



# DUKE LAW

**Bench-Bar Experiences with the 2015 Discovery Proportionality Amendments**  
*Survey for Washington, DC*  
*July 13, 2018*

**1 - Number of years you have practiced law:**

Number of years you have practiced law:

22

28

23

14

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*\*Number in red represents Dallas Survey Number*

**2 - Tell us about your practice:**

**a) Main area(s) of past and current practice:(Check all that apply)**

Answer	Count
	2
Toxic Tort	1 4
Tax	0 1 0
Real Estate	0 1 0
Product Liability	5 3 6
Personal Injury	1 3 6
Medical Malpractice	0 1 1
Intellectual Property	2 3 2
Government	1 2 1
General Practice	1 2 0
Estate planning	0 0 0
Environmental	3 2 2
Employment/Labor/Employee Benefits	1 5 5
Commercial Litigation -- not primarily class action	4 7 9
Commercial Litigation -- class action	4 9 7
Civil Rights	2 5 3
Bankruptcy	1 1 0

Securities Litigation	1
Internal investigations, general litigation	1
Consumer Antitrust	1
Judge	1
Bankruptcy litigation wills and trusts litigation, fraud/accounting/tracing disputes. Since 2015 I have been a full-time neutral mediator and arbitrator	1
Employee mobility/trade secret; business torts	1

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**b) - You usually represent:**

Answer	Count
Plaintiff	2 8 11
Defendant	2 3 5
More or less equal representation of plaintiff or defendant	2 3 3
Total	6 14 19

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In this survey, discovery seeking information in electronic format is referred to as "e-discovery." Electronically stored information is referred to as "ESI." The Federal Rules of Civil Procedure are referred to as "FRCP." The 2015 amendments to the FRCP are referred to as the "2015 amendments."

The time period after the enactment of the 2015 amendments covers the 15-month period from 12/1/2015 to the present. The period before the enactment covers the 15-month period from 9/1/2014 to 12/1/2015.

**3 - How many of your cases involved e-discovery?**

Question	Before 12/1/2015	After 12/1/2015
11-20 cases	0 0 2	1 5 2
6-10 cases	0 1 6	2 2 5
3-5 cases	1 3 3	0 4 5
1-2 cases	1 1 1	1 0 2
0 cases	0 0 0	2 0 0
More than 20 cases	4 6 7	4 5
Total	6 15 19	6 15 19

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**4 - What was the highest amount of monetary relief awarded or most likely to be awarded to either party in any single case you handled involving e-discovery?**

Question	Before 12/1/2015	After 12/1/2015
	0	0
\$75,000 to \$250,000	0 0	0 0
\$250,000 to \$500,000	0 0	0 0
\$500,000 to \$1 million	1 0	0 1
\$1 million to \$5 million	0 0	1 1
More than \$5 million	4 14	5 12
	14	14
Total	6 14	6 14
	14	14

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**5 - What was the highest amount of e-discovery expense you or your client incurred in any single case you handled, including the cost of a vendor, lawyer fees client paid, and response costs the client incurred?**

Question	Before 12/1/2015	After 12/1/2015
	0	0
\$0 – \$10,000	0 3	0 5
\$10,000 to \$25,000	1 1	1 2
	1	0
\$25,000 to \$75,000	1 1	0 1
\$75,000 to \$150,000	0 0	0 3
	2	1
\$150,000 to \$500,000	0 3	2 2
	1	4
\$500,000 to \$1 million	0 4	0 1
	5	2
More than \$1 million	4 4	3 5
	6	6
Total	6 13	6 13
	19	19

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a) - The total average discovery costs in your cases incurred by your client represented what percentage of the monetary stakes in the litigation?

Question	Before 12/1/2015	After 12/1/2015
0%	0 3 1	0 2 1
10%	4 6 11	3 7 10
20%	0 1 2	0 1 3
30%	0 1 2	1 1 2
40%	0 1 1	0 1 1
More than 50%	0 0 1	0 0 1
Total	4 12 18	4 12 18

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6 - The 2015 amendments affected several FRCP. Please rate your familiarity with the changes the amendments made.

Answer	Count
Not at all familiar	0 0 0
Somewhat familiar	1 1 1
Familiar	1 5 11
Very familiar	4 9 7
Total	6 15 19

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**a) - My clients' ESI could be described as:(Check all that apply)**

Answer	Count
High volume of data (more than 100 gigabytes or 40 custodians)	3 6 7
Medium volume of data (between 1 and 100 gigabytes)	1 7 8
Low volume of data (less than 1 gigabyte)	3 5 8
Legacy data (contained in an archive or obsolete system)	4 3 11
Disaster recovery data (contained in a backup system)	3 4 6
Segregated data (subject to a special process, e.g., "confidential" information)	2 5 7
Automatically updated data (e.g., metadata or online access data)	2 5 9
Structured data (e.g., databases, applications)	4 8 9
Foreign data (e.g., foreign character sets, data subject to international privacy laws)	3 6 4
Deleted data	0 5 6

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**b) - Other parties' potentially discoverable ESI in your typical cases could be described as: (Check all that apply)**

Answer	Count
High volume of data (more than 100 gigabytes or 40 custodians)	2 10 15
Low volume of data (less than 1 gigabyte)	4 6 8
Legacy data (contained in an archive or obsolete system)	4 4 11
Disaster recovery data (contained in a backup system)	2 4 5
Segregated data (subject to a special process, e.g., "confidential" information)	2 4 8
Automatically updated data (e.g., metadata or online access data)	2 6 7
Structured data (e.g., databases, applications)	3 9 12

Foreign data (e.g., foreign character sets, data subject to international privacy laws)	2 4 5
Deleted data	2 3 8

