Proposed Amendments to the Federal Rules of Civil Procedure

2010 Duke Conference

- Cooperation
- Early, active judicial case management
- Proportionality
- Preservation of and penalties for loss of ESI

Cooperation

Rule 1: The rules "should be construed, ~~and~~ administered, and employed by the court and the parties, to secure the just, speedy, and inexpensive determination of every action and proceeding."

Case Management

- Time for service shortened to 90 days
- Time for Rule 16 conference shortened to 90 days after defendant served or 60 days after defendant appears
- Actual conferences encouraged
- Additional topics for Rule 26(f) report and Rule 16 conference

Proportionality

Rule 26(b)(1):

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.

Rule 34 Changes

Early Rule 34 Requests

Rule 34 responses must:

- State whether responsive materials are being withheld
- State objections with specificity
- State reasonable date of production

Preservation and Penalties

Current Rule 37:

(e) Failure to Provide Electronically Stored Information.

> Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Proposed Rule 37(e)

(e) Failure to Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

Proposed Rule 37(e)

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

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2015 Amendments to the Federal Rules of Civil Procedure: Challenging the Defense-Side Narrative

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As of December 2015, several amendments to the Federal Rules of Civil Procedure went into effect. This paper provides an overview of the key changes to the Rules, as well as their practical effects and recommended methods for operating under these changes.

In particular, the amendment to Rule 26 regarding "proportionality" of discovery has attracted the most attention and controversy. This paper focuses predominantly on the proportionality amendment, given that there are competing interpretations that could have significant implications for plaintiffs' attorneys. But the main takeaway on proportionality is simple: the substantive law has not changed, so this amendment is not the sea change that many defense attorneys make it out to be. It is now up to plaintiffs' attorneys to challenge that narrative and also to use these amended rules to their advantage whenever possible.

I. Rule 26(b)(1) Amendment: Proportionality

Rule 26(b)(1), which defines the scope and limits of discovery, was amended to include language about proportionality. It now states as follows, with the new language in italics:

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> 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*.

Naturally, how courts interpret the proportionality language is of major concern to both plaintiffs' attorneys and defense attorneys as they argue for more or less discovery in their cases—which explains why this amendment has generated controversy. The defense bar is already spreading the narrative that this amendment represents a significant shift towards more limited discovery. *See, e.g.*, Corey Lee and Robert Scavone, Jr., *Amendments to Rule 26 of the Federal Rules of Civil Procedure "Restore" Proportionality in Discovery*, Hunton & Williams (February 2016). Moreover, there is evidence that courts are picking up this narrative: Chief Justice Roberts commented in his year-end report that the amendments are a "big deal" and that the new Rule 26(b)(1) "crystalizes . . . reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary*, United States Supreme Court, at 5-6 (December 2015).

It is imperative that plaintiffs' attorneys challenge the narrative that the addition of proportionality language to Rule 26(b)(1) is a new and significant change to the scope of discovery, because it is neither. This requires at least two discrete steps: (1) educating courts on the limited changes to the text of Rule 26 along with the Advisory Committee Notes that define the limited impact of these changes, and (2) knowing what does *not* change as a result of the amendment and citing to case law that affirms this. As a related third step, it is also important for plaintiffs' attorneys to recognize how they can use proportionality to their clients' advantage.

A. Changes to the Rule and Their Limited Effect

Regarding the actual text, both the previous version and the amended version of Rule 26 discuss the concept of proportionality. It is not a new addition. The amendment only changes three things about proportionality: its location within Rule 26, the order of the factors listed, and the addition of one factor. Previously, proportionality was discussed in Rule 26(b)(2)(C)(iii), under the heading of "Limitations on Frequency and Extent" of discovery. Rule 26(b)(2)(C)(iii) stated the following:

> [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:] (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Following the amendment, proportionality is simply discussed earlier in Rule 26(b)(1), under the heading of "Scope in General" of discovery.

The two other proportionality-related changes involve the order and number of factors that should be considered when assessing proportionality of discovery requests. Both the amended version and the previous version of Rule 26 include five of the same factors: importance of the issues at stake, amount in controversy, parties' resources, importance of discovery in resolving issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The amended version simply added one more factor—the parties' relative access to information—and changed the order so that "importance of the issues at stake" is listed first. It is also worth noting that the amendment removed some language from Rule 26(b)(1) that did not speak to proportionality specifically, but that discussed the scope of discovery more broadly. For reasons discussed in more detail below, this removed language should have little practical effect.

