Comments

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A Proportional Response: Amending the Oregon Rules of Civil Procedure to Minimize Abusive Discovery Practices

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The cost of litigation has skyrocketed in recent years—and is only expected to climb. Discovery is one of the most expensive components of the litigation process, estimated to be responsible for at least half of the costs incurred in litigation.[1] As electronically stored information (ESI) becomes a larger and larger component of discovery, the price tag will only increase. But discovery, the process by which parties uncover information necessary to make their cases, is one of the most important components of litigation.

Civil litigation in the United States, regulated by rules of civil procedure at the state and federal levels, relies heavily on discovery. It is in discovery that parties uncover facts and clarify the issues. To facilitate these goals, the civil procedure rules have embraced broad discovery practices, which are also termed open or liberal discovery. However, broad discovery, while valued in theory, is susceptible to abuse in practice. Attorneys can use discovery to delay proceedings and burden opponents with discovery requests. Attorneys can hide behind the goal of broad discovery to embark on potential fishing expeditions, a situation described as "overdiscovery."

Regulators at both the state and federal levels have taken note of this risk and sought to limit the potential for abusive discovery practices, while still giving life to the value of broad discovery and allowing discovery to serve its role in civil practice. Traditionally, there are few limitations on discovery. At the federal level, there are three key limitations on discovery: the scope of discovery, protective orders, and the Proportionality Rule. In Oregon civil practice, which is patterned on the federal model, the scope of discovery and protective orders are the two key limitations; Oregon does not have the Proportionality Rule.

[1] Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 892 (2009) (citing Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 548 (1998)).

The Proportionality Rule requires that the burden of a discovery request be proportional to the value of the discovered information to the proceeding. If the burden outweighs the reward, then the discovery request must be denied. This rule is an appropriate response to the growing cost and scope of discovery, particularly in the e-discovery age. It realizes the goal of broad discovery while guarding against discovery abuse. The absence of the Proportionality Rule in Oregon opens the state up to potential abusive discovery practices, particularly in the realm of e-discovery.

E-discovery, or the discovery of ESI, is an increasingly large component of discovery. The nature of e-discovery differs from more traditional sources. This distinction necessitates that e-discovery receive special attention in the rules of civil procedure. This process has begun at the federal level, as amendments to the Federal Rules of Civil Procedure (FRCP) have been enacted to address e-discovery practices specifically. Oregon has yet to follow the FRCP's lead. Adopting the Proportionality Rule would help to mitigate the impact of e-discovery in Oregon by providing additional, but reasonable, limits on discovery. This rule would better help Oregon realize its goals for civil practice—the just, speedy, and inexpensive[2] administration of justice—while remaining true to the value of broad discovery.

This Comment begins by looking at the Federal Rules of Civil Procedure relating to discovery, the purpose and goals of discovery, as well as the three primary federal limitations on discovery, with a particular emphasis on the Proportionality Rule and its needed limitations on discovery, particularly in light of e-discovery. Next, this Comment will examine discovery rules in Oregon, the goals of discovery in Oregon, Oregon's two limitations on discovery, and, finally, the conspicuous absence of the Proportionality Rule. This Comment concludes with a call for the Proportionality Rule to be adopted in Oregon because it is consistent with both the goals of the Oregon Rules of Civil Procedure (ORCP) and the purpose of discovery in civil litigation, and, additionally, it is a needed limitation given the profound impact e-discovery has and will continue to have on litigation in this state.

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[2] OR. R. CIV. P. 1 B ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.").

I
DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The FRCP define the rules for civil practice in federal courts in this country, outlining everything from pleading standards to discovery procedures. Three values are at the core of the FRCP—"the just, speedy, and inexpensive determination of every action and proceeding."[3] While only applicable in federal jurisdictions, the FRCP are also noteworthy in that many states have used the FRCP as the starting point for drafting state rules of civil procedure.[4]

The rules for discovery and disclosure, Rules 26 through 37, are among the most important rules in the FRCP. They are important because discovery comprises such a large component of litigation, but also because these rules help realize the FRCP's goal of facilitating broad discovery. These rules also provide limits on discovery through a few carefully crafted rules limiting discovery.

A. The Purpose of Discovery

Discovery is an integral component of civil litigation. The adoption of the FRCP resulted in a radical change in the general framework of civil proceedings in this country, and, in doing so, it gave discovery a new importance for civil litigation because the FRCP introduced a new, lower pleading standard.

The civil suit commences with the complaint,[5] which is a pleading.[6] "Pleading standard" describes the minimum level of detail in a pleading sufficient for a suit to proceed. Today, the standard for a sufficient pleading is relatively low, a standard often described as "notice pleading." This is in contrast to the pre-FRCP, "fact pleading" standard. Instead of providing mere notice to opposing parties, pleadings were previously the primary means of "issue-formulation and fact-revelation."[7] As a result, pleadings were subjected to a much higher standard in the pre-FRCP civil practice

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3 *See* FED. R. CIV. P. 1.

4 FRCP drafters actually had this in mind when drafting the FRCP—that the federal rules would provide a "model that the states could adopt, thus fostering national and interstate procedural uniformity." Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615, 615 (2002).

5 FED. R. CIV. P. 3.

6 *See* FED. R. CIV. P. 7(a)(1).

7 Hickman v. Taylor, 329 U.S. 495, 500 (1947).

framework because of the depth of facts and theories necessary for a suit to proceed.

Today, the pleading standard is noticeably lessened because pleadings are intended to serve a different goal. A party must merely provide a "short and plain statement" that addresses jurisdiction, relief sought, and the claim.[8] The goal of the pleading, as articulated by the U.S. Supreme Court, is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[9] Although no longer accomplished via pleadings, facts must still be revealed and issues narrowed. With the FRCP, this duty was shifted to the discovery phase. As a result, under the FRCP, discovery assumed a new importance to any proceeding.

It is through discovery that issues are narrowed and facts are identified.[10] Before the FRCP, because of the higher, "fact" pleading standard, this information would have to be known in advance of the pleading in order to be included in the pleading. Reflecting the shift to "notice pleading," the Supreme Court remarked, "[t]he way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[11] Prior to the adoption of the FRCP, judicial proceedings were "a battle of wits."[12] Under the rules, proceedings became a search for the truth.[13]

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[8] FED. R. CIV. P. 8(a). The recent decision of *Twombly* has raised questions as to whether the Supreme Court has raised the standard for pleadings. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). In *Twombly*, the Court required that, to sufficiently plead a section 1 violation of the Sherman Antitrust Act, the complaint had to include "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the illegal conduct. *Id.* This standard is essentially equivalent to fact pleading. Much recent scholarship has been devoted to whether or not *Twombly* heightened the pleading standard for all federal civil litigation or just for antitrust claims. The subsequent decision of *Iqbal* addressed this question and appears to apply a heightened standard across the board. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–51 (2009). Legal commentators will continue to debate the impact of these decisions on the federal pleading standard. However, the language of Rule 8 remains the same. Even if these decisions do result in a heightened pleading standard, the Proportionality Rule is still seen as consistent with the objectives of discovery in federal civil litigation.

