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Making and Responding to Proportionality Objections

Although the concept of proportionality has long appeared in the Federal Rules of Civil Procedure (FRCP), its renewed prominence in the 2015 amendments has caused courts and litigants to rethink their approach to proportionality-based objections. Counsel for requesting parties, responding parties, and non-parties should understand how to properly assert and respond to these objections to comply with recent guidance.

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The 2015 amendments to FRCP 26(b)(1) dramatically altered the scope of allowable discovery by elevating the concept of proportionality and striking the "reasonably calculated to lead to the discovery of admissible evidence" language from the previous rule that was so familiar to litigators. Although the concept of proportionality seems straightforward, the multi-pronged application of the proportionality factors has proven difficult for both courts and litigants. FRCP 26 applies equally to non-party subpoenas under FRCP 45, requiring counsel to similarly consider the proportionality factors in the context of non-party discovery.

Search APB to Requesting Parties: Prepare for Proportionality for more on the proportionality factors and the scope of discovery under amended FRCP 26(b)(1).

Since the amendments, several courts have chided counsel and litigants for failing to modify the longstanding discovery practice of asserting conclusory objections on proportionality grounds. Courts will no longer tolerate counsel's use of outdated discovery forms that incorporate general boilerplate proportionality objections that lack specificity or otherwise fail to comply with the amended rules, such as failing to disclose whether responsive materials are being withheld or omitting the time for production by stating that documents will be produced on a rolling basis.

Instead, counsel for a responding party must prepare discovery responses that provide a requesting party with specific information on the documents and electronically stored information (ESI) that the responding party intends to withhold. When a responding party intends to withhold information on the basis of proportionality considerations, the need for specificity is even greater. Likewise, counsel for a requesting party must come armed with concrete arguments and detailed information when seeking to challenge a proportionality-based objection.

Search Document Requests and Subpoenas in Federal Court Toolkit for a collection of resources counsel can use to draft, serve, respond to, and challenge document requests and subpoenas in federal civil litigation.

PROPORTIONALITY OBJECTIONS TO DISCOVERY REQUESTS

The 2015 amendments did not change the burden allocation among the parties. The requesting party must establish relevance, while the responding party must show undue burden or expense. When a court considers whether a responding party has sufficiently demonstrated that a particular discovery request is disproportionately burdensome, it considers all of the FRCP 26 proportionality factors.

Counsel for a responding party or non-party should craft arguments about:

- The burden and expense inherent in substantively responding to the request.
- The lack of significant public policy issues raised by the litigation.
- The lopsided relationship between the amount in controversy and the cost or burden of the requested discovery.
- The parties' equal access, or the requesting party's superior access, to the requested information.
- The requesting party's greater resources relative to the responding party's or non-party's resources.
- The tangential relationship between the requested discovery and the claims and defenses asserted in the litigation.

To assert case- and factor-specific objections, counsel for a responding party or non-party must have a thorough understanding of both the claims asserted (to show how the discovery at issue is not relevant to the claims or defenses in the case) and the available sources of information (to potentially offer less burdensome alternatives). For example, a requesting party may not be entitled to a full search of all ESI where a simple interrogatory would suffice.

While the proportionality factors are presented as a list of equals, many courts tend to balance the cost and expense of complying with a document request against the other factors. In other words, courts ask whether the demonstrated time and financial burden required to substantively respond to the discovery request or subpoena is justified considering the other proportionality factors. Accordingly, in practice, the time and expense inquiry becomes a threshold issue, with the remaining factors coloring the proportionality analysis. The inquiry may be as simple as, for example, weighing the amount in controversy against the cost of conducting the discovery, and concluding that the discovery sought is impermissible because the discovery expense exceeds the amount in controversy.

UNDUE BURDEN AND EXPENSE

A responding party may object to a discovery request or subpoena by arguing that responding to it would create an undue burden, based on the disproportionate costs associated with identifying, collecting, processing, searching for, and reviewing the requested information. To properly assert this objection, the responding party must explain why the expense of the requested discovery is costly or time-consuming, as it is in a better position than the requesting party to address the cost and time needed to respond to the requests (*State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC*, 255 F. Supp. 3d 700, 705 (E.D. Mich. 2017), aff'd, 2017 WL 3116261 (E.D. Mich. July 21, 2017)).