The Advisory Committee Notes make clear that the proportionality amendment is not a substantive change—let alone a sea change—which makes the Notes a powerful tool in educating the courts accordingly. The Notes state that "[r]estoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality." Specifically, the Notes lay out the same process and considerations for resolving discovery disputes as before: "[I]f the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983." The Notes also describe changes to the actual text in modest terms, stating that "[t]he considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition," and that "[m]ost of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983."

In addition, a number of courts have now assessed the amended language and the Notes, and they have reinforced that there is no substantive change. *See, e.g.*, *Gowan v. Mid Century Insur. Co.*, 5:14-CV-05025-LLP, 2016 WL 126746, at *5 (D.S.D. Jan. 11, 2016) ("Most of what appeared in subsection (b)(2)(C) of old Rule 26 has been in effect for the last 32 years, since 1983, so it is hardly new."); *Wertz v. GEA Heat Exchangers Inc.*, CIVIL ACTION NO. 1:14-CV-1991, 2015 WL 8959408, at *2 (M.D. Pa. Dec. 16, 2015); *Orchestratehr, Inc. v. Trombetta*, No. 3:13-cv-2110-P, 2016 WL 1555784, at *23-24 (N.D. Tex. Apr. 18, 2016). Plaintiffs' attorneys should make a point of citing to the Notes and the case law to shift the narrative in this direction.

B. What Has Not Changed Under the Rule

Equally as important as understanding what the Rule 26(b)(1) amendment does change is understanding what it does *not* change. Specifically, there are three main things that the defense

bar will likely assert are different under the amended Rule but that the plaintiff's bar should be prepared to refute.

First, the amended Rule does not shift the entire burden on the requesting party to demonstrate proportionality at the outset. The Notes state this explicitly: "[T]he change [to Rule 26(b)(1)] does not place on the party seeking discovery the burden of addressing all proportionality considerations." Parties have the same responsibilities as before in this respect. In particular, defendants must continue to meet the same burden, given that "[a] party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination." Courts have held the same. *See, e.g., Carr v. State Farm Mut. Auto. Ins. Co.*, No. 3:15-cv-1026-M, 2015 WL 8010920, at *7 (D.N.D. Tex. Dec. 7, 2015) ("Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."); *Robinson v. Dallas Cnty. Community College District*, No. 3:14-cv-4187-D, 2016 WL 1273900, at *3 (N.D. Tex. Feb. 18, 2016). In practice, plaintiffs' attorneys should look out for objections based on the failure to make an advance showing of proportionality and should clarify that this is not required.

Second, the amended Rule does not authorize the use of boilerplate refusals to provide discovery on proportionality grounds. The Notes are once again explicit on this point: "Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional." Responding parties still have the same obligations under Rules 33 and 34, as well as the new obligation to state all objections with specificity (discussed below).

Third, the amended Rule does not narrow the definition of what is considered relevant information or not for discovery purposes. The defense bar may try to argue that the removal of certain language from Rule 26(b)(1) has this effect, but in practice, this removal should have no such effect. Rule 26(b)(1) used to state the following, where the proportionality language has now been inserted: "[Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense] 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 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)."

Most importantly, despite the removal of the familiar "reasonably calculated to lead to the discovery of admissible evidence" language, subsequent caselaw has developed that confirms that while the language has been removed, the standard has not changed. Thus, the removal of the above language may appear detrimental to plaintiffs' attorneys, but it is not. The standard for relevance in discovery is "still to be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that bear on, any party's claim or defense." *State Farm Mut. Auto. Ins. Co. v. Fayda*, No. 14 Civ. 9792 (WHP) (JCF), 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015) (internal quotation marks omitted). Nevertheless, attorneys should be diligent in removing all "reasonably calculated" language from their discovery discussions going forward, to avoid a suggestion from defense counsel that they are ignoring the change to the Rule.

As explained in the Notes, the phrase stating that parties may obtain discovery "of any matter relevant to the subject matter involved in the action" was rarely invoked and added little of substance. The scope of discovery is already sufficiently defined as information that is relevant "to any claim or defense." And the "subject matter" contemplated in the previous rule—such as other incidents or products of the same type, or information that could be used to impeach a likely witness—is still considered discoverable under the amended rule.

