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Is 'Proportionality' the Most Important Change In The 2015 Rule Amendments?

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Call me a skeptic, but I sense that the current discussions surrounding "proportionality" in the federal discovery rules that became effective Dec. 1, 2015, may be misdirected.

In fact, the most significant effect of the amendments likely will be from changes in Rules 26(d) and 34 regarding document discovery, and Rule 37 setting a national standard on spoliation of electronically stored information or ESI.

Era of Proportionality

Much of the discussion regarding the amendments has focused on the re-introduction of the term "proportionality" to define the scope of discovery. The Advisory Committee Notes shed important light on how those changes should be applied.

The prior rule said:
“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any privileged 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 that is 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)*." [Emphasis added.]

Rule 26(b)(2)(C) then states, in part, that discovery "must" be limited if it is cumulative, it is otherwise available from a less burdensome source, or the burden outweighs the likely benefit, "considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of discovery in resolving the issues."

The amended rule says:
"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*." [Emphasis added.]

From this, we can see that the word "proportional" is now in the rule, and that term is defined within the immediate text rather than being cross-referenced in a later section. The description of "relevance" is omitted; and the shibboleth, "reasonably calculated to lead to the discovery of admissible evidence," has been replaced with "discoverable information need not be

admissible …."

Does the new rule's omission of the definition of relevance—which had included, inter alia, the existence, location and identity of admissible evidence—mean anything? One might think so, if one focused only on the text. If so, the change in the "reasonably calculated" language might be pretty important. However, the text cannot be read in isolation; contrary to normal guidance regarding interpreting "clear" text by its terms, the text must be read in conjunction with the Advisory Committee's Notes. Those notes should be read in their entirety, but they say three things of special importance:

“The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests.

“Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality ….

“A portion of [the] present Rule [regarding locating and identifying discoverable material] is omitted [because] [d]iscovery 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.”

Thus, the substance of the scope of discovery is meant to remain unchanged. The notes specifically say that the prior language about material "reasonably calculated to the discovery of admissible evidence" was never intended to define the "scope" of discovery and is removed to avoid that phrase being used to "swallow any other limitation."

Reading the historical background in the notes, one sees that "restoring proportionality as an express component" was meant

to clarify the scope of discovery. The rule also anticipates that the parties and the court will increasingly be expected to manage discovery effectively. Although there is a new factor to be considered in determining proportionality, i.e., the parties' relative access to information, the notes say that this limitation has always been implicit.

I do not mean to say that the re-introduction of the term "proportional" is not important. Proportionality has always been and remains a key part of the practice. Ask any federal judge in this district. Thus, the reorganization clarifies rather than alters the practice. The change to Rule 26 should not deflect from two more important substantive changes.

Greater Discovery Discipline

Sometimes lost in the commentary about proportionality are the changes to the mechanics of discovery in the rules governing document production. As noted above, the phrase "reasonably calculated to lead to the discovery of admissible evidence" no longer can be used as a blunderbuss rationale for obtaining specific discovery; nor may one incant "not reasonably calculated" as part of boilerplate objections in a party's Rule 34 response. More particularized objections must be used.

New Rule 34(b) requires any objection be stated with specificity and be explained, keeping in mind the definition of proportionality in Rule 26. Documents must be produced on the day of the response or "another reasonable time specified in the response." Any objection must state whether any documents are being withheld "on the basis of that objection"; one must produce the rest. Obviously, boilerplate objections are not allowed, either as a preamble to specific responses or in connection with particular requests. While such boilerplate has become less and less common in the District of New Jersey, it may still be common elsewhere—but no longer.

The effect of these tighter requirements comes into play with the change to Rule 26(d)(2) that permits parties to "deliver" document requests prior to the initial Rule 26(f) conference among counsel. "Service," the starting point for calculating when a response is due, is the date of the initial Rule 26(f) conference. At first glance, this might not be seen as having much practical effect, since the response need not be served until 30 days after the initial conference.

However, now that a request can be delivered *before* the conference means that the parties should be discussing the request *at* the conference. Rather than identifying document sources in generalized terms, for example, the parties must now hone in on specific requests. If certain types of documents may be found in a burdensome number of systems, devices, custodians or employees, this can be discussed; if not resolved, that subject will be highlighted in the Rule 26 Discovery Plan and discussed at the initial Rule 16 conference with the magistrate judge (in this district). Thus, disagreements regarding discovery are to be resolved earlier, and the parties should be ready for trial sooner.

ESI Spoliation Standards

As more and more material is produced, transmitted and maintained in electronic format, courts have struggled with whether to order sanctions when ESI has been lost and with the nature of any sanctions. Some courts have required willful conduct, or at least some level of scienter, while others have found negligence or something less than intentional conduct sufficient. The 2015 amendment to Rule 37 has made an important step in resolving these conflicts.

While not creating a new duty to preserve ESI, Rule 37(e) provides for a two-tiered analysis when ESI should have been preserved in the anticipation or conduct of litigation (as under a discovery request or a court order) and the party failed to take

reasonable steps to preserve it: Where ESI is lost and cannot be replaced or restored, the court may consider sanctions under two pathways. First, where there is *prejudice* from the ESI loss, the court may order "measures no greater than necessary to cure the prejudice," such as attorneys' fees or costs. Second, and complementary to the first, specifically named sanctions may be imposed *only* where a "party acted with the intent to deprive [the other] of the information's use in the litigation." Those sanctions may include adverse inference instructions, dismissal or entry of a default.

Thus, the most severe sanctions are reserved for intentional "loss" of ESI; one of the leading cases in this district on the subject, *Mosaid Techs. v. Samsung Elecs. Co*., 348 F. Supp. 2d 332 (D.N.J. 2004), may no longer be relied upon to support an adverse-inference instruction based on negligence or gross negligence. •

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