The Scope and Relevancy of Discovery: Another Look at Rule 26 of the Federal Rules of Civil Procedure

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Parties may obtain discovery regarding any nonprivileged matter that is ***relevant*** *to any party's claim or defense and is* ***proportional to the needs of the case.*** Fed. R. Civ. P 26(b)(1) (emphasis added).

Introduction

Federal practitioners have long used preliminary objections and preliminary statements with objections in an effort to narrow the scope of discovery. Also commonplace are objections to discovery on grounds that said discovery is "overly broad" or "unduly burdensome." Objections citing an undue burden or an overly broad scope are frequently used in concert. The evolution of Fed. R. Civ. P. 26(b)(1) through its various amendments and recent rulings from magistrate judges on discovery disputes suggests that, although practitioners try to ensure they disclose only what is absolutely necessary in an effort to limit the costs and time associated with discovery for their clients, courts are increasingly discouraging such blanket objections and are applying a proportionality analysis to their rulings. Further, unless the objection is tied to a specific request or can be construed as such, increasingly it appears that the objection will not survive a motion to compel. This article provides a brief review of historical changes to Fed. R. Civ. P. 26 and a discussion of some recent decisions that illustrate how boilerplate and preliminary objections and relevance related discovery disputes have been treated by the courts.

The Evolution of the Treatment of Relevance and Proportionality Under Rule 26 of the Federal Rules of Civil Procedure

Proportionality may be relatively new to Section (b)(1); however, the concept has long existed under Rule 26. The efforts to shift the focus of the scope of discovery toward the concept of proportionality began with the 1983 amendment, when proportionality appeared under Section (b)(2)(C)(iii).[1] At that time, Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery [was] unduly burdensome or expensive."[2]

Rule 26 of the Federal Rules of Civil Procedure was first adopted in 1937 and has since undergone 12 substantive amendments.[3] The prevalent amendments pertaining to proportionality and relevancy occurred in the years 1983, 1993, 2000, and 2015.[4] In 1983, Rule 26(g) was modified under the 1983 amendment to place responsibility on the party signing a discovery request in an effort to impose shared responsibility among parties to honor the limitations of the scope of discovery.[5] The 1983 Committee Note explained that the provisions were added "to deal with the problem of over-discovery,"[6] further stating that its objective was to "guard against redundant or disproportionate discovery" and "to encourage judges to be more aggressive in identifying and discouraging discovery overuse."[7]

In a continued effort to provide the court with broad discretion to impose additional restrictions on the scope and extent of discovery, the 1993 amendment added two key determinative factors. The first was "whether 'the burden or expense of the proposed discovery outweighs its likely benefits.'"[8] The second factor was "the importance of the proposed discovery in resolving the issues."[9] The goal of both factors was to "enable the court to keep a tighter rein on the extent of discovery."[10] The amendment also imposed formatting changes that inadvertently softened the 1983 amendment to Rule 26(b)(2) regarding proportionality.[11]

The 2000 amendment, in an effort to restore proportionality, added the following sentence to Section (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)."[12] Parallel to the proportionality efforts, the 2000 amendment also replaced "reasonably calculated" with "relevant" in a further effort to refine the scope of discovery and to prevent and limit excessive discovery.[13]

Finally, in 2015 proportionality was removed from Rule 26(b)(2)(C)(iii) and restored to Rule 26(b)(1) defining the scope of discovery.[14] The 2015 Committee

Notes state that this restoration of proportionality "does not change the existing responsibilities of the court and the parties" nor does it permit opposing parties to refuse discovery under a boilerplate objection that it is not proportional.[15] "The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."[16]

Since the 2015 amendment went into effect, courts have interpreted "[p]roportionality and relevance [as] conjoined concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate."[17] In an effort to act consistently with the intent of the 2015 amendment to control the scope and prevent excess discovery, courts are no longer overlooking boilerplate and general objections and are defining what they deem to be within the relevant scope of discovery.

