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Proportionality Emphasized In Amendments To The Federal Rules Of Civil Procedure By Immanuel R. Foster Heads Up

Significant amendments to the Federal Rules of Civil Procedure became effective on December 1, 2015. The amendments modify Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84. The amendments seek to increase the efficiency and speediness of litigation while slowing the rising costs of discovery. Toward the latter goal, certain of the revisions establish an express guiding principle to limit the scope of discovery: proportionality.

The application of the proportionality requirement likely will have an immediate and lasting influence on how parties conduct discovery in federal courts and how the courts referee discovery disputes. Specifically, amended Rule 26(b)(1), which governs the scope of discovery, permits discovery into relevant, non-privileged information "proportional to the needs of the case." (Emphasis added.) Old Rule 26(b)(1) permitted discovery into relevant, non-privileged information "reasonably calculated to lead to the discovery of admissible evidence," a phrase that was often misconstrued and which is now removed. Old Rule 26(b)(1) also permitted such discovery into sources of additional discovery, "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Thus, the new rule: (i) establishes "proportionality" as a limiting principle (ii) potentially limits "discovery about discovery" and, consequently, (iii) will, it is hoped, add a needed control to the rising costs of discovery.

Proportionality Is The New Standard

The amended rule removes "reasonably calculated" – an ambiguous phrase that sometimes allowed for expansive discovery – and focuses on "proportional." And the amended rule specifies the considerations for determining whether discovery is proportional, including "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." Parties now must consider these factors when making or responding to discovery requests.

To be sure, proportionality is not a wholly new concept in federal practice. For example, before the 2015 amendments, proportionality was implied by Rule 26(b)(2)(C)(iii), which required courts to limit discovery where "the burden or expense of the proposed discovery" would "outweigh[] its likely benefit," and Rule 26(g) required a party seeking discovery to certify that the discovery was "not . . . unduly burdensome or expensive," in light of the circumstances of the litigation. But while parties seeking protective orders pursuant to Rule 26(c) would frequently call the court's attention to these proportionality considerations, opposing parties would often invoke "reasonably calculated," which the Advisory Committee Notes on the new rule state "were used by some, incorrectly, to define the scope of discovery." The amendments change that. The Committee Notes also state that "[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery," empowering courts to enforce

tighter limits on disproportionate discovery.

Proportionality May Restrict Discovery About Discovery

The amendment to Rule 26 deletes language that permitted discovery into information about "the existence, description, nature, custody, condition, and location of any documents . . . and location of persons who know of any discoverable matter." However, the Committee Notes suggest that this change is more style than substance. It states that the long list of examples is so "deeply entrenched" that to include it would only maintain unnecessary "clutter" in an already lengthy rule, and that "[t]he discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case."

Still, the revision suggests limitations to the scope of this discovery to the extent that it would be at cross purposes with proportionality. For example, in a recent case, a magistrate judge ruling on a motion for a protective order applied Rule 26(b)(1) and limited a proposed Rule 30(b)(6) deposition topic, noting that "[w]hile Plaintiffs have articulated credible reasons for seeking this information nationwide, its production is not proportional to the needs of the case." Cooper v. Charter Commc'ns, Inc., No. 3:12-cv-10530-MGM, 2016 WL 128099, at *2 (D. Mass. Jan. 12, 2016). One of the credible reasons that Plaintiffs had advanced was that they were entitled to test Defendant's assertion that they lacked certain relevant records for Massachusetts by inquiring about "how [Defendant] is able to track service losses in other states." Pl.'s Opp'n To Charter's Mot. at 7, Cooper, ECF No. 187. Thus, although the discovery request might have been permitted under the old rule, it was deemed not proportional under the new rule, and therefore exceeded the scope of discovery now permitted.

Proportionality Considerations Will Likely Contain The Costs Of Discovery

Proportionality figures to slow the ballooning costs of litigation caused by technological advances. Specifically, widespread use and adoption of electronically stored information (ESI), often over many platforms, has made once-mundane discovery requests exponentially more burdensome. In the past, responding to a discovery request might have meant collecting the data from a few computers from a few custodians, and each of those computers might have stored only a few gigabytes of data. Now, discovery sometimes requires searching and reviewing terabytes of data harvested from local computers, from networks, and from the cloud – all of which must be reviewed for relevance and privilege. This discovery can be similarly onerous for discovery recipients who must review and analyze large productions to determine how the information fits into or modifies their theory of the case or how the information might necessitate additional discovery.

The Committee Notes express the hope that parties and the courts will continue to embrace sophisticated ways to reduce the costs of producing ESI. For example, to the extent that a discovery request could call for a click-by-click review through thousands or millions of documents, courts should permit parties to use reasonably-tailored search terms to narrow the scope of review. Proportionality may now require it. Limiting the scope of e-discovery would certainly make discovery less expensive. Moreover, as discussed above, if courts become more reluctant to permit discovery into potential sources of additional discovery, that would further

contain costs.

Conclusion

At the very least, the amended Rule 26(b)(1) will require parties and federal courts to weigh the proportionality factors and determine, for example, whether the importance of certain discovery in resolving an issue is proportional to the burden or expense of providing that discovery. The Committee Notes suggest that parties should use Rule 26(f) and other scheduling and pretrial conferences to gain a "full appreciation of the factors that bear on proportionality" to inform their discovery requests and responses. In discovery motion practice, parties will no longer prevail by arguing that a discovery request is reasonably calculated to lead to admissible evidence; now they must demonstrate that the request is proportional.

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