

CASES APPLYING THE AMENDED FEDERAL RULES

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Aimed at reducing the exorbitant costs of discovery, and accelerating the pace of litigation in general, the latest amendments to the Federal Rules of Civil Procedure became effective on December 1, 2015. Five years in the making, they are widely viewed as comprising “the biggest change in discovery and case management in at least 15 years,” as the chair-elect of the ABA Section of Litigation recently wrote. Laurence F. Pulgram, *The Discovery Rules Have Changed, But Will We?*, LITIGATION at 20 (Spring 2016). But the amendments are not self-executing—they “require thoughtful implementation by the bench and bar if they are to change anything at all.” *Id.* at 18. How are we doing so far? Below, to explore that question, we identify and survey a sample set of cases that have tackled three of the most significant issues addressed by the amendments—proportionality, spoliation, and objections.

I. Proportionality

Rule 26(b)(1) now reads, “unless otherwise limited by court order, the scope of discovery is as follows: 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’ 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.*” Fed. R. Civ. P. 26(b)(1) (amendment in italics). The new rule also removes the words “reasonably calculated to lead to the discovery of admissible evidence” from the description of “relevance.” *Id.*

The courts that applied this amended rule have been analyzing the proportionality factors one by one, while emphasizing that the burdens have not shifted. *See Carr v. State Farm Mutual Automobile Ins. Co.*, 312 F.R.D. 459, 466 (N.D. Tex. 2015) (“[T]he existing allocations of burdens to show undue burden or lack of proportionality have not fundamentally changed. . . . Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.”) There is, however, an unmistakably greater emphasis on proportionality in analyzing the fundamental scope of discovery in a given case. *Eramo v. Rolling Stone LLC*, No. 3:15-MC-00011, 2016 WL 304319 at *6 n.2 (W.D. Va. Jan. 25, 2016) (“[G]iven the 2015

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amendment, the court will put a greater emphasis on the need to achieve proportionality, in determining whether to grant the motion to compel.”).

“The recent changes to the Federal Rules of Civil Procedure (in particular, Rule 26), although substantive and substantial, do not change the definition of relevance. Instead, they reemphasize and highlight requirements already present in the Rules, like proportionality.” *Steel Erectors, Inc. v. AIM Steel Intl. Inc.*, 312 F.R.D. 673, 677 n.4 (S.D. Ga. 2016). One court described the changes to the proportionality rule as a change of “mindset.” *Gilead Scis., Inc. v. Merck & Co, Inc.*, No. 5:13-CV-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) (“What will change—hopefully—is mindset. No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case.”)

In *Carr v. State Farm Mutual Automobile Ins. Co.*, 312 F.R.D. 459, 471 (N.D. Tex. 2015), the court held that documents reflecting payments that Plaintiff received as a result of an automobile accident and documents reflecting other indemnity and insuring agreements covering Plaintiff at the time of the accident were proportional to the needs of the case, which involved an underinsured motorist. The court noted that the amendment “reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management.” *Id.* at 468. When the court addressed each factor of the proportionality analysis, it stated that “it also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors,” and, therefore, “consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party.” *Id.* at 467-68.

In *Eramo v. Rolling Stone LLC*, No. 3:15-MC-00011, 2016 WL 304319 at *4 (W.D. Va. Jan. 25, 2016), the court held that discovery of a student’s communications with a university official and with the author and publishers of a *Rolling Stone* article were proportionate to the value of the case, where the Dean of the university alleged defamation arising out of the publication of an article about an alleged rape on campus involving the student. The court also noted that, “[d]espite the additional proportionality consideration required under the amendment to Rule 26, . . . the 2015 amendment does not place on the party seeking discovery the burden of addressing all proportionality considerations.” *Id.* at *3 (internal quotations omitted).

In *Wertz v. GEA Heat Exchangers Inc.*, No. 1:14-CV-1991, 2015 WL 8959408 at *3 (M.D. Pa., Dec. 16, 2015), the court permitted a plaintiff to take an eleventh deposition in an unlawful termination action after analyzing the proportionality factors. The court noted that the information sought through the proposed deposition was information in the possession of only the defendants, the deposition would be only two hours in length, the plaintiff identified the relevance of the likely testimony, the plaintiff had not had an opportunity to get this information, the plaintiff proactively sought leave from the Court early in the discovery phase, and the cost would not likely outweigh the likely benefit of the additional deposition. *Id.*

In *Steel Erectors, Inc. v. AIM Steel Intl. Inc.*, 312 F.R.D. 673, 677 (S.D. Ga. 2016), the court held that discovery of the contact information of defendant’s corporate parent was not

proportional because the parent company had no involvement with and provided no funding for the construction projects at issue. The court noted that the defendant had already provided adequate responses to plaintiff's interrogatories, and "[a]llowing discovery—particularly 'complicated and complex' discovery that 'may involve treaties or agreements with foreign governments'—based solely on plaintiff's pure speculation [that it may have claims against the parent] and in the face of existing discovery responses indicating no involvement by [defendant's] parent in the contracts at issue would needlessly increase the expense of this litigation and, in doing so, subvert Rule 26(b)(1)'s goal of 'guarding against redundant or disproportionate discovery.'" *Id.*

