The Sedona Conference Journal

Volume 19 | Number 1 2018

Deconstructing "Discovery About Discovery"

Hon. Craig B. Shaffer

Recommended Citation:

Hon. Craig B. Shaffer, Deconstructing "Discovery About Discovery," 19 Sedona Conf. J. 215 (2018).

For this and additional publications see: https://thesedonaconference.org/publications

The Sedona Conference Journal® (ISSN 1530-4981) is published on an annual or semi-annual basis, containing selections from the preceding year's conferences and Working Group efforts. The Journal is available on a complimentary basis to courthouses and public law libraries and by annual subscription to others ($95; $45 for conference participants and Working Group members). Send us an email (info@sedonaconference.org) or call (1-602-258-4910) to order or for further information. Check our website for further information about our conferences, Working Groups, and publications: www.thesedonaconference.org.

Comments (strongly encouraged) and requests to reproduce all or portions of this issue should be directed to:
The Sedona Conference,
301 East Bethany Home Road, Suite C-297, Phoenix, AZ 85012 or
info@sedonaconference.org or call 1-602-258-4910.

The Sedona Conference Journal® designed by MargoBDesignLLC at www.margobdesign.com or mbraman@sedona.net.

Cite items in this volume to "19 Sedona Conf. J. _____ (2018)."

DECONSTRUCTING "DISCOVERY ABOUT DISCOVERY"

*Hon. Craig B. Shaffer**
United States Magistrate Judge for the District of Colorado
Denver, CO

As cases involving expansive volumes of electronically stored information (ESI) become more common and the challenges of e-discovery become more complex, there has been increased focus on whether and to what extent parties may obtain discovery about an opponent's e-discovery processes and the manner in which a party preserves, identifies, collects, searches, and produces ESI. Some take the view that "discovery about discovery" is inappropriate in most instances and, more often than not, results in unnecessary expense.[1] Proponents of this position contend that the only valid measure of an effective e-discovery

* Honorable Craig B. Shaffer is a United States Magistrate Judge for the District of Colorado and a Member of the Advisory Committee on Civil Rules. The opinions expressed by the author do not necessarily reflect the views of the Advisory Committee, the United States District Court for the District of Colorado, or any other judicial officer. Magistrate Judge Shaffer would like to acknowledge the invaluable assistance with editing and finalizing this article provided by his former extern, Jacob Scarr, a second-year student at the University of Colorado School of Law.

1. *See, e.g.*, Progressive Cas. Ins. Co. v. Delaney, No. 2:11-cv-00678-LRH-PAL, 2014 WL 3563467, at *10 (D. Nev. July 18, 2014) (noting that "litigators are loathe to reveal their methodological decisions for various reasons including assertions that: methodological decisions reveal work product; discovery about discovery exceeds the scope of Rule 26 of the Federal Rules of Civil Procedure; revealing documents non-responsive to discovery requests exposes the producing party to unnecessary litigation risks; and the Federal Rules of Civil Procedure only require parties to conduct a reasonable search for responsive documents").

process is the final product of that process; "how" a party chooses to comply with its discovery obligations is immaterial. Requesting parties argue, to the contrary, that an inability to obtain process-directed information makes it difficult, if not impossible, to evaluate the reasonableness and thoroughness of a party's efforts to search for and produce relevant ESI.[2] While these countervailing views may be driven by anecdotal experience or the "worst-case" fears of litigants and their counsel, the development and implementation of an effective e-discovery process does not proceed in a vacuum and may, in some instances, be a relevant topic of discovery. But "discovery about discovery" threatens to become a catchphrase in lieu of a reasonable discussion between requesting and producing parties.

There is no denying that e-discovery has, and will continue to be, a matter of concern for both requesting and responding parties. It is also true that in the absence of controlling precedent, parties (as well as judges) can find case law to support both sides of the discovery about discovery debate. The burdens and associated costs of preserving, collecting, searching, reviewing, and producing ESI should not be discounted, particularly in asymmetrical litigation. However, those concerns are not effectively framed by sweeping generalizations or a deceptively simple phrase that has the potential to oversimplify issues that are often nuanced and interrelated.

---

2. *See, e.g.*, Cannata v. Wyndham Worldwide Corp., No. 2:10-cv-00068-PMP-VCF, 2011 WL 5598306, at *1–2 (D. Nev. Nov. 17, 2011) (The plaintiffs proposed to take a Rule 30(b)(6) deposition that would encompass information regarding the defendant's computer systems, the retention or destruction of ESI, and "enterprise wide systems designated to identify, collect, search, review, export and process ESI in support of a 'litigation hold.'" The court directed the defendant to provide certain categories of ESI-related information to the plaintiffs as a way to "streamline ESI discovery in this action and to get the parties to focus on the proper purpose of discovery . . . .").

In short, the phrase "discovery about discovery" should be abandoned by parties and courts in favor of informed and reasonable case management. That analysis should distinguish between "'merits-directed discovery" and "process-directed discovery." Discovery directed to the merits of the litigation, as a threshold matter, should be framed by the specific elements underlying the claims and defenses advanced by the parties, and focus on issues germane to settlement, dispositive motions, or trial. "Process-directed discovery," on the other hand, is directed to the manner and efficacy of the production process itself, as measured by Rules 1, 26(b)(1), 26(b)(2)(B), 26(b)(2)(C), and 26(g). Discovery directed toward ESI and the information gathering and production process should be addressed within the context of the Federal Rules of Civil Procedure, with due consideration for evolving case law and the litigants' strategic interests.

"Discovery about discovery" captures the procedural, practical, and strategic challenges of ESI and e-discovery. Principle 6 of *The Sedona Principles* has long-recognized that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."[3] Several

3. The Sedona Conference, *The Sedona Principles (Second Edition): Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, ii (2007), https://thesedonaconference.org./publication/The%Sedona%20Principles. "The Sedona Conference . . . a nonprofit legal policy research and education organization, has a working group comprised of judges, attorneys, and electronic discovery experts dedicated to resolving electronic document production issues." Romero v. Allstate Ins. Co., 271 F.R.D. 96, 106 n.6 (E.D. Pa. 2010) (quoting Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec., 255 F.R.D. 350, 355–56 (S.D.N.Y. 2008), and recognizing that "the Sedona Principles and Sedona

judges, including this author, have cited Principle 6 with favor in addressing e-discovery disputes.[4] Although the Federal Rules charge a producing party with the duty to undertake reasonable efforts to preserve and produce relevant information, Principle 6 correctly acknowledges there are "many ways in which a party may comply with those obligations,"[5] and cautions that "[d]iscovery should not be permitted to continue indefinitely merely because a requesting party can point to undiscovered documents and electronically stored information when there is no indication that the documents or information are relevant to the case, or further discovery is disproportionate to the needs of the case."[6]

The most recent edition (Third) of *The Sedona Principles* retains the existing version of Principle 6.[7] Comment 6.a. acknowledges that a "responding party must make a myriad of determinations necessary to identify, preserve, collect, process, analyze,

---

Commentaries . . . are 'the leading authorities on electronic document retrieval and production'").

4. *See* Cache La Poudre Feeds, LLC. v. Land O'Lakes, Inc., 244 F.R.D. 614, 628 (D. Colo. 2007) (acknowledging that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents"); *cf*. Hyles v. New York City, No. 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016); Lightsquared Inc. v. Deere & Co., No. 13 Civ. 8157 (RMB)(JCF), 2015 WL 8675377, at *8 (S.D.N.Y. Dec. 10, 2015); Kleen Products LLC. v. Packaging Corp. of America, No. 10 C 5711, 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012).

5. The Sedona Conference, *supra* note 3, at 38.

6. *Id*.

7. The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018).

review, and produce relevant and discoverable ESI," and therefore is "tasked with making those determinations and generally in a better position to make those decisions." Comment 6.a. concludes that "a responding party, not the court or requesting party, is generally best situated to determine and implement appropriate procedures, methodologies, and technologies."[8]

But building on the foregoing observations, Comment 6.b. to Principle 6 of *The Sedona Principles, Third Edition*, broadly asserts that "[r]esponding parties should be permitted to fulfill their preservation and discovery obligations without preemptive restraint" from either the court or requesting parties.[9]

> [A]s a general matter, neither a requesting party nor the court should prescribe or detail the steps that a responding party must take to meet its discovery obligations, and there should be *no discovery on discovery*, absent an agreement between the parties, or specific, tangible, evidence-based indicia (versus general allegations of deficiencies or mere "speculation") of a material failure by the responding party to meet its obligations. A requesting party has the burden of proving a specific discovery deficiency in the responding party's production.[10]

The foregoing passage, on its face, conveys an orientation toward the discovery process that favors the producing party. Although Comment 6.b. is presented as a "general matter," the supporting footnote does not cite any particular rule of civil procedure, relying instead on nine reported decisions. That same

8. *Id*. at 119–20.

9. *Id.* at 123.

10. *Id*. (emphasis added).

footnote does not reference or even concede the existence of countervailing case law. Comment 6.b. argues that "discovery about discovery" should be allowed only if the requesting party can come forward with specific, tangible evidence of a material discovery failure. A careful review of the case law, however, does not support that rather draconian standard. Federal courts that have expressed a reluctance to allow process-directed discovery have nevertheless recognized that additional inquiries may be appropriate where there is an "adequate factual basis," "some showing" that a production has been incomplete, a "colorable showing," or a "reasonable deduction." Finally, Comment 6.b. does not provide any level of certainty or even predictability. The party accused of a tangible discovery failure will almost certainly argue that the failure is inconsequential given that discovery is governed by a standard of reasonableness, not perfection.

Moreover, the proposed limitation on judicial case management (e.g., the presumptive prohibition on "preemptive restraint") does not acknowledge the countless cases endorsing the trial court's broad discretionary authority over the pretrial process.[11] It is difficult to understand how a "general matter" that circumscribes the court's authority over the discovery pro-

11. *See, e.g.*, Rivera v. Rendell, No. 3:CV-10-0505, 2017 WL 2985400, at *1 (M.D. Pa. July 13, 2017) ("The scope and conduct of discovery are within the sound discretion of the trial court."); W.S. v. Daniels, No. 8:16-01032-MGL, 2017 WL 2954624, at *2 (D.S.C. July 11, 2017) ("Courts are given broad discretion to manage discovery and make discovery rulings."); Goree v. United Parcel Serv., Inc., No. 14-cv-2505-SHL-dkv, 2015 WL 11120572, at *4 (W.D. Tenn. Oct. 30, 2015) (While declining to engage in micromanagement of e-discovery, "[a]s to questions of discoverability, the Court is in the best position to determine the limit and scope of *what* is discoverable and must be produced.").

cess can be reconciled with the renewed emphasis on active judicial case management.[12] A judge should not be required or expected to sit passively while a flawed discovery process continues unabated or unresolved; indeed, that would violate the very premise underlying Rule 1.[13] The court's role is to define and then ensure the appropriate scope of discovery based upon a case-specific inquiry. The "general matter" advanced in Comment 6.b. seems to conflict with a court's more nuanced role.

Certainly, there is a growing view that discovery should be conducted with greater cooperation and transparency.[14]

---

12. *See, e.g.*, Sanchez v. Hartley, No. 13-cv-01945-WJM-CBS, 2016 WL 7176718, at *5 n.7 (D. Colo. Apr. 26, 2016) (citing Chief Justice John Robert's 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, which acknowledged that active judicial case management is critical in providing the parties with "efficient access to what is needed to prove a claim or defense" while also eliminating "unnecessary or wasteful discovery"); *cf.* JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES AND THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION, 10 (2010), http://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf (noting "[p]leas for universalized and invigorated case management achieved strong consensus at the [Duke] Conference," together with a shared belief that "judicial case-management must be ongoing").

13. FED. R. CIV. P. 1.

14. One judge has recognized that "[i]deally, there should not be any formal discovery about discovery." However, "[t]oday, if you have to take a deposition of the IT person or you have to ask interrogatories or requests for admission to find out where the information is, you may have to do that if the other side is stonewalling."

