



# COMPLEX LITIGATION E-DISCOVERY FORUM

## Discussion Session #1

### *Proportionality: What's Happened Since the Amendments?*

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#### **I. LESSONS FROM THE CASE LAW**

On December 1, 2015, various amendments to the Federal Rules of Civil Procedure went into effect, including changes to Rule 26(b)(1) governing the scope of discovery. The revised scope permits discovery of non-privileged information only if it is both “relevant” and “proportional to the needs” of the case.

Our presentation and the summary below examine what we can learn from the case law applying the amended Rule that has come out in the nine months since the amendments took effect. Additional resources and commentary on this topic are listed at the end of this document.

- **Relevance Standard Is Unchanged, and Remains Primary In Determining Scope**
  - Relevance is first question; if information sought is not relevant, no need to address proportionality
  - Relevance standard is unchanged, and still defined broadly by pre-December 1, 2015, case law, including *Oppenheimer Fund v. Sanders*.
    - *Lightsquared Inc. v. Deere & Co.*, No. 13CIV8157RMBJCF, 2015 WL 8675377, at \*2 (S.D.N.Y. Dec. 10, 2015) (Under the amended Rule, while discovery no longer extends to anything related to the “subject matter” of the litigation, relevance is still to be “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on” any party's claim or defense.) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)); *see also*

*Walker v. H & M Hennes & Mauritz, L.P.*, No. 16 CIV. 3818 (JLC), 2016 WL 4742334, at \*2 (S.D.N.Y. Sept. 12, 2016).

- The relevance standard is unchanged and still defined broadly notwithstanding the deletion of reference to the discoverability of information as “reasonably calculated to lead to admissible evidence”.
  - The defendants' belief that the plaintiffs' case lacks merit is not a basis for curtailing discovery. *Lightsquared Inc. v. Deere & Co.*, No. 13CIV8157RMBJCF, 2015 WL 8675377, at \*4 (S.D.N.Y. Dec. 10, 2015) (where defendants would have the Court block discovery related to one aspect of the plaintiffs' claim because there is (according to the defendants) insufficient evidence to sustain a separate aspect of that claim, court found such an outcome would frustrate a core purpose of discovery —namely to enable parties to “obtain the factual information needed to prepare for trial.” Court also found that a plaintiff alleging fraud or misrepresentation will often need sufficiently broad discovery to reveal evidence of the facts at issue.)
  - But, be careful to acknowledge and address rule change when citing pre-change law. Some courts have considered the amendments to dramatically change the law, and thus have come down hard on parties who cited pre-change case law. *See Fulton v. Livingston Fin. LLC*, No. C15-0574JLR, 2016 WL 3976558, at \*7 (W.D. Wash. July 25, 2016) (finding the 2015 amendments “dramatically changed” what information is discoverable, and therefore finding counsel’s citation to pre-amendment case law “inexplicable” and sanctionable).
- **Proportionality “Restored” To Original Place in Defining Scope of Discovery; Application of Factors**
    - Proportionality is not new; simply “restored” to original place
      - “Proportionality in discovery under the Federal Rules is nothing new. Old Rule 26(b)(2)(C)(iii) was clear that a court could limit discovery when burden outweighed benefit, and old Rule 26(g)(1)(B)(iii) was clear that a lawyer was obligated to certify that discovery served was not unduly burdensome. New Rule 26(b)(1), implemented by the December 1, 2015 amendments, simply takes the factors explicit or implicit in these old requirements to fix the scope of all discovery demands in the first instance.” *Gilead Scis., Inc. v. Merck & Co, Inc.*, No.

5:13-CV-04057-BLF, 2016 WL 146574, at \*1 (N.D. Cal. Jan. 13, 2016) (explicitly denying discovery of otherwise relevant information based on proportionality grounds).

