



**DUKE'S REVISED *GUIDELINES AND PRACTICES*
CHART THE COURSE TO PROPORTIONALITY**

A REPORT FROM THE PROPORTIONALITY ROADSHOW

Recommendations from the Bench
and Bar in 17 Cities on Implementing
the 2015 Proportionality Amendments

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6 MONTHS. 17 CITIES. 20,000 MILES.

From November 2015 to May 2016, the “Proportionality Roadshow” criss-crossed the country to hold a series of three-hour exchanges with lawyers and judges about the 2015 proportionality amendments to the Federal Rules of Civil Procedure on discovery. The Roadshow traveled from Boston to San Diego, from Miami to Seattle, from Dallas to Detroit, and from Washington, D.C. to San Francisco, teaming up with panels of local lawyers and judges in each city.¹ We heard from and talked with a total of over 70 local judges and 70 local lawyers who made up the panels. Over 2,500 people attended, and many added their voices to the discussion.



The Roadshow was presented by the ABA Section of Litigation and the Duke Law School Center for Judicial Studies. Professor Steven Gensler and Judge Lee Rosenthal moderated, drawing on their background with the Advisory Committee on the Federal Rules of Civil Procedure and their work as reporters for the Duke Center's *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*.² While the Roadshow did not focus on the *Guidelines and Practices*, the lawyers and judges who attended the sessions provided specific suggestions for refining the work to make it more helpful. Many suggestions were echoed in multiple cities and in the contexts of different cases. Some of those suggestions are reflected in the refinements to the *Guidelines and Practices* published in this *Judicature* edition. Other suggestions will be studied as we continue to refine and revise the *Guidelines and Practices* in light of emerging case law and the experiences of judges and lawyers applying the 2015 discovery Rule amendments.

WHAT THE LAWYERS AND JUDGES SAID

Here are some specific suggestions the lawyers and judges consistently identified as helpful guidance or a useful technique in working toward proportional discovery in every case.

It's Never Too Early to Start Talking About and Planning for Proportional Discovery

Do lawyers and judges know enough when a case starts to make specific plans for proportional discovery? A consensus emerged here. Lawyers agreed that they had to start thinking about relevance and proportionality in discovery requests and responses from the start, often well before the Rule 26(f) meet-and-confer and the Rule 16 conference with the court.

The judges emphatically agreed. Many judges long ago lost patience with lawyers having “drive-by” Rule 26(f) meet-and-confers and submitting joint Rule 26(f) discovery/case management reports for the Rule 16(b) initial pretrial conference that reflect little thought about discovery, much less about how to plan for proportionality. The judges told us that it is unacceptable for lawyers to report that “we have no discovery issues” unless a thoughtful Rule 26(f) discussion about discovery has in fact made that clear.

The lawyers agreed that it was critical for them and their clients to start thinking and talking internally about proportional and relevant discovery from the outset. They also agreed that it was important to starting talking to the other side early in the case, often well before the Rule 26(f) meet-and-confer. Many lawyers told us that it was important to pick up the telephone or arrange in-person meetings with opposing counsel early in the case, to lay the groundwork for effective and ongoing discovery planning.

Some expressed concerns that lawyers, much less judges, know too little about a case early on to set intelligent discovery limits. But others responded that the lawyers and judges are not trying to define where discovery will end. Instead, they are deciding the most promising place for it to start. Lawyers and judges agreed that, in almost every case, they could make good decisions early in the case to answer the where-to-start question reliably and well.

It's been going on, usually implicitly, for years. The 2015 proportionality amendments make the importance of early, thoughtful discovery planning explicit and emphasize it as a requirement for the lawyers to meet and the judges to enforce.

The Parties Often Start Discovery by Getting the Information that is Most Needed and Most Easily Obtained

Lawyers told us that they often start planning discovery for each case by figuring out what information is most likely to be important to resolving central issues in that case and whether the information can be obtained from sources that require relatively less cost, time, and burden. Then they figure out whether to start by taking discovery to obtain this information, deferring the rest to be taken if, as, and when needed. Put in the framework and vocabulary of the 2015 discovery rules amendments, this approach is an important step toward discovery that is proportional to the needs of each case.

This approach is hardly new. Most have been doing it all along; smart lawyers have always decided which sources of information to explore first and used the information learned to decide what to do next.