> But just think about the costs. The best way to do it is that cooperation and transparency mantra, or the informal "let me talk to your IT person for two hours on the record or off the record" . . . . If it is a discussion with knowledgeable people, you can cut through the nonsense and it is not going to affect the merits of either side's position. So it is a question

> While the preservation, review, and production of ESI often involves procedures and techniques which do not have direct parallels to discovery involving paper documents, the underlying principles governing discovery do not change just because ESI is involved. Counsel still have a duty (perhaps even a heightened duty) to cooperate in the discovery process; to be transparent about what information exists, how it is maintained, and whether and how it can be retrieved; and, above all, to exercise sufficient diligence (even when venturing into unfamiliar territory like ESI) to ensure that all representations made to opposing parties and to the Court are truthful and are based upon a reasonable investigation into the facts.[15]

---

of getting the information cheaply and not having formal discovery about discovery.

Hon. Andrew J. Peck et al., *E-Discovery: Where We've Been, Where We Are, Where We're Going*, 12 AVE MARIA L. REV. 1, 24–25 (2014); *cf*. Moore v. Publicis Grp., 287 F.R.D. 182, 192 (S.D.N.Y. 2012) ("[T]he best solution in the entire area of electronic discovery is cooperation among counsel. . . . An important aspect of cooperation is transparency in the discovery process."). Magistrate Judge Peck further noted in *Moore*, that "[a]nother way to phrase cooperation is 'strategic proactive disclosure of information.'" *Id*. at 193.

15. Brown v. Tellermate Holdings, Ltd., No. 2:11-cv-1122, 2014 WL 2987051, at *2 (S.D. Ohio July 1, 2014). *Cf*. Ely v. Cabot Oil & Gas Corp., No. 3:09-CV-2284, 2016 WL 4169197, at *2 (M.D. Pa. Feb. 17, 2016) ("[T]he hallmarks of discovery in federal court are, and should be, openness, transparency, and candor. Gamesmanship, ambush, surprise, and concealment have no place in federal practice.") (quoting Styler v. Frito-Lay, Inc., No. 1:13-CV-833, 2015 WL 11243423, at *5 (M.D. Pa. Mar. 18, 2015)); ACI Worldwide Corp. v. Mastercard Techs., LLC, No.8:14CV31, 2015 WL 4249760, at *2 (D. Neb. July 13, 2015) ("[C]ooperation between counsel regarding the production of electronically stored information allows the parties to save money, maintain

The 2008 *Sedona Conference Cooperation Proclamation* (*Proclamation*) echoes the importance of a cooperative approach to discovery.[16] The *Proclamation* acknowledges that a lawyer's obligation to serve as a zealous advocate for their client must be balanced with a "professional obligation to conduct discovery in a diligent and candid manner" as an officer of the court. To advance these "combined duties," the *Proclamation* suggests that counsel can promote "open and forthright information" sharing by disclosing relevant data sources and collaborating on the use of search and retrieval methodologies.[17] The value of a collaborative approach to e-discovery is also acknowledged in The Sedona Conference *Commentary on Achieving Quality in the E-Discovery Process*, which states that "cooperation and greater transparency among parties throughout the discovery process can significantly contribute to ensuring quality, maintaining best practices, and reducing claims of spoliation in complex e-discovery."[18] This Commentary further suggests that the "meet-and-confer" process should

---

greater control over the dispersal of information, maintain goodwill with courts, and generally get to the litigation's merits at the earliest practicable time.") (quoting Saliga v. Chemtura Corp., NO. 3:12CV832, 2013 WL 6182227, at *1 (D. Conn. Nov. 25, 2013)).

16. The Sedona Conference, *The Case for Cooperation,* 10 SEDONA CONF. J. 339 (2009).

17. But cooperation and transparency do not obviate the need for balance and proportionality. While parties may be "better served by informally exchanging information regarding custodians, databases and other sources of information . . . transparency should not be morphed into an opportunity for unending questions and fishing expeditions[.]" Hon. Elizabeth D. Laporte & Jonathon M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 64 (2015).

18. The Sedona Conference, *Commentary on Achieving Quality in the E-Discovery Process*, 15 SEDONA CONF. J. 265, 271 (2014).

> start as early as practicable and should extend through the entire lifecycle—identification, preservation, collection, processing, search, review, and production—including discussions, where appropriate, on which search and review processes or technologies will be used and what quality steps will be taken to ensure that these tools have adequately captured responsive documents.[19]

The Sedona Conference *Cooperation Guidance for Litigators & In-House Counsel* notes that a contentious, non-cooperative approach to discovery is "much more likely to engender reciprocal intransigence, increased costs and increased risks to the litigants and their counsel."[20]

The Federal Rules require the parties to "meet and confer" through the pretrial process. Just as importantly, federal judges cannot discount their ability to address and potentially resolve discovery disputes by facilitating interaction between counsel and clients. However, that judicial role must be exercised with

---

19. *Id*. at 270–71. These same sentiments are incorporated in the 2017 Third Edition of Principle 6, which recognizes that both requesting and responding parties may achieve significant monetary savings and non-monetary efficiencies if they "voluntarily elect to cooperatively evaluate and agree upon the appropriate procedures, methodologies, and technologies to be employed" in preserving and producing ESI. Such a cooperative approach to preservation and production may "achieve significant monetary savings and non-monetary efficiencies," while also "greatly reduc[ing] or even eliminat[ing] the risk of satellite motion practice or sanctions." *See* The Sedona Conference, *supra* note 7, at 124–126.

20. The Sedona Conference, *Cooperation Guidance For Litigators & In-House Counsel*, THE SEDONA CONFERENCE, 2 (2011), https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Cooperation%20Guidance%20for%20Litigators%20%2526%20In-House%20Counsel.

caution. A judge must guard against unilaterally usurping the discovery process or delving into technical areas beyond their control or expertise. But a court would be equally remiss in summarily rejecting a pretrial dispute as nothing more than an immaterial discussion about "discovery about discovery."

A. The Federal Rules of Civil Procedure

Although Rule 26(b)(1) defines the "scope of discovery," consideration of the discovery process should begin with Rule 1.[21] With the 2015 amendments, Rule 1 requires the court *and the parties* to construe, administer, and employ the discovery process "to secure the 'just, speedy, and inexpensive determination of every action' by narrowing and defining the issues to be litigated and providing adequate information to prosecute or defend."[22] The goals of Rule 1 are to be pursued in tandem, and should not be viewed as divergent or countervailing objectives. The Advisory Committee Note to Rule 1 emphasizes that "[e]ffective advocacy is consistent with—and indeed depends upon—cooperation and proportional use of procedure," and decries the "over-use, misuse, and abuse of procedural tools that increase cost and result in delay."[23] If the goal of discovery is to

21. FED. R. CIV. P. 1; *see also* Kenny Enterprises, Inc. v. Balfour Beatty de Venezuela, C.A., No. 93-1630, 1994 WL 90462, at *1 (E.D. La. Mar. 11, 1994) ("While the discovery rules are to be treated liberally to effect their purpose of adequately informing litigants, they are subject to the injunction in Rule 1 . . . .").

22. Applegate v. United States, 35 Fed. Cl. 47, 57 (Fed. Cl. 1996); *cf.* Solo v. United Parcel Serv. Co., No. 14-12719, 2017 WL 85832, at *2 (E.D. Mich. Jan. 10, 2017) (noting that the general principles expressed in Rules 1 and 26(b)(1) are "particularly important when . . . the discovery sought comprehends a broad-ranging and massive amount of data").

23. FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.

expedite the disposition of cases, with reasonable and proportional time and expense, a pragmatic approach to discovery is essential. As Chief Justice Roberts noted in his *2015 Year-End Report on the Federal Judiciary*, the 2015 amendments were intended, in part, to focus discovery on what is truly necessary to resolve the pending litigation.[24]

The particular challenges of the e-discovery process cannot be divorced from the more fundamental objectives of the discovery process itself.

> [T]he overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information, so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result.[25]

As noted previously, Rule 26(b)(1) permits a party to obtain discovery of nonprivileged matters that are relevant to the existing claims and defenses in the pending action *and* the needs of the case, as measured by the proportionality factors set forth in that rule.[26] "[T]he scope of discovery is not limited simply to

---

24. CHIEF JUSTICE JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015), https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.

25. TIC Park Ctr. 9, LLC v. Cabot, No. 16-24569-Civ-COOKE/TORRES, 2017 WL 3034547, at *2 (S.D. Fla. July 18, 2017); *cf.* Peterson v. Wright Med. Tech., Inc., No. 11-1330, 2013 WL 655527, at *6 (C.D. Ill. Feb. 21, 2013) ("The very purpose of discovery is to give the parties the opportunity to learn what their opponents know about the issues in the case.").

26. *See, e.g., In re* Bard IVC Filters Products Liab. Litig., 317 F.R.D. 562, 564 (D. Ariz. 2016) (noting that after the 2015 amendments, "[r]elevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case;" "[a] party claiming that a request is important to resolve the issues

'facts,' but may entail other 'matters' that remain relevant to a party's claims or defenses, even if not strictly fact-based."[27] As the Advisory Committee noted in addressing the 1983 amendment to Rule 26(b)(1): "The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. 'Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.'"[28] But if litigation

---

should be able to explain the ways in which the underlying information bears on the issues as that party understands them"); Cole's Wexford Hotel, Inc. v. Highmark, Inc., 209 F. Supp. 3d 810, 823 (W.D. Pa. 2016) (under the 2015 changes to Rule 26(b)(1), "the scope of discovery is limited to matter that is relevant to claims or defenses and is proportional to the needs of the case"). *But see* Coleman v. United States, No. SA-16-CA-00817-DAE, 2017 WL 1294555, at *1 (W.D. Tex. Mar. 28, 2017) ("a party cannot decide what documents he/she believes are relevant and produce only that material"); Liguira Foods, Inc. v. Griffith Labs., Inc., No. C 14-3041-MWB, 2017 WL 976626, at *7 (N.D. Iowa Mar. 13, 2017) ("Rule 26(b)(1) does not give any party 'the unilateral ability to dictate the scope of discovery based on their own view of the parties' respective theories of the case,' because '[l]itigation in general and discovery in particular . . . are not one sided.'"); Reinsdorf v. Skechers U.S.A., Inc, No. CV 10-7181 DDP (SSx), 2013 WL 12116416, at *10 (C.D. Cal. Sept. 9, 2013) (noting that blanket objections to discovery requests "improperly provide the responding party alone the right to decide whether certain information fits its undisclosed definition of relevance").

27. Samsung Electronics America, Inc. v. Yan Kun "Michael" Chung, No. 3:15-cv-4108-D, 2017 WL 2832621, at *26 (N.D. Tex. June 26, 2017).

28. FED. R. CIV. P. 26(b)1) advisory committee's note to 1983 amendment (internal citation omitted). *Cf.* Witt v. GC Servs. Ltd. P'ship, 307 F.R.D. 554, 569 (D. Colo. 2014) ("Any application of the proportionality factors must start with the actual claims and defenses in the case, and a consideration of how and to what degree the requested discovery bears on those claims and defenses."). *But see* Carter v. H2R Rest. Holdings, LLC, No. 3:16-cv-1554-N-BN, 2017 WL 2439439, at *3–4 (N.D. Tex. June 6, 2017) ("[T]he amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery;" a party objecting to discovery as disproportionate, "still bears the burden of

is brought in good faith to resolve a pending legal dispute, it should be self-evident that the parties' claims and defenses will define the outer boundary of relevance in that case.[29] The "needs of the case," for purposes of Rule 26(b)(1), must be consistent with the goals of Rule 1.[30]

The relevance standard under Rule 26(b)(1), while broader than the admissibility standard under Rule 401 of the Federal Rules of Evidence, does not permit a requesting party "to engage in a fishing expedition in the hopes that he may turn up some relevant or useful information."[31] The Federal Rules have

---

making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) by coming forward with specific information" bearing on the proportionality factors.).

