Litigating Proportionality Under Federal Rule of Civil Procedure 26(b)(1)

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Since the 2015 amendment, the proportionality requirement under Federal Rule of Civil Procedure 26(b)(1) has become the focus of considerable and often protracted discovery-related battles. While the rule incorporates six factors for a court to consider, no bright-line rules have surfaced regarding the analysis of these factors in the past seven years. The difficulty in formulating clearer rules or standards is that the inquiry is fact-dependent and therefore highly individualized.

What we can glean from recent cases, however, is a general principle that often drives results: A thorough, well-reasoned, and thoughtful approach to demonstrating proportionality—or the lack thereof—boosts the likelihood of prevailing. This painstaking approach is important because the proportionality requirement under Rule 26(b)(1) is both a potent shield against overbroad and burdensome (and thus expensive) discovery demands and a powerful sword against a recalcitrant party resisting legitimate discovery.

Know the Rule

Any analysis of the rule begins with understanding its purpose:

> The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. 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. The key here is careful and realistic assessment of actual need.

John Roberts, 2015 Year-End Report on the Federal Judiciary (Dec. 31, 2015). Significantly, the effort to eliminate wasteful discovery eliminated the oft-relied-upon language that a request is within the permissible scope of discovery if "reasonably calculated to lead to the discovery of admissible evidence." Despite efforts to erase the "reasonably calculated" standard, the language continues to appear in some judicial analyses and lawyers' arguments.

More importantly, the amendment elevated proportionality from its prior position among the "limitations on frequency and extent" of discovery which is addressed in Rule 26(b)(2) to the "scope in general" portion of the rule which appears in Federal Rule of Civil Procedure 26(b)(1). After the 2015 amendment, "[p]arties 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. . . ." In analyzing proportionality under the new rule, courts are instructed to consider six factors. As explained in the advisory committee's note to the 2015 amendment, these six factors were added to the rule over time and in different amendments, beginning with an effort in 1983 "to deal with the problem of over discovery." The current formulation requires consideration of six factors:

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.

To date, at least sixteen states and the District of Columbia have adopted the proportionality limits of Rule 26(b)(1) as part of their comparable civil discovery rule.

Lay the Groundwork

Typically, whether discovery is proportional is decided in a ruling on a motion to compel or for a protective order. But laying the groundwork for success begins long before requests for judicial intervention. By the time the issue reaches the court, you should be able to show the court that your client has been guided by the proportionality requirements at every stage of discovery and complied with its discovery obligations at every turn.

First, the issue of proportionality should be raised no later than during the Federal Rule of Civil Procedure 26(f) discovery planning conference. Rather than treating the conference as a pro forma occurrence, use it as an opportunity to crystallize the issues and exchange information each side needs to level-set discovery expectations. In particular, as stated in the advisory committee's note to the 2015 amendment, the Rule 26(f) conference is an opportune time to begin discussing factors five (the importance of the discovery in resolving the issues) and six (whether the burden or expense of the proposed discovery outweighs its likely benefit). Given the interrelatedness between factors five and six, this approach is most effective when the parties are able to work collaboratively.

Second, avoid the trap of boilerplate requests and responses. Litigants should be cautious and focused on drafting discovery requests as courts are less likely to endorse discovery that is virtually limitless. Instead, draft requests that tie clearly to the claims and defenses. Before any discovery requests leave your office, consider how you will explain to a court that the request is proportional in terms of geographic scope, temporal scope, number of anticipated custodians, volume of documents, and other relevant factors. Likewise, the responding party should be circumspect in its use of proportionality objections. Cabin the urge to use this objection unless you are able to go beyond invoking the word proportionality by providing specific information on relevant sub-factors and their application.

Finally, establish a clear record of operating in good faith throughout the discovery process. Be ready to demonstrate your client's continuing efforts to resolve proportionality issues from proposals made at Rule 26(f) and Rule 16 conferences to the substance of the discovery requests and responses and proposals made during meet and confer conferences and related correspondence.

Creativity can also impress the court. In some cases, it may be appropriate to limit discovery by relying on sample data. In others, the parties may be able to rely on stipulations to eliminate the need for certain discovery.

For either party, these early and frequent attempts to address proportionality issues will stand them in good stead should the issue reach the court.

Play to Your Strengths

Despite the infrequency of opinions parsing the proportionality factors, lawyers quickly learned that simply invoking "proportionality" was not likely a successful tactic. Instead, effective lawyers pivoted to detailed and carefully drafted reasons supporting their positions in the discovery dispute. This is particularly important where one party has superior access to information.

For example, the plaintiff, as the master of their case, is in the best position to explain the interplay between factors one (the importance of the issues at stake in the action), two (the amount in controversy), and five (the importance of the discovery in resolving the issues). The advisory committee note makes clear that the importance of the issues may be 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." Plaintiffs should highlight as many of these aspects of the case as possible when explaining their position on proportionality and remind the opposing party and the court of the critical role they play in the proportionality analysis.

Regarding factor five, plaintiffs should avoid defendants' attempts to cabin claims by explaining why a particular request is proportional despite its apparent breadth. Thus, in an employment discrimination case, it may be that discovery beyond the plaintiff's department could be relevant because, under the plaintiff's theory of the case, decisions were made above the departmental level. Or, in a premises liability case, it may be necessary to discover how the defendant's other stores address a slip-and-fall and how they retain video footage to demonstrate either inconsistent policies or potential spoliation.

As the party typically resisting discovery, the defendant is most often in the position to best understand the burden and expense of the proposed discovery, part of factor six. In terms of expense, provide the opposing party and court with affidavits containing hard data on the cost. This could include information such as quotes from discovery vendors, estimated attorney costs, and the estimated value of employee time devoted to the discovery process. It is worth the effort to gather detailed affidavits from as many sources as necessary to paint a fulsome picture of the burdensomeness. Include any available supporting data on discovery costs in comparable cases.

Also, chronical other evidence of burdensomeness. Support demonstrating burden can take many forms. For example, although the propounding party often relies on the assumption that records are easily accessible, that is not always the case. Perhaps the request is burdensome because relevant records are not computerized, and the files are kept in several different locations. Perhaps the records are computerized but cannot be accessed at the "touch of button." Instead, data retrieval involves extracting data from and searching through one or more legacy systems. Regardless of the rationale, the party resisting discovery should use affidavits and other evidence to provide the court with a clear and detailed picture of the burden. Whenever possible, the discussion of burdensomeness should be accompanied by a discussion of the limited relevance of the requested information.

Conclusion

As Chief Justice Roberts predicted in 2015, "[t]he amendments may not look like a big deal at first glance, but they are." Over the past seven years, trends reflecting courts' propensities have started to emerge. Courts are more inclined to rule in a party's favor on a motion to compel or protective order when the party asserts a well-reasoned and thoughtfully presented proportionality argument. And courts are more likely to rule against a party where the party has been casual in complying with its discovery obligations.

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