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**INITIAL STAGES**

**8 - The amendment to Rule 4(m) reduced the time to serve a complaint from 120 to 90 days. Has the Rule 4(m) amendment affected the burden of serving the complaint?**

Answer	Count
Substantially increased	0 0 0
Increased	1 2 2
No effect	4 8 12
No experience	1 5 5
Total	6 15 19

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**a) - The amendment to Rule 4(m) reduced the time to serve a complaint from 120 to 90 days. Has the Rule 4(m) amendment affected the expense of serving the complaint?**

Answer	Count
Substantially increased	0 0 0
Increased	1 1 2
No effect	4 9 11
No experience	1 4 5
Total	6 14 18

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**b) - Has the Rule 4(m) amendment expedited litigation?**

Answer	Count
Substantially	0 0 0
Modestly	1 3 1
No effect	4 8 13
Increased delay	0 0 0
No experience	1 3 5
Total	6 14 19

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**9 - In what percentage of cases did you personally meet or speak on the phone with opposing counsel or someone on your team to discuss discovery for the Rule 26(f) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	0		0	
20%	0		0	
40%	1		0	
60%	1	73.33%	1	83.33%
80%	3	84.29% 69.47%	3	92.86% 74.74%
100%	1		2	
Total	6		6	

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**a) - In what percentage of cases did a judge before the Rule 26(f) conference enter an order setting out what the judge expected the parties to discuss at the conference and be prepared to discuss with the judge at the Rule 16(b) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	0		0	
20%	1		0	
40%	2	45.71% 45.26% 53.33%	1	51.43% 56.84%
60%	2		2	73.33%
80%	0		1	
100%	1		2	
Total	6		6	

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**b) - In what percentage of cases did you before the Rule 26(f) conference deliver informally Rule 34 document production or other discovery requests?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	20% 7.14%	2	33.33% 25.71%
20%	1	14.74%	1	26.32%
40%	1		1	
60%	1		1	
80%	0		1	
100%	0		0	
Total	6		6	

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**c) - In what percentage of cases did one of the parties before the Rule 26(f) conference request a preservation order from the court?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	2	24%	1	32%
20%	2	17.14% 25.56%	3	27.14% 25.52%
40%	0		0	
60%	0		0	
80%	1		0	
100%	0		1	
Total	5		5	

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**d) - In what percentage of cases did you after the amendments deliver a Rule 34 document production request before the Rule 26(f) conference?**

Answer	Count
0%	1 5 9
20%	2 5 4
40%	1 2 2
60%	0 0 1
80%	1 1 0
100%	0 1 3
Total	5 14 19

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**e) - In what percentage of cases did you after the 2015 amendments receive a Rule 34 document production or other discovery request before the Rule 26(f) conference?**

Answer	Count
0%	2 11 9
20%	2 1 4
40%	1 2 2
60%	0 0 1
80%	0 0 0
100%	0 0 3
Total	5 14 19

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**f) - In what percentage of cases did you start discovery by seeking focused, targeted discovery, or sequenced discovery as opposed to seeking broad discovery permitted under the rules?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	2	36.67%	2	40%
20%	2	44.29% 35.79%	1	57.14% 37.89%
40%	0		1	
60%	0		0	
80%	1		1	
100%	1		1	
Total	6		6	

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**g) - In what percentage of cases did you talk about the possibility of sharing some discovery costs at the Rule 26(f) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	4	6.67% 7.14%	2	13.33% 10%
20%	2	11.58%	4	15.79%
40%	0		0	
60%	0		0	
80%	0		0	
100%	0		0	
Total	6		6	

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**h) - In what percentage of cases did you talk about an Evidence Rule 502(d) order protecting against privilege waiver at the Rule 26(f) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	2	23%	1	56.67%
20%	3	37.5% 20%	1	62.50% 28.42%
40%	0		1	
60%	0		0	
80%	1		1	
100%	0		2	
Total	6		6	

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**i) - In what percentage of cases did local rules, standing orders, or individual judge rules provide for discovery protocols, e.g., in employment discrimination actions?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	16% 18.46%	1	36% 23.08%
20%	0	25.56%	2	32.22%
40%	2		0	
60%	0		1	
80%	0		1	
100%	0		0	
Total	5		5	

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**PRE-TRIAL MOTIONS**

**10 - In what percentage of cases the court's local rules, standing orders, or individual judge rules require parties with a discovery dispute to seek a conference with the court after conferring with opposing parties and before filing a motion to compel or to protect or quash discovery?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	40%	1	50%
20%	2	30% 45.26%	1	37.33% 50.53%
40%	1		2	
60%	0		0	
80%	1		0	
100%	1		2	
Total	6		6	

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**a) - In what percentage of cases did you request an in-person or telephone conference with the court after conferring with opposing parties and before filing a motion seeking to compel or to protect or quash discovery?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	26.66%	1	23.33%
20%	3	24.29% 27.37%	2	31.43% 29.47%
40%	1		2	
60%	1		1	
80%	0		0	
100%	0		0	
Total	6		6	

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**b) - In what percentage of cases did the court hold an in-person or telephone conference after the parties conferred and before filing a motion seeking to compel or to protect against discovery?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	30%	1	23.33%
20%	3	21.43% 26.32%	2	31.4% 25.26%
40%	1		2	
60%	0		1	
80%	1		0	
100%	0		0	
Total	6		6	

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**11 - In what percentage of cases did you file a motion to compel discovery?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	53.33%	1	53.33%
20%	1	56.92% 56.84%	1	44.29% 52.63%
40%	1		1	
60%	0		0	
80%	2		2	
100%	1		1	
Total	6		6	