The most important component of showing an undue burden is counsel's specific calculation of the time and expense inherent in substantively responding to a discovery request or subpoena. To do so, counsel should:

- Involve vendors and IT personnel as early as possible so that specific estimates of the cost can be incorporated.
- Identify whether any particular technology or method was used in forming these estimates.

Courts disfavor conclusory and unsupported statements on why the requested discovery will be extremely expensive and typically reject these arguments outright. (See, for example, *Martinez v. City of New York*, 2017 WL 6403512, at *1 (E.D.N.Y.

Dec. 14, 2017); *Cratty v. City of Wyandotte*, 2017 WL 5589583, at *3 (E.D. Mich. Nov. 8, 2017) ("A party objecting to a request for production of documents as burdensome must submit affidavits or other evidence to substantiate its objections."); *Mann v. City of Chicago*, 2017 WL 3970592, at *5 (N.D. Ill. Sept. 8, 2017).)

Search The Advantages of Early Data Assessment for information on using early data assessment to search, organize, and cull a collection of ESI before it is fully processed to foster cooperation and proportionality in discovery.

For a meet and confer with opposing counsel, evidence-based estimates may be sufficient. When asserting an undue burden or expense argument in court, however, counsel should provide affidavits from company IT specialists or vendors who will testify on the amount of burden and effort involved in complying with the document requests or subpoena. Additionally, it is helpful to offer specific information about the responding party's ESI that is implicated by the challenged requests, such as:

- The type and number of databases used to store the potentially responsive ESI.
- The location and accessibility of the databases.
- The manner in which the information is stored, backed up, and used.
- The search capability, if any, of the relevant systems.

The responding party should also be mindful of readily available technologies that could significantly reduce the required time or costs associated with the discovery, rather than provide inflated quotes based on outdated or inefficient approaches.

Additionally, in situations where responding to the requested discovery will be overly burdensome, counsel should consider whether stipulating to facts might eliminate the need to respond to the discovery request. While the idea of working together with opposing counsel is often at odds with a litigator's natural instinct, the court, counsel, and clients all benefit from avoiding costly and protracted discovery-related motion practice.

LIMITED PUBLIC IMPORTANCE OF THE ISSUES IN THE CASE

Since the concept of proportionality was introduced in the 1983 amendments to the FRCP, the Advisory Committee Notes have directed courts to also consider nonmonetary factors when evaluating the burdens and benefits of discovery and specifically highlighted certain issues that might merit a broader approach to discovery (see 1983 Advisory Committee's Note to FRCP 26(b)(1) ("the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved")).

Given this directive, courts are less inclined to compel burdensome discovery (and even less inclined when evaluating a non-party's subpoena response) when the issues at stake in the litigation are of only marginal importance to the public at large, which is typically the case in most civil litigation. Conversely, where a party demonstrates that a case "involves important issues and has the potential to broadly impact a wide range of third-parties not involved in the litigation," courts generally find broader discovery to be proportional and permissible (*Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 7 (D.D.C. 2017)).

To the extent the requested discovery involves sensitive personal or business information, the parties should consider negotiating a confidentiality order with sufficient protections, including the ability to file appropriate papers with the court under seal or limiting potential competitors from viewing sensitive information by designating such disclosure as attorneys' eyes only.

Search Confidentiality Agreement (Order) (Federal) for a sample agreement and protective order that counsel can use in federal civil litigation to protect against the disclosure of documents outside of the case, with explanatory notes and drafting tips.

DISCOVERY IS DISPROPORTIONATE TO AMOUNT IN CONTROVERSY

A responding party may object to a discovery request or subpoena by arguing that the cost of substantively responding to it is disproportionate to the amount in controversy (see, for example, *Nece v. Quicken Loans, Inc.*, 2018 WL 1072052, at *2 n.1 (M.D. Fla. Feb. 27, 2018) (finding a request for 3 million emails to be disproportionate at the class certification stage of an unauthorized telephone marketing consumer action, where damages are limited to $500 per violation under the relevant statute)).

Counsel can determine the amount in controversy from the pleadings and the parties' responses to discovery, but should bear in mind that the amount is different from what the responding party may believe can realistically be recovered. Put another way, the plaintiff's pleading ultimately dictates the amount in controversy for proportionality purposes.

Counsel should also consider the value of requests for nonmonetary relief. Responding counsel can probe this issue in discovery requests and during the meet and confer process. Through this iterative process, counsel can present a detailed assessment of the as-pled amount in controversy, rather than rely on conclusory, boilerplate statements.

