New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 252—NO. 105
TUESDAY, DECEMBER 2, 2014

FEDERAL E-DISCOVERY

Proportionality: Rarely Used, Primed for a Return?


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On Oct. 29, 2014, a U.S. Magistrate Judge from the Northern District of California issued a rare written decision limiting discovery under the proportionality rule set forth in Fed. R. Civ. P. 26(b)(2)(C)(iii).[1] The current proportionality rule resides in Fed. R. Civ. P. 26(b)(2), entitled "Discovery Scope and Limits; Limitations on Frequency and Extent," and provides that, on motion or on its own, a court must limit the frequency or extent of otherwise allowable discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[2] During discovery in *Lord Abbett*, plaintiff and defendants agreed to share the cost of preserving certain computers during the litigation even though those computers had only been used by persons unlikely to be custodians of relevant data.[3] Notwithstanding that preservation agreement, neither party actually sought discovery from these computers.[4] After summary judgment, in which certain defendants prevailed in whole or in part, a group of board member defendants (the board defendants) who prevailed in whole informed the plaintiff that they would no longer pay their share of the cost of preserving the computers. When plaintiff sought permission to dispose of the computers, however, the board defendants declined to consent on the grounds that the computers could contain relevant information that they might need to access if plaintiff's appeal was successful and the case was remanded for trial.[5] The board defendants also declined plaintiff's offer to make the computers available for inspection prior to disposal, and plaintiff refused the board defendants' request to image the computers' hard drives on the grounds that the imaging would be prohibitively expensive.[6]


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On motion by plaintiff, Magistrate Judge Donna M. Ryu entered an order permitting disposal of the computers.[7] The board defendants had argued that, if plaintiff prevailed in its appeal, the defendants had the right to access the "original source of specific pieces of evidence to analyze the metadata."[8] Ryu reasoned, however, that discovery had "long been closed" and there was "no indication that the [ ] computers contain[ed] relevant information."[9] Thus, Ryu concluded that the "burden of requiring any party to continue to pay $500 per month to store the [ ] computers outweigh[ed] the likely benefit of maintaining the computers where there has been absolutely no showing that they contain relevant evidence" under Fed. R. Civ. P 26(b)(2)(C)(iii).[10]

Decisions and New Amendments

Written decisions on proportionality are rare, despite the fact that litigants frequently bemoan the burden and cost of complying with their discovery obligations.[11] In recognition of this seeming under-utilization of the rule and the continued complaints about the burden of discovery,[12] the proposed amendments to the Federal Rules of Civil Procedure include a change to Rule 26 that involves moving the proportionality rule up from its current position in 26(b)(2) to 26(b)(1). If approved, Rule 26(b)(1) will read, in relevant part, that a party "may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[13] The Advisory Committee is hopeful that this move will increase the awareness of the rule and thereby increase its utilization.[14]

The approach of moving the rule around, rather than changing its substance, suggests that, while the Advisory Committee understands that disproportionate discovery remains a problem for litigants and the courts, the Committee does not see an obvious alternative rule or amendment that would better address the problem. This conclusion, then, raises questions: If the proportionality rule as currently formulated is indeed our best tool for eliminating or reducing burdensome discovery, why are proportionality decisions so rare?

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Similarly, what can be done to help increase the effectiveness of the proportionality rule?

Why are proportionality decisions still so rare? It is widely acknowledged that the proportionality rule is difficult to apply, particularly at the early stages of discovery.[15] Perhaps the most widely acknowledged problem with the rule is that it requires judges to make, at a very early stage, estimations about the merits of a case, which judges are characteristically reluctant to do.[16] This challenge leads to few written decisions on proportionality grounds. In fact, the lack of case law on the topic to assist judges in making these difficult judgments is among the factors that perpetuate the lack of case law on the topic: Judges are even less inclined to make these difficult and precarious determinations when they do not have case law on which to base their decisions. The circumstances in *Lord Abbett* are an excellent example of when, in the procedural history of a case, a judge might be more confident making a decision under the proportionality rule (i.e., *after* summary judgment and *after* discovery has been closed).

The problem with invoking the proportionality rule at such a late stage, however, is that a decision limiting discovery only *after* summary judgment and the close of discovery is unlikely to significantly alleviate the burden and expense of discovery on the parties. The principle benefit of decisions like *Lord Abbett* is thus to future litigants; such decisions provide needed case law on which future litigants may be able to base their proportionality motions (and on which judges will be able to base their decisions), perhaps at an earlier stage of litigation. But, except in rare cases like *Lord Abbett* where cost-sharing comes up later in litigation, the current state of the case law makes it such that most successful motions on proportionality grounds are going to have little direct benefit to the litigants in which the proportionality issues arise. As a result, the unfortunate reality is that neither judges nor parties have the proper incentives to utilize the rule.

Increasing the effectiveness of the proportionality rule. The realization, exemplified by *Lord Abbett*, that the proportionality rule may be more easily and successfully used at a later stage of a case impacts the second question raised by the Advisory Committee's approach to the new amendments to Rule 26: If the language of the proportionality rule is not the problem, what can be done to increase the effectiveness of the rule, particularly at an early stage of discovery?