- Case law applying reordered proportionality factors and new factor
  - Applying new factor re asymmetric access to information, one court interpreted factor to mean that party with superior access needed a stronger showing of burden and expense to avoid production. *Doe v. Trustees of Boston College*, No. 15-10790, 2015 WL 9048225 (D. Mass. Dec. 16, 2015) (in Title IX suit over defendant's handling of sexual assault incidents, court considered factors, particularly balancing two non-monetary factors, the public interest in the litigation and the privacy interest in the students and former students involved, and ultimately granted motion to compel narrowed version of discovery request).
  - *Siriano v. Goodman Mfg. Co. LP*, No. 2:14-cv-1131, 2015 WL 8259548 (S.D. Ohio Dec. 9, 2015) (in product liability action alleging manufacturing and design defects, plaintiffs moved to compel discovery responses regarding past complaints, investigations, and studies of a number of the components and chemicals in the products. Defendant estimated response would require over 4,000 hours of lawyer review time over several months. Analyzing the request and objections under amended Rule 26(b)(1), the court determined that the requests were relevant to the claims, that the defendant was uniquely in possession of the information, and that the defendant had already produced similar information in prior actions; the court acknowledged that the response would be costly, but not unduly so, and that the defendants had made no effort to propose any alternatives or limitations).
- **The Amended Rule Is Not Supposed To Alter the Burdens on the Parties Seeking or Resisting Discovery.**
  - Both the Committee Notes and much case law applying the amended rules insist that the burdens on the parties are not altered by the amendment to Rule 26(b)(1)

- The amendments to Rule 26 “do not alter the basic allocation of the burden on the party resisting discovery.” *Carr v. State Farm Mutual Automobile Ins., Co.*, 312 F.R.D. 459, 469 (N.D. Tex. 2015).
  - *Rowan v. Sunflower Electric Power Corp.*, 2016 WL 3745680 (D. Kan. 2016) (“If a discovery dispute arises that requires court intervention, the parties’ responsibilities remain the same as under the pre-amendment Rule. In other words, when the discovery sought appears relevant, the party resisting discovery has the burden to establish the lack of relevancy.”).
  - *Dao v. Liberty Life Assurance Co. of Boston*, No. 14-CV-04749-SI (EDL), 2016 WL 796095 (N.D. Cal. Feb. 23, 2016) (“while the language of the rule has changed, the amended rule does not actually place a greater burden on the parties with respect to their discovery obligations....than did the previous version of the Rule.”).
- As before, the initial burden of showing relevance is on the party requesting discovery
  - The party seeking an order compelling discovery responses over the opponent's objection bears the initial burden of showing that the discovery requested is relevant. *Caouette v. OfficeMax, Inc.*, 352 F. Supp. 2d 134, 136 (D.N.H. 2005).
- The unsettled question is whether the requesting party must also show the discovery is proportional
  - Some courts have only required a showing of relevance, with no advance showing of proportionality by the requesting party:
    - Once a showing of relevance has been made, the objecting party bears the burden of showing that a discovery request is improper. *See, e.g., Cont’l W. Ins. Co. v. Opechee Constr. Corp.*, No. 15-CV-006-JD, 2016 WL 865232, at \*1 (D.N.H. Mar. 2, 2016)
    - *Hightower v. Grp. 1 Auto., Inc*, No. CV 15-1284, 2016 WL 3430569, at \*3–4 (E.D. La. June 22, 2016) (finding on reconsideration no manifest error because court did not require requesting party to make an advance showing of proportionality, but considered proportionality in response to defendant’s objections to discovery requests)



require improved case management by district judges, a culture of cooperation among lawyers, and active and early involvement by judges to fashion discovery that is proportional to the needs of the case.” *Waters v. Drake*, 2016 WL 4264350, \*18 (S.D.OH 2016) (internal citations and quotations omitted).

- “The adoption of certain protocols or measures will advance this effort and may include: case management conferences early in the litigation; requiring parties to submit joint discovery plans; the judge being available to timely resolve disputes; regular discovery conferences or hearings; stays of discovery to resolve pure legal issues; the use of affidavits to determine whether more costly avenues of discovery, such as depositions, would be justified; and the rolling submission of information produced during discovery to the court so that it can better evaluate the need for additional discovery in light of the discovered facts.” *Id.*

## **II. RESOURCES AND COMMENTARY ON THE APPLICATION OF THE AMENDED RULE 26(B)(1)**

- Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality (Annotated Version – updated regularly), *available at* <https://law.duke.edu/judicialstudies/conferences/publications/>.
- The Sedona Conference Principles of Proportionality [forthcoming]
- Thomas Y. Allman, The Proportionality Principle after the 2015 Amendments, 83 Def. Couns. J. 241 (2016) (containing Appendix of Rule 26(b)(1) decisions through mid-April 2016).