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John L. Carroll

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## Proportionality in Discovery: A Cautionary Tale

JOHN L. CARROLL\*

### INTRODUCTION

“There has been widespread criticism of the abuse of discovery.”<sup>1</sup> That statement comes not from a recent edition of the Defense Research Institute newsletter but from the Advisory Committee notes to the 1980 amendment that gave us the Rule 26(f) conference.<sup>2</sup> Discovery abuse and the increase in the cost of litigation that flows from such abuse has been a constant theme emerging from analysis of the civil justice system. As Congress noted when it passed the Civil Justice Reform Act of 1990,<sup>3</sup>

discovery abuse is a principal cause of high litigation transaction costs. Indeed, in far too many cases, economics—and not the merits—govern discovery decisions. Litigants of moderate means are often deterred through discovery from vindicating claims or defenses, and the litigation process all too often becomes a war of attrition for all parties.<sup>4</sup>

That theme continued to be explored by researchers during the mid-1990s. As one contemporary study of the American civil justice system observed, “[c]ases in federal courts take too long and cost litigants too much. Consequently, proponents of reform argue, some litigants are denied access to justice and many litigants incur inappropriate burdens when they turn to the courts for assistance in resolving disputes.”<sup>5</sup>

The topic is as hot now as it has ever been. In its controversial decision reframing the notice pleading standard, the United States Supreme Court, relying on a 1989 article by Judge Frank Easterbrook,

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\* Judge Carroll (B.A., Tufts University; J.D., Cumberland School of Law at Samford University; LL.M., Harvard College) is Dean and Ethel P. Malugen Professor of Law at Samford University’s Cumberland School of Law where he teaches evidence, mediation, trial advocacy, and a specialized course in the discovery of electronically stored information. He is a former member of the Judicial Conference’s Advisory Committee on the Federal Rules of Civil Procedure and former Chair of its discovery subcommittee.

1. FED. R. CIV. P. 26(f) advisory committee’s note.

2. *Id.*

3. 28 U.S.C. §§ 471-482 (1990 & Supp. 1994).

4. S. REP. NO. 101-416, at 6823 (1990).

5. James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 17 (1997).

lamented discovery abuse and opined that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”<sup>6</sup> The Court’s concerns were echoed in a much-publicized report by the American College of Trial Lawyers and the Institute for the Advancement of the Legal System released in March of 2009.<sup>7</sup> The project that generated the report “was conceived as an outgrowth of increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense.”<sup>8</sup> The report calls for reforms in several areas, including discovery.<sup>9</sup>

E-discovery is often labeled as the discovery problem child. A recent study done by the American Bar Association Section found that 82% of the lawyers surveyed (including 61% of the plaintiffs’ lawyers surveyed) agreed discovery is too expensive.<sup>10</sup> Fifty-one percent believed discovery is commonly abused,<sup>11</sup> and 66% believed that e-discovery in particular is abused.<sup>12</sup> As the report’s detailed findings note, although there is disagreement between the plaintiff and defense bars over the problems created by e-discovery, a majority of both agreed that e-discovery increases the cost of litigation.<sup>13</sup>

To be sure, there are voices expressing another side to the abuse claim. Not everyone believes the system is so broken that radical reforms are necessary. For example, a preliminary report by the Federal Judiciary Center released in October of 2009 surveying lawyers in closed cases suggests that cries of abuse and skyrocketing cost are overblown.<sup>14</sup> The executive summary states that

[m]ore than 60% of the respondents (and two out of three defendant’s attorneys) reported that the disclosure and discovery in the closed

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6. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989)). It is important to note that Judge Easterbrook’s article was published prior to the amendments to the Federal Rules of Civil Procedure.

7. FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009) [hereinafter ACTL REPORT].

8. *Id.* at 1.

9. *Id.* at 2-4, 25.

10. LITIGATION SECTION, AMERICAN BAR ASSOCIATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 49, 93, 138 (2009) [hereinafter ABA SURVEY].

11. *Id.* at 49.

12. *Id.* at 93.

13. *Id.* at 90.

