# INTRODUCTION

* The 2015 amendments to the Federal Rules of Civil Procedure are part of an ongoing effort to rein in excessive discovery.
* Chief Justice Roberts described the recent changes as “the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes.”
	+ See Chief Justice John Roberts, “2015 Year-End Report on the Federal Judiciary.”
* In 2010, the Advisory Committee on Civil Rules convened a symposium to address the problem of civil litigation becoming too expensive, time-consuming, and contentious, inhibiting effective access to the courts.
* The symposium identified the need for procedural reforms that would:

##### encourage greater cooperation;

##### focus discovery on what is truly needed to resolve cases;

##### engage judges in early and active case management; and

##### address serious problems associated with vast amounts of electronically stored information.

* See id.
* The amendment process took several years. The Committee received over 2,000 written comments, held hearings in multiple cities, and heard from over 100 witnesses. Chief Justice Roberts described the final product as marking significant change for both lawyers and judges, in the future conduct of civil trials.
* Numerous insurance companies signed letters supporting the rule amendments on the grounds that federal litigation has become inefficient, too expensive, and fraught with too many uncertainties that have little or nothing to do with the merits of particular cases.
* See Letter from Companies in support of the Proposed Amendments to the FCRP, February 14, 2014 (signatures included: Allstate Ins. Co.; AIG; CNA; Hanover Ins.; The Hartford; Liberty Mutual; Progressive; Property Casualty Insurers Association of America; State Farm; and Travelers).
* See Letter from American Insurance Association, February 18, 2014 (“AIA strongly supports the proposed amendments to the Federal Rules of Civil Procedure as a thoughtful and targeted approach to streamlining many cumbersome and expensive aspects of the litigation process.”).
* The amendment to Rule 26, perhaps the most significant change, is designed to place a collective responsibility on the parties and the court to consider the proportionality of all discovery and in resolving discovery disputes.
* See Adv. Committee Note (2015)
* One court commented that, since the amendments went into effect, “proportionality has become the new black in discovery litigation.”
* See Vaigasi v. Solow Mgmt. Corp., No. 11CIV5088RMBHBP, 2016 WL 616386, at \*13 (S.D.N.Y. Feb. 16, 2016) (noting that parties have invoked proportionality concerns “with increasing frequency” since the amendments).
* The aim of the recent changes to Rule 26 is not to create a number of new obligations. Rather, the goal is to change the “mindset” of the parties and the court and to renew their focus on the existing requirements in the rules to make litigation more efficient and inexpensive.
* See Gilead Scis., Inc. v. Merck & Co, Inc., No. 5:13-CV-04057-BLF, 2016 WL 146574, at \*1 (N.D. Cal. Jan. 13, 2016) (noting that an aim of amendments to federal rules is to change the “mindset” of the court and parties).
* Federal courts have acknowledged that “[n]o longer is it good enough to hope that information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone.”
* See id.
* Further, as Chief Justice Roberts’ comments highlight, a party is **not** entitled to receive every piece of relevant information.
* In re Takata Airbag Prods. Liab. Litig., 2016 U.S. Dist. LEXIS 46206, at \*143-44 (S.D. Fla. 2016).
	+ **Note** – Hunton & Williams LLP attorney John Delionado was appointed as Special Master for discovery in this case.
* While the amendments to Rule 26 are designed to limit discovery, parties seeking to *avoid* discovery have increased obligations as well. The amendment to Rule 34(b)(2)(C) indicates that boilerplate objections are no longer acceptable in federal court. The new requirement that parties identify whether documents are being withheld based on an objection furthers the goals of cooperation and avoidance of obstructionist tactics.
* See Daniel M. Braude, “Methods for Asserting Objections Under Amended Rule 34” Law 360 (March 2, 2016).
* The 2015 Amendments encourage early discussion of preservation obligations.
* See “Applying Amended Rule 37(e)”, Thomas Y. Allman August 9, 2016
* The renewed focus on efficiency and collaboration is also reflected in the amendment to Rule 1. The thrust of the amendment to Rule 1 is to mandate a collective responsibility that obligates not just judges, but the lawyers and parties themselves, to work to control the expense and time demands of litigation.
* In the arbitration context, the ARIAS•U.S.  Rules work in concepts from the Federal Rules relating to proportionality, organizational meetings, initial disclosures, relevance, and other discovery issues. The arbitration process could further benefit from continued influence by the Federal Rules.
* See Daniel FitzMaurice and Matthew Shiroma, “Improving Arbitration by Borrowing from Recent Amendments to Rules of Litigation”

