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Practical Ways to Achieve Proportionality During Discovery and Reduce Costs in the Pretrial Phase of Federal Civil Cases

Judge Paul W. Grimm

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**PRACTICAL WAYS TO ACHIEVE PROPORTIONALITY
DURING DISCOVERY AND REDUCE COSTS IN THE
PRETRIAL PHASE OF FEDERAL CIVIL CASES**

*Judge Paul W. Grimm**

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I. INTRODUCTION

The amendments to the Federal Rules of Civil Procedure that went into effect on December 1, 2015 were few in number but ambitious in scope. In a nutshell, the amendments sought to reduce pretrial delay and expense in civil cases filed in federal court. Towards this end, first, Rule 1 was amended to require that the parties (and, of course, their counsel),

as well as the court, construe, administer, and employ the civil rules “to secure the just, speedy and inexpensive determination of every action and proceeding.”¹ This subtle, but important, change was designed to codify what judges long have felt—that the parties and counsel have a duty to cooperate during the discovery and pretrial process to reduce costs, delays, and burdens.²

Second, Rule 16 was amended (1) to encourage judges to address in their scheduling orders issues regarding the disclosure, discovery, or preservation of electronically stored information (ESI);³ (2) to address any agreements reached by the parties regarding asserting claims of privilege and work product protection, including agreements reached under Fed. R. Evid. 502;⁴ and (3) to “direct that before moving for an order relating to discovery, the movant must request a conference with the court.”⁵ Collectively, these changes were intended to emphasize the need for judges to be active case managers from the very beginning of their civil cases by holding “live” scheduling conferences (in person or by phone or video-conference) once the defendant(s) has been served or entered an appearance. Instead of passive observers, waiting for a fully briefed motion before becoming involved, judges should take an active role in discussing key issues that, left unaddressed, could result in delay, burden, and expense. In particular, encouraging judges to require the parties to request a conference before filing discovery motions was seen as a way to allow informal resolution of discovery disputes (viewed by many to be the single largest driver of cost, delay, and burden in civil litigation) without the need, delay, and cost of formal briefing.⁶

* Paul W. Grimm, United States District Judge, District of Maryland. The author served as a member of the Civil Rules Advisory Committee from 2009 to 2015, and during part of this time chaired the Discovery Subcommittee. The opinions expressed in this article are the author’s alone.

1. FED. R. CIV. P. 1.

2. “Most lawyers and parties cooperate to achieve [the ends of Rule 1] But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.” FED. R. CIV. P. 1 advisory committee’s notes to 2015 amendments.

3. FED. R. CIV. P. 16(b)(3)(B)(iii).

4. FED. R. CIV. P. 16(b)(3)(B)(iv).

5. FED. R. CIV. P. 16(b)(3)(B)(v).

6. With respect to the pre-motion conference for discovery disputes, the Advisory Committee Notes observed: “Many judges who hold such [pre-motion] conferences find them an efficient way to resolve most discovery disputes without the delay and burdens [of] attending a formal motion” FED. R. CIV. P. 16 advisory committee’s notes to 2015 amendments.

Third, Rule 26(b)(1) was amended to clarify that the doctrine of proportionality⁷ is part of the scope of discovery. The amended language states:

[T]he scope of discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.⁸

This, too, was a subtle, but critical change. Although the requirement of proportionality had been part of the civil rules since 1983, judges largely had ignored it. This practice has resulted in the perception that discovery in general had become too bloated and costly, taking on a life of its own, often unrelated to the specific issues raised in the pleadings.⁹

Fourth, Rule 34 was modified in three ways: (1) it explicitly prohibited "boilerplate" objections to requests for production of documents (bringing Rule 34 into line with Rule 33, which long had explicitly prohibited non-particularized "boilerplate" objections)¹⁰; (2) it required parties objecting to a requested production to "state whether any responsive materials are being withheld on the basis of that objection"¹¹; and (3) it obligated the responding party to either allow the production or inspection within the time requested by the initiating party, or "another reasonable time specified in the response."¹² Thus, in one *coup de main*,¹³ the revisions to Rule 34 sought to eliminate some of the most pernicious

7. Proportionality in this context is the idea that discovery costs should be proportional to what is at issue in the case.

8. FED. R. CIV. P. 26(b)(1).

9. Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117 (2017) [hereinafter "Proportionality Article"].

