Dear Director Rabiej,

First of all I would like to say that it is an honor and a privilege to be given the opportunity to share my thoughts concerning the draft Standards and Guidelines Explaining and Practices Implementing the Discovery Proportionality Amendments.

Following are my comments on the Standards and Guidelines Explaining and Practices Implementing the Discovery Proportionality Amendments. I hope they are helpful in making the Standards, Guidelines, and Practices as useful as they can be.

Guidelines

Guideline 1 - Commentary

- When calculating proportionality using the description of proportionality set forth in the commentary to Guideline 1, it is necessary to understand that systems may be costly for a third party to extract. It may be more reasonable to conduct such extractions using internal resources rather than a third party.

Guideline 2(B) - Commentary

- The commentary here recognizes how amount in controversy and claims and defenses can change as a case progresses. It is also important to recognize that costs associated with discovery will change as well, as counsel learns about their client's systems.

Guideline 2(C) - Commentary

- Another factor to consider in the second paragraph of the commentary is that the size of a party can have an effect on a party's ability to take discovery and the costs and burdens of it.

Guideline 2(D) - Commentary

- In determining the reasonably available resources for a party it is important not to generalize about the parties or their systems. Different technical systems have different demands with respect to administrative, technical, and human resources. More expensive systems could have lower administrative, technical, and human resource demands than other cheaper systems.

Guideline 2(F) - Commentary

- An important consideration in the first paragraph of the commentary is what to do if counsel learns that certain information exists after the initial phases of discovery.
- In relation to the estimate of costs in the second paragraph, it is also important to account for the cost resulting from a party's expertise or lack thereof, which could result in much higher costs.
• The benefits/burden assessment discussed in the fifth paragraph raises a potential issue: a party may only be able to assess the benefits of the information to be produced by having the information and they may only be able to get the information by assessing the benefits of having the information.
• Also important to consider what is meant by "inferior" in the sixth paragraph.
• With regards to the importance of cooperation and communication discussed in the last paragraph, something that can be of great value in this area is having the parties use internal employees with first hand knowledge of the systems at issue rather than 30b6 experts to open lines of communication concerning the potential burdens or benefits. Using internal employees will lessen the degrees of separation between counsel, the Court, and the parties, which will enhance transparency and efficiency in the discovery process.

Guideline 3 - Commentary

• Excellent to note that the order of the proportionality factors does not signify relative importance or weight. For example, the burden/benefit factor should rightly take precedence over the parties' resources factor if a wealthy producing party will have to spend great effort and money to produce information that will be of little benefit to the requesting party.

Guideline 5 - Commentary

• In the second paragraph, it is also important to consider the benefits and costs of the human resources available to the parties to do the work as well as the technology.
• In the third paragraph, it is necessary to consider whether a party has been unreasonable in choosing its processes as well as the technology used in discovery.

Practices

Practice 1 - Commentary

• Parties should consider using or creating a data map or something equivalent to a data map as early as possible in the discovery process.

Practice 3 - Commentary

• Parties may want to consider providing a framework to the Court at the case-management conference in order to realize greater value from the conference

Practice 5 - Commentary

• Important to keep in mind when a judge is advising or directing the parties' focus that it will evolve over time and it will be necessary to adjust guidance accordingly.
• In the third paragraph it may be helpful to include that a judge can also order discovery to proceed in an iterative manner, such as with respect to refining search terms through a process by which terms are proposed, run, and refined if they return too many hits.
• In regards to the fourth paragraph, the key players and relevant sources are only clear if the client has a firm grasp on the IT systems in use. Often this is not the case however in which case it would not be prudent to rely on the parties to identify where early discovery should focus without some external guidance.
• The last paragraph here is confusing as worded and appears to contain a typo: "Identifying the subjects and sources for focused early discovery in a particular case is not a precise exercise, but precision is not required."

Practice 6 - Commentary

• It might be helpful here to suggest that parties conduct custodial interviews of IT personnel and custodians.

Please let me know if you have any questions or if I can assist in any way going forward.

Best regards,
Daniel Garrie
Dear Mr. Rabiej:
Thank you for your invitation to comment on the Duke Proportionality Standards and Guidelines. I’m currently the President-Elect of the Consumer Attorney of California and the Treasurer of the American Association of Justice (AAJ). My practice includes the areas of plaintiff’s catastrophic injury, wrongful death, product liability, class actions and civil appeals. I testified before the Advisory Committee regarding the discovery package at the Phoenix hearing. I’m pleased that many members of AAJ actively participated in the Duke Proportionality Conference and have been actively engaged in reviewing the draft guidelines. I wanted to share my own comments with you.

**Practice 10-Cost Sharing:**

The most troubling aspect of the draft is Practice 10: Cost-sharing. Neither the proportionality rule itself nor the Committee Note address cost sharing. Indeed, it is my understanding that this issue might be addressed later by the Civil Rules Advisory Committee. If it is to be examined later, then there should be nothing said about it now. While cost-shifting is addressed in Rule 26(c)(1)(B), which permits cost-shifting for protective orders, it is clear that cost shifting is excluded from 26(b)(1), scope of discovery. An extraordinary amount of time and discussion was devoted to proportionality during consideration of the rule. If the Advisory Committee intended cost shifting, such as was intended for protective orders, it would have said so. Absent that, Practice 10 creates an unfair burden on individual litigants who cannot afford to take on large corporate interests. It is antithetical to the additional factor that was added on asymmetrical information and could be used against plaintiffs in civil rights and employment discrimination cases. As drafted, Practice 10 should be removed from the draft. In the alternative, it could be redrafted to make it perfectly clear that cost-shifting only applies to protective orders.

**Practice 6-Early Focused Discovery:**

Practice 6 suggests that judges should consider ordering early focused discovery sua sponte in the Rule 16 order. This type of bifurcation of discovery has been tried before and failed. Judges correctly concluded that it was inefficient, led to unnecessary motion practice and reduced transparency. While it might be helpful for the parties to be encouraged to focus discovery in some key areas or topics because it would be useful in resolving some claims or promoting settlement, “encouraging” and “directing” are very different actions. Direction by the court may not allow the attorneys to best represent their clients. Further, is may lead to additional discovery disputes, redundant discovery, and additional expense. Like cost-sharing, early discovery is not required by the rule or the Committee Note and is another overreach.

**Guideline 2(C)-Relative Access to Information:**

The new factor on relative access to information was added by the Advisory Committee in response to the numerous comments received from the plaintiffs’ bar about how the shift in scope from relevancy to proportionality affects those without access to information. The factor was added to ensure that plaintiffs have access to information that they would otherwise not have. The Committee Note reflects this:

“One party—often the individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances mean that the burden of responding to discovery lies heavier on the party who has the information, and properly so.”
In contrast, the commentary to Guideline 2(C) suggests that “proportionality requires permitting all parties access to necessary information, but without the unfairness that can result when the asymmetries are leveraged for tactical advantage.” The commentary is a huge leap in assumption from the Committee Note, especially in civil rights and employment discrimination cases where plaintiffs often do not even have the most basic factual information. The classic example is Lily Ledbetter, who did not realize that she was being paid less than her fellow male managers at Goodyear Tire until she received an anonymous note. She did not have any records of what her male colleagues were being paid while Goodyear held all the information. It is hard to imagine that access to records being held by Goodyear would have resulted in a “tactical advantage.” Since these guidelines are proposed to be used as a training manual first and foremost for judges, perhaps it would be best to focus on the true meaning of the new guideline as written and omit comments about tactics altogether.

Thank you for your attention to these issues.
Very truly yours,
ARIA SANGUINETTI
STAHL & TORRIJOS, LLP
Elise R. Sanguinetti
I think I may have good examples for the following, and some others:

2. **ISSUE**: Guideline 2C discusses relative access to information. In employment cases, access to information is often difficult for an employee to obtain, even if she can speak with current employees, because of employer policies or fear of retaliation.
   a. **COMMENT**: Case or explanation or citations in which employees are unwilling to speak because fear of retaliation hinders access to information.
   b. **COMMENT**: Case or explanation or citations in which employees are not allowed to discuss salary, benefits, performance reviews.
   c. **COMMENT**: Case or explanation in which employer failed to tell plaintiff why the adverse action was taken.
   d. **COMMENT**: Case examples and explanation in which employer failed to tell plaintiff even that there was an adverse action.

Thus, in a federal nonselection case, in deposing the decision maker, he admitted that prior to the list from which he made the selection, there was another list that was later canceled. The DOJ defended that such list was irrelevant because it could not show the reason for the ultimate selection. I won the motion to compel and got the list. The list showed that the selecting official had ranked my client on that list behind even a virtually unqualified candidate, which showed retaliatory animus. Summary judgment was reversed at the Sixth Circuit on that claim and I went on to settle the case without confidentiality. The case is *Philbrick v. Holder*, Sixth Circuit 2014. Any proportionality scheme that would preclude that would be unjust.

I’m litigating another case right now before an EEOC AJ, in which I prevailed on a motion to compel deposition testimony of two managers whose relevance was challenged by the Agency. It turns out that they both admit to receiving a key letter that was not disclosed. It would seem that a proportionality scheme might tip the balance against those depositions and therefore against any possibility of using the letter.

Intentional discrimination cases are cases in which the ultimate issue is the mindset of the defendant. To prove that mindset requires stages of information-gathering. I could probably provide support for virtually every point you all are trying to make, but I might do better trying to do that in conversation with someone about what is needed. If someone would like to speak with me, give me a heads up and I would love to chat. I’d really like to help provide examples if that’s what you need.
Just one question for you to consider. Regarding the comments to Guideline 2(D), when considering the "parties' resources," should the Court consider counsel's resources. For example, where the plaintiff has limited resources (inc. for class actions) should the plaintiff's law firm's resources be considered? In ruling in the LA Fitness class action, Judge Baylson made pltf pay for certain additional discovery, noting that the pltf class was represented by a well to do firm. Many commentators thought he was wrong to consider that. Do you want to get into that thicket with the commentary to Guideline 2(D)?

Magistrate Judge Andrew Peck
Dear Professor Rabiej:

Attorney Richard Seymour has submitted a thoughtful, well-reasoned, and well-researched Comment to the Proposed Guidelines which I strongly concur with.

A couple of additional points that I add are:

a. In employment cases, the doctrine of “after-acquired evidence” may serve to cut off Plaintiff’s damages. Defendants routinely assert this as an affirmative defense, do not provide any factual evidence to support the same, and only at the last minute spring it on the Plaintiff using ESI evidence in their sole possession. Proportionality, if applied in accordance with the proposed Guidelines, will further prejudice the Plaintiff.

It should be noted that defendants are “owners” of the ESI. Plaintiffs who are in possession of such ESI are subject to sanctions, including criminal sanctions, if caught in possession of ESI that is otherwise helpful to their case but has been withheld by defendants. Thus, defendants have a double-edged sword to use against plaintiffs—they are in control of the very evidence plaintiff’s need to prove their case and can, if plaintiffs are in possession of the needed evidence, file a criminal complaint against the plaintiff.

b. The guidelines should comment specifically on employment and civil rights cases. Perhaps as follows:

“The courts recognize that Plaintiffs in employment and civil rights cases further the public interests in eradicating discrimination and enforcing civil rights. The courts recognize that Plaintiffs do not possess the financial or information technology resources defendants have; therefore, the Courts should apply the Proportionality rules sparingly.”

c. As pointed out by Mr. Seymour, defendants often employ a “no pay” posture or “millions for defense but not penny of tribute” position, forcing the plaintiff to litigate. In keeping with this tactic, defendants discourage plaintiffs from pursuing their cases by withholding ESI, forcing plaintiffs to file unnecessary motions to compel, hiring experts to examine defendant computer systems, etc. I had the privilege of representing Plaintiff at the trial court level in the 2013 SCOTUS Vance v. Ball State U case. In that case, Plaintiff attempted settlement; however, defendant refused to pay any money or change its practices. As can be seen by the 5-4 decision, it was a close case.

I close by saying that the current system is already tilted against plaintiffs in employment and civil rights cases. One only has to look at the current excessive use of force controversy across the nation to see that police departments have been covering up the truth and that only uncontroverted ESI in the form of videos have uncovered the truth. The proportionality rules will make it even more difficult for plaintiffs. Only plaintiffs with abundant resources will be able to afford to prosecute their
cases. Settlements which are encouraged by the courts will be even more difficult. The Guidelines should address these issues.

Sincerely,

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Dear John:

Thanks for the opportunity to comment on the Guidelines and Suggested Practices. I like the approach taken and wish we had them available when my colleague Scott Kane and I spoke to Magistrate Judges recently in Dayton and Cincinnati. Scott heads up the e-discovery practice at Squire Patton Boggs and we co-teach a course in e-discovery at the University of Cincinnati College of Law.

The following suggestions are, however, my strictly my own:

1. I would separate your document into two parts. The Guidelines are best suited to be a standalone guide to implementing the proportionality aspects of 2015 Amendments, including, as noted in paragraph 2, their impact on Rules 37(e) and the changes to Rules 16 and 26. The Practices are best seen as a standalone guide for judges in responding to the opportunities for enhanced case management to reflect proportionality considerations. At the very least, separating the two documents would help clarify the intent of each and allow for their more effective use.

Guidelines

2. The Guidelines should refer to the role of proportionality in implementing Revised Rule 37(e), whose application turns on whether a party has - or has not - undertaken "reasonable steps" in responding to the onset or trigger of a duty to preserve. You could insert a Guideline 2, structured like Guideline 1, which states that Rule 37(e) is inapplicable to instances where a party has undertaken "reasonable steps," as assessed under proportionality standards akin to Rimkus, since perfection is not required. The Commentary could discuss the Committee Note and reference the amendments to Rules 16 and 26(f) whereby the discovery plan and scheduling orders will encourage early discussions of proportionality. As I cite in my Summary Memorandum, you could also allude to other relevant authorities - ranging from the Sentencing Guidelines to the Business Judgment rule - and Rimkus.

3. Each of the Guidelines would be enhanced by citations to case examples that illustrate the proportionality factors. I acknowledge that the cases are not easily found, given that courts do not use consistent terminology nor always cite to Rule 26(b) or (g). But numerous secondary sources are helpful in locating the cases to be cited. Craig Shaffer has just finished a superb paper (entitled "The ‘Burdens’ of Applying Proportionality") which has an excellent collection of cases; Ralph Losey, in his article on Predictive Coding and the Proportionality Doctrine, lists sixteen key decision showing the growth in popularity of the doctrine, etc.

Practices

4. I strongly support "Practice 2" which speaks of the courts affirmative role in encouraging early discussion of the information relevant to the scope of discovery, presumably including proportionality. I would suggest that it be expanded to advocate that each court or judge use appropriate sample protocols, guidelines or required forms on a local basis to ensure that the relevant issues (see #5, below) are discussed. The Duke Center should consider taking the lead in making available samples from around the country. In our presentation two weeks ago in Dayton, one of the lawyers in the audience stressed the useful impact of such practices in the Southern District of Indiana, leading one of the Ohio Magistrate Judges to muse that a similar effort should occur there. I am aware, for example, that the District of Colorado has just announced local guidelines.

5. I would suggest that Practice 11 - which is echoed, as you know, in last minute additions to the Committee Note to Rule 26(b) - is too narrowly confined in its references to the use of predictive coding. There has been a major sea-change in the way that discovery is handled in cases involving large amounts of ESI which has led to massive productions of ESI. The focus has moved from specific requests for information to a more generalized preservation, collection, de-duplication, search and production of what its deemed to be "relevant" to the claims or defenses involved in the case. Proportionality plays its role in selection of the numbers and types of custodians, data sources, date ranges and the like - in other words, broad, general parameters. Courts need to encourage that process. A classic example is Judge Francis's opinion in Fort Worth Employees' Retirement Fund, 297 F.R.D. 99 (S.D. N.Y. Dec. 16, 2013), where he used selective proportionality rulings on motions to compel to guide the parties.

Finally, I note that your website has posted an earlier, now outdated, version of my Memorandum on the new Amendments. You are welcome to substitute the attached version, which has been updated to include post-transmittal comments and criticisms and some new cases which refer to the Amendments. Best regards and good luck in your efforts,

Tom Allman
Mr. Rabiej:

I have been representing plaintiffs in employment discrimination cases since 1995, when I opened up my own law office, which now employs 4 attorneys and will soon be employing 2 more. Prior to opening my firm, I was the Executive Director of the Women’s Law Fund here in Cleveland for 3 years. Representing victims of employment discrimination is both my vocation and my passion.

I implore you to reconsider these proposed guidelines and not adopt them because, if implemented, will be extremely harmful to litigants – particularly plaintiffs in employment discrimination cases.

The first time I read the guidelines, I thought they appeared to be harsh and limiting. After reading them several times, I can say with certainty that they are harsh and limiting, and they are daunting to we attorneys who represent the economically weaker parties in employment litigation – single plaintiffs, because of the threats of cost-shifting, which could bring financial ruin to us and our clients. Judges will undoubtedly use them to limit discovery, thereby making it even more difficult for us to prove discrimination, where we rely almost exclusively on circumstantial evidence. (It has been more than 15 years since I’ve seen a “smoking gun” memo where the employer clarified that he was seeking to fill a position with “someone under 30”.)

With the proliferation of summary judgment motions filed by defense attorneys and granted by trial courts (some for docket-clearing reasons), along with the limitation on the depositions, it is already exceedingly difficult for plaintiff’s attorneys to prevail in discrimination cases. If discovery is now limited in this way, the reality is that we will not be able to get the discovery we need, which is always predominantly in the hands of the employer (personnel files, policies and procedures, witness contact information, salary and benefit information, etc.). In my experience, employers do not produce these documents without being ordered to. They are the keepers of the evidence, and we rely on the courts to use their “keys” to open the doors to us. Otherwise, we lose.

The biggest problem I see in the proposed guidelines is that it changes the discovery standard to “necessary”, which is extremely restrictive, rather than the broader “relevant” standard used throughout the Civil Rules. Are we going to leave it to the court to determine what is “necessary” in our cases – when we are the ones who know these cases like the back of our hands and know what is “necessary” and what we need to prevail? We don’t want extraneous information or documents. We want what we knew we need, and access to that discovery simply should be not taken away from us and our clients.

Also, what does the “amount in controversy” mean? If a single mother is subjected to quid pro quo sexual harassment and stays at her job because she can’t afford to be without it, and she only earns $35,000 per year, does that mean the “amount in controversy” is $35,000? How could such a determination be made in these types of cases (e.g., KKK flyers left on cars in an employer’s parking lot; a noose is left in a machine worker’s locker; a woman loses her job after turning down her boss’ request for sexual favors)?
Again, I request that you reconsider these in their entirety.

I would be happy to discuss this further with you.

Thank you for your time and effort.

Sincerely,

Caryn M. Groedel, Esq.
OSBA Certified Specialist in Labor & Employment Law
Comments on the

*Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*

We offer the following comments on the Guidelines and Suggested Practices that have been made available for public comment by the Duke Law Center for Judicial Studies. We appreciate the opportunity to comment and stand ready to answer any questions that you may have.

**Preamble**

We offer the following suggested language for a preamble, with the goal of providing an introduction that is more aspirational and transformational.

The goal of the 2015 Discovery Amendments is to achieve a more effective and less expensive resolution of civil disputes, without sacrificing fairness. Those goals are responsive to the needs and demands of litigants themselves, as well as to the overall needs of society and the system.

These Amendments represent a step in that direction. However, the step will only be as good as the judges, attorneys and clients who take it. The worst outcome would be for these Amendments to spin off into satellite litigation at every turn, adding yet another layer to the process. The best outcome would be for them to chart a new course, driven by the intent as well as the language. Judges need to become more involved in the process, understanding the issues in the case at an early juncture and partnering with the attorneys to achieve efficient and fair outcomes. Clients and attorneys need to be forthcoming and to cooperate in disclosure and discovery to the extent possible, in order to identify the areas of real agreement and disagreement in the case, and then to design necessary discovery in a targeted and effective way.
Proportionality is the hallmark of these Amendments. It leads the way toward a system in which each case receives the individual discovery it deserves: no more, and no less. If judges fail to pick up the gauntlet, the system will continue in decline – in terms of numbers of disputes brought to the courts, and in terms of public trust and confidence. If attorneys fail to change their approach to litigation, they will be making themselves increasingly irrelevant. And, neither judges nor lawyers should countenance clients that expect a system of gamesmanship and posturing rather than a commitment to effective truth-finding and appropriate outcomes.

**Guidelines**

Just as in the Preamble, we would suggest additional language throughout the Guidelines and Practices that emphasizes the importance of implementation so as to achieve the goals of the amendments, rather than undermine them. While it is important to keep the document short, clear, and to the point, additional explanation would be of great benefit to judges and lawyers. These Guidelines and Practices must be well understood not just by those steeped in these issues, but those who are not. The greatest opportunity for impact may be with those for whom these concepts are relatively new.

Our specific comments are as follows:

**Guideline 1:**
- The amended language of Rule 26(b)(1) states that discovery must be proportional to the needs of the case, considering six listed factors that are to be used by the court in determining what is proportional. The commentary to Guideline 1 reframes “proportionality” as describing “the six factors to be considered in limiting or allowing discovery to make it reasonable in relationship to a particular case.” The addition of a “reasonable” test in the commentary to Guideline 1 suggests an alternate and different analysis than determining what is “proportional.” There is no basis or further explanation provided for this alternate analysis, and it adds another layer of complexity where simplicity is needed.
- The commentary also refers to the “goal,” both in (b) and (d). As drafted, it is not clear if the “goal” that is referred to is “proportional” or “reasonable” discovery. Regardless, because the rule provides that discovery must be relevant and proportional, it is not a goal but a requirement under the rules.

**Guideline 2:**

**Guideline 2(A): “Importance of Issues at Stake”**
- Guideline 2(A) states that this factor “applies when the money the parties stand to gain or lose in a particular case is inadequate to measure the importance or value of
the issues involved.” As stated in Guideline 2, “not all factors apply to every case, and the way any factor applies depends on each case.” There may be some cases where the importance of the issues at stake and the amount in controversy may both be relevant factors to be applied by the court. For this reason, Guideline 2(A) shouldn’t limit the factors application. Suggested language change: “This factor is particularly important when the money the parties stand to gain or lose . . .”

Guideline 2(B): “Amount in Controversy”

- Guideline 2(B) notes that 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.” As noted in the comments to Guideline 1 above, there is no explanation or justification for the substitution of “reasonable” for “proportional” here.
- At the end of the commentary to Guideline 2(B), the commentary notes that as the controversy calculation changes over the course of the case, “claims and defenses often evolve and the parties and judge learn more about the damages or the value of the equitable relief.” While the document recognizes at a later point that what is proportional also may evolve, it would be useful to state this explicitly here as well.

Guideline 2(E): “Importance of Discovery”

- The commentary to Guideline 2(E) could include a reference to sampling as a way to provide more information for this analysis. To the extent such examples and practice tips can be incorporated throughout, they would be particularly useful for judges and attorneys who may understand the concepts but are having a hard time with implementation in specific cases.

Guideline 4:

- The commentary to Guideline 4 references that Rule 26(g) requires parties to consider discovery burdens and benefits before requesting discovery or responding. This is a point that deserves more emphasis. The more the guidelines, practices, and commentary speak to attorneys and judges’ respective roles and responsibilities, the better.

Guideline 5:

- Here again, the Guidelines replace the proportionality test with an objective reasonableness standard.

**Practices**

In general, the practices note the judge “should consider . . .” While the practices are not mandatory, stronger language would be useful throughout. When referring to the parties, the practices sometimes state that the “parties should” and other times make the statement in the
alternative (e.g. “In many cases, the parties will ____. If not, ____.”). Consistency across the practices would be best, and the more forceful “parties should” is preferable. This is an important document for educating judges and attorneys and impacting their behavior in a positive way.

There are many opportunities throughout the Practices to discuss the importance of an engaged and cooperative discovery process, by both the judges and the attorneys. For example, the commentaries could speak to the importance of holding a meaningful and robust Rule 26(f) conference or Rule 16(b) conference that fully explores the issues in the case, and engages in a dialogue that asks the hard questions, etc. While the Practices touch on this concept, they could go further in emphasizing the importance of these conferences and the unique opportunity that they play in focusing the parties and the court on the issues early in the case. The more that can be added here throughout, the better.

The Practices note that some districts address such practices in local guidelines or orders. It would be very useful to cite examples and/or include an appendix of examples. Real life examples will increase the likelihood that other judges will put these suggestions into practice.

Practice 1:
- Practice 1 speaks to early and ongoing planning, and promptly bringing disputes to the court. Promptly bringing disputes to the court is a critical and separate concept and it would benefit from being separated out into its own practice point.

Practice 5:
- This is an example of a place where the practice could be improved by eliminating the introductory “In many cases, the parties will . . .” and replacing it with “The parties should ____.” It is more direct.
- The commentary notes that the parties are usually in the best position to determine whether and how to focus discovery in their cases. There is an opportunity here to speak to the judge’s role in that analysis, as well, and it should be emphasized. The CAPP experience reflects that the judge’s role is critical, and it is important to emphasize it if we are going to get more judges engaged in this process.
- There is only a brief mention of initial disclosures here. Instead, the commentary focuses on early discovery. While phased discovery is an important concept and should be emphasized, the commentary should speak equally to the importance of robust initial disclosures.

Practice 7:
- It would be useful to mention that such conferences are frequently held by phone.
Practice 9:

- The wording suggests that some discovery may be granted even where not proportional, which goes against the basic rule that discovery must be both relevant and proportional. An alternate wording would be useful, such as, “When requested discovery would not be proportional, the judges should consider whether a modified request would be proportional, deferring the remaining requested discovery for possible later consideration.”

Practice 10:

- This practice suggests that discovery may be allowed even where not proportional on the condition that the requesting party bears some or all of the costs of the request. Under the language of the amended rule, discovery must always be proportional. Some judges will interpret the language in this section as a green light for discovery that is not proportional, merely ordering that the requester pays without a serious analysis of the factors. That does not further the intent of these rules, or help the system. The commentary should emphasize the importance of the proportionality analysis and make clear that discovery must be proportional. The commentary touches on the burden/benefit factor, but it would be useful to discuss this further. In addition, would the parties’ resources be an additional factor for consideration in the cost-shifting analysis?
August 18, 2015

Prof. John Rabiej
Director of the Center for Judicial Studies
Duke University School of Law
210 Science Drive
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Durham, NC 27708

VIA EMAIL TO JOHN.RABIEJ@LAW.DUKE.EDU.

Dear Professor Rabiej:

I am writing to offer some comments regarding the proposed guidelines for the implementation of the 2015 discovery amendments related to proportionality in discovery. Proportionality is a useful guide in determining the appropriate scope of discovery in most litigations. I am concerned, however, that it is a poor guide in civil rights actions. I hope that the following comments explain my concerns.

By way of background, I am the proprietor of a small law firm in the Washington, DC, area in which we provide legal services for families and small business. Since our founding in 1972, one of our primary practice areas has been in the field of employment law. We serve both individuals and small business in employment and other matters, but it is the impact of the guidelines on plaintiffs in employment cases about which I am concerned.

The Amount of Money at Stake in the Litigation Is a Poor Measure of the Appropriate Scope of Discovery in Civil Rights Cases.

The proposed rules are written such that money is the presumptive measure for determining proportionality. That extends even to measuring the value of injunctive or declaratory relief by its monetary value. However, that standard is inapplicable in a great many employment, constitutional, and civil rights cases (referred to collectively herein as “civil rights” cases). Indeed, in some cases (such as in due process litigation) the measure of damages may be but one dollar; that there are small sums at issue does not diminish the importance of the principal that may be at stake in that litigation.

There are other cases as well in which the number of dollars at stake may be very small but the case is nevertheless still very important. For example, in Radtke versus Lifecare Management Partners, we represented two medical records coders who had not properly been paid overtime wages. See ---F.3d---, 2015 WL 4528494, 25 Wage & Hour
Cas.2d (BNA) 18 (D.C. Cir.). We brought the matter to trial and obtained judgment in the amount of $5,114.62 for one of the plaintiffs and $729.67 for the other plaintiff, plus prejudgment interest. The amount at stake was small and the yield to the plaintiffs was small — but the significance of those small amounts was great to the wage earners, for whom the loss of $700 or $5,000 is very meaningful.

In the context of federal litigation, the amounts at stake in these cases are minuscule. But these suits are exceptionally important not only because they provide meaningful relief to the plaintiffs but even more because the award is of great importance to society generally. Civil rights litigation often vindicates important social values. To measure the value of the case — and therefore the amount of discovery that would be reasonable for the case — by the amount of money at stake focuses on the wrong measure.

This is a particularly sensitive point in today’s economy, in which the gap between high wage earners’ incomes and low wage earners’ incomes is increasingly large. That gap in incomes means that it is vitally important to be vigilant that employers do not fail (deliberately or because of inadequate care) to properly pay their employees. Because government has never been able to adequately regulate this arena, wage and hour laws permit lawyers to act as “private attorneys general.” Thus, private lawsuits in the civil rights realm are essential to ensuring fairness, and our Rules should not treat those cases as unimportant (and not worthy of complete discovery) merely because they do not involve large sums of money.

Thus, the Commentary misses the opportunity to make clear that the relevance of the amount in controversy factor varies depending on the type of case.

The Proposed Guidelines Increase the Prospect of Diminishing Access to Justice for Poor People.

As described above, the principle that money should be the guide to measuring the appropriate amount of discovery offends the principle that a litigation may be enormously important even though it involves little money because many such cases vindicate important societal values. But the principle that money should be the guide to measuring the appropriate amount of discovery is offensive also because it is likely to result in diminished access to justice for poor people.
It is axiomatic that more discovery increases the likelihood of collecting more information. It is also true that collecting more information in a lawsuit increases the likelihood of getting closer to a truer understanding of the facts at issue. Thus, when the rules permit more discovery, they open the door to a greater possibility that the case can be decided based on a truer version of events.

The corollary of that, of course, is that limiting discovery increases the likelihood that less information will be collected and in turn then increases the likelihood that the case will be decided based on a less true version of events.

To be sure, the rules of procedure and evidence reflect the jurisprudential acknowledgment that an increased likelihood that a case will be decided based on a less true version of events is a fair price to pay for a system of justice that works. But when that price is paid by just a segment of society, it is problematic.

Here, litigation involving or by poor people (as civil rights litigation typically is) tends to involve smaller sums of money. Thus, if the appropriate amount of discovery is determined based on the dollar value of the case, then suits brought by poor people will be more likely to encounter limited discovery. And because limiting discovery diminishes the ability to collect facts which describe a more true version of events, it means that plaintiffs in civil rights cases will be less able to collect facts which describe a more true version of events. And because collecting facts which describe a more true version of events is essential to obtaining a just outcome in litigation, plaintiffs in civil rights cases will enjoy less access to justice if the dollar value of the case determines the scope of permissible discovery. It is, obviously, unacceptable for our system of justice to be less likely to yield an outcome that is driven by a truer version of facts for cases involving poor people than for other cases.

_The Commentary Does Not Address the Risk of Parties Attempting to Gain Strategic Advantage._

Setting monetary value as a key factor in calibrating the amount of discovery creates the prospect that litigants will use the small monetary value of a case for strategic gain, effectively using this Guideline as a sword rather than as a shield. Because many civil rights cases involve small or even nominal monetary amounts, civil rights cases are particularly subject to this risk.
The *Radtree* case mentioned above highlights the problem. Before that litigation commenced, the plaintiffs made a settlement demand of $25,000 (inclusive of attorney’s fees). During the course of the six-year-long litigation, the plaintiffs shared their calculation of damages with opposing counsel on numerous occasions. Those calculations consistently showed that the amount in controversy was very small. If the Guideline as explained in the proposed Commentary were operative during that litigation, the defendants would have been able to affect the amount of data that the plaintiffs could obtain. If it suited their case, the defendants could have raised no issue about the scope of discovery; if it better suited their case, they could have asked the court to limit discovery based on the Guideline.

This Guideline gives the defendant in a low-value litigation a powerful tool. The defendant can choose to engage in costly litigation if it suits them; the defendant can use the Guidelines to limit discovery if doing so suits them more. Thus, the Guideline (as the Commentary is now written) creates an opportunity for the defendant in a low-value case to affect the scope of discovery that the plaintiff can take. It is the plaintiffs in civil rights cases who face the risk of an opponent willing to game the system this way because it is typically the plaintiff who needs broad discovery, since typically the defendant holds the relevant documents and data.

The Commentary should take cognizance of this risk and require application of the Guidelines in a way that bars the use of the Guidelines as a sword instead of a shield.

*The Relative Access to Information Guideline Unfairly Disadvantages Civil Rights Plaintiffs.*

Guideline 2C discusses relative access to information. Here, too, this Guideline raises very troubling concerns in the context of civil rights litigation.

It is somewhat difficult to articulate the impact of Guideline 2C because both the Guideline and the Commentary state that access to information is a factor, but neither actually describes how that factor is to be applied. The most specific guidance in the Commentary is found in the statements that the less-knowledgeable party should not make unreasonable demands and the more-knowledgeable party should not produce information in a way that is difficult to organize or search.
But those principles of discovery have always existed. It has always been the case that proportionality requires permitting all parties access to necessary information while disallowing the parties from leveraging the asymmetries for tactical advantage. Despite the longstanding existence of that principle, though, parties routinely tangle over discovery in issues relating to relative access to information. In that regard, the Commentary fails because it does not offer meaningful guidance on how to apply that principle.

Moreover, this principle (and hence Guideline 2C) is problematic because it tends to inhibit effective discovery in those situations in which an employee has reason to believe that certain facts are true but lacks good data to prove those contentions. For example, our firm regularly represents individuals in discrimination claims in which there is a reasonable basis for belief that there were wage disparities between Caucasian and African-American employees but the information which would prove that is controlled entirely by the employer. Not infrequently in such cases, the employer thwarts discovery by claiming that producing the data would impose undue burden. Guideline 2C may exacerbate that problem. The Commentary should reflect the fundamental principle that the scope of discovery extends to information which is relevant even if the information sought may not itself be admissible and even if the party seeking the discovery does not have admissible evidence proving the existence of the fact (obtaining of which is, after all, the purpose for promulgating the discovery in the first place).

A further concern is that this Guideline might be interpreted to mean that the employer is not required to convert data that is in some proprietary format into one which is more widely readable. The Commentary emphasizes the importance of making information available to all parties but without imposing undue burden on one of the parties. This could be understood to mean that the employer must produce information but need not incur the cost of producing it in a way which is accessible without software which may be very expensive and which may require specialized skill to utilize.

Employers, governments, and other institutional entities invariably have far greater amounts of information than do the individuals who sue them; those entities have selected the methods of recording and maintaining that information; and those entities have the equipment, software, and skills needed to access that information. They obtain that equipment, software, and skill because their business needs require it of them. If the Guideline were to be interpreted to mean that the employer is not required to
convert data that is in a proprietary format into one which is more widely readable, it would disadvantage plaintiffs in civil rights cases who lack those resources.

Thus, relative access to information should be understood within a practical context. The Commentary should make clear that the employer generally has the duty to produce data in a form which makes that data accessible (i.e., readable and searchable) for the plaintiff.

**The Commentary Regarding Distinguishing Between Central and Peripheral Issues Should Address the Likelihood That it Will Be Difficult to Determine Whether an Issue Is Central or Peripheral until Late in the Case.**

Guideline 2E states that “discovery relating to a central issue is more important than discovery relating to a peripheral issue.” This is a very common basis on which employers frequently object to providing information.

For example, in Rhodes versus Dynamics Research Corp., we represented an African-American employee who had been passed over for promotion in favor of a younger, less experienced, and less successful Caucasian employee. The defendant opposed a great many of our discovery requests on the basis that the information sought was peripheral to the actual dispute. For example, the defendants provided a list of individuals who were the plaintiff’s supervisors, as we had requested, but refused to identify the job duties and responsibilities of each on the basis that the case was not about those persons and therefore that discovery was peripheral to the gravamen of the complaint.

The discovery that we later obtained through that interrogatory ultimately proved to be very important in our demonstration that the plaintiff was far better qualified for the position than was the selectee. Our prospects for success in the litigation would have suffered greatly had the employer’s contention won the day, as it could well do if the Commentary does not provide guidance to courts as to how to handle the case in which a party claims that the centrality of evidence remains uncertain.
Staging Discovery Is Likely to Limit Discovery for Reasons Other than the Merits of the Requested Discovery.

Practice 6 describes the use of staging discovery as a method of managing the discovery process.

Conducting “staged,” or limited and sequential, discovery can help parties collect data efficiently. For example, when this firm represented a putative class of nursing assistants at George Washington University Hospital, the parties set aside time during discovery to do little other than to collaborate on the development of a database of applicants for the jobs that were at issue in the case. By doing so, the parties were able to minimize the costs incurred by both sides and obtain a cleaner database. Thus, conducting limited discovery helped the parties collect data more efficiently.

But if the purpose of limited, early, focused discovery is to “manage discovery,” then the Commentary should not state that the early discovery is to be used to determine whether more discovery is needed. The use of that language creates the presumption that the limited discovery is adequate; it has the effect of putting the burden on the party seeking additional discovery to persuade the court to permit it. If creates an artificial limitation on discovery; it imposes a hurdle at an artificial point — artificial since the completion of the limited, early discovery has no meaningful relevance to the litigation.

That is error for two reasons. First, it would mean that this Practice is not truly for the purpose of managing discovery, as it claims to be, but instead that its purpose would be to reduce discovery, which is not its stated goal.

Second, and more importantly, in most cases this will disproportionately adversely affect plaintiffs in civil rights matters as compared to defendants in those cases. In most civil rights cases, the plaintiff typically has very little data to share and the institutional defendant typically has the vast majority of the data relevant in the case. The new barrier to additional discovery disadvantages the party seeking information as compared to the party which already possesses relevant information. Consequently, it is plaintiffs in civil rights matters who will be adversely affected.

This problem is exacerbated by the fact that partial discovery frequently paints a very inaccurate picture of the facts in a case. In the case of Hicks versus Georgetown
University, for example, early discovery suggested that there was only modest support for our clients' contention that older workers were treated worse than were younger workers during a Reduction in Force. Early discovery in that case focused, sensibly for an age discrimination case, on the ages, tenure, and positions of those who were retained and those who were laid off. Had discovery been evaluated at that point, a clever defendant might well have convinced the court that further discovery would be pointless and that the case was ripe for summary disposition. Had discovery been terminated at that point, the plaintiffs would not have had the opportunity to collect the evidence that they later obtained which demonstrated that there did in fact exist additional facts and evidence which provided very meaningful support for their allegations.

The civil rights attorney Kent Spriggs, author of an important manual on the litigation of employment discrimination cases, describes discovery as a process of forcing your opponent to paint himself deeper and deeper into the corner. Your opponent claims to be right because of \(-X\); you then conduct discovery to demonstrate that \(-X\) is not true. Your opponent may respond with argument \(-Y\); discovery may eliminate that contention as well. Through a managed, back-and-forth process, phased discovery can serve the adversarial process by helping the parties get to a truer version of the facts. Phased discovery should not, however, \textit{ipso facto} limit discovery.

Thus, it should be clear that our objection is not in the use of phased discovery to manage the process, but in allowing the phased discovery process, \textit{ipso facto}, to limit discovery. If the Commentary states that the early discovery will be used to determine \textit{whether} more discovery is needed, then it creates a barrier for the less well-informed party to surpass. It does so at an artificial point in the discovery process, and indeed at a point at which the discovery may well point to an incorrect conclusion.

Instead, the burden should be on the party who believes that additional discovery is not warranted to demonstrate that further discovery would not be fruitful. The language of the Comment should make clear that the purpose of early limited discovery is for the management of the process and not for limitation of the scope of discovery, and that limitations on discovery should be determined by the merits of the discovery requests, not the arbitrariness of whether compelling information arrives early or late in the discovery process.
If Staging Discovery Reduces and Delays the Collecting of Information, it Is Likely to Reduce or Delay the Prospects of Settlement.

There is yet another reason why the Commentary should not suggest that a purpose of early, focused discovery is to limit discovery. It is inherent in the notion of early, focused discovery that the initial discovery would be less than the discovery which is ordinarily done. Social science tells us that, generally speaking, the more data that is collected in a case, the more likely it is that the case will settle. This is because when parties have limited information and evidence, they are less able to assess their likelihood of success at trial. As a result, their settlement positions cannot reflect the realities of the case and that causes the parties to take exaggerated positions. Thus, if early, focused discovery limits the scope of discovery, it thereby diminishes the prospects of settlement.

Practice 7 Presumes Far Greater Access to Judges than Is True in Practice.

Finally, Practice 7 is a superb suggestion — but one which is not a realistic reflection of lawyering. Judges simply are not adequately available to litigants to make practicable a pre-motion conference. This brings to mind the many cases in which opposing counsel engage in inappropriate coaching of the witness during a deposition or in which the witness refuses to answer questions. In some cases, the conduct is so egregious that we will stop the deposition to ask the judge for assistance. Rarely are we able to reach the judge. On those occasions in which we can do so, it is exceptionally difficult to adequately characterize the circumstances in a way that the judge can understand.

Of course, a pre-motion conference is different in important ways from an intra-deposition conference, but this experience highlights both the difficulties of obtaining the court’s attention and also the difficulties of using a teleconference to describe a problem without the benefit of written briefs.

Perhaps more troubling is the fact that telephone conferences of this sort are rarely on the record. Because the judge’s feedback may well have an enormously significant impact on the scope of discovery, a case can be made or broken though off-the-record — and therefore unappealable — actions.
Conclusion.

One final comment seems in order: Discovery is a process intended to aid at getting as close as possible to a true version of events. The Rules aim, however, not only at finding truth but also at recognizing that the process must often be limited in order to avoid Dickensian endless suits, inadequate access to justice because costs of litigation are so high, resolutions unduly affected by a desire to avoid the costs and burdens of litigation as compared to the merits of the case, and the like. In that sense, a sort of unfairness, particularly at the micro level, is an ordinary consequence of the aim of the rules of discovery of having a fair system at the macro level. Thus, a lawyer should not oppose the Rules merely because they limit discovery.

Here, though, the amendments (and the Commentary to the amendments) do not merely limit discovery in a dispassionate way. They limit discovery in ways that tilt the scales in favor of institutions and at the expense of individuals. This problem is especially problematic in the civil rights context, where the claim is not only seeking remedy for fiscal and emotional losses suffered by the individual plaintiff but also the loss to the broader society of a fair system of governance, employment, and social interaction.

Very truly yours,
LIPPMAN, SEMSKER & SALB, LLC

by S. Micah Salb, Esq.
August 18, 2015

Memorandum

To: Duke Conference Discovery Subcommittee of the Advisory Committee on the Civil Rules

C/O: John Rabiej
Director of the Center for Judicial Studies
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From: Richard T. Seymour

Re: July 31, 2015 Draft “Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality”

I have represented plaintiffs in civil rights and employment cases nationwide since I left the government in 1969. While some of my cases have been in State court, the vast majority have been in Federal court. I worked in the former Washington Research Project (later renamed as the Children’s Defense Fund) from 1969 to 1973; was in solo practice from 1973 to 1977; was Director of the Government Employment Project and of the Employment Discrimination Project of the Lawyers’ Committee for Civil Rights Under Law for 24 years, from 1977 to 2001; partner in the class action firm of Lieff, Cabraser, Heimann & Bernstein from 2001 to 2005; and in solo practice since. I have testified before the Advisory Committee, and have submitted comments to the Advisory Committee. I co-authored fifteen editions of Equal Employment Law Update (BNA, 1996-2007) for the American Bar Association’s Section of Labor and Employment Law, and was Chair of the Section from 2011 to 2012. The Section is the fourth-largest entity within the ABA. I also occasionally function as an arbitrator, and as a mediator.

I believe the July 31 proposed guidelines and suggested practices will be more harmful than helpful to practitioners and the courts, and urge you not to adopt them.
The overriding tone of the draft is one of limiting discovery and frightening economically weaker parties with threats of ruinous cost-shifting. Whether intended or not, this draft will encourage judges to limit access to justice by limiting the discovery necessary for a meritorious case to prevail. Whether intended or not, the draft will have an in terrorem effect leading some economically weaker parties not to pursue discovery. Some courts apply the fee-shifting provisions in Rule 37 automatically, and this also tends to lead some economically weaker parties not to pursue motions to compel discovery. I have seen this in my own practice.

A. Overlooked Problems of Context that Apply to All the Guidelines and Suggested Practices

It is critical to keep in mind the context in which discovery currently takes place, for any guidelines or suggested practices to be both useful and fair.

1. The Effect of Ubiquitous Motions for Summary Judgment on the Extent of Discovery Needed in Cases

Love them or hate them, summary judgment motions in civil rights and employment cases are ubiquitous.¹ The disposition of cases by summary judgment is also common. This has had an enormous effect on the extent of pretrial discovery legitimately needed in cases.

Previously, parties were confident they could cross-examine all opposing witnesses at trial, and did not see the need to depose them all in discovery. A lot of my depositions were short and narrow affairs, intended to get at only a couple of topics. I once deposed more than a dozen department overseers in a single day, in a racial discrimination case in North Carolina.² Twenty minutes a witness was all we needed.

¹ E.g., Malin v. Hospira, Inc., 762 F.3d 552, 564-65 (7th Cir. 2014).
² Sledge v. J.P. Stevens & Co., 10 E.P.D. ¶ 10,585 (E.D.N.C. 1975) (decision finding classwide discrimination in hiring, initial assignments, promotions, racial reservations of various job categories for whites, etc., in nine plants and three office facilities of the defendant), 12 E.P.D. ¶ 11,047 (E.D.N.C. 1976) (issuance of decree), 585 F.2d 625 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979) (affirming all findings of discrimination except as to seniority, affirming all nonquota relief and reversing quotas, reversing findings of nondiscrimination as to the named plaintiffs, reversing a ruling on the limitations period which restricted back pay recovery, and affirming other preliminary back pay rulings in the absence of evidence that they would frustrate meritorious claims), 52 E.P.D. ¶ 39,537 (E.D.N.C. 1989) (denying motion to vacate 1975 findings of liability in light of Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989)), summarily affirmed (4th Cir. 1990) (unreported), settled in 1995 for $ 20 million in back pay and interest for the named plaintiffs and the class.
With the vanishing number of trials in employment discrimination and civil rights cases, no one can any longer be confident of there being a real trial with live witnesses. Plaintiffs’ attorneys now have to approach every deposition with an eye to finding out everything the witness knows, about any and every topic that could conceivably be raised in a summary judgment motion. We have no advance word about the basis for the summary-judgment motion that might ultimately be filed, and need to seek every document about everything remotely relevant, and ask witnesses about the documents, in order to protect against any conceivable argument a defendant might make in support of summary judgment. The process requires far more discovery than was formerly necessary.

Any useful guide to the application of the proportionality standard in employment cases should recognize that discovery on the merits of the case — discovery into the employer’s practices, exceptions to those practices, its policies, implementation of those policies, departures from those policies, the experiences of other employees, the possible pretextual character of the explanations offered by the employer, and so forth — should not be limited.

2. **The Reality That Defendants Routinely Abuse Their Economic Advantages to Make Discovery Unduly Difficult**

The 2013 and 2014 comments and testimony on rules amendments are still valuable sources of information on defendants’ tendency to maximize their economic advantage to help avoid accountability. The phrase “make plaintiffs work for it” is very popular among my defense-counsel friends. Courts have also commented on the overly aggressive nature of some defenses. Uncooperative and unduly aggressive defendants increase plaintiffs’ time

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3 In 1990, 8.7% of employment discrimination cases were resolved by trial. In 2006, only 3.2% were resolved by trial. Table 5, p. 6, August 2008 Civil Rights Complaints in U.S. District Courts, 1990-2006, downloaded from [www.bjs.gov/content/pub/pdf/crcusdc06.pdf](http://www.bjs.gov/content/pub/pdf/crcusdc06.pdf) on March 23, 2015. There is no more-current data showing whether the decline has continued, accelerated, or slackened.

4 E.g., *Lipsett v. Blanco*, 975 F.2d 934, 939 (1st Cir. 1992) (“This case was bitterly contested. Appellants mounted a Stalingrad defense, resisting Lipsett at every turn and forcing her to win her hard-earned victory from rock to rock and from tree to tree.”) (Title VII and Puerto Rico law sexual harassment case); *Cuff v. Trans States Holdings, Inc.*, 768 F.3d 605, 611 (7th Cir. 2014) ("A business that can establish a reputation for intransigence may end up not paying damages and not having to defend all that often either, because if a prevailing party who litigates to victory gets only a small award of fees the next would-be victim will see that litigation is futile and the employer won't have to repeat the costly defense.") (FMLA interference case) (emphasis in original).
and expense to get needed discovery. The resulting rules have recognized this by closing off some of defendants’ biggest bolt-holes under Rule 34.5

Yet the draft guidelines seem to assume that both sides will act in good faith, and are devoted to the disclosure of documents enabling the other side to get to the merits. This has actually been true in some of my cases, but is far from the norm in many others. Because the underlying assumptions do not correspond with this reality, they are not likely to work as intended.

