Back to the Future

A Year with Amended Rule 26(b)(1)

By Bryan Browning and Jeffrey Peters

The amendments have refocused court discovery efforts on relevance and proportionality.

"Objection. This request is not reasonably calculated to lead to the discovery of admissible evidence."

These words, or some variation of them, have been used by attorneys for decades to object to the scope of discovery requests. Recent changes to the Federal Rules of Civil Procedure, including Rule 26, however, have refocused the permissible scope of discovery on relevance and proportionality considerations.

Having been in use for a little more than a year, litigants and courts have now had an opportunity to explore the revised language and balance the proportionality factors when drafting, responding to, and ruling on discovery requests. In some respects, what was old is new again. This article analyzes the emerging trends in the wake of the amendments and explores strategies to use proportionality factors advantageously when drafting or responding to discovery.

The 2015 Amendments to the Federal Rules of Civil Procedure

On December 1, 2015, a series of amendments to the Federal Rules of Civil Procedure took effect. The amendments were the culmination of over five years of work to address the most serious impediments to the just, speedy, and efficient resolution of civil disputes. 2015 Chief Justice's Year-End Report on the Federal Judiciary 4 (Dec. 31, 2015), https://www.supremecourt.gov. The reforms were intended to achieve four goals:

> (1) encourage greater cooperation among counsel; (2) focus discovery—the process of obtaining information within the control of the opposing party—on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address the serious new problems associated with vast amounts of electronically stored information.

Id. at 5.

After the amendments to the Federal Rules, some states followed suit and incorporated the changes into their rules of civil procedure. In short, the amendments

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are affecting discovery at all levels and in all jurisdictions.

The reforms began with Federal Rule of Civil Procedure 1, which now directs that the Federal Rules "should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding. Fed. R. Civ. P. 1 (emphasis added). More than any other revision, the amendment to Rule 1 embodies the underlying motivation to "make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation." 2015 Chief Justice's Year-End Report, *supra*, at 6. This motivation is the principle upon which all additional revisions were based.

Perhaps the single largest factor spurring the amendments was the increasing cost and complexity of discovery; including the cost and complexity associated with electronically stored information (ESI). Consequently, it should come as no surprise that several of the most discussed amendments relate to discovery practice.

Changes to the Scope of Rule 26(b)(1)

Among the most significant changes were amendments to Federal Rule 26(b)(1), which defines the appropriate scope of discovery. Rule 26(b)(1) details the acceptable bounds for the use of discovery tools enumerated in other rules. Rule 26(b)(1) is shown below with the deleted language stricken and the additions italicized:

> 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.* 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

The Advisory Committee explained that the deletions were made to clarify the scope of discovery. By removing the often-cited basis for discovery objections—that the requested material is not reasonably calculated to lead to the discovery of admissible evidence—and adding explicit proportionality factors, the rule refocuses litigants and the courts on the permissible scope of discovery through the lens of fairness. The amendments also remove specific mandatory disclosures, "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." The Advisory Committee notes express that this deletion was made because "[d]iscovery of such matters is so deeply entrenched" in standard discovery that its inclusion would now be "clutter." Fed. R. Civ. P. 26(b) advisory committee's note to 2015 amendment.

Conversely, proportionality factors were added to the body of the rule, making it clear that discovery may be obtained on any topic that is relevant, non-privileged, and proportional to the needs of the case. If the proportionality factors look familiar, they should. They consider many of the same issues that were enumerated by previous Federal Rule 26(b)(2)(C). The amendment to Federal Rule 26(b)(1) does not, however, articulate the weight to be given to the proportionality factors. Likewise, there is no express indication that the enumerated factors are the exclusive factors to be considered. Unsurprisingly, diverging opinions formed about the resulting effect of the amendment. It would not take long for the issue to be addressed.

Restoring Proportionality

Within days of the effective date of the amendments, courts throughout the country began incorporating a proportionally analysis into discovery-related orders. Many courts turned to the Advisory Committee notes for guidance in applying the proportionality factors. Some even went so far as to incorporate substantial portions of the Advisory Committee notes into their analysis. *See, e.g., Carr v. State Farm Mut. Auto. Ins.*, 312 F.R.D. 459, 466 (N.D. Tex. 2015) (discussing and citing Federal Rule 26(b)(1) Advisory Committee notes).

