The Next Generation: Upgrading Proportionality for a New Paradigm

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SOMETIMES, it takes a while for an idea to catch on, even a really good one. The first versions of the automobile ran on steam and then electricity, and it took a long time for inventors to determine that gasoline was a superior fuel.[1] Then things really took off. Similarly, the lightbulb wasn't always the safe, bright, long-lasting light source we know today; it took a lot of tweaking to get things just right.[2]

Like the automobile and the lightbulb, the principle of proportionality is a really good idea. But, also like the automobile and the lightbulb, it's been slow to catch on and has required some changes along its way. The proposed amendments to the Federal Rules of Civil Procedure seek to make those last few adjustments that will finally encourage the widespread applica-

[1] Smithsonian Inst., *Early Cars: Fact Sheet for Children,* SI.EDU (Apr. 2001), available at http://www.si.edu/encyclopedia_si/nmah/earlycars.htm (All websites last accessed August 25, 2015).

[2] U.S. Dept. of Energy, *The History of the Light Bulb*, ENERGY.GOV (Nov. 22, 2013), available at http://energy.gov/articles/history-light-bulb.

tion of proportionality in discovery. If everything goes as planned, the future of discovery is bright.

The proposals come none too soon. In recent years, the problems of discovery have reached a critical tipping point and contribute greatly to the oft-repeated sentiment that "[o]ur discovery system is broken"[3] and that our civil justice system is in "serious need of repair."[4] These problems find their source in a diversity of circumstances, but are perhaps most affected by the modern rise of technology and the resulting explosion in the volume and variety of electronic information in the world today. A recent study of the "digital universe" reports that "[l]ike the physical universe, the digital universe is large – by 2020 containing nearly as many digital bits as there are stars in the universe. It is **doubling in size every two years**, and by 2020 the digital universe – the data we create and copy annually – will reach 44 zettabytes, or 44 trillion gigabytes."[5] The effects of this dramatic information growth are increasingly felt by parties, counsel, and courts alike and underlie the inevitable conclusion that modern discovery is different and that traditional notions no longer apply.

Despite its inevitability, there is no denying that "the process of change . . . is tortuous and contentious"[6] and that the effort to shift the discovery paradigm will therefore be substantial. There is good news, however; much of the work has been completed already. Indeed, the principle of proportionality—arguably present in the rules since their development—has been re-designed and improved over many years. Unfortunately, the practical application of the principle of proportionality has continuously met with strong resistance where traditional notions of broad and liberal discovery remain entrenched in the jurisprudence surrounding questions related to scope. Accordingly, the United States Judicial Conference has once again undertaken to reincorporate proportionality into the design of the Federal Rules.

This article will explain the principle of proportionality and its purpose, discuss the changes in the proposed new design and their intended effects, and provide some advice on how to put the principle to use.

I. A Brief History

Although relevance is widely recognized as the keystone of discovery, the principle of proportionality has long existed in the rules as a restraint to overbreadth, abuse, and misuse. Even the original rules drafters recognized the need for limitations on discovery and, pursuant to Rule 30(b), for example, allowed a court to dictate limitations on depositions "to protect [a] party or witness from annoyance, embarrassment or

[3] Am. Coll. of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and IAALS 9 (2009) available at http://iaals.du.edu/rule-one/publications/final-report-joint-project-actl-task-force-discovery-and-iaals.

[4] *Id.* at 2.

[5] EMC^2 Digital Universe with Research & Analysis by IDC, *The Digital Universe of Opportunities: Rich Data and the Increasing Value of the Internet of Things*, Executive Summary (2014) [hereinafter *The Digital Universe of Opportunities*] available at http://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm.

