Duke's Revised Guidelines and Practices chart the course to proportionality

also:

HOW COURT FEES AND FINES CAN UNDERMINE PUBLIC TRUST – AND WHAT JUDGES CAN DO ABOUT IT
IN HIS 2015 END-OF-THE-YEAR REPORT, CHIEF JUSTICE ROBERTS EXHORTED the “entire legal community, including the bench, bar, and legal academy, [to] step up to the challenge of making real change” and embrace the discovery proportionality rule amendments. Instead of wasting time and money demarcating the maximum limits of conceivably relevant discoverable information at the start of litigation, the amended rules aim at “focus[ing] discovery . . . on what is truly necessary to resolve the case.” Have the bench and bar heeded the Chief Justice’s exhortations since the amendments took effect 11 months ago?

It appears so, or at least that is the impression from the 17-city discovery proportionality roadshow programs held before 2,500 lawyers and judges. Follow-up informal discussions have only strengthened the growing evidence that the bench and bar are indeed paying serious attention in reaching reasonable discovery. Reported case law, as reflected in the annotated Discovery Proportionality Guidelines and Practices (available on the Duke Law Center for Judicial Studies website) also manifests judges’ willingness to comply not only with the letter but also the spirit of the amendments.

AND YET NO ONE IS DECLARING VICTORY.

For one thing, experience has shown that it takes five to ten years before all practitioners and even all judges become aware of and familiar with new rule amendments. The discovery amendments are no exception.

Take, for example, the continuing bench-bar knee-jerk reaction, defining the scope of permissible discovery to reach any information that is “reasonably calculated to lead to admissible evidence.” The phrase was misleading, caused confusion, and was deliberately deleted from the rule. The Committee Notes could not be clearer: “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.’”

Notwithstanding the amendment’s clear intent, more than 20 reported cases, with at least one in every circuit, have favorably cited the deleted phrase. With only a few exceptions, however, these decisions merely reference the phrase almost in passing, e.g., “discoverable information is [an] item that is ‘relevant or may lead to the discovery of relevant information.’”

Ten reported cases got it right and go in greater detail, explaining the deletion and rejecting reliance on a pre-amendment Supreme Court decision as authority for the contrary proposition.

Only time will tell whether the persistent judicial invocations of “reasonably calculated to lead to admissible evidence” represent only reflexive, unthinking remarks, or whether they reflect an entrenched, institutional intransigence that will stymie the Chief Justice’s “challenge of making real change.”

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1 See Endnote 4, annotated Discovery Proportionality Guidelines and Practices – https://law.duke.edu/judicialstudies/conferences/publications/)
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