

**GOOD CAUSE IS BAD MEDICINE FOR THE NEW
E-DISCOVERY RULES**

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I. INTRODUCTION

A package of amendments to the Federal Rules of Civil Procedure intended to address issues raised by discovery of electronically stored information (“ESI”) went into effect on December 1, 2006.¹ Enactment of these e-discovery amendments occurred as a result of “intensive and extensive study” of discovery of ESI by the Civil Rules

1. Judge Lee H. Rosenthal, Chair of the Advisory Committee on Civil Rules, has stated that the amendments address five issues: “(1) the parties’ obligations to meet and confer about electronic discovery early in litigation; (2) discovery of information that is not reasonably accessible and allocating costs of that discovery; (3) privilege review; (4) form of production; and (5) sanctions. An overarching change is the introduction of the term [ESI] to the rules.” Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167 (2006), <http://thepocketpart.org/2006/11/30/rosenthal.html>.

Advisory Committee.² The Advisory Committee concluded that discovery of ESI differs in several important ways from conventional discovery of hard-copy documents: ESI “is retained in exponentially greater volume than hard-copy documents; is dynamic, rather than static; and may be incomprehensible when separated from the system that created it.”³ According to the Committee on Rules of Practice and Procedure, each of these differences makes e-discovery more time-consuming, more burdensome, and more costly than conventional discovery.⁴ The Rules Committee further concluded that the package of e-discovery amendments could address these problems.⁵

This Article focuses on the heart of the e-discovery amendments. Rule 26(b)(2)(B) now provides that ESI that is “not reasonably accessible” shall be discoverable only if the requesting party can establish “good cause.”⁶ This Article examines the likely meaning of the good cause standard in this context to determine how much protection the amended rule actually provides against the burden and expense of e-discovery.

Part II sets forth the language of amended Rule 26(b)(2)(B) and highlights the expectation of the bench and the bar that the amended language involves a significant change in the Rules that would contain discovery. Part III reviews the history of other amendments to the discovery rules intended to reduce the cost and burden of discovery. The 2006 e-discovery amendments are the fourth recent attempt to contain discovery. The three prior attempts were ineffective because they relied on increased judicial discretion, mistakenly assuming that judges would act to limit discovery. In practice, however, courts have

2. CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2005) [hereinafter MAY 2005 REPORT OF THE ADVISORY COMM.], available at <http://www.uscourts.gov/rules/Reports/CV5-2005.pdf>. The Judicial Conference of the United States receives recommendations for changes to rules of procedure from its Committee on Rules of Practice and Procedure. See 28 U.S.C. § 2073(b) (2000); ADMIN. OFFICE OF THE U.S. COURTS, THE RULEMAKING PROCESS — A SUMMARY FOR THE BENCH AND BAR (2007), <http://www.uscourts.gov/rules/proceduresum.htm>. The Committee on Rules of Practice and Procedure, in turn, receives recommendations on changes to various types of procedural rules from a number of advisory committees; the Civil Rules Advisory Committee offers recommendations with respect to the Federal Rules of Civil Procedure. See 28 U.S.C. § 2073(a)(2) (2000); THE RULEMAKING PROCESS — A SUMMARY FOR THE BENCH AND BAR, *supra*.

3. MAY 2005 REPORT OF THE ADVISORY COMM., *supra* note 2, at 18.

4. COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22–23 (2005) [hereinafter SEPT. 2005 REPORT OF THE RULES COMM.], available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

5. See *id.* at 24.

6. FED. R. CIV. P. 26(b)(2)(B). The 2006 package of amendments can be found on the federal judiciary’s website at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. Useful background and historical information regarding the rulemaking history for these amendments can be found at <http://www.uscourts.gov/rules/congress0406.html>.

continued to rely on the default policy of “liberal discovery.” Part IV explains the history of the recently enacted e-discovery amendments and illustrates how they build on the structure and standards of the three earlier rounds of discovery amendments.

Part V concludes that continued and expanded use of the good cause standard is problematic both for the new e-discovery rules and for the existing discovery rules. The good cause standard is so vague that it is meaningless, and it provides no guidance to courts in exercising control over discovery disputes. The courts’ persistent reliance on the “liberal rules of discovery” mantra will only be overcome with express instruction to limit discovery, which is absent from the e-discovery amendments. Part VI identifies numerous problems in interpreting and applying Rule 26(b)(1) in conjunction with Rule 26(b)(2)(B), as well as problems with applying these two provisions in conjunction with other discovery requirements.

Part VII considers why the Advisory Committee recommended, and the Rules Committee adopted, another iteration of the wholly ineffective good cause standard. It concludes that there are great divides separating the stated intentions of the Rules Committee in amending the discovery rules, the actual language of the amended discovery rules, and the experience of courts and practitioners in resolving discovery disputes under the discovery rules. The Rules that establish the scope and limitations of discovery no longer mean what they say. They mean only what each judge thinks the rules *ought to* say or what the judge recalls that they *used to* say. Yet in the face of this contradiction, the Rules Committee continues to amend the rules to give the courts more discretion to resolve discovery disputes without providing meaningful standards to guide the courts’ exercise of discretion. Therefore, Part VIII recommends that the Rules Committee clarify or remove the various good cause standards from the discovery rules. In the absence of such changes, it offers an interpretation of the existing discovery rules that gives meaning to the language of the rules, limits the cost and burden of discovery, and is consistent with the Supreme Court’s existing, albeit ignored, interpretation of the good cause standard elsewhere in the discovery rules.

II. THE E-DISCOVERY AMENDMENTS

The e-discovery amendments afford special status to ESI that is “not reasonably accessible.”⁷ If the party from whom discovery is sought establishes that the ESI is not reasonably accessible because of

7. FED. R. CIV. P. 26(b)(2)(B).

undue burden or cost, then the requesting party must establish good cause to obtain the discovery.⁸ Rule 26(b)(2)(B) now states:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.⁹

The e-discovery amendments were intended to provide additional protection against burdensome discovery of e-mails and other computer-based information.¹⁰ The bench and the bar have been told to expect major changes.¹¹ The e-discovery amendments have generated a slew of books and magazine articles,¹² as well as hundreds (perhaps even thousands) of conferences and workshops on how attorneys

8. *Id.* The e-discovery amendments made similar changes to Rule 45 regarding information subpoenaed from a nonparty. See FED. R. CIV. P. 45(d)(1)(D).

9. FED. R. CIV. P. 26(b)(2)(B). Rule 26(b)(2)(C) contains a proportionality test whereby a party responding to a discovery request may object if the burden and expense of the discovery outweighs its likely benefit. See FED. R. CIV. P. 26(b)(2)(C).

10. See SEPT. 2005 REPORT OF THE RULES COMM., *supra* note 4, at 22–23.

11. See, e.g., ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE §§ 1–5 (Supp. 2007) (stating that the use of discovery mechanisms is “revolutionized by amendments to the Federal Rules of Civil Procedure”); GEORGE L. PAUL & BRUCE H. NEARON, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, at vii (2005) (“The ‘E-Discovery amendments’ to the Federal Rules of Civil Procedure will have a significant impact on the practice of law.”); SHIRA A. SCHEINDLIN, E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 1–2 (2006) (supplement to JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE (3d ed. 2006)) (“The Rules effect a major change in some aspects of discovery practice and a comprehensive approach to addressing the many issues that have arisen because of the shift from paper records to electronic records.”); Mary Mack, *The Impact of 120 Days on E-Discovery*, E-DISCOVERY ADVISOR, July–Aug. 2006, available at http://www.fiosinc.com/resources/pdfFiles/200608_eDiscoveryAdvisor.pdf (predicting major changes in litigant behavior as a result of the e-discovery amendments).

12. See, e.g., SHARON D. NELSON ET AL., THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK: FORMS, CHECKLISTS, AND GUIDELINES (2006); Geoff Howard, *What Every Lawyer Should Know About the New E-Discovery Rules*, CAL. LAW., Jan. 2007, at 24; Jason Krause, *E-Discovery Gets Real*, A.B.A. J., Feb. 2007, at 44. The American Bar Association (“ABA”) Section of Litigation created a special publication (essentially a forty-eight page glossy magazine) devoted entirely to e-discovery and the 2006 e-discovery amendments. See ABA SECTION OF LITIG., E-DISCOVERY: A SPECIAL PUBLICATION OF THE SECTION OF LITIGATION (Steven A. Weiss & David Coale eds., 2007).

should prepare for the changes to the discovery rules.¹³ This Article disputes the conventional wisdom conveyed by these sources by arguing that the e-discovery amendments to Rule 26(b) will have little or no impact on the discovery of electronically stored information.

III. THE HISTORY OF AMENDMENTS TO REDUCE THE COST AND BURDEN OF DISCOVERY

A. The Three Pre-2006 Attempts to Amend the Discovery Rules to Reduce the Cost and Burden of Discovery

From their enactment in 1938, the Federal Rules of Civil Procedure have generally been understood to incorporate the then-revolutionary principle that more information is better.¹⁴ In this view, giving parties access to all of the relevant information well in advance of trial allows them to evaluate fairly their claims and defenses and their potential recovery and liability. Despite some initial resistance, the revolution of broad discovery gathered steam and reached its peak in 1970.¹⁵ By that time, liberal discovery had become an accepted principle, and discovery was a matter of right that occurred almost entirely extrajudicially.¹⁶ Consistent with these basic principles, the Supreme Court stated that “the discovery provisions are to be applied as broadly and liberally as possible.”¹⁷

Courts, practitioners, and the Advisory Committee gradually became concerned that parties were abusing the right to discovery, resulting in expensive and burdensome over-discovery.¹⁸ The tension

13. For example, in March, the ABA hosted “The First Annual National Institute on E-Discovery.” ABA Section of Litigation, First Annual National Institute on E-Discovery, http://www.abanet.org/litigation/programs/cle_030907.html (last visited Dec. 1, 2007). The Georgetown University Law Center, in connection with the Federal Judicial Center, hosts an annual workshop on e-discovery. See, e.g., Brochure, Georgetown Univ. Law Ctr., Advanced E-Discovery Institute: A Practical Guide to Implementation of the New Federal Rules (Nov. 16–17, 2006), available at <https://www.law.georgetown.edu/cle/pdfs/140.pdf>; Brochure, Georgetown Univ. Law Ctr., Advanced E-Discovery Institute: The Revised Federal Rules — A Year Later (Nov. 15–16, 2007), available at <http://www.law.georgetown.edu/cle/pdfs/167.pdf>.

14. See Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 535–40 (2001); see also *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation.”).

15. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 747–49 (1998); Stempel, *supra* note 14, at 540–42.

16. See Marcus, *supra* note 15, at 747–49 (“Party-controlled discovery reached its high-water mark in the 1970 amendments in terms of rule provisions.”).

17. *Hickman*, 329 U.S. at 506.

18. See FED. R. CIV. P. 26 advisory committee’s note to 1983 amendments (“[T]he spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons . . . by overuse of discovery [T]his results in excessively costly and time-

between the perceived benefits of liberal discovery and concerns of over-discovery has resulted in several decades of ongoing debate. This debate has focused on ways to reduce the burden and cost of discovery, primarily by limiting the scope of permissible discovery and increasing judicial supervision.¹⁹

1. The 1983 Discovery Amendments

The first round of amendments to reduce the cost and burden of discovery took effect in 1983. Changes were introduced to encourage increased judicial involvement in case management, to require a signature on discovery requests to certify compliance with the Rules, and to allow judges to reduce discovery deemed excessive.²⁰ The last provision warrants particular attention. The 1983 amendments to Rule 26(b)(1) added the following new language, now incorporated in Rule 26(b)(2)(C):

The frequency or extent of use of the discovery methods [otherwise permitted under these rules] shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy,

consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues . . . at stake.”); *see also* FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2000 amendments (noting that in the past “the Committee has . . . made other changes to discovery rules to address concerns about overbroad discovery”).

19. *See* Marcus, *supra* note 15, at 747 (“[S]ince 1976, proposals for amendment to the rules have generally involved retreats from the broadest concept of discovery — in essence to try to contain the genie of broad discovery without killing it.”); *see also* Rosenthal, *supra* note 1, at 191 (“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.”); STEPHEN YEAZELL, CIVIL PROCEDURE 408 (6th ed. 2004) (describing debate over whether it possible to reduce discovery costs without undermining liberal discovery); Stempel, *supra* note 14, at 542–49.

20. Elizabeth Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 232 (1999).

limitations on the parties' resources, and the importance of the issues at stake in the litigation.²¹

The Advisory Committee stated that this new language was "intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse."²²

These changes were considered a radical departure from the free and easy days of liberal discovery. Professor Arthur Miller, the Reporter for the Advisory Committee at that time, wrote that the 1983 amendments were intended to be a "180-degree shift" in the understanding that the rules provide for unbounded discovery:

Until [the 1983 amendments], the last sentence in rule 26(a) said: "Unless . . . the court orders otherwise, the frequency and use of discovery is not limited." Unless the court says otherwise, get ye forth and discover. That had been the message of the last sentence of rule 26(a). In 1984, we decided it was a lousy message. That sentence has been stricken and replaced, quite literally, by the reverse message, which you now find in rule 26(b). Rule 26(b) now says that the frequency and extent of use of discovery shall be limited by the court if certain conditions become manifest. Just realize the 180-degree shift between the last sentence of the old rule 26(a) and the new sentence. Judges now have the obligation to limit discovery if certain things become manifest. The things that are then listed in that paragraph are basically the evils of redundancy and disproportionality.²³

The expected change in judicial approach to discovery assumed that federal judges would act differently and limit discovery once they

21. FED. R. CIV. P. 26(b)(1) (1983). For a discussion of the move of this language to Rule 26(b)(2)(C), see *infra* note 31.

22. FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendments; see also CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, INTRODUCTION TO FINAL DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 28 (1982), available at <http://www.uscourts.gov/rules/Reports/CV03-1982.pdf>.

23. ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYERLY RESPONSIBILITY 32-33 (1984) (revision of remarks made at a Federal Judicial Center Workshop on January 20, 1984).

became more involved in active case management. However, this assumption turned out to be false.²⁴

2. The 1993 Discovery Amendments

The second attempt to reduce the costs and burden of discovery resulted in a package of amendments that became effective in 1993. “These amendments created automatic disclosure provisions as to facts alleged with particularity, required an early conference to develop a discovery plan, and created new presumptive limits on interrogatories and depositions.”²⁵ The 1993 amendments also clarified the role of courts; the amendments required courts to take an active role in managing cases to minimize the cost and burden of litigation. Rule 1 was amended to specify that the Federal Rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”²⁶ According to the Advisory Committee, the “and administered” language was added to recognize the affirmative duty of the court to exercise the authority conferred by the Rules to ensure civil litigation is resolved not only fairly, but also without undue cost or delay.²⁷

3. The 2000 Discovery Amendments

In 2000, the third set of amendments designed to reduce overdiscovery went into effect. The rulemakers intended the 2000 amendments to limit discovery abuse by narrowing the scope of discovery, reducing the amount of information that had to be disclosed in mandatory initial disclosures, establishing a presumptive time limit on each deposition, and involving the judge in determining the proper scope of discovery.²⁸ The Rules Committee described these limitations as a series of “discovery containment” amendments intended to “provide more effective means for controlling overuse and occasional misuse of the discovery devices.”²⁹ The Rules Committee also sought

24. *See infra* Part III.B.

25. Thornburg, *supra* note 20, at 232.

26. Compare FED. R. CIV. P. 1 (1993), with FED. R. CIV. P. 1 (1966) (new language underlined).

27. *See* FED. R. CIV. P. 1 advisory committee’s note to 1993 amendments.

28. *See* FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2000 amendments.

29. SEPT. 2005 REPORT OF THE RULES COMM., *supra* note 4, at 24–25; *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2003.1 (2d ed. Supp. 2007) (“[T]he 2000 amendments included features that were designed to contain overdiscovery.”).

to promote national uniformity in the federal discovery Rules.³⁰ The 2000 Amendments changed Rule 26(b)(1) as follows:

(B) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, ~~that which~~ is relevant to ~~the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party~~ For good cause, the court may order discovery of any information relevant to the subject matter involved in the action. Relevant ~~The information sought~~ need not be admissible at the trial if the discovery information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).³¹

One aspect of the 2000 amendments is particularly crucial to understanding the intent and application of the 2006 e-discovery amendments. The 2000 amendments narrowed the scope of discovery available to attorneys as a matter of right. Prior to 2000, Rule 26(b)(1) defined the scope of permissible discovery to include all information “relevant to the subject matter involved in the pending action.”³² As a result of the 2000 amendments, Rule 26(b)(1) provides that an attorney is only automatically entitled to request and receive information that is relevant to a party’s claim or defense.³³ The 2000 amendments then carved out a new category of information that is discoverable only with the court’s blessing: information relevant to the subject matter of the action, but not relevant to the claim or defense of any party,

30. CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 4 (1999), available at <http://www.uscourts.gov/rules/Reports/CV05-1999.pdf>.

31. Compare FED. R. CIV. P. 26(b)(1) (2000), with FED. R. CIV. P. 26(b)(1) (1993) (new language underlined and eliminated language in strikethrough). The 2006 amendments moved the limitation on discovery previously located at Rule 26(b)(2)(i)–(iii) to Rule 26(b)(2)(C). See FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments. The reference in Rule 26(b)(1) has been updated to reflect that change. See FED. R. CIV. P. 26(b)(1). For ease of use, this Article will refer to previous Rule 26(b)(2)(i)–(iii) as Rule 26(b)(2)[C].

32. FED. R. CIV. P. 26(b)(1) (1993).

33. FED. R. CIV. P. 26(b)(1).

is discoverable only upon court order based on a showing of good cause.³⁴ Prior to the 2000 amendments, discovery of this type of information did not require a court order or judicial involvement of any kind.

Thus, the 2000 amendments to Rule 26(b)(1) did not create new categories of information that are completely excluded from discovery.³⁵ Instead, they created a two-tier framework for discovery.³⁶ First-tier information, central to the parties' claims and defenses, is freely discoverable.³⁷ Second-tier information, less central to resolution of the dispute, is discoverable only upon a showing of good cause. The intent behind creating these different tiers was to narrow the scope of discovery, thereby reducing over-discovery.³⁸

The 2000 amendments "involve[d] the court more actively in regulating the breadth of sweeping or contentious discovery."³⁹ The Advisory Committee believed that the new good cause standard would result in more active judicial management that would in turn lead to more limited and effective discovery. This belief, however, assumed that the courts would treat the good cause requirement as a significant hurdle. The Committee's success in achieving its goals depends on the meaning given to good cause. If good cause is a rigorous standard, then courts will permit less discovery, reducing costs for

34. *See id.*

35. *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendments. As early as 1977, the Advisory Committee had considered proposals to limit the overall scope of discovery to information relevant to parties' claims or defenses. *See* 8 WRIGHT, MILLER & MARCUS, *supra* note 29, at § 2008 (2d ed. 1994).

36. *See, e.g.,* Rosenthal, *supra* note 1, at 171 n.4 (noting that Rule 26(b)(1) has a two-tier structure).

37. The first tier is sometimes referred to as "party-controlled discovery." *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendments.

38. *See* Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 171 (D. Md. 2001) ("The most recent revisions to the discovery rules imposed changes intended to reach lingering concerns about the overbreadth and expense of discovery . . ."); 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).") (footnote omitted); Christopher C. Frost, Note, *The Sound and the Fury or the Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of the Discovery Scope-Narrowing Language in the 2000 Amendments to Federal Rule of Civil Procedure 26(b)(1)*, 37 GA. L. REV. 1039, 1054 (2003); Written Statement, Ronald J. Hedges, U.S. Magistrate Judge, Comments on Proposed Amendments to Rules 26 and 37 of the Federal Rules of Civil Procedure 4 (Feb. 8, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-169.pdf> ("[T]he intent of the 2000 amendment was that the scope of discovery 'be narrower than it is, in some meaningful way.'" (quoting Paul W. Grimm, U.S. Magistrate Judge)).

39. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendments; *see also* Surles v. Air Fr., No. 00CIV5004, 2001 WL 1142231, at *1 n.3 (S.D.N.Y. Sept. 27, 2001) (noting that the amendments mandate greater scrutiny of discovery requests).

litigants. If, however, good cause is an overly-lenient standard, then it will not limit the cost and burden of over-discovery.

Despite the importance of the term to the accomplishment of the Committee's goal, the amendments failed to define good cause or set parameters for its application.⁴⁰ The Committee's Note did not specifically indicate when it would be appropriate to apply the good cause standard.⁴¹ The Note also failed to provide meaningful assistance in determining the meaning of good cause. The Note simply states that, "[w]hen judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action."⁴² Indeed, rather than providing a precise definition of good cause, the Note states that the "good-cause standard warranting broader discovery is meant to be flexible."⁴³

B. Past Attempts to Amend the Discovery Rules Were Ineffective

The first three attempts to amend the Federal Rules of Civil Procedure to reduce the cost and burden of discovery were ineffective.⁴⁴ First, the amendments are so vague that they have largely been ignored. Second, even when the amendments have received judicial attention, the courts have failed to interpret them properly.

1. The First Three Attempts Failed to Constrain Discovery

After the amended rules had been in place for some time, Professor Miller noted that "the 1983 and 1993 amendments do not appear to have brought about the radical shift in practice I foresaw."⁴⁵ Courts have generally ignored the proportionality principle introduced by the

40. See FED. R. CIV. P. 26(b)(1) (2000).

41. See FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendments ("The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision" and "depends on the circumstances of the pending action.").

42. *Id.*

43. *Id.*

44. FED. R. CIV. P. 26(b)(1) advisory committee's notes to 2000 amendment. ("The Committee has been told repeatedly that courts have not implemented [the proportionality limitations of Rule 26(b)(2)(C)] with the vigor that was contemplated."). "[T]he Committee has . . . made . . . changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless . . ." *Id.*

45. See Letter from Arthur R. Miller, Professor, Harvard Law Sch., to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure, Judicial Conference of the U.S. 2 (Feb. 10, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-219.pdf>. Regarding the 1983 amendments to Rule 26(b), one leading treatise remarks: "The paucity of reported cases implementing this amendment shows that no radical shift has occurred. Whatever the theoretical possibilities, the actual effect of the proportionality addition to Rule 26 stands in marked contrast to the very large impact of the simultaneous revisions in 1983 to Rule 11." 8 WRIGHT, MILLER & MARCUS, *supra* note 29, § 2008.1 (2d ed. 1994).

1983 amendments.⁴⁶ The 2000 amendments were considered a necessary response to the federal courts' failure to manage litigation actively to reduce the costs of discovery, despite having the authority and mandate to do so. For example, the 2000 amendments added new language to Rule 26(b)(1) highlighting that the limitations of Rule 26(b)(2)[(C)] apply to all discovery.⁴⁷ The Advisory Committee's Note acknowledged that this new language was redundant, but stated that it was necessary because "courts ha[d] not implemented these limitations with the vigor . . . that was contemplated."⁴⁸

During the period of public comment, academics and practitioners criticized the proposed 2000 amendments to Rule 26(b)(1). These critics feared that the amendments would either (a) engender endless motion practice over the meaning of the phrase good cause or (b) be completely ignored by the parties and the courts, like the 1983 and 1993 amendments.⁴⁹ Today, with the benefit of a few years experience with the application of the two-tier system of Rule 26(b)(1), it is clear that the latter is true; despite the 2000 amendments, the Rule has been ignored.

The 2000 discovery amendments are ineffective in part because courts and practitioners are unable to discern the difference between that which is relevant to the claims and defenses of the parties and that which is relevant to the subject matter of the dispute.⁵⁰ Former Magistrate Judge, Ronald Hedges observed that litigants ignored the amend-

46. See Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 127 (2005) ("[T]he proportionality principle of Rule 26(b)(2) . . . is not being utilized by judges.").

47. See *supra* note 31 and accompanying text.

48. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendments.

49. See, e.g., CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF PUBLIC COMMENTS: PRELIMINARY DRAFT OF PROPOSED AMENDMENTS: CIVIL RULES REGARDING DISCOVERY 1998-99, at 109 (1999) [hereinafter 1998-99 SUMMARY OF PUBLIC COMMENTS] (comments of N.Y. State Bar Ass'n), available at <http://www.uscourts.gov/rules/archive/1999/summary.pdf>; *id.* at 110 (comments of Charles F. Preuss); *id.* at 110-11 (comments of Am. Coll. of Trial Lawyers); *id.* at 111 (comments of Professor Beth Thornburg); *id.* at 113 (statement and testimony of Robert E. Scott, Jr. on behalf of the Def. Research Inst.); *id.* at 113 (testimony of Gregory Arneson on behalf of the N.Y. State Bar Ass'n Commercial and Fed. Litig. Section); *id.* at 117 (statement of Rex K. Linder); see also Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 14 (2001) ("I fear that the amendment may lead to little positive change by way of curbing cost and excess in federal discovery, while increasing purely procedural contention over the multiple and vague terms in the revised rule.").

50. See, e.g., Rowe, *supra* note 49, at 25 ("[I]t is striking how little the courts' opinions reflect any apparent serious effort by parties who are resisting discovery to make anything out of this new and perhaps still unfamiliar scope definition.").

ments.⁵¹ Similarly, the Maryland District Court analogized the distinction created by the Rule to a pointless philosophical exercise and invited practitioners to ignore the two tiers:

Lest litigants and the court become consumed with the philosophical exercise of debating the difference between discovery relevant to the “claims and defenses” as opposed to the “subject matter” of the pending action — the juridical equivalent to debating the number of angels that can dance on the head of a pin — the practical solution to implementing the new rule changes may be to focus more on whether the requested discovery makes sense in light of the Rule 26(b)(2)[(C)] factors, than to attempt to divine some bright line difference between the old and new rule.⁵²

By suggesting that courts should focus on the Rule 26(b)(2)[(C)] factors, the court confirmed that the changes were meaningless as a practical matter.

Furthermore, the Advisory Committee’s Note to the 2000 amendments undermines any impact that the good cause standard could have. The Committee’s Note does not provide any examples of information that would not be relevant to the claims or defenses of a party (tier-one) but would be relevant to the subject matter of the dispute (tier-two).⁵³ Examples would be helpful to courts and litigants, who are left to struggle with the distinction with no official guidance. Instead, the Committee’s Note provides examples of certain types of information that, on their face, do not appear to be relevant to the claims or defenses of any party but, according to the Committee, should nevertheless be treated as such.⁵⁴ By failing to illustrate the tier-two subject matter category and stretching the tier-one claim or

51. See Hedges, *supra* note 46, at 126 (“[A]ttorneys do not as a general rule address the existence of good cause, either to argue for broader discovery as Rule 26(b)(1) contemplates or to counter such arguments.”).

