

SECOND LOOK

Multiple Proportionality Syndrome and Pretrial Discovery

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On December 1, 2015, "proportionality" returned as an explicit component of the Federal Rules of Civil Procedure's definition of the permissible scope of pretrial discovery.returned[1] as an explicit component of the Federal Rules of Civil Procedure's definition of the permissible scope of pretrial discovery.
Amended Fed. R. Civ. P. 26(b)(1) now reads:

> 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.[2]

The precise meaning and practical application of the "new" proportionality standard will be developed by the courts.[3] We will need to follow those developments for reference when drafting discovery requests, objecting to discovery based on disproportionality,[4] and explaining that our own discovery requests are within the scope of proportionality when drafting and arguing motions to compel discovery filed against our clients.

However, Rule 26(b)(1) is not the only place that considerations of "proportionality," in all but name, appear in the federal civil discovery rules as currently amended. There are seven other instances, as I detail below. These proportionality "alter egos" sometimes apply only in limited situations (such as for electronic discovery as distinguished from paper discovery).[5] Sometimes the rules are written in an apparent attempt to differentiate an "alter ego" proportionality factor outside of Rule 26(b)(1) from the explicit proportionality factors in Rule 26(b)(1)[6] – implying that different standards should be applied under the "alter ego" rule. But I question whether any purportedly variant standards will be (or indeed can be) as a practical matter substantively different than the standards that courts will use to enforce the explicit proportionality standard under Rule 26(b)(1). This doubt is reinforced by the consideration that Rule 26(b)(1)'s listed factors allow trial courts to exercise very broad discretion in identifying and weighing relevant proportionality considerations – making it impossible to prevent a court from considering the broadest range of factors in deciding proportionality questions.[7] In other words, I suggest that these "alter egos" are merely additional manifestations of "proportionality" that must be considered along with Rule 26(b)(1), and the same proportionality factors will apply to all of these similar rule standards.

Alter Egos of Proportionality

I contend that these "alter egos" of Rule 26(b)(1) "proportionality" are present whenever the rules require a court or an attorney to weigh the propriety of a discovery request against the needs of a case or against a party's resources. Of course these express instances are in addition to the court's overriding authority to alter discovery rules, limits, and standards to do justice[8] and the trial court's broad discretion to manage discovery.[9] These "alter egos" also are in addition to instances where another pretrial discovery rule expressly incorporates Rule 26(b)(1) by reference.[10]

What and where are these other aspects of proportionality in the rules in addition to the discovery scope definition in Rule 26(b)(1)?[11]

1. Rule 26(b)(2)(B) ("Specific Limitations on Electronically Stored Information" ("ESI")):
   This provision excuses a party from producing ESI that is "not reasonably accessible because of undue burden or cost." The question of when "burden or cost" becomes "undue" must be decided based on principles of proportionality, if only because no other standards would make sense.[12]
2. Rule 26(b)(2)(C)(i) (Court may limit or bar discovery that "is unreasonably cumulative or duplicative"):
   When would cumulative discovery become "unreasonably cumulative"? The only meaningful standards that occur to me are the Rule 26(b)(1) proportionality factors. Indeed, discovery that is "unreasonably cumulative" within the meaning of Rule 26(b)(2)(C)(i) is almost always unduly burdensome under Rule 26(b)(1).[13]
3. Rule 26(b)(2)(C)(ii) (Court may limit or bar discovery after "party seeking discovery has had ample opportunity to obtain the information by discovery in the action"):
   When will a court decide that a party's prior discovery opportunities were "ample"? How else but by deciding that allowing any further opportunities would be disproportionate using the standards of Rule 26(b)(1)?

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4. Rule 26(b)(3)(A)(ii) (Exception to privilege not to produce trial preparation materials where information not obtainable without "undue hardship"):
   This provision terminates the work-product privilege at the point when the party seeking discovery "shows that it has substantial need for the materials to prepare its case and cannot, without *undue* hardship, obtain their substantial equivalent by other means." (Emphasis added). So the court must decide when the hardship becomes "undue." Once again, the court must use standards indistinguishable from those listed for proportionality in Rule 26(b)(1) in making that decision, because there are no other standards that make sense.
5. Rule 26(g)(1)(B)(iii) (Certification on signing discovery requests, responses & objections):
   This provision provides that in signing discovery requests, responses and objections, an attorney certifies that the instrument 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 action." Is this identical to the Rule 26(b)(1) proportionality factors? No. But it is very similar, and I do not think the distinctions will ever prove to be substantive. I suggest that parties likely will cite to proportionality decisions in litigating false certification allegations as the case law on Rule 26(b)(1) proportionality evolves and becomes available for citation, because the considerations are so closely analogous.
6. Rule 30(b)(6) (Representative witness must testify to facts "reasonably available to the organization"):
   Once more, I think that the reasonableness of the effort required for a 30(b)(6) witness to learn about facts known to the organization will be decided on proportionality principles, whether or not the lawyers and the court explicitly acknowledge consulting those principles.
7. Rule 37(e) (discovery sanctions for loss of "electronically stored information . . . because a party failed to take reasonable steps to preserve it"):
   The "reasonableness" of preservation steps must be measured in terms of proportionality. However, in this instance the factors should be viewed in light of facts that were known or reasonably should have been know when the information was lost. At the pre-litigation stage, before claims or damages could have been fully known, perhaps less care or less expense to preserve information on some topics might have been reasonable even if greater efforts preservation would have been required at a later stage had the information still existed.[14]

Practical Implications

Because these other instances of de facto proportionality use terms other than "proportionality" the courts may apply, or purport to apply, distinct rules to these other instances. But the similarities in relevant considerations between Rule 26(b)(1) "proportionality" and the "alter ego" instances that I have identified are so close that we should consider them all when addressing proportionality issues under any name, at least in the following contexts:

1. Consider all the instances as a check list – should we cite more than one rule provision in an objection or motion?
2. Consult citations to the alter egos when litigating an issue under one of them to search for persuasive authority.

