a claim with sufficient facts to withstand a motion to dismiss.<sup>56</sup> As such, some have argued in the context of discovery where placing "the costs of [a] defense imposed on every person sued, merely because the plaintiff believes the defendant is liable—should lead to exactly the same result[.]" and that requiring a defendant to spend money answering an unverified complaint is no different than the unconstitutional pre-judgment attachment requirement.<sup>57</sup>

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51. Redish & McNamara, *supra* note 49, at 777.

52. FED. R. CIV. P. 26(c).

53. *Connecticut v. Doehr*, 501 U.S. 1 (1991).

54. *Id.* at 11.

55. Elliott, *supra* note 10, at 948.

56. *Doehr*, 501 U.S. at 13.

57. Elliott, *supra* note 10, at 950 (internal quotations omitted).

However, the attachment of real property is distinguishable from simply having a party make evidence available.<sup>58</sup> The *Doehr* Court dealt with real property issues that led to a violation in due process such as: clouding the property title, impairing the ability to sell or alienate the property, tainting credit rating, and reducing the change of obtaining a home equity loan or additional mortgage among others.<sup>59</sup> The analogy fails because the issues with property are not inherently related to a defendant's issues when he or she is sued or is required to produce discovery. Constitutional arguments were not justified before, and arguments about costs of compliance and issues related to takings still do not rise to potential constitutional violations.

## II. The American Discovery System Versus Non-American Discovery Systems

American and European discovery practices differ in significant ways that contribute to the costs of litigation. America allows litigants to have "discovery opportunities that the rest of the world would view as unduly intrusive, or at least 'extravagant' in terms of the emerging international . . . consensus."<sup>60</sup> Most common law countries do not use juries, which makes the use of pretrial discovery in America necessary because the system is based on jury trials.<sup>61</sup> The focus on pretrial discovery is less demanding in civil law systems where the judge identifies the legal and factual issues involved.<sup>62</sup> In America, discovery is therefore a system that informs the adversarial parties rather than the judge—since he or she is the umpire of the trial—or the jury because they ultimately will receive very little of the overall discovery due to admissibility.<sup>63</sup> The function of civil pretrial discovery in relation to a jury trial allows the opposing party to anticipate the evidence that will be used against it during trial in efforts to persuade

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58. *Cf. City of West Covina v. Perkins*, 525 U.S. 234 (1999) (holding that the Due Process Clause does not require officers to give property owners notice of the state law remedies available to retrieve seized property); *see also Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding that a statute requiring a prejudgment replevin taking of property without prior notice violates due process, but in regard to search warrants, there is no due process violation for making evidence available because search warrants are generally issued to serve highly important governmental need).

59. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991).

60. Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 *TUL. J. INT'L & COMP. L.* 153, 157 (1999).

61. Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 *NOTRE DAME L. REV.* 1017, 1020 (1998).

62. *Id.*

63. *Id.* at 1021.

the jury.<sup>64</sup> In a civil law jurisdiction, the judge serves the role of deciding fact and law, which includes taking the initiative of “exploring and sifting evidence.”<sup>65</sup> The differences do not end there.

The significant difference in how the American and European legal systems manage costs lie in the background of the arguments related to discovery burdens. In most European countries, the fact that a party has been defeated is sufficient grounds for imposing all of the costs to the losing party without requiring findings of bad faith and includes reimbursement to the winner by the losing party in all costs and attorney fees.<sup>66</sup> Typically, in America, each side pays for its own lawyer regardless of the outcome. The European practice differs from the American practice because of the ingrained notion of finality where victory is not complete if expenses are unpaid.<sup>67</sup> Proponents in favor of changing to the English rule have argued it would effectively deter litigants from filing frivolous lawsuits. Opponents argue that the English rule would create more burdens for lower and middle-class individuals from access to the courts.<sup>68</sup> With that, some have argued that the English rule nullifies a party’s incentive to purposely raise their adversary’s costs because of the risk in having to pay for it if defeated.<sup>69</sup> Parties litigating under the English rule must also account for the risk in paying their adversary’s fees, whereas litigants under the American rule do not take their adversary’s costs into consideration. As such, like the allocation of costs with discovery, the English rule would therefore put more at stake in the litigation compared to the American rule. The difference between the two rules relates to the motivations behind why defendants prefer the English rule when dealing with discovery requests (they may end up being reimbursed for the costs of production) and why plaintiffs prefer the American rule (they can make discovery requests and pass all of the costs to the defendant).

A huge topic related to the costs associated with winning or losing is the American use of litigating a case on a contingency fee basis, where the attorney is paid by a percentage of the ultimate award. Operating under a contingency fee in America is popular in certain types of litigation but is

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64. Hazard, Jr., *supra* note 61, at 1021.

65. *Id.* at 1022.

66. Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 *LAW & CONTEMP. PROBS.* 37, 44 (1984).

67. *Id.* at 83.

68. Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 *UCLA L. REV.* 1452, 1456–57 (2013).

