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You Can't Always Get What You Want . . . But If You Focus on The Case and Follow the Rules, You Can Get What You Need

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Despite the clear intent of the Federal Rules of Civil Procedure, the ''just, speedy, and inexpensive determination of every action and proceeding'' envisioned in Rule 1 is frequently illusive. In too many cases, counsel seeking discovery automatically unleash wide-ranging document requests not tailored to the action at hand, and responding counsel spend a disproportionate amount of their time and energy attempting to comply with the improper requests rather than seeking appropriate limitations on the discovery sought and focusing on the merits of the action.

Both sides often mistakenly believe that because the scope of what is *potentially* discoverable may be broad, then meaningful attempts to narrow the scope of discovery requested in a particular case may prove fruitless or worse, suspect. Sometimes responding parties feel intimidated that any resistance to producing documents may signal a worry that ''there must be something to hide.''

Responding parties know, too, that almost any document can be argued to be relevant if ''relevance'' is given a commonly-used yet mistaken interpretation—that the documents might somehow relate to some fact in the case.

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Fed. R. Civ. P. and the Court's Inherent Power to Control Proceedings

It is instructive to remember what the federal rules actually say. Rules 1, 26(b)(1), 26(b)(2)(C)(iii), and 26(g) anticipate the blind or ill-intentioned pursuit of tangentially relevant documents, and they remind us that efficiencies, expense, practicality, and proportionality must likewise be considered.

Reasonable Limitations on Discoverability Recognized by the Drafters of Rule 26(b)(1)

> Parties may obtain discovery regarding any nonprivileged matter that is *relevant to* any party's *claim or defense*—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.
>
> *For good cause*, the court may order discovery of any matter *relevant to the subject matter involved in the action*. Relevant information need not be admissible at the trial if the discovery appears reasonably *calculated to lead to the discovery of admissible evidence*. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C) (Emphasis added).

A careful reading of the emphasized phrases provide at least three different mechanisms to keep overbroad discovery requests in check.

Claims and Defenses Asserted in the Pleadings. First, discovery that is permitted without a showing of good cause is limited to that which is relevant to a particular claim or defense.

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The ''claim/defense'' language was added to the rule in 2000, yet is often disregarded. See *Thibault v. BellSouth Telecomms. Inc.*, 2008 WL 4808893, at *2 (E.D. La. Oct. 30, 2008) (while this narrowing may not seem dramatic, ''[t]he rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings'' (quoting Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2008, at 24-25 (Supp. 2005)).

A Finding of Good Cause is Required to Exceed the Pleadings. Second, if a requesting party seeks discovery beyond the claims and defenses in a case, that party must establish good cause for the request. At least one court has determined that the requesting party must provide ''a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements'' when attempting to show good cause. *Thibault,* 2008 WL 4808893, at *3.

''Discovery in a civil action is not some fundamental right, to be pursued as long and to whatever extent as a party may desire. . . . The discovery rules are not a ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest. Parties are entitled to a reasonable opportunity to investigate the facts—and no more.'' *Vakharia v. Swedish Covenant Hospital*, 1994 WL 75055, at *1-*2 (N.D. Ill. Mar. 9, 1994).

Documents Must Be Relevant to or Reasonably Calculated to Lead to Admissible Evidence. Third, the requested information must be relevant or reasonably calculated to lead to the discovery of admissible evidence. Admissible evidence includes documents ''having any tendency to make the existence of any *fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence.'' Federal Rule of Evidence 401.

The italicized words matter: the documents must shed light not on just any facts, but on facts of ultimate consequence.

Analyzing Burden Versus Benefit of the Requested Documents in the Interests of Practicality, Proportionality, and Efficiencies. By motion or on its own, a court ''must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

> . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'' Rule 26(b)(2)(C)(iii).

Benefit and burden analyses are helpful in many circumstances, but particularly in cases involving electronic discovery requests for forensic computer inspection.

For example (although not explicitly applying Rule 26(b)(2)(C)(iii)), in setting aside an order regarding forensic imaging, the Sixth Circuit noted that ''mere skepticism that an opposing party has not produced all relevant information is not sufficient to warrant drastic electronic discovery measures.'' See *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008) (deeming the forensic imaging request unwarranted under the circumstances).

The producing party is charged with responding to discovery requests in good faith and is the judge of relevance in the first instance. *See Rozell v. Ross-Holst*, 2006 WL 163143, at *4 (S.D.N.Y. Jan. 20, 2006) (a reasonable basis for believing the producing party is not honestly and accurately performing the review function is necessary before intrusive measures are warranted).

For example, without some showing of a particularized need, the cost of auditing a university's entire computer system was not justified by the possibility that a plaintiff might discover tidbits of information that were possibly related the lawsuit. See *Franks v. Creighton University*, 2007 WL 4553938, at *2 (D. Neb. Dec. 19, 2007).

Certifying That Requests Are Not Unreasonable or Unduly Burdensome. Rule 26(g) requires a requesting party's attorney to certify that requests are not unreasonable or unduly burdensome, and mirrors the considerations outlined in Rule 26(b)(2)(C)(iii). As U.S. Magistrate Paul Grimm emphasized:

> Rule 26(g) is *designed to curb discovery abuse* by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both *excessive discovery* and *evasion* by imposing a certification requirement that obliges each attorney to *stop and think about the legitimacy of a discovery request, a response thereto, or an objection*. . . . If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to *act responsibly and avoid abuse*. . . . Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. Sanctions to deter discovery abuse would be more effective if they were diligently applied ''not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'' *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008) (citing Fed.R.Civ.P. 26(g) advisory committee's notes to the 1983 amendments (citations omitted).

