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Proportionality in Discovery One Year Later: The Focal Points of Planning, Protocol, and Process

By Kevin P. Broughel, James Worthington & Tom Barnett

Introduction

The amendments to Federal Rule of Civil Procedure 26(b) have now passed the one-year mark, and cases applying the Rule continue to pile up. As noted in a previous *Client Alert*, the December 2015 amendments were not intended to create new relevancy parameters for discovery but rather "to exhort judges to exercise their preexisting control over discovery more exactingly."[1] With that in mind, there have been several noticeable trends in the way courts have approached the discovery process that have important ramifications for litigants when they embark on the journey to producing documents, e-mails, and other data. Above all, these trends instruct parties that effective—which often means cooperative—management of planning, protocol, and process are paramount for properly navigating proportionality in discovery.

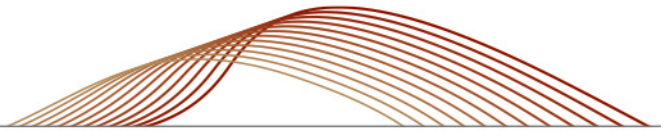
Recap of Amended Rule 26(b)

Under new Rule 26(b), proportionality has been moved up from its former position in section (b)(2) ("Limitations on Frequency and Extent") into section (b)(1) ("Scope in General"). Information is now discoverable if it 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."[2] The old discoverability standard of information being "reasonably calculated to lead to the discovery of admissible evidence" has been abandoned.

When the Rule 26 amendments became effective, some expected that there would be an immediate, substantial impact on the manner and scope of discovery. While we have previously reported that there has not been a dramatic change in that regard, there are several emerging themes from the caselaw that provide valuable insights for parties about to undertake the various stages of discovery.

Planning – Cooperation and Transparency Remain Supreme

As one would expect, courts historically have taken a dim view of litigants who prematurely seek court intervention to resolve discovery disputes without first adequately consulting the opposition.[3] Post-amendment decisions, however, place a renewed emphasis on parties working together to resolve discovery issues. This includes, as one district court has observed, "a shared responsibility on all the



parties to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts."[4]

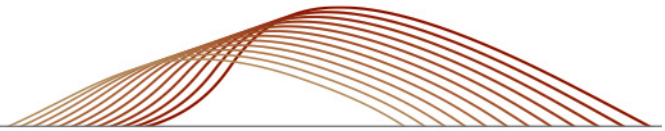
The benefits and, conversely, the consequences of failing to heed these warnings can be material. For instance, in *D.F. v. Sikorsky Aircraft Corporation*, the district court denied a request for an order requiring *in camera* review of privileged documents withheld by a non-party (the Navy) and a formal privilege log or affidavit in part because "the Navy has been very cooperative with the parties in a number of ways and has obviously made a good faith attempt to ensure that the parties … resolve the matters at issue in this case."[5] Accordingly, the district court did not believe that it would be proportional to grant the motion with "the additional time and expense that will undoubtedly be necessary to present the parties and the Court with a formal, detailed privilege claim addressing all disputed documents."[6] In contrast, in *Top Lighting Corp. v. Linco, Inc.*, the district court denied as moot a motion to compel additional discovery because "both parties ha[d] failed to fulfill their obligations … by failing to engage in *any* apparent discussions" to resolve the dispute. The district court observed that "[t]his failure to communicate is particularly troublesome in light of the spirit of cooperation that is the focus of the 2015 amendments to the Federal Rules of Civil Procedure."[7] Likewise, in *Venturedyne, Ltd. v. Carbonyx, Inc.*, the district court ordered that the parties use 78 search terms even though the defendant objected to further searches because the defendant had chosen to stop negotiating with plaintiff on further search term limitations.[8] And in *Fulton v. Livingston Fin. LLC*, the district court sanctioned defense counsel for citing to pre-amendment caselaw in an effort to seek additional discovery or exclude certain evidence presented by the plaintiff, which the court found "inexplicable" in light of the "highly publicized amendments."[9]