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The Advisory Committee notes clarify that the placement of proportionality factors into Rule 26(b)(1) is not intended to result in a significant departure from past discovery practice. Rather, the change is intended to address inconsistent interpretations of Rule 26 limitations on discovery and reinforce the stated aims of the Federal Rules of Civil Procedure. Indeed, proportionally was formally introduced into the Federal Rules of Civil Procedure in 1983. Fed. R. Civ. P. 26(b) Advisory Committee's note to 2015 amendment.

Several amendments over the years resulted in restructuring the rule so that proportionality considerations were included in 26(b)(2)(C). Subsection (b)(2)(C) began by noting that "[o]n motion or on its own, the court must limit the frequency or extent of discovery…" and incorporated proportionally factors to be considered by a court. Fed. R. Civ. P. 26(b)(2)(C) (2014). The result of separating the proportionality considerations from the scope of discovery enumerated in Rule 26(b)(1), according

to the Advisory Committee, was that the limitations were not being used as originally intended. Fed. R. Civ. P. 26(b) Advisory Committee's note to 2015 amendment. In short, the scope of party-controlled discovery was inadvertently expanded. Placing the proportionality considerations back into Rule 26(b)(1) clarifies the proper scope of discovery, creates a single standard for court-controlled and party-controlled discovery, and reinforces the obligation of parties to consider these factors in making discovery requests, responses or objections. It is also intended to "encourage judges to be more aggressive in identifying and discouraging discovery overuse." *Id.*

In practice, the elimination of the language "reasonably calculated to lead to admissible evidence" from Rule 26(b)(1) appears to be resulting in changes at the margins of discovery.

The Advisory Committee notes are not the only resource that courts have turned to. For example, some courts have cited the 2015 Chief Justice's Year-End Report on the Federal Judiciary for insight regarding the rule changes. *See, e.g., Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, Civil Action No. 12-cv-03012-WJM-NYW, 2016 U.S. Dist. Lexis 7668, at *4 (D. Colo. Jan. 22, 2016). In that report, Chief Justice John Roberts remarked,

> [amended Federal Rule 26(b)(1)] crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery.

2015 Chief Justice's Year-End Report on the Federal Judiciary at 4.

In addition, the interrelationship of relevance and proportionality was addressed in the Federal Courts Law Review. *See* Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 Fed. Cts. L. Rev. 2 (2015), http://www.fclr.org. This article has also been cited by at least one court construing the application of the amended rule. *See, e.g.*, *Elliott v. Superior Pool Prods., LLC*, No. 15-cv-1126, 2016 U.S. Dist. Lexis 293, at *5 (C.D. Ill. Jan. 4, 2016). The article addresses the evolution of Rule 26 and proposes a framework to address proportionality considerations.

Instructive Application by Courts

Under the amended rule courts appear to focus on whether the discovery sought is relevant to a party's claim or defense and to seek specificity in the proportionality factors.

Renewed Focus on Claims and Defenses

In practice, the elimination of the language "reasonably calculated to lead to admissible evidence" from Rule 26(b)(1) appears to be resulting in changes at the margins of discovery. In a recent order issued in *In re Bard IVC Filters*, the U.S. District Court for the District of Arizona highlighted the potential resulting effect on discovery. After addressing the Advisory Committee notes, the court stated that under the amended Rule, "[t]he test going forward is whether evidence is 'relevant to any party's claim or defense,' not whether it is 'reasonably calculated to lead to admissible evidence.'" See *In re Bard IVC Filters Prods. Liab. Litig.*, No. MDL 15-02641-PHX DGC, 2016 U.S. Dist. Lexis 126448, *123 (D. Ariz. Sep. 16, 2016).

In that case, the plaintiffs filed a motion to compel the defendants to produce ESI generated by foreign subsidiaries and divisions of the defendants that sell IVC filters abroad. The plaintiffs sought discovery of communications between the foreign entities and foreign regulatory bodies for the purpose of determining whether the communications were consistent with the communications that the defendants had with American regulators. *Id. at* *120. The defendants argued that its regulatory communications, including communications with foreign regulators, are generated by the defendants' United States operations, which were already subject to extensive discovery. *Id.* at *125. However, the court noted that on occasion, foreign entities engaged in their own communications with foreign regulators. *Id.* at *127. As a result, the court, while circumspect about the relevance, concluded that the discovery sought was marginally relevant.

