Proportionality in Discovery – Taking Stock after Six Months

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Introduction
Following implementation of the amendments to Federal Rule of Civil Procedure 26(b) in December 2015, several commenters predicted that 2016 would be "the year of proportionality." Of course, "proportionality is the new black" has been a recurrent refrain in the world of civil discovery for years, and proportionality has had an explicit—albeit all too often understated—role to play in discovery under the Federal Rules since 1983. With six months now passed since the Rule amendments, it is a good time to take stock of the impacts that the amendments have had on the scope of discovery. While the amendments were not intended to fundamentally change the scope of discoverable information, the heightened focus on proportionality factors has led to several interesting emerging trends that parties should keep in mind when responding to or propounding discovery.

Recap of the New Rule 26(b)
The 2015 amendments to Rule 26(b) altered in part the language used to describe the scope of allowable discovery. Under old Rule 26(b), information that was "relevant to any party's claim or defense" was discoverable, and courts could limit the frequency or extent of discovery if its "burden or expense . . . outweigh[ed] its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the discovery in resolving the issues." Information did not need to be admissible to be discoverable so long as it "appear[ed] reasonably calculated to lead to the discovery of admissible evidence."2

Under new Rule 26(b), relevance remains the touchstone of discoverability: information remains discoverable if it is "relevant to any party's claim or defense."3 However, the concept of proportionality has been moved up from its former position in section (b)(2) ("Limitations on Frequency and Extent") and is now incorporated 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."4 Moreover, the "reasonably calculated" language has been eliminated."5
The New Rule 26(b) in Action

The initial response to the proposed Rule 26 amendments was impassioned. The Advisory Committee received nearly 600 comments discussing proportionality, and many of these comments reflected an expectation that the amendments would lead to substantive changes in the manner and scope of discovery.6

Over the past six months, however, many of these concerns have not materialized: courts continue to apply pre-amendment case law in determining the scope of discovery, and many decisions expressly note that the new language has not changed the underlying substance of the Rule. Nonetheless, as described below, several interesting issues have emerged that parties should keep in mind during the discovery process.

Decisions that View the New Rule as Narrowing the Scope of Discovery

A number of courts have observed that "the 2015 amendment does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactly." 7 In other words, "[d]espite the change in terminology for Rule 26(b)(1), the relevancy parameters [for discovery] remain."8 Nevertheless, there have been a handful of cases that suggest that the amended Rule 26(b) narrows the scope of discovery. For example, in XTO Energy, Inc. v. ATD, LLC9 the district court traced the history of discovery’s scope under the Federal Rules of Civil Procedure and concluded that "[t]he 2015 amendments to Rule 26(b)(1) continued [a] process of narrowing the substantive scope of discovery and injecting courts further into the discovery process."10 Although "the proportionality concept . . . has always limited overly burdensome discovery," the XTO court noted it "was relocated to 26(b)(1) to address the ‘explosion’ of information that ‘has been exacerbated by the advent of e-discovery.’"11 Additionally, in Yee v. Cliff Veissman, Inc.,12 the district court noted that the Rule 26(b) amendments "subtly narrowed the concept of relevance for purposes of discovery. They deleted from Rule 26 a party’s ability, for good cause, to obtain discovery of any information relevant to the subject matter of the case, and the notion that information is discoverable, even if not directly relevant, if it is reasonably calculated to lead to the discovery of admissible evidence."13 Another decision has similarly referred to “Rule 26(b)(1)’s narrowing of the scope of discovery.”14 Accordingly, litigants should continuously monitor proportionality decisions in their jurisdiction to determine whether any courts are interpreting the Rule amendments as a directive to reign in further the scope of discoverable information.

