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## Rule 26(B)(1) Proportionality Amendment: Three Outcomes Will Be Contrary to the Advisory Committee's Stated Intent, including Who Bears the Burden of Proving Proportionality

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**RULE 26(B)(1) PROPORTIONALITY AMENDMENT:  
THREE OUTCOMES WILL BE CONTRARY TO THE  
ADVISORY COMMITTEE'S STATED INTENT, INCLUDING  
WHO BEARS THE BURDEN OF PROVING  
PROPORTIONALITY**

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I. INTRODUCTION

Discovery has always been expensive, but with the proliferation of the digital age, discovery is costlier than ever. Not surprisingly, courts struggle with the extent to which documents and electronically stored information are discoverable. To that end, upcoming amendments to the Federal Rules of Civil Procedure expressly define discoverable information as that which is “relevant to any party’s claim or defense *and proportional* to the needs of the case.”<sup>1</sup> To determine whether a matter is proportional, Rule 26(b)(1) includes a list of the following factors to consider: 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.<sup>2</sup>

A. *The Advisory Committee Notes to the Proportionality Amendment*

In the report explaining the 2015 amendments, the Advisory Committee addressed three potential concerns with the proposed proportionality amendment:<sup>3</sup> 1) that the burden of proving proportionality will fall on the

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1. FED. R. CIV. P. 26(b)(1) (emphasis added).

2. *Id.* These factors may sound familiar, as they were previously set forth in Rule 26(b)(2)(C)(iii), although in a different order, and the “the parties’ relative access to relevant information” was added.

3. Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure 109

party seeking discovery; 2) that parties opposing discovery will have a new basis for refusing to provide discovery; and 3) that litigation costs will increase.<sup>4</sup> With respect to these three concerns, the Advisory Committee expressly stated: “None of these predicted outcomes is intended.”<sup>5</sup>

However, notwithstanding the advisory committee’s stated intent, the amended rules will in practice result in these outcomes: Requesting parties will bear the burden of proving proportionality; parties opposing discovery will lodge objections on the basis of proportionality; and litigation costs will increase as discovery about discovery becomes necessary. Thus, including proportionality in Rule 26(b)(1) will result in outcomes the Advisory Committee has expressly stated are *not* intended.

### B. Concerns About “Proportionality,” Particularly the Burden of Proof

After the proposed amendments were published as a package in August 2013, more than 2,300 written comments were received, and more than 120 witnesses appeared to address the Committee in public hearings held in Washington, D.C., Phoenix, and Dallas.<sup>6</sup> Many of the comments centered on the topic of proportionality,<sup>7</sup> including comments submitted by Judge Shira A. Scheindlin, distinguished jurist and scholar on electronic discovery.<sup>8</sup> Judge Scheindlin raised concerns that proportionality will invite producing parties to withhold information “based on a unilateral determination that the production of certain requested information is not proportional” and asked the committee to “clearly state in the rule or notes that the burden is

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(June 14, 2014) (included with the Supreme Court Transmittal Letter), available at <http://www.uscourts.gov/file/18022/download> (explaining the proposed amendments and requesting they be forwarded for consideration by the Judicial Conference, the Supreme Court, and Congress). Over the course of four years, the Advisory Committee on the Federal Rules of Civil Procedure developed, published, and refined the proposed amendments that are set to go into effect on December 1, 2015. The advisory notes and memoranda, along with the proposed amended rules, are included in the Supreme Court Transmittal Letter.

4. *Id.* at 116.

5. *Id.*

6. *Id.* at 111.

7. See Summary of Testimony and Comments, August, 2013, Civil Rules Published for Comment, at 61–68, available at [https://law.duke.edu/sites/default/files/centers/judicialstudies/iii\\_summary\\_public\\_comments.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/iii_summary_public_comments.pdf)

8. *Id.* at 61. Judge Shira A. Scheindlin, United States District Court for the Southern District of New York, has authored seminal decisions on important issues related to electronic discovery, including the line of influential opinions in *Zubulake*. See, e.g., *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Judge Scheindlin also has co-authored a casebook on electronic discovery. SHIRA A. SCHEINDLIN, DANIEL J. CAPRA & THE SEDONA CONFERENCE, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE (3d ed. 2015).

on the objecting party.”<sup>9</sup> As discussed below, the Advisory Committee did not do this.

## II. WHICH PARTY WILL BEAR THE BURDEN TO PROVE PROPORTIONALITY?

Discoverable evidence is now defined as relevant and proportional. With the addition of proportionality, an important issue arises regarding which party must prove that the requested evidence is, or is not, proportional to the needs of the case.

