

TORT TRIAL AND INSURANCE PRACTICE

AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION



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TABLE OF CONTENTS

How Proportionality Under New Rule 26 Narrows the Breadth of Federal Tort Cases	2
<i>By: Domenick Giovanni Lazzara</i> Exploring Rule 26's newfangled proportionality requirements in federal tort cases.	
Objections to the Use of Video and Audio Recordings at Trial	6
<i>By: Kara L. Petteway</i> Providing a step-by-step process for objecting to and using video and audio recordings at trial.	
News and Announcements	10
Summer 2015 News and Announcements from the ABA YLD TIPS Division.	
2016-2017 ABA YLD Leadership Training	10
Report from the 2016-2017 ABA YLD Leadership Training in Chicago, Illinois.	
2016 ABA Annual Meeting	11
Start making plans to attend the 2016 ABA Annual Meeting in San Francisco, California.	
2016 Liberty Achievement Award	11
TIPS will present the Liberty Achievement Award to Attorney Wendy C. Shiba.	
2016 James K. Carroll Leadership Award	11
TIPS will present the James K. Carroll Leadership Award to Attorney Dick Semerdjian.	

ARTICLES

How Proportionality Under New Rule 26 Narrows the Breadth of Federal Tort Cases

By: Domenick Giovanni Lazzara*,**

I. Introduction

The December 2015 changes to the Federal Rules of Civil Procedure narrows the breath of federal tort cases and encourages efficient discovery practice while emphasizing cooperation among the parties. Even though the most notable changes pertain to discovery under Rule 26, changes to Rule 1 creates an obligation between the parties and the court to cooperate. The new Rule 1 States:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court **and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 1 (emphasis added).

The Advisory Committee's Note to Rule 1 highlights this novel and shared responsibility between the parties "to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay". Fed. R. Civ. P. 1., Advisory Committee's Note to 2015 Amendment. This responsibility sets the stage for discovery practice under the emerging proportionality requirement of Rule 26.

Where Rule 1 mentions proportionality as a footnote of sorts, the changes to Rule 26(b)(1) make proportionality discovery's centerpiece. Rule 26(b)(1) now states that:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to 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 purported**

discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1) (emphasis added). Under the new Rule 26, the universe of discoverable information must be weighed in relation to the case as a whole. Rationally related and relevant discovery is no longer routinely obtainable. Instead, the Rule 26 amendments restores proportionality and reinforces cooperation from the very beginning of discovery: case management. See *generally*, Fed. R. Civ. P. 26 Advisory Committee's Note to 2015 Amendment.

II. Case Management

To combat the hydra that was bogging down the legal system – cost, delay, and obstinacy - efficient case management has become paramount to effectively navigate discovery under new Rule 26. From the outset, the parties must work to create a clear plan for the direction of the litigation, including listing: all possible claims and defenses; the factual or legal issues that could be raised; and the underlying facts that need to be proved or disproved to make your case. A comprehensive list – which undoubtedly will change and expand as the case proceeds - will provide easy answers to the essential needs of the case. Additionally, this roadmap will help to craft a discovery plan acutely tuned to what is proportional to those needs.

Efficient case management under the new Rule 26 should paint a clearer picture of what lies ahead as discovery unfolds; especially the discoverable material that will narrow the breadth of federal tort cases. When taking into account the added proportionality requirement of the new Rule 26, discovery no longer needs to include the entire universe of rationally related material.

III. Effective Discovery Under the New Rule 26

Under the new Rule 26, effective discovery in federal tort cases starts early. The Rule 26(d)(2) amendments allow an early document request to be sent to the opposing party 21 days after service of the summons and complaint, even though the parties have not had their required Rule 26(f) conference. See Fed. R. Civ. P. 26(d)(2); see *also*, Fed.

R. Civ. P. 26, Advisory Committee's Note to 2015 Amendment. This early document request allows litigants to define the scope of the issues earlier, thereby narrowing the breadth of the case. Doing so allows the parties to eventually come into their Rule 26(f) conference with a much more concise plan for discovery.

Moreover, the changes to Rule 26 are meant to thin out and streamline discovery, incidentally narrowing the breadth of federal tort cases. Every request for discovery may no longer be deemed relevant when weighed against the new proportionality requirement. Effective discovery under the new Rule 26 requires more tailored and intelligent discovery requests. These requests must focus on the issues that *need* actual discovery and are integral to resolving issues in federal tort cases. If the information is obtainable from other sources - such as the client, internet, or public records, then that information should not be included in the discovery request.

