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A Proportional Response?: Practical Guidance for New Federal Rule 26

By Matthew A. Moeller – October 31, 2016

Few amendments to the Federal Rules have garnered as much notoriety and attention as the recent amendments to Rule 26 of the Federal Rules of Civil Procedure regarding the scope of discovery. As courts begin issuing decisions based on the new amendments, attorneys and clients are beginning to get a sense of the limits and scope of discovery in a new world. A recent ruling by Judge David Campbell based on analysis of relevancy and proportionality under the new rule precluded an attempt to discover electronically stored foreign communications in multidistrict litigation over allegedly faulty medical devices. The ruling is significant because Judge Campbell chaired the Rules Committee when the 2015 amendments were passed. There is no better source of guidance for attorneys learning to practice in the new universe of relevancy and proportionality than a ruling from the chairman of the committee, and this decision is certain to be given much deference as courts struggle to define the new scope of discovery.

In *In re Bard IVC Filters Prods. Liab. Litig.*, 2016 BL 306366, D. Ariz., No. MDL 15-02641, plaintiffs sought recovery for the malfunction of inferior vena cava filter implants. The plaintiffs requested communications between foreign entities that sell the filters abroad and foreign regulatory bodies. After discussing the topic at length during a previous status conference, the court ordered the parties to submit briefs on the issue. In formulating its ruling, the court noted that the new rule eliminates the former provision that inadmissible evidence was discoverable if it appeared reasonably calculated to lead to the discovery of admissible evidence. The court further noted that despite the change, many courts continue to use the phrase, and even cited seven decisions issued in the month prior that relied on the abrogated language. The court further articulated that the amended Rule 26 does not necessarily place the burden on the moving party, for the parties and the court have a “collective responsibility” to consider the proportionality of all discovery in resolving discovery disputes.

The court found the relevancy of the communications to be uncertain because there were no plaintiffs from foreign countries, and plaintiffs were seeking communications with foreign regulators for the sole purpose of determining if any communications were inconsistent with communications with domestic regulators. The key takeaway from the court’s relevancy analysis is that there must be a legitimate justification for discovery. Attorneys in this situation should focus on building evidentiary bridges through documents and/or testimony or other evidence to demonstrate that discoverability is based on more than conjecture. Conversely, those seeking to limit the scope should develop and emphasize the absence of that evidence to characterize the opposition’s position as nothing more than conjecture or hope and outside the scope of discovery under the newly amended rule.

Similarly, in regard to proportionality, the court noted that plaintiffs identified several factors under Rule 26 that weighed in their favor of discovery. However, defendants argued that the

burden and expense outweighed any benefit because the request would require defendants to identify custodians from foreign entities over a 13-year span, collect ESI from the custodians, and search for and identify communications with foreign regulators. The court found that the burden and expense of such a broad and comprehensive search outweighed the possibility of finding foreign communications inconsistent with United States communications. Moreover, while not explicitly stating such, the court implied that the discovery could overlap with and be duplicative of ongoing discovery of communications originating from American regulators. The court's ruling demonstrates that the analysis of the factors that determine proportionality is a flexible one, with the burden and expense versus the benefit likely being the single most important factor. Attorneys seeking to convince a court that the discovery sought is proportional should hone in on the most efficient and cost-effective ways to obtain the information. Furthermore, a focus on information relating to the central issues in the case is paramount. In situations like where operations are far flung but the occurrences at the heart of the suit are comparatively concentrated, courts are likely to be unwilling to allow widespread discovery just for the sake of finding something that could amount to contradictory or inconsistent evidence. Early evaluation and identification of the core issues, particularly in complex cases involving widespread geographical operations, is critical to not run afoul of the proportionality requirements and cost your client unnecessary time and expense—the very thing the amendments are designed to limit.

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