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

Commentary

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

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

***Practice 8*:** On the judge's own initiative or on the parties' request, the judge should consider requiring the parties to request an in-person or telephone conference with the court after conferring with opposing parties and before filing a motion seeking to compel or to protect against discovery.[ii] Some judges require the parties to request a conference on the basis of limited motions or short briefs.[iii] These and similar practices avoid the often unnecessary costs and delays of fully briefed discovery motions.

Commentary

A live pre-motion or limited-motion conference between the parties and the court is often an effective way to promptly, efficiently, and fairly resolve a discovery dispute at considerably less judge- and law-clerk time than reading fully briefed motions, responses, and replies with attachments and issuing a written opinion.[iv] The parties and the judge save time, work, and resources.

The live pre-motion or limited-motion conference can often be held shortly after the parties inform the judge's case manager or judicial assistant that a discovery dispute has arisen. The conference lets the parties tell the judge what the party seeking the

discovery needs and what the party resisting the discovery is able to produce without undue burden, cost, or expense.

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

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

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

The judge might consider the best way to memorialize the results of the conference. Approaches can vary. Some judges have a court reporter present for the conference and hold it in the courtroom. Others hold the conference in chambers, sometimes with a court reporter and other times with a law clerk taking notes for a brief minute entry in the court's docket sheet. Other judges may ask one of the parties to draft and circulate a proposed order. Some cases may be better served by the courtroom formality and others by the more relaxed exchange in chambers.
The judge can include a pre-motion or limited-motion conference requirement and procedure in the case-management order issued under Rule 16(b). The procedure can include provisions for using telephone or video conferences if one or more of the parties cannot attend in person.

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

Committee Note, Rule 16 (Dec. 1, 2015)

"Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who

hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case."

[i] **Chief Justice Roberts urges greater judicial-case management.**

- 3d Cir. *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co*., 2016 WL 5799660, at *12 (3d Cir. Oct. 5, 2016) (quotes Chief Justice's statement that: "'key here is careful and realistic assessment of actual need' that may 'require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery'").
- 2d Cir. *Armstrong Pump, Inc. v. Hartman*, 2016 WL 7208753, at *3 (W.D.N.Y. Dec. 13, 2016) (quoting Report to support importance of case management at early trial stages).
- 6th Cir. *Waters v. Drake*, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016) (agreeing with Chief Justice's report, "court believes that implementation of the new discovery rules will require improved case management by district judges, a culture of cooperation among lawyers, and active and early involvement by judges to fashion discovery that is proportional to the needs of the case").
- 7th Cir. *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 308 (S.D. Ind. Mar. 24, 2016) (amendments designed to emphasize judicial management of discovery process, "especially for those cases in which the parties do not themselves effectively manage discovery").
- 8th Cir. *Sprint Commc'ns. Co. L.P. v. Crow Creek Sioux Tribal Court*, 316 F.R.D. 254, 263 (D.S.D. Feb. 26, 2016) (Chief Justice Robert's year-end Report on the federal judiciary addresses 2015 amendments).
- 9th Cir. *McSwain v. United States*, 2016 WL 4530461, at *3 (D. Nev. Aug. 30, 2016) (favorable reference to Chief Justice's end-of-year report); *Roberts v. Clark Cty. Sch. Dist*., 312 F.R.D. 594, 603 (D. Nev. Jan. 11, 2016) (as explained by Chief Justice Roberts in his year-end Report, amendments "may not look like a big deal at first glance, but they are." He went on to say that accomplishing the amendments' goals will only occur "if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change"); *see also Gibson v. SDCC*, 2016 WL 845308, at *4 (D. Nev. Mar. 2, 2016) ("Chief Justice Roberts asked federal judges [in his year-end Report] 'to take on a stewardship role, managing their cases from the onset rather than allowing parties alone to dictate the scope of discovery' and to actively engage in case management to 'identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.'").
- 10th Cir. *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *18 (D.N.M. Apr. 1, 2016) (Chief Justice Roberts explained that proportionality "assessment may, as a practical matter, require 'judges to be more aggressive in identifying and discouraging discovery overuse by emphasizing the need to analyze proportionality before ordering production of relevant information'").
- D.C. Cir. *United States ex rel. Shamesh v. CA., Inc*., 314 F.R.D. 1, 8, (D.D.C. Jan. 6, 2016) (Rule 26 proportionality factors "'encourage judges to be more aggressive in identifying and discouraging discovery overuse and to make proportionality considerations unavoidable'").