Turning to the proportionality factors, the defendants made specific showings of the burden and expense of obtaining the information sought by the plaintiffs compared to the benefit. The defendants pointed to the fact that much of the information sought by the plaintiffs would be identified by ESI discovery being conducted in the United States. Similarly, the defendants demonstrated that they would be required to identify the applicable custodians from the foreign entities for the last 13 years, collect ESI from the custodians, and search for and identify communications with foreign regulators. *Id.* at *130. The court found that the mere possibility of finding inconsistent foreign communications was outweighed by the significant, specific burden demonstrated by the defendants and not proportional to the needs of the case. Accordingly, the court denied the plaintiffs' request to compel discovery. *Id.*

Similarly, Chief Judge Joy Flowers in the U.S. District Court for the Western District of Pennsylvania expressed similar opinions about the narrowed scope of discovery in an order issued in the context of an antitrust case. *See Cole's Wexford Hotel, Inc. v. Highmark Inc.*, Civil Action No. 10-1609, 2016 U.S. Dist. Lexis 127793, at *33 (W.D. Pa. Sep. 20, 2016). In that case, the court did not permit discovery of base rates and actual insurance rates charged by the defendant outside of the time period of the claims alleged in the complaint. Notably, while accepting the recommendation of the special master to deny the requested discovery, the court denied the request on different grounds.

Relying on the reasoning set forth in a Supreme Court opinion, the special master concluded that the information sought was "relevant" based on the broad construction given to the term in multiple cases. *Id.* at *33–34 (citing decisions rely-

ing on *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 354, (1978)). Judge Flowers did not accept the relevancy analysis of the special master. She noted that the Supreme Court in *Oppenheimer* construed the phrase "relevant to the subject matter involved in the pending action," which no longer appears in the rule. Noting that the scope of discovery is now the same for party-controlled and court-controlled discovery, and the deletion of the authority to order discovery of matter relevant to the subject matter of a case, the court found that the discovery requested was outside the relevancy contours of amended Rule 26(b)(1). *Id*. at *33, 63. The court also foreshadowed that such discovery would also face strong headwinds under the proportionality factors. *Id*. at *63.

These courts are not alone in their analysis of the amended rule. Other jurisdictions have applied the scope of amended Rule 26(b)(1) consistent with the above opinions. *See Amoah v. McKinney*, No. 4:14-40181-TSH, 2016 U.S. Dist. Lexis 91670 (D. Mass. July 14, 2016) (denying a motion to compel a further deposition of a corporate deponent to address technical ESI issues when claim was related to an automobile accident); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 U.S. Dist. Lexis 158455 (S.D.N.Y. Nov. 16, 2016) (denying motion to compel discovery because regulators' investigation was addressing alleged violations of Commodities Exchange Act and plaintiff's claim was brought under the Sherman Act); *Fid. & Guar. Life Ins. Co. v. United Advisory Grp., Inc.*, No. JFM-13-40, 2016 U.S. Dist. Lexis 18773 (D. Md. Feb. 17, 2016) (denying a motion for protective order where information sought was relevant to claims asserted in amended complaint); *Carr*, 312 F.R.D. 459 (granting motion to compel responses to interrogatories concerning medical information); *Siriano v. Goodman Mfg. Co., L.P.*, No. 2:14-cv-1131, 2015 U.S. Dist. Lexis 165040 (S.D. Ohio Dec. 9, 2015) (finding discovery sought relevant to claims asserted but ordering parties to engage in further cooperative dialogue in light of proportionality factors); *Elliott*, 2016 U.S. Dist. Lexis 293 (ordering plaintiff to confine his discovery and pleadings to matters relevant to his claims); *Sprint Communs. Co. L.P. v. Crow Creek Sioux Tribal Court*, 316 F.R.D. 254, 263 (D.S.D. 2016) (granting in part and denying motions to compel by plaintiff and defendant after undertaking relevance and proportionality analysis); *Pertile v. GM, LLC*, Civil Action No. 1:15-cv-00518-WJM-NYW, 2016 U.S. Dist. Lexis 34674 (D. Colo. Mar. 17, 2016) (denying motion to compel production of native finite element analysis models when over 150,000 pages of materials and data, including CAD drawings had already been produced); *Ala. Aircraft Indus. v. Boeing Co.*, No. 2:11-cv-03577-RDP, 2016 U.S. Dist. Lexis 17981 (N.D. Ala. Jan. 13, 2016) (granting motion to compel 30(b)(6) deposition that conformed with scope of Rule 26(b)(1), but limiting examination to "document families" based on proportionality factors).