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a) - If the court denied your motion to compel in whole or in part, in what percentage of cases did you voluntarily dismiss the case, a defense in the case, or a claim in the case because of the ruling?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	5	0% 0% 0%	5	0% 0% 0%
20%	0		0	
40%	0		0	
60%	0		0	
80%	0		0	
100%	0		0	
Total	5		5	

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12 - In what percentage of cases did you file a motion to protect or quash discovery to limit dissemination or use of information produced in discovery solely because the request was not proportional to the needs of the case, as opposed to being privileged or protected?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	10% 7.14%	2	16.67% 11.43%
20%	3	10%	3	6.67%
40%	0		1	
60%	0		0	
80%	0		0	
100%	0		0	
Total	6		6	

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a) - If the court denied your motion for a protective discovery order in whole or in part, in what percentage of cases did the ruling cause you to incur substantial expense to produce the information?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	23.33%	3	26.67%
20%	1	20% 20%	0	21.67% 18.75%
40%	1		2	
60%	0		0	
80%	1		1	
100%	0		0	
Total	6		6	

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**b) - If the court denied your motion for a protective discovery order in whole or in part, in what percentage of cases did you produce information on the merits that was harmful to your position?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	26.67% 18%	3	26.67% 6%
20%	1	17.5%	1	16.25%
40%	1		1	
60%	0		0	
80%	0		0	
100%	1		1	
Total	6		6	

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**RULE 16(b) CONFERENCE**

**13 - In what percentage of cases did the court hold a “live” Rule 16(b) conference either in-person or by conference call, videoconference, or other means of having a real-time conversation?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	48%	1	60%
20%	1	70.67% 52.22%	1	74.67% 47.78%
40%	0		0	
60%	1		0	
80%	2		1	
100%	0		2	
Total	5		5	

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**14 - In what percentage of cases did the court or either party raise for discussion the process for identifying ESI for production (for example Boolean searches, cluster searches, predictive coding) at the Rule 16(b) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	36%	1	64%
20%	2	38.57% 35.79%	0	41.43% 40%
40%	0		1	
60%	1		0	
80%	1		1	
100%	0		2	
Total	5		5	

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**a) - In what percentage of cases did the court or the parties discuss shifting some discovery costs to the requesting party at the Rule 16(b) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	4	8% 6.67%	3	12% 8%
20%	0	11.58%	1	17.89%
40%	1		1	
60%	0		0	
80%	0		0	
100%	0		0	
Total	5		5	

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**b) - In what percentage of cases did the court or the parties discuss preservation during the Rule 16(b) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	0	48%	0	64%
20%	3	42.86% 48.42%	1	52.86% 50.53%
40%	0		1	
60%	0		1	
80%	1		0	
100%	1		2	
Total	5		5	

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**c) - In what percentage of cases did the court or the parties discuss an Evidence Rule 502(d) order during the Rule 16(b) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	8%	2	32%
20%	2	32.86% 24.21%	1	38.57% 27.37%
40%	0		1	
60%	0		0	
80%	0		0	
100%	0		1	
Total	5		5	

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**d) - In what percentage of cases did either party raise a discovery issue identified in the Rule 26(f) discovery plan during the Rule 16(b) conference?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	50%	1	60%
20%	1	57.14% 48.89%	0	55.71% 52.22%
40%	1		2	
60%	1		0	
80%	1		1	
100%	1		2	
Total	6		6	

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**e) - In what percentage of cases did the parties and court at the Rule 16(b) conference talk about starting discovery with information most likely to be important to resolving central issues as opposed to broad discovery permitted under the rules?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	0	36.67%	0	43.33%
20%	3	38.57% 24.44%	2	38.57% 31.11%
40%	1		2	
60%	2		1	
80%	0		1	
100%	0		0	
Total	6		6	

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**f) - In what percentage of cases did either party agree at the Rule 16(b) conference to voluntarily narrow a discovery request?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	16.67%	3	10%
20%	2	12.31% 16.67%	3	17.14% 17.78%
40%	0		0	
60%	1		0	
80%	0		0	
100%	0		0	
Total	6		6	

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**g) - In what percentage of cases did a court issue order(s) at the Rule 16(b) conference narrowing discovery on the ground that the information sought was not proportional to the needs of the case?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	5	3.33%	3	10%
20%	1	4.62% 4.44%	3	15.38% 10%
40%	0		0	
60%	0		0	
80%	0		0	
100%	0		0	
Total	6		6	

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**h) - In what percentage of cases did the court expressly convey in its Rule 16(b) case-management order its willingness to consider additional discovery after the parties got and reviewed the initial discovery production?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	23.33%	1	30%
20%	2	12.86% 15.56%	4	18.57% 21.11%
40%	0		0	
60%	0		0	
80%	0		0	
100%	1		1	
Total	6		6	

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**i) - In what percentage of cases did either party at any time during the litigation stipulate to facts that could be removed from discovery?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	23.33%	0	20%
20%	4	12.86% 17.78%	4	14.29% 20%
40%	0		2	
60%	1		0	
80%	0		0	
100%	0		0	
Total	6		6	

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**j) - In what percentage of cases did the court expressly indicate early in the case the judge's availability to work with the parties in timely resolving discovery disputes?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	0	53.33%	0	66.67%
20%	2	41.33% 42.35%	1	48.75% 45.56%
40%	1		1	
60%	1		1	
80%	1		1	
100%	1		2	
Total	6		6	

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**k) - Please indicate the e-discovery topics typically discussed with opposing counsel at or before the Rule 26(f) conference or the Rule 16(b) court conference. (Check all that apply)**

