Stopping the Proportionality DISTOR

Rein in defendants' mischaracterizations of **Rule 26** to prevent them from escaping their discovery obligations.

By || **George S. Bellas and Marcus Neil Bozeman**

Federal Rule of Civil Procedure 26 received an inauspicious amendment in 2015: The rule was rearranged, with existing considerations of "proportionality" moved from one place to another.[1] Some defendants have inaccurately asserted that this bland amendment wrought a remarkable change on the discovery process.

Attempts to counteract concerns about the supposed "delay and expense"[2] of lawsuits have been memorialized, if inadvertently, through revisions to the Federal Rules of Civil Procedure since they first became effective in September 1938.[3] The meandering path of Rule 26 is one example. As originally promulgated, this rule was devoted exclusively to various aspects of deposition practice.[4] And in those days, the Advisory Committee on Civil Rules was quick to emphasize that "the purpose of discovery is to allow a broad search for facts."[5]

This theme of openness had been tempered by the time the rule was amended in 1970 to make it applicable to discovery generally—the committee made it a point to mention that "courts have denied discovery" whenever "the party whose documents are sought shows that the request for production is *unduly burdensome or oppressive*."[6] The committee underscored the propriety and continued availability of such measures, advising that cases involving "serious burden or expense" would require a court to "exercise its traditional power to decide whether to issue a protective order."[7]

And so began a 50-plus-year obsession with the notions of "burden" and "expense," featured in the official commentary accompanying virtually every substantive amendment to Rule 26 since 1970.[8] In 1983, the committee coined a new term—"proportional"—to capture the essence of both "burden" and "expense."

When introducing the concept of proportionality, the committee explained that it was targeting "excessively costly and time-consuming activities that are *disproportionate* to the nature of the case, the amount involved, or the issues or values at stake."[9] The committee repeated the same thoughts when it slightly restructured Rule 26 in 1993, admonishing that discovery should not "be used as an instrument for delay or oppression."[10] Similar language appeared alongside the 2015 amendment, which moved the provision requiring proportional discovery back to the original location where it had been placed in 1983, but did nothing to "change the existing responsibilities of the court and the parties to consider proportionality."[11]

The committee has clarified that it has not, since 1983, intended to change how proportionality considerations affect determinations regarding the permissibility of discovery.[12] Unfortunately, many large corporate defendants insist on falsely claiming that the 2015 amendment marked a significant contraction of permissible discovery. But they ignore the longstanding position that proportionality (and the underlying concerns it addresses) has occupied within the Rule 26 framework—instead they seize on a biased misinterpretation[13] of the committee's statement that the 2015 amendment "restores the proportionality factors to their original place in defining the scope of discovery."[14] Based on this misinterpretation, defendants often demand massive changes that would alter the federal rules' traditionally "strong[]" preference for "full discovery whenever possible."[15]

To ensure our clients have access to the discovery they are entitled to, plaintiff attorneys must push back and rectify the mischaracterization of proportionality. Among other tactics, defendants deploy two primary strategies that plaintiff attorneys should focus on dismantling: the insistence that a corporation should independently apply proportionality considerations as early as possible to control and shape the discovery process, and the blatant attempt to reconfigure the proportionality analysis so that it neglects all other factors to focus *exclusively* on the "burden" and "expense" of proposed discovery. It is crucial to reveal how each is inappropriate and unsupported by the text and intent of Rule 26.

An early interrogatory or two could reveal whether a defendant has followed the route of implementing proportionality early.

Implementing Proportionality Prematurely

There is a trend among defendants to "adopt a proportionality strategy early in the process."[16] Proponents of this stance argue that by unilaterally using proportionality early on, defendants can avoid "over-preservation" that they claim stems from "over-discovery."[17]

Plaintiff attorneys should assume that even the most marginally sophisticated defendant has adopted this strategy. If there is any doubt, frame discovery directed at the issue, remembering that a defendant is instructed to rank custodians and documents, respectively, according to its own estimation of relevance and ease of access, with the objective of releasing from legal hold obligations those it determines are "not relevant."[18] Specifically, an early interrogatory or two could reveal whether a defendant has followed this route.