[6] Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

oppression." Per the original Committee Note, such limitations were available in recognition of the need for "a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26."[7]

In subsequent years, further limitations to discovery were adopted and the principle of proportionality, although never explicitly named, became an established component of the discovery analysis. In 1983, for example, several of the now-familiar factors of the proportionality analysis were adopted for the first time with the intention of guarding 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*."[8] Rule 26(g)'s signing/certification requirement was also adopted in 1983, imposing an "affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37"[9] and obliging "each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."[10] In 1993, additional proportionality factors were adopted "to enable the court to keep tighter rein on the extent of discovery"[11] recognizing that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay and oppression."[12]

In 2000, in the face of persistent dissatisfaction with the discovery process and growing complaints regarding its expense, the committee turned its attention to the possibility of narrowing the scope of discovery—a solution first proposed (and seriously considered) more than 20 years prior. The resulting amendments created the current discovery model, in which the presumptive scope of discovery is limited to information relevant to any party's claims or defense but may be expanded to the subject matter involved in the action upon a showing of good cause. A cross-reference was also added to the rule directing that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii) [current Rule 26(b)(2)(C)]"—that is to say, to standards of proportionality.

From these examples, the point is clear: proportionality is not new, and expansive discovery is not inevitable and has never been absolute.

II. The Persistence of Tradition

Despite repeated attempts to rein in the breadth of discovery, the traditional notion of broad and liberal discovery perseveres. Six years after the scope of discovery was presumptively narrowed absent a showing of good cause, a court observed that "[t]here seems to be a general consensus that the Amendments to Rule 26(b) 'do not dramatically alter the scope of discov-

[7] Fed. R. Civ. P. 30(b) advisory committee's note to 1937 amendment.

[8] Fed. R. Civ. P. 26 advisory committee's note to 1983 amendment (emphasis added).

[9] *Id.*

[10] *Id.*

[11] Fed. R. Civ. P. 26 advisory committee's note to 1993 amendment.

[12] *Id.*

ery'"[13] and that "[m]ost courts which have addressed the issue find that the Amendments to Rule 26 still contemplate liberal discovery, and that relevancy under Rule 26 is extremely broad."[14]

More recent expositions of the standards of discovery reveal the persistence of this traditional interpretation. Even in 2015, when the ills of over-discovery are well known to the courts and counsel, if not the parties themselves, pronouncements regarding the broad and liberal nature of discovery remain common. Recently, a court in the Northern District of Iowa reasoned that "[t]he Federal Rules of Civil Procedure authorize broad discovery," that "Discovery Rules are to be broadly and liberally construed in order to fulfill discovery's purposes of providing both parties with 'information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement'" and that "[d]iscovery requests are typically deemed relevant if there is any possibility that the information sought is relevant to any issue in the case."[15]

Even in cases in which courts acknowledge and apply limitations on the scope of discovery, they are often accompanied by a statement that the scope of discovery is nonetheless subject to broad interpretation,[16] fueling the general (mis)understanding that proportionality is a reactionary analysis in response to claims of overbreadth, rather than a fundamental consideration of discovery from the outset. Opposition to the new amendments further illustrates ongoing resistance to the shifting discovery paradigm and the entrenchment of the relevance-only analysis with regard to questions of scope.

III. The Tipping Point

The historical failure of proportionality to address the problems of discovery begs an important question: Why will it work now? The answer is that it must.

The effects of the information explosion on litigation have been dramatic. A recent letter from the Microsoft Corporation to the Court Rules and Procedures Committee in Washington State, which was considering proposed amendments to the state rules of procedure, illustrates these effects. In that letter, Microsoft revealed that between 2011 and 2013, the amount of information preserved in an average case grew from about 787 GB of data to a staggering 1,355 GB (approximately 59,285,000

[13] EEOC v. Caesars Entm't, Inc., 237 F.R.D. 428, 431 (D. Nev. 2006) (citing World Wrestling Fed'n Entm't, Inc. v. William Morris Agency, Inc. 204 F.R.D. 263, 265 n.1 (S.D.N.Y. 2011)).

[14] *Id.*

[15] Kampfe v. PetSmart, Inc., 304 F.R.D. 554, 557 (N.D. Iowa 2015) (citations omitted).