[ii] **Preference for pre-motion conference over motion practice.**

- 2d Cir. *Vaigasi v. Solow Mgmt. Corp*., 2016 WL 616386, at *3–7 (S.D.N.Y. Feb. 16, 2016) (court held multiple discovery conferences with parties to resolve discovery disputes).
- 3d Cir. *Fassett v. Sears Holdings Corp*., 2017 WL 386646, at *2 (M.D. Pa. Jan. 27, 2017) (court held two pre-motion status conferences in unsuccessful attempt to resolve discovery dispute without motions); *In re: Domestic Drywall Antitrust Litig*., 2016 WL 4414640, at *2 (E.D. Pa. Aug. 18, 2016) (telephone conference with parties clarified extent of discovery request); *CDK Glob., LLC v. Tulley Auto. Grp., Inc.*, 2016 WL 1718100, at *2 (D.N.J Apr. 29, 2016) (magistrate judge held telephone conference on quashing subpoena seeking discovery); *Vay v. Huston*, 2016 WL 1408116, at *10 (W.D. Pa. Apr. 11, 2016) (lawyers' "reliance on email communications [was] unavailing," as substitute for conferences under local practices); *see also Bell v. Reading Hosp*., 2016 WL 162991, at *1 (E.D. Pa. Jan. 14, 2016) (court held telephone discovery conference).

- 5th Cir. *InforMD, LLC v. DocRX, Inc.*, 2016 WL 2343854, at *2 (M.D. La. May 3, 2016) (court held in-court status conference to consider discovery issues); *see also Krantz v. State Farm Fire & Cas. Co*., 2016 WL 320148, at *1 (M.D. La. Jan. 25, 2016) (parties held discovery conference).
- 8th Cir. *Perez v. KDP Hosp., LLC*, 2016 WL 2746926, at *1 (W.D. Mo. May 6, 2016) (court held telephone conference to hear argument on disputed discovery issues).
- 9th Cir. *Wichansky v. Zowine*, 2016 U.S. Dist. LEXIS 37065, at 3 (D. Ariz. March 22, 2016) ("The Court, which seeks to avoid delay and expense by hearing discovery disputes in telephone conferences without the filing of motions (allowing expedited briefing where needed), has held 10 separate discovery dispute conference calls with parties."); *see also Talavera v. Sun Maid Growers of Cal.*, 2017 WL 495635, at *1 (E.D. Cal. Feb. 6, 2017) (court held informal telephonic pre-motion conference on discovery disputes regarding class-action certification).
- 10th Cir. *Meeker v. Life Care Ctrs. of Am., Inc.*, 2016 WL 1403335, at *7 (D. Colo. Apr. 11, 2016) (court held several informal discovery conferences).

Cf.

- 5th Cir. *La. Crawfish Producers Ass'n- W. v. Mallard Basin, Inc*., 2015 WL 8074260, at *3 (W.D. La. Dec. 4, 2015) (court ordered that "all proposed specific discovery requests not agreed to by the Defendants shall first be presented to the Magistrate Judge with a request and justification for the allowance of the discovery." Defendants had not followed practice ordered by judge).

[iii] **Pre-motion conference informal letter in lieu of motion and brief.**

- 3d Cir. *Bell v. Reading Hosp*., 2016 WL 162991, at *1 (E.D. Pa. Jan. 14, 2016) (plaintiffs submitted "informal motion to compel").
- 9th Cir. *Loop AI Labs Inc. v. Gatti*, 2016 WL 1273914, at *1 (N.D. Cal. Feb. 5, 2016) (court ordered parties to submit briefs of "no more than 5 pages regarding the Court's authority to require the parties to bear the cost of a discovery Special Master absent the parties' agreement to do so"); *Salazar v. McDonald's Corp*., 2016 WL 736213, at *1 (N.D. Cal. Feb. 25, 2016) (parties filed joint letter addressing failure to respond to discovery requests).

[iv] **Rule 16(b)(3)(v) contemplates discovery conference requested before motion filed**.

- 8th Cir. *Duhigg v. Goodwill Industries*, 2016 WL 4991480, at *2 (D. Neb. Sept. 16, 2016) (although court was amendable to holding pre-motion discovery conference as provided under Rule 16, opportunity to hold discovery conference passed because party filed motion to compel prior to request for conference.

[v] **Local rules governing pre-motion conferences.**

- 7th Cir. *Acheron Med. Supply, LLC v. Cook Med. Inc*., 2016 WL 5466309, at *5 (S.D. Ind. Sept. 9, 2016) (court cited Local Rule 37-1(a), which states: "counsel are encouraged to contact the chambers of the assigned Magistrate Judge to determine whether the Magistrate Judge is available to resolve the discovery dispute by way of a telephone conference or other proceeding prior to counsel filing a formal discovery motion").