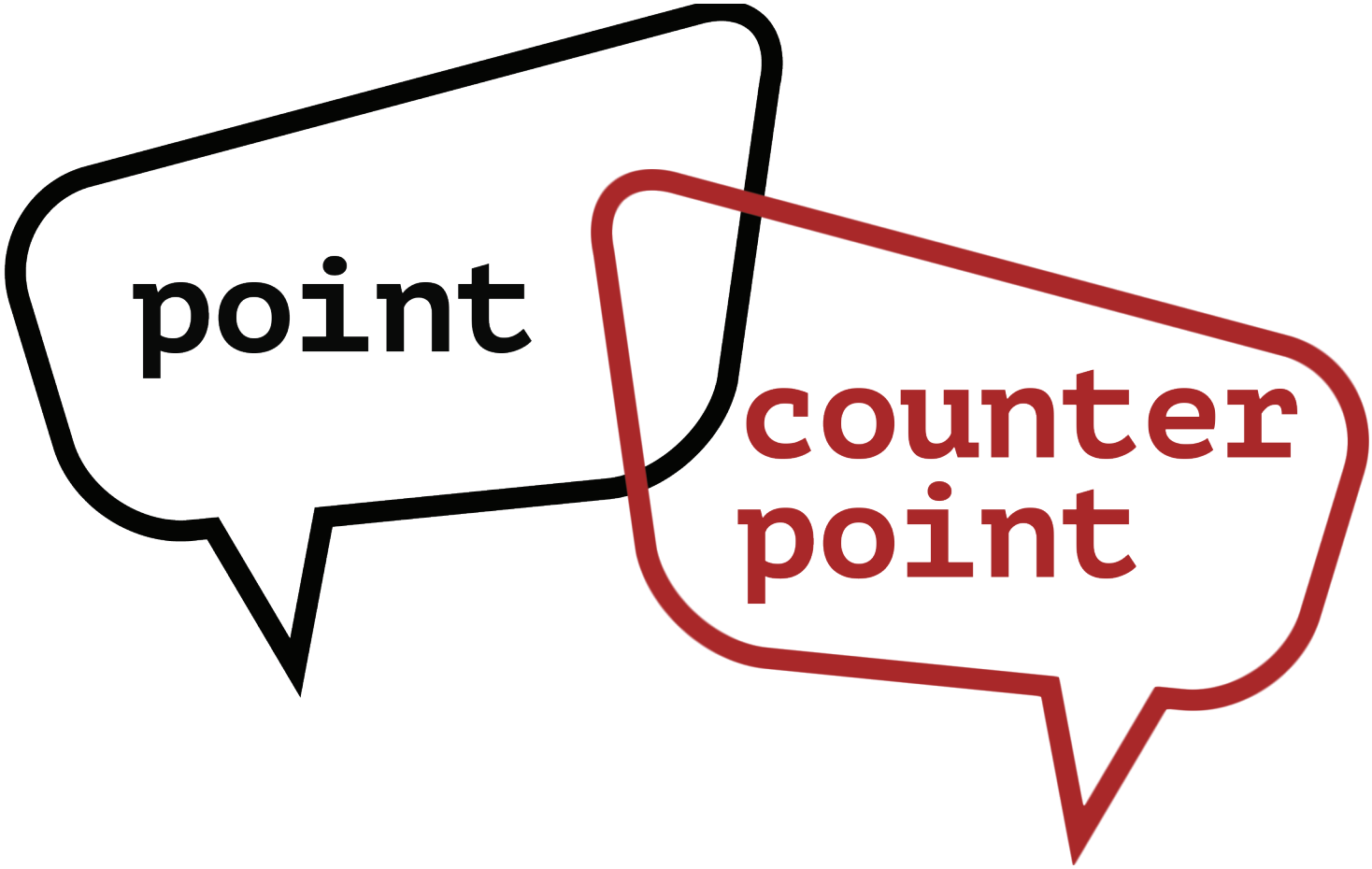


DOING DISCOVERY RIGHT

Judge Leon Holmes and Magistrate Judge Craig Shaffer compare the merits of proactive versus passive pretrial judicial discovery management

Significant proposed discovery amendments will take effect on Dec. 1, 2015, if the Supreme Court approves them and Congress takes no action otherwise. Under the proposed amendments, the scope of discovery defined in Federal Rule of Civil Procedure 26(b)(1) must be proportional to the needs of the case. The amendments are aimed at providing greater access to the courts by reducing pretrial expenses, especially discovery, which continue to rise.