14. See EMERY G. LEE & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009).

cases generated the “right amount” of information. More than half reported that the costs of discovery were the “right amount” in proportion to their clients’ stakes in the closed cases.<sup>15</sup>

While it does not appear that any empirical argument exists showing the abuse of discovery to be rampant, the complaints of members of the legal profession<sup>16</sup>—not to mention the responses of the Advisory Committee<sup>17</sup>—certainly suggest that many cases could benefit from a more focused approach to discovery.<sup>18</sup> Requiring discovery to be conducted in a focused manner benefits both plaintiffs and defendants by reducing the cost and duration of litigation. In particular, application of the “proportionality” analysis embodied in Rule 26 of the Federal Rules of Civil Procedure<sup>19</sup> may provide just the sort of focus needed to curb modern discovery abuses—but this potentially valuable tool must be used with caution.

### I. THE PROPORTIONALITY RULES

The tools for proportionality analysis are not new. They first appeared in the amendments to the Federal Rules of Civil Procedure that came into effect in 1983.<sup>20</sup> Proportionality analysis flows from the texts of two specific provisions: Rules 26(b)(2) and 26(g). The court’s duty to impose that analysis is found in Rule 26(b)(2)(C)(iii),<sup>21</sup> which requires the court to “limit the frequency or extent of discovery” if it determines that “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

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15. *Id.* at 2.

16. *E.g.*, ABA SURVEY, *supra* note 10, at 49, 93. In any event, the purpose of this Article is not to take sides in the debate over how much abuse exists or does not exist in our civil justice system, but rather, to assess the merits and potential pitfalls of the Rule 26 proportionality analysis.

17. *E.g.*, FED. R. CIV. P. 26 advisory committee’s note (noting that “the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses,” and that this “results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake”).

18. The author’s own thirty-five years of experience in the judicial system tend to confirm this phenomenon.

19. *See infra* Part I.

20. FED. R. CIV. P. 26 advisory committee’s note.

21. The proportionality rule has been numbered slightly differently in years past. It began as Rule 26(b)(1)(iii) in the 1983 amendments and in the 1993 amendments as Rule 26(b)(2)(iii). *See* FED. R. CIV. P. 26 advisory committee’s note.

resolving the issues.”<sup>22</sup> Meanwhile, the duty of lawyers to request proportional discovery and to respond to a proportional discovery request is found in the provisions of Rule 26(g)(1)(B)(iii), which states that by signing a disclosure, a discovery request, response, or objection, a lawyer certifies that “to the best of [his or her] knowledge, information and belief formed after reasonable inquiry,” the document is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”<sup>23</sup> The following sections address each of these rules in more detail.

#### A. Rule 26(b)(2)(C)(iii)

The federal civil justice system permits very liberal discovery, and case law makes clear that the concept of relevancy under the Federal Rules of Civil Procedure is to be broadly construed.<sup>24</sup> In 1983, those rules were amended to provide judges with a tool to limit this broad discovery in appropriate cases.<sup>25</sup> That tool is the proportionality rule now appearing as Rule 26(b)(2)(C)(iii). The reasons behind the creation of the rule were set out in unmistakable terms in the Advisory Committee’s notes to the 1983 amendments:

Rule 26(b)(1) has been amended to add a sentence to deal with the problems of over-discovery. The objective is to guard 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 for inquiry. The new sentence was added to encourage judges to be more aggressive in identifying and discouraging discovery overuse.<sup>26</sup>

As one of the earliest court opinions construing the amendment noted, “[t]he amendment to the rule seeks to strike a balance with the general rule that allows for liberal discovery of all relevant but not privileged material.”<sup>27</sup> Courts have consistently used this rule and its successors to limit discovery.<sup>28</sup>

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22. FED. R. CIV. P. 26(b)(2)(C)(iii).

23. FED. R. CIV. P. 26(g)(1)(B)(iii).

24. *E.g.*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

25. *See* FED. R. CIV. P. 26 advisory committee’s note to 1983 amendments.

26. *Id.* (emphasis added).

27. *English v. Cowell*, 117 F.R.D. 132, 134-35 (C.D. Ill. 1986).

