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Practical Considerations For Litigating Proportionality

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After years of discussion regarding how the rules of discovery might be improved, amendments to the Federal Rules of Civil Procedure became effective on Dec. 1, 2015. One of the more prominent amendments involved FRCP 26(b)(1), which was updated to allow discovery of relevant, nonprivileged information so long as such discovery is "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."

In some ways, the amended rules simply recognize that in ruling on discovery issues courts have always had to understand and address the burdens associated with discovery of relevant information. However, by incorporating an explicit requirement that discovery must be "proportional to the needs of the case" and describing pertinent factors to be considered in assessing proportionality, the amended rules, leading up to the effective date of the amendment, garnered much speculation as to their impact on courts' decision-making processes when addressing discovery. Now that the amended rules have been implemented for over two years, several themes have emerged regarding how practitioners might prepare for discovery disputes regarding proportionality and advocate more effectively for their clients.

Context is Critical

In order to evaluate proportionality, courts must be made aware of the circumstances impacting a party's need for the discovery requested as well as the relative burden of responding to discovery. Under amended FRCP 26(b)(1), courts have increasingly relied on parties to provide context along with objective metrics for their arguments. Counsel arguing that the burden of responding to discovery requests is not proportional to the needs of the case should not simply rely on raw numbers to describe potential burdens to the court, but also provide context regarding the potential impact on their clients.

For example, in Royal Mile Co. Inc. v. UPMC & Highmark Inc., Highmark stated it required 13 employees to put forth a collective 100 hours of work and that it expected it to take hundreds of additional hours to restore older data in order to respond to only four out of the 11 years of data requested.[1] Despite providing objective data regarding burden, the special master was not satisfied with Highmark's argument, stating that it provided no context regarding the monetary cost of the documents produced and failed to provide sufficient information regarding the personnel costs of the production. The special master noted that a showing of less than eight hours per person to produce four years of material was hardly an overwhelming showing of hardship on its face, and pointed out that defendants provided virtually no information regarding its resources, either monetarily or with respect to personnel.[2] The special master explained that without information as to how many employees the defendant has in its legal division, or how using a certain subset of those employees to complete these discovery requests would impact its operations, it could not evaluate the relative burden of producing the information requested.[3]

In Mann v. City of Chicago, in a request for email documentation, the city agreed to search email records of two employees but objected that it would be overly "burdened with the time and expense of searching the email boxes of nine (9) additional custodians."[4] However, the city did not offer additional details regarding its alleged burden and the court, in allowing discovery of additional custodians, held that "the City should have [at least] provided an *estimate* of the burden."[5]

Similarly, in In re Qualcomm Litigation, Qualcomm objected to an interrogatory that would have required reviewing records dating back more than 30 years as unduly burdensome and lacking proportion.[6] While the court ultimately limited the scope of the interrogatory, in overruling the objection the court noted that Qualcomm's claim of burden was "not backed up with any evidence, such as a declaration from a knowledgeable person, regarding the extent of such records, their manner of storage, and the time and effort necessary to collect, review and produce responsive, non-privileged information."[7] These examples show that without proper context for the burden required to respond to discovery, courts cannot assess how such burden may impact the proportional needs of the case and are much less willing to curtail discovery of otherwise relevant information.

Even when costs are described in detail and the amounts in controversy are relatively low, the context associated with a party's expenses can be critical to a court's analysis of proportionality. In Wagoner v. LewisGale Medical Center LLC, LewisGale objected to potential document discovery due to the "difficulty and unreasonable expense in performing [the] requested searches," which "would involve seven computers … and an exchange server." The company asserted that it did "not have the capability to perform" the required search and estimated the cost for a third-party vendor search at $45,570 which, it argued, was "not proportional" because the cost was greater than Wagoner's "potential damages."[8] However, the court was not persuaded. The court observed LewisGale "apparently chose to use a system that did not automatically preserve e-mails for more than three days."[9] Therefore, the context for the burden was that it was a self-created problem and, while costly to access, the documents could be produced. The court highlighted the distinction that "inaccessible" data is not merely difficult to find, but rather "is not readily usable," requiring that "backup tapes must be restored … fragmented data must be de-fragmented, and erased data must be reconstructed."[10] LewisGale stated only that it could not perform Wagoner's requested searches "in-house," not that the data would need to be "restored, de-fragmented, or reconstructed."[11] The court found that LewisGale had "not shown that the burdens and costs" of the search rendered "the requested information not reasonably accessible" or that the ESI sought was disproportionate.[12]

While providing context for objective metrics regarding the expense of complying with discovery

requests may seem obvious, perhaps less obvious is the need for counsel to provide context for the importance of the information requested. Since amended FRCP 26(b)(1) requires a court to evaluate the relative importance of relevant information, the more counsel can describe the need for particular information in the context of the litigation, the more likely a court is to require that information to be produced. Likewise, in opposing burdensome discovery, counsel should take every opportunity to minimize the import of the information sought.