[16] *See, e.g., In re* Toyota Motor Corp. Secs. Litig., No. CV 10-922 DSF (AJWx), 2012 WL 3791716 (C.D. Cal. Mar. 12, 2012) (acknowledging that "courts should limit discovery of relevant material only if the 'burden or expense of the proposed discovery outweighs its likely benefit'" but also instructing that "'[w]ith respect to issues of relevancy of discovery, discovery rules are to be accorded a broad and liberal treatment,'" that "[d]iscovery requests are 'relevant if there is any possibility that the information sought is relevant to any issue in the case and should ordinarily be allowed, unless it is clear that the information sought can have no possible bearing on the subject matter of the action,'" and that "for purposes of discovery, relevancy is to be interpreted very broadly." (citations omitted)).

pages).[17] As a result, Microsoft reported that between 30%–50% of its out-of-pocket litigation costs are attributable to the discovery process.[18] Unfortunately, this significant investment in discovery does not reap commensurate returns. Microsoft has also reported that of the more than 59,000,000 pages preserved in an average case in 2013, only about 87,500 pages were actually produced and has estimated that a mere 88 pages were "used in evidence to resolve the merits of a particular case."[19]

The case law also documents the growing volumes of information subject to modern discovery. In In re *Biomet M2a Magnum Hip Implant Products Liability Litigation*,[20] the court sought to settle a discovery dispute over the adequacy of Biomet's discovery process (including reliance on predictive coding) where Biomet "ha[d] produced 2.5 million documents to plaintiffs in this docket's constituent cases, and the Plaintiffs Steering Committee believe[d] production should run something closer to 10 million documents."[21] Notably, 19.5 million documents were originally collected. In another case, a party sought a protective order to limit its discovery obligations and revealed that it was preserving "over 2,500 email back-up tapes, over 56,000 network share back-up tapes, and vast portions of SPI's active network share drives, consisting of about 5 terabytes (TB) of data or roughly 500,000 individual folders."[22] In one case dating from 2009, the court addressed Defendants' motion for sanctions and, in the course of its discussion, noted the extensive discovery that had been undertaken in the case, including "Plaintiff's production of a collection of databases" totaling two terabytes, and "Defendants' production of their Data Warehouse" containing "over ten terabytes of data."[23] In that case, the court further acknowledged that discovery had "already cost each party millions of dollars," including Defendants' expenditure of "approximately $100,000 per custodian on document review and production alone . . . ."[24]

These numbers though once shocking are no longer surprising. Recall the prediction that opened this article: "by 2020 the digital universe – the data we create and copy annually – will reach 44 zettabytes, or 44 trillion gigabytes."[25] It is reasonable to assume that the volume of information subject to discovery in litigation will expand at the same breakneck rate. Failure to actcould render our already "broken" discovery system irreparable within a decade.

[17] Letter from Jonathan M. Palmer, Assistant General Counsel, Microsoft Corporation, to Washington State Bar Association Court Rules & Procedures Committee, ESI Subcommittee, c/o Endel Kolde (Apr. 27, 2015) (copy on file with author).

[18] *Id.*

[19] *Id.*

[20] No. 3:12-MD-2391, 2013 WL 1729682, at *1 (N.D. Ind. Apr. 18, 2013).

[21] *Id.*

[22] United States *ex rel.* King v. Solvay S.A., No. H-06-2662, 2013 WL 820498, at * 1 (S.D. Tex. Mar. 5, 2013).

[23] Oracle USA, Inc. v. SAP AG, 264 F.R.D. 541, 542-543 (N.D. Cal. 2009).

[24] *Id.* at 543.

[25] *The Digital Universe of Opportunities*, *supra* note 5.

IV. Proportionality: Federal Discovery's Critical System Upgrade v.2015

Long-standing resistance to proportional discovery and the impact of the rapid expansion of the "digital universe" on electronic discovery are the two primary causes of our "broken" discovery system. Because only one of these causes is likely to change, proportionality must finally be embraced and applied.

The first, and most important, step to successfully embracing the principle of proportionality is to understand it. The principle of proportionality is currently embodied in several rules, but is specifically laid out in current Rule 26(b)(2)(C). In particular, Rule 26(b)(2)(C)(iii) requires the court to limit discovery when "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." These factors, with notable revisions, will be found in Rule 26(b)(1) after December 1, 2015.

