Federal Discovery in the "Proportionality" Era

Basic Principles, Practical Implications

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Say what?

"Proportionality"

- **[1]pro·por·tion·al**
- : having a size, number, or amount that is directly related to or appropriate for something
- : having parts that are the correct or appropriate size in relation to each other

Merriam-Webster Dictionary

Agenda

- Overview of rule changes expected for December 2015
- Understanding "proportionality"
- Practical impact of the new Rule 26(b)(1)
  - Document requests
  - Interrogatories
  - Depositions

Agenda (cont.)

- Rule 37(e) – ESI
- Additional changes

2015: The Expected Changes

- Rule 1: Scope and Purpose
- Rule 4(m): Time for Service; "Appendix"
- Rule 16(b): Scheduling
- Rule 26(b): Scope of Discovery
- Rule 26(c): Protective Orders

2015: The Expected Changes (cont.)

- Rule 26(d): Early document requests
- Rule 26(f): Joint Discovery Plan
- Rule 34: Document Requests

2015: The Expected Changes (cont.)

- Rule 37(e): Failure to ~~Provide~~ Preserve ESI
- Rule 55(c): Setting Aside a Default or a Default Judgment
- Rule 84: Forms
- Appendix of Forms

Wow…

Time Frames

Rule changes will go into effect on
December 1, 2015
(assuming Supreme Court approval by May 1, 2015 and no action by Congress)

The Rulemaking Process

Civil Rules Advisory Committee
("Advisory Committee")

Committee on Rules of Practice and Procedure of the Judicial Conference
("Standing Committee")

Judicial Conference of the United States

Supreme Court

Congress

Setting the Stage

Late 2000s

- Mounting complaints about cost, delays and burdens of civil litigation in federal courts
- Average outside litigation cost per Fortune 200 company was nearly $115 million in 2008, up 73% from percent from $66 million in 2000
- 1000:1
  - Ratio of pages discovered to exhibit pages

Civil Justice Reform Group, et al., "Litigation Cost Survey of Major Companies"

Late 2000s

- 81% of ACTL Fellows agreed that the civil justice system is too expensive
- 69% of Fellows said that the civil justice system takes too long
- 68% of Fellows agree that the potential of litigation costs inhibits the filing of civil cases
- *"There is a serious concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs,*
- *as opposed to the merits, of cases."*

ACTL & IAALS, Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (2008)

Late 2000s

- **Late 2008**: Standing Committee asks Advisory Committee to hold a conference on the issues of cost and delay in the federal civil-litigation system
- **January 2009**: Advisory Committee schedules conference to be held at Duke University School of Law in May 2010 to determine whether it is necessary to "totally rethink the current approach taken by the civil rules to litigation."

Hon. John Koeltl, "Progress in the Spirit of Rule 1," 60 Duke L.J. 537 (2010); Mary Kay Kane, Pretrial Procedural Reform and Jack Friedenthal, 78 GEO. WASH. L. REV. 30, 38 (2009).

Coach K

May 2010: The Duke Conference

- Two-day conference with eleven panels attended by judges, lawyers, academics, and users of the system, including government, corporations, and groups representing individual litigants and public interest causes
- Scores of articles, studies, and commentary submitted
- "[N]early unanimous agreement that the disposition of civil actions could be improved, reducing cost and delay, by advancing cooperation among the parties, proportionality in the use of available procedures, and early and active judicial case management."

Hon. John Koeltl, "Progress in the Spirit of Rule 1," 60 Duke L.J. 537 (2010); Advisory Committee Report to Standing Committee, May 2014.

After Duke

- Advisory Committee prepares rule proposals; vets them at "mini-conferences"
- August 2013: Standing Committee approves *publication* of "Duke Package"
- Maximum capacity hearings in Washington, D.C., Phoenix, and Dallas
- 120 testifying witnesses

Thomas Y. Allman, "The Civil Rules Package As Approved By the Judicial Conference" (September 18, 2014)

After Duke

- Over 3200 written comments
- Includes extensive comments from the Lawyers for Civil Justice ("LCJ"), American Association for Justice, the Federal Magistrate Judges Association, the Association of Corporate Counsel, the Department of Justice, and the Sedona Conference®