28. *See, e.g.*, *Takacs v. Union County*, No. 08-711, 2009 WL 3048471 (D.N.J. Sept. 23, 2009) (unpublished slip op.) (limiting discovery of information about pretrial detainees); *Hughes v. CUNA Mut. Group*, 257 F.R.D. 176 (S.D. Ind. 2009) (limiting discovery of information about other policyholders whose claims were denied); *Pub. Serv. Enter. Group Inc. v. Philadelphia Elec. Co.*, 130 F.R.D. 543 (D.N.J. 1990) (limit-

While the amendment clearly empowers a court to limit discovery to that which is proportionate, the Advisory Committee's notes caution that proportionality analysis requires consideration of far more than the dollars and cents a case is worth or that discovery will cost:

[T]he rule recognizes that many cases in the public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent the use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.<sup>29</sup>

The best description of the process for analyzing proportionality in discovery comes from an opinion by the iconic United States Magistrate Judge Wayne Brazil, one of the country's leading experts in federal practice and procedure. The opinion was written not long after the concept of proportionality was injected into the rules.<sup>30</sup> The relevant quote is lengthy but very informative and consequently is set out in full:

[The 1983] amendments formally interred any argument that discovery should be a free form exercise conducted in a free for all spirit. Discovery is not now and never was free. Discovery is expensive. The drafters of the 1983 amendments to sections (b) and (g) of Rule 26 formally recognized that fact by superimposing the concept of proportionality on all behavior in the discovery arena. It is no longer sufficient, as a precondition for conducting discovery, to show that the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." After satisfying this threshold requirement counsel also must make a common sense determination, taking into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery probe would impose, that the discovery tool selected is the most efficacious of the means that might be used to acquire the desired information (taking into account cost effectiveness and the nature of the information being sought), and that the timing of the probe is sensible, i.e., that there is no other juncture in the pretrial period when there would be a clearly happier balance between the benefit derived from and the burdens imposed by the particular discovery effort.<sup>31</sup>

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ing discovery of power outages and mismanagement at a power plant other than the one at issue in the lawsuit); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121 (M.D.N.C. 1989) (limiting discovery of other lawsuits against an insurer).

29. FED. R. CIV. P. 26(b)(1)(iii) advisory committee's note.

30. Judge Brazil's opinion in *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328 (N.D. Cal. 1985), was issued two years after adoption of the amendments described *supra* in the text accompanying notes 25-27.

31. *In re Convergent*, 108 F.R.D. at 331.

Judge Brazil's words ring as true today as they did almost twenty years ago when he wrote them.

B. Rule 26(g)(1)(B)(iii)

As noted above, the proportionality provisions of Rule 26(g), which spells out the lawyer's obligation relating to proportional discovery, first appeared in the 1983 amendments to the federal rules. Subsection (g) was added, according to the Advisory Committee's notes, to provide "a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."<sup>32</sup> The purpose of the rule was not to limit discovery but to impose on lawyers engaged in the discovery process the duty of making a reasonable inquiry before signing their name to a discovery document.<sup>33</sup> The obligations imposed under Rule 26(g) flow both ways.<sup>34</sup> They plainly require, under pain of sanctions, that requesting parties seek only proportional discovery.<sup>35</sup> Moreover, they impose an equal obligation (also under pain of sanctions) on producing parties to produce proportional discovery without objection and delay.<sup>36</sup>

## II. THE PROMISES AND PITFALLS OF PROPORTIONALITY ANALYSIS

There is no doubt that proportionality can be a valuable tool in controlling the cost of litigation. Its greatest value is creating a mindset in the court and litigants that discovery needs to be focused on the real issues in the case and that cost is a consideration. If courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution. The proportionality concept also guides the court to use common sense techniques for managing discovery, like phased discovery or

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32. FED. R. CIV. P. 26(g) advisory committee's note.