The lawyers told us that even when they do not know what the central issues in a case will ultimately be, they usually know enough to use the Rule 26 meet-and-confer, the Rule 26(f) report, and the Rule 16 conference to discuss and decide whether to start discovery by seeking the most valuable information most easily available to answer the parties' case-specific important questions and goals.

These questions and goals vary from case to case. They can range from the need to resolve threshold legal issues that might end, narrow, or significantly shape the case and that avoid or narrow further discovery; identifying the value of the claims and defenses for potential settlement; identifying the key players; identifying the likely sources of information and the difficulty in obtaining information from them; and so on.

The lawyers gave specific examples that were consistent across the cities and came from lawyers in different practice areas and on both sides of the “v.” In some cases, the lawyers said, it makes sense to start with some basic discovery — emails from key players followed by one or a few depositions, or just a conversation between counsel — to explore settlement. That basic discovery may or may not give the parties what they need to evaluate the case and agree to settle. In other cases, it may make sense to start discovery limited to a potentially dispositive threshold legal issue, deferring other discovery until the issue is resolved. The lawyers consistently reported that while it may not be clear at the start what the central or dispositive issues in a case will be, it may make sense to start with discovery on the information most central to the questions the lawyers, parties, and judges want answered first. The parties and the court should at least ask why more expansive, expensive, and time-consuming discovery can't be deferred until the parties know it is needed and what “it” is.

The lawyers also told us that, in other cases, this flexible, iterative approach to discovery focuses on the sources of the information that is most likely to be important. The lawyers gave us

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an example that shows the long-standing nature of this approach. Lawyers have long avoided deposing every potential witness, particularly when they are scattered around the world or difficult to subpoena or schedule. Instead, they consider whether it is useful to start by deposing the three or four local witnesses likely to know the most valuable information needed to answer the parties' most important early questions. That testimony is then used to decide whether taking all or some of the remaining depositions is proportional to the needs of the case. As another example, before seeking electronically stored information from sources that are difficult or expensive to search, the lawyers often consider whether equally or more valuable information can be found on sources that are relatively easy and less costly or burdensome to search.

The lawyers and judges also told us that, in some cases, it does not make sense to start with some discovery and defer the rest. The case might involve few witnesses or other information sources, and those sources have information on all the issues in the case. The liability and damages issues may be straightforward and the discovery itself may be relatively limited in amount and complexity. For these and other reasons, not every case is appropriate for this kind of process. But the lawyers consistently agreed that considering and talking about the question are appropriate and important steps in almost every case. The 2015 amendments expressly require that consideration and discussion and emphasize their importance.

This process of considering whether to take some discovery first and using the results to help shape the next steps is important to achieving proportionality and to reducing discovery cost and delay. The process focuses the parties on the choices they are in the best position and have the best information to make at the time, and defers choices that typically depend on information the parties don't yet have.

But the lawyers also told us that, in too many cases, this consideration and discussion do not happen at all. The reasons vary. The case can be contentious or complicated. The case may involve discoverable information that is voluminous or difficult to

search, retrieve, or review. The lawyers or parties may be busy on other matters or the lawyers may be unfamiliar with federal practice. Or the parties may be pursuing broad discovery or resisting any discovery for "strategic" or other reasons.

We also heard that, in some cases, the lawyers do raise and discuss this process, but they encounter major disagreements about where the discovery should start and what discovery can be deferred. Many questions about relevance, proportionality, and privilege can be difficult and lead to good-faith positions on which reasonable minds can and do differ. Some cases present difficult line-drawing issues. For example, in some cases, the information most likely to be valuable is in the sources that are hardest and most burdensome to search, while the easily accessed sources contain relevant but less important information. All these situations can require judicial involvement to resolve. But the lawyers agreed that it is far better to identify and resolve these disagreements early than to pretend they don't exist and pursue discovery without a plan.

The lawyers consistently told us that in cases in which this consideration or discussion does not occur, is unproductive, or leads to discovery disputes, the judges' early engagement is critical. Lawyers consistently identified the lack of timely judicial involvement when it is needed — the lack of active case management in the relatively few cases that need it — as a major cause of unnecessarily costly, burdensome, time-consuming, and disproportionate discovery. We also heard, from judges and lawyers, some specific ways to give lawyers, parties, and judges tools and incentives to work toward the proportional discovery the rule amendments require. The major ones are set out below.