The Burden of Proving Proportionality

A significant concern raised in response to the proposed amendments was that the change could re-allocate the burden in moving to compel or to quash discovery. However, on this score, courts have largely held that the burden has not changed. For example, in State Farm Mut. Auto. Ins. Co. v. Fayda,15 a decision released immediately after the amended Rule 26(b) went into effect, the district court observed, “the parties’ responsibilities remain the same as they were under the previous iteration of the rules, so that the party resisting discovery has the burden of showing undue burden or expense.”16 Other courts have agreed, stating “[i]n general, the parties’ responsibilities remain the same as they were under the rule’s earlier iteration . . .”17

This line of reasoning is consistent with the Advisory Committee notes, which state that the amendment “does not change the existing responsibilities of the court and the parties to consider proportionality,” and that while “[t]he parties and the court have a collective responsibility to consider
the proportionality of all discovery,” the party claiming undue burden or expense “ordinarily has far better information—perhaps the only information—with respect to that part of the determination.” Nevertheless, the party claiming a request is important to resolving issues “should be able to explain the ways in which the underlying information bears on the issues as that party understands them.”

**Specificity of Objections in Responding to Discovery Requests**

The Advisory Committee notes warn that the amendments to Rule 26(b) are not “intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.” Courts have taken notice.

For instance, in *Areizaga v. ADW Corp.* the district court explained “the burden [remains] on the party resisting discovery to . . . specifically object and show that the requested discovery does not fall within Rule 26(b)(1)’s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable.” The *Areizaga* court therefore rejected the plaintiff’s “conclusory” objections to producing information on the grounds that it was in the defendant’s control or easily accessible through other means, because these objections “provide no basis for [the defendant] or the Court to know what responsive documents [the plaintiff] has in his possession, custody, or control that he is withholding or that he contends that he should not be required to produce . . .” As another example, in *Sanders v. Howmedica Osteonics Corp.*, a tort case involving medical devices, the district court cited pre-amendment case law in stating that discovery objections under the new Rule 26 “must include a specific explanation describing why the request lacks relevance, and why the information sought will not reasonably lead to admissible evidence.” Using that framework, the district court held that defendant’s “product-identification” objections to producing information about devices other than those at issue in the litigation were “precisely the type of objections contemplated by the Federal Rules of Civil Procedure.” Accordingly, plaintiff’s motion to compel was denied. In sum, these decisions illustrate that courts are leaving little doubt that objections should specifically explain how particular discovery requests are objectionable to pass judicial muster.

**Impact on Non-Party Witnesses**

One additional emerging theme is that the Rule 26(b) proportionality analysis is affected when the source of information is a non-party.

For example, in *Hahn v. Hunt* the district court held that “non-parties have greater protections from discovery,” and that these protections factor into the Rule 26(b) proportionality test. Likewise, in *Eramo v. Rolling Stone LLC* the court held that “[d]istrict courts give extra consideration to the objections of non-party, non-fact witnesses when weighing burden versus relevance” in a proportionality analysis, and thus the court limited the scope of discovery available from a non-party witness.

While the notion that there is a higher bar to obtain discovery from non-parties is not new, the renewed emphasis on proportionality engendered by the Rule 26(b) amendments highlights that courts will examine closely the burden on non-parties in the discovery process.

**Key Takeaways**

Ultimately the past six months have not seen drastic changes in the scope of discovery under amended Rule 26(b), but proportionality already has a long history in discovery, and the true impact of the amendments may be best observed over a period of years rather than months. The renewed
emphasis on proportionality, however, appears at a minimum to be revitalizing proportionality arguments by litigants, and there may be a trend towards courts becoming increasingly receptive to such arguments, particularly in circumstances where discovery most needs to be reined in and burden is truly disproportionate to the potential value of proposed discovery. Whether confronting or crafting discovery requests, parties should closely examine the evolving proportionality case law in their jurisdiction, to ensure that they are abreast of this evolving body of law.

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

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4 Id.
10 Id. at *16.
11 Id. at *17 (quoting Fed. R. Civ. P. 26(b) advisory comm. note (2015)).
13 Id. at *2.
14 Davita HealthCare Partners, Inc. v. United States, 125 Fed. Cl. 394, 398 n.3 (2016).
16 Id. at *2 (internal citation and quotation omitted).
17 2016 WL 130171, at *18.
19 Id.
20 Id.
22 Id. at *5.
23 Id. at *6.
25 Id. at *2 (quotation and citation omitted).
26 Id.
28 Id. at *2 (quotation and citation omitted).