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

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FOREWORD†

[TBD]

I. PROPORTIONALITY GUIDELINES

These 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 Notes and explore how the proportionality amendments intersect with other Rule provisions.

> **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. Information that is within the scope of discovery is discoverable even if it would not be admissible in evidence. The Rule 26(b)(1) amendments do not alter the parties' discovery obligations or create new burdens.

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 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 older cases defining or describing the scope of discovery because some of the passages from 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," and the Court specifically stated that it was interpreting that "key phrase." Since then, 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. *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.

The statement in *Oppenheimer* that describes the breadth of the relevance inquiry remains intact.[a] In the discovery context, relevance is "construed broadly to encompass any matter that bears on" the matter in question. *Oppenheimer*, 437 U.S. at 351. The difference today is that the relevance inquiry is linked only to claims and defenses—not subject matter—and is joined by proportionality in defining scope.

The rule text no longer specifically states that discovery into the sources of information—discovery into the existence, description, or nature of documents, or the identity of witnesses—is part of the scope of discovery. The Committee Note explains that the language was deleted solely out of a belief that "[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples." Information about the existence and location of sources of information is relevant because it "bears on" the claims and defenses, and is therefore within the scope of discovery so long as it is proportional to the needs of the case.

> **GUIDELINE 2:** Rule 26(b)(1) identifies six factors for the parties 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.

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

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[a] *Oppenheimer* has unfortunately been cited many times since December 1, 2015 for the scope of discovery under Rule 26(b)(1), apparently by practitioners and courts unaware that the 2015 Amendments superseded its broad reading of the rule. It is clear that "the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1)," *In re Bard IVC Filters Prod. Lab. Lit.*, 2016 WL 4943393 (D. Ariz. 2016)(Campbell, J. (chair of the Civil Rules Advisory Committee in 2014-2015)), but the frequency of its appearance in decisions discussing the scope of Rule 26(b)(1) suggest that citations to *Oppenheimer* be avoided, lest it be viewed by lawyers and courts as entirely sound precedent.

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.

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 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.

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.

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 the party is able to do so. Nor does 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.

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 or a required element of a claim or defense 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 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.

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.

This factor focuses on the benefits of the information to be obtained and the burdens or expenses of obtaining that information. It is to be considered along with the other factors, which separately address and take into account the importance of the issues at stake and any resulting benefit to society associated with litigation of those issues.

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.

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.

Under Rule 26(b)(2)(B), the party resisting discovery bears the burden of establishing that the information is not reasonably accessible because of undue burden or costs. Even where such showing is made, however, the court may still order the discovery if the requesting party establishes good cause considering limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery or if the court allocates some of the cost to the requesting party under Rule 26(c)(1)(B).

> **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.

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 Rule 26(b)(1) does not signify preset importance or weight in a

particular case. The 2015 amendments reordered the factors to eliminate the argument that amount in controversy was the most important factor simply because it was listed first. But its relocation does not mean that it no longer is an important consideration. If anything, the changes were made to discourage arguments based on the position of the factors in the queue and promote substantive consideration of each factor in light the others, given the specific circumstances of each case.

GUIDELINE 4: The 2015 rule amendments do not require a party seeking discovery to show in advance that the proposed discovery is proportional.

The 2015 amendments do not alter the parties' existing discovery obligations. 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;

Rule 34, requiring parties to conduct a reasonable inquiry in responding to a discovery request; and

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 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.

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. When a party objects with particularity to producing some discovery but agrees to produce other requested discovery, the parties should discuss the timing of the production of the unobjectionable discovery to determine whether agreement can be reached to begin production before resolution of the objections. If good faith negotiations do not resolve the issue, they should promptly seek court intervention.

> **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 of information relevant to any party's claim or defense. It is incumbent on the party requesting the data to explain how the expected information will be helpful to the trier of fact in resolving a matter in dispute regarding a pertinent element of a claim or defense.

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 in its responses 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.

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, when

appropriate, 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.

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. BEST 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. The suggestions are framed in terms of parties' as well as judges' case-management practices and are intended to provide help in carrying out the shared responsibility for discovery proportional to the needs of the case.

> **BEST 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.

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 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.

Parties and judges have a variety of practices 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 that judges issue early in the case communicating the judge's expectations about how the parties will conduct discovery; (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 bring discovery disputes and related matters that they cannot resolve to the judge; (5) procedures for the parties to engage the judge promptly and efficiently when discovery and related pretrial disputes make it necessary; and (6) orders that judges issue communicating the 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 resolving discovery disputes.

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.

> **BEST 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 and to avoid unnecessary delay. The judge should consider issuing an order early in the case that clearly communicates what the judge expects the parties to discuss, to address in their Rule 26(f) report, and to be prepared to discuss at a Rule 16 conference with the judge.