[9] Conley v. Gibson, 355 U.S. 41, 47 (1957).

[10] *Hickman*, 329 U.S. at 501.

[11] *Id.*

[12] 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2001, at 40 (2d ed. 1994) (discussing the "sporting theory" of justice).

[13] *Id.*

In order to meet this new duty, broad discovery was embraced.[14] Because of the notice pleading standard, parties have an opportunity to use discovery to explore the bounds of their cases. The theory was, simply, if the pleading standard was reduced to a notice pleading standard, to ensure that parties had adequate opportunity to uncover the facts necessary to establish their case, discovery would need to be broad after the pleading stage. As explained by the Supreme Court, "[t]his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[15] To respond to this new duty, a series of amended discovery rules were enacted that embraced the practice of broad discovery. Commentators frequently cite three main purposes for the FRCP's liberalized discovery rules: "(1) To narrow the issues . . . . (2) To obtain evidence for use at the trial. (3) To secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured."[16]

Today, broad discovery remains a key value of the FRCP. Indeed, the FRCP articulates a broad scope of discovery in FRCP 26, "any nonprivileged matter that is relevant to any party's claim or defense,"[17] in order to realize this goal. Discovery now comprises the bulk of time spent in litigation and the bulk of expenses incurred in the process.[18] While broad discovery plays a necessary role in the structure of civil proceedings, it is not without limits.

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[14] Broad discovery is also endorsed in criminal procedure. *See* FED. R. CRIM. P. 16.

[15] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

[16] 8 WRIGHT, MILLER & MARCUS, *supra* note 12, § 2001, at 41.

[17] FED. R. CIV. P. 26(b)(1). In its entirety, the scope of discovery is:

> 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 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).

Id.

[18] *See generally* Moss, *supra* note 1 (arguing for a new procedural rule that explicitly allows discovery post–summary judgment).

B. Federal Limits on Discovery

Despite the value placed on broad discovery, broad discovery in practice is not without criticism. Because of the potentially expansive scope of discovery, conceivably, an attorney can argue that many things fall within the scope of discovery and, in so doing, unnecessarily delay the process or burden his opponent. Simply put, discovery rules are susceptible to abuse. Since the mid to late seventies, the FRCP's Advisory Committee has been concerned with mitigating the potential for discovery abuse. The Advisory Committee formulated revisions to the FRCP with the goal of repairing these weaknesses and strengthening areas in which the rules are susceptible to abuse.[19]

Today, the FRCP include three primary limitations on discovery at the federal level[20]: the scope of discovery outlined in FRCP 26(b)(1), protective orders, and the Proportionality Rule of FRCP 26(b)(2)(C).

First, the initial hurdle for any discovery request is that it must fall within the scope of discovery. The scope of discovery outlined in FRCP 26(b)(1) is quite broad, reaching "any nonprivileged matter that is relevant to any party's claim or defense."[21] This rule describes what is discoverable without any regard for whether the discovered information will be admissible at trial.[22] FRCP 26(b)(1) was amended in 2000 and, as amended, theoretically reduced the scope from any matter relevant to the case to any matter that is relevant to the claim or defense. However, Rule 26(b)(1) preserves the former scope by permitting, on a showing of good cause, "discovery of any matter relevant to the subject matter involved in the action."[23] The

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[19] 8 WRIGHT, MILLER & MARCUS, *supra* note 12, § 2001, at 49–50.

[20] While the FRCP outlines limitations as they relate to discovery practices, this is not the only attempt to thwart abusive discovery requests. Under the American Bar Association's Model Rules of Professional Conduct, "A lawyer shall not: . . . (d) in pretrial procedure, make a frivolous discovery request . . . ." MODEL RULES OF PROF'L CONDUCT R. 3.4(d) (2003). Conceivably, the situations enumerated in FRCP 26(b)(2)(C) would qualify as frivolous. This rule could subject an attorney to discipline for such discovery requests. However, the two approaches differ in that the Model Rules look to the conduct of the attorney rather than the discovery practices as a whole. Oddly, the FRCP excludes the discovery and disclosure rules, including Rule 26, from FRCP 11 sanctions for making a representation to the court that is "presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." FED. R. CIV. P. 11(b)(1), (d).

[21] FED. R. CIV. P. 26(b)(1).

[22] *Id.* ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

[23] *Id.*

2000 amendment, which made the wider "relevant to the subject matter" scope of discovery available only on a showing of good cause, reflects the growing recognition that discovery can and should be subject to some limitations and that such limitations are consistent with the value of broad discovery.[24] In doing so, the Advisory Committee showed its willingness to reign in discovery to guard against potential abuse.

Second, protective orders also limit discovery. Prior to the adoption of the Proportionality Rule, protective orders were the only substantial mechanism to limit discovery. Under FRCP 26(c), protective orders may protect "a party . . . from whom discovery is sought" from "annoyance, embarrassment, oppression, or undue burden or expense."[25] When a protective order is issued, the discovery is limited by placing someone or something effectively off limits from the discovery process.

C. The Proportionality Rule

A relatively recent addition to the FRCP, the Proportionality Rule, FRCP 26(b)(2)(C), is the third key limitation on discovery in the FRCP. FRCP 26(b)(2)(C) outlines situations in which discovery must be limited:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed . . . if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[26]

There are three noteworthy components to this rule. First, if the discovery fits within the enumerated categories, discovery must be limited; it is not a permissive rule. Second, the Proportionality Rule can be invoked by either a party on motion or by the court on its own

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[24] *See* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1215–16 (2005) (discussing what the amendment means in practice).

[25] FED. R. CIV. P. 26(c).

[26] FED. R. CIV. P. 26(b)(2)(C).

initiative. This rule enables the court to act as a check on discovery practices, an additional protection against potentially abusive discovery practices. Finally, this rule requires the court to engage in a cost-benefit analysis of the discovery. Such a limitation reflects an attempt to reform discovery practices to, as one commentator described, "contain the genie of broad discovery without killing it."[27] Most importantly, the Proportionality Rule helps to realize the FRCP's goal of "just, speedy, and inexpensive determination of every action and proceeding."[28]

In practice, the party requesting discovery bears the initial burden of showing that the discovery is relevant under FRCP 26(b)(1). Then, the burden shifts to the party opposing discovery to show that the discovery is improper under the Proportionality Rule and its limitations as outlined in FRCP 26(b)(2)(C).[29]

The seeds of the Proportionality Rule were planted in 1983 with an amendment to then FRCP 26(b).[30] This amendment attempted "to promote judicial limitation of the amount of discovery on a case-by-case basis to avoid abuse or overuse of discovery through the concept of proportionality."[31] No longer were protective orders (i.e., FRCP 26(c)) the only route to limit discovery. Instead, the parties, as well as the court, had an additional tool to limit discovery. As the Advisory Committee noted, "[t]he objective [of FRCP 26(b)(1)] is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."[32] In this sense, the Proportionality Rule has the narrow goal of reigning in irrelevant discovery—not denying the value of broad discovery.

