

## What Does Proportionality Mean for the 'Little Guy'?

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A recent rule change regulating the amount of money spent on discovery in federal court could diminish the chances of success for plaintiffs with limited resources going up against big corporations or otherwise financially-powerful defendants, some lawyers observed.

On the flip side, others maintained that the incorporation of proportionality into rules that determine what material is discoverable now prevents litigants from casting overly-wide nets in the discovery process, thus saving time and money in litigation.

Last December, the language of Federal Rule of Civil Procedure 26 was modified to read that parties could pursue discovery for material that is considered "relevant to any party's claim or defense and proportional to the needs of the case," keeping in mind the priorities of the litigants, the parties' resources, and the importance of the issues, to name a few factors.

Notwithstanding the spirit of the rule change, Messa & Associates partner Eric H. Weitz said the inclusion of proportionality into the definition of what is discoverable means "discovery has now become more of a game than a process leading to justice."

According to Weitz, large companies and corporations spread out their documents through different departments across vast regions, making discovery an expensive process. They'll claim in court that it's too taxing to initiate discovery on certain materials, but invite plaintiffs to pursue it at their own expense.

This means that the "little guy" has less of a chance to obtain materials needed to advance a case because it could be considered by the court to be more than the case is technically worth, Weitz said.

"What this rule means is that while the courthouse doors are open, the courtroom doors are closed," Weitz said.

Weitz said the principle treats people disparately based on earning capacity, even if they are injured in the same incident involving the same defendant.

"For some reason a small claim deserves less justice than a big claim," Weitz said. "That's not what our system of justice is about."

Kline & Specter co-founder Thomas R. Kline also said there is an inherent danger for single plaintiffs with the rule change.

"It is perceived that there is a presumption against discovery," Kline said. "I have seen many cases over a very long period of decades litigating claims for plaintiffs where one document, or a group of documents, is key to the litigation and every litigant is entitled to get the discovery to prove his or her claim."

Ultimately, the discretion of the judge plays a big part in what materials are targeted for discovery.

While the rule appears harsh on its surface to the plaintiffs bar, Kline said it is acknowledged that there is room in the rule for the court to make accommodations for each parties' needs.

"Judges should still approach the discovery on a case-by-case basis obviously, but it is important that individual rights are not abridged for the sake of either convenience or a perceived systemic good," Kline said.

David Cohen, a Reed Smith partner and leader of the firm's records and e-discovery group, said the practical effect of proportionality is that lawyers on both sides need to give more thought to discovery as well as targeting their requests and responses to resolving disputed issues.

"The old approach was to ask for the kitchen sink and the other side would file objections," Cohen said.

He noted that there were additional rule changes relating to responses to discovery requests. Boilerplate responses won't be tolerated, Cohen said. Parties have to say specifically what they're going to produce and not produce. All done while trying to spend the lowest possible amount.

As for whether the inclusion of proportionality hurts or helps the proverbial little guy, Cohen said it's all about balance. "I think it's everyone's hope that this brings more sanity and rationality to the discovery process," he said.

If a case is worth \$50,000 and a plaintiff requests \$100,000 of discovery, he could use that as a tool to force a settlement, Cohen said.

Plus, the fact that the rule makes provisions for getting a hold of only relevant information with the resources available serves to help cash-strapped plaintiffs, according to Cohen.

Ballard Spahr partner Philip N. Yanella said discovery should be limited in low-dollar claim cases.

Leader of the firm's e-discovery group, Yanella said that in those cases, "the amount in controversy isn't that high; you would expect the amount of discovery needed is less than in a class action or mass tort context."

When there are disputes about discovery, the court will naturally step in, but the real issue, according to Yanella, is that there is no magic formula used by judges to balance the resources of the parties with what is needed in discovery.

The point of the rule change, he said, was to get parties and courts to take proportionality more seriously, but "what rules courts are going to fashion to determine what is proportionate is anyone's guess."

And whether or not proportionality is taken more seriously remains to be seen, Yanella said.

"The great unknown is whether it's really going to change behavior," he said.

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