

March 31, 2026

VIA EMAIL: rulescomments@arcourts.gov

Kyle E. Burton
Clerk of the Arkansas Supreme Court
Attn: Amendments to Arkansas Rules of Civil Procedure
625 Marshall Street
Little Rock, AR 72201

RE: Proposed Amendments to Arkansas Rules of Civil Procedure (2026 Ark. 65)

Dear Mr. Burton:

We, the undersigned, are the leading organizations representing lawyers who primarily represent defendants in civil litigation. In addition, our organizations include significant stakeholders across the business and civil justice communities. Our members and supporters include numerous Arkansas employers.

We support the proposed amendments to more closely align the Arkansas Rules of Civil Procedure with the Federal Rules of Civil Procedure (FRCP). This will promote harmony in Arkansas's courts. We write to emphasize the importance of Arkansas's adoption of proportional discovery in Rule 26(b)(1). We also write to encourage the Court to consider an addition to the proposed Rule 26(c) amendment to further harmonize court rules by authorizing the allocation of discovery expenses in a court-issued protective order.

Arkansas Should Update Its Civil Rules to Reflect Key Federal Rule Changes

In December 2015, amendments to FRCP 26 took effect to address abuse of the discovery process. These amendments were the result of years of discussion and debate. Civil defendants' in-house and outside counsel expressed concerns about overbroad discovery "fishing expeditions" and use of the tools of discovery to harass and pressure opponents into settlements. The amended federal rules sought to address these concerns in several key ways, including:

- Amending FRCP 26(b)(1) to redefine the scope of discovery from any information "reasonably calculated to lead to the discovery of admissible evidence" to discovery that is "proportional to the needs of the case."
- Amending FRCP 26(c) to authorize court-issued protective orders to allocate expenses to the party requesting discovery.

In the decade since these proportionality and cost-allocation amendments took effect, federal courts have applied them without difficulty. The rules have proven to be noncontroversial.

A. “Proportional” Discovery Should Be the General Rule

Proportionality enjoys strong support nationally as a “common-sense” limitation on the scope of discovery.¹ Almost twenty states and the District of Columbia require proportional discovery.² Respected national groups including the Sedona Conference³ and National Center for State Courts,⁴ among others,⁵ were early leaders calling for proportional discovery.

States that have adopted proportional discovery have recognized the benefit of closer alignment between state and federal rules. Proportionality makes “discovery a more efficient and right-sized process”⁶ and “courts will have the benefit of the ... federal experience” in interpreting the standard.⁷ In that regard, the proposed Reporter’s Notes to amended Rule 26(b)(1) help clarify that proportional discovery “should be interpreted in accordance with the federal rule.”

¹ Chief Justice John Roberts, 2015 Year-End Report on the Federal Judiciary 6 (Dec. 31, 2015) (the companion federal rule “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality....”).

² See Ala. R. Civ. P. 26(b)(1); Ariz. R. Civ. P. 26(b)(1); Colo. R. Civ. P. 26(b)(1); Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. R. Civ. P. 26(b)(1); D.C. Super. Ct. R. Civ. P. 26(b)(1); Fla. R. Civ. P. 1.280(c); Ind. Commercial Ct. R. 7(A); Kan. Stat. § 60-226(b)(1); Mich. Ct. R. 2.302(B)(1); Minn. R. Civ. P. 26.02(b); Mo. Sup. Ct. R. 56.01(b); Nev. R. Civ. P. 26(b)(1); N.Y. R. Unif. Trial Cts. § 202.20-c; Ohio R. Civ. P. 26(B)(1); Okla. Sta. tit. 12 § 3226(B)(1); Utah R. Civ. P. 26(b)(1); Vt. R. Civ. P. 26(b)(1); Wis. Code § 804.01(2)(a); Wyo. R. Civ. P. 26(b)(1); Mark Behrens & Christopher Appel, *States Are Embracing Proportional Discovery, Moving Into Alignment With Federal Rules*, 29:5 Legal Opinion Letter (Wash. Legal Found., July 17, 2020) (“The federal proportionality concept is well on its way to becoming the majority rule in the states....”).

³ See The Sedona Conf., *Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. 141, 147 (2017) (“Achieving proportionality in civil discovery is critically important to securing the ‘just, speedy, and inexpensive resolution of civil disputes’”).

⁴ See Nat’l Ctr. for State Courts, *Call to Action: Achieving Justice for All* 24 (2016) (“proportionality must be a guiding standard in discovery and the entire pretrial process”).

⁵ See Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System 8 (rev. Apr. 15, 2009) (civil discovery “should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness”) [ACTL/IAALS Final Report]; see also Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 Denv. U.L. Rev. 513, 532 (2010) (“Proportionality must be made the norm, not the exception....”).

⁶ Gregory C. Cook & Sloane Bell, *Alabama Supreme Court Amends Rules 26 and 37 to Address Proportionality and ESI*, 80 Ala. Law. 96, 102 (Mar. 2019).

⁷ Ryan M. Billings et al., *Sweeping Changes to Rules of Civil Procedure*, 91 Wis. Law. 12 (2018).