# FEDERAL RULE CIVIL PROCEDURE 26(b)(1)

## Rule Text and Standard

**Fed. R. Civ. P. 26 (b) Discovery Scope and Limits.**

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

* Courts do not place greater value on any one factor over any other as a blanket rule. Therefore, the analysis requires a review of all six factors that are weighed based upon the facts of any given case.
	+ See Litigation News – “Federal Court Clarifies Discovery Rights Under Revised Rule 26” Caitlin Haney. (“The ‘court’s willingness to engage in a six-factor balancing test demonstrates the increased emphasis on proportionality in discovery,’ suggests Levasseur. It does not appear that ‘any factor is any more important than another, so courts will have to look at all six factors depending on the facts of the case’ predicts Levasseur.”).
* A party seeking to resist discovery must make a specific objection and show that the discovery fails the proportionality calculation.
	+ See Carr v. State Farm Mut. Auto. Ins., Co., 312 F.R.D. 459, 468 (N.D. Tex. 2015).
* While the text of the rule has been updated, courts have been obligated to consider proportionality in addressing discovery issues for the last 33 years.
	+ See Schultz v. Sentinel Ins. Co., Ltd, No. 4:15-CV-04160-LLP, 2016 WL 3149686, at \*5 (D.S.D. June 3, 2016) (describing proportionality requirement as “hardly new” and having first appeared in the rule in 1983).
* The proportionality requirement was first codified in 1983 and was part of the scope of discovery described in part (b)(1), as it is now. However, in 1993, the proportionality requirement was shuffled to part (b)(2)(C) of the Rule dealing with the court’s power to limit discovery. Thus, the 2015 amendment simply restores the provision to part (b)(1) of the rule, where it first appeared.
	+ See id.
* In the arbitration context, discovery was for a long time very limited and virtually non-existent. In many cases, reinsurers were only able to obtain documents under the access to records clauses in reinsurance contracts.
	+ See ARIAS•U.S. Symposium – “How Much Process is Due? Procedural Issues in Arbitrations” (Paul C. Thomson describing lack of discovery in arbitration panels upon which he served in the 1980s and 1990s).
* Eventually, arbitration panels had to confront mushrooming discovery that detracted from the efficiency of the process. For several years now, the ARIAS•U.S. Practical Guide has called for a similar exercise of arbitrator discretion in reining in discovery. Chapter 4, Comment E, directs arbitrators to “exercise the discretion to strike an appropriate balance between the relevant discovery necessary to the respective cases and protecting the streamlined, cost-effective intent of the arbitration process.”
	+ See ARIAS•U.S. Symposium – “How Much Process is Due? Procedural Issues in Arbitrations” (Jamie Scrimgoeour comparing Rule 26 amendments with existing arbitrator responsibilities).
* While the ARIAS•U.S. Rules embody some concepts from the Federal Rules, further amendments to the ARIAS•U.S. Rules would be beneficial. For example, the ARIAS•U.S. Rules address proportionality in the context of depositions and other discovery but do not explicitly require proportionality for document requests. Further, the ARIAS•U.S. Rules could expressly apply the six factors in amended Rule 26 in the arbitration context.
	+ See Daniel FitzMaurice and Matthew Shiroma, “Improving Arbitration by Borrowing from Recent Amendments to Rules of Litigation”
* Arbitration panels and courts have worked for years to strike a balance between giving parties their “day in court” and maintaining efficiency. Walking this line has been a particular focus of arbitrators who tout their dispute resolution forum as one that is often more streamlined than traditional litigation.
	+ See ARIAS•U.S. Symposium – “How Much Process is Due? Procedural Issues in Arbitrations” (Paul C. Thomson describing the efforts of panels and parties to agree to limit depositions and to promote efficiency by meeting and conferring to address this issue, and others).
* Even though both courts and arbitrators alike have been directed to exercise discretion for years, the recent amendments should serve to change the mindset of judges, arbitrators, and the parties, and inspire a renewed focus on efficiency.
	+ See Gilead Sciences, Inc., 2016 WL 146574 at \*1 (“Proportionality in discovery under the Federal Rules is nothing new . . . . What will change – hopefully – is mindset.”).
* As shown by the examples below, there are a number of solutions that can be employed to balance efficiency with fair dispute resolution.