The Proportionality Rule functions as a limitation applicable to all discovery. "[C]ommentators have characterized [this rule] as a radical departure from the free and easy days of liberal discovery."[33] The Advisory Committee addressed this argument, that the

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27 Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 747 (1998).

28 *See* FED. R. CIV. P. 1.

29 Sadofsky v. Fiesta Prods., LLC, 252 F.R.D. 143, 151 (E.D.N.Y. 2008).

30 8 WRIGHT, MILLER & MARCUS, *supra* note 12, § 2008.1, at 117.

31 *Id.*

32 FED. R. CIV. P. 26(b) advisory committee's notes (1983).

33 Patricia Groot, *Electronically Stored Information: Balancing Free Discovery with Limits on Abuse*, 2009 DUKE L. & TECH. REV. 2, ¶ 10 (2009) (quoting Henry S. Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 56 (2007)) (internal quotation marks omitted).

Proportionality Rule denies parties broad discovery, and explicitly rejected it. In fact, as the 1983 Advisory Committee noted, "[t]he grounds mentioned in the amended rule for limiting discovery [i.e., the Proportionality Rule] reflect the existing practice of many courts in issuing protective orders under Rule 26(c)."[34] As described by *Federal Practice and Procedure*, "[i]n general, it seems that the three provisions of the amended [Rule 26(b)(1)] should not be treated as separate and discrete grounds to limit discovery so much as indicia of proper use of discovery mechanisms . . . ."[35]

The Proportionality Rule recognizes that some discovery is not worth the resulting burden. Particularly at a time when discovery is often the most laborious and expensive element of litigation, it is not difficult to imagine situations in which the expenditure of time or money is simply not justified. The Proportionality Rule guards against the proverbial "fishing expedition" that can occur in discovery by imposing a reasonable, but not prohibitive, limit on discovery. As described by one court, "[w]hen a plaintiff first pleads its allegations in entirely indefinite terms, without in fact knowing of any specific wrongdoing by the defendant, and then bases massive discovery requests upon those nebulous allegations, in the hope of finding particular evidence of wrongdoing, that plaintiff abuses the judicial process."[36] The Proportionality Rule guards against abuses of the process; it does not deny relevant discovery to a party.

The Proportionality Rule is not, however, without critics. It does require the judge to weigh the potential evidentiary benefit against the resulting burden, which may administratively be a difficult task.[37] It also results in limiting discovery, which, on its face, runs contrary to the value of broad discovery in this country. In the words of one critic, "[a]lthough denying relevant discovery due to cost may be defensible pragmatically, it is an unsatisfying concession that litigation accuracy inevitably is limited due to the cost of finding and analyzing evidence needed for accurate verdicts or settlements."[38]

In practice, the Proportionality Rule has not unjustifiably limited discovery. By many measures, the rule is underutilized. In fact, the

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[34] FED. R. CIV. P. 26(b) advisory committee's notes (1983).

[35] 8 WRIGHT, MILLER & MARCUS, *supra* note 12, § 2008.1, at 119.

[36] Koch v. Koch Indus., Inc., 203 F.3d 1202, 1238 (10th Cir. 2000).

[37] *See* Moss, *supra* note 1, at 899–904 (criticizing the administerability of the Proportionality Rule).

[38] *Id.* at 907.

2000 amendment of Rule 26(b)(1) (scope of discovery) included a cross-reference to FRCP 26(b)(2)(C) to remind practitioners and courts that the scope of discovery like "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C)."[39]

The Proportionality Rule has effectively guarded against fishing expeditions. For example, in those cases in which the rule was invoked, discovery was limited because the discovery could not be justified given the cost-benefit analysis. For example, in *Tolliver* the Western Michigan U.S. District Court upheld discovery limitations imposed by the magistrate judge.[40] The district court held that the discovery requests were nothing more than examples of overdiscovery, which the party had hoped would yield admissible evidence.[41] The burden on the party from whom discovery was sought outweighed the value of the potential evidence.[42]

On other occasions, FRCP 26(b)(2)(C) has been used to limit discovery in one of the situations expressly outlined in the rule. In *Green Construction Co.*, the U.S. District Court of Kansas held that a discovery request was unduly burdensome under the terms of FRCP 26(b)(2)(C)(iii).[43] That case involved a discovery request for all bond claims filed against the plaintiff since 1983, which totaled over 62,000 claims.[44] Because fulfilling the discovery request would have required each bond to be inspected individually, even though the results may have yielded relevant evidence, the court held the request placed a burden on the plaintiff that could not be justified by any resulting relevant evidence.[45]

Some abuses of the discovery process are so egregious that the court must intervene to limit discovery in the interest of justice.[46] In *Roberts*, Judge Naythons discussed not only the abuse of discovery that occurred at the hands of the plaintiff but also the impact of

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

40 Tolliver v. Fed. Republic of Nigeria, 265 F. Supp. 2d 873, 880 (W.D. Mich. 2003).

41 *Id.*

42 *Id.*

43 Green Constr. Co. v. Kan. Power & Light Co., 732 F. Supp. 1550, 1554 (D. Kan. 1990). The court in *Green Construction Co.* actually made this ruling under then FRCP 26(b)(1)(ii), but that rule has been restyled as FRCP 26(b)(2)(C)(iii); the content of the rules is identical.

44 *Id.*

45 *Id.*

46 *See* Roberts v. Lyons, 131 F.R.D. 75, 77 (E.D. Pa. 1990).

overdiscovery.[47] He acknowledged that overdiscovery, known as a "fishing expedition," is a common practice in litigation.[48] As a result, the plaintiff's conduct, because of the cost associated with overdiscovery, "may well force the [defendant] City of Philadelphia, lacking in sufficient funds, to accept an unfair settlement, or force settlement of an unmeritorious claim."[49] The judge found the plaintiff's requests to be repetitive and indifferent to either costs or alternative sources of information.[50]

Failure to utilize alternative sources of information instead of discovery, particularly publicly available sources, can result in discovery limitations.[51] The court in *Public Service Enterprise Group* found that the plaintiff's discovery request seeking information about power outages was already publicly available because of previous litigation and public records.[52] As a result, the court held that these requests were in violation of the Proportionality Rule even though the information requested yielded information relevant to the action.[53] Using alternative, publicly available sources is a very efficient method of discovery, one encouraged by FRCP 26(b)(2)(C) because costs are often negligible and little resulting burden is placed on the opposing party.

These cases illustrate the potential abuses of discovery that can occur when broad discovery is permitted to run wild. However, these cases also illustrate how the FRCP can continue to value broad discovery while guarding against discovery practices that are likely to accomplish little more than expend resources and delay litigation.