29. *Cf.* Luis de Sousa v. Embassy of the Republic of Angola, No. 16-367 (BAH), 2017 WL 3207701, at *8 (D.D.C. July 27, 2017) ("The discovery process is meant to provide an opportunity for" the parties to find factual support for the claims and defenses set forth in the pleadings.); Durand v. Charles, No. 1:16cv86, 2017 WL 2838286, at *1 (M.D.N.C. June 30, 2017) (Relevancy under Rule 26(b)(1) "essentially involves a determination of how substantively the information requested bears on the issues to be tried.").

30. *Cf. In re* Northrop Grumman Corp. ERISA Litig., No. CV 06-06213-AB (JCx), 2016 WL 6826172, at *2 (C.D. Cal. June 21, 2016) (Although district courts "have broad discretion when determining relevancy for discovery purposes," that discretion "should be balanced with the obligation to interpret the Rules to secure a 'just, speedy, and inexpensive determination' of the action.").

31. King v. Biter, No. 1:15-cv-00414-LJO-SAB (PC), 2017 WL 3149592, at *6 (E.D. Cal. July 25, 2017). *Cf.* Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 125 (M.D.N.C. 1989) ("Conclusory claims of bad faith may not be the bases for conducting marginally relevant discovery which is by its nature burdensome. Such discovery requests amount to nothing more than an out of season fishing expedition.").

never held or even suggested that litigants have an unfettered right to merits or process-directed discovery.[32]

The renewed emphasis on proportionality in Rule 26(b)(1) presumes that all relevant information is not equally important, particularly given the reality that only a very small percentage of civil cases are resolved through trial. "In many instances, proportionality can best be achieved through an iterative approach as the pretrial process evolves and the parties' claims and defenses come into sharper focus."[33] That iterative approach must be shaped by the parties' evolving access to information.

> The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. . . .

32. *See, e.g.*, Hay v. Somerset Area Sch. Dist., No. 3:16-cv-229, 2017 WL 2829700, at *1 (W.D. Pa. June 29, 2017) ("While the scope of discovery under the Federal Rules is broad, 'this right is not unlimited and may be circumscribed.'"); Sapia v. Bd. of Educ. of the City of Chicago, No. 14 C 7946, 2017 WL 2060344, at *2 (N.D. Ill. May 15, 2017) ("The discovery rules are not a ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest. 'Parties are entitled to a reasonable opportunity to investigate the facts–and no more.'"); *cf.* Grynberg v. Total, S.A., No. 03-cv-01280-WYD-BNB, 2006 WL 1186836, at *6 (D. Colo. May 3, 2006) ("[W]hatever may be said for the virtues of discovery and the liberality of the federal rules, . . . there comes at some point a reasonable limit against indiscriminately hurling interrogatories at every conceivable detail and fact which may relate to a case . . . .") (quoting Hilt v. SFC, Inc., 170 F.R.D. 182, 186–87 (D. Kan. 1997)).

33. Witt v. GC Servs. Ltd. P'ship, 307 F.R.D. 554, 561 (D. Colo. 2014).

> But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. . . . The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination on the appropriate scope of discovery.[34]

In the end, the court must "tailor discovery to the circumstances of the case at hand, to adjust the timing of discovery, and apportion costs and burdens in a way that is fair and reasonable."[35] One effective way to promote proportionality and defer unnecessary time and expense is to focus (initially) on the most important witnesses, the most accessible ESI and documents, and those case-dispositive legal issues that can be decided with minimal factual development.[36] That case management approach is far more effective than a prophylactic reference to "discovery about discovery."

A motion to compel under Rule 37(a)(3) initially requires the moving party to show that the requested discovery falls within

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

35. *Witt*, 307 F.R.D. at 569.

36. Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55, 117–18 (2015).

Rule 26(b)(1).[37] That burden of proof is not particularly high.[38] However, a moving party should not prevail under Rule 37(a)(3) if the requested discovery is facially overbroad or seeks information that is not apparently relevant to the claims or defenses of the case; relevance and proportionality must be based on more than assumptions or speculation.[39] Assuming that the moving party's discovery requests satisfy this initial burden of proof, it then becomes the obligation of the objecting party to establish "that the challenged information or production should not be permitted."[40] That burden cannot be satisfied with a boilerplate objection. Rather, the non-moving party has the burden to show

---

37. Shaffer, *supra* note 36, at 81–86. *Cf.* Warren v. Sheba Logistics, LLC, No. 1:15-CV-00148-GNS-HBB, 2017 WL 1227940, at *2 (W.D. Ky. Mar. 31, 2017) (noting that "[t]he burden of the proponent of a motion to compel discovery bears the initial burden of proving that information sought is relevant") (quoting Gruenbaum v. Werner Enters., Inc., 270 F.R.D. 298, 302 (S.D. Ohio 2010)).

38. *Cf.* Samsung Electronics America Inc. v. Yang Kun "Michael" Chung, No. 3:15-cv-4108-D, 2017 WL 896897, at *13 (N.D. Tex. Mar. 7, 2017) (noting that "Rule 26(g)(1) does not impose on a party filing a motion to compel the burden to show relevance and proportionality in the first instance . . . , by signing the discovery requests, the party serving discovery requests makes an affirmative certification that the requests are not unreasonable or unduly burdensome or expensive" as measured by the Rule 26(b)(1) proportionality factors).

39. *See, e.g.*, Hill v. Auto Owners Ins. Co., No. 14-CV-05037-KES, 2015 WL 1280016, at *7 (D.S.C. Mar. 20, 2015) (The party moving to compel must satisfy a threshold showing of relevance that cannot be satisfied by "mere speculation that information might be useful;" "litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case.").

40. Washington v. Folin, No. 4:14-cv-00416-RBH-KDW, 2015 WL 1298509, at *3 (S.D.C. Mar 23, 2015) (quoting HDSherer LLC. v. Natural Molecular Testing Corp., 292 F.R.D. 305, 308 (D.S.C. 2013)); *see also* Germain v. Dixie

> the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.[41]

Under Rule 26(c), the court may limit or prohibit discovery when necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. But a party seeking relief under Rule 26(c) must offer more than a cursory reference to discovery about discovery.[42] Rather, to sustain

---

Motors, LLC., No. 16-695-BAJ-EWD, 2017 WL 1745047, at *2 (M.D. La. May 3, 3017) ("Once the moving party establishes that the materials requested are within the scope of permissible discovery, the burden shifts to the party resisting discovery to show why the discovery is irrelevant, overly broad, or unduly burdensome or oppressive, and thus should not be permitted.") (quoting Mirror Worlds Techs., LLC v. Apple Inc., No. 6:13-cv-419 LEAD Case, 2016 WL 4265758, at *1 (E.D. Tex. Feb. 10, 2010)); ContraVest Inc. v. Mt. Hawley Ins. Co., No. 9:15-cv-00304-DCN, 2017 WL 1190880, at *12 (D.S.C. Mar. 31, 2017) (holding that the non-moving party must prove that the material sought through a motion to compel is not discoverable; "[i]f the court were required to independently confirm whether every piece of discovery material was relevant before ruling on a motion to compel, there would be little point to having a burden of proof").

41. Shaffer, *supra* note 36, at 85; *cf.* Yang Kun (Michael) Chung, 2017 WL 896897, at *9 ("A party resisting discovery must show how the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.").

42. *See, e.g.*, Worldwide Home Prods., Inc. v. Time, Inc., No. 11 Civ. 3633(LTS)(MHD), 2012 WL 1592317, at *1 (S.D.N.Y. May 4, 2012) (noting that "the party seeking Rule 26(c) protection bears the burden of proof and persuasion"); Trinos v. Quality Staffing Servs. Corp., 250 F.R.D. 696, 698 (S.D. Fla. 2008) ("[C]ourts should only limit discovery 'based on *evidence* of the

their burden of proof,[43] the moving party must make a particular and specific showing of oppression, undue burden, or expense, unless the requested discovery is patently outside the bounds of Rule 26(b)(1).[44] If the party invoking Rule 26(c) sustains its initial burden of proof, the party seeking discovery then assumes the burden of showing that the requested discovery is relevant to the claims and defenses in the action and is proportional to the needs of the case.[45] Ultimately, the court must balance the harms to the moving party against the requesting party's need for the disputed information. In the exercise of its discretion, the court may allow or deny the requested discovery in its entirety, or permit discovery under specific conditions, including "limiting the scope of disclosure or discovery to certain matters" or specifying the manner in which the discovery will proceed.[46]

B. Lessons from Case Law

The Federal Rules of Civil Procedure have long recognized that information about a party's organizational arrangements or filing systems may be discoverable. The Advisory Committee

---

burden involved, not on a mere recitation that the discovery request is unduly burdensome.'") (emphasis in original).

43. *See, e.g.*, Norfolk Southern Ry. Co. v. Pittsburgh & West Virginia R.R., No. 2:11-cv-1588, 2013 WL 6628624, at *1 (W.D. Pa. Dec. 17, 2013).

44. *See, e.g.*, Trs. of the Springs Transit Co. Emp.'s Ret. & Disability Plan v. City of Colorado Springs, No. 09-cv-0284-WYD-CBS, 2010 WL 1904509, at *5 (D. Colo. May 11, 2010) (holding that the defendant might not be required to make a particularized showing under Rule 26(a) if plaintiff's discovery requests are facially objectionable) (citing International Society for Krishna Consciousness, Inc. v. Lee, No. 75 Civ. 5388 (MJL), 1985 WL 315, at *10 (S.D.N.Y. Feb. 28, 1985)).

45. Shaffer, *supra* note 36, at 89.

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

Note to the 2000 amendment to Rule 26(b)(1) acknowledged that a "variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action," including "[i]nformation about organizational arrangements or filing systems of a party . . . if likely to yield or lead to the discovery of admissible information."[47]

The 2015 amendment to Rule 26(b)(1) does not expressly authorize discovery concerning the "existence, description, nature, custody, condition, and location of any document or other tangible things, and the identity and location of persons who know of any discoverable matter," because access to this information remains "deeply entrenched" in discovery practice.[48] The Advisory Committee Note recognizes that "[f]raming intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources."[49] The same Committee Note acknowledges, however, that this discovery should be

47. *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to the 2000 amendment.

48. *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to the 2015 amendment; *see also* Martha J. Dawson & Bree Kelly, *The Next Generation: Upgrading Proportionality for a New Paradigm*, 82 DEF. COUNS. J. 434, 443 (2015) (expressing the view that "speculation that the [2015 amendment to Rule 26(b)(1)] may preclude 'discovery on discovery' is unfounded"). *But see* Tucker v. Momentive Performance Materials USA, Inc., No. 2:13-cv-04480, 2016 WL 8252929, at *3 (S.D.W.Va. Nov. 23, 2016) (stating that "[t]he [2015] amendments to Rule 26 put an end to 'discovery about discovery' and imposes a requirement of proportionality on discovery requests").

49. FED. R. CIV. P. 26(b)(1) advisory committee's note to the 2015 amendment. *But see* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008) (rejecting the notion that a party can justify discovery requests that are far broader, and more redundant and burdensome than necessary simply by claiming that they lack sufficient information "to more narrowly tailor" their discovery).

permitted "under the revised [Rule 26(b)(1)] when relevant and proportional to the needs of the case."[50] "[B]road discovery does not mean that the Court need give free reign to parties to request from the other side piles of documents, or terabytes of data, when it is uncertain whether the documents or data contains the information the party seeks."[51]

So, for example, the court in *Cunningham v. Standard Fire Ins. Co.* granted the defendant's motion for a protective order and precluded plaintiff's counsel from questioning the defendant's Rule 30(b)(6) designee on how Standard Fire organized documents and communications during the period from 2004 to 2008.[52] After finding that this line of inquiry was not relevant to the elements underlying the claims for breach of contract and bad faith, the court also rejected the plaintiff's notion that the requested information was relevant as it would allow "'counsel to properly frame requests for production and subsequent discovery[.]'" Pursuing discovery in order to draft discovery seems, at the very least, unnecessarily expensive.

