

# PROPORTIONAL DISCOVERY: MAKING IT THE NORM, RATHER THAN THE EXCEPTION

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## INTRODUCTION

Our discovery system is broken. It is broken because the standard of “broad and liberal discovery,” the hallowed principle that has governed discovery in the U.S. for over seventy years,<sup>1</sup> has become an invitation to abuse. Only the most well-heeled litigants can afford to bring or defend a case that is likely to generate significant discovery, as most cases in this electronic age do. Until the default is reversed from “all you can eat” discovery to proportional discovery geared to the needs of the case, as the rules already contemplate,<sup>2</sup> the courthouse doors will remain closed to legitimate cases that the average citizen<sup>3</sup> cannot afford to bring or defend.

This Article argues proportional discovery should replace the “broad and liberal” discovery currently permitted under the Federal Rules. Rather than examine the theoretical underpinnings of the discovery rules, this Article assesses the current default rule from a practitioner’s perspective. Part I begins by examining the history of federal discovery rules, including recent developments. Part II surveys the typical reading given to Rule 26(b)(1) and the burdens it imposes in practice. Part III attempts to assess the systemic impact of modern discovery by reference to federal court statistics published by the Administrative Office of the U.S. Courts, and examines an illustrative case that demonstrates the costs and delays that may deter the assertion of meritorious claims and defenses. Part IV argues for a return to the concept of proportional discovery as a default rule in place of broad and permissive discovery. The concept of proportional discovery and proposed model rules

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1. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 506 (1947).

2. Rule 26(b)(2)(C) directs federal courts to “limit the frequency or extent of discovery” if the court first determines that “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” FED. R. CIV. P. 26(b)(2)(C).

3. See Justice Powell, *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 522 (1980) (dissenting statement, joined by Justices Stewart and Rehnquist, opposing the 1980 amendments).

are then described in depth by reference to principles already well-developed by practice groups and the bench.

## I. A BRIEF HISTORY OF DISCOVERY RULES

### A. *The Emergence of the “Broad and Liberal” Standard*

The “broad and liberal discovery” standard first appeared in the United States in 1938, when the Federal Rules of Civil Procedure were promulgated.<sup>4</sup> With thirty-five states having adopted the federal rules as their own in the years since,<sup>5</sup> the rule of “broad and liberal” discovery established by current Rule 26(b)(1) now dominates in both federal and state courts. Under Rule 26(b)(1), parties are presumptively entitled to unearth any fact “relevant” to the case—and to do so at the expense of the other party—unless the opposing party blocks the discovery. It is an invitation few litigants decline or avoid, if they dare to enter the courthouse.

Broad discovery functioned without widespread dissatisfaction for decades after Rule 26 was enacted. In fact, as late as 1970 the Advisory Committee on Rules of Civil Procedure described the rule in glowing terms.<sup>6</sup> Rule 26(b)(1), the Committee noted, in combination with the shift to notice pleadings, had marked a “striking and imaginative departure” from judicially supervised discovery and the cumbersome rules of chancery pleading.<sup>7</sup> A 1968 field survey conducted by the Advisory Committee lent support to this position, and revealed no major complaints regarding the broad scope or cost of discovery or its potential for abuse, leading the committee to conclude:

[T]here is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.<sup>8</sup>

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4. See AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 9 (2009), <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20Revised%204-15-09.pdf> [hereinafter ACTL/IAALS, FINAL REPORT].

5. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 n.1 (1994) (noting that over 35 states have adopted the Federal Rules of Civil Procedure for their trial courts).

6. See FED. R. CIV. P. 26 advisory committee’s notes to 1970 amendment.

7. See *id.* tit. V advisory committee’s explanatory statement concerning 1970 amendments to discovery rules.

8. *Id.* The Advisory Committee survey was done in conjunction with Columbia Law School. *Id.*

*B. The Current View of Discovery*

Forty years later, much has changed. With the emergence of the information society, sentiments among the bench and bar towards discovery have shifted dramatically. Judges and litigants now routinely describe modern discovery as a “morass,” “nightmare,”<sup>9</sup> “quagmire,” “monstrosity,” and “fiasco.”<sup>10</sup> If this is how judges and practitioners describe modern discovery, imagine the disdain of the parties themselves whose interests the system is supposed to protect and serve through a “just, speedy, and inexpensive” resolution of disputes.<sup>11</sup> In 2008, the American College of Trial Lawyers (“ACTL”) Task Force on Discovery joined with the Institute for the Advancement of the American Legal System (“IAALS”) to survey members of the ACTL on the role of discovery and any perceived problems in the United States civil justice system.<sup>12</sup> Nearly 1,500 ACTL members responded, speaking with an average thirty-eight years of experience in civil litigation and with nearly equal representation of plaintiffs and defendants.<sup>13</sup> An overwhelming majority of the survey participants reported that discovery has become an end in itself—a costly weapon used to “bludgeon” parties into settlements.<sup>14</sup> The participants commented that attorneys, rather than clients, “drive excessive discovery.”<sup>15</sup> Forty-five percent of them believed that discovery is abused in “almost every case,”<sup>16</sup> and fifty-three percent believed that changes to the discovery rules since 1976 have *not* curbed the abuse.<sup>17</sup>

The Task Force Survey further revealed a widespread belief that radical changes to the system are necessary, rather than continued tinkering with the existing rules. Participants complained that “[w]e have sacrificed the prospect of attainable justice for the many in the interest of finding that one needle in the . . . haystacks,” and that “[t]he total lack of control of discovery . . . is killing civil litigation.”<sup>18</sup> The fact that many of the country’s leading trial lawyers provided this feedback after significant rule changes to address the problem were made in 1983, 1993 and 2000, indicates that in practice, the changes have failed to reduce discovery abuse.

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9. AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS B-1 to B-2 (2008), <http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf> [hereinafter ACTL/IAALS, INTERIM REPORT].

10. PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 1:05-CV-657 (DNH/RFT), 2007 WL 2687670, at \*1, 8, 12 (N.D.N.Y. Sept. 7, 2007).

11. FED. R. CIV. P. 1.

12. See ACTL/IAALS, FINAL REPORT, *supra* note 4, at 1.

13. *Id.* at 2.

14. See ACTL/IAALS, INTERIM REPORT, *supra* note 9, at B-1.

15. See *id.* at A-4.

16. *Id.* at 4.

17. See *id.* at 5 (emphasis added).

18. See *id.* at B-1.

So is the current discovery system merely imperfect, or is it really broken? Following its Interim Report and the Task Force Survey, the ACTL and IAALS task force members issued a final report concluding that “[o]ur discovery system is broken.”<sup>19</sup> If the system is broken, the report concludes, then it is time to reverse the default discovery rule to one of proportionality.<sup>20</sup> In other words, it is time to stop tweaking the rules and change the default from “everything is discoverable” to “you only get what you need.” Discovery has become the tail wagging the dog in many—if not most—civil cases, resulting in “unacceptable delays and prohibitive expense.”<sup>21</sup> The effects of such delays on the broader goals of the civil justice system are severe: fewer jury and bench trials, abandonment of meritorious claims by plaintiffs, and relinquishment of valid defenses by defendants. Many litigants with valid claims or defenses simply cannot rationalize the time and expense that must be devoted to bringing or defending a civil case, with the waves of discovery that normally follow.<sup>22</sup>

Judicial attitudes toward the discovery process and the resolution of discovery disputes show similar frustration and despair, particularly as electronic information proliferates. Judges now must moderate and determine a whole host of e-discovery disputes, including where such information resides, in what format, in whose possession, on what fixed or mobile device, in live, “deleted,” or archived status, on whose server, and on what type of system. And that is just the start. Judges then must sort through issues such as the existence and relevance of “metadata,” alteration and manipulation of electronic information, and the benefits and burdens of allowing or forbidding forensic examinations. Then comes assessment of the penalties that should be imposed upon a party who permitted a “relevant” byte of data to slip away unpreserved.

These issues are not going away. In the modern era, “virtually all discovery involves electronic discovery to some extent.”<sup>23</sup> One can sympathize with Judge Randolph Treece of the U.S. District Court for the Northern District of New York, who bemoans a “landscape [that] may be littered with more casualties than successes” in the modern era of electronic discovery.<sup>24</sup> The “scope, mechanism, cost, and perplexity” of modern discovery is now, more often than not, simply laid at the feet of the courts when well-heeled litigants—armed with expensive e-

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19. See ACTL/IAALS, FINAL REPORT, *supra* note 4, at 9.

20. *See id.* at 10.

21. *Id.* at 1.

22. *See id.* at 2.

23. Beard Research, Inc. v. Kates, No. 1316-VCP, 2009 WL 2997984, at \*7 (Del. Ch. May 29, 2009).

24. PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 1:05-CV-657 (DNH/RFT), 2007 WL 2687670, at \*1 (N.D.N.Y. Sept. 7, 2007).

consultants—cannot resolve the issues themselves after months or even years of wrangling.<sup>25</sup>

Like the ACTL and IAALS, many courts are now recognizing the broader implications of the presumption of “broad and liberal” discovery under Rule 26(b)(1) in the modern age. The costs and delays associated with permitting discovery of “any non-privileged matter,” so long as it is relevant, can overwhelm the very purpose of discovery and the overarching goals of civil dispute resolution. As one court summarized, “The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, ‘discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.’”<sup>26</sup>

### *C. Proportional Discovery: A New Trend?*

Federal and state rules of discovery have, of course, long included means by which courts and litigants can attempt to reign in the cost, delay and burdens of discovery. Such mechanisms include, principally, the limitations and proportionality guidelines of Rule 26(b)(2)(C) and the protective order provisions of Rule 26(c). In practice, however, those protections lie dormant, or are made subservient, to the default rule in favor of virtually unlimited discovery. Unless and until the responding party can muster a specific objection to a particular discovery request, with sufficient evidence to back it up, any and all relevant information must be produced. The real burden, in practice, remains upon the party resisting discovery. The bar is set so high on the resisting party that the default rule in favor of virtually unlimited discovery of any relevant fact routinely prevails.

Many participants in the civil justice system with divergent interests and roles believe the time has come to recognize that the default rule of “broad and liberal” discovery under Rule 26(b)(1) is not simply “competing” or in tension with the primary goal of ensuring the “just, speedy, and inexpensive determination” of civil disputes.<sup>27</sup> Instead, it presents an irreconcilable conflict. Put bluntly and radically, as the ACTL and IAALS suggest, not every conceivably relevant fact should be discoverable.<sup>28</sup> If we are to preserve our civil justice system, it must be available to parties to resolve legitimate disputes, whether the damages are in the thousands or millions of dollars.<sup>29</sup> And if we are going to restore mean-

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25. *See id.*

26. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (quoting *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002)).

27. *See* FED. R. CIV. P. 1; *cf. Zubulake*, 217 F.R.D. at 311 (“This case provides a textbook example of the difficulty of balancing the competing needs of broad discovery and manageable costs.”).

28. *See* ACTL/IAALS, FINAL REPORT, *supra* note 4, at 9, 11.