To make these proposed amendments successful, judges are encouraged to be proactive case managers. Nonetheless, a large number of judges have adopted a passive judicial management style regarding discovery, believing it is more effective and efficient.

Two noted and experienced jurists, **Judge Leon Holmes, Eastern District of Arkansas**, and **United States Magistrate Judge Craig Shaffer, District of Colorado**, shared their views on the issue with *Judicature*.

What is the appropriate role for a judge in managing discovery?

HOLMES: The job of a judge is to adjudicate – to decide disputes presented by litigants. Performing that task fairly and efficiently of course involves management of the docket; but management of discovery in individual cases ordinarily should be left to the lawyers. Generally, good lawyers can agree on discovery and manage their cases without supervision by judges. When lawyers disagree on a discovery matter, they can present their dispute to the court for resolution, and it is the job of the judge to render a decision as to which party is right,

and which is wrong, based on the rules of civil procedure as they apply to the facts of the case.

In this context, adjudication entails considering the facts relevant to the dispute in light of arguments regarding the rights and duties of the parties and then issuing a reasoned decision that can be considered as a precedent in similar cases in the future. Discovery disputes are susceptible to adjudication so defined, which is to say that the parties can present evidence regarding the facts pertinent to the disputes and reasoned arguments, based on the applicable rules, regarding the proper resolution of those disputes. When the parties present a dispute in that manner, the judge can issue a reasoned opinion, applying the applicable rules to the facts.

Absent a dispute for the judge to decide, the judge should trust the lawyers and thus leave them free to manage their cases as they see fit, for competent case management involves considerations that are beyond the ken of the judge and outside the province of the rules by which a judge's decisions should be governed. These include knowledge of the business or activity out of which the case arises; awareness of the nature, location, and quantity of documents to be obtained and witnesses to be interviewed; the number of potential witnesses who should be deposed rather than interviewed, the most efficient or advantageous order in which they should be deposed, and the likely length of those depositions; scheduling for two or more lawyers with a multitude of clients and cases; scheduling for paralegals, fact witnesses, expert witnesses, court reporters, and others; an assessment of the resources needed for discovery; allocation of those resources by the parties and law firms involved; and many other such considerations.

"Proactive case management" thus may require decisions that are less susceptible to resolution by adjudication and better suited to resolution by managerial direction or agreement achieved through the reciprocal give and take of negotiation.[1] Generally speaking, adjudication should result in a decision that can be vindicated as right or criticized as wrong. In contrast, the result in managerial direction or agreement achieved through negotiation generally will be a decision that should be viewed as better or worse, rather than right or wrong.

SHAFFER: At a threshold level, a judge's role in managing discovery is defined by the Federal Rules of Civil Procedure. Rule 16(a) contemplates that the court will confer with the parties to develop a scheduling order that "establish[es] early and continuing control so that the case will not be protracted because of lack of management" and "discourag[es] wasteful pretrial activities." The court's scheduling order may also "modify the extent of discovery." Similarly, the court has the authority under Rule 26(g) to enforce, sua sponte, counsels' certification obligations (i.e., that they are conducting discovery in a manner proportionate to the needs of the case and consistent with the Rules and existing law), as well as a mandatory obligation under Rule 26(b)(2)(C) to limit the frequency or extent of discovery based on various proportionality factors.

Beyond those specific mandates, Rule 1 imposes upon a judge the duty to administer all the Federal Rules to achieve a just, speedy, and inexpensive determination of all actions and proceedings. Early identification and resolution of potential e-discovery disputes is critical to avoiding costly motion practice and resulting delays, and achieving the broader mandate imposed by Rule 1. It is the latter challenge that warrants a more proactive approach to discovery and the pretrial process.

Why do you believe that lawyers often complain that judges are not sufficiently proactive in pretrial discovery?

HOLMES: I have never heard a lawyer complain that judges are not sufficiently proactive in pretrial discov-

ery management. Rather, the most common complaint by lawyers regarding judges' involvement or lack thereof in the discovery process is that judges are unwilling to adjudicate discovery disputes that the lawyers present to them. A judge who refuses to adjudicate discovery disputes is abdicating the duty to enforce the rules and is thereby leaving litigants at the mercy of lawyers who disregard those rules. That failure is not a refusal to take "a proactive discovery management approach" but a refusal to perform the most basic judicial function — deciding disputes presented by the litigants.

