



DESPITE ADVENT OF NEW E-DISCOVERY RULES, OLD JUDICIAL HABITS STILL INFECT FEDERAL DECISIONS

by John J. Jablonski

“The king is dead. Long live the king.” European monarchies conveyed the immediate passage of sovereignty from a dead ruler to a new one with this proclamation. It works as well for the amendment of Federal Rules of Civil Procedure 26(b)(1) and 37(e), because in many ways an old governing rule on discovery passed away on December 1, 2015, when the amendments took effect—but the ghost of the old ruler still haunts both bench and bar.

The Advisory Committee that drafted the amended rules and Chief Justice John Roberts have both acknowledged two significant changes they made.¹ 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 the patchwork of 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.

As this LEGAL BACKGROUNDER will explain, some courts have embraced the express intent and language of the new amendments to the Rules, while others have been reluctant to acknowledge the changes and their significance.

Bid Adieu to Broad “Scope of Discovery” Caselaw ...

New Rule 26(b)(1) limits discovery to matters that are “relevant to any party’s claim or defense.” Gone are the days when lawyers could, with a showing of good cause, ask a court for broader discovery of “any matter relevant to the subject matter involved in the action.” This change reflects that the proper focus of discovery is on the claims and defenses in the litigation.

Courts risk inadvertently wiping out the new discovery rule by ignoring this change. Discovery is now limited to evidence relevant to any party’s *claim or defense* and to disclosure of evidence that is *proportional to the needs of the case*. The old and often misquoted language that all discovery is permitted so long as it is “reasonably calculated to lead to the discovery of admissible evidence” was deliberately deleted from Rule 26(b)(1).

Several recent federal court decisions analyze and apply the new language of Rule 26(b)(1) as envisioned. For example, in *Sibley v. Choice Hotels*, the court emphasized the language changes in the December 2015 amendment and declared, “[T]he discretionary authority to allow discovery of ‘any matter relevant to the subject matter involved in the action’ has been eliminated.”² The *Sibley* court also found the omission of “reasonably

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calculated to lead to the discovery of admissible evidence” to be an improvement in the rule, given that such language had become an “all too familiar, but never correct, iteration of the permissible scope” of discovery.³

... And to *Oppenheimer’s* Broad Definition of “Relevance”

Unfortunately, old habits die hard. Some courts have correctly noted that Rule 26(b)(1) has been amended, but they proceed to ignore the new rule nonetheless. Many judges who have committed that error relied upon the nearly 40-year-old analysis set forth by the U.S. Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*,⁴ in which it noted the “key phrase” of Rule 26(b)1—regarding relevance to the pending action’s subject matter—“has been 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.”⁵ But the 2015 amendments deleted *Oppenheimer’s* “key phrase” from Rule 26(b)(1), so relevance to the “subject matter involved in the action” is no longer the test of discoverability.

Still, some courts, perhaps unknowingly, have yet to delete the “key phrase” cited in *Oppenheimer* from their discovery orders. For example, in *Lightsquared Inc. v. Deere & Co.*, the court *specifically* recognized that “discovery no longer extends to anything related to the ‘subject matter’ of the litigation,” but concluded “relevance is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense”⁶ In *U.S. ex rel. Shamesh v. CA, Inc.*, the court acknowledged the amendments to Rule 26(b)(1) but proclaimed, “[L]ike before, relevance is still to be ‘construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on’ any party’s claim or defense”⁷

Courts should update their discovery orders, and practitioners should be clear in appearances and motion practice—*Oppenheimer* should no longer be cited as the scope of permissible discovery.

Some Courts Ignore the Newly Narrowed Scope

Numerous decisions citing to the old version of Rule 26(b)(1) and quoting the deleted “reasonably calculated” language have emerged in the past few months.⁸ Failure to update boilerplate citations is understandable, but acknowledging amended Rule 26(b)(1) and then ignoring it is harder to understand. For example, in *Fidelity & Guarantee Life Insurance Co. v. United Advisory Group, Inc.*, the court held that “[i]nformation sought need only ‘appear [] [to be] reasonably calculated to lead to the discovery of admissible evidence’ to pass muster.”⁹ In *Dixon v. Williams*,¹⁰ the court cited to amended Rule 26(b)(1), but then held that “[d]iscovery is generally permitted of any items that are relevant or may lead to the discovery of relevant information.” In *Vailes v. Rapides Parish School Board*,¹¹ the court noted that the relevance inquiry “ends where it starts; *i.e.*, the relevancy of a discovery request depends on whether it is ‘reasonably calculated’ to lead to admissible evidence.”