In *Hahn v. Hunt*, No. 15-2867, 2016 WL 1587405 at *2 (E.D. La. Apr. 20, 2016), the court quashed subpoenas seeking testimony and information from a third-party witness in a copyright infringement case because the subpoenas were excessive and sought "much that is not relevant to the claims and defenses in this copyright infringement case, including possibly privileged communications between [the witness] and his attorneys, and are beyond what is necessary and beneficial to resolution of this case." The court noted that other courts have imposed conditions on discovery involving non-parties because of a "reluctance to impose significant costs of litigation onto a non-party." *Id.*

In *Flynn v. Square One Distribution, Inc.*, No 6:16-mc-25-Orl-37TBS, 2016 WL 2997673 at *4 (M.D. Fla. May 5, 2016), the court quashed a subpoena for the deposition of a third-party witness seeking testimony on the process that led to the creation of the warning label on a ski on which plaintiff was injured, because the testimony was not proportionally related to the issues at stake in the litigation (whether the warning was sufficient in its final version). The court noted that the new proportionality analysis required the requested information to be "more than tangentially related to the issues that are actually at stake in the litigation" to be discoverable. *Id.*

In *Pertile v. Gen. Motors, LLC*, No. 115CV00518WJMNYW, 2016 WL 1059450, at *5 (D. Colo. Mar. 17, 2016), the court denied the plaintiff's motion to compel production of General Motors, LLC's Finite Element Models because the information sought constituted a trade secret, and was disproportionate to the needs of the case. The court focused on the balance between harm to the disclosing party and needs of the requesting party. *Id.* at *3 ("[W]hile there is no absolute privilege with respect to the disclosure of trade secrets, if GM is able to prove harm associated with disclosure, then the burden shifts back to Plaintiffs to establish that the FEA Models are not only relevant, but necessary, to prove their case.").

II. Spoliation

Rule 37(e) now reads, "Failure to *Preserve* Electronically Stored Information. *If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or (2) only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was*

unfavorable to the party; or (C) dismiss the action or enter a default judgment.” Fed. R. Civ. P. 37(e) (amendments in italics).

The key change here is in the culpability required for sanctions. The amendment specifically rejects the Second Circuit’s holding in *Residential Funding Corp. v. DeGeorge Capital Corp.*, 306 F.3d 99, 108 (2d Cir. 2002), which permitted the imposition of sanctions, such as an adverse inference, upon a finding that a party had lost or destroyed evidence negligently, as opposed to intentionally. *CAT3 LLC v. Black Lineage Inc.*, No. 14 Civ. 5511 (AT)(JFC) 2016 WL 154116 at * 4 (S.D.N.Y. Jan. 12, 2016).

In *CAT3, LLC v. Black Lineage, Inc.*, No. 14 Civ. 5511 (AT)(JFC) 2016 WL 154116 at * 4 (S.D.N.Y. Jan. 12, 2016), the court imposed sanctions on the plaintiff who had produced emails in which the domain name at issue in the underlying trademark infringement case had been altered for the sender and the recipient. Experts testified that this change could not have happened by accident. The court applied the amended rule, and noted that, even if there had been no actual destruction of evidence (just alterations to it), the court could “nevertheless exercise inherent authority to remedy spoliation.” *Id.* at 6. The court stated that “sanctions would be available under the court’s inherent authority, even if Rule 37(e) did not apply,” but it nonetheless also found that “[t]he prerequisite for assessing sanctions under subsection (e)(2) had been met as well. The plaintiffs ‘acted with the intent to deprive another party of the information’s use in the litigation.’” *Id.* at *9.

In *O’Berry v. Turner*, No. 7:15-cv-00075, 2016 WL 1700403 at *1, 4 (M.D. Ga. Apr. 27, 2016), the court imposed sanctions on a defendant trucking company when it “inadvertently destroyed” the driving log of a truck driver who was involved in the car accident at issue in the case. The keeper of the records lost the folder it was in, and by time he realized it, the electronic network had deleted the log. The defendants did not have a document preservation policy, the documents were moved around from building to building without somebody keeping track of them, and the defendant made only one copy. The court found that “such irresponsible and shiftless behavior can only lead to one conclusion—that [the defendants] acted with intent to deprive Plaintiff of the use of this information at trial.” *Id.* at 4. The court held that it would instruct the jury that it “*must* presume the lost information, including the driver’s log and all other data that was collected through [the defendant’s network], was unfavorable to [the defendants].” *Id.*

