



TWO YEARS IN, NEW E-DISCOVERY RULES TAKE ROOT, ALBEIT SLOWLY

by John J. Jablonski

The “E-Discovery” amendments to the Federal Rules of Civil Procedure are now past their second full year of utilization. Two previous LEGAL BACKGROUNDERS have tracked their implementation since going into effect on December 1, 2015.¹ Judicial application of the Rules continues to advance, with some courts expressing frustration that their colleagues and attorneys, two years into the new regime, have failed to take notice.

The new Rules resulted in two significant changes.² First, the scope of discovery has been narrowed by an amendment to Rule 26(b)(1). This is no minor tweak. It is designed to significantly reduce discovery costs and focus the parties on the merits of a case. Second, a new Rule 37(e) expressly swept away inconsistent federal spoliation decisions involving the failure to preserve electronically stored information (ESI). Creation of a rules-based spoliation standard also marks a major shift. The new framework of Rule 37(e) replaces spoliation caselaw that relied on courts’ inherent powers to sanction parties for lost or destroyed ESI. A significant addition to Rule 37(e) prohibits sanctions when ESI is lost despite the use of reasonable steps during preservation.

Recognition of Narrower “Scope of Discovery” Continues. Rule 26(b)(1) limits discovery to matters that are “relevant to any party’s claim or defense.” Gone is the premise that any discovery is allowed so long as it is “reasonably calculated to lead to the discovery of admissible evidence.” This change limits the proper focus of discovery on the claims and defenses in the litigation.³ Some judges are now working to explain this distinction to their colleagues and litigants in opinions carefully applying the new Rule. While some courts continue to ignore (intentionally or inadvertently) the new narrower scope of discovery of Rule 26(b)(1), a few courts have chided litigants and their colleagues for ignoring the change.

A Nevada district court cited Mark Twain to drive home the point that the 2015 Amendments narrowed the scope of discovery: “Habit is habit, and not to be flung out of the window by any [person],

¹ FED. R. CIV. P. 26(b)(1) and 37(e). See prior articles at http://www.wlf.org/upload/legalstudies/legalbackgrounder/052716LB_Jablonski.pdf; and http://www.wlf.org/upload/legalstudies/legalbackgrounder/120216LB_Jablonski.pdf.

² Chief Justice John Roberts, 2015 Year-End Report on the Federal Judiciary, <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

³ FED. R. CIV. P. 26(b)(1), Committee Note (“The ‘reasonably calculated’ phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that ‘Information within this scope of discovery need not be admissible in evidence to be discoverable.’ Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.”).

but coaxed downstairs a step at a time.”⁴ The court in *Caballero v. Bodega Latina Corp.* continued: “[i]ndeed, many lawyers and courts continue to use the ‘reasonably calculated’ phrase from the earlier version of Fed. R. Civ. P. 26(b)(1). This is improper and, going forward, the test is not—not—whether information is ‘reasonably calculated to lead to admissible evidence,’ but whether evidence is ‘relevant to any party’s claim or defense.’”⁵

Another district court bristled against a large law firm for citing to the liberal scope of discovery standard set forth in *Oppenheimer Fund v. Sanders*. The court in *San Diego Unified Port Dist. v. Nat’l Union Fire Ins. Co. of Pittsburg, PA* held that “[i]n light of the fact that Rule 26(b)(1) now limits discovery to information relevant to ‘claims and defenses and proportional to the needs of the case,’ the *Oppenheimer Fund* definition, like the version of Rule 26(b)(1) that preceded the 2015 amendments, is now relegated only to historical significance.”⁶ Other courts have specifically cited to the narrower scope of discovery in their analysis.⁷

Despite the change in the Rule and the 2015 Amendments’ explicit overruling of *Oppenheimer Fund*, some courts cling to the old broad discovery standard. For example, in *Bush v. Dickerson* the U.S. Court of Appeals for the Sixth Circuit cited to *Oppenheimer* for the proposition that discovery is broad.⁸ By emphasizing the addition of proportionality to Rule 26(b)(1) the court in *Does I-XIX v. Boy Scouts of Am.* rejected defendant’s argument that the 2015 Amendments narrowed the scope of discovery.⁹