69. Eisenberg, *supra* note 16, at 336.

prohibited in foreign jurisdictions such as England and Scotland.<sup>70</sup> There are three different arrangements for contingency fees. First, an attorney can be paid a fixed hourly rate or a specified amount in accordance with hours worked, but payout will only occur if successful.<sup>71</sup> Second, an attorney requests a flat or hourly fee that is paid outright, but incurs a bonus if he or she is successful.<sup>72</sup> Third, an attorney is paid a percentage of the ultimate recovery.<sup>73</sup>

One scholar theorizes that the contingency fee system's acceptance in America is based on the theory that the claimant remains responsible for its own costs.<sup>74</sup> In contrast, and as it relates to the American Rule, a European claimant would have to worry that if he or she loses, then the claimant will have to reimburse the defendant, thus making the contingency fee unworkable outside America.<sup>75</sup> Proponents of the contingency rule say it encourages plaintiffs to pursue their claims when they otherwise could not afford a lawyer, decreases frivolous litigation, and maximizes client welfare.<sup>76</sup> However, some opponents of the contingency fee system argue the English rule, requiring the loser to bear all costs, is more appropriate.<sup>77</sup> These unique aspects of American litigation—heightened pleading standards and broad discovery rights—highlight the motivations behind the *con due process* argument of burdensome discovery.

Differences relating specifically to discovery are also worth noting. In the United Kingdom, discovery is referred to as disclosure.<sup>78</sup> On the other hand, the most significant difference between the two legal systems regarding discovery is that in the United Kingdom the loser pays the costs associated with production, whereas in America the discovery-producing party pays.<sup>79</sup> This single difference has given rise to the unique arguments in America that deal with the violation of a responding party's constitutional rights relating to discovery. The idea behind the English rule is to safeguard against frivolous cases and those without merit because

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70. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 626–27 (1995).

71. Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y.L. SCH. L. REV. 773, 775 (2009–2010).

72. *Id.*

73. *Id.*

74. Pfennigstorf, *supra* note 67, at 60.

75. *Id.*

76. Painter, *supra* note 71, at 628; Shajnfeld, *supra* note 72, at 774.

77. Painter, *supra* note 71, at 628.

78. Nigel Murray, *Discovery from the European Perspective*, ABA LAW PRACTICE TODAY (Oct. 2008), <http://ilta.personifycloud.com/webfiles/productfiles/51/LIT1.pdf>.

79. *Id.*

parties bringing those claims know of the significant risks in paying attorney's fees and discovery costs against their adversary.<sup>80</sup> The effects of the "loser pays" system, proponents say, is that optimistic plaintiffs are encouraged to sue while pessimistic plaintiffs are not, because of the costly risk associated with losing.<sup>81</sup>

### III. The History of Past Amendments to FRCP 26 Regarding Proportionality

Litigation pre-1983 invited litigants to request as much discovery as they wanted. As written, Rule 26 stated that unless ordered by the court, the "frequency of use" of the various discovery methods was not limited.<sup>82</sup> The 1983 amendments to the Federal Rules of Civil Procedure ended the use of broad discovery, and replaced it with the principal of proportionality in order to limit the frequent use of "excessively costly and time-consuming activities that [were] disproportionate to the nature of the case . . . ."<sup>83</sup> Simply put, the 1983 amendment's emphasis on proportionality attempted to make it so discovery "will not permit litigants to use a bazooka where a water pistol [would] do."<sup>84</sup> Similar to the 1983 amendments, the 2015 amendments also sought to restrict the use of over-discovery.<sup>85</sup> The notion of proportionality, although not explicit, appeared in the 1983 amendments when the rule read discovery shall be limited if,

- (i) [T]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in

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80. Eisenberg & Miller, *supra* note 16, at 336.

81. *Id.* at 337.

82. FED. R. CIV. P. 26(a) (pre-1983 amendments).

83. FED. R. CIV. P. 26 advisory committee's note to 1983 amendments.

84. Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 789 (1985).

85. FED. R. CIV. P. 26 advisory committee's note to 1983 amendments ("Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.")

controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.<sup>86</sup>

The incorporation of these factors later were moved down from the second paragraph of Rule 26(b)(1) by the 1993 amendments to Rule 26(b)(2)(C)(iii). Though the text still did not explicitly use the word "proportional," the 1993 amendments listed a number of factors in allowing a judge to rule on discovery motions in Rule 26(b)(2)(C)(iii).<sup>87</sup> Those factors included: (1) the burden or expense of the proposed discovery outweighs its likely benefit, (2) considering the needs of the case, (3) the amount in controversy, (4) the parties' resources, (5) the importance of the issues at stake in the action, and (6) the importance of the discovery in resolving the issues (the ordering of these factors are changed in the 2015 amendments).<sup>88</sup> The rulemakers amended the scope of discovery under Rule 26(b)(1) in 2000 to allow courts to be more involved in managing discovery that was "relevant to the claim or defense of any party." The inclusion of proportionality appears in a cross-reference to Rule 26(b)(2)(C)(iii) in the language "[a]ll discovery is subject to the limitations imposed by [now Rule 26(b)(2)(C)]."<sup>89</sup>

