

# Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity in Civil Rules

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## INTRODUCTION

After more than two decades of vigorous debate, the original Federal Rules of Civil Procedure became effective on September 16, 1938, and ushered in broad provisions for discovery.<sup>1</sup> The need for discovery, however, was not a central theme of the debates that preceded the original codification.<sup>2</sup> Rather, the proponents of the new rules asserted that the Conformity Act of 1872<sup>3</sup> created uncertainty regarding the procedure that would apply in federal court. This uncertainty caused unnecessary expense and delay, particularly for interstate corporations that felt compelled to retain specialized counsel in every state.<sup>4</sup> Proponents asserted that adoption of trans-substantive rules of procedure in federal court would result in national procedural uniformity, both horizontal and vertical, as states voluntarily adopted similar rules for their own courts.<sup>5</sup> Since the adoption of the Federal Rules of Civil Procedure, most states have in fact adopted rules of procedure that mimic the Federal Rules in large respects, including expansive provisions for discovery.<sup>6</sup>

This Article argues that the characteristics of federal and state caseloads are so dramatically dissimilar today that national procedural uniformity no longer makes sense, and may actually contribute to inefficiency and unfairness. Since the enactment of the original Federal Rules, the pursuit of procedural uniformity has become a virtual mantra, repeated reflexively without serious consideration of its

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1. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691–93 (1998). The rules allowed, among other things, a party to depose another party or witness outside of the presence of a court officer, to request documents from a party or witness, and to pose written interrogatory questions to another party regardless of the substantive claim asserted. *Id.* at 703, 705, 707, 718.

2. *Id.* at 693.

3. Conformity Act of 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197 (requiring that the Federal Rules of Civil Procedure conform “as near as may be” with the rules of the state in which the federal court was located).

4. Subrin, *supra* note 1, at 692–93.

5. *Id.* at 693.

6. See PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT’L CTR. FOR STATE COURTS, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 1* (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<https://perma.cc/CSP9-9SCE>] [hereinafter *LANDSCAPE STUDY*] (explaining that “courts experimented with a variety of procedural and administrative reforms to the civil justice system” after the adoption of rules of civil procedure similar to the Federal Rules); Gregory E. Mize & Thomas A. Balmer, *Rebuild Our Courts*, 101 JUDICATURE 17, 21 (2017) (criticizing the one-size-fits-all approach to the Federal Rules that state courts have adopted). See generally Thomas Y. Allman, *E-Discovery Standards in Federal and State Courts After the 2006 Federal Amendments*, K&L GATES (May 3, 2012), <http://www.ediscoverylaw.com/files/2013/11/2012FedStateEDiscoveryRulesMay3.pdf> [<https://perma.cc/UH57-494L>] (explaining how most states eventually adopted the salient elements of the 2006 amendments to the Federal Rules).

continued viability or appropriateness. While we routinely accept variations in state substantive laws, when it comes to procedure, we hold allegiance to the notion of uniformity notwithstanding the fact that state and federal caseloads are strikingly dissimilar. These dissimilarities begin with the volume of cases filed. State courts shoulder the lion's share of litigation in this country, with an estimated seventeen million civil cases filed in state courts annually as compared to roughly 250,000 filed in federal court.<sup>7</sup> A large proportion of the cases filed in state court involve relatively low-value disputes involving few contested issues and at least one unrepresented party.<sup>8</sup> Civil cases filed in federal court, on the other hand, include a large proportion of geographically dispersed, complex cases that are navigated by sophisticated lawyers on both sides of the dispute.<sup>9</sup> With these glaring differences, it is hard to imagine a single set of rules meeting the disparate demands imposed by these caseloads.

Even if a single set of rules could address the demands of state and federal caseloads, an unbending commitment to uniformity would discourage the use of innovative procedures to address particular segments of a caseload. Recognizing the power of procedure unshackled by the demands of uniformity, a number of states have adopted enhanced procedural requirements for debt collection cases in response to the abundant evidence of unsavory litigation practices in these cases.<sup>10</sup> These efforts are hindered, however, by the relentless pursuit of uniformity. If our goal is to achieve fairness and justice in civil litigation, we must acknowledge that a one-size-fits-all procedural system may not be the optimal approach. Proportionality presents an opportunity to recognize the very different demands imposed by civil caseloads in state and federal courts and to tailor rules that meet those demands head on.

The concept of proportionality is not new. It made its debut in 1983 amid high hopes that it would “deal with the problem of over discovery.”<sup>11</sup> Since 1983, the Advisory Committee on the Federal Rules

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7. LANDSCAPE STUDY, *supra* note 6, at 6 (estimating that 16.9 million civil cases were filed in state court in 2013 compared to 259,489 civil case filings in federal court in 2013).

8. *See id.* at 31–33 (estimating that 75% of civil cases in state court involved at least one unrepresented party).

9. *See infra* notes 27–31 and accompanying text.

10. *See* CAL. CIV. CODE § 1788.58 (West 2018) (imposing pleading requirements for action brought by a debt buyer); ME. REV. STAT. ANN. tit. 32, § 11019 (2018) (illustrating one such procedural rule as requiring the debt buyer to attach a copy of the contract and a copy of the bill of sale); N.C. GEN. STAT. ANN. § 58-70-155 (West 2018) (detailing the business records required to bring a debt action).

11. FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendment; *see also* Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical*

of Civil Procedure has revisited the concept on more than one occasion, incorporating minor edits to the language and relocating the provision to different spots within Rule 26.<sup>12</sup> Unfortunately, each of these minor tweaks has suffered from the same fatal flaw—namely, the lack of a clearly identified problem.<sup>13</sup> The Advisory Committee's notes express frustration that proportionality has not had its desired effect, yet empirical evidence suggests that lawyers in many federal court cases believe that the right amount of discovery is exchanged at the right cost.<sup>14</sup> If there is a problem with proportionality in federal court, the evidence suggests that it lies in a relatively small proportion of cases.<sup>15</sup> Even if the evidence suggests proportionality is achieved in a substantial majority of federal cases,<sup>16</sup> state courts should use caution in blindly following suit. Although states have historically tended to follow the lead of the Federal Rules, proportionality presents an opportunity for states to advance the pursuit of civil justice by charting a course that is tailored to the demands of their own caseloads.

This Article evaluates different paths toward proportional discovery. As a foundation for analysis, Part I describes the landscape of civil litigation in federal and state courts. Part II analyzes proportionality in federal court, first by recognizing the unique history of Rule 26 and then by evaluating three hypotheses that highlight common criticisms of proportionality in federal court. Part III explores proportionality in state court, acknowledges the distinguishing characteristics of state civil caseloads, and defines proportionality in light of these characteristics.

## I. LANDSCAPE OF CIVIL LITIGATION

### A. *Civil Litigation in Federal Court*

Approximately a quarter of a million original proceedings are filed in federal court annually.<sup>17</sup> The filings assert substantively diverse

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*Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 787–88 (1985) (discussing amendment to Rule 26(b)(1)).

12. See *infra* text accompanying notes 52–62.

13. Indeed, even the Advisory Committee has recognized that the repeated tinkering may be contributing to the problem. See *infra* text accompanying note 59 (noting that the 1993 amendment may have created ambiguity regarding the intended meaning of the 1983 amendment).

14. See *infra* text accompanying notes 80–81.

15. See *infra* text accompanying notes 79–94.

16. See *infra* text accompanying notes 79–92.

17. A picture of the landscape of civil litigation in federal court is discernible from an interactive database available at the Federal Judicial Center's ("FJC") website. The data is based upon information reported to the Administrative Office of the U.S. Courts by all ninety-four federal district courts. The description of salient characteristics of civil litigation in this Section derives

suits,<sup>18</sup> roughly represented in the following proportions: 31% prisoner,<sup>19</sup> 26% statutory regulation,<sup>20</sup> 14% civil rights,<sup>21</sup> 11% tort,<sup>22</sup> 7% contract,<sup>23</sup> 5% intellectual property,<sup>24</sup> and 2% real property.<sup>25</sup> Antitrust, immigration, shareholder, and bankruptcy suits each account for less than 2% of federal filings.<sup>26</sup>

An overwhelming majority of suits filed in federal court involve representation by counsel for all parties.<sup>27</sup> The prevalence of counsel is likely due to the high stakes and complexity of the cases. A study of closed cases conducted by the Federal Judicial Center asked plaintiffs' and defense attorneys to estimate the stakes of civil litigation: the

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from analysis of all original proceedings filed in federal court between May 1, 2016 and April 30, 2017. A search of this database indicates that 220,376 original proceedings were filed in federal court during the period of May 1, 2016 through April 30, 2017. *Integrated Database Civil 1988-Present*, FED. JUD. CTR., <https://www.fjc.gov/research/idb/interactive/IDB-civil-since-1988> (last visited Aug. 22, 2018) [<https://perma.cc/X3BY-QDV4>] (check "1-original proceeding" in the Origin box, select "Is between" in the File Date box, and input "5/1/2016" and "4/30/2017" in the File Date fields).