Answer	Count
Scope of ESI to be preserved	5 11 16
Procedure for preservation of ESI	4 7 9
Scope of relevant and discoverable ESI	5 11 15
Necessity for protective order	6 12 17
Search methodologies to identify ESI for production, including predictive coding/machine learning technologies (TAR) to identify ESI for production	4 8 12
Format of ESI to be produced	5 12 17
Data requiring significant work or expense to collect (such as: hard drive data that is "deleted", "slack", "fragmented", or "unallocated"; online access data; frequently and automatically updated metadata, backup tapes, etc.)	3 3 9
Procedures for handling of privileged or work-product information in electronic form	2 8 9
Timeframe for completing e-discovery	4 8 15
Any need for special procedures to manage ESI	1 5 4
Other: Database and need for meaningful initial disclosures; The manner of production of ESI to the parties, and the form of the ESI produced; litigation hold and specifics re how and what needs to be preserved; identification of party and third-party custodians; appointing "liaisons" for each side to be responsible for the discussing and making recommendations re e-discovery problems and explaining to judge/arbitrator the specifics of the dispute; Nature and identification of electronic repositories where relevant data is stored.	
ESI Discovery Platform	
whether parties will agree on search terms, or provide feedback but producing party decides what to run and requesting party "checks" production against RFPs.	

Need for defense counsel to avoid ESI production delay strategies which compound the costs of litigation and stress the discovery process, all of which results in resettings of trial dates. The defense production squeeze delays are deadly to the fairness in the pretrial timeline.

**RULE 26(b)(1) & (2)**

The proportionality factors were in Rule 26 before the 2015 amendments. The 2015 amended text of FRCP 26(b)(1) explicitly incorporated “proportionality” into scope. The following questions relate to the impact of this amendment.

**15 - In what percentage of cases as part of your initial discovery request did you intend to seek all relevant discovery permitted under the rules?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	2	53.33%	2	53.33%
20%	0	58.46% 71.58%	0	47.69% 61.05%
40%	1		1	
60%	0		0	
80%	1		1	
100%	2		2	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**a) - In what percentage of cases did you narrow your initial discovery request to targeted individuals or subject matter most likely to possess relevant information?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	2	53.33%	0	60%
20%	0	43.08% 48.42%	2	46.15% 52.63%
40%	1		0	
60%	0		1	
80%	1		2	
100%	2		1	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**b) - In what percentage of cases did you respond to requests to produce the maximum amount of relevant discovery permitted under the rules by producing the discovery?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	63.33%	1	60%
20%	0	66.15% 63.16%	0	56.92% 60%
40%	1		1	
60%	1		1	
80%	1		2	
100%	2		1	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**c) - In what percentage of cases did you as part of your initial production produce discovery narrowed to targeted individuals and subject matter most likely to contain relevant information?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	56%	0	60%
20%	0	33.85% 62.11%	1	36.92% 61.05%
40%	1		1	
60%	1		1	
80%	1		1	
100%	1		1	
Total	5		5	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**d) - Costs your client incurred in requesting discovery and responding to discovery requests represented what percentage of total litigation costs (i.e., pleading, discovery, motions, trial expenses)?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	1	20%	1	24%
20%	3	30% 34.44%	2	32.31% 30%
40%	1		2	
60%	0		0	
80%	0		0	
100%	0		0	
Total	5		5	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**e) - In what percentage of cases did either party suggest using technology to reduce discovery burdens or costs?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	2	40%	1	53.33%
20%	0	47.69% 34.74%	1	61.54% 42.11%
40%	2		0	
60%	1		2	
80%	0		1	
100%	1		1	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**RULE 34**

The amendments to Rule 34 permit parties to send a request for production before the Rule 26(f) conference. They also require producing parties to "state with specificity the grounds for objecting" to a request and "whether any responsive materials are being withheld." The Committee notes explain: "An objection may state that a request is overbroad, but . . . should state the scope that is not overbroad." An objection that "states the limits that have controlled the search for responsive and relevant materials"—which might include the date range or the scope of sources or search terms used—"qualifies as a statement that the materials have been 'withheld.'" The following questions relate to the Rule 34 amendments.

16 - In what percentage of cases in which you objected to a Rule 34 request as overly broad, unduly burdensome, or not likely to lead to the discovery of admissible evidence, did you identify the specific grounds for the objection?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	2	46.67%	0	76.67%
20%	0	35.38% 63.16%	0	75% 81.05%
40%	0		2	
60%	2		0	
80%	2		1	
100%	0		3	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

a) - In what percentage of cases did a party objecting to your Rule 34 requests as overly broad, unduly burdensome, or not likely to lead to the discovery of admissible evidence, identify the specific grounds for the objection?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	13.33%	1	33.33%
20%	2	15% 29.47%	1	43.64% 33.68%
40%	1		3	
60%	0		1	
80%	0		0	
100%	0		0	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

b) - In what percentage of cases did you inform the requesting party that you were withholding responsive information because it was not proportional to the needs of the case?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	25.74%	1	44%
20%	2	6.15% 3.16%	1	31.67% 20%
40%	0		1	
60%	1		1	
80%	1		0	
100%	0		1	
Total	7		5	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

c) - In what percentage of cases did opposing parties state whether they were withholding any responsive information because it was not proportional to the needs of the case?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	5	3.33%	2	40%
20%	1	32.31% 15.79%	1	61.67% 34.74%
40%	0		0	
60%	0		2	
80%	0		0	
100%	0		1	
Total	6		6	

\*Number in blue represents San Francisco percentage

\*Number in red represents Dallas Survey percentage

#### **COST SHARING**

17. The amendment to Rule 26(c)(1)(B) allows a court to shift the cost of discovery in some circumstances.

a) - In what percentage of cases did you request that another party share all or part of the costs of discovery?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	4	6.67%	2	13.33%
20%	2	3.08% 10%	4	6.15% 8.89%
40%	0		0	
60%	0		0	
80%	0		0	
100%	0		0	
Total	6		6	

\*Number in blue represents San Francisco percentage

\*Number in red represents Dallas Survey percentage

b) - In what percentage of cases did the opposing party request that your client share the cost of discovery?