Notably, some of the courts applying amended Rule 26(b)(1) still analyzed whether the discovery was reasonably calculated to lead to the discovery of admissible evidence. As a result, practitioners must be attuned to this issue because it can tip the scales when the information sought is at the margins of permissible discovery.

Weighing Proportionality Factors

In practice, the concepts of relevance and proportionality are interrelated. The application of the proportionality factors turns on how relevant a particular piece of information is. In other words, the more important the evidence is to a claim or defense, the stronger the objections must be to oppose the discovery successfully. This is an inherently fact-specific inquiry. Nonetheless, trends surrounding the application of the proportionality factors exist.

Perhaps the single largest takeaway is that courts are seeking specificity with respect to the proportionality factors. This is true whether a party is seeking or opposing discovery because it is not necessarily the burden of the party seeking discovery to address all proportionality factors. Often, the arguments of the party seeking discovery will center on the relevance of the materials to the party's claim or defense. Parties objecting to discovery, responding to motions to compel, and seeking protective orders must not only be prepared to rebut the claimed relevancy of the discovery but also be prepared to address certain factors that may not have been a focus of the requesting party. For example, an opposing party may not have knowledge about the other party's access to information or the burden or expense of obtaining the requested information.

This was exactly the situation in *State Farm Mut. Auto Ins. Co. v. Fayda*, in the U.S. District Court for the Southern District of New York, which applied amended Rule 26(b)(1) to a case involving alleged fraud and RICO violations. In that case, an insurer alleged that an acupuncture center and its owner had submitted fraudulent insurance claims for services that were not medically necessary. *State Farm Mut. Auto. Ins. Co. v. Fayda*, 2015 U.S. Dist. Lexis 162164, at *2 (S.D.N.Y. Dec. 3, 2015). The payments for the services in dispute amounted to approximately $12,000. *Id*. at *13. The insurer filed a motion to compel productions of financial records of the acupuncture provider, its owner, and other acupuncture practices controlled by the owner. *Id*. at *4.

The insurer demonstrated that the financial information could evidence trans-

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actions to conceal assets or income and demonstrate consciousness of guilt—an element of several of the asserted claims. *Id.* at *12. The defendants objected to the production of the documents, arguing that the amount in controversy rendered the records of minimal value to the case. *Id.* at *13. The court placed little importance on the amount in controversy. Instead, it noted that the defendants failed to (1) rebut the relevance of the records to the claims asserted, and (2) address alternative sources for the information or the burden or expense in producing the records. Because the defendants failed to address these factors, there was no counterweight to rebut the plaintiff's relevancy argument. As a result, the court granted the motion to compel.

When propounding discovery keep the costs and burdens of the discovery sought in mind. Proportionality applies to both parties, and by seeking costly and extensive discovery, a party may undermine its ability to object to similar discovery later.

A lesson learned from the *Fayada* case is that, generally speaking, a party should not rely on the amount in controversy as a primary factor in arguing that discovery is not proportional. That point was vividly illustrated in *Schultz v. Sentinel Ins. Co.* 4:15-CV-04160-LLP, 2016 U.S. Dist. Lexis 72542 (D.S.D. June 3, 2016). In *Schultz*, a hail storm damaged the roof of an insured. After paying for spot repairs to her roof following an inspection by the insurance company adjuster, the insured provided a report from her own inspector, finding that the entire roof required repair. *Id.* at *2. The insured submitted her claim, and it was denied. *Id.* The insured filed suit and alleged breach of contract, bad faith, punitive damages, and vexatious refusal to pay. *Id.* at *3.

The insured subsequently filed a motion to compel the defendant to produce information related to previous bad-faith claims and allegations of unfair claims processing. The insurer objected on the grounds that the information was not relevant to the plaintiff's claims or defenses and that the information was unduly burdensome and disproportionate to the needs of the case because the claim at issue was slightly more than $17,000. *Id.* at *19.

The court began its analysis by noting that this was the prototypical action in which one party "holds all the cards" on the discovery sought. *Id.* at *16. In weighing the proportionality factors, the court refused to equate the "value" of the case with the monetary sum at issue. *Id.* Instead, the court focused on the allegation that the denial of the insured claim was part of a larger companywide culture of misconduct. *Id.* at *20. Accordingly, if proved, the plaintiff's claim had the potential to implicate companywide business practices affecting a greater number of insureds. As a result, the court found that the discovery sought was not disproportionate to the needs of the case and that the monetary value of the claim was not determinative of the issue. *Id.*