PARTIES HAVE SIMILAR ACCESS TO REQUESTED INFORMATION

Discovery should generally be obtained from the most convenient, least burdensome, and least expensive source. In reality, however, it is unlikely that any one source will meet this standard, leading a responding party to object to a discovery request or subpoena by arguing that responding to it is disproportionately costly in light of the requesting party's equal or similar access to the requested information.

When a responding party contends that requested information is not easily accessible, counsel should consider specifically identifying other sources for the requested information that are more accessible or less costly to obtain. Providing this type of specific information about alternative sources gives the court concrete information to craft a remedy if the parties are unable to resolve the dispute without court intervention.

For example, if the court does not fully relieve the responding party from its obligation to produce requested information, it might instead order that the parties phase discovery to begin with the most accessible, least expensive sources. Phasing discovery can be a helpful alternative for the parties and the court to determine whether additional discovery from more burdensome and expensive sources is necessary.

Counsel should bear in mind that a responding party may not object on the basis of a disproportionate burden by contending that its own records are maintained in a manner that makes access difficult or by deliberately creating a burden to accessing its own records (*Brooks v. Macy's, Inc.*, 2011 WL 1793345, at *4 (S.D.N.Y. May 6, 2011) (noting that "the burden that results from disorganized record-keeping does not excuse a party from producing relevant documents")).

REQUESTING PARTY HAS GREATER RESOURCES

A responding party may object to a discovery request or subpoena by arguing that responding to it is disproportionately costly given the comparative resources of the party. Sometimes referred to as "information asymmetry," the relative resources of each party are important in evaluating proportionality. This concept often arises in class action and employment cases, in which individual plaintiffs typically serve broad discovery requests on large companies and employers.

Courts are generally unsympathetic to the higher burden placed on corporations in responding to discovery in these cases, often noting that a corporate defendant has access to relevant records that an individual plaintiff lacks, along with more "sophisticated access to data" (see, for example, *Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637, 643 (W.D. Mo. 2016), vacated on other grounds by 872 F.3d 567 (8th Cir. 2017)).

Courts have been similarly unreceptive to a corporate defendant's objections based on its general financial condition or inability to allocate staff to responding to discovery requests, and courts rarely narrow discovery on these bases (see, for example, *Goes Int'l, AB v. Dodur Ltd.*, 2016 WL 427369, at *4 (N.D. Cal. Feb. 4, 2016) ("Both parties should tailor their efforts to the needs of this case. Discovery and its costs are neither a shield to ward off nor hammer to throttle the opposing party.")).

Counsel for a responding party should provide specific information on the impact of the party's more limited resources with the objections. For example, if a company has very few employees and searching for requested documents would cause a defined detriment to the business, responding counsel should include that information in the party's objections.

REQUESTED DISCOVERY IS NOT CRITICAL TO PROVING THE ASSERTED CLAIMS OR DEFENSES

Responding parties may assert a proportionality-based objection where the requested information has low evidentiary value. For example, requested discovery may have low evidentiary value when it is only tangentially related to the parties' asserted claims and defenses.

This type of objection often turns on the relevance of the information to the case, and adversarial parties will undoubtedly have different views on the evidentiary value of the requested information.

In asserting this type of specific objection, counsel should focus on whether the requested discovery is linked to claims at issue in the matter. Because a requesting party may seek discovery relating to both potential claims a party might make as well as tangential issues that are not currently part of the litigation, counsel for an objecting party should incorporate facts that specify why the requested discovery is not important in resolving the issues before the court. Generalized cries that a request constitutes a "fishing expedition" will no longer be entertained by courts.

For example, in a breach of contract action between the parties, the requesting party may seek emails and information from a party for an extended period of time, including emails that pre-date the beginning of the commercial relationship. The responding party might object to that request because it seeks information outside of the timeframe when the parties had a business relationship, and therefore, it will not help resolve the issues before the court. (See, for example, *Solo v. United Parcel Serv. Co.*, 2017 WL 85832, at *3 (E.D. Mich. Jan. 10, 2017) (finding that "the relevance of the information as requested is not proportional to the needs of the case at this time" where the request called for discovery from an overbroad timeframe).)

As mentioned above, when an objection is based on the relative unimportance of the requested discovery to the issues at stake in the litigation, counsel should consider whether stipulating to certain facts might obviate the need to produce the requested discovery.

