

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Draft Reporter's Notes--2016

The 2016 amendments to the discovery rules were intended to address the burdens of discovery that have been the subject of significant debate over the past few years. There were three distinct changes made involving the scope of discovery, all taken from amendments to the federal discovery rules.

The first change, involving the scope of discovery, deleted the language that discovery must be “relevant to the subject matter involved” in the action and added language that discovery must be relevant to a party’s claim or defense.

The second change adopted the principle of proportionality for discovery requests--i.e., discovery should be “proportional to the needs of the case.”

The third change deleted the familiar, but often misconstrued, language in Rule 26(b)(1) that “[i]t 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.” It also added, however, language that information “need not be admissible in evidence to be discoverable,” more clearly reflecting the intent of the deleted language.

Each of these is discussed below.

1. Scope of Discovery--Relevant to a Party's Claim or Defense

From its inception, Rule 26(b)(1) allowed discovery of any non-privileged matter that is “relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party....” The 2016 amendment to Rule 26(b)(1) struck this language and replaced it with the following sentence: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense....” This language was drawn from a 2000 amendment to Rule 26 of the Federal Rules of Civil Procedure refining the scope of discovery.

Portions of the Committee Notes to the 2000 federal amendments are reproduced below. With the 2016 changes, the views expressed are now equally applicable to the Massachusetts Rules of Civil Procedure.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line

between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

2. *Proportionality.*

a. Adoption of the 2015 federal language.

Amendments to the Federal Rules of Civil Procedure effective in 2015, arrived at after extensive debate and consideration, were intended to emphasize that discovery should be proportional to the needs of the case. The 2016 amendments to the Massachusetts discovery rules, by adopting the federal language, were intended to give a strong signal to attorneys that they must take into account the concept of proportionality in crafting discovery requests.

Under Rule 26(b)(1), as amended, a party may seek discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case....” The rule lists the factors that are to be taken into account in determining whether a discovery request is proportional to the needs of a case: “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.”

The deletion of the language from Rule 26(b)(1), “including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter,” is not intended to make such information non-discoverable; rather, it remains discoverable so long as the discovery meets the standards of the amended rule.

The Committee Notes to the 2015 federal amendments regarding the concept of proportionality are equally applicable to Massachusetts practice. Excerpts from the Committee Notes follow.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs

of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

....

The present amendment restores the proportionality factors to their original [1983] place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

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. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The

other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so....

b. Impact on Protective Orders.

In its deliberations leading to its recommendation to the Supreme Judicial Court to adopt the proportionality language from the federal rules, the Standing Advisory Committee on the Rules of Civil and Appellate Procedure of the Supreme Judicial Court considered whether there was a need to amend Rule 26(c) regarding protective orders to add language that a court should consider proportionality in making a protective order.

The Committee was of the view that the existing language of Rule 26(c) that a court may enter a protective order regarding discovery “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” is sufficiently broad to allow a court to consider the concept of proportionality. Thus, in considering a Rule 26(c) protective order, a court should also take into account the factors relevant to proportionality: the importance of the issues; the amount involved; the parties’ access to information; the parties’ resources; the importance of the discovery; and the relationship between the burden and expense of the discovery and likely benefits.

3. Deletion of language that information must be “reasonably calculated to lead to the discovery of admissible evidence.”

The 2016 amendments to Rule 26(b)(1) deleted the following language that has also been in the discovery rules since their adoption: “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.” This change was taken from the 2015 federal discovery amendments.

In place of the stricken sentence, Massachusetts adopted the following sentence, also taken from the 2015 federal amendments: “Information within this scope of discovery need not be admissible in evidence to be discoverable.” The intent of this change to the Massachusetts rule is the same as that expressed in the Committee Note to the federal amendment:

The former provision for discovery of relevant but inadmissible information that appears “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “Relevant” at the

beginning of the sentence, making clear that “‘relevant’ means within the scope of discovery as defined in this subdivision” The “‘reasonably calculated’” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that “‘Information within this scope of discovery need not be admissible in evidence to be discoverable.’” Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.