One useful corrective to include in the guidelines and suggested practices is a provision stating that any party forfeits proportionality analysis when it overstates the difficulty or expense in providing discovery, or asserts a multitude of unfounded objections. Such a provision will provide an ongoing incentive to comply, and encourage self-policing.

B. The Proposed Guidelines and Suggested Practices Greatly Overstate the Importance of the Monetary Stakes

1. The Overstatements

(a) Guideline 2(A)

Guideline 2(A) states:

Guideline 2(A): “Importance of Issues at Stake”—This factor focuses on measuring the importance of the issues at stake in a particular case. This factor applies when the money the parties stand to gain or lose in a particular case is inadequate to measure the importance or value of the issues involved.

The guideline suggests that there is only one norm for evaluating the importance of a case, and that any other measure of value is an exception to this one norm. This overstates the

5 The June 14, 2014 Report of Judge Campbell, the Chair of the Advisory Committee on the Civil Rules to Judge Sutton, the Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated in Rules Appendix B-11:

These amendments should eliminate three relatively frequent problems in the production of documents and ESI: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting; responses that state various objections, produce some information, and do not indicate whether anything else has been withheld from discovery on the basis of the objections; and responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production. All three practices lead to discovery disputes and are contrary to Rule 1’s goals of speedy and inexpensive litigation.
importance of the monetary stakes, and ignores the importance of enforcement of Constitutional and statutory commands in deterring future violations by defendants and by others who will learn from their example.

The explanation that this guideline refers to cases seeking to enforce statutory or constitutional rights is stated only in the non-emphasized commentary. The explanation needs to be elevated into the emphasized text, and the emphasized text should say that there are multiple norms for evaluating the importance of a case: (a) the public importance of the case as shown by the fact that Constitutional or statutory rights are being enforced or that Congress or another legislature has authorized the court to award attorneys’ fees, (b) the importance of enforcement to deter violations by the defendants and others, and (c) the monetary stakes.

Where Congress has decided that enforcement of a specific statute or the Constitution is so important that the litigation of a type of case should be encouraged, the separation of powers requires that that determination be respected even if there are no monetary stakes, or if they are small. Similarly, it does not matter whether a case is precedent-setting or routine: if Congress has determined that the litigation of the case is important, its judgment should be respected in framing any guidelines or suggested practices. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32-33 (5th Cir. 1968), said it well:

Although there are restrictions both in time and pre-conditions for court action this does not minimize the role of ostensibly private litigation in effectuating the congressional policies. To the contrary, this magnifies its importance while at the same time utilizing the powerful catalyst of conciliation through EEOC. The suit is therefore more than a private claim by the employee seeking the particular job which is at the bottom of the charge of unlawful discrimination filed with EEOC. When conciliation has failed— either outright or by reason of the expiration of the statutory time-table— that individual, often obscure, takes on the mantle of the sovereign. *Newman v. Piggie Park Enterprises*, 1968, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263; *Oatis v. Crown Zellerbach*, *supra*. And the charge itself is something more than the single claim that a particular job has been denied him. Rather it is necessarily a dual one: (1) a specific job, promotion, etc. has actually been denied, and (2) this was due to Title VII forbidden discrimination.

Considering that in this immediate field of labor relations what is small in principal is often large in principle, element (2) has extreme importance with heavy overtones of public interest. Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated. Consequently, while we do not here hold that such a ‘private Attorney General’ is powerless absent court approval to dismiss his suit, see F.R.Civ.P. 41(a)(2); the court, over the suitor's protest, may not do it for him without ever judicially resolving by appropriate means (summary judgment, trial, etc.) the controverted issue of employer unlawful discrimination.
In dollars Employee's claim for past due wages may be tiny. But before a Court as to which there is no jurisdictional minimum, (§ 706(f), 42 U.S.C.A. § 2000e-5(f)), it is enough on which to launch a full scale inquiry into the charged unlawful motivation in employment practices. It is even more so considering the prayer for injunction as a protection against a repetition of such conduct in the future.

**FN9/ In United States Gypsum Co. v. United Steelworkers of America, 5 Cir., 1967, 384 F.2d 38, 45-46, cert. denied, 1968, 389 U.S. 1042, 88 S.Ct. 783, 19 L.Ed.2d 832, we had this to say:**

‘Nationwide activity can grind to a halt over the question of who is to throw a switch. Problems which to the outsider seem petty are thought by the adversaries to be matters of great principle, if not principal.’

See Atlanta Terminal Company & Southern Ry. Co. v. System Federation No. 21, Railway Employees' Dep't., AFL-CIO, 5 Cir., 1968, 397 F.2d 250, affirming a District Court award of $12,000 in attorney fees on a recovery of $2,286.54 in damages. See also Local No. 92, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Norris, 5 Cir., 1967, 383 F.2d 735.

Title VII of the Civil Rights Act of 1964 and the other civil rights laws and employment were enacted with the expectation that they would create sweeping changes in the lives and workplaces of Americans nationwide. To do so, they must be enforced. In the age of constant budget cuts, government agencies bring fewer and fewer cases, and private enforcement has to pick up the slack. If judges were subjectively to separate out “important” from “unimportant” civil rights and employment cases, and limit discovery in the latter, that subjective division would quickly become a docket-clearing device, and compliance with the Constitutional and statutory mandates would become the exception rather than the Congressionally-mandated norm.

These changes are necessary in order to make this Guideline balanced. I suggest that Guideline 2(A) be revised as follows:

**Suggested Guideline 2(A): “Importance of Issues at Stake”—This factor focuses on measuring the importance of the issues at stake in a particular case. The importance of the issues includes both the public importance of the case—Constitutional cases, statutory enforcement cases, cases in which Congress or another legislative body has decided are important by authorizing an award of**

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6 The EEOC received 88,778 charges of discrimination in FY 2014, and brought only 133 cases on the merits. See [http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm) for the charge receipts, and [http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm) for the litigation figures, both downloaded on August 18, 2015.
attorneys’ fees—and the impact of the case on the parties, including ensuring that they and similar actors follow the commands of the Constitution and statutes in the future. In a case seeking only monetary relief, this refers to the money the parties stand to gain or lose.

(b) Guideline 2(B) and the Commentary

Guideline 2(B) states:

**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.

Thus, Guideline 2(A)’s focus on monetary relief as the norm is repeated in Guideline 2(B).

Guideline 2(B) also subjects declaratory and injunctive relief—often the most important relief in a Constitutional or statutory case—to the Procrustean standard of “the pecuniary value of that relief.”

How does one define the pecuniary value of school desegregation? Of an injunction against racial profiling of motorists by highway patrol officers? Of reinstatement of a whistleblower? Of protection from harassment? Of the end of a pattern of racial or sexual discrimination in promotions? Of the freedom to engage in a peaceful demonstration?

Indeed, in a business context, how does one define the pecuniary value of the permanent enforcement of a copyright or trademark? Of the end of an anticompetitive practice? Of the invalidation of a patent?

Getting beyond Constitutional and statutory enforcement altogether, how does one define the pecuniary value of a refusal to enforce an overbroad noncompete clause? Of the correction of a practice prone to fraud? Of the inclusion of an environmental or other measure on a corporate shareholders’ ballot? Of an easement allowing the use of an asset?

The present draft over-emphasizes the importance of monetary relief and, as to injunctions and declaratory relief, subordinates everything to an assumed but unavailable measure of pecuniary relief.

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Corrective changes are necessary in order to make this Guideline balanced, and to avoid the implication that only the only relief of value is relief that can be reduced to pecuniary value. I suggest eliminating the word “financially” from the first sentence of Guideline 2(B), and prefacing the second sentence with the phrase “In cases seeking only monetary relief,”. The revised Guideline would read:

*Suggested Guideline 2(B): “Amount in Controversy”—This factor examines what the parties stand to gain or lose in a particular case as part of deciding what discovery burdens and expenses are reasonable for that case. In cases seeking only monetary relief, the amount in controversy is usually the amount the plaintiff claims or could claim in good faith.*

In the Commentary, the sentence on the pecuniary value of injunctive and declaratory relief should be deleted.

(c) Guideline 2(C) and the Last Paragraph of the Commentary

Guideline 2(C) and the last paragraph of the Commentary state:

*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 examined include the extent to which a party needs formal discovery because relevant information or its reasonable equivalent is not otherwise available to that party.*

*Commentary

* * *

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information, but without the unfairness that can result when the asymmetries are leveraged for tactical advantage. Unfairness can occur when a party with significantly less information imposes unreasonable demands on the party that has voluminous information, or when a party with significantly more information provides the requesting party with unreasonable amounts of information that is difficult to organize or search.

My problems are with the Commentary.

The discovery standard is “relevant” information, not the more restrictive “necessary” information. As my other comments attest, it is also impossible to determine in advance what relevant information will ultimately be “necessary,” “core,” “peripheral” or otherwise.
What is the basis for the inclusion of a statement suggesting routine abuses of discovery by the less-informed parties? Unreasonable discovery requests can readily be handled outside the scope of these Guidelines, and there is no reason to make suggestions here that will embolden defendants to try to shield information that could be used to establish liability.

This suggestion should be deleted in order to make this Guideline balanced, and to avoid placing a thumb on the scale in favor of defendants with better access to information. I suggest the following re-wording:

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information. It does not mean that the party with access to more information only needs to provide discovery proportional to what is provided by the party with less information.

(d) Guideline 2(D) and the Commentary

Guideline 2(D) and the problematic parts of the Commentary states:

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 sought simply because it may have the resources to do so. Nor does it 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 critical point is what resources a party reasonably has available for discovery, when it is needed. Determining what resources a party can reasonably be
expected to expend on discovery may require considering that party’s competing
demands for those resources.

It does not take a prophet to see where this commentary will lead: routine defense
demands for an examination of the plaintiffs’ personal resources. These demands used to be
common in defense efforts to stop class certification in its tracks. The courts recognized the
relevance of the factor in instances where plaintiffs’ counsel did not agree to bear the costs,
but barred extensive discovery on the grounds it may be harassing. WRIGHT, MILLER, KANE,
MARCUS, AND STEINMAN, 7A FED. PRAC. & PROC. CIV. § 1767 (3d ed., West online edition,
2015), states:

The consideration of the representatives' financial adequacy has raised some
problems. In particular, a question has been raised concerning whether the class
opponents can engage in extensive discovery into the financial means of the
representatives in order to ascertain whether the requirement is met.14/ Most courts
have been careful to guard against the possibility that defendants may harass plaintiffs
by this type of discovery.15/ As stated by the Tenth Circuit,

Ordinarily courts do not inquire into the financial responsibility of
litigants. We generally eschew the question whether litigants are rich or poor.
Instead, we address ourselves to the merits of the litigation. We recognize that
the class action is unique and we see the necessity for the court to be satisfied
that the plaintiff or plaintiffs can pay the notice costs, and we also agree fully
with the Court's ruling in Eisen that due process requires decent notice. But we
do not read Eisen as creating a presumption against finding a class action. Nor
does it approve oppressive discovery as a means of discouraging a private
antitrust action which, if meritorious, advances an important interest of the
government.16/

Discovery pertaining to plaintiffs' understanding of the obligation to pay costs may be
allowed.17/ however. Further, one court has ruled that plaintiffs' submission to the
court in camera of affidavits concerning their financial means would satisfy any
request for discovery on that issue.18/ Other courts have satisfied themselves as to
plaintiffs' ability to finance the action on the basis of sworn statements by the plaintiffs
that they had adequate means.19/

(Footnotes omitted.) The Tenth Circuit case quoted is Sanderson v. Winner, 507 F.2d 477,
479–80 (10th Cir. 1974) (per curiam), cert. denied sub nom. Nissan Motor Corporation in

What the courts saw as potentially harassing in the context of plaintiffs trying to serve
as class representatives would be far worse if applied to the 24,118 employment cases filed in
U.S. District Courts annually, as of calendar 2014. This is 16.1% of all Federal-question cases filed in calendar 2014, or one of every 6.2 Federal-question cases. *This is not a small concern.*

The ordinary plaintiff is very fearful of retaliation. Her or his lawsuit in Federal court is usually the first time she or he has been in Federal court, and she or he are very conscious of the fact that their case involves one person with very little power or resources going up against a large employer with far more resources. If the price of being in Federal court is submission to an intrusive examination of the details of their finances, many will withdraw their suits out of fear that this invasion of privacy could lead to their defendant employer’s pressure on their mortgage lender, and every other bad consequence that can be imagined. Employers do not have to do these things in order to stoke their fears; their fears are already there.

The problems with the Commentary are the suggestion of starting the case with an inquiry into the parties’ finances, the absence of any protecting or countervailing language, and the inclusion of the second paragraph:

> 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 sought simply because it may have the resources to do so. Nor does it mean that parties with limited resources can refuse to provide relevant information simply because doing so would be difficult for financial or other reasons.

The second sentence in the second paragraph will lead wealthy defendants to claim exemption from discovery, using their abundance of resources to shield the information on the merits that only they possess. The key should be the information they possess, its importance, and its burden. The possession of wealth should not be a reason to deny needed discovery.

The third sentence in the second paragraph is even worse. Defendants will argue that it has written out of the discovery rules the protection against requests that are unduly burdensome, and will force economically weaker parties to abandon meritorious claims in order to avoid financial ruin.

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This sentence is in sharp contrast to the very useful fourth paragraph, and does not seem to be reconcilable with it.

To make the commentary balanced, I suggest you drop the second paragraph.

(e) **Guidelines 2(E) and 2(F), and Commentaries**

These Guidelines and the relevant parts of their Commentaries state:

*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 are to resolving the 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, it 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 benefit to 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 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 and is not proportional. A party objecting on the basis of discovery burden or expense ordinarily has the burden to show the nature and extent of the burden or expense, whether in support of a motion for protection or in response to a motion to compel, because that party usually has superior access to the most relevant information about what providing the requested or proposed discovery will require. The requesting party ordinarily has the burden of explaining the likely benefit of the proposed discovery, whether in response to an objection or in support of a motion to compel, because that party is usually in the better position to address why it needs the discovery.*

**Commentary**

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.

*    *    *

The difficulty is that employers typically do not announce that they have engaged in discrimination or retaliation. Plaintiffs commonly have to prove their cases by a large collection of circumstantial evidence piercing the defendants’ proffered explanations, showing that some comparators are probative and defendants’ comparators are not, defendants’ policies and past implementation of those policies, defendants’ departures from those policies, and every step in the process in which a thumb may have been placed on the scale. One current example of plaintiffs’ need to pierce labyrinthine defenses is *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562 (4th Cir. 2015). Another is *Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014). Discovery is the life’s blood of civil rights and employment cases; unduly limiting it drains the blood necessary for meritorious cases to succeed.

Defendants have been creative in constantly inventing new doctrines to bar evidence or preclude recovery. Defendants also understandably sometimes focus their motions for summary judgment on documents or ideas that plaintiff has not yet adequately explored. For these reasons, it is extremely difficult, in advance of the summary-judgment filing, to determine just what evidence will be fundamental and what will be peripheral. The imposition of so difficult a requirement on the party least able to make the showing would fundamentally tilt the scales of justice in favor of defendants. The proposed distinction may work in some extreme situations, but simply will not work in the bulk of cases.

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9 Several courts have emphasized the rareness of cases involving direct proof of discrimination, and the corresponding need to rely on inferential proof. *E.g.*, *Hunt v. Cromartie*, 526 U.S. 541 (1999) (“Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence.”) (racial redistricting case); *Sanders v. New York City Human Resources Administration*, 361 F.3d 749, 755, 93 FEP Cases 720 (2d Cir. 2004) (“Courts recognize that most discrimination and retaliation is not carried out so openly as to provide direct proof of it.”); *Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 599, 93 FEP Cases 1307 (7th Cir. 2003) (“For obvious reasons, we rarely encounter direct evidence.”) Citation omitted.), cert. denied, 541 U.S. 1030 (2004).

One change may make it work: conditioning this guidelines on the defendant’s stipulation that it will not move for summary judgment, or defend at trial, on specified issues or rely on specified factual contentions, unless plaintiff opens the door.

2. The Proposed Guidelines Impermissibly Undermine the Assurances Made by the Rules Committee

(a) Proportionality, and the Importance of the Issues at Stake, Compared with the Monetary Amounts at Stake

When many of the more than 2,000 comments submitted to the Advisory Committee in 2013 and 2014 complained that the proposed new proportionality rule would severely harm individual plaintiffs in civil rights and employment cases, the Advisory Committee re-ordered the statement of considerations to make the importance of the issues the first consideration. The June 14, 2014 Report of Judge Campbell, the Chair of the Advisory Committee on the Civil Rules to Judge Sutton, the Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated in Rules Appendix B-8:

In response to public comments, the Committee also reversed the order of the initial proportionality factors to refer first to “the importance of the issues at stake” and second to “the amount in controversy.” This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern. The Committee Note was also expanded to emphasize that courts should consider the private and public values at issue in the litigation – values that cannot be addressed by a monetary award. The Note discussion draws heavily on the Committee Note from 1983 to show that, from the beginning, the rule has been framed to recognize the importance of nonmonetary remedies and to ensure that parties seeking such remedies have sufficient discovery to prove their cases.

A reasonable person looking at this language would conclude that the re-ordering was intended to accomplish something of importance. By contrast, the Commentary to Guideline 3 takes the view that no factor is more important than any other, and states in its last paragraph:

The order in which the proportionality factors appear in the Rule text does not signify relative importance or weight. The 2015 amendments reordered some of the factors, not to endow any of them with special importance, but instead to avoid attaching significance to the order in which they appear.

It is not possible to reconcile this language with Judge Campbell’s report to the Judicial Conference, on which the Judicial Conference presumably thought it could rely in approving this change.
The proposed guidelines should be amended to state clearly that the importance of the issues in the case is more important than the monetary amount at stake.

(b) Asymmetric Discovery

I have explained above why I think the proposed Guidelines’ discussion of asymmetric discovery is likely to lead to defense arguments to shield information on the merits, and to justify imposing ruinous burdens on the economically weaker parties. The June 14, 2014 Report of Judge Campbell, the Chair of the Advisory Committee on the Civil Rules to Judge Sutton, the Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated in Rules Appendix B-8:

Also in response to public comments, the Committee added a new factor: “the parties’ relative access to relevant information.” This factor addresses the reality that some cases involve an asymmetric distribution of information. Courts should recognize that proportionality in asymmetric cases will often mean that one party must bear greater burdens in responding to discovery than the other party bears.

Nothing in Judge Campbell’s remarks lays a foundation for the second paragraph in the Commentary to Guideline 2(E).

To make the draft guidelines balanced, and to be faithful to Judge Campbell’s description to the Judicial Conference, the second paragraph in the Commentary to Guideline 2(E) should be dropped.

D. The Suggested Practices

1. Suggested Practice #1: Bringing Matters to the Court for Efficient Resolution

I have observed above, that plaintiffs with limited resources may not press their discovery rights for fear of having to pay the employer’s attorneys’ fees if they lose, because of the presumption of attorneys’ fees under Rule 37, and the practice of some districts in routinely awarding fees against the loser.

Suggested Practice #1 is not likely to succeed in light of these problems. I suggest that the Suggested Practice invite districts to re-examine their practices on the award of fees against losing parties, in order to encourage parties to bring matters to the court for resolution.
2. **Suggested Practice #2 is Useful**

   Experienced counsel will not need an early reminder from the Court, but counsel new to Federal court, and counsel who practice predominantly elsewhere, could benefit substantially from such reminders. A standard instruction to parties can be useful in focusing them, without consuming much of the court’s time.

3. **Suggested Practice #3 Could Consume Too Much Time**

   A live conference may be a good idea in some cases, but the reality is that judicial time is scarce, criminal matters have priority, and it may take too long to schedule a live conference. In one case, my opposing counsel was a former General Counsel of the EEOC, and he and I together had over fifty years’ experience in litigating EEO cases in Federal court. We had to wait several months for a telephonic conference with the Magistrate Judge before the local rules allowed us to proceed. When we had the conference, the Magistrate Judge said it looked as if we knew what we are doing, he had nothing to add, and he told us to go and do what needed to be done.

4. **Suggested Practice #4 on Pre-Discovery Stipulations Will Not Work in Most Cases**

   Some matters can certainly be stipulated at the start of a case, but they will tend to be the least important matters.

   Particularly in employment cases, the reason for the adverse action can change several times during the course of a case, and even the definition of the adverse action, and the date when it occurred, can change in light of discovery. A great deal of refinement ordinarily occurs during the discovery process.

   The time for meaningful stipulations is not at the beginning of the case, prior to discovery, but after discovery has proceeded to the point where responsible stipulations are possible.

   The discussion above on aggressive defense tactics suggest to me that this idea for stipulations to avoid discovery will not work. Often, plaintiffs’ suggested stipulations after discovery are still rejected. The phrase “make the plaintiff work for it” is still the order of the day.

   I am concerned that the inclusion of this suggested practice will result in defense and judicial pressure on plaintiffs to concede issues and facts by stipulation, to serve the goal of reducing discovery, and that plaintiffs without knowledge may succumb to the pressure. Defendants who already know where the harmful facts are may offer limited stipulations as a tool to bar discovery of more damaging facts.
Excluding prisoner petitions, more than 10% of Federal civil case filings are *pro se.* These will be vulnerable, but many others will be as well.

One other point should be mentioned. When a case has some facts reflecting very poorly on a litigant, that litigant will often want to avoid the bad facts coming in by offering to stipulate the point in question. The adverse party may reject the stipulation and prefer to prove the facts at trial, because they are relevant to knowledge, good faith, the *Faragher/Ellerth* defense, or punitive damages. That choice is for the adverse party to make, and the court should not be pressuring the plaintiff to enter into a stipulation that would bar such evidence.12

5. **Suggested Practices #5 and #6 on Focused Early Discovery Will Not Work**

I regretfully must oppose the suggestions for focused early discovery. I have often used the approach in my cases where we had the time, particularly when I had questions about exactly what the practices in question were, and how things operated to keep my clients from desired jobs. Clients often have incorrect impressions, because employers generally conceal their practices from employees. As presented, however, the suggested practice will not work.

The most important reason is that it is presented as an excuse for denying discovery. The sixth paragraph in the Commentary states: “The parties and the judge can use the results of the focused early discovery to determine whether or not further discovery is warranted.” (Emphasis supplied.) The first paragraph of the Commentary to Suggested Practice #6 contains the same kind of shot across the bow: “The judge might consider including a statement in the Rule 16(b) case-management order acknowledging that the parties will focus their early discovery and use the results to help decide if more discovery is needed and what it should be.”

Any plaintiff’s lawyer worth his or her salt will recognize this as an invitation to district judges to limit plaintiffs to the first round of discovery, and will resist this as much as possible.

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11 Table C-13, Civil Pro Se And Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2014 (24,274 *pro se* non-prisoner filings, out of 234,635 non-prisoner filings).

12 See, e.g., *Blue v. IBEW Local 159,* 676 F.3d 579, 585 (7th Cir. 2012) (“Within the limits of Federal Rule of Evidence 403, Blue was entitled to make her case with the evidence of her own choosing.”).
The second reason is that (a) the segregation of discovery efforts into “early” and “late” discovery means that the same persons may need to be deposed more than once, on different topics and documents, and (b) defendants will need to conduct more than one search and review of the same sets of documents. Quite reasonably, defendants will not want that. They will raise claims of undue burden and, to the extent that the court grants their objections, plaintiffs will be deprived of the discovery they need, solely because of the use of “early, focused discovery.”

The suggested “fix” in the third full paragraph of the Commentary to Suggested Practice #6 is that “the parties and the judge should address the issue by adjusting the scope of early focused discovery to avoid the need for a second deposition from a particular witness or a second search of a particular source, or by expressly permitting limited additional discovery from the same witness or source, or by specifying other appropriate steps.” “Adjusting the scope” will ordinarily be impossible, because one needs the results of full discovery in order to know all the questions and documents the witness may need to address, the second clause of the “fix” simply says “tough,” and the third clause is too vague to permit discussion.

The third reason is that, in “rocket docket” courts using expedited schedules, there is simply no time to do separate waves of discovery. One must be in full running mode all the time.

That said, there may be discrete issues that need to be addressed early, because they could avoid a great deal of work that might then become unnecessary. Statute of limitations questions, adequacy of exhaustion efforts, and the like, could very usefully be the subjects of early, focused discovery.

6. **Suggested Practice #7 on Pre-Motion Conferences**

The beauty of the Federal Rules of Civil Procedure is that they both allow the parties to make and respond to each others’ points, and also allow the record to reflect what points were and were not raised. Any procedural device that serves these functions but saves time is useful, but any shortcut that does not preserve the record should be rejected. For this reason, the suggested procedure, which does not require any moving or responding paper, is not a good idea.

The proposal can readily be modified to require that short documents must be filed in the record.

7. **Suggested Practices #8 and #9**

I believe that these suggestions are useful, but point out that summary-judgment motions may be filed on questions going well beyond sufficiency of the evidence. Post-discovery renewed qualified-immunity motions, and motions based on affirmative defenses,
are both common. I suggest deleting the apparent limitation of the suggestion to summary-judgment motions based on evidentiary sufficiency.

8. **Suggested Practice #10 on Cost-Shifting**

This is yet another provision that would likely seem to a reasonable observer, and will certainly seem to the plaintiff’s bar, as a new rationale to deny discovery. Defendants will raise it in every case, and some judges will accept the idea because it is legitimized in an official set of suggested practices.

Defendants have the sole power to choose how they keep their data. They alone choose whether to keep it in an accessible form, which will limit the burden of responding to the inevitable discovery requests, or to keep it in an inaccessible form and argue “undue burden” to anyone who wants to get it. Any realist can predict the choice.

The gradations of inaccessibility may reflect nothing more than the strength of the defendant’s past desire to avoid turning over any information that might help an adversary.

To condition a plaintiff’s ability to access such information on the plaintiff’s ability to pay the costs or part of the costs means that the plaintiff will be subsidizing the defendant’s decision to make the information hard to access. And the defendant will benefit from soaking the plaintiff for part of the costs, because it too will get access to its own data, partly at plaintiff’s expense.

particularly because the party with the information has made a choice to store the data in a form hard to access, and partly because of the thrust of the Federal Rules for many decades in requiring parties to bear the cost of their own responses to discovery, there is no justification for departing from the principle that the producing party bears the cost of production.

9. **Suggested Practice #11 on Forced Adoptions of Technology**

I oppose suggested practice #11. Many active plaintiffs’ attorneys have a significant number of active cases at any time. If they are forced to buy new computer programs or equipment in every case in which a wealthy opponent says “things will be cheaper if we all use the same program,” the aggregate cost can drive them out of their practices.

E. **The Guidelines and Suggested Practices Should Include the Experimental Discovery Protocols**

It surprised me greatly that the draft guidelines and suggested practices failed to mention and endorse the experimental protocols for discovery in employment discrimination cases that began to be implemented by some district judges in 2012.
Judge Campbell’s December 2, 2014 report on behalf of the Advisory Committee on the Civil Rules to Judge Jeffrey Sutton, Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated at p. 12:

The success of the discovery protocols for individual employment cases has encouraged suggestions that similar protocols should be developed for other types of cases. Suitable candidates might be employment class actions, or actions under the Individuals with Disabilities Education Act or the Fair Credit Reporting Act. The process of generating the protocols for individual employment cases was arduous. The participants were very good lawyers from both plaintiff and defense practices. Three judges engaged in the Enabling Act process provided support and encouragement. The Institute for the Advancement of the American Legal System promoted the work. But with all of those advantages, the work resembled a labor negotiation, with much hard bargaining and several moments that prompted legitimate fears of a breakdown. Still, the result is worth it. All sides seem satisfied with the product.

Surely, this and other successful pilot projects should be given substantial prominence in any document intended to serve as a guide to Federal judges nationwide. The widespread adoption of the protocols would do a great deal to further the goals of proportionality.

**Conclusion**

I appreciate the openness to constructive criticism shown by your release of the current draft for public comment. Unfortunately, my conclusion is that the present draft will be very harmful to plaintiffs of limited means who are trying to enforce rights of great public importance.

I hope you will accept the suggestions I have made for improving the draft. I expect you would hear comments from some others, but think you would have heard from many more if the comment period had not been limited to three weeks in August. These are terrifically important subjects, and I believe that a longer comment period would have been appropriate.
August 19, 2015

Prof. John Rabiej  
Director of the Center for Judicial Studies  
Duke University School of Law  
210 Science Drive  
Box 90362  
Durham, NC 27708  
via email to john.rabiej@law.duke.edu.

RE: Guidelines for the implementation of the 2015 discovery amendments related to proportionality in discovery

Dear Mr. Rabiej:

I am a lawyer who mostly represents clients with employment problems. I have served as President of the Metropolitan Washington Employment Lawyers Association, as Vice Chair of the Labor and Employment Section of the Connecticut Bar and on the Steering Committee of the Labor and Employment Section of the DC Bar. I have practiced in the federal courts mostly in Connecticut, Washington, D.C. and Maryland over the last 38 years. I write to you to give you my own views regarding the proposed guidelines for the implementation of the 2015 discovery amendments related to proportionality in discovery.

The employment and civil rights claims that I litigate are fact-intensive and are often based on circumstantial evidence. They rely on discovery to prove key elements. At the same time, there is a great asymmetry between plaintiffs and defendants in knowledge, access to important documents and financial and technical resources to obtain information.

Limiting discovery also impairs plaintiffs’ abilities to defend against dispositive motions. Defendants’ counsel file these motions in virtually every one of my cases. Limiting discovery is their goal in order to increase their likelihood of success. Access to that discovery is the plaintiffs’ weapon to counteract that strategy. Defendants have every incentive to create roadblocks to discovery and the resources to build those roadblocks.

In addition, the cases in which I am involved often do not have great deal of monetary recovery, relatively speaking, for the plaintiffs. They do often contain important equitable relief such as reinstatement, reversal of an adverse employment action, implementation of a disability-related accommodation or the clearing of an employee’s bad employment record. Though a
crucial part of the goals of any case, this relief often does not have any quantifiable monetary value.

To prevent further increases in the built-in advantages defendants have in the litigation process that employment and civil rights lawyers bring, proportionality guidelines that limit access to otherwise discoverable information based on the monetary value of the case should not be encouraged. In my opinion Guidelines 2(A), (B) and (C) place too much emphasis on monetary values rather than the importance of all the issue at stake. They should be modified to make clear that the latter has greater value than the former.

Similarly, any attempts to quantify equitable relief should also be deleted. Guideline 2(D) and the Commentary also could result in defendants’ demanding an examination of plaintiffs’ resources which would otherwise be improper. The second paragraph of the Commentary should be eliminated to decrease the likelihood that this will happen.

In addition, Guidelines 2(E) and (F) place too much of a burden on plaintiffs to justify their discovery requests in advance when it is the production of the discoverable information itself which will explain its relevance and materiality to the issues. If they need to be included at all they should be balanced against changes in Rule 56 that would allow plaintiffs the right to conduct additional discovery after the filing of a defendant’s dispositive motion. This will decrease the likelihood that the plaintiffs will be blindsided should they be unable to explain during the initial discovery phase the materiality and relevance of the information they seek.

As to the suggested practices, suggested practices 1, 2 and 5 seem reasonable. I would particularly recommend that judges be encouraged not to rely on motions to compel to settle disputes without some pre-dispute process such as judicial teleconferences or other methods of early intervention. This has worked especially well in a case I have before Judge Paul Grimm in the District of Maryland.

Suggested practices 8 and 9 could be useful especially if the defendants are able to pinpoint the issues early on that they will raise in any dispositive motions. The more knowledge plaintiffs have regarding these issues, the more likely they will be able to streamline and adapt their discovery requests.

However other suggested practices may be unwise. Suggested practice 4 related to early discovery stipulations is probably not workable. There is usually too much information that is not known by plaintiffs to allow for such stipulations.

Suggested practices 5 and 6 focusing on early and staged discovery are also probably
unworkable in many cases and should not be emphasized. Parties can always agree to those procedures on their own if they deem them efficient. Most times they will not be.

Suggested practices 10 and 11 seem destined to increase defense advantages in the discovery process. Plaintiffs should not be required to pay for costs of accessing a system of stored information that the defendants have made costly to access. Similarly, plaintiffs and their counsel should not be forced to adopt or purchase any defense technology. This could require plaintiffs to purchase multiple, different systems for each defendant that they sue and could prove prohibitively expensive.

Finally I note the absence of any mention in the Guidelines, Commentaries or Suggested Practices of one device that would assist in streamlining discovery in employment cases and lessen the likelihood of disputes. This is Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Actions. The Protocols recommended by this project came about through considerable thought and hard work by a team of experienced and highly regarded plaintiffs’ and defendants’ counsel. If the Guidelines were fair and balanced they should contain recommendations that parties use these protocols where applicable.

Thank you.

Very truly yours,

[Signature]
Jonathan L. Gould
August 21, 2015

Memorandum

To: Duke Conference Discovery Subcommittee of the Advisory Committee on the Civil Rules

C/O: John Rabiej
Director of the Center for Judicial Studies Duke University Law School
Room: 2201A
210 Science Drive
Box 90362
Durham, NC 27708
john.rabiej@law.duke.edu

From: Michael S. Burg

Re: July 31, 2015 Draft “Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality”

Introduction

Our firm represents plaintiffs and tries cases in a wide range of matters, including class-actions, mass torts, and single plaintiff injury and employment cases, throughout the United States. Many of our attorneys daily engage in discovery in those matters under the Federal Rules of Civil
Procedure. I have vast experience in discovery matters on both sides of civil lawsuits.

The July 31 proposed guidelines and practices will result in curtailing meaningful discovery. The threat of ruinous cost-shifting will discourage injury victims from pursuing justice and holding tortfeasors accountable. Whether intended or not, these guidelines will encourage judges to limit access to justice—by limiting the discovery necessary for a meritorious case to prevail. Our courts should be open to all litigants, not just the scant few who can afford to buy justice. As I explain below, these new guidelines will stand in the way of justice, and limit access to the courts to just those few who can afford to risk economic ruin.

The reality of discovery is that many times defendants will raise a “Stalingrad” defense.1 These new guidelines, as stated, simply buttress the fortresses they erect. By maximizing its economic advantage, a wealthy party can mire discovery in endless litigation on the proportionality factors for each legitimate request for production and interrogatory. This shines through in the 2013 and 2014 comments and testimony on rules amendments. Yet the proposed guidelines and practices anticipate that the cases in which discovery will be contentious are the exception, rather than the rule.

Please note that the drafting for the guidelines is inconsistent. They start varyingly, “This factor focuses on,” “This factor examines,” “This factor addresses,” etc. For uniformity, I suggest editing them so that their language remains consistent. My suggestions on a few below begin with “This factor

1 Lipsett v. Blanco, 975 F.2d 934, 939 (1st Cir. 1992) (“This case was bitterly contested. Appellants mounted a Stalingrad defense, resisting Lipsett at every turn and forcing her to win her hard-earned victory from rock to rock and from tree to tree.”) (Title VII and Puerto Rico law sexual harassment case); Cuff v. Trans States Holdings, Inc., 768 F.3d 605, 611 (7th Cir. 2014) (“A business that can establish a reputation for intransigence may end up not paying damages and not having to defend all that often either, because if a prevailing party who litigates to victory gets only a small award of fees the next would-be victim will see that litigation is futile and the employer won’t have to repeat the costly defense.”) (FMLA interference case).
concerns” because the judge will examine, focus on, or address what the guideline presents. But any uniform language is preferable from a drafting standpoint. Should the committee adopt these in some form, avoiding litigation over inconsistent language will benefit all litigants and the courts.

In sum, overall the proposed guidelines and practices will harm litigants and hinder practitioners and the courts in the pursuit of justice. I urge you not to adopt them or to amend them as suggested below.

1. Guideline 2(A) should not emphasize money at stake in the litigation, and should more clearly delineate the importance of issues at stake in all litigation.

Both guidelines 2(A) and 2(B) discuss the amount in controversy. Guideline 2(A) should either not mention money at all, or it should clearly and unequivocally state that the monetary amount in controversy is not the sole or even central basis for determining proportionality. For instance, in a civil rights or action, the monetary amount at stake could be nominal damages. But the constitutional concerns could far overshadow any other factor. In lieu of the proposed guideline 2(A), the committee should consider something like this (ADDITIONS / deletions):

Guideline 2(A): “Importance of Issues at Stake”—This factor focuses on measuring the importance of the issues at stake in a particular case. This factor applies when the money the parties stand to gain or lose in a particular case is inadequate to measure the importance or value of the issues involved. In particular, in constitutional claims and statutory enforcement matters where Congress or another legislative body has authorized attorney fee-shifting either as costs or damages to encourage enforcement the importance of such issues rises beyond any damages sought or other monetary amounts the case may involve.

The suggested commentary should further elaborate upon guideline 2(A). And the comments should state clearly that the money involved is not a
stand-alone factor and may be a non-factor in some instances. This guideline should stress the importance of civil rights, consumer protection, qui tam, matters seeking declaratory and injunctive relief, and other types of actions where discovery could be expensive but the importance of the issues involved could exceed the importance of other factors. Finally, the commentary should emphasize that the issues at stake in all litigation matter to the parties and should not be discounted merely for not having mass public appeal similar to that of the *Scopes Monkey Trial*.

2. **Guideline 2(B) and its commentary should stress that this factor is equal to and generally does not dominate the other factors.**

Guideline 2(B) overemphasizes the importance of the amount in controversy. This factor looms over the others like a bear and will be used to seek to limit discovery in many actions where doing so will reduce access to justice. As such, the focus in this guideline should be to ensure that courts are not drawn into a reasoning that limits access to the necessary discovery to prove an action—when the party raising this factor controls access to all the relevant and necessary information. For instance, in an insurance bad faith case with just enough at stake to garner diversity jurisdiction, the relatively small amount at stake may become the foundation of a Stalingrad defense on discovering the claims manuals and internal procedures of the company necessary to prove the company acted in bad faith. Or in a large-class, but relatively small dollar consumer class action where the per-plaintiff recovery stands to be relatively low and the cost of discovery may be high, the harm to past and future consumers may loom. The guideline 2(B) should underscore in its boldface text that the amount of money at stake is not the sole or even central basis for every dispute. So guideline 2(B) should be amended to say (ADDITIONS / deletions):

**Guideline 2(B): “Amount in Controversy”—This factor CONCERNS examines what the AMOUNT 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 OFTEN

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2 This portion is superfluous, since that’s the purpose of all the factors.
REPRESENTS usually the amount the A plaintiff or COUNTERCLAIM-PLAINTIFF claims or could claim in good faith. THIS FACTOR HAS NO MORE IMPORTANCE THAN ANY OTHER FACTOR AND SHOULD NOT BE USED TO LIMIT DISCOVERY OF EVIDENCE THAT WOULD SUPPORT ADDITIONAL DAMAGES.

The commentary should then emphasize that each factor must be considered and courts should not allow this factor to overshadow the remaining factors simply because it is small or nominal. It should also suggest eliminating this factor from the analysis in instances where defining the pecuniary value remains elusive and may require experts, raising a jury question that should not be allowed to limit the scope of discovery. Some such disputes in which estimating the total damages from multiple categories of available damages include trademark or patent enforcement or invalidation; ending anticompetitive practices; overcoming an overbroad non-compete clause; defamation, libel, and slander; fraud; loss of business proceeds; future wages; civil rights actions; employment and wage disputes; ADA claims; declaratory and injunctive relief; and product liability actions. Also, a jury or trier-of-fact should decide the value of a death or life-altering impairment due to the fault of another.

For each of these and others, the amount in dispute can include an undetermined amount of past and future economic and non-economic damages and potentially punitive damages. The fact that the amount of damages is undetermined at the time of the Rule 16 or 26(f) conference or the Rule 16 conference should not, alone, be used to limit discovery of information, documents, and things relevant to the claims or defenses in the action.

3. Guideline 2(C) should address information asymmetry in the boldface text and the comments to Guideline 2(C) should not narrow the scope of discovery to necessary information, since the scope involves relevance.

Guideline 2(C) should directly address information asymmetry without equivocation. Instead it appears to define and provide commentary that
could be moved to the commentary section. Guideline 2(C) should be amended to say (ADDITIONS / deletions):

Guideline 2(C): “Relative Access to Information”—This factor CONCERNS addresses INFORMATION ASYMMETRY AND A PARTY’S CONTROL OVER RELEVANT INFORMATION, DOCUMENTS, OR THINGS. COURTS SHOULD CONSIDER the extent to which each party has access to relevant information in the case. The issues examined include the extent to which a party PARTY’S needs FOR formal discovery because relevant information or its reasonable equivalent is not otherwise available to that party AND THE OPPOSING PARTY’S ACCESS TO OR CONTROL OVER THAT INFORMATION.

The third paragraph of the commentary to Guideline 2(C) discusses “access to necessary information.” This misstates the relevance standard in an important discussion about information asymmetry or inequality.

4. The commentary to Guideline 2(D) undermines the rule and raises grave concerns over the use of this factor to limit access to discovery and, ultimately, to impede justice.

While the new rule allows consideration of “the parties’ resources,” that does not mean the court should allow a party with vast or virtually unlimited resources to run roughshod over an individual plaintiff with modest or extremely modest means. The rule’s language indicates an attempt to level the playing field in discovery. The commentary undermines that purpose and incorporates the burden/expense factor addressed in guideline 2(F).

The commentary leaves out but should urge the court to consider that a party with significantly greater resources often will engage in scorched-earth discovery, forcing motions to compel even things that should unquestionably be provided with initial disclosures and objecting to fairly stated, narrow requests solely to force the party with limited means to litigate the issue. This is a great concern. For instance in commercial cases with opposing clients whose lawyers operate without a contingent fee, litigants must pay their lawyers hourly for motions practice. The commentary should urge the
court to identify situations where one party is taking advantage of a disparity in the “parties’ resources” to bankrupt an opponent out of the litigation. In such situations, the court should consider this factor and put a stop to the practice.

For instance, a pharmaceutical or medical device manufacturer with billions of dollars should not be allowed to paper a plaintiff to death over discovery of all documents and things relevant to the design, manufacture, marketing, sale, and delivery of a defective drug or device to market. This may entail literally millions of documents and untold amounts of electronically stored information. Using the commentary, a crafty defendant could argue that even if it has sufficient resources to provide the information, it should not have to expend those resources. While the court may see the importance, forcing the plaintiff to articulate the ways in which the benefit outweighs the burden or expense may prove impossible.

5. Guidelines 2(E) and 2(F) offer little guidance and conflate one another, and may mislead practitioners and the courts.

Guideline 2(E) provides very little assistance. But its commentary and guideline 2(F), along with 2(F)’s commentary all focus on what is important to discover in the litigation. Surely, that will be important in considering proportionality. But the focus falls away from the truth-seeking aspect of discovery and calls for subjective opinions on what benefit may come from the information.

The second paragraph of the commentary to guideline 2(E) is misleading. The June 14, 2014, Report of Judge Campbell, the Chair of the Advisory Committee on the Civil Rules to Judge Sutton, the Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated in Rules Appendix B-8:

Also in response to public comments, the Committee added a new factor: “the parties’ relative access to relevant information.” This factor addresses the reality that some cases involve an asymmetric distribution of information. Courts should recognize that proportionality in
asymmetric cases will often mean that one party must bear greater burdens in responding to discovery than the other party bears.

Nothing in Judge Campbell’s remarks lays a foundation for the second paragraph in the Commentary to Guideline 2(E). To be faithful to Judge Campbell’s description to the Judicial Conference, the second paragraph guideline 2(E)’s commentary should be dropped.

Guideline 2(F) opens the door for a party with control of all or most of the relevant information to the lawsuit to force the party seeking discovery to articulate what the party withholding discovery has in its possession. Often that is unknown until after the discovery is completed.

The commentary should stress that these factors are not meant to impede relevant discovery.

6. The Commentary to Guideline 3 undermines the reasoning behind an important decision by the rules committee.

When many of the more than 2,000 comments submitted to the Advisory Committee in 2013 and 2014 complained that the proposed new proportionality rule would severely harm individual plaintiffs in civil rights and employment cases, the Advisory Committee re-ordered the statement of considerations to make the importance of the issues the first consideration. The June 14, 2014 Report of Judge Campbell, the Chair of the Advisory Committee on the Civil Rules to Judge Sutton, the Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated in Rules Appendix B-8:

In response to public comments, the Committee also reversed the order of the initial proportionality factors to refer first to “the importance of the issues at stake” and second to “the amount in controversy.” This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern. The Committee Note was also
expanded to emphasize that courts should consider the private and public values at issue in the litigation – values that cannot be addressed by a monetary award. The Note discussion draws heavily on the Committee Note from 1983 to show that, from the beginning, the rule has been framed to recognize the importance of nonmonetary remedies and to ensure that parties seeking such remedies have sufficient discovery to prove their cases.

A reasonable person looking at this language would conclude that the re-ordering was intended to accomplish something of importance. By contrast, the Commentary to Guideline 3 takes the view that no factor is more important than any other. It then states in its last paragraph:

The order in which the proportionality factors appear in the Rule text does not signify relative importance or weight. The 2015 amendments reordered some of the factors, not to endow any of them with special importance, but instead to avoid attaching significance to the order in which they appear.

It is not possible to reconcile this language with Judge Campbell’s report to the Judicial Conference, on which the Judicial Conference presumably thought it could rely in approving this change.

The proposed guidelines should be amended to state clearly that the importance of the issues in the case is more important than the monetary amount at stake.

7. Some of the Suggested Practices seem premature and others run against the clock that begins ticking when a case is filed in federal court.

Suggested practice 5 is unworkable.

Suggested practice 5 calls for the parties and court to limit *early* discovery to obtain more information to determine the scope and proportionality of
further discovery. Discovery disputes in this limited-discovery phase will push parties up against discovery deadlines, ultimately extending the discovery period or requiring parties (often plaintiffs) to go without discovery they should have been able to seek from the outset. If a speedy and efficient discovery process is the goal, causing the parties to phase their discovery in this manner will undermine that effort.

Suggested practice 10 unfairly shifts costs and runs against the need for the court to consider the parties’ financial resources.

This provision serves as a new rationale to deny discovery. Defendants will raise it in every case, and some judges will accept the idea because it is legitimized in an official set of suggested practices.

Defendants have the sole power to choose how they keep their data. They alone choose whether to keep it in an accessible form, which will limit the burden of responding to the inevitable discovery requests, or to keep it in an inaccessible form and argue “undue burden” to anyone who wants to get it. Any realist can predict the choice. The gradations of inaccessibility may reflect nothing more than the strength of the defendant’s past desire to avoid turning over any information that might help an adversary.

To condition a plaintiff’s ability to access such information on the plaintiff’s ability to pay the costs or part of the costs means that the plaintiff will be subsidizing the defendant’s decision to make the information hard to access. And the defendant will benefit from soaking the plaintiff for part of the costs, because it too will get access to its own data, partly at plaintiff’s expense.

Particularly because the party with the information has made a choice to store the data in a form hard to access, and partly because of the thrust of the Federal Rules for many decades in requiring parties to bear the cost of their own responses to discovery, there is no justification for departing from the principle that the producing party bears the cost of production.
Suggested practice 11 may impede access to the courts.

Many active plaintiffs’ attorneys have a significant number of active cases at any time. If they are forced to buy new computer programs or equipment in every case in which a wealthy opponent says “things will be cheaper if we all use the same program,” the aggregate cost can drive them out of their practices. While the parties may end up utilizing technology in some cases, the suggested practice at least should stress the need to consider the parties’ relative resources and other proportionality factors before causing a pro se plaintiff or the plaintiff in a nominal damages civil rights action to acquire additional technology in order to proceed.

Experimental discovery protocols should not be abandoned.

The draft guidelines and suggested practices failed to mention and endorse the experimental protocols for discovery in employment discrimination cases that began to be implemented by some district judges in 2012.

Judge Campbell’s December 2, 2014 report on behalf of the Advisory Committee on the Civil Rules to Judge Jeffrey Sutton, Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated at p. 12:

The success of the discovery protocols for individual employment cases has encouraged suggestions that similar protocols should be developed for other types of cases. Suitable candidates might be employment class actions, or actions under the Individuals with Disabilities Education Act or the Fair Credit Reporting Act. The process of generating the protocols for individual employment cases was arduous. The participants were very good lawyers from both plaintiff and defense practices. Three judges engaged in the Enabling Act process provided support and encouragement. The Institute for the Advancement of the American Legal System promoted the work. But with all of those advantages, the work resembled a labor
negotiation, with much hard bargaining and several moments that prompted legitimate fears of a breakdown. Still, the result is worth it. All sides seem satisfied with the product.