29. This applies equally to smaller defense cases, where defendants regularly settle claims with valid defenses, rather than incur the disproportionate costs of discovery. *See id.* at 2.

ingful access, we cannot continue to price litigants out of the system with “over-discovery.”<sup>30</sup>

The default rule, therefore, should be reversed: relevant facts should be discoverable *only in proportion to the specific claims and defenses in dispute*, as determined by the judge at an early case management conference using factors such as those set forth in Rule 26(b)(2)(C), and no further discovery of facts should be allowed without a showing of good cause.<sup>31</sup> Under this reverse default rule, the ability to show relevancy is not the dominating test; as experience has shown, “relevancy” is not much of a test at all. Instead, the dominating factor under the new rule is whether requested discovery passes a threshold, common sense, cost/benefit analysis under established proportionality factors.<sup>32</sup>

## II. “BROAD AND LIBERAL DISCOVERY” IN PRACTICE

The pre-2000 version of Rule 26(b)(1) defined the scope of discovery in now-familiar terms:

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 . . . .<sup>33</sup>

The U.S. Supreme Court made clear from the onset of modern discovery that the scope of discovery authorized by Rule 26 was to be construed broadly and liberally. In its oft-quoted 1947 opinion in *Hickman v. Taylor*, the Court declared that the common cry of a “fishing expedition” no longer would be sufficient to block discovery; instead, litigants must “disgorge whatever facts” they may have that are “relevant” to the subject matter.<sup>34</sup>

By 1978, the rule announced in *Hickman v. Taylor* was in full effect. The high court construed the scope of discovery authorized by Rule 26 so broadly that discovery could only be denied if its relevance was limited to stricken claims or defenses, if it related to events occurring well outside the relevant time period, or if it was sought for use in a different proceeding.<sup>35</sup> Such self-evident boundaries offered almost no protection from massive and intrusive discovery, because “relevancy,” as

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30. See FED. R. CIV. P. 26(b) advisory committee’s notes to 1983 amendment.

31. See ACTL/IAALS, FINAL REPORT, *supra* note 4, at 9.

32. See *id.* at 14 (“Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court’s adjudication, expense and burdens.”).

33. FED. R. CIV. P. 26(b)(1) (1993 amendment), *reprinted in* 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 26 app. 10 (3d ed. 1997 & Supp. 2009).

34. 329 U.S. 495, 507 (1946) (internal quotation marks omitted). We note that the decision was rendered before the Xerox Model A, the first commercial copier, was introduced in 1949, and long before the advent of electronically stored information.

35. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978).

defined by the rule, was virtually limitless. Discovery relating to the subject matter of the case would be deemed “relevant” whether or not it related to the merits of the case, the claims and defenses presented, or the issues raised by the pleadings. The rationale, the court reaffirmed, was that discovery serves to “help define and clarify the issues.”<sup>36</sup>

Lower federal courts picked up the *Hickman v. Taylor* theme in the years afterward, and have described the scope of discovery under Rule 26(b)(1) in even broader terms. Discovery is presumptively permitted if there is “any possibility” that the information sought relates to the “general subject matter” of the case,<sup>37</sup> conversely, information is off-limits from discovery only if it can be said with assurance that the information sought has “no possible bearing” on the issues actually pled or the issues that *may* arise during the course of the case.<sup>38</sup>

With multi-count complaints and stock lists of affirmative defenses having become commonplace in current litigation, along with the frequency of amended pleadings to add claims and defenses, one is left to wonder whether broad and liberal discovery helps “define and narrow” the issues to be tried, or merely serves to expand them. Causes of action and affirmative defenses can be “piled on” at the pleading stage, in the hope that broad and liberal discovery will eventually provide some support, so long as the relatively modest hurdle of Rule 11 is cleared.<sup>39</sup> Justice Powell may have had it right all along, when he observed in 1980 that Rule 26 “invite[s] discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds.”<sup>40</sup>

On its face, of course, Rule 26 prohibits discovery that is unduly burdensome, costly, duplicative or unnecessary, by way of Rule 26(b)(2) and Rule 26(c). Such safeguards in theory counterbalance the broad reading given to “relevancy” under Rule 26(b)(1). In practice, however, the sweeping scope of Rule 26(b)(1) has translated into a strong presumption that “relevant” discovery is allowed unless and until the responding party obtains a court order to prevent a specific request made. “[T]he resisting party must show how, given the broad and liberal reading afforded the Federal Rules of discovery, each interrogatory and document request is

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36. *Id.* at 351 (citing *Hickman*, 329 U.S. at 500–01).

37. *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 124 (M.D.N.C. 1989).

38. *Hammond v. Lowe’s Home Ctrs., Inc.*, 216 F.R.D. 666, 670 (D. Kan. 2003) (internal quotation marks omitted) (quoting *Sheldon v. Vermonty*, 204 F.R.D. 679, 690 (D. Kan. 2001)); *see also Foster v. Berwind Corp.*, No. 90-0857, 1990 WL 209288, at \*6 (E.D. Pa. Dec. 12, 1990).

39. *See* FED. R. CIV. P. 11 (requiring certification that a reasonable inquiry was made before filing).

40. Powell, *supra* note 3, at 522. Justice Powell further commented that the effect of “untrammeled” discovery upon “the average citizen’s ability to afford legal remedies” could not seriously be questioned. *Id.*

irrelevant, overly broad, burdensome, oppressive, or requested in bad faith.”<sup>41</sup>

Many courts still pay lip service to the burden of “establishing relevancy” that the party requesting discovery bears,<sup>42</sup> but in reality the bar of relevancy is set so low as to present virtually no burden at all. The requesting party need only show that the discovery sought is “germane” to the case.<sup>43</sup> Unless a party’s request for relevant information is overly broad or otherwise objectionable “on its face,” the burden immediately shifts to the party resisting discovery.<sup>44</sup> It does not take an experienced or clever practitioner to craft discovery requests that are at least germane to the case on the face of the request. One can remain intentionally vague and speak in the broadest of terms with discovery demands, unless and until a specific objection is made and then sustained.