A wealth of court opinions further define the bounds of proportionality, and the opinion of Magistrate Judge Paul Grewal in the recent patent litigation between Apple and Samsung Electronics illustrates well the work performed by courts to define proportionality. Magistrate Judge Grewal opined that while granting Defendants' motion to compel production of further financial information "would not violate any established discovery principles," there was a persuasive reason to nonetheless deny the defendants' request. Specifically, he reasoned:

> [T]he court is required to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit." This is the essence of proportionality—an all-to-often [sic] ignored discovery principle. Because the parties have already submitted their expert damages reports, the financial documents would be of limited value to Samsung at this point. Although counsel was not able to shed light on exactly what was done, Samsung's experts were clearly somehow able to apportion the worldwide, product line inclusive data to estimate U.S. and product-specific damages. *It seems, well, senseless to require Apple to go to great lengths to produce data that Samsung is able to do without.* This the court will not do.[26]

Broadly stated, the underlying premise of proportionality requires that additional discovery is "worth" the additional effort and resources to be expended in light of the circumstances in an individual case. Importantly, the "worth" of discovery in a given case is not and should not be determined based solely on monetary value.

A. The 2015 Amendments[27]

The new amendments to the Federal Rules of Civil Procedure encourage pro-

[26] Apple Inc. v. Samsung Elecs. Co. Ltd., No. 12-CV-0630-LHK (PSG), 2013 WL 4426512, at *3 (N.D. Cal. Aug. 14, 2013).

[27] Citations to the proposed amendments and their Committee Notes are taken from the Memorandum from Judge John D. Bates, Secretary of the Judicial Conference of the United States, to The Chief Justice of the United States and Associate Justices of the United States (Sept. 26, 2014), which was attached to the Letters from Chief Justice John G. Roberts, Chief Justice of the Supreme Court

portionality in discovery in a number of ways. Rule 26(b)(1) is the primary focus of many of these amendments, but a small but important amendment to Rule 1 illustrates plainly the intentions of the Advisory Committee to encourage more thoughtful and proportional discovery.

Revised Rule 1 makes clear the obligation of the parties and the courts to uphold the purpose of the rules:

> **Rule 1. Scope and Purpose**
>
> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.[28]

As the Committee Note explains, "discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay"[29] and "[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and *proportional* use of procedure."[30] Despite the emphasis on the parties' roles in securing justice, the amendment "does not create a new or independent source of sanctions."[31]

In Rule 26(b)(1), the Advisory Committee has proposed to explicitly invoke the principle of proportionality for the first time to make clear that **both** relevance and proportionality inform determinations related to the proper scope of discovery. Rule 26(b)(1) would provide that:

> 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 and proportional to the needs of the case, considering the importance 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 the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[32]

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of the United States to John A. Boehner, Speaker of the United States House of Representatives & Joseph R. Biden, Jr., President of the United States Senate (Apr. 29, 2015) [hereinafter "Transmittal to Congress"] transmitting the order approving amendments to Federal Rules of Civil Procedure and providing the proposed language of the rules and their Committee Notes for Congressional approval. The page numbers cited are based on the internal pagination of the language of the proposed amendments provided with that Memorandum, and begin (in the Transmittal to Congress) on unnumbered page 45. The Transmittal to Congress is available at: http://www.uscourts.gov/rules-policies/pending-rules-amendments. For further extensive discussion of the proposed amendments and the intent of the Advisory Committee, *see* Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 82 DEF. COUNS. J. 377 (2015).

[28] Transmittal to Congress, Proposed Amendments to the Federal Rules of Civil Procedure at 1.

[29] *Id.*

[30] *Id.* at 1-2 (emphasis added).

[31] *Id.* at 2, proposed Rule 1 Committee Note.

[32] *Id.* at 10-11 (emphasis added).

Under the proposed Rule, parties may answer arguments relying on broad interpretations of relevance to justify expansive discovery with *explicit* invocations of proportionality, as expressed directly in Rule 26(b)(1) addressing the scope of discovery in general. While this and other amendments to Rule 26(b)(1) do not "change the existing responsibilities of the court and the parties to consider proportionality,"[33] the rhetorical and persuasive power of the amendment should not be underestimated. The days of struggling to establish the force of an unnamed principle buried deep in the rules are over.