Finally, removal of the phrase specifying the scope of discovery as "including the existence, description, nature, [etc.] of any documents . . ." has no effect whatsoever. The Notes state that this language is superfluous: "Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples." Consistent with the previous rule, discovery of these same items is permitted whenever it is relevant and proportional to the needs of the case.

C. Using Proportionality to Plaintiffs' Advantage

At least two of the proportionality factors in Rule 26(b)(1) work to plaintiffs' advantage in employment cases, so plaintiffs' attorneys should employ them whenever possible. The two factors are "importance of the issues at stake" and "the parties' relative access to relevant information."

The "importance of the issues at stake" factor existed in the previous rule, but the amended rule has given it new prominence by listing it first among all the proportionality factors, whereas it used to be listed second to last. This is a factor that should *always* weigh in favor of discovery in civil rights and other fee-shifting cases. Attorneys should emphasize the deep social value that a fee-shifting provision represents in a statute: the very reason it encourages private enforcement is because such cases "can serve public and private interests that have an

importance beyond any damages sought or other monetary amounts the case may involve." *Discovery Proportionality Guidelines and Practices*, 99 JUDICATURE 47, 51 (2015).

Moreover, the Advisory Committee Notes strongly caution against proportionality assessments becoming all about money. The Notes opine that "[i]t also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized 'the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as *employment practices*, free speech, and other matters, may have importance far beyond the monetary amount involved.' Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values" (emphasis added, and internal quotation marks omitted). The re-ordering of this factor to be first in the proportionality analysis, before all other monetary factors, underscores the Advisory Committee's intent in this regard. It is up to plaintiffs' attorneys to highlight this factor and demand its due consideration in the face of monetary concerns.

The other factor, "relative access to information," was newly added to the proportionality analysis and represents a victory for the plaintiff's bar. With this factor, it is now the case that, when a defendant possesses most of the relevant information, a plaintiff should get *more* discovery as a result. The Notes make this point explicit by stating that "[s]ome cases involve what often is called 'information asymmetry.' One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to

discovery lies heavier on the party who has more information, and properly so." Once again, plaintiffs' attorneys should make good and frequent use of this new factor in defending their discovery requests.

In addition to the points raised above, an important part of shaping the narrative on proportionality is citing to court cases that have already interpreted the amended Rules in a favorable way. I have compiled a list of these helpful cases in Attachment A.

Relatedly, plaintiffs' attorneys should be strategic in deciding which cases to bring before which judges in testing out this new language. The defense bar is already making these sorts of strategic decisions. It is crucial that the plaintiff's bar be mindful of the good facts that can translate into good law and vice versa.

II. Other December 1, 2015 Changes to the Rules

While the focus has been on the "proportionality" changes, there are several other changes to the Rules. It is critical that attorneys are aware of these changes, as they effect timing requirements and other obligations.

1. Rule 1 Amendment: Parties' Cooperation

Rule 1 speaks to the overall scope and purpose of the Rules, and it was amended to include the following italicized language: "These 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." As explained in the Advisory Committee Notes, the intent of this amendment is to clarify that, along with the court, the parties have a shared responsibility in using the Rules to achieve just, speedy, and inexpensive litigation. The Notes further encourage parties to cooperate more and to avoid the over-use of procedural tools. They describe effective advocacy as depending upon "cooperative and proportional use of procedure."

The Notes also clearly state that this amendment does not create new grounds for sanctions, nor does it affect the scope of any other Rules. Therefore, despite what some defense attorneys may claim, the practical effect of this amendment is relatively little. It is simply aspirational in nature. Parties may try to cite to the language in Rule 1 in conjunction with other Rules to advocate for stricter standards or more sanctions, *see* Meagan Crowley-Hsu, *The FRCP Amendments: Small Step or Giant Leap?*, PRACTICAL LAW, December 2015/January 2016, at 48 (implying greater availability of sanctions by juxtaposing Rule 1 with Rule 26(g)), but the Notes explicitly foreclose this route. Attorneys should watch out for citations to Rule 1 for this purpose and be ready to counter any such arguments.