The Use of Boilerplate and General Objections

While it is common practice for attorneys to include boilerplate and general objections when responding to discovery, unless it is specifically tied to a particular request, it is increasingly being viewed as improper. Federal courts are expressing a distaste and lack of patience for objections to discovery that are not tied to a specific response, and they do not endorse preliminary objections to scope. The banal objection that discovery requests are "overly broad" and "unduly burdensome" are no longer an acceptable approach to responding to discovery in federal courts. In *Fischer v. Forrest*,[18] the judge issued an Opinion & Order stating that federal court decisions have criticized boilerplate objections long before the 2015 amendment, stating "'overly broad and unduly burdensome' is meaningless boilerplate" and "tells the court nothing."[19] In *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*,[20] the court characterized boilerplate objections as obstructionist, frivolous, and an abusive discovery tactic.[21] Additionally, in *Sonnino v. University of Kansas Hosp. Authority*,[22] the court characterized general objections as "worthless for anything beyond delay of the discovery."[23]

Recently, in an ongoing District of New Hampshire case, *Currier v. Ford Motor Company et al.*,[24] the judge issued an Order on Oct. 2, 2020, striking each of a defendant's general objections in their entirety, without prejudice, and all boilerplate objections.[25] Even if the practitioner believes the entirety of the requests are objectionable, it is a better practice to be certain that your objection to each request is properly tailored to that objection. Courts do not want to refer to a list of preliminary objections that were made earlier in the response, and prefer that if a response is objectionable, those objections are set out in response to the request at hand.[26] The practice of using boilerplate or preliminary objections seems to be fraught with trouble, whereas objections based upon proportionality to the claims or defenses at issue appear to be a better practice.

Remove the "Reasonably Calculated" Language From Discovery Objections

The phrase "reasonably calculated" is often included in boilerplate and general objections.[27] "Reasonably calculated" no longer defines the scope of permissible discovery under Rule 26(b)(1).[28] The test since the 2015 amendment has been whether the evidence is "relevant to any party's claim or defense"; however, many courts and lawyers continue to use this phrase.[29] Additionally, the new language has created its own controversy between parties, causing opposing parties to choose to interpret this phrase as a tool to narrow their discovery responses.

The District Court of New Mexico, in *Kennicott v. Sandia Corporation*,[30] was tasked with determining whether the magistrate judge's order granting plaintiffs' motion to compel production of documents exceeded the scope of discovery under Rule 26(b)(1). The plaintiffs' complaint alleged claims of gender discrimination.[31] During discovery, plaintiffs served requests seeking documentation relating to gender discrimination, sexual harassment, hostile work environment, and retaliation.[32] Defendant responded producing documents pertaining solely to gender discrimination.[33] The plaintiffs filed a motion to compel documents relating to sexual harassment, hostile work environment, and retaliation arguing that the documents were relevant to demonstrate a pattern or practice of discrimination.[34] The defendant filed an opposition arguing that discovery is limited to the pleadings' claims and defenses, in this case to the plaintiffs' claim of gender discrimination.[35]

After a hearing, the magistrate judge in *Kennicott* took the position that "there can be relevant evidence for discovery purposes that we can't tie directly to a paragraph or a sentence in a complaint, and yet, it's still relevant" and further stated "I have to be mindful of what parties need in order to have a fair fight in the remainder of this litigation, that is sufficiently relevant and sufficiently proportionate to comply with the discovery rules."[36] The magistrate judge issued an order, and the District Court of New Mexico affirmed, finding that relevant and proportional information regarding gender discrimination may be found within the document requests, and compelled opposing counsel to produce such documents.[37] Both the magistrate judge and the District Court of New Mexico relied on amended Rule 26(b)(1), stating that relevance is to be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any party's claim or defense.[38]

In 2018 in the *Toranto v. Jaffurs* matter,[39] a different court parsed out the issue of proportionality and relevance with regard to discovery. *Toranto* stated that "[t]he 2015 amendments to Rule 26(b)(1) emphasize the need to impose 'reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.'"[40] Further stating that the fundamental principal of the amended rule is "that lawyers must size and shape their discovery requests to the requisites of a case" and that the intent of the rule is "to provide parties with 'efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery.'"[41]

The court in *Toranto* exercised its discretion under Rule 26(b)(1).[42] The *Toranto* Court, by limiting the scope of the discovery, prevented disproportionality while maintaining relevancy.[43] Recently, in the above referenced *Currier* matter, the court also exercised its discretion under Rule 26(b)(1) in an Order issued on Nov. 4, 2020 relying on the relevant and proportional test to parse out the scope of admissible discovery.[44] The *Kennicott* and *Toranto* cases make evident that, although courts are broadening what is deemed relevant discovery under a party's claim or defense, proportionality can still serve as the gatekeeper to monitor the scope of what must be produced.[45] A better approach for federal practitioners is to determine whether their request, response, or objection is proportionally related to the claims and defenses at issue.[46]