To further clarify the importance of proportionality in discovery from the outset, the Advisory Committee deletes the current cross-reference to Rule 26(b)(2)(C) and returns the proportionality factors currently present in Rule 26(b)(2)(C)(iii), with some revisions, to Rule 26(b)(1). The Advisory Committee explained that its "purpose in returning the proportionality factors to Rule 26(b)(1) is to *make them an explicit component of the scope of discovery,* requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes."[34]

The proportionality factors would be slightly revised—or redesigned—from their current state. In response to public comment, the Advisory Committee reverses the order of the first two factors to refer first to "the importance of the issues at stake" and then to "the amount in controversy." "This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern."[35] Also in response to public comment, the Advisory Committee adds a new factor: "the parties' relative access to relevant information." This factor acknowledges that some cases involve an unequal distribution of potential evidence sometimes called "information asymmetry." Regarding the allocation of costs in such a situation, however, the proposed note makes clear that it is generally proper in such cases for the burden of discovery to lie "heavier on the party who has more information."[36]

The proportionality factors should not be understood as an effort to equalize the discovery burdens among parties, but rather as a means to ensure that the burden of discovery on any particular party is appropriate in light of the circumstances of the case. That said, an amendment to Rule 26(c)(1)(B) would directly acknowledge the ability of the court to allocate discovery expenses among the parties pursuant to a protective order intended to "protect a party or person from annoyance, embarrassment, oppres-

[33] *Id.* at 19, proposed Rule 26 Committee Note.

[34] The Committee on Rules of Practice and Procedure, Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Appendix B, at B-8 (Sept. 2014) (emphasis added) [hereinafter Report of the Committee], available at http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014. *See also* Allman, *supra* note 27, at 388.

[35] *Id.*

[36] Transmittal to Congress, Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 27, at 21.

sion, or undue burden or expense . . .”[37] upon a showing of good cause.[38]

Many commentators have speculated about the impact of moving the proportionality factors back to their original location in Rule 26(b)(1). One concern is that the move will impose new burdens upon requesting parties to establish proactively the proportionality of their requests or to encourage boilerplate objections that the requested discovery is not proportional. This concern is not justified.

In an effort to directly address such concerns, the Committee Note contains the following instruction:

> Restoring the proportionality calculation to Rule 26(b)(1) 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.
>
> Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.[39]

Although fears of shifting burdens are misplaced, parties should start thinking about how the proposed amendments may affect their litigation strategies and obligations.

In addition to speculation about the potential overarching effects of returning the proportionality factors to Rule 26(b)(1), commenters have expressed concern about the potential burdens imposed by individual factors. In particular, courts and parties may rely upon the factors addressing the burden of discovery and parties' relative access to relevant information to justify invasive investigation of a party's information systems on the grounds that the court could not otherwise properly assess proportionality. While such invasive investigations are unlikely, courts considering proportionality may indeed require disclosure of details surrounding any alleged burden of discovery from a particular information source. However, numerous opinions show that this disclosure is happening under the current rules.[40]

[37] FED. R. CIV. P. 26(c)(1).

[38] Transmittal to Congress, Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 27, at 14.

[39] Transmittal to Congress, Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 27, at 19.

[40] *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Warren Chiropractic & Rehab Clinic, P.C., No. 4:14-CV-11521, 2015 WL 4094115, at *4 (E.D. Mich. July 7, 2015) (noting Defendants' failure to support arguments of burden, including failure to provide information regarding the "approximate cost of production" or why it would take such a long time to identify relevant information and concluding that "[s]uch conclusory and unsupported allegations are insufficient to warrant precluding a clearly important and relevant request." (citation omitted)); Exec. Mgmt. Servs., Inc. v. Fifth Third Bank, No. 1:13-cv-00583-WTL-MJD, 2014 WL 5529895, at *7 (S.D. Ind. Nov. 3, 2014) (rejecting Defendant's claims of burden based on unspecific assertions and noting that Defendant's contentions would have had more force "if it had provided an estimate of the cost or hours involved in searching, compiling, and producing the requested information." (citations omitted)); Ross v. Abercrombie & Fitch Co., Nos. 2:05–cv–0819, 2:05–cv–0848, 2:05–