The resisting party, on the other hand, bears a heavy burden. The resisting litigant must “specifically demonstrat[e]” that discovery will cause a “clearly defined and serious injury.”<sup>45</sup> To meet that high standard, the resisting party must make a “particularized factual showing” of the harm that will result.<sup>46</sup> “[B]road allegations of harm, unsubstantiated by specific examples, are insufficient,”<sup>47</sup> and “a mere showing that the discovery may involve inconvenience or expense does not establish good cause” sufficient to block the discovery sought.<sup>48</sup> Evidence must be marshaled by the resisting litigant as to each and every discovery request to which an objection is made, and failure to do so can mean discovery is granted in bulk, as a matter of course, with no further inquiry.<sup>49</sup> Not only is the resisting party’s obligation to produce information presumed, so too is his duty to pay for the costs of production.<sup>50</sup> The resisting party can even be required to spend her own time and resources compiling and researching relevant data, and interviewing witnesses at the direction of her opponent.<sup>51</sup>

The potential for abuse, cost, and delay created by this system of “broad and liberal discovery” has gradually received the attention of the Advisory Committee. In 1983, Rule 26(b)(1) was amended to add spe-

41. Phillips v. Dale, No. 86-2690, 1987 WL 9650, at \*2 (E.D. Pa. Apr. 16, 1987).

42. PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 1:05-CV-657 (DNH/RFT), 2007 WL 2687670, at \*7 (N.D.N.Y. Sep. 7, 2007).

43. *Id.* (internal quotation marks omitted).

44. Hammond v. Lowe’s Home Ctrs., Inc., 216 F.R.D. 666, 672 (D. Kan. 2003).

45. Lakeland Partners, L.L.C. v. United States, 88 Fed. Cl. 124, 133 (2009) (internal quotation marks omitted) (quoting Forest Prods. Nw., Inc. v. United States, 62 Fed. Cl. 109, 114 (2004)).

46. *Id.* (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 433 (1991)).

47. *Id.*

48. *Id.* at 137.

49. Phillips v. Dale, No. 86-2690, 1987 WL 9650, at \*2-3 (E.D. Pa. Apr. 16, 1987).

50. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

51. Medcorp, Inc. v. Pinpoint Techs., Inc., No. 08-cv-00867-MSK-KLM, 2009 WL 1049758, at \*3 (D. Colo. Apr. 20, 2009).



cific grounds upon which the courts could limit the “frequency or extent” of discovery, including a recognition that in some cases discovery is simply disproportionate to the amount in controversy, the needs of the case, the importance of the issues presented and the resources of the parties.<sup>52</sup> The proportionality factors recited were intended to guard against “over-discovery” and to encourage judges to be more aggressive in preventing abuse.<sup>53</sup>

By 1993, the Advisory Committee explicitly recognized that “broad and liberal” discovery might lead to vastly greater cost, delay, and widespread abuse, particularly with the proliferation of electronic information: “The 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.”<sup>54</sup> Nevertheless, while attempting to put “tighter rein” on discovery, the Advisory Committee left unchanged Rule 26(b)(1)’s presumptive rule in favor of broad and liberal discovery.<sup>55</sup>

In 2000, the scope of discovery under Rule 26(b)(1) was finally narrowed substantively, by permitting only discovery that is relevant to the “claims and defenses,” and not merely the “subject matter” of the case. A requirement of good cause was imposed for discovery beyond the new, “refined” boundary. With the 2000 amendments to Rule 26(b)(1), the Advisory Committee acknowledged that concerns among the bench and bar over cost, delay, and “over-discovery” in general had become persistent. At the same time, the committee acknowledged that the new boundary would be difficult to enforce. The “dividing line” between information relevant to the general subject matter of the case, but not the actual claims and defenses, is difficult to draw.<sup>56</sup>

Indeed, one might argue that there is no such dividing line at all. If information is relevant to the subject matter of the case, which in turn is determined by reference to the claims and defenses alleged, then by definition such information probably qualifies as at least “reasonably calculated to lead to the discovery of admissible evidence.”<sup>57</sup> In the end, the Advisory Committee summarized that the scope of discovery under the amendment “depends on the circumstances”—hardly a dividing line at all.<sup>58</sup>

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52. See FED. R. CIV. P. 26(b) advisory committee’s notes to 1983 amendment.

53. *Id.*

54. *Id.* advisory committee’s notes to 1993 amendment.

55. *See id.*

56. *Id.* advisory committee’s notes to 2000 amendment.

57. *Id.* 26(b)(1).

58. *Id.* advisory committee’s notes to 2000 amendment.

Judicial opinions appear to confirm that little has changed since the 1983, 1993 and 2000 amendments to Rule 26(b)(1).<sup>59</sup> The default rule of broad and liberal discovery remains intact. In 2010, even after all these rule amendments, the presumption continues to be that if there exists “any possibility”<sup>60</sup> that information or material is relevant to the case, “it should generally be produced.”<sup>61</sup> The resisting party continues to bear the burden of showing by specific proof why information should not be produced, whether on the basis of cost, burden or need.<sup>62</sup> In short, the “strong preference for broad production” continues to dominate. So too does the presumption that the responding party must pay the way of his inquisitive opponent, whether or not the information sought is in paper or electronic repositories, live or archived, measured in bankers boxes or in gigabytes.<sup>63</sup>

Conversely, limitations on discovery are rarely enforced absent a specific, fact-supported challenge mounted by the resisting party. Courts with crowded dockets seem to prefer—or are simply more accustomed to—resolution of discovery disputes by an itemized analysis of each disputed discovery request and the sufficiency of the specific objection. Still largely missing is any assessment of whether the discovery sought is proportional in its broader context, considering the needs of the case, the amount in controversy, the significance of the issues, and the resources of the parties. The judicial “vigor” hoped for by the Advisory Committee when the proportionality guidelines were first adopted has failed to materialize.<sup>64</sup>

### III. THE CONSEQUENCES OF THE CURRENT DEFAULT RULE

#### A. “Broad and Liberal”: By the Numbers

If the “strong preference for broad discovery” of all relevant facts remains largely intact, does it matter? At least some cost, delay, and potential for abuse is inherent in any discovery system, of course. One might argue such distasteful byproducts are “necessary evils” of a system that strives for fair outcomes by allowing the parties and the courts to consider all relevant facts. The ACTL and IAALS argue, however, that the problems with the current discovery system are systemic, and the consequences are severe. According to the members of the ACTL who

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59. See, e.g., *Medcorp, Inc. v. Pinpoint Techs., Inc.*, No. 08-cv-00867-MSK-KLM, 2009 WL 1049758, at \*2–4 (D. Colo. Apr. 20, 2009).