The Proportionality Rule will likely be of greater importance in the years to come, particularly as e-discovery becomes a larger component of discovery. Because the nature of e-discovery differs from that of traditional discovery, and because the impact of e-discovery is potentially enormous, the additional, carefully crafted limitations of the Proportionality Rule will likely ensure that discovery remains a necessary, useful tool.

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47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *See* Pub. Serv. Enter. Grp., Inc. v. Phila. Elec. Co., 130 F.R.D. 543 (D. N.J. 1990).

52 *Id.* at 551.

53 *Id.*

D. E-Discovery: A Case Study in Potentially Explosive Discovery

It is stating the obvious to say that technology has radically changed our lives, how we engage with the world, and how business is conducted.[54] For example, it is estimated that ninety percent of corporate data is digital.[55] As one commentator noted, "[t]his increasing prevalence of electronics in business, government, and individual settings has led to a significant increase in electronically stored information (ESI)."[56] ESI includes all "information that is stored electronically."[57]

E-discovery is a growing component of discovery. In fact, as described by experts, "[t]he aspect of law that is perhaps most impacted by ESI is discovery . . . ."[58] It is widely accepted that e-discovery will become an increasingly larger component of the discovery process, a process that is already the most expensive and, arguably, the most labor intensive portion of litigation. E-discovery has and will continue to have a huge impact on discovery, and discovery must adapt to this changing landscape. To quote one district court judge, "as individuals and corporations increasingly do business electronically . . . the universe of discoverable materials has expanded exponentially."[59] As this "universe" increases, the potential for abusive discovery practices is only going to increase. "It is hard to overstate the importance and the degree of anxiety generated by electronic discovery . . . ."[60]

The impact of e-discovery on litigation is not confined to the volume of potentially discoverable information. There are also fundamental differences between e-discovery and traditional discovery that affect how discovery is conducted. The Judicial Conference Committee pointed to three key differences:

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54 *See generally* Leroy J. Tornquist & Christine R. Olson, *A Last Vestige of Oregon's Wild West: Oregon's Lawless Approach to Electronically Stored Information*, 45 WILLAMETTE L. REV. 161, 161–62 (2008) (discussing the increased use of technology in the legal practice).

55 Moss, *supra* note 1, at 893.

56 Tornquist & Olson, *supra* note 54, at 162.

57 *Id.*

58 *Id.*

59 *Id.* at 162–63 (quoting Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 (S.D. N.Y. 2003).

60 Moss, *supra* note 1, at 894 (quoting Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1, 4 (2007) (comments of Rosenthal, J., S.D. Tex.)).

> [ESI] is characterized by exponentially greater volume than hard-copy documents. . . . Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. . . . A third important difference is that [ESI], unlike words on paper, may be incomprehensible when separated from the system that created it.[61]

The FRCP have acknowledged these distinctions, as well as the radical impact on discovery that e-discovery can have, and has taken steps to address discovery in the ESI context by enacting amendments to the FRCP that specifically address e-discovery.[62] But even these limitations are still subject to the Proportionality Rule. For example, FRCP 26(b)(2)(B) addresses specific limitations on discovery of ESI. Rule 34 addresses how ESI can be produced.

While e-discovery and ESI-specific rules limit discovery, the Proportionality Rule does, too. In addition to the e-discovery-specific rules, the Proportionality Rule can also help to mitigate the impact of e-discovery on litigation. FRCP 26(b)(2)(B), in its second-to-last sentence, specifically invokes the mandatory limits on discovery imposed by the Proportionality Rule.[63] While FRCP 26(b)(2)(B) takes a positive step in this mitigation effort, the Proportionality Rule effectively adds another layer of protection against abusive discovery in the e-discovery context. In fact, the Sedona Conference, in its *Best Practices* for e-discovery, specifically cited the Proportionality Rule as providing the best framework through which to conduct the cost-benefit analysis for ESI in e-discovery.[64]

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[61] JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE & PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22–23 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf. The Committee, as justification, cited these three key differences for the ESI and e-discovery-specific amendments to the FRCP in 2006.

[62] *See* FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C) [i.e., the Proportionality Rule]. The court may specify conditions for the discovery."); Groot, *supra* note 33 (arguing that all discovery should be subject to the same rules).

[63] *See* FED. R. CIV. P. 26(b)(2)(B).

[64] THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17–18 (2nd ed. 2007), *available at* www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.

The FRCP continues to value broad discovery, a value and practice necessary because the FRCP uses a notice pleading standard. Given the necessities of broad discovery, limitations on discovery in the FRCP are few and far between. However, it is not inconsistent with the goals of broad discovery to limit discovery in certain situations, such as those enumerated in the Proportionality Rule. The terms of the Proportionality Rule, in addition to other recent e-discovery-specific FRCP amendments, will likely become especially important in the coming years as e-discovery becomes a larger and more laborious part of the discovery process.

II
DISCOVERY UNDER THE OREGON RULES OF CIVIL PROCEDURE

As the FRCP governs federal procedure, civil practice in Oregon, including discovery, is governed by the ORCP. Similar to its federal counterpart, the ORCP are used to realize the "just, speedy, and inexpensive determination of every action."[65] Efficient litigation and cost-effective litigation, as the language of ORCP 1 B indicates, are primary goals of the ORCP and values of civil litigation in Oregon. By incorporating the federal Proportionality Rule into the ORCP and offering an additional limitation on discovery, Oregon could better realize these goals.

A. Oregon Rules of Civil Procedure—The Background

Prior to the enactment of the ORCP, Oregon civil practice was governed by statute. Little in terms of the substance of the rules for civil procedure, however, changed when Oregon moved from statute to a collection of civil procedure rules. The text of the ORCP was based on both the FRCP and existing Oregon practices, which were often codified in the Oregon Revised Statutes (ORS).

The ORCP were adopted in 1977 and took effect in 1980 after the Oregon Legislature found that uniform rules of civil procedure were needed in the State "to assure prompt and efficient administration of justice in the courts of the state."[66] The Legislature created the Council on Court Procedures ("the Council") to develop, study, and

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[65] OR. R. CIV. P. 1 B; *see also* FED. R. CIV. P. 1. The ORCP formulation is identical to the federal formulation, except that the FRCP's scope and purpose includes the language "of every action and proceeding." The Oregon equivalent reads only "of every action."

[66] OR. REV. STAT. § 1.725(1) (2009).

periodically review the system of civil procedure rules.[67] Although the Council drafts the rules and subsequent amendments, the Oregon Legislature ultimately votes to adopt the rules.

The Council often looks to recent FRCP amendments as an indication of trends in civil procedure, as well as developments and issues unique to the Oregon Bar. As part of the Council's periodic review of the ORCP, however, discovery procedures are rarely considered.[68] Despite being so integral to civil practice, discovery rules in Oregon have remained largely unchanged from the initial 1977 ORCP and largely untouched by the Council's subsequent deliberations.