### A. *The Advisory Committee Does Not Explicitly State Who Bears the Burden*

While the advisory notes to amended Rule 26(b) attempt to address the burden-of-proof concern, the Advisory Committee stops short of declaring that the burden of proving proportionality rests with the objecting party. Instead, the committee notes recognize the concerns but simply state that the burden “does not change”:

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>10</sup>

But change from what? Defining discoverable evidence as proportional is new, so how does one determine the existing responsibilities of the parties when the rule itself has not yet existed? Granted, proportionality considerations have always impacted the discovery analysis, but the scope of discoverable evidence has never been explicitly defined as proportional, until now. It is difficult to ascertain the parties’ existing responsibilities under a rule that that was not in existence until the amendment.

### B. *What are the Parties’ Existing Responsibilities?*

#### i. Analogy: Relevance Objections?

To determine the “existing responsibilities” of the parties — who will bear the initial burden to prove proportionality — let us look to the existing responsibilities of the parties with the regard to proportionality’s equal counterpart: relevance. Indeed, the scope of discoverable evidence is now defined as relevant *and* proportional, so looking to the parties’ existing responsibilities when it comes to relevance may provide guidance on deter-

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9. Judge Scheindlin, Summary of Testimony and Comments, *supra* note 7, at 61.

10. FED. R. CIV. P. 26, advisory committee notes to 2015 amendments (emphasis added).

mining the parties' existing responsibilities when it comes to proportionality.

When a requesting party seeks documents and ESI under Rule 34 that the responding party believes are irrelevant, the producing party usually states a relevance objection in its Rule 34 responses. Notably, amended Rule 34(b)(2)(B) requires a responding party to "state *with specificity the grounds for objecting* to the request, including the reasons."<sup>11</sup> Thus, the objecting party must specifically state a relevance objection.

As a general rule, when the relevance of a request is not apparent on its face, it is the requesting party's burden to show the documents and ESI are relevant.<sup>12</sup> From a practical standpoint, after the producing party objects, and if the parties cannot resolve the relevance dispute after meeting and conferring,<sup>13</sup> the requesting party must file a motion to compel the discovery.<sup>14</sup> As such, the motion to compel becomes the vehicle by which requesting parties argue that evidence is relevant to the claims or defenses in the case and should, therefore, be produced.

Thus, the burden to prove relevance naturally rests with the requesting party — those are the existing responsibilities of the parties when relevance disputes arise. Similarly, the burden to prove proportionality will naturally rest with the requesting party.

## ii. Proportionality Objections

Like relevance disputes, when a requesting party seeks documents and ESI that the responding party believes are not proportional to the needs of the case, the producing party will state a proportionality objection in its Rule 34 responses. The advisory committee attempts to address the use of proportionality objections, stating: "Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."<sup>15</sup> Thus, the advisory committee warns against "boilerplate" objections.

11. FED. R. CIV. P. 34(b)(2)(B) (emphasis added). This provision adopts the language of Rule 33(b)(4), "eliminating any doubt that less specific objections might be suitable under Rule 34." FED. R. CIV. P. 34, advisory committee notes to 2015 amendments. The specificity of the objection ties to another new provision in Rule 34(b)(2)(C), which now requires objecting parties to state whether any responsive materials are being withheld on the basis of an objection. *Id.*

12. *Cardenas v. Dorel Juvenile Grp., Inc.*, 230 F.R.D. 611, 631 (D. Kan. 2005).

13. FED. R. CIV. P. 37(a)(1) ("[A] party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.")

14. Theoretically, the producing party could file a motion for protective order, but the incentive is to object, thereby placing the burden on the moving party.

15. FED. R. CIV. P. 26, advisory committee notes to 2015 amendments.

## iii. The No-Boilerplate-Objection Prohibition is Superfluous

The advisory committee instructs parties opposing discovery on the basis of proportionality to avoid boilerplate objections, but boilerplate objections should *always* be avoided. Indeed, boilerplate objections regarding relevance (and most other objections) are almost always disfavored. The committee's prohibition against boiler-plate objections is therefore superfluous — it merely restates a commonly understood distaste for boilerplate objections. But prohibiting boiler-plate objections does not impact which party must ultimately prove proportionality.

Moreover, the Advisory Committee's discussion of proportionality objections does nothing to address the concern that parties opposing discovery now have a new tool to oppose discovery. As long as a proportionality objection is specific and does not include boiler-plate language, the objecting party may use proportionality as a basis to oppose discovery. Parties opposing discovery *will* use proportionality as a basis for objecting to producing discovery — precisely the opposite of the stated intent of the Advisory Committee.