2. Rule 4(m), Rule 16(b)(1)-(3), and Rule 26(d)(2) Amendments: Start of Litigation and Judicial Case Management

The amended Rules provide for a faster start to litigation in several ways. Under the new Rule 4(m), the default time for serving a defendant after the complaint is filed has been reduced from 120 days to 90 days—with the exception that plaintiffs may still seek extensions for good cause. Similarly, under the new Rule 16(b)(2), the default time for the court to issue a scheduling order has been reduced from 120 days to 90 days after any defendant has been served, and from 90 days to 60 days after any defendant appears. And under the new Rule 26(d)(2), parties may deliver document requests to the other party before the Rule 26(f) scheduling conference instead of having to wait until after the conference. Rule 26(d)(2) is discussed below in more detail. None of these changes are detrimental to plaintiffs' attorneys in particular, but they do require greater diligence at the outset.

Some amendments to the Rules also affect judicial case management. Rule 16(b)(1) was amended to remove the language that a scheduling conference may be "by telephone, mail, or other means." The Notes suggest that a scheduling conference must now be conducted "in direct

simultaneous communication," such as "in person, by telephone, or by more sophisticated electronic means." In addition, under Rule 16(b)(3)(B), the court may now include a provision in the scheduling order that requires parties to request a conference with the court before moving for a discovery-related order. The Notes explain that this provision was added because "[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion." Whether or not this provision is included in a scheduling order, however, is left to the judge's discretion.

Related to these changes and other changes discussed below, the defense bar and some judges have begun to push for themes such as "core discovery," "early focused discovery," and "phased discovery" as part of the amended Rules. This language is not in the Rules, nor is it required by any change to the Rules. It is incumbent upon plaintiffs' attorneys to challenge these themes as unfounded and, in several ways, inconsistent with the amended Rules.

3. Rule 26(c)(1)(B) Amendment: Cost-Shifting in Protective Orders

Rule 26(c)(1) outlines the types of actions a court may take to protect a responding party from certain discovery requests, including 26(c)(1)(B), which allows a court to specify the terms for the disclosure or discovery. Rule 26(c)(1)(B) used to reference just "time and place" as an example of the terms a court could specify for discovery, but the amended Rule has added express reference to "allocation of expenses" as another example.

The defense bar is attempting to use this addition to expand the practice of cost-shifting, but this is unfounded. The Notes not only state that this authority already existed under the previous Rule, but they also address this very misinterpretation: "[This amendment] does not imply that cost-shifting should become a common practice. Courts and parties should continue

to assume that a responding party ordinarily bears the costs of responding." Defense attorneys therefore may not legitimately cite to this Rule as support for greater cost-sharing.

4. Rule 26(d)(2) and Rule 34(b)(2)(B) Amendments: Document Requests and Responses

There are three changes relating to document requests and responses in the amended Rules. These changes allow for earlier and more flexible timelines for document discovery, and they also require more specific objections to document requests. It is clear that both plaintiffs' and defense attorneys are not yet familiar with and following these Rules. As they are advantageous to plaintiffs, attorneys should become familiar with them and insist that defendants follow them.

First, Rule 26(d)(2) was amended to allow parties to deliver document requests earlier to other parties. Whereas the previous Rule did not allow delivery of any discovery before the Rule 26(f) conference, the amended Rule allows for delivery of document requests during this time period. Specifically, after 21 days has passed since a party was served with the summons and complaint, document requests may be delivered to any party. The requests are not considered served until the first Rule 26(f) conference, and responses are still due 30 days after service under Rule 34. As the Notes explain, this amendment is intended to "facilitate focused discussion during the Rule 26(f) conference," and it anticipates that "discussion at the conference may produce changes in the requests." Plaintiffs' attorneys may want to take advantage of this earlier delivery option, particularly if they want to start discovery as soon as possible or if they anticipate defendants raising unreasonable objections in the future.

Second, Rules 34(b)(2)(B)-(C) were amended to require the responding party to do two things when raising objections to document requests: (1) state the grounds for objection "with specificity," and (2) indicate whether any responsive material is being withheld on the basis of

the objection. This should generally benefit plaintiffs' attorneys, who are more often in the position of having to interpret objections or guess what is being withheld or not. However, all attorneys now have to be careful that their objections comply with these requirements. The Notes provide some guidance. For example, the Notes explain that an objection may state that a request is overbroad, but if it acknowledges any part of the request as not overbroad, the objection must state so. Moreover, where an objection "states the limits that have controlled the search for responsive and relevant materials," this qualifies as a statement that materials have been withheld. The objecting party need not provide a detailed log of all withheld documents, but it should "facilitate an informed discussion of the objection."

