Proportionality: Finally, a Tool to Help Media Defendants Achieve Rule 1's Promise

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The Federal Rules of Civil Procedure ("FRCP" or "the Rules") are comprised of 86 individual rules that prescribe procedures for practice in federal district courts. Notably, the very first rule in the FRCP explains the overarching purpose of the Rules: "[The FRCP] should be construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive determination of every action and proceeding*." (Emphasis added.) This rule has existed in the FRCP in some form since the Rules went into effect on September 16, 1938. Thus, for nearly eight decades, the stated purpose of the Rules has been to obtain fair, quick and cost-effective resolutions of each case filed in a federal district court and of each proceeding held in those cases.

This purpose, however, has been painfully difficult to achieve, largely because Rule 1 exists in the FRCP with Rule 26, which until recently, permitted the discovery of marginally relevant, but inadmissible information, as long as it appeared "reasonably calculated to lead to the discovery of admissible evidence."[1] The "reasonably calculated" standard is incredibly broad, and has served to drive up the costs of litigation and cause the wheels of justice to churn *considerably slower* than Rule 1 contemplates. Indeed, the Advisory Committee on the Civil Rules observed six years ago that the "reasonably calculated" phrase gradually had begun to *define* the very scope of discovery, a result the Committee never intended, given its recognition that use of that formulation to define the scope of discovery "might swallow any other limitation on the scope of discovery." The Advisory Committee had tried throughout the years to reform the "reasonably calculated" benchmark in Rule 26, but its efforts did little to combat the rampant discovery abuse that standard fostered.

Under the "reasonably calculated" standard, parties traditionally have been allowed to unearth masses of marginally relevant, inadmissible information and documents – at the expense of the other party – unless the producing party could establish that the requested information and/or documents were not relevant, or that the information and/or documents would be unduly burdensome to gather and produce. Defeating discovery requests on the grounds of relevance or undue burden, however, has proven to be very difficult and disproportionately expensive. And these difficulties have been especially acute for media defendants, who almost always are roped into litigation involving some level of "information asymmetry."[2] As explained in the Advisory Committee Notes, "information asymmetry" is where "[o]ne party – often an individual plaintiff – may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve."[3] "In practice," the Advisory Committee observed, "these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information[.]"[4]

Because media defendants are often the parties in possession of most of the relevant information in the litigation, many plaintiffs set out to exploit this reality, propounding excessive and broadly worded discovery requests that specifically are intended to signal to the media defendant that settlement would be far less expensive than the cost of responding to the plaintiff's voluminous discovery requests and/or gathering and producing hordes of electronically stored information (or mountains of hard-copy documents). Importantly, the "costs" being expended to respond to unjustifiably burdensome discovery requests go far beyond the funds which must be allocated to pay attorneys' fees; the "currency" media defendants are forced to expend in connection with abusive discovery include the disruption of the media defendants' business operations caused by the diversion of resources from the creative endeavors that generate profit. The burden associated with the expenditure of this type of "currency" cannot be overstated.

The "information asymmetry" inherent in most litigation involving media defendants also creates a stark imbalance in the parties' respective preservation obligations. As the Advisory Committee recognized, there has been an "exponential growth" in the volume of electronically stored information ("ESI"). Because most information today is no longer stored in filing cabinets but instead is found in emails, digital files, social media sites, voicemails, text messages and other media, most, if not all, cases involve ESI. The growth of e-discovery has created a veritable cottage industry for third-party vendors, storage platforms, and e-discovery experts. While not all ESI in a case may be of great importance to its ultimate resolution, parties are nevertheless equally entitled to it; ESI "stands on equal footing with discovery of paper documents."[5] These

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developments have resulted in litigants "expending excessive effort and money on preservation to avoid the risk of severe sanctions if a court finds they did not do enough."[6] Here again, media defendants are disproportionately burdened because, in most litigation, they will have a far greater swath of potentially relevant ESI than the individual plaintiffs who sue them.

Against this backdrop, the Advisory Committee set out to achieve the most robust and significant overhaul of the FRCP in decades. One of the Committee's key objectives was to revise Rules 26 and 37 to generate more effective use of the long-ignored principle of "proportionality."[7] Thus, in connection with the 2015 Amendments to the Rules, the Advisory Committee took drastic measures, excising the "reasonably calculated" standard from Rule 26 altogether and replacing it with a standard that is far more likely to promote the efficiency Rule 1 promises. Under the amended Rule 26, "[p]arties 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[.]" (Emphasis added.)

