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Recent Trends in Discovery in Arbitration and in the Federal Rules of Civil Procedure

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Recent Trends in Discovery in Arbitration and in the Federal Rules of Civil Procedure

Paul B. Radvany*

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INTRODUCTION

Arbitration occupies an important place in the landscape of dispute resolution options for commercial and financial disputes. Over the past few decades, the number of traditional trials has dropped, leading the academic community to discuss the

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phenomenon of the “vanishing trial”¹ and a concomitant “Quiet Revolution”² in the usage of alternative dispute resolution. Arbitration is a well-established method for resolving disputes, particularly within the business community. The conventional wisdom is that arbitration offers a faster, less-expensive, more private, flexible, and party-controlled means of resolving disputes, with the further added advantage of being a less-adversarial process, which helps to amicably preserve beneficial business relationships between parties.³

However, recent surveys of arbitrators and counsel alike have indicated that, despite this conventional wisdom, arbitration can play out differently in practice.⁴ The adoption of arbitration in business-to-business commercial disputes is not as widespread as some in the legal community believe. Some surveys indicate that some of the in-house and outside counsel collectively responsible for litigating arbitrations are concerned that arbitration increasingly resembles traditional litigation.⁵ As a result, some have argued that the arbitration community needs to address these concerns in order to ensure that arbitration remains a uniquely beneficial method of dispute resolution and retains its comparative advantage over litigation in terms of costs and duration.⁶ In short, large-scale

1. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (tracing the decline in trials across various American fora).

2. See Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 2–3 (2014) (discussing the transformation of American conflict resolution at the end of the twentieth century).

3. *Id.*

4. See discussion *infra* Part III(A) (revealing recent trends toward longer and more costly arbitration).

5. *Id.*

6. See Thomas J. Stipanowich, *Arbitration: “The “New Litigation,”* 2010 U. ILL. L. REV. 1, 58–59 (2010) (concluding that arbitration’s shift towards being a “New Litigation” style of dispute resolution has “led to the frustration of many users who find their arbitration experience wanting when measured in terms of its conventional attributes such as speed and economy of process,” and that therefore there is a need to “understand and address arbitration in a more nuanced and sophisticated way, . . . not as a unitary concept, but as a spectrum of possibilities and a realm of choice that demands more active participation by those who use, regulate, and comment on the arbitration processes”).

business-to-business arbitration has drifted, in some instances, closer to litigation on the procedural end of the spectrum, and thus, it may be necessary for arbitration to return to its roots.

Of the various concerns held by counsel involved in arbitrations, many relate to the discovery phase of the arbitration process. This Article will describe the ways in which different arbitration regimes attempt to provide the appropriate level of discovery necessary to resolve commercial disputes. It will also compare discovery in arbitration to discovery in federal litigation in order to provide a basis for determining the advantages or disadvantages of arbitration. Further, this Article will describe the various problems parties occasionally encounter while conducting discovery in arbitration, and will show how such problems are sometimes the result of parties seeking expansive discovery, and arbitrators either shying away from using their discretion to limit discovery, or believing that they lack the authority to prevent parties from engaging in certain practices.

Part I of this Article outlines the revisions to the Federal Rules of Civil Procedure (Federal Rules). Part II describes the arbitration rules promulgated by two different arbitration regimes, and then compares them to the revisions of the Federal Rules. Finally, Part III explains recent responses to concerns that arbitration increasingly resembles litigation, and how changes to the Federal Rules may have a spill-over effect on arbitration proceedings through helping to limit discovery and allowing arbitrators to take more of a managerial role during discovery.

I. THE 2015 REVISIONS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Proposed amendments and revisions to the Federal Rules have come out of committee, finished a period of public comment, and gone into effect on December 1, 2015.⁷ These amendments aim

7. See COMM. ON RULES OF PRACTICE & PROC., REPORT TO STANDING COMM. ON RULES OF PRACTICE & PROC., app. B-1 to B-3 (2014) [hereinafter SEPT. 2014 RULES REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf> (explaining the proposed amendment and requesting consideration by the Supreme Court).

to bring about a less costly, less protracted, and less burdensome civil litigation process.⁸ A 2009 survey by the American Bar Association's Section of Litigation concluded that there was a high level of dissatisfaction with the current state of civil litigation in federal courts.⁹ Judicial inattentiveness to discovery is often lamented by practicing attorneys nationwide.¹⁰ Additionally, attorneys complain that the nature of discovery has fundamentally

8. See ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROC., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 4, 12 (2010) [hereinafter 2010 REPORT TO THE CHIEF JUSTICE], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Report%20to%20the%20Chief%20Justice.pdf> (“[The goals of the amendments] are the goals of Rule 1: to secure the just, speedy, and inexpensive determination of every civil action and proceeding in the federal courts.”).

9. See Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make A Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 495–96 (2013) (mirroring a similar survey jointly conducted by the American College of Trial Lawyers, and the Institute for the Advancement of the American Legal system, which found that the civil justice system was “in serious need of repair,” and “takes too long and costs too much,” while finding that practicing attorneys singled out discovery as “the primary cause for cost and delay” (internal quotation marks omitted)); see also A.B.A. SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT, (2009) 5, 6, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf> (“Discovery . . . is seen as the primary cause for cost and delay.”); AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&CContentI=4008> (“In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally . . . From the outside, the system is often perceived as cumbersome and inefficient.”).

10. See Grimm & Yellin, *supra* note 11, at 505–06 (discussing the 2010 survey by the Federal Judicial Center, which found that two-thirds of respondents agreed that judges do not invoke Rule 26 discovery limitations on their own, and just under one half further agreed that judges “do not enforce Rule 26 to limit discovery.” (citing REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT’L. EMPT. LAWYERS ASS’N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 3, 11 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf>)).

changed due to developments in the size and complexity of litigation, the technological progress connected to the rise of electronically stored information, and the legal culture pushing the bounds of “broad” discovery over a period of more than seventy years.¹¹

Over the past twenty years, the discovery phase of traditional civil litigation has increased in duration and cost due to a number of factors. First, the amount of potentially discoverable material has increased, especially due to the tremendous growth in electronically stored information.¹² Second, parties are increasingly making broad discovery requests, while their adversaries are making routine objections, leading to more disputes.¹³ Finally, as the number of trials has declined, discovery has sometimes become the forum for “zealous” and “hyper-adversar[ial]” attorney behavior.¹⁴ The Federal Rules aim at philosophically “broad”¹⁵ discovery, but some

11. See Grimm & Yellin, *supra* note 11, at 507–08.

12. See David F. Herr & Jolynn M. Markinson, *E-Discovery Under the Minnesota Rules: Where We’ve Been, Where We Might Be Headed*, 40 WM. MITCHELL L. REV. 390, 406-07 (2014) (discussing “the continued application of Moore’s Law and the ever-decreasing cost of mass computer storage,” and how “[t]here are now exponentially more records involved in litigation than would once have been possible.”).

13. See Herr & Markinson, *supra* note 14, at 407 (“It is easy to draft a plausible-sounding document request that might call for production of a million documents.”); see also, Andrew Mast, *Cost-Shifting in E-Discovery: Reexamining Zubulake and 28 U.S.C. S 1920*, 56 WAYNE L. REV. 1825, 1839 (2010) (discussing how “the current scheme encourages excessively broad discovery requests”); Matthew L. Jarvey, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 914 (2013) (“One of the most rampant abuses of the discovery process is the use of boilerplate objections to discovery requests.”).

14. See Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 189 (2013) (“As the number of cases going to trial continues to decline, discovery becomes the context within which this ‘zealous advocacy’ plays out.”); see also, Brian Morris, *The 2015 Proposals to the Federal Rules of Civil Procedure: Preparing for the Future of Discovery*, 41 N. KY. L. REV. 133, 140 (2014) (“Litigants will be urged to curtail ‘hyper-adversary behavior’ while encouraged to work directly with opposing counsel.”).

15. See Grimm & Yellin, *supra* note 11, at 507–08.

parties have used that leeway tactically to impose burden, delay, and cost upon opposing parties.¹⁶

In 2010, the Advisory Committee on the Federal Rules (Advisory Committee) convened the “Duke Conference,” which included judges, representatives from big law firms, public interest groups, and both plaintiff and defense counsel.¹⁷ The goal was to produce guiding principles for a new package of rule changes to the Federal Rules, meant to “refocus both the Federal Rules and litigators on the mandate set forth in Rule 1 for the ‘just, speedy, and inexpensive determination’ of federal civil litigation.”¹⁸ The conference determined that there was a need for “(1) early and active judicial case management, (2) proportionality in discovery, and (3) cooperation among lawyers.”¹⁹ In 2013, the Advisory Committee decided to recommend the “Duke Rules Package,” which included suggested changes to the Rules themselves, for publication to the Standing Committee.²⁰ The suggested rule revisions encompassed the three themes identified by the conference.²¹ In June of 2014, after a period of further review, a finalized set of proposed amendments was forwarded by the Advisory Committee for consideration by the Judicial Conference, the Supreme Court, and Congress.²²

16. The Duke Committee’s 2010 REPORT TO THE CHIEF JUSTICE contrasts how defense side parties perceive plaintiff parties with little information to be discovered as “hav[ing] the ability to impose enormous expense on large data producers—not only in legal fees but also in disruption of ongoing business—with no responsibility . . . to reimburse the costs,” with how plaintiff sides perceive much of the cost of discovery to arise from defense “efforts to evade and ‘stonewall’ clear and legitimate requests,” as well as filing motions “to impose costs rather than to advance the litigation.” 2010 REPORT TO THE CHIEF JUSTICE, *supra* note 8, at 4.

17. *See* Morris, *supra* note 14, at 133–34 (describing the Duke conference, and the individuals and entities whose attendance was “welcomed”).

18. *See id.* at 134 (quoting 2010 REPORT TO THE CHIEF JUSTICE, *supra* note 9 at 12) (discussing how abundant costs, burdens, and delays to litigation in federal courts led to the Duke Conference).

19. *Id.*

20. *Id.* at 136–37.

21. *See id.* at 134 (discussing how the Duke themes “are the crux of the new proposals that the Standing Committee approved for comment.”).

22. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-1 (stating that the text of the proposed rules and the proposed Advisory Committee Notes

A. *Changes to Federal Rules 26 and 34*

The most significant changes to the Federal Rules concern Rules 26 and 34. Some commentators go so far as to argue that these changes may affect the scope and nature of discovery, and constitute a “sea change” in philosophically broad discovery.²³ However, given the suggested changes and the Advisory Committee’s comments, it remains to be seen whether the rules will cause such a “sea change.” Nevertheless, the various changes to these two rules represent the Advisory Committee’s attempt to strengthen considerations of proportionality.

The Committee’s recommendations made several changes to Rule 26, with four key changes occurring in Rule 26(b)(1). First, the recommendations elevate the “proportional[ity]” factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) in order to make them “part of the scope of discovery.”²⁴ Second, the recommendations eliminate the language concerning the discovery of sources of information, finding the language “unnecessary.”²⁵ Third, the Committee eliminates the language distinguishing between discovery of information “relevant to the parties’ claims or defenses,” and discovery of information “relevant to the subject matter of the action, on a showing of good cause” by deleting the latter provision.²⁶ Finally, the recommendations remove the provision for discovery of information “reasonably calculated to lead to the discovery of admissible evidence.”²⁷ A memo released by the Advisory Committee indicates the changes made with the new wording of the rule:

immediately following may be forward to the Judicial Conference, the Supreme Court, and Congress).

23. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331 (2013) (commenting that the substantive plausibility requirement drastically effects a plaintiff’s ability to survive the pleading stage).

24. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-4.

25. See *id.* (“[L]anguage regarding the discovery of sources of information is removed as unnecessary[.]”).

26. *Id.*

27. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-4.

(b)(1) *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. ~~Information within this scope of discovery need not be admissible in evidence to be discoverable. — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~²⁸

The underlined language represents the addition of the new proportionality threshold. Proportionality was previously found in Rule 26 (b)(2)(C)(iii), but was not frequently employed by judges.²⁹ However, the additional language attempts to make consideration of proportionality part of the threshold analysis, by discussing the “needs of the case,” “amount in controversy,” “parties’ relative access to relevant information,” “parties’ resources,” “importance of the issues at stake in the action,” and whether the “burden or expense of the proposed discovery” in fact “outweighs its likely benefit”.³⁰

28. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-30–31. The proposed additions are underscored and the proposed deletions are struck-through.

29. See Morris, *supra* note 14, at 147 (“[T]he Advisory Committee noted that judges and litigants rarely use the provision.”).

30. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-30–31.

This new text in Rule 26(b)(1), taken almost *verbatim* from the current text of Rule 26(b)(2)(C)(iii),³¹ essentially casts proportionality as a threshold requirement, one which lawyers and judges will find harder to ignore.³²

One new factor, however, has been added to (b)(2)(C)(iii)—a requirement that courts must consider the parties' relative access to information.³³ This factor was included in part as an

31. In the revised rules, the language of 26(b)(2)(C)(iii) has been changed to reflect the modification to 26(b)(1), so as to avoid redundancy. The new (C)(iii) rule now reads:

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: * * *

(iii) ~~the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-32.

32. The questions of how to effectively provide for proportionality within Rule 26 and where to do so has been debated for quite some time. The proportionality factors—although not the term itself—were originally added by the Committee in the 1983 revisions to Section (b)(1). However, in 1993, although two new factors—whether “the burden or expense of the proposed discovery outweighs its likely benefit,” and “the importance of the proposed discovery in resolving the issues”—were added, the Committee moved the proportionality factors to Rule 26(b)(2)(C). SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5. In the 2000 revisions however, the Committee again amended (b)(1), feeling the need to add what it acknowledged to be an “otherwise redundant cross-reference” directing that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii) [not Rule 26(b)(2)(C)],” because “courts were not using the proportionality limitations as originally intended[.]” *See generally id.* at app. B-7. In the current round of amendments, the Advisory Committee mentions something which may explain this decades-long tension over how to encompass proportionality; that during the Duke Conference, “discussions at the mini-conference sponsored by the Subcommittee revealed significant discomfort with simply adding the word ‘proportional’ to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder.” As a result, the committee for this newest round of amendments decided to include the word itself, as well as the factors previously found in 26(b)(2)(C) in (b)(1). *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5.

33. *See id.* at app. B-30.

acknowledgement of the fact that some cases “involve what is often called an information asymmetry” at the outset of litigation and through the discovery phrase.³⁴ The Advisory Committee acknowledges that “[i]n practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information,” but nevertheless this is cognizable under the rules.³⁵

In the Committee Note regarding the initial draft of the proposed amendment to Rule 26, the Advisory Committee explained that while consideration of proportionality was supposedly “familiar,” the purpose of this change is to incorporate proportionality into the scope of discovery in a fashion “that must be observed by the parties without court order,”³⁶ thereby attempting to ensure that the parties consider proportionality in every case, even before a judge weighs in.³⁷ Similarly, the narrowing of “relevan[ce]” also furthers the goals of philosophically “proportional” discovery—the Advisory Committee reasoned that if a matter is outside “[p]roportional discovery relevant to any party’s claim or defense,” then “[s]uch discovery may support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.”³⁸

The struck-through language appears to narrow the meaning of “relevance” in the discovery context. The Federal Rules previously permitted wide discovery, but the removal of the “relevant to the subject matter” provision sends a message to judges and counsel alike that discoverable material must comport with a somewhat narrower definition of “relevance.” Previously, court-ordered discovery “[f]or good cause” would include items “relevant to the subject matter involved in the action,” and the discovery of inadmissible but “reasonably calculated to lead to”

34. See SEPT. 2014 RULES REPORT, *supra* note 7. at app. B-40-41.

35. See *id.*

36. See JUDGE DAVID G. CAMPBELL, COMM. ON RULES OF PRACTICE & PROC., REPORT TO STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22 (2013), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf> [hereinafter “MAY 2013 RULES REPORT”].

37. See MAY 2013 RULES REPORT, *supra* note 36 at 22 (“[T]he change incorporates them into the scope of discovery that must be observed by the parties without court order.”) (emphasis added).

38. MAY 2013 RULES REPORT, *supra* note 36 at 22.

admissible evidence was permitted by Rule 26(b)(1).³⁹ The Advisory Committee states that the “relevant to the subject matter” language was removed because, in their experience, it was “virtually never used.”⁴⁰ However, parties have sometimes relied upon the “reasonably calculated” language to define the scope of discovery.⁴¹ In those cases, such attempts contributed to the expensive, time-consuming discovery practices, which sometimes rose to the level of “fishing expeditions.”⁴²

According to the Advisory Committee, the revisions to Rule 26 seek to eliminate these practices, although it remains to be seen whether, these changes will in fact bring about a meaningful change in broad discovery in practice. The Advisory Committee contends that these changes will not represent a meaningful change in the scope of discovery, but this position may not reflect the practical reality of how attorneys have historically invoked previous iterations of the rules. Insofar as the Advisory Committee has determined that existing rules have sometimes been misused, their pronouncement that these revisions will not represent a major change rests on the assumption that the previous rules, as practiced, were interpreted and applied correctly.⁴³ Decades of revisions to both proportionality and relevance in Rule 26 indicates that the Advisory Committee has not been satisfied with the practical interpretation and application of

39. See 2010 REPORT TO THE CHIEF JUSTICE, *supra* note 9, at 8–9 (discussing the scope of Rule 26(b)(i) in 2000).

40. See SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-9, B-43 (“The Committee has been informed that [the subject matter] language is rarely invoked.”).

41. See *id.* at app. B-9–10 (discussing the use of the “reasonably calculated” language by attorneys to expand the scope of discovery to anything that is reasonably calculated to be helpful in the litigation).

42. See Miller, *supra* note 23 at 353 (“Although that deletion appears innocuous, the elimination of the passage was read by some—with some justification—to negate any lingering notion that discovery was limitless and permitted ‘fishing’ expeditions.”).

43. See SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-10 (“Most of the comments opposing this change complained that it would eliminate a ‘bedrock’ definition of the scope of discovery, *reflecting the very misunderstanding the amendment is designed to correct.*” (emphasis added)).

either principle.⁴⁴ Thus, it remains to be seen what the actual effect of these revisions will be. If the changes to Rule 26 bring about the Advisory Committee's apparently longstanding intentions concerning proportionality and relevance, the changes may bring about a substantial change in how discovery is actually practiced. This is possible based on the Advisory Committee's repeated pronouncements that parties' reading, interpretation, and usage of its rules have often been incorrect.⁴⁵

The changes to Rule 26 could potentially be abused by parties with tactics such as vague proportionality objections, absent corresponding revisions elsewhere. However, the Advisory Committee makes such changes in Rule 34, by recommending two additions to Section (b)(2). In Rule 34(b)(2)(B), parties objecting to the production of items or categories of items must now explain the

44. See *supra* notes 29–36 and accompanying text (describing the history of proportionality revisions from 1983 to the present). In terms of the Advisory Committee's longstanding attempts to provide for the proper scope of relevance, the “reasonably calculated” language was first added in 1946, and initially intended to cure the problem of parties using inadmissibility to bar relevant discovery. After 1946, however, parties simply shifted to relying upon the new language to define the scope of discovery, prompting a further attempt by the Committee during the 2000 revisions to clarify their original intent, which the Committee acknowledges also failed. See also SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-10 (“Despite the original intent of the sentence and the 2000 clarification, lawyers and courts continue to cite the ‘reasonably calculated’ language as defining the scope of discovery. Some even disregard the reference to admissibility, suggesting that any inquiry ‘reasonably calculated’ to lead to something helpful in the litigation is fair game in discovery.”).

45. Interpreting its own 2000 Committee Note which stated that “relevant means within the scope of discovery as defined in this subdivision [(b)(1)][,]” the 2014 Committee states that “[t]hus, the ‘reasonably calculated’ phrase applie[d] only to information that [was] otherwise within the scope of discovery set forth in Rule 26(b)(1); it *d[id]* not broaden the scope of discovery.” SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-10 (emphasis added). However, that interpretation of the Note was not always practiced. Rather, the scope of discovery continued to be abused not only by lawyers, but by courts as well. See *supra* notes 32, 39–43 (discussing the misinterpretation of the proportionality limitations by courts). Thus, the 2014 Advisory Committee's intent is that “[t]he proposed amendment will eliminate this *incorrect reading of Rule 26(b)(1)* while preserving the rule that inadmissibility is not a basis for opposing discovery of relevant information.” SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-10 (emphasis added).

basis for their objections “with specificity.”⁴⁶ Under the revised Rule 34(b)(2)(C), if such an objection is made, the objection must further state whether any responsive materials are being withheld.⁴⁷ The memo released by the Advisory Committee indicates how the new rule will read:

[(b)(2)] Responses and Objections.

