PLAUSIBILITY, PROPORTIONALITY AND PROFESSIONALISM: PRACTICE REQUIREMENTS UNDER THE CURRENT FEDERAL RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

In 1938, the Federal Rules of Civil Procedure were adopted. The Rules have been amended many times, most recently in December, 2015, after months of study and public comment. The adoption of the 2015 amendments were accompanied by comments which led many commentators to conclude that accessibility of the courts to litigants was under attack. In the intervening 20-plus months since their adoption, courts have had the opportunity to consider and apply the amended rules to actual controversies. The practice under the amended rules, although perhaps different in degree, is hardly revolutionary.

II. PLEADING REQUIREMENTS

Fed. R. Civ. P. 8(a) governs an acceptable pleading in federal court. Although Rule 8(a) was not amended in 2015, it was directly impacted by two United States Supreme Court cases decided in the last 10 years – *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Given the commonality of courts citing to both of these cases when addressing the standard required of a pleading to withstand a motion to dismiss, commentators often refer collectively to the two cases as *Twiqbal.* Although *Twombly* was decided 10 years ago, courts and practitioners continue to assess the impact of these two cases on current pleading practices in the federal courts.

A. Pleading before *Twiqbal*

Rule 8(a) was incorporated into the Federal Rules of Civil Procedure in 1938 when the Rules were first adopted, and has not been substantively amended since. Rule 8(a) only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." It purpose was to usher in a simpler approach than had been adopted under either common-law pleading or code pleading, with the result being that cases would be decided on their merits rather than approaching pleading as "a game of skill in which one misstep by counsel may be decisive to the outcome . . . ." *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)

In *Conley*, the Supreme Court solidified the simpler pleading scheme envisioned by the adopters of the federal rules when it concluded that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." Instead, a complaint is sufficient if it "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." The reference to "fair

notice" caught on with courts in subsequent reported cases as they started referring to the standards required to state a claim as "notice pleading." *Conley* articulated the seminal test for a complaint: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46. This standard governed motions to dismiss for 50 years after it was first set out in *Conley*.

B. *Twombly* and *Iqbal*

Twombly was an antitrust case alleging market allocation in the cable industry. The Southern District of New York dismissed the complaint because it only alleged "conscious parallelism" rather than alleging sufficient facts regarding the "plus factors" that could push the complaint across the required threshold from "conscious parallelism" to a "horizontal agreement." *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179, 189 (S.D.N.Y. 2003), *vacated and remanded*, 425 F.3d 99 (2nd Cir. 2005), *rev'd,* 550 U.S. 544 (2007). The second circuit reversed on the grounds that the plaintiffs were not required to plead specific facts of an actual agreement to allocate the markets.

On appeal, the Supreme Court reversed the second circuit and concluded that the complaint in *Twombly* should be dismissed for failure to state a claim upon which relief can be granted. The Court expressed concern about the rising expense of litigation. 550 U.S. at 546. While *Twombly* expressly reaffirmed the concept of "notice pleading" required under Rule 8(a), Justice Souter, writing for the majority, concluded that the *Conley* standard for the sufficiency of a complaint had "earned its retirement," insofar as it precluded dismissal "whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *Id.* at 561. With respect to Fed. R. Civ. P. 8, Justice Souter wrote:

> Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleading is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle(ment) to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.] Factual allegations must be enough to raise a right to relief above the speculative level . . . ."

Id. at 555. In other words, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547.

Lower courts, commentators, and practitioners were confused by *Twombly*. Some concluded that the pleading principle announced in *Twombly* applied only to antitrust cases or other cases involving conspiracies. Two years later, however, the Court

dispelled that notion when it reaffirmed and elaborated on *Twombly* in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a civil rights case.

Iqbal involved the detention of an Arab individual in the post-9/11 environment. The plaintiff, Javaid Iqbal, was held in the most restrictive environment for allegedly using an improperly obtained Social Security number. Iqbal alleged his mistreatment was unlawfully based on race, religion, and national origin. Some of the defendants moved to dismiss the complaint, but the trial court denied the motion, which was affirmed by the appellate court. The Supreme Court, however, reversed.

In *Iqbal*, the Supreme Court stated that its "decision in *Twombly* expounded the pleading standard for 'all civil actions . . . ," i*d*. at 684, thereby destroying the perception among lawyers that *Twombly* did not apply beyond the antitrust or conspiracy arenas. In elaborating on its prior decision in *Twombly*, the Court noted:

> Two working principles underlie our decision in *Twombly*. First, . . . [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.
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> . . . .
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> Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Id. at 678-9. The Court concluded that "where well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleader is entitled to relief." *Id*. at 678.

C. The impact of *Twiqbal*

The impact of *Twombly* and *Iqbal* was immediate and significant. As noted by Professor Jill Curry and Professor Matthew Ward, *Twombly* was cited over 13,000 times by its one-year anniversary, and the lower courts 'reached every conceivable answer' in applying the Court's 'mixed signals.'" J. Curry & M. Ward, *Are Twombly & Iqbal Affecting Where Plaintiff's File? A Study Comparing Removal Rates by State,* 45 TEX. TECH L. REV. 827, 831 (2013)(citations omitted).

The impact of *Twiqbal* well exceeded the one-year anniversary of *Twombly*. By September, 2015, *Twombly* had become the third most-frequently cited Supreme Court decision of all time, at 127,521, while *Iqbal* was fourth at 104,712. But their significance goes well beyond mere numbers. The interpretations of these two cases were multiple

and varied. Many commentators concluded that *Twiqbal* had replaced "notice pleading" with a new, more restrictive "plausibility pleading" approach. Other commentators concluded the principles enunciated in *Twiqbal* could be read consistent with "notice pleading" and nothing had really changed under Rule 8(a). Even empirical studies conducted after *Twiqbal* came to opposite conclusions. Some studies found an increased likelihood that motions to dismiss would be granted, at least for some kinds of cases, while other studies concluded that *Twombly* and *Iqbal* have not had any effect on how practitioners plead cases in federal court. Regardless of the results of empirical studies, it is clear that even after ten years, federal courts continue to struggle to agree on a concrete and workable interpretation of the "plausibility standard" introduced by these cases.

D. Subsequent Supreme Court Cases involving pleading

There are several Supreme Court post-*Twiqbal* cases, including the two that follow, which suggest that "notice pleading" is not dead:

Skinner v. Switzer, 131 S. Ct. 1289 (2011). Although acknowledging that the plaintiff's complaint was not carefully pled, the Court noted that under Rule 8(a)(2), a complaint "generally requires only a plausible 'short and plain' statement of the plaintiff's claim." *Id.* at 514. The Court cited to *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), a pre-*Twiqbal* opinion, as authority as to whether the complaint was sufficient to cross the threshold.

