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Wants vs. Needs: Guideposts to Ensuring Appropriate Scope of Discovery

In practice, lawyers and parties, from the very beginning of litigation, should understand what information is necessary to prove or disprove claims and defenses pled in the case and focus discovery on those elements.

Long before the Dec. 1, 2015, amendments to the Federal Rules of Civil Procedure (FRCP), the American College of Trial Lawyers' (ACTL) Task Force on Discovery and Civil Justice found that the then "existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself." Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and The Institute for Advancement of the American Legal System (March 11, 2009), at 2. Rule 26(b)(1) of the FRCP has since been amended to increase the emphasis on proportionality, including the importance of discovery in resolving the dispute.

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Courts have provided helpful guidance regarding the important distinction between "wanted" and "needed" information. In *Apple v. Samsung Electronics*, Case No. 12–cv–0630–LHK (PSG), (N.D. Cal. Aug. 14, 2013), the court stated that it's "senseless to require Apple to go to great lengths to produce data that Samsung is able to do without." *Pertile v. General Motors*, Civil Action No. 1:15-cv-00518-WJM-NYW, (D. Colo. March 17, 2016), instructs that "relevance has never been the only consideration under Rule 26" and that "necessity" and not "might yield helpful information," is the standard.

To establish proportionality, you must think like a trial lawyer: in many situations the importance of the discovery in resolving the dispute may trump the other four proportionality factors in Rule 26. If proposed discovery is not likely to be important in resolving the issues, the scope of discovery may be narrower, even if the monetary amount in controversy is significant, (The Sedona Conference, The Sedona Principles, Third Edition (2017 Public Comment Version) (Principle 2, Cmt. 2a)).

While not all judges are deeply immersed in trends and costs regarding electronically stored information, all judges understand evidentiary offerings at the summary judgment stage and at trial. In practice, lawyers and parties, from the very beginning of litigation, should understand what information is necessary to prove or disprove claims and defenses pled in the case and focus discovery on those elements.

Practice Pointers:

1. Trial Date

Consider the benefits of an early trial date on the scope and cost of discovery. Compressed timelines tend to force both parties to focus on discovery and trial strategy (including key evidence) at a much earlier date. This pressure may well serve to avoid time on discovery of information of marginal value or related to peripheral claims. Early trial dates create incentives for both parties to tier or prioritize discovery, beginning with the evidence most likely to prove/disprove the claims and defenses. Only if information provided in the first tier is insufficient, should the parties move to additional discovery. For example, in an employment case regarding disparate impact, structured data should be the priority in discovery, not email. Moreover, in a commercial dispute, the contract will be the central evidence, and in a product liability case, a focus should be what is needed to prove causation.

2. Witnesses

When negotiating the number of custodians for preservation or production, consider the duration of the trial and number of witnesses likely to be called. In a trial scheduled for three days with a small number of witnesses, it is unlikely that data from dozens of custodians will be important to resolving the issues in the case. If information is essential to an effective cross examination at trial, notify the court or your opposing party accordingly.

3. Exhibit List

When negotiating with your opponent on the volume of anticipated collection, review and production, you should frame the discussion around the anticipated exhibit list at trial. If the duration and structure of the anticipated trial will likely include only a few scores of exhibits, many GBs or even TBs of discovery are likely neither necessary nor proportional.

4. Pretrial Conference

When negotiating the scope of discovery or in discovery motion practice, frame discovery discussions around the factors that will be central to the pre-trial conference. Map and focus discovery to the following two inquiries: What are the elements of each claim, and what information do we need to win on the key elements of the jury charge? Understand the evidence most central to issues in your case and force your opponent to articulate why the particular information sought in discovery is important to resolving the dispute.

5. Mediation and Settlement

When pursuing early mediation or settlement discussions, narrow discovery to the key issues that will inform and drive early resolution, such as the issues where there is the most uncertainty.

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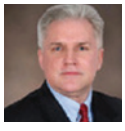

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