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or—if the request was delivered under Rule 26(d)(2)—within 30 days after the parties’ first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.⁴⁸

46. See SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-53 (“Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity.”).

47. See SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-53 (“The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection.”).

48. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-51–53. The proposed additions are underscored and the proposed deletions are struck-through.

The first portion of underlined language in Section (B) and the underlined language in Section (C) will serve to prevent parties from responding to certain discovery demands with boilerplate, non-specific objections.

The Advisory Committee explains that adding the “specificity” requirement and the requirement to state what, if anything, is being withheld are both collectively necessary to eliminate the burdens imposed when the producing party—for tactical reasons—makes several vague, conclusory, or non-specific objections, yet still produces some information.⁴⁹ In such a situation, the requesting party is burdened because they are uncertain whether any relevant and responsive information has been withheld, and if so, what information, and on what basis.⁵⁰

The revised Rule 34 also enumerates what the Advisory Committee describes as the “common practice” of parties producing copies of documents or electronically stored information instead of allowing inspection.⁵¹ This revision has a corollary amendment, found in Rule 37, which will be discussed further below.⁵²

B. The Duty of Cooperation: Federal Rules 1, 37, 26(f), and 26(g)

The changes to the Federal Rules seek to ensure that parties cooperate more than they have under the current rules in order to resolve discovery disputes. In an attempt to increase cooperation among parties, one of the changes to Rule 1 attempts to highlight the parties’ purported duty to cooperate.⁵³ The Duke Conference identified and sought to remedy the overall problem of parties engaging in improper behavior during the discovery phase of litigation. Thus, the Duke Conference attempted to ensure that all entities—now including the parties themselves—involved in a lawsuit must cooperate lest they violate the spirit of the rules. The new rule reads: “Rule 1. Scope and Purpose. [These rules] should be construed, ~~and~~ administered, and employed by the court and the

49. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-11.

50. MAY 2013 RULES REPORT, *supra* note 36, at 26–27.

51. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-54.

52. *See infra* Part I(B).

53. Morris, *supra* note 14, at 140.

parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁵⁴ With this change, the Advisory Committee hopes to “emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.”⁵⁵

It remains to be seen whether this revision will greatly affect the manner in which discovery is conducted, given that the ideal of cooperation and the duty to act in good faith is already contained in the Federal Rules. Elsewhere in the rules, there are commands that parties cooperate in order to prevent unnecessary cost, delay, and judicial time that is spent resolving disputes. Federal Rule 37(a)(1) already requires that parties certify in any motion to compel disclosure or discovery that they have “in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain [disclosure or discovery] without court action.”⁵⁶ A revision to Rule 37(a)(3)(B)(iv), added to mirror the previously discussed addition to Rule 34(b)(1) concerning inspection of documents, now provides that a motion to compel a discovery response may be made if “a party fails to produce documents or fails to respond that inspection will be permitted.”⁵⁷

Another change to Rule 26(f)(2) makes parties “jointly responsible” for “attempting in good faith to agree on the proposed discovery plan,” an outline of which must be submitted to the court in writing within fourteen days after the Rule 16 scheduling conference.⁵⁸ The existing Rule 26(g)(1)(B), which requires attorneys’ signatures on discovery requests, responses, and objections, forbids parties’ attorneys from engaging in dilatory or disingenuous discovery activities.⁵⁹ Rule 26(g)(1)(B)(i) requires that requests, responses, and objections be consistent with the rules, laws,

54. MAY 2013 RULES REPORT, *supra* note 36, at 17 (presenting the Duke Rules Package to the standing committee).

55. *Id.* (describing the purpose of the amendments to Rule 1).

56. FED. R. CIV. P. 37(a)(1).

57. See SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-55 (underlined text is newly added to existing rule).

58. FED. R. CIV. P. 26(f)(2).

59. FED. R. CIV. P. 26(g)(1)(B).

or some other “nonfrivolous argument” for modifying the existing law.⁶⁰ Rule 26(g)(1)(B)(ii) requires that parties not interpose requests, responses, or objections for “improper purpose[s],” such as harassment, delay, or needless increase of cost.⁶¹ Lastly, the existing version of Rule 26(g)(1)(B)(iii) explicitly requires that parties consider proportionality.⁶²

Cooperative duties, similar to those found in Rule 37 and envisioned by the revised Rule 1, are sometimes also apparent in local rules of specific courts. The District Courts for the Southern and Eastern Districts of New York make provisions for efficient and cooperative resolution of discovery disputes, although these provisions vary slightly. The Eastern District requires parties to attempt to resolve disputes before the court will hear discovery motions, while the Southern District requires the parties to attempt to resolve any disputes before seeking assistance from the court.⁶³ The District Court of Maryland also features a local rule requiring conference between counsel before the court will consider any motion.⁶⁴

60. FED. R. CIV. P. 26(g)(1)(B)(i).

61. FED. R. CIV. P. 26(g)(1)(B)(ii).

62. *See generally* FED. R. CIV. P. 26(g)(1)(B) (“[Attorneys must acknowledge discovery is] neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”).

63. *Compare* S.D.N.Y. & E.D.N.Y. LOCAL CIV. R. 37.3, 38, *available at* <http://www.nysd.uscourts.gov/rules/rules.pdf> (“Prior to seeking judicial resolution of a discovery or non-dispositive pretrial dispute, the attorneys for the affected parties or non-party witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute, in conformity with Federal Rule of Civil Procedure 37(a)(1).”) *with* S.D. & E.D.N.Y. LOCAL CIV. R. 37.2, 37, *available at* <http://www.nysd.uscourts.gov/rules/rules.pdf> (“No motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the Court by letter-motion for a pre-motion discovery conference . . . and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.”).

64. *See* D. MD. LOCAL R. 104.7, 12 (Supp. 2012), *available at* <http://www.mdd.uscourts.gov/localrules/LocalRules-Oct2012Supplement.pdf> (“Counsel shall confer with one another concerning a discovery dispute and make sincere attempts to resolve the differences between them. The Court will not consider any discovery motion unless the moving party has filed a certificate reciting (a) the date, time and place of the discovery conference, and the names of all persons participating therein, or (b) counsel’s attempts to hold such a

C. *Increased Involvement of the Judge: Rules 4 and 16*

The Duke Conference also concluded that “sustained, active, hands-on judicial case management” was essential to improving the disposition of civil actions under the Federal Rules.⁶⁵ As a result, the revisions to Rules 4 and 16 intend to ensure that judges become more involved, and involved earlier.⁶⁶

The Committee also made various changes to Rule 16, deleting the provision that allowed the initial case management conference to be held “by telephone, mail, or other means,” in order to foster a more direct, in-person series of exchanges between parties.⁶⁷ However, the Committee Note to the revised rule nevertheless provides that “[t]he conference may be held [...] by telephone, or by more sophisticated electronic means,” so long as it remains consistent with the Committee’s view that “[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication.”⁶⁸ As such, it appears that a live video teleconference would still be permissible, especially if other alternatives would be unnecessarily burdensome.

Additionally, the rule reduces the timeframe for holding the conference. Under the rule, the conference must occur within the earlier of 90 days after any defendant has been served, or 60 days after any defendant has appeared; while the current rule provides that the conference must occur within the earlier of 120 days and 90 days, respectively.⁶⁹ The revisions to Rule 4 also reduce the

conference without success; and (c) an itemization of the issues requiring resolution by the Court.”).

65. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-2–3 (noting that after a year of reviewing several forms of data, there was near-unanimous agreement that the disposition of civil actions could be improved by early judicial case management).

66. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-12 (discussing how the Committee recommended to reduce the time limit for serving the summons from twelve days to eight days).

67. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-25, B-27 (“A scheduling conference is more effective if the court and parties engage in direct simultaneous communication.”).

68. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-27 (quoting the Committee Note).

69. *Id.* at B-25–26.

timeframe for serving summons and complaints from 120 days to 90 days.⁷⁰

Finally, the revised Rule 16(b)(3)(B) provision discussing what the judge's scheduling order may include has a new addition that also speaks to heightened judicial case management. The new Rule 16(b)(3)(B)(v) provides that the scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court."⁷¹ Thus, the revised rules envision an earlier and more active engagement of judges in discovery.

D. *Withdrawn Changes: Discovery Mechanisms and Scheduling Timeframes*

Certain proposed changes were withdrawn from the final draft of the rules after the comment period, in the face of strong opposition. These changes sought to dramatically limit the time and cost of discovery, and likely would have done so if adopted. Rule 30 currently governs the presumptive number of depositions and presently provides each party the opportunity to conduct ten depositions, with seven hours per deposition, whereas the rejected revision permitted each party to conduct five depositions, with six hours per deposition.⁷² Rule 33 governs the permissible number of interrogatories, and presently provides for up to twenty-five per party whereas the rejected revision provided for fifteen interrogatories per party.⁷³ Rule 36 governs requests to admit, and currently has no standing numerical limit whereas the rejected revision had a presumptive limit of twenty-five requests to admit per party.⁷⁴

70. SEPT. 2014 RULES REPORT, *supra* note 7. at app. B-23.

71. *Id.* at B-27.

72. See MAY 2013 RULES REPORT, *supra* note 36, at 24 (discussing the Advisory Committee on Civil Rules Report to the Standing Committee for Rule 30).

73. See MAY 2013 RULES REPORT, *supra* note 36, at 25 ("The purpose [of the reduction in the presumptive number of interrogatories] . . . is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices.").

74. See *id.* at 27; see also Schaffer & Schaffer, *supra* note 14, at 198–99 ("Under the proposed revision, a party could serve on any other party twenty-five requests to admit, but the numerical limit would exempt requests to admit the authenticity of documents.").