The practical implication is that attorneys should treat document objections as mini arguments. In other words, the objection should be written in such a way that, if the court could only consider those one or two sentences before ruling, the court would understand the problem and also agree with the objection. Thus, whenever there is controlling case law on the issue, attorneys should cite to it. Here are two examples of model objections:

> (1) Plaintiff objects that this request is overbroad, as it is unlimited in time. The relevant time period with respect to requests for discovery from Plaintiff is [dates]. [Cite to court order defining discovery, if available]. Accordingly, Plaintiff is not searching for or producing documents otherwise responsive to this request that fall outside the relevant time period.
>
> (2) Plaintiff objects to the extent that this request seeks documents related to Plaintiff's request for costs and attorneys' fees. Plaintiff objects that such documents are not relevant to any claim or defense in this matter. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litigation*, Nos. 1290, 99-276 (TFH/JMF), 2001 WL 1795665, at *3 (D.D.C. July 17, 2001).

Such a request is premature until after Plaintiff has prevailed. Accordingly, Plaintiff will construe the request not to seek such documents and will not provide them.

As demonstrated here, the key is packaging objections so that a court can rule favorably on the spot.

Third, Rule 34(b)(2)(B) was also amended to allow the responding party to produce documents either on the due date or at "another reasonable time specified in the response." The Notes further state that "[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production." Therefore, attorneys should look out for this type of response, since it can no longer be assumed that the 30-day deadline applies.

5. Rule 16(b)(3)(B), 26(f)(3), and 37(e) Amendments: ESI

There are two sets of changes relating to ESI. Rules 26(f)(3) and 16(b)(3)(B) update the discovery plan and scheduling order to address ESI. Rule 37(e) changes the substantive law in several circuits on spoliation of ESI.

Under Rule 26(f)(3), the discovery plan now must include the parties' views and proposals on: (i) issues about preservation of ESI; (ii) whether the court should include the parties' agreements re: privilege claims in an order under Rule 502. Similarly, Under Rule 16(b)(3)(B), the scheduling order may also provide for preservation of ESI and agreements by the parties regarding claims of privilege under Rule 502.

The one change in the Rules package that does appear to be a clear win for the defense bar is the change to Rule 37(e). Now, only upon finding that "the party acted with the intent to deprive another party of the information's use in the litigation" (similar to bad faith), may the court: "presume that the lost information was unfavorable to the party"; "instruct the jury that it may or must presume the information was unfavorable to the party;" or "dismiss the action or

enter a default judgment." Requiring bad faith is contrary to the existing law of several circuits, including the D.C. Circuit. Without a finding of bad faith, the court "may order measures no greater than necessary to cure the prejudice," but NOT adverse inference instructions. Even to impose the "measures no greater" standard requires (i) that ESI should have been preserved, (ii) that reasonable steps were not taken to preserve, (iii) that the ESI cannot be restored or replaced with additional discovery, and (iv) prejudice to the other party. Reasonable steps may include "good-faith operation of an electronic information system," but "the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation." Fed. R. Civ. P. 37(e) advisory committee's note (2015).

* * *

In sum, the 2015 amendments to the Rules are not an overall victory for the defense bar, let alone a significant shift from the prior Rules. Their interpretation by courts in the coming months and years is critical, however, and the plaintiff's bar should be ready to educate the courts and to bring cases in a strategic manner. This requires educating ourselves first.

ATTACHMENT A

Summary of most helpful cases interpreting the proportionality amendment

Carr v. State Farm Mutual Automobile Insurance, Company, No. 3:15-cv-1026-M, 2015 WL 8010920 (N.D. Tex. Dec. 7, 2015)

The court found that "the existing allocation of burdens to show undue burden or lack of proportionality have not fundamentally changed" under the amended Rules. In particular, it stated how the requesting party's burden was unchanged: "[T]he textual amendments do not themselves suggest that, before discovery requests must be answered or objected to or before discovery can be compelled under Rule 37(a), the party seeking discovery must first come forward with evidence to show that it is seeking discovery 'that is relevant to any party's claim or defense and proportional to the needs of the case.'" Moreover, the court found that the responding party's burden was unchanged: "[T]he amendments to Rule 26(b) and Rule 26(c)(1) do not alter the basic allocation of the burden on the party resisting discovery to—in order to prevail on a motion for protective order or successfully resist a motion to compel—specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of proper discovery (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable."