33. *See id.*

34. The existence of this two-way street was one of the emphases in a recent opinion by United States Magistrate Judge Paul Grimm, who in discussing the modern contours of Rule 29(g) explained that it "aspires to eliminate one of the most prevalent of all discovery abuses: knee jerk discovery requests served without consideration of cost or burden to the responding party." *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008). The rule was designed to "bring an end to the equally abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis." *Id.*

35. FED. R. CIV. P. 26(g)(1)(B)(iii), 26(g)(3).

36. FED. R. CIV. P. 26(g)(1)(B)(ii), 26(g)(3).

sequenced discovery. Those techniques will be particularly helpful in managing cases where the discovery of large volumes of electronically stored information is likely to occur. Properly used, the proportionality tools available under the Federal Rules of Civil Procedure can go a long way toward reaching the long sought-after goal of Rule 1: securing the “just, speedy, and inexpensive determination of every action and proceeding.”<sup>37</sup> Proportionality is not, however, the answer to all woes.

The operative concept in the foregoing praise of proportionality is *proper* use. 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. Thus, while proportionality is a valuable tool, it is not a talisman.

#### A. *Early Discussion of Proportionality Is Important*

As a threshold matter, proportionality only works if the intervention is early and by a judge willing to perform the managerial role contemplated by the discovery rules. The amendments designed to facilitate the discovery of electronically stored information, which became effective on December 1, 2006, provide an important step in the right direction by requiring the parties to state their views and proposals on “any issues about disclosures or discovery of electronically stored information, including the form or forms in which it should be produced.”<sup>38</sup> Also helpful is the part of the rule predating the 2006 amendments that requires the parties to discuss phased or limited discovery.<sup>39</sup>

There is nothing in the rules, however, that specifically requires proportionality to be the subject of an early discussion. History suggests that courts do not discuss proportionality in the early stages of a case.<sup>40</sup> Unfortunately, while the rules specifically encourage a proportionality analysis, there is no requirement that the parties and court

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37. FED. R. CIV. P. 1.

38. FED. R. CIV. P. 26(f)(3)(C).

39. See FED. R. CIV. P. 26(f)(2).

40. See, e.g., *State Nat'l Ins. Co. v. County of Camden*, No. 08-5128, 2009 WL 4895245, at \*4 (D.N.J. Dec. 10, 2009) (allowing discovery “beyond answers to interrogatories to flush out [certain] issues”); *Fattahi v. Bureau of Alcohol, Tobacco, & Firearms*, 186 F. Supp. 2d 656, 659 (E.D. Va. 2002) (noting that because of the early stage of litigation, judgment on defendant’s motion to dismiss should be deferred to allow for more discovery); *Moss v. W & A Cleaners*, 111 F. Supp. 2d 1181, 1185 (M.D. Ala. 2000) (explaining that “[a]t this early stage of the proceedings, . . . it would be more appropriate to enter a scheduling order and allow the [p]arties to conduct discovery”).

discuss proportionality early in the case when that discussion would be most beneficial.<sup>41</sup>

A solution to this difficulty is simple: require either by protocol or local rule that there be a discussion of proportionality before the discovery plan required by Rule 26(f) is submitted to the court. Rule 26(f)(3)(B) already requires the parties to state their views and proposals on phasing discovery, and the proportionality discussion would be a natural outgrowth of that mandate.<sup>42</sup>

Some courts are moving in this direction. The District Court of Maryland, for example, in its Suggested Protocol for Discovery of Electronically Stored Information, requires the parties to discuss as part of the Rule 26(f) process “[s]pecific facts related to the costs and burdens of preservation and retrieval and use of ESI,” “[c]ost sharing for the preservation, retrieval and/or production of ESI,” and “the amount of pre-production review that is reasonable for the Producing Party to undertake in light of the considerations set forth in [Rule] 26(b)(2)(C).”<sup>43</sup> In comparison, the proposed Standing Order Relating to the Discovery of Electronically Stored Information designed for use in the Seventh Circuit contains more specific reference to proportionality: “The proportionality standard set forth in [Rule] 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear and as specific as practicable.”<sup>44</sup> This proposed standing order would also require parties to discuss “the potential for conducting discovery in phases or stages as a method for reducing costs and burdens.”<sup>45</sup>

Both the District of Maryland protocol and the proposed standing order of the Seventh Circuit pilot project do what is necessary: they force counsel to focus at an early stage on proportionality. The above references to the language of these documents is not, however, an endorsement of the complexity of the overall procedure set out in them. My suggestion is more simple: the court should simply require

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41. FED. R. CIV. P. 26(b) advisory committee’s note.