Other Courts Ignore the New “Proportionality” Requirements

Although the Draft Committee Note originally described the addition of proportionality to Rule 26(b)(1) as having been made to “limit the scope of discovery,”¹² the final version more accurately states that the amendment merely “restores the proportionality factors to their original place in defining the scope of discovery.”¹³ Rule 26(b)(2)(C)(iii) now requires a court to limit the frequency or extent of discovery when “[iii] the proposed discovery is outside the scope permitted by Rule 26(b)(1).”¹⁴

Some early decisions applying the provisions of Rule 26(b)(1) have focused on both relevance and proportionality. For example, in *Curtis v. Metropolitan Life Ins. Co.*,¹⁵ *Acerlormittal Indiana Harbor LLC v. Amex Nooter, LLC*,¹⁶ and *Gilead Sciences, Inc. v. Merck, Inc.*,¹⁷ courts analyzed whether the requested discovery was both

relevant to the claims and defenses and proportional to the needs of the case. In these cases, the proportionality discussion was either briefed by the parties or raised *sua sponte* by the court.

In other cases, courts ignored the narrower scope of discovery, instead focusing on the proportionality factors as limiting the scope of discovery. For example, in *State Farm Mutual Insurance Co. v. Fayda*¹⁸ the court held that changes to Rule 26(b)(1) do not matter, because “[r]elevance is still to be ‘construed broadly to encompass any matter that bears on, or that could reasonably lead to other matters that bear on’ any party’s claim or defense.” In *Henry v. Morgan’s Hotel Group, Inc.*,¹⁹ the court again noted the existence of the amended Rule 26(b)(1) but followed the lead of the *State Farm* court holding that discovery should be construed broadly.

The Committee Note accompanying the amendment to Rule 26(b)(1) does not support the view that broad discovery is limited only by proportionality. It clearly expresses the intent to permit discovery only if it is *relevant* to the claims and defenses in the action and *proportional* to the needs of the case. The Committee Note explains that subject-matter discovery was deleted because “[p]roportional discovery relevant to any party’s claims and defenses suffices, given a proper definition of what is relevant to a claim or defense.” In the same vein, language allowing discovery of information that is “reasonably calculated to lead to the discovery of admissible evidence” was deleted, because use of that language “might swallow any other limitation on the scope of discovery.”

Chief Justice Roberts agrees, emphasizing that the 2015 amendments are intended to change discovery practice: “Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case[.]” Chief Justice Roberts also noted that while “the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense,” it should “eliminate unnecessary or wasteful discovery.”

Slow Going for the Restructured Rule 37(e)

New Rule 37(e) has been evoked far fewer times than Rule 26(b)(1), but it is no less significant. It provides clear and comprehensive standards for courts to analyze and address failures to preserve ESI. Despite the Committee’s clear statement that the new Rule 37(e) “forecloses reliance on inherent authority or state law to determine when certain measures should be used,”²⁰ 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), because of the alleged spoliation of ESI.²¹

For example, in *CAT3, LLC v. Black Lineage, Inc.*,²² the defendants accused plaintiffs of altering email domains contained within produced email messages. The court held an evidentiary hearing and ruled that the plaintiffs had intentionally altered the emails. As a remedy, plaintiffs were precluded from factually relying upon the altered emails and ordered to pay defendants’ costs and attorneys’ fees. The court relied upon the court’s inherent authority in imposing the remedy, though it also made reference to both subdivisions (e)(1) and (e)(2) of new Rule 37 as well as.

Other applications of Rule 37(e) have been more straightforward. In *Securities and Exchange Commission v. CKB168 Holdings, Ltd.*,²³ the court (which initially found the defendants had destroyed evidence with “a sufficiently culpable state of mind”) revisited its pre-amendment sanctions award of specific jury instructions related to the alleged spoliation of evidence based on a briefing of Rule 37(e)’s application it allowed the parties to provide. It refused the first of two jury instructions because “[a] party cannot be sanctioned for spoliation without a finding that some spoliation occurred” and the second because imposing an adverse jury instruction required “a showing of a loss of ESI ‘because a party failed to take reasonable steps to preserve it,’ as well as ‘intent to deprive another party’ of the use of that information.”

In *Brown Jordan International v. Carmicle*,²⁴ the court ruled that the defendant had acted with “intent to deprive information” from plaintiffs, and it ordered an adverse-inference instruction for the jury based on new Rule 37(e). In *Ericksen v. Kaplan Higher Education, LLC*,²⁵ the court refused to grant dismissal (a sanction requested by defendants) because even though the plaintiff willfully destroyed data, dismissing the case was too harsh a sanction under the “high standard” of new Rule 37(e).