Also, use the initial Rule 26(f) conference between the parties to discuss steps taken by the defendants to preserve and collect evidence and to agree to a discovery plan. However, developing a full discovery plan requires a comprehensive discussion of issues and custodians. The electronically stored information (ESI) protocol is where the rubber meets the road, and during those discussions the defense likely will begin kicking around proportionality to limit discovery.

It should also be stressed that defendants' eagerness to monopolize and own the proportionality inquiry flies in the face of pretty much everything envisioned by the 2015 amendment to Rule 26. The committee stressed "the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management."[19] Stated another way, the

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amendment "serves to exhort judges to exercise their preexisting control over discovery more exactingly."[20]

Nowhere in the text of Rule 26 or its commentary is a suggestion that a party should make and implement unilateral proportionality determinations during ongoing litigation—much less in the period before "claims and defenses [have been] articulated."[21] In fact, with specific regard to ESI, the Sedona Conference has stated that "the failure to notify the requesting party that relevant ESI is being withheld on the basis of proportionality should . . . be weighed against the responding party."[22] Clearly, effective notice cannot occur if there is a decision, before discovery has even begun, to release custodians from a legal hold.

Moreover, the rules elsewhere make it very apparent that a collaborative process involving all parties and the court should be used for decisions regarding proportionality and preservation[23]—and courts have embraced this.[24] Rule 37(e), for instance, "authorizes and specifies measures a court may employ if information that should have been preserved is lost."[25] As an example of potentially appropriate proportionality in the preservation process, the commentary surmises that "a party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms."[26] Notably, the commentary falls well short of endorsing a party's unilateral decision to release information from a litigation hold.[27]

Especially in cases with significant injuries—which one court has described as the death of any person[28]—a strong argument exists that proportionality is not an appropriate justification to limit discovery. The opposing party can raise proportionality nonstop, objecting to every discovery request, no matter how inexpensive or important to the case, as "not proportionate." However, this is not in line with the 2015 amendments.[29] Stand your ground, and insist on a scope of discovery that complies with the rules.

Attempts to Redefine Proportionality

As defined by the federal rules, proportionality is something that takes account 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 discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[30] The Advisory Committee has left no doubt that "monetary stakes are only one factor, to be balanced against other factors," when it comes to proportionality.[31] Nevertheless, defendants choose to home in on the "burden" and "expense" of discovery when promoting their distorted view of proportionality. Courts have rejected this tactic—and boilerplate proportionality objections.[32]

Reiterate that this attempt to recharacterize the proportionality analysis to limit discovery does not comport with the amendments and case law. If necessary, take the issue to the court. One suggestion is to advise the court as soon as possible—perhaps as part of the initial Rule 16(b) scheduling conference—of the true scope of the proportionality inquiry (including the obligation to equally balance all factors listed in Rule 26(b)(1)).

To ensure clients have fulsome access to discovery, plaintiff attorneys must be aware of these defense strategies to inappropriately curb production obligations and work to stop efforts that rely on a biased and unsupported interpretation of the federal rules.

PROPOSED DISCOVERY PROPORTIONALITY MODEL

The James F. Humphreys Complex Litigation Center at The George Washington University Law School issues guidelines on topics of interest to AAJ members. One of those topics is called "Discovery Proportionality Model: A New Framework" and is supposed to help parties assess Federal Rule of Civil Procedure 26(b)(1) proportionality by using a heat map that categorizes custodians by degree of burden and cost in accessing information from various data sources such as email and text messages. A heat map is a graphical representation of data in which individual values are contained in a matrix and represented as colors.