18. The FJC database allows a user to search the "nature of a suit" using over one hundred distinct codes. *Id.* (select the "Nature of Suit" box and scroll through the list to view all codes).

19. During the twelve-month period, 68,258 original proceedings were filed and categorized prisoner suits. *Id.* (select "1-original proceeding" in the Origin box, select "Is between" in the File Date box, input "5/1/2016" and "4/30/2017" in the File Date fields, and scroll through "Nature of Suit" box and select codes 510–555).

20. During the twelve-month period, 58,325 original proceedings were filed and categorized statutory suits. *Id.* (select codes 610–896).

21. During the twelve-month period, 31,180 original proceedings were filed and categorized civil rights suits. *Id.* (select codes 440–446).

22. During the twelve-month period, 24,019 original proceedings were filed and categorized tort suits. *Id.* (select codes 310–370).

23. During the twelve-month period, 14,847 original proceedings were filed and categorized contract suits. *Id.* (select codes 110–196).

24. During the twelve-month period, 10,424 original proceedings were filed and categorized intellectual property suits. *Id.* (select codes 820–840).

25. During the twelve-month period, 4,613 original proceedings were filed and categorized real property suits. *Id.* (select codes 210–290).

26. During the twelve-month period, 470 original proceedings were filed and categorized antitrust suits, *id.* (select code 410); 3,207 original proceedings were filed and categorized immigration and deportation suits, *id.* (select codes 460, 462, 463, and 465); 203 original proceedings were filed and categorized shareholder suits, *id.* (select code 160); and 2,024 original proceedings were filed and categorized bankruptcy suits, *id.* (select codes 422 and 423).

27. During the twelve-month period ending April 30, 2017, approximately 87% of all original proceedings filed, excluding prisoner suits, report all parties are represented by counsel. *Id.* (select "1-original proceeding" in the Origin box, select "Is between" in the File Date box, input "5/1/2016" and "4/30/2017" in the File Date fields, select "0 – no Pro Se plaintiffs or defendants" in the Pro Se box, and scroll through "Nature of Suit" box and select all codes except 510–555). Slightly more than 80% of prisoner cases involve an unrepresented plaintiff. *Id.* (select "1-original proceeding" in the Origin box, select "Is between" in the File Date box, input "5/1/2016" and "4/30/2017" in the File Date fields, click "0 – no Pro Se plaintiffs or defendants" in the Pro Se box, and scroll through "Nature of Suit" box and select codes 510–555).

median estimate by plaintiffs' attorneys was \$160,000<sup>28</sup> and the median estimate by defense attorneys was \$200,000.<sup>29</sup> A substantial component of the federal civil caseload involves multidistrict litigation ("MDL"). As of May 15, 2017, a total of 234 MDL dockets comprising 129,646 actions were pending in fifty-two districts.<sup>30</sup> This staggering number of geographically dispersed, complex cases represents approximately 35% of the total number of pending civil cases in federal court.<sup>31</sup>

Overall, the characteristics of federal civil litigation suggest that sophisticated lawyers are navigating the discovery process to resolve complex factual issues relating to substantively diverse, high stakes claims. The scenario of civil litigation in state court is very different.

### *B. Civil Litigation in State Court*

State courts shoulder approximately seventeen million new filings annually.<sup>32</sup> These filings are dominated by lower-value contract and small claims cases,<sup>33</sup> with nearly two-thirds of studied cases

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28. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 42 (Oct. 2009), <https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf> [<https://perma.cc/JD4B-2C3U>] [hereinafter 2009 CASE-BASED SURVEY] (noting that the 10th percentile estimate by plaintiffs' attorneys was \$15,000 and the 95th percentile estimate was \$4 million).

29. *Id.* (explaining that the 10th percentile estimate by defense attorneys was \$15,000 and the 95th percentile estimate was \$5 million).

30. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT 6 (May 15, 2017), [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-May-15-2017.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-May-15-2017.pdf) [<https://perma.cc/BFR6-NJA7>] [hereinafter MDL STATISTICS REPORT].

31. As of September 30, 2016, the pending civil caseload was 361,566. *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2015 and 2016*, U.S. COURTS, [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_c_0930.2016.pdf) (last visited Aug. 25, 2018) [<https://perma.cc/4FPP-NC3Y>]. The Joint Panel on Multidistrict Litigation reports that 31.61% of MDL Dockets involve between one and ten pending actions, 44.02% involve between eleven and one hundred pending actions, 16.67% involve between 101 and 999 pending actions, and 7.69% involve one thousand or more pending actions. *See* MDL STATISTICS REPORT, *supra* note 30.

32. LANDSCAPE STUDY, *supra* note 6, at 6 n.36. In 2015, the National Center for State Courts completed a multijurisdictional study of civil caseloads in state courts. *Id.* at 14–16. The report focused on all nondomestic civil cases disposed between July 1, 2012 and June 30, 2013 in ten urban counties (the counties were chosen to reflect the variation in national court organizational structures). *Id.* The dataset consisted of 925,344 cases, or approximately 5% of civil cases filed in state courts nationally. *Id.*

33. *Id.* at 35.

involving contract disputes (64%),<sup>34</sup> followed by small claims (16%),<sup>35</sup> other civil (9%),<sup>36</sup> tort (7%),<sup>37</sup> unknown case type (3%),<sup>38</sup> and real property (1%).<sup>39</sup> High-value medical malpractice and product liability claims make up less than 1% of all civil cases studied, and only 5% of the tort caseloads.<sup>40</sup> The stakes in state court tend to be much lower than the stakes in federal civil litigation, with the average value of all cases studied reaching only \$9,267.<sup>41</sup> Contrary to common perceptions, only 0.2% of judgments exceeded \$500,000 and 0.1% exceeded \$1 million.<sup>42</sup>

Perhaps the most significant distinction between federal and state civil caseloads is the representation status of litigants. Only 24% of studied state court cases report both sides represented by counsel, while a shocking 76% of studied cases report at least one unrepresented

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34. The cases involving contract disputes are comprised primarily of debt collection (39%), landlord/tenant (29%), and foreclosure (17%) cases. *Id.* at 19.

35. Small claims are disputes valued at \$12,000 or less. *See id.* at 15 (summarizing all small claims categories for each county). Variability across counties is present, particularly in classifying contract and small claims actions. For example, in Marion County, Indiana, debt collectors appear to be filing low-value debt collection cases in small claims court in order to take advantage of streamlined procedure, evidenced by the fact that the proportion of contract cases is 8% (as compared to the average of 64%) and the proportion of small claims cases is 82% (compared to the average of 16% overall). *Id.* at 18. It is notable that the Marion County Small Claims Court has been the subject of intense criticism regarding the handling of debt collection actions. *See* JOHN DOERNER & DANIEL J. HALL, NAT'L CTR. FOR STATE COURTS, MARION COUNTY, INDIANA, SMALL CLAIMS COURTS FINAL REPORT 4 (July 2014), <https://www.in.gov/judiciary/files/pubs-smclaims-nesc.pdf> [<https://perma.cc/A55R-PN9G>] (stating that Marion County's debt collection practices expose debt collectors to unnecessary liability); SMALL CLAIMS TASK FORCE, REPORT ON THE MARION COUNTY SMALL CLAIMS COURTS 18–20 (May 1, 2012), <https://www.in.gov/judiciary/files/pubs-smclaims-rept-2012.pdf> [<https://perma.cc/57PU-P4XQ>] (providing recommendations for how Marion County can reform their system).

36. This category includes agency appeals and civil claims related to domestic or criminal actions. LANDSCAPE STUDY, *supra* note 6, at iv.

37. The tort claims are comprised primarily of automobile tort (40%) and personal injury/property damage (20%) cases. *Id.* at 18–19.

38. *Id.* at 18.

39. *Id.* at 17–18.

40. *Id.* at 19. Interestingly, the composition of cases in the Landscape Study has changed since 1992. The 1992 Civil Justice Survey of State Courts estimated the ratio of tort to contract cases at 1:1. *See id.* at 7 (“Of more than 750,000 civil cases disposed in the 75 most populous counties, [the 1992 Civil Justice Survey of State Courts] estimated that approximately half (49%) alleged tort claims, 48 percent alleged contract claims, and two percent were real property disputes.”). The Landscape Study reported a 1:9 ratio in 2015. *See id.* at 18 (estimating that tort cases composed 7% of the surveyed cases and contract cases composed 64% of the surveyed cases).

41. *Id.* at 24. Overall, the mean judgment among all cases studied was \$9,267 with a 25th percentile of \$1,273 and a 75th percentile of \$5,154. *Id.* By case type, the mean judgments were \$157,651 for real property; \$64,761 for torts; \$12,349 for other civil cases; \$9,428 for contracts; and \$4,503 for small claims. *Id.* at 24–25.

42. *Id.* at 24 (357 cases exceeded \$500,000 and 165 cases exceeded \$1 million).

party.<sup>43</sup> Interestingly, 92% of studied cases report plaintiffs represented by an attorney but only 26% of cases report defendants represented by an attorney.<sup>44</sup>

These striking differences between federal and state civil caseloads suggest that the demands for discovery, and the corresponding risks of abuse, are likely to be very different in federal and state courts. The next Part analyzes the federal experience with proportionality in Rule 26 and evaluates what, if anything, has caused the concept to falter, in reality or in perception.

