GUIDELINES AND PRACTICES FOR IMPLEMENTING THE 2015 DISCOVERY AMENDMENTS TO ACHIEVE PROPORTIONALITY

Center for Judicial Studies, Duke Law School
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INTRODUCTION

In November 2014, the Duke Law Judicial Studies Center held a conference on the discovery proportionality amendments with more than 70 practitioners and 15 federal judges. Drafting teams were subsequently formed, consisting of 32 practitioners, who worked nine months on an initial draft set of guidelines and practices prepared by Judge Lee Rosenthal and Prof. Steven Gensler. The team's work product, the *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality,* was published in 99 *Judicature*, no. 3, Winter 2015, along with several related articles. Most of the *Guidelines and Practices*' recommendations represented general consensus views, but a handful were not universally endorsed. To address these and future unforeseeable concerns, the Center planned to regularly revise and update the *Guidelines and Practices* in light of case-law developments and actual practice.

The Center's efforts took its first steps with an invitation to the ABA Section of Litigation to co-host programs on the discovery amendments in 13 cities, beginning in November 2015, to learn from judges and practitioners how the amendments were operating. The Litigation Section agreed to select, in consultation with the Center, four local judges and four Section-leading practitioners to serve on two panels at each location, moderated by Judge Rosenthal and Prof. Gensler. The programs quickly became known as the "discovery proportionality roadshows" and expanded to 17 cities. In total, nearly 70 judges and 70 practitioners appeared on panels speaking to more than 2,500 lawyers.

The roadshows presented an unprecedented opportunity to learn first-hand from the bench and bar how the amendments were working across the country. At the same time, the months of experience with the amendments, and the information and insights the reporters and lawyers who drafted the *Guidelines and Practices* gathered from working with and talking to lawyers and judges in 17 cities across the country, have provided a basis for refinements, clarifications, and additions that are helpful, timely, and need not be delayed until a later comprehensive review a few years from

now. Much of what was learned is consistent with the recommendations in the *Guidelines and Practices*. The proposed changes in the attached revised *Guidelines and Practices* account for these experiences and new case law, but do not significantly alter the substance of the document.

Many of the refinements are to the organization, not the content. Some *Guidelines* or *Practices* are moved to better reflect their relationship to the overall proportionality concept and to some of the practices parties and judges are using or considering in implementing the concept. Several changes account for case law. The bulk of the other changes, particularly in the *Practices,* are examples of discovery techniques recommended by judges and practitioners at the roadshows who use and promote them.

The *Guidelines and Practices,* as revised by the project's reporters, Hon. Lee Rosenthal and Prof. Steven Gensler, are being circulated to members of the original drafting teams, lawyers and judges attending the 2014 conference and others, and posted for three weeks on the Center's web site for comment. The reporters will revise the draft in light of comment received, and the final version will be reviewed by a select Center editorial board consisting of Hon. Paul Grimm, Paul Grewal (former magistrate judge and Facebook deputy counsel), and Dena Sharp (Girard & Gibbs).

Although the Rule amendments have been in place for months, more case law, more experience, and more information are needed before deciding whether to substantially change the *Guidelines and Practices* to make them more useful. More significant changes will require more time and work to analyze the developing case law and the diverse experiences of lawyers and judges applying the amended Rules in a variety of cases. That diversity has been critical to the 2015 Rule amendments from the outset.

In addition, the Center has commissioned several studies evaluating the amendments over the next three years, which include holding three regional bench-bar conferences beginning in April 2017 in Dallas, surveying major bar organizations and judges, reviewing discovery-cost invoices submitted by outside counsel, and studying cost data from ESI vendors. These studies are in addition to a monthly comprehensive annotation of the *Guidelines and Practices* with case law posted at https://law.duke.edu/judicialstudies/conferences/publications/ . All this work will inform future revisions of the *Guidelines and Practices*, ensuring an up-to-date useful reference source.

I. GUIDELINES

The *Guidelines* for applying the 2015 "proportionality" amendments to the Federal Rules of Civil Procedure discuss what the amendments mean, what they did and did not change, and ways to understand their impact and meaning. The *Guidelines* add some flesh to the bones of the Rule text and Committee ~~Note~~Notes and explore how the proportionality amendments intersect with other ~~rule~~Rule provisions. ~~The guidelines are, of course, not part of the rules and have no binding effect. They are a resource for judges, lawyers, and litigants who must understand the amendments and their impact to use and comply with the rules governing discovery.~~[1]

Commented [SSG1]: Moved to footnote.

***Guideline 1*: Rule 26(b)(1) defines the scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Proposed discovery must be both relevant and proportional to be within the scope that Rule 26(b)(1) permits. ~~The Rule 26(b)(1) amendments, however, do not alter the parties' existing discovery obligations or create new burdens~~Information that is within the scope of discovery is discoverable even if it would not be admissible in evidence.**

Commentary

Discovery that seeks relevant and nonprivileged information is within the permitted scope of discovery only if it is proportional to the needs of the case.

The 2015 amendments continue to express the longstanding principle that information does not itself have to be admissible in evidence in order to be discoverable. This is because the gathering of that information can itself be very valuable in obtaining admissible evidence. For example, it remains a staple of deposition practice to ask witnesses to testify to what they have heard other persons say, without regard to whether the statements would be inadmissible as hearsay, because the questioner can use that information to identify and examine the person whose alleged statement was repeated.

The ~~As used in Rule 26(b)(1), proportionality describes:~~

~~(a) the six factors to be considered in allowing or limiting discovery to make it reasonable in relationship to a particular case;~~

[1] The *Guidelines* are, of course, not part of the rules and have no binding effect. They are a resource for judges, lawyers, and litigants who must understand the amendments and their impact to use and comply with the rules governing discovery.