Oregon rules of discovery, like many provisions of the ORCP, parallel those found in the FRCP. Mirroring federal civil practice was a goal of the Council in adopting the ORCP, and fostering uniformity in state and federal courts was a goal behind the FRCP.[69] Of course, while the ORCP was enacted in 1977, the FRCP was enacted some forty years prior. Oregon's practice of mirroring federal civil practice rules actually predated the adoption of the ORCP. When initially deliberating over the adoption and contents of the ORCP, the Council acknowledged that Oregon had incorporated federal discovery rules via statute, albeit in a "piecemeal" fashion, from 1955 on.[70] For example, statutorily, Oregon "modified [its scope of discovery] to conform with the Federal scope of discovery under Rule 26(b)(1)"[71]

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[67] *Id.* § 1.725(2)–(4). The ORS outlines the procedure for adopting and modifying the ORCP, as well as the purpose behind the ORCP. *See id.* §§ 1.725–1.760. The Council consists of an Oregon Supreme Court justice, an Oregon Court of Appeals judge, eight circuit court judges, twelve members of the Oregon State Bar, and one member of the public. *Id.* § 1.730(1). Under the procedures outlined in the ORS, the Council drafts the rules, as well as subsequent amendments, which are then submitted to the Oregon Legislature for adoption. The rules and amendments automatically take effect under ORS 1.735 unless the Legislature takes contrary action such as amending or rejecting the proposed rules. *Id.* § 1.735(1). Enacted rules are then published in the ORS. *Id.* § 1.750.

[68] *See generally* 1 OREGON COUNCIL ON COURT PROCEDURES, LEGISLATIVE HISTORY MATERIALS (1977-1979 biennium) (not paginated) (containing a dearth of discussions about discovery procedures).

[69] *See* Tobias, *supra* note 4, at 615.

[70] Memorandum from Fred Merrill to Council on Court Procedures (Apr. 26, 1978), *in* 3 OREGON COUNCIL ON COURT PROCEDURES, *supra* note 68.

[71] Minutes of Meeting of Council on Court Procedures, Sheraton Hotel, Portland, Or. (Feb. 18, 1978), *in* 1 OREGON COUNCIL ON COURT PROCEDURES, *supra* note 68. At the meeting, the Council discussed areas where Oregon differed from the FRCP, including the use of interrogatories. *Id.* at 1–2; *see also* Memorandum from Fred Merrill, *supra* note 70, at 2–6 (contrasting the federal rule with the ABA's recommendations, ultimately adopting the federal perspective, and noting that both embrace broad discovery rules).

before the ORCP were adopted; that scope was subsequently incorporated into ORCP 1 B.

During the initial drafting of the ORCP, the Council engaged in prolonged discussions about the ORCP's purpose, scope, and content before drafting and submitting rules to the Legislature.[72] However, regarding discovery, the only discovery-related rules that received any substantive discussion were rules regarding interrogatories and the discovery of experts.[73] Outside of interrogatories and experts, Oregon largely adopted the FRCP's approach to discovery in content as well as theory. Today, interrogatories and discovery of experts are the two primary distinctions between the ORCP and FRCP.

While many states looked to the FRCP when initially crafting their own state rules of civil procedure, states have, in recent years, distanced themselves from the practice of mirroring the federal procedures at the state level. In recent years, many states have broke with this tradition to establish state-grown approaches and rules to civil procedure.[74] This explains why, in part, Oregon's rules may not correlate to the FRCP; a state is free to develop different rules. Nonetheless, Oregon's rules were based on federal rules, embodying a similar set of values. While Oregon is free to chart its own course, the amendments to the FRCP, including the Proportionality Rule, should be at least persuasive to the Council.

B. Discovery Limitations Under the Oregon Rules of Civil Procedure

As noted previously, the ORCP discovery rules largely paralleled both the existing Oregon practice and the FRCP. For example, Oregon embraced the FRCP's use of broad discovery.[75] As with the federal system, Oregon relies on discovery to be a primary mechanism for issue formulation and information gathering. However, as discussed regarding federal discovery practices, broad

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72 *See supra* note 67 (discussing the process for adopting and amending the ORCP).

73 Memoranda on Interrogatories and Discovery of Experts, *in* 2 OREGON COUNCIL ON COURT PROCEDURES, *supra* note 68. Today, the absence of interrogatories and rules regarding expert witnesses remain the two primary areas in which the ORCP diverge from the FRCP model. *See* Stevens v. Czerniak, 336 Or. 392, 402–05, 84 P.3d 140, 145–47 (2004) (en banc) (discussing Oregon's approach to discovery of experts). Oregon's rule regarding discovery of expert testimony is grounded in ORCP 36 B(1), in that experts are beyond the intended scope of discovery. *Id.* at 404–05, 147.

74 *See* Koppel, *supra* note 24, at 1171–74.

75 *See, e.g.*, Vaughan v. Taylor, 79 Or. App. 359, 364–65 & n.7, 718 P.2d 1387, 1390–91 (1986) (discussing the need for broad discovery, rather than admissibility, as the standard and citing with favor discussion of federal discovery practices and goals).

discovery practices invite the criticism that such practices are susceptible to abuse. The Council considered this criticism, but concluded that "[a]busive and useless discovery is wrong, but this is better controlled either by limiting the discovery devices or court control under the general protective provisions of the discovery rule."[76]

While Oregon uses discovery in a similar fashion, Oregon's pleading standard is higher than the federal standard of "notice pleading." Oregon has adopted a "fact pleading" standard, which requires that a pleading include a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition."[77] Oregon courts have routinely recognized that this pleading standard differs from the federal pleading standard and that it is, effectively, a heightened standard.[78] The Oregon standard is higher because a pleading must include sufficient facts to state the ultimate claim, whereas the federal standard merely requires a concise statement of the claim without addressing the ultimate facts. A sufficient pleading in Oregon must include a "fairly specific description of facts as opposed to adopting the less specific fact description allowable in federal courts [under the 'notice pleading standard']."[79] Despite this distinction, however, discovery plays a similar role; discovery is still an integral component of litigation because, even though the pleading standard is higher, discovery is still crucial for civil litigation to narrow issues and identify facts. However, because of the higher burden that must be met by the pleading (that facts must be included in the pleading in practice), the role of discovery is slightly different. This distinction impacts the role discovery must play and, as will be discussed, the limitations that can be placed on discovery without jeopardizing that role.

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[76] *Discovery*, *in* 3 OREGON COUNCIL ON COURT PROCEDURES, *supra* note 68.

[77] OR. R. CIV. P. 18 A. Prior to the adoption of the ORCP, Oregon actually had a pleading standard more akin to the federal notice pleading standard. *See* Moore v. Willis, 307 Or. 254, 258, 767 P.2d 62, 64 (1988) (discussing the impact of the ORCP language on pleading standards in Oregon).

[78] *See* Davis v. Tyee Indus., Inc., 295 Or. 467, 472, 476, 668 P.2d 1186, 1189, 1192 (1983) (discussing the difference between federal and Oregon assumpsit pleading standards); *see also* Welch v. Bancorp Mgmt. Advisors, Inc., 296 Or. 208, 221, 675 P.2d 172, 180 (1983) (evaluating the federal and state pleading standards and electing to retain Oregon's fact pleading standard despite federal use of "notice pleading").