## II. PROPORTIONALITY IN FEDERAL COURT

Nearly thirty-five years after the Federal Rules incorporated the concept of proportionality, the provision remains an enigma. A memorandum written by the Chair of the Advisory Committee in 2014 conveys a sense of frustration surrounding the elusive nature of proportionality:

[T]hree previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee – that proportionality is an important and necessary feature of civil litigation in federal courts. And yet one of the primary conclusions of comments and surveys at the 2010 Duke Conference was that proportionality is still lacking in too many cases. The previous amendments have not had their desired effect. The Committee's 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.<sup>45</sup>

The premise that proportionality is an important and necessary feature of civil litigation is not subject to serious debate. No one argues that parties should be permitted to engage in disproportionate discovery. But this bland premise is followed by the vague and ambiguous conclusion that proportionality is “still lacking in too many cases” and the previous amendments “have not had their desired

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43. *Id.* at 31. As a rough benchmark, the 1992 Civil Justice Survey of State Courts reported that 95% of cases report both sides were represented by counsel. *Id.* Both sides were represented by counsel in 98% of tort cases, 94% of contract cases, and 93% of real property cases. *Id.*

44. *Id.* at 31–32. Among cases filed in general jurisdiction courts, the percentage of plaintiffs represented by counsel has remained relatively constant since 1992 at 96%, but the percentage of defendants represented by counsel has dropped from 97% in 1992 to 46% in 2013. *Id.* at 31. Multiple hypotheses exist to explain this asymmetry, including a strategic choice to forego counsel because: (1) the cost of legal representation exceeds the amount at stake, (2) the number of contested factual issues is relatively small, or (3) the simplicity of the legal issues suggests counsel is not necessary. Alternatively, the asymmetry may simply result from a lack of resources to afford legal representation.

45. Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure, at B-8 (June 14, 2014), <http://www.uscourts.gov/file/18218/download> [<https://perma.cc/7CQ7-LE7V>] [hereinafter Advisory Committee Memorandum].



effect.”<sup>46</sup> To support this conclusion, the Advisory Committee Memorandum cites seemingly contradictory data gleaned from studies prepared in anticipation of a conference at Duke University School of Law on May 10 and 11, 2010.<sup>47</sup> While empirical data from closed cases supports a conclusion that lawyers are satisfied with discovery in most cases,<sup>48</sup> impressionistic data indicates widespread dissatisfaction with discovery generally.<sup>49</sup> Even if one assumes some level of dissatisfaction with discovery, the root cause of the dissatisfaction is unclear.<sup>50</sup>

Based upon this data, the decision in 2015 to return the proportionality provision to its original location, where it apparently had not been effective, is a head-scratching solution to an ill-defined problem. If the previous amendments have “not had their desired effect,”<sup>51</sup> we need to know why. This Article seeks to determine what, if anything, is hindering the pursuit of proportional discovery in federal court. First, it reviews the series of amendments that have resulted in the proportionality provision we know today. Second, it evaluates three hypotheses to explain potential causes for the perception that proportionality in Rule 26 has been ineffective. Third, it suggests a path forward for analyzing and effectively identifying markers of

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46. *Id.*

47. *Id.* at B-6 to B-7. At the request of the Standing Committee on Rules of Practice and Procedure, the Advisory Committee on Civil Rules sponsored the conference to explore the costs of civil litigation, particularly discovery. In anticipation of the conference, studies were conducted by the FJC, the American College of Trial Lawyers, the ABA Section of Litigation, the National Employment Lawyers Association, and the Institute for the Advancement of the American Legal System, among others.

48. *See infra* text accompanying notes 80–81.

49. *See* Advisory Committee Memorandum, *supra* note 45, at B-6 to B-7 (summarizing the dissatisfaction of plaintiffs’ and defense lawyers); Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 783 (2010) (noting that federal civil procedure rulemakers repeatedly hear that the Federal Rules of Civil Procedure do not adequately control discovery costs). The Advisory Committee Memorandum states that nearly half of respondents in one member study believe “that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers.” Advisory Committee Memorandum, *supra* note 45, at B-6. Although this impressionistic data suggest that abuse is rampant, it is unclear if there was a uniform definition of “abuse.” Is every rule violation an “abuse” of the process? If not, how do respondents distinguish between rule violations that are abusive and rule violations that are not abusive? Suppose a lawyer invokes a rule aggressively but in a manner that technically does not violate the rule. Is this abusive? These questions depend upon a normative assessment that may vary from one respondent to another. If we assume that respondents will tend to be critical of an adversary’s conduct and forgiving of one’s own conduct, the impressionistic survey responses may indicate that lawyers are dissatisfied with their adversaries’ conduct in almost every case. It is important to remember that impressionistic surveys are susceptible to well-known cognitive biases regarding availability and recall that magnify problematic cases.

50. *See* Advisory Committee Memorandum, *supra* note 45, at B-6 to B-7 (hinting that a potential cause of the problem is that judges fail to enforce the proportionality factors).

51. *Id.* at B-8.

disproportional discovery, such that the problem can be addressed in a targeted fashion.

### *A. The History of Proportionality in Rule 26*

In 1983, the proportionality provision debuted as part of Federal Rule of Civil Procedure 26, defining the scope and limits of discovery:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: . . . (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).<sup>52</sup>

The accompanying Advisory Committee note explains that the new provision was intended to “deal with the problem of over discovery” but cautions against excessive reliance upon the amount in controversy to define proportionality.<sup>53</sup> The Committee encouraged judges to consider the significance of the substantive issues, as “measured in philosophic, social, or institutional terms.”<sup>54</sup>

Ten years later, the 1993 Advisory Committee revisited the proportionality provision, relocating it to a different subsection of Rule 26 and incorporating incidental edits to the text.<sup>55</sup> The Advisory

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52. Cavanagh, *supra* note 11, at 787–88 (discussing the amendment to Rule 26(b)(1)).

53. FED. R. CIV. P. 26 advisory committee's note to 1983 amendment:

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 of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). On the whole, however, district judges have been reluctant to limit the use of the discovery devices.

(citations omitted).

54. *Id.*:

[M]any 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 use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

55. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment. The textual edits replaced the unduly burdensome language with cost-benefit language and added a new factor—the relevance of the proposed discovery in resolving the issues. After the amendment, the relocated rule stated:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues.

Committee's note explains that the purpose of the amendment was to "provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery."<sup>56</sup> In 2000, the proportionality provision was revisited yet again in response to sentiment that "courts have not implemented [the proportionality] limitations with the vigor that was contemplated."<sup>57</sup> To remedy the perceived dissatisfaction, the Committee added what it referred to as an "otherwise redundant cross-reference . . . to emphasize the need for active judicial use of [the proportionality factors] to control excessive discovery."<sup>58</sup>

Most recently, the 2015 Advisory Committee revisited proportionality out of concern that the "clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993."<sup>59</sup> Finding that "the previous amendments have not had their desired effect,"<sup>60</sup> the Committee moved the proportionality provision back to its original location. After the 2015 amendment, Rule 26(b)(1) defines the scope of discovery to, once again, include proportionality:

Scope in General. 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 the likely benefit. Information within this scope of discovery need not be admissible into evidence to be discoverable.<sup>61</sup>

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FED R. CIV. P. 26(b)(2) (1993) (amended 2000).

56. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

57. FED. R. CIV. P. 26 advisory committee's note to 2000 amendment. Omitted from the note is the source of the complaints.

58. *Id.*

59. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment. The 1993 amendment is not the only source of ambiguity that may have "softened" the focus of the proportionality provision. In 2006, the Advisory Committee was concerned about the cost and delay associated with electronically stored information ("ESI") and added a provision that partially mimics the proportionality provisions. The Advisory Committee's note does not address how, if at all, these ESI proportionality factors relate to the general proportionality provisions. *See* FED. R. CIV. P. 26 advisory committee's note to 2006 amendment (failing to address the relationship between ESI proportionality factors and general proportionality provisions).

60. Advisory Committee Memorandum, *supra* note 45, at B-8; *see also* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 163 (1999) (observing that proportionality standards are "something of a dud"); Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 349–70 (2000) (analyzing case law that attempted to implement previous proportionality amendments and detailing the differences in paper and electronic evidence that were overlooked by the then-current rules).

61. FED. R. CIV. P. 26(b)(1).

The relocation was accompanied by textual edits that added “relative access to relevant information” as a new factor and reprioritized the list to emphasize that the importance of the litigation is not measured exclusively by monetary value.<sup>62</sup>

The history of proportionality in Rule 26 illustrates why it is necessary to articulate the root of a perceived problem in order to effectively address it. Failure to engage in analytical due diligence results in trivial efforts untethered to any real problem. To chart a path forward, it is necessary to understand the scope of the perceived problem. The next Section analyzes three hypotheses that offer potential explanations for the long-held perception that proportionality has been ineffective since its original incorporation into the rules nearly thirty-five years ago.

