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Proportionality: The (Not So) New Kid On the Block

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Amendments to the Federal Rules of Civil Procedure (the Rules) are expected to go into effect on Dec. 1, 2015. One of the most anticipated changes for civil litigators is the codification of the "proportionality" standard (in which cost and burden are weighed against the importance and value of the case, among other factors) in the amendments to Rule 26(b)(1), which governs the scope of discovery. Proportionality—described only two years ago by one federal judge as "an all-too-often ignored discovery principle"—will soon be one of the primary considerations in defining the scope of discovery.[1]

But the standard is not entirely novel. Over the last decade, federal trial courts—including those in the Second Circuit—have invoked the principle of proportionality to limit the scope of discovery, often in response to arguments of cost- and time-burden. Those decisions provide guidance for the near-future application of the revised rule and may also suggest greater acceptance of a litigant's use of technology, such as predictive coding or related analytics, to effect proportionality between a litigation's value and its costs by streamlining and controlling the costs of electronic discovery. And, although the amendments are not slated to take effect until December, some courts have already moved away from the existing "reasonably calculated" standard to apply the "proportionality" standard—demonstrating how the amendment may impact discovery going forward.

The scope of discovery is changing from "reasonably calculated to lead to the discovery of admissible evidence" to "proportional to the needs of the case."

When the December 2015 Amendments to the Rules go into effect, Rule 26(b)(1) will read:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*, considering the importance of the issues at

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> 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.[2]

The proposed amendment includes direct guidance on the factors relevant to a proportionality review. Notably absent is the current standard—often relied upon by litigants to justify expansive discovery requests—that allowed for the discovery of "[r]elevant information"—even if it would not be "admissible at the trial" so long as it appeared "reasonably calculated to lead to the discovery of admissible evidence."[3]

But while proportionality may be the new codified standard for defining scope under Rule 26(b)(1), it is not a new concept when considering limitations to the scope of discovery. Proportionality considerations were added to the Rules in 1983 in the form of the burden and expense limitations and a balancing test codified in Rule 26(b)(2).[4] As a result, courts commonly considered proportionality when deciding whether requested discovery was unduly burdensome pursuant to Rule 26(b)(2). Judicial consideration of a "proportionality test" to impose discovery limitations in light of the emerging electronic discovery landscape was evident in ground-breaking decisions of the early 2000s, including *Zubulake v. UBS Warburg*.[5] Moreover, some courts have read a proportionality requirement into Rule 26(g), which governs the issuance of discovery demands and responses.[6]

The application of proportionality to define the scope of discovery preservation, review, and production amplified with the rapid, exponential increase of electronic discovery. A recent decision from the District of New Jersey recognized the need for the Rules to "confront the problem of over-discovery and to allow the court to proportion discovery, even though it may be relevant," and that this need had only "intensified" with the "emergence of e-discovery."[7]

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In 2012, Southern District of New York Magistrate Judge James C. Francis IV closely considered proportionality in determining whether data, alleged to be "not reasonably accessible," should be produced.[8] Francis noted that "the concept of proportionality [was] embodied" in the Rules and quoted the Sedona Conference, a leading think tank in e-discovery and data privacy: "The 'metrics' set forth in [Rule 26(b)] provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources."[9] Francis cautioned that in certain types of cases, proportionality could not be measured in dollars alone, writing: "many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amounts involved."[10] "[T]aking into account both monetary and non-monetary components[,]" Francis ordered the production of data from a number of challenged databases as proportionate to the value of the case.[11] Other jurists in the Second Circuit trial courts have also invoked the proportionality test to limit against discovery excesses and in reaction to the proliferation of electronically stored information.[12] And, the Second Circuit has expressly endorsed the trial courts' "broad discretion to limit discovery in a prudential and proportionate way."[13]

But where proportionality was previously used to cabin and curtail discovery, its scope already had been defined; with the impending Rule change, proportionality considerations now will factor in from the outset and help shape the *scope* of discovery itself.

Proportionality may justify the use of technology to curb discovery costs and expedite review.

Proportionality considerations aim to bring sometimes exorbitant discovery costs in line with the true value of a dispute. One way to minimize or rein in such costs has been through the use of technology—whether through

basic search terms, limiting custodians, or culling review sets based on metadata, such as date range. These techniques have gained approval from the courts and increased acceptance from litigants.