AAJ is concerned that burden and costs are driving this tool for assessment while ignoring other factors in the proportionality evaluation, such as the parties' relative access to relevant information and the parties' resources. The Advisory Committee on Civil Rules responsible for the 2015 discovery amendments already rejected emphasizing one factor over others.

It is anticipated that the proportionality model will be open for public comment this fall, and members may want to weigh in. Information on the proposed guidelines can be found at https://tinyurl.com/jt25eksr.

For more information, contact AAJ's senior director of policy and senior counsel, Susan Steinman, at susan.steinman@justice.org.

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Notes

1. Altom M. Maglio & Jessica Olins, *Rule 26(b)(1): One Year Later*, Trial, Nov. 2016, at 26; Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, Trial, July 2016, at 36.
2. *See, e.g.*, Betsy Hendrick et al., *How to Leverage the In Situ eDiscovery Model to Win Proportionality Arguments*, ACC Docket, May 2020, https://tinyurl.com/553d2zud (recounting that general counsel from large and medium-sized corporations are "tremendously frustrated by the time and expense of discovery" (emphasis added)).
3. *See* Daniel C. Hopkinson, *The New Federal Rules of Procedure as Compared With the Former Federal Equity Rules and the Wisconsin Code*, 23 Marq. L. Rev. 159, 159–60 (1939) (tracing the time line of the rules' initial adoption).
4. *Id.* at 171 (analyzing initial version of Rule 26, then entitled "Depositions Pending Action").
5. Fed. R. Civ. P. 26 advisory committee's note (1946 Amendment).
6. Fed. R. Civ. P. 26 advisory committee's note (1970 Amendment) (emphasis added) (citing *Lauer v. Tankrederi*, 39 F.R.D. 334 (E.D. Pa. 1966)).
7. *Id.*
8. The single exception is the 2010 amendment. Fed. R. Civ. P. 26 advisory committee's note (2010 Amendment). *But see* Fed. R. Civ. P. 26 advisory committee's notes (1980 Amendment) (1983 Amendment) (1993 Amendment) (2000 Amendment) (2006 Amendment) (2015 Amendment).
9. Fed. R. Civ. P. 26 advisory committee's note (1983 Amendment) (emphasis added).
10. Fed. R. Civ. P. 26 advisory committee's note (1993 Amendment).
11. Fed. R. Civ. P. 26 advisory committee's note (2015 Amendment).
12. Fed. R. Civ. P. 26 advisory committee's note (2015 Amendment). Academics and legal commentators recognize as much: *see* 1 Bus. & Com. Litig. Fed. Cts. §11.2 (4th ed. 2020 update) ("[T]he 2015 Amendments are not unique or radical."); Michael Hales et al., *W(h)ither Discovery*, 9 Disp. Resol. Int'l 29, 36 (May 2015) ("[T]he 2015 Amendments do not introduce sweeping changes to the American discovery regime."). And the courts agree: *See, e.g.*, *ValveTech, Inc. v. Arojet Rocketdyne, Inc.*, 2021 WL 630910, at *2 (W.D.N.Y. Feb. 18, 2021) ("The 2015 amendments . . . did not establish a new limit on discovery; rather they merely relocated the limitation from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1)); *Hibu Inc. v. Peck*, 2016 WL 4702422, at *2 (D. Kan. Sept. 8, 2016) ("The consideration of proportionality is not new, as it has been part of the federal rules since 1983."); *Black v. Buffalo Meat Serv., Inc.*, 2016 WL 4363506, at *6 (W.D.N.Y. Aug. 16, 2016) ("In effect, the concept of undue burden that has been in Rule 26 for the last thirty plus years has been replaced by proportionality."); *Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) ("The 2015 amendments . . . did not establish a new limit on discovery; rather, they merely relocated the limitation from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1)."); *Gilead Sci., Inc. v. Merck & Co., Inc.*, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) ("Proportionality in discovery under the Federal Rules is nothing new."); *Robertson v. People Magazine*, 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) ("[T]he 2015 amendment does not create a new standard.").
