

## ARTICLES

### How Proportionality Under New Rule 26 Narrows the Breadth of Federal Tort Cases

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#### I. Introduction

The December 2015 changes to the Federal Rules of Civil Procedure narrows the breath of federal tort cases and encourages efficient discovery practice while emphasizing cooperation among the parties. Even though the most notable changes pertain to discovery under Rule 26, changes to Rule 1 creates an obligation between the parties and the court to cooperate. The new Rule 1 States:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They 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.

Fed. R. Civ. P. 1 (emphasis added).

The Advisory Committee's Note to Rule 1 highlights this novel and shared responsibility between the parties "to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay". Fed. R. Civ. P. 1., Advisory Committee's Note to 2015 Amendment. This responsibility sets the stage for discovery practice under the emerging proportionality requirement of Rule 26.

Where Rule 1 mentions proportionality as a footnote of sorts, the changes to Rule 26(b)(1) make proportionality discovery's centerpiece. Rule 26(b)(1) now states that:

Parties 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, 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 purported**

***discovery outweighs its likely benefit.*** Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1) (emphasis added). Under the new Rule 26, the universe of discoverable information must be weighed in relation to the case as a whole. Rationally related and relevant discovery is no longer routinely obtainable. Instead, the Rule 26 amendments restores proportionality and reinforces cooperation from the very beginning of discovery: case management. *See generally*, Fed. R. Civ. P. 26 Advisory Committee's Note to 2015 Amendment.

## **II. Case Management**

To combat the hydra that was bogging down the legal system – cost, delay, and obstinacy - efficient case management has become paramount to effectively navigate discovery under new Rule 26. From the outset, the parties must work to create a clear plan for the direction of the litigation, including listing: all possible claims and defenses; the factual or legal issues that could be raised; and the underlying facts that need to be proved or disproved to make your case. A comprehensive list – which undoubtedly will change and expand as the case proceeds - will provide easy answers to the essential needs of the case. Additionally, this roadmap will help to craft a discovery plan acutely tuned to what is proportional to those needs.

Efficient case management under the new Rule 26 should paint a clearer picture of what lies ahead as discovery unfolds; especially the discoverable material that will narrow the breadth of federal tort cases. When taking into account the added proportionality requirement of the new Rule 26, discovery no longer needs to include the entire universe of rationally related material.

## **III. Effective Discovery Under the New Rule 26**

Under the new Rule 26, effective discovery in federal tort cases starts early. The Rule 26(d)(2) amendments allow an early document request to be sent to the opposing party 21 days after service of the summons and complaint, even though the parties have not had their required Rule 26(f) conference. *See* Fed. R. Civ. P. 26(d)(2); *see also*, Fed.

R. Civ. P. 26, Advisory Committee's Note to 2015 Amendment. This early document request allows litigants to define the scope of the issues earlier, thereby narrowing the breadth of the case. Doing so allows the parties to eventually come into their Rule 26(f) conference with a much more concise plan for discovery.

Moreover, the changes to Rule 26 are meant to thin out and streamline discovery, incidentally narrowing the breadth of federal tort cases. Every request for discovery may no longer be deemed relevant when weighed against the new proportionality requirement. Effective discovery under the new Rule 26 requires more tailored and intelligent discovery requests. These requests must focus on the issues that *need* actual discovery and are integral to resolving issues in federal tort cases. If the information is obtainable from other sources - such as the client, internet, or public records, then that information should not be included in the discovery request.

#### **IV. The Reasonable Lawyer**

Ushered in with the era of proportional discovery is the reasonable lawyer. The reasonable lawyer is not a push over bending to the whims of opposing counsel, but rather knows which battles need fighting and which are better served with a stipulation. The court and parties are encouraged to cooperate "to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay" thus polarizing the justice system. See Fed. R. Civ. P. 1 Advisory Committee's Note to 2015 Amendment. Quite simply, the new proportionality requirement highlights that it is not reasonable to spend all of the parties' resources – including time - on discovery. Being reasonable while still effectively representing your client means working with opposing counsel to keep the case's momentum on track. Early document requests allow for more prepared pre-trial conferences, and stipulations on minor issues keep the focus on issues critical to the case.

In the same vein, general objections to discovery are not reasonable. Under the new Rule 26, a reasonable objection should start in the positive, stating what documents *will* be produced, and poses the objection as an exception, communicating how the objected-to-items are disproportional to the needs of the case. A well-thought-out

discovery objection goes all the way back to the initial case plan, and relays to the judge and opposing counsel how the request is both disproportionate and not reasonable when weighed against the central issues and needs of the case. The reasonable lawyer should cooperate with the court and opposing counsel, and in doing so, may gain the strategic advantage in discovery.

## **V. Conclusion**

The amendments to Rule 26 envision a justice system with a level playing field, consequently narrowing the breadth of federal tort cases. The reasonable and proactive lawyer will get to the starting block early with infantile document requests and well-planned pre-trial conferences. Identifying the critical issues from the outset will map out a discovery plan tailored to circumnavigate all of the relevant issues while remaining proportional to the needs of the overall case.

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