IV. The Reasonable Lawyer

Ushered in with the era of proportional discovery is the reasonable lawyer. The reasonable lawyer is not a push over bending to the whims of opposing counsel, but rather knows which battles need fighting and which are better served with a stipulation. The court and parties are encouraged to cooperate "to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay" thus polarizing the justice system. See Fed. R. Civ. P. 1 Advisory Committee's Note to 2015 Amendment. Quite simply, the new proportionality requirement highlights that it is not reasonable to spend all of the parties' resources – including time - on discovery. Being reasonable while still effectively representing your client means working with opposing counsel to keep the case's momentum on track. Early document requests allow for more prepared pre-trial conferences, and stipulations on minor issues keep the focus on issues critical to the case.

In the same vein, general objections to discovery are not reasonable. Under the new Rule 26, a reasonable objection should start in the positive, stating what documents *will* be produced, and poses the objection as an exception, communicating how the objected-to-items are disproportional to the needs of the case. A well-thought-out

discovery objection goes all the way back to the initial case plan, and relays to the judge and opposing counsel how the request is both disproportionate and not reasonable when weighed against the central issues and needs of the case. The reasonable lawyer should cooperate with the court and opposing counsel, and in doing so, may gain the strategic advantage in discovery.

V. Conclusion

The amendments to Rule 26 envision a justice system with a level playing field, consequently narrowing the breadth of federal tort cases. The reasonable and proactive lawyer will get to the starting block early with infantile document requests and well-planned pre-trial conferences. Identifying the critical issues from the outset will map out a discovery plan tailored to circumnavigate all of the relevant issues while remaining proportional to the needs of the overall case.

**Domenick is a trial attorney with the Law Offices of H.S. Stephen Lee, P.A. in Tampa, Florida. His practice concentrates on civil litigation, specifically personal injury. One of his proudest accomplishments has been the proliferation of his legal blog, The Young Lawyer. You can read more at: <https://domlawfl.wordpress.com/>.*

Domenick can be contacted at +1 813 606 5036 or at dlazzara@hsleelaw.com.

*** Domenick collaborated with Christie Sager for this article. Christie received her JD in 2013 and does freelance research and writing in the Tampa Bay area of Florida.*

OBJECTIONS TO THE USE OF VIDEO AND AUDIO RECORDINGS AT TRIAL

By: Kara L. Petteway*

Imagine the following scenarios:

Scenario 1: Opposing counsel marks a video clip pulled from the internet as a trial exhibit. The identity of the individual who recorded the footage, the manner in which the footage was recorded, and whether the footage was altered are unknown.

Scenario 2: Opposing counsel's pre-trial exhibit list includes a video recording taken by a third-party who has a demonstrated bias against your client. The proposed exhibit is a fifteen-second "snippet" excerpted from a ten-minute recording.

Scenario 3: You are attempting to lay the foundation for the admission of an audio recording. Opposing counsel baldly asserts the recording has been altered and consequently is inadmissible.

How can you effectively argue for or against the admission of the recording in each scenario?

1. **Authentication**

The first step to the admission of any type of evidence – whether it be a document, photograph, or video or audio recording – is authentication. The proponent must “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). Evidence bearing on admissibility “may be circumstantial or direct, real or testimonial, and need not conform to any particular model.” *United States v. Haldeman*, 559 F.2d 31, 107 (D.C. Cir. 1976). Rule 901(a)'s authenticity requirement can be established through, *inter alia*, the testimony of a witness with knowledge or evidence showing that a process or system, such as a surveillance recording system, produces accurate results. Fed. R.

Evid. 901(b). See also *United States v. Cejas*, 761 F.3d 717, 723 (7th Cir. 2014). The decision to admit a video or audio recording is within the sound discretion of the district court. *Haldeman*, 559 F.2d at 109. After a video or audio recording is admitted into evidence, “the task of deciding the evidence’s true authenticity and probative value is left to the jury.” *United States v. Fluker*, 698 F.3d 988, 999 (7th Cir. 2012). See also *Haldeman*, 559 F.2d at 109.