## iv. The Requesting Party Will Usually Bear the Burden of Proving Proportionality

From a litigation stand-point, an opposing party may object on the basis of proportionality — as long as the objection is specific and not boilerplate — but the opposing party is not required to make a showing that the disputed evidence is disproportionate to the needs of the case. This means the party opposing discovery need not initially bear expenses of interviewing IT personnel or collecting affidavits and declarations to establish the burdens and costs associated with producing the disputed discovery; rather, the objecting party need merely specifically state why the disputed discovery is not proportional.<sup>16</sup>

What is the requesting party to do? File a motion to compel production of the disputed discovery.<sup>17</sup>

Like relevance, if proportionality is not apparent on the face of a properly lodged objection, it is logical to conclude that the party *opposing the objec-*

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16. Practitioners should be is advised, however, to speak with the client's IT personnel and key witnesses before lodging a proportionality objection. Practitioners should understand at a basic level why the requested documents and data may be costly to produce to ensure the practitioner has a good faith basis for asserting the proportionality objection. However, at this stage, collection of evidence on the issue of proportionality would not yet be required.

17. Like relevance, after a party opposing discovery objects on the basis that the evidence sought is not proportional, and if the parties cannot resolve the dispute after conferring, the requesting party is left with the option of filing a motion to compel the discovery.

tion shoulders the burden to prove that the disputed evidence is proportional to the needs of the case. Indeed, the committee notes in essence codify the procedure by stating that the change is *not* intended to “place on the party *seeking* discovery the burden of addressing *all* proportionality considerations.”<sup>18</sup> Presumably, then, the party *seeking* discovery must address *some* of the proportionality considerations.<sup>19</sup> *This is a burden*, and the burden lies with the party seeking the discovery.<sup>20</sup>

The burden to show proportionality naturally rests with the party making the motion — the requesting party, which contradicts the Advisory Committee’s stated intent. If the committee *wanted* to place the burden of proving proportionality on the objecting party opposing discovery, it could have said so,<sup>21</sup> but it did not. The advisory committee does not state that the burden of proving proportionality is on the objecting party, as Judge Scheindlin requested.<sup>22</sup> Indeed, by requiring the requesting party to address at least some of the proportionality factors, the committee notes essentially codify that the burden of proof rests with the party who seeks the disputed discovery.

### C. The Duke Guidelines

The Duke Guidelines and Suggested Practices in Implementing the 2015 Discovery Amendments (“Duke Guidelines”)<sup>23</sup> attempt to address concerns about the proportionality burden being placed on the party seeking discovery, but the Duke Guidelines fall short of providing meaningful guidance on the issue:

Guideline 1: The Rule 26(b)(1) amendments do not alter the parties’ existing obligations or create new burdens.<sup>24</sup>

Guideline 4: The Rule 26(b)(1) amendments do not require a party seeking discovery to show in advance that the proposed discovery is proportional.<sup>25</sup>

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18. FED. R. CIV. P. 26, advisory committee notes to 2015 amendments (emphasis added).

19. Stating that the party need not address all of the proportionality considerations makes sense, given that the party seeking discovery likely has no information (yet) as to whether the expense of the proposed discovery outweighs its likely benefit.

20. See Judge Scheindlin, Summary of Testimony and Comments, *supra* note 7, at 61 (“Proportionality . . . will mean the requesting party must make a motion, at considerable expense.”).

21. For example, the Advisory Committee could have stated: “Restoring the proportionality calculation to Rule 26(b)(1) places the burden of proving proportionality on the party opposing the discovery.”

22. See Judge Scheindlin, Summary of Testimony and Comments, *supra* note 7, at 61

23. *Discovery Proportionality Guidelines and Practices*, 99 JUDICATURE, no. 3, Winter 2015, at 47-60. The Duke Guidelines were published by the Duke Law Center for Judicial Studies, whose membership comprises judges, practitioners, professors and government officials.

24. *Id.* at 51.

25. *Id.* at 54 (emphasis added).

Thus, Guideline 4 states that no advance showing of proportionality is required, but in advance of what? The comments to Guidelines 4 explain: “Unless specific questions about proportionality are raised, either by a party or by the court, there is no need for any showing of or about proportionality.”<sup>26</sup> Thus, the Guideline’s proposition that no advance showing of proportionality is required applies *only when no specific questions about proportionality are raised by the opposing party*. In other words, no advance showing of proportionality is required if the opposing party does not raise a proportionality objection.