While this amendment is a welcomed change to most litigators, it is particularly significant to media defendants, who can use Rule 26's proportionality standard to even the discovery-playing-field, and hopefully recapture some of the leverage the old rule's unreasonably broad standard reserved to individual plaintiffs. To determine whether discovery is "proportional to the needs of the case," courts are advised to consider the following six factors: "(1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit."[8] These proportionality factors are not new; most of the factors were added in 1983 and all but one factor – the parties' relative access to information – were found in Rule 26(b)(2)(C)(iii), albeit in a different order. By relocating the factors, the amended Rule 26 now *explicitly* requires parties to consider proportionality when propounding discovery.[9]

Accordingly, media defendants can now argue that discovery should not be permitted where the proportionality factors are not satisfied, such as in cases where a plaintiff seeks unlimited access to a media defendant's records or editorial files. Indeed, courts are already focusing on this new proportionality standard in limiting the scope of discovery in litigation involving media defendants. For example, in *Robertson v. People Magazine*, the plaintiff alleged that the defendant *People Magazine* subjected her to a discriminatory work environment and terminated her due to her race.[10] She propounded 135 discovery requests, including requests for:

- all documents "concerning any of People Magazine's regular meetings"
- all documents "concerning any meeting at which discussions concerning which content would appear in People Magazine occurred"
- all documents "concerning the decision-making process with regard to choosing who would be put on the cover of People Magazine"; and
- copies of all of "People's covers and published stories dating back to 2005."[11]

The court "ha[d] no trouble concluding that Plaintiff's discovery requests [we]re burdensome and disproportionate," adding that "[u]nlike most discrimination cases where discovery is addressed to allegedly discriminatory conduct and/or comments, Plaintiff here seeks nearly unlimited access to People's editorial files, including all documents covering the mental process of People staff concerning what would or would not be published in the magazine."[12]

The court in *American Federation of Musicians of the United States and Canada v. Skodam Films, LLC*, reached a similar conclusion. There, a musician's union filed an expedited motion to compel a nonparty producer ("Producer") to comply with a subpoena *duces tecum* issued in an action alleging that a movie studio ("Studio") breached a collective bargaining agreement by failing to score the movie *Same Kind of Different as Me* ("Movie") in the United States or Canada.[13] The subpoena included 51 requests seeking production of documents relating to the Movie's production; the Producer's organizational structure; and the relationship

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between the Producer, the Studio, and certain other entities and individuals involved in the production of the Movie.[14] The district court modified the third-party subpoena, significantly limiting the information the Producer was required to search for and produce. Of particular relevance here, the district court rejected the subpoena in its original form because it required the Producer "to turn over apparently every document related to the Movie that [it], as a single-purpose entity, was created and exists to make, regardless of the documents' direct connection to [the plaintiff's] claims against [the Studio] based on the scoring of the Movie."[15] Despite the plaintiff's purported need for a complete picture of how the Movie was produced, the district court was "not persuaded that, considering all the circumstances, Producer should be required to produce documents for the purpose of showing what entities other than Producer [or] Studio … may have functioned as a producer of the Movie."[16] Instead, the district court concluded that "[the plaintiff's] real need for discovery from [Producer] appears limited to the question of what, if any, role [the Studio] (the only named defendant in the

Litigation) … played as a producer of the Movie."[17] "And the possible relevance of, and [the plaintiff's] purported need for, the other categories of documents sought … [we]re simply too attenuated to justify imposing the additional burden on [Producer] to search for, review, and produce the significant volume of documents and ESI responsive to [the plaintiff's] other requests."[18]

Requests like those at issue in *Robertson* and *American Federation of Musicians* are far too common; yet, these cases suggest that under the new Rule 26, such requests are now immediately suspect. As a result, proportionality should be raised early and often, and further should be used as a guiding principle in making discovery requests, responding to such requests, and/or interposing objections. Ideally, a media defendant is well-advised to raise any possible issues concerning proportionality during the parties' Rule 26(f) conference.[19] When this is not possible because the contours of anticipated discovery may not be known to the parties until the case has progressed passed the pleading stage, media defendants should be prepared to discuss the proportionality factors as soon as a plaintiff propounds unjustifiably disproportionate discovery requests.

