

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

BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

(SECOND EDITION)

EXECUTIVE SUMMARY

Duke Law School
September 2018

PROPORTIONALITY GUIDELINES

PROPORTIONALITY GUIDELINE 1: Rule 26(b)(1) defines the scope of discovery as “any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Proposed discovery must be both relevant and proportional to be within the scope that Rule 26(b)(1) permits. Information that is within the scope of discovery is discoverable even if it would not be admissible in evidence. The Rule 26(b)(1) amendments do not alter the parties’ discovery obligations or create new burdens.

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

GUIDELINE 2(A): “*Importance of Issues at Stake*”—This factor focuses on measuring the importance of the issues at stake in the particular case. This factor recognizes that many cases raise issues that are important for reasons beyond any money the parties may stand to gain or lose in a particular case.

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.

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

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.

GUIDELINE 2(E): “*Importance of Discovery*” —This factor examines the importance of the discovery to resolving the issues in the case.

GUIDELINE 2(F): “*Whether the Burden or Expense Outweighs Its Likely Benefit*”—This factor identifies and weighs the burden or expense of the discovery in relation to its likely benefit. There is no fixed burden-to-benefit ratio that defines what is or is not proportional.

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

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

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

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

PRACTICES

PRACTICE 1: The parties should engage in early, ongoing, and meaningful discovery planning. The parties should begin to work internally and with opposing parties on relevance and proportionality in discovery requests and responses from the outset, which can be well before a case is filed or served and before the Rule 26(f) meet-and-confer, the Rule 26(f) report, and the Rule 16 conference with the judge. The judge should make it clear from the outset that the parties are expected to plan for and work toward proportional discovery.

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

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

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

PRACTICE 5: In many cases, the parties will start discovery by seeking information relevant to the most important issues in a case, available from the most easily accessible sources. In a case in which the parties have not done so, or in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about relevance or proportionality, the parties and the judge should consider and discuss starting discovery with the subjects and sources that are most clearly proportional to the needs of the case. The parties and the judge can use the results of that discovery to guide decisions about further discovery.

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

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.

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

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

PRACTICE 10: The parties and judge should consider other discovery rules and tools that may be helpful in achieving fair, efficient, and cost-effective discovery. In particular, the parties should consider delivering discovery requests before their Rule 26(f) meet-and-confer.

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

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