[79] *Davis*, 295 Or. at 476, 668 P.2d at 1192 (quoting OR. R. CIV. P. 18 advisory committee's comment).

C. Discovery Limitations Under the Oregon Rules of Civil Procedure

There are two limitations on discovery included in the ORCP[80]—the scope of discovery and protective orders. Both of these limitations have federal counterparts, but the third federal method of limiting discovery, the Proportionality Rule, is absent from the ORCP. Oregon could benefit from the inclusion of an additional limit, one like the Proportionality Rule, particularly given the expected impact of e-discovery in Oregon.

1. The Scope of Discovery Under the Oregon Rules of Civil Procedure

As required by the FRCP, to be discoverable, the requested discovery must fall within the scope of discovery. In Oregon, the rule is drafted equally broadly: "For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ."[81] As noted above, Oregon adopted this standard statutorily, with the intent of "conform[ing] with the Federal scope of discovery" before incorporating this standard into the ORCP. [82]

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80 However, discovery limitations are not confined to the ORCP. As with the ABA's Model Rules of Professional Conduct, *see supra* note 20, the Oregon Rules of Professional Conduct outline the rules relating to how attorneys practice law in Oregon. The Oregon Rules of Professional Conduct provide that an attorney is not to, "in pretrial procedure, knowingly make a frivolous discovery request." OR. RULES OF PROF'L CONDUCT R. 3.4(d). This language is identical to the ABA's Model Rules of Professional Conduct. The Oregon Rules of Professional Conduct went into effect in Oregon in January 2005. However, a review of the *Disciplinary Board Reporter* reveals that no attorney has been disciplined under this rule. While it is arguable that this is because no attorney has violated the rules, it is also arguable that, despite attorneys acting contrary to this rule, a complaint has not been filed. Because this rule sanctions conduct only after it has occurred, after the frivolous discovery request has been submitted, it is unlikely that this rule alone can end abusive discovery requests.

81 OR. R. CIV. P. 36 B(1). As with the FRCP scope of discovery, the test is not ultimate admissibility of the discovery but merely its relationship to the claim or defense of the parties.

82 Minutes of Meeting of Council on Court Procedures, *supra* note 71, at 1. At the meeting, the Council discussed areas where Oregon differed from the FRCP, including the use of interrogatories. *Id.* at 1–2; *see also Discovery*, *supra* note 76, at 2–6.

The scope of discovery under the ORCP is very broad. This is by design, because broad discovery is intended to meet the goals of allowing parties to fully develop their cases.[83]

2. *Protective Orders Under the Oregon Rules of Civil Procedure*

The ORCP relies primarily on protective orders to curb potentially abusive discovery practices. This was the intent of the Council in adopting the ORCP and reflected the state of discovery in Oregon prior to the ORCP. This was the practice in Oregon, as codified in the ORS, in advance of the ORCP.[84]

The ORCP approach to protective orders incorporated existing ORS 41.631[85] and 41.618,[86] as well as federal rules.[87] As noted by

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[83] *See* Vaughn v. Taylor, 79 Or. App. 359, 365 & n.7, 718 P.2d 1387, 1391 & n.7 (1986) (quoting 8 WRIGHT, MILLER & MARCUS, *supra* note 12, § 2001) (implicitly endorsing the federal standard of broad discovery).

[84] *Discovery*, *supra* note 76, at 10–11.

[85] The text read as follows:

> (1) Upon motion by a party, and for good cause shown, the court in which the action, suit or proceeding is pending may make any order which justice requires to protect a party or a witness upon whom a request for any type of discovery has been made from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:
>
> (a) That the discovery not be had;
>
> (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (e) That discovery be conducted with no one present except persons designated by the court;
>
> (f) That a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way;
>
> (g) That the parties simultaneously file specified documents or information inclosed in sealed envelopes to be opened as directed by the court; or
>
> (h) That to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

OR. REV. STAT. § 41.631 (repealed 1979).

[86] The text read as follows:

> (1) Upon motion by a party, and for good cause shown, the court in which the action, suit or proceeding is pending may make any order which justice requires to protect a party upon whom a request for any type of discovery has been made

the Council, the only substantive difference between the pre-ORCP protective orders (ORS 41.631 and 41.618) and FRCP 26(c) protective orders was that the former did not permit a nonparty to seek a protective order, whereas the federal rule permits nonparties from whom discovery was requested to seek a protective order.[88] The Council opted to adopt the FRCP protective order approach, permitting nonparties to seek a protective order, rejecting the Oregon route.[89]

That the Council elected to adopt the federal approach is noteworthy in that it reflects the Council's willingness and even desire to bring Oregon rules in line with federal rules, as well as the Council's willingness to adopt additional limitations on discovery.[90] It makes sense that in 1977 the Council would rely primarily on

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> from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:
>
> (a) That the discovery not be had;
>
> (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (e) That discovery be conducted with no one present except persons designated by the court;
>
> (f) That a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way;
>
> (g) That the parties simultaneously file specified documents or information inclosed in sealed envelopes to be opened as directed by the court; or
>
> (h) That to prevent hardship the party requesting discovery pay the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

Id. § 41.618 (repealed 1979).

87 These rules regarding protective orders are largely similar in scope and text. The Counsel noted this overlap and attributed it to lobbying strategy. *Discovery*, *supra* note 76, at 10. The adoption of the ORCP, resulting in the incorporation of these protective order rules, led to both statutory provisions being repealed by the Legislature.

88 Memorandum from Fred Merrill, *supra* note 70, at 4.

89 *Id.* Another key difference is that ORCP 36 C(9) does not appear in FRCP 36(c). *Compare* OR. R. CIV. P. 36 C(9) *with* FED. R. CIV. P. 36(c)(1).

90 Allowing nonparties to pursue protective orders can be seen as a broader limitation on discovery in that protective orders are available to a potentially larger group (i.e., nonparties as well as parties). Plus, by making protective orders available to nonparties, the court can consider the impact of discovery requests on a larger group when deciding whether or not to limit discovery.

protective orders to limit discovery; other than the scope of discovery, protective orders were the only discovery limitations in place in the FRCP in 1977. The FRCP has, in recent years, added additional limitations on discovery to its arsenal of tools guarding against abusive discovery practices. Protective orders, however, remain the primary limitation on discovery in Oregon.