10. See FED. R. CIV. P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived."). Revised Rule 34 now states: "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." FED. R. CIV. P. 34(b)(2)(B).

11. FED. R. CIV. P. 34(b)(2)(C).

12. FED. R. CIV. P. 34(b)(2)(B).

13. *Coup de main* is defined as a "sudden attack in force." *Coup de main*, WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 521 (Philip Babcock Gove ed., Merriam-Webster 1986) <https://www.merriam-webster.com/dictionary/coup%20de%20main> [<https://perma.cc/JFP5-E3X4>].

discovery abuses that long had been decried as contributing to delay, cost, and burden in civil cases.

Finally, the 2015 rule amendments added a new rule specifically designed to address the problems associated with the duty to preserve ESI and the consequences for failing to do so.¹⁴ This change sought to address a widespread concern that the explosion of the discovery of ESI and the absence of a single nation-wide rule governing the common law duty to preserve this type of information was causing parties to incur significant preservation costs, often disproportionate to what might be reasonable in an individual case.¹⁵

But, as ambitious as the drafters of the 2015 civil rules amendments may have been, they were under no illusion that simply amending the rules would be the cure-all for the ills the amendments were designed to remedy. Judges and lawyers are notoriously adverse to changing long-established habits. If the reforms the new rules sought to promote are to become a reality, more than rule amendments will have to occur. Changes in behavior—of judges, lawyers, and the parties themselves—will be required. And those changes will require judges to become the active case managers the rule makers long intended them to be. Lawyers will have to learn that cooperation during discovery is not a sign of weakness, but of strength, because it reduces the costs and delays that their clients must bear. The parties themselves must be willing to leave behind the desire to inflict cost and burden on an adversary through abuse of the pretrial process, initially, because the courts must require that they do so, but eventually (it is hoped) because they, too, will realize that the bad old ways only serve to increase their costs and delay the resolution of the disputes that landed them in federal court in the first place.

My aim in writing this Article is to discuss some practical, common sense measures that I have used in the management of my own civil cases and that I have found to be very helpful in implementing the kinds of changes contemplated by the 2015 civil rules amendments. There is no magic or genius to them, individually or collectively, however, they have helped me to be a better, more active manager of my own civil docket and resolve cases a little faster, and at less cost.

14. FED. R. CIV. P. 37(e).

15. “Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation to avoid the risk of severe sanctions if a court finds they did not do enough.” FED. R. CIV. P. 37(e) advisory committee’s notes to 2015 amendments.

The lawyers I work with in my cases tell me that they find these measures beneficial, however, I am not so naïve to believe they are all sincere. I still flatter myself to think at least some of them work. I offer these measures as suggestions of what may work for other judges and lawyers, with the knowledge that every court and the lawyers of its bar has its own culture, customs, and norms. Some of my procedures may work well, and others may not. Since every court has the ability to be an innovation incubator with a little imagination and trial and error, it is my hope that the suggestions in this Article will help stimulate the curiosity and willingness to try something new, if there is any promise of it contributing to the goal that Rule 1 imposes on us all: the just, speedy, and inexpensive resolution of all civil cases.

A. *Hold a “Live” Scheduling Conference with the Lawyers and Unrepresented Parties as Soon as it is Practical to do so to Set the Stage for how the Case Will Proceed*

There is no substitute for holding a scheduling conference with counsel and unrepresented parties at the earliest practical time in the case. A good time to do so is once a party has been served or its attorney has entered an appearance. While it is ideal to have a face-to-face conference, the geographic size of the district and the scheduling challenges associated with finding everyone’s availability may make this too difficult. But even if a meeting in court or chambers is not practical, having a telephone or video-conference is more than good enough to achieve the benefits of the conference. There are clear advantages to being able to talk directly to the lawyers and parties early in the case. The parties, lawyers, and the judge can discuss the issues; the pleadings (and whether they need amending); the appropriate discovery, given the issues in the case and the resources available to the parties; and prospects of a settlement conference, either early (before costs mount up) or later (after some discovery, if the parties need more information about the facts before they can intelligently discuss settlement). “Live” communications will help the judge detect animosity between counsel or the parties that is best addressed immediately, identify the most pressing issues raised by the pleadings, offer suggestions about the most effective way to approach discovery, and establish the court’s expectations about how the case should proceed.