## Amended Rule 26(b)(1) in Practice – Limiting Discovery

Below are some examples of the actions that courts have taken to limit discovery when considering the proportionality requirement in amended Rule 26(b)(1).

* **Permitting Physical Inspection of Records In Lieu of Requiring Production of Voluminous Records – Incremental Approach**.
	+ See Design Basics, LLC, et. al. v. Ahmann Design, Inc., No. C16-0015, 2016 WL 4251076 (N.D. Iowa Aug. 10, 2016) (copyright infringement involving building plans). The court held that, where a claim was supported by only one ambiguous email, a request for production of documents relating to 10,000 house plans going back 20 years was not proportional. Instead, the court held that an incremental approach was appropriate. The plaintiff was permitted to inspect the physical records for a single day, from 9:00 a.m. until 4:00 p.m. Whether any additional inspection would be permitted would depend on what evidence was discovered in the first inspection.
* **Limiting Production To Documents Necessary To Accomplish Purpose of Request**. Courts limit discovery to only what is necessary to establish the issue to which the discovery relates.
	+ See Family Wireless #1, LLC v. Auto. Techs., Inc., No. 3:15CV01310(JCH), 2016 WL 3911870, at \*2 (D. Conn. July 15, 2016) (franchisee action against franchisor). The defendants’ request for production sought numerous categories of documents to establish the net worth of plaintiffs. The court held that a summary statement of net worth including basic information regarding assets and liabilities was sufficient. The court found that requiring production of many supporting documents did not achieve the goal of proportionality.
* **Ordering Production of Documents in Phases.** Courts have, on their own initiative, facilitated cooperation among the parties by determining whether discovery that is otherwise permissible could be completed in phases.
	+ See Siriano v. Goodman Mfg. Co., L.P*.*, No. 14-cv-1131, 2015 WL 8259548, at \*1 (S.D. Ohio Dec. 9, 2015) (consumer protection class action). The court considered the proportionality factors and concluded that a products liability defendant was obligated to respond to requests for production of voluminous records relating to copper coils. The court, nevertheless, proposed that plaintiffs agree to discovery in phases, *e.g.* first production of warranty complaints; second, documents relating to investigations, etc.
* **Limiting Time Frame of Interrogatories.** Courts will limit the time frame of discovery to address proportionality concerns.
	+ See Willis v. GEICO Ins. Co., 13-cv-0280, 2016 WL 1749665 (D.N.M. Mar. 29, 2010) (limiting scope of interrogatory requesting GEICO identify all insurance policies sold in New Mexico from 2006 to 2012, to require identification of only those policy in which a claim was made between 2010 and December 2011, among other restrictions, in consideration of proportionality factors).
	+ See Roberts v. Clark County Sch. Dist., 312 F.R.D. 594 (D. Nev. 2016) (limiting interrogatory requesting all personal email addresses and social networking websites to only those sites on which plaintiff had an account after 2011).
* **Refusing Further Discovery Where Sufficient Support for Claim Has Already Been Provided.** When assessing whether discovery is proportional to the “needs of the case” courts look at what is truly necessary to a claim or defense and whether that information has been provided already.
	+ See Vaigasi v. Solow Mgmt. Corp., No. 11CIV5088RMBHBP, 2016 WL 616386, at \*14 (S.D.N.Y. Feb. 16, 2016) (employment discrimination) (disallowing further document requests where plaintiff employee had already received entire personnel files and other documents supporting claim and that the job itself was not ordinarily expected to generate a substantial volume of documentation).
	+ See Turner v. Chrysler Group LLC, No. 14-cv-1747, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016) (products liability suit – lane departure warning system) (refusing to order responses to document requests of voluminous records concerning lane departure warning system where party could gain information from depositions and where party’s own expert did not appear to be hampered by lack of access to requested discovery).
	+ See Roberts v. Clark Cty. Sch. Dist., 312 F.R.D. 594 (D. Nev. 2016) (discrimination claim brought by transgender employee against school district) (holding that request for production of documents relating to expansive medical records was “grossly out of proportion” to what a party “legitimately needs to know to defend itself” against employment discrimination claims).
* **Finding that Privacy Concerns Tipped the Scale of Proportionality Against Production.**
	+ See Williams v. Am. Int’l Grp., Inc., No. 15-CV-554-JDW-GMB, 2016 WL 3156066, at \*1 (M.D. Ala. June 3, 2016). The court refused to order a workers compensation insurer to produce documents relating to plaintiffs’ co-workers’ workplace injuries. The court held that the privacy concerns of third-party health information “tip[ed] the scales of proportionality against disclosure.” This was particularly true where plaintiff had an opportunity to gain information about the defendants’ business practices in a deposition.
* **Refusing to Order Limited Production Where Plaintiff Made No Effort to Tailor His Requests to the Needs of the Case.**
	+ See Mickail Myles v. County of San Diego, et al., No. 15CV1985-BEN (BLM), 2016 WL 4366543, at \*8 (S.D. Cal. Aug. 15, 2016) (police brutality case). The court refused to order a police department to respond to requests for production that would result in $325,000 in costs. The court also refused to pare the requests down or order a limited production where the plaintiff did not even attempt to tailor the requests appropriately.
* **Refusing to Order Discovery Where Cost and Burden Outweigh the Value of a Claim or Benefit to Requesting Party.**
	+ See Rickaby v. Hartford Life & Accident Ins. Co*.,* No. 15-CV-00813-WYD-NYW, 2016 WL 1597589, at \*1 (D. Colo. Apr. 21, 2016) (ERISA case seeking reinstatement of benefits) (cost of compiling information to respond to interrogatories would involve over $25,000 in labor charges and was of only “limited value” to the specific conflict of interest claim to which it related)
	+ See Marsden v. Nationwide Biweekly Administration, Inc., No. 14-cv-00399, 2016 WL 471364 (S.D. Ohio Feb. 8, 2016) (sexual harassment employment suit)(denying motion to compel responses to interrogatory and request for production because, “[a]lthough Plaintiff does not have access to all the requested information, the other proportionality factors – mainly Defendants’ resources and the burden and expense of production – outweigh the production's likely benefit to Plaintiff.”)