Thomas Y. Allman, "The Civil Rules Package As Approved By the Judicial Conference" (September 18, 2014)

2014

- **April 2014**: Advisory Committee reviews and finalizes proposals; recommends adoption
- **May 2014**: Standing Committee accepts recommendations of Advisory Committee
- **September 2014**: Judicial Conference accepts recommendations; submits to Supreme Court for adoption

Report of the Advisory Committee on Civil Rules (May 2014); Thomas Y. Allman, "The Civil Rules Package As Approved By the Judicial Conference" (September 18, 2014)

Next Steps

- Rules currently pending before Supreme Court
- If the rules are adopted and submitted to Congress prior to May 1, 2015, they would become effective on December 1, 2015 if legislation is not adopted to reject, modify, or defer them

Thomas Y. Allman, "The Civil Rules Package As Approved By the Judicial Conference" (September 18, 2014)

The BIG Story

- ***Rule 26(b)(1)***
- ***Rule 37(e)***

Rule 26(b)(1) - NOW

- 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--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).

Rule 26(b)(1) - NEW

- Scope in General. 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.***

What Changed?

- The cost-benefit factors included in present Rule 26(b)(2)(C)(iii) are moved up to become part of the scope of discovery, identifying elements to be considered in determining whether requested discovery is "proportional" to the needs of the case.
- The examples recognizing discovery of the existence of documents or tangible things and the identity of persons who have knowledge of discoverable matter are eliminated as "no longer necessary."

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

What Changed?

- The distinction between discovery of matter relevant to the parties' claims or defenses and discovery of matter relevant to the subject matter of the action, on a showing good cause, is eliminated.

and….

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

What Changed?

The provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery of admissible evidence" is ***eliminated***

Yikes…

Order in the Court

Change No. 1: Proportionality

- Widespread support at the Duke Conference for the proposition that discovery should be limited to what is proportional to the needs of the case
- As to ***meaning***, Advisory Committee borrows the factors prescribed by Rule 26(b)(2)(C)(iii), which courts now use to consider in limiting the frequency or extent of discovery

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

Proportionality

"Information is discoverable under revised Rule 26(b)(1) if it is ***relevant*** to any party's ***claim or defense*** and is ***proportional*** to the needs of the case."

Advisory Committee Note to Rule 26 (2014)

Proportionality

- Surveys from groups representing various and diverse interests generally agreed that outcomes are more driven by discovery costs than the merits of the case
- While proportionality has been in Rule 26 since 1983, it has not been given proper emphasis; placement in Rule 26(b)(1) will make it more prominent
- "The present amendment restores the proportionality factors to their original place in defining the scope of discovery."

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

Proportionality

- "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."

Advisory Committee Note to Rule 26 (2014)

Proportionality

- "Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."

Advisory Committee Note to Rule 26 (2014)

Factors

- ***The "issues at stake in the action"***
- ***The amount in controversy***
- ***The parties relative access to relevant information***

Factors

- ***The parties' resources***
- ***The importance of the discovery in resolving the issues***
- ***Whether the burden or expense of the proposed discovery outweighs its likely benefit***

Factors

- ***"considering the importance of the issues at stake in the action, the amount in controversy…"***
- Advisory Committee switched the order of these two items from current Rule 26(b)(2)(C)(iii)
- The "rearrangement adds prominence to the importance of the issues at stake, avoiding any possible implication that the amount in controversy is the first and therefore most important concern."

Report of the Advisory Committee on Civil Rules (May 2014)

Factors

- ***"…the parties' relative access to relevant information"***
- Not currently in Rule 26(b)(2)(C)(iii)
- "This factor addresses the common concern that the frequently asymmetric distribution of information means that discovery often will impose greater burdens on one party than on another."

Report of the Advisory Committee on Civil Rules (May 2014)

Rule 26(b)(1) - Change No. 2

- *Current Rule 26:*

"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."

Rule 26(b)(1) - Change No. 2

- "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."
- "The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case."

Advisory Committee Note to Rule 26 (2014)

Rule 26(b)(1) – Change No. 3

- The distinction between discovery of matter relevant to the parties' claims or defenses and discovery of matter relevant to the subject matter of the action, on a showing good cause, is eliminated.
- "The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense."