In First Niagara Risk Management Inc. v. Folino, for example, a case in which a company claimed one of its former employees had created a company in violation of an employment agreement, the court found that while the expense of discovery for the employee was substantial, the burden did not outweigh the benefit of discovery for First Niagara, a corporation, since the requested information, documents responsive to search terms from the employee's personal electronic devices, was highly relevant.[13] Even where the parties' financial positions are imbalanced, and burdens are higher for one party than the other, highly relevant discovery is unlikely to be disproportional to the needs of the case. Counsel that can provide compelling context for why information is relevant is much more likely to overcome objections based on burden.

Overlooking the importance of any of the factors outlined in FRCP 26(b)(1) can impede efforts to minimize discovery. In Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co., the court noted that in resisting discovery requests "Oxbow rest[ed] its argument entirely on this final factor [of burden or expense]."[14] However, in granting the motion to compel, the court also noted that burden was not the only factor to be considered. The court highlighted that in previous filings in the same case Oxbow had argued that "the instant case involves important issues and has the potential to broadly impact a wide range of third-parties not involved in the litigation" and that a favorable ruling "could benefit all of America's shippers and consumers, saving billions of dollars a year in reduced rail freight charges in the United States."[15] Counsel should be aware that where the stakes are high, so is the need to address each factor impacting the proportionality analysis.

Flexibility is Rewarded

While courts continue to apply the proportionality factors outlined in the amended rules, counsel should recognize that the court's objective when addressing discovery issues is to resolve those issues efficiently so the litigation can proceed. To that end, parties may be more likely to prevail under FRCP 26(b)(1) if they present, or at a minimum, remain open to, alternative discovery. For example, in Solo v. United Parcel Service Co., plaintiffs sought discovery of a wide-ranging and massive amount of package-specific data on nationwide shipments by UPS over a several-year period.[16] In opposing the discovery requested, UPS pointed out that providing such information would be extremely burdensome with respect to time, manpower and cost, but it did not rely exclusively on arguments related to burden and exhibited a willingness to provide a more limited data set.[17] The court found that the degree of relevance of information from a limited time period was high, and stated that "[t]he appropriate balance between the Plaintiff's need for the information and the burden of producing may be struck through statistical sampling, without prejudice to production of the entire data set at a later time."[18] By proactively providing an alternative set of information so that sampling could be performed, and not relying on burden alone, UPS was able to avoid substantial costs associated with producing highly relevant information until the litigation progressed further.

Conversely, parties that fail to consider alternatives to the production of the requested information may encounter courts that are less persuaded that their burden outweighs the needs of the case. For example, in Wagoner, not only did the court find that the defendant's burden was insufficient to

outweigh the relevancy of the information requested, but the court acknowledged that it remained unpersuaded, in part, because the defendants failed to offer any alternative to the discovery requested.[19]

Conclusion

Courts maintain wide discretion to decide how discovery unfolds. Under the amended rules — when making arguments involving whether certain discovery is proportional to the needs of a case — counsel should provide as much context as possible regarding the expense and burden of the discovery requested, take care to address each of the proportionality factors outlined in FRCP 26(b)(1), and make every effort to offer alternative discovery solutions to the court.

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[1] Royal Mile Co. Inc. v. UPMC & Highmark Inc., No. 2:10-CV-01609-JFC, 2016 WL 6915978, *14 (W.D. Pa. June 24, 2016).

[2] Id.

[3] Id.

[4] Mann v. City of Chicago, No. 13 CV 4531, 2017 WL 3970592, *5 (N.D. Ill. Sept. 8, 2017).

[5] Id. (emphasis in original).

[6] In re Qualcomm Litig., No. 17-CV-0108-GPC-MDD, 2018 WL 1320169, at *2 (S.D. Cal. Mar. 14, 2018).

[7] Id.

[8] Wagoner v. Lewis Gale Med. Ctr., LLC, No. 7:15cv570, 2016 WL 3893135, *1 (W.D. Va. July 13, 2016).

[9] Id. at *3.

[10] Id. (citation omitted).

[11] Id.

[12] Id. at *2.

[13] First Niagara Risk Mgmt. Inc. v. Folino, 317 F.R.D. 23, 28 (E.D. Pa. 2016).

[14] Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co., 322 F.R.D. 1, 9 (D.D.C. 2017).

[15] Id. at 7.

[16] Solo v. United Parcel Serv. Co., No. 14-12719, 2017 WL 85832, *3 (E.D. Mich. Jan. 10, 2017).

[17] Id.

[18] Id. at *3.

[19] Wagoner, 2016 WL 3893135, *4. See also State v. BP America Production Co., 2016 WL 6270995, *2 (Cal. Super.) (listing the numerous and costly steps it would take to comply with the discovery requested and not proposing any alternatives to secure at least some of the information sought tends to undermine the burden assertion); In re State Farm Lloyds, 520 S.W.3d 595, 614 (Tex. 2017) ("Discovery is necessarily a collaborative enterprise, and particularly so with regard to electronic discovery").