~~(b) the criteria for identifying when the discovery meets that goal;~~

~~(c) the analytical process of identifying the limits, including what information is needed to decide what discovery to allow and what discovery to defer or deny; and~~

~~(d) the goal itself.~~phrase "reasonably calculated to lead to the discovery of admissible evidence" is deleted because it was often misapplied, despite earlier revisions to clarify its meaning. Some lawyers and judges misunderstood the phrase to expand the scope of discovery to include irrelevant information if it was "reasonably calculated to lead to the discovery of" relevant information. That was and is wrong; discovery was and is limited to relevant information, revised in 2015 to add proportionality to what defines the scope of permissible discovery. The new phrasing deletes the "reasonably calculated" phrase and replaces it with a statement clearly rejecting admissibility as a limit on discoverability but just as clearly limiting the scope of discovery to relevant and proportional information.

Lawyers and judges must be careful when quoting or citing to older cases defining or describing the scope of discovery because those cases may have been construing rule text that has been superseded. For example, the Supreme Court stated in 1978 that the scope of discovery "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). At the time of that case, however, the text of Rule 26(b)(1) linked the scope of discovery to "the subject matter involved," while the 2000 amendments altered the scope to permit subject-matter discovery only upon a showing of good cause and the 2015 amendments eliminated subject-matter discovery completely. Furthermore, *Oppenheimer* was decided before the concept of proportionality was added to Rule 26, first in the 1983 amendments adding limits to permissible discovery and explicitly in the 2015 amendments limiting the scope of permissible discovery to both relevant and proportional information. While the 2015 amendments do not change the relevance standard, which remains broad, it is now linked only to claims and defenses—not subject matter—and is joined by proportionality in the definition of scope.

***Guideline 2*: Rule 26(b)(1) identifies six factors for the parties[2] and the judge to consider in determining whether proposed discovery is "proportional to the needs of the case." As discussed further in *Guideline* 3, the degree to which any factor applies and the way it applies depend on the facts and circumstances of each case.**

> ***Guideline 2(A)*: "*Importance of Issues at Stake*"—This factor focuses on measuring the importance of the issues at stake in the particular case. This factor recognizes that many cases raise issues that are important for reasons beyond any money the parties may stand to gain or lose in a particular case.**
>
> **Commentary**
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> ~~A case~~An action seeking to enforce constitutional, statutory, or common-law rights, including a case filed under a statute using attorney fee-shifting provisions to encourage enforcement, can serve public and private interests that have an importance beyond any damages sought or other monetary amounts the case may involve.
>
> ***Guideline 2(B)*: "*Amount in Controversy*~~" —~~"—This factor examines what the parties stand to gain or lose financially in a particular case as part of deciding what discovery burdens and expenses are reasonable for that case. The amount in controversy is usually the amount the plaintiff claims or could claim in good faith.**
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> **Commentary**
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> If a specific amount in controversy is alleged in the pleadings and challenged, or no specific amount is alleged and the pleading is limited to asserting that the amount exceeds the jurisdictional minimum, the issue is how much the plaintiff could recover based on the claims asserted and allegations made. When an injunction or declaratory judgment is sought, the amount in controversy includes the pecuniary value of that relief. The amount in controversy calculation can change as the case progresses, the claims and defenses evolve, and the parties

[2] The *Guidelines and Practices* use the word "parties" to cover lawyers and represented litigants, although many of the practices apply usefully to cases involving unrepresented litigants as well.

and judge learn more about the damages or the value of the equitable relief.

***Guideline 2(C)*: "*Relative Access to Information*"—"—This factor addresses the extent to which each party has access to relevant information in the case. The issues to be examined include the extent to which a party needs formal discovery because relevant information is not otherwise available to that party.**

Commentary

In a case involving "information asymmetry" or inequality, in which one party has or controls significantly more of the relevant information than other parties, the parties with less information or access to it depend on discovery to obtain relevant information. Parties who have more information or who control the access to it are often asked to produce significantly more information than they seek or are able to obtain from a party with less.

The fact that a party has little discoverable information to provide others does not create a cap on the amount of discovery it can obtain. A party's ability to take discovery is not limited by the amount of relevant information it possesses or controls, by the amount of information other parties seek from it, or by the amount of information it must provide in return. Discovery costs and burdens may be heavier for the party that has or can easily get the bulk of the essential proof in a case.

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information, but without the unfairness that can result if the asymmetries are leveraged by any party for tactical advantage. Unfairness can occur when a party with significantly less information imposes unreasonable demands on the party who has voluminous information. Unfairness can also occur when a party with significantly more information takes unreasonably restrictive or dilatory positions in response to the other party's requests.

***Guideline 2(D)*: "*Parties' Resources*"—"—This factor examines what resources are available to the parties for gathering, reviewing, and**

producing information and for requesting, receiving, and reviewing information in discovery. "Resources" means more than a party's financial resources. It includes the technological, administrative, and human resources needed to perform the discovery tasks.

Commentary

In general, more can be expected of parties with greater resources and less of parties with scant resources, but the impact of the parties' reasonably available resources on the extent or timing of discovery must be specifically determined for each case.

As with all of the factors, this factor is only one consideration. Even if one party has significantly greater resources, this factor does not require that party to provide all or most of the discovery proposed simply because ~~it~~the party is able to do so. Nor does ~~it~~this factor mean that parties with limited resources can refuse to provide relevant information simply because doing so would be difficult for financial or other reasons. A party's ability to take discovery is not limited by the resources it has available to provide discovery in return.

The basic point is what resources a party reasonably has available for discovery, when it is needed. Evaluating the resources a party can reasonably be expected to expend on discovery may require considering that party's competing demands for those resources.