## Amended Rule 26(b)(1) in Practice – Ordering Discovery

Below are examples where courts have found that the proportionality calculation supports the requested discovery.

* **Ordering Production of Insurer’s Claim File In Bad Faith Dispute Because Insurer Had “Sole Access” To Relevant Information.**
	+ See AMA Disc., Inc. v. Seneca Specialty Ins. Co*.,* No. CV 15-2845, 2016 WL 3186493, at \*1 (E.D. La. June 8, 2016) (ordering that insurer comply with request for production of claim file in bad faith insurance dispute because it had “sole access to relevant information in its file” and the production was proportional to the needs of the instant case).
* **Ordering Production of Documents After Considering Size of Defendant and High Amount in Controversy.**
	+ See Bell v. Reading Hosp.,No. CV 13-5927, 2016 WL 162991, at \*1 (E.D. Pa. Jan. 14, 2016) (FLSA action). The court ordered production of documents relating to wage and hour claims where the defendant was a large company and cost of discovery would “certainly not exceed the amount of controversy.”
* **Ordering Production of Documents and Responses to Interrogatories As Part of Public Policy Consideration.** Advisory Committee notes stress that public policy concerns must be considered as part of proportionality analysis.
	+ See Schultz v. Sentinel Ins. Co., Ltd,No. 4:15-CV-04160-LLP, 2016 WL 3149686, at \*5 (D.S.D. June 3, 2016) (action against homeowner insurer). The court ordered responses to document requests and interrogatories, in part, because the “value” of the case was not limited to $17,000 in claimed damages. Instead, the value included public policy ramifications of plaintiff succeeding on a claim that the insurer had engaged in a pattern of bad faith practices.