---

50. FED. R. CIV. P. 26(b)(1) advisory committee's note to the 2015 amendment; *see also Mancia*, 253 F.R.D. at 357–58 ("If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. . . . [Rule 26(g)] aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party.").

51. Brown v. Montoya, No. CIV 10-0081 JB/ACT, 2013 WL 1010390, at *16, *20 (D.N.M. Mar. 8, 2013) ("[T]he object of inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue.").

52. No. 07-cv-02538-REB-KLM, 2008 WL 2668301, at *2 (D. Colo. July 1, 2008).

In *Martin v. Allstate Ins. Co.,* the plaintiff was not permitted to address during the defendant's Rule 30(b)(6) deposition topics such as "Defendant's document retention policies," "Defendant's efforts in responding to Plaintiff's discovery," or "Defendant's efforts . . . to preserve documents and electronic information relevant to the anticipated suit."[53] The court concluded that this "'non-merits' based discovery" was not warranted because "Defendant's explanation for the manner in which it has produced documents, based on Plaintiff's staggered discovery requests and clarifications, [was] plausible."

Magistrate Judge Jay Francis' successive rulings in *Freedman v. Weatherford International Ltd.* provides useful insights into the potential application of process-directed discovery. That lawsuit alleged that Weatherford and certain of its officers had made false and misleading statements in violation of federal securities laws. Documents relating to separate investigations undertaken by Weatherford's Audit Committee and an outside law firm were produced to litigants in a related lawsuit and to the plaintiffs in *Freedman*. Notwithstanding that production, the *Freedman* plaintiffs filed a motion to compel, seeking "certain reports comparing the results of the defendants' document search and production in [*Freedman*] with (1) the search terms proposed by the plaintiff; (2) the searches and productions related to the Audit Committee's investigation . . . ; and (3) the searches and productions related to [outside counsel's] investigation." The *Freedman* plaintiffs argued that without these materials, "they [had] no way of measuring the adequacy of the defendants' searches and productions."[54]

53. 292 F.R.D. 361, 363–64 (N.D. Tex. 2013).

54. No. 12 Civ. 2121 (LAK)(JCF), 2014 WL 3767034 (S.D.N.Y. July 25, 2014).

In his first Memorandum and Order, Magistrate Judge Francis started his analysis with Rule 26(b)(1) and the observation that a party may obtain discovery of nonprivileged matter relevant to the parties' claims and defenses. For purposes of the pending motion to compel, the court concluded that the plaintiffs had not sustained their burden of showing that the requested materials satisfied the Rule 26(b)(1) relevance standard. The plaintiffs argued that the requested "discovery on discovery" was relevant as they were "entitled to test the reasonableness and adequacy of [the] [d]efendants' production."[55] In addressing that argument, Judge Francis acknowledged that while "[t]here are circumstances where such collateral discovery is warranted," the plaintiffs had "not proffered an adequate factual basis for their belief that the current production is deficient."[56] The court concluded that the plaintiffs' claims of deficient productions were "too conclusory" to prevail, particularly "[g]iven the absence of a legal basis for [their] request."[57]

Approximately two months later, Judge Francis entered a second Memorandum and Order in the same case.[58] Once again,

---

55. *Id*. at *3.

56. *Id*.

57. *Id*. *Cf*. Catlin v. Wal-Mart Stores, Inc., No. 0:15-cv-00004-DWF-KMM, 2016 WL 7974070, at *1–2 (D. Minn. Sept. 22, 2016) (In denying plaintiff's request to reopen discovery "regarding Wal-Mart's data collection process," the court rejected the argument that "collateral discovery" as to defendant's belated disclosure of additional information was warranted. Plaintiff had "failed to offer anything beyond her own speculation that Wal-Mart's belated disclosure . . . might have been the product of [its] willful conduct." Because plaintiff could not identify any specific area of discovery that might be incomplete, the court refused to "share [her] loss of faith in Wal-Mart's overall compliance with its discovery obligations.").

58. Freedman v. Weatherford Int'l Ltd., No. 12 Civ. 2121 (LAK)(JCF), 2014 WL 4547039 (S.D.N.Y. Sept. 12, 2014). This ruling is cited in support of the

the plaintiffs sought the production of the same materials. The plaintiffs, in asking Judge Francis to reconsider his earlier ruling, proffered "new evidence" in the form of 18 emails authored by "critical custodians at Weatherford" that had not been included in the defendants' production, but instead had been obtained from a non-party. Judge Francis noted that Weatherford had "reviewed 'millions of documents [ ] and [produced] hundreds of thousands,' comprising 'nearly 4.4 million pages.'" Nevertheless, the plaintiffs argued that the 18 emails demonstrated "that Weatherford's production [was] 'significantly deficient,'" and insisted that the documents sought through their motion to compel "[would] identify additional relevant documents that [had] not been produced" during the discovery process.

The court rejected this argument and the plaintiffs' motion for reconsideration. Judge Francis recognized that:

> In certain circumstances where a party makes some showing that a producing party's production has been incomplete, a court may order discovery designed to test the sufficiency of that party's discovery efforts in order to capture additional relevant material. However, requests for such "meta-discovery" should be closely scrutinized in light of the danger of extending the already costly and timeconsuming discovery process *ad infinitum*.[59]

The court concluded that the requested discovery was not proportional to the needs of the case to the extent "the suggested

"general matter" advanced in Comment 6.b. of *The Sedona Principles, Third Edition*.

59. *Freedman*, 2014 WL 4547039, at *2.

remedy [was] not suited to the task."[60] Given the extensive ESI already produced by Weatherford, the failure to produce 18 emails was neither surprising nor problematic. Judge Francis further opined that most of the emails in question would not have been identified by the additional discovery the plaintiffs sought to compel and, thus, "the plaintiffs' proposed exercise [was] unlikely to remedy the alleged discovery defects."[61] In short, the plaintiffs again failed to satisfy their burden of proof under Rule 37(a)(3) to the extent their showing of relevance and proportionality was based on nothing more than assumptions or speculation.

Some lessons can be drawn from the two *Freedman* decisions. First, process-directed discovery may, in fact, fall within the scope of relevance under Rule 26(b)(1) "when a party's production *has been* incomplete." Because relevance and proportionality are situational elements that do not fall easily within a general rule, "discovery . . . to test the sufficiency" of an opposing party's discovery efforts should generally be reactive rather than prospective in its application. But in the end, disputes concerning discovery about discovery can and should be addressed within well-established burdens of proof.[62]

---

60. *Id*. at *3.

61. *Id*.

62. *Id*. *See, e.g.*, *In re* Delta/Airtran Baggage Fee Antitrust Litig., No. 1:09-md-2089-TCB, 2015 WL 4635729, *27–28 (N.D. Ga. Aug. 3, 2015) (In refusing plaintiffs' motion to reopen discovery, the court rejected the argument that plaintiffs should be given "an opportunity to directly take admissible discovery related to discovery-on-discovery issues." The court concluded that because there was no "jury question . . . regarding spoliation or Delta's discovery practices, there is no need for Plaintiffs to adduce admissible evidence on that issue," particularly because the case had been derailed for more than a year "by 'discovery on discovery.'").

Some courts have been wary of allowing process-directed discovery at the outset of the case. The plaintiffs in *Miller v. York Risk Services Group* argued that an early Rule 30(b)(6) deposition directed to "the manner and methods used by Defendant to store and maintain electronic information" would allow them to frame more effective discovery requests directed toward their RICO claim and thereby "avoid potential disputes over what may be discovered."[63] In rejecting this proposed deposition topic, the court observed:

> [I]t remains to be determined whether starting the discovery process with a wide ranging inquiry into the manner and method by which a party stores and manages ESI is a helpful and appropriate approach to obtaining substantive information. In this court's view it is not. Plaintiffs contend that starting with discovery of the manner and means of how Defendant stores ESI will allow them to tailor requests in the future. The court's view is that starting discovery with such an inquiry puts the cart before the horse and will likely increase, rather than decrease, discovery disputes. Instead of beginning with a deposition that address nothing but process, discovery should start with inquiries that seek substantive information.[64]

63. No. 2:13-cv-1419 JWS, 2014 WL 1456349, at *1 (D. Ariz. Apr. 15, 2014). *But see* Risinger v. SOC, LLC., 306 F.R.D. 655, 662 (D. Nev. 2015) ("The purpose of a Rule 30(b)(6) deposition is to streamline the discovery process.").

64. *Miller*, 2014 WL 1456349, at *2. *But compare* Bombardier Recreational Products, Inc. v. Arctic Cat, Inc., No. 12-cv-2706 (MJD/LIB), 2014 WL 10714011, at *14–15 (D. Minn. Dec. 5, 2014) (In denying plaintiff's request for a Rule 30(b)(6) deposition that would address, in part, the defendant's "efforts to collect and produce" responsive documents and exclude documents

The court, however, acknowledged that a process-directed deposition might be appropriate if the defendant sought relief under Rule 26(b)(2)(B).

Other courts have denied motions to compel responses to process-directed discovery requests where the moving party has failed to sustain its burden of proof under Rule 37(a)(3). For example, in *Graff v. Haverhill North Coke Co.*, the plaintiffs moved to compel the defendants to run their search terms on all sources of ESI in the defendants' possession, custody, or control, and to produce the defendants' search methodology, notwithstanding defendants' assertion that their search for responsive ESI was complete.[65] The court denied the motion to compel, finding that the "defendants' explanation of the 'methodology' used for ESI searches [was] sufficient."[66]

> Plaintiffs have not identified any relevant documents which are *not* included in the tens of thousands of pages of documents or ESI produced by defendants. The Court is not unmindful of the obvious response that a party cannot identify a document the party does not know the existence of.

---

from production for purported lack of relevancy, the court rejected this topic as "discovery on discovery" without some showing that this information "is relevant to—or may lead to the discovery of information relevant to—any claim or defense at issue in the present case." The court also suggested that the requested information "treads dangerously close to encroaching on attorney work product privilege."), *with* Ferring v. Fera Pharms., LLC, CV 13-4640 (SJF)(AKT), 2016 WL 5396620, at *3 (E.D.N.Y. Sept. 27, 2016) (rejecting the notion that the producing party could claim work product protection and decline to disclose its list of search terms and list of document production topic areas; "[p]laintiff is 'entitled to know the methodology and manner of the ESI production undertaken by Fera'").

65. No. 1:09-cv-670, 2011 WL 13078603 (S.D. Ohio Aug. 8, 2011).

66. *Id*. at *14.

> Nevertheless, as the party seeking a motion to compel, plaintiffs have the burden of persuading the Court that grounds exist to believe defendants are withholding relevant documents or ESI responsive to the requests at issue.[67]

In the end, the court in *Graff* concluded that a requesting party's "theoretical entitlement yields to practical considerations" and principles of proportionality.

Courts have also addressed the timing, relevance, and scope of process-directed discovery in the context of Rule 30(b)(6) depositions.[68] As noted, the Advisory Committee has acknowledged that discovery regarding a party's information systems, including "the identity and location of persons who know of any discoverable matter" should not be precluded "when relevant and proportional to the needs of the case."[69] The challenge comes in applying those qualifying terms. In *Whitesell Corp. v. Electrolux Home Products, Inc.*, the plaintiff served an interrogatory requiring the defendant to "identify every person who has knowledge regarding your document retention policies and

67. *Id*. at *13 (The court also noted that the parties' "dispute highlights the importance of cooperation among the parties in planning the conduction of electronic discovery *before* such discovery is undertaken by the responding party.") (emphasis in original).