Under the original proposed new rules, parties seeking discovery above and beyond the new permissible amounts would have had to seek leave from the judge. To the degree that judges—in light of the other rule changes—might have been hesitant to grant such extensions, these changes would likely have saved time and money in many cases, if adopted.⁷⁵ However, even if these proposed rules had been adopted, parties would still have been free to stipulate to more depositions for various reasons such as when “the need for more depositions is obvious where both parties require more depositions for expert witnesses or when the case involves complex litigation.”⁷⁶

E. Analysis

It is difficult at this stage to predict how the rule changes will affect discovery. It appears they will likely result in somewhat fewer discovery disputes and an overall decrease in the cost and length of discovery; however, the limited nature of the changes suggests that the impact may actually not be dramatic. The “Duty of Cooperation” change to Rule 1, for example, which does not even explicitly use the word “cooperation,” although its purported purpose was to create a meaningful duty to do so, may be insufficient to achieve its purpose. As noted above, the duty to cooperate already exists in the current version of the Federal Rules but has proven ineffective at preventing detrimental behavior of counsel. Moreover, what constitutes a breach of the revised “duty” under the revised rule is unclear and leaves it to judges to determine whether or not a breach

75. See Morris, *supra* note 14, at 156 (“Requesting more depositions or discovery devices when leave from the court is required, however, is more difficult. Such a request would be subject to the new proportionality requirement that balances cost, burden, benefit, previous opportunity to obtain the requested information, and whether the request is duplicative or cumulative.”).

76. *Id.*; see also, Advisory Comm. on Rules of Civil Procedure, Draft Agenda Book of the April 11-12, 2013 Meeting of the Advisory Committee on the Rules of Civil Procedure, 95 (2013), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf> (describing how the changes to Rule 30 would have continued to direct the court that it “must” grant leave to take more depositions to the extent consistent with Rule 26(b)(1) and (2), and that “Rule 30(a)(2)(A) continues to recognize that the parties may stipulate to a greater number”).

has occurred, and whether sanctions would be an appropriate remedy.⁷⁷

Beyond the obvious problems of uniformity and consistency, at present, imposing sanctions upon attorneys for clear misbehavior is currently a relatively limited occurrence due to what appears to be a fairly high standard; the available examples suggest that the rules would need to provide a more explicit command for judges to impose sanctions more often to be successful.⁷⁸ As the current Rules 26, 34, and 37 stand, commentators have argued that although sanctions are clearly appropriate in some situations—such as boilerplate objections or refusals to respond to discovery requests—the rules are “much less helpful when it comes to regulating subtle discovery abuses,” and because of the “good cause” standard of Rule 26(b)(1), “courts tend to let the vast majority of discovery requests pass without in-depth review.”⁷⁹ Even the previously discussed District of Maryland, whose courts have “‘stressed the importance of cooperation during discovery’ and have indicated the

77. See Grimm & Yellin, *supra* note 11, at 506 (discussing how there are “common complaints” that sanctions for failure to follow the discovery rules are “seldom imposed,” based on a “reluctance to impose sanctions for discovery violations” by the courts).

78. In the context of “spoliation” discovery sanctions, the Advisory Committee indicates that the desire to maintain a uniform standard has led the rules to require “‘reasonable steps,’ which can be seen as a form of culpability.” See Judicial Conference of the U.S., Minutes of the Advisory Committee on Rules of Civil Procedure 23 (April 10–11, 2014), <http://www.uscourts.gov/file/15093/download> (stating that “the revised proposal . . . is limited to circumstances in which a party failed to take reasonable steps to preserve, . . . thus embracing a form of ‘culpability’”). In practice, Judges have long been reluctant to sanction even conduct which crossed the line of objective “bad faith,” although there is evidence that they pay attention to such a showing as an important part of the calculus. Compare *Day v. Allstate Ins. Co.*, 788 F.2d 1110, 1113 (5th Cir. 1986) (dismissing a claim where failure to cooperate amounted to “willful, in bad faith, and ‘in callous disregard for the obligations of [the other] party. . .’”) with *Eby v. Target Corp.*, No. 13-10688, 2014 WL 941906, at *5 (E.D. Mich. Mar. 11, 2014) (refusing to sanction for failure to preserve “without a showing of culpability”). The rarity of judges sanctioning attorney conduct has, finally, given rise to some anecdotes based on cases where judges have actually done so. See Morris, *supra* note 14, at 141 n.82 (citing a 2011 “Above the Law” article describing how a judge once ordered attorneys to a “kindergarten party” because they failed to be reasonable and civil to one another).

79. Mitchell London, *Resolving the Civil Litigant’s Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS 837, 853 (2013).

appropriateness of sanctions such as precluding a party's experts from testifying at trial and granting summary judgment to 'deter severely abusive litigation practices,'"⁸⁰ seems to "require a higher threshold—of subjective bad faith or lack of substantial justification—to sanction attorneys for discovery misconduct under the Rules."⁸¹

Some commentators have also raised the question of a potential burden shift concerning which party must first demonstrate proportionality. Previously, the burden was "on the producing party to make a 'particular and specific demonstration of fact' supporting any contention that discovery [requests were] disproportionate. The party seeking a protective order 'ha[d] the burden of demonstrating good cause' and must [have] offer[ed] specific support for its motion beyond mere conclusory statements."⁸² The revisions to Rules 26 and 34 arguably could reverse these roles. At least one state has already enacted discovery reforms which mirror the federal changes, and this state construed its own rules to mean that the "'party seeking discovery always has the burden of showing proportionality and relevance."⁸³

There is at least some basis to argue that such a reversal could happen as a result of the 2015 revisions. In *Oppenheimer Fund, Inc. v. Sanders*, the Supreme Court explained that a district court judge could, under certain circumstances, require the requesting party to pay for discovery costs, stating:

Under [the discovery rules], the presumption is that the responding party must bear the expense of complying with discovery requests, but he may

80. Paul W. Grimm, Ilan Weinberger & Lisa Yurwit, *New Paradigm for Discovery Practice: Cooperation*, MD. B.J., Nov.–Dec. 2010, at 26, 30 (quoting PAUL W. GRIMM, CHARLES FAX & PAUL MARK SANDLER, *MARYLAND DISCOVERY PROBLEMS AND SOLUTIONS* 245 (2008)).

81. See *id.* (noting a difference in thresholds on discovery abuse sanctions, even though the Maryland and Federal rules "yield parallel sanctions").

82. Morris, *supra* note 14, at 148 n.150 (citing *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-CV-01644-REB-CBS, 2010 WL 502721, at *10 (D. Colo. Feb. 8, 2010); *Aikens v. Deluxe Fin. Servs., Inc.*, 217 F.R.D. 533, 534 (D. Kan. Aug. 5, 2003)) (footnote omitted).

83. Morris, *supra* note 14, at 147 (quoting UTAH R. CIV. P. 26(b)(1)–(3)).

invoke the district court's discretion under Rule 26(c) to grant orders protecting him from "undue burden or expense" in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery.⁸⁴

Looking at this text anew and integrating the revised versions of Rules 26(b) and 34, the discretionary protection (for which the producing party must currently attempt to argue) becomes significantly less discretionary if it is possible to argue the requesting party sought disproportionate discovery in the first place. Under the revised rules, it appears that a party moving for protection under Rule 26(c) could argue that the requesting party failed to meet the proportionality requirement now explicitly stated in Rule 26(b)(2), rather than the previous, weaker requirement which was buried in a later part of Section (b), and therefore often ignored by judges. These factors could result in a de facto burden reversal: a judge who consistently applies the revised Rule 26(b)(1) as a matter of course might *not* allow discovery if the requesting party cannot, at the time it makes a discovery request, explain why its request is "proportional."

The current Supreme Court arguably might endorse such a reading and hold that, under a revised rule, the burden to show proportionality is on the party seeking discovery. The argument for this is based upon the Court's various civil procedure decisions since 2007. In a recent article, Arthur Miller argues that compared to the 1938 language, the 2000 changes to Rule 26 "sen[t] a signal . . . with rather Delphic qualities" with regard to the question of burden.⁸⁵ Shifting to the pending changes as they appeared in 2013, Miller then highlights the conceptual similarity of placing the burden to show proportionality on the party seeking discovery with placing what Miller sees as a quasi-factual burden upon the plaintiff during the pleadings before discovery occurs.⁸⁶

According to Miller, in the pleadings stage of litigation, *Twombly* and *Iqbal* effectively, but impermissibly, re-wrote Rule 8

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

85. Miller, *supra* note 23, at 355.

86. See Miller, *supra* note 23, (discussing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

in a way that forces plaintiffs to “protectively negate potential defenses” at the pleadings stage.⁸⁷ Miller added that to do so created “too much potential for inappropriate merit determinations—based only on the complaint—in the *Iqbal* regime.”⁸⁸ This type of doctrine was “inappropriate,” because, in Miller’s view, because questions of the “plausibility” of “facts” under *Twombly* and *Iqbal* can potentially make motions to dismiss “morph into a trial-type inquiry” before discovery has actually occurred.⁸⁹ There is an obvious, inherent “information asymmetry” at the outset of most litigation, which *Twombly* and *Iqbal* can fairly be said to have protected in favor of the original vital information holder at the pleadings stage. By doing this, *Twombly* and *Iqbal* made cases less likely to proceed, and therefore less likely to be resolved on the merits.⁹⁰

The *Twombly* and *Iqbal* holdings favored certain institutional entities depending on the case because information which is legally necessary for plaintiffs to have to survive pleadings, is typically “entirely in the defendant’s possession and unavailable to the plaintiff.”⁹¹ This mirrors discovery concerns if—as it appears might happen under the new rules—discovery is revised to require plaintiffs to speak intelligently about proportionality before they know what information is potentially discoverable. As a result, Miller argues for a conceptual link between what occurred in *Twombly* and *Iqbal* and what might happen as a result of the amendments pertaining to discovery. However, Miller reasons that

87. Miller, *supra* note 23, at 355.

88. *Id.* at 333–34, 335–36.

89. *See id.* at 338–39 (“What seems to have been overlooked in the current rush to judgment is that sometimes what appears implausible on the face of a complaint proves quite plausible when illuminated by discovery.”); *see also* Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 1016–17 (2012) (“Because the requesting party did not know what would be produced, it was impossible to know in advance whether it would produce relevant information.”).

90. *See* Miller, *supra* note 23, at 340–41 (“*Twombly* and *Iqbal* have shifted this information-access balance so that it favors those defendants best able to keep their records, conduct, and institutional secrets to themselves.”).