A document intended to guide federal judges through the rule changes should mention and encourage successful pilot projects. The widespread adoption of the protocols would do a great deal to further the goals of proportionality.

Many of the suggested practices are premature.

Additionally, during this phase, while a 12(b) motion is pending, the plaintiff might otherwise discover evidence supporting a good-faith amendment of the pleadings. By limiting discovery in this manner, that plaintiff might end up losing their day in court—especially where the defendant controls access to all the relevant documents, information, and things and the parties will need to litigate the proportionality factors in order for the plaintiff to get the necessary information to amend the pleading.

Many of these suggested practices seem premature. With the new rules, the courts and parties will require time to adjust and to make sense out of the changes. By imposing suggested practices for anticipated problems now, the committee limits the creative means for the court and parties to resolve differences.

Additionally, where no suggested practice or guideline helps resolve an issue, the parties and court will be left with one party or the other raising that absence as a sign that the creative solution proposed by an adversary or the court goes beyond the court’s authority and cannot be done.
Conclusion

The irony of the amendments is that they run contrary to the core principles of Rule 1. They most certainly will not “secure the just, speedy and in expensive determination of every action and proceeding.” Indeed, this proportionality analysis and its application to real cases affecting real people through the guidelines and suggested practices will result in unjust, dilatory, and inefficient determinations of actions and proceedings. Discovery is the lynch pin that undergirds the civil justice system. The proportionality amendments result in parties in civil litigation being reduced to the status of winners and losers-not participants in a justice system. The primary goal today in our civil justice system, consistent with Rule 1, should be to make access to the courts less complex and less costly, with a clear eye focused on the goal of affording all parties access to equal justice and affirming the guarantee of protecting their substantial rights. These guidelines and suggested practices do no such thing. They should be rejected.

I appreciate the openness to constructive criticism shown by your release of the current draft for public comment. I hope you will accept the suggestions I have made for improving the draft.

I expect you would hear comments from some others, but think you would have heard from many more if the comment period had not been limited to three weeks in August. This is important and I encourage you to re-open the commentary period and seek input from national and state bar associations and specialty bars whose members practice in the federal courts.
August 21, 2015

John Rabiej
Administrative Director, Center for Judicial Studies
Duke University School of Law
210 Science Drive
Box 90362
Durham, NC 27708.

Dear Mr. Rabiej:

I write at the request of the president of the Texas Employment Lawyers Association, and on behalf of the organization. We are a voluntary bar association of Texas lawyers whose employment practice is largely devoted to representing employees in federal and state court. Our organization was founded almost 20 years ago and, in the intervening years, we have grown from a handful of members to over 100.

We quite recently learned of a document entitled “GUIDELINES AND SUGGESTED PRACTICES FOR IMPLEMENTING THE 2015 DISCOVERY AMENDMENTS TO ACHIEVE PROPORTIONALITY.” These guidelines are to be used to provide the drafters’ opinions as to how the federal judiciary should interpret and apply a newly-revised rule of discovery. The contents of this document, however, cannot fairly be characterized as one written with any input from the public.

Although the title states that this is a call for public comment, the document was not made available to the public. Nor can it fairly be said that it was made available to the practitioners who represent the interests of individuals seeking justice through the federal judicial system. A quick review of information on the internet instills no confidence in the process, and underscores the validity of our concerns. We found only one web site where it was published – the Center for Judicial Studies at Duke Law School. And even that publication was not easy to find on the School’s website. Only through a diligent search did we find it mentioned under the category of “Faculty & Scholarship.”

And we found links to the document on only two websites. One is The Law Professors Blog Network; the other is The Institute for the Advancement of the American Legal System, a research center located at the University of Denver. This distribution can hardly be characterized as one intended to publish the document to a broad audience.
Yet another serious flaw in the process is that even federal court practitioners had virtually no time in which to read the document, analyze its contents, and submit thoughtful comments. The deadline was unilaterally set by the Center for Judicial Studies – and it is today. The only reason we can see for this rush is that seminars to present this document have already been scheduled, with the first set in a little over two months. And in these non-public seminars, federal judges will be advised of the opinions and recommendations developed by your organization with virtually no input from the public.

To avoid the unfair prejudice that will most certainly result from the process now underway, there must be a meaningful opportunity for the public to comment. First, these Guidelines should be widely published and in forums commonly accessed by the public. Second, the public must be afforded a fair and reasonable amount of time to analyze and provide thoughtful comments. This is not a process that can be rushed if the public’s input is something the Center sincerely desires.

In the limited time available to us, we have not been able to analyze the document in any depth, disseminate it to the membership, or develop substantive comments. We have, however, had an opportunity to read the comments submitted by the National Employment Lawyers Association, and they appear to have touched upon the facially obvious problems. That organization’s comments are not, of course, nearly as comprehensive as they should be, and that they would have been had there been a reasonable opportunity to review the document. And our organization has not had any opportunity to develop our own, independent comments. But, for the time being, we adopt the comments presented by the National Employment Lawyers Association.

Speaking on behalf of the officers and the Board members of the Texas Employment Lawyers Association, and with the interests of our members in mind, we ask that your group take our concerns to heart, publish the Guidelines widely, and afford our members, the clients we represent, and the public a fair opportunity to provide input to a document that will have a lasting influence on the judiciary as the courts are called upon to control discovery sought by those who come to court to secure justice.

Very truly yours,

Margaret A. Harris for
Susan Motley, President,
Texas Employment Lawyers Association
August 21, 2015

Dear Mr. Rabiej,

I am writing in response to your call for public comment on the “Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality.”

As the President and Director-Counsel of the NAACP Legal Defense Fund, our organization has a direct interest in how the rules of civil procedure, and especially the requirements of discovery, will impact the advancement of civil rights and access to justice. The Center and Duke Law do such important work and we would welcome the opportunity to become more involved going forward. While public interest organizations like ours have finite resources, we would be very interested in sending one of our attorneys to participate in future meetings if you might be able to waive the fees. Moreover, I believe the added involvement of civil rights groups would contribute to the types of conversations and expand the range of perspectives that your Center seeks to convene.

Enclosed, please find an initial set of comments about the proposed Guidelines, which are somewhat condensed given the relatively short comment period. I am concerned that the current draft Guidelines will confound discovery in civil rights actions and impede the enforcement of civil rights statutes. Additionally, I am worried that various aspects of the Guidelines are not consistent with the amended rules and go beyond the scope of “proportionality” considerations. I hope you and your colleagues are able to incorporate these comments – both for the benefit of the Guidelines’ content and also so that your hard work will reflect the even-handedness for which I know you strive.

Thank you for your consideration, I would be pleased to discuss this in more depth.

Sincerely,

/s/ Sherrilyn Ifill

Sherrilyn Ifill
President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.

Cc: Dean David F. Levi
Judge David Campbell
NAACP LEGAL DEFENSE FUND COMMENTS ON THE
“GUIDELINES AND SUGGESTED PRACTICES FOR IMPLEMENTING
THE 2015 DISCOVERY AMENDMENTS TO ACHIEVE PROPORTIONALITY”

Please find below a number of specific comments about the draft “Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality” (hereinafter, “Guidelines”). Substantively, the NAACP Legal Defense Fund (“LDF”) is concerned that the Guidelines would significantly hamper discovery in civil rights cases and thus undermine the enforcement of critical civil rights laws. This is particularly troublesome in cases involving racial discrimination or segregation where an individual plaintiff may have limited means to engage in protracted disputes about proportionality or cost-shifting. Procedurally, it could be problematic if the Guidelines come to obtain the imprimatur of the Judicial Conference, even though they were developed by a non-public group of participants, many of whom seem to share a perspective on discovery in the commercial context that may differ from that of non-commercial litigants.

More broadly, the federal courts have proven essential to protecting the civil rights of African Americans and other minorities and effectuating structural reforms that make our country more equal and inclusive. Historically, the Federal Rules were designed to promote access to the courts and were in many instances defined by landmark civil rights cases. We urge Duke’s Center for Judicial Studies (the “Center”) and the Advisory Committee to uphold this great tradition and safeguard the vital role that civil rights actions play in our democracy.

Comments on the “Guidelines” Section

Guideline 2(A):

This Guideline overstates the significance of the monetary stakes that may be implicated by a given case. It also deemphasizes the importance of enforcing Constitutional rights or statutes in the civil rights context and deterring future legal violations. This could be particularly problematic for public interest cases where plaintiffs assume the mantle of a “private Attorney General.” Additionally, some civil rights and consumer protection actions may initially implicate low dollar amounts but ultimately vindicate essential rights and effectuate important structural changes. The Guideline should be revised to focus on the importance of the issues at stake and make clear that this factor should be carefully considered regardless of whether the monetary relief at issue is sizeable or the sole relief sought by parties.
Guideline 2(B):

While the language appears intended to track the language of the amended Rule, the second sentence is superfluous and not germane to the factor at issue. Mentioning a good faith requirement unnecessarily infuses an additional requirement into the proportionality calculus that will encourage judges to discount the claimed damages when determining whether the requested discovery is proportional. Additionally, given the re-ordering of the factors to avoid the appearance of supremacy of the “amount in controversy” factor, we would suggest adding the language “as one of the several factors in deciding” to replace “as part of deciding.”

Guidelines 2(B), Commentary:

This Commentary improperly suggests money is the presumptive measure of proportionality, even with respect to non-monetary injunctive relief. This is concerning in cases where an injunction was important, but difficult or impossible to monetize. For example, it is entirely unclear how courts should assess financial stakes in a case involving an injunction to end racial discrimination, housing segregation, school segregation, or racial profiling. These are critical issues for our country and our courts and yet the draft Commentary seems to subordinate all such considerations if they are not immediately monetizable.

Additionally, the second sentence of the Commentary is incomplete, as the amount-in-controversy for injunctive judgments can also be measured by the cost of compliance by the defendant. Limiting the valuation to the value to the party seeking the injunction (the plaintiff) is an effort to minimize the amount-in-controversy and thereby make it more likely that the sought discovery will be deemed disproportionate.

Guideline 2(C):

Proposed Guideline 2(C) is generally superfluous and should be struck or considerably pared back. The concern of the “relative access to relevant information” factor is information asymmetry, which may require judges to be more solicitous of requests by individuals with less information directed to parties with voluminous information. Thus, as the Advisory Committee says in its Note:

“Some cases involve what often is called ‘information asymmetry.’ One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.”
This statement suffices to clarify the rule and the Guideline is unnecessary and may be interpreted as inconsistent with the note of the Advisory Committee.

Additionally, in the second sentence of the Guideline, the statement “or its reasonable equivalent” should be deleted as not germane to the rule under discussion, Rule 26(b)(1). Whether sought information “is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient” is governed by Rule 26(b)(2)(C)(i). Thus, whether the information can be obtained from another source is not properly a component of the proportionality determination, but is a matter to be taken up on motion or by the court on its own initiative under Rule 26(b)(2)(C)(i). In other words, such information is not disproportionate and thus beyond the scope of discovery simply because “its reasonable equivalent” is accessible by the requesting party.

To the extent the Guideline goes beyond the language in the Advisory Committee Note, it could be particularly harmful to plaintiffs in the employment law context, since it is often difficult for an employee to obtain access to information, even if he or she can speak with current employees, because of the employer’s policies or a fear of retaliation. In some instances, employees will have inadequate access to information because they are not allowed to discuss salary, benefits, performance reviews. In other instances, an employer may fail to tell a plaintiff that it took an adverse action or why it took that action.¹

Finally, the Guideline misquotes the rule and should read “Relative Access to Relevant Information.”

Guideline 2(C), Commentary:

The third paragraph of the Commentary should be stricken as not empirically based and biased.² The statement that parties with less access to information “leverage [the asymmetries] for tactical advantage” is not supported by empirical data and reflects the biased perspective of the defense bar, and must be omitted for this to be (and appear to be) a facially neutral document. Similarly, the statement that requesting parties use information asymmetry to make “unreasonable” demands for “unreasonable amounts of information” is unsupported and biased. Moreover, “unreasonable” is undefined here; if it means “inappropriate,” then whether a discovery request is inappropriate is governed by Rule 26(g). An undefined feeling that a request is “unreasonable” has no place in evaluating the factor addressing the parties’ relative access to relevant information.

¹ In addition, having access to information requested is not a ground for preventing a party from requesting it from their adversary and the rule does not suggest anything to the contrary. For example, in some cases it may be important to establish that an opposing party possessed or knew about certain information at a given time, or that their version of a relevant document contains unique and revealing information (e.g., notes, markings, metadata). Alternatively, consider whether there is sufficient support for the underlined term here: “Discovery costs and burdens may be heavier for the party that has or can more easily get the bulk of the essential proof in a case.”
Similarly, the statement that certain parties “often impose heavy discovery burdens on other parties” is not supported by empirical data, reflects the defense perspective only, and should be stricken.  

The Commentary should also note that when the party is a government actor or entity (or effectively functioning as such), courts should broadly consider and construe their resources (and ability to procure additional resources).

Guideline 2(E), Commentary:

The Commentary is likely to be used in a manner that is inconsistent with the language of the Advisory Committee. As the Advisory Committee Note states,

“The parties may begin discovery without a full appreciation of the factors that bear on proportionality. For example, a party requesting discovery, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party.”

The Commentary’s reference to “speculative” benefit is subjective and could be used to reject discovery requests that would be of importance to the requester’s case. As the Advisory Committee recognized, at the outset of a case, litigants may have little information; it may be too easy to label the potential benefit of sought information as “speculative” at this stage. Indeed, that is one of the purposes and benefits of discovery. If a legal claim is too speculative, there are ways of disposing of it, thereby eliminating the need for discovery related to that claim.

Additionally, the Commentary states that “discovery relating to a central issue is more important than discovery relating to a peripheral issue.” This belies the fact that litigants do not always know the important facts or issues until after discovery or until the defendant mentions it in its summary judgment brief. In other instances, an issue that may have initially appeared to be minor later turned out to be significant only after discovery revealed critical information.

We are especially concerned that this language is likely to be used in a way that will undermine the manner in which evidence is presented and a jury may consider the evidence in many civil rights cases. In a case involving a pretext for racial discrimination, a facet of the case that might initially appear to be uncontroverted may turn out, with

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3 For example, there is no clear factual support for the underlined terms: “In a case that has ‘information asymmetry’ or inequality, parties with less access depend on discovery to obtain relevant information and often impose heavy discovery burdens on other parties. The parties with significantly more information are often asked to produce significantly more information than they are able to seek or obtain from the party with little access.”
some discovery, to be the lynchpin in establishing the falsity or speciousness of the defendant’s purported justification.

Guideline 2(F):

This Guideline and Commentary unnecessarily attempt to give the cost/benefit analysis its own independent weight, which is unwarranted. Under the pre-amendment version of the rule, whether the burden or expense of the discovery requested outweighed its likely benefit was determined with reference to the other factors listed in 26(b)(2)(C)(iii) – the factors that now are enumerated in Rule 26(b)(1) as amended. Thus, cost/benefit was not a factor distinct from the others but was determined by reference to them. Currently, cost/benefit is listed separately as its own factor in 26(b)(1). But the history of the rule should indicate that cost/benefit is primarily a matter of the previously mentioned factors and courts should be urged not to develop a cost/benefit analysis separate and distinct from the factors mentioned above.

The inconsistency of this Guideline with the Federal Rules would likely harm cases involving racial discrimination, where discovery is often crucial to establishing an inference of discrimination. Pretext (and thus racial discrimination) can be shown by a comparator analysis, but such an analysis requires discovery that goes well beyond the treatment of the plaintiffs and the individual adverse employment action in an employment case. Similarly, in an individual lending case, consideration of pretext through a comparator analysis necessarily requires production of many loan files of other individuals who may have been treated more favorably. Improper use of this Guideline due to its incorrect emphasis in this document could lead to results that undermine the substantive law on proving race discrimination claims.

Moreover, there may be instances where the benefit of obtaining discovery is difficult to monetize or predict.4

Guideline 3, Commentary:

The final paragraph makes a declaration regarding the intention of the amendment that is at best not confirmed or confirmable as fact and is inconsistent with our understanding of statements by those on the Advisory Committee. The paragraph should be deleted.

4 We also suggest the underlined language be added: “that may be unreasonably hard to find or retrieve . . . .” Simply because discovery may be difficult does not mean it should not be pursued.
Guideline 4, Commentary:

This discussion also should address the potential impact on Federal Rule of Civil Procedure 34. In particular, in the fifth paragraph (beginning “No advance. . . .”) the last sentence should be revised to read as such: “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 or the responding party believes, without affirmation from the court, that the request is disproportional.”

Guideline 5, Commentary:

In exploring the use and expense of technology here, the Commentary should also exhort courts to consider principles of fairness and equity.

Comments on the “Practices” Section

Practice 3:

This is beyond the scope of proportionality issues, which is the stated focus of the Guidelines and Practices here.

Practice 4, Commentary:

This Practice encourages stipulations before discovery, which has uncertain practical implications and may give rise to several problems. Courts should not blame plaintiffs for failing to stipulate facts before discovery because, in our experience, in many cases it would be border on malpractice for a plaintiff’s attorney to do so. In some instances, relevant stipulations may not be known until after discovery or defendants themselves may be unwilling to make certain stipulations.

Practices 5 and 6:

The suggestion of “early focused discovery” is beyond the scope of proportionality issues and could seriously harm essential forms of discovery in civil rights litigation. This is a substantial concern for public interest organizations like ours. Historically and across a range of civil rights cases, important facts are sometimes only uncovered later on in the proceedings after more detailed discovery requests are fulfilled. This is particularly true when there is asymmetric access to information and resources. In some instances, it may be unknowable how to precisely focus discovery at such an early juncture. Moreover, this
Practice assumes that early focused discovery is all that is needed, whereas the goal here should be to determine whether additional discovery would be useful. In some instances, opposing parties may also be unwilling to engage in early discovery.

Practice 7, Commentary:

Consider whether there is sufficient factual support for the underlined terms: “A pre-motion conference can result in a fast and efficient resolution of a discovery dispute without the cost and delay of extensive briefing that is often unnecessary.”

This Practice assumes a substantially greater availability of judges when, in fact, it may be difficult to get a hold of judges in some instances due to other trials or obligations. Such delays and difficulties may further prolong an already-protracted discovery process and be costly to litigants. Additionally, motion practice can sharpen the issues and encourage parties to resolve disputes absent court intervention. Because our experience is that this Practice does not always result in a record, this Commentary should include that such conferences should be on the record with a transcript taken.

Practice 8:

This is beyond the scope of proportionality issues.

Practice 10:

This Practice could be very problematic for civil rights litigants and public interest groups such as ours. The real risk here – and the implication of the draft language – is that plaintiffs can obtain their requested discovery only if they pay for it. Moreover, this Practice encourages defendants to raise proportionality issues by default, as a means of “pricing out” individual plaintiffs and civil rights attorneys. That outcome would be unnecessary, unfair, and troubling, which is presumably not the intent of the drafters.

The Center should reconsider whether the premise of the Practice here is true and if so, how. Indeed, this Practice seems to conflate questions of discovery with the issue of cost-sharing. Furthermore, if the Practice is maintained in some form, it should reaffirm that reasonable and proportional discovery requests should be responded to in the normal fashion, regardless of cost considerations. Alternatively, the Practice should make clear that these new cost-sharing considerations are geared mainly towards exceptional, disproportionate requests.
Conclusion

These comments are intended to improve and refine the Guidelines to serve a broader swath of litigants and, by doing so, improve the integrity and efficacy of our civil justice system. Although LDF continues to have concerns with the adoption of the underlying discovery amendments, we aspire to ensure that rules that are implemented are as fair, just, and equitable as reasonably possible and hope that our comments and changes assist in achieving that goal. We would welcome the opportunity to continue the conversation and become more involved in the Center’s work in the future.

August 21, 2015

Submitted via email to john.rabiej@law.duke.edu

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Re: Comments To Guidelines And Suggested Practices For Implementing The 2015 Discovery Amendments To Achieve Proportionality

Dear Mr. Rabiej:

The National Employment Lawyers Association (NELA) appreciates the opportunity to submit comments concerning the Guidelines And Suggested Practices For Implementing The 2015 Discovery Amendments To Achieve Proportionality. The Guidelines and Practices were drafted initially by Judge Lee Rosenthal and Professor Steven Gensler and are being revised under the auspices of the Duke Law Center for Judicial Studies with the goal of producing a consensus document from lawyers representing both plaintiffs and defendants who are participating in the process as Discovery Proportionality Team Members.

NELA is well qualified to comment on the Guidelines and Practices because it is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA’s members litigate daily in every federal circuit, affording NELA a unique perspective on how the Guidelines And Practices actually will play out on the ground. Moreover, NELA and its members were very active participants when the then-proposed amendments to the Federal Rules of Civil Procedure, particularly the proportionality provision in Rule 26, were being considered by the Advisory Committee on Civil Rules in 2013 and 2014. NELA submitted comprehensive written comments in March 2013 and again in February 2014. Members of NELA’s Federal Rules Task Force testified at public hearings held by the Advisory Committee in Washington, D.C., Phoenix, and Dallas. Many NELA members submitted comments of their own. Earlier, NELA members acted as the plaintiffs’ representatives in the process of developing the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, an experience that provided a particularly informed view of the issues presented in discovery.
I. THE METHOD AND TIMING OF SOLICITATION OF PUBLIC COMMENTS WERE NOT DESIGNED TO MAXIMIZE SUBMISSION OF RESPONSES

The Guidelines And Practices were posted for public review on the Center for Judicial Studies’ website on or about August 4, 2015, on a link to a page entitled “Publications.” Upon opening the document, it was revealed that the public comment deadline was less than three weeks later, on August 21, 2015. The Guidelines And Practices were also circulated a few days earlier, on Sunday, August 2, to the Discovery Proportionality Team Members with a request for their comments by August 21. Limited distribution and a request for comments within 17 days during the last month of the summer, when many people take vacation and are unavailable, is not a process calculated to obtain a robust response. Moreover, this was the first time that anyone outside of the Discovery Proportionality Team was even aware of the existence of the Guidelines And Practices or to review and consider their impact. The short comment period hampers the ability of almost all members of the legal community to provide thoughtful reactions to the proposed guidelines.

If the Center for Judicial Studies truly wants thoughtful public comment and is serious about ensuring that the Guidelines And Practices are the product of consensus across constituencies, we suggest that it undertake a broader publication of the Guidelines And Practices, and a longer comment period, i.e., at least 30 days. It is unrealistic to expect that the current publication and comment process will yield the kind of input that will lead to the development of a consensus document. NELA urges the Center for Judicial Studies to take action now to redistribute broadly the Guidelines And Practices allowing adequate time for collecting comments.

II. THE ORDER IN WHICH THE GUIDELINES APPEAR SHOULD BE REVISED

Attorneys know that the order in which provisions appear often has an effect on the relative importance and even the meaning ascribed to them. Indeed, one of the most important changes in the Rules was the decision to move the provisions on proportionality in Rule 26 to a more prominent place, and that seems to have been done precisely in order to make them more prominent and influential.

In this respect, the order in which the Guidelines are presented should be changed. Guidelines 3 and 4, which deal with the general principles of proportionality and the manner in which proportionality should factor into questions of what is discoverable and what burdens must be borne by the parties should come ahead of Guideline 2, which is concerned with interpretation of the specific factors contained in the rule.

We suggest that the present Guideline 4 should be renumbered as 1. The precept of the present Guideline 4 is basic to the issues that may arise:

The Rule 26(b)(1) amendments do not alter the parties’ existing obligations or create new burdens. These amendments do not require a party seeking discovery to show in advance that the proposed discovery is proportional.

The principles set forth in that Guideline should inform all decisions made about the interpretation of Rule 26(b)(1), and that should be made clear by placing them at the beginning of the Guidelines.
Guideline 3, renumbered, should also be given more prominence, emphasizing that there is no “one size fits all” approach, but that flexibility in light of the knowledge and experience of the court and the parties, as well as the nature and facts of the particular case, is of great importance. Guideline 3 should be renumbered as Guideline 2, immediately after the renumbered Guideline 4.

With respect to Guideline 2, before delving into the specific sub-parts, a general statement as to the interplay of the factors enumerated would help courts and the parties to put them into the proper perspective. We suggest that the Advisory Committee’s Note on this subject be incorporated entirely into Guideline 2, immediately after the opening paragraph:

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

We also suggest that Guideline 2(E) should be re-ordered to be Guideline 2(A), because the importance of discovery should be the touchstone for resolving disputes.

**III. THE EMPHASIS ON “CENTRAL” VS. “PERIPHERAL” DISCOVERY IS LIKELY TO DISADVANTAGE PLAINTIFFS**

In assessing what discovery is important (currently Guideline 2(E)), an appropriate analysis will vary widely from case to case. We therefore believe that this Guideline should advise the courts that the first consideration of what discovery matters are and are not important should be the substantive law setting forth the elements of proof necessary to establish liability with regard to the specific claim(s), cross-claims, counterclaims, and defenses at issue. Such guidance should be straightforward and would place the parties and the courts at the same starting point.

Additionally in some types of cases, summary judgment motions are common, which may require discovery of evidence that is not identified in the elements required to establish or disprove liability. The elements specifically set forth with regard to assessing the merits of a summary judgment motion therefore are also clear and, accordingly, easy to apply. Consideration of dispositive motions should play an important role in assessing the nature and amount of discovery that may be needed.

To take one example, in employment cases, summary judgment motions are virtually ubiquitous; it is so rare that one is not filed that the absence of such a motion in one of our cases becomes a matter of comment among members of the employment bar. Thus, Guideline 2
should be amended to point the courts and the parties to the proof necessary to meet the prima facie test, when it is required.¹

Because employment cases require our members to prove motive or intent, they rely heavily on circumstantial evidence to show that the stated reason is pretextual. Pretext can be proved, for example, by showing subsequent conduct/statements of the employer, the existence of a double standard, the defendant’s failure to not follow its own policies, or a facially flawed investigation, to name but a few approaches. Without broad and flexible discovery, a plaintiff may never learn that there is circumstantial evidence to support a showing of pretext by one or more of the recognized avenues.

In the majority of cases handled by our members, therefore, what may appear on its surface to be a peripheral issue could very well be the critical piece of circumstantial evidence needed to persuade the jury that the defendant is liable—and the court that the plaintiff is entitled to go to the jury. The Comments provided to give guidance to the courts on how to apply this factor do not fully consider how efforts to force discovery topics into a disfavored “peripheral” or approved “central” category would affect the dynamics of the case. Such efforts will invite side skirmishes over what is a “peripheral” vs. “central” discovery issue, which both distracts from the orderly progress of the litigation and unfairly forces plaintiffs to reveal their case strategy to their adversaries.

IV. REFERENCES TO COST-SHARING CANNOT BE PART OF THE GUIDANCE

The Commentary to Guideline 4 ends with two sentences discussing the court’s authority to require cost-sharing in some circumstances. As summarized, those two sentences do not accurately capture the current state of the rules on cost-sharing. In any event, a comment to a guideline on a rule on proportionality is not the place to introduce highly controversial positions on cost-sharing that are strongly opposed by the plaintiffs’ bar.

V. THE DISCUSSION OF “ASYMMETRY” IN GUIDELINE 2(C ) SHOULD BE MODIFIED

Guideline 2(C) has substantial importance in employment cases, where virtually all employees have limited access to salient background information about their cases. For that reason, it would be better for the third paragraph of the Commentary to read “proportionality requires permitting all parties access to RELEVANT information” rather than “…access to NECESSARY information” as it reads now. In addition, the primary mechanism by which the party with more information leverages its position is to withhold information. Thus, we suggest that the final clause of the paragraph read “when a party with significantly more information provides the requesting party with unreasonable amounts of information that is difficult to organize or search, or fails to provide available information to the other party.”

¹ The Circuits are split as to whether a plaintiff is required to prove a prima facie case once the defendant articulates a legitimate non-discriminatory reason for the decision in question. Therefore, the range of discovery to be permitted may vary from one part of the nation to another.
VI. THE SUGGESTED PRACTICES ARE BEYOND THE SCOPE OF THE AMENDMENTS TO RULE 26 AND MANY UNFAIRLY DISADVANTAGE PLAINTIFFS

The Suggested Practices have no foundation in the Federal Rules. In particular, the Suggested Practices do not appear focused on implementing proportionality, but on improving judicial case management generally and specifically on a cost-benefit approach to case management. But plaintiffs seeking to vindicate their statutory and constitutional rights, particularly in employment cases, must often address issues that are not appropriately viewed primarily in terms of the dollar cost of discovery responses. Yet, the Suggested Practices appear to have economic cost as their cornerstone.

For example, Practices 5 and 6 suggest phased discovery in cases where it is likely to be voluminous, complex, or disputed. Nothing in the Federal Rules calls for such an approach, which seemingly forces parties to conduct discovery in a certain order for it to be considered “proportional” or even permitted future discovery at all. This “one size fits all” approach could needlessly delay discovery for plaintiffs up to, or past, court deadlines. Absent use of the Initial Discovery Protocols for Employment Cases Alleging Adverse Action (where a later round of discovery is specifically contemplated and permitted), phased discovery usually disadvantages plaintiffs. Our members have often had the experience of dealing with defendants that, knowing the contents of their document repositories, produce voluminous responses without disclosing potentially detrimental items, hoping to preclude a second round of discovery because of the sheer volume of their initial responses. Quantity does not substitute for quality in responses, nor is that what the Federal Rules require. Phased discovery will too often tend to assist in abusive practices.

Practice 10 encourages the use of cost-sharing in order to assure disclosure of relevant discovery. Cost-sharing should not be part of a document intended to address proportionality. While the Federal Rules have very limited mechanisms for cost-sharing, expanding that to a general suggested Practice has no support in the Rules and would alter the balance that the Rules have always maintained. Putting a price on the discovery of relevant information shifts the main focus of proportionality to cost, which is inconsistent with the language of the Rule, and reduces consideration of other factors such as the importance of issues at stake, use of discovery to resolve issues, and the parties’ relative access to information. Cost-sharing that is not limited strictly would also change the “American Rule” in which each side bears the cost of its legal representation, a shift that would bear much more heavily on plaintiffs than defendants. This issue is not an appropriate topic for a Practice.

Thank you for the opportunity to present NELA’s views on this important matter. Please do not hesitate to contact me should you have any questions.

Sincerely yours,

Terisa E. Chaw
Executive Director
August 21, 2015

Via U.S. Mail and Electronic Submission: john.rabiej@law.duke.edu

Duke Conference Discovery Subcommittee of the Advisory Committee on the Civil Rules
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Re: California Employment Lawyers Association Comments to Proposed Changes Restricting Discovery in Civil Cases

Dear Members of the Committee:

We are writing on behalf of the California Employment Lawyers Association (“CELA”), regarding the proposed changes to the Federal Rules of Civil Procedure. CELA is a nonprofit mutual benefit corporation under IRS Code Section 501 (c) (6) with a volunteer board of practicing employment lawyers and a membership of over 1,200 individuals. CELA’s fundamental mission is to help our members protect and expand the legal rights of working women and men through litigation, education and advocacy.

CELA is the nation’s largest and strongest statewide organization of attorneys who practice primarily civil employment law representing employees in termination, discrimination, wage and hour, and other employment cases. CELA was established to assist and promote the common interests of licensed California lawyers who represent employees or unions in matters related to employment. CELA provides a forum for exchange of information among its members; it takes and presents positions on legislation, regulations, and policy matters before governmental agencies, legislatures and courts. CELA files as Amicus Curia in appropriate cases pending before state or federal courts that have an impact on the rights of California workers.

Discovery, in particular, is a necessary and critical part of our practice on behalf of employees. In the typical employment dispute, 90 percent or more of the relevant information is held exclusively by our client’s current or former employer and thus must be obtained by proper
discovery. There are many legal authorities that underscore the necessity of discovery in employment actions and assume that Plaintiff will have access to sufficient information to meet formidable standards of liability in individual and class cases. For example, the U.S. Court of Appeals for the Second Circuit has stressed that “if unable to engage in discovery, [plaintiff] cannot prove intent, and without proof of intent, he has no case.”

As a result, our members include many highly experienced and frequent discovery practitioners in the federal trial and appellate courts. By advocating at the ground level for the rights of employees, many of our members have become experts in federal discovery, mandatory meet and confer, and discovery motion practice. Because employment law and civil rights cases are, by design, complex and factually intensive individual cases, these plaintiffs comprise a large segment of the federal litigants who benefit from substantial discovery.

It is from this broad, ground-level experience that we respectfully submit these comments on the currently proposed changes to the Federal Rules of Civil Procedure (“FRCP”) that would impact all civil cases. We are deeply troubled by “proportionality” standards that we believe would serve to limit the scope of allowable discovery in civil cases. These changes would have far-reaching negative consequences in workers' rights and civil rights cases. The proposed rules make it difficult, time-consuming and laborious to obtain necessary discovery and thus risk crowding meritorious cases out of the system. If limited discovery makes it too difficult or expensive to “find the ball,” cases with limited economic value, such as those on behalf of low-wage employees, will increasingly become too expensive to litigate, irrespective of merit.

In addition, the current FRCP system of discovery has not been given a real chance to work because the rules, as they currently exist, are often not followed by Defendants in our cases. It is very burdensome to enforce discovery rules. Due to budget cuts, vacant judgeships, sequesters, government shutdowns, expanding removal jurisdiction and a variety of other impediments, federal judges are generally overburdened with heavy dockets and unable or unwilling to get much involved in monitoring and enforcing discovery rules. Indeed, the proponents of these changes, as we will discuss below, agree that the lack of judicial monitoring is a major problem. While we expressed our concerns in a letter dated February 5, 2014, many of those concerns, particularly as it relates to FRCP 26, remain the same.

1 Gray v. Board of Higher Educ., City of New York, 692 F.2d 901, 905-06 (2d Cir. 1983).
2 From the perspective of a legally aggrieved employee, discovery under the current FRCP is already very lean and far less than a litigant’s rights in California State Court actions. California’s “unlimited jurisdiction” rules allow for form interrogatories, 35 special interrogatories, 35 requests for admissions, and no arbitrary limit on number or length of depositions in employment cases. The concept of “proportionality” as articulated by the proposed rule changes, does not exist.
3 While the order of the initial proportionality factors were rearranged, placing “the importance of the issues at state” as the first factor listed, each factor delineated is deemed to be no more important than any other. See Commentary to the Guidelines, Note 3. Thus, there was no substantive change to the proposed amendment to FRCP 26 in this regard.
Proposed Changes to the Scope of Discovery Are Not Needed and Will Lead to Greater Motion Practice and Unnecessary Expenditure of Court Resources.

The Advisory Notes to the 1983 FRCP 26 Amendments noted that “[T]he purpose of discovery is to provide a mechanism for making relevant information available to the litigants.” Indeed, our own Supreme Court has articulated that “[M]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). (emphasis added) This is particularly critical in cases where individuals seek to vindicate their statutory civil rights, as most of the relevant documents and witnesses are in the sole possession of the employer or entity defendant.

However, the proposed changes to FRCP 26 would limit the scope of allowable discovery and, instead, replace discovery with added delays and new legal fees and costs. The proposed change to FRCP 26 adds a novel and factually intensive definition of "proportionality" as a consideration and bar to the scope of discovery. The proposed change to FRCP 26 considers "the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit," in the determination of whether discovery is allowable.

These proposed changes to FRCP 26 will almost certainly lead to increasing expenditure of judicial and party resources on pre-discovery litigation motion practice in federal court, as the parties litigate what “proportionality,” “amount in controversy,” “importance” and “relative resources” mean in each particular case. Rather than streamlining discovery, the proposed changes will actually thwart efficiency by expending the court's and plaintiffs’ limited resources on gateway issues.

A good example of this is the addition of the listed factors in determining proportionality: “the amount in controversy” and “importance to the issues at stake.” Civil rights in employment cases vindicate not only the rights of the individuals who have brought the actions, but also further the promise of freedom and equality that is guaranteed by the United States Constitution and the Bill of Rights. How much do we value the continued concept of freedom and equality? How much do we value the concept that if civil rights are not enforced, they do not exist both for the present litigants, as well as the citizens in the community for which the dispute arose. As an example, how important is school desegregation? How do you value not having pernicious effects of race and sex discrimination in workplaces, including the federal government, research institutes, and universities? Employees often seek injunctive relief, such as wide-ranging changes to unlawful business practices, in addition to monetary awards. Moreover, many civil rights employment statutes contain limits regarding the amount of damages that may be awarded that have remained unchanged for decades, while the cost of living continues to rise. This artificially deflates the monetary value of these cases, having the gross result of a lowered overall ability to obtain discovery in civil rights in employment cases.

Regarding the “relative access to information,” and “parties’ resources” plaintiffs in employment civil rights actions do not hold the information. Employers have access to all email, servers, company papers and policies, personnel files and the like. Employers also have a captive audience of employees that work day to day, who, for the most part need his/her position
to economically survive. Plaintiffs in employment civil rights cases are at an enormous disadvantage to the access of information. This is further compounded by the economic differences between the parties. Most often the plaintiff in an employment civil rights case is unemployed and has little financial means. This is contrasted with employers with greater financial resources, including often insurance for employment claims that defers the costs to the employer, allowing it to litigate longer and robustly by large employment defense law firms. It is only through robust discovery, that there is any hope of striving to level the playing field.

Some proponents of the proposed FRCP 26 argue that this proportionality test is particularly needed because of information technology and web-based information. They argue that technology is greatly increasing litigation costs for the parties and that the price of e-discovery must be controlled. These proponents want plaintiffs to routinely bear all of the costs of the other side’s production efforts. On November 5, 2013, attorney Andrew Pincus, a partner with the Mayer Brown law firm, testified before the Senate subcommittee that the “cost of electronic discovery, that’s a principal reason for the moving of the proportionality standard to a place of more prominence.”

However, there is no empirical evidence supporting the argument that discovery must be limited to control e-discovery costs. Federal Judicial Center researchers found that “[e]mpirical research has not provided support for the prevailing view that discovery costs are necessarily the major cost driver in litigation,” and recommended that “[i]nstead of pursuing sweeping, radical reforms of the pretrial discovery rules, perhaps it would be more appropriate to pursue more focused reforms of particularly knotty issues (such as preservation duties with respect to [electronically stored information]) and additional, credible research on the relationship between pretrial discovery and litigation costs.”

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4 U.S. CHAMBER INSTITUTE FOR LEGAL REFORM; Public Comment To The Advisory Committee On Civil Rules Concerning Proposed Amendments To The Federal Rules Of Civil Procedure (November 7, 2013) at page 1. [“Increased costs are due in large part to the FRCP’s failure to contain the rapid growth of electronic discovery, which has forced parties to pay hundreds of thousands (if not millions) of dollars to respond to vexatious requests for documents that are often nothing more than open-ended fishing expeditions in search of a quick settlement.”]

5 Id. at page 2. [“The Committee should consider, over the longer term, an amendment requiring each party to pay the costs of the discovery it requests, subject to adjustments by the court.”] CELA is particularly troubled by this “longer term” goal. Though not before the Committee yet, such a rule would force many employment plaintiffs out of court. Terminated and otherwise aggrieved employees generally cannot afford to pay the other side’s discovery costs.

6 Andrew Pincus, Testimony from United States Senate Subcommittee on Bankruptcy and the Courts; “Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?” (Nov. 5, 2013). Mr. Pincus argued on behalf of AT&T Incorporated in ATT Mobility v. Conception and has served as Amicus counsel to the National Chamber of Commerce Litigation Center. Kilgore v Keybank, et. al. 718 F.3d 1052 (2013, 9th Cir.).

7 Emery G. Lee, III and Thomas E. Willging, DEFINING THE PROBLEM OF COST IN FEDERAL CIVIL LITIGATION, 60 DUKE L. J. 765, 779, 787 (2010).
Indeed, credible research is needed because inflated e-discovery estimates are commonplace. For example in a recent employment case, defense counsel and their vendor quoted a $250,000 price tag to respond to a document request from one of our members. The CELA member investigated and found an established e-discovery provider who would do the same work for $15,000 -- 83 percent (83%) less than the employer’s quote of costs.

Similarly, in testimony before the subcommittee, Mr. Pincus repeatedly cited that a RAND study claiming that the median cost of electronic discovery per case is an astounding $1.8 million. Based on our members’ experience, that level of “median” costs is absurd for a typical employment case. Anything remotely close to that level of costs for employment litigation is a rare outlier, necessary only for the largest and most critical employment class actions. Not surprisingly, on closer review the “median” cost of the RAND study is a red herring, and has no meaning or legitimate relevance, other than perhaps to the approximately 50 “self-reported” cases for which they focused their research. The study itself concedes: “It is not possible to assess the extent to which the cases included in our data collection actually reflect typical e-discovery production in the participating companies as we had requested.”

We agree with the committee that in a high percentage of cases the current discovery limitations do not create an issue of undue burden and recognize that it has been concerned with e-discovery costs in a minority of cases. Accordingly, the most logical option is to maintain the current scope of discovery and focus the Committee’s resources on finding novel solutions to the challenges and costs of e-discovery. But that does not mean that courts should turn away from the potentially greatest new source of credible evidence. Trial attorney and forensic computer examiner Craig Ball summarizes the promise of electronic discovery well:

9 Ibid. The study is very limited: all data was collected from eight large corporations who volunteered to participate, and the 50 cases studied were self-selected by the corporations; all costs were self-reported; the “cases” were not limited to litigation but included governmental subpoenas; the researchers did not contact lawyers and litigants opposing the participating companies in the sample cases for an “alternative perspective;” and “discovery events of relatively modest size were generally not included.” “The organizational litigants participating in the study include some of the largest corporations in the United States, so the experiences of relatively small companies were not included. And finally, the approach we have taken also ignores the benefits of discovery in the search for truth, in helping to narrow issues in anticipation of trial, and in providing sufficient information to both sides of a dispute in order for the parties to realistically assess their respective chances before a trier of fact.” Ibid. at 6 and 7.
The exabytes of digital information streaming about us today are rich rivers of evidence that will help us find the truth and move us to do justice more swiftly, more economically and more honorably than ever before. . . . We must reinvent ourselves to master modern evidence or be content with a justice system that best serves the well-heeled and the corrupt. The path to justice is paved with competent evidence and trod by counsel competent in its use.”

Every institution in the industrialized world is grappling with benefits and costs of the information revolution. The legal system continues to work towards efficient, cost-effective practices to manage and benefit from technology without reducing access to useful discovery. Indeed, we ask that the Committee increase its focus on e-discovery but with an eye toward increasing cost-effective access to the type of e-discovery that will help courts in the truth seeking process.

We respectfully submit that the prior definition of relevance and scope of allowable discovery in FRCP 26 is clear and well defined, is explicated by a well-developed body of case law, and should not be changed. Indeed, the current rules already allow for the objection of undue burden, a justification to refuse to produce overly burdensome e-discovery, or other discovery.

A promising solution to ineffective or overly costly discovery: judicial supervision and focused “e-discovery” procedures.

There is one method on which there is universal agreement that would almost certainly help both problem discovery cases and the development of electronic discovery: greater judicial involvement. For example, proponents of these new limitations to FRCP discovery also decry the current lack of judicial involvement and hope the changes will “finally cultivate the “judicial ‘vigor’ hoped for by the Advisory Committee when the proportionality guidelines were first adopted.” Indeed, Mr. Pincus testified before the Senate sub-committee that “a big complaint from all lawyers on all sides is that judges are not engaging enough, early enough in the case. They don’t manage.”

There is, however, no empirical evidence that the management problem or electronic discovery issues will be resolved at all -- much less fairly -- with the proposed changes to the rules.

There are many other things the committee could recommend that would directly address the issues of novel technology and judicial oversight. Our members are very interested in the sort of progress that would actually make it easier and more cost-effective to enforce the existing

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12 U.S. CHAMBER INSTITUTE FOR LEGAL REFORM; Public Comment To The Advisory Committee On Civil Rules Concerning Proposed Amendments To The Federal Rules Of Civil Procedure (November 7, 2013) at page 7.
13 Andrew Pincus, Testimony from United States Senate Subcommittee on Bankruptcy and the Courts; "Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?" (Nov. 5, 2013).
1. Implementing the requirement for judges to hold pre-motion meetings on discovery disputes.
2. Pattern interrogatories by case category.
3. The development of attorney-friendly e-discovery protocols, including e-discovery pattern searches and requests which would apply to cases by category. This would give lawyers, judges and technology specialists clear direction to economically and effectively harness this trove of credible evidence.
4. Supporting the Judiciary: federal judges work very hard under large caseloads and with limited ranks. Accordingly, we urge the Committee to recommend the following steps:
   a. The prompt filling of currently vacant federal judgeships\textsuperscript{14} as well as vacant magistrate positions.
   b. The adoption of new federal judgeships and magistrate positions.
   c. The addition in each courthouse of dedicated discovery magistrates who would specialize in traditional discovery and e-discovery, in particular.
   d. Stable court funding to prevent the fallout of sequesters and shutdowns.

Limited Discovery Will Lengthen Trials and Hamper Settlement Efforts.

A further unintended consequence of limiting discovery is that the length of trials will increase, as information is uncovered for the first time at trial, which would otherwise have been produced in discovery. Attorneys will be less able to streamline cases before trial and thereby present only the most relevant information and witnesses. This wastes not only the parties’ resources and time, but increases the time and costs for the judiciary.

The probability of settlement increases when each party has sufficient information to determine the merits of its case. If discovery is limited, the parties are less able to make informed decisions regarding the likely outcomes at trial. Cases that should be settled are less likely to resolve because sufficient information has not been exchanged to allow both parties to realistically evaluate the case.

No Empirical Evidence Supports Such Sweeping Changes to the FRCP

There is no empirical evidence to support such a sweeping change to the scope of discovery in civil cases. Indeed, the Advisory Committee on the Civil Rules Report to the Standing Committee, December 5, 2012, Briefing Book at p. 218, states there was, “little call for drastic revision and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available.” It thus appears that education and case management could properly address any concerns regarding discovery abuses without resorting to a wholesale revision of the allowable scope of discovery in civil cases.

\textsuperscript{14} http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx.
The Advisory Committee, “recognized that many possible rule reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects.” Prior to considering sweeping changes that would affect every civil case across the nation and jeopardize rights guaranteed by the U.S. Constitution, empirical studies should be undertaken that identify what changes, if any, are truly necessary.

These studies should include greater outreach to all the stakeholders, including groups that represent workers. Insufficient outreach has been performed to inform workers and their advocates of proposed changes that would have devastating consequences in enforcing their civil rights.

Utilizing Proven Discovery Devices Such as Judicially Approved Form Interrogatories Would Streamline Discovery

In cases that proceed in state court in California, the parties routinely use judicially approved form interrogatories for employment cases, as well as other types of civil cases. A copy of the employment form interrogatories are attached for your review and consideration.

The Form Interrogatories were drafted with the input of attorneys who represent both plaintiffs and defendants, as well as members of the judiciary. California’s Employment Form Interrogatories were drafted by an Advisory Committee of six employer-side lawyers and six employee-side lawyers, who reached consensus on every single word. These were then reviewed and approved by the California Judicial Council.

The form interrogatories streamline the discovery process in employment cases for all parties. They facilitate the exchange of key information regarding claims, defenses and damages, while often minimizing objections and discovery disputes. In nearly every employment case in California, form interrogatories are used by all parties to obtain relevant and admissible evidence in a cost-effective and efficient manner. We ask the Advisory Committee to consider adopting the use of form interrogatories to supplement the existing discovery procedures currently provided for by the FRCP.

In conclusion, it is not speculation, but extensive and broad discovery experience that informs our conviction that the proposed changes to the FRCP would severely hurt workers, would limit the ability to address civil rights violations in federal court, and would create more work and greater expenditure of resources to the federal court system. No empirical evidence supports the need or suggests the efficacy of these rule changes. We respectfully ask the Committee to take seriously the adage that when it comes to discovery in employment and civil rights cases, less is not more.

Sincerely,

J. Bernard Alexander III, Chair
California Employment Lawyers Association

JBA/ck
Enclosure
Via Electronic Mail

John K. Rabiej, Director
Center for Judicial Studies
Duke University School of Law
210 Science Drive
Box 90362
Durham, NC 27708-0362

August 20, 2015

Dear Mr. Rabiej,

The National Police Accountability Project (NPAP) joins the plaintiffs-side representatives of the civil rights/employment working group in their opposition against the inclusion of two controversial recommendations – cost sharing and core discovery/focused early discovery – into the guidelines drafted by the Center for Judicial Studies.