Of course, most judges, perhaps all judges, prefer that lawyers resolve discovery disputes among themselves. Again, good lawyers usually can do that: They can resolve discovery disputes among themselves. Even so, some discovery disputes, even when the lawyers on both sides are among the best, cannot be resolved without a decision by the court. And again, whenever the parties present a dispute they cannot resolve to the court pursuant to the applicable rules, it is the duty of the court to adjudicate that dispute.

SHAFFER: Although the demand for a proactive judge is raised by commentators and practitioners as a common refrain, it might help to place the question in context. Traditionally, discovery in the federal courts has been a self-managed process, predicated on the assumption that reasonable lawyers can manage discovery in a cooperative manner without the need for judicial intervention. That raises the inevitable rejoinder: what does the demand for proactive judging say about the prevailing civil litigation culture or philosophy? Setting that question aside, I find that lawyers typically complain that judges are not effectively enforcing the rules "against the other guy."

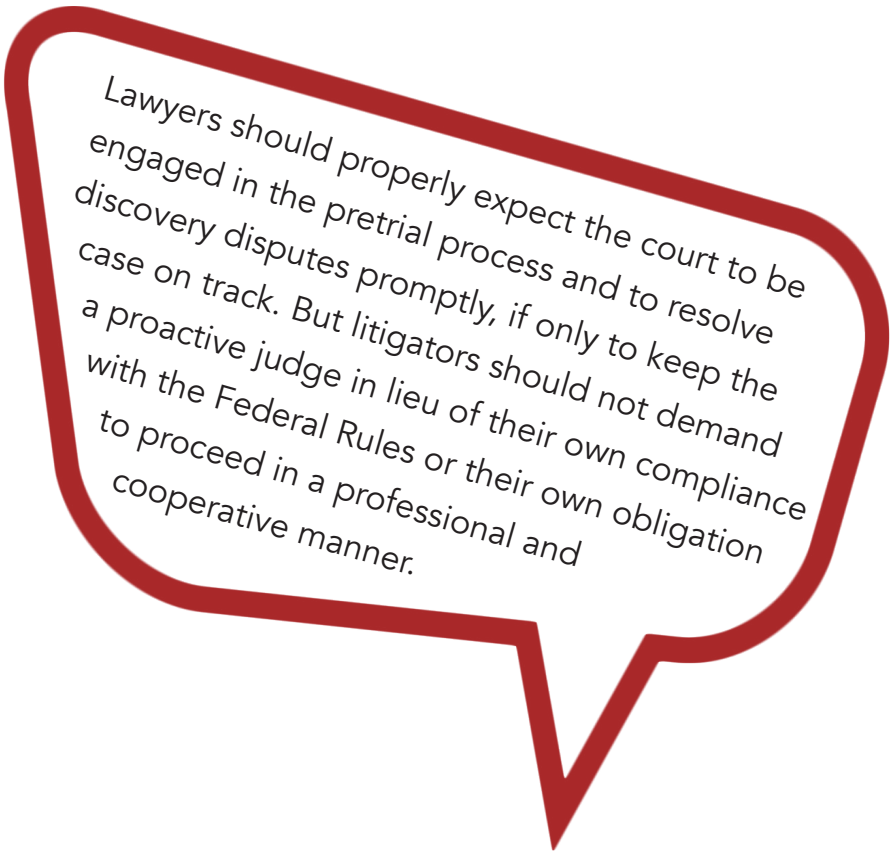
A lawyer who complains about "blockbuster" discovery requests rarely invites me to critique the merits of their own boilerplate objections or undifferentiated data dump. Lawyers should properly expect the court to be engaged in the pretrial process and to resolve discovery disputes promptly, if only to keep the case on track. But litigators should not demand a proactive judge in lieu of their own compliance with the Federal Rules or their own obligation to proceed in a professional and cooperative manner.

Ironically, although Rule 1 has been framed from the case-management perspective of the court, the goals underlying that Rule ("just, speedy, and inexpensive") really reflect the interests of the parties. A proactive judge can collaborate with the parties to achieve those goals, but cannot be the only stakeholder committed to that process.

Most cases do not end up in a trial and are resolved by the lawyers themselves with little judicial intervention, either by motion or settlement. Is it efficient to devote significant time in every case to proactive pretrial discovery management, knowing that many cases disappear from the docket without much judicial involvement?

HOLMES: It is inefficient to devote significant time in every case to proactive pretrial discovery management, but not because most cases are resolved short of trial either by motion or settlement. It is inefficient to devote significant time in every case to proactive pretrial discovery management because the cases are few in which such discovery management by the judge is needed, regardless of how many of those cases go to trial.