Johnson v. City of Shelby, 135 S. Ct. 346 (2014). The district court dismissed the plaintiffs' complaint for failing to specifically invoke 42 U.S.C. §1983 in their complaint. The Supreme Court reversed and noted that the Federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.* at 346. With specific reference to *Twombly* and *Iqbal*, the Court noted that they did not address whether plaintiffs must cite specific statutory authority for their claims, but instead addressed "the *factual* allegations a complaint must contain to sustain a motion to dismiss." *Id.* at 347. The Court stated that the complaint was not deficient in that regard because the plaintiffs "stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city." *Id.* "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. See Fed. Rules Civ. Proc. 8(a)(2) and (3), (d)(1), (e)." *Id.*

E. Nebraska District Court post-*Twiqbal*

Not surprisingly, *Twombly* and *Iqbal* are often cited by the federal district court in Nebraska. It is beyond the scope of this presentation to examine in detail the hundreds of cases which cite to those opinions since 2009, the year in which *Iqbal* was decided; however, it will in a cursory fashion examine those decided in 2017. There are dozens of

reported cases decided in 2017 which cite *Twombly* and *Iqbal*, but the vast majority of them are *pro se* cases which are decided under different standards. Eleven cases in 2017 have applied *Twombly* and *Iqbal* to motions to dismiss in non-*pro se* cases, but prior to examining them, it is prudent to examine the general approach taken by the Nebraska federal district court in applying *Twiqbal* to decide a Rule 12(b)(6) motion to dismiss.

In *Hugler v. Cilantros Mexican Bar & Grill, LLC, et al.,* 2017 WL 3995543 (D. Neb. September 8, 2017), Senior Judge Joseph Bataillon addressed the defendants' motions to dismiss a complaint filed under the Fair Labor Standards Act of 1938. Judge Bataillon set out the following standard of review to decide the pending motions:

> Under the Federal Rules, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(s)(2). The rules require a "'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n.3. (2007)(quoting Fed. R. Civ. P. 8(a)(2)). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)(quoting *Twombly*, 550 U.S. at 555). In order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the plaintiff's obligation to provide the grounds for his entitlement to relief necessitates that the complaint contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.
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> The factual allegations of a complaint are assumed true and construed in favor of the plaintiff, "even if it strikes a savvy judge that actual proof of those facts is improbable and 'that a recovery is very remote and unlikely.'" *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "[O]n the assumption that all the allegations in the complaint are true (even if doubtful in fact)," the allegations in the complaint must "raise a right to relief above the speculative level." *Id*. at 555-56. In other words, the complaint must plead "enough facts to state a claim for relief that is plausible on its face." *Id.* at 547. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(stating that the plausibility standard does not require a probability, but asks for more than a sheer possibility that a defendant has acted unlawfully.).
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> *Twombly* is based on the principles that (1) the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions and (2) only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id*. at 678-79. Determining whether a complaint states a plausible claim for relief is a "context-specific task" that requires the court "to draw on its judicial experience and common sense." *Id.* at 679. Accordingly, under

> *Twombly*, a court considering a motion to dismiss may begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *Id.* Although legal conclusions "can provide the framework of a complaint, they must be supported by factual allegations." *Id.* When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*
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> Thus, the court must find "enough factual matter (taken as true) to suggest" that "discovery will reveal evidence" of the elements of the claim. *Twombly*, 550 U.S. at 556; *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 347 (2005)(explaining that something beyond a faint hope that the discovery process might lead eventually to some plausible cause of action must be alleged). When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, the complaint should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Twombly*, 550 U.S. at 558; *Iqbal*, 556 U.S. at 679.

2017 WL 3995543, at *2. Although articulated in different ways, some or all of the principles Judge Bataillon cites in *Hugler* are duplicated in each of the following 2017 Nebraska federal district court cases:

Steier v. Highland Operating Co., et al. 2017 WL 384295 (D. Neb. January 25, 2017)(Judge Kopf). Plaintiff did not respond to the motion to dismiss filed by the defendants. Motion **granted** because plaintiff alleged no facts to support legal conclusion that defendants were "joint employers."

Tremaine v. Goodwill Industries, Inc., 2017 WL 394490 (D. Neb. January 27, 2017)(Judge Smith Camp). Motion to Dismiss plaintiff's Third Claim for Relief based on Nebraska Fair Employment Practices Act. Motion to dismiss **granted** because plaintiff failed to identify any state or federal law violated by the defendant.

Sake v. Prudential Ins. Co. of America, 2017 WL 486927 (February 6, 2017)(Judge Smith Camp). Motion to partially dismiss one claim for relief and two claims for special damages under two other claims for relief. Plaintiff did not respond to the motion. Motion **granted** because claim by plaintiff was preempted by federal law and special damages beyond the amount of the policy are barred.

Carnrick v. Riekes Container Corp., *2017 WL 1476229* (D. Neb. February 7, 2017)(Judge Bataillon). Motion to dismiss Title VII claims because defendant did not have 15 employees and to dismiss other state law claims because employer not liable for conduct of its employees. Motion **granted** as to intentional tort claim due to legal (and not factual) bar but **denied** as to remaining claims.

Perez v. City of Hastings, et al., 2017 WL 1066574 (D. Neb. March 21, 2017)(Judge Rossiter). Plaintiff asserted claims under state and federal law against State of

Nebraska, municipality, and officers of the Hastings Police Department. Defendants moved to dismiss claims, in part, under Rule 12(b)(6). Motion **granted** as to federal claims because "plaintiffs' blanket allegations fail to provide sufficient factual support to state a plausible claim that any defendant deprived them of their rights under the First, Sixth, Eighth, and Fourteenth Amendments, much less that any policy, custom, or practice of any governmental entity 'led to any such deprivations of rights.'" State law tort claims remanded to state court.

Harrington v. Seward County, Nebraska, 2017 WL 1080931 (D. Neb. March 22, 2017)(Judge Gerrard). Plaintiff asserted constitutional and state law claims arising out of zoning action and inaction by defendant. Defendant filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Motion **granted** as to federal claims because of lack of standing and unripeness of claims. State law claims dismissed without prejudice to refile in state court.

Pearson v. Wellmark, Inc., 2017 WL 2371142 (D. Neb. May 31, 2017)(Judge Gerrard). Plaintiff sued defendant under ERISA, and defendants moved to dismiss counts II and III of plaintiff's amended complaint. Motion **denied** because accepting plaintiff's allegations as true, claim for relief was stated under both claims. Motion **granted** as to equitable relief sought by plaintiff because plaintiff failed to generally allege a "pattern or practice of fiduciary violations" which is a prerequisite to her requested equitable relief of removing defendant as fiduciary under plan.

Thaden v. Transwood, Inc., 2017 WL 2589257 (D. Neb. June 14, 2017)(Judge Smith Camp). Plaintiff asserts three claims related to the termination of his employment with defendant – disability discrimination, retaliation for engaging in protected activity, and damages for defendant's violation of Nebraska Clean Air Act. Defendant moved to dismiss all claims. Motion **granted** because no private right of action under Acts pled by plaintiff; plaintiff failed to report violations but merely threatened to do so; therefore, no retaliation because of reporting; and plaintiff's speech motivated by private interests rather than raising issues of public concern.