### *B. Proposed Hypotheses*

#### 1. Hypothesis Number One: The Problem with Discovery Is That Lawyers and Judges Routinely Ignore the Proportionality Factors

The Advisory Committee hinted at this hypothesis in 2000, when it added an “otherwise redundant cross-reference . . . to emphasize the need for active judicial use of [the proportionality factors] to control excessive discovery.”<sup>63</sup> In 2015, the Committee invoked this hypothesis again when it chose to move the provision back to its original location, to make the factors “an explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes.”<sup>64</sup> Empirical evidence, however, does not support this hypothesis.

In 2008, the Chair of the Judicial Conference Advisory Committee on Civil Rules requested that the Federal Judicial Center design and administer a national, case-based survey of attorneys.<sup>65</sup> The survey was administered in May and June of 2009 to a large sample of attorneys listed as counsel in civil cases terminated in the last quarter

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62. FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment. The Advisory Committee explained that “[t]his rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern.” Advisory Committee Memorandum, *supra* note 45, at B-8.

63. FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment.

64. Advisory Committee Memorandum, *supra* note 45, at B-8.

65. 2009 CASE-BASED SURVEY, *supra* note 28, at 5. The 2009 survey was designed to parallel in key respects a 1997 survey conducted by the FJC. See THOMAS E. WILLGING, JOHN SHAPARD, DONNA STIENSTRA & DEAN MILETICH, FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE, at v (1997), <https://www.fjc.gov/sites/default/files/2012/discovery.pdf> [<https://perma.cc/A57D-LPLH>] (reporting survey responses of nearly 1,200 attorneys nationwide regarding discovery rules).

of 2008.<sup>66</sup> Nearly half of the attorneys invited to participate responded.<sup>67</sup> According to the Case-Based Survey, the advocates and judicial officers who participated in the closed cases that were studied diligently shouldered the responsibilities imposed by Rule 26. Indeed, the survey reports that more than 80% of plaintiffs' and defense attorneys conferred with opposing counsel to plan for discovery;<sup>68</sup> the court formally adopted a discovery plan in over 70% of the cases;<sup>69</sup> a judicial officer held a conference to plan for discovery in 45% of the cases;<sup>70</sup> and a judicial officer held a conference regarding matters relating to discovery other than planning in 13% of the cases.<sup>71</sup> This evidence strongly suggests that the overwhelming majority of advocates and judicial officers are well aware of the requirements of Rule 26, and regularly comply with the demands imposed by the rule. Any assumption that lawyers and judges are unaware of the proportionality factors included within Rule 26 flies in the face of evidence showing overwhelming compliance with many aspects of the Rule.

Of course, it is possible that judges and advocates are aware of the proportionality factors but choose to ignore them nonetheless. The checks and balances of our adversarial system, however, suggest that this possibility is unlikely. There is no reason to think that if an advocate strategically ignores the proportionality factors to achieve an unfair advantage, her adversary will politely acquiesce to the conduct. Indeed, the advocate on the receiving end of this strategy would be expected to rely upon the proportionality factors to fight back on overreaching discovery. If the parties cannot reach an agreement on the right amount of discovery, at least one of the advocates would be expected to take the battle to the judge. Judges have no direct stake in the litigation and nothing to gain by ignoring the proportionality factors. Even overburdened judges, who might be tempted to ignore proportionality and allow discovery to proceed unabated, will hesitate to do so knowing that appellate review looms as a backstop to redress any failure of the system. Admittedly, the proportionality factors are

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66. 2009 CASE-BASED SURVEY, *supra* note 28, at 5, 7 (noting that of the 2,371 total respondents, 1,183 were attorneys representing plaintiffs and 1,188 were attorneys representing defendants).

67. *Id.* at 5 (reporting that approximately 47% of attorneys invited to participate submitted a response).

68. *Id.* at 7. Respondents were asked: "After the filing of the complaint and before the first pretrial conference, did you or any attorney for your client confer with opposing counsel—by telephone, correspondence, or in-person—to plan for discovery in the named case?" *Id.*

69. *Id.* at 12. Respondents were asked: "Did the court adopt a discovery plan?" *Id.*

70. *Id.* at 13. In approximately 45% of cases, the court imposed a limit on the time to complete discovery. *Id.*

71. *Id.*

inherently subjective, and judges must use discretion to interpret proportional discovery in every case. This does not mean, however, that an abuse of discretion occurs whenever a judge allows challenged discovery to proceed. In the absence of evidence to the contrary, it is only fair to assume that judges seek to interpret the subjective proportionality factors in good faith.

Overall, there is little evidence to support the hypothesis that lawyers and judges are aware of the proportionality factors but choose to ignore them.

## 2. Hypothesis Number Two: The Problem with Discovery Is That Lawyers Use the Rules to Accomplish Strategic Goals That Are Beyond the Purpose of Discovery (i.e., Abusive Discovery)

There are several ways that this might happen. When the cost of serving a discovery request is small and the cost of responding to the request is high, a requesting party may have an incentive to maximize the amount of information requested in order to impose unnecessary costs on her adversary.<sup>72</sup> Such cost externalization imposes pressure to settle at a higher value than the case might otherwise be worth because the avoided cost of discovery is inflated.<sup>73</sup> Even if cost externalization does not technically violate a rule, it violates the spirit of the rules—the system does not intend to allow discovery that is motivated by a desire to impose unnecessary costs on the other side.<sup>74</sup> Agency costs also provide an opportunity to game the system. When a party collects information in response to a request, the responding party acts as an agent for the requesting party.<sup>75</sup> The responder possesses superior information regarding the costs of the production and the strategic impact of the information produced.<sup>76</sup> Thus, when the responding party makes determinations about which documents are responsive to a request and which documents are not responsive, the agency relationship inverts the adversarial obligations of the parties and tends

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72. Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1096, 1104–05 (2016) (explaining that requesting parties externalize the costs of discovery and thus lack incentives to control discovery costs).

73. *Id.* at 1106–07, 1106 n.43 (admitting the possibility that a case may settle solely to avoid disproportionate discovery costs).

74. *Id.* at 1107 (explaining that the risk of cost externalization is generally minimized when the parties stand on equal footing with regard to access to information and resources because any perceived abuse will be reciprocated in kind).

75. *Id.* at 1096, 1104.

76. *Id.*

to misalign incentives.<sup>77</sup> Sometimes, this misalignment results in the production of fewer relevant documents (and/or greater numbers of irrelevant documents) while increasing the potential for inflated costs of production.<sup>78</sup> While it is well known that these risks of abuse exist, opinions can vary on how often abusive discovery occurs. Data from randomly chosen closed cases is a valuable tool for evaluating this hypothesis.

The empirical data generated by the Federal Judiciary Committee (“FJC”) Case-Based Survey suggest that these types of behavior do not dominate discovery practice. The FJC Survey asked respondents to rate the information generated in discovery in a randomly chosen closed case using a seven-point scale, with one being too little, four being just the right amount, and seven being too much.<sup>79</sup> A majority of plaintiffs’ lawyers (56.6%) and defendants’ lawyers (66.8%) responded that discovery generated “the right amount of information” in the closed case that was the subject of the survey.<sup>80</sup> Additionally, nearly 60% of plaintiffs’ and defense attorneys responded that the ratio of discovery costs to stakes was “just right.”<sup>81</sup> Overall, lawyers were satisfied with both the quantity of information produced in discovery and the cost of discovery in a substantial majority of cases. While this does not rule out the possibility of strategic (mis)use of the rules, it does suggest that such problems are not the norm.

Of course, not everyone was satisfied with discovery. Both plaintiffs’ and defense attorneys reported cases in which discovery generated too much information or too little information. Possibly the most important takeaway from the data is that plaintiffs’ and defense attorneys report a relatively small proportion of cases in which too much information was generated in discovery. Indeed, 7% of plaintiffs’ attorneys and 11% of defense attorneys reported that discovery generated too much information in the closed case that was the subject of the survey.<sup>82</sup> When the Advisory Committee adopted amendments to proportionality in 2015, it stated that proportionality is “still lacking in too many cases” and the previous amendments “have not had their desired effect.”<sup>83</sup> Yet, if proportionality is concerned with unnecessary

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77. *See id.* at 1105 (“[O]ne feature of our discovery system is cross-party agency costs, whose misaligned incentives may be even stronger than those that exist in the well-studied agency relationship between a lawyer and his client.”).

78. *Id.*

79. 2009 CASE-BASED SURVEY, *supra* note 28, at 27.

80. *Id.*

81. *Id.* at 28.

82. *Id.* at 27.