68. FED. R. CIV. P. 30(b)(6).

69. *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to the 2015 amendment; *cf*. Watkins v. Hireright, Inc., No. 13CV1432-MMA (BLM), 2013 WL 10448882, at *3 (S.D. Cal. Nov. 18, 2013) (In granting defendant's motion for protective order and denying plaintiff's attempt to depose a corporate representative on defendant's email systems, electronic document management systems, databases, and archival storage and backup systems, the court held this "discovery about discovery" was "extremely overbroad and encompass[ed] large amounts of irrelevant information.").

procedures and your efforts to preserve and produce documents and information relevant to this litigation, and describe the subject matter of his or her knowledge."[70] The plaintiff then moved to depose those same corporate representatives, arguing that it should be permitted "to discover general information about" the defendant's "ESI protocol and management and document production issues." The plaintiff rationalized this request by suggesting that it could not adequately prepare for fact depositions without knowing why the defendant had perceived gaps in its Rule 34 responses.[71] At the time this dispute arose, the court already was holding monthly hearings to address any perceived issues involving discovery. Given its own regularly scheduled efforts to manage the discovery process, the court rejected the plaintiff's proposed Rule 30(b)(6) inquiry on the grounds that it could not "justify further delaying this case or adding to its already tremendous expenses by allowing [the plaintiff] to conduct discovery about discovery."[72] Interestingly, while the court cautioned that it would impose "its punitive powers with exacting force and direction" if "the Court detect[s] or uncover[s]" any attempts to deliberately falsify, conceal, obfuscate, or destroy relevant information, it did not allow the plaintiff to conduct discovery that might elucidate such matters, presumably because of anticipated costs and the court's own ongoing case-management efforts.[73]

A party moving to compel process-directed discovery should be prepared to substantiate their claims of relevance and

70. No. CV 103-050, 2015 WL 5316591, at *1–2 (S.D. Ga. Sept. 10, 2015).

71. *Id*. at *2.

72. *Id*. at *3.

73. *Id*.

proportionality with factual support.[74] In that respect, the court's analysis in *Ford Motor Co. v. Edgewood Properties, Inc.* is enlightening.[75] The court did not find a "conclusory allegation premised on nefarious speculation" to be persuasive, and reasoned that an unsubstantiated claim of deficiencies "would unreasonably put the shoe on the other foot and require a producing party to go to herculean and costly lengths . . . in the face of mere accusation to rebut a claim of withholding."[76] But the court did not discount the possibility of future relief, particularly as no depositions had been taken.

---

74. *See generally* Mirmina v. Genpact, LLC, No. 3:16CV00614 (AWT), 2017 WL 3189027, at *2 (D. Conn. July 27, 2017) (In denying the plaintiff's motion to compel an additional search for ESI, the court noted the plaintiff's request was based on "nothing but speculation" which was not sufficient justification to require the defendant to conduct an additional search. The court concluded from the detailed and sworn affidavit provided by defendant that all responsive materials had been disclosed.); Club v. BNSF Ry. Co., No. C13-0967-JCC, 2016 WL 4528452, at *5 (W.D. Wash. Aug. 30, 2016) (In granting the plaintiff's motion for protective order, the court held that it would be disproportionate to require a Rule 30(b)(6) deponent to describe "the search performed of . . . files, business records, and/or archives for documents responsive to [defendant's] discovery requests." The requested deposition testimony was not required simply because the plaintiff failed to provide a single responsive document "over the course of a very lengthy and complex discovery process," particularly given that the plaintiff remedied that omission immediately upon being alerted to the problem.). *Cf*. Procaps S.A. v. Patheon Inc., No. 1:12-cv-24356-JG, 2014 WL 11498060, at *27, *36 (S.D. Fla. Dec. 1, 2014) ("[D]iscovery on discovery is not permitted because of possibilities;" but the special master "chastened" counsel for both sides, suggesting that if the parties had worked together cooperatively, "the myriad discovery problems presented in this case, and the substantial time and cost associated with addressing discovery-related motions, would have been substantially reduced or perhaps even avoided.").

75. 257 F.R.D. 418 (D.N.J. 2009).

76. *Id*. at 427–28.

> If Edgewood wishes to press its argument that correspondence or other documentation in the realms in which it is concerned about *must* exist, it can take that up in depositions with fact witnesses who have knowledge in these areas. If relevant, unproduced documents appear or are even referenced in these depositions, Edgewood can move for the appropriate relief before this Court at that time, whether it be via another motion to compel documents, or for sanctions.[77]

Although the court in *Ford Motor* did not preclude the possibility of process-directed discovery, it left unresolved what would constitute a "colorable showing" sufficient to support the defendant's request.

So, for those courts resistant to process-directed discovery, what degree of evidence or showing is required to sustain a motion to compel? Again, the case law is less than clear. Several courts have held that process-directed discovery is not available absent some factual showing of a production deficiency. In *Orillaneda v. French Culinary Institute*, the court was not persuaded by the requesting party's request for "discovery about discovery."[78] The court acknowledged that discovery concerning the

77. *Id*. at 428. *Cf.* Hanan v. Corso, No. CIV.A. 95-0292 TPJJMF, 1998 WL 429841, at *7 (D.D.C. Apr. 24, 1998) (After noting that the Federal Rules of Civil Procedure "already contain several provisions that mandate the consequences of failing to comply with discovery," the court expressed a disinclination to "open the door to discovery about discovery in every case;" the court concluded that because discovery "is already a costly and time consuming process, [t]o add another level of discovery in every case is fraught with peril.").

78. No. 07 Civ 3206 (RJH)(HBP), 2011 WL 4375365, at *6 (S.D.N.Y. Sept. 19, 2011).

search and maintenance of an opposing party's information systems might be "relevant" where the requesting party can "'point to the existence of additional responsive material' or when the documents already produced 'permit *a reasonable deduction* that other documents may exist or did exist and have been destroyed.'"[79] In that case, however, the plaintiff could not raise that "reasonable deduction" in the absence of "*any specific reasons* to believe the defendant's production was deficient."[80] The court in *Hubbard v. Potter* adopted a similar approach, suggesting that process-directed discovery may be appropriate where "documents *that have been produced permit a reasonable deduction* that other documents may exist or did exist and have been destroyed."[81] As the court in *Hubbard* properly noted, "discovery would never end" if a requesting party was required to simply raise a "theoretical possibility that more documents exist;" an

79. *Id*. (emphasis added).

80. *Id*. (emphasis added); *cf*. Koninklijke Philips N.V. v. Hunt Control Sys., Inc., No. 11-cv-3684 DMC, 2014 WL 1494517, at *4 (D.N.J. Apr. 16, 2014) (In granting plaintiff's motion for protective order, the court found that the producing party had "made adequate representations . . . that its approach to conducting and gathering ESI discovery material [was] reasonable" and the moving party's allegations of deficient production were "speculative and suggestive in nature." An "alleged dissatisfaction with the results of [the producing party's] production is not enough to reopen the door to the collection of ESI discovery under an entirely different method;" "the marginal benefit that would emanate to [the requesting party] [was] heavily outweighed by the burden that would be sustained by [the producing party]."). *See, e.g.*, *In re* Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (In vacating the trial court's discovery order allowing plaintiff direct access to defendant's databases, the appellate court held that plaintiff was "unentitled to this kind of discovery without—at the outset—a factual finding of some non-compliance with discovery rules by Ford.").

81. 247 F.R.D. 27, 29–30 (D.D.C. 2008) (emphasis added).

equally plausible explanation might be that additional documents had not been produced because the requesting party had "already received all responsive documents."[82]

Some courts have held that discovery deficiencies, standing alone, are insufficient to warrant process-directed discovery; rather the proper analysis weighs the burdens of that additional discovery against the likely benefits of those efforts. The plaintiffs in *Larsen v. Coldwell Banker Real Estate Corp.* were able to identify a "few isolated examples" of production discrepancies.[83] Nevertheless, the court denied the plaintiffs' request that

82. *Id*. *Cf*. Enslin v. Coca-Cola Co., No. 2:14-cv06476, 2016 WL 7013508, at *1 n.2 (E.D. Pa. May 13, 2016) (In denying plaintiff's request for an order requiring defendants to search ESI in the possession of an additional 38 individuals and 4 corporate departments or committees, the court noted that "while Plaintiff explained why he believes that these individuals may have some connection to the events at issue in this action, he did not articulate any basis to believe that Defendants' search and production was inadequate."); Cummings v. General Motors Corp., No. Civ.00-1562-W, 2002 WL 32713320, at *8 (W.D. Okla. June 18, 2002) ("Plaintiffs have shown nothing more than their counsel's speculation that the proposed computer searches would produce additional documents within the proper scope of discovery.").

83. No. SACV-1000401-AG (MLGx), 2012 WL 359466, at *6 (C.D. Cal. Feb. 2, 2012); *see also* Steuben Foods, Inc. v. Country Gourmet Foods, LLC, No. 08-CV-561S(F), 2011 WL 1549450, at *6–7 (W.D.N.Y. Apr. 21, 2011) (The court denied defendant's request to conduct discovery regarding plaintiff's preservation efforts, finding that defendant's failure to produce three emails did not establish a "colorable factual basis" for plaintiff's spoliation claim or warrant a "fishing expedition" predicated on "mere speculation;" the plaintiff already had addressed preservation efforts in early depositions.); Memry Corp. v. Kentucky Oil Tech., N.V., No. C04-03843 RMW (HRL), 2007 WL 832937, at *3–4 (N.D. Cal. Mar. 19, 2007) (In denying the requesting party's motion to compel, the court noted that while the defendant's "document production may not have been absolutely perfect," "two missing emails out of thousands of documents produced in this discovery-intensive case" did not justify a forensic examination of defendant's computers and storage media.).

defendants answer questions under oath regarding their ESI preservation, collection, and processing efforts, finding that the additional burden and expense to defendants of the proposed discovery outweighed any likely benefit.

Other courts, however, have permitted discovery about discovery in a number of different circumstances. One case, *Burnett v. Ford Motor Co.*, discussed at length many of the issues that surround process-directed discovery.[84] There, Ford Motor moved for a protective order, arguing that the plaintiffs' proposed Rule 30(b)(6) deposition improperly sought testimony regarding Ford's document retention policies and practices, its knowledge of possible spoliation, and "the identity of Ford custodians whose files have been searched for relevant documents and the process by which the custodians searched for documents." The defendant argued that the plaintiffs sought irrelevant "discovery on discovery" and information protected by the work product doctrine, which was particularly inappropriate in the absence of any evidence that Ford had "committed discovery abuses."[85] Plaintiffs insisted, to the contrary, that the requested discovery was necessary "given Ford's secretive approach to discovery" and deposition testimony suggesting that key Ford employees had conducted only limited or partial searches of their records.[86]

After several months of discovery, Magistrate Judge Cheryl Eifert "expressed misgiving regarding the timeliness and effectiveness of Ford's search and its subsequent productions" of ESI, but declined to determine the reasonableness of the "self-selection process used by Ford to collect relevant documents."

84. No. 3:13-cv-14207, 2015 WL 4137847 (S.D.W.Va. July 8, 2015).

85. *Id*. at *4.

86. *Id*.

Defendant insisted that it could not provide the plaintiffs with a list of the search terms it was using "because Ford had allowed each individual employee to develop his or her own terms and phrases to search his or her documents" after conferring with counsel. Although the parties later agreed upon search terms, discovery disputes continued. Approximately one month later, the plaintiffs insisted that "the purported lack of documents found in the employees' custodial files demonstrated a problem with the search terms," while Ford Motor disputed the lack of precision in the plaintiffs' search terms and phrases. The court concluded that "Ford was not forthcoming in sharing specifics about the results of the searches with Plaintiffs" and that "the parties simply were not communicating well with each other."[87]

Judge Eifert acknowledged that while Rule 26(b)(1) establishes a broad definition of relevance, discovery may be limited under Rule 26(c), Rule 26(b)(2)(C), and the general principles of proportionality. She also highlighted *The Sedona Conference Cooperation Proclamation* and Rule 26(f), which "encourage cooperation and transparency early in the discovery process."[88] Judge Eifert noted that "broader 'discovery on discovery' may be appropriate and relevant under Rule 26(b) when it aids a party in the presentation of its case."[89]

---

87. *Id*. at *3.