42. FED. R. CIV. P. 26(f)(3)(B).

43. United States District Court for the District of Maryland, Suggested Protocol for Discovery of Electronically Stored Information 21–22 (n.d.), available at <http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf>.

44. Seventh Circuit Electronic Discovery Pilot Program, Statement of Purpose and Preparation of Principles 18 (2009), available at <http://www.ilcd.uscourts.gov/state%20-%20phase%20one.pdf>.

45. *Id.*

the parties, in the planning stages of discovery, to discuss the burdens and expenses of the proposed discovery and the likely benefit.

Of course, requiring the parties to discuss proportionality is simply a step in the right direction. The discussion accomplishes nothing if the court is not willing to be engaged in the proportionality discussion. The amendments to the Federal Rules of Civil Procedure that became effective on December 1, 1983 marked the entry of the concept of managerial judging into the federal rules. The amended rule made case management an express goal, encouraging early intervention and lauding its benefits.<sup>46</sup> That early intervention theme then continued in the 2006 amendments designed to facilitate the discovery of electronically stored information.<sup>47</sup> The respondents to a recently-released study by the American Bar Association confirmed the wisdom of the rules drafters in encouraging early intervention: 73% of all the respondents indicated that they believe that when a judicial officer gets involved early and stays involved, the results are more satisfactory to their clients.<sup>48</sup>

Unfortunately, it does not appear that early intervention by judges is a prevalent practice. It also appears even when judges intervene early that the proportionality tool is infrequently used. In the ABA's recent survey, 76% of respondents believed judges do not invoke protections against excessive discovery on their own,<sup>49</sup> and nearly 60% believed that judges do not enforce those mechanisms to limit discovery.<sup>50</sup> These results are echoed in the survey of lawyers done by the American College of Trial Lawyers and the Institute for Advancement of the American Legal System, which contends that

[j]udges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, "Judges need to actively manage each case from the outset to contain costs; nothing else will work."<sup>51</sup>

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46. FED. R. CIV. P. 16 advisory committee's note (discussing case management and early intervention by a judge for purposes of assuming judicial control).

47. See FED. R. CIV. P. 16(b)(3)(B)(iii)-(iv); 26(f)(3)(C)-(D).

48. ABA SURVEY, *supra* note 10, at 113.

49. *Id.* at 64.

50. *Id.* at 65.

51. ACTL REPORT, *supra* note 7, at 2.

Thus, it appears that proportionality, which most suggest is a valuable tool for managing discovery, may be very underutilized.<sup>52</sup>

### B. *The Proportionality Tools Must Be Carefully Used*

A more fundamental problem with proportionality needs to be discussed: the danger that monetary value of a case, alone, will control the proportionality analysis, impeding the discovery efforts of parties with limited resources and failing to acknowledge the non-pecuniary importance of public policy-related suits, such as those involving allegations of discrimination. I will explain.

There really are two components to the proportionality analysis and the proportionality rule. The first component is what I will describe as a *global* proportionality analysis that focuses on the amount in controversy and the importance of the issues at stake in the litigation. That analysis is heavily value-laden and presents the opportunity for the most uncertainty. The second component is *specific* proportionality that focuses on the needs of the case and the importance of the discovery at issue in resolving the case. Specific proportionality is much like materiality analysis under Rule 401 of the Federal Rules of Evidence, which limits the admission of facts to those that are “of consequence to a determination of the action.”<sup>53</sup> It is this specific proportionality analysis that is most valuable, because it provides an appropriate standard for controlling discovery.