An example shows the benefits of an early scheduling conference. Sitting as I do in a fairly busy district, I am assigned several hundred civil cases each year. I was struck by how often the defendant filed a motion to

dismiss the complaint at the very start of the case—often before I could even set a scheduling conference. What ensued happened so often that it was like watching a video loop. The motion to dismiss identified perceived deficiencies in the complaint. More often than not, they were not case dispositive issues like statute of limitations or lack of personal or subject matter jurisdiction, but rather, they were pleading deficiencies that usually could be cured or narrowed by an amended complaint.

The plaintiff would file an opposition to the motion to dismiss that argued that the case should not be dismissed, but if the court disagreed, the plaintiff should be given an opportunity to file an amended complaint. The defendant would then file a reply, insisting that the case should be dismissed. Sometimes the parties briefed the request to amend as a separate motion. My law clerks and I then would have to wade through the filings to prepare a memorandum laboriously addressing each of the perceived deficiencies in the original complaint, as well as whether the proposed amendments cured the deficiencies.

Because the appellate courts have established that dismissing an initial complaint before allowing the plaintiff a chance to amend (unless amendment would be futile) is inappropriate, I usually would allow the plaintiff to amend, after which the defendant often filed another motion to dismiss asserting (once again) the same pleading deficiencies, requiring a second round of briefing (sometimes including a request to amend once again) and another opinion resolving the motion.

After going through this procedural minuet a few too many times, I decided to adopt a different approach. Borrowing from other judges who used a similar procedure, I drafted a “pre-motion conference order” that prohibits the filing of a motion to dismiss without first submitting a letter, no more than three pages, single-spaced, setting out the issues the moving party wanted to raise.¹⁶ The order states that no response is required from the other party unless I ask for one.

As soon as a pre-motion letter is filed I schedule an expedited telephone conference. During that conference I discuss the moving party’s letter. If the letter raises defenses that appear to be meritorious, such as the failure to exhaust administrative remedies or to give notice under the Federal Tort Claims Act, I ask the plaintiff for its position. Frequently, plaintiff’s counsel agrees that there is a deficiency with regard to a particular challenge and agrees to dismiss that count. In other instances, the plaintiff acknowledges that some research needs to be done to

16. The pre-motion conference order also states that the time to respond to the complaint will be extended until after the pre-motion conference. A copy is attached in the Appendix of this Article.

determine whether or not to proceed with that claim. As for those counts that the plaintiff thinks could be bolstered by filing an amended complaint, we discuss a schedule for amending the complaint.

However, because the plaintiff has now had the advantage of knowing the specific deficiencies the defendant believes were present in the complaint, I inform the parties that once the amended complaint is filed, the defendant may respond with a motion to dismiss without first having to file another pre-motion conference letter if the defendant still believes that the previously identified deficiencies persist. I tell the parties that if that motion to dismiss results in a dismissal on the basis of a previously identified deficiency, the dismissal likely will be with prejudice because the plaintiff already has had a fair opportunity to amend to address the deficiency. The plaintiff almost always agrees with this, and the defendant also has the advantage of knowing that by setting out in some detail the perceived pleading deficiency in the pre-motion letter, the defendant likely will have the benefit of a dismissal with prejudice if the amended complaint fails to cure the deficiency. This method is fair to both parties and eliminates the filing of serial motions to dismiss that must be fully briefed and ruled on.¹⁷

Having followed this practice for years now, I have found it to be effective in most cases. I have been favorably impressed by just how much detail can be contained in a three-page, single-spaced pre-motion letter. I also have been pleasantly surprised by how often the plaintiff, when presented with a well-supported challenge to a particular claim and a chance to research it before the pre-motion conference call, will agree to dismiss or narrow the claim. This in turn gives the defendant the benefit of a dismissal without the need for full briefing.

Many plaintiffs' lawyers tend to over-plead by including multiple, redundant, or overlapping causes of action (in fairness, because they must anticipate the almost inevitable *Iqbal/Twombly*¹⁸ argument that they have failed to plead a plausible claim). The willingness at the very beginning of a case to amend a complaint to the truly supportable causes of action is beneficial to the plaintiff, defendant, and the court not only during the pleading stage, but also during discovery and dispositive motions practice.