In sum, it behooves litigants to work directly together early and often in discovery planning so as to best define and maintain the boundaries of discovery and, if necessary, narrow and crystalize bona fide discovery disputes requiring judicial resolution. These discussions, if possible, should not be limited to just Rule 26(f) meet-and-confers or case management conferences, but should be integrated into ongoing dialogue between the parties throughout the discovery process. In addition, when disputes are ripe for adjudication, parties should be prepared to address all of the proportionality factors and how they impact the appropriate scope of discovery.[10] In that regard, the more specifically a party can anchor its arguments with particularized data concerning time, cost, and burden, the better. Simply asserting without support that certain requests or targeted sources of information will be costly and time-consuming will likely not be persuasive. An objection to—or motion to compel—discovery requests supported by specific, defensible metrics is far more likely to result in a favorable ruling.

Protocol – Courts Are Getting More Hands On With Technology, But Generally Still Give Responding Parties Broad Discretion in Managing Their Data

One of the most closely-watched areas of development with the new amendments is the interplay between proportionality and technology. In other words, how will the increased use of technology assisted review (*e.g.*, predictive coding) and other automated search technologies impact the proportionality analysis?

The answer thus far is somewhat mixed. One takeaway is that courts are generally not yet at the point of ordering parties to use technology assisted review instead of other types of document review approaches. In *Hyles v. New York City*,[11] for example, although the district court acknowledged that technology assisted review was "in general … cheaper, more efficient and superior to keyword searching," it declined to enter an order *requiring* the defendants to use technology assisted review.



Citing among other sources Sedona Principle 6[12] that "[r]esponding parties are best situated to evaluate procedures, methodologies and technologies they may employ to identify and produce relevant and responsive documents," the district court held that while there "may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR … [w]e are not there yet." The district court added, "[w]hile [plaintiff] may well be correct that production using keywords may not be as complete as it would if TAR were used, the standard is not perfection, or using the 'best' tool, but whether the search results are reasonable and proportional."[13] In the same vein, another district court applied *Hyles*' reasoning in denying without prejudice plaintiffs' motion to require defendant to use technology assisted review when it preferred to use ordinary search terms.[14]

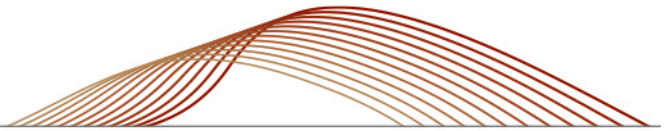
This does not mean, however, that courts will not weigh in on certain other aspects of discovery and technology. For instance, courts may evaluate and order parties to use or not use certain search terms based on an evaluation of the proportionality factors.[15] When undertaking this analysis, arguments by parties about search term efficacy or lack thereof are most likely to be effective when supported by quantitative evidence. As courts have recognized, sampling and statistical testing and analysis can be valuable not only in assessing the effectiveness of such approaches, but in generating and agreeing upon search terms as part of the negotiation process.[16] Similarly, courts will order that certain repositories of information be searched or not searched in light of the proportionality factors,[17] and will consider proportionality when resolving disputes over the appropriate scope of custodians.[18]

At bottom, the intersection between the amended Rule 26 proportionality factors and how electronic data should be collected and searched continues to evolve. For now, the decisions underscore that responding parties will still largely if not exclusively control the procedure and methods of document production absent clear evidence that the producing party's chosen protocol is deficient. Nevertheless, caselaw and secondary authority suggest that parties should employ appropriate expertise to create, negotiate and validate search terms and data selection criteria in case a search protocol is challenged.[19]

Process – Phased or Targeted Discovery is Prevalent

Although discussed in cases pre-dating the 2015 Rule amendments,[20] the renewed emphasis on proportionality has given new energy to the concept of incremental discovery at the outset of a case, while leaving open the door for more comprehensive discovery should the initial set of produced information be insufficient.[21] As quoted by one district court shortly after the amendments took effect, "[t]he parties and court should consider sequencing discovery to focus on those issues with the greatest likelihood to resolve the case, and the biggest bang-for-the buck at the outset, with more discovery, later, as the case deserves."[22] This plays out in a number of different ways. Among other methods, courts may, at the outset, limit the sources of data to be searched by a party, or pare back the use of certain keywords, or shorten the relevant timeframe from which information must be examined.