Southern District of New York Magistrate Judge Andrew Peck issued a seminal ruling in *Da Silva Moore v. Publicis Groupe* in 2012, providing judicial approval for the use of predictive coding, an analytic tool that can be trained with "seed sets" or already identified relevant documents to organize additional documents for review in order of responsiveness.[14] Among the considerations weighed by the court in determining that predictive coding was appropriate was "the need for cost effectiveness and proportionality[.]"[15]

Following *Da Silva Moore*, even without the codification of proportionality, courts have looked to technology to help rein in discovery costs, invoking the proportionality standard. For example, with over two million documents requiring a responsiveness review, plaintiffs in *Bridgestone Americas v. Int'l Business Machines*, sought permission from the court—over the defendant's objection—to employ predictive coding software on a review set, which already was culled based on search terms.[16] In support of its approval of the request, the court relied on the "exhortation" of Rule 26 that discovery "be as efficient and cost-effective as possible."[17] Similarly, in *FDIC v. Bowden*, the court urged the parties to consider using predictive coding after they failed to agree on a joint protocol for the review and production of electronically stored information and already had spent $615,000 to digitally scan 153 million pages.[18] And earlier this year, Peck revisited *Da Silva Moore* in his decision in *Rio Tinto v. Vale*, in which—without consideration of burden or proportionality—he endorsed the parties' technology assisted review (TAR) protocol, writing: "It is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it."[19] The codification of the proportionality standard into Rule 26(b)(1) should only further judicial support for and encouragement of the use of analytics and technology assisted review tools.

Some courts have begun applying the proposed amendments.

With the proposed amendments almost certain to take effect in December, some courts have featured the proportionality standard more prominently in their discovery decisions.[20] Southern District of New York Chief Judge Loretta Preska recently decided a discovery dispute in a fraud action, *Cohen v. Cohen*, ordering plaintiff to produce withheld documents using both the current Rule 26(b)(1) standard and the proposed standard of proportionality:

> The Supreme Court recently submitted for congressional review proposed amendments to the [Rules]. If adopted, these amendments would revise the Rule 26(b)(1) civil discovery standard ... . Although these revisions remain subject to congressional review and will not take effect until December 1, 2015, the Court has taken this proposed revision into account and has concluded that all documents found discoverable today under the present Rule 26 standard are also discoverable under the newly narrowed standard of the proposed amendments. Specifically, production of this finite group of emails will pose minimal burden or expense and is proportional to the needs of the case in light of the documents' potential to illuminate facts central to the merits of the case, the location of possible witnesses, and issues concerning witness credibility.[21]

It is noteworthy that the documents under dispute in *Cohen* had already been identified and withheld by plaintiff on the grounds of their alleged irrelevance. The order for their production turned on an in camera analysis of their relevance and not on the burden or cost of their collection, review, or production—making this case less than perfect for comparing outcomes under the old and proposed Rule 26(b)(1) and how they might differ. However, Preska's careful weighing of the burden and expense of production against the needs of the case under the amended language is likely to be modeled in cases to come.

In another recent case, Turner v. The Paul Revere Life Ins. Co., the court explicitly relied on the six factors for determining proportionality included in the language of the proposed Rule, granting in part and denying in part the discovery sought in light of the proposed new standard.[22] The court noted that "[a] party may no longer obtain information [only] because it is relevant to the subject matter involved in the action"—the

information must be relevant and it must be proportional.[23]

Conclusion

The codification of proportionality to define the scope of discovery in the Federal Rules may give greater teeth to the admonishment in Rule 1 that civil actions in the federal courts 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."[24] Moreover, it is likely to strengthen arguments for the use of technology to aid in review to satisfy the proportionality standard for scope. At a minimum, there is optimism from the bench and litigants, as noted above, that a change of focus to proportionality will help to rein in the modern-day burdens of satisfying discovery obligations in the face of mounting data and proliferating electronic communication.

1. *Apple v. Samsung Elecs.*, 2013 WL 4426512, at *3 (N.D. Cal. Aug. 14, 2013) (Grewal, J.) (denying additional discovery based on a proportionality review, holding that it was "senseless" to require one party "to go to great lengths to produce data" that the other party appeared not to need to calculate its damages).