We share the working group’s concern that both recommendations are controversial and should therefore be the subject of the regular rule making process which allows for a more comprehensive discussion and consideration of the implications these recommendations may have. Instead of reiterating the working group’s arguments, we attach its letter of June 29, 2015, which we fully endorse.

In addition, NPAP requests that the guidelines clarify that a systematic proportionality analysis must also consider increasing the amount of permitted discovery, not just decreasing it. The complexity of a case and the important issues at stake should allow a court to use the concept to expand discovery beyond the general limits in the Federal Rules of Civil Procedure. Many NPAP members handle complex police shooting cases or cases that involve multiple defendants and witnesses, and courts in those cases may allow more depositions than the 10 depositions allowed under the Rules. Courts should be encouraged to
continue to use their discretion to increase the allowed discovery beyond the limits imposed by the Federal Rules of Civil Procedure when the case warrants such discovery.

The National Police Accountability Project ("NPAP") is a nonprofit public interest organization dedicated to protecting the rights of individuals in their encounters with law enforcement. NPAP was founded in 1999 by members of the National Lawyers Guild and currently has more than five hundred attorney members throughout the United States who represent people in civil rights and police misconduct cases. NPAP provides legal education and disseminates information on issues relating to police misconduct. The project regularly supports reform efforts aimed at increasing law enforcement accountability.

One of the core issues of NPAP's mission is preserving the means to obtain redress for civil rights violations under state laws and Title 42 U.S.C. Section 1983. We are concerned that the guidelines, as proposed, will further restrict the ability of civil rights advocates, including our members, to provide redress to persons who have been subject to unconstitutional conduct by government actors.

NPAP thanks you for your consideration of our concerns.

Sincerely,

Brigitt Keller, Esq.
Executive Director
NPAP
499 7th Ave 12N
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June 29, 2015

Via Electronic Mail
John K. Rabiej, Director
Center for Judicial Studies
Duke University School of Law
210 Science Drive
Box 90362
Durham, NC 27708-0362

Dear John:

Plaintiffs-side representatives of the civil rights/employment working group object to the inclusion in the standards and practices of two controversial recommendations: (i) those for cost sharing and (ii) those for what has been termed “core discovery” or “focused early discovery.”

We cannot agree to a “consensus” document including recommendations for either of these practices. Neither issue flows naturally from the relevant enacted change to the Federal Rules: the addition of the limitation on the scope of discovery to that “proportional to the needs of the case.” Both issues are controversial and we think would be more appropriately the subject of separate rule making—with its notice-and-comment period and broader opportunity for deliberation and input—than the standards and guidelines.

Cost sharing

As the Supreme Court reiterated earlier this month, federal courts operate under “the bedrock principle known as the American Rule: Each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.” *Baker Botts LLP v. Asarco LLC*, No. 14–103, slip op. at 3 (June 15, 2015) (internal quotation omitted). Consistent with that bedrock rule, the overwhelming presumption in federal discovery is that the responding party bears the costs of complying with discovery requests.

Nothing in the enacted change regarding “proportionality” alters that underlying rule. And a proposal encouraging the use of cost-sharing is inconsistent with the contemporaneous revision to Rule 26(c)(1)(B), which references cost sharing only upon a motion for a protective order, but which the Rules Committee cautions “does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the cost of responding.” In contrast, the proposed “best practices” encourage the courts to turn to cost-sharing whenever there is a difficult decision about proportionality.
Particularly as prior efforts to enact cost sharing through the Rules process have failed, we believe it is inappropriate to back-door such a change through the “standards and guidelines” process. Should the defense bar seek an expansion of cost-sharing, our position is that it must go through the Rules process (and we would strenuously oppose it).

As plaintiffs’ lawyers, we have substantial concerns about any expansion of cost sharing. Our clients bear the burden of proof, typically need to request most relevant information from defendants, and almost invariably have far fewer resources than the defendants do. We believe that cost sharing will have a chilling effect on meritorious employment and civil rights cases.

**Core or early focused discovery**

We also have serious concerns about the emphasis on “core” or “early focused” discovery, which is a substantial focus of and woven throughout the “best practices” section of the guidelines.

Like cost-sharing, phasing of discovery is a significant change to existing practice that is not included in the concept of “proportionality.” The Rules changes and comments make no reference to core, early focused, or any other iteration of phasing or staging of discovery. As demonstrated by the text of the best practices, this is a major change that should not be attempted through this process.

We disagree with court-imposed phasing or staging of discovery when it is not voluntarily agreed to by the parties. We believe that the concept of “core” or “early focused” discovery in every case should be removed and, instead, concepts such as encouraging consideration of the development of protocols like the employment protocols for other types of cases, and encouragement of agreement between the parties on the expansion of initial disclosures or early production of certain types of discovery in a given case should be included. These do not bear the same inefficiencies and risks described below, but seek to serve the legitimate goals of the drafters. Any more substantial revisions to the way that discovery works in every case should be vetted through the rules-making process. We have several significant concerns regarding court-imposed phasing or staging of discovery.

The only way that limiting initial discovery can actually achieve the purposes of Rule 1—“a just, speedy and inexpensive determination” of the action—is if the initial discovery led to a resolution of the case, such as a settlement. But, of course, a settlement takes the participation and agreement of both sides. Thus while it might be helpful for a court to suggest that the parties consider whether they could agree to focus initial discovery on certain topics or areas, it would not be helpful to promoting settlement for the court to direct that they do so.

On the other hand, court-imposed phasing or staging of discovery is inconsistent with the purpose of the Rules, as set out in Rule 1: to “secure the just, speedy, and inexpensive determination of every action and proceeding.”
We are substantially concerned that the practical result of court-imposed phasing or staging of discovery is that the early stage will become the only stage. By definition, such discovery is less than what is considered “proportional” to the needs of the case. If a party is not allowed further discovery (which is contemplated by the language suggested), the party would necessarily be permitted less than the full discovery authorized under the Rule. This is inconsistent with at least Rules 1 and 26.

If a second phase of discovery—to allow the remainder of proportional discovery—is allowed after that court-ordered discovery, the parties would get the exact same discovery they would have without this restriction, but after more time and more litigation expense. This undermines the goal of Rule 1.

In addition, where there is no subject-specific protocol that has been developed by the plaintiffs’ and defense bar, court-imposed phasing or staging of discovery will cause additional discovery disputes. Such disputes delay discovery and resolution of the case, utilize scarce judicial resources, and generate unnecessary attorneys’ fees—making resolution less speedy and more expensive. What should be included in “core” or “early focused” discovery is left completely undefined; there will certainly be substantial disputes among the parties as to what should be included in the earliest phases.

However, we agree that individual, subject-specific protocols may be an effective way to make discovery more efficient. Examples including the employment litigation protocols and the S.D.N.Y. § 1983 litigation protocols have had success. But those protocols were developed through substantial conference between stakeholders from the plaintiffs’ side, defense side, and the court. The protocols require concessions by both sides—for example, there are standard types of documents defendants must produce immediately and without objections. In contrast, the proposal to phase discovery advantages defendants—by limiting discovery initially permitted—without providing any countervailing benefit to plaintiffs.

In addition, court-imposed phasing or staging of discovery substantially impedes on the client’s right for their attorneys to pursue the discovery strategy developed to best advance the client’s case. The general rule in federal discovery is that there is no set order imposed on the parties as to what discovery should be taken when. The timing and order of discovery is a critical strategic decision given substantial thought by competent counsel. Injecting court-imposed phasing into discovery may significantly hamper that strategy, without according any benefit to the parties or the courts.

* * * *

In sum, we cannot agree to the inclusion of the current recommendations for (1) cost sharing or (2) core or focused early discovery in a “consensus” document.
Sincerely,

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New Pretrial Rules for Civil Cases—Part II: What is Changed

by Richard P. Holme

Effective July 1, 2015, the Colorado Supreme Court has adopted a series of amendments to the Colorado Rules of Civil Procedure designed to significantly reduce the cost of and delays in litigation and to create a new culture for the handling of lawsuits. The amended rules will increase involvement of judges to establish early and personal judicial oversight of pretrial activities; provide for expedited discovery motions; change the breadth of required disclosures; limit discovery to what is needed, not what is wanted; limit expert discovery; clarify obligations when responding to interrogatories and requests for documents; and strengthen judges’ ability to award sanctions for noncompliance with these rules. The newly amended rules are available at www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes/2015.cfm (click on Rule Change 2015(05)).

These revised pretrial rules will apply only to cases filed on or after July 1, 2015. Cases filed before then will continue to be governed by the older rules.1 This article explains, for both judges and lawyers, the nature of and justification for the changes and how the changes endeavor to foster a new culture and paradigm for handling civil cases in a way that will be faster and less expensive, while preserving the necessary search for and application of justice.

Reasons for the Changed Rules

With the approaching termination of the Civil Action Pilot Project (CAPP) in early 2014, the Colorado Supreme Court asked its Civil Rules Committee to consider what should be done with those rules. The Civil Rules Committee appointed a subcommittee that considered and recommended a number of amendments to the rules,2 which were discussed, modified, and approved by the entire Committee. The Supreme Court solicited written comments, held a public hearing to discuss the proposals, and adopted the recommended amendments with a few changes.

The reasons for these changes arose in conjunction with a dramatically increased nationwide recognition of the problem and the need for revised rules. The proposed rules were described in the April 2015 article in The Colorado Lawyer3 (“Part I: A New Paradigm”). The primary influences on the changes were (1) the changes to the Federal Rules of Civil Procedure (Federal Rules) recommended by the federal Judicial Conference Committee on Rules of Practice and Procedure, which are expected to be effective December 1, 2015;4 and (2) the June 30, 2015 expiration of CAPP for the handling of business actions applicable in five of the Denver metropolitan counties.5 The more specific reasons and justifications for substantive changes in Colorado’s various amended rules are discussed below. The amendments contain a number of other organizational and non-substantive technical and conforming changes that are not detailed in this article.

It is significant that the Supreme Court has adopted not only the revised rules (New Rules) discussed below, but also a set of Comments that are published along with the New Rules. Thus, interpretation of the New Rules, if necessary, should begin with an analysis of any pertinent provisions of the Court’s “2015 Comments.”

Rule 1—Scope of Rules

Other than the belated removal of the reference to the “Superior Court,” gone for so long that most readers will have never heard of it,6 the reason for amending Rule 1 was to make clear the intended breadth of its impact. Thus, securing “the just, speedy, and inexpensive determination of every action” is no longer simply a basis for “liberal construction” of the Civil Rules. As amended, Rule 1 now requires that the rules are also to be “administered and employed by the court and the parties” to achieve a just, speedy, and inexpensive determination of all cases. (Emphasis added).

The amended language in Rule 1 is taken verbatim from the change recommended for Federal Rule 1. As explained by the federal Advisory Committee on Civil Rules (Advisory Committee), a significant reason for bringing parties under the requirements of Rule 1 is to emphasize the need for the parties, and their counsel, to cooperate with each other to bring about the expeditious and effective processing of cases.7

No one challenges the proposition that litigation moves much more smoothly, quickly, and efficiently when parties, and especially the lawyers, cooperate with each other in handling lawsuits. Although it is difficult to legislate civility, with the broadening of

About the Author

Richard P. Holme is senior of counsel in the Trial Group at Davis Graham & Stubbs LLP. He is a member of the Colorado Supreme Court Standing Committee on Civil Rules and was chair of its Improving Access to Justice Subcommittee, which drafted the proposed changes—(303) 892-7340, richard.holme@dgslaw.com. He has also been a member of the ACTL Joint Task Force since 2010, and was involved in the latter stages of the Joint Project of the ACTL and the IAALS. This article expresses the author’s views and does not endeavor to represent all the views of the Civil Rules Committee or the Supreme Court.
Rule 1’s applicability, lawyers can expect courts to remind them regularly of the importance—and effectiveness—of cooperating among themselves.

Rule 12—Defenses and Objections

The changes to Rule 12 are largely cosmetic. Rule 12(a) is broken into several subsections to make its provisions somewhat easier to find and read. Also, a number of changes were made to amend gender-based terminology.

It is noteworthy, however, and consistent with the aim of making litigation more just, speedy, and inexpensive, that the 2015 Comment to Rule 12 also pointedly notes that, “The practice of pleading every affirmative defense listed in Rule 8(c), irrespective of a factual basis for the defense, is improper under C.R.C.P. 11(a).” The 2015 Comment notes that defenses may be pleaded only if well founded in fact and warranted by existing law or a good-faith argument for changing existing law. If an adequate basis for a defense is subsequently discovered, a defendant may then move to amend the answer to add it.

Rule 16—Case Management

The case management provisions of Rule 16(b) through (e) are largely rewritten, and the central focus of case management has been significantly changed. The primary change has been to involve the trial judge in case management personally and actively from an early stage of the case. As noted in “Part I: A New Paradigm” in describing the proposed amendments to the Federal Rules, the federal Advisory Committee said, “What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management.” Likewise, this judicial involvement and oversight were crucial and widely appreciated aspects of CAPP by both lawyers and judges. Early, active judicial case management is also an important factor emphasized by leading judges nationwide.

Early judicial involvement should include review and discussion of a number of matters, depending on the individual case. It can and should include identifying pleading and discovery issues proportional to the needs of the case, narrowing the claims and defenses, focusing and targeting discovery, establishing limits on allowable discovery, emphasizing the expectation that parties must cooperate civilly and efficiently, and setting a firm trial date.

New Rule 16 provides that the initial case management conference will be held within forty-nine days of the at issue date of the case. There is nothing in the Rule, however, that precludes a judge from initiating an earlier, in-person (or telephonic or video) status conference. Indeed, a number of judges use such early conferences. There are several matters that can be accomplished at such an early status conference and probably within about fifteen minutes. For example, the court can impress on the parties its view of the importance that counsel cooperate and maintain civility; and in smaller cases, it can urge the parties to give serious consideration to using Simplified Procedure under Rule 16.1 as a means of avoiding the need to prepare a proposed case management order (proposed order). (One of the reasons Simplified Procedure was successful during its pilot phase, under Judges Harlan Bockman and Christopher Munch, but was not as successful later, was that the pilot judges specifically urged parties to use simplified procedure, but subsequent judges generally have not affirmatively encouraged its use.) The court can also urge parties to demonstrate genuine cooperation and to agree on appropriately proportional discovery in their proposed order so they can avoid the necessity of a subsequent initial case management conference, as provided in Rule 16(d)(3). Additionally, the court can encourage reducing unnecessary claims and defenses, as well as targeting initial discovery on a key issue or issues in the case.

To facilitate meaningful case management, the parties will need to communicate early in the case to prepare a proposed order that will provide the court the basic information it needs to meaningfully participate. The new Rule 16 also anticipates an expanded use of oral motions and the potential for more regular contact between the parties and the judge to keep the case moving efficiently.

The revisions to Rule 16 reflect several matters learned both from CAPP and from the case management experience of the members of Civil Rules Committee. Under CAPP, case management conferences were to be attended in person by lead counsel; they were to be preceded by a fairly extensive report of pertinent matters; and they were then followed by a case management order from the judge. Thereafter, courts were instructed by CAPP to provide “active case management,” including prompt conferences by telephone if permitted by the court. Firm trial dates were to be set at the case management conference and not changed absent extraordinary circumstances.

After more than two years of experience with CAPP, the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver published its report of the case data and experience of lawyers and judges with CAPP based on surveys, interviews, and reviews of case filings. For lawyers, “CAPP’s focus on early, active and ongoing judicial management of cases received more positive feedback than any other aspect of the project.” Similarly, judges found that the initial case management conference was “the most useful tool for determining a proportionate pretrial process.”

The use of the “presumed case management order” was adopted by the Colorado Supreme Court in 2002 as a means of reducing the time attorneys spend preparing individual proposed orders. Nonetheless, the intervening years have shown that it also isolated the judges from involvement in the early and frequently most expensive and time-consuming aspects of litigation. The presumed case management order also had the somewhat perverse effect of disengaging the lead trial lawyers from much thought or collaboration with opposing counsel about the genuine needs of the case. Thus, in some cases, much of the pretrial disclosure and discovery was left in the hands of junior lawyers with less experience and little or no independent responsibility and accountability to the judicial system. The prevailing culture of “leave no stone unturned regardless of the cost” remained unchanged.

Prior to the current amendments, Rule 16(b) normally meant that no case management order would be issued by the court. The Rule itself became the “presumptive” order, unless the parties filed either a stipulated or disputed case management order within forty-two days of the at-issue date. Experience suggests that having an actual court order improves compliance with the discovery terms and is easier to enforce, when needed. Without judicial awareness of pretrial activities, lawyers’ financial incentives and concerns about protection against possible future malpractice claims meant that many cases proceeded on a “give us everything” basis without independent oversight and supervision.
Although Rule 16(b) focuses on the initial case management conference, courts and parties should note that nothing in this rule prevents additional status conferences when the need becomes apparent. Indeed, in complex cases, it may be desirable to have regularly scheduled status conferences (for example, “3:30 p.m. on the last Friday of every month”) to deal with new issues that may have arisen or to determine which conference can be cancelled if no new problems have arisen that would benefit from the court’s participation and oversight.

Rule 16(a)—Purpose and Scope

First, and importantly, the Civil Rules Committee did not revise Rule 16(a). The message and meaning of that section remain significant and should create the environment for the remainder of Rule 16 (and all other pretrial matters).

(a) Purpose and Scope. The purpose of this Rule 16 is to establish a uniform, court-supervised procedure involving case management which encourages professionalism and cooperation among counsel and parties to facilitate disclosure, discovery, pretrial and trial procedures.

This purpose carries added weight and reemphasizes the expansion of Rule 1’s requirement that court and parties now also administer and employ these rules to secure the just, speedy, and inexpensive determination of every action.

Rule 16(b)—Case Management Order

This section of Rule 16 has been completely revised. The parties must now prepare and submit to the court a proposed order not later than forty-two days after the case is at issue. There is now an approved form—JDF 622—that can be downloaded and filled in to comply with this requirement. The proposed order is to be submitted in editable format so that the court can make whatever amendments to the proposed order it deems to be appropriate and desirable. It is expected that many proposed orders will have attached pages providing the information requested in the form.

Also, when the parties are not in agreement on certain issues, each party must supply the form its own version of the information that must be included, the judges who had experience with the use of a detailed form under CAPP have concluded that the greater amount of information was necessary for them to effectively provide guidance at the case management conference. While the required information will necessitate more thought and more conferring at the outset of the case by parties and their counsel, this information should, in any event, be discussed early in the case if the goal of just, speedy, and inexpensive is to be approached. Furthermore, although some lawyers complain that preparation of this information is unnecessary “front-loading” of expense, counsel and parties will need this same information to evaluate and expedite any possible settlement or to consider the wisdom of proceeding to trial.

Each of the requirements contained in revised Rule 16(b) is described below. Readers are cautioned to read the text of the rules, because not all details of each subsection are discussed.

Rule 16(b)(1)—At-issue date. The at-issue date still triggers the timing requirements of the proposed order, initial disclosures, and discovery. The at-issue date remains the day when all parties have been served and all Rule 7 pleadings have been filed, or defaults or dismissals have been entered. The at-issue date is included in the proposed order for the court’s information.

Rule 16(b)(2)—Responsible Attorney. As in the prior Rule 16(b)(2), the responsible attorney is charged with organizing and preparing the proposed order and the steps leading to the preparation of that order. Normally, the responsible attorney will be plaintiff’s counsel, unless the plaintiff is pro se; in that case the responsible attorney may be the defendant’s counsel. The proposed order must identify the responsible attorney and provide contact information for the court’s use.

Rule 16(b)(3)—Meet and Confer. Within two weeks of the at-issue date, lead counsel and unrepresented parties are to confer about the case and the proposed order. The rule specifically calls for these conferences to be person-to-person (“in person or by telephone”) so that ordinary e-mails are insufficient to comply. Indeed, it is anticipated that preparing proposed orders may require multiple conferences and meetings. To ensure these conferences take place in a timely fashion, the rule also requires that the proposed order list the dates and identities of persons participating in those conferences. The conferences are held to discuss the basis for the claims and defenses, anticipated initial disclosures, the proposed order, and possible dates for the case management conference. The responsible attorney, who has arranged the conference, must obtain a date for the case management conference from the court. This sounds like a lot of time and effort, but if started in a timely fashion (and much can be done even before the final pleadings are filed), it should normally be easy to accomplish, because the time between the at-issue date and the case management conference can be up to seven weeks, and the proposed order does not have to be filed until one week before the case management conference.

Rule 16(b)(4)—Description of the Case. To advise the court of the nature of the case, each party must prepare a one-page (double-spaced) description of the case, including identification of the issues to be tried. Obviously, this is not intended to be a detailed factual recitation or a regurgitation of the entire complaint. It simply needs to be enough for the court to tell, for example, whether this is a single or multiple car accident, an antitrust case, or a building defect dispute. If publishers such as West Publishing can summarize a case decision in a paragraph or two, it was felt that parties to the litigation should also be able to describe the case succinctly.

Rule 16(b)(5)—Pending Motions. When there are motions under Rule 12 or otherwise that have not been resolved or ruled on when the proposed order is submitted, they are to be listed so the court will be reminded of them. Parties should be prepared to argue or discuss those motions at the case management conference, even if the time for full briefing has not expired. The court may decide them at that time, either by written order or orally from the bench.

Rule 16(b)(6)—Evaluation of Proportionality. For other than smaller, routine cases, this may be one of the most important parts of the proposed order. It will not be unusual for one of the major topics of discussion at the case management conference to be the proportionality of desired discovery, with the court deciding how much discovery is appropriate under the circumstances of the case. To the extent that the parties are seeking either more discovery than the limits set out in Rule 26(b)(2) or are seeking to limit even that discovery, this is the portion of the proposed order in which to address those issues. Parties should at least discuss the propor-
tionality considerations listed in Rule 26(b)(1) that are relevant to the case at hand. These may include: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties’ relative access to relevant information, (4) the parties’ resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. Individual cases may have additional matters that a court should consider, and they should be identified in this section of the proposed order.

Rule 16(b)(7)—Initial Exploration of Prompt Settlement and Prospects for Settlement. The parties are required to discuss possible settlement, describe the prospects for settlement, and provide future dates for mediation or arbitration. Experience shows that more than 95% of the cases will not go to trial, so this requirement merely reflects that reality and seeks to have the parties start the discussions earlier rather than later. The discussion may also be helpful in organizing discovery. For example, if the defendant believes that liability is probably going to be established but that it needs to understand the plaintiff’s damages before settlement discussions are likely to be useful, the parties or court may suggest phasing discovery to focus on damages before going into all other areas. This way, settlement can be reopened before unnecessary sums are spent on less pertinent issues. Thus, in this example, proposed dates for settlement could be set for shortly after the projected date for completing discovery on damages.

Rule 16(b)(8)—Proposed Deadlines for Amendments. This provision moves the date for amending pleadings and adding parties up to two weeks from the deadline in prior Rule 16(b)(8). However, if this deadline is unnecessary or can be moved sooner to the case management conference, that fact should be addressed in this portion of the proposed order. The justification for fifteen weeks following the at-issue date is: seven weeks for the case management conference, five weeks for the first set of discovery responses, and three weeks to prepare any amendments. Of course, nothing prevents parties from taking depositions to investigate this subject following the case management conference without further consideration limits on awardable costs. For example, a court might include consideration limits on awardable costs. For example, a court might include

Rule 16(b)(9)—Disclosures. The parties’ initial disclosures under Rule 26(a)(1) are due twenty-eight days following the at-issue date—that is, three weeks before the case management conference deadline. The proposed order must state when those disclosures were actually made and when the documents were produced. Because parties sometimes disagree on whether the disclosures are complete, this proposed order requests that any objections to the other parties’ disclosures be addressed here. This way, there is a significant likelihood that the judge can rule on those issues at the case management conference without further delay. Indeed, Rule 26(a)(1) specifically prohibits filing motions objecting to allegedly inadequate disclosures prior to the case management conference. This is required because the adequacy of disclosures normally can be more easily addressed in person at the case management conference at the same time the court is considering issues of proportionality.

Rule 16(b)(10)—Computation and Discovery Relating to Damages. Rule 26(a)(1)(C) requires (and has for years) disclosure of categories of damages, a computation of damages, and supporting documents. That requirement is not changed in the New Rules. However, experience has shown that frequently claimants will assert that they have not been able to establish those calculations or to have gathered the supporting documents. Because this information is often crucial to resolving the case through settlement discussions, this new provision demands at least that if the disclosures have not been made, the claiming party must explain why it was unable to provide the disclosures as required and when it expects that it can produce those disclosures and documents. If the court believes the delay does not result from inability to provide the damages or that the delay is too distant, it may well shorten those time limits when it issues the case management order.

Rule 16(b)(11)—Discovery Limits and Schedule. This provision essentially incorporates the presumptive limits on discovery contained in Rule 26(b)(2), although it expressly permits parties to request more or less discovery and allows the court to either increase or decrease those limits after considering the proportionality factors in Rule 26(b)(1). Parties should expect to be asked to support any changes in discovery when they attend the case management conference. The changes in authorized discovery may not only impact numbers of deponents or allowed hours of depositions, but might also limit the number of interrogatories, requests to produce documents, or requests for admissions. Before attending the case management conference, parties should think about what specific written discovery they might want, especially interrogatories and requests for admission, because some judges and lawyers believe that such discovery is often unproductive or not proportional.

This provision also establishes that discovery may not commence until the case management order is served. This delay is incorporated to allow the court to expand or limit discovery before the parties begin under possibly erroneous assumptions as to what discovery will be allowed or limited. Likewise, the deadline for discovery is set for not later than forty-nine days before trial—a date the court can alter if appropriate.

A provision relating to discovery limits allows the court to consider limits on awardable costs. For example, a court might include in the order that it will not allow recovery of videotape charges for depositions, travel costs for out-of-state depositions of relatively unimportant witnesses, or travel costs for the depositions that could be taken telephonically. The parties can consider how badly they really need that discovery.

Rule 16(b)(12)—Subjects for Expert Testimony. This subsection asks the parties to identify subject areas for anticipated expert testimony both for retained experts and for percipient witnesses of facts who may also be asked to provide opinion testimony (such as the investigating police officer, the attending physician, or a party’s accountant). If parties on one side of a case are seeking more than one retained expert per subject, they must show the good cause for them, consistent with proportionality. (A case for negligent heart surgery may justify more experts than a case for negligent setting of a broken arm.) Sometimes, parties on one side of the case may have different perspectives and need additional experts, which this provision allows. For example, plaintiffs in medical malpractice cases may sue hospitals, nurses, and doctors, each of whom may want to have available expert testimony as to why they are not liable but other defendants might be. The same problem can be routinely expected in building defect cases.
Rule 16(b)(13)—Proposed Deadlines for Expert Disclosures. Expert disclosures are to be made within the time limits established in Rule 26(a)(2)(C), unless some different date is set in this subsection. For example, it might be expeditious for discovery to focus on liability at the outset and, therefore, to have liability experts provide their disclosures early so parties can attempt to settle or so the court could consider summary judgment on that issue before the parties undergo the entire panoply of discovery.

Rule 16(b)(14)—Oral Discovery Motions. A significant number of judges have found that requiring discovery disputes to be presented on short notice and orally is much faster, cheaper, and more efficient than using an extended written motion briefing schedule and then plowing through dozens of pages of briefs. Other judges require that motions be written and fully briefed. Because of the substantial potential savings in time and expense of oral motions, it was felt desirable to bring this issue to everyone's attention and to have the judge advise the lawyers of the judge's practice in this respect. If the lawyers are not already aware of the court's procedures, they should leave unmarked the choice of "(does)(does not) require discovery motions to be presented orally" in the proposed order. The judge can then mark out the inappropriate one or may insert a more extensive description of the judge's desires concerning discovery motions.

Rule 16(b)(15)—Electronically Stored Information. The federal courts have tended to impose exhaustive and frequently onerous requirements on parties with respect to preservation, production, and handling of electronically stored information (ESI). The Colorado Civil Rules Committee on the other hand has been reluctant to impose specific requirements on all Colorado cases primarily because more than 50% of the civil cases seek relief of under $100,000 and very few seek as much as $1 million. Thus, while cases will almost inevitably have some information that is in the form of ESI, a large proportion of those cases in Colorado courts will not involve unusual amounts of relevant ESI, and parties acting in good faith can normally find it easy to agree on and produce that information.

Where, however, it appears early in the case that a significant amount of the discoverable ESI will be involved, the parties must discuss, attempt to resolve, and report in the proposed order (1) issues of any search terms that should be used; (2) production, preservation, and restoration of ESI; (3) the form of production (for example, native format, with or without metadata, etc.); and, if significant, (4) an estimate of the related cost of such production. Here, as in many aspects of litigation, genuine cooperation and communication among counsel can save thousands of dollars, weeks or months of time, and substantial brain damage to all concerned. This provision does not attempt to draw a sharp line between whether and when such details are to be included, because this decision must be made on a case-by-case basis. Whatever is decided, the parties should expect to be asked about it by the judge at the case management conference.

Even if discovery of ESI is relatively simple and noncontroversial, it is important to address this topic soon after the case is at issue so the parties can understand what problems, if any, might be anticipated. Even an agreement that the parties will work together and do not need special provisions can smooth the way for better cooperation, less time, and less expense.

Rule 16(b)(16)—Trial Date and Length of Trial. The parties should discuss and report on their sense as to when they expect to complete discovery, as well as the expected length of the trial itself. In most cases, the parties should expect that the court will set a trial date during the case management conference. However, some courts decline to set trial dates until the completion of discovery or some other date further into the case preparation. This provision allows for both situations. Still, most judges expect that the case will be tried on the first trial date, so parties should not count on easy or automatic extensions of a trial date.

Rule 16(b)(17)—Other Appropriate Matters. This portion of the report is simply a catch-all for other issues unique to the particular case.

Rule 16(b)(18)—Entry of Case Management Order. Once the proposed order is prepared for filing, lead counsel are to approve and sign it before filing. After the case management conference and after reviewing and making any changes the court deems necessary or appropriate, the court shall sign the document, at which time it will become the official case management order and will bind the parties thereafter, unless modified pursuant to Rule 16(e).

Rule 16(c)—Pretrial Motions

The provisions of the prior Rule 16(c) (modified case management orders) are completely deleted because that section related to modifications of presumptive case management orders, which have been repealed. Modification of those orders is now moot. In its place, the provisions of former Rule 16(b)(9) have been moved verbatim to Rule 16(c). Thus, the need to file pretrial motions and motions in limine thirty-five days before trial, summary judgment motions ninety-one days before trial, and challenges to the admissibility of expert testimony seventy days before trial remain intact.

Rule 16(d)—Case Management Conferences

Again, because the prior version of this section related to resolution of disputed modified case management orders, or specially requested case management conferences, this section has been completely rewritten and is now a focal point of the effort to bring early, active judicial case management to the forefront of civil litigation. The impetus for this change was from several sources. The ACTL Final Report states:

We believe that pretrial conferences should be held early and that in those conferences courts should identify pleading and discovery issues, specify when they should be addressed and resolved, describe the types of limited discovery that will be permitted and set a timetable for completion. We also believe the conferences are important for a speedy and efficient resolution of the litigation because they allow the court to set directions and guidelines early in the case.

This conclusion was bolstered by the interviews with outstanding trial judges, virtually all of whom use in-person, initial case management conferences.

Similarly, an amendment to Federal Rule 16(b) strikes the prior reference to scheduling conferences (the federal term for case management conferences) being held by "telephone, mail, or other means." Although the text of the federal rule suggests that scheduling conferences are to be conducted in person, the accompanying Committee Note urges that the conference be held "in person, by telephone or by more sophisticated electronic means," anticipating video conferences. The Note adds that a "scheduling conference is more effective if the court and parties engage in direct simultaneous communication."
Colorado Rule 16(d)(1) requires that the case management conference be held no later than forty-nine days (seven weeks) after the case is at issue. There is no prohibition on the court setting an earlier conference or on the parties seeking an earlier date from the court.

Rule 16(d)(2) provides that lead counsel for the parties and any unrepresented parties are to be present at the case management conference in person, unless allowed by the court to attend by telephone or video conference, if available. That subsection calls for parties to be prepared to “discuss the proposed order, issues requiring resolution and any special circumstances of the case.” Experienced judges who have previously used in-person case management conferences suggest that there are a number of matters that can be discussed and clarified to create case preparation procedures that are in fact just, speedy, and inexpensive.28

Rule 16(d)(3) provides the one exception for personal case management conferences. Where all parties are represented by counsel and counsel agree, they may submit a request to the court to dispense with a case management conference. This does not, however, dispense with the need to prepare and file a proposed order. The court can grant the request if (1) there appear to be no unusual issues that might be better dealt with by the court early in the case; (2) counsel appear to be working together collegially; and (3) the proposed order appears to be consistent with the best interests of the parties and is proportional to the needs of the case. It is expected that it will be the smaller cases and those with fewer factual and legal issues for which courts will more likely dispense with the case management conferences. Counsel can clearly aid their request if they can demonstrate by a clear, concise, and limited proposed order that they are—and are likely to continue to be—working together in the spirit of obtaining a just, speedy, and inexpensive resolution.

**Rule 16(e)—Amendment of Case Management Orders**

All amendments to case management orders, whether for extension of deadlines or otherwise, must be supported by specific showings of good cause for the timing of the request and for its necessity. If applicable, the showing of good cause needs to address the provisions of Rule 26(b)(2)(F), describing factors for determining good cause, discussed below. Although this amended rule is essentially the same as the prior version of this rule, because the details of the new case management orders are more extensive, there may be more need to request amendments. If counsel agree to changes that do not affect the court (for example, they agree to take deposition two weeks before trial), the parties must assume that if the agreement is breached by one of the parties, the court will refuse to enforce the agreement and will look askance at counsel willing to act inconsistently with the case management order.

**Rule 16.1—Simplified Procedure**

**Rule 16.1(f) and (h)—Case Management Orders and Certification of Compliance.** The amendments to Rule 16.1 regarding simplified procedure are minimal, but provide another incentive to use that method of dealing with lawsuits under $100,000.29 Sections 16.1(f) and (h) incorporate by reference some provisions from Rule 16. Because some of the incorporated provisions of Rule 16 have been renumbered, the corresponding provisions in Rule 16.1 have been renumbered to remain consistent. The significant change in Rule 16.1 is that the parties under Simplified Procedure do not have to prepare or file a proposed order or attend a case management conference unless they wish to. This exception was designed to maintain the simplified procedure with minimal paperwork for these smaller, less complicated cases.

**Rule 26—General Provisions Governing Discovery and Duty of Disclosure**

The amendments to Rule 26 relating to discovery and disclosures are the most significant of all the new amendments. As described in “Part I: A New Paradigm,” these amendments are central to a nationwide effort to change the litigation culture from “discover all you want” to “discover only what you need.” They are intended to enforce the urgent need to make cases just, speedy, and inexpensive; to reopen genuine access to the judicial system for many parties that have been priced or delayed out of their ability to use or interest in using the courts to resolve disputes; and to reinvigorate confidence and trust in the courts and judges. As stated in the 2015 Comment to Rule 26, these amendments “allow discovery of what a party/lawyer needs to prove its case, but not what a party/lawyer wants to know about the subject of a case”—the amendments “emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.” (Emphasis in original.)

These changes should persuade parties and counsel to sharpen their focus; to relinquish the idea that they must discover every conceivable fact that may have some remote relevance to their general dispute; to recognize that justice delayed is justice denied; and to acknowledge that unchecked expense is more frequently used as an unjust sword than a shield against injustice. The cultural change is not expected to be immediately popular with some trial lawyers, or clients with unlimited litigation budgets, but the change may help lawyers to become better trial lawyers when they learn they must focus their cases and use thoughtful cross-examination in place of discovery paper blizzards.

As detailed below, the amendments call for more precise early disclosures—of both the favorable and the harmful information. They redefine discoverable information to limit it to that which relates to the claims and defenses of the specific case and, more significant, require that discovery be proportional to the needs of the case at issue. At this initial discovery stage, the information to be disclosed is that which is “then known and reasonably available to the party.” In complex cases with many possible witnesses and multitudes of documents, the limitation to those things “then known and readily available” should be reasonably applied, while recalling that this initial disclosure does not terminate the continuing requirement of disclosure. Disclosures must be supplemented under Rule 26(e) “when a party learns that the information is incomplete or incorrect,” unless complete and correct information has already been provided in discovery responses. However, nothing permits information subject to mandatory disclosure to be withheld while waiting to see whether the opposing party will request it in discovery.

Although subject to change by the court, considering proportionality, the amendments limit the numbers of expert witnesses, call for more comprehensive written expert disclosures, limit discovery of communications between counsel and their experts, and limit expert testimony to that which has been previously disclosed.
The amendments reduce the normal deposition times from seven hours to six hours.

Rule 26(a)(1)—Disclosures

The Good, the Bad and the Ugly

The first visible change in this subsection is to make clear what should have been the standard for years. The opening sentence requires parties to make initial disclosures, without awaiting a discovery request, of four categories of information: identification of possible witnesses; production of certain documents; description of categories of damages, in addition to computations of economic damages; and production of potential insurance agreements. The clarification in this initial amendment is that the information is to be disclosed “whether or not supportive of the disclosing party’s claims or defenses.”

In 2000, the Federal Rules were amended to limit disclosure to information “a disclosing party may use to support its claims or defenses.” Colorado declined to adopt that limitation, thus requiring disclosure of all the information listed in Rule 26(a)(1). One of the reasons for declining to adopt the federal limitation was the belief of the Civil Rules Committee that failure to produce adverse information would only cause delay while waiting for the opposing party to request such adverse information in its initial set of interrogatories and document requests. Thus, for example, in an employment discharge case, the employer must produce not only memos, notes, and e-mails criticizing the plaintiff—employee’s behavior, but also the memos, notes, and e-mails praising the employee’s performance.

Some lawyers complain that this clarification is contrary to their ethical obligation to represent their clients. However, lawyers must also recall that they act as “an officer of the legal system,” and in that light, among other things, have professional responsibilities to bring or maintain meritious claims, to expedite litigation, to be fair to opposing parties and counsel, and to be truthful in statements to others. The fact that any of these obligations may impinge on a client’s interests or desires does not weaken their application to the lawyer.

Subsections 26(a)(1)(A) (identity of individuals) and (B) (documents) have both been revised to require disclosures not just of names and documents concerning “disputed facts alleged with particularity in the pleadings,” but to disclose names and documents relevant to the “claims and defenses of any party.” Therefore, in an automobile collision negligence case with a statute of limitations defense, both the plaintiff and defendant must provide names of individuals “likely to have discoverable information” about both the collision and the statute of limitations.

Subsection (A) (list of individuals) has also been amended to require more than the name, address, and “subjects of information.” Too often parties may provide a list (frequently as many names as the party can think of) with a description of the subject of their knowledge such as “these individuals may have information about the claims in this case.” This, of course, is useless and often is intentionally designed to make it difficult for the opposing party to have any real idea of who it might want to depose or interview. The revised subsection (A) now requires, in addition to the names, addresses, and phone numbers of disclosed individuals, a “brief description of the specific information” the individual in “known or believed to possess.” (Emphasis added.) The wording of this provision is not designed to require binding disclosures used to limit the scope of possible trial testimony, such as is required from testifying experts. Rather, it is designed, for example, to reveal who was responsible for deciding to discharge the plaintiff/employee; who directly participated in negotiating the key contractual provision; and who hired the allegedly negligent company truck driver. For essentially the same reasons, subsection (B) (list of documents) now requires that a listing of the subject matter of documents be provided in addition to the category of documents.

Challenging Inadequate Disclosures

An important change is found in the last sentence of the second paragraph of Rule 26(a)(1), which was imported from the experience gained from CAPP. Motions challenging the adequacy of another party’s disclosures may no longer be filed prior to the initial case management conference. There are several reasons for this limitation. First, the parties are to note concerns relating to the other party’s disclosures in the proposed order (Rule 16(b)(9)) so that these issues can be addressed at the case management conference. The process of listing the asserted shortcomings will, itself, create the need for counsel to confer about these issues and perhaps resolve some of them. The identification of asserted failures to disclose should be much shorter than a motion to compel. Further, one of the court’s significant tasks at the case management conference is to determine the appropriate level of proportionality for disclosure and discovery purposes. The court’s ruling on this issue may indicate that some of the alleged shortcomings in disclosures are not proportional to the case and need not be disclosed for that reason alone. Additionally, the court can probably resolve the issues and concerns while conducting the case management conference without any need for briefing of a motion to compel.

Rule 26(a)(2)—Disclosure of Expert Testimony

The disclosure rules for witnesses providing opinion testimony continue to provide different requirements for disclosures of two classes of persons allowed to render opinion testimony. Persons retained or specially employed to provide expert testimony are referred to in Rule 26(a)(2)(B)(I) as “retained experts.” Persons who are not specially retained or employed to give expert testimony in the case but who are expected to present testimony concerning their personal knowledge of relevant facts, along with their opinion testimony relating to those facts, are referred to in Rule 26(a)(2)(B)(II) as “other experts.”

The major differences in the amended rule are that summaries of expert testimony are no longer allowed, and experts will be allowed to testify on direct examination only about matters “disclosed in detail,” in conformity with the rule. This limitation was included in CAPP and judges enforced it rather strictly. These witnesses are not required to anticipate issues or areas of inquiry that may be brought up in cross-examination, and may testify about such areas without prior disclosure. Indeed, the knowledge that witnesses may testify only as to opinions disclosed in their reports should allow opposing parties to plan much more focused, precise, and concise cross-examinations.

Experience with summaries of expert testimony has revealed that there can be so much background that is omitted that either the opposing party is blind to what testimony to expect or, as is usually the case, needs to take an extensive deposition to try to flesh
out the expert’s testimony. These more extensive depositions add significant cost to the party taking the deposition, both in the hours preparing for and the time actually spent deposing the expert. Furthermore, once a deposition is taken, many courts will not limit testimony to the summary if the subject was or could have been covered in the deposition itself. The fundamental objectives here are to require parties using retained experts to fully disclose their opinions and bases for those opinions so that the parties can more accurately evaluate the strength of their cases and to reduce or eliminate the need to take the expert’s depositions in the first place.

**Rule 26(a)(2)(B)(I)—Retained Experts**

The revised rule now requires full written reports of the expert’s expected testimony. There is no requirement that the expert must personally prepare the report because frequently lawyers work closely with the experts to tailor and limit the testimony to what is most necessary for the case. Determining who is responsible for selecting each word of the report is not deemed significant. What is significant is that the expert witness must sign the report and thereby accept responsibility for both what the report says and includes and what it omits.

Much of the remainder of the changes in this portion of the rule is a clarification of certain required portions of expert reports that have been in existence for years. The most critical part of the report will be the complete statement of all opinions and the basis and reasons for those opinions. The word “complete” here supports the requirement that experts be limited in their direct testimony to what is disclosed in the report. This does not require a proposed transcript of the witness’s direct examination. However, before the report is complete, lawyers should plan that direct examination in detail to make sure nothing crucial is omitted. Lawyers should not rely on the assumption that the opposing party will depose the expert and open the door for further “supplementation” of the witness’s opinions.

Other amendments clarify that the data and other information considered by the witness in forming opinions is listed but need not be included. The information considered, however, should be both that which is relied on and that which was rejected in forming the opinions. Likewise, literature to be used during the expert’s testimony needs to be identified and referenced in the report, but need not be provided. On the other hand, copies of exhibits to be used must be provided with the report, along with the expert’s qualifications, a list of publications authored by the witness within the prior ten years, and a list of deposition or trial testimony given by the expert within the preceding four years.

The amended rule now mandates more information about the compensation to be paid the retained expert. Experts have been known to testify that they are to be paid $____ per hour, but they are not sure how many hours have been spent yet, or they have only been paid a small portion of their fee because most of their billings have not been rendered or paid yet. Now, reports must include the expert’s fee agreement or schedule for the study, preparation, and testimony, and an itemization of the fees incurred, whether or not actually billed or paid. The time spent must be included in the report and must be supplemented fourteen days before trial. In short, jurors are entitled to know what the expert’s true, total compensation is, not just what may have been paid to the expert as of the day of the expert’s initial report.

**Rule 26(a)(2)(B)(II)—Other Experts**

These witnesses are frequently investigating police officers at accident or crime scenes; treating physicians; and employees such as business owners, accounting personnel, supervisors, mechanics, and construction personnel with specialized, relevant background and experience, as well as personal knowledge of the events in suit. Especially for those who are not employees of a party, it is often difficult to arrange for the necessary time for them to prepare extensive reports of their planned testimony. Testimony from non-specially retained or employed witnesses who will give opinions must be disclosed either by written reports signed by the witness, or by statements prepared and signed by counsel or by any unrepresented party. The allowance of statements prepared and signed by counsel recognizes that frequently, witnesses such as police officers or treating doctors cannot or will not make time available to review or sign a written disclosure statement. In either event, the witness will be limited to testifying on direct about matters disclosed in detail in the report or statement. Again, the report or statement must include all opinions to be expressed, together with the bases and reasons therefor. Thus, a statement that the treating physician “will testify about the patient’s medical records and their impact on the physician’s treatment of the patient” will not meet this test. Additionally, the report or statement must list any qualifications of the witness needed to support allowing the witness to have and express admissible opinions, and must include copies of any exhibits to be used to support the opinions.

A feature of “other [non-retained] experts” is that they are not called to testify in the case because they have been specially retained as independent experts to offer opinions. They are called as fact witnesses with personal information relating to the case, and through training or experience are qualified to offer opinions useful to the jury based on facts they observed. In short, as noted in the Supreme Court’s 2015 Comments, non-retained experts are people whose opinions are formed or reasonably derived from or based on their occupational duties with respect to the matter at issue in the case. Even though their opinions and supporting factual bases and reasons must be disclosed in detail in their report or statement, they are not required or expected to prepare and sign a full report containing the other information only required from retained experts. For example, in addition to the opinions and diagnoses reflected in the plaintiff’s medical records, a treating physician may have reached an opinion as to the cause of those injuries gained while treating the patient. Those opinions may not have been noted in the medical records but, if appropriately disclosed, may be offered at trial without the witness having first prepared a full, retained expert report.

**Rule 26(a)(2)(B)—Limitations of Trial Testimony**

Both of the revised subsections of Rule 26(a)(2)(B) relating to retained experts and other experts contain the same last sentence: “The witness’s direct testimony shall be limited to matters disclosed in detail in the report [or statement].” This is a new provision based in part on the experience from CAPP and on the desire to continue holding down the cost of trial preparation. One of the justifications for the perceived necessity to take expert depositions is that trial courts frequently do not limit experts to their reports at trial so that the deposition is necessary to uncover unreported opinions (or belatedly conceived opinions), which the trial judges might allow in evidence.
With the revised rule, trial courts are instructed to limit direct testimony. This does not preclude opinions for which the opposing party opens the door by cross-examining on opinions held by the witness beyond those disclosed in the report or statement. Not only does this provide a rule-based requirement that the trial courts limit testimony, but it also enforces the requirements that reports or statements in fact be complete. This limitation is also bolstered by the supplementation requirements of Rule 26(e) in those situations where depositions are taken.\textsuperscript{37}

Rule 26(b)—Discovery Scope and Limits

Before discussing the significant change in subsection 26(b)(1), it is important not to overlook the opening phrase of section 26(b): “Unless otherwise modified by order of the court . . . ;” In other words, the court is not bound to treat discovery in all cases the same. Some cases may actually have more stringent limitations placed on their discovery than the presumptive limitations in subsection 26(b)(2). Conversely, larger and complex cases may need and can be given significantly more discovery than that which is set out as the presumptive discovery limitations, as appropriate.

Rule 26(b)(1)—In General

The amended portion of Rule 26(b)(1) is taken verbatim from the new Federal Rule. It makes one fundamental change and two significant but lesser revisions to the prior Colorado Rule 26(b)(1).

Proportionality. Previously, there were four factors in Rule 26(b)(2)(F) for courts to consider when determining whether good cause existed to justify modifying the presumptive limits on discovery. The third of those factors was whether the expense of discovery outweighed its likely benefit, “taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues in litigation, and the importance of the proposed discovery in resolving the issues.”\textsuperscript{38} Very few reported cases ever discussed this obscurely located provision.

In 2009, the ACTL/IAALS Final Report lit the wildfire. It stated “Proportionality should be the most important principle applied to all discovery.”\textsuperscript{39} Thereafter, proportionality of discovery became a key issue at the Duke Conference.\textsuperscript{40} Then, the Federal Rules Advisory Committee joined in, concluding that “What is needed can be described in two words—cooperation and proportionality—and one phrase.”\textsuperscript{41} CAPP, along with many other pilot projects, also incorporated the concept of proportionality.\textsuperscript{42} When the Federal Rules Advisory Committee proposed its revisions to Rule 26(b)(1), it lifted the list of factors to establish good cause from Federal Rule 26(b)(2).\textsuperscript{43} It then specifically referred to this language as involving proportionality, and placed it directly into the very definition of what is discoverable. Thus, it is not enough any longer to contend that information is discoverable simply because it is relevant to a claim or defense. Such information must also be “proportional to the needs of the case.”