Woodmen of the World Life Ins. Soc. V. Weathersbee, 2017 WL 3128804 (D. Neb. July 21, 2017)(Judge Gerrard). Plaintiff sued two former employees for breach of non-solicitation agreement and defendants moved to dismiss the complaint. Motion **denied** because facts pled by plaintiff, which the court accepts as true, raise issues of fact which preclude granting motion, and claim is not barred as a matter of law by Nebraska law.

Fastrich v. Continental General Ins. Co., et al., 2017 WL 3610535 (D. Neb. August 21, 2017)(Judge Smith Camp). Plaintiffs brought claims of breach of contract, tortious interference with a business relationship or expectancy, and unjust enrichment arising out of plaintiffs claim they were not paid commissions, renewals, and overrides on insurance policies. Defendants filed 12(b)(6) motion to dismiss. Motion **denied** as to

breach of contract claim and unjust enrichment claim because plaintiffs pled plausible claims as to each, but **granted** as to tortious interference claim because defendant is not a "true third-party interferer" which is a requirement for the claim.

Hugler v. Cilantros Mexican Bar & Grill, LLC, et al., 2017 WL 3995543 (D. Neb. September 8, 2017)(Judge Bataillon). As noted above, plaintiff asserted this claim under the FLSA, and asserts the defendants are an enterprise under the Act. Defendants moved to dismiss under Rule 12(b)(6). Motion **denied** because Court found that plaintiff sufficiently pled the necessary allegations. "Plaintiff alleges that employees worked over 40 hours in one or more work weeks and were not properly compensated overtime. Plaintiff alleges reasons why overtime was not properly calculated, including failing to combine hours of employees who worked at more than one locations and failing to pay for all hours worked such as time in mandatory staff meetings. Plaintiff has plausibly stated weeks in which employees would have worked more than 40 hours that week and not been properly compensated, e.g. week where more than 40 hours were worked by an employee by working at more than one location. The Court finds these allegations are sufficient on a motion to dismiss."

F. Application of *Twiqbal* by Nebraska District Court to affirmative defenses

The district court in Nebraska has addressed the issue of whether *Twiqbal* applies to affirmative defenses in *Infogroup, Inc., et al. v. Database LLC, et al.,* 95 F. Supp.3d 1170 (D. Neb. 2015). The District Court concluded that *Iqbal* and *Twombly* should not be applied in deciding whether to strike a defense as insufficiently stated. Judge Gerrard, citing to *Zotos v. Lindbergh Sch. Dist.,* 121 F.3d 356, 361 (8th Cir. 1997), noted that "while defenses must be asserted in a responsive pleading, they need not be articulated with any rigorous degree of specificity, and may be sufficiently raised for purposes of Rule 8 by their bare assertion." *Id.* at 1193. While acknowledging that *Zotos* was decided before *Twombly* and *Iqbal*, Jude Gerrard concluded that *Zotos* remains the law of the circuit, but he further noted that is presented with the question, the Court would agree that *Iqbal* and *Twombly* should not be applied to affirmative defenses. *See also Oglesby v. Lesan*, 2017 WL 2345666 (May 30, 2017)(Magistrate Judge Zwart).

G. Practical application of *Twiqbal*

For all of the consternation expressed by commentators and practitioners regarding the impact of *Twombly* and *Iqbal* on pleading in federal court, at least in Nebraska, it appears there has been limited impact on complaints filed in this district. It is, of course, impossible to determine the manner in which lawyers plead their client's claims differently after *Twiqbal* than they did before. It is likely that lawyers are cognizant of a different, albeit undefined, standard that will apply to their complaints and draft them accordingly.

With respect to the impact of *Twiqbal* on motions to dismiss in the Nebraska federal district court, it appears remarkably similar to the practice before the cases were decided. In the 2017 cases noted above, although in several of the cases a motion to dismiss was granted, in most of them the motion was granted because of a legal defect in the claim rather than a pleading deficiency. Indeed, in only a couple of the cases did the Court specifically note the failure of the plaintiff to plead facts sufficient to constitute a plausible claim against the defendants.

To withstand a challenge to the sufficiency of the claims asserted in a complaint, it is essential that plaintiffs plead facts rather than legal conclusions in support of the claims. The differences between a "statement of fact" and a "statement of a legal conclusion" may be minimal in certain circumstances, but a lawyer that focuses more on what happened rather than the legal effect of what happened, will more often succeed in the face of a *Twiqbal* attack on the pleading.

III. DISCOVERY REQUIREMENTS

A. Introduction

The 2015 amendments to the Federal Rules of Civil Procedure made several changes to the rules affecting discovery in federal courts. The genesis for the current amendments to the Federal Rules of Civil Procedure was a symposium on civil litigation held at Duke University in 2010. The participants in the Duke symposium included federal and state judges, attorneys representing a variety of interests, and academics. In his 2015 Year-End Report on the Federal Judiciary, Chief Justice Roberts summarized the symposium as follows:

> The symposium, which generated 40 papers and 25 data compilations, confirmed that, while the federal courts are fundamentally sound, in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts. The symposium specifically identified the need for procedural reforms that would (1) encourage greater cooperation among counsel; (2) focus discovery . . . on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information.

On December 1, 2015, the amended rules, which seek to address some of the issues identified at the symposium, went into effect. The amendments directed to the discovery process made changes to Rules 26 and 34, which will be discussed in this section. The amendments made changes to Rules 16, 26, and 37 regarding the preservation, review, and production of electronically stored information ("ESI"), as well as sanctions for spoliation of ESI, all of which will be discussed in the next section. The 2015 amendments also made a seemingly innocuous change to Rule 1, but that change

has the opportunity to make the most significant impact on federal civil litigation practice, and will be discussed in the final section.

B. Proportionality

The 2015 amendment which has received the most publicity is the change to the scope of discovery under Rule 26(b)(1). Pre-2015, the scope of discovery under Rule 26 stated:

> 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, 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 the 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).

After the 2015 amendments, Rule 26(b)(1) now states:

> 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.***

While the scope of discovery has been amended to include a proportionality requirement, the 2015 amendments did not introduce that requirement to the Federal Rules of Civil Procedure; indeed, proportionality has been a part of the rules since the 1983 amendments. The 1983 amendments authorized the court to limit discovery if it is "unduly burdensome or expensive, taking into account the need of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The standard for limiting discovery under the 1983 amendments is similar to the proportionality standard implemented with the 2015 amendments. The 1983 amendments also introduced Rule 26(g) which addressed the effect of a lawyer's signature on discovery requests, responses, or objections:

> By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

. . . .

(B) with respect to a discovery request, response or objection it is:

. . .

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

The amendments implemented in 1993, 2000, and 2006 retained the proportionality requirements, although the language was slightly modified and the location of the requirement was changed within the rules. Given the thirty-year existence of a proportionality requirement under the federal discovery rules, what is the significance of the 2015 amendments to Rule 26(b)(1)? According to Chief Justice Roberts:

> Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality . . . . The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need.