Parties should prepare in advance to reduce the potential burdens of such a disclosure. Parties may consider taking proactive steps outside of the litigation context to investigate the potential burdens associated with the discovery of their information systems and be prepared to present the results of that investigation when relevant to the consideration of proportionality in a particular case. Parties must also keep in mind that information regarding the "existence, description, nature, custody, condition, and location of any documents or other tangible things"[41] is properly subject to discovery. Although the proposed amendments would delete this language from Rule 26(b)(1), the Committee Note makes clear that "[t]he discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case."[42] Speculation that the deletion may preclude "discovery on discovery" is unfounded. Notably, however, the principle of proportionality itself may provide a response to overzealous demands for disclosure, to the extent the principle is applicable to all aspects of discovery. A party may argue that the disclosure demanded in the name of proportionality itself violates the principle.

Regarding the newly proposed factor focusing on "the parties' relative access to relevant information," the Advisory Committee's choice of language, *i.e.*, "*relative* access," makes clear that the proper analysis is a comparative one and should focus on both/all parties' access to information more generally and not on any particular party's access to information specifically. In most cases involving an asymmetric distribution of information—the specific scenario this factor is intended to address—the parties' relative access to relevant information will be easy to discern. In a wrongful termination case, for example, the employer will be in possession of much of the relevant evidence in the case. The burden of requiring one party to lay bare the details of all available discovery repositories in an effort to discern both/all parties' relative access is unlikely to be justified. Again, such overly zealous demands for disclosure justified by the need to establish proportionality may themselves become subject to the principle.

While one party or another will ultimately bear the responsibility of establishing the force of an individual factor—or several—it is unlikely that any party will be required (or able) to establish the overall presence or lack of proportionality by itself. As acknowledged in the Committee Note to Rule 26(b)(1):

> A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination. A party claiming that a request is important to resolve the

cv–0879, 2:05–cv–0893, 2:05–cv–0913, 2:05–cv–0959, 2010 WL 1957802 at *3 (S.D. Ohio May 14, 2010) (noting party's failure to provide sufficient information in support of the alleged burden of additional searches, reasoning in part that "'[t]he party claiming that discovery is burdensome does have an obligation to make that claim with specificity" and concluding that "[w]ithout such a showing, the Court simply may not preclude discovery on the grounds that it would unduly burden the responding party.").

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

[42] Transmittal to Congress, Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 27, at 23.

> issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.[43]

Several of the factors are particularly susceptible to competing interpretations and are likely to require a presentation from both/all sides. The importance of the issues at stake in the action, for example, may be subject to disagreement between parties. Although the proposed Committee Note makes clear that "the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved,"[44] and that "[m]any other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values,"[45] that does not mean that the mere invocation of a public or constitutional interest will automatically justify expansive discovery. Both/all parties will weigh in on this factor, when appropriate. Likewise, the "amount in controversy" may be an issue in dispute, requiring the input of all sides.

The Advisory Committee has also proposed to narrow the scope of discovery definitively by eliminating discovery of information relevant to the subject matter involved in the action, even upon a showing of good cause. The Advisory Committee reached the conclusion that "the subject matter provision is virtually never used, and the proper focus of discovery is on the claims and defenses in the litigation."[46] The Committee Note explains that "[p]roportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense."[47]

In a related amendment aimed specifically at curtailing the traditionally expansive understanding of the proper scope of discovery, the Advisory Committee has proposed to rewrite Rule 26(b)(1)'s expression of the relationship between the scope of discovery and admissibility. Currently the rule states that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This language has been frequently, if inappropriately, relied upon to justify a broad scope of discovery. The Advisory Committee has proposed to replace that provision with the declaration that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." Thus, while the standard is unchanged, the language may no longer be relied upon to expand the scope of discovery beyond its appropriate boundaries.