***Guideline 2(E)*: "*Importance of Discovery*"~~—~~ —This factor examines the importance of the discovery to resolving the issues in the case.**

Commentary

One aspect of this factor is to identify what issues or topics are the subject of the proposed discovery and how important those issues and topics are to resolving the overall case. Discovery relating to a central issue is more important than discovery relating to a peripheral issue. ~~Another aspect is the role of the proposed discovery in resolving the issue to which that discovery is directed. If the information sought is important to resolving an issue, discovery to obtain that information can be expected to yield a greater benefit and justifies a heavier burden, especially if the issue is important to resolving the case or materially~~

~~advances resolution. If the information sought is of marginal or speculative usefulness in resolving the issue, the burden is harder to justify, especially if the issue is not central to resolving the case or is unlikely to materially advance case resolution.~~

Another aspect is the role of the proposed discovery in resolving the issue to which the discovery is directed. Discovery that is essential to resolving that issue is more important than discovery that is cumulative or only tangentially related to that issue.

Understanding the importance of proposed discovery may involve assessing what the requesting party is realistically able to predict about what added information the proposed discovery will yield and how beneficial it will be.

***Guideline 2(F)*: *Whether the Burden or Expense Outweighs Its Likely Benefit*—This factor identifies and weighs the burden or expense of the discovery in relation to its likely benefit. There is no fixed burden-to-benefit ratio that defines what is or is not proportional.** ~~**When proportionality disputes arise, the party in the best position to provide information about the burdens, expense, or benefits of the proposed discovery ordinarily will bear the responsibility for doing so. Which party that is depends on the circumstances. In general, the party from whom proposed discovery is sought ordinarily is in a better position to specify and support the burdens and expense of responding, while the party seeking proposed discovery ordinarily is in a better position to specify the likely benefits by explaining why it is seeking and needs the discovery.**~~

Commented [SSG2]: Moved to Commentary to Guideline 2(F).

Commented [SSG3]: Moved to become new Guideline 6.

Commentary

In general, the "importance of discovery factor" discussed in *Guideline* 2(E) addresses the likely benefits of proposed discovery based on its importance to resolving issues and the importance of those issues to resolving the case.

In general, proposed discovery that is likely to return important information on issues that must be resolved will justify expending more resources than proposed discovery seeking information that is unlikely to exist, that may be hard to find or retrieve, or that is on issues that

may be of secondary importance to the case, that may be deferred until other threshold or more significant issues are resolved, or that may not need to be resolved at all.

If the information sought is important to resolving an issue, discovery to obtain that information can be expected to yield a greater benefit and justifies a heavier burden, especially if the issue is important to resolving the case or materially advances resolution. If the information sought is of marginal or speculative usefulness in resolving the issue, the burden is harder to justify, especially if the issue is not central to resolving the case or is unlikely to materially advance case resolution.

Guideline 6 separately addresses which party bears the burden of providing specific information about the burdens, expense, or benefits of proposed discovery when proportionality disputes arise.

~~If a party objects that it would take too many hours, consume unreasonable amounts of other resources, or impose other burdens to respond to the proposed discovery, the party should specify what it is about the search, retrieval, review, or production process that requires the work or time or that imposes other burdens.~~

~~If a party objects to the expense of responding to proposed discovery, the party should be prepared to support the objection with an informed estimate of what the expenses would be and how they were determined, specifying what it is about the source, search, retrieval, review, or production process that requires the expense estimated.~~

~~If a party requests discovery and it is objected to as overly burdensome or expensive, the requesting party should be prepared to specify why it requested the information and why it expects the proposed discovery to yield that information. Assessing whether the requesting party has adequately specified the likely benefits of the proposed discovery may involve assessing the information the requesting party already has, whether through its own knowledge, through publicly available sources, or through discovery already taken.~~

~~A party with inferior access to discoverable information relevant to the claims or defenses may also have inferior access to the information needed to~~

~~evaluate the benefit, cost, and burden of the discovery sought. Assessing the benefits of proposed discovery may also involve assessing how well the requesting party is able to predict what added information the proposed discovery will yield and how beneficial it will be.~~

~~Party cooperation is particularly important in understanding the burdens or benefits of proposed discovery and in resolving disputes. The parties should be prepared to discuss with the judge whether and how they communicated with each other about those burdens or benefits. The parties should also be prepared to suggest ways to modify the requests or the responses to reduce the burdens and expense or to increase the likelihood that the proposed discovery will be beneficial to the case.~~

Commented [SSG4]: Moved to Commentary to new Guideline 6.

Rule 26(b)(2)(B) addresses a specific type of burden argument—that discovery should not proceed with respect to a particular source of electronically stored information because accessing information from that source is unduly burdensome or costly. Examples might include information stored using outdated or "legacy" technology or information stored for disaster recovery rather than archival purposes that would not be searchable or even usable without significant effort. Rule 26(b)(2)(B) has specific provisions for discovery from such sources. Those provisions do not apply to discovery from accessible sources, even if that discovery imposes significant burden or cost.

***Guideline 3*: Applying the six proportionality factors depends on the informed judgment of the parties and the judge~~,~~ analyzing the facts and circumstances of each case. The weight or importance of any factor varies depending on the facts and circumstances of each case.**

Commentary

The significance of any factor depends on the case. The parties and the judge must consider each factor to determine the degree to which and the way the factor applies in that case. The factors that apply and their weight or importance can vary at different times in the same case, changing as the case proceeds.

No proportionality factor has a prescribed or preset weight or significance. No one factor is intrinsically more important or entitled to greater weight than any other.

The order in which the proportionality factors appear in ~~the~~ Rule ~~text~~26(b)(1) does not signify preset importance or weight in a particular case. The 2015 amendments reordered some of the factors to defeat any argument that the amount in controversy was the most important factor because it was listed first.

Guideline 4: **The ~~Rule 26(b)(1)~~2015 rule amendments do not require a party seeking discovery to show in advance that the proposed discovery is proportional.**

Commentary

The 2015 amendments ~~to Rule 26(b)(1)~~ do not alter the parties' existing discovery obligations ~~under the discovery rules~~. The obligations unchanged by the amendments include obligations under:

> Rule 26(g), requiring parties to consider discovery burdens and benefits before requesting discovery or responding or objecting to discovery requests and to certify that their discovery requests, responses, and objections meet the rule requirements;
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> Rule 34, requiring parties to conduct a reasonable inquiry in responding to a discovery request; and
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> Rule 26(c), Rule 26(f), Rule 26(g), and Rule 37(a), among others, requiring parties to communicate with each other about discovery planning, issues, and disputes. The need for communication is particularly acute when questions concerning burden and benefit arise because one side often has information that the other side may not know or appreciate.