91. *See id.* (noting that “[i]n many contemporary litigation contexts,” the information needed is complex and unavailable to the plaintiff, and that it is “futile and a bit absurd to tell someone to plead what he or she does not know and cannot access”).

“judicial ‘common sense’ suggests that, when a plaintiff has no economically or logistically reasonable way of unearthing important information that is in the possession of the defendant, the plausibility barrier needs to be lowered somewhat *to allow some contained discovery*.”⁹²

By similar logic, that same outcome arguably might result from the revised discovery rule. *Twombly* and *Iqbal* “offered three propositions to justify the changes they were making in the pleading regime: (1) the threat of abusive litigation behavior and frivolous lawsuits is present; (2) the possibility of extortionate settlements against businesses must be avoided; and (3) litigation is expensive.”⁹³ These concerns effectively mirror some of the concerns that caused the push for discovery reform. Some of the discovery practices that led to the revised rules would also fall well within the ambit of “abusive litigation behavior.”⁹⁴ In addition, some commentators and the participants at the Duke Conference explicitly noted broad discovery has driven up the price of litigation.⁹⁵ Given these clear similarities, there is a good basis upon which to argue that if the revised Rule 26 is adopted, the Court could find that the burden to satisfy strengthening proportionality and narrowing “relevance” requirements will indeed fall upon the party seeking the discovery, for reasons similar to those which contributed to the outcomes seen in *Twombly* and *Iqbal*.

The Advisory Committee was aware of these (and similar) arguments, and attempted to establish a clear position that such burden reversals would not result from the revised rules. The Committee acknowledged arguments that the new proportionality calculus would favor defendants, become a new “blanket objection” to all discovery requests, “impose[s] a new burden on the requesting party to justify each and every discovery request,” or that cost shifting—consistent with *Oppenheimer*, which the Committee

92. Morrison, *supra* note 89, at 341 (emphasis added).

93. *Id.* at 360.

94. See Miller, *supra* note 23, at 361 (linking “abusive litigation behavior” to some cases of “motions and discovery requests and objections that should not have been made.”).

95. See 2010 REPORT TO THE CHIEF JUSTICE, *supra* note 9, at 7 (noting that the Conference discussions included the “costs, delays, and abuses imposed by overbroad discovery demands”).

specifically mentioned—would become a common practice.⁹⁶ As a result, the Committee Note explains:

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

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.⁹⁷

Later on in the same note, the Committee also emphasized that as far as cost-shifting is concerned, “[r]ecognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the cost of responding.”⁹⁸

II. DIFFERENT ARBITRATION REGIMES AND CHALLENGES POSED BY PARTY CHOICE

Attempting to generally describe rules that govern discovery in arbitrations would be akin to attempting to generally describe a set of rules which apply to all types of professional sports. First, there are many different contexts in which arbitrations occur: international, domestic, securities, consumer, small claims, and court-annexed programs, to name a few. Second, various organizations administer arbitrations, and each has its own sets of rules. Third, the nature of arbitration—a party-driven dispute resolution mechanism—does not lend itself to establishing a set of rules that will apply in all contexts. Thus, it is beyond the scope of this Article—or perhaps any article—to examine the rules and regimes for all arbitrations because in the context of arbitration, a

96. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5, B-11.

97. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-39.

98. *Id.* at B-45.

one-size-fits-all approach to arbitration does not exist and, for reasons discussed below, would be impracticable.

This Part focuses on the Judicial Arbitration and Mediation Services' (JAMS)⁹⁹ and the American Arbitration Association's (AAA) rules used for commercial arbitrations to describe the regimes used to decide many domestic commercial disputes, before finally comparing these rules to the revisions to the Federal Rules.¹⁰⁰

A. JAMS

Founded in 1979, JAMS is the "largest private alternative dispute resolution (ADR) provider in the world," and employs almost 300 full-time neutrals, including retired judges and attorneys.¹⁰¹ JAMS arbitration and mediation services provide various sets of rules and procedures, including the comprehensive and streamlined rules and procedures to govern arbitrations.¹⁰²

The Comprehensive Arbitration Rules and Procedures (Comprehensive Rules) govern binding arbitrations administered by JAMS unless the parties provide for other rules in their arbitration agreements.¹⁰³ Under the Comprehensive Rules, discovery is largely controlled by Rule 17, which is titled: "Exchange of Information."¹⁰⁴ Rule 17 states that parties "shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ('ESI')) relevant to the dispute or claim immediately after

99. JAMS was formerly known as Judicial Arbitration and Mediation Services.

100. Although arbitration is used extensively to resolve international disputes, it is beyond the scope of this Article to discuss international arbitration. Thus, this Article focuses on domestic commercial arbitration.

101. *About JAMS*, JAMS ARB., MEDIATION, & ADR SERVICES, http://www.jamsadr.com/aboutus_overview/ (last visited Apr. 5, 2015).

102. ADR Clauses, Rules, and Procedures, JAMS ARB., MEDIATION, & ADR SERVICES, <http://www.jamsadr.com/rules-clauses/> (last visited Apr. 5, 2015) (referring to specific rule bodies, the "Comprehensive" and "Streamlined" rules. JAMS also features "Class Action," "Construction," and "Employment" arbitration rules, which are not discussed in this Article).

103. JAMS COMPREHENSIVE ARB. R. 1 (2014), *available at* <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

104. *Id.*

commencement of the Arbitration.”¹⁰⁵ The Rule also provides that “[e]ach Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party,” and that “[t]he necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options[,] and the burdensomeness of the request on the opposing Parties and the witness.”¹⁰⁶

Under the “Streamlined Rules,”¹⁰⁷ exchange of information is governed by Rule 13.¹⁰⁸ Rule 13 initially provides the same language as Rule 17, and states that parties “shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information (‘ESI’)) relevant to the dispute or claim”;¹⁰⁹ thereafter, these two rules differ. Under Rule 13, parties must provide:

copies of all documents in their possession or control on which they rely in support of their positions or that they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim[,] and the names of all experts who may be called upon to testify or whose reports may be introduced at the Arbitration Hearing.¹¹⁰

105. JAMS COMPREHENSIVE ARB. R. 17 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/> (internal quotation marks omitted).

106. *Id.*

107. The streamlined rules “govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, no disputed claim or counterclaim exceeds \$250,000, not including interest or attorneys’ fees, unless other Rules are prescribed.” JAMS STREAMLINED ARB. R. 1 (2014), available at <http://www.jamsadr.com/rules-streamlined-arbitration/>.

108. JAMS STREAMLINED ARB. R. 13. (2014), available at <http://www.jamsadr.com/rules-streamlined-arbitration/>.

109. JAMS STREAMLINED ARB. R. 13 (2014), available at <http://www.jamsadr.com/rules-streamlined-arbitration/>.

110. *Id.*

This Rule states that the parties and the arbitrator must make every effort to conclude the document and information exchange process within fourteen calendar days after all pleadings and notice of claims have been received, and that the necessity of any additional information “shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options[,] and the burdensomeness of the request on the opposing Parties and the witness.”¹¹¹ There is no provision in the Streamlined Rules that explicitly provides for depositions.

JAMS allows, through mutual agreement by both parties, the use of two rules providing for “Expedited Procedures,” which are found in Rules 16.1 and 16.2 of the Comprehensive Rules.¹¹² JAMS has included these two rules within the Comprehensive rules since 2010.¹¹³ Pursuant to Rule 16.1, these two Expedited Procedures take effect if they “are referenced in the Parties’ agreement to arbitrate or are later agreed to by all Parties.”¹¹⁴ Rule 16.2 narrows discovery in terms of both timeframe and subject matter.¹¹⁵ Under the Expedited Procedures, the arbitrator “shall require” parties to “confirm in writing” that they have complied with the Rule 16.2(a) duty to cooperate in a good-faith, voluntary exchange of documents and information, and parties must do so prior to the arbitrator conducting the preliminary conference.¹¹⁶

JAMS Rule 16.2 limits document requests to documents “directly relevant to the matters in dispute or to its outcome,” which are “reasonably restricted in terms of time frame, subject matter[,] and persons or entities to which the requests pertain,” and prohibits

111. JAMS STREAMLINED ARB. R. 13 (2014).

112. JAMS COMPREHENSIVE ARB. R. 16.1–2 (2010), available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Comprehensive_Arbitration_Rules-2010.pdf.

113. Meredith N. Reinhardt, *JAMS Issues New Optional Expedited Arbitration Procedures*, IN-HOUSE LITIGATOR, Winter 2011, at 1, 1.

114. JAMS COMPREHENSIVE ARB. R. 16.1 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

115. JAMS COMPREHENSIVE ARB. R. 16.2 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/> (limiting document requests to documents “directly relevant to the matters in dispute or to its outcome,” and requiring that they be “reasonably restricted in terms of time frame, subject matter, and persons or entities to which they pertain,” and prohibiting the use of “broad phraseology,” or extensive “definitions” or “instructions”).

116. *Id.*

the use of “broad phraseology.”¹¹⁷ The rules limit e-discovery and include a proportionality requirement relating to e-discovery.¹¹⁸ Finally, although the expedited rules do not eliminate the single deposition provided by Rule 17(b) provides—the language of Rule 16.2(d)(i) contains strong language directing the arbitrator to limit depositions—these expedited rules direct the arbitrator to examine the amount in controversy, the complexity of the factual issues, the number of parties, the diversity of parties’ interests, and whether any of the claims may have merit to justify the time and expense of the requested discovery.¹¹⁹

The two Expedited Rules are optional, and are invoked at the will of all parties.¹²⁰ In situations where the parties do not invoke the Expedited Rules, however, the normal Rule 16 states that at the request of any party, or at the direction of the arbitrator, a preliminary conference will be conducted.¹²¹ This conference may address matters such as the exchange of information pursuant to Rule 17, the discovery schedule “as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law,” pleadings, any agreement to clarify or narrow the issues at stake in the arbitration, scheduling of the hearing, potential dispositive motions, attendance of witnesses, and various other matters which parties or arbitrators suggest.¹²² However, parties are not required to confirm prior compliance in writing before the preliminary conference occurs, as they would be under the Expedited rules.¹²³ By confirming compliance in writing under the Expedited Rules, parties enter the preliminary conference essentially having stated that they have either completed discovery, or having identified “any

117. JAMS COMPREHENSIVE ARB. R. 16.2 (2014).

118. *See id.* (“Where the costs and burdens of e-discovery are disproportionate to the nature of . . . the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.”).