Consider for example, a case where a plaintiff alleges an idea submission claim against a production company for allegedly using her idea as the basis of *one episode* in a *long-running television series*. Assume the plaintiff requests in discovery all documents concerning or referring to the creation and development of the entire television series. Or consider a case where the plaintiff sues for the purported violation of his right of publicity based on the use of his name in *one sentence* of an article published on a website. Assume this plaintiff requests all documents concerning or referring to the promotion, marketing, or advertising of the website. We have all seen these types of ridiculously broad requests, which historically have been difficult to circumscribe because, while all the information requested may not be highly probative, it arguably is reasonably calculated to lead to the discovery of admissible evidence. As discussed below, however, a media defendant can now leverage the proportionality factors to beat back such unreasonably broad discovery requests.

The Importance of the Issues at Stake in the Action

This factor is meant to take into account that, although some cases may not involve a lot of money, they still may implicate "vitally important personal or public values."[20] As a result, when a discovery request is propounded in cases implicating public policy spheres, like employment practices or free speech,[21] this factor weighs in favor of permitting discovery, despite the amount of damages sought in the prayer. In contrast, where a case involves "garden-variety" legal issues, this factor would weigh against the requested discovery. In the hypothetical cases mentioned above, the production company should emphasize to the court that the plaintiff's idea submission case does not touch on a value of vital social importance; similarly, the website should argue that the discovery requested in the right of publicity action does not seek to vindicate any critical public policy within the meaning of Rule 26. In both cases, therefore, the first proportionality factor weighs against compelling the media defendants to produce the requested documents.

The Amount in Controversy

The amount in controversy factor generally will weigh against permitting broad discovery if the amount in controversy is "low." This makes sense because discovery should be limited in cases where the monetary stakes are minimal to prevent the parties from spending more on responding to discovery than the case is worth. For example, in the hypothetical idea submission case, if responding to the request would cost the production company $100,000 because it requires going through years of emails, documents, and other media, and the plaintiff is only demanding $75,000 in damages, then there is a strong argument that the amount in controversy weighs against permitting the requested discovery.

The Parties' Relative Access to Relevant Information

This factor is specifically meant to address the issue of information asymmetry discussed above.[22] Because media defendants usually control significantly more of the relevant information, plaintiffs will emphasize this factor. Take the idea submission case, for instance, that plaintiff would argue that the production company has all the information about how the television series was developed and created, while the plaintiff has none. Similarly, in the right-of-publicity action, the plaintiff would argue that information regarding the marketing, promotion, and advertising naturally is maintained by the website and not the plaintiff. In these situations, the media defendants should argue that the plaintiffs are using information asymmetry to obtain an unfair tactical advantage; propounding overly broad discovery requests seeking only marginally relevant information to drive up the litigation costs and force a settlement. The media defendants also should emphasize that the "relative access" factor is not dispositive, but only one of many factors the district court should consider.

The Parties' Resources

As with the third factor, plaintiffs will emphasize this factor, arguing that media defendants have far greater resources to respond to discovery. But it is important for media defendants to point out to the court that this factor does not mean that a media defendant with greater resources than the plaintiff should have to bear the burden of *disproportionate* discovery. As the Advisory Committee has made clear, "consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party."[23] In discussing this factor, a media defendant also should emphasize that there are competing demands for its resources. For example, a production company may have employees who can run searches in email databases and collect documents, but these employees have other job responsibilities that must be fulfilled. A website may have a person

in its advertising department who can search for, gather, and collect documents regarding the marketing, promotion, and advertising of a website, but the time that person spends dealing with inordinately burdensome discovery is time he/she spends away from his/her normal duties. These are competing demands for media defendants' resources that the district court should consider when evaluating proportionality.

Moreover, where responding to particular request would be costly, the media defendant should consider applying for a protective order under Rule 26(c)(1)(B), which now recognizes a court's authority to enter protective orders that allocate expenses for disclosure or discovery.

The Importance of the Discovery in Resolving the Issues

When a plaintiff propounds a set of overly broad discovery requests, this factor will be particularly relevant. It requires courts to determine the degree to which the discovery is important to a particular claim or defense. Thus, discovery relating to a central issue will be more important than discovery directed to ancillary issues. In practice, this means that discovery requests for "any and all documents" or "all documents" that "relate to" or "evidence" a particular topic or subject matter will necessarily encompass documents that have little importance in resolving the issues in the case.[24] In the hypotheticals above, every single scrap of paper (or byte of ESI) relating to the development of a long-running television series will not bear on the resolution of whether the single at-issue episode was based on plaintiff's idea; nor will documents relating to the marketing or promoting of the entire website be central where the plaintiff's name appears in one sentence of one article on the website.