Use of Proportionality Requirements Remains Low. Although 2017 produced several notable Rule 26(b)(1) proportionality decisions, the cases remain few and far between. Not to be discouraged, however, a few 2017 decisions contain textbook application of the six proportionality 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.¹⁰

The clearest example of a detailed proportionality analysis arose from a multimillion-dollar dispute in *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*¹¹ The court carefully analyzed each of the six proportionality factors to grant defendants’ motion to compel additional discovery (despite plaintiffs’ arguments of undue burden and expense, and request for cost shifting). Interestingly, the court acknowledged its ability to shift costs pursuant to the 2015 Amendments, but held that the discovery costs were not burdensome to a party seeking \$50 million in damages. *Nat’l R.R. Passenger Corp. v. Cimarron Crossing Feeders, LLC* provides another

⁴ *Caballero v. Bodega Latina Corp.*, No. 217CV00236JADVCF, 2017 WL 3174931, at *2 (D. Nev. July 25, 2017)(quoting Mark Twain, *Pudd’nhead Wilson* (1894)).

⁵ *Ibid.*

⁶ No. 15CV1401-BEN-MDD, 2017 WL 3877731, at *1 (S.D. Cal. Sep. 5, 2017).

⁷ See *Youngevity Int’l, Corp. v. Smith*, No. 16-CV-704 BTM (JLB), 2017 WL 6730078, at *5 (S.D. Cal. Dec. 29, 2017)(“The test going forward is whether evidence is ‘relevant to any party’s claim or defense,’ not whether it is ‘reasonably calculated to lead to admissible evidence.’”); *Mfg. Automation & Software Sys., Inc. v. Hughes*, No. CV 16-8962-CAS (KSX), 2017 WL 5641120, at *3 (C.D. Cal. Sep. 21, 2017)(“Accordingly, this Court analyzes the discovery requests at issue here based on whether they seek information relevant to the claims and defenses in the case and Rule 26(b)(1)’s proportionality requirements.”).

⁸ No. 16-6140, 2017 WL 3122012, at *4 (6th Cir. May 3, 2017)(citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (“It is well established that the scope of discovery is ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’”).

⁹ No. 1:13-CV-00275-BLW, 2017 WL 3841902, at *1 (D. Idaho Sep. 1, 2017)(“[A]s to Rule 26(b)(1) specifically, Justice Roberts stated only that the amendment ‘crystalizes’ the concept of proportionality as a limit on discovery. This statement is consistent with the view that the amendments to Rule 26(b)(1) emphasized, but did not substantively change, the responsibility of the court and the parties to consider proportionality.”).

¹⁰ FED. R. CIV. P. 26(b)(1).

¹¹ 322 F.R.D. 1, 7 (D.D.C. 2017).

notably detailed 26(b)(1) analysis.¹² The court denied a motion to compel an inspection/recreation of the scene of a derailment, holding that the results of such an inspection may not be relevant and the burden to the railroad was significant.

A different district court refused to allow a second site inspection on proportionality grounds due to plaintiff's failure to consider proportionality. In *Lopez v. United States*, plaintiff's counsel forcefully questioned several times "what harm" would be caused by a second site inspection.¹³ The court responded that "counsel misses the point of this process, the [c]ourt's inquiry, and indeed his own role and responsibility in this inquiry [and] doesn't acknowledge newly-revised Rule 26(b)(1)'s directive that '[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.'" In *Patterson v. Hepp* the court denied broad discovery, holding that "these proportionality concerns have always been a part of the Rule, they now enjoy pride of place after the 2015 Rule amendments and must form a part of the [c]ourt's discoverability analysis."¹⁴ The court in *Davis v. United States Dep't of Veterans Affairs* also denied additional discovery when plaintiff's counsel failed to address relevancy and proportionality in a request for discovery in opposition to summary judgment.¹⁵

