Reinventing Discovery
under the New Federal Rules

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They did it again. Only this time, it's a whole new ballgame. Just as we were mastering our craft under the last iteration of the Federal Rules of Civil Procedure, they changed them. This happens. In the past 25 years, the Federal Rules have gone through five substantive revisions.

We all need to play by the rules, but what are we to do when the rules keep changing? Simply understanding how the new ones differ from those we already know might be sufficient when the revisions only nibble around the edges, sandpaper out rough spots, or make some technical adjustments.

But these new rules are a paradigm shift. If the December 2015 revision to the Federal Rules could be compared to football regulations, it's as if the field shrunk to 70 yards, the downs per possession were lowered to three, and fumbles resulted in automatic do-overs.

Of course, the object remains the same, as does the essential nature of the process. We still get to offer evidence, make motions and arguments, and try to persuade judges or juries to rule in our favor. But in discovery—when we collect evidence, refine settlement calculations, posture the case for mediation, alter the parties' risk tolerance, and typically bring the case to an end—the new rules are a game changer.

Intentionally so. The driver behind them was a well-organized push to change discovery in a big way, largely by narrowing its scope and downsizing the consequences for losing evidence, all ostensibly to make litigation faster and cheaper.

Because discovery is essential to the outcome and soaks up so much time and money, we do our clients no service by treating these new rules as a mere tweak. We need to take command of them and make them work to our advantage. We need to make sure we still get the evidence we need while neutralizing our opponents if they want to fight over evidence they don't need. To do this, we need to make our own paradigm shift in how we litigate.

So how do we strengthen our discovery playbook to make these changes work to our advantage? Let's first look at these changes in the context of the history that produced them. The discovery rules have always had bright lines and fuzzy ones. The bright lines are easy to navigate. They spell out things like how many interrogatories you can ask, when you can serve a document request, or what topics you must address in your automatic disclosures. The fuzzy ones generate the quarrels, largely boundary disputes over what must be disclosed or produced.

What Went Wrong with the Old Rules

Because issues fluctuate from case to case, the rules cannot define that boundary with precision. Instead, they describe it with a narrative that requires interpretation and case-specific

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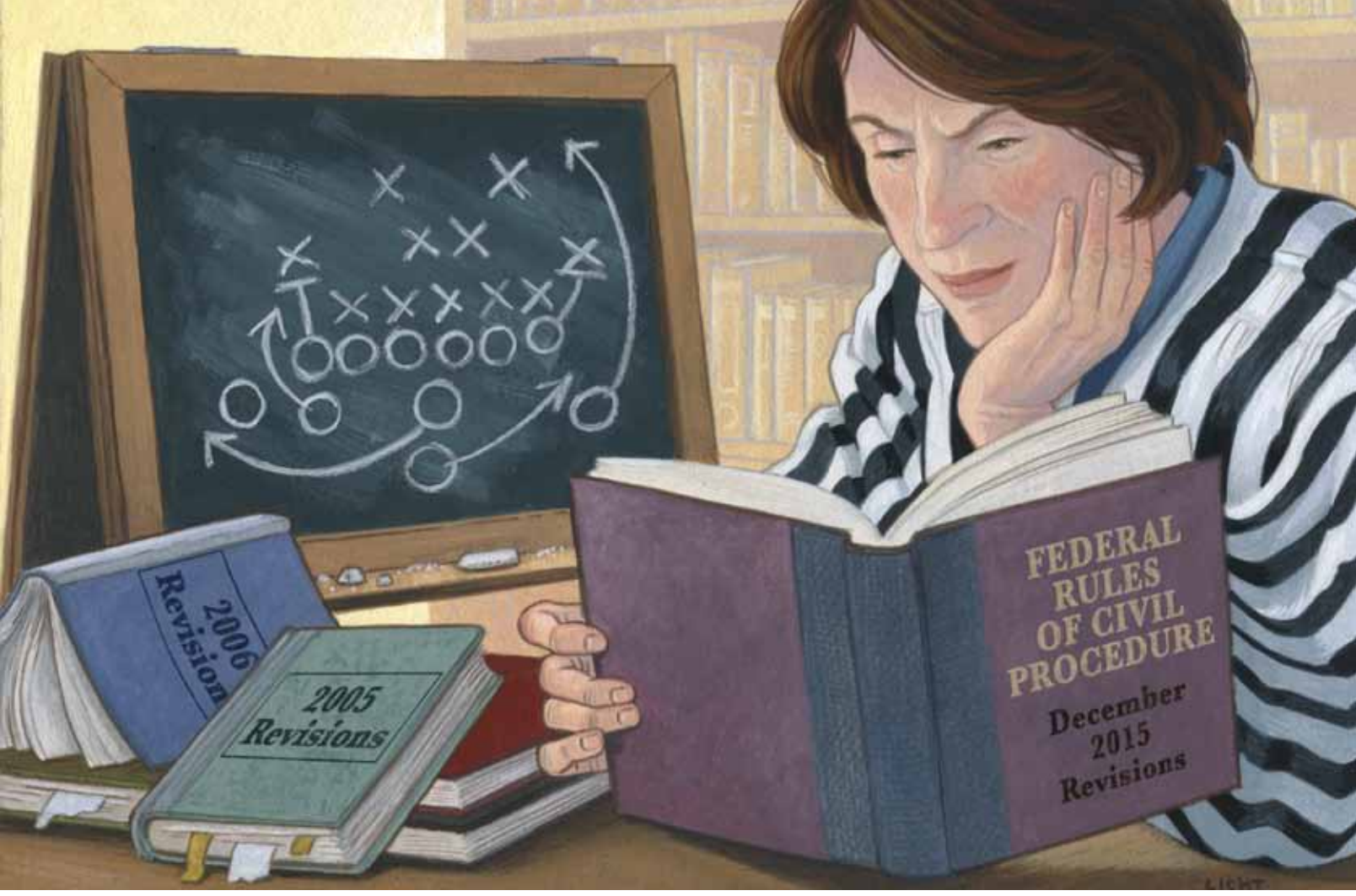