119. *Id.* at 16.2(d)(i).

120. JAMS COMPREHENSIVE ARB. R. 16.1 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

121. JAMS COMPREHENSIVE ARB. R. 16 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

122. *Id.*

123. *See* JAMS COMPREHENSIVE ARB. R. 16.2 (2014).

limitations on full compliance and the reasons therefor,” ensuring immediate attention to those issues.¹²⁴ In contrast, under the normal Rule 16, it is possible that parties are still in the process of exchanging information and discovery disputes may subsequently arise.

B. The American Arbitration Association

The American Arbitration Association (AAA) functions similarly to JAMS, in that it provides both arbitration services, as well as various bodies of rules for parties that opt to arbitrate their disputes. The AAA’s “Commercial” rules include “Expedited Procedures,” by which—similar to the JAMS Rules 16.1 and 16.2—parties may opt to be governed.¹²⁵

The AAA discovery rule, R-22, governs “Pre-Hearing Exchange and Production of Information” and provides that “[t]he arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party’s opportunity to fairly present its claims and defenses.”¹²⁶ This rule further provides that “[t]he arbitrator may, on application of a party or on the arbitrator’s own initiative” require parties to exchange documents, update their exchanges, exchange non-disclosed documents, or produce documents in a particular form.¹²⁷

Comparing the AAA rules to JAMS, the AAA R-22 adopts an arbitrator-defined conception of relevance while suggesting that the arbitrator consider proportionality, by directing the arbitrator to maintain an overall “view to achieving an efficient and economical resolution of the dispute.”¹²⁸ In contrast, JAMS Rule 17 adopts a more objectively defined conception of relevance by outlining the meaning of the term itself; the JAMS rule requires that discovered

124. JAMS COMPREHENSIVE ARB. R. 16.2 (2014).

125. AAA COMMERCIAL ARB. R. & MEDIATION P. R-1 (2013), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 (“Parties may, by agreement, apply the Expedited Procedures. . .”).

126. AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

127. *Id.*

128. *Id.*

material be “relevant to the dispute or claim,” and that the material be something “on which [the parties] rely in support of their positions” language.¹²⁹ The AAA rule states that an arbitrator must “[safeguard] each party’s opportunity to fairly present its claims and defenses,” but it does not contextualize the “claims and defenses” language further, and does not directly use the word “relevance.”¹³⁰

The AAA’s R-33 permits dispositive motions at the arbitrator’s discretion “only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose[s] of or narrow[s] the issues in the case.”¹³¹ The AAA Rules do not explicitly prohibit depositions, but the rule only mentions depositions in the rules governing “Large, Complex Commercial Disputes.”¹³² Under Rule L-3, “In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of the arbitration, the arbitrator may order depositions”¹³³

C. *JAMS, the AAA, and the Federal Rules*

JAMS and the AAA, because of the diversity of commercial disputes that their rules are meant to govern, simply cannot provide for very specific discovery rules applicable to all commercial arbitrations. Moreover, arbitration is meant to be a more flexible process tailored to the individual case and the parties’ preferences. Nevertheless, the two rule regimes touch on the same fundamental points in attempting to describe and constrain discovery during arbitration. When they do so, they attempt to use—or, as the case may be, specifically distinguish from—concepts familiar to the Federal Rules: specifically, the concepts of party cooperation and the consideration of proportionality, and the definition of relevance.

129. JAMS COMPREHENSIVE ARB. R. 17 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

130. AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

131. AAA COMMERCIAL ARB. R. & MEDIATION P. R-33 (2013), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

132. AAA COMMERCIAL ARB. R. & MEDIATION P. L-3(f) (2013), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

133. *Id.*

Accordingly, before proceeding further, this subpart will compare those concepts, in light of how the different regimes contrast with the revisions to the Federal Rules.

1. Relevance

The current, non-revised Federal Rules permit broad discovery, which can involve documents that are not directly relevant to a claim or defense, but which have the potential to lead a party to other documents that do contain such information.¹³⁴ The 2015 revisions limit this language by removing the “subject matter” provision.¹³⁵ However, given that this provision is rarely invoked, this change is unlikely to lead to substantial changes. For JAMS, the relevance language contained in the two optional expedited rules appears similar to the revised definition of the 2015 Federal Rules. The JAMS rules explicitly state that document requests shall be limited to documents “directly relevant to the matters in dispute or to its outcome,” be “reasonably restricted” in terms of “subject matter,” and “not include broad phraseology.”¹³⁶ Whereas the changes to Federal Rule of Civil Procedure 26 wholly eliminates mention of discovery for items “relevant to the subject matter,”¹³⁷ the JAMS rule preserves mention of subject matter; but, the use of the words “directly relevant” still indicates a fairly narrow conception of relevance.

However, the two “Expedited” JAMS rules contained in Rule 16 are only binding when parties agree to them; if they are not invoked, then parties will be operating under either the “Comprehensive” or “Streamlined” rules. Those rules rely upon “voluntary exchange” by parties cooperating in “good faith.”¹³⁸ Both Rule 13 of the Streamlined Rules and Rule 17 of the

134. See discussion *supra* Part I(A) (discussing the “relevant to the subject matter” and “reasonably calculated to lead to” provisions).

135. See discussion *supra* Part I(A) (discussing the revised Rule 26 where the “reasonably calculated to lead to” admissible evidence provision is removed).

136. JAMS COMPREHENSIVE ARB. R. 16.2 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

137. See discussion *supra* Part I(A) (describing the revised text of Federal Rule of Civil Procedure 26).

138. JAMS STREAMLINED ARB. R. 13 (2013), available at <http://www.jamsadr.com/rules-streamlined-arbitration/>; JAMS COMPREHENSIVE ARB. R. 17 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

Comprehensive Rules provide that parties should be prepared to exchange all non-privileged documents and other information “relevant to the dispute or claim.”¹³⁹

The AAA’s discovery rule, R-22, does not use the word “relevance” in Section (a) of the rule, and does not define “relevance” when it uses the word in Section (b) of the rule. In Section (a), R-22 frames the process of discovery in a way where the “arbitrator shall manage” whatever exchange of information takes place with a view towards economic efficiency, and equality of treatment; it does not approach the concept of relevance from a definitional perspective, but rather from that of the arbitrator’s discretion.¹⁴⁰ Later in the R-22(b) when the word “relevance” is actually used, it defines relevance in relation “to the outcome of disputed issues.”¹⁴¹ By making initial discovery exchanges fully within the control of the arbitrator but providing for subsequent discovery of arguably “relevant” material not yet disclosed, the AAA rules are perhaps able to prevent more significant, extended discovery disputes later in the arbitration.

ii. Proportionality

The changes to proportionality contained in the 2014 revisions to the Federal Rules could arguably be considered a change without meaningful impact because a proportionality analysis was always intended by the framers of the Federal Rules—or it could be viewed as the latest in a process seeking to actually make substantive changes to the meaning of discovery.¹⁴² At present, while

139. JAMS STREAMLINED ARB. R. 13 *available at* <http://www.jamsadr.com/rules-comprehensive-arbitration/>; JAMS COMPREHENSIVE ARB. R. 17.

140. *See* discussion *supra* Part II(B) (describing the text of the AAA rule).

141. *See* AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 (providing only that the arbitrator may require production of documents which are “relevant and material to the outcome of disputed issues”).

142. *See, e.g.*, Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule 26(b)(1) in Litigation: The New Scope of Discovery*, 199 F.R.D. 396, 404 (2001) (“The change in the language of Rule 26(b)(1) and its drafting history, including the debate over efforts to drop the change, all clearly suggest that the scope of discovery under new Rule 26(b)(1) is designed to be narrower than under old Rule 26(b)(1).”); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV.

proportionality exists in Rule 26(b)(2)(C)(iii), as previously discussed, there has been concern that it is not rigorously applied, arguably based on where it is located in the text of Rule 26 itself.¹⁴³ However, the Advisory Committee has made it clear that it is not seeking to bring about broad change—because proportionality has always been a consideration—but, instead, explains that these revisions merely seek to clarify how the proportionality provision is supposed to apply, and potentially increase the rate at which judges actually apply the provision.¹⁴⁴

Both of the arbitration regimes discussed above have explicitly provided for some conception of proportionality within their rules. JAMS's Comprehensive Rules do not use the word "proportionality," but they use other words which clearly implicate the concept; the word "disproportionate" is used in Rule 16.2(c)(iv), which is one of the rules only applicable within the context of the optional, "expedited" procedures, and is only applicable to e-discovery.¹⁴⁵ Reference to "burden" or "burdensomeness" is made three times throughout the comprehensive rules: once in Rule 16.2(c)(iv); again in Rule 17(b) in the context of a party request for depositions above and beyond the single deposition provided for; and a third time in Rule 21, as a consideration for an arbitrator ruling on an objection to producing a subpoenaed person as a witness, or to other evidence.¹⁴⁶

747, 747 (1998) ("[S]ince 1976, proposals for amendment to the rules have generally involved retreats from the broadest concept of discovery . . ."); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 191 (2006) ("The frequency of changes to the discovery rules—in 1983, 1991, 1993, 2000, and again in 2006—reflects an ongoing struggle to find fair and reliable means to contain discovery and keep it reasonably related to the needs of particular cases.").

143. See discussion *supra* Part I(A) (discussing Federal Rule of Civil Procedure 26).

144. See discussion *supra* Part I(A) (discussing Federal Rule of Civil Procedure 26).

145. See JAMS COMPREHENSIVE ARB. R. 16.2 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/> ("When the costs and burdens of e-discovery are disproportionate to the nature of the dispute . . . the Arbitrator may . . . deny such requests.").