Holding a "live" early scheduling conference also helps properly commence discovery by allowing the exploration of an early settlement conference in cases where that makes sense and a discussion about the

17. If the subsequent motion to dismiss raises new issues that had not previously been disclosed to the plaintiff, any dismissal would not be with prejudice, unless amendment would be futile.

18. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

anticipated time it will take to litigate the case. In doing so, it may be possible to expedite discovery and set an early trial date. In those cases when it seems as though a full-blown motion to dismiss needs to be filed and briefed (either without first amending, or after having done so), then the conference enables me to defer issuing a discovery order until after a ruling on the motion—avoiding the need to pursue discovery on claims that may not survive the motion to dismiss.

When discussing this procedure with other judges, some have said that they just do not have the time to schedule in-person, or even telephone, scheduling conferences in every case. This is quite contrary to my experience. I do not have the time *not* to set conferences. I find that most of the conferences, even in complex cases, seldom take more than 15 minutes, and I can schedule them in the early morning, during lunch, or in the evening after court is over for the day. In short, nothing can take the place of that early opportunity to hear from the parties and counsel to detect any problem areas that need immediate response and to actually tailor the future proceedings to the particular case.

B. Extend the Pre-motion Conference Procedure to Discovery Disputes and Dispositive Motions

The pre-motion conference procedure is not limited in its effectiveness to initial motions to dismiss a complaint. It also has particular value when applied to discovery disputes and post-discovery dispositive motions practice. With respect to discovery disputes, the 2015 revision to Rule 16(b)(3)(B)(v) permits the scheduling order to “direct that before moving for an order relating to discovery, the movant must request a conference with the court.”¹⁹ The rule allows courts the maximum flexibility in determining how the order should be implemented. Some judges only require a phone call, during which they hear from each side of the discovery dispute and attempt to resolve it during that call. Others hold in-court conferences to informally address and resolve the dispute. Others require the party that wishes to initiate a discovery motion to file a brief letter setting out the basis of the dispute, with the opposing party responding in kind. However the court decides to approach this, the key is to (a) identify discovery disputes as soon as they arise, and (b) promptly schedule a meeting or conference call to discuss the problem before any formal motions and oppositions have been filed.

19. FED. R. CIV. P. 16(b)(3)(B)(v).

In my own cases, I find that the most effective way to approach this procedure is to require the party desiring to file a discovery-related motion to file a letter, setting out the facts and law germane to the dispute, no longer than three pages, single-spaced. This letter, of course, must be filed after first attempting in good faith, without success, to resolve the dispute without court involvement. I do not ask the opposing party to respond unless, after I read the initial letter, it appears the facts and/or the law involved are such that I need input from both parties before the conference. Then I set a prompt conference call (usually within no more than a week or ten days). During the call, I discuss the issue and each party's position with regard to it. In at least 90% of cases I am able to resolve the dispute during the call, and I file a brief follow-up letter memorializing the issue and my ruling. In the very few cases where some briefing is required because more than a call is needed to resolve the problem (such as an issue involving work product or privilege), I will set an expedited briefing schedule and then rule quickly. If there is something about the dispute that leads me to conclude that a more extensive record is required, I will have the conference call on the record (utilizing courtroom recording equipment during the call). I will then issue an on-the-record ruling, which I also follow up with a brief written order.

In discussing this procedure with other judges, there seems to be widespread agreement that the resolution of most discovery disputes basically involves the application of common sense. A brief ruling that resolves the issue right away is far better than a longer written ruling after formal briefing (motion, opposition, and reply) that delays the resolution for perhaps 30 days or more. During this hiatus, the lack of a resolution, for example, over document production requests or interrogatories may also affect other discovery events, such as taking depositions or preparing expert disclosures. When this happens, the entire discovery schedule can be affected. Further, when the court is not promptly involved in addressing discovery issues, it is not unusual to see a pile-up of motions and counter-motions that can also hinder the entire discovery process. Quickly addressing these disputes at the very start prevents them from taking the discovery schedule hostage.

Additionally, the very availability of the judge on quick notice to resolve discovery disputes has the added effect of deterring future disputes. The parties learn there is no benefit to be gained from uncooperative and contentious discovery practices, since the delay and burden that some parties hope to cause by a discovery dispute cannot be realized. Since adopting this practice years ago, I have noticed that I am called upon to address discovery disputes in fewer than ten percent of my

civil cases. And in the years since becoming a district judge, I have not had to write a single lengthy discovery opinion in a civil case—brief letter orders have been sufficient.