The 2015 amendments do not require the requesting party to make an advance showing of proportionality. Unless specific questions about proportionality are raised by a party or the judge, there is no need for the requesting party to make a showing of or about proportionality. The amendments do not authorize a party to object to discovery solely on the ground that the requesting party has not made an advance showing of proportionality. As discussed in *Guideline* 5, the amendments do not authorize boilerplate, generalized objections to discovery on the ground that it is not proportional.

~~The amendments do not authorize boilerplate objections or refusals to provide discovery on the ground that it is not proportional. The grounds must be stated with specificity. Boilerplate objections are insufficient and risk violating Rule 26(g). Objections that state with specificity why the proposed discovery is not proportional to the needs of the case are permissible.~~

Commented [SSG5]: Moved to Commentary to new Guideline 5.

The amendments do not alter the existing principles or framework for determining which party must bear the costs of responding to discovery requests.

Guideline 5: **The 2015 rule amendments do not authorize boilerplate, blanket, or conclusory objections or refusals to provide discovery on the ground that it is not proportional.**

Commentary

~~***Guideline 5***~~

The addition of proportionality to the Rule 26(b)(1) definition of the scope of discovery does not authorize a party to assert boilerplate, blanket, or conclusory objections to discovery or refusals to provide discovery. To the contrary, Rule 34 is amended to require parties to state with specificity the grounds for objections or for refusals to produce documents or electronically stored information. Boilerplate objections or refusals to respond to discovery requests risk violating Rule 26(g). Objections that state with specificity why the proposed discovery is not proportional to the needs of the case are permissible.

Guideline 6: **When proportionality disputes arise, the party in the best position to provide information about the burdens, expense, or benefits of the proposed discovery ordinarily will bear the responsibility for doing so. Which party that is depends on the circumstances. In general, the party from whom proposed discovery is sought ordinarily is in a better position to specify and support the burdens and expense of responding, while the party seeking proposed discovery ordinarily is in a better position to specify the likely benefits by explaining why it is seeking and needs the discovery.**

Commentary

If a party objects that it would take too many hours, consume unreasonable amounts of other resources, or impose other burdens to respond to the

proposed discovery, the party should specify what it is about the search, retrieval, review, or production process that requires the work or time or that imposes other burdens.

If a party objects to the expense of responding to proposed discovery, the party should be prepared to support the objection with an informed estimate of what the expenses would be and how they were determined, specifying what it is about the source, search, retrieval, review, or production process that requires the expenses estimated.

If a party requests discovery and it is objected to as overly burdensome or expensive, the requesting party should be prepared to specify why it requested the information and why it expects the proposed discovery to yield that information. Assessing whether the requesting party has adequately specified the likely benefits of the proposed discovery may involve assessing the information the requesting party already has, whether through its own knowledge, through publicly available sources, or through discovery already taken.

Burdens and expenses are not limited to the costs incurred in, and the time spent on, discovery. Other resources may be considered, such as the resources spent on devising and implementing steps to protect privileged or private communications from disclosure. The benefits to be considered are similarly broad and may include obtaining information that may identify additional witnesses or sources or clarify the claims, defenses, and issues.

A party with inferior access to discoverable information relevant to the claims or defenses may also have inferior access to the information needed to evaluate the benefit, cost, and burden of the discovery sought. Assessing the benefits of proposed discovery may also involve assessing how well the requesting party is able to predict what added information the proposed discovery will yield and how beneficial it will be.

Party cooperation is particularly important in understanding the burdens or benefits of proposed discovery and in resolving disputes. The parties should be prepared to discuss with the judge whether and how they communicated with each other about those burdens or benefits. The parties should also be prepared to suggest ways to modify the requests or the responses to reduce the burdens and expense or to increase the likelihood that the proposed discovery will be beneficial to the case.

***Guideline 7*: If a party asserts that proposed discovery is not proportional because it will impose an undue burden, and the opposing party responds that the proposed discovery will provide important benefits, the judge should assess the competing claims under an objective reasonableness standard.**

Commentary

In deciding whether a discovery request is proportional to the needs of the case, only reasonable (or the reasonable parts of) expenses or burdens should be considered.

Changes in technology can affect the context for applying the objective reasonableness standard. It is appropriate to consider claims of undue burden or expense in light of the benefits and costs of the technology that is reasonably available to the parties.

It is generally not appropriate for the judge to order a party to purchase or use a specific technology, or use a specific method, to respond to or to conduct discovery. In assessing discovery expenses and burdens and the time needed for discovery, however, it may be appropriate for the judge to consider whether a party has been unreasonable in choosing the technology or method it is using.

II. PRACTICES

The following practices suggest useful ways to achieve proportional discovery in specific cases. There is no one-size-fits-all approach. While practices that would advance proportional discovery in one case might hinder it in others, the suggestions may be helpful in many cases and worth considering in most. ~~Although many of these~~The suggestions are framed in terms of parties' as well as judges' case-management practices~~, they~~ and are intended to provide ~~helpful guidance~~help in carrying out the shared responsibility for discovery proportional to ~~lawyers and litigants as well.~~the needs of the case.

***Practice 1*: The parties should engage in early, ongoing, and meaningful discovery planning. The parties should begin to work internally and with opposing parties on relevance and proportionality in discovery requests and responses from the outset, which can be well before a case is filed or served and before the Rule 26(f) meet-and-confer, the Rule 26(f) report, and the Rule 16**

conference with the judge. **The judge should make it clear from the outset that the parties are expected to plan for and work toward proportional discovery.** ~~**If there are disputes the parties cannot resolve, the parties should promptly bring them to the judge. The judge should make it clear from the outset that he or she will be available to promptly address the disputes.**~~

Commented [SSG6]: Moved for emphasis and better organizational flow; now subject of new Practice 7.