application. Before 2000, Rule 26 described it this way: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." The rule also allowed parties to ask about the location of potentially discoverable documents and the identity of knowledgeable witnesses, and it pushed out the boundary even further by allowing discovery of information "reasonably calculated to lead to the discovery of admissible evidence."

Not surprisingly, many judges read the rule broadly, permitting discovery even if only tangential to the dispute. That was the intent. If the discovered information turned out to be inadmissible, there would be no harm because the information would not come into evidence. Those discovery boundaries were premised on a utopian vision—open up everyone's evidence and justice will be done. Everyone would know everyone else's facts, parties would be informed to make a merits-based settlement, and, should trial be necessary, counsel would have access to all conceivably relevant information. What could possibly go wrong?

What went wrong was the ensuing discovery explosion and the disputes it generated. Information is a valuable commodity in litigation, worth spending money either to get or to keep someone else from getting. With nearly limitless discovery allowed in an adversary system, is it any wonder that litigators would chronically engage in discovery battles, fought on a huge Rule 26 battlefield that called on judges to decide, case by case, what was relevant to the subject matter or likely to lead to discovery of admissible evidence?

While, in theory, much could fit within the stated scope of permissible discovery, the theory didn't account for practical factors such as time, expense, business disruption, lack of utility, confidentiality, and resource disparities. Over time, some judges were persuaded to narrow permissible discovery while others continued to read the rule broadly. The differences in enforcement resulted in an uneven and unpredictable application, generating even more disputes.

After a half-century of conflict and bloodletting, what started out as utopian had become dystopian. While the enormous transaction costs of discovery battles stimulated more settlements and cleared litigation dockets, the results were hardly satisfactory from the perspective of producing cost-efficient outcomes, let alone just ones. Those who did better often had deeper pockets and a higher risk tolerance, not necessarily better cases.

Parties tried to turn discovery disputes into settlement or litigation advantages simply by seeking more than they needed or withholding more than the rule might have allowed. While judges could impose sanctions for abuses, it was hard to sanction

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someone for stepping over a line that Rule 26 defined so poorly. Case resolutions often favored those who best understood how to apply the pressure points that Rule 26 created. It was justice by attrition.

The 2000 Rule Revision

Finally realizing that Rule 26 did not create the ideal playing field, the drafters revised the rule in 2000 to create a new scope of discovery, with boundaries thought to be clearer and more circumscribed: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." While this was narrower than "relevant to the subject matter"—the problematic words that produced fishing expeditions—the drafters still were reluctant to outlaw subject matter discovery altogether. After all, fishing expeditions sometimes produced important and relevant fish that did not always swim close to shore.