# FEDERAL RULE OF CIVIL PROCEDURE 34(b)(2)(C)

## Rule Text and Standard

**Fed. R. Civ. P. 34(b)(2)(C) Objections.**

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

* The amendment is designed to end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.
	+ See Adv. Committee Note (2015)
* A party is not required to provide a detailed description of any documents withheld, but it needs to alert the other parties to the fact that documents have been withheld and facilitate and informed discussion of the objection.
	+ Id.
* This requirement will prevent time wasted addressing the veracity of objections that have not actually deprived a party of any discovery.
* Further, this requirement continues efforts by courts under the prior version of the rule to prevent gamesmanship by parties who do not reveal whether any documents are being withheld by virtue of an objection.
	+ See Haeger v. Goodyear Tire and Rubber Co., 906 F. Supp. 2d 938 (D. Ariz. 2012) (stating that “litigation is not a game” and sanctioning party that “combine[d] its objections with a partial response, without any indication that the response was, in fact, partial”).
	+ See Pro Fit Management v. Lady of America Franchise Corp., No. 08-cv-2662, 2011 WL 939226 (D. Kan. Feb. 25, 2011) (finding that production of documents was improper where made “subject to” certain objections because it left the other party “wondering whether all documents [had] been produced, or if some documents [were] still being withheld”).
	+ See Rodriguez v. Simmons, No. 09-cv-02195, 2011 WL 1322003 (E.D. Cal. Apr. 4, 2011) (requiring party to “clearly state that responsive documents do not exist, have already been produced, or exist *but* are being withheld” based on an objection).
* The courts and the parties in these cases, and many others, may not have been side-tracked by expensive additional litigation had the rules required, as they do now, what the court ordered after-the-fact.

## Amended Rule 34(b)(2)(C) in Practice

Below are examples where courts have confronted a party’s failure to identify whether it withheld documents based on an objection, as required in the amended Rule 34.

* + **Ordering Discovery Because Boilerplate Objections Do Not Support Withholding of Documents Under Amended Rule.**
		- See Orchestratehr, Inc. v. Trombetta, No. 3:13-CV-2110-P, 2016 WL 1555784, at \*26 (N.D. Tex. Apr. 18, 2016) (former employer action regarding non-compete agreement). The court held that general objections that the requests for production are overly broad and unduly burdensome are not valid as codified in amended Rule 34(b)(2). The court granted a motion to compel where the party had failed to properly support its objections.
	+ **Holding that Amended Rule 34(b)(2)(C) Applies to Any Basis Asserted for Withholding Documents.**
		- See Jiang v. Porter, No. 4:15-CV-1008 (CEJ), 2016 WL 3015163, at \*2 (E.D. Mo. May 26, 2016). A party claimed that it should not need to specify whether it withheld documents based on relevance grounds. The court held that, regardless of whether an objection was on privilege grounds, relevance, or any other basis, the party must state whether any responsive materials are being withheld. The court ordered the party to revise its discovery responses and affirmatively state whether it was withholding responsive materials.
	+ **Prohibiting Reliance on “Laundry List” of General Objections**
		- See City Furniture, Inc. v. Chappelle, No. 2:15-CV-748-FTM-99CM, 2016 WL 4262228, at \*3 (M.D. Fla. Aug. 12, 2016). The court held that responses to requests for production made subject to a party’s sixteen general objections did not comply with rule. The court prohibited the parties from relying on a “laundry list” of objections going forward.