In *Thomas v. Butkiewicz*, No. 3:13-cv-747(JCH), 2016 WL 171368 at *8 (D. Conn., Apr. 29, 2016), the court held that it would be unjust to apply the amended spoliation rule under the particular facts of the case, and it therefore imposed sanctions under the former *Residential Funding* standard. There, corrections officers had destroyed video evidence of their actions immediately preceding an assault on an inmate plaintiff who was under their watch. The court stated that it would be unjust to apply the new rule because the plaintiff was initially pro se, and “[i]f [the defendant] had been represented by counsel from the beginning of this action, it is highly likely that the case would have proceeded more quickly, and the issue of sanctions for alleged spoliation would have been resolved before the amendment to Rule 37(e) went into effect. Furthermore, all of the actions and inaction relevant to resolution of the pending Motion transpired before the revisions to Rule 37(e) went into effect.” *Id.* Therefore, because the defendants negligently violated their duty to preserve the videos, and negligence is a state of

mind sufficiently culpable under the old rule, the court granted plaintiff's request for a mandatory adverse inference instruction. *Id.* at 15.

In *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, No. 14-cv-62216, 2016 WL 1105297 at *6 (S.D. Fla., Mar. 22, 2016), the court denied the plaintiff's motions for sanctions against a defendant who did not archive or save text messages on his phones when they were replaced. The court applied the new spoliation rule, asking: (1) should the allegedly spoliated ESI evidence have been preserved?; (2) was the allegedly spoliated ESI lost because a party failed to take reasonable steps to preserve it?; and (3) could the allegedly spoliated ESI evidence be restored or replaced through additional discovery? *Id.* at 5. The court further explained that, if the answer to all three questions was yes, then the court would proceed to determine whether (a) there was prejudice, or (b) an intent to deprive. *Id.* Though it answered the first three questions in the affirmative, the court ultimately found that there was neither prejudice nor an intent to deprive, and consequently denied the requested sanctions. *Id.*

In *Accurso v. Infra-Red Services, Inc.*, No. CV 13-7509, 2016 WL 930686, at *3 (E.D. Pa. Mar. 11, 2016), the court denied a defendant employer's motion to impose an adverse inference on plaintiff employee for "apparently" deleting all of his personal emails after he was terminated. The court noted that "an adverse inference is an extreme remedy for the alleged spoliation of evidence," and it focused on the "acted with intent" portion of the amendment when it denied the employer's motion: "The new rule, however, makes explicit that an adverse inference is appropriate *only* on a finding that the party responsible for the destruction of the lost information *acted with the intent* to deprive another party of access to the relevant information." *Id.* at *3 (emphasis in original).

III. Objections

Rule 34(b)(2) now states, "(B) For each item or category, the response [to a discovery request] must either state that inspection and related activities will be permitted as requested or state *with specificity the grounds for objecting* to the request, including the reasons. *The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be complete no later than the time for inspection specified in the request or another reasonable time specified in the response.* (C) *An objection must state whether any responsive materials are being withheld on the basis of that objection.* An objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2) (amendments in italics).

The reason for this amendment was to "end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections." *Loop AI Labs Inc. v. Gatti*, No. 15-cv-00798-HSG(DMR), 2016 WL 2342128 at *4 (N.D. Cal. May 3, 2016) (citing Fed. R. Civ. P. 34, Advisory Committee Notes to 2015 Amendments). "Thus, '[a]n objection may state that a request is overbroad, but ... should state the scope that is not overbroad.'" *Sprint Commc'ns Co. L.P. v. Crow Creek Sioux Tribal Court*, No. 4:10-CV-04110-KES, 2016 WL 782247, at *5 (D.S.D. Feb. 26, 2016) (citing Advisory Committee Notes (2015 Amendment)).

In *Loop AI Labs Inc. v. Gatti*, No. 15-cv-00798-HSG(DMR), 2016 WL 2342128 at *4 (N.D. Cal. May 3, 2016), the court required that the plaintiff amend its responses to interrogatories to comply with the new rule. The court ordered the plaintiff to amend responses and produce responsive documents to various interrogatories, and gave only a seven-day deadline for the plaintiff to do so, because in the previous responses, it was “not clear whether Plaintiff has produced any responsive documents.” *Id.*

In *Moser v. Holland*, No. 2:14-cv-02188-KJM-AC, 2016 WL 426670, at *3 (E.D. Cal., Feb. 3, 2016), the court held that, because plaintiff’s responses to discovery requests consisted of “general boilerplate objections,” they were insufficient under Fed. R. Civ. P. 34(b)(2)(B). The court stated that the “recent amendments to Rule 34 make [it] particularly clear” that “general or boilerplate objections such as ‘overly burdensome and harassing’ are improper—especially when a party fails to submit any evidentiary declarations supporting such objections.” *Id.*