146. JAMS COMPREHENSIVE ARB. R. 16.2(c)(iv), 17(b), 21 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/> (noting that Rule 16.2(c)(iv) is concerned with when "the costs and burdens of e-discovery are

To the degree that the financial burdens inflicted by burdensome or disproportionate discovery are arguably part of the question of proportionality in the eyes of the Federal Rules,¹⁴⁷ JAMS and AAA do not seem to address costs in the discovery context. Under JAMS's rules, costs are mentioned in the context of e-discovery, but afterwards only mentioned in non-discovery situations such as Rule 22(k)(i), which provides that a party requesting a stenographic record bears the cost unless there is some agreement to share the cost among the parties.¹⁴⁸ The only other usage of the word "cost" in the discovery context is in Rule 24(g), which authorizes an arbitrator to determine reasonable attorneys' fees in part based on "the failure of a Party to cooperate reasonably in the discovery process and/or comply with the [a]rbitrator's discovery orders" when this "caused delay to the proceeding or additional costs to the other [p]arties."¹⁴⁹

The AAA perhaps takes a slightly stronger stance on including proportionality as an explicit requirement to be considered in all discovery contexts, but when it does so, it adopts language different than the term "proportionality." In R-22, the AAA commands the arbitrator to "manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute."¹⁵⁰ This is similar to the revisions to the 2015 rules in that the concept itself—regardless of the words chosen to represent it—makes an appearance in the

disproportionate"; Rule 17 is concerned with "the burdensomeness of the request on the opposing Parties and the witness"; and Rule 21 is concerned with weighing "the burden on the producing Party and witness" with the proponent's need for the evidence).

147. See discussion *supra* Part I(A) (discussing how after being revised to strengthen proportionality, Rule 26(b)(1) mentions "burden or *expense* of the proposed discovery" as one of the factors to be considered) (emphasis added) and discussion *supra* Part I(A) (acknowledging, under *Oppenheimer*, that the default rule is that costs will be paid by the party responsible for production).

148. JAMS COMPREHENSIVE ARB. R. 22 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

149. JAMS COMPREHENSIVE ARB. R. 24 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

150. AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013) (emphasis added), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

primary text of R-22, immediately following the name of the rule.¹⁵¹ Furthermore, in R-23, which lays out the enforcement powers of the arbitrator, the AAA gives arbitrators the license to “[i]ssue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation: . . . (c) allocating *costs* of producing documentation, including electronically stored documentation.”¹⁵²

iii. Objections to Discovery

The 2015 revisions to the Federal Rules make clear that objections to requested production must clarify what documents are being withheld and state the reasons for withholding such documents.¹⁵³ JAMS and the AAA lack any such standard for objections.

iv. Cooperation

As noted above, the changes to Rule 1 of the Federal Rules are meant to create a duty of cooperation, but this does not appear to be a strong mandate. However, it may have the effect of strengthening other mandates for judges to enforce cooperative practices by parties, such as those found in Rule 37 and Rule 26 (f)–(g).¹⁵⁴ JAMS’s rules rely upon “voluntary exchange” by parties cooperating in “good faith.”¹⁵⁵ In contrast, AAA’s rules are framed from the arbitrator’s perspective;¹⁵⁶ starting with an emphasis on what the arbitrator may or may not permit, arguably suggesting a more arbitrator-centered mode of control which is akin to some of

151. See AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013) (discussing the balancing required of an arbitrator).

152. AAA COMMERCIAL ARB. R. & MEDIATION P. R-23(c) (2013) (emphasis added), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

153. See discussion *supra* Part I(A) (discussing the specificity requirement).

154. See discussion *supra* Part I(B) (discussing the duty of cooperation).

155. See JAMS COMPREHENSIVE ARB. R. 17 (2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/> (“The Parties shall cooperate in good faith in the voluntary and informal exchange of . . . information.”).

156. See *supra* Part II(C)(1) (construing R-22).

the efforts under the Federal Rules to increase managerial judging.¹⁵⁷ Such a reading of the AAA rules is, however, consistent with AAA's advocacy of what it refers to as "muscular arbitration," which aims to make arbitration discovery less costly and more efficient by empowering arbitrators to forcefully take charge of proceedings through use of discretion.¹⁵⁸

III. RECENT EFFORTS TO MAKE DISCOVERY IN ARBITRATION LESS COSTLY

Arbitration is largely susceptible to the parties' deliberate choices. Parties sometimes insist upon broad discovery, and arbitrators sometimes believe they are obligated to permit practices that are detrimental to an efficient, cost-effective resolution of the dispute because of the apparent will of the parties. Also, many arbitrators simply believe that it is not their place to take a strong, "managerial" approach to their duties, absent the parties' explicit consent.¹⁵⁹ Over the past ten to fifteen years, commercial arbitrations have arguably become increasingly similar to litigation because of these factors. This Part will first seek to describe this trend. It will then examine some of the ways in which various institutions have attempted to address it. Finally, it will suggest that the revisions to the Federal Rules, if taken to heart by the legal

157. See *supra* note 21 and accompanying text (discussing the Duke Conference's determination that there was a need for "early and active judicial case management").

158. See *infra* Part III(B) (discussing "muscular arbitration" as one of the ways to lower the cost of arbitration by reversing the litigation trend in arbitration discovery).

159. See DISPUTE RESOLUTION SECTION, N.Y. STATE BAR ASS'N, GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF DOMESTIC COMMERCIAL ARBITRATIONS AND GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF INTERNATIONAL ARBITRATIONS 11 (2010), available at http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf ("Section 10 of the Federal Arbitration Act provides that one of the very few ways an arbitration award can be vacated is 'where the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy.' Some arbitrators tend to grant extensive discovery out of concern that any other approach might lead to a vacated award under Section 10.").

community, may inevitably have an effect upon arbitration and be marginally helpful towards reversing this trend.

A. *Evidence of the Litigation Trend in Arbitration*

Recently, arbitrations have become more like litigation, particularly in the realm of discovery. The arbitration discovery process has become lengthier and more costly. In a recent article, Thomas Stipanowich and Ryan Lamar describe two separate surveys of corporate counsel; the first was circulated in 1997 and the second in 2011.¹⁶⁰ The original 1997 survey was taken during the “Quiet Revolution,” a term used to describe the transformation of American conflict resolution during the latter decades of the twentieth century, a period that also saw the “Vanishing Trial” partially due to the rise of ADR and the costs of litigation.¹⁶¹ The 1997 survey suggested that at that particular point in time, “almost seventy percent [of respondents] indicated they chose arbitration because it saved time (68.5%) or saved money (68.6%).”¹⁶² A majority indicated that arbitration “afforded a more satisfactory process than litigation and limited the extent of discovery.”¹⁶³

Perhaps ominously, the 1997 respondents “expressed views that arbitration might be improved by introducing elements analogous to litigation,” despite the fact that the “Quiet Revolution” was “[s]purred by the need to develop alternatives to the high costs and risks associated with litigation”¹⁶⁴—in particular, from discovery. By the time of the 2011 survey however, a somewhat different picture of the respondents’ perceptions of arbitration had emerged. This perception appeared to have reversed that particular position on litigation-style discovery: In the 1997 survey, 59.3% of respondents stated that “limited discovery” was a compelling reason to use arbitration over litigation; by 2011, that percentage had dropped to 51.5%.¹⁶⁵ Although still more than half, the downward

160. STIPANOWICH & LAMARE, *supra* note 2, at 4–5.

161. *See id.* at 9–10 (discussing the “unprecedented changes” to conflict resolution procedures happening at the time of the “Quiet Revolution”).

162. *Id.* at 16–17.

163. *Id.*

164. *Id.* at 8–9.

165. *Id.* at 37.

shift is an indication of the degree to which discovery practices changed over the fifteen years between the two surveys.

At the time of the 1997 survey, many corporate attorneys were either less experienced or wholly inexperienced with the arbitration process.¹⁶⁶ Whereas by 2011 “during the course of repeatedly using and participating in ADR processes, attorneys ha[d] actually changed those processes. In some cases the transformation ha[d] made alternatives to litigation more like the very thing they were designed to replace—more formal, more adversarial, lengthier and more expensive.”¹⁶⁷ Across the board, more companies “viewed cost as a barrier to the use of arbitration.”¹⁶⁸ Although from the mid-1980s to 1997, arbitration seemed to ride a rising tide of widespread usage, the 2011 survey reported that “half of the survey respondents [thought] it unlikely that their company [would] use arbitration in the future.”¹⁶⁹

While these surveys are very useful, it is unclear to what extent they indicate that in-house counsel have significantly decreased their use of arbitration. Although the 2011 survey indicated that since 1997 leading businesses had decreased the use of binding arbitration across several different types of disputes, the number of commercial arbitrations administered by the AAA has not changed significantly.¹⁷⁰ Since 2003, the AAA’s commercial arbitration caseload has fluctuated between a high of 13,600 (2003) and a low of 11,355 (2007). Most recently, the caseload number was 12,680 in 2012.¹⁷¹

166. This factor—counsel’s better familiarity with litigation and litigation style discovery—potentially explains, at least in part, the expressed desire in 1997 to see the introduction into arbitration of some elements analogous to litigation discovery.

167. STIPANOWICH & LAMARE, *supra* note 2, at 40.

168. *Id.* at 54.

169. *Compare id.* at 63 (discussing survey results), with DAVID LIPSKY & RONALD SEEGER, *THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS* 29 (1998), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=icrpubs> (“More than 29 percent said they were unlikely or very unlikely to use arbitration in the future. . .”).

170. STIPANOWICH & LAMARE, *supra* note 2, at 19–22.

171. Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals* 6 (Pepperdine

B. *Attempts to Reverse the Litigation Trend in Arbitration Discovery*

Although arbitration has experienced a trend towards litigation, in the past five years there has been a push back against that trajectory. However, because arbitration is inherently a party driven process, it is difficult to curtail undesirable litigation-style discovery practices through changes in the arbitration rule regimes themselves. Parties must choose to arbitrate under JAMS or the AAA rules for their respective rules to apply, but those parties can at the same time contractually modify how those rules will actually be implemented; as such, if a party wishes to provide for the AAA rules, but with discovery “consistent with the Federal Rules” in the governing contract, no arbitrator would be able to ignore such a command. If JAMS or the AAA were to adopt an inflexible discovery regime and prohibit parties from attempting to modify discovery rules, it would undermine the inherent principle of arbitration and drive potential users away. Because their rules must apply to a very broad array of disputes, arbitration providers like JAMS and the AAA cannot severely or unilaterally attempt to restrict discovery through the mechanism of their rules.

At present, one set of solutions focuses upon the arbitrators themselves. Although arbitrators cannot blatantly ignore explicit provisions that parties add into an arbitration provision, by training and reminding them that discovery in arbitration is meant to be more limited than discovery in litigation, it is perhaps possible to prevent arbitrators from innocently or negligently allowing parties to employ litigation-style discovery.