52. Thompson v. Dep’t of Hous. & Urban Dev., 199 F.R.D. 168, 171 (D. Md. 2001).

53. See FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2000 amendments.

54. See *id.* (noting that the relevancy standard could apply to information about organizational arrangements or filing systems, as well as information about “other incidents of the same type, or involving the same product” as the incident or product involved in the suit). The Committee introduces these examples by stating that “[a] variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action.” *Id.* As one court noted, “the commentary strongly indicates that ‘same’ and, by extension, similar incidents, products, etc. are related to the claim, not the subject matter; and therefore discovery is not dependent on demonstration of good cause.” United Oil Co., Inc. v. Parts Assocs., Inc., 227 F.R.D. 404, 409 n.3 (D. Md. 2005).

defense category, the Committee undercut the potential impact of the amendments.

Even if the parties or the court are able to discern some distinction between tier-one and tier-two information, parsing the difference is futile. The good cause standard is so vague that it is almost always ignored by the parties.⁵⁵ Former Magistrate Judge Ronald Hedges stated that he has not noticed any changes in discovery practice as a result of the 2000 amendments:

My experience . . . is that discovery has not been narrowed in any meaningful way. Discovery is not generally limited to that which is relevant to a claim or defense. Attorneys rarely argue for or against the existence of “good cause” for broader discovery. In fact, attorneys appear to assume that the broader discovery contemplated by Rule 26(a)(1) is allowed in the normal course.⁵⁶

Thus, even if the parties raise the issue of good cause with the court, there is no guarantee that the court will impose the limitation contemplated by the 2000 amendments. Thus, the theoretical limitation on discovery created by the two-tier system is toothless.⁵⁷

A pattern has developed. The discovery rules are continually tweaked consistent with a “philosophical readjustment of the uncabined liberality formerly accorded opportunities for discovery,”⁵⁸ but they are never subject to a complete overhaul. The amended rules then fall victim to the siren song of liberal discovery. Ultimately, the amendments intended to result in discovery containment are rendered wholly ineffective. Then, the process starts over because courts, prac-

55. See Frost, *supra* note 38, at 1067 (“[N]one of the cases seemed to involve situations where a plaintiff failed to meet a burden proving ‘good cause’ in order to obtain the . . . ‘subject matter’ scope — in fact, the lack of discussion of the ‘good cause’ provision may indicate that plaintiffs are not using this provision at all.”).

56. Hedges, *supra* note 38, at 4.

57. See Rowe, *supra* note 49, at 24–25 (concluding, after a review of court decisions through January 2002, that “in nearly all instances it appears that the outcomes would have been the same under either version of the rule; indeed, it is striking how little the courts’ opinions reflect any apparent serious effort by parties who are resisting discovery to make anything out of this new . . . scope definition”); Thompson, 199 F.R.D. at 173 (refusing to attempt to apply the good cause standard and ordering the parties to “focus their discussions not on their scope differences under Rule 26(b)(1), but instead on a particularized analysis of the burden/benefit factors of Rule 26(b)(2)(C)”); Bruce Sewell, Gen. Counsel & Vice President, Intel Corp., Testimony Before the Committee on Rules of Practice & Procedure of the Judicial Conference of the U.S. 5 (Jan. 12, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-016.pdf> (“Unfortunately, some courts have tolerated these blunderbuss and potentially abusive sorts of discovery demands, apparently without imposing any good cause requirement on the requesting party.”).

58. Letter from Arthur R. Miller to Peter G. McCabe, *supra* note 45, at 2.

titioners, and the rulemakers remain concerned about the cost and burden of discovery.

2. Courts Have Ignored the Standard Canons of Statutory Construction in Interpreting the Discovery Rules

The 2000 amendments generally have failed to change the practice of federal judges in granting broad discovery because judges remain unwilling to contravene the liberal discovery mantra. Instead, in the absence of explicit direction, courts default to the maxim that discovery rules should be afforded a broad and liberal construction.⁵⁹ Moreover, despite the 2000 amendments, the burden of meeting this incredibly generous standard is not placed on the party requesting discovery. Instead, courts continue to follow pre-amendment reasoning that the burden always falls on the party opposing discovery.⁶⁰

This reluctance by courts to restrict discovery is consistent with the Supreme Court's statement, made in the era of increasingly unconstrained discovery, that interpretation of the discovery rules begins with the "basic premise 'that the deposition-discovery rules are to be accorded a broad and liberal treatment.'"⁶¹ It is not consistent, however, with the Supreme Court's subsequent interpretation of specific discovery rules. The Court has made clear that the presumption of liberal discovery must yield to the plain language of the Rules and to the requirement that the Rules be construed to ensure the speedy and inexpensive resolution of cases.

In 1965, the Supreme Court issued its opinion in *Schlagenhauf v. Holder*,⁶² a case construing Rule 35. The plaintiff, a bus passenger, brought a negligence action to recover for injuries he suffered when a Greyhound bus collided with the rear of a tractor trailer.⁶³ The plaintiff sued, among others, Greyhound and the bus driver.⁶⁴ Certain parties alleged that the bus driver was at fault, arguing that the bus driver "was not mentally or physically capable of driving a bus at the time of

59. See *Fleet Sys., Inc. v. Fed. Coach, L.L.C.*, No. 8:07CV08, 2007 WL 2264618, at *4 (D. Neb. Aug. 6, 2007); *Payless Shoesource Worldwide, Inc. v. Target Corp.*, No. 05-4023-JAR, 2007 WL 1959194, at *13 (D. Kan. June 29, 2007); *Arias-Zeballos v. Tan*, No. 06 CIV 1268 GEL KNF, 2007 WL 1599150, at *2 (S.D.N.Y. May 31, 2007) (quoting *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 42 (S.D.N.Y. 1984)); *United Oil*, 227 F.R.D. at 411; *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1111 (N.D. Ill. 2004); *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 619 (S.D. Ind. 2002).

60. See *infra* Part VI.A.1.

61. *Schlagenhauf v. Holder*, 379 U.S. 104, 114 (1964) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)).

62. 379 U.S. 104 (1964).

63. *Id.* at 106-07.

64. *Id.*

the accident.”⁶⁵ Several parties then sought an order from the district court requiring the bus driver to submit to both physical and mental examinations.⁶⁶ At the time, Rule 35 provided that:

In an action in which the mental or physical condition of the party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown.⁶⁷

To resolve the dispute, the Supreme Court had to construe and apply Rule 35. In doing so, the Court focused on the requirement that the matter be in controversy and that the moving party demonstrate good cause. The Court stated that “[w]e enter upon determination of this construction with the basic premise ‘that the deposition discovery rules are to be accorded a broad and liberal treatment,’ to effectuate [the Rules’] purpose that ‘civil trials in the federal courts no longer need be carried on in the dark.’”⁶⁸ Despite this recitation of the liberal discovery mantra, the Supreme Court applied standard canons of statutory construction when interpreting the Rules.⁶⁹ The Court noted that all discovery is subject to Rule 26(b)’s requirement that the discovery must be relevant to the subject matter of the action.⁷⁰ The Court found it “notable” that the only discovery rules that required the moving party to make an affirmative showing of good cause were Rules 34 and 35.⁷¹ The Court quoted with approval a Fourth Circuit opinion addressing the then-existing good cause requirement of Rule 34:

The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevance standard has already been imposed by Rule 26(b). Thus by adding

65. *Id.*

66. *Id.*

67. FED. R. CIV. P. 35 (1937).

68. *Schlagenhauf*, 379 U.S. at 114–15 (quoting *Hickman v. Taylor*, 329 U.S. 495, 501, 507) (internal citations omitted).

69. The Supreme Court has ruled that the standard canons of statutory construction apply to the Federal Rules. *See Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 540–41 (1991).

70. *Schlagenhauf*, 379 U.S. at 117.

71. *Id.* In 1970, Rule 34 was amended to remove the requirement of demonstrating good cause in order to obtain document discovery. *See infra* Part V.C.

the words [good cause], the Rules indicate that there must be a greater showing of need under Rules 34 and 35 than under the other discovery rules.⁷²

Moreover, the Court noted that “[t]he courts of appeal in other cases have also recognized that Rule 34’s good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule.”⁷³ Therefore, the Supreme Court concluded that the policy of liberal discovery must yield to standard methods of interpretation: “The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations.”⁷⁴

In a later case, the Supreme Court reiterated that the liberal discovery mantra does not supersede other interpretive principles. In its 1979 opinion in *Herbert v. Lando*,⁷⁵ the Supreme Court explained that the “broad and liberal treatment” accorded to the Rules is limited by Rule 1’s command that the Rules be construed to ensure the speedy and inexpensive determination of all cases.⁷⁶ The Court further specified that “the requirement of Rule 26(b)(1) that the material sought in discovery be ‘relevant’ should be firmly applied.”⁷⁷

Given the Supreme Court’s statements and method of textual construction in *Schlagenhauf*, the good cause standard of Rule 26(b)(1) must require something more than that the information be relevant and satisfy the proportionality principle of Rule 26(b)(2)(C). This conclusion is bolstered by the standard canon of construction that courts should avoid rendering statutory language meaningless or redundant.⁷⁸ As the Supreme Court stated in *Herbert*, interpretations of the Rules should rely on the Rules’ language and on their express purpose, not on what they used to say or what they used to mean.⁷⁹

72. *Schlagenhauf*, 379 U.S. at 117–18 (quoting *Guilford Nat’l Bank of Greensboro v. S. Ry. Co.*, 297 F.2d 921, 924 (4th Cir. 1962)).

73. *Id.* at 118 (footnote omitted) (citing *Mitchell v. Bass*, 252 F.2d 513, 518 (8th Cir. 1958); *Hauger v. Chi., Rock Island & Pac. R.R. Co.*, 216 F.2d 501, 504–05 (7th Cir. 1954); *Williams v. Cont’l Oil Co.*, 215 F.2d 4, 6–7 (10th Cir. 1954); *Allmont v. United States*, 177 F.2d 971, 978 (3d Cir. 1950); *Martin v. Capital Transit Co.*, 170 F.2d 811, 812 (D.C. Cir. 1948)).

74. *Id.* at 121.

75. 441 U.S. 153 (1979).

76. *Id.* at 177; *see also* FED. R. CIV. P. 1.

77. *Herbert*, 441 U.S. at 177.

78. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992).

79. *Herbert*, 441 U.S. at 177. A fair reading of the good cause requirement should take into account the express requirement that the Rules “should be construed *and administered* to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1 (emphasis added); *see also supra* Part III.A.2 (discussing 1993 amendments adding “and administered” language and the intent of the rulemakers that this lan-

However, the lower courts interpreting the Rule 26(b)(1) good cause standard have failed to follow the standard canons of construction and the guidance provided by the nearly identical interpretive issue resolved in *Schlagenhauf*.⁸⁰ Instead, many lower courts have acknowledged the 2000 amendments but have interpreted them as having changed nothing.⁸¹ As a result, courts have clung to the liberal discovery mantra while disregarding both the express language of Rule 26(b)(1) and the serial amendments to the discovery rules that were meant to rein in the cost and burden of discovery.

IV. ONCE MORE UNTO THE BREACH: THE 2006 E-DISCOVERY AMENDMENTS

A. The E-Discovery Amendments Were Intended to Reduce the Cost and Burden of Discovery and to Ensure Equality of Treatment

The Advisory Committee first learned about the problems of e-discovery in 1996.⁸² The Advisory Committee consulted judges, practitioners, academics, bar organizations, and experts in information technology.⁸³ It concluded that e-discovery is more time-consuming,

guage should cause courts to involve themselves actively in avoiding undue cost and delay for litigants).

80. A search of all federal decisions since 1999 finds no cases that follow these interpretations of the good cause standard and cite *Schlagenhauf*. A Westlaw search of ALLFEDS database for “schlagenhauf /3 holder /100 26(b) /50 good /3 cause & da(aft 1999)” identifies four cases: *Vilkhu v. City of N.Y.*, No. 06-CV-2095 (CPS)(JO), 2007 WL 27713340 (E.D.N.Y. Sept. 13, 2007); *Touhy v. Walgreen Co.*, No. CIV-05-135-M, 2006 WL 1716646 (W.D. Okla. June 21, 2006); *Gattegno v. PricewaterhouseCoopers, L.L.P.*, 204 F.R.D. 228 (D. Conn. 2001); and *Houghton v. M&F Fishing, Inc.*, 198 F.R.D. 666 (S.D. Cal. 2001). A Westlaw search of ALLFEDS database for the key *Schlagenhauf* phrase “rules /10 liberal! /10 constru! /10 expand! /10 disregard! /10 plain! /10 express! /10 limit! & da(aft 1999)” reveals two cases, one of which did not appear in the prior search results: *Samsung Electronics Co. v. Rambus, Inc.*, 440 F. Supp. 2d 495 (E.D. Va. 2006). None of these cases discuss or apply the 26(b)(1) good cause standard required for discovery of information relevant only to the subject matter of the action. In *Samsung*, the district court rejected a liberal construction of Rule 41(a)(1)(ii), unlike several other courts. *Id.* at 506–07. Instead, the district court determined that the “plain meaning of Rule 41(a)(1)(ii) forecloses the liberal construction adopted by a number of other courts.” *Id.* at 506.

81. *See, e.g.*, *Klein v. AIG Trading Group Inc.*, 228 F.R.D. 418, 423 (D. Conn. 2005) (citing 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 26.41[3][c] (3d ed. 2004)) (indicating that the 2000 amendments do not signal a significant departure from the earlier Rules); *Graham v. Casey’s Gen. Stores*, 206 F.R.D. 251, 253 (S.D. Ind. 2002) (“Even after the recent amendments to Federal Rule of Civil Procedure 26, courts employ a liberal discovery standard.”); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 400 (4th ed. 2005) (citing *Sanyo Laser Prods., Inc. v. Arista Records, Inc.*, 214 F.R.D. 496 (S.D. Ind. 2003)) (“Despite the 2000 amendments, the use of broad discovery appears to remain the norm and does not seriously seem to have been affected by the change in wording.”).