The location of the proportionality factors was not the only component that needed to be reworked throughout the history of Rule 26. The language within the scope of discovery has been through changes surrounding the phrase "reasonably calculated." Rule 26 contained this language before the emphasis of proportionality in the 1983 amendments.<sup>90</sup> The problem with this language arose because litigants seeking discovery in the past have improperly used the phrase, "reasonably calculated to lead to the discovery of admissible evidence," arguing that their broad requests fit into the calculation.<sup>91</sup> Parties were confusing the language to define the scope of discovery generally and used it for broad discovery despite the proportionality limitations of the 1983 amendments against over-discovery. The 2000 amendments attempted to fix that problem by adding the word "relevant" in order to make clear that the "reasonably calculated" language was limited to the scope of discovery listed in that subsection.<sup>92</sup>

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86. FED. R. CIV. P. 26(b)(1)(i)-(iii).

87. *See Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594 (D. Nev. 2016).

88. FED. R. CIV. P. 26(b)(2)(C)(iii).

89. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendments (referring to the 2000 amendments).

90. FED. R. CIV. P. 26(b)(1) advisory committee's note to 1970 amendments.

91. Marcus, *supra* note 47, at 1719.

92. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendments.

Subsequently, many lawyers misused the newly added word “relevant” to refer to the meaning of admissible evidence under Federal Rule of Evidence 401.<sup>93</sup> The misuse of relevancy occurred despite the Advisory Committee Note expressly stating that “[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>94</sup> Fortunately, the phrase “reasonably calculated” has been removed to deal with this confusion in order to restrict the use of over-discovery.<sup>95</sup> In its place, the 2015 amendments included “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable” in Rule 26(b)(1) to deal with the confusion of relevancy.<sup>96</sup> Deleting confusing language was one of many changes to the scope of discovery that reflect the 2015 amendment’s goal of keeping costs down.

#### IV. The Response: Rulemakers Emphasize Recalibration

Rulemakers have responded to recent constitutional challenges by recalibrating the scope of discovery since the 1983 amendments. When the Federal Rules of Civil Procedure were adopted in 1938, cases were simpler and discovery was limited to the nature of their simple facts.<sup>97</sup> There are two distinct types of cases in civil litigation.<sup>98</sup> The first is the discovery concerning ordinary cases, which pass through the courts cheaply without discovery issues.<sup>99</sup> However, the second involves the high-stakes and high-conflict cases that tend to cause more problems due to voluminous discovery.<sup>100</sup> The need to elevate and rearrange the proportionality factors higher in Rule 26 was important because judges were not heavily using them when ruling on discovery motions. The American College of Trial Lawyers survey found that “76.8% of Fellows agree that judges [did] not invoke Rule 26(b)(2)(C) on their own initiative.”<sup>101</sup> The 2015 amendments

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93. FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

94. FED. R. CIV. P. 26 (pre-2015 amendments).

95. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendments.

96. FED. R. CIV. P. 26.

97. Elliott, *supra* note 10, at 908 n.53.

98. Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Coast and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998).

99. *Id.*

100. Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Coast and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998).

101. See, e.g., KIRSTEN BARRETT, RHODA COHEN & JOHN HALL, MATHEMATICA POLICY RESEARCH, INC., ACTL CIVIL LITIGATION SURVEY, FINAL REPORT 41 (2008); see also Emery



seek to revitalize what the 1983 amendments originally sought to do by incorporating proportionality into the scope of discovery definition to reinvigorate the existing trend of its use.<sup>102</sup> Discovery must now focus on the needs of the case, as emphasized in the new Rule 26(b)(1), and involve a more active federal judge as the neutral arbitrator.<sup>103</sup> However, just because the notion of proportionality is appealing does not necessarily mean it will be easy to apply.<sup>104</sup> The objective was and still is to guard against redundant and disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.<sup>105</sup> Some redundancy in the intentions of different amendments must be warranted because the 2015 amendments are building off what earlier amendments say efficient discovery management ought to be.

It is important to understand the changes in prior amendments to appreciate the tweaks in the new ones. In addition to moving the location of proportionality to the forefront of the rule, the order of the other factors since the 1993 amendments also have been rearranged in Rule 26(b)(1)'s new scope of discovery.<sup>106</sup> Some judges have interpreted this change as minimal and have continued to treat all factors as weighing equally when determining proportionality.<sup>107</sup> Other judges view the change as a way to put "the importance of the issues at stake in the litigation" before "the amount in controversy" to emphasize that some cases deal with little or no money but involve important public and private substantive issues.<sup>108</sup> The emphasis on proportionality in the 2015 amendments continues the trend

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G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Litigation*, 60 DUKE L.J. 765, 773 n.32.