WHAT JUDGES CAN DO TO HELP WHEN IT IS MOST NEEDED IN THE CASES THAT NEED IT MOST

Specific Case-Management Tools Already Used in Courts Around the Country

The judges in the Roadshow cities consistently identified specific case-monitoring and case-management tools that are helpful in working toward proportional discovery in every case.

Make the Judge's Expectations Clear From the Start

One common technique is to issue an order at the start of the case setting out what the judge expects the parties to discuss at the Rule 26(f) discovery-planning conference, address in the Rule 26(f) joint discovery planning report, and be prepared to discuss at the Rule 16(b) live conference with the court. This might seem unnecessary; Rule 26(f) already covers this ground. But the judges who do this consistently identified two benefits of specific "Pre-Rule 26(f)" Orders. First, lawyers seem to take the Rule 26(f) process more seriously when the judge reminds the lawyers of what the Rule requires and stresses its importance to that judge. This type of order has proved to be a strong tonic against the stubborn problem of the "drive by" meet-and-confers and the perfunctory Rule 26(f) reports they spawn. Second, a pre-Rule 26 Order lets the judge state his or her specific expectations. Some judges direct the parties to discuss proportionality specifically and

include that discussion in their Rule 26(f) report. Some judges direct the parties to describe what steps they will take to ensure that discovery is proportional to the needs of the case. Some judges direct the parties to state whether they have considered and discussed starting with less-than-all-discovery. Some judges helpfully include the procedures for the parties to engage the judge when needed.

The point is not to wrest control from the parties but rather to facilitate the parties' use of the tools the rules give them to design a sensible plan on their own.

Hold "Live" (Interactive) Initial and Other Rule 16 Pretrial Conferences

Judges across the country reported consistent benefits in holding "live," interactive Rule 16 pretrial conferences, as opposed to simply looking at papers the parties file and entering an order setting out some deadlines. The judges agreed that while in-person conferences are preferable, particularly when substantive issues need to be discussed, telephone or videoconference discussions are far better than paper exchanges.

Judges and lawyers told us that having a live, interactive initial Rule 16(b) conference is particularly important. This is often the parties' first chance to talk about the case with the court and the court's first opportunity to assess the case. This conference usually generates the required discovery and scheduling order. No matter how good the parties' planning discussion is or how thoughtfully they write their Rule 26(f) report, there is no substitute for a live dialogue in which the judge can press the parties on their positions, ask follow-up questions, and raise issues the parties might have overlooked or swept under the rug.

Judges reported that the in-person or telephone interactive Rule 16(b) conference with the lawyers and parties is uniquely effective and efficient. It lets the judge have a meaningful conversation with the lawyers and parties to assess whether they are working toward proportional discovery. In many cases, that monitoring is management enough. If, however, the judge sees the need for more active case management, a variety of approaches is available. One is to set periodic status conferences, passing them if no specific issues need to be addressed. Another is to have the parties conduct some discovery and then return to court for a live conference with the judge to discuss further discovery. Some judges schedule status conferences halfway through the discovery period, either in complex cases or, for some, as a default practice across their civil dockets, including their "small" cases. These options are available for both the district judge assigned to the case and to a magistrate judge if the matter is referred.

These techniques, and others, are not mutually exclusive. Most judges who use one combine it with others. For example, judges who discuss discovery at live Rule 16(b) conferences often issue pre-Rule 26(f) or pre-Rule 16(b) Orders. The combination can be powerful. When the judge tells the lawyers and litigants in advance to take the proportionality discussion seriously, and at the same time tells them that she will ask probing questions at a live Rule 16(b) conference, the Rule 26(f) meet-and-confer, the Rule 26(f) report, and the Rule 16(b) conference become more thoughtful and informed. Those attending the Roadshows agreed that

lawyers act differently when they know the judge is watching and might ask questions.

Requiring the Parties to Seek Prompt Pre-Motion or Limited-Motion Conferences with the Court to Address Discovery Disputes

Judges at the Roadshows reported using and recommended ways to address discovery disputes without full-blown motions and long briefs filed with longer attachments. By the time the parties have filed a motion to compel or for protection and the response, reply, and often a surreply, the time and money required can be astronomical. The result is to kill proportionality.

Judges across the country told us that it is far more efficient and effective to address discovery disputes by requiring the parties promptly to seek a conference with the judge when a dispute arises that the parties cannot resolve themselves. Some judges require and set a telephone or in-person conference as soon as practicable after the parties report the dispute. Other judges ask the parties to submit short letters (perhaps two pages) or a brief motion and response (for example, no more than five pages) describing the dispute and then hold a live telephone or in-person conference within a short time. The consistent theme is that the parties and the judge talk about the dispute before the lawyers launch the full-blown briefing exchange.

