

# Amended rule: sea change in scope of allowable discovery

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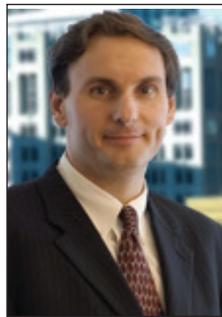
In April, the U.S. Supreme Court changed the scope of allowable discovery under Rule 26 from “reasonably calculated to lead to the discovery of admissible evidence” to “proportional to the needs of the case.”

This amendment conclusively changes the way a generation of litigators approaches discovery under the federal rules. The upshot of the change remains to be seen.

Prior to the enactment of the Federal Rules of Civil Procedure in 1938, there was little authority for discovery in civil cases. With the enactment of the rules, and in particular upon the enactment of the 1946 amendments implementing the “reasonably calculated” standard, the Supreme Court opened the gates to allow discovery that was broad enough to



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permit what one court called “fishing” for evidence. *Olson Transportation Co. v. Socony-Vacuum Company*, 8 Fed. R. Serv. 34, 41 (E.D. Wis. 1944).

Since that first “revolution” in the approach to discovery in 1938, there has been a “counter-revolution.” Since 1983, the Supreme Court has whittled away at fishing-expedition-based discovery. In 1983 and 1993, the court implemented new proportionality rules granting the court the authority to limit “discovery otherwise allowed by these rules.”

With its current amendment, the Supreme Court has now effectuated complete rejection of the “reasonably calcu-

lated” standard and replaced it with a rule of proportionality.

The new Rule 26, which becomes effective Dec. 15 (both as to civil cases thereafter commenced and “insofar as just and practicable” to all proceedings then pending), gives some guidance as to what is to be considered “proportional.” It expressly cites factors to be evaluated by a court in determining proportionality, including: “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.”

Whether the amended rule achieves its stated goal of reducing the cost and increasing the speed of discovery will depend on the degree to which the bar can refocus its approach to discovery and, of course, the interpretation of the new standard by the courts. **MMW**

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