In evaluating the “needs of the case,” the Advisory Committee also adjusted the order of some of the factors to be considered when determining proportionality. It switched the order of “the amount in controversy” and “the importance of the issues at stake in the action” so that the amount of money was listed after the importance of the issues. This change was made to place less emphasis on the amount of money at stake as the leading factor (even though all of the factors must be considered if significant). The

Advisory Committee also moved the issue of whether the burden or expense outweighed the likely benefit of the additional discovery from being a main issue in considering good cause (as phrased in Federal Rule 26(b)(2)(C)(iii) and Colorado Rule 26(b)(2)(F)(iii)) to being simply another factor to be considered. Thus, as revised, the federal and Colorado provisions regarding the scope of discovery are virtually identical and state:

Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. (Emphasis added)

This new rule is patently designed to limit “full discovery” in all but the larger, more important and more complex cases. This is an important brick in the new paradigm of giving parties only what they need rather than whatever they want.

The Supreme Court’s 2015 Comments to Rule 26 emphasize the case-by-case considerations that may impact proportionality. All the listed factors should be thought about, but individual factors may carry very different weights depending on the case and claims. The amount in controversy may not be as much of a factor as the desired enforcement of fundamental civil or constitutional rights. The public interest may demand resolution of issues in the case. In employment and professional liability cases and for the amount of damages, for example, the parties’ relative access to key information may prove to justify more discovery for one party than to the other on selected issues.

Other limitations on the scope of discovery. In addition to the requirement that discovery be proportional to the needs of the case, a second change in both the Federal and Colorado Rules was to delete the authority of a court to “order discovery of any matter relevant to the subject matter involved in the action,” as allowed in the previous version of Rule 26(b)(1). This, too, strikes a blow at potentially vast discovery of material even less directly relevant to the specific claims and defenses of the lawsuit. Discovery as the fishing expedition to find out whether a party can uncover new causes of action should no longer be available.

The third change in Rule 26(b)(1) is a clarification relating to information that is not admissible at trial. The last sentence of this section still allows discovery of information that may not be admissible, but only if the information sought is “within the scope of discovery.” Thus, such inadmissible information must still be relevant to the parties’ claims and defenses, not just to the “subject matter involved in the action,” and must still be proportional to the needs of the case.

Rule 26(b)(2)—Limitations on Discovery

This Rule retains Colorado’s previous basic limitations on the use of the various discovery devices. It retains the ability to expand or contract the uses of those devices “for good cause shown,” but also imports the proportionality factors of subsection (b)(1).

The only change is in subsection (b)(2)(F)(iii)—the subsection describing the factors to be considered in determining “good cause,” and the subsection from which the proportionality factors were removed for relocation into subsection (b)(1). This new con-
sideration in reworded (b)(2)(F)(iii), taken verbatim from the proposed Federal Rule amendment, is whether the proposed additional discovery is “outside the scope permitted by C.R.C.P. 26(b)(1).” However, subsection (b)(2) specifically allows exceptions to its limits on use of discovery methods for good cause. Thus, this factor in (b)(2)(F)(iii) does not mean that good cause cannot be shown in situations if discovery is sought beyond subsection (b)(1)’s scope of discovery. If the broader discovery is sought, however, the other considerations in (b)(2)(F)(i), (ii), and (iv) will need to be quite persuasive.

Rule 26(b)(4)—Trial Preparation: Experts

Depositions of Experts. The subject of expert depositions has, from the beginning of CAPP, been a hotly debated topic. Opponents of expert depositions have argued that with requirements for disclosures of full expert reports and limiting their testimony to what is disclosed in detail, depositions of experts are unnecessary, expensive, and counterproductive. They argue that the main result of deposing experts is to “educate and make them smarter” and better able to prepare for and to withstand cross-examination at trial. Proponents of expert depositions counter that depositions allow lawyers to get a feel for the quality of the expert as a person, prospective witness, and expert in the designated field. They contend that the added cost of the deposition is not great in the overall expense of expert study and preparation, and that expert depositions enhance settlement once the lawyers have seen how well the expert can withstand intense examination. Finally, as noted above, a number of lawyers claimed that depositions were necessary because they could not rely on the judges to limit the expert’s testimony to the report or summary.

Although the Civil Rules Committee ultimately recommended that depositions for retained experts should be limited to three hours, the Supreme Court decided to apply the standard of six hours to all experts, as well as to all other deponents. Because of the varying importance of expert testimony in cases, this rule specifically authorizes trial courts to expand or limit deposition time in accordance with proportionality.

Disclosures and Discovery About the Preparation of Expert Opinions and Reports. In 2010, Federal Rules 26(b)(4)(B) and (C) were added to preclude discovery of drafts of expert reports or disclosures made pursuant to Rule 26(a)(2) and to provide work-product protection to communications between a party’s attorneys and the party’s retained experts and the expert’s assistants. The discovery bar does not extend to other information gathered by the expert or to questions about alternative analyses or approaches to the issue on which the expert is testifying.44 Discovery may extend to communications relating to the expert’s compensation for study or testimony; facts and data provided by the attorney that the expert considered in forming the opinions expressed; or assumptions that the attorney provided and the expert relied on.45 Among other things, these rules were adopted to prevent game playing with experts, such as counsel telling them to never make notes of what they discuss, to not prepare and send drafts, and to always make revisions to the original version of the report while deleting all portions that had been changed.

After this amendment was adopted in the Federal Rules in 2010, the Colorado Civil Rules Committee was prepared to recommend a similar change. However, it decided that such a change might adversely impact the information that was to be gained from the study of how CAPP worked and, therefore, the amendment was not further considered until the study of CAPP was concluded. Although there are slight variances in language between new subsection 26(b)(4)(D) of the Colorado Rules and subsections 26(b)(4)(B) and (C) of the Federal Rules, the substance of the changes is identical.

Rule 26(c)—Protective Orders

This Rule allows courts to issue a variety of protective orders to protect against annoyance, embarrassment, oppression, or undue burden or expense. The new amendment to Colorado Rule 26(c) (2), taken verbatim from the amendment to Federal Rule 26(c)(1) (B), now also gives courts the authority to allocate the expenses of discovery among the requesting and delivering parties (or non-parties) where appropriate. This amendment does not mandate any allocation, but simply adds this tool to the court’s tool box of alternatives. Indeed, the Committee Note relating to the Federal Rule change provides that “recognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice,” and that “[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”46

Rule 26(e)—Supplementation of Disclosures, Responses, and Expert Reports and Statements

A provision has been added to the requirement to supplement expert reports or statements where a party intends to have the expert testify on direct examination about matters disclosed for the first time during the expert’s deposition, but that are not in the expert’s report or statement. The supplementation must be a specific description of the deposition testimony to be offered and relied on. This additional supplementation is intended to allow the court to determine from the expert’s Rule 26(a)(2) report and its supplementation whether the direct testimony offered at trial has or has not been properly disclosed. These provisions are designed to avoid the court’s need to read scattered portions of the deposition before ruling on admissibility of the new testimony. It also avoids the opponent arguing surprise because it did not understand what deposition testimony was going to be offered as additional and admissible expert testimony.

When the expert report is properly supplemented with this subsequent deposition opinion testimony, Rule 26(e) instructs the trial courts that those supplemented opinions must be permitted, unless the court finds that the opposing party has been unfairly prejudiced by the failure to have made disclosure in the original expert report.

Rule 30—Depositions Upon Oral Examination

The only changes of note in Rule 30 are contained in subsection 30(d)(2). They shorten the standard deposition for all witnesses from one day of seven hours to one day of six hours (unless otherwise ordered by the court). With the usual practice now being to clock deposition times to the minute (not counting breaks for consultation or bathroom breaks), seven hours has frequently devolved into about ten hours of actual time spent at the deposition. Furthermore, many felt that six hours of solid time, leaving out boilerplate questions, was still normally sufficient to get the genuinely necessary evidence. If more is likely to be needed, the
Rule 33—Interrogatories

After the Civil Rules Committee agreed on the changes to Rule 34 for the reasons described below, those changes seemed to be equally applicable to responses to interrogatories. Thus, Rule 33(b) was amended to add the requirements that objections to interrogatories specify the grounds for objection and to state whether responsive information is being withheld on the basis of the objection. Such objection also stays the need to answer those objectionable portions pending a ruling by the trial court and without filing a motion for a protective order.

Rule 34—Production of Documents

Over time, litigants have developed the habit of making a string of boilerplate objections to requests for production of documents. The objections are then incorporated verbatim, or by reference, at the beginning of the response to each document request. (To be fair, these responses are often invited by equally boilerplate definitions and instructions in the opposition's request.) Thus, the requesting party has no real information about which of the objections are intended to apply or why they are being made. This confusion can then be aggravated by the boilerplate comment to the effect that “notwithstanding these objections, and without waiving them, [defendant] is producing the following documents.” With this response, the requesting party has no idea whether the responder is providing all the documents it has or whether it really is withholding some of them and, if so, how many are being withheld and on what basis. If so, the responder is refusing to produce them.

Colorado Rule 34(b) and Federal Rule 34(b)(2) are being amended with virtually identical language. First, the amended rules provide that the response to each request must “state with specificity the grounds for objecting to the request.” The objections must then be specific, not generic, and relevant to the precise request to which objection is being made. Second, the amended rules require that an objection state whether any responsive materials are actually being withheld on the basis of that objection.

Separately, the rules are also being amended to allow production of materials instead of offering inspection of the materials. Essentially, this simply recognizes what has for many years been the practice in most cases, at least where the produced documents are not especially numerous or burdensome.

Finally, Colorado Rule 34(b) adds a new provision to clarify the effect of a fairly common practice. When a party objects to production of certain documents, it has been unclear whether the opposing party also must request a protective order under Rule 26(c) or whether the requesting party must file a motion to compel production. The newly amended Colorado Rule now specifies that an objection to production stays the obligation to produce these documents until the court resolves the objection and that no motion for protective order is necessary. Frequently, when the requesting party receives an objection, especially if some responsive documents are produced, the requesting party will decide that it is unnecessary to fight for more documents or the parties can reach an acceptable compromise as to what documents will be produced. Thus, it seems appropriate to await the requesting party's determination that it really is worth the effort to obtain the withheld documents rather than requiring the objecting party to move for protection and involve the court on matters that the requesting party may no longer need.

Rule 37—Failure to Make Disclosure or Cooperate in Discovery: Sanctions

Rule 37(a)(4)(A) and (B) have allowed courts to award reasonable expenses, including awarding attorney fees in favor of prevailing parties and against opposing parties and their attorneys, unless the court finds certain factors that ameliorate against such an award, including “other circumstances that make an award of expenses unjust.” Experience has shown that courts, which historically have been unwilling to award monetary sanctions, have used this latter escape valve to justify the lack of monetary sanctions.

The CAPP rules, however, required that courts grant sanctions “unless the court makes a specific determination that failure to disclose in a timely and complete manner was justified under the circumstances or was harmless.” Judges handling CAPP cases found this extra pressure to impose sanctions helpful in some instances, although they still felt that encouraging compliance and emphasizing that attorneys cooperate with each other was ultimately more desirable.

After struggling with this dichotomy at some length, the subcommittee of the Civil Rules Committee, the full Committee, and ultimately the Supreme Court chose the path of encouraging courts to be more aggressive with the imposition of sanctions, but not to go as far as CAPP went. Thus, rather than making the mere determination that other circumstances made monetary sanctions unjust—a low standard for avoiding monetary sanctions—Rule 37(a)(4)(A) and (B) were amended to allow that reprise from imposing sanctions only where it would be manifestly unjust to award monetary sanctions to the prevailing party.

Under these rules, however, courts may still decline to impose sanctions where the movant did not make a good-faith effort to obtain compliance before seeking court action or where the accused party was substantially justified for the nondisclosure, response, or objection. Indeed, those findings might trigger a sanction against the complaining party or its counsel. This counter-provision significantly increases the pressure on parties seeking these sanctions to meet, confer in person, and diligently endeavor to reach a reasonable resolution.

Conversely, Rule 37(c)(1) has authorized preclusion at trial or for summary judgment of nondisclosure information required to be disclosed by Rules 26(a) or (e), unless such failure is harmless. Because it is so easy to articulate some kind of harm, this rule has caused preclusion of evidence that failed to cause significant harm or where the harm caused by the nondisclosure would be substantially outweighed by the harm resulting from preclusion. The amended subsection 37(c)(1) prohibits preclusion as a sanction simply upon allegations of some harm. Thus, preclusion for nondisclosure may not be imposed where the failure has not and will not cause significant harm or where the preclusion is disproportionate to the alleged harm.

Rules 54 and 121 § 1-22—Costs

Although only tangentially related to the issue of amending pretrial procedures to increase access to the judicial system by advanc-
ing the concept that cases should be just, speedy, and inexpensive, the Civil Rules Committee also submitted two amendments relating to controlling costs awarded to prevailing parties. First, in Rule 54(d), as approved by the Supreme Court, awarded costs must be reasonable considering any relevant factors that may include the needs and complexity of the case and the amount in controversy. Second, Rule 121 § 1-22 is amended to allow hearings on bills of costs where the requesting party has identified the issues to be heard and where the court has concluded that a hearing would be of material benefit to the court in ruling on the bill of costs.

Conclusion
With the revisions and amendments to the foregoing Rules, Colorado has moved to address the increasingly severe problem of a litigation culture that appears to be driven by and has thrived on frequently excessive demands for information. These demands can add substantial unnecessary expense and foreclose the societal benefits of efficient judicial systems for the peaceful resolution of disputes and wrongdoing. By encouraging and expediting a new culture focused on the genuine and limited needs of clients and not their (or their lawyers') desires—a culture trained in and dedicated to the prompt and efficient handling of disputes—it is hoped that civil litigation can indeed incorporate a new paradigm.

Notes
1. See CRCP 1(b).
2. The Subcommittee members included Rules Committee members: Court of Appeals Judge Michael H. Berger (Committee Chair); Richard P. Holme (Subcommittee Chair); David R. DeMuro; Judge Lisa Hamilton-Fieldman; Judge Ann B. Frick; Thomas K. Kane; Richard W. Laugesen; David C. Little; Professor Christopher B. Mueller; Teresa T. Tate; Judge John R. Webb; and Judge Christopher Z. Zenisek. Outside members of the subcommittee were Judge Herbert L. Stern, III; Judge E. Eric Elliff; Gordon (Skip) W. Netzerz; and John R. Rodman.
4. See id. at 46-47. Following publication of Part I: A New Paradigm, on April 29, 2015, the U.S. Supreme Court approved the amendments and submitted them to Congress, which could change them, but has only done so on one prior occasion. See online.cobar.org/2015/05/04/supremecourt-adopts-amendments-to-the-federal-rules-of-civil-procedure.
5. See Holme supra note 3 at 47-48 (description of CAPP).
6. The Denver Superior Court was a civil court with a jurisdictional limit of $5,000. It was abolished in 1986.
8. Id. at B-2 to B-3.
11. See, e.g., id. at Appendix D.
12. Rule 16(b) and 16(d)(1).
13. See ACTL/IAALS, supra note 10 at 7.
15. PPR 7.1 to 7.2.
16. PPR 8.1 to 8.4.
17. PPR 8.5.
19. CAPP Final Report, supra note 18 at 23.
20. Id. at 24.
21. PPR 7.1 to 7.2; and PPR Appendix B.
27. Id.
28. See, e.g., 2015 Comment to CRCP 16(d). See also ACTL/IAALS, supra note 10 at 10-20 and Appendix D; Prince, “A New Model for Civil Case Management: Efficiency Through Intrinsic Engagement,” 5 Court Review 174, 189-92 (2014).
30. FRCP 26(a)(1)(A)(i) and (ii). See Advisory Committee Notes re 2000 Amendment.
31. Colo. RPC, Preamble and Scope at [1].
32. Colo. RPC 3.1.
33. Colo. RPC 3.2.
34. Colo. RPC 3.3.
35. Colo. RPC 3.4.
37. See discussion of Rule 26(e), infra.
38. CRCP 26(b)(2)(F)(iii).
40. See Holme, supra note 3 at 46 and notes 35 to 37 and accompanying text.
42. PPR 9.1. See Holme, supra note 3 at 47.
43. FRCP 26(b)(2)(C)(iii).
44. See Advisory Comm. Notes re: 2010 Amendments to FRCP 26(b)(4).
45. Id.; CRCP 26(b)(4)(C)(i) to (iii).
47. PPR 3.7.
RULE CHANGE 2015(05)

COLORADO RULES OF CIVIL PROCEDURE

Chapters 1 and 2
Rules 1, 12, 16, and 16.1

Chapter 4
Rules 26, 30, 31, 33, 34, and 37

Chapter 6
Rule 54

Chapter 17A
Rule 121, Section 1-22

New Form
JDF 622 – Proposed Case Management Order

Rule 1. Scope of Rules

(a) Procedure Governed. These rules govern the procedure in the supreme court, court of appeals, district courts, and superior courts and in the juvenile and probate courts of the City and County of Denver, in all actions, suits and proceedings of a civil nature, whether cognizable as cases at law or in equity, and in all special statutory proceedings, with the exceptions stated in Rule 81. These rules shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.

Rules of civil procedure governing county courts shall be in accordance with Chapter 25 of this volume. Rules of Procedure governing probate courts and probate proceedings in the district courts shall be in accordance with these rules and Chapter 27 of this volume. (In case of conflict between rules, those set forth in Chapter 27 shall control.) Rules of Procedure governing juvenile courts and juvenile proceedings in the district courts shall be in accordance with these rules and Chapter 28 made effective on the same date as these rules. In case of conflict between rules those set forth in Chapter 28 shall control. Rules of Procedure in Municipal Courts are in Chapter 30.

(b)–(c) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

2015

[1] The 2015 amendments are the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial
discovery with the goal of emphasizing and enforcing Rule 1’s mandate that discovery be administered to make litigation just, speedy, and inexpensive. One of the primary movers of this reform effort is a realization that the cost and delays of the existing litigation process is denying meaningful access to the judicial system for many people.

[2] The changes here are based on identical wording changes proposed for the Federal Rules of Civil Procedure. They are designed to place still greater emphasis on the concept that litigation is to be treated at all times, by all parties and the courts, to make it just, speedy, and inexpensive, and, thereby, noticeably to increase citizens’ access to justice.
Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—
Motion for Judgment on Pleadings

(a) When Presented.

(1) A defendant shall file his answer or other response within 21 days after the service of the
summons and complaint upon him. The filing of a motion permitted under this Rule alters these
periods of time, as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the
responsive pleadings shall be filed within 14 days after notice of the court's action;

(B) if the court grants a motion for a more definite statement, or for a statement in separate
counts or defenses, the responsive pleadings shall be filed within 14 days after the service of the
more definite statement or amended pleading.

(2) If, pursuant to special order, a copy of the complaint is not served with the summons, or if the
summons is served without the state, or by publication, a defendant shall file his
answer or other response the time limit for filings under subsections (a)(1) and (e) of this Rule
shall be within 35 days after the service thereof upon him.

(3) A party served with a pleading stating a cross-claim against him shall file an
answer or other response thereto within 21 days after the service thereof upon him.

(4) The plaintiff shall file his reply to a counterclaim in the answer within 21 days after the
service of the answer.

(5) If a reply is made to any affirmative defense, such reply shall be filed within 21 days after
service of the pleading containing such affirmative defense.

(6) If a pleading is ordered by the court, it shall be filed within 21 days after the entry of the
order, unless the order otherwise directs. The filing of a motion permitted under this Rule alters
these periods of time, as follows: (1) If the court denies the motion of postpones its disposition
until the trial on the merits, the responsive pleadings shall be filed within 14 days after notice of
the court's action; (2) if the court grants a motion for a more definite statement, or for a statement
in separate counts or defenses, the responsive pleadings shall be filed within 14 days after the
service of the more definite statement or amended pleading.

(b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading,
whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the
responsive pleading thereto if one is required, except that the following defenses may at the
option of the pleader be made by separate motion filed on or before the date the answer or reply
to a pleading under C.R.C.P. 12(a) is due:

(1) Lack of jurisdiction over the subject matter;
(2) lack of jurisdiction over the person;

(3) insufficiency of process;

(4) insufficiency of service of process;

(5) failure to state a claim upon which relief can be granted; or

(6) failure to join a party under C.R.C.P. Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or with any other motion permitted under this Rule 12 or C.R.C.P. Rule 98. If a pleading sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in C.R.C.P. Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. Rule 56.

c – (d) [NO CHANGE]

(e) Motion for Separate Statement, or for More Definite Statement. Before responding to a pleading or, if no responsive pleading is permitted by these rules, within the time limits for filings under subsections (a)(1) and (a)(2) of this Rule 21 days after the service of the pleading upon him, a party may file a motion for a statement in separate counts or defenses, or for a more definite statement of any matter which is not averred with sufficient definiteness or particularity to enable the party to properly prepare his responsive pleading. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion filed by a party before within the time for responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion filed by a party within 21 days after the service of any pleading, motion, or other paper, or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper. The objection that a responsive pleading or separate defense therein fails to state a legal defense may be raised by motion filed under this section (f).

(g) Consolidation of Defenses in Motion. A party who makes a motion under this Rule may join with it any other motions herein provided for and then available to that party. If a party makes a motion under this Rule but omits therefrom any defense or objection then available to that party which this Rule permits to be raised by motion, that party shall not thereafter
make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) of this Rule on any of the grounds there stated.

(h) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMENTS

2015

[1] The practice of pleading every affirmative defense listed in C.R.C.P. 8(c), irrespective of a factual basis for the defense, is improper under C.R.C.P. 11(a). The pleading of affirmative defenses is subject not only to C.R.C.P. 8(b), which requires a party to “state in short and plain terms his defense to each claim asserted,” but also to C.R.C.P. 11(a): “The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Some affirmative defenses are also subject to the special pleading requirements of C.R.C.P. 9. To the extent a defendant does not have sufficient information under Rule 11(a) to plead a particular affirmative defense when the answer must be filed but later discovers an adequate basis to do so, the defendant should move to amend the answer to add the affirmative defense.
Rule 16. Case Management and Trial Management

(a) [NO CHANGE]

(b) Presumptive Case Management Order. Not later than 42 days after the case is at issue and at least 7 days before the case management conference, the parties shall file, in editable format, a proposed Case Management Order consisting of the matters set forth in subsections (1)–(17) of this section and take the necessary actions to comply with those subsections. This proposed order, when approved by the court, shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue until otherwise required pursuant to section (f) of this Rule or unless modified upon a showing of good cause. Use of the “Proposed Case Management Order” in the form and content of Appendix to Chapters 1 to 17A, form (JDF 622), shall comply with this section. Except as provided in sections (c)–(e) of this Rule, the parties shall not file a Case Management Order and subsections (1)–(10) of this section shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue until otherwise required pursuant to section (f) of this Rule.

(1) At Issue Date. For the purposes of this Rule, a case shall be deemed at issue at such time as when all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court may direct. The proposed order shall state the at issue date.

(2) The Responsible Attorney. For purposes of this Rule, the responsible attorney shall mean plaintiff’s counsel, if the plaintiff is represented by counsel, or if not, the defense counsel who first enters an appearance in the case. The responsible attorney shall schedule conferences among the parties, and prepare and file the certificates of compliance, prepare and submit the Proposed Modified Case Management Order, if applicable, and prepare and submit the proposed Trial Management Order. The proposed order shall identify the responsible attorney and provide that attorney’s contact information.

(3) Meet and Confer. No later than 14 days after the case is at issue, lead counsel for each party and any party who is not represented by counsel shall confer with each other in person, by telephone, or video conference about:

(A) the nature and basis of the claims and defenses;

(B) the matters to be disclosed pursuant to C.R.C.P. 26(a)(1);

(C) the Proposed and whether a Modified Case Management Order;

(D) mutually agreeable dates for the case management conference; and

(E) based thereon shall obtain from the court a date for the case management conference.

The proposed order shall state the date of and identify the attendees at any meet and confer conferences is necessary pursuant to subsection (e) of this Rule.
(4) **Trial Setting - Description of the Case.** The proposed order shall provide a brief description of the case and identification of the issues to be tried. The description of the case and identification of the issues to be tried shall consist of not more than one page, double-spaced, per side. No later than 42 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. § 1-6, unless otherwise ordered by the Court.

(5) **Pending Motions - Disclosures.** The proposed order shall list all pending motions that have been filed and are unresolved. The court may decide any unresolved motion at the case management conference. No later than 35 days after the case is at issue, the parties shall serve their C.R.C.P. 26(a)(1) disclosures. The parties shall disclose expert testimony in accordance with C.R.C.P. 26(a)(2).

(6) **Evaluation of Proportionality Factors - Settlement Discussions.** The proposed order shall provide a brief assessment of each party’s position on the application of any factors to be considered in determining proportionality, including those factors identified in C.R.C.P. 26(b)(1). No later than 35 days after the case is at issue, the parties shall explore the possibilities of a prompt settlement or resolution of the case.

(7) **Initial Exploration of Prompt Settlement and Prospects for Settlement - Certificate of Compliance.** The proposed order shall confirm that the possibility of settlement was discussed, describe the prospects for settlement and list proposed dates for any agreed upon or court-ordered mediation or other alternative dispute resolution. No later than 49 days after the case is at issue, the responsible attorney shall file a Certificate of Compliance. The Certificate of Compliance shall state that the parties have complied with all requirements of subsections (b)(3)-(6), inclusive, of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.

(8) **Proposed Deadlines for Amendments - Time to Join Additional Parties and Amend Pleadings.** The proposed order shall provide proposed deadlines for amending or supplementing pleadings and for joinder of additional parties, which unless otherwise provided by law, shall be not later than 105 days (15 weeks) after the case is at issue, and shall provide a deadline for identification of non-parties at fault, if any, pursuant to C.R.S. §13-21-111.5. No later than 119 days (17 weeks) after the case is at issue, all motions to amend pleadings and add additional parties to the case shall be filed.

(9) **Disclosures - Pretrial Motions.** The proposed order shall state the dates when disclosures under C.R.C.P. 26(a)(1) were made and exchanged and describe any objections to the adequacy of the initial disclosures. No later than 35 days before the trial date, pretrial motions shall be filed, except for motions pursuant to C.R.C.P. §56, which must be filed no later than 91 days (13 weeks) before the trial and except for motions challenging expert testimony pursuant to C.R.E. 702, which must be filed no later than 70 days (10 weeks) before the trial.

(10) **Computation and Discovery Relating to Damages - Discovery Schedule.** If any party asserts an inability to disclose fully the information on damages required by C.R.C.P. 26(a)(1)(C), the proposed order shall include a brief statement of the reasons for that party’s
inability as well as the expected timing of full disclosure and completion of discovery on damages. Discovery shall be limited to that allowed by C.R.C.P. 26(b)(2). Except as provided in C.R.C.P. 26(d), discovery may commence 42 days after the case is at issue. The date for completion of all discovery shall be 49 days before the trial date.

(11) Discovery Limits and Schedule. Unless otherwise ordered by the court, discovery shall be limited to that allowed by C.R.C.P. 26(b)(2). Discovery may commence as provided in C.R.C.P. 26(d) upon service of the Case Management Order. The deadline for completion of all discovery, including discovery responses, shall be not later than 49 days before the trial date. The proposed order shall state any modifications to the amounts of discovery permitted in C.R.C.P. 26(b)(2), including limitations of awardeable costs, and the justification for such modifications consistent with the proportionality factors in C.R.C.P. 26(b)(1).

(12) Subjects for Expert Testimony. The proposed order shall identify the subject areas about which the parties anticipate offering expert testimony; whether that testimony would be from an expert defined in C.R.C.P. 26(a)(2)(B)(I) or in 26(a)(2)(B)(II); and, if more than one expert as defined in C.R.C.P. 26(a)(2)(B)(I) per subject per side is anticipated, the proposed order shall set forth good cause for such additional expert or experts consistent with the proportionality factors in C.R.C.P. 26(b)(1) and considering any differences among the positions of multiple parties on the same side as to experts.

(13) Proposed Deadlines for Expert Disclosures. If any party desires proposed deadlines for expert disclosures other than those in C.R.C.P. 26(a)(2)(C), the proposed order shall explain the justification for such modifications.

(14) Oral Discovery Motions. The proposed order shall state whether the court does or does not require discovery motions to be presented orally, without written motions or briefs, and may include such other provisions as the court deems appropriate.

(15) Electronically Stored Information. If the parties anticipate needing to discover a significant amount of electronically stored information, the parties shall discuss and include in the proposed order a brief statement concerning their agreements relating to search terms to be used, if any, and the production, continued preservation, and restoration of electronically stored information, including the form in which it is to be produced and an estimate of the attendant costs. If the parties are unable to agree, the proposed order shall include a brief statement of their positions.

(16) Trial Date and Estimated Length of Trial. The proposed order shall provide the parties’ best estimate of the time required for probable completion of discovery and of the length of the trial. The court shall include the trial date in the Case Management Order, unless the court uses a different trial setting procedure.

(17) Other Appropriate Matters. The proposed order shall describe other matters any party wishes to bring to the court’s attention at the case management conference.
(18) **Entry of Case Management Order.** The proposed order shall be signed by lead counsel for each party and by each party who is not represented by counsel. After the court’s review and revision of any provision in the proposed order, it shall be entered as an order of the court and served on all parties.

(c) **Pretrial Motions—Modified Case Management Order.** Unless otherwise ordered by the court, pretrial motions, including motions in limine, shall be filed no later than 35 days before the trial date, except for motions pursuant to C.R.C.P. 56, which must be filed no later than 91 days (13 weeks) before the trial and except for motions challenging the admissibility of expert testimony pursuant to C.R.E. 702, which must be filed no later than 70 days (10 weeks) before the trial. Any of the provisions of section (b) of this Rule may be modified by the entry of a Modified Case Management Order pursuant to this section and section (d) of this Rule. If a trial is set to commence less than 182 days (26 weeks) after the at-issue date as defined in C.R.C.P. 16(b)(1), and if a timely request for a modified case management order is made by any party, the case management order shall be modified to allow the parties an appropriate amount of time to meet case management deadlines, including discovery, expert disclosures, and the filing of summary judgment motions. The amounts of time allowed shall be within the discretion of the court-on-a-case-by-case basis.

(1) **Stipulated Modified Case Management Order.** No later than 42 days after the case is at issue, the parties may file a Stipulated proposed Modified Case Management Order, supported by a specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such proposed order only needs to set forth the proposed provisions which would be changed from the presumptive Case Management Order set forth in section (b) of this Rule. The Court may approve and enter the Stipulated Modified Case Management Order, or may set a case management conference.

(2) **Disputed Motions for Modified Case Management Orders.** If any party wishes to move for a Modified Case Management Order, lead counsel and any unrepresented parties shall confer and cooperate in the development of a proposed Modified Case Management Order. A motion for a Modified Case Management Order and one form of the proposed Order shall be filed no later than 42 days after the case is at issue. To the extent possible, counsel and any unrepresented parties shall agree to the contents of the proposed Modified Case Management Order but any matter upon which all parties cannot agree shall be designated as “disputed” in the proposed Modified Case Management Order. The proposed Order shall contain specific alternate provisions upon which agreement could not be reached and shall be supported by specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such motion only needs to set forth the proposed provisions which would be changed from the presumptive case management Order set forth in section (b) of this Rule. The motion for a modified case management order shall be signed by lead counsel and any unrepresented parties, or shall contain a statement as to why it is not so signed.

(d) **Case Management Conference.**
(1) The responsible attorney shall schedule the case management conference to be held no later than 49 days after the case is at issue, and shall provide notice of the conference to all parties.

(2) Lead counsel and unrepresented parties, if any, shall attend the case management conference in person, except as provided in subsection (d)(3) of this Rule. The court may permit the parties and/or counsel to attend the conference and any subsequent conferences by telephone. At that conference, the parties and counsel shall be prepared to discuss the proposed order, issues requiring resolution, and any special circumstances of the case.

(3) If all parties are represented by counsel, counsel may timely submit a proposed order and may jointly request the court to dispense with a case management conference. In the event that there appear to be no unusual issues, that counsel appear to be working together collegially, and that the information on the proposed order appears to be consistent with the best interests of all parties and is proportionate to the needs of the case, the court may dispense with the case management conference.

If there is a disputed modified case management order or if any counsel or unrepresented party believes that it would be helpful to conduct a case management conference, a notice to set case management conference shall be filed stating the reasons why such a conference is requested. If a Notice to Set Case Management conference is filed concerning a disputed Modified Case Management Order, or if the Court determines that such a conference should be held, the Court shall set a Case Management Conference. The conference may be conducted by telephone. The court shall promptly enter a Modified Case Management Order containing such modifications as are approved by the Court.

(e) Amendment of the Case Management Order. At any time following the entry of the Case Management Order, a party wishing to extend a deadline or otherwise amend the presumptive Case Management Order or a Modified Case Management Order shall file a motion stating each proposed amendment and a specific showing of good cause for the timing and necessity for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2)(F).

(f) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMITTEE COMMENTS

1995

History and Philosophy

[1] Effective differential case management has been a long-term goal of the Bench, Bar, and Public. Adoption by the Colorado Supreme Court of C.R.C.P. 121 and its practice standards in 1983; revised C.R.C.P. 16 in 1988 to require earlier disclosure of matters necessary for trial; and
the Colorado Standards for Case Management--Trial Courts in 1989 were a continuing and evolving effort to achieve an orderly, fair and less expensive means of dispute resolution. Those rules and standards were an improvement over prior practice where there was no prescribed means of case management, but problems still remained. There were problems of discovery abuse, late or inadequate disclosure, lack of professionalism, slow case disposition, outrageous expense and failure to achieve an early settlement of those cases that ultimately settled.

[2] In the past several years, a recognition by the organized Bar of increasing unprofessional conduct by some attorneys led to further study of problems in our civil justice system and new approaches to resolve them. New Federal Rules of Civil Procedure were developed to require extensive early disclosure and to limit discovery. The Colorado Bar Association's Professionalism Committee made recommendations concerning improvements of Colorado's case management and discovery rules.

[3] After substantial input through surveys, seminars and Bench/Bar committees, the Colorado Supreme Court appointed a special Ad Hoc Committee to study and make recommendations concerning Colorado's Civil Rules pertaining to case management, disclosure/discovery and motions practice. Reforms of Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, 121 § 1-11, 121 § 1-12, 121 § 1-15, and 121 § 1-19 were developed by this Committee.

[4] The heart of the reform is a totally rewritten Rule 16 which sets forth a new system of case management. Revisions to Rules 26, 29, 30, 31, 32, 33, 34, 36, and 37 are patterned after December 1, 1993, revisions to Federal Rules of the same number, but are not in all respects identical. Colorado Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, and 37 were developed to interrelate with each other to provide a differential case management/early disclosure/limited discovery system designed to resolve difficulties experienced with prior approaches. Changes to C.R.C.P. 121 §§ 1-11, 1-12, 1-15, and 1-19 are designed to interrelate with the case management/disclosure/discovery reform to improve motions practice. In developing these rules, the Committee paid particular attention to the 1993 revisions of the Federal Rules of Civil Procedure and the work of the Colorado Bar Association regarding professionalism.

**Operation**

[5] New Rule 16 and revisions of Rules 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, and 121 §§ 1-11, 1-12, 1-15, and 1-19 are designed to accomplish early purposeful and reasonably economical management of cases by the parties with Court supervision. The system is based on communication, including required early disclosure of persons with knowledge and documents relevant to the case, which disclosure should lead in many cases to early evaluation and settlement efforts, and/or preparation of a workable Case Management Order. Lead attorneys for each party are to communicate with each other in the spirit of cooperation in the preparation of both the Case and Trial Management Orders. Court Case Management Conferences are available where necessary for any reasonable purpose. The Rules require a team effort with Court leadership to insure that only appropriate discovery is conducted and to carefully plan for and conduct an efficient and expeditious trial.
Rules 16 and 26 should work well in most cases filed in Colorado District Courts. However, where a case is complex or requires special treatment, the Rules provide flexibility so that the parties and Court can alter the procedure. The importance of economy is encouraged and fostered in a number of ways, including authorized use of the telephone to conduct in-person attorney and Court conferences.

The Committee acknowledges the greater length of the Rules comprising this reformed system. However, these Rules have been developed to describe and to eliminate “hide-the-ball” and “hardball” tactics under previous Disclosure Certificate and Discovery Rules. It is expected that trial judges will assertively lead the management of cases to ensure that justice is served. In the view of the Committee, abuses of the Rules to run up fees, feed egos, bludgeon opponents into submission, force unfair settlements, build cases for sanctions, or belittle others should not be tolerated.

These Rules have been drafted to emphasize and foster professionalism and to de-emphasize sanctions for non-compliance. Adequate enforcement provisions remain. It is expected that attorneys will strive diligently to represent their clients' best interests, but at the same time conduct themselves as officers of the Court in the spirit of the recently adopted Rules of Professional Conduct.

(a)

The purpose and scope of Rule 16 are as set forth in subsection (a). Unless otherwise ordered by the Court or stipulated by the parties, Rule 16 does not mandatorily apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, Rule 120, or other expedited proceedings. Provisions of the Rule could be used, however, and Courts involved in those proceedings should consider their possible applicability to particular cases.

(b)

The “Case Management Order” is the central coordinating feature of the Rule 16 case management system. It comes at a relatively early but realistic time in the case. The Case Management Order governs the trial setting; contains or coordinates disclosure; limits discovery and establishes a discovery schedule; establishes the deadline for joinder of additional parties and amendment of pleadings; coordinates handling of pretrial motions; requires a statement concerning settlement; and allows opportunity for inclusion of other provisions necessary to the case.

Lead counsel for each of the parties are required to confer about the nature and bases of their claims and defenses, discuss the matters to be disclosed and explore the possibilities of a prompt settlement or other resolution of the case. As part of the conferring process, lead counsel for each of the parties are required to cooperate in the development of the Case Management Order, which is then submitted to the Court for approval. If there is disagreement about any aspect of the proposed Case Management Order, or if some aspect of the case requires special treatment, the parties are entitled to an expeditious Case Management Conference. If any party is appearing pro se an automatic mandatory Case Management Conference is triggered.
A time line is specified in C.R.C.P. 16(b) for the C.R.C.P. 26(a)(1) disclosures, conferring of counsel and submission of the proposed Case Management Order. The time line in section (b) is triggered by the “at issue” date, which is defined at the beginning of C.R.C.P. 16(b).

Disclosure requirements of C.R.C.P. 26, including the duty to timely supplement and correct disclosures, together with sanction provisions of C.R.C.P. 37 for failure to make disclosure, are incorporated by reference. Because of mandatory disclosure, there should be substantially less need for discovery. Presumptive limitations on discovery are specified in C.R.C.P. 26(b)(2). The limitations contained in C.R.C.P. 26 and Discovery Rules 29, 30, 31, 32, 33, 34, and 36 are incorporated by reference and provision is made for discovery above presumptive limitations if, upon good cause shown (as defined in C.R.C.P. 26(b)(2)), the particular case warrants it. The system established by C.R.C.P. 16(b)(1)(IV) requires the parties to set forth and obtain Court approval of a schedule of discovery for the case, which includes the timing and number of particular forms of discovery requests. The system established by C.R.C.P. 16(b)(1)(IV) also requires lead counsel for each of the parties to set forth the basis of and necessity for all such discovery and certify that they have advised their clients of the expenses and fees involved with each such item of discovery. The purpose of such discovery schedule and expense estimate is to bring about an advanced realization on the part of the attorneys and clients of the expense and effort involved in the schedule so that decisions can be made concerning propriety, feasibility, and possible alternatives (such as settlement or other means of obtaining the information). More stringent standards concerning the necessity of discovery contained in C.R.C.P. 26(b)(2) are incorporated into C.R.C.P. 16(b)(1)(IV). A Court should not simply “rubber-stamp” a proposed discovery schedule even if agreed upon by counsel.

A Court Case Management Conference will not be necessary in every case. It is anticipated that many cases will not require a Court Case Management Conference, but such conference is available should the parties or the Court find it necessary. Regardless of whether there is a Court Case Management Conference, there will always be the Case Management Order which, along with the later Trial Management Order, should effectively govern the course of the litigation through the trial.

The Trial Management Order is jointly developed by the parties and filed with the Court as a proposal no later than thirty days prior to the date scheduled for the trial (or at such other time as the Court directs). The Trial Management Order contains matters for trial (see specific enumeration of elements to be contained in the Trial Management Order). It should be noted that the Trial Management Order references the Case Management Order and, particularly with witnesses, exhibits, and experts, contemplates prior identification and disclosure concerning them. Except with permission of the Court based on a showing that the witness, exhibit, or expert could not have, with reasonable diligence, been anticipated, a witness, exhibit, or expert cannot be revealed for the first time in the Trial Management Order.

As with the Case Management Order, Trial Management Order provisions of the Rule are designed to be flexible so as to fit the particular case. If the parties cannot agree on any aspect of the proposed Trial Management Order, a Court Trial Management Conference is triggered. The Court Trial Management Conference is mandatory if any party is appearing in the trial pro se.
As with the Case Management Order procedure, many cases will not require a Court Trial Management Conference, but such a conference is available upon request and encouraged if there is any problem with the case that is not resolved and managed by the Trial Management Order.

The Trial Management Order process will force the attorneys to make decisions on which claims or defenses should be dropped and identify legal issues that are truly contested. Both of those requirements should reduce the expenses associated with trial. In addition, the requirement that any party seeking damages define and itemize those damages in detail should facilitate preparation and trial of the case.

Subsection (c)(IV), pertaining to designation of “order of proof,” is a new feature not contained in Federal or State Rules. To facilitate scheduling and save expense, the parties are required to specifically identify those witnesses they anticipate calling in the order to be called, indicating the anticipated length of their testimony, including cross-examination.

Provision is made in the C.R.C.P. 16 case management system for an orderly advanced exchange and filing of jury instructions and verdict forms. Many trial courts presently require exchange and submission of a set of agreed instructions during the trial. C.R.C.P. 16(d) now requires such exchange, conferring, and filing no later than three (3) days prior to the date scheduled for the commencement of the trial (or such other time as the Court otherwise directs).

The previous substantive amendment to Rule 16(b) established presumptive discovery limits and procedures which caused filing of detailed Case Management Orders and appearing before a judge to become rare. While this reduced lawyers’ time in preparing detailed orders, it also resulted in judges not being involved in pretrial case management.

Among the key principles adopted by the Federal Advisory Committee on Rules of Civil Procedure, as well as the Civil Access Pilot Project (“CAPP”), is that cases move more efficiently if judges are involved directly and early in the process. (See also, “Working Smarter, Not Harder: How Excellent Judges Manage Cases,” at 7-20 (2014), available at http://www.actl.com).

Particularly in conjunction with the principle that discovery should be in proportion to the genuine needs of the case, it was deemed important for judges, in addition to litigants, to be involved early in the pretrial process in deciding how much discovery was appropriate. Both judges and lawyers have noted that some lawyers have a financial incentive not to limit discovery. Perhaps more significant was the recognition that many lawyers engage in “over discovery” because of the fear (justifiable or not) that failing to engage in every conceivable means of discovery until a judge orders one to “stop!” could expose a trial lawyer to subsequent expensive malpractice litigation. These problems are greatly alleviated with the intervention of
trial judges placing reasonable limitations on discovery and potentially excessive pretrial practices at the earliest meaningful stage of the case.

[20] CAPP required in-person initial case management conferences with the judge. These conferences followed submission of a report from the parties which included information relevant to the evaluation of proportionality as well as how the case should be handled. The analysis of CAPP reflects that this practice was widely liked by both lawyers and judges. It is desirable that there be an official order arising from the case management conference reflecting the court’s input and which, importantly, provides enforcement power. Thus, Rule 16(b) has completely rewritten the rule to include requiring a joint report to the court in the form of a proposed Case Management Order. It can be approved or modified by the court to become the official order. It is to be filed with the court not later than 42 days after the case is at issue, but at least 7 days before the case management conference.

[21] The new rule lists the required contents of the proposed Case Management Order and also provides a form that can be downloaded for preparation of the proposed order. Although at first glance the new rule appears somewhat onerous, most of the information sought is relatively easy to include and should be discussed by opposing counsel or parties, in any event, at the outset of the case.

[22] The joint report/proposed Case Management Order must contain the following information, which is unchanged from former Rule 16(b)(1)-(3): the “at issue” date; contact information for the “responsible attorney”; and a description of the “meet and confer” discussions. The joint report must also provide:

- a brief description of the case from each side, and of the issues to be tried (one page per side);
- a list of pending, unresolved motions;
- an evaluation of the proportionality factors from C.R.C.P. 26(b)(1);
- a confirmation that the parties discussed settlement and description of prospects for settlement;
- proposed deadlines for amending the pleadings;
- the dates when disclosures were made and any objections to those disclosures;
- an explanation of why, if applicable, full disclosure of damages has not been completed and when it will be;
- subjects for expert testimony with a limit of only one expert per side per subject unless good cause is established consistent with proportionality;
- acknowledgement that oral discovery motions may be required by the court;
- provision for electronic discovery when significant electronic discovery is anticipated;
- estimated time to complete discovery and length of trial so the court can set trial at the case management conference; and
- a catchall for other appropriate matters.

[23] The former provisions in Rule 16(c) related to Modified Case Management Orders are repealed as moot but are replaced with the deadlines for pretrial motions presently contained in Rule 16(b)(9).
Rule 16(d) is rewritten to require personal or telephonic attendance at the case management conference by lead counsel. In anticipation that judges will not want (or need) to hold in person case management conferences in all cases, Rule 16(d)(3) allows the court to dispense with a case management conference if it is satisfied that the lawyers are working together well and the joint report contemplates appropriate and proportionate pretrial activity. However, the rule recommends that case management conferences always be held if one or more of the parties is self-represented. This gives the court the opportunity to try to keep the case and self-represented party focused and on track from the beginning.
Rule 16.1 Simplified Procedure for Civil Actions

(a) – (e) [NO CHANGE]

(f) Case Management Orders. In actions subject to Simplified Procedure pursuant to this Rule, the presumptive case management order requirements of C.R.C.P. 16(b)(1), (2), (3) (5) and (76) shall apply even though a proposed Case Management Order is not required to be prepared or filed.

(g) [NO CHANGE]

(h) Certificate of Compliance. No later than 49 days after the case is at issue, the responsible attorney shall also file a Certificate of Compliance stating that the parties have complied with all the requirements of sections (f), (g), and (k)(1) of this Rule or, if they have not complied with each requirement, shall identify the requirements that have not been fulfilled and set forth any reasons for the failure to comply.

(i) – (l) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.
Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) Disclosures. Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party’s claims or defenses:

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party, disputed facts alleged with particularity in the pleadings, identifying who the person is and the subject and a brief description of the specific information that each such individual is known or believed to possess;

(B) A listing, together with a copy of, or a description by category, of the subject matter and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings, the claims and defenses of any party, making available for inspection and copying such the documents and other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) A description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) Any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

Disclosures shall be served within 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party’s disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to C.R.C.P. 16(d).

The timing of disclosures shall be within 35 days after the case is at issue as defined in C.R.C.P. 16(b). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the
party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made the required disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall:

(I) **Retained Experts.** With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made accompanied by a written report or summary signed by the witness. The report or summary shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness’s testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the compensation fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness’s direct testimony shall be limited to matters disclosed in detail in the report. In addition, if a report is issued by the expert it shall be provided.

(II) **Other Experts.** With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written the report or statement that summary shall include:

(a) the qualifications of the witness and a complete description, statement describing the substance of all opinions to be expressed and the basis and reasons therefor;
(b) a list of the qualifications of the witness; and

(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party’s lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness’s direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule--see instead C.R.C.P. 16(c).]

(4) Form of Disclosures; Filing. All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to C.R.C.P. 10, signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) Methods to Discover Additional Matters. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) Discovery Scope and Limits. Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to
the claim or defense of any party, and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant Information within the scope of discovery need not be admissible in evidence to be discoverable at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. Rules 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. Rules 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(i) Whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) Whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;
(III) Whether the burden or expense of the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1) outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and

(IV) Whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

[Subsections (E)(i)--(iv) are moved to new paragraph (F).]