102. Marcus, *supra* note 47, at 1717.

103. See Chief Justice Roberts, *supra* note 1, at 7.

104. Marcus, *supra* note 47, at 1717.

105. FED. R. CIV. P. 26 advisory committee's note to 2015 amendments.

106. *Supra* note 89, ((1) the burden or expense of the proposed discovery outweighs its likely benefit, (2) considering the needs of the case, (3) the amount in controversy, (4) the parties' resources, (5) the importance of the issues at stake in the action, and (6) the importance of the discovery in resolving the issues.); *cf.* FED. R. CIV. P. 26(b)(1) ("[A]nd proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

107. See *Bell v. Reading Hosp.*, No. 13-5927, 2016 WL 162991, at \*2 (E.D. Pa. Jan. 14, 2016) (finding that "proportionality determinations are to be made on a case-by-case basis using the factors listed in Rule 26(b)(1), and that no single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional").

108. United States Courts, *Civil Rules 2015—Proportional Discovery*, YOUTUBE (Dec. 21, 2015), <https://www.youtube.com/watch?v=c2Fje4GzmGg>.

set by the 1983 amendments at the time of their adoption.<sup>109</sup> The reemphasis is also necessary because the subsequent amendments after 1983 may have inadvertently diluted the notion of proportionality.<sup>110</sup> Emphasizing proportionality is the answer to lowering litigation costs and responding to the recent constitutional challenges regarding costs.

### V. FRCP 26(b)(1) Proportionality Safeguards Due Process Rights

Although the American and English legal systems have differences in handling the costs of discovery, they also share similarities. English courts use reasonableness when reviewing disclosure requests.<sup>111</sup> The main focus when evaluating reasonableness in English courts is exactly what the new scope of discovery attempts to emphasize: proportionality. Both systems review discovery requests by considering: (1) the number of documents involved, (2) the nature and complexity of the proceedings, (3) the ease and expense of retrieving any particular document, and (4) the significance of any document that is likely to be found.<sup>112</sup> According to Professor Martin Redish, “the fact that a party’s opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request.”<sup>113</sup>

Even with the heightened emphasis on proportionality that the new amendments bring to the table, many believe that they are not enough to shield litigants from the heavy, arguably due process violating, costs that are associated with producing electronically stored information.<sup>114</sup> In 2009, the cost of e-discovery was \$2.8 billion and was estimated to rise ten percent to fifteen percent annually in subsequent years.<sup>115</sup> Global e-discovery expenditures are expected to be well over ten billion dollars. One of the causes of the high costs of e-discovery comes from the need to

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109. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 773–74 (1998) (“[T]he amendment itself seems to have created only a ripple in the caselaw, although some courts now acknowledge that it is clearer than it was before that they should take responsibility for the amount of discovery in cases they manage.”) (quoting 8A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2008.1, 121 (2d ed. 1994)).

110. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendments.

111. Murray, *supra* note 78.

112. *Id.*

113. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE. L.J. 561, 603 (2001).

114. Beisner, *supra* note 2.

115. John T. Yip, *Addressing the Costs and Comity Concerns of International E-Discovery*, 87 WASH. L. REV. 595, 595–96 (2012).

restore and reformat back up tapes, which many corporations use to guard against data loss.<sup>116</sup> Back up tapes are typically compressed for maximum capacity and must be reformatted when litigants seek information via discovery requests.<sup>117</sup> Opponents of the 2015 amendments continue to believe e-discovery has the potential to violate due process rights and still are not convinced that the proportionality requirement goes far enough to shield litigants from the costs in complex civil discovery because of these growing expenditures.<sup>118</sup> Opponents claim that the amendments address and will likely reduce the amount of discovery in litigated cases but do not fully address the burdens that come into the larger picture of the American rule where the producer pays.<sup>119</sup>

These arguments prove to be weak in light of the 2015 amendments because the cases decided since December indicate a cost-conscious approach taken by judges when evaluating costs. The purpose of the 2015 amendments is to bring further judicial involvement into the equation by having judges participate in the management of discovery early on in the litigation and to play an active role in determining what is proportional. Given the constitutional ramifications, some detail about this emerging practice is warranted.

#### A. Responsibility of Providing Information on Proportionality

Proportionality is measured by the list of factors new to Rule 26(b)(1) that were previously in Rule 26(b)(2)(C)(iii). Who is responsible for weighing these factors? The Advisory Committee Note explicitly states that the responsibility is not on the party seeking discovery to calculate all proportionality considerations.<sup>120</sup> Rather, the Advisory Committee Note places the responsibility on the parties and the court to collectively resolve these disputes.<sup>121</sup> The judge ultimately decides the discovery motions, but both sides are responsible for informing the judge on the issues and are expected to resolve discovery disputes early on in pretrial conferences. The requesting party typically sets forth reasons why it needs the discovery, and the responding party objects by stating why it would be too burdensome. The judge then decides which party has the more persuasive

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116. Gideon Mark, *Federal Discovery Stays*, 45 U. MICH. J.L. REFORM 405, 417 (2013).

117. *Id.*

118. Beisner, *supra* note 2.

119. *Id.*

120. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendments.

