

E-Discovery in the Age of (Refined) Proportionality

By Bart C. Sullivan

The focus here will be on the continually developing area of discovery relating to electronically stored information (“ESI”) under the updated e-discovery provisions of the Federal Rules of Civil Procedure, particularly Rule 26’s new—or renewed—emphasis on proportionality.

What is Rule 26 proportionality? Under Federal Rule 26(b)(1):

Scope in General. . . . Parties may obtain discovery regarding any non-privileged 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.

In addition to emphasizing proportionality, 26(b)(1) does away with the old “reasonably calculated to lead to the discovery of admissible evidence” standard. One early judicial interpretation suggested Rule 26 was changed “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 Distrib. Co.*, 314 F.R.D. 304, 307 (S.D. Ind. 2016). The United States District Court for the Eastern District of Missouri has said:

[T]he scope of discovery is not without limitation. The court must limit discovery if (1) the requested discovery is unreasonably cumulative, duplicative, or can be obtained from another source that is more convenient; (2) the party seeking discovery has had ample opportunity to obtain the

information; or (3) the discovery is not proportional to the case.

Rhone v. Schneider Nat'l Carriers, Inc., 2016 LEXIS 53346 (E.D. Mo. Apr. 21, 2016) (citing Fed. R. Civ. P. 26(b)(2)(C)). A quick search will lead the reader to numerous other judicial pronouncements on proportionality.

But is proportionality truly “new”? The Advisory Committee Notes to the 2015 revision as well as some courts say no, including the Northern District of Texas, in which a judge wrote the Rule 26 changes do not really change parties’ discovery responsibilities. On the other hand,

Supreme Court Chief Justice Roberts has said the changes may not look significant, but they are, and attorneys and parties need to learn and heed these changes.

Defense lawyers should be aware that plaintiffs' publications have suggested, following some early decisions, that "proportionality is often a question of 'whether discovery production has reached a point of diminishing returns,' about the 'marginal utility' of additional discovery once the core discovery in the case has been completed," and the need for defendants to object with specificity. The commentary is based on decisions like *Abbott v. Wyoming Cty. Sheriff's Office*, No. 15-CV-531W, 2017 WL 2115381, at *2 (W.D.N.Y. May 16, 2017) (considerations of proportionality can include reviewing whether discovery production has reached a point of diminishing returns); and *Fischer v. Forrest*, 2017 WL 773694 (S.D.N.Y. Feb. 27, 2017) (objecting party must specifically show how the proposed discovery is not proportionate: "It is time, once again, to issue a discovery wake-up call to the Bar in this District" to state grounds for objecting to discovery requests with specificity under Rule 34).

As a practical matter, how is proportionality applied? A number of cases now talk about multi-part tests, such as:

- (1) the importance of the issues at stake in the action;
- (2) the amount in controversy;
- (3) the parties' relative access to relevant information;
- (4) the parties' resources;
- (5) the importance of the discovery in resolving the issues; and
- (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

An additional reference is the updated "*Sedona Conference Commentary on Proportionality in Electronic Discovery*." The Sedona Conference is a nonprofit research and educational institute dedicated to the advanced study of law and policy in several areas, including complex litigation. The import of the "Commentary" is its six "Principles of Proportionality," a common sense framework for the application of proportionality to all aspects of electronic discovery.

The principles:

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive sources. ("needs" focus is new)
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

4. The application of proportionality should be based on information rather than speculation (new).
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.

Sedona is consistent with what the courts are using in their multi-part tests. It does remain to be seen, as has been the case since the proportionality rules were changed or implemented (depending on your point of view), the degree to which the principles will be uniformly followed, or followed at all.

But, overall, proportionality adds some clout to other aspects of Rule 26:

Rule 26(b)(2)(B): *Specific Limitations on Electronically Stored Information.* “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”

Rule 26(b)(2)(C): *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

From all of that, here are some practical considerations regarding proportionality under Rule 26:

- 1) Focus on the specific discovery at issue;
- 2) Recognize that proportionality and relevance are intertwined;
- 3) Consider alternative approaches to discovery;
- 4) Raise discovery scope and proportionality issues early;

5) Do not address proportionality requirements by citing superseded case law or standards (some attorneys still insist on objecting based on the now-defunct “reasonably calculated to lead to the discovery of admissible evidence” standard; don’t be one of them); and

6) Do not forget that proportionality considerations also apply to preservation decisions and disputes.

In sum, the problem the courts and litigants face with proportionality is nicely framed in *Samsung Elec. America Inc. v. Chung*, No. 3:15-CV-4108-D, 2017 WL 896897, at *11 (N.D. Tex. Mar. 7, 2017), in which the Northern District of Texas Court held:

The 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, 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, and the importance of the discovery in resolving the issues, in opposition to the resisting party’s showing.

In other words: Be prepared!