# FEDERAL RULE CIVIL PROCEDURE 1

## Rule Text and Standard

**Fed. R. Civ. P. 1 – Scope and Purpose**

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

* The amendment to Rule 1 makes clear that the parties share the responsibility to achieve Rule 1’s goal. The advisory committee, in crafting this amendment, sought to emphasize that effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.
	+ See Adv. Committee Note (2015)
* In the arbitration context, the ARIAS•U.S. Rules could be changed to clarify that the parties, and not just the arbitrators, are responsible to administer the rules to achieve a speedy and inexpensive resolution to a dispute.
	+ See Daniel FitzMaurice and Matthew Shiroma, “Improving Arbitration by Borrowing from Recent Amendments to Rules of Litigation”

## Amended Rule 1 in Practice

Below are examples of how the amendment to Rule 1 has been recognized by the courts.

* **Finding that Rule 1 Contemplates “Active Judicial Case Management” and Ordering Cooperative Dialogue Among the Court and Parties**
	+ See Siriano v. Goodman Mfg. Co., L.P*.*, 2015 WL 8259548, at \*1 (S.D. Ohio 2015) (consumer protection class action). Where defendant had not proposed any lesser degree of production or limitation, the court acknowledged that the amended rules contemplated “active judicial case management.” The court, in furtherance of the goals embodied in amended Rule 1, proposed a compromise, and ordered a cooperative dialogue among the parties on how to limit document requests.
* **Ordering Parties to Stipulate to Matters Not Disputed and on Evidentiary Foundations that Clearly Could Be Laid.**
	+ See Wichansky v. Zowine, 2016 U.S. Dist. LEXIS 37065 (D. Ariz. Mar. 22, 2016). The court recognized that “the parties share the responsibility to achieve Rule 1’s goal” of a just, speedy, an inexpensive resolution of disputes. The court ordered the parties to stipulate to undisputed matters and evidentiary foundations to avoid wasting time in front of the jury.

# FEDERAL RULE OF CIVIL PROCEDURE 37(e)

## Rule Text and Standard

**Fed. R. Civ. P. 37 Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

**(e) *Failure to Preserve Electronically Stored Information.*** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

* FRCP 37 addresses discovery failures and subpart (e) was added in 2006 to deal with the failure to disclose electronically stored information (“ESI”).
* The 2006 Amendments to the FRCP were the first amendments to address ESI. Unfortunately, there were several unintended consequences. The 2015 amendments revise the 2006 version of Rule 37(e) and address those deficiencies.
	+ See Business Law Today – “New Amendments to the Federal Rules of Civil Procedure Litigation News: What’s the Big Idea?” Joseph F. Marinelli (The previous version of Rule 37(e) included the following deficiencies: “(1) failing to harmonize inconsistencies among jurisdictions when dealing with lost ESI; (2) stating only what courts could not do in the event of lost ESI without providing any guidance on what measures the court could take; and (3) being ambiguous as to when a court could impose more punitive sanctions rather than less serious curative measures for lost ESI.”).
* The general intent of amended Rule 37(e) was to address the excessive effort and money being spent on ESI preservation as a result of the continued exponential growth in the volume of ESI, along with the uncertainty caused by significantly differing standards among the federal circuits for imposing sanctions or curative measures on parties who failed to preserve ESI.
	+ See Marten Transport v. Platform Advertising, No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at \*10 (D. Kan. Feb. 8, 2016).
* For Rule 37(e) to apply, the ESI at issue must have been lost after the duty to preserve attached and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve.
	+ See Adv. Committee Note (2015)
* A duty to preserve may also arise from statutory requirements, administrative regulations, an Order in another case or a party’s own retention requirements.
	+ See “Applying Amended Rule 37(e)”, Thomas Y. Allman August 9, 2016
* Due to the ever-increasing volume of ESI and the multitude of devices that generate such information, perfection in preserving all relevant ESI is often impossible. This rule recognizes that “reasonable steps” to preserve suffice; it does not call for perfection. Courts should take into account the party’s sophistication with regard to litigation in evaluating preservation efforts. Rule 37(e) is inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve.
	+ See Adv. Committee Note (2015)
* Proportionality also plays a role when evaluating reasonableness of preservation efforts. Courts should take into account a party’s resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients’ information systems and digital data – including social media – to address these issues.
	+ See id.
* When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. If the information is restored or replaced, no further measures should be taken.
	+ See id.
* Seven months into the implementation of the Amended Rule, some authorities have found that it “clearly resolved the circuit split on culpability for harsh measures by imposing a more uniform approach to lost ESI.”
	+ See “Applying Amended Rule 37(e)”, Thomas Y. Allman August 9, 2016
* It has also been noted that there are a number of courts that have ignored Rule 37(e) entirely and have found this “troubling” and “problematic”.
	+ See id.

