

# Client Alert

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## Amendments to Rule 26 of the Federal Rules of Civil Procedure “Restore” Proportionality in Discovery

Several amendments to the Federal Rules of Civil Procedure became effective on December 1, 2015. Of particular note are the changes to Rule 1, which defines the scope and purpose of the Rules, and to Rule 26, which governs discovery. Rule 1 now requires “the courts and *the parties*,” to construe, administer and employ the Rules “to secure the just, speedy, and inexpensive determination of every action and proceeding.” (Emphasis added.) Rule 26, as amended, emphasizes that a party may only obtain discovery as to any “nonprivileged matter that is relevant to any party’s claim or defense,” and removed the frequently misunderstood (and misapplied) language regarding discovery “reasonably calculated to lead to the discovery of admissible evidence.”

More importantly, Rule 26(b)(1) now states that the information sought must be “proportional to the needs of the case.” Accordingly, the five factors — the 2015 iteration of the Rule added one factor — that cabin the scope of discovery have risen in prominence. The proportionality factors are: (i) “the importance of the issues at stake in the action”; (ii) “the amount in controversy, the parties’ relative access to relevant information”; (iii) “the parties’ resources”; (iv) “the importance of the discovery in resolving the issues”; and (v) “whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1) (2015). A party resisting discovery has the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b).

Federal district courts that have applied the amended version of Rule 26 have stressed the importance of proportionality and refused to require the production of information that, although reasonably calculated to lead to the discovery of admissible evidence, was not proportional to the needs of the case. In *Roberts v. Clark County School District*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 123320 (D. Nev. Jan. 11, 2016), the plaintiff asserted claims of gender discrimination and emotional distress. The plaintiff, who was born biologically female and identified as female until undergoing gender transition, alleged that he was “subjected to inappropriate comments pertaining to his sexuality and experience, and to overly intrusive and unnecessary demands for information about his gender and genitalia” by his employer.

The employer sought to compel the production of documents relating to the plaintiff’s gender transition. Specifically, the employer asked the plaintiff to “identify every healthcare provider who ha[d] examined or treated [the plaintiff] for the last ten years regarding his gender transition[,]” and produce “all documents including medical records pertaining to any surgeries [the plaintiff] had ... and/or drug or hormone therapy undergone related to gender transition.” At bottom, the employer argued that “it [was] entitled to the discovery it [sought] because [the plaintiff was] attempting to assert a Title VII discrimination claim based on his transgender status and [he] therefore put his anatomy and the medical records that establish the details of his transition at issue.” The plaintiff argued that the requests were “overly intrusive” and outside the “bounds of what is discoverable under federal law.” The district court agreed with the plaintiff and characterized the discovery sought by the employer as “grossly disproportionate to what [the employer] need[ed] to know to defend itself from claims that [it] discriminated against [the plaintiff.]”

In a patent-infringement case out of the Northern District of California, *Gilead Sciences, Inc. v. Merck & Co, Inc.*, No. 5:13-CV-04057-BLF, 2016 WL 146574 (N.D. Cal. Jan. 13, 2016), the plaintiff’s expert produced photographs of various test tubes containing synthesized chemical compounds. The label on one of the

tubes indicated the identical molecular weight of the compound to which the defendant claimed it held the patent. The expert testified in a deposition that he received the compounds prior to the patent date. Thus, timing became a key issue in the case.

Based on the expert's testimony, the defendant demanded that the tubes and their contents be produced. The district court denied the defendant's motion to compel, finding that the defendant's demands were "exactly the type of disproportionate demands Rule 26(b)(1) proscribes." The court pointed out that any number of compounds might share the same molecular weight as the compound at issue. Moreover, the plaintiff produced a laboratory notebook and a letter that confirmed the tubes in the photo did not contain the compound at issue. The defendant argued that it should not have to take the plaintiff's word for what was in the tubes.

The district court acknowledged that the information the plaintiff produced (the laboratory notebook and the letter) could have been "false or ... concocted," but the court refused to compel production of the tubes. To do so, the court stated, would put the plaintiff in the "untenable" position of having to "produce discovery on all sorts of compounds" that had no "nexus to the dispute in th[e] case." That sort of "disproportionate discovery" is impermissible under Rule 26.

In instances in which a party has failed to meet its burden of showing that the requested discovery was not proportionate to the needs of the case, the requested discovery has been compelled. In *Carr v. State Farm Mutual Automobile Ins., Co.*, No. 3:15-CV-1026-M, 2015 WL 8010920 (N.D. Tex. Dec. 7, 2015), a case arising out of an automobile accident, an insurance carrier sought "documents reflecting payments that [the p]laintiff received as a result of the accident at issue, documents reflecting other indemnity and insuring agreements covering [the p]laintiff at the time of the accident, and documents sent by [the p]laintiff or his attorney to any insurance company after the accident related to [the p]laintiff's personal injury claim." The plaintiff objected to the requests on the grounds that the information sought was "not relevant nor reasonably calculated to lead to the discovery of admissible evidence." The district court held that the information was "discoverable under Rule 26(b)(1) and proportional to the needs of the case," and ordered the plaintiff to produce the information.

In light of the amendments to Rule 26, and the cases applying the Rule, in order to meet its burden, a responding party needs to come forward with specific reasons as to why the requested discovery is not proportionate to the needs of the case. This will require parties to implement discovery plans for responding to discovery requests, especially in those cases involving electronically stored information, which include identifying the sources of relevant information, identifying sources of electronically stored information that are not reasonably accessible, and determining the cost that will be associated with the collection, processing and review of the electronically stored information.

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