Advisory Committee Note to Rule 26 (2014)

Rule 26(b)(1) – Change No. 3

- The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000.
- The Rule was amended in 2000 in response to complaints that discovery should be confined to the parties' claims or defenses, not "subject matter."

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

Rule 26(b)(1) – Change No. 3

- "The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were 'other incidents of the same type, or involving the same product'; 'information about organizational arrangements or filing systems'; and 'information that could be used to impeach a likely witness.' Such discovery is not foreclosed by the amendments."

Advisory Committee Note to Rule 26 (2014);

Rule 26(b)(1) – Last But Not Least

The provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery of admissible evidence" is ***eliminated****.*

"Reasonably Calculated"

- "The former provision for discovery of relevant but inadmissible information that appears 'reasonably calculated to lead to the discovery of admissible evidence' is also deleted."
- "The phrase has been used by some, incorrectly, to define the scope of discovery."

Advisory Committee Note to Rule 26 (2014)

"Reasonably Calculated"

- "As the Committee Note to the 2000 amendments observed, use of the 'reasonably calculated' phrase to define the scope of discovery 'might swallow any other limitation on the scope of discovery.'"
- The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ."

Advisory Committee Note to Rule 26 (2014)

"Reasonably Calculated"

- "The 'reasonably calculated' phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that 'Information within this scope of discovery need not be admissible in evidence to be discoverable.'"
- "Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery."

Advisory Committee Note to Rule 26 (2014)

Proportionality – Practical Implications

- Global discovery versus the individual case
- "Relevant" versus "Relevant"
- Rule application versus case law development
- Rule 26(b) and Bell/Twombly

Proportionality – Document Review

- Current Rule 26(b) Analysis
  - Discovery is broader than admissibility
  - Is it reasonably likely to lead to the discovery of admissible evidence?
  - Is it privileged or otherwise protected?
  - Should probably produce, if not privileged

Proportionality – Document Review

- New Rule 26(b) Analysis
  - "Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case."
  - "Not Proportional" cannot be used as a boilerplate objections
  - *Is the document "**relevant** to any party's **claim or defense**"?*

Proportionality – Document Review

- New Rule 26(b) Analysis (cont.)
  - Document does not have to be *admissible*
  - Information may be withheld if privileged or non-responsive

Proportionality – Document Review

- New Rule 26(b) Analysis (cont.)
  - "The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were 'other incidents of the same type, or involving the same product'; 'information about organizational arrangements or filing systems'; and 'information that could be used to impeach a likely witness.' Such discovery is not foreclosed by the amendments."

Advisory Committee Note to Rule 26 (2014)

Proportionality – Document Review

- New Rule 26(b) Analysis (cont.)
  - "Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery."

Advisory Committee Note to Rule 26 (2014)

Proportionality – Interrogatories

- Effect on common objections (vague, unduly burdensome)
- Use of "not proportional" or "disproportionate"
- "Not relevant to any party's claim or defense"

Proportionality – Depositions

- During the deposition
- Persons/entities to depose
  - 30(b)(6) Notice
- Protective orders

Rule 26(b) Changes

Discussion

Rule 37(e)

Current Rule:

(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.

Rule 37(e)

"[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."

Chief Justice John Roberts, Riley v. California, -- U.S. – (2014)

The Duty to Preserve

"While a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation."

Scott v. IBM Corp., 196 F.R.D. 233 (D.N.J. 2000)

The Duty to Preserve

- Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.
- *Counsel must oversee compliance* with the litigation hold, monitoring the party's efforts to retain and produce relevant documents.

Major Tours, Inc. v. Colorel, 2009 WL 2413631 (D.N.J. Aug. 4, 2009) (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y.2003) ("Zubulake IV"))

Spoliation

Spoliation is defined as the destruction or significant alteration of evidence, either during or prior to reasonably foreseeable litigation.

Bensel v. Allied Pilots Association, et al., 263 F.R.D. 150 (D.N.J. 2009)

Spoliation

Spoliation exists where:

- The evidence in question must be within the party's control.
- The evidence destroyed or withheld was relevant to claims or defenses.
- It must appear that there has been actual suppression or withholding of evidence.
- It was reasonably foreseeable that the evidence would later be discoverable.