82. SEPT. 2005 REPORT OF THE RULES COMM., *supra* note 4, at 22.

83. *Id.*

more burdensome, and more costly than conventional discovery.⁸⁴ In addition, it determined that the existing Rules “provided inadequate guidance to litigants, judges and lawyers in determining discovery rights and obligations in particular cases,” resulting in inconsistent case law that was “necessarily limited by the specific facts involved.”⁸⁵ Thus, the Advisory Committee recommended the e-discovery amendments for three principal reasons: (a) to reduce the costs and burden of e-discovery; (b) to ensure that similarly situated litigants are treated the same, regardless of which federal district handles the case; and (c) to encourage the judiciary to participate more actively in case management when appropriate.⁸⁶ Many of the public comments received by the Committee regarding the proposed e-discovery amendments lauded the proposals.⁸⁷

B. New Rule 26(b)(2)(B) Builds on the Structure and Standards of the Prior, Ineffective Discovery Amendments

The e-discovery amendments to Rule 26(b)(2) build on the structure and standards of the prior three rounds of discovery amendments. In its transmittal letter to the Chief Justice of the U.S. Supreme Court and the Members of the Judicial Conference, the Rules Committee stated that the 2006 e-discovery amendments “grew out of the advisory committee’s work on the 2000 amendments.”⁸⁸ Just as it described the 2000 amendments, the Rules Committee described the e-discovery amendments to Rule 26(b)(2)(B) as a “two-tier system of discovery.”⁸⁹ The dominant features of the 2000 discovery amendments were: (1) separation of relevant information into two catego-

84. See *id.* at 22–24; cf. Henry S. Noyes, *Is E-Discovery So Different that It Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*, 71 TENN. L. REV. 585, 593–94 (2004) (concluding five true differences exist between discovery of electronic information and discovery of traditional hardcopy information and that the pre-2006 amendment Rules already provide sufficient guidance on two of the true differences).

85. SEPT. 2005 REPORT OF THE RULES COMM., *supra* note 4, at 23. “Disparate local rules have emerged to fill this gap between the existing discovery rules and practice, and more courts are considering local rules. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop.” *Id.*

86. *Id.* at 24.

87. For example, Professor Miller wrote: “The [Advisory] Committee is on appropriate ground in offering amendments to the rules to address the unique problems of today’s e-discovery The objective, of course, is to promote discovery that is more efficient, less costly, and less burdensome but meets the needs of the particular case.” Letter from Arthur R. Miller to Peter G. McCabe, *supra* note 45, at 3.

88. SEPT. 2005 REPORT OF THE RULES COMM., *supra* note 4, at 24.

89. *Id.* app. at C-43; see also Rosenthal, *supra* note 1, at 171 (“The amendment to Rule 26(b)(2) applies a two-tier structure to this distinctive and recurring problem of electronic discovery.”).

ries — one of which is protected from discovery absent a particular showing; (2) defining the required showing as good cause; and (3) protection of all relevant information from disclosure pursuant to Rule 26(b)(2)(C) if the burden and expense of disclosure outweighs its likely benefit. The 2006 e-discovery amendments mimic these changes: (1) separation of ESI into two categories — one of which is protected from discovery absent a particular showing; (2) defining the required showing as good cause; and (3) protection of all ESI from disclosure pursuant to Rule 26(b)(2)(C) if the burden and expense of disclosure outweighs its likely benefit.⁹⁰ Combined, the two-tier systems of the 2000 amendments and 2006 amendments form a “double” two-tier system for e-discovery.⁹¹

*C. Revisions to Rule 26(b)(2)(B) Following the Public Comment
Period Tie Good Cause to the Proportionality Test of
Rule 26(b)(2)(C)*

The Advisory Committee originally proposed to amend Rule 26(b)(2) to state that, once the producing party establishes that its ESI is not reasonably accessible, “the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.”⁹² During the period of public comment, the Advisory Committee received many comments that the Rule did not clearly state what constitutes good cause and the how the good cause standard relates to the proportionality principles of Rule 26(b)(2)(C).⁹³ The

90. FED. R. CIV. P. 26(b)(2)(B); see Rosenthal, *supra* note 1, at 171.

91. How (and whether) the two-tier structure of the e-discovery amendments works together with the general two-tier structure of discovery remains uncertain. See *infra* Part VI.F.

92. See CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 26 (2004) [hereinafter AUG. 2004 REPORT OF THE ADVISORY COMM.], available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>. These documents, constituting the Advisory Committee’s recommendations and accompanying proposed amendments, were formally released by the Rules Committee for publication and comment in August 2004. *Id.* at 1.

93. See SEPT. 2005 REPORT OF THE RULES COMM., *supra* note 4, at 43; see also COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., MEETING OF JUNE 15–16 MINUTES 25 [hereinafter RULES COMM. JUNE 2005 MINUTES] (statement of Judge Lee Rosenthal, Chair), available at http://www.uscourts.gov/rules/Minutes/ST_June_2005.pdf; CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 98 (2005), available at <http://www.uscourts.gov/rules/e-discovery/0112frcp.pdf> (testimony of Henry S. Noyes); Gregory P. Joseph, *Electronic Discovery I*, NAT’L L.J., Oct. 4, 2004, at 12, Column 1 (arguing that there is no apparent difference between the Rules as amended in 2000 and the proposed new standard and, if there is a difference, it should be spelled out in the Advisory Committee’s Note); Letter from the Ass’n of the Bar of the City of N.Y. to Peter G. McCabe, Sec’y to the Comm. on Rules of Practice & Procedure 5 (Feb. 15, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-179.pdf>.

Federal Magistrate Judges Association Rules Committee, representing judges on the front line of discovery battles, complained that “the proposed amendment is potentially redundant [I]t is unclear whether the good cause analysis is intended to be something different than what courts already are doing under Rule 26(b)(2)(C).”⁹⁴

In response to the public comments, the Advisory Committee revised the proposed Rule and corresponding Committee Note to “clarify” the meaning of the good cause standard.⁹⁵ The minutes of the Rule Committee’s meetings and their actions both make clear that the amended Rule 26(b) provides no new protection against the cost and burden of discovery — electronic or otherwise. Instead, the amended rule simply codified existing practice.⁹⁶

In its May 2005 report, the Advisory Committee stated, “[m]any comments suggested that the ‘good cause’ standard seemed to contemplate the limitations identified by [the proportionality test of Rule 26(b)(2)(C)]. The revised text clarifies the ‘good cause’ showing by expressly referring to consideration of these limitations.”⁹⁷ The amended rule now states that, once the producing party establishes that its ESI is not reasonably accessible, “the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”⁹⁸

The Committee report might indicate that the 2006 amendments to Rule 26(b)(2) provide no new protection against the costs and burdens of e-discovery. Rule 26(b)(2)(C) already provides that all materials subject to discovery — traditional paper documents, ESI that is reasonably accessible, and ESI that is not reasonably accessible — shall be limited if the request does not satisfy the proportionality test. In fact, the 2000 amendment to Rule 26(b)(1), which defines the scope of permissible discovery, states that “[a]ll discovery is subject to the limitations imposed by [Rule 26(b)(2)(C)].”⁹⁹ Finally, the Advisory Committee’s Note emphasizes that “[t]he limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.”¹⁰⁰

94. Written Statement, Fed. Magistrate Judges Ass’n Rules Comm., Comments of the Federal Magistrate Judges Association on Proposed Changes to the Federal Rules of Civil Procedure 5 (Feb. 3, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-080.pdf>.

95. SEPT. 2005 REPORT OF THE RULES COMM., *supra* note 4, app. at C-43.

96. MAY 2005 REPORT OF THE ADVISORY COMM., *supra* note 2, at 44.

97. *Id.* at 43.

98. FED. R. CIV. P. 26(b)(2)(B).

99. FED. R. CIV. P. 26(b)(1).

100. FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments.

V. THE GOOD CAUSE STANDARD IS BAD MEDICINE FOR THE DISCOVERY RULES

The good cause standard introduced to Rule 26(b)(2)(B) by the 2006 amendments does not achieve the goals of the drafters. First, the rulemakers have not meaningfully defined good cause. Second, in light of the many good cause standards contained in the Rules, courts cannot be expected to meaningfully apply Rule 26(b)(2)(B) without further guidance. Third, prior experience with Rule 34 demonstrates that courts have difficulty applying good cause standards to discovery. Moreover, the good cause standard is incompatible with the requirement of relevancy already embedded in the discovery Rules. Finally, the Rule improperly relies on judicial discretion to curb discovery.

A. The Discovery Rules Do Not Define Good Cause

The discovery rules do not define good cause beyond reiterating the requirements of Rule 26(b)(2)(C). Although Rule 26(b)(1) also contains the good cause standard, there has been little guidance provided about how it should be interpreted.¹⁰¹ Similarly, since enactment of the 2006 amendments, the rulemakers have not offered additional guidance.¹⁰² The Advisory Committee's Note that accompanies the 2006 e-discovery amendments purports to provide some guidance on the factors a court should consider in determining whether there has been a showing of good cause:

The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances

101. *See supra* Parts III.A.3 & III.B.

102. Professor Richard Marcus, Special Reporter to the Civil Rules Advisory Committee, discusses the e-discovery amendments in a recent article, but he fails to address the meaning (or even the concept) of the new good cause standard. *See* Richard L. Marcus, *E-Discovery & Beyond: Toward A Brave New World or 1984?*, 25 REV. LITIG. 633 (2006). Likewise, in sharing her thoughts on e-discovery, Judge Rosenthal mentions the good cause requirement of Rule 26(b)(2)(B) but does not discuss the meaning of this new standard. *See* Rosenthal, *supra* note 1, at 170–72, 177–81. In a recent publication, the Federal Judicial Center sought to “help federal judges manage the discovery of electronically stored information.” BARBARA J. ROTHSTEIN, RONALD J. HEDGES, & ELIZABETH C. WIGGINS, *MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES*, at v (2007), available at <http://www.uscourts.gov/rules/eldscpkt.pdf>. The *Pocket Guide* mentions the good cause standard of Rule 26(b)(2)(C) and refers to the cost-shifting facts set forth in the Committee's Note, but it does not provide guidance on the meaning or application of the good cause standard. *See id.* at 6–9.

of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.¹⁰³

However, these factors do not tell us much about the Rule 26(b)(2)(B) good cause standard. All discovery must satisfy the proportionality test of Rule 26(b)(2)(C).¹⁰⁴ Judge Scheindlin, who decided *Zubulake v. UBS Warburg, L.L.C.*,¹⁰⁵ the case that established many of the above factors,¹⁰⁶ confirms that these seven factors "overlap the proportionality considerations of Rule 26(b)(2)(C)."¹⁰⁷ Rather than elucidating the meaning of good cause, the list of factors thus may be simply another redundant reminder that all discovery is subject to the limitations of Rule 26(b)(2)(C).¹⁰⁸

Furthermore, the above seven factors are taken directly from case law determining whether to shift the cost of production to the requesting party.¹⁰⁹ If these factors are accepted as the definition of good

103. FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments. The Advisory Committee's Note also states that a "requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause." *Id.*

104. *See* FED. R. CIV. P. 26(b)(2)(C).

105. 216 F.R.D. 280 (S.D.N.Y. 2003).

106. The *Zubulake* court established a seven factor test (in descending order of importance) to determine whether to shift the cost of production of e-discovery: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. *Id.* at 322–23.

107. SCHEINDLIN, *supra* note 11, at 17. Judge Scheindlin also served on the Advisory Committee during the development of the 2006 amendments. Judicial Conference of the U.S., Roster of the 2004 Rules Committees (2004), http://www.uscourts.gov/rules/Committee%20Membership%20Lists/ST_Roster_2004.pdf.

108. *See* Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 1, 9 (2006) (arguing that the requirement that a party identify its ESI that is not reasonably accessible is the only real change to Rule 26(b)(2)); *supra* Parts III.B.1 & IV.C.

109. *See Zubulake*, 216 F.R.D. at 280; Noyes, *supra* note 84, at 626–34 (discussing the cost-shifting tests established in *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), as well as *Zubulake*).

cause, we end up with a good cause standard that is no longer used to determine whether information is *discoverable* or even whether it must be *produced*; it merely is used to determine whether the producing party must bear the costs of production.¹¹⁰ Is it possible that the rulemakers intended that objections to discoverability and production would no longer be viable and meaningful? The 2006 amendments may have this effect by making discoverability and production entirely dependent upon the requesting party's ability to pay for discovery.

In sum, the new good cause standard probably does not provide any additional protection against the cost and burden of discovery beyond that already available under the pre-2006 discovery rules.¹¹¹ In her recent article, *A Few Thoughts on Electronic Discovery After December 1, 2006*, Judge Rosenthal expressed a similar view, stating "Rule 26(b)(2)(B) does not create new authority for judges to limit discovery or to allocate the costs of that discovery."¹¹² Perhaps the Advisory Committee's own description of the e-discovery amendments sums it up best: "The proposed amendment is modest."¹¹³ In fact, it is so modest as to be essentially meaningless.

