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**Guidelines and Practices for Implementing the 2015  
Discovery Amendments to Achieve Proportionality  
Duke Law Center for Judicial Studies**

Hon. Jeffrey P. Norman

**Guidelines and Practices for Implementing the 2015 Discovery  
Amendments to Achieve Proportionality  
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**May 20, 2016  
(Annotated Version)<sup>1</sup>**

**I. GUIDELINES**

***Guideline 1:*** Rule 26(b)(1) defines the scope of discovery as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”<sup>1</sup> Proposed discovery must be both relevant<sup>2</sup> and proportional to be within the scope that Rule 26(b)(1) permits.<sup>3</sup> The Rule 26(b)(1) amendments,<sup>4</sup> however, do not alter the parties’ existing discovery obligations or create new burdens.<sup>5</sup>

**Commentary**

Discovery that seeks relevant and nonprivileged information is within the permitted scope of discovery<sup>6</sup> only if it is proportional to the needs of the case.<sup>7</sup>

As used in Rule 26(b)(1), proportionality describes:

- (a) the six factors to be considered in allowing or limiting discovery to make it reasonable in relationship to a particular case;
- (b) the criteria for identifying when the discovery meets that goal;
- (c) the analytical process of identifying the limits, including what information is needed to decide what discovery to allow and what discovery to defer or deny;<sup>8</sup> and
- (d) the goal itself.<sup>9</sup>

**COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)**

“Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.”

“The former provision for discovery of relevant but inadmissible information that appears ‘reasonably calculated to lead to the discovery of admissible evidence’ is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the ‘reasonably calculated’ phrase to define the scope of discovery ‘might swallow any other limitation on the scope of discovery.’ The 2000

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<sup>1</sup> Annotations prepared by Lauren Sanders, 2016 graduate of Duke Law School under oversight of Thomas B. Metzloff, Professor of Law, Duke Law School. [Annotations updated monthly. Additions and changes since last month’s annotations noted in color print.](#)

amendments sought to prevent such misuse by adding the word ‘Relevant’ at the beginning of the sentence, making clear that ‘relevant’ means within the scope of discovery as defined in this subdivision . . . .’ The ‘reasonably calculated’ phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that ‘Information within this scope of discovery need not be admissible in evidence to be discoverable.’ Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.”

***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.”<sup>10</sup> 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.***

#### **COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)**

“The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.”

***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.<sup>11</sup>***

#### **Commentary**

A case seeking to enforce constitutional, statutory, or common-law rights, including a case filed under a statute using attorney fee-shifting provisions to encourage enforcement, can serve public and private interests that have an importance beyond any damages sought or other monetary amounts the case may involve.

#### **COMMITTEE NOTE, RULE 26 (DEC. 1, 2015)**

“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.”

***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.<sup>12</sup> The amount in controversy is usually the***

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