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FEDERAL E-DISCOVERY

Proportionality Is on the Rise


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The year 1983 was a memorable one. Not only did it bring us Ewoks and the A-Team, but it also introduced us to the concept of proportionality in discovery, courtesy of the Aug. 1, 1983 amendments to the Federal Rules of Civil Procedure (Federal Rules). Proportionality, then part of Rule 26(b)(1)(iii),[1] was introduced "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 [as well as] to encourage judges to be more aggressive in identifying and discouraging discovery overuse."[2]

Unlike its pop culture compatriots, though, the proportionality amendment was not a success. According to one commentator, the 1983 "amendment itself seems to have created only a ripple in the case law, although some courts now acknowledge that it is clearer than it was before that they should take responsibility for the amount of discovery in cases they manage."[3]

In the 1993 amendments to the Federal Rules, Rule 26(b)(1) was restructured,[4] moving the proportionality considerations to newly created Rule 26(b)(2)(iii)[5] and updating them with two additional factors. The goal was "to enable the court to keep tighter rein on the extent of discovery … [and] to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery[.]"[6] This too proved unsuccessful.

Leaving the proportionality factors themselves intact, the 2000 amendments to the Federal Rules focused on further limiting the scope of discovery under Rule 26(b)(1)[7] along with the inclusion of a new sentence "calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii)."[8]

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The disruption of litigation and discovery processes caused by the rise of electronic information and e-discovery in the early 2000s quickly made evident the need for further amendments to the Federal Rules to provide the appropriate framework and guidance to judges and litigants. The resulting 2006 amendments to the Federal Rules were revolutionary in terms of evolving e-discovery practice, though perhaps not so with respect to proportionality. Rule 26(b)(2) was further subdivided and restructured again, moving and slightly modifying the proportionality factors to their new location within Rule 26(b)(2)(C)(iii).[9]

As the e-discovery era entered its second decade, "it was widely contended that the failure to enforce proportionality had contributed to excessive costs of discovery."[10] Jurists and practitioners worked to revive the concept and reintroduce it as a critical aspect of determining the scope of discovery.[11] As discussions began concerning the next round of amendments to the Federal Rules, the Rules Committee quickly focused on proportionality, since "courts were not using these limitations as originally intended."[12] Ultimately, on Dec. 1, 2015, amended Rule 26(b)(1) went into effect, "restoring proportionality as an express component of the scope of discovery[.]"[13] The amended Rule, though, "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."[14] The full text of Rule 26(b)(1), as amended, reads:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

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Information within this scope of discovery need not be admissible in evidence to be discoverable.[15]

Early Success

In his 2015 year-end "Report on the Federal Judiciary,"[16] U.S. Supreme Court Chief Justice John Roberts highlighted that the amendments "mark significant change, both for lawyers and judges, in the future conduct of civil trials. The amendments may not look like a big deal at first glance, but they are."[17] With respect to the scope of discovery, he noted that "Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality[.]"[18]

Judges took heed—within days of its enactment, amended Rule 26(b)(1) began being utilized and referenced in opinions. Dozens of courts have cited to the amended Rule and many have conducted a proportionality analysis.[19] One court even noted that "proportionality has become the new black, in discovery litigation, with parties invoking the objection with increasing frequency."[20] Some of these early decisions underscore that judges are now focused on proportionality when deciding whether to grant or deny motions to compel discovery.

'Robertson v. People Magazine'

In *Robertson v. People Magazine*,[21] a decision from the Southern District of New York, the plaintiff, a former senior editor at People Magazine, sued defendants, including People Magazine, for "race discrimination and harassment[.]"[22] The plaintiff moved to compel discovery of a wide range of documents "concerning People's editorial discussions and decisions on articles to be published (or not published)."[23]

As part of determining whether to grant the motion, the court undertook a proportionality analysis under newly amended Rule 26(b)(1). After reviewing the history of proportionality as part of Rule 26, the court described the 2015 amendment and noted that it "does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactingly."[24] The court then analyzed the plaintiff's requests, noting that the plaintiff "seeks nearly unlimited access to People's editorial files, including all documents covering the mental process of People staff concerning what would or would not be published in the magazine."[25] Concluding that the requests "extend far beyond the scope of Plaintiffs claims and would significantly burden Defendants,"[26] the court determined that it had "no trouble concluding that Plaintiff's discovery requests are burdensome and disproportionate"[27] and, based on this and other grounds, denied the plaintiff's motion to compel discovery.[28]

'Moore v. Lowe's Home Centers'

An order from a district judge in the Western District of Washington resulted in a split decision with respect to whether certain discovery was proportional. In *Moore v. Lowe's Home Centers*,[29] the plaintiff asserted claims against the defendant for unlawful employment practices, including discrimination, retaliation, harassment, and termination related to her disabilities, gender, and pregnancy.[30] After document production by the defendant, the plaintiff filed a motion to compel production of additional sets of documents, including certain personnel records previously withheld, and to "compel additional searches for, and production of, emails responsive to Plaintiff's discovery requests."[31]

> The resulting 2006 amendments to the Federal Rules were revolutionary in terms of evolving e-discovery practice, though perhaps not so with respect to proportionality.