ORCP 36 C,[91] by its own terms, vests discretion in the court, once the good cause standard is met, to craft a protective order to ensure that justice is done given the facts of the case.[92] Oregon appellate courts grant great deference to a trial court's decision to issue or deny a protective order, employing an abuse of discretion level of review.[93]

Protective orders can be an effective tool for limiting abusive discovery practices in Oregon. For example, in *Citizens' Utility Board*, the Oregon Court of Appeals upheld a protective order issued to the defendant at trial.[94] At issue was a study conducted by the defendant of its telephone service costs. The court concluded that the defendant's investment in the study, the confidential nature of the

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[91] ORCP 36 C today provides,

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

[92] *See* Carton v. Shisler, 146 Or. App. 513, 516, 934 P.2d 448, 450 (1997) ("[U]nder the plain language of [ORCP 36 C], once a court concludes that a party or person is entitled to a protective order, it has the authority to protect that party or person in *any* way that justice requires.").

[93] *See* Farmers Ins. Grp. of Or. v. Hansen, 46 Or. App. 377, 380, 611 P.2d 696, 698 (1980).

[94] Citizens' Util. Bd. of Or. v. Or. Pub. Util. Comm'n, 128 Or. App. 650, 656–57, 877 P.2d 116, 120–21 (1994).

study, and the competitive impact the defendant would suffer if the study became public entitled the defendant to a protective order.

ORCP 36 C differs from its federal analog (FRCP 26(c)) in one substantial regard: the text of ORCP 36 C(9), which allows for the party requesting discovery to pay for such discovery if the request would otherwise be a hardship for the party providing discovery. This language reflects the Council's recognition of the potential astronomical costs that can be incurred in litigation and provides for the expense to be shifted to the party requesting discovery as a condition of obtaining that discovery. Ensuring that litigation costs remain manageable is a continued concern for the Council.[95] Plus, it is an explicit goal of the ORCP as articulated in ORCP 1 B.[96]

Over time, as discussed above, new rules have been incorporated into the FRCP to curb potentially abusive discovery practices—most notably, for the purposes of this Comment, the Proportionality Rule. However, a review of the Council's proceedings discussing potential amendments to the ORCP reveals that subsequent FRCP amendments relating to discovery, including the Proportionality Rule, have not entered into the Council's deliberations.[97] Even ORCP 36 C (protective orders) receives negligible attention from the Council in deliberations.

The federal Proportionality Rule of FRCP 26(b)(2)(C) is conspicuously absent from the ORCP. This is conspicuous in that the absence is arguably contrary to the ORCP and Council's interest in efficient and cost-effective litigation.[98] The dearth of Council discussion about discovery practices in Oregon generally is also noteworthy given how integral discovery is to the system of civil litigation in Oregon. In Oregon today, practitioners must continue to rely on protective orders under ORCP 36 C to limit discovery. Oregon courts could greatly benefit and better realize their goals of administering justice by incorporating the federal Proportionality Rule into the ORCP.

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95 *See* Letter from Joe D. Bailey, Chairman, Council on Court Procedures, to John Kitzhaber, President of the Senate, and Vera Katz, Speaker of the House 2 (Jan. 2, 1987), *in* 1 OREGON COUNCIL ON COURT PROCEDURES, *supra* note 68.

96 *See* OR. R. CIV. P. 1 B.

97 *See generally* 3 OREGON COUNCIL ON COURT PROCEDURES, *supra* note 68.

98 *See* OR. R. CIV. P. 1 B.

3. Specific E-Discovery Limitations in Oregon

Unlike the FRCP, the ORCP has yet to address e-discovery.[99] This potentially places Oregon in a precarious position as the cost and expense associated with e-discovery is expected to increase, and e-discovery is expected to become a larger and larger component of discoverable information. As one Oregon scholar noted, "despite the FRCP amendments and multiple sets of guidelines produced by several organizations, the [ORCP] remain unchanged. . . . Oregon has remained on the sidelines, taking no steps to amend its civil procedure rules . . . ."[100]

As discussed above, e-discovery, by virtue of the mass of ESI that can be discovered, has the power to result in great burdens for civil litigation in this country. Oregon is particularly vulnerable because the state, through the ORCP, has not taken account of the myriad of ways in which e-discovery presents unique challenges to discovery.[101]

III
A CALL FOR PROPORTIONALITY IN OREGON

The ORCP's discovery rules remain largely unchanged since they were first adopted over thirty years ago. In the intervening years, much has changed about discovery and litigation generally. The Council should reevaluate the discovery rules, particularly in light of the recent FRCP amendments, and incorporate the Proportionality Rule into the ORCP. The Proportionality Rule would offer Oregon judges and parties to litigation an additional means by which to guard against abusive discovery practices. There are three primary reasons why the Proportionality Rule will be of benefit to Oregon. First, the Proportionality Rule comports with the goals of the ORCP and will help ensure these goals are better realized. Second, the rule comports with the use of discovery in Oregon, even though it is, theoretically, a narrowing of discovery. Third, and finally, the rule will help ensure that the growing use of e-discovery is not permitted to hijack the litigation process, ensuring the discovery process is not unnecessarily

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[99] *See* Tornquist & Olsen, *supra* note 54, at 167–68 (discussing the Council's discussion of e-discovery but noting that no amendment to the ORCP resulted from such discussions).

[100] *Id.* at 164.

[101] *See generally id.* (advocating for Oregon to amend the ORCP to more specifically provide for the treatment of ESI and e-discovery).

susceptible to potential abuses through e-discovery requests and practice.

A. The Proportionality Rule Comports with Oregon's Civil Procedure Goals

The Proportionality Rule explicitly outlines limits on discovery that do not exist under the ORCP. For example, under the Proportionality Rule, discovery can be denied if requests are duplicative or cumulative. Or discovery can be limited if the requested information is otherwise available to the requesting party. In a system that is susceptible to overdiscovery, it is not difficult to imagine scenarios where discovery requests are duplicative, are cumulative, or involve information that can otherwise be obtained. However, these discovery limitations are available in Oregon only if they also qualify under the grounds for issuing a protective order such as annoyance, embarrassment, oppression, or undue burden or expense.

There may be overlap between what would be excluded under the Proportionality Rule and Oregon's protective order rule (ORCP 36 C). For example, ORCP 36 C addresses the burden of expense. This is also a situation directly addressed by the Federal Proportionality Rule. However, there are many situations that fall outside of the scope of ORCP 36 C but are addressed by the Proportionality Rule. If a request falls within the enumerated categories of the Proportionality Rule but fails to meet the protective order requirements, there is no mechanism in the ORCP to prevent against overdiscovery. This leaves parties and nonparties open to overdiscovery, an abusive discovery practice that is counter to the express goals of the ORCP.