According to Magistrate Judge Pitman in *Vaigasi v. Solow Management Corp., et al.,* 2016 WL 616386 (S.D.N.Y., February 2, 2016) at *13 (citing *Aguilar v. Immigration & Customs Enf't Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 359 (S.D.N.Y. 2008)) proportionality "has become 'the new black.'" The reinvigoration of the proportionality requirement under Rule 26(b)(1) was accompanied by an amendment to Rule 16 regarding preliminary conferences with the court. The Advisory Committee Notes to the amendments in 1993, 2000, and 2006 each commented on the failure of lawyers and the courts to implement the proportionality requirements in place since 1983. The Advisory Committee Notes to the 2000 amendments specifically state with respect to the proportionality limitations on discovery that "courts have not implemented these limitations with the vigor that was contemplated."

As noted above, the 2015 amendments also amended Rule 16 which addresses scheduling orders entered by the trial court. The new Rule 16(b)(3)(B) makes three changes to the list of provisions that may be included in a court's scheduling order, including, with respect to discovery, that it may "direct, that before moving for an order relating to discovery, the movant must request a conference with the court." Fed. R. Civ. P. 16(b)(3)(B)(v). The concept under the 2015 amendments is that a trial court will become much more actively involved in monitoring the progress of cases before it,

including the discovery process underway. The Advisory Committee Notes to Rule 26 states:

> The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

Consequently, the 2015 amendments contemplate that the parties will, on their own, conduct discovery consistent with the proportionality requirements called for in Rule 26(b)(1) and Rule 26(g). However, the amendments further contemplate that courts will more proactively monitor the progress of pending cases, particularly in those types of cases where proportionality is typically a problem, or by addressing prior to the filing of a formal motion, any proportionality issues brought before the court by the parties.

C. Practice under the proportionality requirement

Rule 26(g) makes it clear that the lawyer serving that discovery is certifying by his or her signature that the discovery is proportionate to the case. The same is true with respect to the responses to discovery. Consequently, it is incumbent on all parties to consider the proportionality of their discovery before serving it. While that requirement has been in place for 30 years, the renewed emphasis on proportionality may cause some Courts to more aggressively enforce that requirement.

Although discretionary, Rule 16 authorizes courts to require that the parties request a conference with the court to review discovery disputes before filing a formal motion to compel. The concept is to avoid the time and expense of formal motions, evidence, and briefs, while still obtaining insight from the judge about the proportionality of pending discovery. As noted below, the federal court in Nebraska have already implemented this aspect of Rule 16.

1. Relevance under pre- and post-2015 amendments.

Under Rule 26 both pre- and post-2015 amendments, only "relevant" information is discoverable. Prior to the 2015 amendments, information was deemed "relevant" under the rules if it proved or disproved "any party's claims or defenses." Upon proof of good cause, courts further allowed discovery of information if it was relevant to "the subject matter involved in the action." In addition, "relevant" information did not need to be admissible in evidence "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

The 2015 amendments altered the concept of what is "relevant" under Rule 26(b)(1) and therefore discoverable. Information continues to be "relevant" if it proves or disproves "any party's claim or defense." The amendments eliminated the concept of "relevance" as it relates to "the subject matter involved in the action." The Advisory Committee Notes to Rule 26 suggest that this provision of the rule was rarely invoked. Further, although the amendments maintained the concept that evidence need not be admissible to be discoverable, it eliminated the concept of discovery that "appears reasonably calculated to lead to the discovery of admissible evidence." With respect to the elimination of this clause in the amended rule, the Advisory Committee Notes reiterate a concern identified in the 2000 amendments that the "use of the 'reasonably calculated' phrase to define the scope of discovery 'might swallow any other limitation on the scope of discovery.' . . . The 'reasonably calculated' phrase has continued to create problems, however, and is removed by these amendments."

The overall effect of the 2015 amendments to concept of "relevance" is uncertain. Some commentators believe that the changes will limit the potential of fishing expeditions in the discovery process while others suggest there will be no change in practice. As noted below, the impact in the Nebraska federal courts of the amendment to what is "relevant" is unclear.

2. Proportionality under the 2015 amendments.

Even if discovery is deemed to seek "relevant" information, it may still be limited if the information sought is not proportionate to the case. As noted above, proportionality has long been a part of the federal rules, and the factors to determine proportionality are similar both pre- and post-2015 amendments. One conclusion from this is that there will be no change to actual practice under the amended rules. However, the renewed emphasis on proportionality, as well as some of the early Nebraska cases interpreting the requirement, suggests that is inaccurate.

Anticipating what is likely a common occurrence when changes are made to the discovery rules, the Advisory Committee Notes warn against a party refusing to provide discovery "simply by making a boilerplate objection that it is not proportional." The Notes proceed to describe how a court and the parties would address whether discovery is proportional:

> The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties

> continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information – perhaps the only information – with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

Under this approach, those factors that bear on the need for the requested information will generally be addressed by the party seeking it, while a showing of the burden and expense of producing the requested information will fall on the party responding. In both instances, specific showings are required rather than generalities. Early reported Nebraska cases after adoption of the 2015 amendments follow this very approach.

D. Nebraska cases on proportionality after adoption of the 2015 amendments.

The following reported cases address discovery disputes arising after the adoption of the 2015 amendments to the Federal Rules of Civil Procedure and provide insight into the Court's approach to resolving those disputes. This does not purport to be an exhaustive review of all such cases, but only a representative few.

Design Basics, LLC v. Carhart Lumber Co., 2014 WL 6669844 (D. Neb. November 24, 2014)(Magistrate Judge Zwart). Although this case was decided before the effective date of the 2015 amendments, it illustrates the court's use of the proportionality concept which already existed in the federal rules under Rule 26(b)(2). The plaintiff sought "full disk imaging of Defendant's hard drives, including Defendant's POS server, secretaries' computers, UBS devices . . . ." The defendant objected to this request and the parties held a telephone conference with the court to discuss the request and objections. The court thereafter entered an order granting plaintiff the right to examine the computer but placing limits on the number of computer and the amount of time the defendant had to spend on responding. In response to the Order, several computers in the defendant's possession were imaged.

The plaintiff subsequently filed a motion to compel seeking full-disk imaging of additional computers in the defendant's possession, and the defendant filed a motion for protective order precluding such examination. The plaintiff offered evidence from its retained expert that "'secretary and assistant's computers are usually included in the ediscovery process because they frequently contain evidence relevant to the matter at hand.'" *Id*. at *3. Defendant offered evidence of the documents, both electronic and hard copy, that were produced as well as the hours spent by defendant to comply with the

court's prior order. The court denied the motion to compel and granted the motion for protective order stating:

> In the end, the plaintiff failed to show good cause why additional data must be collected from the defendant. Taking into consideration the factors listed in Fed. R. Civ. P. 26(b)(2)(C), the court is convinced that allowing imaging of every computer or data storage device or location owned or used by the defendant, including all secretaries' computers, is not reasonable and proportional to the issues raised in this litigation.

Id. Under the new rules, simply substituting Rule 26(b)(1) for the rule cited above would lead to the same conclusion by the court.