Whether the Burden or Expense of the Proposed Discovery Outweighs Its Likely Benefit

Under this factor, courts weigh any burden or expense imposed by discovery in relation to the discovery's benefits. Courts have advised that this factor "should be determined in a realistic way."[25] That means that parties resisting discovery must be prepared to substantiate any objections with details and facts demonstrating the purported burden. For example, in the case of the hypothetical idea submission case, if the production company objects to discovery on the grounds that it will take too many hours or that it will be disproportionately costly, the production company must specify how many hours it will take and provide a defensible estimate of the costs associated with the discovery. Media defendants should also remind the court that the plaintiffs, as the requesting party, must justify the need for the requested information and explain how it is relevant to the claims or defenses asserted in the litigation.

Conclusion

While the full impact of the Advisory Committee's overhaul of the FRCP has not yet been felt, the Committee's new focus on proportionality considerations in discovery brings parties, especially media defendants, that much closer to realizing the elusive promise in Rule 1 of a just, speedy, and inexpensive resolution of cases filed in federal district courts.

Endnotes

1. Fed. R. Civ. P. 26 (2014).
2. Fed. R. Civ. P. 26, Advisory Committee Note for 2015 Amendment.
3. *Id.*
4. *Id.*
5. Fed. R. Civ. P. 34(a), Advisory Committee Note for 2006 Amendment.
6. Fed. R. Civ. P. 37(e), Advisory Committee Note for 2015 Amendment.
7. For more on proportionality in the context of Rule 37, *see* Henry, Karen A., *Keeping Things in Proportion: Preservation of ESI under Amended Rule 37(e)*, The Woman Advocate, Vol. 21, No. 2 (American Bar Association Winter 2016).
8. *Id.* (numbering added).
9. While making proportionality a centerpiece in discovery, the Advisory Committee felt compelled to explain that this change neither places the burden of addressing all proportionality considerations on the party seeking discovery nor permits the opposing party to refuse discovery by making boilerplate objections based on proportionality. *See* Fed. R. Civ. P. 26, Advisory Committee Note for 2015 Amendment.
10. No. 14 CIV. 6759 (PAC), 2015 WL 9077111, at *1 (S.D.N.Y. Dec. 16, 2015).
11. *Id.*
12. *Id.* at *2. The court explained that "[t]hose requests (and others) extend far beyond the scope of Plaintiffs claims and would significantly burden Defendants. In addition, what Defendants decide to publish (or not publish) and its editorial decisions (as opposed to its business decisions in personnel hiring, firing, promoting, or demoting) are not relevant to Plaintiff's claims." *Id.* at *14.
13. No. 3:15-MC-122-M-BN, 2015 WL 7771078, at *14 (N.D. Tex. Dec. 3, 2015). Although the dispute in *American Federation of Musicians* involved a third-party subpoena, the district court found "that applying the standards of Rule 26(b)(1), as amended, to the [s]ubpoena and [the plaintiff's] motion to compel is both just and practicable where [the plaintiff] is not entitled to enforce its [s]ubpoena against a non-party based on a greater scope of relevance than should apply to any discovery against any party going forward."
14. *See id.* at *2.
15. *Id.* at *14.
16. *Id.*
17. *Id.*
18. *Id.*
19. In fact, the Advisor Committee foresaw raising proportionality at the Rule 26(f) conference, stating "[i]t is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules." Fed. R. Civ. P. 26, Advisory Committee Note for 2015 Amendment.
20. *Id.*
21. *Id.*
22. *Id.*
23. Fed. R. Civ. P. 26, Advisory Committee Note for 2015 Amendment.
24. For example, in *Elliott v. Superior Pool Products, LLC*, No. 15-CV-1126, 2016 WL 29243, at *3 (C.D. Ill. Jan. 4, 2016), the court held that a discovery request for "all documents" that "involve" employee reviews in a discrimination case was "clearly unwarranted and disproportionate to the claims asserted by the Plaintiff."
25. Fed. R. Civ. P. 26, Advisory Committee Note for 2015 Amendment.