Applying the amended Rules, the court granted the requesting party's motion to compel discovery responses, finding that they were proportional to the needs of the case.

Wertz v. GEA Heat Exchangers Inc., No. 1:14-CV-1991, 2015 WL 8959408 (M.D. Pa. Dec. 16, 2015)

The court interpreted the new proportionality language broadly, stating that "Rule 26 establishes a liberal discovery policy," "[d]iscovery is generally permitted of any items that are relevant or may lead to the discovery of relevant information," and "the scope of relevance in discovery is far broader than that allowed for evidentiary purposes." It also cited to the Advisory Committee's Notes in stating that the amendment "does not change any of the existing responsibilities of the court or the parties."

In this employment (FLSA/ADA) case, the court cited to proportionality factors in granting an additional deposition (beyond the presumptive ten depositions). It also granted two particular depositions that the responding party had objected to on proportionality grounds, finding that the information sought was important to the issues in the case and that it would not be unduly burdensome.

Gowan v. Mid Century Insurance Company, 5:14-CV-05025-LLP, 2016 WL 126746 (D.S.D. Jan. 11, 2016)

The defendant delayed addressing a discovery matter until the amendment to Rule 26 went into effect, on the basis that it believed that the new Rule 26 limited discovery. The Court included the amended and prior language side by side and concluded that "the proportional requirement was already a part of Rule 26, it was just codified previously in subsection (c). Most of what appeared in subsection (b)(2)(C) of old Rule 26 has been in effect for the last 32 years, since 1983, so it is hardly new. Thus, as to this particular change, the only change rendered by the amendment was to move the proportional requirement from subsection (b)(2)(C) up to subsection (b)(1). The amended rule also specifies one additional factor to be considered in determining proportionality: the parties' access to relevant information" (citation omitted).

Based on proportionality factors, the court denied the defendant a protective order and allowed the plaintiff to take the desired deposition.

Robinson v. Dallas County Community College District, No. 3:14-cv-4187-D, 2016 WL 1273900 (N.D. Tex. Feb. 18, 2016)

The court holds that the "the amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery discussed above," and that "just as was the case before the December 1, 2015 amendments, under Rules 26(b)(1) and 26(b)(2)(C)(iii), a court can—and must—limit proposed discovery that it determines is not proportional to the needs of the case." As for the responding party specifically, it finds that it "still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) by coming forward with specific information to address [the proportionality factors]."

In this First Amendment case, the court granted the requesting party's motion to compel a deposition. It reasoned that the deposition was relevant to issues of some importance in the case, even though those issues were not dispositive.

Hodges v. Pfizer, Inc., No. 14-4855 ADM/TNL, 2016 WL 1222229 (D. Minn. Mar. 28, 2016)

In light of the amendments, the court stated that "Federal Rule of Civil Procedure 26 is to be construed broadly and encompasses any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case" (citation omitted). It further downplayed the changes to the Rules: "The 2015 Amendment to Rule 26(b)(1) relocated and slightly revised the proportionality language formerly located in subdivision (b)(2)(C)(iii). Fed. R. Civ. P. 26 at advisory committee's note to 2015 amendment. In doing so, the amendment 'restores the proportionality factors to their original place in defining the scope of discovery' but 'does not change the existing responsibilities of the court and the parties to consider proportionality'" (citing to the Advisory Committee's Notes).

The defendants appealed the magistrate judge's ruling, claiming that the judge failed to analyze proportionality in ordering certain production. The court upheld the magistrate judge's ruling and agreed that the discovery requests were proportional.

Rui He v. Rom, Case. No. 1:15-CV-1869, 2016 WL 909405 (N.D. Ohio Mar. 10, 2016)

The court held that "Rule 26 was amended in 2015 to include the 'proportionality' requirement. However, the 2015 amendments do not alter the basic tenet that Rule 26 is to be liberally construed to permit broad discovery."

The court granted the plaintiff's first motion to compel, partly because the defendant had not made a showing that the requested documents were not proportional to the needs of the case. The court also granted the plaintiff's second motion to compel because its allegations of fraud were extensive, and therefore an extensive request was proper.