Commentary

~~## Commentary~~

The ~~judge and the~~ parties and judge share responsibility for ensuring that discovery is proportional to the needs of the case.

The parties are usually in the best position to know which subjects and sources will most clearly and easily yield the most promising discovery benefits. In many cases, the parties use their knowledge of the case to set discovery ~~priorities~~plans that achieve proportionality. When that does not occur, or when discovery disputes nonetheless arise, judges play a critical role by taking appropriate steps to ensure that discovery is proportional to the needs of the case.

~~Judges~~ Parties and judges have ~~many~~a variety of practices ~~available~~ to work toward proportionality. They include: (1) practices for the parties to identify and work together beginning early in the case to create and implement a discovery and case-management order that works toward proportional discovery; (2) orders ~~issued~~that judges issue early in the case communicating the judge's expectations about how the parties will conduct discovery; (~~2~~)3) ways for parties to identify discovery disputes promptly, attempt to resolve them, and if unsuccessful to bring them to the judge for timely, efficient, and fair resolution; (4) orders that judges issue early in the case setting procedures for the parties to promptly ~~identify~~bring discovery disputes and ~~attempt to resolve them, and if~~related matters that they cannot ~~do so to bring them~~resolve to the judge ~~for prompt consideration; (3) setting~~; (5) procedures ~~to enable~~for the parties to engage the judge promptly and efficiently when discovery and related pretrial disputes make it necessary; and (~~4)~~ 6) orders that judges issue communicating the ~~judge's~~ willingness to be available when necessary.

The practices that follow provide examples of specific approaches that judges and parties across the country have used to work toward proportionality in

discovery, including timely and efficiently ~~resolve~~resolving discovery disputes~~, ranging from objections to overly expansive requests to objections to obstructive or dilatory responses.~~.

While the judge has the ultimate responsibility for determining the boundaries of proportional discovery, the process of achieving proportional discovery is most effective and efficient, and the likelihood of achieving it is greatest, when the parties and the judge work together.

***Practice 2*: As soon as possible and both before and in the Rule 26(f) meet-and-confer, the parties should talk in person or at least by telephone to discuss what the case is about and what information will be needed and to plan for proportional discovery. The parties' discussions should result in a proposed discovery/case-management plan with enough detail and specificity to demonstrate to the judge that the parties are working toward proportional discovery. The judge should consider issuing an order early in ~~advance of~~ the ~~parties' Rule 26(f) conference~~case that clearly communicates what the judge expects the parties to discuss ~~at the conference~~, to address in their Rule 26(f) report, and to be prepared to discuss at a Rule 16 conference with the judge.**

Commentary

~~The Rule 26(f) conference is a critical first step in achieving proportionality.~~ Early discussions between the parties, in person or by telephone, provide the best opportunity to meaningfully discuss what the discovery will be, where it should begin, and how it might relate to the overall case plan. Email or written exchanges alone are much less effective at facilitating detailed discovery planning or establishing a framework for identifying and resolving discovery and other pretrial disputes.

The parties' discussions, including in the Rule 26(f) meet-and-confer, and report should cover more than dates for pleading amendments, expert designations, discovery deadlines, motions, and trial, and should go beyond the Rule 26(f) required topics of preservation, protection against privilege waiver, and form of production. The discussions should result in a proposed discovery/case management plan detailed and specific enough to demonstrate to the judge that the parties are working toward proportional discovery.

The judge should make clear—by order or other manner the judge chooses—that the parties are expected to have a meaningful discussion and exchange of

information during the Rule 26(f) ~~conference~~meet-and-confer and what the parties are expected to cover. The judge should also make clear that the Rule 26(f) report will be reviewed and addressed at the Rule 16 conference. Judges following this practice often issue a form order that is routinely sent shortly after the case is filed, along with the order sent to set the ~~date~~dates to file the Rule 26(f) report or to hold the Rule 16 conference.

In a case in which the judge has a basis to expect that discovery will be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge might consider scheduling a conference call with the parties before they hold their Rule 26(f) ~~conference~~meet-and-confer and draft their joint discovery/case-management plan.

Some districts address these practices in their local guidelines or rules.

***Practice 3*: ~~The~~On the judge's own initiative or on the parties' request, the judge should consider holding ~~a~~ "live" Rule 16(b) case-management ~~conference~~and other conferences, in person if practical~~,~~ or by a conference call ~~or~~, videoconference, or other means of having a real-time conversation if distance or other obstacles make in-person attendance too costly or difficult.**

Commentary

~~**Commentary**~~

A "live" interactive conference, in person if possible or if not by telephone, videoconference, or other means for having a real-time, interactive conversation, even among multiple parties, provides the judge and the parties the best opportunity to meaningfully discuss what the discovery will be, where it should focus and why, and how the planned discovery relates to the overall case plan. The parties and the judge should take advantage of technology to facilitate live interactive case-management and other conferences and hearings when in-person attendance is impractical.

A live interactive conference allows the judge to ask follow-up questions and probe the responses to obtain better information about the benefits and burdens likely to result from the proposed subjects and sources of discovery. A live interactive conference also provides the judge an opportunity to explore

related matters, such as whether an expected summary- judgment motion might influence the timing, sequence, or scope of planned discovery.

A live interactive case-management conference allows the judge to identify early the relatively few cases that require more extensive case management. The conference provides the court the most effective way to monitor all cases with little judge or law clerk time required to determine whether the parties are planning proportional discovery, and to limit more extensive case management to the cases that need it.
~~The parties and the judge should take advantage of technology to facilitate live interactive case management and other conferences and hearings when in-person attendance is impractical.~~

In some cases, more than one live case-management conference might be appropriate. In a case in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about discovery, the judge and parties should consider whether to schedule periodic live conferences or hearings, which can be canceled if not needed.