88. *Id*. at *8.

89. *Id*. at *9. The producing party in *PCS Phosphate Company, Inc. v. American Homes Assurance Co,* No. 5:14-CV-99-D, 2015 WL 8490976 (E.D.N.C. Dec. 10, 2015), also unsuccessfully moved for a protective order in response to the plaintiff's Rule 34 request for "all document retention or destruction policies." In seeking relief under Rule 26(c), the defendant argued that these documents were irrelevant in the absence of any evidence of spoliation. The plaintiff insisted, however, that these materials would "assist in the narrowing and specifying [of] discovery requests and in avoiding or resolving disputes over what information is in [the defendant's] possession, custody or

In addressing the scope of the proposed deposition topics, the court noted that the plaintiffs had "identified several instances in which document productions [had] been slow-to-come, incomplete, or inconsistent" and "[t]he reservations expressed by Plaintiffs . . . [were] sufficiently corroborated to justify investigation into the reasonableness of Ford's search."[90]

> When two-way planning does not occur upfront, and *questions about the adequacy of the document production subsequently arise, common sense dictates that the party conducting the search must share information* regarding the universe of potentially relevant documents being preserved, and those that no longer exist, as well as the search terms used in collecting relevant documents and the identities of the custodians from whom the documents were retrieved. After all, the party responsible for the search and production has the duty to demonstrate its reasonableness.[91]

The court also observed, in this particular case, that Ford had not offered any evidence to support its claims of undue burden and continued to "resist sharing any specific facts regarding its collection of relevant and responsive documents," even as it conceded that its custodians were using various search terms and processes. Judge Eifert concluded that Ford had "cloaked

---

control." Citing well-established case law, the court noted that a protective order required "a particularized showing of why discovery should be denied," which could not be sustained with "conclusory or generalized statements."

90. Burnett v. Ford Motor Co., 2015 WL 4137847, No. 3:13-cv-14207, 2015 WL 4137847, at *9 (S.D.W.Va. July 8, 2015).

91. *Id*. at *8 (emphasis added).

the circumstances surrounding its document search and retrieval in secrecy, leading to skepticism about the thoroughness and accuracy of that process."[92] In closing, the court allowed the Rule 30(b)(6) deposition to proceed as requested, but deferred any decision on the adequacy of Ford's search, retrieval, and production process.

Courts have allowed process-directed discovery based upon an application of traditional burdens of proof under the Federal Rules. In *Cotton v. Costco Wholesale Corp.*, the defendant moved for a protective order to limit the scope of a Rule 30(b)(6) deposition.[93] The plaintiff sought to question the deponent on topics and document requests dealing with "Costco's computer application, systems, and networks, as well as Costco's efforts to retain, identify, and produce [ESI] in this case." Defendant argued that these topics sought unduly burdensome and irrelevant information in the absence of any evidence of actual or suspected spoliation, and cited as supporting authority the decision in *Orillaneda*. In rejecting these arguments, the magistrate judge in *Cotton* noted that "it is somewhat difficult for a litigant to evaluate an opposing party's efforts to search for and produce ESI without some information regarding the steps taken to accomplish this task." Although the court expressed some disinclination to allow a "broad inquiry into this subject" and recognized that a protective order might be issued "based on a sufficient showing," Costco had provided "no estimate of how much time or cost it would take to produce" a qualified witness or any evidence to support its claim of "annoyance, embarrassment, op-

92. *Id*. at *9.

93. No. 12-2731-JWL, 2013 WL 3819975, at *1 (D. Kan. July 24, 2013).

pression, or undue burden or expense." In short, Costco's motion was denied simply because it had not sustained its burden of proof under Rule 26(c).

The court in *McNearney v. Washington Department of Corrections* applied the proper burden of proof in deciding a motion to compel responses to written discovery that included, *inter alia*, a description of the processes employed by the defendants to "locate all e-mails, text messages, voicemail messages, word-processing documents and other electronic information" responsive to the plaintiff's requests for production.[94] In the same interrogatory, the plaintiff asked who performed those searches, the locations that were searched, and the search terms used. The defendant responded to that interrogatory with a list of objections and the assertion that "the request assumes facts not in evidence as the request assumes that the Defendants did not properly determine what information it would search before producing the previously disclosed documents."[95] Although that interrogatory response was supplemented three months later, the defendants still refused to identify who conducted searches, what storage locations were searched, or what search terms were used. It also appears that the defendants failed to search for responsive ESI from several key witnesses. In granting the plaintiff's motion to compel, the court noted that producing some documents does not satisfy the producing party's obligation "to make a reasonable search for and produce all responsive documents in its possession, custody or control."[96] The

94. No. C11-5930 RBL/KLS, 2012 WL 3155099, at *1 (W.D. Wash. Aug. 2, 2012).

95. *Id*. at *2.

96. *Id*. at *6; *see also* FED. R. CIV. P. 37(a)(4) (For purpose of Rule 37(a), "an evasive or incomplete . . . answer or response must be treated as a failure to . . . answer, or respond.").

court held that the plaintiff's interrogatory sought relevant information directed to "whether Defendant has made a reasonable and thorough search for responsive electronic records that may yield admissible evidence;" more importantly, "Defendant offer[ed] no compelling reason why it should be relieved from fully answering the interrogatory in this case."[97]

A motion to compel answers to interrogatories was also at issue in *Ruiz-Bueno v. Scott*.[98] In particular, the plaintiffs sought to learn what efforts the defendants took to answer previous discovery requests, and "what procedures or methods were used to search for responsive electronically stored information." In objecting to those interrogatories, the defendants argued that the plaintiffs sought "irrelevant information which [was] not related any of the claims or defenses in this case . . . [and that] Defendants' discovery methods have no bearing on any aspect of this case."[99] The court distilled the parties' competing positions down to two salient questions: "is discovery about discovery ever permissible," and "if so, is it permissible under the facts of this case?"

As for the first issue, the court rejected the notion that inquiries directed toward a party's efforts to respond to discovery are always irrelevant under Rule 26(b)(1), suggesting that such an argument "fails to acknowledge the nuanced nature of discovery." The court reasoned that when "information about discovery is a matter which 'may aid a party in the preparation . . of his case,'" it falls within the relevance standard of Rule 26(b)(1) and, therefore, should not be absolutely banned.[100] Moving to

97. *McNearey*, 2012 WL 3155099, at *6.

98. No. 2:12-cv-0809, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013).

99. *Id*. at *1.

100. *Id*. at *2.

the second critical question, the court noted that while the plaintiffs generally "distrusted" the diligence of the defendants' search efforts, the court was actually confronted with an incomplete record "of what defendants did or did not do to find ESI, or what the actual state of defendants' ESI happen[ed] to be."[101] Although the court disclaimed the notion that "discovery about discovery" is appropriate in every case, it concluded that the plaintiffs' motion should be granted

> in this case . . . based, at least in part, on the fact that plaintiffs' concern about the volume of ESI appears to be reasonably grounded; the fact that defendants were less than forthcoming with information needed to make further discussion of the issue a collaborative rather than contrarian process; and the need to get this case moving toward resolution.[102]

A scattershot approach to discovery responses may well create a basis for process-directed discovery.

In some cases, courts have attempted to resolve motions to compel, not by requiring the non-moving party to incur the costs of additional production, but rather by directing the non-moving party to explain their search methodology. In *New Orleans Regional Physician Hospital Organization, Inc. v. United States*, the court recognized that a party seeking relief under Rule 37(a)(3) must show that the opposing party's discovery responses are incomplete.[103] Prior to filing a motion to compel, the court had directed the defendant "to submit affidavits or decla-

101. *Id*. at *3.

102. *Id*. at *4.

103. 122 Fed. Cl. 807, 815 (Fed. Cl. 2015).

rations from individuals who performed searches for potentially responsive documents detailing their search efforts." Based upon the resulting declarations from 24 different individuals, the plaintiff argued that the defendant's production was sufficiently deficient that the defendant should be required to "redo its searches with a more rigorous search protocol agreed upon by the parties." Not surprising, the defendant countered that the moving party had "failed to demonstrate that defendant's production was inadequate." After noting that a producing party "must be able to 'explain the rationale'" for their chosen search methodology, as well as demonstrate that the methodology was properly implemented, the court in *New Orleans* concluded that "defendant did not put into place a systematic, reliable plan to find and produce all relevant documents in this case."[104] The court held that the evidence presented by the parties did not suggest that a "thorough and reliable search was conducted." For that reason, the court granted the motion and directed the defendant to provide the plaintiff with a record of "which custodians performed searches, what search terms they used, what records they searched, and how many responsive documents were found."[105]

Similarly, in *Desire, LLC. v. Rainbow USA, Inc.*, the plaintiff moved to compel answers to specific interrogatories and requests for production, arguing that the defendant had not conducted a "thorough search" for responsive materials.[106] The

104. *Id*. at 818 ("[I]t appears there was little oversight by defendant's counsel over the search efforts," . . . [and custodians] "were not required to keep any record of the search terms they used and exactly what records they searched.").

105. *Id*.

106. No. CV 15-4725-DSF (PLAx), 2016 WL 6106740 (C.D. Cal. June 29, 2016).

plaintiff supported that argument by citing Rule 30(b)(6) deposition testimony during which the defendant's designee conceded that some paper and ESI records had never been searched. The defendant argued, to the contrary, that it had conducted additional searches and made further productions of ESI in the wake of that deposition. The plaintiff challenged that assertion, however, noting that it was "unaware of how this additional search was conducted or what its scope was." Confronted with these conflicting positions, the court directed the defendant to "provide plaintiff with the documents retrieved as a result of its latest electronic search . . . along with a declaration informing plaintiff of the search protocols and parameters used in performing this electronic search, signed under penalty of perjury."[107]

In *American Home Assurance Co. v. Greater Omaha Packing Co.*, the court noted the plaintiff's concern that the defendant's limited production of emails suggested a lack of diligence responding to written discovery requests.[108] While defendant should not be required to produce information that did not exist, the plaintiff was entitled to have an adequate opportunity to contest the discovery of ESI.[109] Although the court declined to order further production in the absence of any showing that specific information had been withheld, it did require the defendant to disclose the sources it searched or intended to search and, for each source, the search terms used in order "to provide [the moving party] an adequate opportunity to contest discovery of ESI."[110]

---

107. *Id*. at *4.

108. No. 8:11CV270, 2013 WL 4875997, at *6 (D. Neb. Sept. 11, 2013).

109. *Id*.

110. *Id*. *Cf*. *In re* Facebook Privacy Litig., No. 5:10-cv-02389-RMW, 2015 WL 3640518, at *2 (N.D. Cal. June 11, 2015) (After expressing some concern as to

Finally, courts have allowed process-directed discovery in response to protracted discovery disputes that have or threaten to unnecessarily prolong the pretrial process. For example, in *Crocs, Inc. v. Effervescent, Inc.*, the counterclaim plaintiffs (Dawgs) moved to compel the counterclaim defendant (Crocs) to produce a Rule 30(b)(6) deponent who could address, *inter alia*:

---

whether the plaintiff had conducted a diligent search for all responsive information, the court directed the plaintiff to provide "a declaration explaining her search in detail, including, but not limited to all sources searched and all search parameters used."); Fleming v. Escort, Inc., No. 1:12-CV-066-BLW, 2014 WL 4853033, at *6 (D. Idaho Sept. 29, 2014) (After noting the defendant's "stonewalling" and its counsels' "vexatious conduct," the court granted a motion to compel and required the defendant to specifically describe the search terms it employed, identify the computers and repositories that were searched, and the time frame covered by that search. As the court explained, "there [was] no way that Fleming—and this Court—[could] evaluate Escort's claim that it has produced everything" without answers to those questions.); Vieste, LLC. v. Hill Redwood Dev., No. C-09-04024 JSW (DMR), 2011 WL 2198257, at *1–2, *4 (N.D. Cal. June 6, 2011) (After concluding that the plaintiff had raised "legitimate concerns" about the adequacy of the defendants' preservation efforts that might precipitate a spoliation motion, the court directed defendants to provide a detailed declaration indicating their efforts to preserve potentially relevant information, gather documents responsive to discovery requests, and identify each custodian whose files were searched. The court ultimately determined that the submitted declarations "omitted or glossed over some of the requested information and were often evasive and unforthcoming."); Seven Seas Cruises S. De. R.L. v. V. Ships Leisured Sam, No. 09-23411-CIV, 2011 WL 181439, at *4–6 (S.D. Fla. Jan. 19, 2011) (Plaintiffs moved to compel the defendants to re-run their ESI searches, arguing that defendants' search methods would not capture all responsive ESI. Although the court concluded that the defendants' search was reasonable under the circumstances and that more intensive search methods were disproportionate to the needs of the case, it did require the defendants to provide a detailed affidavit providing additional information regarding the method they used to conduct their ESI searches.).