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	4	3.33%	3	10%
20%	2	15.38% 13.68%	3	15.38% 18.95%
40%	0		0	
60%	0		0	
80%	0		0	
100%	0		0	
Total	6		6	

\*Number in blue represents San Francisco percentage

\*Number in red represents Dallas Survey percentage

**c) - In what percentage of cases did you agree to share all or part of the costs of discovery without the need for a court order?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	5	3.33%	6	0%
20%	1	1.54% 4.21%	0	1.54% 3.16%
40%	0		0	
60%	0		0	
80%	0		0	
100%	0		0	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**d) - In what percentage of cases did a court order cost-sharing?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	5	3.33%	3	10%
20%	1	1.54% 2.11%	3	1.54% 3.16%
40%	0		0	
60%	0		0	
80%	0		0	
100%	0		0	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**RULE 37**

**18. The amendment to Rule 37(e) changed the standard for sanctioning the failure to preserve ESI that should have been preserved in anticipation or conduct of litigation.**

**a) - In what percentage of cases did you seek a “remedial measure” to cure the prejudice from lost information, e.g. restoring or replacing ESI?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	10%	4	10%
20%	3	12.31% 10.53%	1	10.77% 7.37%
40%	0		1	
60%	0		0	
80%	0		0	
100%	0		0	
Total	6		6	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**b) - In what percentage of cases did you seek sanctions for failure to preserve ESI on the ground that the party acted with the intent to deprive you of the information's use in the litigation?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	4	4.29%	4	11.43%
10%	3	7.69% 4.47%	1	2.31% 5.26%
20%	0		1	
30%	0		0	
40%	0		0	
More than 50%	0		1	
Total	7		7	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**c) - In what percentage of cases did an opposing party seek sanctions for failure to preserve ESI?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	3	7.14%	3	12.86%
10%	3	4.62% 1.58%	2	4.62% 2.11%
20%	1		0	
30%	0		1	
40%	0		1	
More than 50%	0		0	
Total	7		7	

*\*Number in blue represents San Francisco percentage*

*\*Number in red represents Dallas Survey percentage*

**EVALUATING LAWYER COOPERATION**

**19. Please assess the typical level of cooperation among opposing counsel in the following categories:**

**a) - Formulating a discovery plan:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	2	1.83	1	2.33
Adequate	3	1.36 2.16	2	1.86 2.5
Good	1		3	
Excellent	0		0	
Total	6		6	

\*Averages based on a scale of 1 to 4 with poor = 1; adequate = 2; good = 3; and excellent = 4

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**b) - Reasonably limiting discovery requests and responses:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	5	1.17	2	1.67
Adequate	1	1.5 1.68	4	1.64 1.83
Good	0		0	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*



**c) - Reasonably responding to discovery requests and responses:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	3	1.5	2	1.67
Adequate	3	1.36 1.68	4	1.46 1.83
Good	0		0	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**d) - Promptly resolving objections to discovery requests:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	3	1.5	1	1.83
Adequate	3	1.43 1.68	5	1.71 1.72
Good	0		0	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**EVALUATING COURT ACTIONS**

**20. Please assess the typical level of engagement by the court in the following categories:**

**a) - Formulating a discovery plan:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	3	1.83	0	2.67
Adequate	2	2 2.11	3	2.21 2.44
Good	0		2	
Excellent	1		1	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**b) - Encouraging cooperation by the parties in the discovery process:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	2	2	1	2.17
Adequate	3	2.89 2.89	4	2.5 2.89
Good	0		0	
Excellent	1		1	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**c) - Promptly resolving objections to discovery disputes:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	1	2.17	0	2.5
Adequate	4	2.43 2.5	4	2.43 2.67
Good	0		1	
Excellent	1		1	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**21. Please assess the following:**

**a) - The level of cooperation of counsel and parties:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	1	1.83	0	2.17
Adequate	5	1.79 1.89	5	1.93 2.06
Good	0		1	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**b) - Your ability effectively to represent your client:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	0	3.17	0	3
Adequate	1	3.23 3.05	2	3.23 3.11
Good	3		2	
Excellent	2		2	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**c) - The parties' ability to resolve discovery disputes without court involvement:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	2	1.67	2	1.67
Adequate	4	2.14 2.16	4	2.14 2.17
Good	0		0	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**d) - The fairness of the discovery process:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	1	2.17	1	2
Adequate	3	2.43 2.26	4	1.86 2.11
Good	2		1	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**e) - Your ability to obtain relevant and important documents:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	0	2.83	0	2.5
Adequate	1	2.43 2.37	3	2.6 2.28
Good	5		3	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**f) - Your ability to identify information important to resolve the litigation:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	0	2.67	0	2.5
Adequate	2	2.36 2.68	3	2.29 2.61
Good	4		3	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**g) - Your ability to narrow the amount of information to be produced by either party:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	2	1.67	2	1.83
Adequate	4	1.86 2.05	3	2.07 2.05
Good	0		1	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**h) - In what percentage of cases did either party allege spoliation or other sanctionable misconduct on the preservation or collection of ESI?**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
0%	2	13.33%	2	20%
20%	4	23.08% 15.79%	3	18.46% 23.33%
40%	0		0	
60%	0		1	
80%	0		0	
100%	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**i) - Your ability to obtain discovery relevant to another party's efforts to preserve or collect ESI:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	1	1.83	0	2.17
Adequate	5	2.71 1.94	5	1.86 1.83
Good	0		1	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**AMENDMENTS' IMPACT**