(3) Trial Preparation: Materials. Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b)(1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of
litigation or preparation for trial, and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded, and protects communications between the party’s attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert’s study, preparation, or testimony;

(II) identify facts or data that the party’s attorney provided and which the expert considered in forming the opinions to be expressed; or

(III) identify the assumptions that the party’s attorney provided and that the expert relied on in forming opinions to be expressed.

(5)(A) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

[This subsection has been moved from section (a)(6) and amended.]

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall within 14 days after receiving such notice present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the
information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this rule shall be in writing.

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before the submission of the proposed Case Management Order pursuant to C.R.C.P. 16(b)(18). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures, and Responses, and Expert Reports and Statements. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information
relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is in some material respect incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or statement summary disclosed pursuant to section (a)(2)(B) of this Rule and to information provided through any deposition of or interrogatory responses by the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) - (g) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

1995

COMMITTEE COMMENTS

SCOPE

[1] Because of its timing and interrelationship with C.R.C.P. 16, C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and C.R.C.P. 16 to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after Fed.R.Civ.P. 26 as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in C.R.C.P. 16, which is very different from its Federal Rule counterpart. The interrelationship between C.R.C.P. 26 and C.R.C.P. 16 is described in the Committee Comment to C.R.C.P. 16.

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is
made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7) presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in C.R.C.P. 16(b) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in C.R.C.P. 8 for a “short, plain statement” of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

**FEDERAL COMMITTEE NOTES**

[5] Federal “Committee Notes” to the December 1, 1993 and December 1, 2000 amendments of Fed.R.Civ.P. 26 are incorporated by reference and where applicable should be used for interpretive guidance.

[6] The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

[7] Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the C.R.C.P. 16(b) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.
It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.

2001 COLORADO CHANGES

The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

2015

Rule 26 sets the basis for discovery of information by: (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

Scope of discovery.

Perhaps the most significant 2015 amendments are in Rule 26(b)(1). This language is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable.
Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the “subject matter involved in the action.” Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer needs to prove its case, but not what a party/lawyer wants to know about the subject of a case.


C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties’ relative access to relevant information may be the most important factor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules “shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.” C.R.C.P. 1.

[16] Limitations on discovery.

The presumptive limitations on discovery in Rule 26(b)(2)—e.g., a deposition of an adverse party and two other persons, only 30 interrogatories, etc.—have not been changed from the prior rule. They may, however, be reduced or increased by stipulation of the parties with court approval, consistent with the requirement of proportionality.

[17] Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the amendment to section (a)(1) adds to the requirement of disclosing four categories of information and that the disclosure include information “whether or not supportive” of the disclosing party’s case. This should not be a significant change from prior practice. In 2000, Fed. R. Civ. P. 26(a)(1) was changed to narrow the initial disclosure requirements to information a party might use to support its position. The Colorado Supreme Court has not adopted that limitation, and continues to require identification of persons and documents that are relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)
Changes to subsections (A) (persons with information) and (B) (documents) of Rule 26(a)(1) require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a “brief description of the specific information that each individual is known or believed to possess.” Under the prior rule, disclosures of persons with discoverable information identifying “the subjects of information” tended to identify numerous persons with the identification of “X is expected to have information about and may testify relating to the facts of this case.” The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.


Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a “summary” of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

“Other” (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a “statement” must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.


The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers’ ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. Rule 26(b)(4)(A).

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. Rule 26(e). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by the “deposition.” However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. Id.

The 2015 amendments to Rule 26, like the current and proposed version of Fed. R. Civ. P. 26, emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.
Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of “all opinions to be expressed [by the expert] and the basis and reasons therefor.” Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must “liberally construe[], administer[] and employ[]” these rules “to secure the just, speedy, and inexpensive determination of every action.” C.R.C.P. 1. Rule 26(a)(2) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert’s opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.
Rule 30. Depositions Upon Oral Examination

(a) – (c) [NO CHANGE]

(d) Schedule and Duration; Motion to Terminate or Limit Examination. (1) Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. An instruction not to answer may be made during a deposition only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion pursuant to subsection (d)(3) of this Rule.

(2) (A) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial is limited to one day of seven hours. Upon the motion of any party, by order, the court may limit the time permitted for the conduct of a deposition to less than seven hours, or may allow additional time if needed for a fair examination of the deponent and consistent with C.R.C.P. 26(b)(2), or if the deponent or another person impedes or delays the examination, or if other circumstances warrant. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(B) Depositions of a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial are governed by C.R.C.P. 26(b)(4).

(3) At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in C.R.C.P. 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) – (g) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.
COMMITTEE COMMENTS

1995


[2] A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of depositions and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

[3] Language in C.R.C.P. 30(c) and C.R.C.P. 30(f)(1) differs slightly from the language of Fed.R.Civ.P. 30(c) and Fed.R.Civ.P. 30(f)(1) to facilitate the taking of telephone depositions by eliminating the requirement that the officer recording the deposition be the person who administers the oath or affirmation.

2015

[4] Rule 30 is amended to reduce the time for ordinary depositions from 7 to 6 hours, so that they can be more easily accomplished in a normal business day.
Rule 31. Depositions Upon Written Questions

(a) Serving Questions; Notice.

(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by the use of subpoena as provided in C.R.C.P. 45.

(2) A party must obtain leave of court, and the court must grant leave to the extent consistent with C.R.C.P. 26(b)(2). Leave of court must be obtained pursuant to C.R.C.P. Rules 16(B)(1) and 26(B), if:
   (A) A proposed deposition, if taken, would result in more depositions than set forth in the Case Management Order;
   (B) The person to be examined already has been deposed in the case;
   (C) A party seeks to take a deposition before the time specified in C.R.C.P. 26(d); or
   (D) The person to be examined is confined in prison.

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:
   (A) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; and
   (B) the name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation, or a partnership, or association, or governmental agency in accordance with the provision of C.R.C.P. 30(b)(6).

(4) Within 21 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 14 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve re-cross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) – (c) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.
1995

[1] Revised C.R.C.P. 31 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

[2] A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of depositions and the basis for the necessity of such discovery with attention to the presumptive limitations and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.
Rule 33. Interrogatories to Parties

(a) [NO CHANGE]

(b) Answers and Objections.

(1) An objection must state with specificity the grounds for objection to the Interrogatory and must also state whether any responsive information is being withheld on the basis of that objection. A timely objection to an Interrogatory stays the obligation to answer those portions of the Interrogatory objected to until the court resolves the objection. No separate motion for protective order pursuant to C.R.C.P. 26(c) is required. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 35 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties pursuant to C.R.C.P. 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection will be deemed to be waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) – (e) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

Committee Comments

1995

[1] Revised C.R.C.P. 33 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

[2] A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of interrogatories and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the
requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.
Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) [NO CHANGE]

(b) Procedure. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and-or category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 35 days after the service of the request. A shorter or longer time may be directed by the court or agreed to in writing by the parties pursuant to C.R.C.P. 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, or state with specificity the grounds for objecting to the request unless the request is objected to, in which event the reasons for objection shall be stated. The responding party may state that it will produce copies of information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, the part shall be specified. A timely objection to a request for production stays the obligation to produce which is the subject of the objection until the court resolves the objection. No separate motion for protective order pursuant to C.R.C.P. 26(c) is required. The party submitting the request may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. As provided in C.R.C.P. 45, this rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

1995

[1] Revised C.R.C.P. 34 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.
A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of requests for production and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

Rule 34 is changed to adopt similar revisions as those proposed to Fed. R. Civ. P. 34, which are designed to make responses to requests for documents more meaningful and transparent. The first amendment is to avoid the practice of repeating numerous boilerplate objections to each request which do not identify specifically what is objectionable about each specific request. The second amendment is to allow production of documents in place of permitting inspection but to require that the production be scheduled to occur when the response to the document request is due, or some other specific and reasonable date. The third amendment is to require that when an objection to a document request is made, the response must also state whether, in fact, any responsive materials are being withheld due to that objection. The fourth and final amendment is simply to clarify that a written objection to production under this Rule is adequate to stop production without also filing a motion for a protective order.
Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery and imposing sanctions as follows:

(1) Appropriate Court. An application for an order to a party or to a person who is not a party shall be made to the court in which the action is pending.

(2) Motion. (A) If a party fails to make a disclosure required by C.R.C.P. 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted pursuant to C.R.C.P. Rules 30 or 31, or a corporation or other entity fails to make a designation pursuant to C.R.C.P. Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted pursuant to C.R.C.P. 33, or if a party, in response to a request for inspection submitted pursuant to C.R.C.P. 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the disclosure without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subsection an evasive or incomplete disclosure, answer, or response shall be deemed a failure to disclose, answer, or respond.

(4) Expenses and Sanctions. (A) If a motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court may, after affording an opportunity to reasonable notice and an opportunity to be heard, if requested, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(B) If a motion is denied, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard if requested, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses manifestly unjust.
(C) If the motion is granted in part and denied in part, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Non-Party Deponents-Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in which the action is pending or from which the subpoena is issued, the failure may be considered a contempt of court.

(2) Party Deponents-Sanctions by Court. If a party or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this Rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

COMMITEE COMMENT

Subsection (b)(1) was modified to reflect that orders to deponents under subsection (a)(1), when the depositions are taking place within this state, are sought in and issued by the court where the action is pending or from which the subpoena is issued pursuant to Section 13-90-111, C.R.S., and it is that court which will enforce its orders. Deponents appearing outside the state are beyond the jurisdictional limits of the Colorado courts. For out-of-state depositions, any problems should be addressed by the court of the jurisdiction where the deponent has appeared for the deposition under the laws of that jurisdiction.

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring the party to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of
this subsection (2), unless the party failing to comply shows that he is unable to produce such
person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party
failing to obey the order, or the attorney advising the party, or both, to pay the reasonable
expenses, including attorney's fees, caused by the failure, unless the court finds that the failure
was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. (1) A party that
without substantial justification fails to disclose information required by C.R.C.P. Rules 26(a) or
26(e) shall not, unless such failure is harmless, be permitted to present any evidence not so
disclosed at trial or on a motion made pursuant to C.R.C.P. 56, unless such failure has not caused
and will not cause significant harm, or such preclusion is disproportionate to that harm. In
addition to or in lieu of this sanction, the court, on motion after affording an opportunity to be
heard, may impose other appropriate sanctions, which, in addition to requiring payment of
reasonable expenses including attorney fees caused by the failure, may include any of the actions
authorized pursuant to subsections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of this Rule. The court,
after holding a hearing if requested, may impose any other sanction proportionate to the harm,
including any of the sanctions authorized in subsections (b)(2)(A), (b)(2)(B) and (b)(2)(C) of this
Rule, and the payment of reasonable expenses including attorney fees caused by the failure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as
requested pursuant to C.R.C.P. 36, and if the party requesting the admissions thereafter proves
the genuineness of the document or the truth of the matter, the requesting party may apply to the
court for an order requiring the other party to pay the reasonable expenses incurred in making
that proof, including reasonable attorney fees. The court shall make the order unless it finds that

(A) the request was held objectionable pursuant to C.R.C.P. 36(a), or

(B) the admission sought was of no substantial importance, or

(C) the party failing to admit had reasonable ground to believe that the party might prevail on the
matter, or

(D) there was other good reason for the failure to admit.

(d) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMITTEE COMMENTS

1990
Subsection (b)(1) was modified to reflect that orders to deponents under subsection (a)(1), when the depositions are taking place within this state, are sought in and issued by the court where the action is pending or from which the subpoena is issued pursuant to Section 13-90-111, C.R.S., and it is that court which will enforce its orders. Deponents appearing outside the state are beyond the jurisdictional limits of the Colorado courts. For out-of-state depositions, any problems should be addressed by the court of the jurisdiction where the deponent has appeared for the deposition under the laws of that jurisdiction.

1995

Revised C.R.C.P. 37 is patterned substantially after Fed.R.Civ.P. 37 as amended in 1993 and has the same numbering. There are slight differences: (1) C.R.C.P. 37(4)(a) and (b) make sanctioning discretionary rather than mandatory; and (2) there is no State Rule 37(e) [pertaining to sanctions for failure to participate in framing of a discovery plan]. As with the other disclosure/discovery rules, revised C.R.C.P. 37 forms a part of a comprehensive case management system. See Committee Comments to C.R.C.P. 16, 26, 30, 31, 33, 34, and 36.

2015

The threat and, when required, application, of sanctions is necessary to convince litigants of the importance of full disclosure. Because the 2015 amendments also require more complete disclosures, Rule 37(a)(4) now authorizes, for motions to compel disclosures or discovery, imposition of sanctions against the losing party unless its actions “were substantially justified or that other circumstances make an award of expenses manifestly unjust.” This change is intended to make it easier for judges to impose sanctions.

On the other hand, consistent with recent supreme court cases such as Pinkstaff v. Black & Decker (U.S.), Inc., 211 P.3d 698 (Colo. 2009), Rule 37(c) is amended to reduce the likelihood of preclusion of previously undisclosed evidence “unless such failure has not caused or will not cause significant harm, or such preclusion is disproportionate to that harm.” When preclusion applied “unless the failure is harmless,” it has been too easy for the objecting party to show some “harm,” and thereby cause preclusion of otherwise important evidence, which, in some circumstances, conflicts with the court’s decisions.
Rule 54. Judgments; Costs

(a) – (c) [NO CHANGE]

COMMITTEE COMMENT

The amendment to C.R.C.P. 54(c) is to eliminate what has been perceived as a possible conflict between that section and the recent change to C.R.C.P. 8(a) which prohibits statement of amount in that ad damnum. The amendment simply strikes the words “or exceed in amount” to make the section consistent with C.R.C.P. 8(a). Relief sought in the prayer is now described rather than stated as an amount. It is, therefore, not necessary to have an amount limitation in C.R.C.P. 54(c).

(d) Costs. Except when express provision therefor is made either in a statute of this state or in these rules, reasonable costs shall be allowed as of course to the prevailing party considering any relevant factors which may include the needs and complexity of the case and the amount in controversy, unless the court otherwise directs. But costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(e) – (h) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMENTS

1989

[1] The amendment to C.R.C.P. 54(c) is to eliminate what has been perceived as a possible conflict between that section and the recent change to C.R.C.P. 8(a) which prohibits statement of amount in that ad damnum. The amendment simply strikes the words “or exceed in amount” to make the section consistent with C.R.C.P. 8(a). Relief sought in the prayer is now described rather than stated as an amount. It is, therefore, not necessary to have an amount limitation in C.R.C.P. 54(c).

2015

[2] Rule 54(d) is amended to require that cost awards be “reasonable” by directing courts to consider any relevant factors, which may include the needs and complexity of the case, and the amount in controversy.

[3] The reasonableness requirement is consistent with §13-16-122, C.R.S., which lists matters included in cost awards, because it can hardly have been the intent of the legislature to authorize unreasonable awards.

Section 1-22
COSTS AND ATTORNEY FEES

1. COSTS. A party claiming costs shall file a Bill of Costs within 21 days of the entry of order or judgment, or within such greater time as the court may allow. The Bill of Costs shall itemize and provide a total of costs being claimed. Taxing and determination of costs shall be in accordance with C.R.C.P. 54(d) and Practice Standard § 1-15. Any party that may be affected by the Bill of Costs may request a hearing within the time permitted to file a reply in support of the Bill of Costs. Any request shall identify those issues that the party believes should be addressed at the hearing. When required to do so by law, the court shall grant a party’s timely request for a hearing. In other cases where a party has made a timely request for a hearing, the court shall hold a hearing if it determines in its discretion that a hearing would materially assist the court in ruling on the motion.

2. [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMITTEE COMMENTS

1992

[1]: —COSTS. This Standard establishes a uniform, optimum time within which to claim costs. The 15 day requirement encourages prompt filings so that disputes on costs can be determined with other post-trial motions. This Standard also requires itemization and totaling of cost items and reminds practitioners of the means of determining disputes on costs. C.R.S. 13-16-122 (1981) sets forth those items generally awardable as costs.

[2]: —ATTORNEY FEES. Subject to certain exceptions, this Standard establishes a uniform procedure for resolving attorney fee disputes in matters where the request for attorney fees is made at the conclusion of an action or where attorney fees are awarded to the prevailing party (see “Scope”). Unless otherwise ordered by the court, attorney fees under C.R.S. 14-10-119 should be heard at the time of the hearing on the motion or proceeding for which they are requested.

2015

[3] The prior version of Rule 121, Section 1-22(2) addressed when and under what circumstances a party is entitled to a hearing regarding an award of attorney fees, but no rule addressed the circumstances regarding a hearing on costs. The procedural mechanisms regarding awards of attorney fees and awards of costs should be the same, and thus the rule change adds the existing language regarding hearings on attorney fees to awards of costs.
District Court _______________________ County, Colorado
Court Address: ____________________________________________________________

Plaintiff(s): _____________________________________________________________

v.                                                                                   ▲ COURT USE ONLY ▲

Defendant(s): ______________________________________________________________

Responsible attorney or if no responsible attorney pursuant to C.R.C.P. 16(b)(2), Plaintiff’s name and address:

Phone Number: __________________ E-mail: __________________ Atty. Reg. #: __________

FAX Number: __________________

Case Number: __________________ Division __________ Courtroom __________

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PROPOSED CASE MANAGEMENT ORDER

Pursuant to C.R.C.P. 16(b), the parties should discuss each item below. If they agree, the agreement should be stated. If they cannot agree, each party should state its position briefly. If an item does not apply, it should be identified as not applicable.

This form shall be submitted to the court in editable format. When approved by the court, it shall constitute the Case Management Order for this case unless modified by the court upon a showing of good cause.

This form must be filed with the court no later than 42 days after the case is at issue and at least 7 days before the date of the case management conference.

The case management conference is set for _____________ ___, 20_____ at __:___.m.

1. The “at issue date” is: ________________________________________________________.

2. Responsible attorney’s name, address, phone number and email address:

   ________________________________________________________________

3. The lead counsel for each party, ________________________________________, and any party not represented by counsel, ____________________________, met and conferred in person or by telephone concerning this Proposed Order and each of the issues listed in Rule 16(b)(3)(A) through (E) on _____________ ___, 20____.
4. Brief description of the case and identification of the issues to be tried (not more than one page, double-spaced, for each side): _______________________________________________

5. The following motions have been filed and are unresolved:
____________________________________________________________________________

6. Brief assessment of each party’s position on the application of the proportionality factors, including those listed in C.R.C.P. 26(b)(1): ____________________________________________

7. The lead counsel for each party, _______________________________________________, and any party not represented by counsel, ______________________________________, met and conferred concerning possible settlement. The prospects for settlement are:
____________________________________________________________________________

8. Deadlines for:
   a. Amending or supplementing pleadings: (Not more than 105 days (15 weeks) from at issue date.)
      ______________________________________________________________

   b. Joinder of additional parties: (Not more than 105 days (15) weeks from at issue date.)
      ______________________________________________________________

   c. Identifying non-parties at fault:_______________________________________

9. Dates of initial disclosures: _________________________________________________
   Objections, if any, about their adequacy: ______________________________________

10. If full disclosure of information under C.R.C.P. 26(a)(1)(C) was not made because of a party’s inability to provide it, provide a brief statement of reasons for that party’s inability and the expected timing of full disclosures __________________________________________, and completion of discovery on damages: _______________________________________

11. Proposed limitations on and modifications to the scope and types of discovery, consistent with the proportionality factors in C.R.C.P. 26(b)(1): __________________________________________

    Number of depositions per party (C.R.C.P. 26(b)(2)(A) limit 1 of adverse party + 2 others + experts per C.R.C.P. 26(b)(4)(A)): __________________________________________

    Number of interrogatories per party (C.R.C.P. 26(b)(2)(B) limit of 30): ______________

    Number of requests for production of documents per party (C.R.C.P. 26(b)(2)(D) limit of 20): _________________________

    Number of requests for admission per party (C.R.C.P. 26(b)(2)(E) limit of 20): _________

    Any physical or mental examination per C.R.C.P. 35: ____________________________
Any limitations on awardable costs: ________________________________

State the justifications for any modifications in the foregoing C.R.C.P. 26(b)(2) limitations:

______________

12. Number of experts, subjects for anticipated expert testimony, and whether experts will be under C.R.C.P. 26(a)(2)(B)(I) or (B)(II):

__________

If more than one expert in any subject per side is anticipated, state the reasons why such expert is appropriate consistent with proportionality factors in C.R.C.P. 26(b)(1) and any differences among the positions of multiple parties on the same side:

______________

13. Proposed deadlines for expert witness disclosure if other than those in C.R.C.P. 26(a)(2):

a. production of expert reports:
   i. Plaintiff/claimant: ________________________________
   ii. Defendant/opposing party: ________________________________

b. production of rebuttal expert reports: ________________________________

c. production of expert witness files: ________________________________

State the reasons for any different dates from those in C.R.C.P. 26(a)(2)(C): _______________ ________________

______________

14. Oral Discovery Motions. The court (does)(does not) require discovery motions to be presented orally, without written motions or briefs.

______________

15. Electronically Stored Information. The parties (do)(do not) anticipate needing to discover a significant amount of electronically stored information. The following is a brief report concerning their agreements or positions on search terms to be used, if any, and relating to the production, continued preservation, and restoration of electronically stored information, including the form in which it is to be produced and an estimate of the attendant costs.

______________

16. Parties’ best estimate as to when discovery can be completed: ________________

Parties’ best estimate of the length of the trial: ______________________________________
Trial will commence on (or will be set by the court later): ____________________________

17. Other appropriate matters for consideration:
______________________________________________________________________________

DATED this ____ day of ____________, 20____.

__________________________________________  __________________________
Signature                                      Signature
__________________________________________  __________________________
Attorney for Plaintiff                        Attorney for Defendant

CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED that the foregoing, including any modifications made by the court, is
and shall be the Case Management Order in this case.

Dated this ___ day of ______________, 20__.

BY THE COURT:

__________________________________________
District Court Judge

Amended and Adopted by the Court, En Banc, May 28, 2015, effective July 1, 2015 for cases
filed on or after July 1, 2015.

By the Court:

Allison H. Eid
Justice, Colorado Supreme Court
August 21, 2015

Duke Conference Discovery Subcommittee
   of the Advisory Committee on the Civil Rules
C/O: John Rabiej
Director of the Center for Judicial Studies Duke University Law School
Room 2201A
210 Science Drive
Box 90362
Durham, NC 27708
Via email to: john.rabiej@law.duke.edu

Re: July 31, 2015 Draft "Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality"

Dear Sirs and Madams:

I represent the Western Pennsylvania Employment Lawyers Association (“WPELA”) in the capacity of Vice Chairman. WPELA, an affiliate of the National Employment Lawyers Association (“NELA”), is comprised of more than 40 lawyers dedicated to enforcing federal and state laws prohibiting discrimination and retaliation in the workplace. NELA was founded in 1985 and is the country’s only professional organization that is comprised exclusively of lawyers who represent employees in cases involving employment discrimination, employee benefits, and other employment-related matters. NELA has a membership of lawyers in all 50 states and the District of Columbia.

I write to express WPELA’s strong concerns regarding the draft guidelines referenced above. As written, the draft guidelines will tilt the playing field between employers and employees in civil rights cases even further in favor of employers, and will spur satellite litigation over discovery matters, consuming resources that could either be saved altogether or devoted to resolving the merits of the controversy.

Fed. R. Civ. P. 1 provides that the FRCP “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The draft guidelines must be measured against the objectives of Rule 1. WPELA believes that many courts will read the draft guidelines in a way that prevents employees from obtaining information necessary for a just disposition of their claims, slows the pace of employment litigation in federal court, and drives the expenses of litigation up, not down.

When an employment discrimination case begins, everything favors the employer. The employer has vastly superior financial resources, vastly superior information and a facially plausible storyline about why it acted the way it did. The employer also controls all the documents and usually all the witnesses.
In contrast, a typical employee has often been terminated and is laboring under tremendous financial and emotional stresses. The former employee has no access to the documents and witnesses necessary to pierce through the employer’s storyline and prove her claims. Informal discovery is all but impossible, with ex parte interviews of current employees often being prohibited by state ethical rules, and because current employees simply clam up, fearful of retaliation.

Employers know that if they can starve a claim of evidence, the claim will die. This is why employers go to extremes to avoid disclosing information in discovery. What should be routine, cooperative discovery to promote a decision on the merits is instead combative and protracted. Obtaining even basic information from an employer is often an exercise in pulling teeth. In my 19 years of practice, for example, every discovery request I have ever issued has been objected to as irrelevant, overbroad as to subject matter and duration, unduly burdensome, disproportionate to the needs of the case and calculated solely to harass and annoy. Employers object to discovery requests routinely and indiscriminately, resulting in extensive, time-consuming negotiations and motions practice more often than not.

Because courts grant summary judgment at a statistically significant and disproportionately high rate in employment cases, see, Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 Harv. L. & Pol’y Rev. 103 (2009), discovery is absolutely critical. Only discovery begins to level the playing field between the parties. Only discovery transfers information from the employer to the employee. And only discovery permits the employee any chance of surviving summary judgment and presenting her claims to a jury. Therefore, a useful guide to the application of the proportionality standard in employment cases would recognize that discovery on the merits of the case - discovery into the employer’s practices, exceptions to those practices, its policies, implementation of those policies, departures from those policies, the experiences of other employees, the possible pretextual character of the explanations offered by the employer, and so forth - should not be limited.

Where Congress has decided that enforcement of a specific statute or the Constitution is so important that the litigation of a type of case should be encouraged, the separation of powers requires that that determination be respected even if there are no monetary stakes, or if they are small. Similarly, it does not matter whether a case is precedent-setting or routine: if Congress has determined that the litigation of the case is important, its judgment should be respected in framing any guidelines or suggested practices. The guidelines also should make clear that because of the importance of the issues at stake in statutory discrimination and constitutional tort cases, proportionality can require more discovery not less.
WPELA concurs in all respects with Richard T. Seymour, Esq., whose thoughtful, written comments have been separately submitted.

Sincerely,

[Signature]

Charles A. Lamberton
Vice Chair, Western Pennsylvania Employment Lawyers Association

CAL.cal
August 21, 2015

To: Duke Conference Discovery Subcommittee of the Advisory Committee on the Civil Rules

c/o John Rabiej, Director of the Center for Judicial Studies
Duke University Law School - Room 2201A
210 Science Drive, Box 90362
Durham, NC 27708
john.rabiej@law.duke.edu

From: Heninger Garrison Davis, LLC

Re: Memorandum to Duke Conference Subcommittee on the Draft Guidelines on Proportionality

Our firm has represented Plaintiffs in numerous types of cases nationwide during the many years of our lawyers’ legal career. While some of our cases have been in State courts, many have been in Federal court. We believe the July 31st proposed guidelines and suggested practices will be more harmful than helpful to practitioners and the courts and urge you not to adopt them.

The overriding tone of the draft is one of limiting discovery and frightening economically weaker parties with threats of ruinous cost-shifting. Whether intended or not, this draft will encourage judges to limit access to justice by limiting the discovery necessary for a meritorious case to prevail. Whether intended or not, the draft will have an in terrorem effect leading some economically weaker parties not to pursue discovery. Some courts apply the fee-shifting provisions in Rule 37 automatically, and this also tends to lead some economically weaker parties not to pursue motions to compel discovery. I have seen this in my own practice.
A. Overlooked Problems of Context that Apply to All the Guidelines and Suggested Practices

It is critical to keep in mind the context in which discovery currently takes place, for any guidelines or suggested practices to be both useful and fair.

1. The Effect of Ubiquitous Motions for Summary Judgment on the Extent of Discovery Needed in Cases

Love them or hate them, summary judgment motions in federal cases are ubiquitous.¹ The disposition of cases by summary judgment is also common. This has had an enormous effect on the extent of pretrial discovery legitimately needed in cases.

Previously, parties were confident they could cross-examine all opposing witnesses at trial, and did not see the need to depose them all in discovery. A lot of our depositions were short and narrow affairs, intended to get at only a couple of topics. Twenty minutes a witness was all we needed.

With the vanishing number of trials in employment discrimination and civil rights cases,² no one can any longer be confident of there being a real trial with live witnesses. Plaintiffs' attorneys now have to approach every deposition with an eye to finding out everything the witness knows, about any and every topic that could conceivably be raised in a summary judgment motion. We have no advance word about the basis for the summary judgment motion that might ultimately be filed, and need to seek every document about everything remotely relevant, and ask witnesses about the documents, in order to protect against any conceivable argument a defendant might make in support of summary judgment. The process requires far more discovery than was formerly necessary.

Any useful guide to the application of the proportionality standard in employment cases should recognize that discovery on the merits of the case — discovery into the employer’s practices, exceptions to those practices, its policies, implementation of those policies, departures from those policies, the experiences of other employees, the possible pretextual character of the explanations offered by the employer, and so forth — should not be limited.

¹ E.g., Maitin v. Hospira, Inc., 762 F.3d 552, 564-65 (7th Cir. 2014).

² In 1990, 8.7% of employment discrimination cases were resolved by trial. In 2006, only 3.2% were resolved by trial. Table 5, p. 6, August 2008 Civil Rights Complaints in U.S. District Courts, 1990-2006, downloaded from www.bjs.gov/content/pub/pdf/ccrsd06.pdf on March 23, 2015. There is no more-current data showing whether the decline has continued, accelerated, or slackened.
2. The Reality That Defendants Routinely Abuse Their Economic Advantages to Make Discovery Unduly Difficult

The 2013 and 2014 comments and testimony on rules amendments are still valuable sources of information on defendants’ tendency to maximize their economic advantage to help avoid accountability. The phrase “make plaintiffs work for it” is very popular among my defense-counsel friends. Courts have also commented on the overly aggressive nature of some defenses. Uncooperative and unduly aggressive defendants increase plaintiffs’ time and expense to get needed discovery. The resulting rules have recognized this by closing off some of defendants’ biggest bolt-holes under Rule 34.

Yet the draft guidelines seem to assume that both sides will act in good faith, and are devoted to the disclosure of documents enabling the other side to get to the merits. This has actually been true in some of my cases, but is far from the norm in many others. Because the underlying assumptions do not correspond with this reality, they are not likely to work as intended.

One useful corrective to include in the guidelines and suggested practices is a provision stating that any party forfeits proportionality analysis when it overstates the difficulty or expense in providing discovery, or asserts a multitude of unfounded objections. Such a provision will provide an ongoing incentive to comply, and encourage self-policing.

B. The Proposed Guidelines and Suggested Practices Greatly Overstate the Importance of the Monetary Stakes

E.g., Lipsett v. Blanco, 975 F.2d 934, 939 (1st Cir. 1992) (“This case was bitterly contested. Appellants mounted a Stalingrad defense; resisting Lipsett at every turn and forcing her to win her hard-earned victory from rock to rock and from tree to tree.”) (Title VII and Puerto Rico law sexual harassment case); Cuff v. Trans States Holdings, Inc., 768 F.3d 605, 611 (7th Cir. 2014) (“A business that can establish a reputation for intransigence may end up not paying damages and not having to defend all that often either, because if a prevailing party who litigates to victory gets only a small award of fees the next would-be victim will see that litigation is futile and the employer won’t have to repeat the costly defense.”) (FMLA interference case) (emphasis in original).

The June 14, 2014 Report of Judge Campbell, the Chair of the Advisory Committee on the Civil Rules to Judge Sutton, the Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated in Rules Appendix B-11:

These amendments should eliminate three relatively frequent problems in the production of documents and ESI: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting; responses that state various objections, produce some information, and do not indicate whether anything else has been withheld from discovery on the basis of the objections; and responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production. All three practices lead to discovery disputes and are contrary to Rule 1’s goals of speedy and inexpensive litigation.
1. The Overstatements

(a) Guideline 2(A)

Guideline 2(A) states:

*Guideline 2(A): “Importance of Issues at Stake”—This factor focuses on measuring the importance of the issues at stake in a particular case. This factor applies when the money the parties stand to gain or lose in a particular case is inadequate to measure the importance or value of the issues involved.*

The guideline suggests that there is only one norm for evaluating the importance of a case, and that any other measure of value is an exception to this one norm. This overstates the importance of the monetary stakes, and ignores the importance of enforcement of Constitutional and statutory commands in deterring future violations by defendants and by others who will learn from their example.

The explanation that this guideline refers to cases seeking to enforce statutory or constitutional rights is stated only in the non-emphasized commentary. The explanation needs to be elevated into the emphasized text, and the emphasized text should say that there are multiple norms for evaluating the importance of a case: (a) the public importance of the case as shown by the fact that Constitutional or statutory rights are being enforced or that Congress or another legislature has authorized the court to award attorneys’ fees, (b) the importance of enforcement to deter violations by the defendants and others, and (c) the monetary stakes.

Where Congress has decided that enforcement of a specific statute or the Constitution is so important that the litigation of a type of case should be encouraged, the separation of powers requires that that determination be respected even if there are no monetary stakes, or if they are small. Similarly, it does not matter whether a case is precedent-setting or routine: if Congress has determined that the litigation of the case is important, its judgment should be respected in framing any guidelines or suggested practices. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32-33 (5th Cir. 1968), said it well:

> Although there are restrictions both in time and pre-conditions for court action this does not minimize the role of ostensibly private litigation in effectuating the congressional policies. To the contrary, this magnifies its importance while at the same time utilizing the powerful catalyst of conciliation through EEOC. The suit is therefore more than a private claim by the employee seeking the particular job which is at the bottom of the charge of unlawful discrimination filed with EEOC. When conciliation has failed—either outright or by reason of the expiration of the statutory time-table—that individual, often obscure, takes on the mantel of the sovereign. *Newman v. Piggie Park Enterprises*, 1968,
390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263; *Oatis v. Crown Zellerbach, supra.* And the charge itself is something more than the single claim that a particular job has been denied him. Rather it is necessarily a dual one: (1) a specific job, promotion, etc. has actually been denied, and (2) this was due to Title VII forbidden discrimination.

Considering that in this immediate field of labor relations what is small in principal is often large in principle, FN9 element (2) has extreme importance with heavy overtones of public interest. Whether in name or not, the suit is performa a sort of class action for fellow employees similarly situated. Consequently, while we do not here hold that such a "private Attorney General" 10 is powerless absence court approval to dismiss his suit, see F.R.Civ.P. 41(a)(2); the court, over the suitor's protest, may not do it for him without ever judicially resolving by appropriate means (summary judgment, trial, etc.) the controverted issue of employer unlawful discrimination.

In dollars Employee's claim for past due wages may be tiny. But before a Court as to which there is no jurisdictional minimum, (§ 706(f), 42 U.S.C.A. § 2000e-5(f)), it is enough on which to launch a full scale inquiry into the charged unlawful motivation in employment practices. It is even more so considering the prayer for injunction as a protection against a repetition of such conduct in the future.

FN9/ In *United States Gypsum Co. v. United Steelworkers of America,* 5 Cir., 1967, 384 F.2d 38, 45-46, cert. denied, 1968, 389 U.S. 1042, 88 S.Ct. 783, 19 L.Ed.2d 832, we had this to say:

‘Nationwide activity can grind to a halt over the question of who is to throw a switch. Problems which to the outsider seem petty are thought by the adversaries to be matters of great principle, if not principal.’

See *Atlanta Terminal Company & Southern Ry. Co. v. System Federation No. 21, Railway Employees' Dept., AFL-CIO,* 5 Cir., 1968, 397 F.2d 250, affirming a District Court award of $12,000 in attorney fees on a recovery of $2,286.54 in damages. See also *Local No. 92, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Norris,* 5 Cir., 1967, 383 F.2d 735.

Title VII of the Civil Rights Act of 1964 and the other civil rights laws and employment were enacted with the expectation that they would create sweeping changes in the lives and workplaces of Americans nationwide. To do so, they must be enforced. In the age of constant budget cuts, government agencies bring fewer and fewer cases, 5 and private enforcement has to

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5 The EEOC received 88,778 charges of discrimination in FY 2014, and brought only 133 cases on the merits. See http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfms for the charge receipts, and http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfms for the litigation figures, both downloaded on August 18, 2015.
pick up the slack. If judges were subjectively to separate out “important” from “unimportant” civil rights and employment cases, and limit discovery in the latter, that subjective division would quickly become a docket-clearing device, and compliance with the Constitutional and statutory mandates would become the exception rather than the Congressionally-mandated norm.

These changes are necessary in order to make this Guideline balanced. I suggest that Guideline 2(A) be revised as follows:

Suggested Guideline 2(A): “Importance of Issues at Stake”—This factor focuses on measuring the importance of the issues at stake in a particular case. The importance of the issues includes both the public importance of the case—Constitutional cases, statutory enforcement cases, cases in which Congress or another legislative body has decided are important by authorizing an award of attorneys’ fees—and the impact of the case on the parties, including ensuring that they and similar actors follow the commands of the Constitution and statutes in the future. In a case seeking only monetary relief, this refers to the money the parties stand to gain or lose.

(b) Guideline 2(B) and the Commentary

Guideline 2(B) states:

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.

Thus, Guideline 2(A)’s focus on monetary relief as the norm is repeated in Guideline 2(B).

Guideline 2(B) also subjects declaratory and injunctive relief—often the most important relief in a Constitutional or statutory case—to the Procrustean standard of “the pecuniary value of that relief.”

How does one define the pecuniary value of school desegregation? Of an injunction against racial profiling of motorists by highway patrol officers? Of reinstatement of a whistleblower? Of protection from harassment? Of the end of a pattern of racial or sexual discrimination in promotions? Of the freedom to engage in a peaceful demonstration?

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6 See the second definition in http://www.merriamwebster.com/dictionary/procrustean.
Indeed, in a business context, how does one define the pecuniary value of the permanent enforcement of a copyright or trademark? Of the end of an anticompetitive practice? Of the invalidation of a patent?

Getting beyond Constitutional and statutory enforcement altogether, how does one define the pecuniary value of a refusal to enforce an overbroad noncompete clause? Of the correction of a practice prone to fraud? Of the inclusion of an environmental or other measure on a corporate shareholders’ ballot? Of an easement allowing the use of an asset?

The present draft over-emphasizes the importance of monetary relief and, as to injunctions and declaratory relief, subordinates everything to an assumed but unavailable measure of pecuniary relief.

Corrective changes are necessary in order to make this Guideline balanced, and to avoid the implication that only the only relief of value is relief that can be reduced to pecuniary value. I suggest eliminating the word “financially” from the first sentence of Guideline 2(B), and prefacing the second sentence with the phrase “In cases seeking only monetary relief,”. The revised Guideline would read:

*Suggested Guideline 2(B): “Amount in Controversy”*—This factor examines what the parties stand to gain or lose in a particular case as part of deciding what discovery burdens and expenses are reasonable for that case. In cases seeking only monetary relief, the amount in controversy is usually the amount the plaintiff claims or could claim in good faith.

In the Commentary, the sentence on the pecuniary value of injunctive and declaratory relief should be deleted.

(c) Guideline 2(C) and the Last Paragraph of the Commentary

Guideline 2(C) and the last paragraph of the Commentary state:

*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 examined include the extent to which a party needs formal discovery because relevant information or its reasonable equivalent is not otherwise available to that party.

**Commentary**

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information, but without the unfairness that can result when the asymmetries are leveraged for tactical advantage. Unfairness can occur
when a party with significantly less information imposes unreasonable demands on the party that has voluminous information, or when a party with significantly more information provides the requesting party with unreasonable amounts of information that is difficult to organize or search.

My problems are with the Commentary.

The discovery standard is “relevant” information, not the more restrictive “necessary” information. As my other comments attest, it is also impossible to determine in advance what relevant information will ultimately be “necessary,” “core,” “peripheral” or otherwise.

What is the basis for the inclusion of a statement suggesting routine abuses of discovery by the less-informed parties? Unreasonable discovery requests can readily be handled outside the scope of these Guidelines, and there is no reason to make suggestions here that will embolden defendants to try to shield information that could be used to establish liability.

This suggestion should be deleted in order to make this Guideline balanced, and to avoid placing a thumb on the scale in favor of defendants with better access to information. I suggest the following re-wording:

When a case involves information asymmetry or inequality, proportionality requires permitting all parties access to necessary information. It does not mean that the party with access to more information only needs to provide discovery proportional to what is provided by the party with less information.

(d) Guideline 2(D) and the Commentary

Guideline 2(D) and the problematic parts of the Commentary states:

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 sought simply because it may have the resources to do so. Nor does it 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 critical point is what resources a party reasonably has available for discovery, when it is needed. Determining what resources a party can reasonably be expected to expend on discovery may require considering that party's competing demands for those resources.

It does not take a prophet to see where this commentary will lead: routine defense demands for an examination of the plaintiffs' personal resources. These demands used to be common in defense efforts to stop class certification in its tracks. The courts recognized the relevance of the factor in instances where plaintiffs' counsel did not agree to bear the costs, but barred extensive discovery on the grounds it may be harassing. WRIGHT, MILLER, KANE, MARCUS, AND STEINMAN, 7A FED. PRAC. & PROC. CIV. § 1767 (3d ed., West online edition, 2015), states:

The consideration of the representatives' financial adequacy has raised some problems. In particular, a question has been raised concerning whether the class opponents can engage in extensive discovery into the financial means of the representatives in order to ascertain whether the requirement is met.14/ Most courts have been careful to guard against the possibility that defendants may harass plaintiffs by this type of discovery.15/ As stated by the Tenth Circuit,

Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, we address ourselves to the merits of the litigation. We recognize that the class action is unique and we see the necessity for the court to be satisfied that the plaintiff or plaintiffs can pay the notice costs, and we also agree fully with the Court's ruling in Eisen that due process requires decent notice. But we do not read Eisen as creating a presumption against finding a class action. Nor does it approve oppressive discovery as a means of discouraging a private antitrust action which, if meritorious, advances an important interest of the government.16/

Discovery pertaining to plaintiffs' understanding of the obligation to pay costs may be allowed,17/ however. Further, one court has ruled that plaintiffs' submission to the court in camera of affidavits concerning their financial means would satisfy any request for discovery on that issue.18/ Other courts have satisfied themselves as to plaintiffs' ability
to finance the action on the basis of sworn statements by the plaintiffs that they had adequate means.19/


What the courts saw as potentially harassing in the context of plaintiffs trying to serve as class representatives would be far worse if applied to the 24,118 employment cases filed in U.S. District Courts annually, as of calendar 2014.7 This is 16.1% of all Federal-question cases filed in calendar 2014, or one of every 6.2 Federal-question cases. This is not a small concern.

The ordinary plaintiff is very fearful of retaliation. Her or his lawsuit in Federal court is usually the first time she or he has been in Federal court, and she or he are very conscious of the fact that their case involves one person with very little power or resources going up against a large employer with far more resources. If the price of being in Federal court is submission to an intrusive examination of the details of their finances, many will withdraw their suits out of fear that this invasion of privacy could lead to their defendant employer’s pressure on their mortgage lender, and every other bad consequence that can be imagined. Employers do not have to do these things in order to stoke their fears; their fears are already there.

The problems with the Commentary are the suggestion of starting the case with an inquiry into the parties’ finances, the absence of any protecting or countervailing language, and the inclusion of the second paragraph:

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 sought simply because it may have the resources to do so. Nor does it mean that parties with limited resources can refuse to provide relevant information simply because doing so would be difficult for financial or other reasons.

The second sentence in the second paragraph will lead wealthy defendants to claim exemption from discovery, using their abundance of resources to shield the information on the merits that only they possess. The key should be the information they possess, its importance, and its burden. The possession of wealth should not be a reason to deny needed discovery.

7 This includes the 12,969 cases filed under the category “Civil Rights -- Jobs,” the 1,961 ADA employment cases, the 8,074 FLSA cases, and the 1,114 FMLA cases. Administrative Office of the U.S. Courts, Table C-2. U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending December 31, 2013 and 2014,” downloaded from http://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2014/12/31 on August 17, 2015.
The third sentence in the second paragraph is even worse. Defendants will argue that it has written out of the discovery rules the protection against requests that are unduly burdensome, and will force economically weaker parties to abandon meritorious claims in order to avoid financial ruin.

This sentence is in sharp contrast to the very useful fourth paragraph, and does not seem to be reconcilable with it.

To make the commentary balanced, I suggest you drop the second paragraph.

(e) Guidelines 2(E) and 2(F), and Commentaries

These Guidelines and the relevant parts of their Commentaries state:

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 are to resolving the 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, it 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 benefit to 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 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 and is not proportional. A party objecting on the basis of discovery burden or expense ordinarily has the burden to show the nature and extent of the burden or expense, whether in support of a motion for protection or in response to a motion to compel, because that party usually has superior access to the most relevant information about what providing the requested or proposed discovery will require. The requesting party ordinarily has the burden of explaining the likely benefit of the proposed discovery, whether in response to an objection or in support of a motion to compel, because that party is usually in the better position to address why it needs the discovery.
Commentary

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.

The difficulty is that employers typically do not announce that they have engaged in discrimination or retaliation. Plaintiffs commonly have to prove their cases by a large collection of circumstantial evidence piercing the defendants’ proffered explanations, showing that some comparators are probative and defendants’ comparators are not, defendants’ policies and past implementation of those policies, defendants’ departures from those policies, and every step in the process in which a thumb may have been placed on the scale. One current example of plaintiffs’ need to pierce labyrinthine defenses is Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562 (4th Cir. 2015). Another is Rorrer v. City of Stow, 743 F.3d 1025 (6th Cir. 2014). Discovery is the life’s blood of civil rights and employment cases; unduly limiting it drains the blood necessary for meritorious cases to succeed.

Defendants have been creative in constantly inventing new doctrines to bar evidence or preclude recovery. Defendants also understandably sometimes focus their motions for summary judgment on documents or ideas that plaintiff has not yet adequately explored. For these reasons, it is extremely difficult, in advance of the summary-judgment filing, to determine just what evidence will be fundamental and what will be peripheral. The imposition of so difficult a requirement on the party least able to make the showing would fundamentally tilt the scales of justice in favor of

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8 Several courts have emphasized the rareness of cases involving direct proof of discrimination, and the corresponding need to rely on inferential proof. E.g., Hunt v. Cromartie, 526 U.S. 541 (1999) ("Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence."); Sanders v. New York City Human Resources Administration, 361 F.3d 749, 755, 93 FEP Cases 720 (2d Cir. 2004) ("Courts recognize that most discrimination and retaliation is not carried out so openly as to provide direct proof of it."); Venturelli v. ARC Community Services, Inc., 350 F.3d 592, 599, 93 FEP Cases 1307 (7th Cir. 2003) ("For obvious reasons, we rarely encounter direct evidence."). Citation omitted.), cert. denied, 541 U.S. 1030 (2004).

defendants. The proposed distinction may work in some extreme situations, but simply will not work in the bulk of cases.

One change may make it work: conditioning this guidelines on the defendant’s stipulation that it will not move for summary judgment, or defend at trial, on specified issues or rely on specified factual contentions, unless plaintiff opens the door.

2. The Proposed Guidelines Impermissibly Undermine the Assurances Made by the Rules Committee

(a) Proportionality, and the Importance of the Issues at Stake, Compared with the Monetary Amounts at Stake

When many of the more than 2,000 comments submitted to the Advisory Committee in 2013 and 2014 complained that the proposed new proportionality rule would severely harm individual plaintiffs in civil rights and employment cases, the Advisory Committee re-ordered the statement of considerations to make the importance of the issues the first consideration. The June 14, 2014 Report of Judge Campbell, the Chair of the Advisory Committee on the Civil Rules to Judge Sutton, the Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated in Rules Appendix B-8:

In response to public comments, the Committee also reversed the order of the initial proportionality factors to refer first to “the importance of the issues at stake” and second to “the amount in controversy.” This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern. The Committee Note was also expanded to emphasize that courts should consider the private and public values at issue in the litigation — values that cannot be addressed by a monetary award. The Note discussion draws heavily on the Committee Note from 1983 to show that, from the beginning, the rule has been framed to recognize the importance of non-monetary remedies and to ensure that parties seeking such remedies have sufficient discovery to prove their cases.

A reasonable person looking at this language would conclude that the re-ordering was intended to accomplish something of importance. By contrast, the Commentary to Guideline 3 takes the view that no factor is more important than any other, and states in its last paragraph:

The order in which the proportionality factors appear in the Rule text does not signify relative importance or weight. The 2015 amendments reordered some of the factors, not to endow any of them with special importance, but instead to avoid attaching significance to the order in which they appear.
It is not possible to reconcile this language with Judge Campbell’s report to the Judicial Conference, on which the Judicial Conference presumably thought it could rely in approving this change.

The proposed guidelines should be amended to state clearly that the importance of the issues in the case is more important than the monetary amount at stake.