There is one potentially substantive distinction between Rule 26(b)(1) proportionality and the alter egos: Rule 26(b)(1) purports to establish a non-discretionary limit on the scope of discovery, whereas the alter egos each set out discretionary standards for conduct that is presumptively within the permissible scope of discovery. However, given the trial courts' discretion to determine proportionality, Rule 26(b)(1) seems as elastic as any discretionary rule. One might think that appellate courts should be less deferential to a trial judge's proportionality conclusion, than to the trial court's exercise of discretion on one of the alter ego issues, because Rule 26(b)(1) supposedly imposes a non-discretionary standard. But I doubt that will happen. Trial courts have so much discretion in adjudicating the individual standards listed in Rule 26(b)(1) that appellate courts will give the trial courts' ultimate proportionality conclusions great deference.

Notes

1. "The present amendment restores the proportionality factors to their original place in defining the scope of discovery." Fed. R. Civ. P. Rule 26, Committee Notes on Rules—2015 Amendment, online at (among many other sites) https://www.law.cornell.edu/rules/frcp/rule_26 (last visited Jan. 22, 2016) (hereinafter "Note R. 26 - 2015 Amend."). This note also provides a good history of proportionality's meandering and evolving place in the federal discovery rules.
2. Online at https://www.law.cornell.edu/rules/frcp/rule_26 (last visited Jan. 22, 2016)(Emphasis added).
3. The drafters insist that the amendment merely clarifies and highlights, but does not substantively change, the existing proportionality standard for discovery: "This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections. Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." Note R. 26 - 2015 Amend. (Paragraph break omitted). We shall see.
4. The drafters caution, "Nor is the change intended to permit the opposing party to refuse discovery simply by making a *boilerplate* objection that it is not proportional. The parties and the

court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." *Id.* (Emphasis added). This remark would permit disproportionality objections, but require them to conform to the specific facts of a discovery dispute as they exist in a specific case – forbidding only those disproportionality objections that are not tailored to the facts.

5. *See* Fed. R. Civ. P. 26(b)(2)(B) ("*Specific Limitations on Electronically Stored Information*").

6. *Compare* Fed. R. Civ. P. 26(b)(2)(C)(i) and (ii) *with* Fed. R. Civ. P. 26(b)(2)(C)(iii).

7. *See* the factors italicized in R. 26(b)(1) as reproduced above. I do not suggest that judicial discretion should be limited, only that the absence of meaningful limits to this discretion makes difficult or impossible any practical distinction between the standards used to decide nominal proportionality questions under Rule 26(b)(1), and the standards used to decide proportionality "alter ego" issues arising under other rules. I think that the result will be that similar or identical factors will be considered in resolving the similar issues.

8. Rule 26(b)(1) gives the trial judge explicit authority to limit the scope of discovery, but omits the authority to expand it, by court order, suggesting that the court cannot or at least should not expand the scope of discovery to permit disproportionate discovery. However, since the proportionality factors so subjective and usually evade quantification, I do not view this "limit" as providing an effective check on court discretion except in extreme situations. Note too that other rule provisions give the court discretion to alter some discovery limits. *See, e.g.*, Fed. R. Civ. P. 26(b)(2)(A) ("By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions"). This further vitiates any meaningful restraint on judicial discretion when making proportionality decisions.

9. *See, e.g.*, *United States v. Clarke*, 134 S. Ct. 2361, 2368 (2014)(tax case).

10. *See, e.g.*, Fed. R. Civ. P. 30(d)(1) (for deposition on oral questions, "court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent"), 31(a)(2) (court must grant leave to take additional deposition on written questions "to the extent consistent with Rule 26(b)(1) and (2)"), 33(a)(1) ("leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2)"). Rule 26(b)(2) sets out the general default limits on the "frequency and extent" of discovery. One effect of these provisions that incorporate Rule 26(b)(1)'s proportionality standards by reference is to further insulate trial judges' proportionality determinations from appellate review.

11. Please do email me at peter.haskel@dallascityhall.com if you find that I have missed any.

12. Perhaps this is a slight exaggeration as applied to one or more of these "alter egos." Lawyers can always devise additional factors on any issue. But I question whether any such additional factors would be materially different from those in Rule 26(b)(1), or, more important, whether they would lead to different results.

13. Rule 26(b)(1) includes as one proportionality factor "whether the burden or expense of the proposed discovery outweighs its likely benefit." I suppose that the reverse is not necessarily always so: Discovery might be "unreasonably cumulative," Rule 26(b)(2)(C)(i), without being unduly burdensome to produce, Rule 26(b)(1), if the cumulative information were easy to produce (*e.g.*, ESI that was already saved, reviewed, indexed, and tagged so that it could be spit out by a computer). But such instances will be few and usually unworthy of judicial protection.

14. "This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998). ML