Conclusion

The Federal Rules of Civil Procedure are continuously evolving. It is our responsibility as attorneys to stay informed and conform our

practice techniques to current jurisprudence.[47] Federal practitioners should take note that discovery in the federal courts no longer is tolerant of boilerplate and general preliminary objections. Parties must provide specific objections tailored to the discovery request before them. Additionally, after the 2015 amendment, proportionality and relevancy have been teased out by the courts. A broadening of the scope of what is termed 'relevant' has been expanded since the advent of the 2015 amendment to Rule 26(b). Armed with the knowledge that this shift has occurred, motivated by the 2015 amendment's underlying goal to prevent unnecessary discovery disputes and delays, federal practitioners need to adapt their practice styles to reflect this new way of tying a request, response, or objection to the proportional relationship between the claims and defenses of the case at bar. ⊙

Endnotes

[1]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.
[2]*Id.*
[3]*See* Fed. R. Civ. P. 26(b)(1).
[4]*Id.*
[5]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment; Fed. R. Civ. P. 26(b)(1) advisory committee's note (1983).
[6]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.
[7]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 1983 amendment.
[8]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.
[9]*Id.*
[10]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 1993 amendment.
[11]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.
[12]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment; Fed. R. Civ. P. 26(b)(1) advisory committee's note (2000).
[13]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment; Fed. R. Civ. P. 26(b)(1) advisory committee's note (2000).
[14]Fed. R. Civ. P. 26(b)(1).
[15]Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.
[16]Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.
[17]*N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, 325 F.R.D. 36, 49 (E.D.N.Y. 2018) (citing *Vaigasi v. Solow Mgmt. Corp.*, No. 11CIV5088RMBHBP, 2016 WL 616386, at *14 (S.D.N.Y. Feb. 16, 2016)).
[18]*Fischer v. Forrest*, No. 14CIV1304PAEAJP, 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017).
[19]*See Forrest*, 2017 WL 773694, at *3 (citing *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (stating that "boilerplate objections ... persist despite a litany of decisions from courts ... that such objections are improper unless based on particularized facts.")).
[20]*St. Paul Reinsurance Co. v. Com. Fin. Corp.*, 198 F.R.D. 508 (N.D. Iowa 2000).
[21]*See Com. Fin. Corp.*, 198 F.R.D. at 514.
[22]*Sonnino v. Univ. of Kansas Hosp. Auth.*, 221 F.R.D. 661 (D. Kan. 2004).
[23]*Univ. of Kansas Hosp. Auth.*, 221 F.R.D. at 666-67.
[24]*Currier v. Ford Motor Co. et al.*, No. 1:19-cv-00676-PB (D.N.H. Oct. 2, 2020).
[25]*See* Order by Judge Andrea K. Johnstone in *Currier v. Ford Motor Co. et al.*, No. 1:19-cv-00676-PB, , slip op. at 1 (D.N.H. Oct. 2, 2020) (citing *Autoridad de Carreteras y Transportacion v. Transcore Atl., Inc.*, 319 F.R.D. 422, 427 (D.P.R 2016) (stating "generalized objections to an opponent's discovery requests are insufficient)).
[26]*See Autoridad* 319 F.R.D. at 430 (citing *Sanchez-Medina v. UNICCO Serv. Co.*, 265 F.R.D. 24, 27 (D.P.R. 2009)).
[27]*Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008).
[28]Fed. R. Civ. P. 26; *see also In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016).
[29]Fed. R. Civ. P. 26(b)(1); *see also In re Bard,* 317 F.R.D. at 564.
[30]*Kennicott v. Sandia Corp.*, 327 F.R.D. 454 (D.N.M. 2018).
[31]*Id.* at 456.
[32]*Id.* at 456-57.
[33]*Id.* at 457.
[34]*Id.* at 457-58.
[35]*Id.* at 458.
[36]*Id.* at 459-60.
[37]*Id.* at 474-75.
[38]*Id.* at 469.
[39]*Toranto v. Jaffurs*, 16CV1709-JAH (NLS), 2018 WL 3752760 (S.D. Cal. Aug. 6, 2018).
[40]*Id.* at *1 (citing *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 603 (D. Nev. 2016)).
[41]*Id.*
[42]*Id.* at *2.
[43]*Id.* at *1-3.
[44] *See* Order by Judge Andrea K. Johnstone in *Currier v. Ford Motor Co. et al.*, No. 1:19-cv-00676-PB, slip op. at *3-8 (D.N.H. Nov. 4, 2020).
[45]*See Sandia Corp.*, 327 F.R.D. at 454; *see also Jaffurs*, 2018 WL 3752760, at *1-3.
[46]*See Sandia Corp.,* 327 F.R.D. at 454; *see also Jaffurs*, 2018 WL 3752760, at *1-3.
[47]*See* Model Rules of Prof'l Conduct R. 1.1 cmt. 8 (Am. Bar Ass'n 2019) (discussing duty to keep abreast of changes in law and its practice).