



APB to Requesting Parties: Prepare for Proportionality

The most recent amendments to the Federal Rules of Civil Procedure (FRCP) follow a lengthy and contentious debate, particularly on the appropriate scope of discovery. While the renewed focus on proportionality might seem unruly and even unfair for requesting parties, counsel can navigate the revised rules successfully and help shape decisional authority by being well prepared, strategic, and agile.



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The explosive growth of electronically stored information (ESI) has permanently changed the discovery landscape, with the concept of proportionality now taking center stage. The amendments to the FRCP, which take effect on December 1, 2015, include changes that transfer the proportionality factors previously found in Rule 26(b)(2)(C)(iii) to the scope of discovery in Rule 26(b)(1) with some modifications.

Many advocates, particularly those who represent plaintiffs, argue that these rule changes favor corporate defendants, by restricting the scope of discovery to alleviate the purported skyrocketing costs and burdens associated with preserving and producing ESI at the expense of achieving justice. Evidence of these alleged increasing costs, at least to the extent they pertain exclusively to discovery, is questionable.

Indeed, one study, conducted by the Federal Judicial Center and completed shortly before the most recent amendment process began, found that discovery worked well and at a modest cost

in most federal cases. (Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, 27-31 (2009); see also Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. Cin. L. Rev. 1083, 1085 (2015); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 363 (2013).)

Rather than fixating on the inadequacies or unnecessary breadth of the amendments, or the frustrations surrounding the rulemaking process, counsel should arm themselves for the future by preparing thoughtfully and strategically for the imminent implementation of the revised rules. This article explores:

- The redefined scope of discovery under amended Rule 26(b)(1).
- Emerging efforts to influence how proportionality is interpreted, which generally reflect a defense perspective.
- Tactical tips for requesting parties and their counsel navigating the new discovery landscape.

REDEFINED SCOPE OF DISCOVERY

While counsel should carefully review the entire rules package, requesting parties in particular should pay immediate attention to the modified scope of discovery under amended Rule 26(b)(1). The revised rule permits only discovery that is “relevant to any party’s claim or defense and proportional to the needs of the case.”

The concept of proportionality in discovery is not new, and has been included in the FRCP since 1983, but it is more prominent under the recent amendments. Former Rule 26(b)(2)(C) permitted a court issuing a protective order to limit the frequency or extent of discovery based on certain proportionality factors that are now incorporated in amended Rule 26(b)(1). These factors are:

- The importance of the issues at stake in the case.
- The amount in controversy.
- The parties’ relative access to relevant information.
- The parties’ resources.
- The importance of the discovery in resolving the case.
- Whether the burden or expense of the discovery outweighs its likely benefit.

(FRCP 26(b)(1) (adding the factor requiring courts to consider the parties’ relative access to information, and reordering the factors to list the importance of the issues at stake in an action first).)

The advisory committee note cautions that moving and reordering the proportionality factors “does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations” (2015 Advisory Committee Note to FRCP 26(b)(1)).

By moving the proportionality factors into Rule 26(b)(1), the court and counsel must consider these issues at the outset of a case, as they focus on the scope of preservation and production,

rather than simply in connection with a motion for a protective order. Further, the changes reinforce the parties’ Rule 26(g) obligation to consider the proportionality factors in propounding discovery requests, responses, or objections.

UNBALANCED GUIDANCE

Some practitioners who had strong views throughout the amendment process and were not satisfied with the extent of the rule changes have continued their efforts to construct a new paradigm with a narrower scope of discovery. For example, some commentators have suggested that amended Rule 26(b)(1) provides courts with more ammunition to rein in overly broad discovery requests and to address the “misconception within the legal community that the rules allow for broad (and sometimes seemingly limitless) discovery.” (Brian K. Cifuentes, *Proportionality: The Continuing Effort to Limit the Scope of Discovery*, *Metropolitan Corp. Couns.*, 17:21 (Mar. 2015); see also Martha J. Dawson & Bree Kelly, *The Next Generation: Upgrading Proportionality for A New Paradigm*, 82 *Def. Couns. J.* 434 (2015).)

Others have gone further, suggesting that proportionality supports a cost-shifting rule that requires “a requester to pay some or all of the expenses resulting from its requests.” These commentators have advised that this type of cost allocation “would also encourage practical cooperation among the parties.” (John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 *Def. Couns. J.* 411, 422 (2015).) The general rule that the producing party pays remains intact, at least for now (but see FRCP 26(c)(1)(B) (a protective order may allow for expenses to be allocated)).

It is similarly unsurprising that articles and seminars detailing best practices and proposed guidelines have emerged in attempts to influence how proportionality is interpreted. Most recently, the Duke Law Center for Judicial Studies released guidelines (Proportionality Guidelines) intended to foster proportional discovery (see *Duke Law Center for Judicial Studies, Discovery Proportionality Guidelines & Practices*, 99 *Judicature No. 3*, 47-60 (Winter 2015)). Working in tandem with the American Bar Association (ABA), the Duke Law Center for Judicial Studies embarked on a multi-city roadshow to discuss some of the new discovery rules, and specifically Rule 26(b)(1), and introduce the Proportionality Guidelines before the rules even became effective.

