Stopping the Proportionality
Rein in defendants’ mischaracterizations of Rule 26 to prevent them from escaping their discovery obligations.

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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. 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” of lawsuits have been memorialized, if inadvertently, through revisions to the Federal Rules of Civil Procedure since they first became effective in September 1938. The meandering path of Rule 26 is one example. As originally promulgated, this rule was devoted exclusively to various aspects of deposition practice. 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.”

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.” 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.”
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. 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.” 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.” 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.”

The committee has clarified that it has not, since 1983, intended to change how proportionality considerations affect determinations regarding the permissibility of discovery. 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 of the committee’s statement that the 2015 amendment “restores the proportionality factors to their original place in defining the scope of discovery.” Based on this misinterpretation, defendants often demand massive changes that would alter the federal rules’ traditionally “strong[]” preference for “full discovery whenever possible.”

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. Implementing Proportionality Prematurely

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

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.” 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.” Stated another way, the
amendment “serves to exhort judges to exercise their preexisting control over discovery more exactly.”

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.” 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.” 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—and courts have embraced this. Rule 37(e), for instance, “authorizes and specifies measures a court may employ if information that should have been preserved is lost.” 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.” Notably, the commentary falls well short of endorsing a party’s unilateral decision to release information from a litigation hold.

Especially in cases with significant injuries—which one court has described as the death of any person—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. 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.” 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. 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.

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 appropriately curb production obligations and work to stop efforts that rely on a biased and unsupported interpretation of the federal rules.
NOTES
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/553d2iu2 (accounting that general counsel from large and medium-sized corporations are “tremendously frustrated by the time and expense of discovery” (emphasis added)).
4. Id. at 171 (analyzing initial version of Rule 26, then entitled “Depositions Pending Action”).
eri, 39 F.R.D. 334 (E.D. Pa. 1966)).
7. Id.
13. When the committee noted that the 2015 amendment “restores the proportionality factors to their original place,” it referred only to proportionality’s “relocation[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).
15. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985).
20. 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”).