Proportionality for all discovery will also address an internal inconsistency in the Arkansas rules for the scope of electronic discovery. Rule 26.1(h) already incorporates several of FRCP 26(b)'s proportionality factors in requiring a court to limit the frequency or extent of discovery of electronically stored information (ESI) that is “unreasonably cumulative or duplicative,” can be obtained from sources that are “more convenient, less burdensome, or less expensive,” or where “the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.” Arkansas’s rules should be consistent and apply the proportionality standard to all discovery.

B. Arkansas Should Allow Courts to Allocate Discovery Expenses

The Court should consider further harmonizing Arkansas’s court rules by incorporating the other key 2015 amendment to FRCP 26—authorizing court allocation of discovery expenses in a protective order—into the proposed Rule 26(c) amendment. Like proportionality, discovery cost allocation has strong support among other jurisdictions⁸ and respected organizations.⁹

This update would only require adding the five-word phrase “or the allocation of expenses” to Rule 26(c), just as in the 2015 amendment to FRCP 26(c). Arkansas Rule 26(c)(2)(B) should permit a court to issue a protective order “that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses.”

In adopting this approach, the Federal Advisory Committee on Civil Rules recognized that courts already have the authority to issue such protective orders, and that an explicit recognition of cost allocation “will forestall the temptation some parties may feel to contest this authority.”¹⁰ Arkansas courts do not appear to have

⁸ See Ala. R. Civ. P. 26(c)(2); Colo. R. Civ. P. 26(c)(2); Del. Ch. Ct. R. 26(c)(2); Del. Super. Ct. R. Civ. P. 26(c)(2); D.C. Super. Ct. R. Civ. P. 26(c)(1)(B); Fla. R. Civ. P. 1.280(d)(2); Ind. Trial R. 26(C)(2)(b); Iowa R. Civ. P. 1.504(1)(a)(2); Kan. Stat. § 60-226(c)(1)(B); Md. R. Civ. P., Cir. Ct. 2-403(a)(3); Mass. R. Civ. P. 26(c); Minn. R. Civ. P. 26.03(a)(2); Mo. Sup. Ct. R. 56.01(c)(2); Neb. Ct. R. Disc. § 6-326(d)(1)(B); Nev. R. Civ. P. 26(c)(1)(B); Ohio R. Civ. P. 26(C)(2); Okla. Sta. tit. 12 § 3226(C)(1)(b); Vt. R. Civ. P. 26(c)(2); Wis. Code § 804.01(3)(a)(2); Wyo. R. Civ. P. 26(c)(1)(B).

⁹ See, e.g., ACTL/IAALS Final Report, at 11 (raising “cost shifting/co-pay rules”); see also Kathy Josephson et al., *Shifting the Burden: How Courts Consider Requests to Re-Balance eDiscovery Costs*, 40:10 Legal Background (Wash. Legal Found. Aug. 18, 2025) (“recent decisions demonstrate some courts’ willingness to rebalance discovery costs in the context of eDiscovery, particularly in light of proportionality considerations”).

¹⁰ FRCP 26 advisory committee’s note to 2015 amendment.

expressly asserted this authority under Rule 26(c), although courts have recognized allocation of expenses with respect to a party’s failure to comply with discovery.¹¹ The proposed addition to Rule 26(c) would make clear—consistent with federal courts in the state¹²—that a court may allocate expenses in a protective order.

The proposed amendment would—much like the adoption of a proportionality rule—resolve an internal inconsistency in the Arkansas rules for the scope of electronic discovery. Rule 26.1(d)(2)(H) authorizes a court to issue an order governing the discovery of ESI that addresses the “allocation of the expense of production.” Arkansas courts should be expressly permitted to address the allocation of expenses with respect to all discovery.

* * *

Thank you for the opportunity to comment and for considering our recommendation to include cost allocation in the Rule 26(c) amendment. We applaud the Court and Committee on Civil Practice’s initiative to bring the Arkansas Rules of Civil Procedure into closer alignment with the federal rules.

Arkansas Association of Defense Counsel	Arkansas State Chamber of Commerce
DRI – Association of Lawyers Defending Business	International Association of Defense Counsel
Lawyers for Civil Justice	Federation of Defense & Corporate Counsel
U.S. Chamber of Commerce Institute for Legal Reform	Association of Defense Trial Attorneys
NFIB Small Business Legal Center, Inc.	American Tort Reform Association
Coalition for Litigation Justice, Inc.	Washington Legal Foundation
National Association of Mutual Insurance Companies	American Property Casualty Insurance Association
	American Trucking Associations
	Arkansas Trucking Association

¹¹ See *Hunter v. Estate of Springston*, 710 S.W.3d 468, 474 (Ark. Ct. App. 2025) (affirming trial court’s award of expenses as discovery sanction under Arkansas Rules of Civil Procedure 30 and 37).

¹² See *Singleton v. Arkansas Housing Auths. Prop. & Cas. Self-Insured Fund, Inc.*, 934 F.3d 830, 840 (8th Cir. 2019) (Ark. law) (affirming allocation of discovery expenses under FRCP 26(c)).