Conclusion

A survey of decisions from the first quarter of 2016 reflects that while some courts seem to understand the letter and spirit of the 2015 amendments readily, a majority of courts require more guidance. Judges risk losing the forest for the trees by issuing decisions that rely on deleted language, inapplicable caselaw or unsupported interpretations of the new Rules. Decisions that ignore ESI-related rule changes threaten to undermine the five-year effort to both narrow the scope of discovery and provide a meaningful safe harbor against sanctions for spoliation of ESI.

Practitioners must remind presiding trial court judges that new rules are in effect. Parties on the losing side of courts’ reliance on old discovery principles will need to appeal those defeats to federal courts of appeal. With time, surely the vast majority of federal judges will shake off their old habits and adjust to the new regime.

(Endnotes)

¹ Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary*, available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

² *Id.* (Citing Fed. R. Civ. P. 26(b)(1), Advisory Comm. Notes (2015) and noting that the amendment “restores the proportionality factors to their original place in defining the scope of discovery,” and “reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.”)

³ The present definition of the scope of discovery continues to refer to admissibility, but only by stating that “[i]nformation within the scope of discovery need not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b).

⁴ 437 U.S. 340 (1978).

⁵ *Id.* at 351 (emphasis supplied) (internal citation omitted).

⁶ 2015 U.S. Dist. LEXIS 166403, at *7 (S.D.N.Y. Dec. 10, 2015).

⁷ 2016 U.S. Dist. LEXIS 945, *21 (D.D.C. Jan. 6, 2016); see also, e.g., *Wit v. United Behavioral Health*, 2016 U.S. Dist. LEXIS 7242, at *35-36 (N.D. Cal. Jan. 21, 2016) (citing *Oppenheimer Fund* for the proposition that “[t]raditionally the relevance requirement of Rule 26(b)(1) has been construed broadly” despite acknowledging *Oppenheimer Fund’s* focus on “language contained in Rule 26 prior to 2015 amendments.”)

⁸ *Ghorbanian v. Guardian Life*, 2016 U.S. Dist. LEXIS 35454, at *5 (W.D. Wash. Mar. 18, 2016); *Torcasio v. New Canaan*, 2016 U.S. Dist. LEXIS 8103 (D. Conn. Jan. 25, 2016); *Trans Energy v. EQT Production Co.*, 2016 U.S. Dist. LEXIS 10530 (N.D. W.Va., Jan. 29, 2016) citing Fed. R. Civ. P. 26(b)(1), but noting December 1, 2015 amendments.

⁹ *Fid. & Guar. Life Ins. Co. v. United Advisory Grp., Inc.*, 2016 U.S. Dist. LEXIS 18773, (D.Md Feb. 17, 2016) (citing case referring to “reasonably calculated” but then, inserting “proportionality” requirement into the amount and content of the discovery sought.).

¹⁰ 2016 U.S. Dist. LEXIS 18829 (M.D. Pa. Feb. 17, 2016).

¹¹ 2016 WL 744559, * 2 (Feb. 22, 2016).

¹² Committee Note, 16, Initial Proposal, at 296 of 354.

¹³ Committee Note, 19. The original rule is found at 97 F.R.D. 165, 215 (1983) (Rule 26(b)(1)).

¹⁴ Fed. R. Civ. P. 26(b)(2)(C)(iii) (emphasis added).

¹⁵ 2016 U.S. Dist. LEXIS 20182 (N.D. Tex. Feb. 19, 2016).

¹⁶ 2016 U.S. Dist. LEXIS 18211 (N.D. Ind. Feb. 16, 2016).

¹⁷ 2016 U.S. Dist. LEXIS 5616 (N.D. Cal. Jan. 13, 2016).

¹⁸ 2015 U.S. Dist. LEXIS 162164 (S.D.N.Y. Dec. 3, 2015).

¹⁹ 2016 U.S. Dist. LEXIS 8406, at *8-9 (S.D.N.Y. Jan. 25, 2016).

²⁰ Fed. R. Civ. P. 37(e), Committee Note.

²¹ See, e.g., *CAT3, LLC v. Black Lineage, Inc.*, 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016).

²² 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016).

²³ 2016 U.S. Dist. LEXIS 16533 (E.D.N.Y. Feb. 2, 2016).

²⁴ 2016 U.S. Dist. LEXIS 25879 (S.D. Fla. Mar. 1, 2016).

²⁵ 2016 U.S. Dist. LEXIS 20819 (D. Md. Feb. 22, 2016).