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Case Law Update: Fed. R. Civ. P. Amendments

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Overview

The goal of the amendments to the Federal Rules of Civil Procedure (FRCP) that took effect on December 1, 2015 was to make discovery proportional to the case, cut down foot-dragging in response to document requests, and eliminate “over-preservation” of records.

Have courts interpreted and enforced the rules in a way that will achieve this goal?

How can you adapt your practice in light of these amendments and their implementation?



Key Amendments to Federal Rules

Rule 26 **Scope of Discovery, Proportionality,
Cost-Shifting**

Rule 37 **Preservation, Sanctions**



Rule 26(b)(1): Scope of Discovery and Proportionality

(1) *Scope in General*
of discovery is as for nonprivileged matters proportional to the controversy, the interests of justice, the parties' resources, the issues, and whether the benefits outweigh its likely costs. Discovery need not be admitted to the existence, description, or tangible things and the facts. For good cause, the court involved in the action. Rule appears reasonably calculated subject to the limitations

What's New?

- Uses word "proportional"
- Brings proportionality into scope of discovery (but same factors as before)
- Cuts examples
- Eliminates "relevant to the subject matter" language
- Drops "reasonably calculated to lead" language

Rule 26(b)(1): Overview

- Since the 2015 amendments, courts have struggled with the removal of the “reasonably calculated” language and with the additional emphasis on proportionality.
- The proportionality factors alone have developed a growing body of case law, as courts consider how to properly weigh the factors.
- One theme has emerged in the cases – there is no substitute for specificity: both parties are required to state with specificity why they are requesting or objecting to discovery.
- The selected Rule 26(b)(1) cases are divided into three sections:
 - ♦ Discovery Must Be Both Relevant and Proportional
 - ♦ The Factors Determine What Is “Proportional”
 - ♦ Court Will Not Allow Broad Discovery Requests or Objections



Discovery Must Be Both Relevant and Proportional

***Noble Roman's, Inc. v Hattenhauer Distrib. Co.*, 2016 U.S. Dist. LEXIS 38428 (S.D. Ind. Mar. 24, 2016)**

- Facts: The defendant issued subpoenas to the plaintiff's shareholder. However, the court prohibited the discovery, finding that while the information may be relevant, the "[defendant] never attempt[ed] to demonstrate that the discovery is in any way proportional to the needs of this case."
- Takeaway: Even relevant information is not discoverable if the request is not proportional to the needs of the case. In short, proportionality *and* relevance are key considerations.



Discovery Must Be Both Relevant and Proportional

***Gilead Scis., Inc. v. Merck & Co.*, 2016 WL 146574 (N.D. Cal. Jan. 13, 2016)**

- Facts: The defendants requested additional discovery to prove that the contents of a tube of compounds were what the plaintiff claimed. The court denied this discovery, stating that “in the absence of any reason to doubt the proof Gilead has tendered about the identity of the disputed compounds . . . Merck's request is precisely the kind of disproportionate discovery that Rule 26—old or new—was intended to preclude.”
- Takeaway: A discovery request needs to be narrowly tailored and relevant to the case at hand. The court demands a showing of *why* the requested information is needed.



The Factors Determine What Is “Proportional”

***Doe v. Trs. of Bos. Coll.*, 2015 U.S. Dist. LEXIS 168189 (D. Mass. Dec. 16, 2015)**

- Facts: The plaintiffs requested the court to compel additional discovery, which included prior complaints or charges of sexual assault which were brought by other current students and past students at Boston College. The court granted the motion for discovery, with some redactions made in order to protect the non-party students' privacy.
- Takeaway: The inclusion of a new factor in the proportionality analysis—the relative access to the information—makes it clear that the party with more information and resources has a higher burden for discovery.



The Factors Determine What Is “Proportional”

***Roberts v. Clark County School District*, 312 F.R.D. 594 (D. Nev., 2016)**

- Facts: Transgender school police officer, who was born biologically female but who was in process of formally transitioning to male, sued school for gender discrimination and retaliation in violation of state and federal law. School moved to compel officer's responses to discovery to allow it to subpoena officer's medical records directly from providers, and both sides moved for attorney fees. Court denied the request as “grossly out of proportion.”
- Takeaway: Lawyers must size and shape their discovery requests to the requisites of a case. 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. This requires active involvement of federal judges to make decisions regarding the scope of discovery.