In some instances, because of the complexity of the case, the novelty of the issues, a lack of cooperation among the lawyers, or some other reason, the ▸



judge must devote significant time to adjudicating discovery disputes, and adjudicating those disputes may necessarily encompass some management of the discovery process. But whether the case is settled, is resolved by motion, or goes to trial does not bear on whether the court should devote significant time to resolving discovery disputes.

SHAFFER: The underlying premise of the question is correct: very few civil cases actually proceed to trial. But that reality actually militates in favor of a proactive approach to case management and discovery disputes. It should come as no surprise that as trials become more and more infrequent, discovery has assumed a greater significance both as a precursor for settlement or dispositive motions and as an inevitable byproduct of the billable-hour business model.

It seems self-evident that cases that are well managed by the parties and the court will settle faster or proceed to dispositive motions in a cost-effective manner. Cases that do not settle or get resolved on motion will move through trial with more focus and efficiency.

I am not suggesting that a "proactive" approach to case management requires the court to micromanage the discovery process. Certainly at the outset of litigation, the parties are far more knowledgeable about their claims and defenses than the court. Active case management during the initial phases of the pretrial process could simply require the court to depart from a "one-size-fits-all scheduling order" or invite counsel to "think outside the box." But the court should signal its willingness to stay engaged in the pretrial process and be willing to intervene on a timely basis as needed. It is difficult to understand how any other approach to case management can be reconciled with Rule 1.

Do lawyers too often present a discovery dispute to a judge without fully working through it among themselves, expecting the judge to do the work and go into the weeds and review mountains of documents?

HOLMES: Rarely, if ever, have I had a case in which discovery disputes were presented to me for resolution because the lawyers wanted to shift to me the job of reviewing mountains of documents. The question suggests that discovery disputes arise because the lawyers are lazy, but I cannot recall ever seeing such a case.

Discovery disputes do not arise because lawyers are lazy; rather, they typically arise either because the parties have a good-faith disagreement regarding the scope of discovery or the applicability of a privilege, or because lawyers gripped by misguided zeal lose perspective regarding discovery issues.

SHAFFER: Yes, often parties prematurely seek judicial intervention in a discovery dispute, notwithstanding the "meet-and-confer" requirement incorporated in Rules 26(a) and 37(a)(1). Every judge, regardless of their approach to case management, has been confronted with a motion to compel that was filed after the moving party made a single pro forma demand for compliance with discovery obligations. And every judge's response should be the same: the motion should be denied without prejudice and the parties required to comply in good faith with their "meet-and-confer" obligations.

A judge's proactive approach to case management does not absolve counsel of their own responsibilities under the Federal Rules of Civil Procedure. Excessive or disproportionate discovery, as well as evasive responses and boilerplate objections impose unnecessary demands on already overburdened judicial dockets. The Rule 26(g) "stop-and-think" obligation arises before discovery requests or responses and objections are served. Improper discovery requests and responses should not be used in the first instance as ploys to negotiate amended discovery that actually complies with the Federal Rules of Civil Procedure.

Similarly, the duty to confer requires counsel "to converse, confer, compare views, consult, and deliberate" to avoid the need for judicial intervention. If the proposed amendment to Rule 1 is adopted in December 2015, courts and parties will share responsibility to administer and employ the Federal Rules to secure the just, speedy, and inexpensive determination of every action or discovery dispute. Counsel cannot avoid that responsibility under the guise of "zealous advocacy."

THE JUDGES

J. LEON HOLMES is a United States District Judge for the Eastern District of Arkansas.

CRAIG B. SHAFFER has been a United States Magistrate Judge for the District of Colorado since January 2001. He is a member of the Judicial Conference Advisory Committee on Civil Rules.

An increasing number of proactive discovery management judges are requiring lawyers to call them before filing pretrial motions, in order to resolve issues quickly before they grow. Should this practice be promoted?

HOLMES: One of my colleagues, the Hon. Billy Roy Wilson, requires lawyers to call chambers before filing pretrial motions. His experience has been that if he can discuss the matter with the lawyers before a motion is filed, the issue often can be resolved quickly. If I had his ability, I would emulate Judge Wilson in many respects, but I have chosen not to follow his practice of requiring lawyers to call chambers before filing a discovery motion.