Both JAMS and the College of Commercial Arbitrators (CCA)—a collective of experienced professional arbitrators—have produced protocols for arbitrators and parties alike.¹⁷² These protocols cannot change the realities of the contractual nature of arbitration, but they do explain to arbitrators the nature of the problem, which, perhaps, has arisen in part through the lack of arbitrator awareness of their own contributions to allowing broader and more costly discovery.

The JAMS “Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases,” which was released in 2010, emphasizes that “good judgment of the arbitrator” is a “key element” in preserving the cost-efficient, expedited nature of arbitration, and explains that, particularly with respect to discovery matters, arbitrator discretion must be exercised in a manner consistent with limiting discovery when possible.¹⁷³ The JAMS Protocols identify the fact that “party preferences” can lead to overly broad arbitration discovery and indicate to the arbitrator that, when not explicitly bound by the contract, the arbitrator’s proper role is to resist parties’ attempts to subvert the aims and goals of arbitration. The JAMS Protocols also stress “Early Attention to Discovery by the Arbitrator,”¹⁷⁴ advise arbitrators to “establish[] the ground rules,” and remind the arbitrators that the JAMS Comprehensive rules “lack the specificity that one finds, for example, in the Federal Rules.”¹⁷⁵ The JAMS protocols also discuss depositions and stress that while parties are entitled to one deposition, if an arbitrator chooses to grant leave for more discovery, the arbitrator must weigh this decision carefully because it can make the arbitration “extremely expensive, wasteful and time-consuming.”¹⁷⁶

The 2010 CCA Protocols also attempt to raise arbitrator awareness of some of the specific ways in which parties have brought litigation-style practices into arbitration. The CCA Protocols explain:

[m]any skilled and experienced attorneys, while happy to accept the foregoing advantages of arbitration, nonetheless generally want to try cases in arbitration with the same intensity and the same tactics with which they were conducted in court. Thus, expanded arbitral motion practice and discovery have developed within the framework of

173. JAMS, JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES 2–3 (2010), *available at* <http://www.jamsadr.com/arbitration-discovery-protocols/>.

174. *Id.* at 3.

175. *Id.*

176. *Id.* at 6.

standard commercial arbitration rules which tend to afford arbitrators and parties considerable ‘wiggle room’ on matters of procedure. As a consequence, practice under modern arbitration procedures is today often a close, albeit private, analogue to civil trial.¹⁷⁷

The Protocols go on to explain that despite these practices, arbitrators are supposed to be “deliberate and proactive” in resolving disputes, and must maintain a focus on controlling discovery and motion practice where possible.¹⁷⁸

For the AAA, members of the organization’s leadership have been lending their voices to the debate by specifically emphasizing “muscular arbitration.” A 2013 article from the *Dispute Resolution Journal*, written in part by Robert Matlin, a senior vice president of the AAA, states that “[t]he challenge of protecting the time and cost advantages of arbitration will continue until parties and arbitration counsel learn to think of arbitration as a process that is distinct from litigation and arbitrators learn to be more ‘muscular’ and disciplined managers of the process and themselves.”¹⁷⁹ Calling upon arbitrators to embrace being “muscular” and to take a more forceful, aggressive approach to managing arbitrations from the beginning will deter parties from engaging in discovery practices which are antithetical to arbitration’s intended purpose.

The recent emphasis by JAMS, the AAA, and CCA on how arbitrators and parties ought to conduct discovery is likely to have a positive effect towards making discovery more cost efficient and faster, but it is perhaps too early to see results. In order to maintain a competitive advantage over federal court litigation, arbitration must remain, in the aggregate, a less costly and quicker method of resolving disputes—although, as mentioned above, there are numerous other reasons parties choose arbitration to settle domestic commercial disputes that have nothing to do with costs.

177. COLL. OF COMMERCIAL ARBITRATORS, *PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS & ARBITRATION PROVIDER INSTITUTIONS* 5 (Thomas J. Stipanowich, et al, eds., 2010).

178. *Id.* at 22.

179. Mitchel Marinello & Robert Matlin, *Muscular Arbitration and Arbitrators Self-Management Can Make Arbitration Faster and More Economical*, 67 DISP. RES. J., no. 4, 2013, at 69.

Both arbitration organizations and the Advisory Committee are aware that the relative costs of arbitration (as compared to litigation) affect parties' determination of which fora to bring disputes. Arbitrators "must strike a delicate balance . . . working to ensure that the discovery will allow the case to be resolved *more quickly and less expensively than it would be in litigation*"¹⁸⁰ because, unless arbitration is "significantly faster and more cost effective than litigation[,] . . . arbitration will lose much of its value."¹⁸¹ As noted above, JAMS and the AAA have taken steps to ensure that arbitration continues to have a competitive advantage over litigation. It is equally clear that the Advisory Committee, in proposing revisions to the Federal Rules, seeks to make changes in part to ensure that litigation becomes less costly lest litigants choose arbitration. The Advisory Committee acknowledged that the relative costs are important to litigants in its June 14, 2014 Memorandum to the Standing Committee on the Rules of Practice and Procedure.¹⁸² In discussing the public comments in favor of the proposed proportionality changes, the Memorandum explained that these comments "stated that disproportionate litigation costs bar many from access to federal courts and have resulted in a flight to other dispute resolution fora such as arbitration."¹⁸³

The revisions to the Federal Rules will perhaps only have a marginal effect on how arbitrations are conducted. As explained above, the revisions may not bring about a significant change to the way discovery is conducted in federal courts, or the revisions may too vaguely state their philosophy of cooperation between adversaries, or they may fail to resonate within the hearts and minds of lawyers schooled to think as adversaries, not problem-solvers. However, in the recently released *2015 Year-End Report on the Federal Judiciary*, those hoping for a meaningful change in the wake

180. John Wilkinson, *Arbitration Discovery: Getting it Right*, 21 DISP. RES. MAG., no. 1, 2014 at 4 (emphasis added).

181. *See id.* at 1 (discussing the issues with incorporating elements of litigation in arbitration).

182. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5.

183. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5.

of the rule revisions gained a potentially-influential and high profile supporter: Chief Justice John Roberts.¹⁸⁴

The Chief Justice dedicated much of the December 31st memo to describing his earnest desire for the legal community to heed the cooperative message embodied in the rule revisions. Acknowledging that while over the past 80 years, most amendments of the Federal rules have been “modest and technical, even persnickety,” Roberts states that “the 2015 amendments to the Federal Rules of Civil Procedure are different.”¹⁸⁵ Roberts recites the history of the 2010 Duke Conference, notes the resulting findings of a need for cooperation, proportionality, judicial case management, as well as the burgeoning problem of electronically stored information, before giving his own personal analysis of the 2015 revisions:

The amended rules, which . . . went into effect one month ago . . . mark significant change, for both lawyers and judges, in the future conduct of civil trials.

The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report.¹⁸⁶

Roberts speaks favorably of how “by a mere eight words,” the modified Rule 1 “make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation.”¹⁸⁷ Roberts characterizes the new Rule 26 as “crystaliz[ing] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality[,]” one which relies upon a “careful and realistic assessment of actual need.”¹⁸⁸ Roberts affirmatively acknowledges that this assessment “may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide

184. See generally, John Roberts, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015) [hereinafter 2015 CHIEF JUSTICE REPORT], available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

185. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 4.

186. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 5.

187. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 6.

188. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 6–7.

decisions respecting the scope of discovery[.]" which is aided by the fact that the amended rules "accordingly emphasize the crucial role of federal judges in engaging in early and effective case management."¹⁸⁹

Roberts acknowledges, however, that the revisions to the rules are not guaranteed. Successfully achieving the goal of Rule 1 will occur "only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change."¹⁹⁰ Roberts concludes with further remarks affirming the need for "genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share," before later charging the legal community to share in the need to "engineer a change in our legal culture."¹⁹¹

Thus, despite the passionate advocacy from an individual possessing a powerful pulpit to spread a message to the legal community, the effect of the revised federal rules remains murky at best. If the legal community is able to follow in the words of the Chief Justice and pull collectively to bring about real change on a meaningful and wide-spread level, it seems that such a philosophy would almost inevitably spill over into the realm of arbitration. However, if the effect of the rule revisions is relatively minor, then any spill-over effect on how arbitrations are conducted will be correspondingly minimal.

CONCLUSION

Arbitration is a flexible means of resolving disputes quickly and efficiently, and if used properly, it has the capacity to provide exceptional value to financial, commercial, and business users. However, engaging in certain litigation-style discovery practices may cause any given arbitration to spiral out of control in terms of

189. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 7. The Chief Judge coyly applauds the use of informal conferences between parties and judges before the filing of formal motions as settings which can "obviate the need for a formal motion—a well times scowl from a trial judge can go a long way in moving things along crisply." 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 7.

190. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 9.

191. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 10, 11.

cost and time. In these situations, the resulting process is one no less protracted or expensive than civil litigation—yet one which lacks the procedural safeguards and appellate options which arguably justify the higher costs and extended timeframes of civil litigation.

Parties themselves may be unwilling to sacrifice meaningful control over discovery, either in a pre-dispute contract providing for arbitration or a post-dispute agreement to arbitrate. The former makes it difficult to predict the discovery needs of a future dispute, and the latter goes against the grain of most litigation-familiar attorneys by sacrificing tactical options. Moreover, the rules promulgated by various arbitration service providers like JAMS and AAA—even those rules which are “Streamlined,” “Expedited,” or “Accelerated”—are limited because they must maintain the flexibility to apply to myriad different types of disputes with varying discovery needs. Providers cannot risk driving parties away by adopting rigid rules.

Thus, the arbitration community has focused on solutions in the past several years that include providing better information to arbitrators on the true nature of their role, the ways in which arbitrators’ discretion should be utilized, and various methods of either coping with party misbehavior or forestalling abusive discovery practice by adopting a more aggressive, managerial stance in order to take control of and enforce the arbitration schedule. While the 2015 revisions to the Federal Rules potentially will not only limit discovery in traditional civil litigation, but also carry over into arbitration and help to limit discovery in arbitral proceedings as well, due to the relatively minor changes to the Federal Rules, it seems unlikely that arbitrators and organizations which administer arbitrations will feel the need to reduce discovery costs even further, unless it comes in the wake of the larger legal community engaging in the difficult task of reigning in civil discovery and cooperating with one another to bring about real change.