

Professional Perspective

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Revisiting Proportionality Under Rule 26(b)(1)

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The 2015 amendment to [Rule 26\(b\)\(1\)](#) of the Federal Rules of Civil Procedure is about continuity. That's because the proportionality analysis under Rule 26(b)(1), since it became effective in 2015, has always been a reflection of legacy, not change. Accordingly, the "new" Rule 26(b)(1) mandates consideration of six proportionality factors and eliminates the "reasonably calculated" language that many civil litigators considered a tacit endorsement of overly broad, unduly burdensome, and oppressive discovery.

To the casual observer viewing this amendment in substantive and temporal isolation, the change might appear pioneering. But five of the six proportionality factors had been in existence, albeit under [Fed. R. Civ. P. 26\(b\)\(2\)\(C\)](#), for decades. And while the "relative access" factor was technically new in 2015, it was added "to provide explicit focus on considerations already implicit in ... Rule 26(b)(2)(C)(iii)." "New" was the fact that these factors had been elevated to the primetime of Rule 26(b)(1), thereby resolving any doubts about their rightful role in shaping the scope of discovery on a case-by-case basis.

Today, with several years of refocused proportionality analyses under our collective belt, we present several principles and practices that have been, and remain, critical to your client's chance of achieving proportionality in discovery, whether your client's name appears above or below the "v."

Each of these ideas enjoys long-standing support in the law, and their utility warrants our attention today more than ever before –particularly in light of challenges presented by discovery of electronically stored information (ESI). Though the concept of proportionality in civil discovery is decades-old, its application in every case will be unique. For this reason, each proportionality analysis under Rule 26(b)(1) will, by necessity, render everything old new again.

No Factor Takes Precedence

The importance or weight attributed to each proportionality factor depends on the facts and circumstances of each case, and the order in which the factors are listed is of no consequence.

Consider, for example, a scenario in which a requesting party demands information that requires the responding party, one with significant resources, to spend large sums collecting and producing information that will likely be of little benefit to the litigation.

Here, the "burden/benefit" factor, listed last, should rightly take precedence over the "parties' resources" factor, even if the responding party could reasonably cover the costs. In short, parties with significant resources will not necessarily be expected to absorb the costs of producing information, particularly if the information sought is of highly questionable utility.

Notably, this is not a new idea. Even before the 2015 amendments, when the "burden/benefit" factor took residence within the confines of Rule 26(b)(2)(C)(iii), that factor took precedence, even when a deep-pocketed requestor offered to cover the opposing party's production-related costs. Such was the case in *Bradfield v. Mid-Continent Casualty Co.*, No. 13-CV-222, [2014 BL 255570](#) (M.D. Fla. Sept. 15, 2014), a dispute alleging bad faith denial of insurance coverage. In that case, the defendant insurer moved for forensic examinations of the plaintiff attorney's computer, which had been corrupted by a power surge, to discover information related to mediation and settlement in the underlying action.

The court, which previously determined mediation and settlement information to be within the scope of discovery, held that the corrupted hard drive and server constituted a source from which relevant data would not be reasonably accessible. The court found that the insurer failed to demonstrate that value of the discovery would outweigh the burden, despite the defendant's offer to assume the cost, because the insurer could not "even articulate whether the information sought ha[d] any importance, much less to which issues."

Facts Collected Can Justify Reassessment

All proportionality factors are subject to reevaluation during discovery, as the litigators gain more information about the case and how the parties' systems actually work. The amount in controversy, for example, frequently changes, such as in cases where an amount alleged in pleadings is challenged or no specific amount is alleged. Costs associated with discovery will also frequently change as counsel learns more about their client's systems or as previously overlooked sources of responsive information are identified. A party's expertise or lack thereof is likely to play a significant role in this potential for cost fluctuation.

The court's role here is critical. When a judge is advising or directing the parties' focus, it is important to keep in mind that the focus will evolve over time and it will be necessary to adjust guidance accordingly. For instance, the key players and relevant sources of information to focus on will only be clear if the client has a firm grasp on the IT systems in use. Often this is not the case. It is not always prudent to rely solely on the parties to identify where early discovery should focus without some external guidance. As the parties learn more about their own systems, the focus of discovery efforts will shift.