Application of the pre-motion conference procedure to dispositive motions (usually summary judgment motions at the end of discovery) plays out a little differently than it does for discovery disputes or preliminary motions to dismiss a complaint. This is because summary judgment motions by their very nature usually require a much more significant record and frequently involve more complex legal issues and extensive facts. It is not likely that a three-page letter setting out the grounds for an intended summary judgment motion (which the opposing party does not respond to before a conference call) will enable a ruling during the conference call. However, I have found that it is not at all unusual for the call to reveal that one of several grounds for the motion is either not contested or allows the issues to be narrowed so that the subsequent motion practice addresses fewer issues, allowing for a faster ruling.

During the call, in which I set a briefing schedule for the motion, I am able to make sure that it is a realistic schedule that reduces the number of motions for an extension of time, which allows me to address another important cost and time saving device—page limits on the memoranda. While there are certain kinds of cases that require briefing longer than the 35-page limit in my court's local rules (intellectual property, antitrust, complex tort cases, and security cases, to name a few),²⁰ many more do not require that level of briefing. Cutting down the briefing to 15 or 20 pages for the initial motion and opposition and 10 to 15 for the reply results in a huge savings of time for the court—especially when the judge has dozens of pending motions at a time. I often tell the parties that the less they write, the faster I can rule. Except for the most complex cases, the parties generally agree that they can brief the issues adequately in fewer pages than the maximum pages permitted in our court's local rules.

Having pre-motion conferences for dispositive motions also allows the court to address a related matter—exhibits—and further reduce the time it takes for briefing and a decision. I have noted on many occasions that when the parties are involved in motions practice, they end up attaching many of the same exhibits, often with different exhibit numbers. Not only does this not make sense, but referring to both sets of exhibits is tedious and time consuming for the court. It is much better to have a single set of joint exhibits relied on by both parties and allow separate (and much

20. D. Md. Adm. R. 105.

smaller) sets of individual exhibits only if needed. Similarly, I have noticed that a significant amount of the briefing in dispositive motions is devoted to discussing background facts that really are not disputed. During a pre-motion conference call to discuss dispositive motions, I will ask the parties if they can agree to a core of stipulated background facts that can be contained in a written stipulation attached as one of the joint exhibits. This allows the parties simply to refer to the stipulation without having to cite to separate supporting documents, deposition responses, or interrogatory answers. My experience has been that in even the most factually contentious cases there are a surprisingly large number of background facts that are not in dispute, and having them readily at hand in a stipulation that may be referenced in the briefing and ruling, is a tremendous time-saver.

Similarly, having the parties highlight the key portions of exhibits longer than three pages can produce a substantial savings for the reviewing judge and her law clerks. I have had too many cases where exhibits to dispositive motions included voluminous contracts, insurance agreements, medical records, or even statutory references that required me to read line by line to identify the essential language critical to resolution of the dispute—which often comprises a mere fraction of the total document. It is a tremendous time-saver when I can flip through a lengthy exhibit quickly to a highlighted portion, and then read it carefully to get the essence of its importance. I can then read other portions of the exhibit that may need to be considered along with the key language, but starting with the most important text saves time. This also works well for deposition transcripts, particularly when there are references to many pages of a particular deposition. Also, having the lawyers attach the entire deposition transcript as an exhibit in “minuscrit” (multiple deposition pages on a single exhibit page), including the word index, can be very helpful to the judge when reviewing the record.

In short, the pre-motion conference for dispositive motions is beneficial because it allows the judge to adopt simple procedures that reduce the length of the briefing, allows for more streamlined use of exhibits, and reduces the time needed for the court to read the record. The benefit to the parties is a faster decision.

In a variation of the pre-motion conference procedure for dispositive motions discussed above, I will usually set the trial date at the same time I set the briefing schedule for the motion. That way, if the motion is denied, the trial will already be on the docket, which often results in a trial date several months earlier than if the judge waited until ruling on the motions to set a trial date, and there is no need to have another scheduling

conference to set it. There is nothing like an impending trial date to motivate the judge to get the dispositive motion finished, which may obviate the need for a trial, or at least streamline the issues that must be tried.