60. *Id.* at \*2 (internal quotation marks omitted) (quoting *Cardenas v. Dorel Juvenile Group, Inc.*, 232 F.R.D. 377, 382 (D. Kan. 2005)).

61. *Id.*

62. *Payless Shoesource Worldwide, Inc. v. Target Corp.*, No. 05-4023-JAR, 2007 WL 1959194, at \*13 (D. Kan. June 29, 2007).

63. *Dahl v. Bain Capital Partners, L.L.C.*, 655 F. Supp. 2d 146, 148 (D. Mass. 2009); *Medcorp*, 2009 WL 1049758, at \*2–3.

64. FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment.

responded to the Task Force Survey,<sup>65</sup> parties with the means or fortitude to use the court system now face longer waits than ever to get to trial, and at exponentially greater costs. The result is far fewer jury and bench trials.<sup>66</sup> Many parties are forced to settle to avoid the sheer cost and delay. The system can hardly be called “fair,” “just” or “speedy,” when the cost and delay of discovery is used to “bludgeon a case to settlement.”<sup>67</sup>

Federal court statistics lend support to the ACTL and IAALS conclusions regarding fewer trials and longer delays, even if factors other than discovery play a role. According to the Administrative Office of the U.S. Courts, the delay in getting a federal civil case to trial in the last seventeen years has steadily gone from 15 months to 25 months,<sup>68</sup> and the upward climb shows no signs of abating. Clients now must wait over two years to get to trial, while the parties slog through expensive discovery and related motions practice. At the same time, the average number of civil cases handled annually by each federal judge has remained constant, even as the economy and population grow. Thus, while the number of *cases* remains constant, the number of *trials* conducted has steadily decreased over the last seventeen years and has flat-lined, both in raw numbers and as a percentage of civil cases filed. The following table summarizes the statistics<sup>69</sup>:

Year	Median Months – Civil Case Filing to Trial	Trials Per Judge	Civil Cases Per Judge
1992	15	32	355
1993	16	30	354
1994	18	27	364
1995	18	27	383
1996	18	27	416
1997	19	26	420
1998	19.5	25	398

65. Nearly forty-two percent of the ACTL’s membership responded. See ACTL/IAALS, FINAL REPORT, *supra* note 4, at 2.

66. *Id.* at 3.

67. ACTL/IAALS, INTERIM REPORT, *supra* note 9, at B-1.

68. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURT—JUDICIAL CASELOAD PROFILE (2008), <http://www.uscourts.gov/cgi-bin/cmsd2008.pl> (click “generate” button) [hereinafter 2008 CASELOAD PROFILE]; STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, DISTRICT COURT—JUDICIAL CASELOAD PROFILE (1997), <http://www.uscourts.gov/cgi-bin/cms.pl> (click “generate” button) [hereinafter 1997 CASELOAD PROFILE].

69. Data compiled from Administrative Office of the U.S. Courts, Federal Court Management Statistics, Judicial Caseload Profile, twelve-month annual statistics for period ending Sep. 30 of each year. See 2008 CASELOAD PROFILE, *supra* note 68; STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, DISTRICT COURT—JUDICIAL CASELOAD PROFILE (2003), <http://www.uscourts.gov/cgi-bin/cmsd2003.pl> (click “generate” button); 1997 CASELOAD PROFILE, *supra* note 68.

1999	20.5	23	403
2000	20.0	22	396
2001	21.6	20	377
2002	21.8	19	413
2003	22.5	19	372
2004	22.6	19	414
2005	22.5	19	374
2006	23.2	19	383
2007	24.6	20	380
2008	24.8	20	394

These numbers are troubling. Not only do they show that it is taking longer to get to trial, but the “Trials Per Judge” statistic may overstate the number of civil trials because it apparently also includes criminal trials. Furthermore, the ACTL and IAALS conclude that “[s]ome deserving cases are not brought because the cost of pursuing them fails a rational cost–benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.”<sup>70</sup> This suggests that many parties with valid claims or defenses simply opt out of the system altogether to avoid the costs, delays, and disruption associated with the discovery system. If this is true, then the current model of discovery might have an even stronger suppressive effect than is reflected in caseload statistics.

Proof that meritorious claims and defenses are simply abandoned by potential litigants, in response to the costs imposed by the current discovery system, is difficult to find beyond the type of survey conducted by ACTL and IAALS. But one can look to reported opinions to see that litigants who *may* have meritorious claims or defenses often face punitive discovery burdens. If an aggrieved party dares to bring or defend a case likely to trigger substantial discovery requests from the other side, as most civil cases do today, she must be prepared for the overwhelming costs and delay that will result. In other words, rational litigants have to predict whether the discovery nightmare they can expect is worth it. The following section illustrates one such case.

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70. ACTL/IAALS, FINAL REPORT, *supra* note 4, at 2.