A particularly egregious example of a party's failure to identify where discovery should focus, ultimately requiring significant external guidance, occurred in *Small v. University Medical Center of Southern Nevada*, No. 13-00298, [2014 BL 228669](#) (D. Nev. Aug. 18, 2014). In this class action, plaintiffs alleged that the medical center systematically deprived its employees of appropriate wages and overtime compensation.

After more than a year of prolonged and grossly inadequate ESI production by the defendant, it was clear the medical center did not have a grasp of what IT systems were likely to contain responsive ESI. It became necessary to appoint a special master to investigate and guide the e-discovery process. The special master's investigation revealed that several sources of responsive ESI had not been identified and that responsive ESI had been deleted. Due to the defendant's lack of candor and bad faith conduct in the proceedings, the costs and time spent in discovery turned out to be far beyond what they should have been. As a result, the special master recommended the imposition of sanctions.

Communication & Cooperation

Attorneys should always consult with their clients at the outset of a case to prepare a discovery strategy. That discovery strategy will require early communication and cooperation with opposing counsel.

When attorneys talk about cooperation, the conversation is generally about trying to get along with the other side and limit the gamesmanship. While these remain important considerations, communication and cooperation in the context of discovery and e-discovery are vital to the integrity and efficiency of the entire case. Accordingly, state bar associations have added e-discovery proficiency as an ethical obligation.

The State Bar of California, for example, issued an [advisory opinion](#) in 2015, stating that it is an attorney's ethical duty to be, become, or hire someone who is informed on the systems and processes at play in e-discovery. Open communication and cooperation implicate more than just strategy, as staying informed on e-discovery from the beginning of a case is now part of a lawyer's ethical duty. Failure to cooperate is no longer a viable option.

Rather than relying on a [Fed. R. Civ. P. 30\(b\)\(6\)](#) witness, who may not even work for the company, as the primary source of information regarding operation and maintenance of company IT, involving internal employees with firsthand knowledge can be of great value. This will remove degrees of separation between counsel, the court, and the parties, which will enhance transparency and efficiency in the discovery process. Moreover, it will prepare you to be in the best position to offer specific, fact-based information in addressing the proportionality factors when (not if) the need arises.

First Mariner Bank v. The Resolution Law Group, P.C., No. 12 Civ. 1133, [2014 BL 111622](#) (D. Md. Apr. 22, 2014), an unfair trade practices case, shows how an inadequate 30(b)(6) expert can seriously damage a party's credibility and compliance in discovery. The defendants' corporate designee could not answer questions about whether the defendant had a document retention policy, what business records it kept, where it kept them or what client files it maintained, and invoked the Fifth Amendment approximately 40 times in response to questions about the defendants' financial dealings.

Weighing this lack of candor strongly against defendant in light of all applicable factors, the magistrate judge concluded that the "facts of this case speak so clearly to Defendants' egregious misconduct that judgment by default as to all counts of the amended complaint is both necessary to uphold the integrity of the judicial process and squarely within the Court's discretion," leaving only a hearing for the determination of damages.

Cooperation and communication in discovery also can save money. In *Western Convenience Stores, Inc. v. Suncor Energy (USA), Inc.*, 11-CV-01611, [2014 WL 1257762](#) (D. Colo. Mar. 27, 2014), the judge chastised the parties for incurring unnecessary fees and costs throughout discovery noting that a “cooperative attitude” would have reduced the spend. “Rather than considering how and where their interests might align, Dillion and Western chose to raise and then recycle arguments that did not materially advance the litigation.”

Generalizations Lead to Bad Outcomes

A well-tested way to lose your next proportionality dispute is to rely upon unsupported statements, speculation, or boilerplate objections. After all, “Rule 26 requires ‘a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” So whether you are attempting to prove or disprove proportionality, specificity is critical.