While these amendments hold great promise, the history of the principle of proportionality teaches us that promise is

[43] *Id.* at 20.

[44] *Id.* at 22.

[45] *Id.*

[46] REPORT OF THE COMMITTEE, *supra* note 34, at B-9.

[47] Transmittal to Congress, Proposed Amendments to the Federal Rules of Civil Procedures, *supra* note 27, at 23.

not enough. To realize its benefits, parties, counsel, and the courts must take responsibility for ensuring proportionality in discovery by understanding and applying the principle.

B. Proportionality in Practice

A major component of the historical failure of courts to take proportionality into account rests upon the failure of parties to proactively employ and invoke the principle. Parties, counsel, and courts must dedicate themselves to putting the principle to use both with regard to their own discovery strategies and when responding to the discovery demands of opposing parties and counsel. The assessment of proportionality in discovery should not be merely a reactionary analysis. Instead, parties should incorporate this analysis into their own discovery considerations from the outset, much like relevance is today.

On this point, parties should consider the intersection between the preservation obligation and the principle of proportionality. The return of proportionality to Rule 26(b)(1) (and its specific invocation in the rules) clarifies the importance of the principle and its applicability in all phases. Parties' preservation decisions should take the principle into account. The key is reasonableness. Although not the primary focus of this article, the proposed amendments to the Federal Rules include a *completely rewritten* Rule 37(e) addressing the loss of information that "should have been preserved."[48] The newly drafted rule will, among other things, resolve the circuit split over the proper standard for imposing sanctions and provide specific instruction regarding when the most serious sanctions are appropriate. Returning to the question of proportionality, the proposed Committee Note addresses its application to preservation directly:

> Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.[49]

Parties must begin to consider the principle of proportionality, as defined by the proposed Rule 26(b)(1) factors, when contemplating the appropriate scope of their preservation obligation. Of course, caution is warranted in the unilateral application of proportionality in preservation, particularly concerning information that may be lost absent proactive preservation efforts. Decisions regarding the scope of preservation should be carefully

[48] *See* Allman, *supra* note 27, at 398.

[49] Transmittal to Congress, Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 27, at 41-42.

documented in anticipation of the need to establish that "reasonable steps" were taken to preserve potentially relevant evidence in case of a challenge or accusations of spoliation.

More generally, parties and counsel should invoke and discuss the applicability of the principle of proportionality in early conversations with opposing parties and counsel. Cooperation to establish an appropriate scope of discovery *by agreement* is the gold standard for ensuring proportional discovery in any case. That said, agreement with your opponent on matters of discovery is not always in the cards, and counsel must be prepared to invoke the principle before the court, if necessary, and to persuasively explain its applicability to the question at hand.

It would be impossible to opine on all the ways to achieve proportionality in discovery. Accordingly, it is important to let go of old habits, keep an open mind, and think outside the box. Compromises like sampling or phased discovery, for example, may be preferable to denying discovery from a particular repository altogether. Similarly, cost shifting may provide a reasonable means to address the discovery of information, the relevance and proportionality of which is disputed. Technology may also provide some degree of relief to the burdens and expense of discovery and should be utilized where appropriate. As indicated in the proposed Committee Note to Rule 26: "Computer-based methods of searching . . . continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available."[50]

While the methods for achieving proportionality are many and varied their success or failure in a given case is entirely dependent upon the parties and the court. As the old saying goes, "you can lead a horse to water, but you can't make it drink." Similarly, the Advisory Committee has provided the tools necessary for repairing our broken system, but it is up to us to use them.

V. Conclusion

The revised rules, including the new proportionality rules, will become effective on December 1, 2015. The changes to Rule 26 promise to finally restore the principle of proportionality to the position it should always have held as a check on over-burdensome discovery. However, history has taught us that changes to the Rules will not effectively check judicial decisions on their own. Parties must incorporate the principle of proportionality into their own discovery requests, and even their own business practices, to change the culture of discovery. And given the rapidly increasing flood of information subject to discovery, this change in culture cannot come too soon.

[50] *Id.* at 22.