Some judges hold these conferences in court and on the record; others hold them in chambers, with different approaches to recording the results. Whatever variation is used, in the great majority of cases the conversations between judge and lawyers or litigants resolve the dispute then and there.

We asked lawyers who had experience with pre-motion or limited-motion conferences how they liked them. Without exception, the lawyers were enthusiastic. They could not overstate the value of getting discovery disputes resolved quickly and without the cost and burden of the traditional full-briefing model. They could not overstate how ill-suited most discovery disputes are to full-blown legal briefs. These disputes tend to be practical, not jurisprudential or legalistic. So do the solutions. The lawyers consistently described full-blown briefs focused on jurisprudential principles as one of the most ineffective and inefficient ways to explore and resolve the practical problems that are usually the stuff of discovery disputes. The lawyers emphasized how the long delays to exchange briefs and wait for the court's opinion disrupt the discovery process and the entire case. Often, everything stops while the parties wait for the briefs and then the opinion. The work and the uncertainty often result in significant costs.

We also asked judges who had adopted some variation of the pre-motion or limited-motion discovery dispute conference practice how they liked it. The judges were just as enthusiastic. They consistently reported that the result was less work for them and their law clerks. In most cases, the judge could rule after discussing the disputes with the parties. In most cases, the conferences and discussions ranged from 10 minutes to no more than an hour. Some cases required a longer conference, but these were rare. The judges could usually rule in the conference. If some issues required briefing, the briefs were limited to, and suitable to explore, just those issues. When all or part of the dispute is resolved in the

conference, the judge and law clerks are spared the large time and effort of slogging through the briefs and attachments and drafting a written opinion.

Some judges worried that they would not get enough information without briefs to make a fair and accurate ruling. But the judges and lawyers who had used this approach emphasized that because the disputes are usually practical in nature, the approach does not present unusual risks of unfairness or error. These judges also emphasized that if they need more information, including briefs, they can and do ask for it.

The result? Much less expense and work for the litigants, and much less time and work for the lawyers and the judges and their clerks. Clients are grateful, lawyers look good to their clients, and judges don't have the discovery motions on their dockets.

Providing Assurances to Lawyers and Judges in Response to Specific Concerns about Fairness and Feasibility in Implementing Proportional Discovery

Both lawyers and judges repeatedly raised specific concerns. As the Roadshow dialogue continued, lawyers and judges reported broad agreement on how to address the concerns to make sure that steps taken to promote proportional discovery are fair as well as efficient and cost-effective.

THE LAWYERS' CONCERNS

During the Roadshow, the lawyers often stated their comfort with many of these themes, including the concept of starting with flexible, iterative discovery. But lawyers repeatedly raised two sets of concerns.

One set of concerns focused on the "asymmetrical" cases in which the party seeking discovery, often the plaintiff, has little information or resources, while the defendants control the voluminous information that is expensive to search for, retrieve, review, and produce. Those who seek discovery but have little information to discover expressed the fear that the proportionality rule amendments would be applied to favor those who control the information and frequently try to obstruct efforts to get it with overbroad objections and motions.

Is proportional or iterative discovery inherently pro-defendant? No. Plaintiffs as well as defendants receive and respond to discovery requests. Even in cases presenting large information asymmetries, plaintiffs often have large amounts of discoverable information, including electronically stored information found on multiple cell phones, home computers, or social media accounts.

A second and related set of concerns was that proportional discovery would turn out to be a "limited discovery" trap. The lawyers representing those who seek discovery worried that if they started by taking discovery into the information that is both most likely to be valuable and is relatively easy to find, retrieve, and produce, deferring other discovery until later, opposing parties would later claim that further discovery was waived or available only on a heightened showing. Many feared that they would not be able to get to a judge for relief or would encounter judicial acceptance of these arguments.

The judges provided some reassurance. They readily accepted that there is no special or different test for whether further

discovery is available or to what extent. The scope of discovery under Rule 26(b)(1) is information that is relevant, not privileged, and proportional to the needs of the case. That test applies to the first step in discovery, the last step in discovery, and all steps in between. The only thing that changes along the way is the information the judge and the lawyers have at their disposal to decide what other requested discovery is relevant and proportional.