For example, it is no longer enough to simply assert that a particular set of discovery will impose unreasonable costs on your client without providing supporting evidence. In *Ashmore v. Allied Energy, Inc.*, No. 8:14-CV-00227-JMC, [2016 BL 18648](#) (D.S.C. Jan. 25, 2016), the defendant argued that it should not be forced to spend \$400,000 to produce responsive documents and that such an expenditure is unreasonable in comparison to the value of the plaintiff's claim (approximately \$250,000). The court denied the requested relief because the defendant provided no documentation to justify the alleged cost of production, to support an alternate form of production, or to detail its ability to pay.

Similarly, in *Cochran v. Caldera Medical, Inc.*, Civ. No. 12-5109, [2014 BL 111378](#) (E.D. Pa. Apr. 22, 2014), a medical products liability action, the defendant moved to compel the plaintiff to share discovery costs, citing its limited financial resources. The court denied the motion, finding that the defendant failed to demonstrate that the requested discovery was not reasonably accessible or that the burdens of producing the requested discovery outweighed the benefits.

But the need for specificity applies to all parties, including those seeking to compel discovery. In *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), [2016 BL 380969](#) (S.D.N.Y. Nov. 16, 2016), an antitrust case in which the plaintiffs alleged manipulation of a benchmark interest rate, the plaintiffs relied on a “common sense” argument in seeking to compel the production of documents related to regulatory agency investigations.

Citing differences between the case at bar and the regulatory investigations at issue, as well as the plaintiffs’ “general contention” that relevant information would likely be found in the requested documents, the court denied the motion, saying that Rule 26 standards called for closer scrutiny than simply relying on a “common sense notion” that “[c]ommunications with Regulators investigating manipulation of ISDAfix rates” necessarily “‘bear on’ a civil case about manipulation of ISDAfix rates.”

Be Prepared to Address Relevancy and Proportionality

When one party moves to compel discovery from an adversary, it is the requesting party's burden first to establish that the discovery at issue is relevant and sufficiently targeted; it is then the resisting party's burden to demonstrate a lack of relevance or proportionality. *Wahab v. N.J. Dep't of Env't Prot.*, No. 12-6613 (BRM), [2017 WL 4912617](#), at *4 (D.N.J. Oct. 30, 2017). But the division of labor in proportionality disputes may not be so cleanly segregated. In fact, a court may very well call upon the requesting party to offer arguments and evidence addressing some or all of the proportionality factors. *McKinney/Pearl Rest. Partners, L.P v. Metro. Life Ins.*, [322 F.R.D. 235](#) (N.D. Tex. 2016). Treat this as an opportunity. If you seize it, your client just might get the discovery they seek. See *State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC*, [255 F. Supp. 3d 700, 708](#) (E.D. Mich. 2017).

The zealous advocate should be prepared to offer fact-based proportionality arguments, whether the attorney represents the requesting or the resisting party. All sides should have analyzed proportionality on multiple occasions by the time a motion to compel or motion for a protective order ever reaches the court. Counsel for the propounding and responding parties should have engaged in collaborative communications with their respective clients, as well as with each other, in formulating a discovery plan pursuant to [Fed. R. Civ. P. 26\(f\)](#).

Counsel should have communicated pursuant to [Fed. R. Civ. P. 37](#) in a good faith attempt to resolve the instant discovery dispute without court involvement. And Rule 26(b)(1) "imposes a collective burden on 'the parties and the court ... to consider the proportionality of all discovery....'" *Caballero v. Bodega Latina Corp.*, No. 217CV00236JADVCF, [2017 BL 256071](#) (D. Nev. July 25, 2017). Accordingly, all sides of the dispute will have had multiple opportunities to develop and revise fact-based justifications in support of their proportionality positions.

Conclusion

The 2015 amendment to Rule 26(b)(1) was not intended to announce or impose a new scope of civil discovery in our federal courts; it was intended to refocus the commitment to the old idea of proportionality in civil discovery. In every federal civil case employing discovery, you should, from the earliest stage possible, consciously and continuously evaluate proportionality so that discovery efforts reasonably meet the needs of the case.

Communicate with your client. Communicate with opposing counsel. Hire consultants if you do not understand the technology. Be sure that your discovery and your proportionality assessments remain appropriately targeted and thorough so that you are prepared to win on relevance and proportionality.

If you do these things, your clients will likely win more proportionality disputes than they lose. That never gets old.