B. The Numerous Good Cause Standards Both Illustrate the Weaknesses of and Undermine Rule 26(b)(2)(B)

The Federal Rules of Civil Procedure contain numerous good cause standards.¹¹⁴ It is a canon of statutory construction that a word

110. Compare Noyes, *supra* note 84, at 639 (recommending that the restriction on discovery of information that is not reasonably accessible should be incorporated into the existing two-tier system of Rule 26(b)(1) to determine whether the information is *discoverable*), with Elaine Ki Jin Kim, Comment, *The New Electronic Discovery Rules: A Place For Employment Privacy?*, 115 YALE L.J. 1481, 1486–87 (2006) (concluding that new Rule 26(b)(2) "removes electronic data from the scope of discoverability if the court finds that production would be overly burdensome and no good cause exists to override that determination").

111. See Sarah A.L. Phillips, Note, *Discoverability of Electronic Data Under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for "Not Reasonably Accessible" Data?*, 83 N.C. L. REV. 984, 986 (2005) (arguing that the 2006 amendments provide no additional protection to ESI that is not reasonably accessible because the good cause requirement is too weak); cf. Kim, *supra* note 110, at 1486–87 (arguing that treating the Rule 26(b)(2)(C)(i)–(iii) factors as the entirety of the Rule 26(b)(2)(B) good cause inquiry would frustrate the purpose of the new Rule).

112. Rosenthal, *supra* note 1, at 181.

113. SEPT. 2005 REPORT OF THE RULES COMM., *supra* note 4, app. at C-44; see also Marcus, *supra* note 102, at 648 ("Actually, the proposed amendments are quite modest.")

114. See FED. R. CIV. P. 4(d)(2), 4(m), 6(c)(1)(C), 16(b), 26(a)(3)(B), 26(b)(1), 26(b)(2)(B), 26(c)(1), 31(a)(5), 32(c), 33(b)(4), 35(a)(2)(A), 43(a), 44(a)(2)(C), 45(d)(1)(D), 47(c), 55(c), 59(c), 65(b)(2), 71.1(h)(2)(C), 73(b)(3). The December 2007 restyling rendered a collection of phrases previously in the Rules — "for good cause," "for cause shown," "for good cause shown," "shows good cause," "showing of good cause," and "for valid cause" — to all read "for good cause." COMM. ON RULES OF PRACTICE & PROCEDURE,

used in multiple places in the same legal text should have the same meaning.¹¹⁵ Thus, the various good cause standards in the Rules should receive the same interpretation. But they do not. For example, a party seeking relief from a court's pretrial order pursuant to Rule 16(b) must demonstrate good cause;¹¹⁶ a party seeking to set aside a default judgment pursuant to Rule 55(c) must show good cause;¹¹⁷ and a party seeking to avoid an assessment of costs for failing to agree to a waiver of service of summons pursuant to Rule 4(d)(2) must show good cause.¹¹⁸ Although these rules all require a showing of good cause, courts have interpreted the phrase to mean different things in different contexts and have applied the standard with varying levels of vigor. Good cause for relief from a court's pretrial order means a showing of substantial need and diligence in pursuing the amendment in a timely fashion.¹¹⁹ Good cause to set aside a default judgment is determined by: "(1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; [and] (3) whether the default was the result of the defendant's culpable conduct."¹²⁰ Good cause to avoid assessment of costs for failure to waive service of summons "should be rare"¹²¹ and may not be based on a defendant's "misconception of the law."¹²²

Even within the more limited universe of discovery rules, there is no single definition of good cause. A party seeking discovery of in-

JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF PROPOSED AMENDMENTS TO THE FEDERAL RULES 3 (2007), available at http://www.uscourts.gov/rules/supct1106/summary_proposed_amend.pdf. The lack of clear definition of the good cause standard — and its ubiquity — is amplified by the recent style revision. The Rules Committee intends that the style revisions will "clarify, simplify, improve consistency, and modernize expression, without changing substantive meaning." COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., INTRODUCTION TO PROPOSED STYLE REVISION OF FEDERAL RULES OF CIVIL PROCEDURE, at viii (2005), available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf. Although the various phrases will all read "for good cause," the meaning of the phrase will vary depending upon its placement and the proposed revisions will not clarify, simplify or improve consistency in the interpretation of the numerous instances of the good cause standard.

115. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)); see also *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (stating that a term appearing in statutory text in several places is normally interpreted to have the same meaning each time it appears); *Marek v. Chesny*, 473 U.S. 1, 21 (1985) ("[W]ords and phrases in the Federal Rules must be given a consistent usage and be read *in pari materia*[;] . . . to do otherwise would 'attribute a schizophrenic intent to the drafters.'" (quoting *Delta Airlines, Inc. v. August*, 450 U.S. 346, 360 (1981))).

116. FED. R. CIV. P. 16(b).

117. *Id.* 55(c).

118. *Id.* 4(d)(2).

119. See *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 339–41 (2d Cir. 2000).

120. *United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984).

121. FED. R. CIV. P. 4(d)(2) advisory committee's note to 1993 amendments.

122. See *Butler v. Crosby*, No. 3:04CV917-J-32MMH, 2005 WL 3970740, at *3 (M.D. Fla. June 24, 2005) (collecting and discussing cases).

formation that is not relevant to any party's claims or defenses but is relevant to the subject matter of the action must show good cause pursuant to Rule 26(b)(1);¹²³ a party seeking a protective order limiting discovery must demonstrate good cause pursuant to Rule 26(c);¹²⁴ and a party seeking to conduct an adverse medical examination of another party must demonstrate good cause pursuant to Rule 35(a).¹²⁵ Although these good cause standards all appear in the discovery rules, they have each been interpreted differently. As discussed above, the Rule 26(b)(1) good cause standard is weak and does not pose a significant hurdle to parties seeking discovery.¹²⁶ In contrast, good cause for a protective order must be based on "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements;"¹²⁷ and it must be shown that the "disclosure will cause a clearly defined and serious injury."¹²⁸ Good cause for conducting a medical examination requires the moving party to make a showing of relevance and to demonstrate more than mere conclusory allegations.¹²⁹

In the past, some commentators have predicted that one of these good cause standards would provide clarity for Rule 26(b)(1). For example, one leading treatise relied on the Supreme Court's interpretation of good cause for Rule 35 to conclude that the 2000 amendments to Rule 26(b)(1) would give that good cause standard some actual teeth:

[I]t is likely that the "good cause" showing required for such an order will not be a mere formality It will, in all likelihood, be necessary for a movant for relief from the normal limitations on discovery to make more than conclusory allegations of good cause and to show more than that the requested additional discovery is likely to lead to information relevant to the case.¹³⁰

But that expectation went unfulfilled. There is no reason to believe that the good cause requirement of the 2006 amendments will fare differently. The 2006 amendments do not identify which among these many good cause standards will apply to e-discovery, and there is no

123. FED. R. CIV. P. 26(b)(1).

124. *Id.* 26(c).

125. *Id.* 35(a).

126. *See supra* Part III.B.

127. 8 WRIGHT, MILLER & MARCUS, *supra* note 29, § 2035 (2d ed. 1994).

128. 6 MOORE ET AL., *supra* note 81, § 26.104 (3d ed. 2007).

129. *Schlagenhauf v. Holder*, 379 U.S. 104, 118–19 (1964).

130. 6 MOORE ET AL., *supra* note 81, § 26.41[3][c] (3d ed. 2007).

reason to think that the courts will even settle on a single standard, let alone choose one with teeth. If the good cause standards have different meanings, the rules should explain how the various meanings are different and how they should be applied.

C. The Good Cause Standard Was Eliminated from a Discovery Rule Previously Because It Was Ineffective

Prior to 1970, the discovery rules required that a party seeking document discovery must first make a motion and obtain a court order based upon a showing of good cause.¹³¹ This requirement was “originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder.”¹³² The phrase good cause was so vague, however, that courts and practitioners were unclear about its meaning, and judges were left with unguided discretion to resolve questions of entitlement to discovery.¹³³ The Rules Committee reported substantial criticism by the bar to the use of the good cause standard as a discovery requirement.¹³⁴ In 1970, Rule 34 was amended to eliminate the good cause requirement “because it has furnished an uncertain and erratic protection to the parties from whom production is sought.”¹³⁵

When reviewing the 2000 amendments to the discovery rules, Judge Scheindlin stated that “[t]he ‘good cause’ requirement will lead to ten or twenty years of satellite litigation, while its meaning is worked out; the good cause requirement was abandoned from Rule 34 in 1970, and should not now be resurrected.”¹³⁶ Judge Scheindlin’s dire forecast was wrong. Instead of leading to years of litigation over its meaning, the resurrection of the good cause standard had no impact

131. COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., RULES COMMITTEE REPORT 91–93 app. 2 (1969) [hereinafter 1969 REPORT OF THE RULES COMM.], available at <http://www.uscourts.gov/rules/Reports/ST10-1969.pdf>; FED. R. CIV. P. 34 advisory committee’s note to 1970 amendments.

132. 1969 REPORT OF THE RULES COMM., *supra* note 131, at 94.

133. Stempel & Herr, *supra* note 38, at 420.

134. 1969 REPORT OF THE RULES COMM., *supra* note 131, at 11; see also CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 16 (1969) [hereinafter 1969 REPORT OF THE ADVISORY COMM.] (Comments of Professor David W. Louisell), available at <http://www.uscourts.gov/rules/CV04-1969-min.pdf> (arguing that “[w]e must do better than ‘good cause.’ We simply can’t rest on that language”); *id.* at 18 (Comments of George Cochran Doub) (noting that “[c]riticisms of ‘good cause’ have been proposed all through this material, and it’s a totally inadequate standard. It gives no guidance, it isn’t explicit and it’s subject to a wide variety of interpretations”).

135. FED. R. CIV. P. 34 advisory committee’s note to 1970 amendments.

136. See CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., DRAFT MINUTES OF CIVIL RULES ADVISORY COMMITTEE 28 (1999), available at <http://www.uscourts.gov/rules/Minutes/CV04-1999.pdf>.

at all; it has simply been ignored.¹³⁷ The unwise resurrection of the good cause standard in 2000 has been followed by the 2006 third coming of the good cause standard in the e-discovery amendments.¹³⁸

D. Use of the Good Cause Standard in the Discovery Rules Is Inappropriate Because All Discovery Must Be Relevant

Unlike matters governed by other Rules, information governed by discovery rules is already subject to the relevance requirement. The relevance requirement makes the good cause standard particularly inappropriate for discovery. Indeed, there is a danger that good cause under Rule 26(b)(2)(B) could be mistakenly conflated with relevance.

The various appellate courts that considered the issue generally concluded that, because the Federal Rules of Civil Procedure required relevance in order to obtain any discovery, the express inclusion of a good cause requirement in Rule 34 prior to 1970 imposed a separate requirement necessitating a showing beyond mere relevance.¹³⁹

[G]ood cause has been the source of a considerable amount of difficulty in the past. It has been construed sometimes to mean essentially relevant and it has been construed at other times to mean more than that We discerned in the interpretation of good cause in prior cases a trend or a tendency on the part of courts essentially to utilize relevance plus a protective order approach of undue expense or annoyance or oppression when documentary materials were generally involved under Rule 34.¹⁴⁰

It seems likely that the Rule 26(b)(2)(B) good cause requirement added by the 2006 amendments will create similar interpretive difficulties. Because many courts do not interpret good cause to be a rig-

137. *See supra* Part III.B.

138. *See supra* Part IV.

139. *See, e.g.*, *Guilford Nat'l Bank v. S. Ry. Co.*, 297 F.2d 921, 923–24 (4th Cir. 1962); *Mitchell v. Bass*, 252 F.2d 513, 518 (8th Cir. 1958); *Hauger v. Chi., Rock Island & Pac. R.R.*, 216 F.2d 501, 504–05 (7th Cir. 1954); *Williams v. Cont'l Oil Co.*, 215 F.2d 4, 6–7 (10th Cir. 1954); *Alltmont v. United States*, 177 F.2d 971, 978 (3d Cir. 1950); *Martin v. Capital Transit Co.*, 170 F.2d 811, 812 (D.C. Cir. 1948); *see also* FED. R. CIV. P. 34 advisory committee's note to 1970 amendments (“It has often been said in court opinions that good cause requires a consideration of need for the materials and of alternative means of obtaining them, i.e., something more than relevance and lack of privilege.”).

140. 1969 REPORT OF THE ADVISORY COMM., *supra* note 134, at 11 (comments of Professor Albert M. Sacks, Reporter).

orous requirement,¹⁴¹ there is a danger that courts will conflate the standard with relevance. Yet, good cause must mean something more than relevance. To treat good cause as merely requiring relevance would violate the principle that all terms in legal texts should be given meaningful effect.¹⁴²

E. The 2006 E-Discovery Amendments Wrongly Increase Judicial Discretion

The e-discovery amendments neither provide additional protection against discovery of ESI, nor ensure uniform treatment of similarly situated litigants. By again dusting off the good cause standard, the e-discovery amendments continue to expand judicial discretion.¹⁴³ This expanded judicial discretion will be almost entirely unregulated, in part because this type of discretion is not possible to regulate:

[T]he trial judge enjoys enormous discretionary power to shape what may be the only significant stage of litigation. The broad language of most of the key discovery rules gives the judge wide latitude. Moreover, the trial judge, when acting on a discovery dispute, is in most cases virtually immune to appellate supervision, the rare third stage of discovery. Appellate review of trial court discovery rulings is rare; when review does occur, the appellant must demonstrate that the trial court “abused its discretion,” a standard guaranteeing substantial insulation from appellate supervision.¹⁴⁴

The phenomenon of case management, encouraged by recent amendments to the Rules, hinders the ability of appellate courts to foster uniformity in the law of discovery. Managerial decisions — such as

141. See *supra* Part III.B (concerning Rule 26(b)(1)); *infra* Part V.E (concerning Rule 26(b)(2)).

142. See *supra* note 78 and accompanying text.

143. There is significant debate about whether increased judicial discretion is a net positive. Compare Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007) (arguing that bounded rationality, information access, and strategic interaction impairs the quality of case-specific decision-making by trial judges), with Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) (noting that there has been a significant increase in judicial discretion in the last century and arguing that concerns about this increased judicial discretion are overblown).

144. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 651–52 (1994). This immunity from meaningful appellate review is further bolstered because discovery rulings normally do not constitute a final decision and therefore are not immediately appealable. See 28 U.S.C. § 1291 (2000); Yeazell, *supra*, at 660–62.

whether there is good cause for discovery of specific information — provide little or no guidance to future litigants because they turn on case-specific considerations, rarely result in published opinions, and are virtually immune from review on appeal.¹⁴⁵

Unfettered judicial discretion will further open the door to inconsistent, arbitrary, and biased decision-making.¹⁴⁶ Past practice and pressure by litigants makes it likely that judges will resort to the liberal discovery mantra. As a result, over-discovery will continue. It is also easier for judges to err on the side of over-discovery. The court does not bear the cost of discovery. In fact, granting all discovery requests reduces the time, expense and effort the court must spend overseeing discovery.¹⁴⁷

In rare instances, judges may apply the new good cause requirement rigorously. This, in turn, will lead to forum shopping as litigants seek districts¹⁴⁸ that contain judges whose views on discovery suit their particular needs.

Increased judicial discretion, coupled with the absence of meaningful boundaries on that discretion, leads to unpredictability. Parties will file more motions because they cannot anticipate the outcome of discovery disputes with any degree of confidence or certainty. Such uncertainty over discovery rules may discourage early settlement because plaintiffs will choose to test the limits of courts' tolerance for discovery.

Ultimately, the Advisory Committee's process of serially amending the discovery rules, coupled with an unwillingness to enact *explicit* limitations on the scope of discovery that have cognizable definitions, devalues the Federal Rules of Civil Procedure. The 2006 discovery amendments are part of a trend that diminishes the importance of the actual text of the Rules by giving judges increasing discretion to read their own requirements into (or out of) the text.¹⁴⁹

145. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 425–26 (2007).

146. See *S. Ry. Co. v. Lanham*, 403 F.2d 119, 126 (5th Cir. 1968) (“There is no settled understanding of what ‘good cause’ means; and because the determination depends to a large extent upon the facts of each case, a wide latitude of discretion is necessarily vested in the trial judge.”); Bone, *supra* note 143, at 1986.

147. Of course, denying all discovery would reduce the court's efforts to nearly zero, but this position is more likely to result in reversal on appeal and remand for further proceedings.

148. See, e.g., E.D. TEX. LOC. R. CV-26(d) (providing a list of factors “for counsel's guidance in evaluating whether a particular piece of information is relevant to the claim or defense of any party” (internal quotation marks omitted)); see also JOINT BAR-COURT COMM., SUGGESTED PROTOCOL FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2007), available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> (providing a working model of e-discovery for the District of Maryland).

149. In its recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court acknowledged that charging the lower courts with the responsibility of man-

VI. FURTHER PROBLEMS IN INTERPRETING AND APPLYING RULES 26(B)(1) AND 26(B)(2)(B)

The problems with Rule 26(b)(2)(B) go beyond the ambiguity of good cause. This Part raises a number of questions about the proper treatment of the good cause requirement of Rule 26(b)(2)(B), as well as the good cause requirement of Rule 26(b)(1). Most, but not all, of the questions raised relate to the relationship between Rule 26(b)(2)(B) and Rule 26(b)(1). This Part concludes that the answers to these questions are as yet unclear.

A. Who Has the Burden of Proof for the Rule 26(b)(1) and 26(b)(2)(B) Good Cause Standards?

How burdens of proof are assigned under Rule 26(b)(1) and Rule 26(b)(2)(B) is crucial to the joint functioning of these rules.¹⁵⁰ However, it is unclear whether the requesting party or the producing party has the burden of proof under either Rule. Several years of practice have not resolved the question for Rule 26(b)(1). The proper assignment of the burden for Rule 26(b)(2)(B) is similarly unclear due to problems and inconsistencies arising from the Advisory Committee's suggested assignments.

1. Rule 26(b)(1)

Prior to the 2000 amendments, courts uniformly placed the burden of proof on the party objecting to discovery to show that the request was improper.¹⁵¹ The 2000 amendments to Rule 26(b)(1) called into question the validity of this settled principle, by appearing to shift the burden to the requesting party. Its critics expected that the new Rule would shift the burden of demonstrating good cause to the party seeking discovery.¹⁵²

aging discovery has failed to reduce the cost and burden of discovery. *See id.* at 1967 (noting the "common lament that the success of judicial supervision in checking discovery abuse has been on the modest side").

150. Kenneth Withers, *Two Tiers and a Safe Harbor: Federal Rulemakers Grapple with E-Discovery*, FED. LAW., Sept. 2004, at 38 ("The answer to [the question of whether the amendment changes anything] uncovers the controversy, which is buried in the subtle nuances of presumptions and the shifting burdens of the parties in discovery.").

151. *See Peterson v. Union Pac. R.R. Co.*, No. 06-CV-3084, 2006 WL 2054365, at *1 (C.D. Ill. July 21, 2006); *United Oil Co. v. Parts Assocs.*, 227 F.R.D. 404, 411–12 (D. Md. 2005) (gathering and discussing cases).

152. *See Frost*, *supra* note 38, at 1057–58; Written Statement, Steve W. Berman, Proposed Amendments to Rules on Electronic Discovery 8–9 (Feb. 15, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-183.pdf> (arguing that the "proposed rules would contradict existing precedent by shifting the burden to the requesting party to show

Contrary to the expectation of critics, a review of cases decided after the 2000 amendments generally leads to the conclusion that courts and practitioners have ignored the amendments altogether.¹⁵³ Courts have continued following the pre-amendment reasoning that the principles of liberal discovery require the burden to be placed on the party opposing discovery.¹⁵⁴ One author surveyed all of the reported cases in the first two years of practice under the 2000 amendments and concluded that the 2000 amendments have not resulted in any real change to the practice of the courts.¹⁵⁵

Some courts have acted differently, however. These courts have created a two-part test for good cause. First, the party seeking discovery over another's objection must show that the information is relevant.¹⁵⁶ Upon a showing of relevance, the burden shifts to the party opposing discovery to show "why discovery should not be permitted."¹⁵⁷ In the few instances in which the courts have placed the full burden of showing good cause on the party requesting production, this burden shift has had a dramatic impact in limiting the scope of discovery. In such circumstances, the good cause requirement has some teeth and has resulted in a denial of a request to expand discovery to tier-two information that is relevant to the subject matter of the action.¹⁵⁸

entitlement to relevant evidence"); Written Statement, Comm. on Fed. Courts, State Bar of Cal., Comments on Proposed Amendments to the Federal Rules 3 (Feb. 15, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-174.pdf> ("The proposed rule change affects the burden of proof of showing the reasonableness of the discovery request, basically shifting it to the requesting party. The burden has always been on the responding party to show that the requested information is not readily obtainable.").

153. See, e.g., *Fleet Sys., Inc. v. Fed. Coach, L.L.C.*, No. 8:07CV08, 2007 WL 2264618, at *4 (D. Neb. Aug. 6, 2007); *Payless Shoesource Worldwide, Inc. v. Target Corp.*, No. 05-4023-JAR, 2007 WL 1959194, at *13 (D. Kan. June 29, 2007); *Arias-Zeballos v. Tan*, No. 06 CIV 1268 GEL KNF, 2007 WL 1599150, at *2 (S.D.N.Y. May 31, 2007); *AIG Trading Group Inc.*, 228 F.R.D. 418, 424 (D. Conn. 2005); *United Oil Co. v. Parts Assocs., Inc.*, 227 F.R.D. 404, 411 (D. Md. 2005); *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 684 (D. Kan. 2004); *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1111 (N.D. Ill. 2004); *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 619 (S.D. Ind. 2002).

154. *Arias-Zeballos*, 2007 WL 1599150, at *2 (citing *Compagnie Francaise d'Assurance Pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 42 (S.D.N.Y. 1984)).

155. See *Frost*, *supra* note 38, at 1067.

156. *Diaz-Padilla v. Bristol-Myers Squibb Ltd.*, No. 04-1003 (PA/GAG), 2005 WL 783076, at *2 (D.P.R. Apr. 4, 2005); *Creely v. Genesis Health Ventures, Inc.*, No. Civ. A. 04-CV-0679, 2005 WL 44526, at *1 (E.D. Pa. Jan. 10, 2005) ("Once a party opposes a discovery request, the party seeking the discovery must demonstrate the relevancy of the information sought.").

157. *Diaz-Padilla*, 2005 WL 783076, at *2.

158. See *Druck Corp. v. Macro Fund (U.S.) Ltd.*, No. 02 Civ.6164(RO)(DFE), 2005 WL 1949519, at *4 (S.D.N.Y. Aug. 12, 2005) ("[T]he 39-page complaint contains no claims about soft dollar arrangements; accordingly, Rule 26(b)(1) requires plaintiff to show good cause for this discovery. It has failed to do so."); *BG Real Estate Servs., Inc. v. Am. Equity Ins. Co.*, No. Civ.A 04-3408, 2005 WL 1309048, at *2 (E.D. La. May 18, 2005) (granting protective order, in part, where "neither party has shown good cause to expand the scope of

However, more often than not, the burden of proof continues to be consistently placed on the party opposing discovery. Yet, given the varying practices in courts, the nature of the Rule 26(b)(1) good cause inquiry remains unclear. Parties who seek broad discovery — typically, plaintiffs — will do well to forum shop to avoid those courts that shift burdens under the 2000 amendments.

2. Rule 26(b)(2)(B)

Under amended Rule 26(b)(2)(B), it is likewise unclear who bears the burden of establishing good cause for production of ESI that is not reasonably accessible. The plain language of amended Rule 26(b)(2)(B) seems to indicate that the requesting party bears the burden of establishing good cause.¹⁵⁹ The Rule states, in part: “If that showing [of not being reasonably accessible] is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause”¹⁶⁰ The 2006 Advisory Committee’s Note states that the “responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found.”¹⁶¹ By specifically mentioning only one instance in which the responding party bears the burden of proof, the Note implies that the requesting party has the burden with respect to all other aspects of Rule 26(b)(2). Indeed, the 2006 Advisory Committee’s Note goes on to state that the “requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information.”¹⁶²

discovery to broad ‘subject matter’ discovery”); *Diaz-Padilla*, 2005 WL 783076, at *2–3 (denying discovery requests where plaintiff made only conclusory allegations of relevance and failed to satisfy its “affirmative duty to set forth sufficient allegations as to the relevance of the discovery”); *Johnson v. Mundy Indus. Contractors, Inc.*, No. 7:01CV99-BO3, 2002 WL 31464984, at *4 (E.D.N.C. Mar. 15, 2002) (noting that 2000 amendments permit the court to restrict discovery to the claims and defenses asserted in the pleadings and finding that plaintiff failed to meet burden of demonstrating good cause for inspection demands); *Surles v. Air Fr.*, No. 00CIV5004, 2001 WL 1142231, at *2 (S.D.N.Y. Sept. 27, 2001) (denying discovery requests when moving party failed to set forth specific facts necessary to establish good cause).

159. “[T]he burden of making a motion to compel on the basis of ‘good cause’ falls on the requesting party. The responding party still has the burden of demonstrating that, indeed, the electronically stored information is not reasonably accessible, but there is no longer any presumption of discoverability to overcome.” Withers, *supra* note 150, at 29.

160. FED. R. CIV. P. 26(b)(2)(B).

161. FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments.

162. *Id.*; see also MAY 2005 REPORT OF THE ADVISORY COMM., *supra* note 2, at 51 (noting that this provision was revised following the period of publication and comment to “state[] specifically that the requesting party is the one who must show good cause”); Ro-

Thus, the Rule seems to state that the court may not order discovery if the requesting party fails to show good cause. However, this interpretation creates three problems. First, placing the burden on the requesting party would necessarily mean that the information is presumptively not discoverable, contrary to the stated intention of the rulemakers.¹⁶³ Second, placing the burden on the requesting party is inconsistent with amended Rule 26(b)(2)(B)'s requirement that the requesting party show "good cause, *considering the limitations of Rule 26(b)(2)(C)*."¹⁶⁴ For all other discovery scenarios in which Rule 26(b)(2)(C) applies, the party *opposing* discovery has the burden of demonstrating that the request is unduly burdensome or overbroad.¹⁶⁵ Third, Rule 26(b)(2)(B) specifies that the dispute may be brought as either a motion to compel or a motion for a protective order.¹⁶⁶ Placing the burden on the requesting party is not problematic with regard to a motion to compel. However, under Rule 26(c), which generally governs motions for protective orders in discovery,¹⁶⁷ the party seeking a protective order bears the burden of showing good cause for that order.¹⁶⁸

B. Is ESI that Is Not Reasonably Accessible Presumptively Not Discoverable?

Under the 2006 amendments, it is unclear whether ESI that is not reasonably accessible is presumptively not discoverable. On the one hand, the plain language of amended Rule 26(b)(2)(B) contemplates a presumption of non-discoverability. The Rule begins: "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."¹⁶⁹ Moreover, during the period of public comment, some commentators assumed that the amended rule would alter the normal presumption of discoverability.¹⁷⁰ In a prior article, I

senthal, *supra* note 1, at 171 ("The party requesting the discovery then has the burden of demonstrating good cause for the production.")