The Factors Determine What Is “Proportional”

***Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, 2016 U.S. Dist. LEXIS 107930 (E.D.N.C. Aug. 15, 2016)**

- Facts: The plaintiff sought an order compelling the defendants to provide a full answer to one of its interrogatories and responsive documents to four of its requests for production. The defendants argued that the requested discovery was not relevant to either party's claims or defenses and not proportional to the needs of the case. The court held that “the proportionality factors contained in the amended version of Rule 26(b)(1) of the Federal Rules of Civil Procedure are substantially similar to the proportionality factors contained in 2014 version of Rule 26(b)(2)(C)(iii).”
- Takeaway: Many courts do not impose different proportionality factors based on the amended rules, but instead, apply the same standard to the amended rules as the previous rules.



Courts Will Not Allow Broad Discovery Requests or Objections

***Carr v. State Farm Mut. Auto. Ins.*, 312 F.R.D. 459 (N.D. Tex. 2015)**

- Facts: The defendant filed a motion to compel discovery, claiming that the plaintiff did not “adequately respond” to its discovery demand. The court granted the motion, despite the plaintiff’s broad objections, with a couple exceptions to protect irrelevant medical records.
- Takeaway: The amendments have not changed the discovery burden and the defendant bears the burden of proportionality factors as the party seeking to resist discovery.
 - ♦ *Carr*’s analysis and interpretation of the amended rule is frequently cited by other courts.



Courts Will Not Allow Broad Discovery Requests or Objections

***Rhone v. Schneider Nat'l Carriers, Inc.*, 2016 U.S. Dist. LEXIS 53346 (E.D. Mo. Apr. 21, 2016).**

- Facts: In a personal injury action, a motion to compel discovery on the plaintiff's social media accounts partially succeeded. The court ordered production of the information from the date of the accident to the present, despite plaintiff's broad objections that did not explain how the requests were overbroad or burdensome.
- Takeaway: A broad discovery request does not mean that an objection can be broad: courts expect specific examples of how the discovery would be burdensome or overbroad.



Courts Will Not Allow Broad Discovery Requests or Objections

***Moore v. Lowe's Home Centers*, 2016 U.S. Dist. LEXIS 20630 (W.D. Wash. Feb. 19, 2016).**

- Facts: The plaintiff asserted that the completed email searches were deficient, and additional searches were needed because they believed that the defendant possessed emails that were never produced. The plaintiff provided no basis for that belief. The court agreed with the defendant since the new “search would result in hundreds of thousands of irrelevant emails.”
- Takeaway: Like with other discovery, ESI requests need to be specific – parties need to be prepared to show that the information they expect from the search results cannot be found by other means.



Rule 26: Practice Tips

- Be aggressive in trying to enforce the amended rules
 - ♦ Many judges are not aware of the specifics of the amended rules and can benefit from your explanations
- Be specific in your objections so you don't inadvertently waive them
- When arguing that the burden of discovery is not proportional to the benefit, use specific numbers to illustrate your point
- Be willing to have a conversation with the Court about what you really need and why



Rule 26(b)(1): Significant Cases

Discovery Must Be Both Relevant and Proportional

- *Labrier v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 61246 (W.D. Mo. May 9, 2016)
- *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, 2016 U.S. Dist. LEXIS 38428 (S.D. Ind. Mar. 24, 2016)
- *Bentley v. Highlands Hosp. Corp.*, 2016 U.S. Dist. LEXIS 23539 (E.D. Ky. Feb. 23, 2016)
- *Henry v. Morgan's Hotel Grp., Inc.*, 2016 U.S. Dist. LEXIS 8406 (S.D.N.Y. Jan. 25, 2016)
- *Wit v. United Behavioral Health*, 2016 U.S. Dist. LEXIS 7242 (N.D. Cal. Jan. 21, 2016)
- *Gilead Scis., Inc. v. Merck & Co.*, 2016 U.S. Dist. LEXIS 5616 (N.D. Cal. Jan. 13, 2016)
- *Elliott v. Superior Pool Prods., LLC*, 2016 U.S. Dist. LEXIS 293 (C.D. Ill. Jan. 4, 2016)

The Factors Determine What Is "Proportional"

- *Wilmington Trust Co. v. AEP Generating Co.*, 2016 U.S. Dist. LEXIS 28762 (S.D. Ohio Mar. 7, 2016)
- *Marsden v. Nationwide Biweekly Admin., Inc.*, 2016 U.S. Dist. LEXIS 15001 (S.D. Ohio Feb. 8, 2016)
- *Chrimar Sys. v. Cisco Sys.*, 312 F.R.D. 560 (N.D. Cal. Jan. 12, 2016)
- *Doe v. Trs. of Bos. Coll.*, 2015 U.S. Dist. LEXIS 168189 (D. Mass. Dec. 16, 2015)
- *Siriano v. Goodman Mfg. Co.*, 2015 U.S. Dist. LEXIS 165040 (S.D. Ohio Dec. 9, 2015)
- *Roberts v. Clark County School District*, 312 F.R.D. 594 (D. Nev., 2016)
- *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, 2016 U.S. Dist. LEXIS 107930 (E.D.N.C. Aug. 15, 2016)