In *McFarlane v. First Unum Life Ins. Co.*, the court affirmed a magistrate judge's order allowing a deposition in lieu of document production, because the documents were of marginal value to plaintiff's claims. The court held that proportionality requires courts to determine the utility of the information sought.¹⁶ In *Rembrandt Diagnostics, LP v. Innovacon, Inc.*, a district court denied a request for emails totaling 300GB of data based on undue burden.¹⁷ Other cases of note include *Industrias Martinrea de Mexico, S.A., de C.V. v. Fluid Routing Sols., Inc.* where the court denied a request for expanded discovery and crafted an ESI protocol based on proportionality grounds.¹⁸ In *Solo v. United Parcel Serv. Co.*, the court focused exclusively on cost to deny broad discovery of years of package-delivery data stored on backup tapes.¹⁹ In *Nachurs Alpine Sols., Corp. v. Nutra-Flo Co.*, the court quashed a subpoena seeking seventeen years of information deemed of little value to the pending litigation due to excessive burden.²⁰ Finally, in *Panel Specialists, Inc. v. Tenawa Haven Processing, LLC*, the court denied specific relevant document discovery because the value of the information sought was outweighed by the burden of producing it.²¹

¹² No. 16-CV-1094-JTM-TJJ, 2017 WL 4770702, at *5 (D. Kan. Oct. 19, 2017)("The Court will focus its Rule 26(b)(1) proportionality analysis on the fifth and sixth factors ... the Court concludes the heavy burden and expense that would be imposed [] from the proposed inspection outweighs any potential benefit of evidence that might be obtained.")

¹³ No. 15-CV-180-JAH(WVG), 2017 WL 1062581, at *5 (S.D. Cal. Mar. 21, 2017)(internal citations omitted)(The court is "not required to indulge Plaintiff's every request, allow discovery on every conceivable issue that arises in the case, and fill every gap a party raises.")

¹⁴ No. 16-CV-942-JPS, 2017 WL 1901573, at *1 (E.D. Wis. May 9, 2017).

¹⁵ No. 16-CV-00701-CBS, 2017 WL 3608192, at *8 (D. Colo. Aug. 22, 2017)("Rule 26(b)(1) permits a party to obtain discovery of nonprivileged matters that are relevant to the actual claims and defenses in the pending action and proportional to the needs of the case, as measured by the factors set forth in the Rule.")

¹⁶ No. 16-CV-7806 (RA), 2017 WL 4564928, at *4 (S.D.N.Y. Oct. 12, 2017).

¹⁷ No. 316CV0698CABNLS, 2017 WL 4391707, at *6 (S.D. Cal. Oct. 3, 2017).

¹⁸ No. 16-12095, 2017 WL 3160072, at *3 (E.D. Mich. May 30, 2017)("Considering the six factors of proportionality, particularly the importance of the issues at stake in the action, the parties' relative access to relevant information, the importance of the discovery in resolving the issues and the burden or expense of the proposed discovery weighed against its likely benefit, requiring Martinrea to produce the additional four years' worth of documents at this juncture is not justified.")

¹⁹ No. 14-12719, 2017 WL 85832, at *3 (E.D. Mich. Jan. 10, 2017)("The relevance of the information as requested is not proportional to the needs of the case at this time.")

²⁰ No. 15-CV-4015-LTS, 2017 WL 1380460, at *4 (N.D. Iowa Apr. 17, 2017)(quoting *Maxtena, Inc. v. Marks*, 289 F.R.D. 427, 434 (D. Md. 2012))("[A]ll permissible discovery must be measured against the yardstick of proportionality.")

²¹ No. 16-4140-SAC, 2017 WL 3503354, at *3 (D. Kan. Aug. 16, 2017)("Nevertheless, the court is persuaded that the information sought by Tenawa in Interrogatory No. 5 is not proportional to the needs of the case, considering the relevant factors under Rule 26(b)(1).")