83. Advisory Committee Memorandum, *supra* note 45, at B-8.

costs associated with production of too much information in discovery, this problem impacts roughly 10% of the civil docket, according to both plaintiffs' and defense counsel in randomly chosen closed cases.<sup>84</sup>

Plaintiffs' and defense attorneys report more cases that produce too little information in discovery than cases that produce too much information. Specifically, 36% of plaintiffs' lawyers and 22% of defense lawyers report too little information was generated in discovery.<sup>85</sup> While plaintiffs' lawyers report that discovery generates too little information in five times as many cases as those that generate too much discovery,<sup>86</sup> even defense lawyers report nearly twice as many cases that generate too little information as those that generate too much information.<sup>87</sup> One might expect a plaintiff's lawyer to report that too little information was produced in discovery because the plaintiff bears the burden of proof and may struggle to collect sufficient information to meet that burden. What is curious is that defense lawyers corroborate the sentiment in 22% of cases.<sup>88</sup>

Consider cases in which one adversary possesses far more discoverable information than the other (so-called informational asymmetry).<sup>89</sup> This situation typically involves a plaintiff who requests a substantial quantity of information from the defendant, and a defendant who requests very little information from the plaintiff.<sup>90</sup> Presumably, cases involving asymmetrical discovery obligations where the defendant produces virtually all of the information generated in discovery do not account for the 22% of cases in which defense lawyers report that too little information is generated in discovery. Rather, in cases involving asymmetrical discovery obligations, defense lawyers are more likely to report that discovery generated too much information

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84. See 2009 CASE-BASED SURVEY, *supra* note 28, at 27 (reporting that 7% of plaintiffs' attorneys and 11% of defense attorneys polled in a national survey believed that discovery had generated too much information in their selected cases).

85. *Id.*

86. See *id.* (reporting that 36% of plaintiffs' attorneys responded that discovery generated too little information and 7% of plaintiffs' attorneys responded that discovery generated too much information).

87. See *id.* (reporting that 22.4% of defense attorneys responded that discovery generated too little information and 10.9% of defense attorneys responded that discovery generated too much information).

88. *Id.*

89. Gelbach & Kobayashi, *supra* note 72, at 1104–05.

90. See Karel Mazanec, Note, *Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse*, 56 WM. & MARY L. REV. 631, 639 (2014) (noting that defendants typically have more discoverable information than plaintiffs).



(11%)<sup>91</sup> or just the right amount of information (66.8%),<sup>92</sup> but not too little information. The most likely scenario is that the 22% of cases in which defense attorneys report that discovery generated too little information involve symmetrical discovery obligations. In this situation, both sides seek roughly the same amount of information through discovery. It would be reasonable to expect that in some of these situations the defense attorney felt entitled to receive more information than she actually received. If the 22% of cases in which defense attorneys report discovery generated too little information involve symmetrical discovery obligations, the risk of cost externalization and agency costs is reduced because both sides stand on roughly equal footing.<sup>93</sup> This suggests that of the 36% of cases in which plaintiffs' attorneys report discovery generated too little information, roughly 22% involve symmetrical discovery obligations, and roughly 14% represent asymmetrical discovery obligations. If the risk of abuse is greatest in the context of asymmetrical discovery obligations, the risk arises in a relatively small proportion of the overall civil caseload (i.e., 14%).

Finally, plaintiffs' and defense attorneys consistently assessed the cost of discovery relative to the stakes, with approximately one-quarter of plaintiffs' attorneys (23%) and defense attorneys (27%) reporting that the costs of discovery were too high in relation to the stakes.<sup>94</sup> Interestingly, both plaintiffs' and defense lawyers report the cost of litigation as too high even if discovery generated the right amount of, or too little, information. Thus, it may be helpful to focus on the costs of discovery disconnected from the quantity of information produced to reduce dissatisfaction. For example, cost-saving measures such as offering a hearing or phone call with the judge prior to filing a formal discovery motion may reduce the number of discovery motions filed and allow quicker resolution of discovery disputes.

Overall, this data suggests that discovery abuse is not rampant. Rather, plaintiffs' and defense lawyers report that a substantial majority of cases produce the right amount of information at the right cost, that discovery more often generates too little information than too much, and that costs associated with discovery are a problem in more cases than the quantity of information generated.

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91. See *supra* note 87 and accompanying text (noting that 10.9% of defendant attorneys reported that discovery generated too much information).

92. See *supra* note 80 and accompanying text (noting that 66.8% of defendant attorneys reported that discovery generated just the right amount of information).

93. Cf. Gelbach & Kobayashi, *supra* note 72, at 1096, 1104–05 (explaining the concepts of cost externalization and agency costs produced by a responder-pays system).

94. 2009 CASE-BASED SURVEY, *supra* note 28, at 28.

### 3. Hypothesis Number Three: Disproportionate Discovery Is Pervasive

The Committee hinted at this hypothesis when it cited a member survey administered by the ABA Section of Litigation and National Employment Lawyers Association. This survey found that more than 80% of the respondents indicated that litigation costs are disproportionate in small-value cases, and 40% of the respondents indicated that litigation costs are disproportionate in large cases.<sup>95</sup> A close look at the empirical evidence, however, casts doubt on this hypothesis.

One way to evaluate proportionality is by considering the ratio of discovery costs to the stakes in the litigation. To calculate this ratio, the FJC asked attorneys to estimate discovery costs and stakes in closed cases.<sup>96</sup> The FJC Case-Based Survey calculates a median ratio of discovery costs to stakes of 1.6% (plaintiff lawyers) and 3.3% (defense lawyers).<sup>97</sup> While the ratio is nearly zero at the 10th percentile for both plaintiffs' and defense lawyers, the ratio jumps to 25% (plaintiff lawyers) and 30% (defense lawyers) at the 95th percentile.<sup>98</sup> The FJC Case-Based Survey notes that in a survey administered in 1997 the data was similar. Indeed, the 1997 survey concluded that "the median ratio of discovery costs to stakes was 3%, for both plaintiff and defense attorneys, and that the 95th percentile was 32%, for both plaintiff and defense attorneys."<sup>99</sup>

This data is telling in large part for what it does not show: change. The ratio of discovery costs to stakes remained relatively constant from 1997 through 2008. Such evidence supports the Committee's conclusion that amendments to Rule 26 have been ineffective at changing the ratio of discovery costs to stakes, at least during the decade between the two datasets. The evidence, however, does not support the hypothesis that disproportional discovery is a widespread problem that impacts all or nearly all of the civil caseload. In half of the studied cases, plaintiffs' attorneys reported that discovery costs represented less than or equal to 1.6% of the stakes in the litigation, and defense attorneys reported that discovery costs represented less than or equal to 3.3% of the stakes in the litigation.<sup>100</sup>

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95. Advisory Committee Memorandum, *supra* note 45, at B-6; *see also* Lee & Willging, *supra* note 49, at 774–75 (noting the same survey results).

96. 2009 CASE-BASED SURVEY, *supra* note 28, at 43.

97. *Id.*

98. *Id.*

99. *Id.* at 42.

100. *Id.* at 43.

The best approach to reducing litigation costs is avoiding litigation in the first place. When litigation is necessary, however, these ratios support a conclusion that discovery costs are not excessive in at least half of the studied cases.<sup>101</sup> This does not mean, however, that there is no problem with disproportional discovery at all.

The data gathered by the FJC indicate that in 5% of the studied cases, plaintiffs' attorneys reported discovery costs equal to or more than 25% of the stakes of the litigation, and defense attorneys reported discovery costs equal to or more than 30.5% of the stakes of the litigation.<sup>102</sup> A normative judgment is necessary to acknowledge the right ratio of discovery costs to stakes, but the survey responses provide some guidance on this question. Respondents were asked to rate the costs of discovery to the stakes of the litigation on a seven-point scale. Scores of five to seven represent discovery costs that were "too much," scores of one to three represent discovery costs that were "too little," and a score of four represents "just the right amount."<sup>103</sup> For plaintiffs' attorneys who reported "just the right amount," the median ratio of discovery costs to stakes was 1.2%, and for defense attorneys who reported "just the right amount," the median ratio of discovery costs to stakes was 2.5%.<sup>104</sup> These ratios are similar to the median ratios reported by all attorneys,<sup>105</sup> again suggesting that at least half of the reported cases are likely within the range of what most lawyers perceive to be "just the right amount" of discovery.

The data also reveal that for respondents who reported that discovery costs were "too much" in relation to the stakes of the litigation, the median ratio of discovery costs to stakes ranged from 3.4% to 5.2% for plaintiffs' attorneys and 5.7% to 10.9% for defense attorneys.<sup>106</sup> While it is hard to precisely identify a normatively ideal ratio of discovery costs to litigation stakes from this data, discovery costs of 25% to 30% of litigation stakes (the 95th percentile of ratios reported)<sup>107</sup> appear well beyond the range that most respondents would deem proportional. If we consider that roughly 25% of plaintiffs' and defense lawyers reported that the costs of discovery were too high in

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101. See Lee & Willging, *supra* note 49, at 770 (concluding that total litigation costs "do not support the claim that the typical case in federal court has escalating costs").

102. 2009 CASE-BASED SURVEY, *supra* note 28, at 43.

103. *Id.*

104. *Id.*

105. See *id.* (reporting that plaintiffs' attorneys reported a median ratio of 1.6% and defense attorneys reported a median ratio of 3.3%).

106. *Id.*

107. *Id.*

relation to the stakes,<sup>108</sup> we could loosely extrapolate from the data a ratio of discovery costs to litigation stakes of 10% to 15% at the 75th percentile.