121. *Id.*

argument.<sup>122</sup> Additionally, the Advisory Committee Note emphasizes that parties responding to discovery cannot refuse to provide relevant material by simply saying it is disproportional to the needs of the case when objecting and nothing more.<sup>123</sup> The requesting party is in a better position to articulate why it needs the information. Similarly, the responding party claiming undue burden in responding is likely to be the only one who can provide information on why it is burdensome.<sup>124</sup>

## B. Judicial Interpretations Since December 1, 2015

Since the amendments went into effect on December 1, 2015, there have been many reported decisions that utilize the new proportionality tools and none of them incorporate any successful constitutional arguments regarding burdensome discovery. In *Marsden v. Nationwide Biweekly Administration, Inc.*, plaintiff employee sued defendant employer under Title VII relating to various unlawful employment actions.<sup>125</sup> Defendant successfully produced seven performance evaluations of employees that plaintiff requested.<sup>126</sup> Nonetheless, plaintiff subsequently requested defendant to “identify all individuals employed in the positions Plaintiff held . . . from 2005 through the present, including his/her job title, phone number, address, start date, disciplinary history (including whether ever placed in a performance improvement plan (PIP)), termination date (if applicable), reason for termination, and salary.”<sup>127</sup> The court found the request too overly broad and therefore disproportional to the needs of the case because there was no reason to believe similarly situated employees existed that were treated more favorably.<sup>128</sup> Even when Plaintiff offered to limit the scope of her search to “those employees who were disciplined for the same conduct Defendants purportedly terminated Plaintiff for,” the court denied Plaintiff’s motion to compel because she did not put forth any

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122. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendments (“[T]he 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 considerations.”)

123. *Id.* (“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.”).

124. *Id.*

125. *Marsden v. Nationwide Biweekly Admin., Inc.*, No. 3:14-cv-00399, 2016 WL 471364, at \*1 (S.D. Ohio Feb. 8, 2016).

126. *Id.* at \*2.

127. *Id.* at \*1.

128. *Id.* at \*2.

factual support to indicate the discovery request was not equivalent to a fishing expedition.<sup>129</sup> In this case, the judge's decision is an example of careful judicial scrutiny of the discovery proponent's justification. The weighing of proportionality favored denying Plaintiff's motion to compel because Defendants laid off sixty percent of their workforce due to the winding down of its business and the burdens of identifying and producing all of their information outweighed plaintiff's need.<sup>130</sup> Therefore, "[a]lthough Plaintiff does not have access to all the requested information, the other proportionality factors—mainly Defendants' resources and the burden and expense of production—outweigh the production's likely benefit to Plaintiff."<sup>131</sup>

According to The Wall Street Journal, "[c]ompanies notched a quiet win . . . when the federal courts adopted rules intended to curb the scope of pretrial evidence requests . . ." <sup>132</sup> Lawyers for Civil Justice, a legal group comprised of companies such as PG&E, Ford Motor, FedEx, Microsoft, and State Farm, expressed their relief because the amendments would provide less leverage for plaintiffs to pressure with unnecessary costs.<sup>133</sup> Indeed, the Lawyers for Civil Justice's comments confirm that due process violations are not a threat but it may have exaggerated its win. Plaintiffs are not completely shut out from making requests to collect information necessary for their cases. Rule 34(b) has also been amended to reflect plaintiffs' need to know what is being withheld. Under Rule 34(b)(2)(C), an objection must state what, if any, materials are being withheld—which is congruent with the Advisory Committee Note regarding boilerplate objections in Rule 26.<sup>134</sup> *Patriot Rail Corp v. Sierra Railroad Co.* is an example of how boilerplate objections are prohibited grounds for noncompliance to a request for production. Patriot moved for a protective order in response to a request from Sierra to provide all related documents from the beginning of the litigation regarding the company's financial downfall.<sup>135</sup> Although the broad request dated back eight years, the court

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129. *Marsden*, No. 3:14-cv-00399, at \*2.

130. *Marsden v. Nationwide Biweekly Admin., Inc.*, No. 3:14-cv-00399, 2016 WL 471364, at \*2 (S.D. Ohio Feb. 8, 2016).

131. *Id.*

132. Joe Palazzolo & Jess Bravin, *Businesses Win Lawsuit Curbs with New Rules: Change Could Help Companies in Their Battle Against Consumer Litigation*, WALL ST. J. (Mar. 22, 2016), <http://www.wsj.com/articles/businesses-win-lawsuit-curbs-with-new-rules-1458689192#:c=OJlZaZzK67A>.

133. *Id.*

134. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendments.

135. *Patriot Rail Corp. v. Sierra R.R. Co.*, No. 2:09-cv-0009, 2016 WL 492702, at \*3 (E.D. Cal. Feb. 8, 2016).

denied the motion for a protective order finding Patriot's arguments to be insufficient because it did not explain why it was unduly burdensome and harassing in detail.<sup>136</sup> A party objecting to a discovery request now has to show with specificity why the request does not comply with Rule 26(b)(1)'s scope of discovery.<sup>137</sup>

Careful judicial scrutiny of the scope of discovery made in the requests will be the catalyst in lowering discovery costs and ensuring that due process arguments remain ineffective. In *Gilead Sciences, Inc. v. Merck & Co., Inc.*, the court analogized a broad discovery request regarding a patent infringement to suggest that “[i]t would be like requiring [General Motors] to produce discovery on Buicks and Chevys in a patent case about Cadillacs simply because all three happen to be cars.”<sup>138</sup> In the future, parties requesting discovery must seek relevant information to their case and be ready to explain such relevance—otherwise, they will be subject to a valid objection based on proportionality or a protective order that forces them to pay the costs associated with its production (but not an objection based on due process).