Zurich American Ins. Co. v. Andrew, 2016 WL 2350115 (D. Neb. May 4, 2016) (Magistrate Judge Gossett). This is a subrogation action to recover amounts the plaintiff paid in connection with a gasoline spill from a pipeline. The plaintiff issued a notice of intent to issue a subpoena seeking information from Farmers Alliance Mutual Insurance Company, the company that insured the defendants. Defendants objected on the grounds the proposed subpoena requested irrelevant, privileged, and confidential information. The parties conferred, but were unable to resolve their dispute, and the matter was before the court on the plaintiff's motion to allow the issuance and the defendants' objections.

The court cited to the amended Rule 26(b)(1) and noted that "[a]lthough relevance is to be broadly construed for discovery issues, the proponent of discovery must make '[s]ome threshold showing of relevance . . . before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.'" *Id.* at *2 (citing to *Prism Techs., LLC v. Adobe Sys., Inc.*, 284 F.R.D. 448, 449 (D. Neb. 2012)). The court continued: "Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity the information they hope to obtain and its importance to their case." *Id.* The court found that "the relevance of the documents sought from Farmers by Zurich is not readily apparent and Zurich has not met its burden to show relevancy of such requests." *Id.* at *3. The court concluded the requests directed to Farmers "do not appear relevant or proportional to the needs of the case." *Id.*

The court noted that the case was filed before the new rules were effective, but the motion was being decided after the effective date. The court stated it was "just and practicable" to apply the new rules, but further noted that the concept of proportionality existed under the prior version of the rules.

This case was decided under the "relevance" portion of Rule 26(b)(1), although it concluded the requests were neither relevant nor proportional to the needs of the case.

The decision in this case regarding relevance should be contrasted with the case that follows.

Vigil v. Waste Connections of Nebraska, Inc., 2016 WL 1698285 (D. Neb. April 27, 2016) (Magistrate Judge Thalken). The plaintiff sought a protective order precluding the defendant from issuing a subpoena for the cell phone records of the plaintiff on the date of an accident. The defendant argued that the evidence was relevant to the nature and extent of the injuries suffered by the plaintiff. The plaintiff argued that the defendant already had sufficient evidence from other sources to make such determination, and therefore, the additional evidence sought is irrelevant and "proportionally insignificant."

With respect to the relevancy argument, the court noted the 2015 changes to Rule 26(b)(1), but concluded that "[d]espite the change in terminology for Rule 26(b)(1), the relevancy parameters remain." *Id.* at *2. The Court continued:

> Broad discovery is an important tool for the litigant, and so '[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.' *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032, 1039 (8th Cir. 2011)(quoting Fed. R. Civ. P. 26(b)(1)). Accordingly, relevant information includes "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Id. Despite the fact that Rule 26(b)(1) was amended in 2015 to omit the clause "reasonably calculated to lead to the discovery of admissible evidence," the court continued to cite a case which relied upon that phrase. Consequently, in this case as opposed to *Zurich* above, the amendments did not impact in any manner what is relevant under Rule 26(b)(1). The juxtaposition of these two cases leave it unclear how the Nebraska federal court will construe the "relevance" requirement in future cases.

After concluding the information sought was relevant, the court proceeded to address the proportionality factors identified in Rule 26(b)(1). The plaintiff conceded the burden or expense of obtaining the evidence was not significant, which led the court to conclude that "the germane elements of the proportionality assessment are the parties' relative access to relevant information and the importance of the discovery in resolving the issues." *Id.* The court concluded that despite the fact that defendants had other evidence available to assess the nature and extent of plaintiff's injuries, the requested information is nevertheless proportional to the claims and as a result, denied plaintiff's request for a protective order.

Vallejo v. Amgen, Inc., 2016 WL 2986250 (D. Neb. May 20, 2016)(Judge Smith Camp). The plaintiff alleged that the decedent, Jan Vallejo, developed myelodysplastic syndrome ("MDS") as a result of taking Enbrel, which caused his death. Magistrate

Judge Zwart ordered phased discovery with the first phase directed to whether Enbrel can cause MDS. The parties were unable to agree on compliance with Judge Zwart's order, and submitted a joint outline of the issues and briefs. Judge Zwart found that the discovery requests served by Plaintiff were overbroad, but also found that Defendants had not introduced sufficient evidence to assist her in making the necessary discovery determinations. Judge Zwart nevertheless entered an order setting the bounds of discovery for Phase I. Plaintiff objected to the order and the matter was submitted to Judge Smith Camp.

Plaintiff argued that having found the defendants failed to quantify the burden of responding to the discovery requests meant that the discovery order entered by Judge Zwart is contrary to law and clearly erroneous. Judge Smith Camp disagreed. She noted that under the Advisory Committee Notes regarding the 2015 amendments to Rule 26 "[t]he parties and the Magistrate have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." *Id*. at *3. Judge Smith Camp found that Judge Zwart had properly considered all of the factors regarding proportionality and that her order was neither contrary to law nor clearly erroneous.

There are several aspects to this case that are noteworthy. First, even before a discovery dispute arose, Judge Zwart had entered an order directing phased discovery. As discussed below, this is one technique available to parties and courts to minimize the expense of discovery. Second, the case highlights that it is incumbent on the parties to provide specific evidence to support their positions regarding the proportionality of particular discovery requests. Finally, and perhaps most importantly, even in the absence of sufficient evidence provided by the parties, the court will still take it upon itself to fashion an order requiring proportionate discovery requests.

Cor Clearing, LLC v. Calissio Resources Group, Inc., 2016 WL 2997463 (D. Neb. May 23, 2016)(Judge Strom). Plaintiff issued a third-party subpoena on TD Ameritrade seeking production of documents pursuant to five different requests. TD Ameritrade objected to the subpoena and plaintiff filed a motion to compel. Judge Strom found that the plaintiff had "sufficiently established its threshold showing of relevancy" with respect to the requests in the subpoena. *Id*. at *3. He further found that TD Ameritrade had failed to show "specifically how . . .each . . . [request for production] is not relevant or how the discovery is overly broad, burdensome, or oppressive." *Id*. (citing *Lubrication Technologies*, 2012 WL 1633259). Judge Strom granted the motion to compel and ruled that "[g]iven the broad nature of Rule 26, the proportionality of plaintiff's requests, and the interests to be balanced, the Court finds plaintiff's request's to be relevant, even under the stronger standard applicable for third-party subpoenas. In addition, the Court finds that plaintiff's requests are not overly broad, burdensome, or oppressive." *Id.*

This case is further evidence of the specific and particularized showing that needs to be made by any party challenging the proportionality of discovery requests served.

Duhigg v. Goodwill Industries, 2016 WL 4991480 (D. Neb. September 16, 2016) (Magistrate Judge Gossett). The plaintiff filed a lawsuit claiming wrongful termination and discrimination. Plaintiff served requests for production of documents on defendant. The parties began communicating about defendant's search for responsive documents, particularly its search for responsive emails. Defendant advised plaintiff of the manner in which it conducted its search for emails, including whose emails were searched and the specific terms used to conduct the search. Plaintiff requested the defendant to conduct an additional search of the emails using terms the plaintiff supplied. The defendant complied resulting in 14,500 "hits," which were estimated to include 14,119 separate emails. Defendant denied plaintiff's request to review and produce such emails due to the burden and expense to retrieve, format, and review the data. Plaintiff filed a motion to compel and the defendant filed a motion for a protective order.