To leave the door ajar, the drafters compromised. They put subject matter discovery under a good-cause standard and made it subject to court approval: "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Likewise, they felt uneasy about discarding discovery that could "lead to the discovery of admissible evidence," even though that phrase helped to blur the boundary.

So they changed it, but just slightly. The old rule said: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The 2000 revision said: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

Both versions intended to make certain information discoverable if likely to lead to admissible evidence. In the pre-2000 rule, that standard applied to information relevant to the subject matter; in the 2000 rule, it applied to information relevant to the claim or defense.

The difference proved too subtle and too hard to apply. If information was reasonably calculated to lead to admissible evidence, there seemed no principled distinction for automatically allowing its discovery if relevant to the claim or defense but allowing its discovery only for good cause if relevant to the subject matter.

Anticipating that this revision would still not moderate discovery enough, the drafters of the 2000 revision enhanced a mechanism first introduced into the rule in 1983 but seldom used—the judge's authority to scale back a discovery request that appeared overreaching based on whether the request was proportional to the needs of the case. The 2000 revision was just a tweak, though, an added sentence cross-referencing another part of the rule that described this authority. That revision did little to change things.

While the proportionality provision gave judges leeway to deny discovery of information relevant to a claim or defense, and while the good cause provision gave judges leeway to allow discovery of information relevant to the subject matter, it took a discovery dispute and a motion to make that happen. Because the boundaries were not very clear, the disputes and motions did not seem to abate.

Two events also conspired to keep the 2000 revision from having its intended transformative effect.

One was the electronic revolution—the abundance of discoverable information so easily created, modified, and shared, all digitally, and stored in multiple electronic locations and formats. Digital progress made all document handling easier, except for producing them in lawsuits. Discovery shifted from file cabinets and banker boxes to the digi-sphere. The volume of discoverable electronic information was constantly growing, making it more difficult to find and collect, to review for responsiveness and privilege, and to produce in useable fashion, all of which magnified the burden and expense of document production exponentially.

> The more lawyers learned that these disputes could alter the settlement landscape, the more these disputes proliferated.

The other was the surge in spoliation motions. In the 20th century, spoliation motions were rare. When documents, even critical ones, went missing or were altered, the problem was often addressed by rules of evidence and reserved for handling at trial as an issue of fact, rather than as a discovery problem. The best evidence rule was created precisely because documents sometimes got lost: If the original disappeared, a party could offer secondary evidence of its contents. *See* Fed. R. Evid. 1002.

Electronic discovery catalyzed spoliation issues and pushed them into the discovery phase. In a paper world, when a document vanished, no court order could bring it back. But in an electronic world, a missing document might not really be missing. It might have been deleted, altered, or moved, yet still exist in one form or another, in one computer or another, or in a

storage device. It might be subject to recovery by a computer forensic expert. Or it might just be lost in a digital haystack, buried in some poorly organized document management system, yet searchable and retrievable.

That gave lawyers something to fight about—what efforts should be made to resurrect or find it, who should control the process, and who should bear the expense? These were 21st-century discovery fights, not often seen before the 2000 rule revisions. And when it appeared as if the trouble and expense of bringing a document back from the dead was not worth the effort, or if the effort proved unsuccessful, courts were now prone to impose a consequence, using the array of sanctions available under Rule 37 meant to deal with parties who failed to cooperate in discovery. Those consequences could be case-altering, leading even to default judgments or dismissals, all while in the discovery phase.

The more that lawyers learned of these disputes and how they could alter the settlement landscape or secure a case-dispositive sanction, the more these disputes proliferated. Discovery became not simply an exchange of potentially relevant evidence but a hunt to discover whether documents had gone missing. Discovery fights were not just about where to draw the line but about electronically stored information (ESI) that had "disappeared" and what the consequences should be.

In 2006, the drafters amended the rules in an attempt to manage this, but those amendments merely precluded sanctions if the ESI were lost due to routine, good-faith operations of an electronic information system. In the fullness of time, the bench and bar saw that the 2000 and 2006 rule revisions were not up to the task of dealing with how the discovery tail was wagging the litigation dog.

In these two areas—where to draw the line and how to control disputes over missing ESI—the 2015 rule revisions make the biggest changes.

The New Rules

First, let's consider the new boundary line. Rule 26 starts by defining the universe of discoverable information in the same way as the 2000 revision: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." But it now says nothing about discovery of information relevant to the subject matter, even with good cause. Nor does it expressly allow discovery of matter likely to lead to admissible evidence.