## Amended Rule 37(e) in Practice

Below are some examples of how the courts have recognized Rule 37(e).

* **Scope of the Rule** – Rule 37(e) only applies to the loss of ESI, not the loss of other forms of discoverable information.
	+ See Best Payphones v. City of New York, No. 1-CV-3924 (JG) (VMS), 1-CV-8506 (JG) (VMS), 3-CV-0192 (JG) (VMS) 2016 WL 792396, at \*4 and \*13-14 (S.D.N.Y., Feb. 26, 2016). In an action seeking spoliation measures for failure to retain and produce document and emails, the court applied separate legal analyses based on Circuit law for the tangible evidence and Rule 37(e) for the electronic evidence. The court found that, as to tangible items, the party acted with negligence but the availability of the evidence from other sources negated any prejudice. The court also found that the loss of the emails resulted in no prejudice under Rule 37(e)(1), and, given that “preservation standards and practices for email retention” were in flux at the time, the party had not “acted unreasonably as is required” under Rule 37(e).
* **Duty to Preserve** – Rule 37(e) only applies if the duty to preserve has attached.
	+ Marten Transport v. Platform Advertising, No. 14-cv-02464-JWL-TJJ, 2016 WL 492743 (D. Kan. Feb. 8, 2016) (the court held that there was no breach of the duty to preserve because the ESI had already been overwritten under routine, good faith procedures in effect at the time the duty attached).
* **Reasonable Steps** – Rule 37(e) only applies if the party took “reasonable steps” to preserve the data. Courts, however, appear to be split over the degree of imperfection that still qualifies as having undertaken “reasonable steps”.
	+ Marten Transport v. Platform Advertising, No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at \*9 (D. Kan. Feb. 8, 2016) (the court found that conduct was reasonable when it involved routine, good faith operation of an electronic information system).
	+ Living Color v. New Era Aquaculture, No. 14–cv–62216–MARRA / MATTHEWMAN, 2016 WL 1105297, at \*5 (S.D. Fla. March 22, 2016) (the court found that the failure to disable an auto-delete function was sufficient to find a failure to take “reasonable steps”).
	+ Matthew Enterprise v. Chrysler, No. 13-cv-04236-BLF, 2016 WL 2957133, at \*4 (N.D. Cal. May 23, 2016) (the court found that Plaintiff’s “lackadaisical attitude towards document preservation” did not qualify as “reasonable steps”).
* **Additional Discovery and Prejudice** – Rule 37(e) does not apply if additional discovery would mitigate the prejudice of the lost ESI. Rule 37(e) does not assign which party has the burden of proof.
	+ Fiteq. v. Venture Corp., No. 13-cv-01946-BLF, 2016 WL 1701794, at \*3 (N.D. Cal. April 28, 2016) (the court found that the moving party had “failed to provide that other responsive documents ever existed”).
	+ GN Netcom v. Plantronics, No. 12-1318-LPS, 2016 WL 3792833, at \*10 (D. Del. July 12, 2016) (the court found that the nonmoving party was required to show that additional discovery mitigated the loss. While the additional discovery included 21 additional custodians and back-up tapes, less than 5% of the deleted emails were secured).