Amendments to the Federal Rules of Practice and Procedure: Civil Rules 2015—Proportional Discovery (Video Transcript)[1]

Federal Judicial Center

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I am Judge John Koeltl of the Southern District of New York and a former member of the Advisory Committee on Civil Rules. I am here to tell you about the changes to the civil rules designed to make discovery more efficient and less expensive. In another video we talk about the changes promoting active judicial management of civil litigation. These two topics are closely related and we will mention judicial case management in this segment as well. But we will have more to say on the subject of active case management separately.

As mentioned in our earlier video, the 2010 Conference was preceded by surveys of several national bar groups. The surveys reflected a widespread belief that civil discovery is often too costly and too time-consuming.

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Survey Results

Civil discovery is often too costly and time consuming.

Discovery should be proportional to the needs of the litigation.

Respondents in the surveys and participants in the Conference largely agreed that discovery should be proportional to the needs of the litigation, and often is not. In response, the Advisory Committee developed amendments to Rule 26(b)(1) designed to achieve greater proportionality in discovery.

1. This is a transcript of a video available at http://fjconline.fjc.dcn/content/309288/rules-amendments-2015-civil-overview.

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FRCP 26(b)(1)
Proportional Discovery

- Discovery tailored by the judge and the parties to meet the reasonable needs of the case.
- Provides information needed by the litigants but avoids excess and waste.
- Eliminates unnecessary document production, excessive interrogatories, obstructive responses to legitimate discovery requests and unduly long depositions.

What is proportional discovery? It is discovery tailored by the judge and the parties to meet the reasonable needs of the case. It provides the information needed by the litigants to prove their cases, but avoids excess and waste. It eliminates unnecessary document production, excessive interrogatories, obstructive responses to legitimate discovery requests, and unduly long depositions. The amendments designed to achieve greater proportionality in discovery are found in Rule 26(b)(1).

The idea of proportionality is not new to the Federal Rules of Civil Procedure. It has been there since 1983. Under the old Rule 26(b)(2)(C), a court, in response to a motion or on its own, was directed to limit the frequency or extent of discovery otherwise allowed, if it determined that the burden or expense of the proposed discovery outweighed its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Before the current amendments, Rule 26(b)(1), in establishing the scope of permissible discovery, declared that all discovery was subject to the limitations found in Rule 26(b)(2)(C).

Because the Conference found that judges were not applying these provisions, the amendments move the proportionality factors from 26(b)(2)(C) to Rule 26(b)(1) so they are more prominent.

Thus the scope of discovery in civil litigation will now be defined as follows:

"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 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."

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Scope of Discovery in Civil Litigation

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The Committee's intent in making this change is to make proportionality an integral part of the scope of discovery. The court and the parties have a shared responsibility to develop a discovery plan that reflects the particular needs of the case and incorporates proportionality principles. This objective, however, will not be achieved unless judges are willing to engage in a dialogue with the parties regarding the amount of discovery reasonably needed to resolve the litigation.

There are some other changes within Rule 26(b)(1) that are important to recognize. The Advisory Committee changed the order of the proportionality factors previously included in Rule 26(b)(2)(C). That list now refers to "the importance of the issues at stake in the litigation" before it mentions "the amount in controversy." This was done to avoid any implication that the amount in controversy is the most important consideration. The Committee recognized that many lawsuits present substantive claims that involve relatively small amounts of money, or no money at all, but seek to vindicate vitally important public or personal values.

And the Committee added a new factor: "the parties' relative access to relevant information." This change was made to highlight the reality that some cases involve what might be referred to as asymmetrical distribution of information. In those cases, one party has much more information than the other, resulting in one party bearing greater burdens in responding to discovery than the other. That fact does not mean that discovery is disproportional.

Judges should hear from all parties when making proportionality determinations and use all the information provided by the parties in applying the proportionality factors to determine the appropriate scope of discovery in light of the particular circumstances of the case.

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Judges should hear from all parties and use all the information they provide in applying the proportionality factors to determine the appropriate scope of discovery for each case.

The Committee Note acknowledges that parties may begin the pretrial process without a full appreciation of the factors that bear on discovery or shape the proportionality analysis. Proportionality factors should be addressed at the parties' Rule 26(f) conference and in subsequent scheduling conferences with the court. The amended rule does not place the burden of proving proportionality on the party seeking discovery or impose a burden on the requesting party to address all proportionality considerations. Nor does this amendment authorize boilerplate refusals to provide discovery on the ground that it is not proportional.

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Proportionality factors should be addressed at the Rule 26(f) conference and in subsequent scheduling conferences with the court.

Amended rule does not place burden of proving proportionality or addressing all proportionality considerations on party seeking discovery.