Use of Rule 37(e) to Avoid Harsh Sanctions Grows. New Rule 37(e) was honored in the breach at the start of 2016.²² Since that time, however, the Rule is having its intended impact. In a closely watched battle between two tech giants, the district court in *Waymo LLC v. Uber Techs., Inc.* held “[b]ecause the evidence in question consists of electronically-stored information, FRCP 37(e), not inherent authority, supplies the controlling legal standard.”²³

Two circuit courts have now applied the Rule. In *ML Healthcare Servs., LLC v. Publix Super Markets, Inc.*, the Eleventh Circuit applied a straightforward application of Rule 37(e) to affirm the trial court’s refusal to find spoliation.²⁴ Specifically, the court held that the mere destruction of portions of a surveillance video pursuant to routine record keeping requirements was insufficient to supply “intent to destroy.” In *Equal Employment Opportunity Comm’n v. JetStream Ground Servs., Inc.*, the Tenth Circuit affirmed the lower court’s denial of a non-spoliation motion seeking an adverse inference charge. Although not a Rule 37(e) motion, the court equated “intent to deprive” with bad faith when applying the Advisory Committee’s intent requirement.²⁵

In *Citibank, N.A. v. Super Sayin’ Publ’g, LLC*, the court held plaintiff failed to show intent to deprive under the Rule and declined to exercise inherent power due to plaintiff’s failure to prove bad faith.²⁶ In *Watkins v. New York City Transit Auth.*, despite plaintiff admitting failure to preserve a cell phone, defendant failed to establish that ESI could not be restored or replaced through additional discovery, or that plaintiff acted with a culpable state of mind.²⁷

Lastly, some litigants failed to establish that ESI was “lost” or could not be “restored.” For example, in *Barcroft Media, Ltd. v. Coed Media Grp., LLC* the court held “[p]laintiffs’ motion borders on frivolous, for the simple reason that they cannot even show that the evidence at issue was ‘lost.’”²⁸ In *Title Capital Mgmt., LLC v. Progress Residential, LLC*, the court held that the decision on whether sanctions are appropriate turns on whether or not the lost information can be restored or replaced through additional discovery. The court held it could and denied the motion.²⁹

Conclusion. Decisions following the second anniversary demonstrate use of the new E-Discovery Rules is continuing to grow. Courts are more comfortable denying harsh sanctions when applying Rule 37(e). A narrower scope of discovery under Rule (26)(b)(1) is taking hold, although some courts wish their colleagues would stop ignoring the new Rule. The routine application of proportionality to limit the burden and expense of discovery may be years away, but some courts have used the Rule to limit otherwise relevant discovery.

²² John J. Jablonski, *Despite Advent of New E-Discovery Rules, Old Judicial Habits Still Infect Federal Decisions*, Washington Legal Foundation LEGAL BACKGROUNDER, Vol. 31, No. 15 (May 25, 2016)(reporting “some courts are ignoring the clear language of the new rule and are employing ‘inherent authority’ to impose sanctions for conduct that is clearly governed by new Rule 37(e).”).

²³ No. C 17-00939 WHA, 2018 WL 646701, at *14 (N.D. Cal. Jan. 30, 2018).

²⁴ 881 F.3d 1293 (11th Cir. 2018).

²⁵ 878 F.3d 960 (10th Cir. 2017).

²⁶ No. 14CV5841SHSKNF, 2017 WL 462601, at *2 (S.D.N.Y. Jan. 17, 2017), *objections overruled*, No. 14-CV-5841 (SHS), 2017 WL 946348 (S.D.N.Y. Mar. 1, 2017).

²⁷ No. 16 CIV. 4161 (LGS), 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018).

²⁸ No. 16-CV-7634 (JMF), 2017 WL 4334138, at *1 (S.D.N.Y. Sept. 28, 2017).

²⁹ No. 16-21882-CV, 2017 WL 5953428, at *5 (S.D. Fla. Sept. 29, 2017)(“We find that it can, and that the Motion should be denied for this reason.”).