> [t]he search for, preservation of and production of electronic and hard copy documents information and things potentially relevant to this Action and/or responsive to Dawgs' requests for production of documents, information and things (and the identity and scope of participation of the individuals who participated in the determination of which files and custodians to be searched and the actual search for documents, information and things).[111]

Dawgs argued that this topic was a proper area of inquiry because Crocs "refuse[d] to produce complete discovery responses or to certify the thoroughness of its search for responsive materials as Dawgs has done." Although the court characterized the proposed deposition topic as "classic 'discovery about discovery,'" she also recognized that "such discovery will be allowed if a party's efforts to comply with proper discovery requests are reasonably drawn into question." The court observed "that discovery in this case appears to be moving at glacial speed and that [defendant's] motions demonstrate . . . a high frustration level with the discovery being produced by Crocs." While the court was concerned by Dawgs' overbroad discovery requests, it concluded that "the case would benefit from some guidance from Crocs as to its efforts to fully respond to discovery requests" and overruled the plaintiff's objection to this deposition topic.[112] A party opposed to unfettered process-directed discovery may find that disclosure of some information

111. No. 06-cv-00605-PAB-KMT, 2017 WL 1325344, at *8 (D. Colo. Jan. 3, 2017).

112. *Id*. at *9.

early in the litigation provides the best defense against later motion practice.

Applying a similar, proactive approach in the wake of the plaintiffs' request for additional ESI, the court in *In re Lipitor (Atorvastatin Calcium) Marketing* directed the parties to confer and then address the following issue: what would be the additional probative value of the requested discovery relative to the burden of producing those source file documents?[113] The plaintiffs argued that they could not respond to the court's concerns without Rule 30(b)(6) testimony from the defendant; Pfizer objected that the plaintiffs were improperly seeking "discovery about discovery." Citing Magistrate Judge Francis' decision in *Freedman*, the court acknowledged that while "'meta-discovery' or discovery about discovery 'should be closely scrutinized,'" to avoid unnecessarily prolonging the discovery process, the requested discovery in this case was appropriate. The court concluded that the Rule 30(b)(6) topic would assist the parties, and ultimately the court, in considering the cumulative nature and associated burden of the desired production.[114]

---

113. No. 2:14-mn-02502-RMG, 2014 WL 12621613, at *1 (D.S.C. Nov. 13, 2014).

114. *Id*. *Cf*. Alomari v. Ohio Dep't of Public Safety, No. 2:11-cv-00613, 2013 WL 5874762, at *2–4 (S.D. Ohio Oct. 30, 2013) (In a case involving delayed and protracted discovery, the court granted in part the plaintiff's motion to compel, after finding that "[d]efendants [had] demonstrated a pattern of inexcusable delay and non-responsiveness throughout the discovery phase" of the case. Although the court declined to order additional discovery based solely on the plaintiff's speculation, where defendants maintained that no further responsive documents existed, defense counsel was required to set forth in an affidavit "the steps they took to locate and produce responsive documents" and certify "that Defendants have completed a reasonable inquiry in locating and producing responsive documents and that all responsive documents of which they are aware have been produced.").

In the end, the decision in *Little Hocking Water Ass'n., Inc. v. E.I. Du Pont De Nemours & Co.* illustrates the nuanced evaluation that is appropriate for addressing process-directed discovery requests.[115] In this environmental contamination case, plaintiff filed an amended motion to compel seeking an order requiring the defendant to "revise and expand its search for documents and [ESI]," produce additional categories of documents, and supplement interrogatory responses. In a lengthy decision, the court noted its responsibility to balance the broad scope of discovery with the need to forestall fishing expeditions. Implementing that balancing standard, the court denied the plaintiff's request that DuPont again interview and search the files of 284 custodians whose records had been searched in earlier litigation. As the court explained, Little Hocking's unsubstantiated suspicion that "additional responsive documents" might be found would not suffice to sustain a motion to compel. Applying principles of proportionality in the context of the entire record, the court concluded that "the burden of spending thousands of attorney hours and millions of dollars to search the files of hundreds of custodians far outweighs Little Hocking's speculation that additional responsive documents may yet reside somewhere in the files of 284 custodians."[116] Little Hocking also moved to compel based upon the defendant's alleged failure to properly search ESI sources in the possession of internal DuPont entities. As to some of these entities, the court concluded that the plaintiff's motion was based on "very little documentation" which, standing alone, would not demonstrate that the likely benefit of the additional searches would justify the associated

115. No. 2:09-cv-1081, 2013 WL 608154 (S.D. Ohio Feb. 19, 2013).

116. *Id*. at *11.

burdens. However, for other DuPont entities, the court concluded Little Hocking's motion should be granted. For at least one entity, the court directed the defendant to provide "additional clarification as to the comprehensiveness" of its search and production of ESI. The court directed DuPont to provide a declaration "confirming and explaining how its search and production of files [from that entity] . . . constituted a complete production of all responsive documents relating" to that team.[117]

C. *Strategic Considerations in Addressing Process-Directed Discovery*

If, as the foregoing discussion suggests, process-directed discovery is permissible under the Federal Rules of Civil Procedure, litigants and jurists must consider when and how to seek that information. Case law can be found to support both sides of the process-directed discovery debate. Those conflicting judicial decisions, however, miss the more critical point: what is the fundamental purpose of discovery? A party should not spend money indiscriminately or focus on facts or issues that are not material to the disposition of the case. Rather, discovery should be pursued to achieve a just, speedy, and inexpensive resolution of the matter.

Discovery requests or Rule 30(b)(6) deposition topics that are based on nothing more than naked speculation, that become fishing expeditions, or smack of gamesmanship do not advance the goals of Rule 1 and should not be granted. However, a pro-

117. *Id*. at *23.

hibition that precludes or drastically circumscribes process-directed discovery creates its own shortcomings.[118] The latter approach will almost certainly morph into motion practice near the end of the pretrial process, when a proportionate and efficient approach to case management may be difficult to achieve and a trial date is jeopardized. Process-directed discovery should be predicated on a thoughtful analysis of strategic considerations, the goals of the Federal Rules, and a factual record that is consistent with well-recognized burdens of proof.

1. Timing Considerations

Any decision to pursue process-directed discovery initially raises questions of timing. With some exceptions, Rule 26(d)(3) of the Federal Rules of Civil Procedure permits a party to use any method of discovery in any sequence they wish. A party may serve an early set of written discovery requests or a Rule 30(b)(6) notice that focuses on the responding party's document preservation policies, as well as any processes for identifying, collecting, reviewing, and producing responsive documents. In the typical case, however, those early discovery efforts will have little practical value in promoting the goals of Rule 1. Rule 26(b)(1) contemplates that litigants will focus on information that bears upon the merits of the claims and defenses and is important to the needs of the case. It is difficult to see how process-

118. The Sedona Conference, *supra* note 7, at 59; *see, e.g.*, Congoo, LLC. v. Revcontent LLC., No. 16-401 (MAS), 2017 WL 3584205, at *3 (D.N.J. Aug. 10, 2017) ("[I]t is well settled that the appropriate scope of discovery and the management of requests for discovery are left to the sound discretion of the Court."); Bradford v. Shrock, No. 3:11CV-00488-DJH, 2017 WL 3444801, at *2 (W.D. Ky. Aug. 10, 2017) ("District courts have 'broad discretion under the rules of civil procedure' in managing the discovery process and controlling their dockets.").

directed discovery served at the outset of the case (particularly in advance of any merits-based discovery) would be "important" in resolving the issues raised in the complaint or answer or withstand proportionality challenges under Rule 26(b)(1).[119] More to the point, Rule 26(b)(2)(C)[120] states that the court must limit the frequency or extent of discovery if it determines that the proposed discovery would be outside the scope of Rule 26(b)(1) or could "be obtained from some other source that is more convenient, less burdensome, or less expensive." The latter restriction plainly implicates the Rule 26(f) process.

Rule 26(f) states that the parties "must" develop a discovery plan that addresses "any issues about disclosure, discovery, or preservation of" ESI and "any other orders the court should issue under Rule 26(c) or under Rule 16(b) and (c)."[121] By way of illustration, *The Guidelines Addressing the Discovery of Electronically Stored Information* for the District of Colorado note that counsel at the Rule 26(f) conference "should discuss the scope, sources, and types of ESI that have been and will be preserved in light of the claims and defenses in the case and other proportionality factors." Counsel should be "prepared to identify likely sources of relevant ESI," "provide basic information about their client's system architecture and protocols," and consider the types of data that may be relevant to the issues in dis-

119. FED. R. CIV. P. 26(g)(3) (The court has the power to impose sanctions "on motion or on its own.").

120. FED. R. CIVIL P. 26(b)(2)(C) (The court must act either "on motion or on its own.").

121. *Cf.* Techtronic Indus. North America, Inc. v. Inventek Colloidal Cleaners, LLC., No. 13-4255 (NLH/JS), 2013 WL 4080648, at *2 (D.N.J. Aug. 13, 2013) (noting the benefits of the Rule 26(f) "meet and confer," which include identifying relevant issues and narrowing potential disputes).

pute, the estimated volume of relevant ESI in the parties' possession, and current locations and custodians of relevant data. The parties are further directed to "discuss alternative methods for collecting, filtering and reviewing ESI." Comparable requirements or suggestions have been adopted by other federal district courts.[122]

A party that believes process-directed discovery may be appropriate at some future point should raise those issues initially in a letter sent to the opposing party in advance of the Rule 26(f) conference.[123] That communication should not be cast as an ultimatum or a demand for sweeping disclosures. Counsel should explain how or why focused information will facilitate the discovery process and the ultimate resolution of the action; suggesting that process-directed information will enable the requesting party to draft better interrogatories or requests for production seems unpersuasive. A better approach would be to ask for sources of relevant ESI that may not be reasonably accessible under Rule 26(b)(2)(B), and/or ask whether or to what extent the opposing party can readily search for responsive ESI. More importantly, the letter should invite a reasoned and cooperative response from the other side.

---

122. *See, e.g.*, U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED DISCOVERY [ESI]; U.S. DIST. COURT FOR THE DIST. OF DEL., DEFAULT STANDARD FOR DISCOVERY, INCLUDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION ("ESI").

123. *See, e.g.*, Rabin v. Pricewaterhousecoopers LLP, No. 16-cv-02276, 2016 WL 5897732, at *1 (N.D. Cal. Oct. 11, 2016) (directing the parties to "conduct discovery in a cooperative manner . . . and conferring in good faith on topics such as identification of custodians of relevant ESI, potentially relevant data sources, search methodologies, and such other issues as may arise during the course of discovery").