Before addressing the specific motions, Judge Gossett noted:

> The court is amenable to conducting discovery conferences in light of the most recent amendments to the Federal Rules of Civil Procedure, and has done so previously in this case. However, Rule 16 contemplates that the movant may request a discovery conference "before moving for an order relating to discovery." Fed. R. Civ. P. 16(b)(3)(v). Plaintiff filed her motion to compel prior to the parties' request for a discovery conference, and therefore the opportunity for a discovery conference on this issue has passed.

Id. at *2. In addressing the pending motions, the court found that plaintiff "had not met her burden to show the relevance of her request for *all* emails that simply mention her name." *Id.* at *3. The court concluded that "[p]laintiff's request appears to be merely on a fishing expedition." *Id.* On the other hand, the court found that defendant "had demonstrated the data requested by Plaintiff is not reasonably calculated due to undue burden or cost." Defendant provided evidence that it would take "approximately 235 hours to review the 14,119 emails, plus an additional ten to fifteen hours of review by defense counsel." *Id.* Defendant estimated it would incur $45,825 in legal fees to comply with the request. The court ruled: "In consideration of the above, and in balancing the proportionality factors set forth in Fed. R. Civ. P. 26(b)(1), the court finds Goodwill should not be compelled to produce the emails responsive to Plaintiff's search terms." *Id.*

The court did, however, agree with plaintiff that defendant's prior search of its emails using its own terms was insufficient. Plaintiff had requested a search of four years, but the defendant had only searched one year of emails. The court concluded:

> The four-year time frame suggested by Plaintiff is appropriate to search for emails that may provide background evidence relevant to Plaintiff's timely claim of discrimination. Moreover, Goodwill unilaterally supplied its own search terms to search only one custodian's email account, without input from Plaintiff. Rather than attempt to craft search terms for the parties, the court directs the parties to meet and confer and mutually agree upon search terms for Goodwill to use to search the email accounts of Hilgenkamp, Sloderbeck, and McGree, for the four-years predating Plaintiff's termination.

Id. at *4.

There are several aspects of this case that warrant mention. First, the court invites parties to discuss discovery disputes with the court BEFORE filing motions to compel or motions for protective order. This is consistent with Rule 16 which attempts to avoid the time and expense of formal motions by encouraging preliminary discussions with the court regarding discovery disputes. Nebraska federal courts are clearly amenable to such conferences. Second, the case is a good example of the detail necessary to establish the burden and expense of responding to discovery necessary to sustain a finding that such discovery is not proportionate. Finally, the case is also a good example of the cooperation the new rules expect from parties to a lawsuit to resolve discovery issues without court involvement. This aspect will be discussed further below.

Applied Underwriters, Inc. v. Top's Personnel, Inc., 2017 WL 1214413 (D. Neb. March 31, 2017)(Magistrate Judge Zwart). This case arises out of an insurance and reinsurance agreement, the details of which are unnecessary to identify. The defendant served discovery on plaintiff to which the plaintiff replied. Defendant considered the plaintiff's responses incomplete and issued a "meet and confer" letter consistent with the federal and local rules. The parties failed to resolve their dispute and the defendant filed a motion to compel. Magistrate Judge Zwart cited the now well-recognized burdens on the parties – the requesting party must show why the requested information is relevant, and the responding party must show the burden and expense of responding. The court stated that "Courts should examine each case individually to determine the weight and importance of the proportionality factors," which will then allow it to "balance the parties' interests and order discovery consistent with the proportionality mandated under the federal rules." *Id*. at *2.

The plaintiff did not argue it was burdensome or expensive to provide additional information but instead claimed the information sought was irrelevant. Consequently, there was no evidence of what it would cost plaintiff to respond. The court examined eight separate interrogatories and their responses to determine whether they were incomplete. With respect to each, the court examined the relevance of the information sought and determined whether or not the response was sufficient. If not, the court identified the deficiency and order additional information to be supplied.

The cases discussed above make clear that the federal courts in Nebraska take seriously the requirements imposed by the 2015 amendments to the Federal Rules of Civil Procedure, with respect to the proportionality requirements in Rule 26(b)(1), the evidence required to prove relevance and proportionality, their willingness to conduct preliminary conferences regarding disputed discovery, and their expectation that parties will cooperate on discovery and meet their duty to serve and respond to discovery "proportionately." It is strongly suggested that lawyers behave likewise.

E. 2015 AMENDMENTS TO RULE 34

There were several changes made to Rule 34 by the 2015 amendments. First, under the amended rules, a party may issue requests for production of documents before the Rule 26(f) conference occurs; however, for purposes of responding to such requests, they will be deemed to have been served as of the date of the first Rule 26(f) conference.

Second, Rule 34 now requires that a party that wants to object to a request must "state with particularity the grounds for objecting to the request, including the reasons." This makes Rule 34 consistent with Rule 33 (b)(4) and removes the idea that objections to requests for production can be less specific than objections to interrogatories. Furthermore, if an objection recognizes that some portion of the request is inappropriate, then the objection should state what portion is appropriate. For example, if an objection is asserted that the request is overbroad, the objection should further state what portion of the request is not considered overbroad by the responding party. The party is then obligated to produce those documents within the scope of the request that party concludes is not overbroad.

Third, the response may state that the party will produce copies of documents or electronically stored information rather than permit an inspection. This is consistent with actual practice even before the 2015 amendment to Rule 34.

Finally, pursuant to Rule 34(b)(2)(C), if an objection is made to a request, the responding party must also state whether any documents are being withheld pursuant to that objection. Prior to the rule, it was not uncommon for a party to make several objections to a request, yet nevertheless produce documents responsive to that request. The requesting party was left with uncertainty as to whether any documents were withheld pursuant to the objections that were made. The amended Rule eliminates that uncertainty.

IV. REQUIREMENTS WITH RESPECT TO ELECTRONICALLY STORED INFORMATION

A. Introduction

Perhaps nothing has altered the landscape of civil litigation more than the creation, storage, review, and production of electronically stored information ("ESI"). "Every five minutes, today's brave new, computational world is said to create the digital equivalent of all of the information stored in the Library of Congress. Put another way, we now create as much information in two days as we have from the dawn of man through 2003." Ralph C. Losey, *Predictive Coding and the Proportionality Doctrine: A Marriage Made in Big Data*, 26 Regent U. L. Rev. 7, 9 (2014). For the trial lawyer, the issues relating to ESI are whether the client has properly retained the necessary electronic information, how much of that information is responsive to the issues in the pending lawsuit and to the discovery requests that have been served, and how expensive it will be to review all of the potentially responsive electronic information.

The last several rounds of amendments to the Federal Rules of Civil Procedure have attempted to address the issues relating to ESI. Each iteration of the rules has tried to mitigate in some manner the enormous time and expense of reviewing and producing such information. The 2015 amendments are no exception as they address the topic in Rules 16, 26, and 37. The amendments to these rules will be addressed in this section. In addition, the topic of ESI will further be addressed in the following section.