The plaintiff made a broad request to compel production of personnel records, not only for those "who allegedly harassed, discriminated, and retaliated against" her, but also for "store managers, HR representatives, and investigators" and for comparable employees without protected characteristics.[32] The defendant challenged this request, stating that the privacy interests of the other employees outweighed the plaintiff's need for the information, that it had already provided the personnel records for the eight alleged harassers and two comparable employees, and that the plaintiff failed to show any factual basis as to the need for the records of the others.[33]

The court found that, since the plaintiff had specifically named an additional alleged harasser, production of that personnel file was "relevant and proportional discovery to Plaintiff's claim."[34] For the other employees, however, "relevance is tangential and not proportional to Plaintiff's claims."[35] Thus, as to this portion of the motion to compel, discovery was granted in part and denied in part.[36]

As to the portion of the plaintiff's motion to compel an additional search for responsive email messages, the plaintiff claimed that the defendant "failed to conduct proper email searches, as evidenced by emails in Plaintiff's possession that were not uncovered in Defendant's search."[37] The prior searches, claimed the plaintiff, were unnecessarily restrictive in that they included her name, meaning that only messages that explicitly included her name were reviewed and produced. She requested new searches that did not include her first or last name.[38] The defendant countered that it had "already reviewed 21,000 emails from 17 custodians, at a cost of $48,074," that the messages the plaintiff thought should have been recovered were from 2012 and had likely been deleted, and that a new search without the plaintiff's name "would result in hundreds of thousands of irrelevant emails."[39]

The court found the plaintiff's request for additional searches "overly broad and not proportional to the case," stating that, although the searches might yield some relevant emails, the plaintiff had not provided specifics for what she expected to find and had not shown that the information "could not be found through other means[,]" such as through questioning at depositions.[40] Having found the request not proportional, the court denied plaintiff's motion as to this issue.[41]

'Wilmington Trust v. AEP'

Our final example is a decision from a magistrate judge in the Southern District of Ohio where the underlying dispute was a breach of contract claim. In *Wilmington Trust v. AEP Generating*,[42] the plaintiffs, dissatisfied with the defendants' original search parameters, moved to compel the defendants to conduct two additional searches for documents in time periods excluded from the original searches. The original searches, while including as the time period parts of 2007 and all of 2008, did not include 2009 or 2010 (with limited exceptions for some custodians) nor did they include any time period after the complaint was filed in the matter in 2013.[43]

The plaintiffs considered it "simply inconceivable that Defendants stopped discussing or communicating about matters relevant to the case for two years (or 18 months) beginning on Jan. 1, 2009, or that the same thing magically occurred the date the lawsuit was filed."[44] The plaintiffs, according to the court, believed that this contention, along with the fact that some relevant documents from the excluded time periods had been produced, was enough "to satisfy their burden of showing that they are seeking to compel the production of relevant documents."[45] The defendants, though, argued

that excluding the time frames was actually part of a carefully constructed plan for discovery and that "it would be a waste of resources to search for any documents in the 2009-2010 time frame because nothing of significance was happening then."[46]

While acknowledging the validity of the plaintiffs' point regarding 2009 and 2010, the court noted that any remedial discovery effort by the defendant would be "very costly and time-consuming." Based on the representations made by the defendants, such an effort could involve a search of "as many as a million pages" and a review of potentially "200,000 pages" to yield a production where "the volume of documents is small."[47] The court observed that the plaintiffs had not challenged the accuracy of these estimates.[48] Citing to amended Rule 26(b)(1), the court wrote that "[c]learly, the question of proportionality is raised by this scenario."[49]

Since the enactment of the amended rule, courts appear to be faithfully and pragmatically enforcing these standards. The case law examples provided suggest increased reliance by courts on the use of the proportionality.

Finding that both parties should be required to address the proportionality factors[50] and that the defendant had provided a "logical" explanation while the plaintiffs "have not presented anything … showing that this search would add materially to their existing collection of relevant documents," the court held that ordering an additional search for 2009 and 2010 would "violate the rule of proportionality" and denied the motion to compel for this time period. However, the court granted the motion for the time period after the filing of the complaint, finding that the defendant had "not presented any specific argument about undue burden"[51] and that the defendant's "categorical approach to post-complaint documents is not appropriate[.]"[52]

Conclusion

Federal Rule of Civil Procedure 26(b)(1), as amended, effective Dec. 1, 2015, clearly establishes the scope of discovery to be items that are (1) relevant, (2) non-privileged, and (3) proportional to the needs of the case.[53] Since the enactment of the amended rule, courts appear to be faithfully and pragmatically enforcing these standards. The case law examples we provide above suggest increased reliance by courts on the use of the proportionality.[54] Practitioners and parties should be aware that, although we are still in the early stages of the post-2015 amendments era, proportionality may now be playing a critical role in determining the permissible scope of discovery and courts may expect both the requesting and producing parties to fully consider the issue. And perhaps in the future as we look back on 2015 as the year of "the dress" and "Pizza Rat," we will also be able to say that, with respect to proportionality, the 2015 amendments finally succeeded where prior efforts had not.

