

APPENDIX F

The Role of Proportionality in Reducing the Cost of Civil Litigation

PROPORTIONALITY IS THE CORNERSTONE OF “RIGHT SIZING” EFFORTS IN CIVIL CASES

It’s easy to recommend doing the right amount of work as a bedrock principle to apply in civil cases—especially when it’s not your case.¹ For many, there is uneasiness that borders on professional discomfort when it is suggested that how we prepare and present civil litigation lacks focus and is wasteful. The actual point that is made by the CJI recommendations is that we need to be mindful, throughout the pendency of every case, that proportionality is now more than ever an essential guide. Proportionality underlies the goal of achieving “just, speedy, and inexpensive” civil justice.

Resources in civil cases should be expended where they will be most useful, such that they are “tailored” to the needs of the case.² Ponderous handling of civil litigation is unaffordable for courts and parties. In every aspect of civil litigation there is room to analyze and apply the correct level of effort. The ever-burgeoning volume of information, especially electronically stored information (“ESI”), makes what was previously the acceptable scope of litigation shockingly expensive. Proportionality, including rightsizing the effort in the discovery phase of civil cases, is easily recognized as an effective method of reducing unnecessary costs. There are few actions that can more directly reduce the expense of civil litigation than the application of proportionality principles.³

The traditional approach to civil litigation includes a discovery process that serves multiple goals and supports many strategies, many of which can be very expensive and of no benefit to resolving the issues in dispute. The historic boundary for discovery, which mirrors the federal standard in many states, has operated as little more than a rule-based opportunity to explore, rather than focus on, what civil cases need for their resolution. When evaluating what to do about a case, the search for information has

become, for many, more important than the merits in determining whether pursuing or defending a claim is actually worth the cost.⁴ The CJI Committee recognizes the need to channel the litigation process, including discovery efforts, toward information that is important for case resolution. The Committee endorses processes that move cases to completion, as this is integral to the goal of reducing expense in civil litigation. In this regard, the concept of proportionality as applied to discovery is an essential means to refocus efforts and strategies on the information that matters to the parties, the lawyers, and the courts.

THE CJI COMMITTEE RECOMMENDS PATHWAYS THAT INCORPORATE PROPORTIONALITY PRINCIPLES

As explained in the report, the Committee has recommended three pathways that direct the efforts of the parties, the courts, and the lawyers to sensibly apply their efforts to that which is important to resolving their particular type of case. In each pathway, there are related components for the disclosure of information that will enable these crucial actors at the earliest stage in the litigation process to make critical decisions. In every instance, the objective is to make information available that supports or defeats the parties’ claims and defenses.

STREAMLINED PATHWAY (RECOMMENDATION 4)

The Streamlined Pathway is designed for cases that inherently need less discovery. The attributes of streamlined cases put them in this type of process for the very reason that the information supporting the claims and defenses are known to each side, contemplating little additional information beyond prompt mandatory initial disclosures, to make

decisions about trial or settlement. Applying proportionality principles is essential in these cases, but it can also be very challenging. Proportionality principles should guide these cases and should be included in all states' adoptions of rules that are based on developing a pathway approach.

COMPLEX PATHWAY (RECOMMENDATION 5)

Active case management by the court is inherent in the operation of the Complex Pathway. Litigation expense, especially discovery costs, easily can get out of control absent some guiding hand and principle in complex lawsuits. Proportionality serves as a critical guiding principle and provides the foundation of planning for efficient use of party resources throughout these cases. As noted later, keeping the litigation on track, including the application of proportionality principles, is a shared obligation of lawyers and courts.

GENERAL PATHWAY (RECOMMENDATION 6)

There is substantial need for application of proportionality principles in traditional civil litigation—the cases in the General Pathway. This pathway stimulates the parties to make informed initial disclosures as well as to tailor follow on discovery to those matters that will enlighten decisions on the need for further discovery, settlement, trial, ADR, etc. General Pathway cases are expected to be managed by the trial court. At the same time, the day-to-day reality requires the parties and attorneys to make their decisions about what discovery to do next, typically without court involvement. Providing a principled approach, premised on proportionality principles, provides the parties continuing guidance throughout the discovery process.

PROPORTIONALITY IS TO BE FAIRLY APPLIED: IT FAVORS NEITHER PLAINTIFFS NOR DEFENDANTS

Both as a principle as well as in actual practice, proportionality must be applied in an even-handed way in accordance with the requirements of the case. It neither favors nor disfavors parties making or defending claims. The concept of proportionality has been around for a long time, as contained in the Federal Rules of Civil Procedure,⁵ although infrequently cited as such. It has evolved to a core concept—civil litigation must be focused on the needs of the case. For example, there is no measure of how much or how little discovery disputants should receive, except that they should get what they need. All discovery requests, regardless of origination, are to be evaluated in the context of whether or not they go to the necessary proofs or other important purposes that advance the litigation. A further consideration is whether and what burden the requested discovery has on the parties to the case. Ultimately, if the court and the rules require the parties to disclose, exchange, produce, and have in hand what they reasonably need to make informed decisions about the continued handling of the case, we will have a less expensive environment for civil cases.