Overall, the empirical data do not support the hypothesis that disproportionate discovery occurs in all, or even nearly all, civil cases. The data do support a hypothesis that disproportionate discovery occurs in a segment of the civil docket and that repeated amendments to Rule 26 have been largely ineffective at changing the ratio of discovery costs to litigation stakes (at least in the time period from 1997 through 2008). Taking this data at face value, therefore, the next step should be to identify the defining characteristics of the cases that have proven to be problematic and use these characteristics to predict which cases in the future are most likely to become problematic. With a clear articulation of the problem, it will become much easier to identify the solution.

### C. *The Future of Proportionality in Federal Court*

The proportionality factors incorporated into Rule 26 provide general guideposts to navigate the normative judgment that lies at the heart of the question: How much discovery is too much? While there has been much debate regarding the efficacy of these factors,<sup>109</sup> the evidence suggests that lawyers, when asked about specific cases, believe that most cases are generating the right amount of information at the right cost.<sup>110</sup> To the extent that discovery may be excessive in some cases, evidence suggests that the focus should be on identifying cases where the ratio of discovery costs to litigation stakes exceeds 10%. The Advisory Committee Memorandum states that

[t]he [Duke] Conference concluded that federal civil litigation works reasonably well—major restructuring of the system is not needed. There was near-unanimous agreement, however, that the disposition of civil actions could be improved by advancing cooperation

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108. See *id.* at 28 (reporting that 23% of plaintiffs' attorneys and 27.2% of defense attorneys believed discovery costs were too high relative to the stakes in the case).

109. JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1, 5 (2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/D6PH-GDD8>] ("The amendments [to the Federal Rules of Civil Procedure] may not look like a big deal at first glance, but they are."); Max Kennerly, *A Plaintiff's Guide to Discovery Proportionality: Part 1*, LAW 360 (Aug. 14, 2017, 2:17 PM) <https://www.law360.com/articles/953237/a-plaintiff-s-guide-to-discovery-proportionality-part-1> [<https://perma.cc/4RVQ-HE97>] (noting that "thousands of articles and blog posts" discuss the impact of the 2015 proportionality amendments); Suja A. Thomas, *Opinion: Via Duke, Companies Are Shaping Discovery*, LAW 360 (Nov. 4, 2015, 2:41 PM) <https://www.law360.com/articles/723092> [<https://perma.cc/8XAZ-PLXS>] ("Through funding, corporations have successfully lobbied academics and judges to define [the] proportionality rule in their favor.").

110. See *supra* notes 80–81 and accompanying text.

among parties, proportionality in the use of available procedures, and early judicial case management.<sup>111</sup>

Like motherhood and apple pie, it is hard to argue with the bland assertion that we should advance cooperation, proportionality, and judicial case management. Indeed, one may ask: What could possibly be wrong with encouraging judges to police proportionality more stringently in all cases and at all times? The problem with such an approach is that encouraging judges to become involved in the normative judgment surrounding proportionality in all cases will only increase costs, particularly if lawyers are already achieving proportional discovery without judicial intervention. With a clearer idea of where costs are ballooning, based upon empirical as opposed to impressionistic evidence, we will be able to root out excess discovery without imposing unnecessary and costly restrictions where the system is functioning well.

On the heels of the 2015 amendments to Rule 26, the next step should be collecting further empirical evidence to evaluate how the rule, in its new location, is being applied. The Advisory Committee should request that the FJC administer a third case-based survey, similar in form and substance to the 1997 and 2008 surveys, but targeted at identifying the characteristics that define the cases most likely to involve disproportionate discovery. The survey will provide comparative data over two decades to identify discovery trends, corroborate (or contradict) conclusions from previous studies, and evaluate potential deficiencies in the proportionality factors.

Technology exists to create an interactive survey that is capable of diverting respondents who report a particular ratio of estimated discovery costs to litigation stakes. If a respondent reports a discovery ratio in excess of 10%, that respondent might be diverted to a particular series of questions specifically focused on identifying key characteristics that may predict a higher risk for disproportionate discovery. For example, if we hypothesize that complexity increases the risk of disproportionate discovery, an interactive survey might drill down into the specific features of complexity that tend to be problematic. Indeed, there are many characteristics that may contribute to litigation complexity, including the legal or factual context of a dispute (consider an intellectual property dispute that rests upon immature questions of law and the analysis of advanced scientific theory), the logistics of the litigation (consider a multidistrict mass tort involving millions of geographically dispersed parties), or even challenging interpersonal

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111. Advisory Committee Memorandum, *supra* note 45, at B-2.

relationships (such as a dispute involving an acrimonious business relationship).

Historical data will illustrate when certain case characteristics, either in isolation or in conjunction with other potential triggers (such as resource or informational asymmetry between the parties), pose a risk for disproportional discovery and support the development of techniques to avoid or defuse a problem before it materializes. Indeed, with knowledge of the potential signals that predict disproportionate discovery, it may be possible to identify cases that possess these characteristics and yet avoid the problem of disproportional discovery. These outliers will provide valuable information for reducing the risk of disproportional discovery in other cases. If these cases generate the right amount of discovery at the right cost, we need to know why.

Finally, a new survey will provide an opportunity to gather data on multidistrict litigation, a segment of the federal docket that was not studied in either the 1997 or the 2009 FJC surveys. Multidistrict litigation currently accounts for approximately 35% of the total number of pending civil cases in federal court, suggesting that a complete and accurate picture of discovery in federal court is impossible without data relating to experience in MDL cases.

### III. PROPORTIONALITY IN STATE COURTS

When the Federal Rules of Civil Procedure were codified in 1938, the proponents hoped that the rules would usher in nationwide procedural uniformity.<sup>112</sup> During the ensuing decades, state rule committees perceived that consistency was beneficial to litigants and courts alike and they adopted state rules of civil procedure that largely mirrored the Federal Rules.<sup>113</sup> Today, however, states are questioning the wisdom of uniformity and are entertaining the notion of stepping out of the shadows of the Federal Rules.<sup>114</sup> From the volume of litigation to the amount in controversy and the representational status of the litigants, state courts face very different demands than their federal counterparts.<sup>115</sup> Discovery presents an opportunity for state courts to

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112. Subrin, *supra* note 1, at 693.

113. See LANDSCAPE STUDY, *supra* note 6, at 1 (“After the federal judiciary adopted uniform rules of rules of civil procedure . . . the vast majority of state courts followed suit, enacting states rules of civil procedure that often mirrored the federal rules verbatim.”).

114. Only a small number of states have adopted or considered adopting amendments inspired by the 2015 federal amendments, including Arizona, Colorado, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, and Utah. See *Current Listing of States That Have Enacted E-Discovery Rules*, K&L GATES, <http://www.ediscoverylaw.com/promo/state-district-court-rules> (last visited Sept. 15, 2018) [<https://perma.cc/F7PF-6MBP>].

115. See *supra* text accompanying notes 32–44.

adopt procedures that more closely align with the demands of their own caseloads.

Reform of state rules of civil procedure must begin with recognition that state courts shoulder the lion's share of civil litigation in this country.<sup>116</sup> While federal judges are able to commit individualized attention to case-specific discovery for a substantial portion of their civil docket,<sup>117</sup> it is unrealistic to expect state judges to accomplish this Herculean task for a civil caseload that is approximately sixty-eight times larger than the federal caseload.<sup>118</sup> The path forward, therefore, depends upon efficient allocation of state judicial resources to ensure that the right amount of discovery is achieved in the wide variety of cases that comprise the staggering state caseload. The answer to this resource allocation puzzle may rest upon the recognition that some cases are more likely to achieve the right amount of discovery without significant judicial intervention than others.<sup>119</sup> To the extent possible, effective resource allocation will depend upon identification of characteristics that enable courts to foretell the likely posture of a case at the time of filing. The Landscape Study, undertaken by the National Center for State Courts, provides valuable data to make this assessment.

The Landscape Study estimates that a substantial proportion of civil cases filed in state court involve routine issues relating to liability and damages, a limited need for discovery, and a modest amount in controversy.<sup>120</sup> These characteristics suggest that parties are likely to seek to minimize costs on their own accord, in part because there is a limited demand for information in the possession of the other side and in part because of the obvious desire to keep costs below the amount in controversy. A significantly smaller proportion of civil cases involve complex factual disputes, sophisticated legal issues, and substantial

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116. LANDSCAPE STUDY, *supra* note 6, at 6 n.36 (“In 2013, litigants filed approximately 16.9 million civil cases in state courts compared to 259,489 civil cases filed in U.S. District Courts.”). State courts shoulder approximately sixty-eight times the caseload of their federal counterparts.

117. *See supra* text accompanying notes 69–70.

118. *See supra* note 116 and accompanying text.

119. *See* NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 12 (2016), <https://www.ncsc.org/~media/microsites/files/civil-justice/ncsc-cji-report-web.ashx> [<https://perma.cc/9C5Y-SRWT>] [hereinafter CALL TO ACTION]:

[U]niform rules that apply to all civil cases are not optimally designed for most civil cases. They provide too much process for the vast majority of cases . . . . And they provide too little management for complex cases that comprise a small proportion of civil caseloads, but which inevitably require a disproportionate amount of attention from the court.