The implication is clear. Matter relevant to a party's claim or defense is in play. Everything else is out of bounds. A party who wants to discover something will have to persuade the opponent or a judge that the information sought is somehow relevant to a claim or defense.

And there's more. The new rule states that something is not discoverable unless it is also

> 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.

While proportionality in one form or another has been a ground for objection for over 20 years, the 2015 placement of the proportionality clause into the defined scope of discovery means that it now will be a more prominent and important factor, albeit a subjective one and a fuzzy line, in determining what is and isn't discoverable.

For clarity's sake, the new rule states that information need not be admissible to be discoverable. In this respect, the new rule is like its predecessors, eliminating rules of evidence as bases for discovery objections.

The new rule also eliminates the language about obtaining discovery regarding the location of documents and the identity of witnesses, but, unlike other changes, this one was not intended to change the scope of discovery. According to the advisory committee notes, discovery about where the facts might be found is so ingrained in the system and so relevant to claims and defenses that there was no need to mention it in the rule.

Now let's consider what happens when ESI disappears. The changes are in Rule 37(e). The old rule addressed when missing ESI would *not* draw a sanction, providing somewhat of a safe harbor, but did not speak to when missing ESI *could* be sanctioned or what that sanction should be. The 2015 version now addresses both "when" and "what," putting many hurdles in the way.

It begins by stating that there can be no sanctions unless "a party failed to take reasonable steps to preserve [the ESI]." Of course, what is "reasonable" depends on the circumstances and involves factors similar to the proportionality factors as well as the parties' sophistication. Perfection is not required. If ESI is lost despite reasonable preservation steps, the party is protected. But don't be fooled—"reasonable steps" means that mere negligence may suffice for sanctions if other elements are present.

Before sanctions may be considered, though, the court must also be satisfied that the missing ESI "cannot be restored or replaced through additional discovery." If additional discovery can make up for the missing material, sanctions are off-limits.

Only if all three of these conditions exist—ESI has been lost, the party who lost it failed to take reasonable preservation steps, and the information cannot be restored or replaced through other discovery—may sanctions be considered. But there are still more hurdles to jump, for the road to sanctions forks at this point.

One road addresses missing ESI when there was no intent to prevent another party from using it in the litigation. On this path, sanctions may be entered against parties who negligently

or recklessly allowed the ESI to disappear or who intentionally deleted it for reasons other than to keep it from being used in the lawsuit. The court still can't impose a sanction unless it finds "prejudice to another party from loss of the information." While the rule does not assign the burden of proving or disproving prejudice, as a practical matter the party seeking sanctions most likely will face the burden of persuasion because prejudice is required for the sanction. If the court finds prejudice, its sanction must be "no greater than necessary to cure the prejudice." The sanction thus is restorative only, not punitive, and not meant to give the other party a tactical advantage. It is simply to put the other party where it otherwise would have been, taking into account, according to the advisory committee, "the information's importance in the litigation."

Almost always, whichever side appears more reasonable will be better off.

The other road addresses missing ESI when the court finds that the responsible party intended to prevent another party from using it in the lawsuit. In that instance, the court need not find prejudice and "may presume that the lost information was unfavorable to the party; instruct the jury that it may or must presume the information was unfavorable to the party; or dismiss the action or enter a default judgment." None of these sanctions is mandatory—what the court chooses to do or not do is within its discretion, reviewable only for abuse.

Using the New Rules to Advantage

What can we distill from this combination of Rule 26 and Rule 37 changes? And what can we do in light of them that will make us more effective litigators? Here's a concise list of the teachings:

- The universe of discoverable information is smaller than before. We should not need to produce as much. We should not expect to get as much.
- The boundary between discoverable and non-discoverable information remains blurry. Instead of fencing over whether the requested information is related to the subject matter or likely to lead to admissible evidence, the parties will fight over whether the information is relevant to a party's claim or defense. This might be a more difficult boundary to establish. In the forest of information relevant to the subject matter or likely to lead to admissible evidence, the boundary was the forest's outer edge. Now, it runs right through the forest but with no easily located demarcation. It will be shaped and defined as the parties go along.
- Less ESI will be preserved. Under the old rules, clients were well advised to take aggressive or even extreme measures to preserve ESI, fearing stiff sanctions should the preservation efforts later be found wanting. Now, with the stiffest sanctions reserved only for those who intentionally bury evidence to hide it from another party, with fairer consequences for those who have less culpability, and with a smaller universe of potentially discoverable information, parties can be expected to loosen their preservation practices. Old habits die hard, so it may take a while for this to happen.
- Less energy will be spent chasing missing ESI. With most of the "gotcha" element removed, and with intentional spoliation likely to be the exception rather than the rule, hunting for missing ESI won't be fruitful as often. If discovery reveals that ESI disappeared, lawyers will search into the details but won't be lusting for missing ESI as a primary discovery strategy.
- Proportionality will be the key metric by which discovery requests and objections will be measured, and it will be the primary basis on which discovery disputes will be decided. Almost always, whichever side appears more reasonable will be better off.