163. See *infra* Part VI.B (discussing presumption of non-discoverability).

164. FED. R. CIV. P. 26(b)(2)(B) (emphasis added).

165. See *Zubulake v. UBS Warburg, L.L.C.*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003); *Black & Veatch Int'l Co. v. Foster Wheeler Energy Corp.*, 2002 U.S. Dist. LEXIS 9685, at *9 (D. Kan. May 2, 2002); *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D. Kan. 2002); *Alexander v. FBI*, 194 F.R.D. 299, 302 (D.D.C. 2000); *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511–512 (N.D. Iowa 2000).

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

167. See FED. R. CIV. P. 26(c).

168. See, e.g., *Velasquez v. Frontier Med. Inc.*, 229 F.R.D. 197, 200 (D.N.M. 2005).

169. FED. R. CIV. P. 26(b)(2)(B).

170. See SCHEINDLIN, *supra* note 11, at 15 ("[T]he new Rule creates two tiers of information, accessible and not reasonably accessible — the former being presumptively discoverable, and the latter presumptively not discoverable."); Kenneth J. Withers, *Electronically*

also suggested that the proposed amendment should be interpreted such that ESI that is “not reasonably accessible” is presumptively not discoverable.¹⁷¹

The rulemaking history, however, supports a different interpretation. The minutes of the June 2005 meeting of the Rules Committee indicate that the rulemakers did not intend the amendments to change the presumption of discoverability. Judge Rosenthal, Chair of the Advisory Committee, “emphasized that the rule is not one of presumed non-discoverability, but instead makes the existing proportionality limits more effective in a novel area in which the rules can helpfully provide better guidance.”¹⁷²

In light of these two plausible interpretations, it is unclear whether ESI that is not reasonably accessible remains presumptively discoverable in any given case.

C. When Are Objections Waived Under the Double Two-Tier System?

The structure of the double two-tier system, which is composed of the two tiers of discovery under Rule 26(b)(1) and Rule 26(b)(2)(B),¹⁷³ is frustrated by the procedural requirements for asserting and maintaining objections to discovery requests. A party objecting to discovery must assert and pursue all objections to discovery requests in a timely manner or risk waiver of the objections.¹⁷⁴ Furthermore, objections to discovery must not only be asserted in a timely manner in a party’s initial written response to discovery, but they must also be reasserted in response to a motion to compel. Objections that are not reasserted are considered waived and abandoned.¹⁷⁵

This requirement of asserting all objections and then maintaining them at all times throughout discovery is inconsistent with a tiered approach to discovery. The structure of the rules anticipates several sequential battles over a single issue of discovery.¹⁷⁶ However, the reality of the discovery motion process requires the party opposing

Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure, 4 NW. J. TECH. & INTELL. PROP. 171, 199 (2006), <http://www.law.northwestern.edu/journals/njtip/v4/n2/3/> (stating that ESI that is not reasonably accessible “is presumptively outside the scope of discovery”); Written Statement, Fed. Magistrate Judges Ass’n Rules Comm., *supra* note 94, at 5–6 (noting that, under the e-discovery amendments, “there is no longer any presumption of discoverability to overcome” and arguing that this “may well lead to more, not fewer, discovery disputes than already arise from the present rule”).

171. Noyes, *supra* note 84, at 635–39.

172. RULES COMM. JUNE 2005 MINUTES, *supra* note 93, at 25.

173. *See supra* Part IV.B.

174. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992); *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991).

175. *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 681 n.8 (D. Kan. 2004).

176. *See* FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments.

discovery to stage a single all-out war of objections. Otherwise, if the discovery issue is disputed over an extended period, the party opposing discovery runs too great a risk of waiver.

Furthermore, it is unclear what happens under the new rules if a party determines that the ESI it possesses is not reasonably accessible only after discovery and production of material is underway. Has the party waived objection by failing to object promptly and state in its initial, written discovery responses that the ESI is not reasonably accessible? If so, every party will be required to assert boilerplate objections to discovery at every stage of the process to protect themselves from possible waiver. Yet such practice runs afoul of the general rule that boilerplate “general objections” are insufficient and will constitute a waiver of specific objections to discovery.¹⁷⁷

D. Is the Rule 26(b)(2)(B) Good Cause Standard Different than the Other Good Cause Standards in Rule 26?

It is unclear whether the Rule 26(b)(2)(B) good cause standard is different than the Rule 26(b)(1) good cause standard. The accompanying Advisory Committee’s Note sheds no light on this question of interpretation.¹⁷⁸ Applying standard canons of statutory construction, the two occurrences of good cause should have the same meaning.¹⁷⁹ Imputing the same meaning to the term is warranted not only because the phrase appears in the same legal text, but it also appears in the same subpart of the same Rule. Furthermore, it can be presumed that a lawmaking body is aware of the meaning of a pre-existing legal phrase and, by using it in a new law, intends to incorporate that meaning.¹⁸⁰ Moreover, the Federal Rules of Civil Procedure must “be construed in a manner that is internally consistent.”¹⁸¹ Unfortunately, consistent interpretation of the Rule 26(b)(1) good cause standard and the Rule 26(b)(2)(B) standard would render the phrase meaningless in the latter section because the same phrase has proven toothless in the former.¹⁸²

A comparison of the language of amended Rule 26(b)(2)(B) with the language of Rule 26(b)(1) raises more questions than it answers. Rule 26(b)(2)(B) now states that “the court may nonetheless order

177. See, e.g., *Hall v. Sullivan*, 231 F.R.D. 468, 470 (D. Md. 2005); *M2 Software, Inc. v. M2 Commc’ns, L.L.C.*, 217 F.R.D. 499, 501 (C.D. Cal. 2003); *Chubb Integrated Sys. Ltd. v. Nat’l Bank of Wash.*, 103 F.R.D. 52, 58 (D.D.C. 1984).

178. See generally FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments.

179. See *supra* note 115 and accompanying text.

180. See *Comm’r v. Keystone Consol. Indus., Inc.*, 598 U.S. 152, 159 (1993).

181. *Mortgage Info. Servs., Inc. v. Kitchens*, 210 F.R.D. 562, 564–66 (W.D.N.C. 2002).

182. See *supra* Part III.B.

discovery from such sources if the requesting party shows good cause, *considering the limitations of Rule 26(b)(2)(C)*.¹⁸³ By adding this language for the purpose of clarification following public comment,¹⁸⁴ did the Rules Committee intend the Rule 26(b)(2)(B) good cause standard to be different from the Rule 26(b)(1) standard? Rule 26(b)(1) requires a showing of good cause, but it does not demand that the court “consider[] the limitations of Rule 26(b)(2)(C).” Should Rule 26(b)(1) be interpreted *without considering* the limitations of Rule 26(b)(2)(C)?

On the other hand, “*all discovery* is subject to the limitations imposed by Rule 26(b)(2)(C).”¹⁸⁵ Since all discovery is conducted against the backdrop of Rule 26(b)(2)(C), the phrase “considering the limitations of Rule 26(b)(2)(C)” is redundant.¹⁸⁶ The redundancy of the limitation may make it meaningless as an interpretive qualifier. If so, it would not be the first time that the Rules Committee has intentionally introduced such redundancy. The first redundant reference to Rule 26(b)(1) was added in 2000 “to emphasize the need for active judicial use of subdivision (b)(2)[(C)] to control excessive discovery.”¹⁸⁷

It is not clear whether the 26(b)(2)(B) good cause standard differs from the good cause standard for issuance of a protective order pursuant to Rule 26(c). Rule 26(c) states: “The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”¹⁸⁸ Because a protective order contravenes the liberal discovery mantra and presumption of discoverability, the 26(c) good cause standard is quite demanding.¹⁸⁹

The uncertainty regarding the interpretations of these various good cause standards is exacerbated because the Rule 26(b)(2)(B) standard may apply in the context of a motion to compel or a motion for protective order.¹⁹⁰ If a Rule 26(b)(2)(B) objection is raised by

183. FED. R. CIV. P. 26(b)(2)(B) (emphasis added).

184. *See supra* Part IV.C.

185. FED. R. CIV. P. 26(b)(1) (emphasis added).

186. *See infra* Parts IV.C & V.A; *see also* Rosenthal, *supra* note 1, at 171 (“In deciding whether to compel production and what terms or conditions should apply, the court is to consider the proportionality limits of Rule 26(b)(2)(C) — *which have been part of Rule 26 since 1983 . . .*” (emphasis added)). The Advisory Committee acknowledged that this cross-reference was redundant because the limitations of Rule 26(b)(2)(C) already applied to all discoverable information but stated that “[t]his otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.” FED. R. CIV. P. 26. advisory committee’s note to 2000 amendments.

187. FED. R. CIV. P. 26 advisory committee’s note to 2000 amendments.

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

189. *See supra* notes 127–128 and accompanying text.

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

motion for protective order pursuant to Rule 26(c), which good cause standard applies?

E. How Are Courts Meant to Interpret the Rule 26(b)(2)(B) Standard for “Good Cause, Considering the Limitations of Rule 26(b)(2)(C)”?

It is unclear how to interpret the Rule 26(b)(2)(B) standard for “good cause, considering the limitations of Rule 26(b)(2)(C).”¹⁹¹ On the one hand, as noted above, the new good cause standard in Rule 26(b)(2)(B) might serve as simply another reminder that all discovery is subject to the limitations of Rule 26(b)(2)(C).¹⁹² On the other hand, the new language might be intended to say something about the meaning of this particular iteration of good cause. The 26(b)(1) good cause standard should require a showing of something more than relevance and proportionality.¹⁹³ However, the Rule 26(b)(2)(B) good cause standard is restricted by its terms to the limitations of Rule 26(b)(2)(C). As a result, the Rule 26(b)(1) good cause standard may be more stringent than that in Rule 26(b)(2)(B). This would be an odd result. The discovery rules were amended to provide that ESI is less subject to discovery than non-electronic information. Interpreting Rule 26(b)(1) as the more stringent requirement would not further this result.

An alternate interpretation is that the good cause standards of Rule 26(b)(1) and Rule 26(c) are limited to consideration of factors other than the proportionality limitations of Rule 26(b)(2)(C). Under this reading, amended Rule 26(b)(2)(B) contains the only good cause standard that permits inquiry into the limitations of Rule 26(b)(2)(C). However, again, this interpretation does not make much sense because a requesting party still must consider proportionality in determining whether the ESI is not reasonably accessible. Rule 26(b)(2)(B) provides that a party need not provide discovery of ESI “that the party identifies as not reasonably accessible because of undue burden or cost.”¹⁹⁴ It is unclear how considerations of undue burden or cost differ from the limitations of Rule 26(b)(2)(C), which requires the court to determine whether “the burden or expense of the proposed discovery outweighs its likely benefit.”¹⁹⁵ Because Rule 26(b)(2)(B) independently recapitulates a major portion of the Rule 26(b)(2)(C)

191. *Id.* See *supra* Part IV.C for a description of how the Advisory Committee ironically “clarified” Rule 26(b)(2)(B) by adding a reference to Rule 26(b)(2)(C).

192. See *supra* Part VI.D.

193. See *supra* Part III.B.

194. FED. R. CIV. P. 26(b)(2)(B).

195. *Id.* 26(b)(2)(C)(iii).

inquiry, it would seem strange if only the Rule 26(b)(2)(B) good cause standard permitted use of the Rule 26(b)(2)(C) factors.

F. How Should the Double Two-Tier System Be Applied?

It is unclear how the different tiers of the double two-tier system work together and how they should be applied. Is it four tiers? Is it a three layer cake? Consider the following scenarios:

Scenario 1: The requesting party demands production of ESI that is directly relevant to its claims or defenses but is not reasonably accessible.

In Scenario 1, is the ESI automatically discoverable because it is core evidence — directly relevant to the claims or defenses of the parties? Or does the status of the requested information as *electronically stored* give it some exalted and hyper-protected status?

Scenario 2: The requesting party demands production of ESI that is *not* relevant to its claims or defenses but is relevant to the subject matter of the action. The requesting party establishes good cause for production pursuant to Rule 26(b)(1). Then, the producing party determines that the ESI is not reasonably accessible.

Is this ESI automatically discoverable because good cause has already been shown pursuant to Rule 26(b)(1)? Responding to a similar scenario, Magistrate Judge Ronald Hedges raised difficult questions: “What additional showing of ‘good cause’ for access to e-information which is not reasonably accessible does the Advisory Committee intend a judge to make? Is there a redundancy here?”¹⁹⁶

Scenario 3: The requesting party demands production of hard-copy information that is not relevant to its claims or defenses but is relevant to the subject matter involved in the action. The requesting party establishes good cause for production. After the showing of good cause, it is determined that the information is not reasonably accessible.

196. Hedges, *supra* note 38, at 5.

In scenario three, is the information automatically discoverable because good cause has already been shown? Because Rule 26(b)(2)(B) refers only to ESI, does that rule preclude the producing party from objecting to production of hard-copy information that is not reasonably accessible? What if the request is for 100 million pages of information that has been stored on microfiche, and the microfiche is only searchable by hand?¹⁹⁷ Or change Scenario 3 so that the information requested is one hard-copy claim form stored in an unlabeled box among 100,000 boxes, each box containing 5,000 pages, of insurance claims files stored in a warehouse. Is the hard copy claim form automatically discoverable while one electronically stored copy of the claim form, saved on backup tapes containing 500 million electronic pages of claims files, would be not discoverable?