Some districts address this practice in their local guidelines or rules.

Practice 4: **The judge should ensure that the parties have considered what facts can be stipulated to or are undisputed and can be removed from discovery.**

Commentary

Discovery about matters that are not in dispute and to which the parties can stipulate is often inherently disproportionate because it yields no benefit. The judge should ensure—through an order, in a Rule 16 conference, or in another manner—that the parties are not conducting discovery into matters subject to stipulation. The judge should also work with the parties to identify matters that are not in dispute and need not be the subject of discovery, even if no formal stipulation issues.

~~A live interactive case-management conference provides an excellent opportunity for the judge to raise these questions with the parties.~~

Practice 5**: In many cases, the parties will ~~initially focus~~start discovery ~~on~~by seeking information relevant to the most important issues in a case, available from the most easily accessible sources. In a case in which the parties have not**

done so, or in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about relevance or proportionality, the parties and the judge should consider ~~initially focusing~~and discuss starting discovery ~~on~~with the subjects and sources that are most clearly proportional to the needs of the case. The parties and the judge ~~should~~can use the results of that discovery to guide decisions about further discovery.

~~Commentary~~

Commentary

The information available at the start of the case is often enough to allow the parties to ~~identify~~discuss with clients and each other the subjects and sources of ~~discovery~~information that are ~~both~~ highly relevant ~~and accessible~~to important issues in the case and can be obtained without undue burden or expense. Discovery into those subjects and from those sources is usually proportional to the needs of the case because it is likely to yield valuable information with relatively less cost and effort. In many cases, the parties ~~initially focus~~ begin discovery on these subjects and sources without judicial involvement and without explicitly labeling it as "proportional" or "focused." The process is simply the familiar one of making smart choices about the most productive steps to get the information the parties need most and first.

If the parties have not thought through discovery, or the discovery is likely to be voluminous or complex, or there is likely to be significant disagreement about relevance or proportionality, the judge should encourage the parties to consider ~~initially focusing~~starting discovery ~~on~~with the information central to the most important subjects, available from the most easily accessible sources of that information. The parties and the judge can use ~~the~~this information ~~obtained~~ to guide decisions about further discovery. For example, the parties can use the information to decide whether to make additional discovery requests or how to frame them. The judge can use the information to help understand and resolve proportionality or other questions that may arise during further discovery. This approach does not foreclose additional discovery or predetermine that it will be required.

The objective of this approach is to identify good places for discovery to begin, deferring until later more difficult questions about where discovery

should end. ~~This approach is sometimes described as conducting~~ If more discovery ~~into the "low hanging fruit"~~is sought, no heightened showing is required. The parties and ~~using that~~the judge will have more information to ~~decide whether more is needed~~assess proportionality, but the factors and ~~what that should be~~their application do not change simply because some discovery has occurred.

~~The~~
In some cases, the parties ~~are usually in the best position~~may want to ~~determine whether and how to focus~~start discovery ~~in their cases. In some cases, it is sufficient and preferable for~~by obtaining enough information to decide whether to file a dispositive motion, to try the ~~judge simply to verify that the parties have adequately planned for discovery. In other cases, the judge may need to explore options with the parties~~ case, or to ~~help~~ work toward ~~reaching an agreement.~~

prompt settlement. It may make sense for the parties and the judge to ~~focus early~~start discovery ~~on~~by seeking information directed to a particular issue, claim, or defense. For example, a case may raise threshold questions such as jurisdiction, venue, or limitations that are best decided early because the answers impact whether and what further discovery is needed. In some cases, this may be clear after initial disclosures are exchanged. In other cases, ~~it may be necessary for~~ the parties may want to ~~exchange more~~start by seeking information bearing on damages to ~~identify whether and where early~~make decisions about settlement value or how aggressively to pursue claims or defenses. In still other cases, discovery ~~might focus.~~of information about a causation issue may be decisive.

~~If the parties have conducted focused early discovery and more discovery is sought, no heightened showing is required. The parties and the judge will have more information to assess proportionality, but the factors and their application do not change simply because some discovery has occurred.~~

In some cases, it may be necessary for the parties to exchange more information to identify where to start discovery. In other cases, with relatively few disputed issues and limited discoverable information available from relatively few sources, setting discovery priorities may not be necessary or useful at all.

A judge who holds a live Rule 16 conference can address with the parties the potential benefits of ~~focusing early~~starting with focused or targeted discovery and his or her expectations about how the parties will conduct it. The judge can address concerns that one or more parties will misunderstand the process or engage in inappropriate tactics. The judge might consider discussing with the parties what objections typically would or would not be appropriate. If the parties have reached agreement on ~~how to focus early~~starting discovery to get the most important information from the most accessible sources, there should be few occasions for objections on relevance or proportionality grounds.

Judges should consider using other tools designed to facilitate and accelerate the exchange of ~~core~~the most useful information on issues central to the case. For example, judges should consider using the Initial Discovery Protocols for Employment Cases Alleging Adverse Action in cases where they apply. Developed jointly by experienced plaintiff and defense attorneys, these protocols are pattern discovery requests that identify documents and information that are presumptively not objectionable and that must be produced at the start of the lawsuit. The self-described purpose of these protocols is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." The protocols are another way to work toward proportional discovery and have been used effectively in courts around the country. It is expected that work will be undertaken to develop similar subject-specific discovery protocols for other practice areas.

***Practice 6*: In a case in which discovery will ~~initially focus on~~start with particular subjects or sources of information, the judge should consider including guidance in the Rule 16(b) case-management order.**

Commentary

~~**Commentary**~~

While ~~focusing early~~starting discovery by seeking less information than the maximum conceivably allowed can advance the goal of proportionality, it can also cause concern to some litigants. Some may worry that it will be used as a tool to restrict discovery, fearing that they will be required to make a special

case for proportionality before any additional discovery will be allowed. Others may worry that it will be used as a tool to protract discovery if additional rounds of discovery are viewed to be allowed as a given regardless of how robust the initial efforts were or what information they yielded. Still others may worry that expressing an interest in ~~focusing early~~starting with less-than-maximum discovery will be mischaracterized or misunderstood as a desire for a rigidly phased or staged discovery process. Absent any guidance from the judge, these and other concerns may lead parties to forego or resist ~~focusing early~~setting priorities for discovery even when it would make sense to do so.