Mindful of these points, you can earn the discovery and litigation advantage in several ways. At the outset, it would be smart to create a thorough list of each claim and potential defense, each factual or legal issue raised by each claim or defense, and each underlying fact to be proven or refuted on each issue. The list will be dynamic—new issues will emerge as the case evolves, each to be added to the list along with the underlying pertinent facts.

This list will guide your presumptive discovery boundary. It will inform what you need to request and tie those requests to the claims and defenses in suit. If you are pressed to explain how a discovery request falls within Rule 26, this list will have the answer.

Before the initial Rule 26(f) conference, give thought to how to structure a discovery program that will serve your needs with proportionality in mind. For example, is there information asymmetry—a significant disparity in the amount of discoverable information each party has? If the other side knows most of the facts, has most of the important documents, and employs most of the key witnesses, you will want to pursue a discovery

program that permits more depositions and has fewer discovery-event limitations.

Is there an imbalance in the parties' resources? If so, and if you represent the one with more money, consider how you will structure your discovery program without being or appearing overbearing. If you represent the party with fewer resources, consider how you will deploy them to yield the biggest bang for the discovery buck.

Are some issues more important than others? If so, can you offer or solicit some stipulations on the lesser issues so that you and your adversary can concentrate on the important ones? If your adversary declines to stipulate, that could justify a more probing discovery program should the other side later raise a proportionality challenge.

When evaluating the importance of the issues and the discovery needed to flesh them out, does your analysis identify whether more than money is at stake? If there are legal or precedential issues whose importance cannot be quantified, can they be marshaled to support the discovery program you feel you need?

Before the Rule 16 conference, consider trying to reach agreement with opposing counsel on a list of issues in dispute, not necessarily at the level of granularity as in your private issues list, but at a higher level. If you have an uncooperative opponent, consider unilaterally identifying top-level issues, with the caveat that the identification might be incomplete at that early stage of the dispute.

This will serve two purposes. First, if your opponent does not dispute or add to your identification of issues, then your identification, coupled with your opponent's silence, should give you cover for the discovery requests you will make. It should also cover you for objections you might later assert if your opponent serves a request not logically tied to an issue you identified. As you wade further into the case and identify new issues, you can disclose them, add them to your list, and expand the scope of discovery.

Of course, you'll need to balance the benefits of that approach against the risk of educating your opponent prematurely about issues you might prefer to surface later. But absent a meaningful strategic disadvantage, proactively identifying and disclosing issues before the Rule 16 conference can go a long way in resolving later discovery disputes in your favor.

Second, by identifying your issues early, you also will stake out the contours of an ESI preservation program. If your opponent will not engage with you in an honest and early discussion about the issues, you opponent will be hard-pressed to complain later about missing ESI if it pertained to issues not identified at the outset. And if your opponent rises to the occasion and adds to your issues list, you can make sure you cover those additional issues when drafting litigation holds and working with your client to craft reasonable ESI preservation guidelines specific to the lawsuit.

Remember that new Rule 37 requires only reasonable preservation, not perfect preservation. The more you can work with opposing counsel to tailor an ESI-preservation program for identified issues, the more reasonable your client's preservation efforts will appear and the less ESI-related risk your client will face. If opposing counsel does not implement an ESI-preservation program covering the issues you both have identified, you've bought yourself a Rule 37 advantage.

A smart new way of scoping the issues is to send a document request to opposing counsel before the Rule 26(f) conference. Under amended Rule 26(d)(2), an early document request may be delivered by or to a party 21 days after service of the complaint on that party. Although the 30-day response clock does not start until the first Rule 26(f) conference, an early document request can help flesh out scope issues at the Rule 26(f) conference itself. This can lead either to a revision of the request or to identifying issues for discussion and resolution with the judge at the Rule 16 conference.