The danger mentioned above is revealed by a recent detailed analysis of proportionality appearing in the opinion of Judge Paul Grimm in *Mancia v. Mayflower Textile Services Co.*<sup>54</sup> This case was a collective action for declaratory and monetary relief under the Fair Labor Standards Act.<sup>55</sup> At a discovery hearing, the court cautioned counsel about the boilerplate objections filed by the defendants as well as the breadth of the plaintiff’s discovery requests, which the court noted were possibly “excessively broad and costly.”<sup>56</sup> The court then engaged in an extensive analysis of Rules 26(g) and 26(b)(2)(C)(i)-(iii) and an assessment of the value of those rules in controlling the costs of discovery.<sup>57</sup> The court ended its opinion with an interesting practical

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52. *But see* Debra Lyn Bassett, *Reasonableness in E-Discovery*, 32 CAMPBELL L. REV. 435, 452 (2010) (observing that the Rule 26(b)(2)(B) good cause standard is commonly conflated with the proportionality test of Rule 26(b)(2)(C)).

53. FED. R. EVID. 401.

54. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

55. *Id.* at 355.

56. *Id.* at 356.

57. *Id.* at 357-63.

approach to proportionality. It ordered the parties to meet and confer to attempt “to identify a foreseeable range of damages from zero if the Plaintiffs do not prevail, to the largest award they could likely prove if they succeed.”<sup>58</sup> The court also asked plaintiffs’ counsel to estimate their attorney fees.<sup>59</sup> It then noted,

While admittedly a rough estimate, this range is useful for determining what the “amount in controversy” is in the case, and what is “at stake” for purposes of Rule 26(b)(2)(C)’s proportionality analysis. The goal is to attempt to quantify a workable “discovery budget” that is proportional to what is at issue in the case.<sup>60</sup>

The notion of a “discovery budget” is an interesting concept, but a limited one, because it calls for a global proportionality analysis rather than a specific one. Where what is at stake is solely money and the maximum and minimum amounts can be easily quantified, pursuit of a discovery budget and limiting discovery based on that budget may well make sense and be appropriate. In a contract action, for example, where the maximum damages are \$100,000, that figure may well represent what is “at stake” in the litigation. But such monetizing of what is “at stake” is not so easy where the issue is not breach of contract but constitutional or statutory civil rights.

Take, for example, a case involving the discharge of an employee for reasons of race or gender. If we decide that what is “at stake” in the litigation is strictly controlled by the maximum possible recovery, then essentially we are saying discovery in a case where the plaintiff is a low ranking hourly employee should be more restrictive than in a case where the victim of discrimination is a high level manager because the dollar amount of damages will be less, since the low-level employee earns much less.

In addition, consider cases where no damages are sought but the public value of the case is high, such as a case against a private employer for maintaining a racially harassing work environment or against a city police force for racial profiling. The use of a “discovery budget” tool in those sorts of cases would be counterproductive. This is not to say that the concept of proportionality goes out the window. The point, rather, is that it will be difficult to monetize the case and thus difficult to discuss what is “at stake” in monetary terms.<sup>61</sup>

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58. *Id.* at 364.

59. *Id.*

60. *Id.*

61. This concern was expressed by the Rules Committee in the advisory notes to the original proportionality rules that were promulgated in 1983.

Engaging in a global proportionality analysis that simply asks, “What is this case worth monetarily?” will certainly be helpful in a limited number of cases. But engaging in a *specific* proportionality analysis that asks, “Is this particular approach to discovery worth the cost given the information which it will produce?” is a much more helpful inquiry that focuses the parties on the most efficient way to manage discovery in a particular case. The focus on the value of discovery in producing useful information is a better approach than trying to limit discovery based on the value of the case.

#### CONCLUSION

The proportionality provisions of the Federal Rules of Civil Procedure can be valuable tools in managing discovery. Their use can bring an appropriate focus to discovery matters, enabling the court and the parties to make discovery more narrowly structured and more cost efficient. The best and highest use of proportionality, however, is the *specific* proportionality analysis, which focuses on the burden or expense of discovery as it relates to the needs of the case and the importance of the discovery in resolving the issues. This approach allows a discussion of the costs of particular discovery, the likely information that the discovery will produce, and the value of that information to the critical issues in litigation. Less helpful is the global proportionality analysis that focuses on the amount in controversy and the importance of the issues at stake in the case.