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. If discovery is expected to include the production of electronically stored information (ESI) the responding party should be prepared to provide information about its electronic systems and data, including the types of platforms used, the location of the data, and accessibility to the extent it is reasonably helpful in assisting the requesting party in formulating its request for production, and is not disproportionately costly.

Such disclosures should be focused on relevant systems and be and information necessary for the requesting party to formulate its requests. Absent evidence of discovery abuse or obstructionism, these disclosures should be conducted informally.

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) 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 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) meet-and-confer and draft their joint discovery/case-management plan.

If the responding party intends to use technology assisted review (TAR) or ESI discovery techniques such as applying search terms, it should be prepared to propose a protocol for doing so that provides transparency and feedback from all parties. Although not required, allowing all parties to provide input on the particular search techniques to be used will facilitate discovery and reduce the potential for disputes. In larger cases in particular, the responding party should consider the benefits of using TAR.

Regardless, the parties at all times have an obligation under Rule 34 to conduct a reasonable inquiry in responding to a discovery request. Just because a party is considering using technology, whether it be TAR, search terms or other techniques to assist in its review, this does not relieve the responding party of its duty to produce discovery that is relevant, accessible, and can be produced without TAR or search terms. Many relevant documents can be readily retrieved without using such techniques, such as policy documents, prospectuses, organizational charts, and transactional data. If readily available and responsive, such information should be produced promptly and should not be subject to or withheld pending development of an ESI protocol, which, in larger cases, can take many months to develop and implement. The production of such documents may also aid the parties in developing an ESI protocol. Documents that are known to exist and to be relevant and responsive should not be withheld because they are not identified by using TAR, search terms, and the like.

A protocol regarding the treatment of privileged materials should also be addressed at the Rule 26(f) meet and confer. What information must be included in a privilege log should be discussed, including metadata. Privilege logs should be provided at the time of the production or as soon thereafter as possible to identify any documents withheld on privilege ground stated in the responding party's objections. What information must be included in a privilege log should be discussed. This dialogue can be aided by the producing party disclosing during the early

conference what metadata will be captured in its production so its inclusion in a privilege log can be considered.

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

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

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.

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. To avoid undue delay, the judge should consider including firm discovery due dates in his or her scheduling order by which all responsive documents must be produced and any discovery disputes must be brought to the court for resolution. When considering such dates, the judge should consider the time and work necessary to collect, search, process, review, QC, format and produce documents. If deadlines are short or tight, then the same level of accuracy or completeness that longer deadlines would provide may not be possible.

In cases involving complex or extensive electronic discovery, the parties and judge might consider whether to have IT personnel, records management personnel, or electronic discovery consultants attend the case-management conference. Depending on the complexities of the case, the judge may consider requiring a tutorial on the technology being used for discovery in a

particular case so he or she may better supervise the development of an ESI protocol and be better prepared to address any disputes that may arise. But the court seldom will be in a position to know a party's documents and systems as well as the party itself, and should keep this in mind when resolving disputes regarding the specific procedures that will be used to produce ESI in such complex cases.

Active judicial case management is uniformly cited as an important if not the most important tool for case resolution. Judges should consider scheduling regular, and in complex cases monthly, status conferences where the parties identify the progress of discovery and identify potential disputes as they arise.

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

> **BEST 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.

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. Additionally, the judge should encourage the parties to consider stipulating to the authenticity of certain documents, such as business records produced by the parties or emails and social media posts made by individual parties.

> **BEST PRACTICE 5**: In many cases, the parties will start discovery by producing 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 and discuss starting discovery with the subjects and sources that are most clearly proportional to the needs of the case. The parties and the judge can use the results of that discovery to guide decisions about further discovery.

The information available at the start of the case is often enough to allow the parties to discuss with clients and each other the subjects and sources of information that are highly relevant 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 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.

In most cases, discovery is not a major problem. But 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 starting discovery with production of information central to the most important subjects, available from the most easily accessible sources of that information. The parties and the judge can use this information to guide decisions about further discovery. For example, the parties can use the information to decide whether to pursue or 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. If 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, the parties may want to start discovery by obtaining enough information to decide whether to file a dispositive motion, to try the case, or to work toward prompt settlement. It may make sense for the parties and the judge to start discovery 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, the parties may want to start by seeking information bearing on damages to make decisions about settlement value or how aggressively to pursue claims or defenses. In still other cases, discovery of information about a causation issue may be decisive.

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 starting with the production of core discovery and his or her expectations about when such information will be produced. 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 starting discovery with the production of 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 information on issues central to the case. For example, judges should consider using the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, FLSA, and natural disasters 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.