Another consideration is whether opposing counsel will join you in asking the court to order—under new Rule 16(b)(3)(v)—that "before moving for an order relating to discovery, the movant must request a conference with the court." Pre-motion conferences with the judge are not available as of right, but they are available if the court provides for them in a Rule 16 order. If the judge offers them, accept; if the judge does not offer them, ask.

For one thing, pre-motion conferences are a powerful time-saving and cost-reducing tool. A phone call with the judge usually brings a quick end to an emerging discovery battle, thus obviating what would otherwise require expensive briefing. If you and your client have conducted yourselves as the rules envision, your opponent may well appear unreasonable and the result most often should go your way.

For another, pre-motion conferences give you a chance to educate the judge about your case themes. What you hear from the court in response is precious feedback—you'll have a better sense of how the judge sees your case, whether you need to change course, and, if so, what new directions you should pursue.

Naturally, be sensible about whether, when, and how often to ring the judge's phone. Some judges are very approachable, but many are not. A welcome mat is not an open invitation. Call or write if necessary, but before you do, make every effort to resolve your discovery dispute without having to bother the court.

Changes in Approach

What about the discovery requests themselves? Do the new rules call for any changes in approach? Of course they do, for in this new regime, proportionality is king.

Here's an irony that shows up most often in document requests. Document requests can be either narrow, seeking specific

items, or broad, asking for documents fitting categorical descriptions. Asking for production of a specific contract is a razor-sharp request—it requires just one shortly worded specification, seeks only one document, and should not give rise to an objection for overbreadth. If you wrote a Rule 34 request with 100 similarly narrow specifications, each asking for production of a single document, it should not be burdensome at all. Yet, the sheer number of requests could create the false impression that, in toto, the request is disproportional to the needs of the case.

The strategic objection helps the judge rule in your favor.

On the other hand, if you wrote a Rule 34 request comprising just one paragraph asking for all documents pertaining to the drafting, negotiation, *or performance* of the contract, it could easily call for production of thousands or tens of thousands of documents. And even though not every document pertaining to the contract's performance would be relevant to the claim or defense, the phrasing of the request makes it sound as though it falls squarely within the new Rule 26 sweet spot and thus might not, at least on the surface, seem objectionable.

In the prevailing Rule 34 culture, most specifications in a document request are of the categorical variety. The rules expressly permit it, and it is hard to quarrel with their efficiency based on document yield per specification. But to a judge or magistrate judge, a Rule 34 request with 100 narrowly tailored paragraphs might well at first blush raise more eyebrows than one with 25 broadly phrased categorical requests. In a world that separately counts and caps the total number of interrogatories, the natural tendency is to count specifications in a document request separately as well, even though the rules contain no similar cap on document requests.

Crafting a Rule 34 request in the age of proportionality therefore requires some balancing. Each specification, especially categorical ones, should be defensible if challenged, and the total number of specifications should seem reasonable when measured against the proportionality factors described in Rule 26.

There is no precise formula here; it's all case-specific. Taking into account the context your case provides, this might involve consolidating requests that you otherwise would write out in separate paragraphs or, instead, breaking down categorical requests into smaller chunks. Prune your requests of anything you can get from your client, your own files, the Internet, public records, and other sources. And if appropriate, consider whether it makes sense to subpoena documents from nonparty witnesses under Rule 45 to help minimize what you must seek in discovery from the opposing party.

However you draft your requests, note this observation in the advisory committee notes. The new rules *do not*

> place on the party seeking discovery the burden of addressing all proportionality considerations. . . . The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party.

Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment.

So when considering proportionality, don't sell yourself short. While you have a responsibility to be judicious in how you use discovery, your primary duty is to secure relevant evidence to pursue your client's claim, to defeat the opposing party's claim, or to achieve a favorable settlement. And because no one, including the court, knows in advance where the precise boundary lies, you deserve some latitude, though you always risk being second-guessed.

Discovery Reponses

The new rules also affect discovery responses. Proportionality is in. Burden and overbreadth are out. "Disproportional" is the new "burdensome and overbroad" objection. But the change in vocabulary—from burdensome and overbroad to disproportional—does not justify asserting a disproportionality objection reflexively or in boilerplate fashion. Just the opposite.