Contrast *Kozlowski v. Sears, Roebuck & Co.*, a 1976 case before the introduction of proportionality where the district court denied defendant's request for a protective order when it argued that forcing it to produce a massive discovery request would be a violation of its constitutional right to due process.<sup>139</sup> In *Kozlowski*, Plaintiff was a minor that was severely burned when a pair of pajamas allegedly manufactured and marketed by defendant Sears caught fire.<sup>140</sup> Plaintiff sought all complaints and communications concerning personal injuries or deaths allegedly caused by the burning of children's nightwear, which had been manufactured or marketed by Defendant.<sup>141</sup> The court stated “merely because compliance with ‘Request for Production’ would be costly or time-consuming is not ordinarily sufficient reason to grant a protective order where the requested

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136. *Patriot Rail Corp.*, 2016 WL 492702, at \*3

137. FED. R. CIV. P. 34 advisory committee's note to 2015 amendments (explaining that Rule 34 of the Federal Rules of Civil Procedure, effective December 2, 2015, requires objections to discovery requests to be made with “specificity” and “an objection must state whether any responsive materials are being withheld on the basis of the objection.”).

138. *Gilead Sciences, Inc. v. Merck & Co., Inc.*, No. 5:13-cv-04057, 2016 WL 146574, at \*1–2 (N.D. Cal. Jan. 13, 2016). Here, plaintiff sought evidence regarding two alleged patent infringements. (“Merck's demands are exactly the type of disproportionate demands that Rule 26(b)(1) proscribes. Sure, it's possible that Gilead's evidence confirming the compounds are not PSI-6130 is false and even concocted. But Merck offers no real evidence that this is the case . . .”).

139. *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 74–76 (D. Mass. 1976).

140. *Id.* at 74.

141. *Id.* at 74–75.

material is relevant and necessary to the discovery of evidence.”<sup>142</sup> The court similarly rejected defendant’s offer of shifting the costs of production to plaintiff by simply inviting and allowing access to gather and organize the documents itself.<sup>143</sup> Sears did not offer anything in regards to the discovery request. It simply stonewalled, and the court found its behavior unacceptable.

*Kozlowski* is an example in which a single plaintiff makes a broad and costly discovery request against a large wealthy defendant. What would happen if *Kozlowski* was decided in 2016? An opportunity to evaluate the workability of proportionality is shown by contrasting *Kozlowski* with *R. Fellen, Inc. v. Rehabcare Group*, a case decided after the 2015 amendments. In *R. Fellen*, Plaintiff sued Defendant for allegedly violating the Telephone Consumer Protection Act by sending junk faxes.<sup>144</sup> Defendant raised an affirmative defense by claiming to have prior express permission (“PEP”) or an existing business relationship (“EBR”) with the recipients of the alleged junk faxes.<sup>145</sup> Plaintiff requested defendant to identify each and every person it contended gave PEP or whom it had an EBR with when it sent any faxes.<sup>146</sup> In other words, Plaintiff made a broad request for every fax number of each party defendant ever sent a fax to during the relevant time. The level of judicial scrutiny regarding proportionality here is what differentiates this case from *Kozlowski* and shows the trend currently in place. In *R. Fellen*, the judge found the request to be “excessively overbroad” because the request was unduly vague.<sup>147</sup> Furthermore, the judge in *R. Fellen* seemed to accept the same argument that was rejected in *Kozlowski* regarding a lack of a specific record keeping. The lack of record keeping of each facsimile number’s origin assisted in denying the motion to compel.<sup>148</sup> The judge cited the new scope of discovery under Rule 26(b)(1) in adjudicating the motion.

### C. Constitutional Challenges to Discovery After December 1, 2015

The discovery practice of leaving no stone unturned for the sole purpose of increasing the costs against the opposing party is as nonsensical

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142. *Id.* at 76.

143. *Id.*

144. *R. Fellen, Inc. v. Rehabcare Grp.*, No. 1:14-cv-2081, 2016 U.S. Dist. LEXIS 15228, at \*2 (E.D. Cal. Feb. 5, 2016).

145. *Id.* at \* 2.

146. *Id.* at \*4.

147. *Id.* at \*9.