Interestingly, Rule 26(g) is frequently discussed in terms of the responding parties' requirement to certify productions. As demonstrated, however, the rule likewise sets forth the same obligations to the requesting party.

Practical Steps and Considerations in Responding to Unchecked Discovery Requests

Narrow, Prioritize, and Sequence Discovery. Responding attorneys should carefully review requests for overbreadth and work to narrow, prioritize, and sequence the type and amount of data and documents to be produced. Consider a *Lone Pine* motion (an increasingly-used case management device intended, as a threshold matter, to narrow issues and ensure the potential viability of claims before undertaking extensive discovery and in many cases, obviating its need entirely), bifurcation of threshold issues, and other methods to eliminate entire phases of discovery wherever appropriate.

It is critical for counsel to analyze the specific claims, issues, and defenses in a case to determine which requests actually make sense. Judges, counsel, and parties should ask themselves whether the pursuit of sweeping, unchecked electronic and paper documents is really necessary. Would it be practical? Is it propor-

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tionate to the real value of the matter? Would the cost of identifying, collecting, reviewing, and producing those documents truly advance a significant essential issue in the case?

Do those documents proximately relate to a point of proof? Or is the requestor's real goal in pursuing only marginally relevant documents to try to drive up the costs of litigation, increase pressure on the responding party, and enhance his overall leverage to obtain a better, faster, or greater settlement?

Often, seasoned discovery service providers can help identify which custodians have information that is truly relevant. Focus, for example, on heads of project teams, rather than anyone or everyone who might have ever been copied on an e-mail.

Discovery should not be so wide-ranging as to encompass the review of potentially millions of pages of documents that have little bearing on the actual facts of the case. Particularly in asymmetric cases—cases in which the requesting party might have very few documents and the responding party has potentially tens or hundreds of millions of documents—discovery requests can be used improperly as ''weapons of mass discovery'' designed to overwhelm respondents by significantly increasing the amount of time, cost, personnel, and other resources required to comply with such requests. This can result in unfair leverage designed to force an unearned and unwarranted outcome.

Outside counsel should consider negotiating aggressively, suggesting alternatives, and outlining possible prioritized approaches when responding to overbroad discovery requests rather than simply reacting by filing objections.

Consider Sampling and Rolling Productions. Custodians can be grouped and tested by sampling to determine if they are likely to have new, relevant information. Rolling productions can force the requester to hone its substantive requests, as an analysis of documents produced early can enable it to better know what remains to be produced. Sampling and rolling productions can be useful tools in fighting the argument that all documents must be produced in order for the requesting party to determine what is relevant.

Narrow the List of Custodians. Start by producing documents from two or three key decision makers. Usually, this is enough for the requesting party to understand the central issues, the specific terms and language used, and the relevant players. From there, requesting parties can determine much more quickly which other custodians, if any, must be selected, as well as what keywords and concepts can be used.

There are rarely more than a handful of highly relevant custodians, even on the largest cases. While there may be more custodians with tangential documents, these tend to be duplicate documents or cumulative information, as many potential custodians participate in the same meetings and/or are copied on the same e-mails. Therefore, it is much more important to focus on the substance of the custodians' records rather than their number.

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Use Keywords, Search Terms, and Date Ranges. Where appropriate, agree to keywords and search terms early on. Identify inclusive date ranges during which relevant information was created and search around them. Most importantly, focus on issues rather than percentages and mechanisms.

Cost Shifting. If a requestor demands burdensome discovery, a quick and effective method to help determine whether that party truly believes the documents are critical to his case is to request a split of some or all of the costs of the production burden. Counsel truly in need of documents is very likely to agree to funding some portion of that production.

If, on the other hand, counsel is unwilling to fund some or all of the production, that may suggest—to both counsel and the judge—that finding those documents is less important than obtaining unfair leverage.

Hire Excellent Electronic Discovery Service Providers. Choosing a discovery service provider requires a comparison of cost, quality, and trust. Having confidence in the project manager and every individual charged with ensuring a complete, accurate, efficient, and high-quality production is essential. They can help limit the monetary and time costs of every aspect of discovery—preservation, collection, review, production, tracking, and documentation. It is important to note that winning battles to limit production is based to some extent on credibility. Give your adversaries or judge reason to suspect that you are hiding or unable to produce responsive documents and it will be hard to win the argument that you need not produce everything they request. Make sure you hire well and watch carefully.

Honor Your Role as an Officer of the Court. The *Sedona Principles* reinforce the reality that the party that owns the documents is in the best position to determine how to produce those documents. Properly producing documents is a critical responsibility of any responding party, and care must be taken to ensure that productions comply with both the letter and the spirit of all applicable rules.

Many of the discussions surrounding discovery generally and electronic discovery specifically center on advances in technology, the various forms of exotic media, the role of metadata, and the pursuit of ESI with the idea that ''if you can find it, go get it.'' Such discussions are often ''noise.'' The longstanding principles and rules of discovery, when followed, are the keys to successful management of discovery.