The 2015 version of Rule 34 seeks to squeeze boilerplate objections out of the system. It now requires objections to "state . . . *with specificity* the grounds for objecting" and, further, "whether any responsive materials are being withheld on the basis of that objection." When coupled with the preexisting requirement that an "objection to part of a request must specify the part and permit inspection of the rest," the new rules are designed to end the odious practice of asserting a boilerplate objection followed with "subject to this objection, the plaintiff will produce responsive documents."

Those were faux responses. They left the other side wondering what documents among those requested would be produced—all, none, or only some unspecified portion? If the party was producing *all* the requested documents, then what was the point of the objection? If the party was producing *none*, then why say that responsive documents would be produced? And if

the party was planning on producing *some* but not others, what was being withheld and how would the requesting party know?

That form of objection was a dirty trick—an Eddie Haskell of an objection, disguised with a patina of respectability because it was used by so many, yet craftily masking its true object of holding back documents and frustrating the opposing party. Following precedent set by lawyers who came before them, generations of litigators have used that sharp practice without realizing how unprofessional it is.

Under the new rules, don't expect to win a discovery dispute if you rely on boilerplate objections or fail to specify what part of the request you deem objectionable. Forget about asserting such an objection in the form of a "General Objection" to all requests "to the extent that they seek documents that are disproportional to the needs of the case." Such an objection has no utility; it signals that you lack confidence in your specific objections and may be intent on holding things back indiscriminately.

If you believe that the request is disproportional to the needs of the case, that objection should not be stated simply by parroting the words of the rule. Cutting and pasting those words and phrases is still boilerplate. Rather, a properly stated specific disproportionality objection would look something like this:

> Defendant will produce the documents requested in paragraph 12, except for applications for car loans between 2006 and 2012 on the ground that that portion of the request is disproportional to the needs of the case for the following reasons: (a) those applications did not contain the fee schedule at issue in this case; (b) those applications are archived electronically on a legacy system that is no longer in use and whose reactivation would entail great expense and require diverting attention of three employees from defendant's Information Technology department for an extended time, rendering them unable to serve ongoing company needs; and (c) those applications would not shed light on whether defendant defrauded the plaintiff class, a class defined as persons who submitted car loan applications on or after March 1, 2013.

Note the difference. When boilerplate is used, the response generally leads with the objection—anything to be produced is stated as an exception to the objection. Such a sequence exudes confrontation, not cooperation. But so framed, it won't scare your opponent as much as put the judge in a bad mood.

A strategic objection, by contrast, leads with saying that the requested documents will be produced. It then states the objection as an exception, telegraphing that you are producing what you deem to be relevant but making a reasonable judgment about where to draw the line.

The strategic objection also shows that you have thought through the objection, rather than objecting to be obstreperous. Instead of reflexively copying the words of the rule, the strategic objection identifies what is not being produced and explains why it is disproportionate to the needs of the case. It helps the judge rule in your favor.

When litigating under the new rules, we all should keep in mind the most benign but perhaps most relevant revision. Rule 1 used to state that the rules were to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The 2015 revision inserted a subtle but significant change: The rules are to be "construed, administered, and employed by the court *and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."

As the Advisory Committee noted, this is not a change in substance or an effort to create a new source of sanctions; it is a change in emphasis, reminding counsel and the parties of their duty to cooperate and be reasonable: "Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."

Will the amended rules end discovery disputes? Plainly not. Lawyers still will have honest disagreements over the scope of discovery and still will have boundary disputes, though now over differently defined boundaries. Some lawyers, in fits of zeal, will find it hard to resist the impulse to be more aggressive than what might be in their client's best interest.

And, inevitably, the new rules will disadvantage some litigants who were better off before, and vice versa. This is unavoidable. Whenever the scope of allowable discovery is reduced, someone, maybe even both sides, will end up getting less evidence.

But in the end, the advantage won't necessarily go to the party who gets more evidence or produces less evidence; it will go to the party who holds better evidence. The success of the new rules cannot be measured by how much or how little evidence is obtained or produced; it is measured by whether the overall quality of justice increases.

Will wars of discovery attrition decline in number? Will the cost of litigation decrease for most parties? Will litigators shine their attention more effectively on what they truly need to pursue to protect their clients' interests?

Under this new regime, the edge will be earned by those who have a keen focus, who understand which issues are more important than others and what fights are worth fighting, who avoid game playing, who seek to reach agreement and to narrow issues with opposing counsel, who make intelligent decisions about how to conduct discovery, who frame a discovery program with a strategic sense of purpose, and whose acute sense of proportionality allows them to define a fair battleground.

Welcome to a whole new ballgame. ■