148. *Id.* at \*10 (“As written, and because Defendant does not keep a record of each facsimile number’s origin, Defendant is correct that there is no way for it to reasonably respond to this interrogatory.”).

as settling disputes with dueling pistols. The 2015 amendments are a reminder that federal courts need to foster and encourage the peaceful resolutions of disputes. Hopefully, with the assistance of the revamped proportionality considerations, there will be an end to the practice of adversaries using “creatively burdensome discovery requests or evading legitimate requests through dilatory tactics.”<sup>149</sup> The recent constitutional challenges to American discovery are weak in light of the 2015 rule amendments. Along with changes in Rule 26 also came changes to Rules 1, 4(m), 16, 34, 37(e). Collectively, these rule changes invite and set the expectation of close judicial involvement for more effective and cooperative issue solving regarding cost management. Those expectations look promising because recent judicial decisions show that judges are becoming more active in the discovery process in order to reduce costs where discovery would be redundant and duplicative otherwise.<sup>150</sup> Furthermore, judicial decisions also show that requesting parties benefit from the 2015 rule amendments where protective orders are denied due to a failure to object or respond with specificity.<sup>151</sup> Rule 34 allows more transparency between the disputes and puts the judge in the front seat to decide, alongside the litigants, what would be proportional under the new scope of discovery.<sup>152</sup> With costs minimized and early involvement by judges in resolving discovery disputes, everyone, courts included, has much to benefit from going forward. With the 2015 amendments, there is no room to fit constitutional challenges against American discovery.

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149. See Chief Justice Roberts, *supra* note 1, at 11.

150. *Youssef v. Lynch*, No. 11-1362, 2016 WL 183504, at \*4 (D.D.C. Jan. 14, 2016) (“In light of the documents’ duplicative nature and the fact that the disciplinary proceedings are in no way related to Plaintiff’s retaliation claim or any of the facts underlying Plaintiff’s case, the Court finds that discovery of the additional documents in Defendant’s possession would not be ‘proportional to the needs of the case’ under Fed. R. Civ. P. 26(b)(1).”); see *United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 11–12 (D.D.C. 2016) (finding that “[c]onsiderations of proportionality weigh against compelling” discovery that is duplicative or a subset of other requested discovery and that requesting the production of information that is a “largely irrelevant subset would outweigh its likely benefit and be disproportionate to the needs of the case.”).

151. *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, No. 12-cv-03012, 2016 WL 27772,1 at \*2 (D. Colo. Jan. 22, 2016) (“Plaintiffs’ boilerplate objections are no better. Rule 34 of the Federal Rules of Civil Procedure, effective December 2, 2015, requires objections to discovery requests to be made with ‘specificity’ and ‘an objection must state whether any responsive materials are being withheld on the basis of the objection.’”) (quoting FED. R. CIV. P. 34 (b)(2)(B)–(C)).

152. FED. R. CIV. P. 34(b)(2)(C) advisory committee’s note to 2015 amendments.



## VI. FRCP 37(e) Clarifies Sanctions to Further Eliminate Unnecessary Costs

Electronically stored information has been referred to under the scope of discovery limitations regarding proportionality in the past and present amendments.<sup>153</sup> There are grounds to excuse the production of electronically stored information if it does not fit within the proportionality clause in Rule 26(b)(2)(B). Furthermore, the Advisory Committee Note to the 2015 amendment of the Rule 37 duty to preserve also provides further guidance on how proportionality plays a role. The Advisory Committee Note explicitly states that the reasonableness of preservation efforts is a factor in determining proportionality and that the information sought must be proportional to the importance of the claims or defenses being litigated.<sup>154</sup> However, repercussions still exist for failing to preserve electronically stored information when proportionality is found. Analyzing the change in reasonableness of preserving electronically stored information is an important factor in evaluating the potential costs of litigation and the trend towards limiting those costs. Unnecessary costs can come from spending in order to over-preserve or spending in the form of sanctions for failing to preserve.

### A. Over-Preservation and Sanctions for Failing to Preserve

The 2015 amendments to Rule 37 respond to the extreme and growing burden claimed by some that result from the duty to preserve potential evidence that may or may not be made available in litigation later. These expenses regarding preservation play a role in the overall cost of litigation. Rule 37(e) did not focus on whether or when a duty to preserve exists, but what courts must do when that duty is breached. The duty to preserve arises when there is a reasonable anticipation of litigation. The exchange of documents has always been the hallmark of discovery, but the term “document” entails a lot more now than it did in the past.<sup>155</sup> As the computer continues to be the center of many features in life, the rules of discovery continue to develop to accommodate the effects it has on litigation.<sup>156</sup> As amended, Rule 37(e) reads,

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153. FED. R. CIV. P. 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”).

154. FED. R. CIV. P. 37 advisory committee’s note to 2015 amendments.

155. See generally Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 *FORDHAM L. REV.* 1 (2004).

156. *Id.*

Failure to Produce Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment."<sup>157</sup>

Prior to this amendment, some circuits ruled that a court could impose sanctions under Rule 37(e)(2) for mere negligent failure to preserve.<sup>158</sup> The sanctions that the rule imposes may come in many measures listed in Rule 37(b)(2)(A)(i)-(vi),<sup>159</sup> or in the form of a jury instruction that it may "(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment."<sup>160</sup> Nonetheless, the newly amended Rule 37(e) requires the court to make a finding of intent in order to impose these sanctions.<sup>161</sup> In *Nuvasive, Inc. v. Madsen Medical, Inc.*, the United States District Court for the Southern District of California granted defendant's motion in July 2015 for sanctions when the court found that Plaintiff had unintentionally failed to preserve

157. FED. R. CIV. P. 37(e) (emphasis added to identify the amendment).

158. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2d Cir. 2002).