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

While 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 starting with less-than-maximum discovery will be mischaracterized or misunderstood as a desire for a rigidly phased or staged discovery process. Others may worry that delaying full discovery may lead to delay tactics designed to prevent additional discovery altogether. Absent any guidance from the judge, these and other concerns may lead parties to forego or resist 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 starting with discovery into certain issues or from certain sources and will use the results to guide decisions about further discovery. 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. In a case in which discovery is likely to be voluminous or complex, the parties may choose to serve robust discovery requests, taking into account the proportionality factors, followed by discussions or orders that focus on the immediate production of the most important information first, but allowing the parties and the court to prepare a larger discovery plan. This would avoid a situation where a party agrees to serve requests for more limited discovery or from more limited sources, is forced to engage in protracted negotiations and motion practice to obtain that discovery, only to face arguments that additional discovery was not contemplated or that multiple productions are unduly burdensome.

After discussing the issues that may affect the timing scope, completeness, and accuracy of production with the parties, the court should consider providing a reasonable document discovery schedule that provides a deadline for all parties to serve document requests; produce documents, including providing interim deadlines for certain types or volumes of documents; and motions to compel.

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. In particular, in cases where it may be necessary to conduct discovery in locations that are not reasonably accessible or otherwise more expensive, it is generally better to conduct discovery of more easily accessible and less expensive locations to minimize the need to access the more expensive locations. Also, in cases that may involve cross border discovery, it is generally best practice to start with domestic discovery and then move to non-U.S. discovery where it is reasonable and necessary to avoid (or at least minimize) any conflict with local non-U.S. law. 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. However, development of a detailed discovery plan ordinarily should not delay the production of documents the parties agree are responsive to a production request, relevant, accessible and should be produced. If the parties cannot agree to begin production of documents that have not been objected to prior to the completion of the discovery plan, they should promptly seek resolution by the court.

In larger, more complex or contentious matters, judges should consider scheduling regular discovery status conferences (monthly or every other month) to keep discovery moving and to assist resolving disputes that are bogging down matters. Judges should consider requiring parties to provide joint status reports in advance of these conferences that highlight progress and the concerns of the parties. This can help the court understand and avoid lingering problems that may arise at the close of discovery and delay the resolution of the matter.

If discovery 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. The parties and the judge should address and consider ways to avoid repeat work, including by allowing the witness to be deposed on all matters in the case or by allowing a broad search from that source.

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

> **BEST 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.

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.

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

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 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. Fed. R. Civ. P. 16(b)(3)(B)(v) authorizes the judge to adopt such procedures to resolve discovery disputes without formal briefing. They 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 needs and what the party resisting the discovery is able to produce without undue burden, cost, or expense.

The judge should consider, for example, a procedure by which the parties must submit a one- or two-page joint letter describing the discovery dispute or a conference call with the judge to try to resolve disputes prior to bringing a formal motion to compel. Parties and judges report that such procedures resolve the vast number of discovery disputes more quickly and without requiring a noticed motion.

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 fairly and accurately. Discovery can continue, allowing the case to stay on track instead of stopping while the judge reads extensive motions and briefs and writes a written opinion. The parties are saved the cost and delay of filing full motions and briefs, and the judge and her clerks are saved the work and time needed to read those motions and briefs and issue a written opinion.

If the pre-motion 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 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 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 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.

> **BEST PRACTICE 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.

Allowing 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.

> **BEST PRACTICE 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 delivering discovery requests before their Rule 26(f) meet-and-confer.

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 26(d) 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. Early delivery also allows the responding party to identify documents that it agrees are responsive. This can aid the parties in developing a discovery plan. 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 26(c) makes explicit 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. While cost-shifting should not be used to allow discovery that is outside the scope of discovery (i.e. a party should not be allowed to purchase discovery to which it is not entitled), in close cases of proportionality the judge may wish to discuss the advisability of cost shifting with the parties.

Rule 37(e) is amended to clarify when and how a judge may respond to a 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.

Generally, inadvertent disclosure of privileged material does not operate as a waiver under Federal Evidence Rule 502(b), if reasonable steps were taken to prevent disclosure and reasonable steps were taken to rectify the error. 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 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.

> **BEST 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.

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. The level of specificity required by the responding party may depend on the level of particularity of the request being responded to. Enforcing requirements for specific and clear requests and objections can be as important to proportionality as weighing the costs and burdens of discovery 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.

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

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. That being said, courts should be aware that they rarely, if ever, will know the details about the IT systems of the parties. For that reason, except in cases of discovery abuse or obstructionism, a court should not impose a particular discovery technology on a party.