*B. Case Study: Orrell v. Motorcarparts of America, Inc.*<sup>71</sup>

Tanya Orrell brought a Title VII claim against her former employer, alleging sexual harassment and a hostile work environment.<sup>72</sup> Orrell alleged that over a three-year period, beginning in 2002, she was harassed by “several” co-workers and customers.<sup>73</sup> Some of the harassment allegedly took the form of “hundreds” of pornographic and offensive emails directed to Orrell.<sup>74</sup> Orrell, who traveled frequently for the defendant, received many of the alleged emails on her company-issued laptop computer.<sup>75</sup> Orrell also testified that it was her practice to forward emails from her laptop to her home computer.<sup>76</sup> In addition, Orrell had sent some of the offensive emails to her husband over the 3-year period, delivered to his work computer.<sup>77</sup>

Upon termination of her employment, Orrell and her husband had the laptop hard drive “wiped” of all data before returning it to her employer, allegedly to protect personal financial information.<sup>78</sup> That, of course, was an enormous mistake. The discovery sought by the employer upon filing of the complaint was predictably exhaustive and penal. The employer demanded Orrell and her husband identify all computers used over the 3-year period of the suit, plus an additional four years going back to the date of her original employment with the defendant in 1998.<sup>79</sup> The defendant then made demand for production of “[a]ny and all documents concerning [the employer] retained by you or obtained by you in any manner during or from your [seven years of] employment.”<sup>80</sup>

Orrell produced twenty-two pages of emails from 2003–2004 supporting her claim, but the defendant deemed that production insufficient.<sup>81</sup> Orrell and her husband then paid a technical consultant to produce back-up tapes of additional responsive documents including 10,000 printed pages.<sup>82</sup> The defendant also demanded a forensic examination of the husband’s business computer and a third computer the couple used for a side business.<sup>83</sup> The defendant further demanded that Orrell answer interrogatories detailing each and every instance of alleged harassment over the three-year period, by whom, the specific content, together with the time, date, and location of each event and the identity of any observ-

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71. No. 3:06CV418-R, 2007 WL 4287750 (W.D.N.C. Dec. 5, 2007).

72. *Id.* at \*1.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (internal quotation marks omitted).

79. *Id.* at \*3–4.

80. *Id.* at \*2.

81. *Id.* at \*2–3.

82. *See id.*

83. *Id.* at \*3 (internal quotation marks omitted).

ers or persons with knowledge of such event.<sup>84</sup> Orrell had specifically identified persons with knowledge of the harassment she alleged, but she did not give further explanation.<sup>85</sup> The defendant also demanded all records relating to Orrell's post-termination employment to evaluate her claim of lost wages and compliance with her duty to mitigate damages.<sup>86</sup> Orrell had produced only her tax returns showing her income and sources for all relevant periods.<sup>87</sup>

The *Orrell* court granted the defendant's motion to compel on virtually all issues, without ever discussing the cost or burden imposed upon Orrell in light of the damages claimed and the importance of the issues presented.<sup>88</sup> For example, according to the published opinion, the court failed to consider whether production of less than all of the offensive emails by Orrell was sufficient in light of the claims made, or whether she would simply have to risk losing the case on the basis of not having retained all of the "hundreds" of emails alleged.<sup>89</sup> Nor, according to the opinion, did the court consider whether relevant electronic communications were accessible by a search of the company's own computer systems, or the overall significance of the emails in light of other acts of harassment alleged. Nor did the court evidently consider the feasibility or nature of the burden that would be imposed upon the company by simply interviewing the persons identified by Orrell. Instead, as might be expected, the court simply cited the default rule that all "relevant" information is presumptively discoverable, and chastised Orrell for not preserving all offending emails that accumulated over the three-year period.<sup>90</sup> Although the case involved a personal claim brought by a relatively unsophisticated plaintiff, the court cited the same rigid duty to produce and preserve all electronic data that applies to corporate litigants engaged in a multi-million dollar commercial dispute.<sup>91</sup>

Whether or not Orrell's claims had merit, any sexual harassment victim or her counsel reading the discovery opinion would undoubtedly think long and hard before filing a Title VII claim that relies on voluminous emails exchanged over a lengthy period of time—regardless of the fact that email has become one of the primary means of intra-company communication in today's business world.

Perhaps creation of a disincentive to sue from the threat of massive discovery is the whole point, from a defendant's perspective. Intentional or not, massive discovery sends a message to the next potential plaintiff.

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84. *Id.* at \*8.

85. *Id.* at \*5.

86. *Id.* at \*5–6.

87. *Id.* at \*5.

88. *See id.* at \*9–10.

89. *See id.* at \*1–2 (internal quotation marks omitted).

90. *See id.* at \*1–6.

91. *See id.* at \*6–8.

And, to be fair, plaintiffs and their counsel are equally incentivized by the current discovery system to use the threat of costly, invasive, and time-consuming discovery to cause defendants to settle cases quickly for substantial payment rather than pursue valid defenses. That is not a fair system. That is a system where the party able to launch the most aggressive and far-reaching discovery campaign prevails, regardless of how the law applies on the merits. Once again, it appears Justice Powell accurately warned of such results nearly three decades ago.<sup>92</sup>

#### IV. MAKING PROPORTIONAL DISCOVERY THE RULE, RATHER THAN THE EXCEPTION

##### *A. Proportionality as a Default Rule*

There is another way. The default rule for discovery should *start* with proportionality, and a recognition that not all conceivably-relevant facts are discoverable in every case.<sup>93</sup> To be sure, proportionality factors are already a part of the discovery rules. Rule 26(b)(2)(C) provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.<sup>94</sup>

But while proportionality limits are available, in practice the guidelines are rarely used. Instead, proportionality takes a back seat to the strong presumption in favor of broad and liberal discovery. As the ACTL and IAALS put it, “these factors are rarely if ever applied because of the

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92. Powell, *supra* note 3, at 523 (“[A]ll too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate.”).

93. Large, complex cases, cases with important social issues, and other cases which require extensive discovery would properly get extensive discovery. Less complicated and smaller cases that do not require such extensive discovery would not.