2. Witness Testimony Authenticating the Recording

In a typical case, a witness who has knowledge of the events depicted in the video or audio recording should be able to authenticate the recording by testifying that it fairly and accurately depicts the events that took place, even though the witness did not make the recording. But, where there are concerns that a recording has been altered or selectively edited, failure to produce the individual who took the recording as a trial witness may lead to exclusion of the recording.

For example, in *Griffin v. Bell*, 694 F.3d 817 (7th Cir. 2012), the Seventh Circuit affirmed the district court’s exclusion of a videotape, and still photographs taken from the videotape, where there the plaintiff failed to proffer a witness who could testify regarding how the videotape was made and whether it had been altered. The plaintiff sought to authenticate, through his own testimony, a two-minute videotape that was emailed to him by a fellow student. *Id.* at 826. Although the plaintiff was a witness to the events depicted in the videotape, the plaintiff could not verify how the videotape was recorded; there was no date or timestamp on the videotape; the plaintiff could not verify if the videotape had been altered; and the videotape depicted only a small part of the confrontation. *Id.* at 826-27. The Seventh Circuit affirmed the district court’s exclusion of the videotape and photographs: there were “many valid reasons” to question the authenticity of the videotape that only could be addressed by testimony from the student who took the recording. *Id.* at 827.

Applying *Griffin* to Scenario 1, there are strong arguments against admission of the internet video clip. The proponent of the evidence should be required to produce the individual who took the videotape to testify and respond to questioning regarding how the videotape was made and whether it had been altered.

3. **Completeness**

Assume that the student who took the videotape recording in *Griffin* appeared at trial and testified that she edited the original videotape down from twenty minutes to two minutes. Would the two-minute version of the videotape be admissible? “A video recording of only a portion of the events is not inherently less admissible than the testimony of a live witness who saw only part of a crime or a photograph that captures an isolated moment from a single perspective.” *United States v. Patrick*, 513 Fed. Appx. 882, 888 (11th Cir. 2013). The key inquiry is whether the probative value of the partial recording outweighs the risk of unfair prejudice. See *id.* Further, the rule of completeness provides a vehicle to challenge the admission of a “clipped” recording. See Fed. R. Evid. 106, advisory committee’s note (1972) (Rule 106 addresses “the misleading impression created by taking matters out of context”); cf. *United States v. Normand*, 16 Fed. App. 719, 722 (9th Cir. 2001) (defendant did not allege “that the government introduced distorted or prejudicial snippets of the two conversations [that were admitted]”).

The misleading or prejudicial nature of a “clipped” recording - such as the two-minute videotape in *Griffin* - may be cured by introducing a more complete version of the recording. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) (“when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rule 401 and 402”); *Torres v. City of Santa Clara*, 2014 U.S. Dist. LEXIS 116195, at *16 (N.D. Cal. Aug. 20, 2014) (denying plaintiff’s motion to exclude initial five minutes of audio recording; “The entire recording is relevant and provides context for Silvan’s interaction with Torres and how and when the Santa Clara Police Department officers responded to the incident.”). Thus, in *Griffin*, the misleading nature of the two-minute excerpt could have been cured by admission of additional portions of the videotape, assuming it was available – a point that should have been addressed in discovery through a motion to compel production of the complete recording. In Scenario 2, likewise, the fifteen second “snippet” could be effectively challenged by arguing that the biased videographer deliberately edited the recording and a more complete version of the recording, which provides sufficient context, should be played to the jury.

4. **Alterations**

Altered recordings, like partial recordings, are not *per se* inadmissible. An altered or enhanced recording is admissible if the proponent makes a showing that it “accurately reproduce[s] the scenes that took place, [and is] ... accurate, authentic and trustworthy.” *United States v. Seifert*, 351 F. Supp. 2d 926, 928 (D. Minn. 2005), *aff’d* 445 F.3d 1043 (8th Cir. 2006) (admitting videotape where alteration “maintain[ed] the image while assisting the jury in perceiving and understanding the recorded event”). Bare assertions that a recording has been altered are insufficient to block admissibility. Indeed, in the context of litigation arising out of the Watergate scandal, the D.C. Circuit rejected the defendant’s challenge to the admissibility of a tape recorded conversation of President Nixon and others, due to alleged tampering. *Haldeman*, 559 F.3d at 107-109. Although there was a now infamous eighteen-minute gap on a different White House recording that presumptively was the result of intentional conduct, there was no such evidence with respect to the specific tape at issue. *Id.* at 109. The court held that “real evidence is not inadmissible because one can conjure up hypothetical possibilities that tampering occurred.” *Id.* Thus, in Scenario 3, opposing counsel’s unsupported assertions that the audio recording was altered, without more, would not defeat admissibility.