The sharpened focus on phased discovery presents parties, particularly those with disparate or voluminous amounts of information, a real opportunity to meaningfully reduce their discovery burden by focusing on only the key case issues in conjunction with their corresponding readily accessible sources of information. As just one example, a party may be able to circumscribe its production sources to just a small number of custodial data files if a credible argument can be made that further discovery from additional sources would not be proportional to the needs of the case.



For the most effective results, litigants must move quickly when a case is filed to assess all the relevant factual and legal issues while analyzing the scope of potentially relevant data. In that way, a party will be best positioned to forcefully negotiate or, if necessary, argue in court about the information and data sources that should be prioritized versus those that are more peripheral and perhaps ultimately unnecessary. Failure to do this early case analysis can result in time-consuming and costly discovery that could have been nipped in the bud.

Key Takeaways

Naturally, cases analyzing proportionality and the scope of discovery under amended Rule 26(b) will always to some extent be dependent on the particular facts and circumstances of the case at hand. Moreover, the true impact of the amendments will take years to fully shake out. It is clear, however, that courts expect parties at the outset to initiate and conduct good faith discovery planning before seeking court intervention, providing litigants with an opportunity to potentially better control the scope of discovery or stake out critical early positions as to what discovery will shape litigation of the action. Where court intervention is necessary, judges are generally deferring to parties to determine the most appropriate technological protocols for efficiently managing their own data, while applying the proportionality factors in assessing appropriate data sources, custodians and timeframes. As 2017 unfolds, parties should continue to closely monitor proportionality case law in their jurisdiction, to best understand how courts are analyzing and implementing the proportionality factors in their cases.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Thomas I. Barnett
1.213.683.6123
tombarnett@paulhastings.com

New York

Kevin. P. Broughel
1.212.318.6483
kevinbroughel@paulhastings.com

James B. Worthington
1.212.318.6416
jamesworthington@paulhastings.com

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[1] *See* Kevin Broughel, James Worthington and Jessica Oliva, *Client Alert: Proportionality in Discovery – Taking Stock After Six Months* (June 9, 2016), available at https://www.paulhastings.com/publications-items/details/?id=767fe969-2334-6428-811c-ff00004cbded.

[2] Fed. R. Civ. P. 26(b)(1) (2017).

[3] *See, e.g., Gopalratnam v. Hewlett-Packard Co.*, 2015 U.S. Dist. LEXIS 132837, at *19-20 (E.D. Wis. Sept. 30, 2015) ("in the court's experience, it isn't that judges hate discovery disputes. It is that judges dislike unnecessary discovery disputes that involve unprofessional (some might say puerile) behavior by the lawyers or the parties.").

[4] *Salazar v. McDonald's Corp.*, 2016 U.S. Dist. LEXIS 23293, at *7 (N.D. Cal. Feb. 25, 2016).

[5] 2016 WL 3360515, at *7 (S.D. Cal. June 13, 2016).

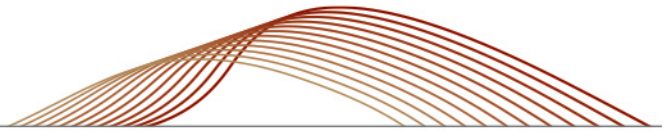
[6] *Id.*

[7] 2016 U.S. Dist. LEXIS 137997, at *4 (C.D. Cal. Oct. 4, 2016).

[8] 2016 WL 6694946, at *3 (N.D. Ind. Nov. 15, 2016).

[9] 2016 U.S. Dist. LEXIS 96825, at *18-19 (W.D. Wash. July 25, 2016).

[10] *See, e.g.*, *Nerium SkinCare, Inc. v. Olson*, 2017 U.S. Dist. LEXIS 7986, at *11-12 (N.D. Tex. Jan. 20, 2017) (stating while a "party seeking to resist discovery on [proportionality] grounds still bears the burden of making a specific



objection and showing that the discovery fails the proportionality calculation … [t]he party seeking discovery, to prevail on a motion to compel, may well need to make its own showing of many or all of the proportionality factors").

[11] 2016 U.S. Dist. LEXIS 100390, at *5 (S.D.N.Y. Aug. 1, 2016).

[12] *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Principle* 6.