The lawyers emphasized that judges could do one more thing. The most effective reassurance that the lawyers could work toward proportional discovery is the judge's clear indication that he or she will be available to assist when opposing counsel objects to additional discovery. Judges can communicate their availability and willingness to hear these disputes promptly in a variety of ways, including an order issued early in the case, in the scheduling and docket control order, or during the Rule 16(b) discussion of discovery. This is not a commitment to allow additional discovery in every case. Instead, it is a commitment that the judge will promptly hear and fairly consider the discovery requests and the objections.

The lawyers on both sides, but particularly those seeking discovery, also emphasized the importance of the Rule 34 amendments. These amendments require specificity in objections to production requests. The amendments also require producing parties to identify whether they have withheld requested documents when they produce "without waiving and subject to" their objections and require producing parties to state when promised supplemental productions will occur. Lawyers consistently reported that both sides would pay more attention to making production requests and objections conform to the rule changes, which are consistent with the similar requirements of Rule 26(g). If judges are available to promptly and efficiently enforce these obligations when the lawyers do not comply, that is another source of assurance that proportional discovery can be fair to all sides.

JUDGES' CONCERNS AND RESERVATIONS

Is There Time to Monitor Cases and Actively Manage Those Cases That Need It?

Some judges expressed concern that they and their colleagues could not feasibly meet the demands of proportionality case-monitoring and management. The demands sounded to them like a lot of time and work, particularly troublesome for judges with large criminal dockets.

The judges who were engaged in managing cases to work toward proportionality provided assurance. These judges reported that monitoring cases to determine whether the lawyers are engaging in proportional discovery typically requires little judge or law-clerk time. A live initial Rule 16 conference with the lawyers is a particularly efficient way to monitor cases to identify those that need more active management to achieve proportional discovery. In particular, the judges said the live conference lets them watch for some of the telltale signs that the case might need more active management, like extreme animosity or contentiousness between the parties or counsel, the need for extensive or particularly complicated electronic discovery, or early indications of potential spoliation issues.

The judges using this and similar practices reported that when they do need to assume a more active case-management role that requires more time than just monitoring, these efforts consistently allow them and their law clerks to avoid or reduce the time spent on discovery problems. Discovery disputes are less likely to arise, and less likely to be as intense or complex when they do, if the parties plan for proportional discovery because the judge requires it. Discovery disputes can be quickly and efficiently resolved with relatively little judge or law-clerk time by avoiding fully briefed discovery motions and instead having pre- or limited-motion discovery dispute conferences. Judges have time to spend, and save time by, monitoring and managing cases to implement proportional discovery. It is feasible, particularly with the cooperative work of district and magistrate judges across the country.

Can Judges Avoid Adding Costs and Delays In Implementing the Proportionality Rules?

Judges also expressed concern that an unintended consequence of front-loading cases with steps intended to promote proportional discovery would be more discovery costs, burdens, and delays — not less. The judges who had used active case-monitoring and case-management techniques consistently emphasized that these risks exist but can be avoided by careful case management. The lawyers consistently agreed.

Most of the concern stemmed from viewing discovery that starts by seeking some, but not all, discoverable information as presenting the same problems as formal orders staging or bifurcating discovery into rigidly divided phases. Judges properly pointed out that the problems of policing these orders and the disputes they generate can increase costs and cause delays. Starting with discovery geared to easily obtaining the information that is most helpful to answering the parties' most important questions is consistent with what lawyers have done for a long time. It is different from more formal staging or bifurcation orders.

That said, lawyers and judges must be careful to avoid inefficiencies that can run up costs and burdens. If, for example, the lawyers start with discovery into a threshold question of jurisdiction or limitations, they may take depositions of witnesses who also have broad knowledge about other issues in the case. It may be wiser to depose those witnesses on all relevant subjects rather than redepose that witness. Similarly, if a server contains a range of relevant information, it may be smarter to search that server once for all purposes rather than do an initial limited search and perhaps do it again, more broadly. This kind of management can avoid or reduce the risks of inadvertent consequences.

Another useful tool to keep costs and burdens down while working toward proportional discovery is found in the Adverse Action Employment Protocols that were jointly developed by a team of experienced plaintiff's and defense employment lawyers working together.³ The protocols are nothing more than pattern discovery requests and responses for use in cases seeking damages for adverse employment actions, such as Title VII. They are issued early in the covered cases. Each side must disclose core categories of information promptly, without formal discovery requests. The information is what is routinely sought in these

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cases. Relevance and proportionality objections are presumptively unavailable and are in practice not raised. After this exchange, discovery proceeds on the usual request-and-respond basis under the general Rule 26(b)(1) standard. The parties are free to pursue further discovery to the extent it is relevant and proportional to the needs of the case. Lawyers and judges who told us they have used the protocols were enthusiastic about them and planned to keep using them.