**22. Please assess how the 2015 amendments affected the following after the amendments' enactment:**

**a) - Discovery costs:**

Answer	Count
Substantially Increased	0 0 0
Increased	2 1 5
No effect	3 7 10
Decreased	1 5 3
Substantially Decreased	0 0 0

*\*Number in blue represents San Francisco survey*

*\*Number in red represents Dallas survey*

**b) - Total litigation costs:**

Answer	Count
Substantially Increased	0 1 0
Increased	2 1 5
No effect	3 7 11
Decreased	1 4 2
Substantially Decreased	0 0 0

*\*Number in blue represents San Francisco survey*

*\*Number in red represents Dallas survey*

**c) - Length of the discovery period:**

Answer	Count
Substantially Increased	0 0 0
Increased	0 2 4
No effect	4 10 12
Decreased	2 1 2
Substantially Decreased	0 0 0

*\*Number in blue represents San Francisco survey*

*\*Number in red represents Dallas survey*

**d) - Length of the litigation:**

Answer	Count
Substantially Increased	0 0 0
Increased	0 3 4
No effect	5 9 12
Decreased	1 1 1
Substantially Decreased	0 0 1

*\*Number in blue represents San Francisco survey*

*\*Number in red represents Dallas survey*

**e) - Settlement**

Answer	Count
Substantially facilitated settlement	0 0 0
Facilitated settlement	1 1 1
No effect	5 12 14
Hindered settlement	0 0 3
Substantially hindered	0 0 0

*\*Number in blue represents San Francisco survey*

*\*Number in red represents Dallas survey*

**f) - Number of discovery disputes:**

Answer	Count
	1
Substantially Increased	0 1
Increased	3 4 5
No effect	2 5 9
Decreased	0 4 3
Substantially Decreased	0 0 0

*\*Number in blue represents San Francisco survey*

*\*Number in red represents Dallas survey*

**23. Please assess the 2015 amendments' effect on the following for the 15-month period before and after the amendments' enactment.**

**a) - Your ability to pursue legitimate claims:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	0	2.5	0	2.5
Adequate	3	2.77 2.72	3	2.46 2.56
Good	3		3	
Excellent	0		0	
Total	6		6	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**b) - Your ability to weed out meritless claims:**

Question	Before 12/1/2015	Avg.	After 12/1/2015	Avg.
Poor	1	2.2	0	2.6
Adequate	2	2.54 2.71	2	2.46 2.59
Good	2		3	
Excellent	0		0	
Total	5		5	

*\*Number in blue represents San Francisco average*

*\*Number in red represents Dallas Survey average*

**24 - Which of the 2015 amendments are the most useful?**

The proportionality standard in Rule 26 provides useful guidance.

The amendments to Rules 16 and 26(f), have had some positive effect on accelerating the initial stages of the case and, more importantly, spurred some more judges to become actively involved in early case management.

The ability to serve early discovery

specific objections; proportionality; sanctions

Rule 34

Requirement that parties responding to discovery make specific and understandable objections to discovery requests, so that the parties and the Court can understand the real issue; and second, the requirement that parties must state whether or not that information is being withheld, which stops the pervasive practice of parties objecting with boilerplate objections, and then responding "subject to the objection."

Proportionality

Early Rule 34 document requests

Rule 26(b), which eliminated the oft-misused "reasonably calculated to lead to the discovery of admissible evidence" language, and created a focus on the already-existing but not often applied proportionality.

Rule 16 and Rule 37(e)

Requiring objections to be stated with specificity.

Filing discovery requests before the initial conference so the parties could hit the ground running and resolve some discovery disputes at the outset.

37(e), in improving uniform application of hold obligations

26(f) and setting the expectation for a conference up front to get certain things hashed out early is good.

The ability to send early discovery requests.

Rule 34: Boilerplate objections are prohibited and objections must "state with specificity the grounds for objecting" and "whether any responsive materials are being withheld."

Rule 34 early service of discovery requests, requirement of specific objections and indication of what withheld

Rule 26's express proportionality requirement.

R. 26(b)

None

n/a

Most helpful is the early Rule 34 and Rule 26(d)(2) Requests that provide the parties an earlier focus on the issues and pushes the pretrial progress at its slowest point. Rule 26(b)(1) on proportionality offers some practical guidance which seems to be many of the same metrics judges have been following for years. However, there is a risk that proportionality simply becomes a safe harbor for "uncooperative" parties and complicit counsel who think that the burden or expense of producing the CEO's inculpatory, private notes outweighs the likely benefit to the requesting party.

In order: Requiring a Rule 16 conference within 90 days; explicit permission to serve RFPs before Rule 16 conference; shortening time to serve complaint.

Identifying objections with specificity, along with stating whether documents have been withheld pursuant to an objection.

Identification of documents withheld on basis of objection

Guidance on ESI.

Amendments to Rule 34 regarding specificity of objections and requiring statement as to whether materials are being withheld and basis for same.

Adding proportionality to Rule 26(b)(1).

26(b)(1); 26(g); 26(f)(3); 34(b)(2); 37(e)

26(b)(1) - proportionality

## **25 - How might the 2015 amendments be improved?**

get rid of proportionality

The requirement to outline specifics of documents not being produced in written responses isn't workable as it requires certainty before you realistically have full and complete visibility into the documents that you are excluding in virtually any case involving large volumes of data

Greater judicial engagement in the discovery process

The amendments entirely fail to address the one sided information disparity. No court is enforcing meaningful initial disclosures, as a result Plaintiffs cannot ask targeted requests because they don't know about the system.

The "proportionality" language has led to confusion and created a weapon for the defense bar to limit the production of discoverable ESI.

