The oft-repeated assertion that in most cases discovery costs are reasonable and proportional is undoubtedly true. Nonetheless, three generations of Civil Rules Committee members concluded that discovery costs are wasteful and unfair in a minority of cases, i.e., 5–10 percent of filings, or 10,000–20,000 civil cases annually. It is this sliver of cases, which consumes so much of the judiciary’s and parties’ resources, where discovery costs can be way out of line, closing the courthouse to parties who do not have the financial resources to engage in limitless discovery. And it is why three rules committee generations, including today’s, have amended Rule 26 to highlight “proportionality” to better calibrate reasonable and fair discovery.

Although they recognize the seriousness of wasteful and unfair discovery, the rules committees are constrained by the Rules Enabling Act rulemaking process to move cautiously, making only incremental changes to the law. This is because every rule change requires the approval or acquiescence of the Standing Rules Committee, Judicial Conference, Supreme Court, and Congress, which can stop any proposal deemed too controversial. The charge that rules committees are incapable of bold action and are limited to “tweaking” the language is only a slightly unfair criticism. In truth, the rules committees have always looked to developing case law and best practices fostered by innovative individual judges as sources of and support for proposed rule changes.

And so, the question arises: Why should the “tweaked” proportionality amendments that take effect on Dec. 1, 2015, succeed when two earlier Rule 26 proportionality amendments failed? And the answer is that they will fail as did their predecessors.

This outcome is not inevitable, however. The bench and bar can accept the challenge and comply with the amendments, not grudgingly, construing every provision miserly, but expansively. The 2015 amendments might succeed if individual judges and the bar embrace the spirit of the amendments, build on its framework, and employ procedures and practices consistent with the amendments’ intent.

The amendments provide only a framework, however, and not a detailed map on how to implement the changes. That is left to individual judges and others. The Duke Law Judicial Studies Center developed the Discovery Proportionality Guidelines and Practices, published in this issue beginning on page 47, based on best practices of judges who have been strong proponents of the “proportionality principles” for many years and with the input of 40 volunteer judges and practitioners and the assistance of many others who participated in a conference held by the Center. The Guidelines recommend useful, practical, and concrete procedures and practices that build on the amendments’ framework, which the bench and bar can adopt and adapt to local conditions. Although proportionality principles apply in every case, the Guidelines especially address problematic cases and are not intended to disturb the management of the majority of cases that raise minimum discovery contentiousness.

The Guidelines is not a static document. It will be updated periodically to reflect developing case law and the adoption of new best practices created by individual judges. The Center plans to hold separate regional conferences with 10 judges and 20 practitioners at four-month intervals to evaluate the Guidelines. A major conference will follow in 18–24 months, and the Guidelines will be updated in light of bench and bar actual experience.

Changing the legal culture to curb unreasonable and unfair discovery costs poses daunting challenges, especially when a significant segment of the bar has grave doubts and suspicions about them. Quick success should not be expected. Yet a solid core of judges and attorneys have become disciples of proportionality, and their steadfast leadership instills hope that this third attempt may yet succeed.