Finally, when a case results in the parties wanting to file cross-motions for summary judgment, the pre-motion conference call can allow a more streamlined briefing approach (and shortened number of pages for the memoranda) than if each side filed separate motions. It works as follows: First, one party files the initial motion. Second, the other party responds with a joint opposition to the initial motion and cross-motion (with an agreed upon page limit). Third, the initiating party files a joint reply to the opposition to the initial motion and opposition to the cross-motion (again, with page limits agreed to). Fourth, the final submission is the cross-movant's reply to the opposition to the cross-motion. This streamlined briefing approach results in a total of four filings, instead of six (motion, opposition and reply, plus cross-motion, opposition to cross-motion, and reply).

In short, spending time with the parties before dispositive motions are filed to streamline the briefing schedule, tailoring it to the needs of the particular case, and making it easier for both the parties and the court is an effective way to reduce cost and delays in ruling on the motion. I have found this procedure to be so effective that I do not include a dispositive motion deadline in my scheduling order. Instead, on the final day of discovery, I require the attorneys to file a joint status report and attach to it a letter (again, no longer than three pages, single-spaced) setting out any dispositive motion the parties want to file. I then set an expedited scheduling conference to set the briefing schedule, discuss page limits, exhibits, and, in most cases, set in a trial date that will govern if the motion is not granted.

C. The Benefits of a Standard Discovery Order

The final procedure that I have found to be very effective in managing my civil cases is issuing a standard discovery order in every case, regardless of complexity. It has several features that I will discuss in turn, which, when combined with the pre-motion conference, make the discovery phase of my cases much more efficient and less contentious.

Before diving into the details, however, I want to stress that the standard discovery order only works well because I hold a telephone conference with the lawyers and unrepresented parties shortly after the order is issued to go over the order and to discuss any adjustments that

make sense given the needs of the particular case. I do this at the same time that I hold the scheduling conference, and it works well. The important takeaway is that while the standard discovery order may look inflexible, it cannot fairly be implemented that way. Rather, it must be adjusted where needed to accommodate the reasonable needs of each case. The advantage of using the same discovery order in each case is that it sets a common starting point for a discussion of what discovery really is needed, the order in which it should be taken, and the most effective and cost-efficient way to do so. This also spurs the lawyers to talk together about what a reasonable discovery plan for that case should look like. With this caveat in mind, I will discuss the principal features of my standard discovery order. A copy is attached in the Appendix of this Article.

1. Disclosure of Damages

My standard discovery order begins with the requirement that any party (typically the plaintiff) seeking monetary damages must provide the Fed. R. Civ. P. 26(a)(1) damages disclosure before the initial scheduling conference. This may not seem like such a big deal, but it is helpful at the very start of the case to understand exactly how much money the plaintiff is seeking. It allows the defendant to know what the plaintiff's demand is and enables the court to assess the monetary value of the case, which is one of the proportionality factors in Rule 26(b)(1). For example, in a breach of contract case where the plaintiff seeks \$200,000, the discovery process needs to be managed so that the cost of discovery to resolve this dispute is not disproportionately high considering the damages that the plaintiff seeks. After all, spending \$100,000 to resolve a \$200,000 case hardly can be viewed as efficient.

To be of any use, the damages disclosure needs to be as detailed as possible. Some lawyers try to avoid doing this by pointing out that they cannot really know the recoverable damages until after discovery. This is true in some cases, but not in others. When filing a complaint seeking damages of a specified amount, the plaintiff has an obligation under Fed. R. Civ. P. 11 to have a good faith basis for claiming the damages sought. Similarly, Fed. R. Civ. P. 26(g) provides that in making the damages disclosure required by Rule 26(a)(1), a party "certifies that to the best of the person's knowledge, information, and belief, formed after reasonable inquiry", that the disclosed information is complete and accurate as of the

time it is made.²¹ Therefore, even though the damages sought may change as the case progresses, the case should begin with the best estimate of what those damages are. This is important for settlement purposes and for identifying a discovery plan proportional to the issues in the case. Finally, while there certainly are cases where the relief requested is non-monetary, the majority of cases filed in federal court do seek monetary damages of some kind. For those that do not, it is good to know this at the beginning of the case.