Shorten time periods for service and discovery even more

To address the predicament the courts and parties have, where counsel informs the client that such clients can "negligently" fail to preserve ESI and be immune from sanctions. While this is a policy argument, as Magistrate Judge Francis points out, the institutional integrity of our civil justice system depends on parties preserving evidence. The situation we face now is that we can tell our clients that so long as the failure to preserve isn't intentional with a design to harm another party's case, there will be no severe sanction; The Rule should explicitly state what courts hold: that an objection (such as boilerplate objection) is waived and constitutes no objection at all, unless the objection deals specifically with the request, and specifically notifies the party seeking discovery (for conferral purposes) and the court (which must ultimately address the objection)

Rule 34 and Rule 45 should be amended to standardize the test for possession, custody, and control; the "legal right" test should be uniformly adopted and the "practical ability" test eliminated. Rule 37(e) should be modified to expressly eliminate reliance on inherent authority; the reference in the committee note has proved inadequate. Rule 37(e) should also be updated to apply to all forms of

evidence and not just electronically stored information. Finally, the Rule 37(e) committee note should make clear that pre-amendment case law has been abrogated and is no longer applicable.

Some method of actually limiting production of marginally relevant information would be helpful.

Make the attorneys read them.

ditch proportionality - it is too vague and open to mischief. It is too easy for a responding party to reject production of relevant material and drive up costs and delay.

They are vague and aspirational. They also tend to not address document preservation so much, which is the real expense I think as opposed to production. And I also think that plaintiffs tend to use spoliation allegations as a "gotcha". Spoliation allegations are made even though plaintiffs would never have used the information in the case and even though a defendant may have gone to extreme lengths and extreme expense to preserve evidence. This may not be anything to take care of with a rule change, but there could be something done to make it more difficult to bring these kinds of strategic challenges--there should be a strong showing of relevance and also most of the time these sort of things should not result in sanctions as long as there was some good faith effort to preserve. It is usually a huge sideshow. I also would consider some consideration to foreign production--frequently when foreign companies are involved, there are difficulties due to both the privacy laws but also the lack of familiarity of the foreign companies with US standards for preservation and discovery. There should be some recognition of the differences and maybe a more forgiving approach to materials located in foreign jurisdictions. Frequently these are the types of materials that are subject to "gotcha" sanctions motions.

More details on proportionality

remove Rule 26 proportionality requirement

NA

Do the proportionality factors of Rule 26(b)(1) provide safe harbors for less than forthright parties and their complicit counsel by condoning clever responses (to well framed requests) with, for example, millions of tangential, almost non-responsive documents that geometrically inflate the costs of litigation? Or, do the proper proportional discovery requests Require a correlative, responsive discovery production; without the superfluous production? ESI production should be produced in an organized manner which correlates to the requests or by files with an index which seldom happens in large productions. Even with advanced ESI review software, purposefully disorganized and scattered ESI undermines the very essence of discovery and pushes the costs of litigation to the stratosphere.

Education on specific objections, clarification that proportionality is not new/different and that cost-shifting not new/different

Mandate that initial scheduling orders MUST include deadlines for items identified in Rule 16(3)(B), including deadlines for all events, including a trial date.

The jury is still out. More discussion and publicity (like this symposium) will help courts and practitioners fully implement the letter and spirit of the amendments.

n/a.

Remove the proportionality language. Impose a mandatory and streamlined process for raising discovery disputes. Expand required disclosures regarding discoverable information.

More specific and clear guidance on the scope of discoverable evidence. Take out the Rule 37 language about "intent" in relation to not producing discoverable evidence. Without the evidence, no one can glean the party's intent to deprive the other side of relevant evidence.

Protocols for basic e-discovery. Also, the rules need to protect a party's work product better, not just the attorney's work product.

The only way to do it is to have a body of law develop around them. "Proportionality" is a defense now used by the defendants at every turn in discovery. They're testing various ways they may have success in limiting discovery. Until a line is drawn and a "normal practice" develops, discovery is going to take longer because it requires more court intervention. The amendments could also be improved by more direct emphasis being put on transparency and cooperation in the discovery process. Defendants are still trying to keep the curtain closed so that plaintiffs' counsel can't see what they're doing.

Continued emphasis on proportionality and training for lawyers on same.

## 26 - Has any 2015 amendment been harmful or counterproductive?

proportionality

The renewed emphasis on Rule 37(e) has perhaps caused more satellite litigation over spoliation than the law warrants.

I worry about harmful ramifications of the requirement to specifically identify the documents being excluded from intended productions, but haven't faced actual harmful ramifications from this requirement yet.

Unsubstantiated proportionality objections and baseless threats of cost shifting has been used as a sword by defense counsel nearly every case

The requirement that parties identify what documents they are not producing and identify a timeline for production is frequently impractical in cases involving massive amounts of data.



Because of one-sided information about the sources of discovery Defendants are now able to argue general requests are disproportional slowing discovery, when in fact more targeted requests could have been made had Defendants provided information about their systems. At bottom, the amendments have provided additional arguments for withholding disclosure without facilitating Plaintiffs' need to gather early information about how discovery can be targeted so it can be more streamlined and tailored.

See 25. Also 37(e) have made it easier for parties to avoid responsibility for destroying ESI because the burden of proof is nearly impossible to meet.

No

Yes, in two ways. First, there is the issue of the watering down of sanctions for negligent failure to preserve ESI, discussed above. In American law, all parties should know, in advance, their duties to preserve, and that ordinary negligence in failing to comply can result in severe sanctions. Second, we are seeing some boilerplate proportionality objections that we didn't see before. While the Amendments and the Duke Guidelines make it clear that this practice is not permitted, it is happening, forcing parties seeking discovery to spend resources to persuade the responding party to either withdraw the boilerplate proportionality objection or flesh out what the problems are.