5. **Practice Pointers**

Key practice pointers for lawyers handling civil matters involving the use of video or audio recordings are as follows:

- Aggressively seek information concerning the reliability of the recording during discovery. File a motion to compel production of the complete recording. If the complete recording has not been preserved, consider whether spoliation sanctions are appropriate. Probe authenticity during the deposition of the individual who took the recording.
- Determine whether the recording was improperly edited such that it is unreliable, misleading or will confuse the jury. Consider whether the recording has been deliberately clipped such that the proposed trial exhibit is a misleading “snippet”

of the full recording. Also consider whether a separate piece of video or audio footage from another date, time or camera would provide context helpful to understanding the events taking place in the recording.

- Scrutinize any potential bias or motive of the individual who took the video or audio recording, particularly if the recording has been altered.
- If an incomplete or altered video or audio recording is admitted into evidence, establish facts demonstrating that the probative value of the recording is minimal and should not be afforded significant weight by the jury.

*** Kara L. Petteway is a Senior Associate at Norton Rose Fulbright US LLP in Washington, DC.** *Ms. Petteway's practice focuses on complex civil litigation and government investigations. Kara has litigated complex civil litigation matters across a wide variety of subject areas, including breach of contract disputes, employment discrimination and retaliation matters, insurance coverage disputes, the enforcement of international arbitral awards, business torts and lawsuits brought under the Endangered Species Act and the Racketeer Influenced and Corrupt Organizations Act. Her government investigation experience has involved the False Claims Act, securities enforcement and pay-to-play allegations. She can be reached at kara.petteway@nortonrosefulbright.com or +1 202 662 4714.*

NEWS AND ANNOUNCEMENTS

2016-2017 ABA YLD Leadership Training

The ABA YLD Leadership Training took place from April 18 – April 19. Young lawyers from around the country gathered inside the ABA Headquarters in Chicago, Illinois for a weekend of bonding, networking, and training. Ana Romanskaya, ABA YLD Chair for 2016-2017, led the charge by setting the theme for the 2016-2016 bar year as: *Relationships. Relevance. Resilience.* Content from day 1 included an overview of the ABA and YLD, followed by break-out sessions, and concluded with a division sponsored reception at Public House. Day 2 picked up where day 1 left off, and for most attendees, concluded with membership meetings.

The ABA's 2016 ABA Annual Meeting in San Francisco, California

The ABA's [2016 Annual Meeting](#) will take place in San Francisco, California from August 4 through August 6. [Register here](#) and don't miss out on this chance to network with lawyers from across the country, gather CLE credits, and hear from well-known speakers. A [tentative schedule](#) is posted on the ABA's website. For more information, check out the [website for the annual meeting](#).

The TIPS schedule of events is filled with numerous opportunities to network, learn, and socialize with some of the best trial lawyers and litigation managers in our profession. All TIPS events will take place at the Westin St. Francis Hotel unless otherwise noted. The ABA YLD also provides one full scholarship (up to \$570) for attendance by a leader from a New or Formerly Inactive Affiliate. Please contact (logan.murphy@hwlaw.com) if you believe you qualify.

2016 Liberty Achievement Award

TIPS will present the Liberty Achievement Award to Los Angeles Attorney Wendy C. Shiba and the Pursuit of Justice Award to San Francisco Attorney Lori Andrus. The Welcome and Liberty Achievement Award Reception will take place Friday, August 5, 2016 from 6:30 pm to 8:00 pm at The Olympic Club, 524 Post Street in San Francisco, California. Purchase tickets [here](#).

2016 James K. Carroll Leadership Award

TIPS will present the James K. Carroll Leadership Award to Past Section Chair and San Diego Attorney Dick Semerdjian and the Robert B. McKay Award to Professor Jean Stapleton University of Texas School of Law. The James K. Carroll Leadership and Awards Dinner will take place Saturday, August 6, 2016 from 6:30 pm to 10:30 pm at the Westin St. Francis Hotel, 335 Powell Street, 32nd Floor – Alexandria's in San Francisco, California. Purchase tickets [here](#).