Should discussions be unproductive at the Rule 26(f) conference, process-directed issues can be addressed at the Rule 16 scheduling conference. At both conferences, the party seeking process-directed discovery must couch their requests as steps intended to expedite the disposition of the action and discourage wasteful pretrial activities.[124] Raising process-directed issues at the Rule 26(f) conference and then, if necessary, at the scheduling conference with the court, has the potential to frame focused motion practice. Sweeping demands for any and all process-directed information, on the other hand, will be challenged as requesting "unnecessary proof and cumulative evidence," as inconsistent with the goal of "formulating and simplifying the issues," or contrary to the goal of "controlling and scheduling discovery."[125]

Although very early requests focusing on an opponent's e-discovery processes are not particularly helpful in resolving the litigation, precluding process-directed discovery in the absence of "specific, tangible, evidence-based indicia . . . of a material failure by the responding party to meet its obligations" will only invite extended motion practice over what constitutes "specific" or "tangible" omissions or how to define a "material" violation of discovery obligations. More to the point, Rule 26(e) states that a party must supplement in a timely manner discovery responses that are incomplete or incorrect, or where additional or corrective information has not been disclosed to other parties "during the discovery process or in writing."[126] A responding party's supplementation of discovery responses, even if tardy,

124. FED. R. CIV. P. 16(a)(1) and (3).

125. FED. R. CIV. P. 16(c)(2)(A), (D), and (F).

126. FED. R. CIV. P. 26(e).

may well preclude process-directed discovery and leave the responding party on the horns of a dilemma. A motion filed late in the pretrial process, after all written discovery, fact depositions, and expert disclosures have been completed, effectively becomes a motion to reopen discovery, which may be difficult to rationalize under Rule 1.[127]

Save for the exceptional case, the proper time, if at all, to seek process-directed discovery is after written discovery has been answered and more critical depositions have been taken. At that point, the requesting party has obtained enough discovery to determine whether deficiencies in the producing party's production are sufficiently important to the ultimate disposition of the action to require judicial intervention.

2. Carefully Select the Appropriate Remedy

If a party concludes that process-directed discovery is necessary, the next issue is how to obtain that information. Process-directed information can be obtained through written discovery or through a Rule 30(b)(6) deposition. Although interrogatories provide the most cost-effective discovery method, responses will be delayed (the responding party, typically, is allowed 30 days to answer) and written discovery may be ineffective if the

127. *See, e.g.*, Zimmerman v. Edwin A. Abrahamsen & Associates, P.C., No. 15-CV-1174, 2017 WL 3701827, at *6 (M.D. Pa. Aug. 28 2017) (holding that while the plaintiff requested additional discovery before the expiration of the discovery deadline, the motion to compel was filed after that deadline passed; granting the motion "would require the Court to extend the discovery deadline . . . without the requisite good cause shown and would 'reward [Plaintiff's] failure to undertake discovery in this matter'"); Gray v. Cox, No. 2:14-cv-01094-JAD-PAL, 2016 WL 4367236, at *3 (D. Nev. Aug. 11, 2016) ("If the moving party has unduly delayed or the delay would result in substantial prejudice to the opposing party, the court may conclude that a motion to compel is untimely.").

responding party interjects boilerplate objections or incomplete responses. A Rule 30(b)(6) deposition has the advantage of allowing follow-up questions, but imposes increased expense on both sides and may result in subsequent motion practice if the deponent is unprepared to testify about information known or reasonably available to the organization. Although both discovery tools have advantages and disadvantages, neither avenue will be immediately effective if the parties become mired in motion practice. The best way to avoid that possibility is to draft written discovery and/or deposition topics that are focused and proportional to the actual needs of the case. Broadly-based discovery requests will almost certainly increase the time and expense of the pretrial process, without materially advancing the disposition of the case.

Another alternative might be regular discovery sessions with the court or a special master appointed by the court. Echoing Magistrate Judge John Facciola's comments in *Tadayon v. Greyhound Lines, Inc.*,[128] a court has the discretion to require the parties to "meet and confer in person in a genuine, good faith effort to plan" discovery and to submit a discovery plan for the court's approval. Judge Facciola noted that he would "schedule a telephone status conference every two weeks in which [he]

128. No. 10-1326 (ABJ/JMF), 2012 WL 2048257, at *6 (D.D.C. June 6, 2012). *See also* Waters v. Drake, 222 F. Supp. 3d 582, 606 (S.D. Ohio 2016) (observing that active judicial case management includes "active and early involvement by judges to fashion discovery that is proportional to the needs of the case," as well as timely intervention by the court to resolve disputes, and "regular discovery conferences"); Pacific Coast Steel v. Leany, No. 2:09-cv-02190-KJD-PAL, 2011 WL 4572008, at *1 (D. Nev. Sept. 30, 2011) (noting that the court "has been conducting regular case management and dispute resolution conferences in this case, and has resolved a large number of the parties' discovery disputes on an ongoing basis without the necessity of formal briefing on the parties' Joint Status Reports").

will ask the parties about their progress (or lack thereof) and try to resolve any disagreements they have." This author has found that when regular discovery conferences have been set, the parties either resolve disputes on their own or significantly narrow the areas of disagreement before speaking with the court.

If proper process-directed discovery has been served without adequate responses, motion practice may be inevitable. Rule 37(a)(3) permits a party to move to compel responses to interrogatories submitted under Rule 33 or permit inspection under Rule 34.[129] The moving party, however, must seek relief under Rule 37(a)(3) based upon discovery requests that were actually served on opposing counsel, not on completely different requests that counsel would now prefer to pursue. Discovery requests are potentially vulnerable if the requested information does not appear to be relevant to the issues at stake in the action, or is unreasonable or unduly burdensome or expensive.[130] The same potential problem exists if a requesting party moves to reopen a Rule 30(b)(6) deposition. As the court noted in *Fish v. Air & Liquid Systems Corp.*, a Rule 30(b)(6) deposition is improper if

129. FED. R. CIV. P. 37(a)(3).

130. *See, e.g.*, Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 634 (D. Colo. 2007) (suggesting an unwillingness to impose sanctions "that might be misconstrued as a tacit endorsement of poorly drafted discovery requests"); *cf.* Williams v. Metcalfe, C 08-3907 SI (pr), 2010 WL 2640293, at *1 (N.D. Cal. July 1, 2010) (warning plaintiff that any motion to compel must be "tied specifically to the discovery he has propounded and for which he has been unable to receive satisfactory responses;" plaintiff "cannot request one document from defendants and then ask the court to order them to produce another document"); Cartel Asset Management v. Ocwen Financial Corp., No. 01-cv-01644-REB-CBS, 2010 WL 502721, at *24 (D. Colo. Feb. 8, 2010) ("In reviewing a claim that an answer to an interrogatory is not responsive or is incomplete, the initial focus is on the question, not the answer, for on the question you ask depends the answer you get.").

it seeks process-directed discovery that is not relevant to the allegations in the case or seeks information that is patently disproportional to the needs of the case.[131] The plaintiffs in *Fish* failed to demonstrate why information regarding Ford's document collection, search efforts, or retention efforts had any relevance to the claims in the action. More importantly, the proposed deposition in *Fish* would simply "distract the parties from merits issues and instead force them to spend time and resources on nonmerits issues that do nothing to resolve the pending dispute."

Finally, a party could seek relief under Rule 26(g)(3). That rule permits the court, either on motion or *sua sponte*, to take action if a party or their attorney fails to comply with Rule 26(g) without substantial justification. A party serving or responding to written discovery must certify, based upon a reasonable inquiry, that their discovery requests, responses, and objections are consistent with the Federal Rules of Civil Procedure, are not intended for an improper purpose, and are neither unreasonable or unduly burdensome or expensive. If judicial intervention is required under Rule 26(g)(3), the court has considerable discretion in addressing any real or perceived problems. As the court explained in *S2 Automation*, the critical questions are

131. No. GLR-16-496, 2017 WL 697663, at *14–18 (D. Md. Feb. 21, 2017). *But see* Stage v. Restoration Hardware, Inc., No. 2:14-cv-077, 2015 WL 631113, at *1 (S.D. Ohio Feb. 12, 2015) (After determining that it was "not clear from the record" what the defendant's ESI search encompassed and noting examples of apparent incomplete document production, the court permitted the plaintiff to "use a Rule 30(b)(6) deposition to investigate, among other topics, the efforts that Restoration Hardware made to locate, collect, review and produce responsive documents." The court also suggested that the plaintiff could then request a hearing where the defendant's employees would have to "describe under oath the efforts they made to locate responsive documents and to certify that all responsive documents have been produced.").

whether counsel has complied with their Rule 26(g) obligations and whether that attorney employed a reasonable strategy to provide responsive discovery. The latter analysis "is often a fact-intensive inquiry that requires evaluation of the procedures the producing party employed during discovery."[132]

> [T]he totality of the circumstances should be evaluated to determine the appropriate sanction. Appropriate or "just" sanctions may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances. Moreover, sanctions should be tailored to address the harm identified.[133]

In seeking relief under Rule 26(g)(3), the moving party should be required to show a violation that is more than speculative or de minimis. If such a showing is made, the non-moving party can be required either to supplement their prior discovery requests or to show that all reasonable steps have been taken to identify and produce responsive materials and that no additional information is reasonably available. As in *S2 Automation,* the court also has the authority to require the non-moving party to explain its search strategy for identifying pertinent documents, including the procedures that party used and how that party interacted with its counsel to facilitate the production process. Relief under Rule 26(g)(3) may actually provide the most

132. S2 Automation, L.L.C. v. Micron Technology, Inc., No. CIV 11-0884 JB/WDS/, 2012 WL 3656454, at *31 (D.N.M. Aug. 9, 2012).

133. Younes v. 7-Eleven, Inc., 213 F.R.D. 692, 713 (D.N.J. 2015).

efficient and cost-effective way to resolve any process-directed discovery disputes.

3. Remember Your Burden of Proof

Finally, a party seeking process-directed discovery under Rule 37(a), or a producing party moving for relief under Rule 26(c), must present sufficient evidence to satisfy their burden of proof. Process-directed discovery should not be granted based on bald speculation alone; it is difficult, in that case, to see how such a motion could withstand challenge on proportionality grounds. An argument centered around the notion that "I didn't get what I expected" should be no more effective in an e-discovery case than it was in a paper world.[134] It is difficult to understand how a court could vacate pretrial deadlines or require a producing party to incur significant costs based upon minimal discrepancies in an ESI-intensive case. It seems equally clear, however, that a party should not be required to endure repeated production delays or Rule 26(g) deficiencies before requesting information relating to the producing party's e-discovery process. The critical issue is how to frame a request for relief under Rule 26(c) or Rule 37(a).

Although Rule 26(b)(1) does not require a litigant seeking discovery to "address all proportionality considerations," a

134. *See, e.g.*, Family Wireless #1, LLC v. Automotive Techs. Inc., No. 3:15CV01310(JCH), 2016 WL 3911870, at *4 (D. Conn. Jul. 15, 2016) (In addressing one of the issues framed by the defendant, the court rejected the argument that "it simply cannot be the case that these Plaintiffs" did not have additional responsive documents. The court, however, required plaintiffs to provide a sworn affidavit setting forth the general nature of the search they conducted in responding to defendant's requests for production and the nature of plaintiffs' counsel's oversight of that search.).

moving party seeking information about an opponent's e-discovery processes should explain how proportionality factors have been addressed in a focused request for relief. A motion under Rule 37(a)(3) should demonstrate how the requested relief relates to specific issues that will be decided in the case, and furthers the Rule 1 goals of just *and* speedy *and* inexpensive. So, for example, rather than broadly requesting information about all facets of the opposing party's e-discovery process, a moving party may be more successful by identifying specific categories of missing information that relate to a key witness or custodian. Alternatively, the moving party should remind the court that the credibility of a key witness will be at issue at trial or that previously undisclosed information may relate to "other incidents of the same type or involving the same product." In the same way, a party seeking a protective order should show with factual support that the burdens of the requested discovery substantially outweigh any tangential benefits that might come from additional discovery relating to the moving party's e-discovery process.

In the final analysis, a party seeking process-directed discovery must determine whether and to what extent additional information will materially advance the ultimate disposition of the action. Discovery about discovery is not a substitute for an informed and strategic application of the Federal Rules of Civil Procedure.