I am more comfortable addressing discovery disputes after I have had a chance to read the discovery documents at issue and the briefs of the parties, so I prefer to have the papers in hand before issuing an opinion or discussing the matters with the lawyers. Some judges, like Judge Wilson, may work more efficiently and achieve better results by requiring lawyers to call them before filing pretrial motions; others, like myself, may perform the judicial task more effectively by waiting until motions are filed, as the rules contemplate, before addressing discovery issues.

While Judge Wilson's practice lacks sanction by the Federal Rules of Civil Procedure or the local rules, I do not doubt that a judge has the inherent power to impose that requirement. Which course to follow is a matter of personal preference and judicial style, not an issue of principle, so each judge should be free to choose which practice to adopt.

SHAFFER: The Civil Rules Advisory Committee recently has acknowledged that judges "who hold [premotion] conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion." Certainly, that is my experience. As a proponent of proactive discovery management, I have long required counsel and pro se parties to participate in an on-the-record conference call with the court before filing an opposed discovery motion. After mandating this procedure for the past 12 years, I have found that the overwhelming majority of discovery disputes can be resolved during the discovery conference and that less than 15 percent of the disputes culminate in formal motion practice.

In my experience, most discovery disputes are easily resolved if the parties simply focus on their actual claims and defenses and comply with their discovery obligations in a reasonable, nonconfrontational manner. My discovery conferences are really nothing more than a judicial-supervised "meet and confer." After hearing from each side, I discuss with counsel the pertinent discovery rules, cite the corresponding Advisory Committee Notes, and perhaps highlight discovery orders I have authored that seem particularly on point. I also emphasize that I am not "deciding" a discovery motion that has not yet been filed and assure the parties they remain free to file motions.

However, I also explain that once formal motion practice begins, I will be required to award fees and costs under Rules 26(g) or 37(a)(4) or (5), unless I find that the nonprevailing party's position was substantially justified. Typically, at that point, the parties resolve their differences and the conference ends.

My "discovery conferences" typically last less than a hour and provide a forum for the parties to air their respective positions, resolve any misunderstanding or miscommunication, and refocus counsels' efforts to the actual claims and defenses. I have found that time better spent than reading hyperbolic briefs and drafting written orders.

Proactive discovery judicial managers are encouraging parties to cooperate in pretrial discovery. Do you encourage lawyers to cooperate in discovery?

HOLMES: Our district has a local rule, which predates my time on the bench and which provides:

> All motions to compel discovery and all other discovery-enforcement motions and all motions for protective orders shall contain a statement by the moving party that the parties have conferred in good faith on the specific issue or issues in dispute and that they are not able to resolve their disagreements without the intervention of the Court. If any such motion lacks such a statement, that motion may be dismissed summarily for failure to comply with this rule. Repeated failures to comply will be considered an adequate basis for the imposition of sanctions.
>
> —E.D. Ark. R. 7.2(g)

I enforce this local rule, as I attempt to enforce all of the applicable rules in any given case.

I seldom hear when lawyers confer in good faith and resolve a discovery dispute without judicial intervention because when that happens the dispute is not presented to me, so I have no adequate way to measure the effect of this local rule. My impression, however, is that in our district we have relatively few discovery disputes,[2] and I attribute that to the fact that our bar is comprised largely of good lawyers who cooperate with one another while still representing their clients zealously. Cooperation does not lead to gamesmanship, fishing expeditions, or gotchas. By definition, those concepts signify a lack of cooperation. Cooperation is "co-operating"; it requires two parties.

It is possible that if one party attempts to cooperate, the other may attempt to take advantage of that

cooperation; but it is certain that if one party refuses to cooperate, the other party will attempt to take advantage of that refusal. No fail-safe prophylactic exists to prevent a party from engaging in gamesmanship.

The best course for a litigant always will be to attempt to cooperate, and then, if mutual cooperation cannot be obtained, to present the resulting dispute to the court for resolution pursuant to the rules. The best way for judges to encourage cooperation is to enforce the rules, just as the best way to prevent crime is to enforce the law.

SHAFFER: I encourage the parties and their counsel to cooperate throughout the pretrial process, including discovery. My review of recent reported decisions reveals that district and magistrate judges faced with burgeoning dockets are requiring cooperation and transparency by the parties as an expression of the court's frustration or as a default mechanism to break a cycle of discovery disputes and move their cases forward. But counsel who treat cooperation as a less-than-desirable default response to discovery disputes or view cooperation as a trap for the unwary are not being strategic.