Has this tool simply deferred discovery fights until later? Quite the opposite. A recent Federal Judicial Center study found that discovery motions in cases using these protocols had been cut in half.⁴ These early results provide useful empirical support for the common-sense idea that starting discovery with a quick, battle-free exchange of the information experienced lawyers know they need to get or provide can go a long way toward making the rest of the discovery process smoother, simpler, better informed, and less contentious.

THE INCENTIVES FOR LAWYERS AND JUDGES TO WORK ACTIVELY TOWARD PROPORTIONAL DISCOVERY

What's In It for the Lawyers?

We asked the lawyers in each city what incentive they have to engage in proportional discovery, including starting with less-than-all discovery. The answers were consistent and reassuring. The parties want the most important information right away, without the battles that cause the delays and costs. If starting with some, but not all, discovery means that those seeking discovery must work just as hard or harder to get less information, or get ▶

To paraphrase one judge who spoke at the Roadshow, “would you rather take a little time early to check to see if your cases are on the right track, and perhaps a little more time to put them on the right track, or would you rather spend a lot of time dealing with them after they derail into the motions morass that requires endless clerk-and-judge hours to sort through and resolve?”

it later, they are not interested. If objecting to excessive discovery means that there is a battle over every objection, the parties responding to discovery are not interested. But if the parties can expect a fast, battle-free exchange of the most important information, they are very interested and willing to cooperate and reciprocate.

The lawyers and judges consistently reported that proportional discovery works best when the judges are available and willing to use tools and approaches that make it efficient, cost-effective, and fair. That includes, but is not limited to, reducing or avoiding the battles that too often accompany discovery.

What's In It for the Judges?

Judges reported that taking an earlier, more active role in discovery consistently saves them hours of work later. The discovery problems the judges avoid or reduce are the types of nasty and knotty messes that judges (properly) hate most. To paraphrase one judge who spoke at the Roadshow, “would you rather take a little time early to check to see if your cases are on the right track, and perhaps a little more time to put them on the right track, or would you rather spend a lot of time dealing with them after they derail into the motions morass that requires endless clerk-and-judge hours to sort through and resolve?” Many judges reminded us that most cases need only brief judicial monitoring. It's only a few cases that need the most active case-management. Judges also reported that discovery management was the best way for them to learn about the case. And many judges said they simply enjoyed it. A district judge's life may not be as cloistered as that of an appellate judge, but much of what a district judge does is still desk work. Holding “live” conferences with the lawyers (and the

parties when needed) is for many judges a welcome occasion to interact with the legal communities they serve.

CONCLUSION

A lawyer who helped create the Roadshows captured proportional discovery in just a few words. He first quoted a Spice Girls song. Judges need to be sure the party seeking discovery can answer this question: “What do you want, what do you really, really want?” He then turned to the Rolling Stones to express the fundamental spirit of proportionality and provide assurance to those seeking discovery: “You can't always get what you want, but you'll get what you need.”

Rule One, set to music. Sounds like a hit.

- ¹ New York, Philadelphia, Newark, St. Louis, Atlanta, Chicago, Washington, D.C., Los Angeles, San Francisco, Phoenix, Denver, Dallas, Miami, San Diego, Seattle, Boston, and Detroit.
- ² The *Guidelines and Practices* resulted from months of collaborative work by over 40 lawyers, more than half from the plaintiffs' side of the practice and the remainder from the defense side, plus some who regularly represented both and some who were in-house counsel for clients on both sides.
- ³ See *Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action* (Nov. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/discempl.pdf/\\$file/discempl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/discempl.pdf/$file/discempl.pdf).
- ⁴ See Emery G. Lee and Jason A. Cantone, *Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action* (Oct. 2015), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Discovery-Protocols-Employment-Lee-Cantone-FJC-2015.pdf/\\$file/Discovery-Protocols-Employment-Lee-Cantone-FJC-2015.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Discovery-Protocols-Employment-Lee-Cantone-FJC-2015.pdf/$file/Discovery-Protocols-Employment-Lee-Cantone-FJC-2015.pdf).



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