The very first rule of the ORCP lists the goals of the ORCP—just, speedy, and cost-effective administration of justice.[102] The Proportionality Rule reflects and helps realize these goals. First, it facilitates the just administration of justice because it protects parties from falling victim to burdensome discovery requests that yield little value to the litigation at hand. For example, as discussed in *Roberts*, the discovery requests at issue, because of the burdensome scope, could force the City of Philadelphia into an unjust settlement simply because it lacked the resources to comply fully with the request. The Proportionality Rule in that case successfully blocked these discovery requests, even though they fell within the scope of discovery, helping

[102] *See* OR. R. CIV. P. 1 B.

yield a just result in the case. Additionally, because the Proportionality Rule explicitly enumerates grounds upon which discovery must be limited, it is administrable.[103]

Second, the Proportionality Rule facilitates speedy and efficient adjudication. The Proportionality Rule is available both to the parties on motion and to the judge at his own election. Judges in Oregon civil courtrooms do not enjoy any discretion comparable to their federal counterparts to police discovery; they must instead rely on the motion of either a party or of the individual from whom discovery is sought.[104] The court's inability to act alone to limit discovery denies Oregon judges a potential opportunity to act as a gatekeeper as judges can in the federal system. This means that potentially abusive discovery practices can occur essentially unchecked should a party elect not to pursue a protective order. The discretion vested in trial courts in Oregon to limit discovery is limited to the terms of ORCP 36 C.[105] If the goal of the ORCP truly is to pursue justice efficiently, then allowing the court to act on its own to limit abusive discovery, as is the case through the Proportionality Rule, offers an additional check on potentially abusive discovery practices.

This is more efficient, and potentially speedier, because it eliminates the procedural step of filing and arguing for a protective order and limits the ability of parties to engage in an unwarranted discovery war merely to delay the proceeding.

Additionally, the Proportionality Rule furthers the goal of speedy adjudication because it requires parties to consider more efficient methods of discovery and information acquisition. For example, in *Public Service Enterprise Group* the information requested, although within the scope of discovery, was held to violate the Proportionality Rule.[106] The court in that case recognized that the information requested was already available to the plaintiff through public

103 Although, as discussed above, there are administrability questions raised by the Proportionality Rule, especially because it is essentially a balancing test. *See generally* Moss, *supra* note 1; *supra* text accompanying note 1.

104 *Cf.* Lane Transit Dist. v. Lane Cnty., 146 Or. App. 109, 123, 932 P.2d 81, 89 (1997) (indicating that discussion at trial of the potential burden incurred because of a discovery request was sufficient to place a motion for protective order on the basis of cost before the court).

105 *See* State ex. rel. Anderson v. Miller, 320 Or. 316, 320, 882 P.2d 1109, 1111 (1994). Under ORCP 36 C, the trial court enjoys the discretion to issue a protective order, but only if the order is justified by the terms of the rule—to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. *Id.*

106 *See supra* notes 51–53 and accompanying text.

records, including prior litigation. Without the Proportionality Rule, parties could use duplicative or cumulative discovery requests, requests for information otherwise within the scope of discovery under ORCP 36 B(1), to burden a party or delay litigation with little resulting discovery of any value to the proceeding. By denying this practice, either via motion or on the court's own initiative under the Proportionality Rule, the goal of speedy adjudication is furthered.

Finally, the Proportionality Rule helps realize the cost-effective adjudication of an issue because it recognizes that there are alternative and less expensive methods of obtaining the requested information. This is similar to the prior discussion about the speedy adjudication of justice. With the astronomical costs associated with litigation generally and discovery specifically, the Proportionality Rule offers another opportunity for parties and the court to come down on the side of cost-effective litigation. Oregon's current protective order rule provides that discovery can be limited on the grounds of expense, but only in the event of financial hardship.[107] Under the Proportionality Rule, the inquiry does not involve the question of hardship but rather evaluates the value of expending financial resources given the likely discoverable information. This difference allows the discovery to be limited to avoid unnecessary financial expenditures, regardless of the means of the parties. In practice, this distinction means that parties can be sheltered from expensive discovery requests even though, by virtue of financial status, compliance did not pose a financial hardship. It can protect, for example, wealthier companies and individuals from certain discovery requests because of the lack of merit of the request without regard for their financial status. The Proportionality Rule could be of special significance given the costs associated with e-discovery.

B. The Proportionality Rule Comports with Oregon's Pleading Practice and Use of Discovery

As noted previously, the low federal notice pleading standard relies heavily on discovery to perform the tasks of issue narrowing and fact identification. Since the notice pleading bar is so low—merely stating a claim in a short, plain statement—discovery is essential for litigation to proceed. In contrast, Oregon's fact pleading standard is higher. It requires that a pleading include sufficient facts to state an ultimate claim. To meet this standard, the parties must, in advance of

[107] *See* OR. R. CIV. P. 36 C(9).

filing a pleading, have acquired the information necessary to state, with facts, an ultimate claim. While Oregon embraces broad discovery practices, because the party needs information for the pleading in advance of filing, the role of discovery in Oregon litigation is somewhat lessened because some fact investigation must necessarily be accomplished before discovery and in advance of filing the pleading.

Under the FRCP, justifications for broad discovery rest heavily on the assumption that the broadest possible discovery is crucial given the low notice pleading standard. The Proportionality Rule, while a discovery limitation that effectively narrows discovery, is seen as consistent with this notice pleading standard and the required functions of discovery. The FRCP Advisory Council concluded that the discovery limits at work in the Proportionality Rule are consistent with the federal standard of notice pleading, even though discovery is technically limited. If the Proportionality Rule is consistent with notice pleading under the federal system, then it must also be consistent with the higher fact pleading standard in place in Oregon. Therefore, the Proportionality Rule comports with Oregon's pleading standards and the goals of discovery.

C. The Proportionality Rule Protects Oregon from Potential Litigation-Disrupting E-Discovery

E-discovery presents unique challenges, some of which have been addressed both directly and indirectly in the FRCP, including the quantity of documents and the cost associated with storing such information and turning it over in discovery. The Oregon Council on Court Procedures should incorporate the Proportionality Rule in the ORCP to best ensure that the goals of the ORCP are met, especially in the e-discovery age.

At a minimum, considering the adoption of the Proportionality Rule in Oregon is consistent with the purpose of the Council under ORS 1.735. As discovery is so crucial to civil litigation in Oregon, the Council should conduct a periodic review of discovery practices in Oregon and around the country. However, a review of the minutes, correspondence, and proposals of the Council reveals that discovery is almost never a topic of discussion. Given the FRCP's adoption of 26(b)(2)(C) and the Advisory Council's recognition of the need to institute additional measures to guard against over discovery, it is only reasonable that the Council consider the increased potential for overdiscovery presented by e-discovery.

The FRCP has adopted both the Proportionality Rule and the e-discovery-specific FRCP 26(b)(2)(B) to address the challenges posed by e-discovery. Oregon has yet to take any such steps. It should begin this process by adopting the Proportionality Rule, which would limit the potential for abusive discovery practices in both e-discovery and traditional discovery contexts.

CONCLUSION

Discovery is a crucial component of the civil litigation system in our country. Courts have affirmed, and will likely continue to affirm, broad discovery practices. While broad discovery is necessary, broad discovery is not equivalent to unchecked discovery. Indeed, discovery must have some limitations to ensure that the discovery process does not hijack litigation. Broad discovery is susceptible to abusive discovery practices. By adopting the Proportionality Rule, Oregon will best be able to pursue its objective of the "speedy, efficient, and inexpensive" administration of justice, particularly in the age e-discovery.