While the new amendments relating to the proportionality rule do not seem to be a significant substantive change, the change in location of the proportionality rule within Rule 26 may offer more significant guidance to litigants than it would appear at first blush. By moving the proportionality rule out of Fed. R. Civ. P. 26(b)(2), "Limitations on Frequency and Extent," into 26(b)(1), which is entitled "Scope in general," the Advisory Committee seems to be signaling to parties and judges that the proportionality rule should no longer be seen solely as a *limit* on the scope of discovery. Indeed, the new location confirms that that the Advisory Committee instead views proportionality as a concept that is central to defining the appropriate scope of discovery.[17]

Such a change in perspective regarding the purpose of the rule should promote positive developments in discovery practice. For example, today, many judges impose strict deadlines and limits (time, volume, or otherwise) on parties to prevent discovery from becoming unwieldy or unduly time-consuming. In theory, these limits should act as a constraint on the costs and burden of discovery. In practice, however, rigid deadlines and limits can create perverse incentives, *encouraging*, rather than containing, overbroad discovery. While "drop dead" dates for discovery are doubtless intended to limit discovery, short time periods may actually create incentives for requesting parties to issue overbroad requests (for fear they will have only a single opportunity to make such requests). This can lead to massive document productions—along with expensive and time-consuming document reviews—much of which has only tangential relevance to the merits of the case.

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Contrast this with what sometimes happens in regulatory investigations. Regulators seeking production of documents in connection with investigations generally are not subject to discovery cut-offs and are aware that they will need to review whatever documents they have requested. As a result, some regulators (albeit far too few) will start their investigations with targeted requests, although they almost invariably reserve the right to make additional or more expansive requests after reviewing the documents responsive to their initial requests. A potential lesson to be drawn from this example is that when a requesting party knows it can come back later for more information, it may be more inclined to pursue proportional discovery on its own.

"Phased discovery" that mimics this regulatory approach may allow litigants to honor the proportionality rule's new position within Rule 26 as a tool for determining the appropriate scope of civil discovery. Phased discovery is an approach for containing discovery in civil litigation that some judges and arbitrators have used with great success. After an initial production (and perhaps targeted motion practice), requesting parties may be better able to assess what else they may need, and responding parties may be better informed about any impediments to making additional productions.[18] And significantly, with some initial information about the facts, judges may be better able to assist parties in narrowing the scope of discovery.

Phased discovery could also contribute to the development of the badly needed case law applying and enforcing Rule 26's proportionality rule. Parties may be able to make more meaningful motions under the proportionality rule in phased discovery, and judges may be more inclined to make findings on the proportionality factors when some discovery has already taken place.

Conclusion

While the new amendments to the Rules will hopefully foster increased awareness of the proportionality rule, underutilization of the rule is likely to continue unless courts and parties are proactive about using proportionality as a tool for determining scope of discovery. Phased discovery is one approach that could aid litigants and courts in this effort and help promote the development of a body of case law on proportionality, which should, in the long run, resolve many of the barriers to effective use of the proportionality rule even at the early stages of discovery.

1. *Lord Abbett Municipal Income Fund v. Asami*, No. C-12-03694 DMR, 2014 WL 5477639 (N.D. Cal, Oct. 29, 2014)
2. Fed. R. Civ. P. 26(b)(2)(C)(iii).
3. *Lord Abbett*, 2014 WL 5477639, at *1.
4. Id.
5. Id.
6. Id. at *1-2.
7. Id. at *3.
8. Id. at *2-3.
9. Id. at *3. Ryu also noted the board defendants' reluctance to examine the computers and the seeming unfairness of requiring plaintiffs, who did not believe the computers contained relevant information, to bear 100 percent of costs associated with the preservation, as reasons why plaintiff's motion should be granted. Id. at *3, *3 n.3.
10. Id. at *3.
11. See, e.g., Memorandum from Hon. David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure to Hon. Jeffrey S. Sutton, Chair, Standing Committee on Rules of Practice and Procedure, at 9-11 (May 8, 2013), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf ("Proportionality in discovery, cooperation among lawyers, and early and active judicial case management are highly valued and, at times, missing in action.") [May 2013 Memorandum].
12. Thomas Y. Allman, The Civil Rules Package As Approved By the Judicial Conference (September 2014) at 1, available at http://law.duke.edu/sites/default/files/centers/judicialstudies/ii_2014_comments_on_rule_package.pdf.
13. Appendix B to Memorandum from Hon. David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure to Hon. Jeffrey S. Sutton, Chair, Standing Committee on Rules of Practice and Procedure, at B-5 (June 14, 2014), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf.
14. See May 2013 Memorandum, supra note 11 at 10-13.
15. See, e.g., Scott A. Moss, "Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age," 58 DUKE L. J. 889 (2009).
16. Id. at 914-16.
17. Indeed, the Committee Note has been revised to "trace[ ] the evolution of the 'restoration' of proportionality as an express component of the scope of discovery and repeats parts of the 1983 and 1993 Committee Notes to emphasize the role of judicial management when the parties 'fall short of effective, cooperative management on their own.'" May 2013 Memorandum, supra note 11 at 9.
18. See, e.g., J. Maria Glover, "The Federal Rules of Civil Settlement," 87 NYU L. REV. 1713, 1753 n. 163 and cited cases.