94. FED. R. CIV. P. 26(b)(2)(C).

longstanding notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise.”<sup>95</sup>

Attorneys are required to zealously advocate for their clients. Excessive or evasive discovery tactics are among the most commonly used tools to induce a favorable settlement—or to deter a claim altogether, depending on which side abuses the process. Unless and until attorneys are *forced* to make discovery proportionate, the abuses outlined in this article will continue. Guidelines, to put it bluntly, are not enough. Courts and litigants will continue to look primarily to the rules in discovery—as they should. Therefore the rules must be explicitly changed to make limited discovery the *primary and presumptive* rule of discovery, not the exception: “The primary goal [should be] to change the default from unlimited discovery to limited discovery. . . . Additional discovery beyond the default limits would be allowed only upon a showing of good cause and proportionality.”<sup>96</sup>

Reversing the default rule means proportionality would replace relevancy as the most important principle guiding discovery. Relevancy would remain a threshold requirement, but would not be a license to obtain discovery regardless of the burden or expense imposed on the opponent if the costs of discovery outweigh the likely benefit.<sup>97</sup> While such a cost/benefit approach to discovery may strike some practitioners as inviting subjectivity, it is a policy choice already built into the existing rules, albeit secondary to the greater goal of allowing a virtually unbridled search for truth. Until proportionality becomes the guiding principle, virtually unlimited discovery will continue unless and until the responding party convinces the court to actually apply the proportionality factors—and almost none do.

In 2009, the ACTL and IAALS, following their eighteen-month joint project and survey on discovery, developed “Pilot Project Rules” designed to encourage the discovery reforms included in the groups’ final report. Proportionality takes center stage as the governing principle for the entire pre-trial process:

Rule 1.2. At all times, the court and parties must address the action in ways designed to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties’ resources, and complexity and importance of the issues at stake in the litigation. This proportionality

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95. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES 2 (2009) [hereinafter IAALS, PPR].

96. ACTL/IAALS, FINAL REPORT, *supra* note 4, at 11.

97. For example, the benefit of obtaining potentially tangential or duplicative facts may not justify the added burdens and costs.



rule is fully applicable to all discovery, including the discovery of electronically stored information.<sup>98</sup>

The ACTL and IAALS suggested rule, in addition to reversing the default rule, realistically recognizes that litigants, acting as zealous advocates for their clients, are likely to end the tug-of-war over relevancy and instead focus upon proportional discovery only when they are forced to do so. The suggested rule is perhaps an indirect concession that long-standing judicial calls for “cooperat[ion]” and “collaboration”<sup>99</sup> among opposing parties and counsel, and hopes for more “reasonable lawyers,”<sup>100</sup> are at best inconsistent with the aggressive, zealous representation that lawyers strive to give their clients—and at worst naïve. Opposing counsel are not companions in the discovery process. Unless required by the rules to jointly devise a plan of proportionate discovery, mandated by the court if necessary, lawyers will simply continue costly and time-consuming battles over the scope of “relevant” information to be exchanged.

Proportionality is quickly becoming the guiding principle for discovery of electronic information, as courts are increasingly forced to grapple with the issue.<sup>101</sup> Thus, the reform we recommend is as follows: make proportionality the guiding, mandatory principle for *all* discovery, including the Rule 26 required disclosures, interrogatories, document requests, requests for admissions, third party subpoenas, and party and non-party depositions. If a weighting of the relative costs and benefits is appropriate for electronic discovery, then there is no principled reason why proportionality should not be the guiding principle for all forms of discovery.

For example, The Sedona Conference Working Group has discussed the costs of producing electronic information in terms that apply to all discovery.<sup>102</sup> Electronic or other discovery must take into account not only the hard costs of locating and retrieving relevant information, but also the less quantifiable or even non-monetary costs, “including the interruption and disruption of routine business processes and the costs of reviewing the information” and “the resources required to review documents for relevance, privilege, confidentiality, and privacy.”<sup>103</sup> Absent a balancing test required by a rule of proportionality, warns the Sedona Conference, electronic discovery costs alone stand to “overwhelm the

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98. IAALS, PPR, *supra* note 95, at 1–2.

99. Dahl v. Bain Capital Partners, LLC, 655 F. Supp. 2d 146, 149 (D. Mass. 2009).

100. FED. R. CIV. P. 26 advisory committee’s notes to 2000 amendment.

101. See, e.g., Zubulake v. UBS Warburg LLC., 217 F.R.D. 309, 316 (S.D.N.Y. 2003); Rowe Entm’t, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 426 (S.D.N.Y. 2002).

102. THE SEDONA CONFERENCE WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: SECOND EDITION BEST PRACTICES RECOMMENDATIONS AND PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 (2007), [http://www.thesedonaconference.org/dltForm?did=TSC\\_PRINCP\\_2nd\\_ed\\_607.pdf](http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf).

103. *Id.*

ability to resolve disputes fairly in litigation.”<sup>104</sup> While the Sedona Conference addresses the issue in a business-to-business context, similar considerations of costs and disruption should apply when determining the discovery obligations of individuals like Tanya Orrell, discussed earlier.