PROPORTIONALITY IS A SHARED OBLIGATION

Ensuring proportionality is an obligation shared by all of the participants in the litigation, including the court. The process of determining whether some request fits within the principles of what is proportional requires communication initially among the parties and counsel, and at some point with the court. The need for communication and cooperation among counsel is increased as proportionality is applied. Unlike the traditional, more adversarial

approach to litigation as evidenced by reliance on motion practice, proportionality initially calls upon the court, parties, and their attorneys “to examine each civil action to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues.”⁶ As a strategy to promote cost effectiveness in litigation, proportionality also demands that alternatives such as cost sharing and cost shifting be considered as a means to lessen a disproportionate impact. These alternatives can be explored either prior to or in connection with court involvement. Succinctly stated, proportionality and cooperation follow hand in glove.

RIGHT SIZING LITIGATION EQUALS PROPORTIONALITY IN ACTION

Litigation activities of all types, including discovery, should be undertaken to prove a claim, prove a defense, or impeach a witness, and should be assessed in accordance with the following principles:⁷

- a. The importance of the issues in the litigation;
- b. The importance of the discovery in resolving issues in the case;
- c. The parties’ resources;
- d. The parties’ relative access to relevant information;
- e. The burdens of the proposed discovery including its cost and likely benefit; and
- f. The amount in controversy.

Discovery activities require an assessment of the following principles:⁸

- a. The burdens and cost of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation;
- b. Discovery should be obtained from the most convenient, least burdensome, and least expensive source;
- c. Undue burden expense or delay resulting from a party’s actions or inactions should be weighed against that party;
- d. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the burden or expense of its production;
- e. Non-monetary factors should be considered when evaluating the benefits and burdens of discovery; and
- f. Technology to reduce cost should be considered where appropriate.

PROPORTIONALITY REQUIRES CONTINUAL ASSESSMENT

Active case management in the General and Complex Pathways, including involvement of the attorneys and parties, must involve ongoing examination and reexamination of whether proportionality obligations are being met. It is not enough that plans are initially established, with or even without court involvement pursuant to stipulation, as to how the litigation may be conducted. It is the continual responsibility of everyone in the litigation that the case moves forward in accordance with proportionality principles.

In the Streamlined Pathway, initial disclosures and party familiarity with the claims and defenses coupled with rules that implement proportionality will in large measure self-regulate these cases.

Unworkable plans (i.e. those not meeting proportionality obligations) should be modified at such time as it appears they do not meet the goals initially set, including the goal of achieving proportionality in the litigation.

Issues may change and develop over the life of a case, requiring reassessment of how proportionality principles apply. To the extent necessary, it is expected that parties and their lawyers make the appropriate adjustments to the litigation in a timely manner.

The Court, in appropriate cases, should be informed at timely intervals of case progress before significantly expensive steps such as dispositive motions, trial, etc. take place. In the spirit of both common sense and proportionality, parties should confer with the court before scheduling major events. Issues often need to be resolved that will make some of these events more meaningful or alternatively untimely without some other process having first taken place. The court should be aware of problems that exist so they can be corrected. This is an obvious means to reduce cost and increase effectiveness

of parties' strategic choices. For example, a well-founded timely motion is a better use of everyone's resources than a premature request for relief that is awaiting some further discovery. In addition, providing periodic reports to the court of case progress will, in many situations, lead to the better timing and effectiveness of litigation efforts.

Notes

1. Acknowledgement: This appendix was principally authored by Judge Jerome Abrams (CJI Committee member and chair of the Rules & Litigation Subcommittee) with generous assistance from Brittany Kaufman (Director, Rule One Project, IAALS).
2. “Preparing Discovery Requests. A party should tailor discovery requests to the needs of each case. This means that the content of the requests should apply to the case, and the form of discovery requested should be the one best suited to obtain the information sought. A party should weigh in each case which discovery methods will achieve the discovery goals of (i) obtaining usable information and (ii) obtaining it as efficiently and inexpensively as possible for everyone concerned.” ABA Section of Litigation, *Discovery Standards, Parties’ Discovery Obligations* (Standard 5), (1999; rev. 2004) at p. 13.
3. See, e.g., *Inst. for the Advancement of the Am. Legal Sys. and American College of Trial Lawyers Task Force on Discovery and Civil Justice, Reforming Our Civil Justice System: A Report on Progress and Promise* (Apr. 2014).
4. Former Rule 26(b) of the Federal Rules of Civil Procedure provided that parties could obtain information “reasonably calculated to lead to the discovery of admissible evidence.” This rule has been replaced with an explicit proportionality obligation in 26(b)(1).
5. See Fed. R. Civ. P. 26 advisory committee notes – 2015 Amendment (noting that the considerations that bear on proportionality were initially adopted in 1983 and included in Rule 26(b)(2)(C)(iii)).
6. Minn. R. Civ. P. 1.
7. The text of the newly adopted FRCP, Rule 26(b)(1) provides: “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.” Some states, such as Minnesota have highlighted the importance of these factors by placing them in their Rule 1, and prefacing these factors with the admonition “It is the responsibility of the court and the parties to examine each civil action to assure that the process and the costs

are proportionate” [to the factors]. Minnesota Rules of Civil Procedure, Rule 1 (2013). It may be a matter of local preference as to the order and significance of each factor, or whether other factors may be considered.

8. The Sedona Conference, “Principles of Proportionality,” The Sedona Conference Commentary on Proportionality in Electronic Discovery, (January 2013) at p.2.