

**The Impact of the Amendments to Federal Rule 26 on Initial Discovery in Federal Courts**

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As of December 1, 2015, the Federal Rules of Civil Procedure have been amended to include changes that will presumably have a significant impact on the world of federal litigation. Although the full impact of these amendments remains to be seen, the changes to Federal Rule of Civil Procedure 26 figure to have an immediate effect on the way discovery is conducted in federal courts. At the very least, those who practice in federal court should be aware of the changes to the rule and the possible impact on discovery.

The Advisory Committee makes clear that the changes to Rule 26 are designed to prevent overly broad discovery requests – a problem that has “been exacerbated by the advent of e-discovery” – and, in doing so, reduce the cost of discovery by requiring parties to focus their efforts on the important issues of the litigation. The amendment seeks to accomplish this goal by making three major changes to the former rule.

The first and most prominent change to former Rule 26 shifts the scope of discovery by removing the longstanding language that information need only be “reasonably calculated to lead to the discovery of admissible evidence” to be discoverable. Instead, the amended rule seeks to focus discovery on what is specifically relevant to the claims and defenses asserted in the case by requiring that discovery be “proportional to the needs of the case.” In considering proportionality, the new rule necessarily involves a balancing of interests to determine the permissible scope of discovery. Specifically, federal courts will now be required to consider the factors included in former Rule 26(b)(2)(C) – which governed court ordered limitations on discovery – when making the initial determination of what information is discoverable. These factors include: (1) the importance of the issues at stake; (2) the parties’ relative access to relevant information; (3) the parties’ resources; (4) the importance of the discovery in resolving the issues; and (5) whether the burden or expense of the proposed discovery outweighs its likely benefit.

The purpose of introducing proportionality into the definition of the scope of discovery is to reduce the cost of discovery by requiring litigants to focus their requests on the truly important issues of the case. Although it is impossible to speculate on how federal courts will interpret and apply the rule, it seems likely, given the stated purpose of the amendment, that the new focus on proportionality will benefit parties that prefer less discovery — defendants. However, it cannot be ruled out that some litigants may try to use the proportionality factors to justify greater discovery.

For example, Rule 26(b)(1) introduces a new proportionality factor that was not contained in the former rule: “the parties’ relative access to relevant information.” According to

the Advisory Committee, this factor was added to recognize that some cases involve disparities in the parties' access to information. Such a disparity may justify one party bearing greater burdens in discovery than another. Specifically, one can imagine how the addition of this factor could adversely affect larger corporate defendants by requiring them to bear the burden of producing discovery not easily available to plaintiffs. However, the Advisory Committee has made clear that the amendment to Rule 26(b)(1) is not meant to place the burden of establishing proportionality on the party seeking discovery. Rather, it is simply intended to require the parties and the court to consider proportionality when making, responding, and ruling on discovery requests.

Rule 26(b)(1) has been further amended to emphasize that the scope of discovery is not dependent on the probability of discovering admissible evidence. Instead, the rule now specifically states: "Information within this scope of discovery need not be admissible in evidence to be discoverable." This new provision has likely been included to prevent parties from objecting to discovery requests merely because they are not reasonably calculated to the discovery of admissible evidence – a common objection. However, the effect of this amendment may not be as great as initially thought because under the amended rule discovery is still limited to "nonprivileged matter[s] that [are] relevant to any party's claim or defense." Thus, basic relevance objections should remain a viable alternative.

The proportionality focus on the scope of discovery under new Rule 26(b)(1) is also buttressed by an addition to Rule 26(c)(1)(B) which authorizes protective orders that include "allocation of expenses" arising from discovery. Presumably, this new provision is intended to provide a party who faces abusive discovery requests with recourse by seeking that the costs be allocated to the party making the request. Connecting the cost of discovery to the party who seeks to benefit from it is intended to force the parties to contemplate whether the requests are truly necessary to advance the case.

Lastly, Rule 26(d)(2) has been amended to allow for discovery prior to the parties' Rule 26(f) conference, which sometimes does not happen until months after the complaint is filed. Under the new rule, Requests for Production may be served as soon as 22 days after service of the complaint. According to the Advisory Committee, the purpose of this amendment is to make the Rule 26(f) conference more productive. Specifically, it allows the parties to have focused discussions at the conference on disputes regarding the scope of the discovery requests and agreements to facilitate document production. In theory, this will help to streamline discovery and prevent unnecessary motion practice.

Since Rule 26 affects the very outset of a case, the amendments to the rule will have an immediate impact on cases brought in federal court after December 1, 2015. As a result, prospective litigants contemplating filing a case in federal court should be cognizant of these changes and should keep an eye out for how federal courts interpret and apply the new requirements of the rule.