Bensel, 263 F.R.D. at 152

Is Bad Faith Required?

Bull v. United Parcel Service, Inc., 665 F.3d 68 (3d Cir. 2012)

- Third Circuit resolves uncertainty
- Bad faith *is* required to show "actual suppression":

"[A] finding of bad faith is pivotal to a spoliation determination. This only makes sense, since spoliation of documents that are merely withheld, but not destroyed, requires evidence that the documents are actually withheld, rather than—for instance—misplaced. Withholding requires intent."

New Rule 37(e)

- (e) **Failure to ~~Provide~~ Preserve 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.~~

New Rule 37(e)

- 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:
  - (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.

New Rule 37(e) - Preconditions to Sanctions

- Should the ESI have been preserved in the anticipation or conduct of litigation?
- Was the ESI lost because a party failed to take reasonable steps to produce it?
- Can the ESI be restored or replaced through additional discovery?

New Rule 37(e) - Preconditions to Sanctions

- Did the party act "***with the intent to deprive another party of the information's use in the litigation"?***
  - Court ***may***, but is not ***required*** to impose sanctions in the form of a presumption, adverse inference, dismissal, or default
- Prejudice alone is ***insufficient*** for presumption, adverse inference, dismissal, or default

"Intent to Deprive"

- Adverse inference or other sanctions require a showing that a party acted "***with the intent to deprive another party of the information's use in the litigation"***
- New rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used."

Advisory Committee Note to Rule 37 (2014)

Advisory Committee

- Analysis applies only to ESI, and only applies when such information is actually lost
- "[L]oss from one source may often be harmless when substitute information can be found elsewhere."
- New rule does not create a new duty to preserve

Advisory Committee Note to Rule 37 (2014)

Advisory Committee

- "Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed."

Advisory Committee Note to Rule 37 (2014)

Advisory Committee

- "The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case."

Advisory Committee Note to Rule 37 (2014)

Prejudice

- "The rule does not place a burden of proving or disproving prejudice on one party or the other."
- "The rule leaves judges with discretion to determine how best to assess prejudice in particular cases."
  - *Uniformity versus case law development*
  - *Risk of inconsistency*

Advisory Committee Note to Rule 37 (2014)

Advisory Committee - Adverse Inference

- No adverse inference permitted based solely on finding of negligence or gross negligence
- "Intent" may require jury determination
  - Defeating the purpose?
- (e)(2) does ***not*** require a separate finding of prejudice

Advisory Committee Note to Rule 37 (2014)

Advisory Committee - Adverse Inference

- "Courts should exercise caution, however, in using the measures specified in (e)(2)."
- Court is not ***required*** to impose (e)(2) sanctions where intent to deprive exists
- "The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss."

Advisory Committee Note to Rule 37 (2014)

Other Rule Changes

- **Rule 1**
  - Amended to make clear that the just, speedy, and inexpensive determination of civil actions is the responsibility of the parties, not just the court
- **Rule 4**
  - Time to serve defendant after filing the Complaint is reduced from 120 days to 90 days

Other Rule Changes

- **Rule 16**
  - Scheduling Conferences are to be permitted in person or by telephone
  - Issuance of the first Scheduling Order is reduced from 120 days to 90 days after any defendant has been served, or 60 days after any defendant has appeared
  - The first Scheduling Order ***may*** provide for the preservation of ESI, incorporate claw-back agreements, and require parties to request a conference before filing a discovery motion

Other Rule Changes

- **Rule 26(d)(2)**
  - "Early" document requests are permitted where they are served more than 21 days after service of summons and complaint
  - The requests are considered "served" at the first Rule 26(f) conference

Other Rule Changes

- **Rule 34(b)(2)(C)**
  - Responses to document requests must indicate whether anything is actually being withheld on the basis of an asserted objection
- **Rule 55(c)**
  - Amended to make clear that a default judgment can be revised at any time until it becomes a ***final*** default judgment

Other Rule Changes

- **Rule 84 – Forms**
  - Rule 84 and the Appendix of Forms "are no longer necessary and have been abrogated" given "many excellent alternative sources for forms"
  - The "Waiver of Service" form used in connection with Rule 4 is now incorporated into Rule 4

QUESTIONS AND ANSWERS