Orchestratehr, Inc. v. Trombetta, No. 3:13-cv-2110-P, 2016 WL 1555784 (N.D. Tex. Apr. 18, 2016)

The court provided a thorough discussion of how "the amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery discussed above. Rather, just as was the case before the December 1, 2015 amendments, under Rules 26(b)(1) and 26(b)(2)(C)(iii), a court can—and must—limit proposed discovery that it determines is not proportional to the

needs of the case" (citation omitted). Specifically, it stated that "the amendments to Rule 26(b) and Rule 26(c)(1) do not alter the basic allocation of the burden on the party resisting discovery to—in order to successfully resist a motion to compel—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 court granted the plaintiff's motion to compel document production, where the defendants had failed to produce certain documents and failed to raise proper objections.

List of helpful cases interpreting the proportionality amendment since December 2015

1. *State Farm Mutual Automobile Insurance Company v. Fayada*, 14 Civ. 9792 (WHP) (JCF), 2015 WL 7871037 (S.D.N.Y. Dec. 3, 2015)
2. *Carr v. State Farm Mutual Automobile Insurance Company*, No. 3:15-cv-1026-M, 2015 WL 8010920 (N.D. Tex. Dec. 7, 2015)
3. *In re Blue Cross Blue Shield Antitrust Litigation*, No. 2:13-cv-20000-RDP, 2015 WL 9694792 (N.D. Ala. Dec. 9, 2015)
4. *Siriano v. Goodman Manufacturing Company, L.P.*, Civil Action 2:14-cv-1131, 2015 WL 8259548 (S.D. Ohio Dec. 9, 2015)
5. *Board of Commissioners of Shawnee County, Kansas v. Daimler Trucks North America, LLC*, No. 15-4006-KHV, 2015 WL 8664202 (D. Kan. Dec. 11, 2015)
6. *Bagley v. Yale University*, No. 3:13-cv-01890 (CSH), 2015 WL 8750901 (D. Conn. Dec. 14, 2015)
7. *Doe v. Trustees of Boston College*, No. 15-10790-DJC, 2015 WL 9048225 (D. Mass. Dec. 16, 2015)
8. *Wertz v. GEA Heat Exchangers, Inc.*, No. 1:14-CV-1991, 2015 WL 8959409 (M.D. Pa. Dec. 16, 2015)
9. *Green v. Cosby*, No. 14-30211-MGM, 2015 WL 9594287 (D. Mass. Dec. 31, 2015)
10. *McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Insurance Company*, No. 3:14-cv-2498-B, 2016 WL 98603 (N.D. Tex. Jan. 8, 2016)
11. *Gowan v. Mid Century Insurance Company*, 5:14-CV-05025-LLP, 2016 WL 126746 (D.S.D. Jan. 11, 2016)
12. *Herrera-Velazquez v. Plantation Sweets, Inc.*, No. CV614–127, 2016 WL 183058 (S.D. Ga. Jan. 14, 2016)
13. *Eramo v. Rolling Stone LLC*, No. 3:15–MC–00011, 2016 WL 304319 (W.D. Va. Jan. 25, 2016)
14. *Goes International, AB v. Dodur Ltd.*, Case No.14-cv-05666-LB, 2016 WL 427369 (N.D. Cal. Feb. 4, 2016)
15. *Dixon v. Williams*, No. 4:13-CV-02762, 2016 WL 631356 (M.D. Pa. Feb. 17, 2016)
16. *Robinson v. Dallas County Community College District*, No. 3:14-cv-4187-D, 2016 WL 1273900 (N.D. Tex. Feb. 18, 2016)
17. *Rui He v. Rom*, Case. No. 1:15-CV-1869, 2016 WL 909405 (N.D. Ohio Mar. 10, 2016)
18. *Celanese Corporation v. Clariant Corporation*, Nos. 3:14-cv-4165-M, 3:16-mc-15-M-BN, 2016 WL 1074573 (N.D. Tex. Mar. 18, 2016)
19. *Hodges v. Pfizer, Inc.*, No. 14-4855 ADM/TNL, 2016 WL 1222229 (D. Minn. Mar. 28, 2016)
20. *Braud v. Geo Heat Exchangers, L.L.C.*, No. 15-112-JWD-RLB, 2016 WL 1274558 (M.D. La. Mar. 31, 2016)
21. *Holmes v. North Texas Health Care Laundry Cooperative Association*, No. 3:15-cv-2117-L, 2016 WL 1366269 (N.D. Tex. Apr. 6, 2016)
22. *Orchestratehr, Inc. v. Trombetta*, No. 3:13-cv-2110-P, 2016 WL 1555784 (N.D. Tex. Apr. 18, 2016)