[13] *Hyles,* 2016 U.S. Dist. LEXIS 100390, at *7-10.

[14] *In re Viagra (Sildenafil Citrate) Prods. Liab. Litig.*, 2016 U.S. Dist. LEXIS 144925, at *52-53 (N.D. Cal. Oct. 14, 2016) (explaining that "it is not clear on what basis the Court could compel … a particular form of ESI [searching] … especially in the absence of any evidence that [defendant's] preferred method would produce, or has produced, insufficient discovery responses.")

[15] *See, e.g., Pre-Paid Legal Servs. v. Cahill*, 2016 U.S. Dist. LEXIS 136837, at *19 (E.D. Okla. Sept. 30, 2016) (holding, for example, that "the terms 'message me,' 'opportunity,' and 'opportunities' are generic terms that would likely capture a large volume of irrelevant documents. Accordingly, these terms shall be excluded from searches."). Notably, some courts have cautioned against resolving keyword search disputes without expert guidance. *See, e.g., United States v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) ("for lawyers and judges to dare to opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.").

[16] *See, e.g., In re Lithium Ion Batteries Antitrust Litig.*, 2015 U.S. Dist. LEXIS 22915, at *52-56 (N.D. Cal. Feb. 24, 2015) ("The proposed sampling procedure is designed to prevent irrelevant documents from being reviewed or produced in the litigation, and will obviate, or at least clarify, motion practice over the search terms themselves."); *United States v. O'Keefe, supra*; *The Sedona Conference: Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery,* December, 2013.

[17] *See, e.g., In re: Fluoroquinolone Prods. Liab. Litig.*, 2016 WL 4045414, at *1 (D. Minn. July 20, 2016) ("Due to the significant burden the proposed custodial-file searches would impose on Defendants, and the less-than-certain benefits of such searches, the Court finds Defendants need not engage in them at this time … [t]hat being said, Plaintiffs are free to seek permission from the Court to engage in further discovery if the information available in these [existing] databases turns out to be insufficient.").

[18] *See, e.g., In re Disposable Contact Lens Antitrust Litig.*, 2016 U.S. Dist. LEXIS 151330, at *8 (M.D. Fla. Nov. 1, 2016) (after reciting proportionality factors, permitting only a subset of requested additional custodians because "considering the custodians already agreed upon and the documents they are likely to have, limiting the additional custodians sought in this manner strikes the proper balance: it allows for the discovery of relevant and hopefully non-duplicative information but limits the cost of the search.").

[19] *See supra* note 16.

[20] *See, e.g., Kleen Prods., LLC v. Packaging Corp. of Am.,* 2012 U.S. Dist. LEXIS 139632, at *59 (N.D. Ill. Sept. 28, 2012) ("[T]o the extent possible, discovery phases should be discussed and agreed to at the onset of discovery.").

[21] *See, e.g., In re Domestic Drywall Antitrust Litig.*, 2016 WL 4414640, at *2 (E.D. Pa. Aug. 18, 2016) (applying "discovery fence" to limit initial discovery while stating "[t]he discovery fence may be expanded or limited because of developments in the case or because of demonstration by the parties."); *Design Basics, LLC v. Ahmann Design, Inc.*, 2016 U.S. Dist. LEXIS 106430, at *10 (N.D. Iowa Aug. 10, 2016) (ordering an "incremental approach" to discovery and allowing plaintiff limited inspection of documents with an additional inspection "depend[ing] on what evidence, if any, is discovered in the first inspection."); *Lauris v. Novartis*, 2016 WL 7178602, at *15 (E.D. Cal. Dec. 8, 2016) ("The Court denies Plaintiffs' request to expand the list of custodians without prejudice finding that the additional burden or expense of the proposed discovery outweighs its likely benefit. If, after production of responsive documents …the parties dispute whether further production is warranted, the Court will revisit the scope of discovery and who should bear the cost of production.").

[22] *Wide Voice, LLC v. Sprint Commc'ns Co. L.P.*, 2016 WL 155031, at *2 (D. Nev. Jan. 12, 2016), quoting *The top 7 takeaways from the 2015 Federal Rules Amendment*, America Bar Ass'n (Nov. 24, 2015).