The Proportionality Guidelines were the result of a year-long drafting process that inspired tenacious advocacy by all sides. Notably, few, if any, of the roadshow panelists participated in the drafting process. Therefore, they lack the context necessary to educate courts and counsel on the most contentious aspects of the Proportionality Guidelines and the extent to which certain recommendations and best practices reflect compromises reached after vigorous debate.

For example, after much persistence by the plaintiffs’ lawyers involved in the drafting process, the Proportionality Guidelines state the Rule 26(b)(1) amendments “do not alter the parties’

existing discovery obligations or create new burdens," including on the issue of cost-shifting (*Proportionality Guidelines*, at 51, 54, 60). However, the ABA's promotional materials for the roadshow declare that the amendments usher in "the most significant changes to discovery and case management practices in more than a decade" (see *americanbar.org*; see also *Andrew J. Kennedy, Significant Changes to Discovery and Case Management Practices*, *ABA Litigation News* (Oct. 14, 2015) (describing the new amendments as "the most significant change to federal civil practice in the last decade" and suggesting that proportionality "signals a sea change in the scope of discovery").

If roadshow presenters seek to weaponize the Proportionality Guidelines to advocate for even greater restrictions than those proffered by the actual rule, they could undermine the collaborative and neutral advice that the Proportionality Guidelines purport to provide and thus limit their usefulness. In any event, the rule amendments and corresponding committee notes are the best and most reliable resources at this stage.

BEST PRACTICES FOR REQUESTING PARTIES

As one prominent magistrate judge advises, proportionality does not automatically preclude discovery. Instead, the proportionality factors "require lawyers and judges to approach the discovery process more thoughtfully." That means developing a discovery strategy that reduces the potential for successful proportionality objections. (*Hon. Craig B. Shaffer, The "Burdens" of Applying Proportionality*, 16 *Sedona Conf. J.* __, 4 (forthcoming 2015).)

In other words, it is best to formulate a plan early. Requesting parties must develop strategies to ensure they can access the information they need and generate evidence to prove their case, while also complying with the proportionality factors. In particular, requesting parties' counsel should:

- Read the rules and the corresponding committee notes.
- Propose specific, targeted discovery requests.
- Guard against boilerplate objections.
- Discuss discovery scope and objections at the Rule 26(f) meet and confer to develop a proper discovery plan.
- Review guidance from the court.
- Seek assistance from more experienced counsel, if necessary.

READ THE RULES AND NOTES

Too often, lawyers (and even some judges) fail to read a rule's corresponding committee note. Instead, they focus on the text of the rule in isolation in an effort to influence decisional authority. The advisory committee spent many months refining amended Rule 26(b)(1) and drafting a note to provide guidance to counsel and the court on the intent and scope of the rule. Rule 26(b)(1) and its note should be read in conjunction with the other discovery rules and their notes, including, in particular, Rule 26(g).

TARGET SPECIFIC INFORMATION

Counsel must retire discovery requests that call for "all documents concerning, relating, referring, or corresponding to"

a subject. These requests are certain to prompt a proportionality challenge and likely do not conform to required standards, including Rule 26(g) (see *Shaffer, The "Burdens" of Applying Proportionality*, at 15, 32 ("counsel should avoid pattern or stock discovery requests recycled from past lawsuits even if that approach seems to hold false promises of cost-savings")).

Instead, counsel should:

- **Draft pointed and strategic requests.** Counsel should consider the types of information needed to prove the party's case and use clearly defined terms and detailed, targeted language when requesting that information. Counsel also should be prepared to articulate why that information is needed.
- **Specify the form of production.** Document requests should include clear definitions and technical specifications as to the form in which the information should be produced.
- **Deliver discovery requests as soon as permissible.** Under amended Rule 26(d)(2), parties may deliver Rule 34 document requests before the Rule 26(f) conference with opposing counsel. These early document requests place opposing counsel on notice of the types of information the requesting party will be seeking and should facilitate a cooperative dialogue to discern the extent of any objections.

REJECT BOILERPLATE OBJECTIONS

Amended Rules 26(b)(1), 26(g), and 34(b)(2)(C) make clear that parties may not make boilerplate objections stating that discovery requests are not proportional (see *FRCP 26(g); 2015 Advisory Committee Notes to FRCP 26(b)(1), 34(b)(2)(C)* (an objection must be stated with specificity)). Counsel must therefore read an adversary's responses and objections to discovery requests with a keen eye, and analyze her own requests with the same scrutiny.