RESPONSES TO PROPORTIONALITY OBJECTIONS

If a responding party objects to a discovery request, the objection stands unless the requesting party challenges it. The requesting party may initiate a challenge by informing the responding party that it contests the objection. This begins the meet and confer process on the discovery requests and objections that the parties must engage in before bringing the dispute to the court (FRCP 26(c)(1)).

Counsel should be mindful to engage in this meet and confer process in good faith and with an effort toward resolution. A cooperative dialogue between opposing parties about what information the requesting party is actually seeking or the specific concerns the responding party has about a request or subpoena can often lead to a narrowed request, and will help to reduce costs on all sides. This conversation can often begin with the exchange of letters, but most local rules and judges require the parties to meet and confer via telephone or in person before raising a discovery dispute with the court. The parties then may formally raise the issue through a joint letter or more formal motion practice.

If the meet and confer process shows that no extrajudicial resolution is possible, only then should the parties request relief from the court in the form of a conference, motion to compel, or

Practical Methods to Ensure Proportionality

As discovery costs and the time dedicated to the process continue to increase exponentially, proportionality considerations can be beneficial to all parties. To best operationalize proportionality concepts, counsel should:

- **Identify the relevant data and systems as soon as possible.** Early conversations with clients about custodians, document management systems, and salient facts will help counsel to streamline the discovery process and provide specific metrics to discuss with a requesting party and, if needed, the court.
- **Explore technological solutions and tools.** Counsel can use technology to reduce the cost and burden, although in some instances, the cost of the available technology itself will outweigh the benefit. Sampling and testing the data before performing a full collection may assist counsel when analyzing whether the requested discovery is sufficiently important to warrant the potential burden or expense of its production.
- **Cooperate actively and in good faith with opposing counsel.** A revived focus on proportionality means closer cooperation with opposing counsel. Frank conversations with opposing counsel about the discovery sought and burdens of providing it can inspire creative solutions that benefit both sides. Counsel should actively work to reach agreement on date ranges, custodians, search terms, and the format of production to prevent the need to litigate these disputes later in the case.
- **Consider requesting cost-sharing or phased discovery.** The 2015 amendments to the FRCP have led to an increased willingness by the federal courts to engage early on discovery issues to achieve proportional discovery and to alleviate some of the burdens of discovery through different means. Two primary methods involve requesting:
  - cost-shifting in some rare situations, and most typically where requested information resides in inaccessible sources; and
  - phased or staged discovery (for example, where a court permits discovery on a specific issue first if it would be dispositive to a case or limited discovery while it evaluates pending motions to dismiss) in complex cases and class actions or where the requested information resides in sources with varying degrees of accessibility.

protective order. Regardless of the relief sought, the responding party should marshal together concrete arguments against the document request or subpoena along with identifying different options to eliminate or mitigate the burden. For example, if a discovery request is too broad, counsel should be prepared to provide the court with documentation for costs involved in complying with the discovery request as written while also offering suggestions on how it can be narrowed.

Although it is the requesting party's burden to establish relevance, it is the responding party's burden to support arguments related to proportionality. The requesting party generally does not bear the burden to show that the request is proportional. However, the requesting party should be prepared to make affirmative arguments that the requests are proportional during the meet and confer and at any subsequent hearings. The requesting party can rely on the ordinary presumption of broad discovery, but providing specific details about why the requested information is important and sufficiently narrow will be more persuasive in defeating any proportionality objections.

Specifically, the requesting party should be prepared to respond to an objection by:

- Explaining the ways in which the underlying information relates to the claims or defenses in the case.
- Arguing that the responding party's purported burden is exaggerated and unnecessary because, for example, it overlooked available technologies that would enable it to collect, review, or produce the information in a more timely and cost-effective manner.
- Arguing that any boilerplate objections should be waived and demonstrating how the responding party has failed to satisfy its burden of specificity (*Arrow Enter. Comput. Sols., Inc. v. BlueAlly, LLC*, 2016 WL 4287929, at *3 (E.D.N.C. Aug. 15, 2016) (noting that an appropriate objection must contain sufficient information to allow the court and the requesting party to determine the validity of the objection)).
- Confirming with the responding party whether it is withholding any documents based on its objections. If so, the parties should begin a new meet and confer process about the withheld information along the lines described above.

Search Motion to Compel Discovery (Federal) for sample motion papers counsel can use to draft and file a motion to compel discovery under FRCP 37, with explanatory notes and drafting tips.