Addressing several specific discovery requests, the court took issue with the defendant's boilerplate objections and self-imposed limitations to requests that appeared to have been based in large part on the value of the claim compared to the burden and expense of providing the requested discovery. *See id.* at *21. For example, the plaintiff requested case materials for bad-faith claims made during the last 10 years. The insurer objected on the basis that it only maintained information in an electronically searchable format since 2009. *Id.* at *25–26. The court found this argument unavailing because the materials requested were relevant to a showing of a prima facie case for punitive damages and bad faith. *Id.* The insurer was ordered to produce the complaints and answers (including any amended complaints and amended answers), the docket sheets, and copies of any dispositive motions and responding briefs, as well as a brief summary of the outcome of each case. *Id.*

In addition, the plaintiff requested copies of claim files, logs, and related correspondence in which the insurer initially determined damage was covered but subsequently denied coverage. The insurer argued the request would encompass thousands of claim files. *Id.* at *32. The plaintiff proposed a search protocol and pointed to the limited claim types to support the proportionality of her request. *Id.* at *32–33. The defendant made no specific response as to the burden of the search or offer of proof that the proposed search would result in thousands of claim files. *Id.* Consequently, the court granted the motion and ordered the insurer to search for the requested information.

The overarching factor in both cases is that the information sought was directly connected to an element of the claims asserted. It was also solely in the possession of the party from whom it was requested, and the party objecting failed to address proportionality factors specifically aside from the amount in controversy. While many other cases have also addressed the application of proportionality factors, the general pattern presented by these two cases is representative of some of the common pitfalls in arguing that the discovery sought is not proportional to the needs of the case.

Practice Pointers

While courts and litigants continue to explore the contours of the amended rule, practitioners can immediately implement the rule to their advantage by considering the following.

Increase Scrutiny of Claims and Defenses

Rule 26(b)(1) now clarifies that the proper scope of discovery is information relevant to claims and defenses. Courts applying the amended rule have, thus far, firmly applied the requirement. And courts no longer have the express power to expand discovery to information relating to the subject matter of a claim. Moreover, it is important

remember that the oft-used standard—reasonably calculated to lead to the discovery of admissible evidence—no longer has a place in party-controlled or court-controlled discovery.

Do Not Unwittingly Expand the Scope of Discovery

The increased focus on claims and defenses provides an opportunity to begin controlling the boundaries of discovery at the outset of a case. Litigators should consider the potential effect of claims, defenses, cross-claims, and counter-claims on the scope of discovery. For example, asserting a personal jurisdiction defense could potentially be used by savvy opponents to expand the scope of discovery to learn about business operations.

Plan Ahead

The amended rules and the commentary surrounding them demonstrate that an increased emphasis has been placed on cooperation of the parties. Before a Rule 26 conference, take additional time to anticipate the information that you will want and that the opposing party may request. It may be beneficial to meet with a client, including the client's information technology department, to determine the process and format for obtaining data from the client's information technology systems. Then, draft the Rule 26 report with your discovery goals in mind. Obtaining the agreement of the other party concerning the scope or methods of discovery and production of materials may pay significant dividends down the road, particularly if the involvement of a court becomes necessary.

Proportionality Applies to Both Parties

When propounding discovery, keep the costs and burdens of the discovery sought in mind. Proportionality applies to both parties, and by seeking costly and extensive discovery, a party may undermine its ability to object to similar discovery later.

Tailor Your Objections

Rule 26(b)(1) provides the factors that are to be considered when making a determination concerning proportionality. Courts are unlikely to respond favorably to boilerplate objections that do not address the enumerated factors. Therefore, be specific when making written objections and be prepared to be even more specific if the issue is before a court. The cases to date demonstrate a higher likelihood of success if a party addresses the proportionality factors with specificity. For example, if objecting to the burden and cost of producing records, don't rely on "common sense." Instead, be prepared with specific information about the volume of records, the manner of storage, and the contents of the records.

Conclusion

To quote Chief Justice John Roberts, "[t]he amendments may not look like a big deal at first glance, but they are." 2015 Chief Justice's Year-End Report, *supra*, at 6. The amendments to the Federal Rules of Civil Procedure not only mark a change in substance, but also call for a change in mindset. It is the latter that holds the greatest potential to streamline discovery practice. By focusing on proportionality considerations and engaging with opposing counsel at the inception of a case, practitioners can maximize the benefits of the rule changes and potentially avoid unnecessary discovery motion practice in the process. And if motion practice becomes necessary, you will be better positioned as a result. FTD