

LEGAL TECH

Building a Proportionality Defense Under the New Federal Rules

By Colleen Casey Voshell

The latest round of amendments to the Federal Rules of Civil Procedure (FRCP) went into effect in December 2015, and while some revisions, like Rule 34(b)(2) requiring specificity in RFP objections, are anticipated to spur changes in civil litigation, practitioners won't know the full impact of these amendments until judges begin making decisions based on the new standards. That being said, the explicit addition of proportionality—the determination of how the cost and burden of collecting evidence for the case weighs against the matter's overall value—to Rule 26(b)(1), which governs the scope of electronic discovery, is likely to arm defendants with stronger arguments against collecting certain electronic data for a matter.

The revised rule, which amends the definition of what is discoverable from “reasonably calculated to lead the discovery of admissible

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evidence,” to “proportional to the needs of the case,” states:

Parties may obtain discovery regarding any non-privileged 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 proposed discovery outweighs its likely benefit.

Information within this scope of discovery need not be admissible in evidence to be discoverable.

All but one of these proportionality factors previously existed in Rule 26(b)(2)(C), but the restructuring of the rule is attractive to defendants because it highlights the importance of proportionality in requesting and responding to discovery. Now, a defendant can avoid the burden of handling excessive amounts of irrelevant or duplicative data sources if the cost of doing so is disproportionate to the overall monetary value of the case. Litigators who understand these rules can effectively substantiate proportionality objections. Here are some of the strategies our clients are implementing to help argue for proportionality in civil litigation.

Be Reasonable and Proactive

Building credibility with the judge through a proactive approach goes a long way. If, at the outset of a matter, an attorney is proactive in saying, “here are the top five custodians, and what is involved with collecting data from them,” the judge is much more likely to notice a sense of cooperation and be willing to listen to proportionality objections raised later in the matter. Setting up credibility and trust at the outset, rather than fighting requests every step of the way, sets the stage for more reasonable and open discussions about the scope of discovery.

In addition to establishing a good working rapport with the other parties involved, having established information governance policies and e-discovery workflows in place make it easier to compile the information needed to validate a proportionality argument. The ability to thoroughly discuss both the sources of respon-

sive information and what has been done to preserve those sources at the meet-and-confer, arms the defense with proof of having done the right thing from the outset, and adds further credibility.

Know the Burden

In preparing for a proportionality defense, litigators must know exactly how big of a monster they are dealing with. It is critical at the outset of a matter to gather information about the scope of what is potentially discoverable and the time and cost associated with preserving, collecting, reviewing and producing the data. Beyond understanding cost, attorneys should understand and be able to clearly communicate exactly all of the steps involved in the e-discovery process, so they can articulate the cost and burden of each step to a judge and opposing counsel. This may also include outlining the cost involved with adding additional data sources, date ranges and/or keywords to the collection.

One strategy for calculating costs is to do some sampling. For example, if you collect data from a few of the most relevant data sources, you will get a sense of the degree of duplication among those custodians. This information may justify the potential gain (or lack thereof) of adding additional custodians to the collection. In determining cost, which is a key factor of understanding the burden of a matter, it is important to rely on either in-house or external trusted technical experts who can provide a breakdown of the time and cost of each step in the e-discovery process. Anyone with a solid foundation and expertise in these types of matters should be able to assist in preparing a thorough cost analysis and make assumptions extrapolated from look-

ing at samples of the dataset. Having this level of analysis on hand can make all the difference in backing up a proportionality claim.

Find Alternate Data Sources

Finding comparable sources for information that are more accessible than others is a savvy e-discovery approach that can significantly reduce the amount of time spent on collection and review. For example, reports generated from databases may be easier to collect, review and produce, rather than collecting, reviewing and producing the raw data. If opposing counsel is simply looking for the output of that database, it makes much more sense to produce a report from the system. This is a practical and helpful step that can illustrate the overall work and cost involved with collecting a specific population of data, and is useful when discussing proportionality during meet-and-confers.

While the new proportionality standards will, in theory, make e-discovery easier for litigators, attorneys should not expect to see a dramatic shift in their law practice. Rather, it offers an opportunity for proactive and strategic attorneys to gain a leg up on the opposition in complex cases involving large volumes of electronic data. Taking these steps in preparation for a proportionality discussion allows the legal team to go on the offensive with a fully defensible, thought-out and strategic understanding of the responsive information. Additionally, as data volumes continue to grow, and the stakes of e-discovery matters increase, litigators will likely see more and more instances where the proportionality defense makes sense and can help save considerable time and money. ■