In sum, many unanswered questions and ambiguities exist regarding the good cause requirements and regarding e-discovery. The lack of clarity will hinder the discovery process.¹⁹⁸

VII. WHY DID THE RULEMAKERS ADOPT THE GOOD CAUSE STANDARD FOR E-DISCOVERY?

Why would the Advisory Committee recommend, and the Rules Committee adopt, a new but meaningless implementation of the good cause standard? It is possible that the Committees were not aware that the new Rule 26(b)(2)(B) good cause standard, if patterned after the architecture of Rule 26(b)(1) and its good cause standard, would be meaningless. But that possibility seems unlikely. First, the Rules Committee solicited comments on, and held public hearings regarding, the e-discovery amendments. Second, the Committee received a large number of public comments complaining that the good cause standard was unclear.¹⁹⁹

It is also possible that the rulemakers knew and intended the Rule 26(b)(2)(B) good cause standard to be toothless and meaningless. There is some support for this theory in the Rules Committee's actions following the public comment period. After receiving the public

197. This also raises the question of whether microfiche is ESI.

198. The e-discovery amendments have come under criticism for complicating the discovery process. The early experience of corporate counsel in the United States under the amendments has not been positive. In a survey conducted by the law firm Fulbright & Jaworski, 27% of corporate counsel surveyed indicated that the amendments had made the e-discovery process "more difficult." See FULBRIGHT & JAWORSKI L.L.P., FOURTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 24 (2007), available at <http://www.fulbright.com/index.cfm?fuseaction=correspondence.LitTrends07> (free registration required). By comparison, only 18% believed that the amendments had made the process at least "somewhat easier." *Id.*

199. See *supra* notes 93–94 and accompanying text.

comments criticizing the proposed creation of an additional good cause standard that lacked a fixed definition, the rulemakers could have clarified the meaning of good cause to give it teeth. Instead, the rulemakers “clarified” the new good cause standard by referring back to the existing requirement that discovery satisfy the Rule 26(b)(2)(C) proportionality standard.²⁰⁰ Perhaps this change was just one more in a line of changes intended to increase judicial discretion.²⁰¹

Why would the rulemakers spend significant time and energy on the e-discovery amendments if they knew that the amended rule would not reduce the cost and burden of discovery, but would instead increase judicial discretion? Perhaps the question answers itself. “[J]udges have come to dominate membership on the Civil Rules Advisory Committee in recent years and judges tend to favor broad discretion.”²⁰²

In addition, it is possible that the amended rule is a somewhat Solomonian action. The public debate over the alleged need to amend the discovery rules generally falls along party lines — plaintiffs’ lawyers on one side, defense lawyers on the other. When the Discovery Subcommittee of the Advisory Committee solicited commentary on possible amendments to address e-discovery issues in 2002, the responses were predictable:

[O]rganizations associated with the plaintiff side (the Assoc. of Trial Lawyers of America, the National Assoc. of Consumer Advocates, the Trial Lawyers for Public Justice, and the San Francisco Trial Lawyers Assoc.) urged that rule changes were not warranted. Organizations associated with the defense side (the Defense Research Institute and Lawyers for Civil Justice) argued that rule changes are needed, and that the developing caselaw does not provide sufficient guidance. The Federal Bar Assoc., meanwhile, urged that more local rules be developed to address these problems.²⁰³

200. See *supra* Part IV.C.

201. See *supra* Part III.B (arguing that prior amendments to the discovery rules mistakenly increased judicial discretion); *supra* Part V.E (arguing that the good cause standard of the e-discovery amendments wrongly increases judicial discretion).

202. Bone, *supra* note 143, at 1974. When the e-discovery amendments were passed, the majority of the members of the Committee on Rules of Practice and Procedure were judges. See JUDICIAL CONFERENCE OF THE U.S., JUDICIAL CONFERENCES RULES COMMITTEES 2-3 (2006), available at <http://www.uscourts.gov/rules/Memb1206.pdf>. The same was true of the Civil Rules Advisory Committee. See *id.* at 8-9.

203. MILES LINK & RICHARD MARCUS, DISCOVERY SUBCOMM. OF CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., DISCOVERY SUBCOMMITTEE

Public commentary and testimony on the proposed e-discovery amendments also fell along party lines.²⁰⁴ The amended Rule's broad delegation to trial judges allowed the rulemakers to avoid making a difficult decision on which side to favor.²⁰⁵ Perhaps by publicly stating that the amendments would limit the burden of discovery, the Advisory Committee sought to cater to the demand of the defense lawyers. In turn, by its choice of the amendment's actual language, the Committee could also reassure plaintiffs' lawyers that, in practice, courts would rely on the familiar and friendly mantra of liberal discovery to interpret the vague good cause standard. If that was indeed the compromise, then by trying to please everyone, the rulemakers have put into place amendments that will accomplish little to nothing.

VIII. RECOMMENDATIONS TO CLARIFY THE GOOD CAUSE STANDARDS AND IMPROVE E-DISCOVERY

A. The Rulemakers Should Clarify the Meaning of the Various Good Cause Standards

The rulemakers should amend the discovery rules to clarify the meaning of the various good cause standards. The Rules Committee long ago removed a good cause standard that was deemed excessively vague.²⁰⁶ But now the rulemakers seem content to rely on and expand the use of the good cause standard, perhaps for the very reason that it is so nebulous.

There is nothing unusual about amending the Rules. Professor Richard Marcus has written that “[t]he Federal Rules of Civil Procedure change with the telephone directory. Every year, something is tweaked, torn, wrenched or rewritten. Most of this is merely annoying. Sometimes, though, buried amid the clutter is an amendment that carries a real wallop for major aspects of practice.”²⁰⁷ The Rules Committee may have thought that the 2006 e-discovery amendment to Rule 26(b)(2)(B) would carry a real wallop; however, this Article predicts that the actual impact will fall short and only result in more clut-

REPORT ON ELECTRONIC DISCOVERY 6 (2003), available at <http://www.kenwithers.com/rulemaking/report041403.pdf>.

204. See SCHEINDLIN *supra* note 11, at 14–15.

205. See Bone, *supra* note 143, at 1974 (“[D]elegating discretion allows rulemakers to dodge difficult and controversial normative choices by handing them to trial judges in individual cases, where they are less transparent and less likely to trigger public debate. Indeed, delegation is an especially attractive strategy when . . . rulemakers . . . face strongly conflicting interest group pressures.”).

206. See *supra* Part V.C.

207. Richard Marcus, *Only Yesterday: Reflections on Rulemaking Response to E-Discovery*, 73 *FORDHAM L. REV.* 1, 18 (2004).

ter. Maybe such small tweaks to the Rules are a root cause of the problem. Because the Rules are subject to frequent, minor amendments, courts and practitioners might simply ignore the serial amendment of the rules and continue to apply the rules as they remember them.

It is time for meaningful change. The rulemakers should clarify the substantive meaning of the various good cause standards. Better yet, they should eliminate the good cause standard from the discovery rules altogether.

B. How Courts Should Interpret Rules 26(b)(1) and 26(b)(2)(B)

Absent clarification by way of further amendment, courts should interpret Rules 26(b)(1) and 26(b)(2)(B) to give real meaning and teeth to both good cause standards. In order to avoid an interpretation that renders the good cause standard meaningless, good cause must mean something more than relevance and consideration of the proportionality principle of Rule 26(b)(2)(C). The court might borrow from the Rule 26(c) good cause standard and require a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, that failure to permit discovery will cause a clearly defined and serious injury.²⁰⁸ The court might also define good cause to require a showing beyond relevance, such as special need, necessity, or the prevention of injustice.²⁰⁹ Based on this interpretation and the existing language and architecture of the discovery rules, a discovery dispute in which the requesting party propounds Rule 34 requests for documents would play out as follows:

Tiered Objections for Tiered Discovery

- The producing party may serve written objections that include any objections it has to discoverability. The objections must specify which portion of the information should not be discoverable. By objecting to discoverability, the producing party preserves its right to object to production of that information; in a departure from current practice, all objections need not be made at once. For information that the producing party acknowledges to be discoverable, the producing party

208. *See supra* notes 127–128 and accompanying text.

209. *See* THE SEDONA CONFERENCE WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 49 (2d ed. 2007), available at http://www.thosedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf (proposing a showing of “special need and relevance” for electronic discovery).

also must immediately assert any objections to production of the information.

- Once any dispute over discoverability is resolved, the producing party must assert any objections to production.

The Discoverability Procedure Under Rule 26(b)(1)

- If the producing party has objected to discoverability under Rule 26(b)(1), and the parties cannot resolve the dispute among themselves, either party may seek an order from the court establishing whether the information is discoverable. This initiates the “Discoverability Procedure.”
- During the Discoverability Procedure, the producing party bears the burden of establishing that the requested information is privileged. Likewise, the producing party bears the burden of establishing that the information is not relevant to the claims or defenses of a party.
- If the producing party establishes that the information is not relevant to a party’s claims or defenses, then the information is presumptively not discoverable. The burden then shifts to the requesting party to establish (a) that the information is relevant to the subject matter of the action, and (b) that good cause exists for its production.
- The Rule 26(b)(1) good cause standard should relate to the issue of discoverability. To be meaningful, it must require more than simple relevance. To show good cause, the requesting party should be required to make a particular and specific demonstration of fact establishing that the information is essential to prove or contest an issue that will be in dispute at trial. Absent such a showing, the standard might be satisfied by a showing of special need or injustice that would result if the information were not discoverable. If the court finds that the information is not discoverable, the inquiry is over. A requesting party’s agreement to pay the cost of discovery and production of the information should not be a factor considered by the court when ruling on whether the information is discoverable.²¹⁰

210. *See Cognex Corp. v. Electro Scientific Indus., Inc.*, No. Civ.A.01CV10287RCL, 2002 WL 32309413, at *5 (D. Mass. July 2, 2002) (“There is something inconsistent with

The Production Procedure Under Rule 26(b)(2)(C) and Rule 26(b)(2)(B)

- Once the court resolves any issues of discoverability, the producing party and the requesting party must meet and confer to resolve any objections to production of the requested, discoverable information. All requested information that survives the Discoverability Procedure is presumptively discoverable and presumptively subject to production.
- During the “Production Procedure,” either party may seek judicial assistance in resolving party objections to the production of otherwise discoverable information. In this context, the producing party bears the burden of establishing that production of the requested information does not satisfy the proportionality test of Rule 26(b)(2)(C). This is the final inquiry for information that is not electronically stored.
- If the information is ESI, the producing party may also object to production if the ESI is not reasonably accessible because of undue burden or cost. The producing party bears the burden of establishing undue burden or cost. If the producing party meets this burden, then the ESI is presumptively not subject to production. The burden then shifts to the requesting party to make a showing of good cause for production of the ESI that is not reasonably accessible.
- The determination of whether the requesting party can establish good cause may require a hearing separate from the hearing to resolve whether the ESI is not reasonably accessible.²¹¹ The requesting party may be granted discovery with respect to the factors that will establish good cause.²¹² The requesting party should bear the burden of establishing good cause based upon a particular and specific demonstration of fact. The Rule 26(b)(2)(B) determination should relate to the issue of production; in this context, therefore, the court should consider the limitations of Rule 26(b)(2)(C). Because the producing party necessarily must already have established that the ESI is not reasonably accessible because of undue burden or

our notions of fairness to allow one party to obtain a heightened level of discovery because it is willing to pay for it.”)

211. See SCHEINDLIN, *supra* note 11, at 18–19.

212. *Id.* (“Once again, the Advisory Committee Note explicitly permits discovery with respect to the good cause factors.”).

cost, at this stage the court should focus on the other factors set forth in Rule 26(b)(2)(C): unavailability of other means to obtain the information, the needs of the case, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.²¹³ A requesting party's agreement to pay the costs of production should be one factor,²¹⁴ but it should not be determinative of the decision whether production is required.

This interpretation and application of discovery dispute resolution rules and procedures is consistent with the language and architecture of the existing Federal Rules of Civil Procedure. It gives meaning to all of the language of all of the discovery rules. It provides a rational and meaningful two-tier inquiry for questions of discoverability, and another rational and meaningful two-tier inquiry for questions of production. Finally, it respects, and appropriately incorporates, the requirement that all discovery is subject to the limitations of Rule 26(B)(2)(C).

IX. CONCLUSION

For more than twenty years, the Federal Rules of Civil Procedure governing discovery have been poked, prodded, and tweaked — but never overhauled — to combat the problem of discovery run amok. The one constant in this process of serial amendment has been increasing reliance on judges to exercise their discretion to limit discovery. The rulemakers have hoped that the judges will rescue the discovery process from itself. At the same time, the rulemakers have continued to pepper the Rules with meaningless good cause standards. Good cause is indeed bad medicine for the discovery Rules. Time and experience have shown that judges' discretion is guided by the historical policy of liberal discovery, which has overwhelmed the language and structure of the discovery amendments as well as standard canons of construction.

This Article suggests two cures for these problems. First, the rulemakers should speak clearly and directly if they want to limit the cost and burden of discovery. Second, courts should revisit the interpretation and application of the existing discovery rules, in particular the good cause standards of Rule 26(b)(1) and Rule 26(b)(2)(B). The Supreme Court has stated that the historical policy of liberal discovery must yield to the plain language of the rules. Although many lower

213. See FED. R. CIV. P. 26(b)(2)(C).

214. See FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments.

courts have ignored it, the plain meaning of the existing discovery rules requires a rigorous analysis of whether information is discoverable and, if so, whether it must be produced. A proper interpretation of the good cause standards in the discovery rules gives meaning to the actual language of the discovery rules. It also will accomplish the unmet goals of the last twenty years of discovery amendments: it will provide guidance to the bench and bar in determining their discovery rights and obligations; it will limit the cost and burden of discovery; and it will ensure that similarly situated litigants will be treated the same, regardless of which federal district court or judge oversees discovery.