120. LANDSCAPE STUDY, *supra* note 6, at 35 (concluding that the majority of state court cases are small-value contract disputes).

amounts in controversy.<sup>121</sup> Judicial oversight is particularly important in these cases because the demand for information in the possession of an adversary is substantial, and fiscal restraint is less imperative because a substantial amount is at stake in the litigation. Utah presents a case study of how one state has structured its rules of civil procedure in recognition of these insights.

### A. *The Utah Experience*

In 2011, the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure concluded that it no longer made sense for the Utah Rules to mirror the Federal Rules, noting:

[I]t was perceived that consistency with the federal rules, along with the extensive case law interpreting them, would provide a positive benefit . . . [T]he Committee has come to question the very premise on which Utah adopted those rules. The federal rules were designed for complex cases with large amounts in controversy that typify the federal system. The vast majority of cases filed in Utah courts are not those types of cases. As a result, our state civil justice system has become unavailable for many people because they cannot afford it.<sup>122</sup>

The Utah Advisory Committee sought to address the problem by requiring parties to disclose certain information without a discovery request,<sup>123</sup> and assigning cases to one of three tiers defined according to the amount in controversy.<sup>124</sup> Each tier imposes presumptive limits on discovery,<sup>125</sup> but parties are allowed to stipulate to (or seek court

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121. *See id.*

122. NAT'L CTR. FOR STATE COURTS, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS 1 (Apr. 2015), [https://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report\(2015\).ashx](https://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report(2015).ashx) [<https://perma.cc/48Z3-S9FA>] [hereinafter NCSC: UTAH IMPACT STUDY] (alterations in original).

123. *See* UTAH R. CIV. P. 26(a)(1) (requiring the automatic disclosures of (A) the identity of individuals who possess information that support the disclosing party's case; (B) documents, electronically stored information, and tangible things that support the disclosing party's case; and (C) a computation of damages).

124. UTAH R. CIV. P. 26(c)(5). Tier 1 cases involve an amount in controversy of \$50,000 or less and presumptively allow five requests for admissions, five requests for production, and three deposition hours (no interrogatories are presumptively allowed in Tier 1 cases). *Id.* Tier 2 cases involve an amount in controversy of more than \$50,000 but less than \$300,000 and presumptively allow ten interrogatories, ten requests for admissions, ten requests for production, and fifteen deposition hours. *Id.* Tier 3 cases involve more than \$300,000 and presumptively allow twenty interrogatories, twenty requests for admission, twenty requests for production, and thirty deposition hours. *Id.* Cases seeking nonmonetary relief are assigned to Tier 2 unless the request for relief is accompanied by a damages claim for more than \$300,000 (justifying a Tier 3 assignment). *Id.*

125. Admittedly, it is possible to steer a case into a higher tier by pleading an inflated amount in controversy. The data showed some evidence of tier inflation between the pre-implementation cases and the post-implementation cases. The data indicated the proportion of Tier 1 cases decreased from 66% pre-implementation to 61% post-implementation, while the proportion of Tier 2 cases increased from 32% to 36%, and the proportion of Tier 3 cases increased from 1% to 3%.



permission for) additional discovery.<sup>126</sup> Evidence suggests that these changes have had a positive impact in Utah.

In April 2015, the National Center for State Courts completed an empirical study of the short-term and long-term impacts of the revisions to Utah Rule 26.<sup>127</sup> The data showed an increase in the rate of settlement across all three tiers (excluding debt collection and domestic cases),<sup>128</sup> and post-implementation cases reached a final disposition more quickly than pre-implementation cases.<sup>129</sup> Parties sought additional discovery (above the presumptive limits) in only a small percentage of cases,<sup>130</sup> and when additional discovery was requested, it occurred most frequently in Tier 3 cases.<sup>131</sup> Litigated discovery disputes increased by 1.2%,<sup>132</sup> but most of this increase is attributable to Tier 1 debt collection cases in which consumer defendants sought additional information about the details of the debt.<sup>133</sup> From a normative perspective, this may suggest that mandatory disclosures prompted consumers to request additional information that they would not have thought to request absent the disclosures. Beyond this category, the data showed dramatic decreases in discovery disputes in all other

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NCSC: UTAH IMPACT STUDY, *supra* note 122, at 10. To substantiate the suspicion of tier inflation, the report found that the proportion of judgments less than \$50,000 in Tier 2 cases increased from 31% in the pre-implementation cases to 48% in the post-implementation cases, and the proportion of judgments between \$50,000 and \$300,000 decreased from 68% to 50%. *Id.* at 12.

126. *See* UTAH R. CIV. P. 26(c)(6) (necessitating that motions for extraordinary discovery indicate whether parties have reviewed and approved discovery budgets).

127. NCSC: UTAH IMPACT STUDY, *supra* note 122. The study compared selected case characteristics of all cases filed in Utah district courts between January 1, 2011 and June 30, 2011 (pre-implementation cases) and all cases filed in Utah district courts between January 1, 2012 and June 30, 2012 (post-implementation cases). *Id.* at 5. The study was comprised of five components: (1) trends in aggregate case filings, (2) case-level characteristics for cases filed before and after implementation of the discovery reforms, (3) survey results from attorneys representing parties in civil cases subject to the revised provisions of Rule 26, (4) judicial observations about the impact of the changes obtained during focus groups, and (5) Civil Litigation Cost Model Survey results from attorneys of record in civil cases filed after the amendments. *Id.* at 5–6.

128. *Id.* at 13–14 tbl.8 (demonstrating a 14% to 18% increase in the rate of settlement across all three tiers). This suggests that necessary information is being exchanged to evaluate the merits of the case and reach acceptable outcomes.

129. *See id.* at 14–21 (suggesting that new discovery rules may be encouraging earlier case evaluation).

130. *Id.* at 22 tbl.10. Contested motions for additional discovery were filed in 0.4% of cases, and stipulations for additional discovery were filed in 0.9% of cases. Among the 130 motions and stipulations seeking additional discovery, 85% sought to expand the scope of discovery and 15% sought more time to comply with discovery. *Id.*

131. *Id.* When contested motions for additional discovery were filed, they were overwhelmingly granted. Indeed, of the sixty-four court orders entered in response to requests for additional discovery, only four orders denied the motion or disapproved the stipulation. *Id.*

132. *Id.* at 24 tbl.13.

133. *Id.* Discovery disputes in Tier 1 debt collection cases increased from 2.2% in pre-implementation cases to 5.6% in post-implementation. *Id.*

categories.<sup>134</sup> When discovery disputes occurred, they tended to be earlier in the litigation.<sup>135</sup> The amendments had little impact on the overall proportion of cases involving pro se litigants.<sup>136</sup> Some interesting changes, however, were detected within the tiers. Specifically, the proportion of Tier 1 non-debt collection cases where both parties were represented by counsel increased nearly 20%,<sup>137</sup> and the proportion of Tier 2 nondomestic cases in which both parties were represented by counsel increased 12%.<sup>138</sup>

Overall, the evidence suggests that the Utah initiatives had a positive effect in the state. The next question is: Can these results be replicated more broadly?

### *B. The Civil Justice Initiative*

In 2013, the Conference of Chief Justices created a special committee, the Civil Justice Improvements (“CJI”) Committee, and charged the committee with “developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input . . . .”<sup>139</sup> After nearly two years of study, the CJI Committee presented a detailed report to the Conference of

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134. *Id.* at 24–25. Disputes in Tier 1 non-debt collection cases fell from 6.2% to 1.7%, disputes in Tier 2 nondomestic cases fell from 10.2% to 8.3%, and disputes in Tier 3 cases fell from 18.3% to 10.9%. *Id.*

135. *Id.* at 25. On average, discovery disputes in post-implementation cases took place four months earlier in the life of the case than in pre-implementation cases. *Id.*

136. *Id.* at 26. Both parties were represented by counsel in 26% of all civil cases in the pre-implementation group and 26% in the post-implementation group. *Id.* Moreover, almost no difference was detected in the pre- and post-implementation categories for the proportion of cases where plaintiff was represented and defendant was pro se (60% pre-implementation and 58% post-implementation), for the proportion of case where plaintiff was pro se and defendant was represented (5% pre-implementation and 6% post-implementation), or for the proportion of cases where both parties are pro se (10% pre-implementation and 11% post-implementation). *Id.*

137. *Id.* at 27. Tier 1 non-debt collection cases where both parties were represented by counsel increased from 42% in pre-implementation cases to 61% in post-implementation cases. *Id.*

138. *Id.* Tier 2 nondomestic cases in which both parties were represented by counsel increased from 60% in pre-implementation cases to 72% in post-implementation cases. *Id.*

139. CONFERENCE OF CHIEF JUSTICES, RESOLUTION 5, at 2 (Jan. 30, 2013), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01302013-Civil-Litigation-Establish-Committee-Charged-with-Developing-Guidelines.ashx> [<https://perma.cc/79X7-HAY7>]; see also CALL TO ACTION, *supra* note 119, at 5 (explaining the role of the Civil Justice Improvements (“CJI”) Committee). The Conference of Chief Justices named the twenty-three member committee, chaired by the Chief Justice of the Oregon Supreme Court, Thomas Balmer. The members included trial and appellate court judges; court administrators; experienced civil lawyers representing the plaintiff, defense, and legal aid bars; representatives of corporate legal departments; and legal academics. CALL TO ACTION, *supra* note 119, at 5. The author of this Article was a member of the CJI Committee.