(b) Asymmetric Discovery

I have explained above why I think the proposed Guidelines’ discussion of asymmetric discovery is likely to lead to defense arguments to shield information on the merits, and to justify imposing ruinous burdens on the economically weaker parties. The June 14, 2014 Report of Judge Campbell, the Chair of the Advisory Committee on the Civil Rules to Judge Sutton, the Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated in Rules Appendix B-8:

Also in response to public comments, the Committee added a new factor: “the parties’ relative access to relevant information.” This factor addresses the reality that some cases involve an asymmetric distribution of information. Courts should recognize that proportionality in asymmetric cases will often mean that one party must bear greater burdens in responding to discovery than the other party bears.

Nothing in Judge Campbell’s remarks lays a foundation for the second paragraph in the Commentary to Guideline 2(E).

To make the draft guidelines balanced, and to be faithful to Judge Campbell’s description to the Judicial Conference, the second paragraph in the Commentary to Guideline 2(E) should be dropped.

D. The Suggested Practices

1. Suggested Practice #1: Bringing Matters to the Court for Efficient Resolution

I have observed above, that plaintiffs with limited resources may not press their discovery rights for fear of having to pay the employer’s attorneys’ fees if they lose, because of the presumption of attorneys’ fees under Rule 37, and the practice of some districts in routinely awarding fees against the loser.

Suggested Practice #1 is not likely to succeed in light of these problems. I suggest that the Suggested Practice invite districts to re-examine their practices on the award of fees against losing parties, in order to encourage parties to bring matters to the court for resolution.
2. **Suggested Practice #2 is Useful**

   Experienced counsel will not need an early reminder from the Court, but counsel new to Federal court, and counsel who practice predominantly elsewhere, could benefit substantially from such reminders. A standard instruction to parties can be useful in focusing them, without consuming much of the court’s time.

3. **Suggested Practice #3 Could Consume Too Much Time**

   A live conference may be a good idea in some cases, but the reality is that judicial time is scarce, criminal matters have priority, and it may take too long to schedule a live conference. In one case, my opposing counsel was a former General Counsel of the EEOC, and he and I together had over fifty years’ experience in litigating EEO cases in Federal court. We had to wait several months for a telephonic conference with the Magistrate Judge before the local rules allowed us to proceed. When we had the conference, the Magistrate Judge said it looked as if we knew what we are doing, he had nothing to add, and he told us to go and do what needed to be done.

4. **Suggested Practice #4 on Pre-Discovery Stipulations Will Not Work in Most Cases**

   Some matters can certainly be stipulated at the start of a case, but they will tend to be the least important matters.

   Particularly in employment cases, the reason for the adverse action can change several times during the course of a case, and even the definition of the adverse action, and the date when it occurred, can change in light of discovery. A great deal of refinement ordinarily occurs during the discovery process.

   The time for meaningful stipulations is not at the beginning of the case, prior to discovery, but after discovery has proceeded to the point where responsible stipulations are possible.

   The discussion above on aggressive defense tactics suggest to me that this idea for stipulations to avoid discovery will not work. Often, plaintiffs’ suggested stipulations after discovery are still rejected. The phrase “make the plaintiff work for it” is still the order of the day.

   I am concerned that the inclusion of this suggested practice will result in defense and judicial pressure on plaintiffs to concede issues and facts by stipulation, to serve the goal of reducing discovery, and that plaintiffs without knowledge may succumb to the pressure.
Defendants who already know where the harmful facts are may offer limited stipulations as a tool to bar discovery of more damaging facts.

Excluding prisoner petitions, more than 10% of Federal civil case filings are pro se.\textsuperscript{10} These will be vulnerable, but many others will be as well.

One other point should be mentioned. When a case has some facts reflecting very poorly on a litigant, that litigant will often want to avoid the bad facts coming in by offering to stipulate the point in question. The adverse party may reject the stipulation and prefer to prove the facts at trial, because they are relevant to knowledge, good faith, the \textit{Faragher/Ellerth} defense, or punitive damages. That choice is for the adverse party to make, and the court should not be pressuring the plaintiff to enter into a stipulation that would bar such evidence.\textsuperscript{11}

5. \textbf{Suggested Practices #5 and #6 on Focused Early Discovery Will Not Work}

I regrettfully must oppose the suggestions for focused early discovery. I have often used the approach in my cases where we had the time, particularly when I had questions about exactly what the practices in question were, and how things operated to keep my clients from desired jobs. Clients often have incorrect impressions, because employers generally conceal their practices from employees. As presented, however, the suggested practice will not work.

The most important reason is that it is presented as an excuse for denying discovery. The sixth paragraph in the Commentary states: “The parties and the judge can use the results of the focused early discovery to determine \textit{whether} or \textit{what further discovery is warranted.” (Emphasis supplied.) The first paragraph of the Commentary to Suggested Practice #6 contains the same kind of shot across the bow: “The judge might consider including a statement in the Rule 16(b) case-management order acknowledging that the parties will focus their early discovery and use the results to help decide if more discovery is needed and what it should be.”

Any plaintiff’s lawyer worth his or her salt will recognize this as an invitation to district judges to limit plaintiffs to the first round of discovery, and will resist this as much as possible.

The second reason is that (a) the segregation of discovery efforts into “early” and “late” discovery means that the same persons may need to be deposed more than once, on different

\textsuperscript{10} Table C-13, Civil Pro Se And Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2014 (24,274 pro se non-prisoner filings, out of 234,635 nonprisoner filings).

\textsuperscript{11} See, e.g., \textit{Blue v. IBEW Local 159}, 676 F.3d 579, 585 (7th Cir. 2012) (“Within the limits of Federal Rule of Evidence 403, Blue was entitled to make her case with the evidence of her own choosing.”).
topics and documents, and (b) defendants will need to conduct more than one search and review of the same sets of documents. Quite reasonably, defendants will not want that. They will raise claims of undue burden and, to the extent that the court grants their objections, plaintiffs will be deprived of the discovery they need, solely because of the use of “early, focused discovery.”

The suggested “fix” in the third full paragraph of the Commentary to Suggested Practice #6 is that “the parties and the judge should address the issue by adjusting the scale of early focused discovery to avoid the need for a second deposition from a particular witness or a second search of a particular source, or by expressly permitting limited additional discovery from the same witness or source, or by specifying other appropriate steps.” “Adjusting the scope” will ordinarily be impossible, because one needs the results of full discovery in order to know all the questions and documents the witness may need to address, the second clause of the “fix” simply says “tough,” and the third clause is too vague to permit discussion.

The third reason is that, in “rocket docket” courts using expedited schedules, there is simply no time to do separate waves of discovery. One must be in full running mode all the time.

That said, there may be discrete issues that need to be addressed early, because they could avoid a great deal of work that might then become unnecessary. Statute of limitations questions, adequacy of exhaustion efforts, and the like, could very usefully be the subjects of early, focused discovery.

6. Suggested Practice #7 on Pre-Motion Conferences

The beauty of the Federal Rules of Civil Procedure is that they both allow the parties to make and respond to each others’ points, and also allow the record to reflect what points were and were not raised. Any procedural device that serves these functions but saves time is useful, but any shortcut that does not preserve the record should be rejected. For this reason, the suggested procedure, which does not require any moving or responding paper, is not a good idea.

The proposal can readily be modified to require that short documents must be filed in the record.

7. Suggested Practices #8 and #9

I believe that these suggestions are useful, but point out that summary-judgment motions may be filed on questions going well beyond sufficiency of the evidence. Postdiscovery renewed qualified-immunity motions, and motions based on affirmative defenses, are both common. I suggest deleting the apparent limitation of the suggestion to summary judgment motions based on evidentiary sufficiency.
8. **Suggested Practice #10 on Cost-Shifting**

This is yet another provision that would likely seem to a reasonable observer, and will certainly seem to the plaintiff’s bar, as a new rationale to deny discovery. Defendants will raise it in every case, and some judges will accept the idea because it is legitimized in an official set of suggested practices.

Defendants have the sole power to choose how they keep their data. They alone choose whether to keep it in an accessible form, which will limit the burden of responding to the inevitable discovery requests, or to keep it in an inaccessible form and argue “undue burden” to anyone who wants to get it. Any realist can predict the choice. The gradations of inaccessibility may reflect nothing more than the strength of the defendant’s past desire to avoid turning over any information that might help an adversary.

To condition a plaintiff’s ability to access such information on the plaintiff’s ability to pay the costs or part of the costs means that the plaintiff will be subsidizing the defendant’s decision to make the information hard to access. And the defendant will benefit from soaking the plaintiff for part of the costs, because it too will get access to its own data, *partly at plaintiff’s expense.*

Particularly because the party with the information has made a choice to store the data in a form hard to access, and partly because of the thrust of the Federal Rules for many decades in requiring parties to bear the cost of their own responses to discovery, there is no justification for departing from the principle that the producing party bears the cost of production.

9. **Suggested Practice #11 on Forced Adoptions of Technology**

I oppose suggested practice #11. Many active plaintiffs’ attorneys have a significant number of active cases at any time. If they are forced to buy new computer programs or equipment in every case in which a wealthy opponent says “things will be cheaper if we all use the same program,” the aggregate cost can drive them out of their practices.

E. **The Guidelines and Suggested Practices Should Include the Experimental Discovery Protocols**

It surprised me greatly that the draft guidelines and suggested practices failed to mention and endorse the experimental protocols for discovery in employment discrimination cases that began to be implemented by some district judges in 2012.
Judge Campbell’s December 2, 2014 report on behalf of the Advisory Committee on the Civil Rules to Judge Jeffrey Sutton, Chair of the U.S. Judicial Conference’s Standing Committee on Rules of Practice and Procedure, stated at p. 12:

The success of the discovery protocols for individual employment cases has encouraged suggestions that similar protocols should be developed for other types of cases. Suitable candidates might be employment class actions, or actions under the Individuals with Disabilities Education Act or the Fair Credit Reporting Act. The process of generating the protocols for individual employment cases was arduous. The participants were very good lawyers from both plaintiff and defense practices. Three judges engaged in the Enabling Act process provided support and encouragement. The Institute for the Advancement of the American Legal System promoted the work. But with all of those advantages, the work resembled a labor negotiation, with much hard bargaining and several moments that prompted legitimate fears of a breakdown. Still, the result is worth it. All sides seem satisfied with the product.

Surely, this and other successful pilot projects should be given substantial prominence in any document intended to serve as a guide to Federal judges nationwide. The widespread adoption of the protocols would do a great deal to further the goals of proportionality.

**Conclusion**

I appreciate the openness to constructive criticism shown by your release of the current draft for public comment. Unfortunately, my conclusion is that the present draft will be very harmful to plaintiffs of limited means who are trying to enforce rights of great public importance.
I hope you will accept the suggestions I have made for improving the draft. I expect you would hear comments from some others, but think you would have heard from many more if the comment period had not been limited to three weeks in August. These are terrifically important subjects, and I believe that a longer comment period would have been appropriate.

Sincerely,

HENINGER GARRISON DAVIS LLC

[Signatures]

Mark Ekonen
VIA E-MAIL – JOHN.RABIEJ@LAW.DUKE.EDU

John Rabiej  
Director of the Center for Judicial Studies  
Duke University Law School  
Room: 2201A  
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Box 90362  
Durham, North Carolina 27708

Re: July 31, 2015 Draft “Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality”

Dear Mr. Rabiej:

I am writing to address briefly the above-reference draft guidelines for the 2015 federal discovery amendments. I have a small law practice devoted to representing plaintiffs in labor and employment discrimination cases. The majority of our cases are litigated in federal district courts in North Carolina and Tennessee.

Over the past fifteen (15) years, there is no question but that the focus of employment discrimination litigation has become the summary judgment motion. Consequently, my discovery efforts have expanded so that the depositions have become longer, and much more expansive. I will typically take five to seven depositions in a case, and the depositions will generally last five to seven hours. In preparation for these depositions, I conduct very extensive written discovery, particularly with an eye toward obtaining documents about my client and "comparators" in order to establish that my client was discriminated against on an unlawful basis. Many of these cases involved hourly-paid workers whose cases will not involve large damage claims. Nevertheless, the cases are very vigorously defended, often beyond the scope of exposure to the defendant(s). Without extensive document discovery, it is, in my opinion, virtually impossible to prevail in a discrimination case based upon circumstantial evidence. Thus, any proportionality standard should recognize that discovery into the merits of the case should not be limited.

As a result of this increased emphasis on the summary judgment motion, as well as the strict time limitations imposed by scheduling orders, the defense bar typically throws up
roadblocks to written discovery and even the scheduling of depositions. In virtually every case that I file, the defendants take an aggressive stance in opposing discovery requests. The amended rules have closed off some of the more aggressive tactics, but there is the assumption the parties will work cooperatively in the discovery process. I have never found this to be the case.

I would like to first address the factors set forth in Guideline 2 for determining whether discovery is proportional to the needs of a case.

First, Guideline 2(A), addressing the “Importance of Issues at Stake,” appears to measure the importance of the issues only in terms of the monetary amount. The problem with an undue focus on the monetary stake of a case is that it does a disservice to those individuals who are generally the plaintiffs in discrimination claims. In my experience, they are persons of very moderate circumstances, whose claims could never match the amounts at stake in commercial litigation in federal courts. Nevertheless, Congress and the federal courts have emphasized the public importance of the constitutional and statutory rights at issue, in addition to the private interests of the litigants. I submit that the language of the guideline should place more emphasis on the public importance of the rights at stake and the private interests of the individuals bringing such cases.

Second, Guideline 2(B), addressing the “Amount in Controversy,” also over-emphasizes the importance of monetary relief, and subordinates it to a pecuniary measurement. This measure is not appropriate in cases involving declaratory and injunctive relief (e.g., cases involving reinstatement of an employee unlawfully terminated; cases involving decrees to cease from discriminatory employment practices; and cases directing that an employer cease from sexual harassment). Indeed, there is no way to measure the value of such relief in purely monetary terms.

Third, Guideline 2(C), addressing the “Relative Access to Information,” places undue emphasis upon a party with lesser access to information putting unreasonable demands upon the party holding the information. The discovery standard is “relevant” information, not a far more restrictive standard of “necessary” information. For example, and as stated above, I find that it is often necessary to obtain discovery about “comparators” in order to successfully litigate a discrimination case based upon circumstantial evidence. This is precisely the type of discovery that defendants often object to (and refuse to provide without a motion to compel) on the basis of irrelevance. In that regard, the defendants typically make every effort to characterize such discovery as an unnecessary imposition upon the operation of the company’s business. In reality, it rarely is in the typical individual plaintiff case.

Fourth, Guideline 2(D), addressing the “Parties’ Resources,” has the potential for abusive litigation tactics through defense inquiries into the financial circumstances of even persons of modest means. Although I generally represent hourly wage earners, or employees earning
annual salaries of less than $75,000, I still receive defense demands of “cost-sharing” on electronic discovery. To date, those demands have been generally unsuccessful, but I expect that there would be more discovery about a party’s financial resources, and demands that a party use his or her financial resources for discovery with the guideline’s language as presently written.

**Fifth.** Guidelines 2(E) and (F), addressing the “Importance of Discovery and “Whether the Burden or Benefit or Expense Outweighs Its Likely Benefit,” raise the same issues addressed above. It is often the case that plaintiffs prove their cases in discrimination lawsuits by reviewing a large amount of circumstantial evidence in order to attack the defendants’ purportedly legitimate reasons for the adverse employment action. It is typically the case that plaintiffs do not know at the outset of a lawsuit where useful information will be found. The guidelines, as written, place a significant burden upon a plaintiff to precisely identify what he or she expects that a particular discovery request will yield in a discovery dispute.

Finally, I want to comment briefly about the “Suggested Practices” contained in the guidelines.

**First.** Suggested Practice No. 1 states that the parties should promptly bring to the court’s attention – presumably by way of a motion – disputes “for efficient resolution.” Given the concerns noted above regarding obstructionist litigation tactics, and the fact that a court may summarily assess attorney’s fees against a losing party, it is doubtful that this suggested practice will accomplish very much other than make discovery for plaintiffs more difficult.

**Second.** Suggested Practice No. 4 promotes early stipulations of fact. As a practical matter, I find that I do not know enough about the facts early on in a discrimination case to feel confident in entering into stipulations of fact. If this practice becomes commonplace in federal litigation, I fear that a pattern will develop in which defense counsel seek (or demand) such stipulations, and then use a plaintiff’s decision not to enter into such stipulations as a basis for arguing that the plaintiff is being non-cooperative, or obstructionist.

**Third.** Suggested Practice Nos. 5 and 6 focus on early discovery with the caveat that in the course of early discovery, the parties can determine whether or what further discovery is warranted. This process may work for large, commercial cases, but not run-of-the-mill discrimination claims. The problem is that it would give defense counsel another reason or means to delay discovery, and to argue against discovery beyond an inadequate initial response.

**Fourth.** Suggested Practice No. 10 promotes the concept of cost-sharing. I am sure that if this becomes a standard practice, the defense bar will use it as a strategy to elevate the cost of litigation even more. I have already seen defense counsel push that notion in cases over the past several years. This will simply make individual plaintiff discrimination suits beyond the reach of most plaintiffs and the attorneys who routinely do this work.
I very much appreciate the opportunity to submit these comments.

Very truly yours,

Glen C. Shults

GCS/lev
Dear Prof. Rabiej:

I have been involved with the enforcement of the federal and local equal employment discrimination laws since 1965. As an attorney with the EEOC in its first five years, I was directly involved with several of the seminal cases under Title VII. My practice over the years has included individual cases and class actions -- some in conjunction with national or local Civil Rights organizations.¹

In addition, I have served on the Board of the National Employment Lawyers Association and recently as its First Vice President, the Board of the Metropolitan Washington Employment Lawyers Association since its founding and as its second President and on the ABA Labor & Employment and its Liaison Committee with the EEOC, DOL & DOJ. I have, among other things, also in the past submitted comments on proposed discovery changes to the Federal Rules and worked to encourage the United States District Courts to adopt the Pilot Project Initial Discovery Protocols for Employment Cases.

My purpose in sharing my background is to underscore that in attempting over the years to prove unlawful employment discrimination I have endured and weathered many discovery battles. (Unfortunately, the term “battles” is appropriate.) Those disputes, however, are not played out

¹ On occasion my practice has included the representation of a few (but well known) employers confronting employment discrimination issues.
on a level field. As noted in many of the comments you have been receiving from stakeholders involved with the representation of plaintiffs, the vast majority of information requested and needed by plaintiff counsel is typically within the records and knowledge of the employer. Obtaining that information requires industrious and diligent perseverance. My war stories include situations where the racial statistics I had requested for two years had been sitting with defense counsel the entire time. (I am well aware that other counsel bringing discrimination cases have had to endure similar delays.)

The burdens and obstacles I have experienced have, among other things, included receiving computer information that was unusable absent acquisition of new software, having to create computerized data from information derived from several thousand paper personnel records to perform multi-variant analysis, and having to conduct on the employer’s premises a professionally developed survey that would provide information not contained in the employer’s records. In short proving discrimination has never been easy. Measuring the need for relevant discovery based on cost is flawed and frightening.

While I recognize that the Rules now specifically call for discovery proportional to the needs of the case, I fear that the draft guidelines over emphasis on cost will, if adopted, be applied so as to unduly shut off access to information that needs to be included in the panoply of circumstantial of evidence by which employees can prove that race, gender or one of the other protected categories under Title VII, ADA, ADEA or GINA made a difference.

Under Guideline 2(A) I fear that too much emphasis is given to the money that the plaintiff stands to gain or lose and not upon the issues at stake. The guideline needs to emphasize that Congress has assigned enforcement of Civil Rights the “highest of priorities” Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400. These priorities have not changed.

In the face of constricting budgets enforcement efforts by EEOC and DOJ have fallen off. As a result, there continues concomitantly to be dependence, if not enhanced dependence, upon the private bar to address these priorities. Those Congressional priorities are a dominant factor in all statutory Civil Rights Cases. That they are a dominant factor should be reflected in any proportionality analysis. This is axiomatic regardless of the level of potential back-pay, front-pay or damages that may be at stake.

The focus in Guideline 2(B) upon the “amount in controversy” as a significant factor for assessing the boundaries for discovery feeds my pessimism. There is an inherent and incalculable value in the cases I have brought that extends beyond the compensation that my clients received or that I may have received through payment of statutory fees. One example, I hope exemplifies this and resonates with your Committee – a telephone call 25 years later from an African American female calling me to tell that she now holds a managerial position, as do many other African Americans and females, at the company where I had represented her mother.

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2 MWELA, at II in its comments, likewise corroborates that more often than not the vast majority of information requested by its members in employment discrimination litigation resides with the employer and that this information is not otherwise available.
I can assure you that the then and now statistics for that employer are both dramatic and heartening.

In my experience such laudable changes in employment practices are not limited to cases where there court orders or settlements mandate such changes. They also flow from or are stimulated by cases or settlements with low monetary awards. In short, this Guideline, as with 2(A), also needs to reflect the requirement or presumption that in conducting the discovery proportionality analysis in employment discrimination cases and other statutory fees cases that the dominant factor is the public interest.

Guideline 2(C) speaks to access to “relevant information” yet the Commentary converts “relevant” to “necessary”. As Richard Seymour and others have explained in regard to this Guideline and 2E, it is (or often is) in employment discrimination cases impossible to determine in advance what relevant information will ultimately be “necessary,” “core”, “peripheral” or “or otherwise”. The Commentary connotes a strong bias and negativity suggesting that broad informational requests by plaintiff counsel are made primarily or solely for tactical advantage. The Commentary’s assigning negativity to the motivation for plaintiff counsel’s broad requests is especially inappropriate when one takes into account that frequently counsel for employers engage in tactics to preserve this asymmetry. (See MWELA’s compelling list of examples.) Yet, one takes away from a reading of the Commentary the errant implication that no negativity should be attached to motivation of the protectors of this asymmetry. In order for there to by any reasonable assessment of access to “relevant” information in asymmetrical situations the Draft Commentary needs, at least with respect to employment discrimination litigation, should be more balanced.

Guideline 2(D) and the accompanying Commentary provides too much cover or protection for employers who are well staffed and flush with technological know-how to fend off relevant discovery demands. It is my experience that projections put forward by counsel for employers with respect to resources and costs are often inflated and include inappropriate components. Some recognition of this conduct and the inclusion of language to deter such excessive projections should be included in the Commentary both with respect to Guideline 2(D) and 2(F).

As reflected in the above discussion, I have read some of the other comments (e.g., MWELA’s, Richard Seymour’s and Jonathan Gould’s) that have been submitted to you. Those comments effectively highlight other realistic and serious problems the Draft Guidelines and Commentary pose for attorneys representing employees in discrimination cases. I share the concerns expressed in those comments and trust that the Committee will recognize the validity of those comments and the need to make appropriate changes.

Sincerely,

David R. Cashdan
VIA EMAIL (john.rabiej@law.duke.edu)

Duke Conference Discovery Subcommittee of the Advisory Committee on the Civil Rules

c/o John Rabiej
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Re:  Response to Call for Public Comment on July 31, 2015 Draft “Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality”

This comment is submitted on behalf of myself and my law firm. I have an extensive practice limited almost exclusively to helping workers enforce their federal and state rights to wages. I have been or am currently lead counsel in numerous matters of complex litigation, primarily collective and class actions, including: Allen v. Pulaski County, No. 4:10-cv-01514 SWW (E.D. Ark. 2010); Benefield v. Convacare Mgmt., No. 4:12-cv-00589 KGB (E.D. Ark. 2012); Broach v. Ark. Convalescent Ctrs., Inc., Case No. 5-12-cv-143 DPM (E.D. Ark. 2012); Campbell v. Reliance Healthcare, Inc., No. 4:12-cv-00176 DPM (E.D. Ark. 2012); Charles v. Horizon Foods, LP, No. 2013-2915 (Jefferson County Cir. Ct. 2013); Conners v. Gusano’s Chicago Style Pizzeria et al., Case No. 4:14-cv-00002-BSM (E.D. Ark. 2014); Farnsworth v. So. Paramedic Servs., Inc., 4:11-cv-00760 BSM (E.D. Ark. 2011); Gay v. Saline County, No. 4:03CV00564 HLJ (E.D. Ark. 2006); Hawkins v. So. Heritage Health &
Duke Conference Discovery Subcommittee
August 21, 2015
Page 2 of 5


I have reviewed the draft guidelines and suggested practices. I write to offer a comment from a practitioner’s perspective about these guidelines. My main concern is that the the Guidelines or Practices do not emphasize that parties have a duty to provide relevant information in discovery. To the contrary, the Guidelines and Practices provide numerous avenues for parties to avoid discovery and engage in gamesmanship.

A. The guidelines and suggested practices are too focused on the money at issue to define “proportionality.”

Money is often inadequate to define the importance of a case seeking to enforce constitutional and statutory rights. Although the commentary to Guideline 2(A) contains a reference that cases “can serve public and private interests that have an importance beyond any damages sought,” the predominant focus is money.

Proportionality is often (and wrongly) associated with a strictly financial analysis. Defendants use an idea of “proportionality” to argue for a reduction in the amount of attorneys’ fees awarded in fee-shifting litigation. Circuit courts unanimously reject the arguments based on the Supreme Court’s decision in *Rivera v. Riverside*, 477 U.S. 561, 574 (1986). Sadly, however, the argument sometimes works at the district-court level forcing an appeal. See, e.g., *Anderson v. AB Painting & Sandblasting, Inc.*, 578 F.3d 542, 546 (7th Cir. 2009) (reversing reduction in attorneys’ fees). In one notable case, the district court awarded only $20,000.00 of a $117,056.00 fee request because of the Kloberdanz theory — i.e., that a two-bit case deserves a two-bit fine. *Quigly v. Winter*, 598 F.3d 938, 958-59 (8th Cir. 2010). The Eighth Circuit reversed. *Id.*
Defendants (and some plaintiffs) will likely use similar “proportionality” arguments in regards to discovery disputes as they use in fee disputes. Unfortunately, discovery disputes can likely never be appealed. If a district court decides that discovery is inappropriate because the statutory right is a “two-bit case,” the plaintiff will be left with no remedy.

To give a real world example, our clients individually are sometimes not owed a lot of money. For instance, we have represented a large number of nursing home workers who had to work through unpaid lunch breaks because the facilities are lightly staffed but who were not paid for the time because the facility automatically deducted the lunch breaks and provided no effective way to reclaim the time. With limited exception, the damages to any individual usually top out at a few thousand dollars. Some are only owed a few hundred dollars.

Although the damages to each individual are low, the employer can save a significant amount of money by trampling on statutory rights. Fee-shifting litigation enables workers to enforce their rights, which offers a significant deterrent for employers to comply with the law. That is the very purpose behind shifting fees in constitutional and statutory litigation. As Judge Posner recognized, fee shifting statutes “disable defendants from inflicting with impunity small losses on the people whom they wrong.” *Orth v. Wisc. State Employees Union, Council* 24, 546 F.3d 868, 875 (7th Cir. 2008).

B. The Guidelines and Suggested Practices lack clear standards, which will increase gamesmanship and frustration with the process.

The Guidelines, while undoubtedly well intentioned, will further confusion. Guideline 5 counsels the district court to apply an objective reasonableness standard. But, in applying this standard, Guideline 3 would counsel the district court to apply some or all of the six proportionality factors, in its discretion, based on the facts and circumstances of the case. In other words, parties to the litigation will have fruitful new ground to litigate discovery disputes.

Although some often bemoan the high cost of discovery, it has been my experience that parties spend more money fighting to avoid discovery than they would spend actually producing responsive information. For instance, in a recent tip-polling case, defense counsel produced an email discussing tip pooling (unquestionably relevant), but he redacted any sentence within the email that he felt was irrelevant to the issues in the case. Making the improper redaction cost more money than simply producing the email.
The new discovery guidelines and practices, while well intentioned, will further discovery abuses. Many parties will add a boilerplate objection that discovery requests are not proportional (on top of the objection that a request is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence). The party will go on to provide some information while leaving the response unclear about what information was withheld on the grounds of proportionality. The end result is confusion.

Faced with such responses, the party has difficult choices. Has the opposition provided a full response and is only asserting the objection as a prophylactic measure? Or is the answer incomplete because the party did not conduct a complete search. To get to the bottom of the issue, the party must engage in a tedious meet-and-confer process. All of this causes delay and increase the expense of litigation.

Practices 1 and 10 is particularly dangerous. Practice 1 states that “the Judge should consider making it clear from the outset that the parties are expected to engage in efforts to work toward proportional discovery.” Practice 10 states that cost-sharing can be explored as an alternative. The practical effect of these suggested practices will be devastating. Some parties will resist routine discovery on proportionality grounds and, during the meet-and-confer process, offer to provide the information if the party pays the cost.

C. The Guidelines and Suggested Practices do not recognize that Employment Plaintiffs will often lack the evidence to clearly articulate the benefits of discovery because they lack information.

The Guidelines place employment plaintiffs in a difficult situation. The Guidelines contemplate that Courts will have substantial information about the projected benefits of given discovery to make a “proportionality” determination. That presupposes, however, that the requesting party will know what the discovery will ultimately uncover and be able to articulate how that discovery will benefit the case. This ignores that the producing party (the party resisting discovery) has perfect information about how it creates and stores information, while the requesting party is forced to guess.

In FLSA collective-action litigation, courts will have great difficulty making proportionality decisions because Defendants control all of the information needed to calculate the amount in controversy. In an FLSA case it is usually impossible to compute damages without accessing his or her own payroll records.
Some background on the FLSA is in order. Under the Fair Labor Standards Act, employees are permitted to bring suit on behalf of themselves and other similarly situated employees. No employee, however, is allowed to participate in the case unless they affirmatively choose to participate by filing a consent to join. An employee cannot bring an action under Rule 23. Instead, most courts have adopted a two-step process whereby Courts issue notice to other employees inviting them to join an FLSA case. See Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).

D. The Guidelines and Practices put too much of a burden on district courts, who are currently reluctant to get involved in discovery disputes.

The Guidelines and Practices are grounded in an idealistic vision for the practice of law, where counsel and judges thoughtfully confer and deliberate to make sure that justice is done. Counsel, however, has a duty to zealously advocate for the client and must use the rules to their advantage. It has been my experience that the federal courts do not have the time to referee the discovery process. The Civil Rules recognize this, requiring parties to make a good-faith effort to resolve discovery disputes before involving the court. Fed. R. Civ. P. 37(a)(1). In a court system where it often takes three to six months (and sometimes longer) to get a ruling on a dispositive motion, does the court have time to get involved in more discovery disputes?

The practices, however, contemplate that judges will now play a much more active role in discovery. Unfortunately, that envisioned role is not realistic for most courts. At best, the process will result in more pro forma meetings. These meetings usually do little to advance the ball, and they simply waste more of the court’s time and increase the expense for the parties.

Best personal regards,

Holleman & Associates, P.A.
John Holleman
August 21, 2015

To: Duke Conference Discovery Subcommittee of the Advisory Committee on the Civil Rules

C/O: John Rabiej
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Re: Response to Call for Public Comment on July 31, 2015 Draft “Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality”

This is my first time commenting on proposed changes to the Rules of Procedure. However, these proposed changes to discovery to bring about proportionality are a big mistake. I would like to adopt the by reference the comments made by the National Employment Lawyers Association, Richard T. Seymour, American Association for Justice, and the Metropolitan Washington Employment Lawyers Association. In additional to adopting these comments, I would like to share with you some of my own experiences as a solo attorney representing employees against large corporate defendants with unlimited resources.

In each and every case the employer has possession, access, and control over the evidence necessary to prove an employee’s allegations of any lawsuit. Generally, my clients cannot take ESI evidence from their employers without running into a potential criminal prosecution for taking that evidence. This is because most employers have policies stating that any ESI evidence is property of the employer. No employer is going to give their employee permission to take copies of emails or other ESI communications
needed to prove the necessary elements of a lawsuit. To believe otherwise is to defy common sense.

In most instances my clients are not high wage earners so their damages may be limited. Damages available under the law may be capped. Therefore, in some instances my clients’ damages could be around $50,000.00. Most defendants deny each and every material allegation of a lawsuit. This forces my clients to now engage in discovery to obtain the necessary evidence to prove the material allegations of the complaint. However, I am forced in every case to engage in extensive motion practice to obtain the necessary discovery needed to prove the allegations of the lawsuit. Most employers put on a hyper-aggressive defense. Most employers have a financial incentive to put on a hyper-aggressive defense and force the employee to work for the necessary discovery needed to prove the allegations of the lawsuit by any means necessary. Under the current discovery rules, I have been successful in obtaining the necessary evidence needed to prove the allegations of the complaint, but I needed to work for it. No defendant is ever willing to roll over and produce the evidence necessary to prove the allegations of the complaint. In every case, I have had defense counsel making boilerplate objections that my discovery requests were unduly burdensome and too expensive to produce. If discovery needed to prove my clients’ claims are now predicated even in part on the value of their claims, you will open the flood gates to every defendant now claiming that all necessary discovery like ESI (production of emails and text messages) cost more to produce than the case is actually worth. Therefore the plaintiffs should not be allowed to obtain this discovery. Alternatively, you will be opening the flood gates to every defendant claiming that a plaintiff should bear the significant cost of obtaining the necessary discovery needed to prove the allegations. Under this so called “proportionality” my clients could be faced with the choice of either paying for necessary discovery they cannot afford or not getting the discovery they need because they cannot afford to pay for it. This will result in many clients either losing their claims on summary judgment or dropping the lawsuit because they cannot afford to cost of discovery to prove their claims.

In Cuff v. Trans State Holdings, Inc., 768 F.3d 605, 610-611 (7th Cir. 2014) an FMLA case in which the recovery for the plaintiff was less than $50,000.00, is a prime example of problems faced by most employees in litigation against employers and the future evil that will result from “proportionality.” In Cuff, 768 F.3d at 610-611, the court took notice of how hyper-aggressive defenses can drive up the cost of litigation:

“... defendants might say to plaintiffs at the outset: ‘we concede violating your rights under the Act, and we also concede that your loss is $50,000.00, but we plan to wage an all-out-defense that will cost at least $200,000.00 to overcome. You might as well capitulate, because you will lose on the net.’ A business that can establish a reputation for intransigence may end up not paying damages and not having to defend all that often either because if a prevailing party who litigates to victory gets only a small award of fees the next would-be victim will see that litigation is futile and the employer won’t have to repeat the costly defense.”
Similar to Cuff, 786 F.3d at 610-611, “proportionality” opens the flood gates to defendants saying, “we concede violating your rights under the law, and we also concede that you loss is $50,000.00, but we will wage an all-out defense denying every allegation and forcing you to engage in discovery to prove each and every allegation and if you do engage in the necessary discovery, we will invoke “proportionality” to either deny you the necessary discovery or else increase your litigation costs by getting the court to shift the expense of discovery onto you so that you are paying more to obtain discovery than your claim is worth.” Needless to say, use of “proportionality” would be used by every defendant in every lawsuit as a sword to prevent plaintiffs from obtaining necessary discovery and/or making to cost of obtaining it not worth the value of the case. Every Judge will be flooded with these types of motions demanding “proportionality” as a sword to prevent plaintiffs from obtaining necessary discovery. “Proportionality” will become a roadblock to obtaining necessary discovery and it will reward defendants who want to prevent plaintiffs from proving their cases by invoking it at every opportunity.

I respectfully urge you not to adopt “proportionality” as it will lead to defendants abusing the system to avoid having to produce necessary evidence in discovery to prove my clients allegations. Most of my clients would be forced to abandon their claims because they will either not obtain necessary discovery or cost of obtaining the necessary discovery will be shifted onto them forcing them to abandon enforcement of their federal civil rights.

Respectfully submitted,

Brian J. Graber

BRIAN J. GRABER
Dear Mr. Rabiej:

I write on behalf of myself and my office to echo the comments that the Plaintiff-side representatives of the civil rights/employment working group submitted to you on June 29, 2015, with respect to the Guidelines and Suggested Practices’ potential recommendations regarding (i) cost sharing, and (ii) “core” or “focused early” discovery.

We are a small civil rights non-profit law firm that represents people in Louisiana prisons seeking to vindicate their Eighth Amendment rights against cruel and unusual punishment. Our work nearly always involves a significant imbalance in the possession of information between our clients—who are usually indigent—and the people and state entities we sue. For this reason, we have serious concerns that rules changes along the lines of what is proposed could be fatal to the sort of litigation we practice, where the ability to gain information in discovery is especially crucial.

The June 29, 2015 letter from Anna Benvenutti Hoffman and other members of the working group capably expounds on the reasons for concern for Plaintiff-side lawyers. We similarly urge, at a minimum, that any changes of the nature proposed go through the full rule-making process allowing for notice-and-comment and other opportunities to study the issue and provide input.

Thank you for your time and attention in this important matter.

Sincerely,

Sarah Ottinger
August 21, 2015

VIA E-MAIL
Prof. John Rabiej
Director of the Center for Judicial Studies
Duke University School of Law
210 Science Drive
Box 90362
Durham, NC 27708

Dear Professor Rabiej:

I want to commend the hard work of the participants in drafting the Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments. Having attended the Proportionality conference last year, I thought that task would be close to impossible to achieve. Not so. I have just a few comments and a suggestion.

Guideline 3 Commentary – Significance of the Order of the Factors

The final paragraph of the commentary states that “the order in which the proportionality factors appear... does not signify relative importance” and the reordering was “not to endow any of them with special importance.” My understanding from the Advisory Committee was the contrary. Judge Campbell’s report to the Standing Committee explained that placing “importance of the issues” first was intended to add “prominence” to it and avoid the implication that “amount in controversy” was the most important factor. That change was of particular significance to those of us who regularly represent clients in systemic litigation where injunctive relief is the primary or only remedy sought. Consequently, I would suggest that that paragraph of the Commentary be deleted.

Suggested Practices 5 & 6 - Initial Focused Discovery

Initial focused or phased discovery can be very useful and cost effective in cases where a threshold or discrete issue will potentially be consequential to the litigation. As an example, a disputed question of jurisdiction or venue may lend itself to focused discovery. The Suggested Practices 5 & 6 regarding Initial Focused Discovery target a much broader swath of cases: those where discovery is likely to be “voluminous, complex, or disputed/contentious.” These are not inherently ones where phased discovery will
make sense. Our experience in class action practice suggests that bifurcating discovery (i.e. class certification and merits) is unnecessarily expensive and duplicative and generates disputes about which side of the line a particular deposition question falls.

That being said, the Commentary to Practice #5 generally leaves this planning to the parties and the Court; concerns about duplication could be aired and assessed in that process. One aspect of the Commentary is troubling, however, and might well deter parties from proposing or agreeing to focused discovery. The commentary states that focused discovery could be used to determine “whether or what further discovery is warranted.” If a party perceives that “focused” initial discovery is or could presumptively be all the discovery, that party will certainly not agree to what might otherwise be a sensible and efficient way to begin discovery. Eliminating the first sentence of the sixth paragraph in the Commentary would solve that problem.

The same issue is presented in the first sentence of the Commentary to Practice #6. Changing the final phrase from “if more discovery is needed and what it should be” to “what more discovery is needed” would address that concern.

**Suggested Practice 10 - Cost Sharing**

I was surprised and concerned to see that cost-shifting had been imported into the Proportionality calculus since it was not part of the amended rules. As you are aware, cost-shifting for underfunded litigants is a matter of grave concern. Given how contentious this issue was in the amendment process (and continues to be), I would urge you to delete this practice.

**One Further Suggestion - Evidence Code 502(d) Orders**

One of the most important innovations for controlling the cost of discovery is the use of Evidence Code 502(d) orders. Unfortunately, many lawyers are still unaware of them or do not use them. They are not mentioned in the Practices and I thought it would be useful to do so, either as a stand-alone practice or as part of the Commentary to Practices 1 and/or 11.

Thank for your consideration.

Yours very truly,

Jocelyn D. Larkin
Via Electronic Mail
JOHN.RABIEJ@LAW.DUKE.EDU

John Rabiej
Duke Center for Judicial Studies
Duke University School of Law
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Re: Comments on Importance of Issues in Litigation and Cost-sharing

Dear Mr. Rabiej:

Thank you for the opportunity to provide written comments on the draft *Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality (Guidelines)* on behalf of the client communities served by the undersigned legal aid organizations in Ohio. Our comments focus on two components of the *Guidelines*: (i) those addressing the consideration of civil and constitutional rights in analyzing whether the importance of the issues are proportional to the discovery requested, and (ii) those addressing cost sharing as a possible solution to discovery disputes.

Legal aid attorneys provide free legal services to persons in poverty in local, state, and federal courts. We regularly seek injunctive relief in federal courts to enforce clients’ civil and constitutional rights. Injunctive relief to enforce a client’s rights is the only vehicle to address systemic violations that affect both the client and the rights of others affected by the violations. Legal aid organizations have for decades sought and obtained injunctive relief to enforce clients’ rights protected by fair housing, special education and other civil rights statutes and the constitutional rights of our clients in the areas of the public benefits and housing. We are unique in that, while we are able to seek attorney fees, fees do not affect our salaries and livelihood. This fact sometimes makes legal aid the only access to justice for low-income persons faced with a loss of their rights. In addition, our daily work in poverty law cases makes us aware of the most common and egregious losses of constitutional and civil rights that are endured by our clients. For these reasons, we are very concerned about the *Guidelines’* insubstantial treatment of the importance of enforcing constitutional and civil rights and the commentary encouraging cost-sharing.

1. The Commentary to Guideline 2 (A) should be strengthened to reflect the true value of enforcement actions in federal court.

The Guideline 2(A) Commentary contains only one sentence about the importance of constitutional and “statutory” rights. When balanced against the other guidelines and commentaries on Rule 26(b)(1) factors, which include detailed analyses and guidance, this sentence is inadequate to emphasize the weight of this factor. In addition, the description should specifically name “civil rights.” While the inclusion of “constitutional and statutory rights” arguably encompasses civil rights, the failure to include civil rights specifically appears to favor a technical reading rather than providing a full explanation similar to all of the other commentaries. Based on its terse explanation, litigants and courts may discount the one-sentence commentary in favor of other factors and their own discretion. The commentary states that cases involving constitutional or statutory rights “can’ serve public and private interests....” This does not come close to reflecting the Committee Notes on the 2015 amendment, which states that “it is also important to repeat the caution that the monetary stakes are only one factor” and explains the significance of substantive issues without regard to the monetary value. Rather than explaining, the language in this commentary suggests that in determining the importance of the violation of a right, the court may look to
the merits of such a case. The word “can” also implies that there are cases alleging the violation of invaluable rights that would not be important. This language should be corrected.

2. Guideline 2(B) should be clarified to reinforce Guideline 2 (A).

Guideline 2(B) discusses the amount in controversy and specifically discusses the court’s ability to put a value on equitable relief as a case moves forward. This commentary should also refer to the Commentary to Guideline 2 (A) to avoid conflict and confusion.

3. Practice 10 – when read in concert with the perfunctory treatment of constitutional and civil rights – is an invitation for strong-arm discovery tactics.

The failure to properly describe the importance of enforcing rights granted by the constitution and Congress is of particular concern when read together with Practice 10. This section suggests that sharing the cost of disputed discovery may be explored when discovery requests are denied based on a lack of proportionality. The specter of cost sharing is particularly threatening to legal aid’s impoverished clients and provides an incentive for defendants to create discovery disputes as a method of pushing plaintiffs to back down from discovery disputes. While this concern may seem speculative, it would be naïve to ignore the fact that defendants routinely use objections and discovery disputes to wear down, punish, or deter public interest firms’ clients and their attorneys.

When combined with the weak commentary about the importance of enforcing constitutional and statutory rights, the Commentary on Practice 10 bolsters the ability of defendants to object to discovery requests based on undue burden, minimize the importance of the case issues in proportionality arguments, and push for cost-sharing as a solution. Moreover, cost-sharing in discovery conflicts with the American Rule, which creates the overwhelming presumption that in federal discovery, the responding party bears the costs of complying with discovery requests. Finally, the commentary encouraging the use of cost-sharing is inconsistent with the revision to Rule 26(c)(1)(B), which references cost-sharing only when a party has filed a motion for a protective order.

4. Case examples from recent enforcement actions involving constitutional and civil rights

To underline the relevance of these comments, two recent cases illustrate why the importance of the issues at stake must include further emphasis in the Guidelines. In each case, the enforcement of clients’ rights was paramount but difficult to quantify. If these cases were analyzed utilizing the current draft of the Guidelines, a court could default to emphasizing the monetary value of the case to limit the scope of discovery if it did not believe that the issues served the public interest.

The first example is a recent case litigated by the Legal Aid Society of Columbus. In Homewood v. McCarthy, No. 2:15-cv-1119 (S.D. Ohio 2015), the plaintiffs challenged the Ohio Department of Medicaid’s terminations of over 180,000 individuals. The lawsuit sought injunctive relief for due process violations, including reinstatement of Medicaid coverage and improvements to the Medicaid renewal process. The court granted immediate injunctive relief and the case settled on May 12, 2015.

This lawsuit involved the rights of hundreds of thousands of individuals and families who relied on Medicaid for their health care needs. Despite these extremely high stakes, it would be difficult to measure the monetary value of Medicaid for each terminated Ohioan, or for each person at risk for termination: The value of medical coverage is not readily ascertainable unless a person becomes ill or receives ongoing treatment or medication. Without an actuarial expert, it is difficult to measure the monetary cost of the lack of access to health care until someone becomes ill, does not receive needed treatment, and then suffers damage from the lack of treatment. Yet, discovery in this case would have
involved an extensive database of a state agency, emails within the state agencies administering Medicaid, and a review of numerous notices and communications. Using the proportionality test with its minimal recognition of the importance of non-monetary relief in the current Guidelines, a court that had questions about the merits of the case could have determined that the needs of the case, when balanced with other factors, did not warrant the necessary discovery.

Another recent case involves the violation of civil rights through racial profiling. Advocates for Basic Legal Equality and Murray and Murray Co., LPA filed Muniz et al. v. United States Border Patrol, et al. in 2009. The plaintiffs' claims included a request for injunctive relief to halt the U.S. Border Patrol's traffic stops of Latinos throughout a broad area in Northern Ohio. There is no way to quantify the indignity and stigma of discrimination and the value of stopping it. Yet, if the defendants had access to the additional support of the Guidelines, they would have been able to argue cost-sharing due to the expense of producing emails was not proportionate to the issues of the case, and a full record reflecting the intent of the defendants would never have been brought to light. Because the court did not believe that it had subject matter jurisdiction, the court could have believed that the case did not serve the public interest and, under the Guidelines, could easily have determined that the discovery requested was not proportionate to the importance of the issues. The Border Patrol often resisted discovery on a variety of grounds, but without it, plaintiffs may never have had access to emails in which the Border Patrol referred to persons as "Wets" and "Wetbacks," which served as important evidence at trial.

These are only two examples of cases brought by legal aid organizations to enforce the due process and civil rights of their clients. They illustrate the need to emphasize the importance of cases brought to enforce civil and constitutional rights.

5. Concluding Comments

It is clear that the defense bar has deeply influenced these Guidelines. The Guidelines, as written, appear to be written to parse out roles and responsibilities, rather than promote the ability to secure justice through federal courts. The perfunctory treatment of cherished constitutional and statutory rights will give legal aid and other public interest attorneys very little support for arguing the importance of enforcing those rights. And the lack of explanation of the importance of those rights anywhere in the Guidelines will give defendants unfair leverage in civil and constitutional rights cases, particularly when coupled with recommendations that cost-sharing may be deployed to resolve discovery disputes when there is a finding that a request is not proportionate.

We urge the committee working on the Guidelines to further emphasize the importance of civil and constitutional rights in analyzing Rule 26(B)(1) factors by removing the word "can" from the phrase "can serve public and private interests." The committee should also add case citations to opinions explaining the value of private enforcement actions, and more complete guidance on the value of claims brought to enforce rights versus monetary damages claims. We also urge reconsideration of the commentary on Practice 10, so that it does not promote cost-sharing and is in accord with Rule 26. Without these changes, the Guidelines give the distinct impression that constitutional and statutory civil rights are barely worthy of mention in the proportionality analysis. We hope that the committee will improve the Guidelines to reflect the legal profession's longstanding recognition that real and meaningful access to justice is not just an ideal, but plays a major role in upholding democracy.

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1 The court dismissed the claims for prospective, injunctive relief for lack of subject matter jurisdiction. The Sixth Circuit Court of Appeals reversed and remanded the case. See Muniz et al. v. United States Border Patrol, No. 12-4419 (6th Cir. 2013). The case went to trial recently.
Thank you for the opportunity to provide comments. Please contact Janet Hales at 614-824-2501 or jhales@ohiopovertylaw.org with any questions.

