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2017: The Year of Proportionality

In 2017, the expectation will be even higher for counsel to have adopted and be proficient with FRCP rules.

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Of the many changes that emerged from the 2015 FRCP amendments, none has spurred uncertainty within the legal community as much as Rule 26(b)(1) and its emphasis on proportionality. Judges and counsel alike have wrestled to apply the new rule, leaving 2016 case law rife with complex, fact-based interpretations. Even the Sedona Conference issued a publication addressing this issue in their recent publication, *Commentary on Proportionality in Electronic Discovery* (with public comments due Jan. 31, 2017). As we head into 2017, one conclusion is certain: Proportionality is here to stay.

What Is Proportionality?

Rule 26(b)(1) provides a list of factors, requiring parties to take into account "the amount in controversy," "the parties' resources" and "the importance of the issues at stake in the action," among other factors. At its core, proportionality is about balance, ensuring that parties receive the information they need to plead their claims and argue their defenses, while curtailing expensive and time-consuming waste. While the concept of proportionality seems simple enough, applying it can be difficult for parties.

One mistake counsel make is to look at the factors involving monetary expenditures and stop their analysis there. However, as the Sedona Conference Publication indicates, this is just the beginning of the analysis. Courts care about the claims at issue, and they still have the same commitment to ensuring that parties will have the relevant information that they need. Relevance still matters, but it no longer stands alone. Courts are now more likely to say "no" to requests that are designed to burden parties and have relatively little value.

Another mistake that counsel make is to tell a judge that a discovery request is not proportional but then offer no suggestion as to how a request can be altered to make it so. If a discovery request is too broad, offer a suggestion as to how it can be narrowed, and be prepared to show the court documentation for costs involved. Where scope of discovery is in dispute, show the court a

willingness to cooperate and be in contact with the opposing party when issues arise, rather than filing a motion to compel at the first sign of conflict. In 2017, more Rule 26(b)(1) opinions will have judges admonishing parties for failing to attempt to cooperate with each other. In fact, in the latter part of 2016, judges were increasingly reminding parties that the court is a last resort—not the first—when it comes to managing scope of discovery.

What We Have Learned in 2016

A blanket rule cannot be crafted to determine whether a request is proportional. In many of the Rule 26(b)(1) opinions in 2016, the courts took each specific discovery request and applied proportionality to the facts at hand. While judges might not be able to define proportionality, they recognize it when it is presented to them. When the proportionality analysis is so fact-specific, the job of counsel is to demonstrate to a judge how proportionality can work in the case. In a world buried in data, to be successful in gaining access to the most critical information, counsel must see proportionality as a tool and not a constraint.

In 2017, the expectation will be even higher for counsel to have adopted and be proficient with the new rules. Judges will have less and less patience for those who still apply the old "reasonably-calculated" language of Rule 26(b)(1). While in 2016, some courts themselves were still applying the old standard, in 2017, courts will expect parties to have fully acclimated themselves to the new rule. Courts are getting tired of paring down broad discovery requests and instead are sending the dispute back to the parties with orders to attempt to resolve the issue themselves.

Before the 2015 amendments took effect, the legal community was unsure whether the new emphasis on proportionality meant a material change in ediscovery. The opinions of 2016 have shown that judges have more than wrestled with proportionality; they have embraced it. Gone are the days in which parties can ask for everything and, frankly, strategic litigators know they do not want to be overwhelmed with all that useless data. 2017 will be the year of proportionality, and it is up to counsel to keep pace.

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