2. Proportionality

My standard discovery order also emphasizes the requirement that discovery must be proportional to the needs of the case, because, as previously noted, this is part of the scope of discovery set out in Fed. R. Civ. P. 26(b)(1). However, as the rule itself points out, the amount in controversy is only one of the factors to consider in determining proportionality. Other factors include: the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.²²

What I find useful in discussing the proportionality factors with counsel during the initial scheduling conference is that they inevitably lead to a helpful discussion about the best way to approach discovery in that case. It allows me to discuss ways to streamline discovery so that it focuses first on what is most important to that particular case. I frequently refer to Professor Steven Gensler's excellent article²³ analogizing the discovery process in a civil case to target shooting. No one shoots at a target by aiming for the outermost circles. You aim first for the bull's-eye. Discovery should be approached the same way—go first for what is most important, then follow up (if needed) with the information of lesser value.

This varies with each case. Sometimes the most important step is to take a particular deposition right away. In others, it is more important to get greater clarity as to the contentions relating to liability. Occasionally the logical starting point is to get the key documents produced—especially in so-called “asymmetrical” cases, where most of the information needed

21. FED. R. CIV. P. 26(g).

22. FED. R. CIV. P. 26(b)(1).

23. Stephen S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363 (2009).

to resolve the case is in the possession of one party.²⁴ The goal is to avoid the “I want everything—and a pony!” approach to discovery, in which the requesting party seems unable to distinguish between the important and the tangential. Discussing proportionality with the lawyers at the initial scheduling conference helps the judge and the parties decide on a discovery plan that makes the most sense for that case.²⁵

3. Cooperation, Cooperation, Cooperation

As I mentioned earlier in this article, the 2015 changes to Fed. R. Civ. P. 1 emphasize that the parties themselves have a duty to employ the rules of procedure in a manner that promotes the just, speedy, and inexpensive resolution of every civil case.²⁶ This simply cannot be done unless the parties and their lawyers cooperate during the discovery process, and the standard discovery order that I issue makes this clear.²⁷

24. For example, consider an employment discrimination case where the employer has the lion’s share of the key facts—especially the reason underling the adverse employment action, the identity of the decision makers, the internal policies and procedures governing claims of discrimination, and the all-important personnel file of the plaintiff.

25. Some judges with whom I have spoken take the position that it is not their job to dictate how the discovery is to take place; instead, the parties are responsible for initiating and responding to discovery, and the judge should stay out of their way unless a motion is filed requiring a ruling. It is true that the parties are responsible for developing a discovery plan. But it is simply inaccurate to say that the judge has no role in shaping the discovery that will take place. FED. R. CIV. P. 26(b)(2)(C) unambiguously states:

On motion or *on its own*, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1) [which includes the proportionality requirement].

(emphasis added). A judge simply cannot meet his or her responsibility under Rule 26(b)(2)(C) by adopting a passive bystander approach to managing discovery.

26. FED. R. CIV. P. 1.

27. The standard discovery order refers the parties to *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2009). This case contains an extensive discussion of the duty to cooperate during discovery. Further, the Local Rules of my court contain Discovery Guidelines which clearly state:

The parties and counsel have an obligation to cooperate in planning and conducting discovery to tailor the discovery to ensure that it meets [the requirements of FED. R. CIV. P. 1 and 26(b)(1)] . . . Counsel have a duty to confer early and throughout the case as needed to ensure that discovery is planned and conducted consistent with these requirements and, where necessary, make adjustments and modifications in discovery as needed. During the course of their consultation, counsel are encouraged to think creatively and to make proposals to one another about alternatives or modifications to the discovery otherwise permitted that would permit discovery to be completed in a more just, speedy, and inexpensive way.

But, simply telling counsel that they must cooperate does not get the job done. The judge needs to explain why they must cooperate, so that they can understand what is expected and, more importantly, why it benefits their clients.

When reviewing the standard discovery order with counsel during the initial scheduling conference, I try to do just that. I explain that cooperation does not mean capitulation, nor do I expect the parties to make it all the way through the discovery process without any disputes that have to be resolved by the court. But cooperation does mean that the lawyers must behave “reflectively” instead of “reflexively.”²⁸ If a party objects to a written discovery request, the objection must explain with sufficient particularity the basis for the objection.²⁹ Upon receiving an objection that contains a particularized explanation of why it is objectionable, the party initiating the discovery request must re-evaluate it in light of the Rule 26(g) certifications and the Rule 26(b)(1) proportionality requirement and, if appropriate, modify or narrow the request.