The judge should consider taking steps to avoid misunderstanding and provide clarity. The judge might consider including a statement in the Rule 16(b) case-management order acknowledging that the parties are ~~initially conducting~~starting with discovery into certain issues or from certain sources and will use the results to guide decisions about further discovery. ~~The judge might consider dividing~~The order can convey the judge's willingness to consider additional discovery and to be available when the parties disagree over whether that is proportional to the needs of the case.

The parties might consider asking the judge to divide the discovery period, using an interim deadline for completing early discovery and a later deadline for completing further discovery that is warranted. ~~Whether the judge formally divides the discovery period or simply guides the parties to focus their early discovery, the judge might find it helpful~~The parties might also consider asking the judge to schedule a discovery status conference or ask for a report after the early discovery is complete. The point is not to impose rigid "bifurcated" or "staged" discovery, but to work toward and implement a case-specific plan that is tailored to the needs of the case and flexible enough to evolve with the case.

If discovery ~~is focused on~~starts with particular subjects or sources, the parties and the judge should consider whether this may require some individuals to be deposed more than once, or require the responding party to search a source more than once. ~~If so, the~~The parties and the judge should address ~~the issues, whether by adjusting the discovery~~and consider ways to avoid repeat ~~efforts, expressly leaving open the possibility of limited additional discovery from the same~~ work, including by allowing the witness to be deposed on all matters in the case or by allowing a broad search from that source.~~, or specifying other appropriate.~~

If the parties reach agreement on starting discovery with particular subjects or sources ~~for early focused discovery~~, a party stipulation or a court order might also specify ways to streamline that discovery, including arranging for the informal exchange of information.

***Practice 7*: If there are discovery disputes the parties cannot resolve, the parties should promptly bring them to the judge. The judge should make it clear from the outset that he or she will be available to promptly address the disputes.**

Commentary

Procedures for the parties to promptly engage the judge in resolving discovery disputes that the parties are unable to resolve on their own are important to avoiding the costs and delays that frustrate efficient and cost-effective case management and defeat proportionality. Prompt resolution of discovery disputes prevents them from growing in intensity and complexity and allows discovery, motions, and pretrial preparations to continue rather than entirely stop while the dispute is pending. The judge should consider including in an order issued early in the case a procedure that makes clear the judge's availability to work with the parties in timely resolving discovery disputes.

Some districts address this practice in their local guidelines or rules.

***Practice 8*: On the judge's own initiative or on the parties' request, the judge should consider requiring the parties to request ~~a~~an in-person or telephone conference with the court after conferring with opposing parties and before filing a motion ~~relating to discovery, including a motion~~ seeking to compel or to ~~quash~~protect against discovery ~~or seeking protection from discovery.~~**
~~.~~. Some judges require the parties to request a

~~Commentary~~

~~A live premotion~~ **conference on the basis of limited motions or short briefs. These and similar practices avoid the often unnecessary costs and delays of fully briefed discovery motions.**

Commentary

A live pre-motion or limited-motion conference between the parties and the court is often an effective way to promptly, efficiently, and fairly resolve a

discovery dispute~~. The conference~~ at considerably less judge- and law-clerk time than reading fully briefed motions, responses, and replies with attachments and issuing a written opinion. The parties and the judge save time, work, and resources.

The live pre-motion or limited-motion conference can often be held shortly after the parties inform the judge's case manager or judicial assistant that a discovery dispute has arisen. The conference lets the parties tell the judge what the party seeking the discovery really needs and what the party resisting the discovery is able to produce without undue burden, cost, or expense.

The live, interactive conference exchange allows the parties and the judge to productively focus on practical solutions to practical problems rather than on disagreements over jurisprudence. The conference exchange often resolves the discovery dispute, either by leading to an agreed resolution or by providing the judge with the information needed to rule~~. The~~ fairly and accurately. Discovery can continue, allowing the case ~~remains~~to stay on track~~, the~~ instead of stopping while the judge reads extensive motions and briefs and writes a written opinion. The parties are saved ~~expense,~~the cost and ~~the parties~~delay of filing full motions and briefs, and the judge and her clerks are saved the work and time ~~associated with formal~~ needed to read those motions and briefs and issue a written opinion.

If the pre-motion ~~practice that is often unnecessary. If the premotion~~or limited-motion conference indicates that some briefing or additional information on specific issues would be helpful, the judge can focus further work on the specific issues that require it.

The judge might consider requiring the party requesting a ~~premotion~~pre-motion or limited-motion conference on a discovery dispute to send a short communication—often limited to two pages—describing (not arguing) the issues that need to be addressed and allowing a similarly limited response.

The judge might consider the best way to memorialize the results of the conference. Approaches can vary. Some judges have a court reporter present for the conference and hold it in the courtroom. Others hold the conference in chambers, sometimes with a court reporter and other times with a law clerk taking notes for a brief minute entry in the court's docket sheet. Other judges may ask one of the parties to draft and circulate a proposed order. Some cases

may be better served by the courtroom formality and others by the more relaxed exchange in chambers.

The judge can include a ~~premotion~~pre-motion or limited-motion conference requirement and procedure in the case-management order issued under Rule 16(b). The procedure can include provisions for using telephone ~~and~~or video conferences if one or more of the parties cannot attend in person.

Some districts address this practice in their local guidelines or rules.

