

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

Center for Judicial Studies, Duke Law School

October 2016

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 for 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 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, refining and updating 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, were 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 revised the draft in light of comments received, and the final version was 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 May 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.