B. Rule 16

The 2015 amendments revised Rule 16(b)(3)(B) by adding three sections, each of which implicate, either directly or indirectly, ESI.

Rule 16(b)(3)(B)(iii) adds to the list of items considered as part of the Scheduling Order issued pursuant to Rule 16(b)(1) the "preservation of electronically stored information." Earlier versions of this rule had already included the "disclosure" and "discovery" of ESI as part of the Scheduling Order, and courts traditionally have had the authority to issue orders relating to preservation of evidence, but this amendment makes explicit the court's authority to order the preservation of ESI at the commencement of the litigation. Obviously, most practitioners today send a "litigation hold" letter to opposing counsel advising of the opposing party's duty to preserve all documents, not just ESI.

Rule 16(b)(3)(B)(iv) was amended to explicitly include agreements related to Fed. R. Evid. 502 as one of the subjects of the Scheduling Order. As applied to ESI, the significance of this amendment relates to agreements among the lawyers regarding what happens if privileged documents are inadvertently disclosed as part of a response to a document request. To avoid an argument that the attorney-client privilege or work product doctrine is waived by such inadvertent disclosure, parties often agree that such

disclosures do NOT waive them and further require the immediate destruction or return of the privileged documents. This amendment to Rule 16(b) makes clear that such agreements can become part of the Scheduling Order applicable to the case.

Finally, Rule 16(b)(3)(B)(v) was added by the 2015 amendments. This subsection permits judges to include in the Scheduling Order a provision directing the parties "that before moving for an order relating to discovery, the movant must request a conference with the court." The purpose is to avoid the time and expense of formal motions to compel or motions for a protective order when the issue can be resolved by an informal conference with the court. As discussed above, in *Duhigg v. Goodwill Industries,* 2016 WL 4991480 (D. Neb. September 16, 2016), Magistrate Judge Gossett expressed the court's willingness to engage in such pre-motion conferences to resolve discovery disputes. This amendment can make such conferences mandatory, rather than permissive. Given their increasing popularity among judges and magistrate judges, the likelihood of that occurring is increasing.

C. Rule 26

Given the prevalence and magnitude of ESI, the modification to the scope of discovery under Rule 26(b)(1) to include a proportionality requirement directly implicates the manner in which counsel must review and produce ESI. Indeed, many of the Nebraska cases discussed above under the section on proportionality relate the a parties obligation to review and produce this information. The following section on Professionalism will further explore this topic and the resources available to the parties and the courts to reduce the burden and expense of reviewing and producing ESI.

D. Rule 37

Perhaps the most significant amendment in 2015 affecting ESI was to Rule 37(e). The purpose for amending this Rule was to resolve a split among the circuits regarding the culpability required to impose sanctions for the loss or destruction of ESI.

Rule 37(e) states:

> (e) 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.

Broken down to its essential requirements, the Rule applies when (1) ESI (2) that should have been preserved (3) is lost (4) because a party failed to take reasonable steps at preservation, and (5) the lost ESI cannot be replaced or restored. If all five of these requirements are present, Rule 37(e) applies, and curative measures can be imposed by the court. Conversely, if one of these requirements is missing, Rule 37(e) does not apply at all.

1. Unintentional loss of ESI

Rule 37(e)(1) applies when ESI that cannot be replaced is lost because a party unintentionally failed to take reasonable steps to preserve it. The concept of "reasonable steps" is not defined by the Rule, but the Advisory Committee Notes state:

> Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, ... The rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection.

To impose measures under Rule 37(e)(1), the court must first find that another party was prejudiced by the loss. If there is no prejudice, there will be no measures imposed. If the court does find prejudice, then it can impose measures "no greater than necessary to cure the prejudice." Although such measures are not included in the Rule, the Advisory Committee Notes give as examples, permitting additional discovery, precluding the party from offering certain evidence, and permitting the parties to present evidence and argument to the jury regarding the loss of information. The measures available are entrusted to the court's discretion.

2. Intentional loss of ESI

Rule 37(e)(2) applies when ESI is lost and the party who lost it intended to deprive the requesting party of that evidence. If that finding of intent is made by the court, it can instruct the jury that the lost information was unfavorable to the party losing it, or can dismiss the action or enter a default judgment. The Advisory Committee Notes instruct court to exercise caution under this provision of the Rule and emphasizes that the

measures indicated are not mandatory. The Notes further advise the Court to assess the importance of the lost information and if it is not important, the Court can impose lesser measures.

V. PROFESSIONALISM UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

A. Introduction

Fed. R. Civ. P. 1 states: "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 provision in ***bold/italics*** was added by the 2015 amendments. Although these eight words appear relatively innocuous, they in fact are essential to everything else that has been discussed during this presentation. The Advisory Committee Notes to the 2015 amendments drive home this point:

> Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.

Many of the Nebraska cases discussed above mention the cooperation of the lawyers involved in addressing discovery issues, or direct the lawyers involved to cooperate in resolving such issues. Nebraska is fortunate to have lawyers that are effective and zealous advocates for their clients, yet still maintain the professional cooperation with opposing counsel that is necessary to "secure the just, speedy, and inexpensive determination" of disputed matters. The need for such cooperation will only increase.

B. Professionalism and ESI

As noted above, the explosion of ESI has greatly increased the costs of civil litigation. The RAND Corporation conducted a study in 2012 which addressed the high costs of electronic discovery and found that 73% of the total cost of e-discovery relates to document review by lawyers. The high cost of document review has led to the development of new technologies to reduce the burden, and thereby the cost, of document reviews. These technologies have been introduced into the market, but have not been universally approved by the courts.

1. The problems relating to document review of ESI

In any given case, it is common, if not actually universal, that the parties will serve on each other requests for production of documents pursuant to Fed. R. Civ. P. 34. The lawyer on whom the requests were served with provide the client with a copy and begin discussions about identifying and gathering documents potentially responsive to the requests. In the case of electronically stored information, that will include identifying all of the computers or servers on which potentially responsive documents are located. Once the documents are gathered, the lawyer will review the documents to determine which documents are responsive to the requests served, and further determine whether any of such documents are protected by the attorney-client privilege or the work product doctrine. After identifying the responsive, non-privileged documents, the lawyer will prepare those documents to be produced to the requesting party and will further respond in writing to the Rule 34 requests that were served. As noted above, by signing the response, the lawyer is certifying pursuant to Rule 26(g) that the responses, including the documents produced, are "complete and correct" at the time made, and that they are consistent with the Rules of Civil Procedure.

Assuming the set of potentially responsive documents identified at the beginning of the process number in the hundreds, thousands, or perhaps even the tens of thousands, it is at least possible to conduct the necessary review of the documents manually. But if the document set numbers in the hundreds of thousands or millions of discrete documents, the review becomes impossible, or prohibitively expensive.