As the Sedona Conference's Cooperation Proclamation makes clear, cooperation does not require counsel to subordinate his or her client's interests or capitulate to the demands of opposing counsel. Cooperation is not antithetical to counsel's "zealous" representation of their client. To the contrary, cooperation and transparency can actually advance a party's interests.

A cooperative exchange of information during the Federal Rule of Civil Procedure 26(f) "meet and confer" may serve to avoid wasteful pretrial activities and thereby expedite the disposition of the action. In an e-discovery context, greater transparency may lead to agreement on search methodologies that eliminate the potential for successive rounds of production or second-guessing by the court. Finally, in the event that discovery disputes do arise, cooperation may reduce the potential for a spoliation motion or provide the nonprevailing party with some protection against the imposition of fees and costs.

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Under the proposed amendments to Rule 26, which are scheduled to take effect on Dec. 1, 2015, if the Supreme Court approves them and Congress takes no action otherwise, discovery must be proportional to the needs of the case. How can a proactive judge undertake the proportionality analysis early in the litigation before a factual record is developed?

HOLMES: Presently, the scope of discovery is defined in Federal Rule of Civil Procedure 26(b)(1) in terms of whether the discovery is reasonably calculated to lead to the discovery of admissible evidence, with certain caveats, one of which is that discovery may be limited if the burden or expense is disproportionate to the needs of the case.[3] During the last cycle of proposed revisions to the Federal Rules of Civil Procedure, a proposal was introduced to move the proportionality provision from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1), which will transform what is now a caveat, or an exception to the general rule, to the definition of the scope of discovery. Doing so will be a mistake for at least three reasons.

First, the proposed amendment almost certainly will increase the number of disputes regarding the scope of discovery.

Second, and more importantly, those disputes will be less susceptible to principled resolution than disputes under the present definition of the scope of discovery. Whether proposed discovery

is reasonably calculated to lead to the discovery of admissible evidence is an issue that is susceptible to principled resolution and one that can be decided early in the case. Whether proposed discovery is disproportionate to the needs of the case is a more subjective matter and is less susceptible to principled resolution.

Third, forming an intelligent judgment as to whether proposed discovery is disproportionate to the needs of the case requires an understanding of the value of the case; the nature, location, and quantity of documents and witnesses available for presentation at trial; and knowledge as to what information may be available through other avenues. Such information usually is unavailable to the court until discovery is complete, or almost so. These difficulties are inherent in the question of whether discovery is proportional to the needs of the case and do not depend upon whether the judge is proactive.

SHAFFER: Discovery under the Federal Rules of Civil Procedure has been subject to proportionality factors since 1983. The proposed amendment to Federal Rule of Civil Procedure 26(b)(1), if adopted, will make those proportionality factors an explicit component of the scope of discovery, and require courts and parties to consider those factors when conducting discovery and resolving discovery disputes.

Rule 26(g) already requires parties to serve discovery requests that are proportionate to the needs of the case. Rule 26(b)(2)C) imposes a mandatory obligation on the court to limit the frequency and extent of discovery based on proportionality considerations. An amended Rule 26(b)(1) merely reaffirms that proportionality is an essential part of a "just, speedy and inexpensive" pretrial process.

So, for example, in discharging their case-management responsibilities under an amended Rule 1, counsel should take into consideration the proportionality factors during the Rule 26(f) conference in discussing "the subjects on which discovery may be needed" and "what changes should be made in the limitations on discovery imposed under these Rules." Application of the proportionality factors should not be transformed into a mathematical formula or a debate over the "perfect fit," but rather involves an iterative process that is refined as the parties' claims and defenses come into sharper focus.

Parties (and courts) should not presume at the outset of the pretrial process that proportionality factors necessarily default to quantitative limits on discovery. Phased discovery, particularly in complex cases, may provide a more effective means to incorporating proportionality into a case-management or discovery plan. But any consideration of proportionality starts from two threshold questions: "what are the parties' actual claims and defenses?" and "what discovery do the parties really need in light of those claims and defenses?" A proactive discovery judge may best serve the objectives of Rule 1 simply by asking those questions at the outset of the case.

[1] Here, I am borrowing from Lon L. Fuller's classic essay, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

[2] Over a span of 10 years on the bench, I have had some 2,500 civil cases, with approximately 250 civil cases on my docket at any given time. On average, I receive between two and four discovery motions per month, many of which the parties resolve before the motion becomes ripe for decision. I can count on one hand the cases that have required me to spend significant amounts of time resolving discovery disputes.

[3] *See* Fed. R. Civ. P. 26(b)(2)(C)(iii).