Hello “Proportionality,”
Goodbye “Reasonably Calculated”:
Reinventing Case Management and Discovery
Under the 2015 Civil Rules Amendments

John Rabiej
Honorable Lee Rosenthal
Professor Steven Gensler
John Rosenthal
Panel

• John Rabiej:
  • Director, Duke Center

• Judge Lee Rosenthal:
  • U.S. District Judge for the Southern District of Texas

• Steven Gensler:
  • Professor at the University of Oklahoma School of Law

• John Rosenthal:
  • Partner, Winston & Strawn
  • Chair, eDiscovery & Information Governance
The Big Picture

• 2010 Duke Conference on Civil Litigation

• Case Management, Proportionality, and Cooperation (Plus Spoliation)

• Amendments Took Effect Dec. 1, 2015

• Getting From Rule Text to Reality
Getting the Case Moving Faster

• **Rule 4(m)** Period to Serve Shortened From 120 Days to 90 Days

• **Rule 16(b)** Deadline to Issue Scheduling Order Shortened From 120 Days to 90 Days

• Too Much Pressure on Parties to Properly Prepare for and Conduct Good Rule 26(f) Conferences?
Timing Changes

Complaint

Rule 34 Service of Discovery (New)

Rule 12 Early Motion Practice

Rule 26(f) Conference

Rule 16 Conference/Scheduling Order

21 days

Not Less than 21 Days

120 90 Days
Rule 16: “Live” Management

• Advisory Committee Encourages Judges to Hold “Live” Case-Management Conferences

• Advisory Committee Endorses Pre-Motion Conferences for Discovery Disputes
Rule 26(b): Scope of Discovery

Rule 26(b)(1): As You Have Known It

1. Relevant, Not Privileged
2. Relevance Linked to Claims and Defenses, But Subject Matter Upon Showing of Good Cause
3. Including Existence and Details of Documents and People Who Have Discoverable Information
4. Need Not Be Admissible “If Reasonably Calculated to Lead to the Discovery of Admissible Evidence”
5. Subject to the Limits of Rule 26(b)(2)(C)
Rule 26(b): Scope of Discovery

Rule 26(b)(1): As It Is Now:

1. Relevant, Not Privileged, and Proportional to the Needs of the Case

2. Relevance Linked Only to Claims or Defenses (No More “Subject Matter”)

3. Need Not Be Admissible to Be Discoverable (“Reasonably Calculated” Phrasing Deleted)
**Rule 26(b): Scope of Discovery**

**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.
Rule 26(b): Proportionality Factors

- 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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Proportionality Analysis

• No Rigid Formulas

• No Order of Importance

• Case-by-Case Assessment

• Judicial Discretion
Role of Burdens

• No Fixed Burden for Overall Analysis

• No Advanced Showing of Proportionality Required

• No Boilerplate Objections

• Party in Best Position to Provide Information About Burdens or Benefits Ordinarily Bears Responsibility
Rule 26(b): Scope of Discovery

—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).
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Rule 26(c): Cost-Sharing

The court may, for good cause, issue an order to protect a party or person from . . . undue burden or expense, including one or more of the following:

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
Rule 26(c): Cost-Sharing

- Default Is Still Responder/Producer Pays
- Alternative to Denying Request Completely
- No Entitlement Because Willing to Pay
CLE Presentation Code

34975
Rule 34: Making Objections More Specific and Transparent

- Grounds for Objections Must Be Stated “With Specificity”

- Response Must Identify *When* Documents Will Be Produced

- Response Must State Whether Documents Are Actually Being Withheld
Rule 1: Cooperation

“These rules . . . should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”
Rule 1: Cooperation

Committee Note:

“Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”

“This amendment does not create a new or independent source of sanctions.”
Failure to Preserve ESI

(e) Failure to Preserve Electronically Stored Information. 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:
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Failure to Preserve ESI

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice, or:
Failure to Preserve ESI

(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.
Failure to Preserve ESI

New Rule 37(e):

1. Is limited to loss of ESI;
2. Leaves duty and breach to common law;
3. Looks first to replacement;
4. Requires “intent to deprive” for adverse inference, dismissal, or entry of judgment; and
5. Permits any other sanction as needed to cure prejudice.
Resource Materials

- **Federal Rules of Civil Procedure, Amendments** (December 1, 2015)
- **Judicature** Articles (November 2015):
  - **New Rules, New Opportunities** (David G. Campbell)
  - **The Nuts and Bolts** (Roundtable Discussion Led by David F. Levi)
  - **Rule 37(e) – The New Law of Electronic Spoliation** (Gregory P. Joseph)
  - **From Rule Text to Reality – Achieving Proportionality in Practice**
    (Lee H. Rosenthal and Steven S. Gensler)
  - **Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality**
    (Duke Law School Center for Judicial Studies)

https://law.duke.edu/judicialstudies/conferences/proportionality/materials/
Questions