1. "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." Former FED. R. CIV. P. 26(b)(1)(iii) (1983).

2. FED. R. CIV. P. 26 advisory committee's note (1983).

3. Richard L. Marcus, "Confronting the Future: Coping with Discovery of Electronic Material," 64-SUM Law & Contemp. Probs. 253, 257 (Spring/Summer 2001) (quoting 8 Charles Alan Wright et al., Federal Practice & Procedure §2008.1, at 121 (2d ed. 1994)).

4. Rule 26(b)(1) was "subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes [were] then made in new paragraph (2) … " FED. R. CIV. P. 26 advisory committee's note (1993).

5. "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 proposed discovery in resolving the issues*." Former FED. R. CIV. P. 26(b)(2)(iii) (1993) (emphasis added).

6. FED. R. CIV. P. 26 advisory committee's note (1993) ("The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.").

7. See FED. R. CIV. P. 26 advisory committee's note (2000).

8. Id. Given that the Advisory "Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated[,] … [t]his otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery." Id. (internal citations omitted).

9. "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: … (iii) 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." Former FED. R. CIV. P. 26(b)(2)(C)(iii) (2006) (emphasis added). The accompanying Advisory Committee Note mentioned the proportionality limitations only generally, stating that the "limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources." FED. R. CIV. P. 26 advisory committee's note (2006).

10. Thomas Y. Allman, "Applying the 2015 Civil Rules Amendments," Jan. 23, 2016, at 8, available at http://www.lfcj.com/uploads/3/8/0/5/38050985/2016applyingtherulespackage_jan23_.pdf.

11. In 2010, The Sedona Conference released its Commentary on Proportionality in Electronic Discovery, 11 Sedona Conf. J. 289 (2010), the culmination of efforts by the respected e-discovery think-tank to help bring proportionality considerations to the forefront in e-discovery practice and to ensure the appropriate consideration of proportionality in addressing the scope of discovery. Also, during Duke Law School's May 2010 conference on civil litigation in federal courts, or the "Duke Conference," "[t]here was nearly unanimous agreement that the disposition of civil actions could be improved, reducing cost and delay, by advancing cooperation among the parties, proportionality in the use of available procedures, and early and active judicial case management." See Report of the Duke Conference Subcommittee of April 10-11, 2014, Agenda Book for April 1, 2014 Civil Rules Advisory Comm., at 79, available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014.

12. FED. R. CIV. P. 26 advisory committee's note.

13. Id.

14. Id.

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

16. C.J. John G. Roberts Jr., 2015 Year-End Report on the Federal Judiciary, Dec. 31, 2015, available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

17. Id. at 5.

18. Id. at 7.

19. See, e.g., Thomas Y. Allman, "The Proportionality Principle after the 2015 Amendments," app. at 10-17 (March 21, 2016) (unpublished manuscript) (on file with author).

20. *Vaigasi v. Solow Mgt.*, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) (quoting *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 359 (S.D.N.Y. 2008) (Maas, M.J.)) (internal quotations omitted).

21. *Robertson v. People Magazine*, 2015 WL 9077111 (S.D.N.Y. Dec. 16, 2015).

22. Id. at *1.

23. Id.

24. Id. at *2.

25. Id.

26. Id.

27. Id.

28. Id. at *3.

29. *Moore v. Lowe's Home Ctrs.*, 2016 WL 687111 (W.D. Wash. Feb. 19, 2016).

30. Id. at *1.

31. Id. at *2.

32. Id. at *4.

33. Id.

34. Id. at *5.

35. Id.

36. Id.

37. Id.

38. Id.

39. Id.

40. Id.

41. Id.

42. *Wilmington Trust v. AEP Generating*, 2016 WL 860693 (March 7, 2016).

43. Id. at *1.

44. Id.

45. Id.

46. Id.

47. Id. at *2

48. Id.

49. Id.

50. Id.

51. Id. at *3.

52. Id. The court excused the defendant from having to create a privilege log with respect to any privileged documents withheld from this new production. Id.

53. Scope of discovery is, additionally, subject to the limitations provided in FED. R. CIV. P. 26(b)(2).

54. See also *Brinker v. Normandin's*, 2016 WL 270957 (N.D. Cal. Jan. 22, 2016) (court, sua sponte, takes up the issue of proportionality and finds requested production of materials to be proportional to the needs of the case).