Nor does amendment authorize boilerplate refusals to provide discovery on the ground it is not proportional.

In short, the amendments do not change a lawyer's certification obligations under Rule 26(g)(1)(B), or permit a discovery request or response that is "unreasonable or unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the action."

Just a few other comments on the proportionality amendments. The changes are intended to prompt a discussion among the parties and the court, early in the case, concerning the amount of discovery reasonably needed to resolve the litigation. To be effective, they will require judges to take an active role in managing cases, set limits on discovery, confer with the parties when needed, and adjust the limits when warranted. The proportionality amendments are not intended to deprive any party of the evidence reasonably needed to prove its claim or defense—they are designed to eliminate disproportionate discovery.

The new amendments make a few other changes to Rule 26(b)(1). They eliminate the sentence which provides that "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This sentence will be replaced with, quote, "Information within this scope of discovery need not be admissible in evidence to be discoverable."

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The Amendments eliminate the sentence providing that "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

Replaces old sentence with new one stating "Information within the scope of discovery need not be admissible in evidence to be discoverable."

The "reasonably calculated to lead" phrase was added in 1946 to stop the practice of objecting to relevant questions on the grounds that the answers would be inadmissible hearsay. The phrase was never intended or meant to define the scope of discovery, but nevertheless it was used by attorneys and judges to do so. The amendments eliminate this incorrect reading of Rule 26(b)(1) while preserving the rule that inadmissibility is not a basis for opposing discovery of relevant information.

The amendments also delete two other phrases from Rule 26(b)(1). The Committee removed the language that permitted discovery relating to the subject matter of the litigation on a showing of good cause, after research revealed that the provision was rarely used. The Committee also struck the specific reference to discovery of "the existence, description, nature, custody, condition, of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."

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Amendments delete two other phrases from 26(b)(1)

Language permitting discovery relating to the subject matter of the litigation on a showing of good cause.

Specific reference to discovery of the "existence, description, nature, custody, condition, of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."

Discovery of this information is now so widely accepted that a specific reference in the rule was considered superfluous. The Committee Note makes clear that discovery of this information should still be permitted "when relevant and proportional to the needs of the case."

The new amendments include some other changes to the discovery rules. These are separate from the proportionality changes, but are also intended to make discovery more efficient.

As amended, Rule 26(c)(1)(B) includes "allocation of expenses" among the terms that may be included in a protective order. This change is not meant to make cost shifting more frequent or to suggest that cost shifting is a part of the proportionality analysis. It is simply a codification of existing protective authority.

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Committee Note makes clear

That "courts and parties should continue to assume that a responding party ordinarily bears the cost of responding."

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The new amendments also include three changes to Rule 34. The first requires that objections to document production requests be stated with specificity. The second allows a responding party to state that it will produce copies of documents or electronically stored information instead of permitting inspection, but requires that party to identify a reasonable time for producing the copies. The third change requires that an objection state whether any responsive documents or electronically stored information are being withheld on the basis of the objection.

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Three changes to Rule 34

- Requires objection to document production requests be stated with specificity.
- Allows responding party to state it will produce copies of documents or electronically stored information instead of permitting inspection, but requires that party to identify a reasonable time for producing the copies.
- Requires that an objection state whether any responsive documents or ESI are being withheld on the basis of the objection.

These changes are intended to eliminate several abusive practices: boilerplate objections that provide little or no information about what is truly objected to, responses that promise production "in due course" but are then followed by unreasonable delay, and objections that provide no clue as to whether any documents

have been withheld on the basis of the objections. Rule 34(b)(2)(C) requires the objecting party to provide enough information to alert other parties that documents have been withheld and to permit an informed discussion of the objection.

Finally, an amendment to Rule 26(d) will allow parties to provide an opposing party with Rule 34 document production requests in advance of the Rule 26(f) conference between the parties. Rule 34(b)(2)(A) requires the party to whom the request is directed to respond in writing within 30 days after the parties' first Rule 26(f) conference, but also permits the parties to stipulate to, or the court to order, a shorter or longer response period.

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Rule 26(d) amendment allows parties to provide each other with Rule 34 document production requests in advance of Rule 26(f) conference between the parties.

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Rule 34(b)(2)(A) amendment requires the party to whom the request is made respond in writing within 30 days after parties' first Rule 26(f) conference, but also permits parties to stipulate, or the court to order, a shorter or longer response period.

This change is meant to facilitate discussion of specific discovery proposals between the parties at the Rule 26(f) meeting and with the court at the Rule 16 scheduling conference.

The Advisory Committee believes the renewed emphasis on proportionality and the changes to the discovery process provide a real opportunity to make civil discovery less expensive and more effective. But these amendments will have little effect without sustained, hands-on judicial involvement in the pretrial process. That is the subject of our next video.