Chief Justices, recommending a mandatory pathway-assignment system.<sup>140</sup>

The first pathway, referred to as the streamlined pathway, is intended for cases requiring minimal judicial intervention.<sup>141</sup> Based upon data included in the Landscape Study, the CJI Committee estimates that approximately 85% of all civil cases fit the criteria for this pathway.<sup>142</sup> In streamlined cases, both sides of the dispute will likely know most of the information relevant to claims and defenses, suggesting that mandatory disclosures supplemented by limited traditional discovery will be sufficient.<sup>143</sup> With a showing of good cause, additional discovery will be permitted in streamlined cases.<sup>144</sup>

On the other end of the spectrum, a complex pathway is intended for cases that are likely to require close court supervision.<sup>145</sup> Approximately 3% or fewer of all civil cases will meet the criteria for assignment to a complex pathway.<sup>146</sup> The defining feature of the complex pathway is a need for customized case management that begins with a mandatory initial case-management conference to develop a detailed discovery plan for the particular needs of the case.<sup>147</sup>

In between the streamlined and complex pathways is the general pathway.<sup>148</sup> This pathway will absorb the cases that are not

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140. See CALL TO ACTION, *supra* note 119, at 7, 13 (explaining the need for a pathway assignment system).

141. *Id.* at 21–22 (detailing the advantages of establishing streamlined pathway for relatively uncomplicated cases). Streamlined cases are defined as “those with a limited number of parties, routine issues related to liability and damages, few anticipated pretrial motions, limited need for discovery, few witnesses, minimal documentary evidence and anticipated trial length of one to two days.” *Id.* at 21.

142. *Id.* The case types most likely to possess these characteristics include: “automobile tort, intentional tort, premises liability, tort-other, certain insurance coverage claims, landlord/tenant, buyer plaintiff, seller plaintiff, consumer debt, other contract, and appeals from small claims.” *Id.*

143. See *id.* at 22 (“Thus, streamlined rules should include presumptive discovery limits, because such limits build in proportionality. Where additional information is needed to make decisions about trial or settlement, the parties can obtain additional discovery with a showing of good cause.”).

144. *Id.*

145. See *id.* at 23 (“The Complex Pathway provides right-sized process for those cases that . . . may be legally complex or logistically complicated, or . . . may involve complex evidence, numerous witnesses, and/or high interpersonal conflict.”).

146. *Id.* (“Cases in this pathway include multi-party medical malpractice, class actions, antitrust, multi-party commercial cases, securities, environmental torts, construction defect, product liability, and mass torts.”).

147. *Id.* at 24.

148. *Id.* at 26:

The General Pathway provides the right amount of process for the cases that are not simple, but also are not complex. Thus, General Pathway cases are those cases that are principally identified by what they are not, as they do not fit into either the Streamlined Pathway or the Complex Pathway. Nevertheless, the General Pathway is not another route to “litigation as we know it.”

captured by either of the other two pathways, and it is likely to account for approximately 12% of civil cases filed.<sup>149</sup> This pathway recommends mandatory initial disclosures followed by tailored additional discovery as determined by a judge based upon the needs of the case.<sup>150</sup>

The Conference of Chief Justices officially endorsed the CJI Recommendations in July 2016,<sup>151</sup> and encouraged state courts to study and evaluate the recommendations for implementation.

### *C. The Future of Proportionality in State Courts*

While the characteristics of civil caseloads are likely to vary from state to state in important ways, the Landscape Study and the CJI Recommendations present compelling evidence that the basic characteristics of civil litigation in state courts are quite dissimilar from the characteristics of civil litigation in federal court.<sup>152</sup> This fact alone suggests that states would be well served to step out of the shadow of the Federal Rules and adopt rules that aim to address the demands of their own caseloads. In addition to the commonsense appeal of this assertion, there are several additional reasons that states should reject the federal proportionality factors.

The subjective proportionality factors incorporated in Federal Rule of Civil Procedure 26 are not suited to the majority of civil cases filed in state courts, in large part because fewer litigants are represented in state court. Federal civil litigation overwhelmingly involves zealous advocates on both sides of a dispute, who are well equipped to wrangle over the proportionality factors. In turn, the proportionality factors support the normative judgments that inform how much discovery is too much (or not enough), in light of the complex demands of federal cases and a substantial amount in controversy.<sup>153</sup> While the federal Advisory Committee has repeatedly expressed frustration with the efficacy of the proportionality concept in federal court, there is little doubt that trained advocates on both sides of a dispute are more likely to achieve a fair outcome on these normative

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149. *See id.* at 21, 23 (estimating that the streamlined pathway would account for 85% of all cases and the complex pathway would account for 3% of all cases, leaving 12% of all cases to the general pathway).

150. *See id.* at 26–27 (advocating that courts should require mandatory disclosures and tailored additional discovery rather than relying upon presumptive discovery limits).

151. CONFERENCE OF CHIEF JUSTICES, RESOLUTION 8, at 2 (July 27, 2016), <https://ccj.nsc.org/~media/Microsites/Files/CCJ/Resolutions/07272016-Support-Call-Action-Recommendations-CJI.ashx> [<https://perma.cc/4Y99-Z4Y4>].

152. States should consider supplementing the Landscape Study with state-specific studies to allow states to tailor rules to the particular needs of their own caseload.

153. *See supra* text accompanying note 28.

judgments than a trained advocate sparring with an unrepresented party. Moreover, data from the Landscape Study suggest that plaintiffs are overwhelmingly represented by counsel and defendants are overwhelmingly pro se.<sup>154</sup> In this situation, even if an unrepresented party does not want to invest time and effort to interpret vague proportionality factors in cases that involve low-value disputes and few contested facts, plaintiffs' counsel may use the rules of discovery to externalize costs to increase the settlement value of a case by asking for more discovery than is necessary. Clearly articulated parameters for discovery in cases that demand little discovery and involve modest stakes will protect all parties, particularly those who are unrepresented, from unfairness and potential abuse.

Moreover, consistency with the Federal Rules is unlikely to produce benefits of efficiency because of the sui generis nature of the proportionality analysis. The proportionality factors are based upon subjective criteria that apply to a wide swath of cases involving very different facts and circumstances. Normative judgments that sculpt the parameters of discovery in a particular case are likely to be unique to those facts. As such, the development of a deep body of federal case law that is helpful to state court judges is unlikely. States should not adopt the proportionality factors in Rule 26 with the belief that consistency with the Federal Rules will increase efficiency for state courts or their litigants.

Nor should states be tempted by administrative convenience to adopt the federal proportionality standard. The history of proportionality in Rule 26 illustrates the frustration and uncertainty that has surrounded the proportionality concept in federal court over the last thirty-five years.<sup>155</sup> Rather than continuing to follow each twist and turn of proportionality in the Federal Rules, states have a viable alternative that has been studied and vetted by a deep and wide variety of stakeholders. The CJI Recommendations are tailored to the characteristics of state caseloads and supported by empirical evidence derived from pilot projects administered in state courts around the country. While consistency between state and federal civil rules may have made sense in 1938, today states should seize the opportunity to advance their own local policy preferences by adopting rules of procedure that advance the concept of proportional discovery in light of the particular demands of their own civil caseloads. Over time, easing the commitment to uniform rules of procedure will encourage states to use procedure innovatively even beyond discovery. Jurisdictions will

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154. *See supra* text accompanying notes 43–44.

155. *See supra* text accompanying notes 52–62.

learn from each other and successes (as well as failures) will inform future developments.

#### CONCLUSION

While states have nibbled at the edges of uniformity to address discrete problems, this Article argues that the time has come to unleash procedure from the constraints of uniformity and address the disparate demands of civil caseloads in federal and state courts head on. Proportionality presents an opportunity to begin this process. Empirical evidence suggests that in many federal court cases, lawyers believe that the right amount of discovery is exchanged at the right cost. If there is a problem with proportionality in federal court, the evidence suggests that it lies in a relatively small proportion of cases. Notwithstanding this evidence, state courts should use caution in blindly following the Federal Rules on proportionality. Indeed, empirical evidence suggests that civil caseloads in state courts are very dissimilar to civil caseloads in federal court, suggesting that a one-size-fits-all approach to proportionality is likely not the best approach. Freeing states from the binds of uniformity may, over time, encourage even broader procedural innovations. As states move away from the Federal Rules template, the rules of civil procedure in each jurisdiction will begin to reflect policy goals and priorities that are most important to the citizens of the state, just as state substantive laws have always done. Uniformity may suffer, but fairness and justice will likely flourish.