

# From Rule Text to Reality

## ACHIEVING PROPORTIONALITY IN PRACTICE

By Lee H. Rosenthal and Steven S. Gensler

In November 2014, a year before the 2015 discovery amendments could become effective, the Duke Center for Judicial Studies started a project to provide guidance for judges and lawyers on ways to implement the amendments, to put flesh on the proportionality bones and to provide a practical and realistic framework to make proportionality work in practice. The result of those efforts, *Guidelines and Practices to Implement the 2015 Proportionality Amendments*, is published for the first time in this issue of *Judicature*. ▶



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“Unless judges actively manage the cases they preside over to keep discovery both within the defined scope and consistent with the parties’ right to get the information within that scope, these rule amendments are no more likely to succeed than the predecessors.

This publication coincides with the effective date of the rule changes and with efforts by many to provide the bench and bar with information about the rule changes, what they mean, and ways to implement them in individual cases.

The 2015 rule amendments mark a “new” chapter in the history of discovery practice. If the amended rules achieve their intended purposes, this chapter may come to be known for its emphasis on, and commitment to, proportionality. As of Dec. 1, 2015, Rule 26(b)(1) defines the scope of discovery as nonprivileged information that is relevant to the parties’ claims and defenses and “proportional to the needs of the case.” For the first time, the word “proportional” is in the rule text. The provisions on proportionality are moved to become part of the definition of permissible discovery, as opposed to limits on otherwise permissible discovery.

But as new chapters and rule changes go, these are hardly seismic shifts. The proportionality concept became part of the rules over 30 years ago, in 1983, when Rule 26(b) was amended to require judges to limit discovery to ensure that the benefits outweighed the costs and Rule 26(g) was added to require lawyers to certify that their discovery requests or objections were neither unreasonable nor unduly burdensome or expensive. Indeed, the Advisory Committee has taken pains to emphasize that it does not view the 2015 proportionality amendments as imposing any new duties or obligations.<sup>1</sup> Rather, the intended change is to elevate awareness and get lawyers, litigants, and judges to pay more attention to the duties they have had for over three decades.

And there lies the proverbial rub. Lawyers and judges have had proportionality obligations since 1983, but few lawyers or judges made proportionality a focus of discovery, and fewer still expressly invoked or applied the proportionality limits. Some academics and thoughtful judges have questioned whether proportionality is sufficiently defined or understood to achieve the stated goals.<sup>2</sup> As discovery has become e-discovery and even more expen-

sive, burdensome, and complex, the complaints have grown. The rule amendments require us to answer a nagging question. Why should these rule amendments, so modestly introduced, work when prior efforts to achieve discovery that is consistently both fair and reasonable — proportional — have failed?

### A SENSE OF URGENCY

One reason for optimism is that the proportionality amendments are expressly linked to existing and new case-management tools intended to promote and facilitate early, active judicial case management. The 2015 rule amendments recognize that changing the words used in the rules will accomplish nothing unless lawyers and judges effectively implement the changes. The 2015 rule amendments include an expanded menu of case-management tools to make it easier for lawyers and judges to tailor discovery to each case and to resolve discovery disputes efficiently and promptly, without full-scale motions and briefs. The Committee Notes emphasize the important link between the proportionality changes to the scope of discovery in Rule 26(b)(1) and the case-management provisions in Rules 16, 26(f), and 34.<sup>3</sup>

Another reason for optimism is a growing sense of urgency among lawyers and judges. In 1983, the bench and bar seemed to greet the proportionality amendments with a collective shrug and went about their business as usual. The years of public discussion and debate leading up to the 2015 amendments reflect a growing concern that our civil justice system needs to adjust or risk losing its ability to serve its vital purposes. At the same time, electronic discovery and increasing cost-consciousness by clients provide an incentive for lawyers to exchange the information each side needs without all the costs and burdens of discovery built on the “demand everything and object to everything” model.

Which brings us to the elephant in the courthouse. Proportionality begins with the parties and lawyers who apply and invoke it, but it ends with judges

who enforce it. Whether proportionality moves from rule text to reality depends in large part on judges. Judges who make clear to the parties that they must work toward proportionality. Judges who are willing and available to work with parties to achieve what the Advisory Committee has described as the goal of making proportionality an explicit part of discovery in all cases.<sup>4</sup> Judges who are willing and available to resolve discovery disputes quickly and efficiently when needed. Unless judges actively manage the cases they preside over to keep discovery both within the defined scope and consistent with the parties' right to get the information within that scope, these rule amendments are no more likely to succeed than the predecessors.

Trial judges, this is our chance to make a difference. It is also our chance to fail.

### MODEST INVESTMENT, GREAT DIVIDENDS

The good news is that lawyers and their clients are not alone in having strong incentives to work toward proportionality. Enforcing proportionality by engaging in active case management can make a trial judge's work easier and better. Requiring the lawyers to talk to each other, then to the court, about what the discovery in the case will involve allows the parties to reach agreement when they can, reducing the number of disputes or narrowing them. Requiring the lawyers to talk to each other about discovery planning also allows the parties to identify areas that are unclear or the subject of disagreement and to promptly bring these areas to the court for resolution. Good case management allows the judge to rule on disputed discovery issues fairly, efficiently, and promptly, sparing the judge the need to slog through lengthy motions to compel or for protection (often accompanied by even longer briefs and voluminous attachments) and writing opinions, often on issues that don't involve matters of jurisprudence as much as practical problems ill-suited to the motion-and-brief presentation.