159. FED. R. CIV. P. 37(b)(2)(A)(i)-(vii):

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

160. FED. R. CIV. P. 37(e)(2).

161. FED. R. CIV. P. 37(e).

certain electronic messages relevant to the case.<sup>162</sup> Based on this determination, the court approved an adverse inference instruction against Plaintiff because of its failure to preserve.<sup>163</sup> Still, the court reconsidered its ruling in light of the 2015 amendments in addition to the trial date being set for February 2016.<sup>164</sup> With these new factors in consideration, the court rescinded its earlier approval of an adverse jury instruction because the amendments now require a specific finding of intent in order to give such an instruction.<sup>165</sup>

Intent to spoil no longer requires a finding of bad faith, but it is still a factor in determining what sanction is appropriate. In *InternMatch, Inc. v. Nxtbigthing, LLC*, a district court concluded that a sanction under Rule 37(e)(2), short of an entry of default judgment, was appropriate.<sup>166</sup> In *Internmatch*, Plaintiff sought discovery in the form of dated electronic documents to establish that defendant's use of a trademark was not continuously and extensively out to the consumer market before its own.<sup>167</sup> The court found that Defendant failed to take reasonable steps to preserve these documents when he allowed his wife to discard the computer after two lightning strikes allegedly caused damage to the device.<sup>168</sup> In awarding an adverse jury instruction, the court relied on evidence that no reasonable attempts to preserve were taken and evidence showing the existence of Defendant's acts of bad faith to mislead opposing counsel.<sup>169</sup>

## **B. Eliminating the Need for Over-Perseveration by Focusing on "Reasonable Steps"**

Rule 37(e)'s requirement for "reasonable steps" recognizes that preserving information can come in a variety of methods and need not be perfect.<sup>170</sup> Unless the intent to spoil is found, the failure to take reasonable steps to preserve is not the end-all and be-all in permitting sanctions. The purpose of preserving electronically stored information is to allow a judge to make the determination on a future date as to whether production of the

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162. *Nuvasive, Inc. v. Madsen Med., Inc.*, No. 13-cv-2077, 2016 WL 305096, at \*1-2 (S.D. Cal. Jan. 26, 2016).

163. *Id.* at 2-3.

164. *Id.*

165. *Nuvasive, Inc.*, No. 13-cv-2077, at 2-3.

166. *InternMatch, Inc. v. Nxtbigthing, LLC*, No. 14-cv-05438, 2016 WL 49148, at \*13 (N.D. Cal. Feb. 8, 2016).

167. *Id.* at \*2.

168. *Id.* at \*5.

169. *Id.* at \*13.

170. See FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendments.

information would be necessary.<sup>171</sup> Prior to these amendments, the risk of being sanctioned led to over-preservation. Over-preservation forced litigants to spend burdensome amounts of money in order to preserve based on the fear of sanctions. When reasonable steps are not taken, the next question is whether if the information is “lost” within the meaning of Rule 37. If the information sought is not lost, then a court need not determine whether it must impose sanctions. Instead, a court can

[Make] the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.<sup>172</sup>

This amendment was meant to clarify confusion in the circuit courts as to when sanctions were proper. With this better-defined standard, the burden is lifted from the need to over-preserve because sanctions have taken a backseat in priority and now allow courts to determine if there are any alternative means of obtaining similar or equivalent information.

### Conclusion

The constitutional challenges to American discovery have always lingered in the background but needed to be overstated to be heard. When the 1983 proportionality provisions were introduced in 1983, many thought that a huge change to federal discovery would come with it because of its impact on restricting redundant discovery.<sup>173</sup> However, the change came as a ripple effect.<sup>174</sup> Now with the 2015 amendments in place, constitutional challenges to American discovery will be cast away while the use of proportionality will be felt with much more force. Proportionality has now been elevated to the basic definition of the scope of discovery and has been revitalized, thus far, into the many recent discussions during discovery motions. Litigants can now be more at ease about sanctions provided they

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171. Marcus, *supra* note 156, at 14 (“All that preservation does is to ensure that a judge will be able to make that determination at a time when it can be put into effect if the justification for production seems sufficient.”).

172. FED. R. CIV. P. 37 advisory committee’s note to 2006 amendments.

173. Marcus, *supra* note 47, at 1717.

174. *Id.*

act reasonably in preserving potential evidence.<sup>175</sup> To keep the boat sailing, judicial involvement must be active and consistent so that parties remain true to the goals of the 2015 amendments. Constitutional challenges to American discovery cannot survive with the 2015 amendments in place.

[T]he existing discovery rules have been attacked as ‘un-American’ and a proposed amendment designed to constrain discovery has faced the same criticism.

– Richard Marcus<sup>176</sup>

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175. UC Hastings Law, *E-Discovery: Fiat Justitia with Richard Marcus*, YOUTUBE (June 14, 2013), [https://www.youtube.com/watch?v=BX\\_WiqGeuno](https://www.youtube.com/watch?v=BX_WiqGeuno).

176. Marcus, *supra* note 48, at 1721–22.

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