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August 21, 2015

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Re: Guidelines for the Implementation of the 2015 Discovery Amendments Related to Proportionality

Dear Mr. Rabiej:

The issue of proportionality is inherently a relative measure, comparing two items to determine if they are proportional to each other. But that comparison raises a critically important question: (1) how do you measure the items being considered to determine the proportionality of one to the other? Both sides of that question are problematic—the values at stake in a plaintiff's civil rights claim (my area) are difficult to quantify, and the producing party's estimate of its costs are subject to exaggeration and manipulation. The proposed guidelines emphasize monetary values and costs for these issues to the detriment of other interests. In addition, the guidelines provide insufficient bulwarks against gamesmanship and cures that may be worse than the disease. Below, I address these concerns in my area of practice of civil rights and employment discrimination claims and offer some suggestions on how to avoid proportionality becoming a one-sided tool that affects the outcome of merit decisions.

TWO-TIERED JUSTICE

Rich people ought not to get more advantageous discovery rules than poor people. But a two-tiered system based on wealth is a substantial risk of the current draft guidelines.

I represent individuals (plaintiffs) litigating employment discrimination and other civil rights cases. Is discrimination against an employee earning $30,000 per year more palatable than discrimination against an employee who earns $300,000 or $3,000,000 per year? The current draft is likely to lead to that result because the amount of discovery permitted is directly related to the ability to overcome the inevitable summary judgment motion. Based on my practice, I can
say that proving unlawful intent is no easier for higher paid employees. Under the current draft of the rules, the proportionality analysis depends heavily on the dollar value of the claim, which suggests that highly-compensated employees will be entitled to more discovery, and therefore have better outcomes at summary judgment and trial. The most prevalent problem with the draft guidelines is that dollar value is the primary measure of proportionality.

I submit that any victim of unlawful discrimination or retaliation has an equal stake in seeking redress, no matter his or her wealth. A discriminatory firing is an equally serious violation of civil rights regardless of pay grade. Yet the guidelines as drafted will inevitably permit higher-paid employees to obtain more documents, more emails/ESI and take more depositions, thereby providing a definite and strong advantage vis-à-vis a lower paid employee when it comes to amassing evidence to prove the claim. This will make a tangible difference in the outcome of merits decisions. As currently practiced, we face a summary judgment motion in nearly every discrimination case, which means that the plaintiff must have sufficient discovery materials to oppose that motion. Moreover, the defendant's theory of summary judgment is often not disclosed, meaning that a competent plaintiff's lawyer must be prepared to meet a long list of possible attacks on the quantity and quality of the evidence.¹

I am not writing to oppose the concept of proportionality (and I understand that it is already in the rules), but the guidelines ought to be amended to emphasize that the issues at stake (e.g., civil rights, harassment) are a more important consideration, or at least equally important, as the dollar value of potential recovery, in determining the scope of discovery that is proportional to the claim. Only by elevating this consideration over the strictly monetary valuation can we avoid having different litigation rules for poor people. In particular, Guideline 3 and the Commentary suggest that all six proportionality factors are the same. That is a problem. In fact, they should not be treated the same because the importance of the issue in a civil rights case should trump the argument that the dollar value of damages is low.

Statutory fee shifting provisions exist for civil rights claims to foster private enforcement of the laws -- to encourage citizens to act "as a 'private attorney general,' vindicating a policy that [the Legislature] considered of the highest priority." Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). Fee shifting exists precisely to foster litigation where ordinary

¹ In our types of cases, I do not believe that early conferences of counsel or proposed stipulations are likely to resolve any issues at all. Indeed, plaintiffs' counsel routinely complain that it is difficult to pin down the employer's theory of the case early in discovery. But if this Committee really wants to streamline the discovery process and focus on the most important discovery, there is a simple way to achieve this: Create a schedule that requires the defendant to file its summary judgment motion (or at least, list the legal/evidentiary issues it intends to raise) early in the discovery process. This will provide a degree of clarity and focus that is not only lacking, but is intentionally obfuscated by defendants in employment cases. As currently litigated, defendants try hard to hide the ball as to what the inevitable summary judgment motion will raise, often raising arguments for the first time and submitting affidavits from undeposed witnesses (who may well have been deposed if the plaintiff had known earlier of their intended role). While more liberal use of Rule 56(d) could help ameliorate discovery that was too restricted, as things stand now, it is difficult to count on that rule.
commercial considerations (such as the dollar value at stake) would not result in the case being brought. The Supreme Court rejected the notion that the resources expended on litigation must be proportional to the dollar value of potential recovery *City of Riverside v. Rivera*, 477 U.S. 561 (1986), holding that a "rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine" the statutory policy. *Id.* at 576. These cases are consistent with proportionality so long as the value of vindicating civil rights is given greater weight than the dollars at stake. And the issue of attorney fees (discussed in *City of Riverside*) is comparable to discovery costs in that both are the transaction costs associated with vindicating important rights in court.

If the dollar value of recovery were merely on an equal footing as the importance of the interests at stake, then lower-paid employees will face restrictions on basic discovery that higher-paid employees will not.

The guidelines' focus on money as the measure of "proportionality" is further exacerbated by the modest damage caps available under Title VII. Those caps were adopted as a compromise in 1991 and were modest at the time; over a quarter century later the caps are even smaller relative to litigation costs. As a result of this, the only "big-money" Title VII cases arise where the economic losses are very substantial, generally for higher paid employees. Wealthier people generally can afford better representation, but it would be wrong if the proportionality guidelines gave a substantive advantage to wealthier litigants.

In addition, potential equitable relief, such as reinstatement, and punitive damages needs to be accounted for as well but not in strictly dollar terms. In particular, the commentary to guideline 2(B) states "when an injunction or declaratory judgment is sought, the amount in controversy includes the pecuniary value of that relief." (emphasis added). This language is problematic, because the type of injunctive relief sought in civil rights cases often defies valuation. What is the dollar value of having an employee's work record corrected, or being reinstated to employment for an unknown and indeterminate period of time?

**COST OF PRODUCTION**

The draft guidelines do not devote much attention to determining the cost of production, but there is a great deal of gamesmanship that can occur on this side of the "proportionality" determination. There is a "fox guarding the chicken coop" aspect to this situation. For example, courts rarely accept the property owner's personal valuation of real estate as accurate in an eminent domain action because of the strong interest and incentives to overestimate. Similarly, there is a strong incentive for the objecting party to overstate the cost of production.

Guideline 2(F) says that the party objecting on the basis of burden or expense ordinarily has the burden to show the expense. In the commentary states that the objecting party should provide "an informed estimate of what the expenses would be and how they were determined."
Both of these statements point in the same direction, namely giving the party who is resisting discovery based on costs nearly absolute control over estimating the costs of production.

An example would be useful: An expert statistician explained to me how he approached these disputes. For example, the defendant had submitted an affidavit stating that it would take hundreds of man-hours for programmers to write, test and debug a computer program to search and extract the relevant personnel transactions from legacy data tapes, suggesting that this was too burdensome and expensive. This led to a deposition of the defendant's IT expert, who initially testified that the personnel data existed on old-fashioned reel to reel computer tapes, and the project would require multiple programmers, writing computer code in old programming languages to extract the relevant data. The statistician advised a line of questioning, establishing that the data itself was in a standard ASCII format, that there was one tape of data for each year of the seven years at issue, and that it only took about 20 minutes to copy one of the tapes. The statistician then estimated that a non-programmer could copy the seven years' worth of data in 2.5 hours and produce it, capping the defendant's costs at a trivial amount. The statistician further explained that no computer programming, testing and debugging was necessary to sort a few thousand entries in a database because his team could easily import the ASCII data into a spreadsheet where the personnel actions could be sorted by job series and grade level, and the non-relevant rows deleted. He estimated that this could take as little as 15 minutes per tape.

In another example, the defendant opposed producing computerized data of personnel actions claiming in declarations that it would take hundreds of hours to review all the data. We established at a status conference that the database consisted solely of personnel action data, the same information that would be on a paper "personnel action form." Accordingly, there was no possible disclosure of trade secrets or privileged information; it was just ordinary data showing hirings, firings, promotions, demotions, raises and transfers. And, as in the previous example, it was trivially easy to simply copy the universe of data and produce it in a computer readable format, letting the plaintiffs' expert sort it and search it (in a far more efficient and less expensive manner).

These two examples show how easy it is for a party resisting production to put forth a superficially plausible estimate of a high cost of production, but one that is, in fact, orders of magnitude higher than necessary. In many cases, neither the court nor the requesting party's counsel would be in a position to controvert such a declaration absent further discovery. In these examples, it required experts' depositions and/or a Rule 30(b)(6) deposition to pierce the inflated cost estimates. But this approach is a cure that is often worse than the disease. In a typical case, it is likely far less expensive for the defendant to simply produce the emails requested or the personnel records sought rather than have protracted disputes with competing expert testimony and company depositions over the cost of making the production.

There is also room for gamesmanship in the way that companies create their systems and store their data. Many companies set up their email systems and their "document retention
policies" in such a way as to facilitate an argument that retrieval and production of this data would be difficult and expensive. Even Justice Scalia famously noted that document retention policies are really mis-named because they are document destruction policies, designed to get rid of potentially bothersome evidence. Defendant likely will see it as substantively advantageous to order their affairs in such a way as to make discovery productions appear to be more expensive then necessary.

In this regard the last comment to Guideline 2(D) is troubling. That comment reads, "Determining what resources a party can reasonably be expected to expend on discovery may require considering that party's competing demands for those resources." This appears to say that if a company's employees are busy on other tasks, that is a basis to limit discovery. Presumably, no company has employees sitting around doing nothing, or hired primarily to respond to discovery requests unless it is required to do so. It would make as much sense as saying that a company could pay less in taxes if it did not have any employees available to fill out tax forms. This sentence should be deleted, as it adds nothing to the proportionality analysis and is a one-way ratchet to limit discovery simply by saying "our employees are busy on other things."

DISPARITIES IN ACCESS TO INFORMATION

There are certain inherent qualities in this kind of litigation that have a large impact on the course of discovery. First and foremost, the defendant/employer usually has nearly all the documents, and control of (or access to) all the witnesses without the need for formal discovery. Typically, the employee is able to obtain documents and access to most witnesses only through the formal discovery process, but the employer needs only the plaintiff's deposition. In most commercial cases, all parties need substantial discovery so there are incentives to work out disputes. In civil rights cases (which comprise about 16% of federal litigation), there is almost no "horse-trading" as the defendant does not need to offer any concessions to secure the deposition of the plaintiff. This sets the playing field for more stonewalling and a perception by judges that discovery disputes are more frequent in civil rights cases. That is likely true, but is largely a result of asymmetric access to information and rules which tend to reward intransigence.

This asymmetric access to information is exacerbated by employer policies and practices. For example, employers often aggressively assert expansive application of Rule 4.2 to vast swaths of corporate employees which then pressures plaintiffs' lawyers to avoid the risk of disqualification by not contacting witnesses (even those that are permitted) outside of formal discovery. Another tactic gaining ground is the use of broad confidentiality and non-cooperation clauses in routine severance agreements which prohibit (or at least appear to prohibit) former employees from speaking with plaintiff's counsel. Even where these "gag provisions" are improper, it takes time and money to litigate these issues (see attached order in White v. AICPA, No. 2013 CA 002623 B (D.C. Superior Court, 4/7/14) as an example of litigating these clauses). Similarly, we see companies now improperly designating as "company property" or "trade
secrets" all information which is normally provided by our clients, including the employee policy manual, company policies regarding harassment or discrimination, and even the employee's own past performance evaluations. Collectively, this makes it much harder to formulate targeted discovery requests or to be efficient in gathering data.

This issue should be addressed in Guideline 2(F) and the following commentary. Specifically, factors such as gag provisions, Rule 4.2 assertions and designations of ordinary employment documents and policies as "proprietary information" should all be viewed as actions by the employer that result in increasing the costs and burdens of discovery. These actions and others like them should be expressly noted as justifications for permitting more discovery by the "party with inferior access." In addition to directly furthering the goals of proportionality in these guidelines, this would also provide at least some incentive for employers to cooperate, earlier in the litigation evaluation process, and encourage more equal access to information without resorting to formal discovery. At a minimum, those companies that choose to erect roadblocks to access should do so knowing that broader formal discovery will be permitted as a matter of course in such situations.

Thank you for your time and consideration of these comments. I would be happy to provide additional information if that would be helpful. I would appreciate the opportunity to expand on these and related issues as the current deadlines conflicted with my vacation and other obligations, limiting the time I could devote to these comments.

Sincerely,

[Signature]

Stephen Z. Chertkof
ORDER GRANTING IN PART PLAINTIFF GEORGE WHITE’S MOTION FOR A PROTECTIVE ORDER TO PREVENT OBSTRUCTION OF WITNESSES

This matter is before the court upon Plaintiff George White’s Motion for a Protective Order to Prevent Obstruction of Witnesses. Upon consideration of the plaintiff’s motion and reply, Defendant American Institute of CPAs’ opposition, the applicable law, and the entire record herein, the court concludes that the plaintiff’s motion should be granted in part.

By way of background, on April 12, 2013, the plaintiff filed a complaint against Defendant American Institute of CPAs (AICPAs) for age discrimination and retaliation. In pertinent part, the plaintiff alleges that one of his supervisors, Mr. William Stromsem, warned him that a senior vice president within Defendant AICPAs wanted to fire him due to his age. Pl.’s Compl. ¶8. The plaintiff continues that when Mr. Stromsem refused to take part in arranging for the plaintiff to be terminated, Mr. Stromsem was forced into early retirement. Id.

In the instant motion, the plaintiff claims that Defendant AICPAs has effectively prevented him from speaking with Mr. Stromsem by refusing to waive its right to enforce a confidentiality agreement, which penalizes Mr. Stromsem for speaking on matters related to his termination from Defendant AICPAs. The plaintiff principally argues that if Defendant AICPAs’ agreement were to remain enforceable, it would make conducting a pre-trial investigation, preparing for Mr. Stromsem’s deposition, and otherwise engaging in discovery as it relates to Mr.
Stromsem impossible for the plaintiff. Specifically, the plaintiff argues that no party in a civil matter has a right to block or otherwise prevent any witness from offering relevant evidence and cites to Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983), and Street v. Hedgepath, 607 A.2d 1238, 1247 (D.C. 1992). The plaintiff asserts that given the inherent differences in time-related efficiencies and costs between informally interviewing that witness versus taking a deposition or receiving testimony at trial, he should not be forced to take the “cold deposition” of a witness with whom he would otherwise be able to interview prior to and after that deposition.¹

In opposition, Defendant AICPs asserts that the plaintiff’s motion is procedurally deficient as he lacks standing to challenge the enforceability of a contract to which he is not a party. Furthermore, the defendant contends that since the plaintiff has failed to attach an affidavit from Mr. Stromsem stating a desire to meet with the plaintiff in regards to the allegations in this case, the plaintiff’s request only speculates as to what is motivating Mr. Stromsem not to be interviewed by the plaintiff. While emphasizing that its confidentiality agreement with Mr. Stromsem is lawful and enforceable, Defendant AICPs states that its agreement with Mr. Stromsem seeks to not interfere with a legitimate legal process by preventing Mr. Stromsem from testifying pursuant any subpoena or any court’s or administrative agency’s order not solicited by him. Finally, in responding to the plaintiff’s argument that the confidentiality agreement interferes with the plaintiff’s access to Mr. Stromsem as a witness, Defendant AICPs argues that this case has significantly different facts from the cases cited by the plaintiff, especially whereas here Mr. Stromsem has voluntarily chosen not to speak with counsel from either side.

¹ The court notes that the plaintiff makes additional supporting arguments regarding how 1) counsel for Defendant AICPs have seemingly violated Professional Conduct Rules 3.4 (f) and 8.4 by reminding Mr. Stromsem of his contractual obligations pursuant to the confidentiality agreement and stating that Defendant AICPs would strictly enforce any violation of that agreement; 2) Defendant AICPs’s conduct may violate D.C. criminal statutes by penalizing Mr. Stromsem for providing information to the plaintiff related to his claim; 3) the D.C. Human Rights Act forbids Defendant AICPs’ conduct of intimidating or threatening a witness from cooperating or otherwise participating in any legal action or investigation related to any alleged violation of that statute; 4) the Equal Employment Opportunity Commission has issued guidance stating that confidentiality agreements may be unenforceable as against public policy; and 5) the liquidated damages provision of Defendant AICPs and Mr. Stromsem’s confidentiality agreement is unreasonable.

Here, notwithstanding Defendant AICPAs’ correct assertion that its confidentiality agreement is lawful and enforceable, the defendant cannot tacitly use its confidentiality agreement to effectively control or otherwise limit the scope or frequency of interactions between the plaintiff and Mr. Stromsem. See Doe, 99 F.R.D. at 128-29 (reasoning that to allow one litigant to set the terms by which the other can speak to a witness “enables the party so wielding the privilege to monitor his adversary’s progress in preparing his case by his presence on each occasion such information is revealed while his own preparation is under no such scrutiny”").

3
Defendant AICPAs does not proffer a counter-argument on how it would be prejudiced if Mr. Stromsem were allowed by court order to speak with the plaintiff regarding matters relevant to his case. Indeed, if the plaintiff’s underlying allegations were to be believed, it is a logical conclusion that Mr. Stromsem will be the subject of much discovery in this case. See Sklagen v. Greater SE Cnty. Hosp., 625 F. Supp. 991, 992 (D.D.C. 1984) ("The ex parte interview is an effective discovery procedure which operates outside of and is not precluded by the federal discovery rules."). Accordingly, in light of the efficiencies generated from informal interviews that would accrue to the parties and seeking to avoid circumstances that might allow a party to abuse a confidentiality agreement in a manner that bears no relation to the purposes for which the agreement exists, it is by the court this 7th day of April 2014

ORDERED, that the plaintiff’s Motion for a Protective Order to Prevent Obstruction of Witnesses shall be and is hereby GRANTED IN PART AND DENIED IN PART; and it is further

ORDERED, that Defendant American Institute of CPAs is hereby enjoined from enforcing its confidentiality agreement with Mr. William Stromsem, should Mr. Stromsem choose to speak with and provide relevant information to counsel for either party regarding the plaintiff’s underlying allegations and claims. In all other respects, plaintiff’s motion is DENIED.

[Signature]
HERBERT B. DIXON, JR.
JUDGE
(Signed in Chambers)

Copies to:
Stephen Z. Chertkov, Esq.
Katherine S. Wallet, Esq.
Jennifer Everitt, Esq.
Richard Haygood, Esq.
VIA EMAIL

Duke Conference Discovery Subcommittee
of the Advisory Committee on the Federal Rules
of Civil Procedure

Attn: John Rabiej
Director of the Center for Judicial Studies
Duke University Law School

Dear Mr. Rabiej:

The Equal Employment Opportunity Commission (EEOC) submits the comments below on the proposed Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality. EEOC enforces five federal employment discrimination statutes: Title VII of the Civil Rights Act of 1964 (Title VII), Title I of the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, and Title II of the Genetic Information Nondiscrimination Act of 2008. Since receiving suit authority under Title VII in 1972, EEOC has been an active litigant in federal trial and appellate courts. Currently, the Agency has over 150 suits pending in federal district courts throughout the United States. EEOC’s General Counsel is responsible for the conduct of the Agency’s litigation, and the following comments represent the General Counsel’s Office’s position on the proposed guidelines and practices.

Although EEOC is commenting specifically on only a few of the proposed guidelines, the Agency believes the guidelines’ broad emphasis on limiting discovery will disadvantage private employment discrimination plaintiffs. (Admittedly, the purpose of the proportionality amendment is to reduce the volume of discovery, and EEOC is not opposed to efforts to address abusive discovery requests (in its comments on the proposed rules amendments, EEOC supported the addition of proportionality to Rule 26(b)(1)). Such efforts, however, must take into account the public interest considerations indicated below and in my testimony at the Advisory Committee’s January 9, 2014, public hearing in Phoenix on the proposed rules amendments.) As the Duke Subcommittee is aware, many, likely most, private plaintiffs in employment discrimination actions are at a distinct disadvantage compared to defendants with respect both to resources and to access to information relating to the employment practice(s) being challenged. This does not mean, of course, that different standards should apply to the respective parties in determining the proportionality of discovery requests, or for that matter to any other aspect of discovery practice. But given these positional disparities, EEOC believes the subcommittee should be particularly cognizant of the risks of issuing guidance material that could cause courts to act in a manner that while seemingly neutral (both in content and intent) could adversely affect individual plaintiffs in employment discrimination suits.
For example, the Commentary to Guideline 2(C) on relative access to information appears to lament (probably not too strong a word) the heavier discovery burden that falls on the party possessing significantly more relevant information; however, in referring to situations of “informational asymmetry,” the Advisory Committee’s Note to the proposed amendment to Rule 26(b)(1) states: “The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.” Further, the Commentary is concerned that “[u]nfairness can occur when a party with significantly less information imposes unreasonable demands on the party that has voluminous information.” Not only does this statement suggest (more or less say), with no factual support, that parties at an informational disadvantage are prone to make unreasonable discovery requests, but assumes, also without factual support, that such unreasonable requests are likely to occur only in situations of informational asymmetry.

Another example is the statement in the Commentary to Guideline 3 that “[l]he order in which the proportionality factors appear in the Rule text does not signify relative importance or weight.” This statement is supported only by a reference to the reordering of some of the factors (ascribing the reordering to avoiding “attaching significance to the order in which [the factors] appear”), but not only does the reordering better support the contrary conclusion – why reorder the factors except to indicate relative importance? – the Commentary’s statement is inconsistent with Judge Campbell’s description of the Advisory Committee’s position on the reordering in his May 2, 2014, memorandum (at page 8) to Judge Sutton recommending the Standing Committee’s approval of the proposed rules amendments: “One proposed revision in the published rule text is to invert the order of the first two factors so now they are ‘the importance of the issues at stake, the amount in controversy ***.’ This reorganization adds prominence to the importance of the issues at stake, avoiding any possible implication that the amount in controversy is the first and therefore most important concern. In addition, the Committee Note is expanded to address in depth the need to take account of private and public values that cannot be addressed by a monetary award.”

EEOC believes the proposed practices directed at encouraging more judicial involvement in discovery matters are generally useful, particularly in light of the Advisory Committee’s decision not to require that parties request a conference with the court prior to moving for a discovery order. In view of the problems indicated above with the proposed guidelines, EEOC recommends that any materials issued regarding the proportionality amendment be limited to court case management practices.

Thanks you for the opportunity to comment on the proposed Guidelines and Suggested Practices.

Sincerely,

P. David Lopez
General Counsel
August 21, 2015

John K. Rabiej
Center for Judicial Studies
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210 Science Drive
Durham, NC 27708


Dear Mr. Rabiej,

The Greater New Orleans Fair Housing Action Center, a non-profit organization that enforces and litigates claims under the Fair Housing Act, 42 U.S.C. 3601 et seq., respectfully submits the following comments to the proposed guidelines for Fed. R. Civ. P. 26(b)(1). Our organization has substantial experience in federal civil rights litigation and discovery matters.

The Proposed Guidelines Permit Proportionality Objections to Be Raised for Any Discovery Request in Any Case

We suggest that clarifying language be inserted in the guidelines to the effect that proportionality considerations and objections should presumptively be triggered only in cases where discovery will be voluminous or complex. Or alternatively, in cases or with respect to discovery requests that do not implicate voluminous or complex discovery, there should be a presumption that discovery requests are clearly proportional to the reasonable needs of the case.

The revised Rule aims to curtail burdensome discovery unnecessary to a particular case, but without the suggested clarifying language in the proposed guidelines, parties may presume that any discovery request or set of discovery requests, now matter how minor, is burdensome and can be challenged on grounds of disproportionality. This will lead to wasted effort and expense lost to unnecessary discovery disputes and motion practice in potentially every matter.
For example, when our organization sues in the capacity of an organizational plaintiff, the Supreme Court has imposed specific and narrow requirements we must prove to establish both Article III standing and damages. See Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). Diligent defendants who seek to disprove our grounds for standing or damages routinely make years-spanning discovery requests for documentation regarding funding and programming, requests which are burdensome for our resource-limited organization to satisfy. We nevertheless satisfy the requests without serious dispute or judicial intervention because such requests are almost always relevant, or will lead to information relevant, to the issues of our standing and damages.

Without clarifying language that where discovery sought is not voluminous or complex requests are presumed to be clearly proportional to the reasonable needs of the case, we may arguably be able to raise a proportionality challenge in each case to such requests. Of course, we anticipate that defendants in our suits will do the same in response to our discovery requests, although the information sought is often routine.

In sum, we foresee disputing and possibly litigating proportionality in every run-of-the-mill case – to the detriment of expeditiously resolving cases, minimizing discovery disputes, and sparing courts from resolving unnecessary conflicts. If the guidelines were clear that proportionality is not a presumptive consideration in every case and with regard to every discovery request, but only comes into play when the case involves, or the requests seek, voluminous or complex discovery, such disputes will be avoided in most cases.

The Cost-Sharing Remedy Will Impose Unequal Burdens on Resource-Outmatched Parties

We share the reservations expressed by the civil rights/employment working group in its comment letter of June 29, 2015, with respect to cost-sharing remedy set forth in Practice 10.

By way of example, we occasionally undertake cases involving small and impecunious landlords who have made discriminatory statements in violation of the Fair Housing Act. Our resources significantly outweigh theirs in such cases. In other matters, we have filed suit on behalf of individuals with modest means against housing providers that own or manage tens of thousands of homes. Cost-sharing in these cases imposes an unequal burden on the resource-outmatched party.

To the extent that cost-sharing will be part of the final guidelines, we urge that consideration of the parties’ resources be made an explicit consideration to be undertaken in determining whether a cost-sharing remedy should be devised, and on what terms.

The Bifurcation of Discovery into Core and non-Core Phases Will Have Unintended Consequences
Finally, we also join the criticisms and observations of the civil rights/employment working group with respect to the bifurcation of discovery into two phases as encouraged in the “Practices” section.

We add that, although the commentaries take pains to clarify that discovery occurring in the secondary discovery phase does not entail any distinct proportionality analysis, the very fact that such pains have been taken make it clear that it will be hard for parties and courts to resist the natural inference that follow-up discovery beyond initial “core” discovery is of lesser importance and benefit.

We relatedly observe that bifurcating discovery into two phases encourages parties to “hide the ball” with respect to issues that one party knows may become crucial, in the hopes that discovery on the issue is deferred to the second stage where “clear proportionality” no longer enjoys a natural presumption.

One such example occurred in a recent case where an unforeseen agency issue—known only to the opposing party—became the crucial issue of the case. The opposing party raised lack of agency as a defense in early settlement discussions, permitting us to focus our discovery requests on the issue and determine the merits of the defense. This, in turn, led to early and expense-saving settlement before additional significant discovery had been undertaken. Under the practice regime contemplated by the proposed guidelines, the opposing party would have had an incentive to not disclose this key issue, so that the existence of the issue would only be discovered in the “core” phase. The party could have then argued to the court that the additional discovery required to investigate the defense—discovery that was relatively extensive—was not proportional in the context the non-core phase.

Conclusion

We thank you for the opportunity for comment and appreciate the effort that the Center for Judicial Studies has undertaken to improve the rules and practice of civil procedure.

Sincerely,

[Signature]

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August 24, 2015

**VIA EMAIL**

John K. Rabiej, Director  
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**Re:** Duke Center for Judicial Studies  
Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality

Dear John:

I appreciate the opportunity to share comments, perspective, and concerns regarding the draft Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality (“Guidelines and Practices”), in process through the Duke Center for Judicial Studies. As a practitioner predominantly (though not exclusively) representing plaintiffs in complex class and mass actions involving, among other substantive areas, products liability, trade secret, consumer, and securities claims, I have frequent exposure to the technical and case management tools and techniques associated with discovery in massive document litigation. I thus am particularly sensitive to how the Guidelines and Practices could inform or shape discovery in these and analogous litigation settings.

The below comments and concerns relate to three specific areas in the most recent draft Guidelines and Practices, namely (a) the suggestions and directives relating to focused or staged early discovery (Practices 5 and 6), (b) the recommendation and guidance to explore cost shifting as a tool to address proportionality and discoverability concerns (Practice 10), and (c) the relative role of the importance of issues at stake in the determination of the proportionality of requested discovery (Guideline 2(a)).

**Focused Early Discovery (Practices 5 & 6)**

Practice 5 problematically sets up an expectation that the parties will, in the ordinary course, focus—and therefore stage, sequence, or tier—their discovery. *See Practice 5* (“In many cases, the parties will initially focus discovery on information relevant to the most important issues, available from the most easily accessible...
suggestions."). Where they haven’t, Practice 5 guides the court to direct the parties to do so. Practice 5 (“In a case in which the parties have not done so . . . the judge should consider advising or directing the parties to initially focus discovery on the subjects and sources that are most clearly proportional to the reasonable needs of the case.”).

Practice 6 furthers emphasizes this expectation, through its specific equation of planned “proportional discovery” with a sequence involving “focused early discovery.” See Practice 6 (“In many cases, the parties plan proportional discovery. In a case in which this does not occur, or in which discovery is likely to be voluminous, complex, or contentious, the judge should consider addressing the use of focused early discovery in the Rule 16(b) case-management order.”).

The explicit endorsement and directives of Practices 5 and 6 towards focused early discovery and thus staged discovery go well beyond what constitutes common practice, let alone a “best practice.” Nor do the strong recommendations derive from the language of Rule 26 or its associated Committee Note, which notably and repeatedly attempt to assure that the proportionality amendments neither plow substantial new ground, nor impose on the party seeking discovery the burden of showing proportionality. Indeed, the very premise of Practice 5 seemingly eviscerates the assurance of Guideline 4, namely, that “[n]o advance showing of proportionality is required” as a prerequisite to discovery. Practice 5’s further suggestion that the prioritization of discovery of subjects and sources be driven by the relative extent of proportionality finds no support in amended Rule 26. See Practice 5 (counseling the judge to direct “the parties to initially focus discovery on the subjects and sources that are most clearly proportional”).

As a practitioner in complex and voluminous discovery cases, I am very surprised to see this expectation or directive as a consensus practice. In my experience (and, I suspect, in the experience of many plaintiffs’ counsel who dwell in discovery of complex cases), rarely does tiered or staged discovery serve the “just”, “speedy”, or, rather ironically, “inexpensive” considerations of Rule 1. The reality is that once the discovery path is framed as a less-than-the-whole approach, the tour guide on the path of focused early discovery is an interested and adverse responding party, zealously advocating his or her client’s interests, with objectives that are not aligned with those of the discovering party. The responding party has full access to the departmental and custodial sources, and has the ability to investigate and understand the information sources that may prove most problematic for the responding party on the merits. With that information in hand,

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1 See, e.g., Memorandum of the Judicial Conference of the United States, September 26, 2014, at 19 (Rule 26 Committee Note: “Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.”); Report of the Committee on Rules of Practice and Procedure, June 14, 2014, at 6
the knowledgeable responding party—armed with gross information asymmetry—guides the court and requesting party to the early custodial or file sources that the responding party is most comfortable producing. The sequential discovery thereafter sought is then measured against the content of what has already been produced, and is often objected to by the responding party on the ground that the requesting party has already received the custodial file for another person in the particular department. In sequencing discovery in this manner, the responding party has enlisted the support and endorsement of the court in gerrymandering custodial and departmental sources.2

The attempted assurance in the Commentary to Practice 5 that “[t]here is no heightened showing required to obtain discovery beyond the focused early discovery” rings hollow to those who are familiar with how sequenced or focused early discovery plays out in practice. The discovery that has been previously produced is regularly and systematically highlighted to limit the production of relevant information from the custodial and departmental sources requested in later discovery waves or phases. A responding party zealously advocating his or her client’s interests would surely highlight that, in light of the custodians already produced, the burdens of the producing the supplemental custodians exceeds the likely benefit. Tiered or phased discovery with serial proportionality reviews invites tactical discovery gerrymandering.

Most ironic is that Practices 5 and 6 guide this approach in cases where discovery is likely “to be voluminous, complex, or disputed.” Products liability, securities fraud, environmental, and antitrust cases come immediately to mind. However, it is these cases—where the amounts in controversy are massive, the responding party has substantial resources and near exclusive access to information relevant to the claims and defenses, and the claims often touch on broad issues of public health, safety, or financial welfare—that are most likely to warrant the broad discovery under the proportionality considerations of 26(b)(1). That Practices 5 and 6 seem directed at curtailing discovery in this group of cases is puzzling.

Proponents of staged discovery champion cost savings and efficiency gains without consequent lost of meaningful relevant information. In practice, the truth is

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2 Countless cases discovered under the party-moderated, traditional discovery framework demonstrate the wisdom of proceeding in that general fashion. It is not at all uncommon for critical pieces of evidence that one would expect to see in the files of many employees—e.g., a formal departmental memorandum from a pre-launch meeting that reflects the internal concern and need for testing about the very risk that later materializes and harms thousands—to be found in only one person’s online repository, email, or physical/virtual file drawer. One has to seriously question whether those documents would ever see daylight in a framework where each follow-up custodial request had to show the relative proportionality of the additional custodian as compared to the custodians that had already been produced in the initial or earlier wave.
often the reverse. The promise of cost savings through reduction of production and review expenses is often undermined by the costs of serial meet and confers and discovery motion practice.\(^3\) The paradigm of staged discovery infuses substantial procedural “overhead” to the discovery process, with consequent impact on what can meaningfully be achieved within the court-imposed discovery deadlines. The obvious bears repeating: cases are not litigated in a boundless timeframe. The bookends of discovery commencement and completion frame an ever-present timer for the parties’ development of the factual foundations for their claims or defenses.

Requiring serial showings of proportionality in complex cases—or requiring the demonstration that what is sought is most proportional, before proceeding to the next most proportional piece of information, etc.—will put the requesting party in a true discovery squeeze play. The discovery window will be disproportionately spent negotiating and litigating discovery rather than discovering the claims and defenses. A framework that specifically encourages and endorses that approach will only entrench the “meet and confer to death (or until the discovery cutoff)” approach that has become all too common and problematic in complex cases.

Of course, implicit in the concept of focused or staged discovery is the recognition that relevant information is specifically and permissibly withheld from production. The parties and court, however, should be guided to employ all reasonable efforts to prevent that result. It is antithetical to the ideals expressed in Rule 1. Parties should press to address burden through means that eliminate the risk of discovery gerrymandering, delay, or enhanced discovery overhead. To that end, tools and techniques that aid efficiency and reduce costs—\textit{i.e.,} de-duplication, predictive search and review, etc.—while keeping relevant information off of the cutting room floor, should be the first tools drawn where proportionality is not self-evident.

The Guidelines and Practices should not endorse focused or staged discovery. Its absence from Rule 26(b) and related Committee Note is telling. This blunt instrument has been surpassed by tools that actually do aid efficiency, reduce cost, and make more relevant discovery available. The Guidelines and Practices should respect the Committee’s silence on focused early discovery and withhold any endorsement of it.

\(^3\) No doubt, the endorsement in the recommended Practices of a “one-bite-at-a-time” discovery cycle—request tailored discovery, meet and confer, meet with the court, litigate the dispute, review the focused discovery responses, serve supplemental requests, meet and confer defending the proportionality of supplemental requests, meet with court, litigate the dispute, review the supplemental discovery, and so on—will only further serve to drive up non-production-related discovery expenses.
**Imposition of Costs, Cost-Shifting & Cost-Sharing (Practice 10)**

Earlier this summer, the Supreme Court once again affirmed the vitality and prominence of the American Rule as it concerns litigation in our federal courts: “Our basic point of reference when considering the award of attorney’s fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.” *Baker Botts LLP v. Asarco LLC*, No. 14-103, slip op. at 3 (2015) (internal quotation omitted). Consistent with that bedrock principle, the overwhelming presumption and practice in federal discovery is that the responding party bears the costs of responding to discovery directed to it.

While the comments to Practice 10 recognize this longstanding presumption, the practice and related commentary variously suggest cost-sharing as a meet-and-confer or Rule 16-type conference topic on discoverability, e.g., (a) cost-sharing “can be explored”, (b) “[t]he parties and judge might consider cost-sharing”, (c) “the judge may shift some of the costs”, or (d) “the judge ... may shift the costs conditionally.” In short, Practice 10 pushes cost-shifting and cost-sharing into the front-end of the discoverability discussion topics, attempting to knit that exceedingly rare protective-order remedy into the fabric of proportionality. Notably, nowhere in the Committee Note concerning proportionality considerations is there any reference to applying such relief in managing or assessing proportionality or discoverability. The absence of such reference is telling, and should inform the Guidelines & Practices proportionality committee to avoid recommending a practice that has been unsuccessful in the rulemaking process.

While amended Rule 26(c)(1)(B) recognizes a court’s authority through a protective order to allocate expenses for discovery or disclosure, the amendment was not designed to—and, indeed, does not—alter current practice. The Committee was clear that “[r]ecognizing the authority [to issue a protective order pursuant to amended Rule 26(c)(1)(B)] does not imply that cost-shifting should become a common practice. *Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.*” Memorandum of the Judicial Conference of the United States, September 26, 2014, at 25 (Rule 26 Committee Note) (emphasis added). Providing a practice tip counseling exploration and discussion of something that the Committee cautioned should not “become a common practice” contravenes the Committee’s specific assurance otherwise. More generally, directing the exploration of cost-sharing in the discoverability and proportionality framework—and seemingly suggesting it as a conference agenda item with the court—threatens the bedrock principle that is the American Rule, and the strong presumption that flows from it that the responding party should bear the costs of responding to discovery.
Proportionality Consideration:
"Importance of Issues at Stake" (Guideline 2(A))

The Guideline and associated comments related to the proportionality consideration, "importance of issues at stake", could, as drafted, be read as limiting the applicability of this consideration to only a very narrow swath of cases. Though this consideration is particularly significant in cases where there is little money in dispute, the Guideline and commentary should not be framed to suggest that is the only circumstance where it is applies. Cf. Guideline 2(A) Commentary (providing examples of cases "seeking to enforce constitutional or statutory rights"); Guideline 2(A) ("This factor applies when the money the parties stand to gain or lose in a particular case is inadequate to measure the importance or value of the issues involved.").

As the Committee Note to amended Rule 26 reflects, “[m]any other substantive areas”—beyond cases involving constitutional matters or those seeking to enforce statutory rights—"may involve litigation ... that seeks to vindicate vitally important personal or public values.” September 26, 2014 Memorandum of the Judicial Conference of the United States, at 22. Indeed, among others, cases involving matters of public health, public safety, or personal privacy may very well provide the significant importance needed to support the broader discoverability of information sought in those cases.

Nor should the fact that an action encompasses both an amount in controversy and an issue of public importance negate consideration of the issue of public importance in assessing proportionality and, thus, the discoverability of information in the litigation. The Supreme Court has often recognized the important and broader impact that claims of an individual person for financial compensation can have on issues of public safety and consumer welfare. See, e.g., Wyeth v. Levine, 555 U.S. 555, 579 (2009) (“State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCA’s premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times. Thus, the FDA long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation.”). In assessing the proportionality of discovery in an action where both money and issues of public importance are at stake, both can and should be appropriately considered by the Court and the parties in assessing discoverability. Nothing in the language of amended Rule 26 or the Committee Note suggests otherwise.

More broadly, Guideline 2(A), through its seemingly restricted significance, could serve to undermine the Advisory Committee’s very specific concern that money would be the primary or most important proportionality consideration. Compare Guideline 2(a) ("This factor applies when the money the parties stand to
gain or lose in a particular case is inadequate to measure the importance or value of the issues involved.”), with June 14, 2014 Memorandum of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 7 (“In response to public comments, the Committee also reversed the order of the initial proportionality factors to refer first to ‘the importance of the issues at stake’ and second to ‘the amount in controversy.’ This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern.”). The either-or construct of the Guideline betrays the prominence and independence the Committee sought to ascribe to “the importance of the issues at stake” in assessing proportionality in any case—even one in which a meaningful amount in controversy is at issue.

* * * * *

Thank you for your consideration of these comments. If a further draft of the Guidelines and Practices is made available for review and comment, I would appreciate the opportunity to review the same.

Respectfully,

/s/David R. Buchanan
David R. Buchanan
August 24, 2015

Via Email and Mail

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Re: Draft Guidelines re Implementing the 2015 Discovery Amendments

Dear Mr. Rabiej:

I write to thank you for your work on the draft Guidelines, but also to express concerns about their effect on plaintiffs’ civil rights litigation.

Our firm specializes in federal fair housing litigation, representing plaintiffs in cases before the Supreme Court, Meyer v. Holley, 527 U.S. 280 (2003), and courts of appeals, Holley v. Crank, 400 F.3d 667 (9th Cir. 2005), Fair Housing Council v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008), Giebeler v. M&B Associates, 343 F.3d 1143 (9th Cir. 2003), Harris v. Itzaki, 183 F.3d 1043 (9th Cir. 1999), Gibson v. County of Riverside, 132 F.3d 1311 (9th Cir. 1997), Gilligan v. Jamco Development, 108 F.3d 246 (9th Cir. 1997), Pacific Shores v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013), among others.

With that background, I am concerned that the Guidelines, as drafted, will hamper the effective enforcement of fair housing and civil rights laws. My principal concern is the manner in which the Guidelines further restrict the scope of discovery already curtailed by new Rule 26(b)(1).

First, the Guidelines drain urgency from the problem of “information asymmetry,” stating that

unfairness [] can result when the asymmetries are leveraged for tactical
Unfairness can occur when a party with significantly less information imposes unreasonable demands on the party that has voluminous information, or when a party with significantly more information provides the requesting party with unreasonable amounts of information that is difficult to organize or search. (Emphasis added)

This anemic construction of “information asymmetry” in civil rights litigation is unhelpful. My experience teaches that civil rights defendants not only control most of the relevant information, but also hoard that information unless and until its suits their defenses. I have confronted this problem repeatedly over the past decade, most recently in Jones v. Travelers, 304 F.R.D. 677 (N.D. Cal. 2015). Since most defendants create, store and use information in digital format, it is relative easy to produce. It is, indeed, a rare civil rights case where information relevant to a live controversy depends on data that is truly inaccessible. It is equally rare to litigate against a civil rights defendant who does not object to the scope of plaintiffs’ discovery complaining about the unfair burden imposed by plaintiff’s request. Finally, new Rule 26(b)(1) is fully equipped to handle any “unfairness” by an over-reaching plaintiff. The underlined portion in the above-quoted language should be stricken from the Guidelines.

Second, the Guidelines’ discussion of the “importance of discovery” factor amplifies a misunderstanding of the range and variety of evidence that must be discovered to prove a civil rights 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 are to resolving the 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, it 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 benefit to 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.

Unfortunately, the truism embodied in this comment – important stuff is more important than unimportant stuff – will fuel obstreperous conduct by defendants. By exalting an unfounded concern over “peripheral” issues, the Guidelines invite defendants to limit broad civil rights proscriptions to the unique facts of a
plaintiff’s claim – all in the name of “getting to the central issue, your Honor.”

Fair Housing Act litigation illustrates the problem. Although most fair housing complaints are the immediate result of specific acts of discrimination – the “central issue” according to defendants – most valid FHA claim arises out of a larger practice of discrimination. Defendants already strive to limit discovery to plaintiff-specific and transaction-specific facts, seeking to deprive fair housing plaintiffs of the types of highly relevant and admissible evidence tending to show a pattern of discrimination – evidence that is invaluable in proving that discrimination more likely than not played a role in the challenged conduct.¹

The Guidelines’ reference to “peripheral” issues provides defendants with another argument to resist the broad discovery that reveals the types of evidence needed to win a civil rights case. For example, the nature and variety of evidence from which discriminatory intent may be inferred is wide-ranging, a concept the Guidelines marginalize. Intentional discrimination is regularly established by indirect, or circumstantial evidence. See, e.g., Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242 (4th Cir. 1982). Indirect evidence may consist of comparative evidence, anecdotal evidence, statistical evidence or historical evidence. Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977).

• Comparative evidence focuses on the defendants treatment of individuals who are similarly situated to the plaintiff or persons of the protected class. For example, in Watson v. Pathway Financial, 702 F. Supp. 186, 189 (N.D. Ill. 1988), the fact that the defendant had denied the plaintiff’s loan application based on prior late payments but had approved six applications of white couples with similar credit histories was considered highly probative of discriminatory intent. See also Marks v. Global Mortgage Group, Inc., 218 F.R.D. 492, 497 (S.D. W. Va. 2003) (granting motion to compel discovery of other financial customers’ loan files in predatory lending case). In a race discrimination case, “it is the plaintiff’s task to

¹Since every fair housing case arises out of injury caused by a “discriminatory housing practice,” a fair housing plaintiff needs to conduct “core” discovery about the housing practice at issue (rental, sales, lending, insuring, zoning), the creation, revision, implementation, application and effect of that practice, persons (employees) involved in those practice-related processes, and persons subjected to the practice (victims or comparators). See 42 U.S.C. §3613(a)(1)(A) (authorizing an “aggrieved person” to commence a civil action), and 42 U.S.C. § 3602 (defining “aggrieved person” to include “any person who claims to have been injured by a discriminatory housing practice”).
demonstrate that similarly situated employees were not treated equally.” Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). As a result, courts have repeatedly held that personnel files and the information contained in them are highly relevant to claims under Title VII. See, e.g., E.E.O.C. v. Roadway Exp., Inc., 580 F. Supp. 1063, 1067 (D. Tenn. 1984) (“it is relevant to both of the charges [of violations of Title VII] to investigate personnel files of other similarly situated employees to determine how employees of different races were treated in comparable situations”); Collins v. Allied-Signal, Inc., 128 F.R.D. 643, 646 (E.D. Va. 1989) (“[Plaintiff] . . . could have obtained [defendant’s] personnel records to provide proof of his allegations . . . that other employees were in fact similarly situated and were in fact treated more favorably”). Information relating to comparators is critical to any claim of discrimination.

- Statistical comparisons are frequently a basis for inferring intentional discrimination in civil rights cases. See, e.g., Holder v. City of Raleigh, 867 F.2d 823, 827 (4th Cir. 1989) (the race of individuals in defendant’s employment was relevant to the plaintiff’s employment discrimination claim). Where a pattern and practice of discrimination has been alleged, one way of raising an inference of intentional discrimination against the plaintiff is by showing a discriminatory pattern of behavior by the defendants with respect to other members of the protected class. See Obrey v. Johnson, 400 F.3d at 694-95 and cases cited therein. Statistical evidence may be used to establish such a pattern. Id. For instance, that all requests for job transfers have been granted except for the plaintiff’s, is highly significant where all other requests were by non-minority employees. In addition, statistical evidence itself may be used to assist the jury in determining whether discrimination occurred or whether the defendant’s purported justification is a pretext for discrimination. Id. at 695 n.2. In Obrey, the Ninth Circuit found that the district court had erred in refusing to admit statistical evidence regarding the race of managers selected at a Navy shipyard as compared to the race of those who applied for the managerial positions. Id. at 696-97.

- Anecdotal evidence also serves as a basis for inferring discriminatory intent. Such evidence typically refers to behavior or conduct that is unrelated to the specific incidents alleged in the complaint, but that is probative of a discriminatory mindset. See, e.g., Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1422 (11th Cir. 1984); Teamsters, 431 U.S. at 335 n. 15. For example, in Obrey v. Johnson, the Ninth Circuit found that the district court had abused its discretion when it refused to allow three
Asian-Pacific Islander employees of the Naval Shipyard to testify that the Shipyard discriminated against them on the basis of race when it failed to select them for supervisory positions. 400 F.3d at 697. Evidence that defendants engaged in discriminatory conduct in other aspects of their operations, other than the specific incidents alleged in the complaint, would constitute relevant and admissible anecdotal evidence.

- Historical evidence also may be used to establish discriminatory intent. In Pinchback v. Armistead Homes Corp., 689 F. Sup. 541, 545 (D. Md. 1988), aff'd in relevant part, 907 F.2d 1447 (4th Cir. 1990), for example, the fact that there had never been a black leasehold owner of the defendant housing development was relevant and admissible to establish discriminatory intent. Historical evidence includes prior incidents of discrimination. Miller v. Poretsky, 595 F.2d 780, 782-5 (D.C. Cir. 1978); Pinchback, 689 F. Supp. at 545 n. 3.

These are just a few of the many different forms of admissible evidence that a civil rights plaintiff must be prepared to adduce at trial to win a disparate treatment case. Civil rights defendants already resist discovery of these sources and types of evidence, dismissing them as “peripheral” to the “central issue.” The Guidelines will make their job easier. The above-quoted language should be stricken in its entirety.

* * *

What I find perplexing about the pro-defendant tilt of the Guidelines is the utter lack of need for their one-sidedness. Credible analyses report a surprisingly high rate of discrimination in the housing and employment markets. While, at the same time, data published by the Administrative Office of the United States Court show that defendants overwhelmingly beat civil rights plaintiffs in district court, even before implementation of a new, more restrictive Rule 26(b)(1).

Thank you for your consideration.

Sincerely,

/s/ Christopher Brancart
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