13. When the committee noted that the 2015 amendment "restores the proportionality factors to their original place," it referred only to proportionality's "relocat[ion] from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1)." *ValveTech, Inc.*, 2021 WL 630910, at *2; *see also Vaigasi*, 2016 WL 616386, at *13. This is evident from, among other things, the committee's very next statement, which clarified that "restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties." Fed. R. Civ. P. 26 advisory committee's note (2015 Amendment).
14. Fed. R. Civ. P. 26 advisory committee's note (2015 Amendment).
15. *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).
16. Prism Litig. Tech., *Proportionality: The Earlier, The Better* 6 (2019), https://tinyurl.com/5ymb4j3m.
17. *Id.* at 1–2.
18. *Id.* at 3.
19. Fed. R. Civ. P. 26 advisory committee's note (2015 Amendment).
20. *Robertson*, 2015 WL 9077111, at *2; *see also Black*, 2016 WL 4363506, at *6 ("Another intention of this amendment was to have greater judicial involvement in the discovery process." (quotation omitted)); *Henry v. Morgan's Hotel Grp., Inc.*, 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016) ("[T]he amended Rule is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse." (quotation omitted)).
21. Prism Litig. Tech., *supra* note 16, at 2.
22. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. 141, 161–62 (2017).
23. *See* Fed. R. Civ. P. 37 advisory committee's note (2015 Amendment) (explaining that parties should engage in "meaningful discussion of the appropriate preservation regime"); *cf.* Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary* 6 (Dec. 31, 2015) ("[L]awyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.").
24. *See Singh v. Lenovo (U.S.) Inc.*, 2021 WL 1516032, at *4 (D. Md. Apr. 16, 2021) ("Counsel are expected, as always, to collaborate and to look to proportionality as their guiding principle."); *Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp.*, 2018 WL 6843629, at *1 (S.D. Fla. Dec. 21, 2018) (observing that the court encouraged the parties to engage in "collaboration in an effort to narrow down which data the parties agree is relevant and proportional").
25. Fed. R. Civ. P. 37 advisory committee's note (2015 Amendment).
26. *Id.*
27. *Id.*
28. *See Simon v. Nw. Univ.*, 2017 WL 467677, at *2 (N.D. Ill. Feb. 3, 2017) ("The Court finds the importance of the issues at stake in this action extremely high.").
29. *Vaigasi*, 2016 WL 616386, at *13.
30. Fed. R. Civ. P. 26(b)(1).
31. Fed. R. Civ. P. 26 advisory committee's note (2015 Amendment); *see also Black*, 2016 WL 4363506, at *6 (identifying undue burden as "one factor to determine whether the discovery demand is proportionate to the case").
32. *See Greenwood v. Nationwide Mut. Ins., Co.*, 2017 WL 11592488, at *3 (N.D. Ill. Aug. 30, 2017) ("Defendant . . . does not articulate why the burden and cost of this effort is not proportional. Without more, Defendant's boilerplate objection is not persuasive."); *First Am. Bankcard, Inc. v. Smart Bus. Tech., Inc.*, 2017 WL 2267149, at *2 (E.D. La. May 24, 2017) (overruling objections to discovery when "defendant ha[d] offered nothing more than a boilerplate proportionality objection, without providing any information concerning burden or expense that the court would expect to be within defendant's own knowledge"); *cf. Kruse v. Regina Caeli, Inc.*, 2016 WL 3549361, at *1 n.3 (E.D. Mich. June 30, 2016) ("With the advent of the 2015 amendments to Rule 26, the days of boilerplate objections are over."); *Capetillo v. Primecare Med., Inc.*, 2016 WL 3551625, at *2 (E.D. Pa. June 29, 2016) ("No single factor is designed to outweigh other factors in determining whether the discovery sought is proportional." (internal quotation omitted)).