I have not encountered a situation where the amendments have been detrimental; however, their impact has been less significant than I had hoped.

The proportionality nonsense

Helpful

Rule 26 proportionality requirement

No

Rule 37(e) has likely become a safe harbor for defalcating producing parties and their counsel. "Intent to deprive" is a bar too high for sophisticated parties and high powered counsel. Their answer is "No" and "I don't recall" to all of the pertinent questions. SMU's students at the Meadows School of the Arts might pick up some drama tips from reviewing well-rehearsed, video depositions on such topics.

Yes. Confusion re: proportionality and cost-shifting.

Unclear to me whether proportionality has helped. "Proportionality" is just a new buzzword to discuss what was always discussed: burden of searching for and producing versus requesting party's need for the information.

No.

No.

The burden in responding to discovery requests has increased because the requirement that a party explain, in detail, the objection and state whether it is withholding documents based on that objection requires collection of all documents before preparation of the response. In some very large commercial disputes, it is impossible to collect documents within 30 days.

To some extent, the production timing requirements added burden/pressure on litigants; the ESI production process (collection/processing/review/privilege analysis/production) typically takes longer than parties anticipate, can be impacted by many factors, and in most cases it will be difficult to specify in the response/objections a date by which production will be made.

Yes. It has made it more difficult to discover relevant information. Disputes regarding "proportionality" have increased and have become a tool for delay and withholding relevant information. Pre-production meet and confers have become a process of "death by 1,000 cuts."

We are seeing more boilerplate objections to "what is discoverable" because of the re-interpretation about what is "reasonably calculated to lead to admissible evidence." That language is superfluous but being used as license to mount boilerplate objections, requiring "discovery on discovery."

Proportionality is unnecessarily highlighted as another issue.

Counterproductive. They're supposed to relieve a burden on defendants, and they're only dragging out cases.

no

## 27 - Is there any question that should have, but was not, asked in this survey?

To me, the key to efficient discovery lies not in the rules but in the judges' ability to be available and engage in case management. More questions about how judges can be more effectively encouraged and trained to engage could be helpful

What kind of disclosures are made about databases, reports and system and when and how are courts forcing that information to come out (if at all).

percentage choice should include 10%, e.g., for sanctions, as 0 too low, 20% too high

No

Perhaps surveying the rough percentages the participants, of their plaintiffs' and defense practice. As it exists, the survey only seeks to know the majority of the participants' clients, so it might be useful to know how many actually have vigorous practices that involve both plaintiffs and defendants.

Yes: size/ type of my cases. The fact that I handle MDLs makes my experiences (before and after amendments) not comparable to single-party cases.

No.

In all seriousness, I'd ask counsel and courts, for that matter, whether they understood that the definition/scope of what is relevant has changed.

Ask how the lawyers have argued what is "proportional" discovery: do they rely on an individual claim in a purported class case? do they provide declarations about what an ESI production would cost? do they rely on first negotiating a hit report to get evidence of what would be reviewed? Did they just assert it and see if the Court might agree or opponent back down to avoid a tangential fight?

No.

not that I can think of

No. My only comment is that depending upon the type of litigation (large matter such as IP infringement versus accident claims) result in two different sets of responses so the answers to questions were averaged.

Regarding Rule 34, does the responding party's promise of "rolling production" have any meaning? That usually means late production, with highly relevant production at the end of the discovery period. Further, can the responding party's proclaimed ignorance of the meaning of words defined in any generally used dictionary continue to be the weapon of choice for delayed non-production--the meaning of, for example, for such strange words as "agent, manager, violation, customer file, customer complaint, capitalized charges on debt, notice, complaint, etc." The producing party's purposeful, dilatory discovery strategy strangles justice, trips up pretrial preparation, delays meaningful depositions, unfairly constricts the discovery period for the claimant, causes the need for trial re-settings which frustrates and interferes with the Court's orderly management of its docket and the requesting party's right to have a fair day in Court. This is a nationally systemic problem. Suggestion. Court's need to proactively admonish the parties not to engage in such conduct. Arrange for counsel in, at least, a telephonic communication to affirm that they and their staff will not engage in such conduct. See *Heller v. City of Dallas*, 303 F.R.D. 466 (N.D. Tex. 2014); <http://www.ndtexasblog.com/?p=3581>; see Rule 34(b)(4)(2)(B). While the litigant's standards for discovery responses in the federal courts are in writing, much like the Court's Charge, there is something special about a "direct stare" from the District Judge admonishing counsel to be obedient to specific rules and not to bother the court with litigation refuse.

How much time is spent negotiating ESI protocols and/or specific search terms and custodians? And are judges actually resolving disputes about these topics? I have one case where the parties spent 8 months doing so, still had disputes, moved to resolve it, and got an order requiring further meet and confers.

Not sure that this should have asked, but I am curious whether lawyers and judges believe that the amendments have yet taken hold. Changes in practice often lag far behind changes in rules.

I haven't had a federal case since the amendments, just state court cases involving e-discovery, so I wasn't able to answer many of the post-Dec 2015 questions. However, I wrote the chapter on preservation and proportionality and the relevant amendments for the State Bar E-Discovery book. No more questions at this time.

n/a

How are judges interpreting and applying the rule amendments in their cases?

Can't think of any.

How is proportionality being used? In almost all of my cases, it's being used as a delay tactic/shield to providing information. The idea behind proportionality is that there's supposed to be more transparency because only one party has information relative to proportionality. Instead, the defendants are using it routinely as a shield without providing any underlying information. There is no cooperation.

no