Judges who engage in early, active discovery management often find that it

takes relatively little of their time and work. This modest investment pays the great dividend of saving the judge and the judge's clerks from spending much more time later solving problems that could have been avoided. And the work that is avoided tends to be the type that is tedious and slow, and that can often bring the case to a halt.

Active case management is not only vital to making discovery reasonable for each case, it also can be gratifying for the judge. It allows trial judges to be creative in working through what are usually practical problems to devise reasonable and fair solutions that keep the case on track, on time, and (for the parties) on budget.

It may be true that most do not think of case management as among the most satisfying or important parts of judging. Ask a trial judge why he or she chose to become a judge, and the judge is not likely to mention case management. But we are not talking about case management in the dismissive, belittling sense used by some academics and others to describe judges' lower selves (the higher selves being the more pure and exalted jurisprudential being). The interactive exchanges we have described are as important, as highly valued, and as demanding of judicial discretion and judgment as any work judges do.<sup>5</sup> And it is work that is unique to the trial judges. By the time a case gets to the appellate courts, case management is a lost opportunity. Case management is an important part of what sets the trial judges' work apart. No one else can do it. The more trial judges — an enormously talented and creative lot — work on these tasks, the closer we will all get to achieving proportionality in practice.

All of this provides reason for optimism. The 2015 amendments envision, and are being met by, prompt and energetic work by bench and bar to change litigation culture and make the rule changes a part of everyday practice. Self-interest, institutional interests, client interests, and a shared commitment to moving beyond aspiration and rule to reality may all converge to achieve proportionality.

This does not mean we should hang a banner declaring mission accomplished. History teaches us that hard work lies ahead to make these rule changes a benefit for our system, not for any particular type of litigant or case. The *Guidelines and Practices* are part of that work. They are the result of many months of discussion, experimentation, and refinement involving teams of lawyers on both sides of the "v.," practicing in a number of areas, working together to define and clarify and make concrete what proportionality looks like in particular cases and how to achieve it. With the many dedicated lawyers who worked on the *Guidelines and Practices*, the reporters will continue to listen and learn. We will monitor developments in the courts and hear from the judges and lawyers who apply the 2015 amendments and, we hope, the *Guidelines and Practices*, in their own cases. The *Guidelines and Practices* publication is intended to be a living document that changes and grows as we all discover new and better ways to achieve proportionality in discovery and help fulfill the goals of Rule 1.

### TO BETTER SERVE THE GOALS OF RULE 1

On Jan. 20, 1984, Prof. Arthur Miller stood before an audience of federal judges to explain the amendments that had taken effect on Dec. 1, 1983. As the Reporter for the Civil Rules Advisory Committee, he was uniquely suited to the task. He explained that the rulemakers were motivated by a belief that, in too many cases, litigation was conducted in a way that frustrated the goals of Rule 1. He emphasized that the discovery amendments were part of a larger package of amendments, designed to work together in an effort to better serve the goals of Rule 1. He explained that a major goal of the package of amendments in general — and the amendments to Rule 26(b) in particular — was to combat the problem of disproportionate discovery. And he concluded by stressing the critical role that judges would play, using their new case-management powers under amended Rule 16: ▶

There is an important interrelationship between the management philosophy of rule 16 and the anti-redundancy and anti-disproportionality policies of rule 26. The latter can be effective only if the judges educate themselves about their cases and attempt to manage them throughout the discovery process. The two rules must be utilized together.<sup>6</sup>

All of that could just have easily been said — and has been said — about the 2015 amendments. Is it *deja vu*, all over again?

It is hard to know why the bench and bar did not embrace proportionality in discovery in 1983. Perhaps the scheme was just a bit too different from what they were used to and how they had been trained. In a time long before email and smartphones, perhaps the consequences of persisting with “business as usual” were not sufficiently grave to fully spark the desired change. But that was decades ago. *The Guidelines and Practices* themselves show that many lawyers and judges are committed to working to make reasonableness — proportionality — in discovery real. There is good reason for optimism, and there is good work to do.

<sup>1</sup> See Fed. R. Civ. P. 26 advisory committee’s note (2015) (“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.”).

<sup>2</sup> See, e.g., John L. Carroll, *Proportionality In Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 461 (2010) (“Used improperly, the proportionality analysis can be at best a meaningless exercise and at worst a tool to deny civil litigants access to information to which they are entitled.”); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603-04 (2001) (arguing that proportionality limits are impractical because the trial judge is not in a good position to assess whether the desired information is worth the cost); *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (stating, in the preservation context, that a proportionality standard “may prove too amorphous” to provide meaningful guidance to parties).

<sup>3</sup> See Fed. R. Civ. P. 26 advisory committee’s note (2015) (“The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management.”); *id.* (explaining that the new Rule 34 mechanism allowing for pre-Rule 26(f) exchange of document requests “is designed to

facilitate focused discussion during the Rule 26(f) conference”).

<sup>4</sup> See Fed. R. Civ. P. 26 advisory committee’s note (2015) (“The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”)

<sup>5</sup> Lawyers certainly view active judicial case management as an important and highly valuable part of what judges do. When asked what would make the existing federal pretrial process work better, lawyers consistently singled out more and better judicial case management. See Steven S. Gensler & Lee H. Rosenthal, *Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process*, 18 LEWIS & CLARK L. REV. 643, 647-48 (2014) (discussing results of surveys prepared for the 2010 Duke Conference on Civil Litigation); Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation 10, available at <http://www.uscourts.gov/file/reporttothechiefjusticepdf> (“Pleas for universalized and invigorated case management achieved strong consensus at the Conference.”).

<sup>6</sup> ARTHUR MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 35-36 (Federal Judicial Center 1984).

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