*B. Proportionality in Practice: Early Developments*

Building upon the proportionality factors of Rule 26(b)(2)(C) and the work of the Sedona Conference, some federal courts are slowly beginning to enforce proportionality guidelines against litigants—albeit primarily in the context of electronic discovery. In *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,<sup>105</sup> for example, U.S. Magistrate Judge James C. Francis IV developed an eight-factor proportionality test for e-discovery that supplemented Rule 26(b)(2)(C) with considerations such as “the likelihood of discovering *critical* information,” “the specificity of the discovery requests,” “the total cost associated with production,” and “the relative ability of each party to control costs and its incentive to do so.”<sup>106</sup>

In *Zubulake v. UBS Warburg LLC*,<sup>107</sup> a federal opinion that has emerged as a primary reference in many e-discovery disputes, Judge Shira Scheindlin applied and revised the factors developed by the *Rowe* court.<sup>108</sup> Judge Scheindlin appropriately noted that the “total cost associated with production,” as referenced in *Rowe*, is almost always a large number at least in cases where an objection to production and cost-shifting is sought.<sup>109</sup> Thus, real proportionality, as contemplated by Rule 26(b)(2)(C), requires weighing such production costs against the “amount in controversy” and the “importance of the issues” for which the information is sought.<sup>110</sup> Similarly, Judge Scheindlin observed, real proportionality requires an assessment of not merely the *relative* ability of the parties to produce the discovery requested, but also the “total cost of [the discovery] as compared to the resources available to each party.”<sup>111</sup> “Thus, discovery that would be too expensive for one defendant to bear would be a drop in the bucket for another.”<sup>112</sup> The “impor-

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104. *Id.*

105. 205 F.R.D. 421 (S.D.N.Y. 2002).

106. *Id.* at 429 (emphasis added). The eight-factors are:

(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.

*Id.*

107. 217 F.R.D. 309 (S.D.N.Y. 2003).

108. *Id.* at 316–21.

109. *See id.* at 321 (internal quotation marks omitted).

110. *See id.*

111. *Id.*

112. *Id.*

tance of the issues” factor, noted the court, also necessarily raises the question of the potential public impact of the case.<sup>113</sup> A toxic tort class action or environmental case, for example, might affect millions of citizens while other disputes are truly private affairs.<sup>114</sup>

### C. The 2006 Amendments

Following *Zubulake*, proportionality concepts were further developed in the 2006 “e-discovery amendment” to Rule 26, adopted as Rule 26(b)(2)(B).<sup>115</sup> The e-discovery amendment specifically regulates production of electronically stored information.<sup>116</sup> Once again, while limited to the context of electronic information, the rationale for proportional discovery cited by the Advisory Committee applies with equal force to all forms of discovery. The Advisory Committee explicitly recognized that a producing party should be obligated to disgorge only electronic information “reasonably accessible,” as measured by burden and cost, after which further information would require the requesting party to show good cause.<sup>117</sup> The Committee specifically calls for a rational cost/benefit analysis that takes into account the parties’ resources, the issues at stake in the litigation, and other proportionality factors.<sup>118</sup> This, we urge, should be the guiding principle for *all* discovery.

It is too soon to tell whether the foregoing steps towards proportional discovery can be called a trend, but they do offer hope of a more rational discovery system. Plaintiffs and defendants will likely differ on the fairness of proportional or limited discovery as applied in particular cases, or even systemically.<sup>119</sup> The perceived fairness of proportional discovery may depend upon the adoption of additional reforms that take into account matters such as fact-based pleading standards applicable to both plaintiff and defendant, judicial willingness to manage the discovery

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113. *Id.*

114. *See id.*

115. *See* FED. R. CIV. P. 26(b)(2)(B).

116. *Id.*

117. *Id.* advisory committee’s notes to 2006 amendment.

118. *Id.*

119. A noted plaintiff’s attorney, Elizabeth J. Cabraser, in commenting upon the ACTL and IAALS Final Report, notes that proportional or limited discovery may favor defendants unless done in conjunction with other civil justice reforms:

Holistically, the *Final Report* program seems balanced, with a potential to improve the quality, and reduce the cost, of civil litigation. It is the product of extensive study, thoughtful reflection, discussion and compromise among those with opposing viewpoints, and it reflects the practicality gained through the litigation experience of seasoned practitioners on both sides of the “v.”

The danger is that the project’s recommendations will be implemented piecemeal. Discovery limitations on their own spell disaster for the process of fact-finding. In any discovery limitation program, the defense has the clear advantage: it has the information, and it can hide or destroy the information, without plaintiffs being the wiser. Punishment depends on detection, and discovery limitations make concealment easier and detection less likely. An honor system depends upon the honor of the participants—and this is the crux of the problem, perceived or real.

Elizabeth J. Cabraser, *Uncovering Discovery*, 59 DUKE L.J. (forthcoming 2010) (manuscript at 55, on file with authors); *see also* Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. (forthcoming 2010).

process *before* disputes arise, early production of documents by the parties, including documents which support defenses, mandatory sanctions for failure to produce documents, and other factors.<sup>120</sup>

#### CONCLUSION

The time has come to recognize that the “broad and liberal” default rule of discovery, dominant in the U.S. for over 70 years, has outlived its useful life. It has increasingly led to unacceptable delay and abuse. The bench, the bar, and litigants have few kind words for the system. The threat of delay and cost from “over-discovery” likely means many litigants with deserving cases must simply opt out of the system, or settle cases that otherwise would be tried on unfavorable terms. Those who use the system are less likely to get a trial of their claims or defenses, and face longer waits to get there.

Proportionality guidelines written into the existing rules, but rarely used or enforced, should become the governing rule. This must be done explicitly. Proportionality must be made the norm, not the exception—the starting point, rather than an afterthought. Proportionality guidelines should not simply be available, they should be imposed. The “broad and liberal” standard should be abandoned in place of proportionality rules that make “relevancy” part of the test for permissible discovery, but not the starting point. If we are to take back the system, and restore accessibility to meritorious cases, no matter their size, we are compelled to make fundamental changes. Hopefully these changes will enable us to stop litigating discovery and start trying a greater number of meritorious cases. The Pilot Project Rules of the ACTL and IAALS are a bold step in this new direction. If embraced by the courts, parties and their counsel, such proportionality guidelines offer hope that the system can actually live up to its first goal as expressed in Federal Rule 1: securing for the average citizen, as Justice Powell would say, a “just, speedy and inexpensive determination” of her case.<sup>121</sup>

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120. The ACTL and IAALS have recognized that such additional reforms may need to accompany proportional discovery to make it effective.

121. Powell, *supra* note 3, at 522 & n.4.