2. Search terms for ESI

If the documents are all in an electronic format, it is possible to search them using predetermined terms and identify those documents that contain one or more of those terms. Assuming the resulting document numbers are reasonable, the parties can begin the manual review of them described above. This is precisely the mechanism that was described in *Duhigg v. Goodwill Industries,* 2016 WL 4991480 (D. Neb. September 16, 2016). The defendant originally performed a limited search that resulted in no documents returned. The plaintiff suggested additional search terms, but the resulting responsive document set included over 14,000 emails, and counsel for the defendant estimated $45,000+ in legal fees to review them. The search terms proposed by the plaintiff in that case were insufficient to reduce the document set to a manageable size. Of significance in *Duhigg*, however, was the order ultimately entered by the court directing the parties to meet and confer and agree upon search terms that could be used to search the emails of designated individuals over a designated period of time. Judge Gossett directed the parties to cooperate in an effort to obtain a responsive document set that would be manageable. Indeed, that case reflected at least some cooperation between the parties even before Judge Gossett's involvement.

3. Phased Discovery.

In many cases, the quantity of documents are not equally spread across all of the issues in a case. Perhaps there are few documents that relate to liability, but a larger quantity of documents that potentially pertain to damages. Or perhaps there are discrete issues that would be dispositive of a case that contain a more limited set of pertinent documents than the set that would be potentially responsive to all of the issues in the case. That was the situation in *Vallejo v. Amgen, Inc.*, 2016 WL 2986250 (D. Neb. May 20, 2016), where Magistrate Judge Zwart entered an Order directing phased discovery with Phase I addressing the proximate cause issue of whether the drug in question was capable of causing the plaintiff's medical condition. *See also Aurora Cooperative Elevator Co. v. Aventine Renewable Energy – Aurora West, LLC*, 2015 WL 10550240 (D. Neb. January 6, 2015).

Fed. R. Civ. P. 26(f) requires the parties to prepare a discovery plan which considers, in part, "whether discovery should be conducted in phases or be limited to or focused on particular issues." Given the obligations imposed on the parties by Rule 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding," and Rule 26(b)(1)'s obligation that all discovery be "proportionate" to the issues in the case, there is a solid argument to be made that phased discovery should be considered by the parties in many cases.

4. Preliminary discovery conference

Several of the Nebraska cases discussed above reference preliminary discovery conferences with the court before a formal motion to compel or motion for protective order is filed. The intent is for the court to work informally with the parties to resolve discovery disputes, or at least to indicate to the parties the court's thoughts on the dispute, before incurring the time and expense of formal motions. Even if such conferences are not mandatory, as is now permitted by Rule 16, the parties should explore that option as a means to more inexpensively resolve discovery disputes.

5. Other mechanisms to reduce discovery expenses

There are many other mechanisms available to the courts and parties that can better control discovery costs. To explore further options, I would direct you to an excellent article written by Judge Paul W. Grimm, of the U.S. District Court in Maryland, titled. *Are we Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure.*

6. Predictive Coding

One of the more interesting and potentially useful technologies is "predictive coding." The concept of "predictive coding" involves the use of computer algorithms, based on

human modeling, to code documents without the need for document-by-document human review. This process predicts the relevance of discovery documents based on the prior coding of a sample set of documents by an attorney who is familiar with the case. "[T]he same computing power that has provided this overabundance of data may also provide the solution for reviewing, coding, and producing it in litigation with minimal human review." A. Goodman, *Predictive Coding*, 43 No. 1 Litigation 23 (Fall, 2016).

Moore v. Publicis Groupe & MSL Group, 287 F.R.D. 182 (S.D.N.Y. 2012) was an early case that addressed the issue of whether a court will accept predictive coding as dispositive of a party's obligations under the Federal Rules of Civil Procedure. Judge Peck determined it "is an acceptable way to search for relevant ESI in appropriate cases." *Id*. at 183-84. He concluded with the following advice:

> What the Bar should take away from this Opinion is that computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review. Counsel no longer have to worry about being the "first" or "guinea pig" for judicial acceptance of computer-assisted review. As with keywords or any other technological solution to ediscovery, counsel must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and produce relevant ESI while adhering to Rule 1 and Rule 26(b)(2)(C) proportionality. Computer-assisted review now can be considered judicially-approved for use in appropriate cases.

Id. at 193. Many courts have found that predictive coding is more accurate and more cost-effective than human review. *See, e.g., Progressive Cas. Ins. Co. v. Delaney,* 2014 U.S. Dis. LEXIS 691166 (D. Nev. July 18, 2014); and *Fed. Hous. Fin. Agency v. HSBC N. Am Holdings, Inc.,* 2014 U.S. Dist. LEXIS 19156 (S.D.N.Y. Feb. 14, 2014).

The federal court in Nebraska has already addressed the issue of "predictive coding" and has further addressed certain legal issues pertaining thereto. In *Aurora Cooperative Elevator Co. v. Aventine Renewable Energy – Aurora West, LLC*, 2015 WL 10550240 (D. Neb. January 6, 2015), the parties were embroiled in a breach of contract case which involved a large volume of electronic information. During the course of the proceedings, Magistrate Judge Zwart ordered the parties "to consult with a computer forensic expert to create search protocols, including predictive coding as needed, for a computerized review of the parties' electronic records." *Id*. at *1. The parties went back before the court to address certain issues regarding the predictive coding. First, the plaintiffs were requesting delivery to the retained computer expert of a file containing privileged relevant documents. Second, plaintiff's counsel was demanding the right to review documents from the training set that defendant had marked as irrelevant.

With respect to the privileged documents, the court expressed reservation about disclosing them even to a retained computer expert; however, the court concluded that the defendant had failed to offer evidence to support the claim that the documents were privileged. Accordingly, the court ordered the file produced to the expert. With respect to the "irrelevant" documents, the court agreed with the defendants that the Federal Rules of Civil Procedure do not require the disclosure of irrelevant information and denied the plaintiff's request. However, "the court encourages the defendants to reconsider their position and work cooperatively with the plaintiff in developing and implementing computer-assisted review. Working together will allay the risk of having to repeat the process if the plaintiff later challenges, and the court agrees, that the defendant's unilaterally created computer review training was faulty or unreliable. *Id.* at *2.

VI. CONCLUSION

I would like to return to the comments provided by Chief Judge Roberts in his 2015 Year-End Report on the Federal Judiciary where he stated that the [Duke] symposium "identified the need for procedural reforms that would (1) encourage greater cooperation among counsel; (2) focus discovery . . . on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information."

This review of Nebraska federal district court cases reported after the effective date of the 2015 amendments to the Federal Rules of Civil Procedure reflects the implementation of every one of the procedural reforms identified by Chief Justice Roberts. Time and again, the reported cases have encouraged cooperation among counsel, implemented procedures to focus discovery on what is truly necessary to resolve the case, reflected the active involvement of Nebraska judges in managing discovery, and adopted innovative, technological solutions to address the burden and expense of reviewing and producing ESI. Whatever reluctance other federal courts may have to embrace the principles behind the 2015 amendments is not shared by the Nebraska court. Nebraska lawyers should do likewise.

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