When counsel receives boilerplate objections, she should promptly send a letter identifying any and all portions of the responses and objections that are noncompliant, and demand a revised set by a specified date. If opposing counsel does not comply, counsel should prepare to approach the court to resolve the matter. Counsel is best positioned to approach the court when she has a concrete record showing she has been proactive, engaged opposing counsel in a dialogue, and demonstrated a willingness to be flexible.

PREPARE FOR RULE 26(f) CONFERENCES

While additional guidance on applying the individual proportionality factors is anticipated, it is important for counsel to bear in mind that the factors will be applied differently across cases and, depending on the facts of a case, different factors might bear different weight. For example, a civil rights case may lend itself to a different analysis than a product liability case. Therefore, when preparing for a Rule 26(f) conference and formulating a discovery plan, counsel should think strategically about how each of the factors might affect the proportionality analysis. Counsel also should remember that amended Rule 26(b)(1) neither shifts the proportionality burden to the requesting party, nor directs that the burden resides exclusively with the producing party.

Counsel should come to the initial Rule 26(f) conference prepared to address what her client is seeking and why, or to elicit answers and information that will enable counsel to articulate those points in a discovery plan or during a court appearance.

When addressing the scope of discovery during the Rule 26(f) conference, counsel should:

- **Discuss objections based on burden and expense in detail.** If an adversary objects to the breadth or scope of counsel's discovery requests, counsel should use the Rule 26(f) conference as an opportunity to tease out the specific basis for the objections. Responding parties often have better information (and sometimes the only information) to support claims of undue burden or expense. Conversely, requesting parties are better positioned to explain why a request is important to resolve the issues and the ways in which the underlying information bears on those issues. (See *2015 Advisory Committee Note to FRCP 26*.)
- **Be wary of attempts to limit discovery to overly restrictive "core" issues.** Counsel should prioritize discovery requests to highlight information needed to prove her client's case, but should not, without experience and strategic purpose, agree to limit discovery to core issues. (Perhaps, in time, protocols for certain early core discovery, such as those used in employment cases, will become the norm. In most types of cases, however, these consensus-driven protocols do not currently exist.) While some phased or tiered discovery might be reasonable and acceptable in certain cases, core discovery might be an adversary's disguised attempt to impose additional restrictions on discovery that are not contemplated by amended Rule 26(b)(1).
- **Discuss preservation.** Rule 26(f) conferences should be iterative throughout the course of a litigation, and counsel should expect to address discovery issues on multiple occasions. However, counsel should vet any issues pertaining to preservation and production at the initial Rule 26(f) conference to prepare the discovery plan and avoid potential spoliation. Indeed, before the Rule 26(f) conference, counsel should identify issues warranting a discussion about preservation.
- **Document cooperative efforts.** Amended Rule 1 and the corresponding committee note contemplate cooperation among parties. Being cooperative from the outset can only serve counsel well. Counsel should document the steps taken to cooperate to assist a court, when reviewing the discovery plan or a discovery dispute, with evaluating the history of discussions among counsel in a way that pure argument might not show.
- **Consider strategic compromises.** Counsel should determine the extent to which she would modify requests, while reserving all rights, to demonstrate a willingness to cooperate (see, for example, *Hon. Elizabeth D. LaPorte & Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 *Fed. Cts. L. Rev.* 20, 68 (2015) ("The party that can best support its position, and can offer the alternative that produces key

information most cost-effectively, likely will prevail.")). This might involve offering alternatives, such as:

- summary information with the right to seek greater detail or the underlying documents;
- excerpts from a database or the creation of a report with certain data points, in contrast to all data points; or
- a reduced number of custodians based on a transparent exchange of information on those custodians' knowledge and actions, with the right to expand the number.

In most cases, a discussion or dispute about proportionality should be the exception, not the norm.

REVIEW JUDICIAL GUIDANCE

Many courts and individual judges are attuned to the issues relating to proportionality. Some judges have established guidelines or best practices, and some have even opined on the application of proportionality (see, for example, *Shaffer, The "Burdens" of Applying Proportionality*; *LaPorte & Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*; *Hon. Paul W. Grimm et al., Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 *U. Balt. L. Rev.* 381, 383 (2008)).

Counsel should become familiar with these resources and refer to them when conferring with adversaries and before approaching the court.

SEEK ASSISTANCE

A lawyer must recognize when she needs assistance and seek out seasoned advisors who are well-equipped to litigate proportionality disputes based on their experience with the rulemaking process or otherwise. When counsel is unprepared, inexperienced, or uninformed, there can be consequences beyond the immediate client or case. Counsel's missteps might inadvertently create bad law in the developing area of proportionality.

By enlisting the services of a more knowledgeable lawyer who has credibility in the field of discovery (including among adversaries and judges) and can help craft practical arguments, counsel can help to shape the law in a fair and reasoned way.

The views expressed in this article are those of the author and not necessarily those of Milberg LLP or its clients.