***Practice ~~8~~9*: When proposed discovery would not or might not be proportional if allowed in its entirety, the judge should consider whether it would be appropriate to grant the request in part and defer deciding the remaining issues.**

Commentary

~~**Commentary**~~

Allowing ~~the~~ proposed discovery in part can further an iterative process. The discovery allowed may be all that is needed, or it may clarify what further discovery is appropriate. Deferring a decision on whether to allow the rest of the proposed discovery gives the judge and parties more information to decide whether all or part of it is proportional.

Sampling can be used to determine whether the likely benefits of the proposed discovery, or the burdens and costs of producing it, warrant granting all or part of the remaining request at a later time.

If a modified request would be proportional, the judge ordinarily should permit the proportional part of the discovery. However, the judge is under no obligation to do so and may rule on the discovery request as made.

***Practice ~~9~~10*: The parties and judge should consider other discovery rules and tools that may be helpful in achieving fair, efficient, and cost-effective discovery. In particular, the parties should consider presenting discovery requests as soon as possible as authorized under amended Rule 34.**

Commentary

Other discovery rule changes and tools, not part of the proportionality amendments, should be considered as part of the judge's and parties' overall plan for fair, workable, efficient, and cost-effective discovery and case resolution.

Rule 34 is amended to allow a requesting party to *deliver* document requests to another party before the Rule 26(f) conference. The requests are not considered *served* until the meeting, and the 30-day period to respond does not start until that date. The early opportunity to review the proposed requests allows the responding party to investigate and identify areas of concern or dispute. The parties can discuss and try to resolve those areas at the Rule 26(f) conference on an informed basis. If disputes remain, the parties should use the Rule 26(f) report and the Rule 16(b) conference to bring them to the court for early resolution.

As an alternative to the formal mechanism that now exists under Rule 34, some lawyers may prefer to share draft, unsigned document requests, interrogatories, and requests for admission. Both the formal and informal practices prompt an informed, early conversation about the parties' respective discovery needs and abilities.

~~Rule 34 is also amended to prohibit boilerplate objections to requested discovery, including objections to proportionality, and to require the responding party to state whether documents are being withheld on the basis of objections. A judge's prompt enforcement of these requirements can be very helpful in managing discovery.~~

Commented [SSG7]: Moved to new Practice 11 focusing on this topic.

Rule 26(c) makes explicit ~~judges'~~judges' authority to shift some or all of the reasonable costs of discovery on a good cause showing if a party from whom discovery is sought moves for a protective order. A judge may, as an alternative to denying all of the requested discovery, order that some or all of the discovery may proceed on the condition that the requesting party bear some or all of the reasonable costs to respond. The longstanding presumption in federal-court discovery practice is that the responding party bears the costs of complying with discovery requests. That presumption continues to apply. The 2015 amendments to Rule 26(c) make that authority explicit but do not change the good cause requirement or the circumstances that can support finding good cause.

Rule 37(e) is amended to clarify when and how a judge may respond to a ~~party's~~party's inability to produce electronically stored information because it was lost and the party failed to take reasonable steps to preserve it. It provides a nationally uniform standard for when a judge may impose an adverse inference instruction or other serious sanctions. It responds to the concern that some persons and entities were over-preserving out of fear their actions would later be judged under the most demanding circuit standards. Working toward proportionality in preservation is an important part of achieving proportionality in discovery overall. Other rule amendments emphasize the need for careful attention to preservation issues. Rule 26(f) has been amended to add preservation of electronically stored information to the list of issues to be addressed in the parties' discovery plan. Rule 16(b) is amended to add preservation of electronically stored in formation to the list of issues the case-management order may address.

Rule 16(b) and Rule 26(f) have been amended to encourage the use of orders under Rule 502(d) of the Federal Rules of Evidence providing that producing information in the litigation does not waive attorney-client privilege or work-product protection, either in that litigation or in subsequent litigation. Nonwaiver orders under Federal Rule of Evidence 502(d) can promote proportionality by reducing the time, expense, and burden of privilege review and waiver disputes.

Questions impacting and approaches to discovery are usually best explored in a live conference between the judge and the parties, preferably before formal discovery-related motions (such as under Rule 26(c) or Rule 37(a)) and accompanying briefs are filed. A live Rule 16 or ~~premotion~~pre-motion conference enables the judge and the parties to examine how the various discovery tools can best be used to create and implement an effective discovery and case-management plan.

***~~Practice 10~~:Practice 11*: The parties must frame discovery requests and responses after considering the burdens and benefits. Rule 34 emphasizes this obligation by prohibiting general, boilerplate objections to production requests and requiring the responses to state objections with specificity, to state whether documents are being withheld on the basis of objections, and to state when discovery will be completed. When necessary, the parties should ask the judge to enforce these discovery obligations, and judges should make themselves available to do so promptly and efficiently.**

Commentary

A judge's prompt enforcement of the Rule 34 prohibition on conclusory and boilerplate objections, including to a lack of proportionality, can be a critical part of managing and achieving discovery that is both proportional and fair. Enforcing requirements for specific and clear objections can be as important to proportionality as limiting discovery requests to enforce the Rule 26(b)(1) definition of scope. Similarly, enforcing the requirements to state when documents will be produced and whether documents are being withheld on the basis of objections can help ensure proportionality by avoiding uncertainties that often led to more objections and disputes.

The Rule 34 requirements are consistent with the Rule 26(g) requirements to consider discovery burdens and benefits before requesting or objecting to discovery and to certify that the requests, responses, and objections meet the rule requirements.

The parties should identify ways to engage the judge when necessary to efficiently enforce the Rule 34 requirements for responding to production requests.

Practice 12: **The parties and the judge should consider using technology to help achieve proportional discovery.**

Commentary

Technology can help proportionality by decreasing the burden or expense, or by increasing the likely benefit, of the proposed discovery.

When the discovery involves voluminous amounts of electronically stored information, the parties and judge should consider using technologies designed to categorize or prioritize documents for human review.

Because technology evolves quickly, the parties and the judge should not limit themselves in advance to any particular technology or approach to using it. Instead, the parties and the judge should consider what specific technology and approach works best for the particular case and discovery.