Courts Will Not Allow Broad Discovery Requests or Objections

- *Carr v. State Farm Mut. Auto. Ins.*, 312 F.R.D. 459 (N.D. Tex. 2015)
- *Rhone v. Schneider Nat'l Carriers, Inc.*, 2016 U.S. Dist. LEXIS 53346 (E.D. Mo. Apr. 21, 2016)
- *In re Takata Airbag Prods. Liab. Litig.*, 2016 U.S. Dist. LEXIS 46206 (S.D. Fla. Feb. 29, 2016)
- *Moore v. Lowe's Home Centers*, 2016 U.S. Dist. LEXIS 20630 (W.D. Wash. Feb. 19, 2016)



Rule 37: Preservation and Sanctions

(e) Failure to ~~Provide~~ Preserve Electronically Stored Information

~~Absent exceptional circumstances for failing to provide electronic operation of an electronic information system~~

If electronically stored information in *litigation* is lost because a party failed to take measures to restore or replace the information, the court may

(1) upon finding that the party's failure to take measures no greater than that of a prudent person in the same or similar circumstances

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

(A) prohibit the party from introducing the information in the litigation

(B) in the discretion of the court, require the party to take additional measures to preserve the information

unfavorable to the party

(C) direct the party to take additional measures to preserve the information

What's New?

- Drops the “safe harbor”
- Attempts to distinguish between failure to take “reasonable steps” and “intent to deprive”
- Requires a showing of prejudice



Rule 37: Overview

- In the first six months after the FRCP amendments, courts issued sanctions 40% of the time.
- The most common sanction issued was an adverse inference.
- The opinions considering Rule 37(e) sanctions contained a myriad of data sources, with email and business data ranking the highest.
- The selected Rule 37(e) cases are divided into three sections:
 - ◆ Parties Must Take “Reasonable Steps”
 - ◆ Sanctions Require a Finding of Intent or Bad Faith
 - ◆ Courts are Relying on Their Inherent Power



Parties Must Take “Reasonable Steps”

***Marten Transp., Ltd. v. Plattform Adver., Inc.*, 2016 U.S. Dist. LEXIS 15098 (D. Kan. Feb. 8, 2016)**

- Facts: Even though a duty to preserve had generally attached, it did not apply to the loss of the Internet search history of an employee due to routine business practices, which occurred at a later time when it was not known it would be an issue. The court noted that the plaintiff acted reasonably, in part because most businesses do not preserve Internet search history.
- Takeaway: The intent of Rule 37(e) is to curtail excessive efforts made to preserve ESI, and as a result, courts expect “reasonable” efforts to preserve ESI, not perfection.



Parties Must Take “Reasonable Steps”

***FiTeq Inc. v. Venture Corp.*, 2016 U.S. Dist. LEXIS 60213 (N.D. Cal. Apr. 28, 2016)**

- Facts: The plaintiff sought sanctions in response to deleted emails, which the defendants claimed were restored through later discovery. The court held that sanctions could not be granted under Rule 37(e) because there was no proof that any additional “missing” emails existed.
- Takeaway: A party needs more than an inference that evidence was permanently destroyed for a court to grant sanctions under Rule 37(e).



Sanctions Require a Finding of Intent or Bad Faith

***O'Berry v. Turner*, 2016 U.S. Dist. LEXIS 55714 (M.D. Ga. Apr. 27, 2016)**

- Facts: The defendants preserved ESI pertaining to vehicle operation data and the driving log after an auto accident only by printing off a single paper copy, and then allowing the ESI to be deleted due to routine procedures. This paper copy was then lost during transfers to a new office. The court granted sanctions by inferring intent to deprive under Rule 37(e)(2), stating that preserving ESI in this manner was “simply irresponsible.”
- Takeaway: Making a single physical copy of ESI may not satisfy a litigant’s duty to preserve evidence.



Sanctions Require a Finding of Intent or Bad Faith

***Living Color Enters. v. New Era Aquaculture Ltd.*, 2016 U.S. Dist. LEXIS 39113 (S.D. Fla. Mar. 22, 2016)**

- Facts: Text messages were deleted from a defendant's phone after he failed to turn off the automatic deletion feature. Using the three part threshold test for analyzing Rule 37(e) applicability, the court found that the defendant's negligent failure to turn off this feature did not result in sufficient prejudice. In addition, the negligent failure was not sufficiently culpable to have the level of intent needed for sanctions under either subsection (e)(1) or (e)(2) to be applied.
- Takeaway: A negligent failure to turn off an auto-delete feature may not be "reasonable steps" but it is also not sufficiently culpable to constitute an "intent to deprive" or "bad faith."