2. Fed. R. Civ. P. 26(b)(1), eff. Dec. 1, 2015 (emphasis added).

3. Fed. R. Civ. P. 26(b)(1).

4. See *Dongguk Univ. v. Yale University*, 270 F.R.D. 70, 73 (D. Conn. 2010) (Rule 26(b)(2)(C) includes a "proportionality consideration [that] was added in 1983 specifically to address the perceived problem of over-discovery").

5. 217 F.R.D. 309, 316 & n.30 (S.D.N.Y. 2003) (observing that the broad discovery allowed under Rule 26(b)(1) was subject to the limitations of 26(b)(2), which imposed "general limitations on the scope of discovery in the form of a 'proportionality test'").

6. See, e.g., *Artt v. Orange Lake Country Club Realty*, 2015 WL 4911086, at *1 (M.D. Fla. Aug. 17, 2015) ("Rule 26 also requires that discovery be proportional to the needs of the case. When a person signs a discovery request she/he is certifying 'that to the best of the person's knowledge, information, and belief formed after reasonable inquiry' the discovery request is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation.'" (citing Rule 26(g)(1)(B)(iii))); *Coleman v. Starbucks*, 2015 WL 2449585, at *5 (M.D. Fla. May 22, 2015) ("Concern about overbroad discovery requests doubtless provided some of the motivation for the Rules Advisory Committee to propose making proportionality concerns an express component of the scope of discovery in the pending 2015 amendments to Rule 26." (quotation marks omitted)).

7. *City of Sterling Heights Gen. Employees' Ret. Sys. v. Prudential Fin.*, 2015 WL 5055241, at *2 (D.N.J. Aug. 21, 2015) (citation omitted) (granting motion to add additional custodians to review, but limiting to those that appeared would provide non-duplicative information; "allowing plaintiffs a moderate number of additional custodians does not seem disproportionate to the size and scale of this action").

8. *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 301 (S.D.N.Y. 2012).

9. Id. at 303 (quoting 11 Sedona Conf. J. 289, 294 (2010)).

10. Id. at 306.

11. Id. at 306-07.

12. See, e.g., *Daniels v. City of New York*, 2014 WL 325934, at *1 (S.D.N.Y. Jan. 27, 2014) (Castel, D.J.); *Dongguk Univ.*, 270 F.R.D. at 72 (Fitzsimmons, M.J.). See also *Tucker v. American Intern. Group*, 281 F.R.D. 85, 91 (D. Conn. 2012) (Haight, D.J.) (under Rule 26(b), "courts impose a proportionality test to weigh the interests of the parties to determine whether discovery, even if relevant, should be allowed to proceed"); *Pippins v. KPMG*, 279 F.R.D. 245, 255 (S.D.N.Y. 2012) (McMahon, D.J.) (applying principle of proportionality to preservation obligations); *Orbit One Commc'ns v. Numerex*, 271 F.R.D. 429, 436 n.10 (S.D.N.Y. 2010) (Francis, M.J.) (same).

13. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207 (2d Cir. 2012).

14. 287 F.R.D. 182, 192-93 (S.D.N.Y 2012), adopted sub nom. *Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. April 26, 2012).

15. 287 F.R.D. at 192.

16. 2014 WL 4923014, at *1 (M.D. Tenn. July 22, 2014).

17. Id.

18. 2014 WL 2548137, at *13 (S.D. Ga. June 6, 2014) (Smith, J.).

19. 2015 WL 872294, at *1 (S.D.N.Y. March 2, 2015).

20. See, e.g., *Turner v. The Paul Revere Life Ins.*, 2015 WL 5097805, at *1 & n.2 (D. Nev. Aug. 28, 2015) (applying the revised proportionality standard to scope); *Uppal v. Rosalind Franklin Univ. of Medicine and Science*, __ F. Supp. 3d __, 2015 WL 5026228, at *3, n. 5-6 (2015) (discussing the role of proportionality in the Rules and the pending amendment).

21. 2015 WL 4469704, *3 n.2 (S.D.N.Y. June 29, 2015) (Preska, C.J.).

22. 2015 WL 5097805, at *1 (citing Rule 26(b)(1), Advisory Comm. Notes (2015)).

23. Id. at *1 & n.2.

24. Fed. R. Civ. P. 1.