But what happens when a party opposing discovery raises an objection based on proportionality — who has the burden of proving proportionality? The Duke Guidelines, while otherwise helpful, do not answer this question. The Duke Guidelines do not address who bears the burden to prove proportionality *after* a party opposing the discovery objects.

#### *D. Why is the Proportionality Burden a Big Deal?*

In practice, the party requesting documents and ESI will bear the burden of proving that the disputed discovery is proportional to the needs of the case. The problem with this scenario is that, when a proportionality objection is lodged, the requesting party usually does not possess the information or proof necessary to address the proportionality factors. For example, the party requesting discovery probably has no knowledge of the opposing party’s relative access to the requested documents and ESI. Moreover, given that the requesting party likely has no information about the expense of producing the disputed documents and ESI, the requesting party probably has little information about whether the benefit of the requested discovery outweighs the costs.

Inevitably, because the burden is on the party with the least amount of information pertinent to a proportionality analysis, the requesting party must discover information about the opposing party’s access to the information and the costs associated with producing the disputed documents and ESI. The requesting party must learn how the opposing party creates and stores its documents and ESI, and this discovery likely will come in the form of Rule 30(b)(6) depositions,<sup>27</sup> Rule 33 interrogatories,<sup>28</sup> and more Rule 34

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26. *Id.*

27. FED. R. CIV. P. 30(b)(6). A sample deposition topic to discover information about a party’s email accounts may command a person to testify about the company’s email systems used, as well as the company’s policies and enforcement procedures for retention periods, use of files, and deletion of emails.

28. FED. R. CIV. P. 33. A sample interrogatory requesting information about a party’s email accounts may state: “Identify all types of email system used by you for business or personal. If you do

requests for production of documents.<sup>29</sup> In other words, discovery about discovery will ensue. And with more discovery usually comes more costly discovery disputes.

### III. CONCLUSION

The Advisory Committee addressed three specific concerns with the proposed proportionality amendment, the first being that the burden of proving proportionality would fall on the party seeking discovery. While stating that this outcome is not intended, the Advisory Committee failed to make clear upon whom the proportionality burden should rest, instead directing the analysis to the existing responsibilities of the parties. Under that analysis, the requesting party bears the burden of proof.

The Advisory Committee also stated that the proportionality amendment was not intended to provide a new tool to oppose discovery.<sup>30</sup> However, when addressing proportionality objections in the advisory notes, the Advisory Committee went only so far as to pronounce that boiler-plate objections are disfavored.<sup>31</sup> The Advisory Committee did not limit the availability of proportionality objections, so parties opposing discovery are free to assert specific, non-boiler-plate objections, thereby providing a new tool to oppose discovery.

Finally, the Advisory Committee stated that it does not intend litigation costs to increase as a result of the proportionality amendment.<sup>32</sup> However, by sanctioning non-boiler-plate proportionality objections, the requesting party — who has the least amount of information about the disputed evidence — is forced to discover information about the other side's documents and ESI in order to address the proportionality considerations. Discovery about discovery, with a whole new set of disputes.

Hopefully, future revisions to the Duke Guidelines will include clearer guidance on which party bears the burden of proving proportionality after a party opposing discovery lodges a proportionality objection. Otherwise, in addition to fighting over discovery, the parties may also be fighting over who has the burden of proving the disputed evidence is proportional.

Regardless of the advisory committee's stated intent, the amendment will result in proportionality objections, proportionality hearings, and increased

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not know the type of email system, describe with particularity how you access and store emails for all of your different accounts."

29. FED. R. CIV. P. 34. A sample request for documents regarding a party's email accounts may state: "Provide all email system user guides and other policies, procedures, guidelines, rules, and protocols for usage of your email system."

30. See *supra* notes 3–5, and accompanying text.

31. See *id.*

32. See *id.*

litigation costs for parties requesting discovery.<sup>33</sup> Parties opposing discovery will lodge objections on the basis of proportionality, and requesting parties will bear the burden of proof or chose to fight the issue. As discovery about discovery commences, litigation costs increase. These outcomes are likely, despite the Advisory Committee's stated intent otherwise.

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33. Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, Trial, July 2015, at 36, 38–40. (“In response to an initial request to produce, expect a proportionality objection. Your subsequent motion to compel the production likely will result in an evidentiary hearing. [Opposing] counsel will bring witnesses to testify at the hearing to avoid the burden and cost of producing the requested materials. You must be ready to counter these witnesses with your own witnesses. Unfortunately, you almost certainly will need to conduct discovery on the [opposing party's] proportionality claims to effectively counter them. If you have not encountered this issue yet, you likely will soon.”).