Courts Are Relying on Their Inherent Power

***Cat3, LLC v. Black Lineage, Inc.*, 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016)**

- Facts: In a trademark dispute, evidence emerged which indicated that the plaintiffs modified emails they intended to offer as evidence. The court granted sanctions, noting that if Rule 37(e) had not applied, it had inherent authority to remedy spoliation through its inherent power, provided bad faith had been present.
- Takeaway: Even though Rule 37(e) applies only to ESI, courts have other remedies available through their inherent power to impose sanctions.



Courts Are Relying on Their Inherent Power

***Freidman v. Phila. Parking Auth.*, 2016 U.S. Dist. LEXIS 32009 (E.D. Pa. Mar. 10, 2016)**

- Facts: The defendants had an ineffective email storage system, leading the plaintiffs to request sanctions for the destruction of ESI. The court declined sanctions under Rule 37(e) because the plaintiff had no evidence that ESI had been permanently destroyed.
- Takeaway: Although some courts hold that ineffective data storage does not show “intent to deprive,” it may be enough to warrant a court to consider moving beyond Rule 37(e) and exercising its inherent authority.



Rule 37: Practice Tips

- Amended Rule 37 was intended to function as a safe harbor for, but has not done so
 - ◆ Instead, courts have used their inherent authority to impose sanctions when Rule 37 sanctions are unavailable
- Focus on timing
- Focus on size of corporation and both cost and impracticality of expansive preservation obligations
- Emphasize inadvertence
- Emphasize small likelihood that anything material was lost anyway



Rule 37: Significant Cases

Parties Must Take “Reasonable Steps”

- *FiTeq Inc. v. Venture Corp.*, 2016 U.S. Dist. LEXIS 60213 (N.D. Cal. Apr. 28, 2016)
- *Brown Jordan Int’l, Inc. v. Carmicle*, 2016 U.S. Dist. LEXIS 25879 (S.D. Fla. Mar. 2, 2016)
- *Best Payphones, Inc. v. City of New York*, 2016 U.S. Dist. LEXIS 25655 (E.D.N.Y. Feb. 26, 2016)
- *InternMatch, Inc. v. Nxtbigthing*, 2016 U.S. Dist. LEXIS 15831 (N.D. Cal. Feb. 8, 2016)
- *Marten Transp., Ltd. v. Plattform Adver., Inc.*, 2016 U.S. Dist. LEXIS 15098 (D. Kan. Feb. 8, 2016)

Sanctions Require a Finding of Intent or Bad Faith

- *O’Berry v. Turner*, 2016 U.S. Dist. LEXIS 55714 (M.D. Ga. Apr. 27, 2016)
- *Orchestratehr, Inc. v. Trombetta*, 2016 U.S. Dist. LEXIS 51405 (N.D. Tex. Apr. 18, 2016)
- *Living Color Enters. v. New Era Aquaculture Ltd.*, 2016 U.S. Dist. LEXIS 39113 (S.D. Fla. Mar. 22, 2016)
- *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 U.S. Dist. LEXIS 8997 (S.D. Cal. Jan. 26, 2016)
- *Bry v. City of Frontenac*, 2015 U.S. Dist. LEXIS 169286 (E.D. Mo. Dec. 18, 2015)

Courts Are Relying on Their Inherent Power

- *Freidman v. Phila. Parking Auth.*, 2016 U.S. Dist. LEXIS 32009 (E.D. Pa. Mar. 10, 2016)
- *DVComm, LLC v. Hotwire Communs., LLC*, 2016 U.S. Dist. LEXIS 13661 (E.D. Pa. Feb. 3, 2016)
- *Cat3, LLC v. Black Lineage, Inc.*, 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016)



What Does This Mean for Me?

- **Be proactive about your process BEFORE litigation**
- **Have an ESI preservation process in place and thoroughly document that process**
- **Be aggressive in using proportionality factors**
- **Push the e-discovery discussion as early as possible and negotiate as many limits as possible**
- **Move for unnecessary expenses/cost sharing**



What Does This Mean for Me?

- **Be specific in your requests and objections**
- **Revise objections as necessary to avoid possible waiver**
- **Be aware that judges take seriously their ability to sanction inappropriate conduct, and may use whatever remedy they feel would best suit the facts at hand.**
- **Both parties should be prepared to emphasize why and how a request is or is not proportional and relevant**



Questions?

Thank you!

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