HOW THE CHANGE TO RULE 26 IS CHANGING DISCOVERY

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Litigants – especially defendants – have historically lamented the broad scope of discovery allowed by the Federal Rules of Civil Procedure. Discovery often is the most time-consuming and contentious aspect of litigation. In 2010, the Committee on Rules of Practice and Procedure met at the Duke University School of Law to develop strategies to "improve the disposition of civil cases by reducing the costs and delays in civil litigation … and furthering the goals of Rule 1 'to secure the just, speedy, and inexpensive determination of every action and proceeding.'" http://www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/st09-2014.pdf at 13.

The Committee decided to do this by promoting "cooperation, proportionality, and active judicial case management." http://www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/st09-2014.pdf at B-2. To further these goals, the Committee proposed changes to certain rules, including Rule 26, which governs discovery.

On December 1, 2015, those changes went into effect. These changes govern discovery in cases filed after that date, and most cases that were pending on December 1, 2015, so long as it is just and practicable. There is little evidence in the case law that courts are still applying the former Rule 26 to cases that were filed before that date.

Rule 26(b)(1) now provides, "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. Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

The new Rule 26 has the potential to narrow the scope of discovery. As of April 2016, the editors of *The Federal Litigator* had located 54 district-court cases applying the proportionality provisions of Rule 26. Of those, approximately 60 percent found at least one discovery request to be disproportionate. *Federal Litigator*, Vol. 31, Issue 4 at 115 (April 2016). This author found many cases analyzing proportionality under Rule 26 that were published after April 2016, so it is very important to stay up-to-date in this area.

Additionally, many courts found the change in the language describing the scope of discoverable information to be important. *Id.* The rule previously stated, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Committee replaced that with the sentence, "Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

While it is still too early to know how every court will interpret the changes to Rule 26, the case law in this

area is developing quickly. As of the time this article was submitted, no federal appellate courts had specifically addressed the changes to Rule 26. A sample of the district-court opinions analyzing proportionality are discussed below, along with some practical tips.

NO BIG DEAL?

Some commentators speculated that the new Rule 26 would greatly reduce the scope of discovery. This has not occurred in some courts that have addressed the new language of Rule 26.

For example, a magistrate judge in the District of South Dakota wrote that most of the proportionality factors in Rule 26(b)(1) were previously in subsection (b)(2)(C), which "has been in effect for the last 33 years, since 1983, so it is hardly new." *Schultz v. Sentinel Insurance Co. Ltd.*, 4:15-CV-4160-LLP, 2016 WL 3149686 at *5 (South Dakota, June 3, 2016). The court went on to opine that "[t]he rule, and the caselaw that developed under the rule, have not been drastically altered." *Id.* at *7.

In contrast, courts in other jurisdictions have stated or implied that the changes to Rule 26 will require litigants and courts to modify their analysis of discovery disputes. A magistrate judge in Indianapolis wrote that the scope and limitations of discovery under Rule 26 "has evolved over the last thirty years or so" and those changes serve "to rein in popular notions that anything relevant should be produced and to emphasize the judge's role in controlling discovery." *Noble Roman's, Inc. v. Hattenhauer Distributing Co.*, 314 F.R.D. 304, 307 (S.D. Ind. 2016). The court granted a protective order to prevent "discovery run amok." *Id.* at 312.

THE STAKES ARE HIGH

Many courts have agreed that the issues at stake are incredibly important to the proportionality analysis.

This type of analysis is clear in the *Schultz* case, cited above. In that case, the plaintiff was suing an insurance company for bad faith, among other claims. The court held that the plaintiff was entitled to broad and expensive discovery, despite the fact that she was suing for only $17,000. The court supported this holding by stating that the plaintiff's claim "is about many victims of an unscrupulous claims-handling practice. … Plaintiff] has the potential to affect [the insurance company's] alleged business practices and to remedy the situation for many insureds, not just herself." *7.

SCOPING IT OUT

The proportionality factors can also define the scope of discovery. A court in the District of Utah, for example, held that defendants could seek broad discovery from the plaintiff. *Lifevantage Corp. v. Jason Domingo and Ovation Marketing Inc.*, 2:13-CV-1037, 2016 WL 913147 (D. Utah, Mar. 9, 2016). The discovery was "very broad and might be unduly burdensome in many cases," but it was held to be proportional because the plaintiff sought a large amount in damages, and the defendant needed to be able to perform a nuanced analysis to properly defend the case. *Id.* at * 2.

In contrast, when a plaintiff seeks broad and onerous discovery on a relatively minor claim, some courts will hold that the proportionality analysis demands restrictions on that discovery. *Willis v. Geico General Ins. Co.*, Civ. No. 13-280, 2016 WL 1749665, at *4 (D.N.M., Mar. 29, 2016).

PRACTICAL TIPS

Know how to defend requests and objections

Lawyers should be prepared to defend every discovery request and every objection. Many courts have noted that the litigants bear responsibility for ensuring that they only seek discovery that fits the requirements of Rule 26. *See, e.g., Capetillo v. Primecare Medical, Inc.*, Case No. 14-2715, 2016 WL 3551625 (E.D. Penn., June 29, 2016). Additionally, the scope of discovery under Rule 26 is still broad, and courts are trying to work through how to balance all the factors in the proportionality analysis.

It is also imperative that the client and counsel have a deep understanding of the universe of potentially responsive documents. Counsel will need to know all the factors in the proportionality analysis and how they apply to the particular case.

Read as much as possible

Many lawyers rely solely on the text of the rules. In the case of Rule 26, this is a mistake. The comments to Rule 26 are vital to a thorough understanding of the rule. For example, the Committee explains in the comments that computer-based searching could resolve a party's objections before asking the court to intervene in the dispute. The Committee also explains the relative weight of the proportionality factors. A careful review of the comments will give insights into the rule and its application.

Also, keep in mind that case law interpreting the changes to Rule 26 is developing quickly. Lawyers will need to check for new cases regularly and review developments in this area of law each time they are crafting objections, conferring with the other parties, or writing motions to compel.

Articulate your objections

Courts have already refused to consider unsupported objections that requests are not proportional. Likewise, the comments to Rule 26 explicitly forbid a party from simply making "a boilerplate objection that [the request] is not proportional." Counsel drafting responses must understand the new boundaries to discovery created by the proportionality analysis and how to articulate specifically why certain requests are outside the scope of discovery.

Support your position

The party resisting discovery has the burden of proving that the request is not proportional. *See, e.g., Waters v. Union Pac. R.R. Co.*, Case No. 15-1287, 2016 WL 3405173 (D. Kan., June 21, 2016). This can be done through affidavits, deposition testimony, or producing documents that show how onerous or disproportional the discovery requests are.

Go beyond the amount at stake

When drafting objections and responding to motions to compel, the responding party might be tempted to rely heavily on the "amount in controversy" factor to limit the scope of discovery. However, as it explains in the comments to Rule 26, the Committee deemphasized the importance of the amount in controversy by listing "the importance of the issues at stake" as the first proportionality factor. Although the amount in controversy should be considered in the proportionality analysis, the Committee deemphasized that factor to "avoid any implication that the amount in controversy is the most important concern." As the comments also note, many lawsuits "seek[] relatively small amounts of money, or no money at all, but … seek[] to vindicate vitally important personal or public values."

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