Cooperation means that counsel must maintain good lines of communication and an ongoing dialogue about the discovery process. This means that phone calls, letters, emails, or text messages raising concerns about discovery issues must be responded to in a timely manner. Cooperation also means thinking about what type of discovery procedures will be most effective and least expensive or burdensome. Cooperation also requires the parties to be flexible.

For example, if a document production request is overbroad, it is foolish to answer simply by objecting without explaining why it is overbroad and, more importantly, offering an alternative production that the party thinks is reasonable. The receiving party also must be flexible and willing to reconsider a request when met with a particularized objection based on over-breadth or excessive cost or burden, as well as a reasonable alternative that the producing party is willing to provide.

Finally, it is essential to promoting cooperation during discovery for the judge to be available on short notice to intervene quickly when, despite the parties’ good faith efforts, the dispute is one they cannot work out. The very willingness and availability of a judge to jump in and resolve a discovery dispute once it arises helps the parties cooperate, because they

D. Md. Loc. R. app. A § 1.a

28. *Mancia*, 253 F.R.D. at 358.

29. FED. R. CIV. P. 34(b)(2)(B).

know that if reasonable efforts to do so fail, they will not be taken advantage of by an adversary.

4. Limitations on Certain Discovery

The standard discovery order that I issue also limits the number of interrogatories and document production requests to 15 each, and fact depositions to 4 hours each. This is less than what the rules of civil procedure allow,³⁰ but there is a method to my madness. When I discuss this limitation during the initial scheduling conference (and as explicitly stated in the standard discovery order itself), I tell the lawyers that if they think they need more than what these limits allow, they can agree to modify them without first getting my permission. So, if I allow them to modify these limitations without checking with me first, why bother having the limits at all? The reason is that limiting the number of interrogatories and document production requests requires the parties to think about just how many they actually need.

Interrogatories are only a blunt instrument of discovery. They do not usually result in precise and detailed responses because the answers are drafted by lawyers and often are designed to provide as little information as possible. And the client usually signs them without any real consideration of whether they are complete and accurate. Not to put too sharp of a point on it, but in most cases all that parties really need are interrogatories that request (a) the identity of individuals with personal knowledge of the underlying facts, (b) the factual basis for the key contentions in the causes of action, (c) the calculation of damages, and (d) the identity of experts and the bases for their opinions. When you expand beyond these key areas of inquiry, the interrogatories tend to get repetitive.

There are cases where the parties do need up to 25 interrogatories or the full 7 hours per deposition allowed by the rules of civil procedure. Providing the attorneys think through what they do and discuss with their adversary, they should be allowed to use all that the rules allow without first having to go to the judge to obtain permission. This is the second reason why I impose initial limits on certain types of discovery requests. It forces the parties to have a conversation, which helps foster cooperation. It is a point of satisfaction for me that in many of the cases where I discuss the presumptive limits established by the discovery order, the parties readily agree that they really do not need any more.

30. FED. R. CIV. P. 33(a)(1); FED. R. CIV. P. 34; FED. R. CIV. P. 30(d).

5. ESI Discovery

The standard discovery order I issue also discusses discovery of ESI. It reminds the parties of the common law duty to preserve evidence relevant to the disposition of the case³¹ and sets out a number of factors that I will consider if there is a dispute about whether this duty to preserve was met. It also sets presumptive limits on the amount of time a producing party must spend responding to requests for production of ESI, how far back in time they must search, and the sources from which they must produce ESI. During the preliminary scheduling conference, I discuss ESI discovery, and try to get a sense of whether there are potential issues with this type of discovery so that they may be addressed effectively. I also discuss newly revised Fed. R. Civ. P. 37(e), which specifically deals with preservation and spoliation issues associated with ESI discovery.³²

Although it is nearly impossible to get through the week without being notified of a new webinar, podcast, or CLE dealing with ESI discovery (and offering, often at a price, the latest advice or software designed to help with ESI discovery), my experience has been consistent with that of most of the judges I have spoken with about the topic. It simply does not come up in very many cases at all. In the cases where ESI discovery is really central to the dispute, the lawyers seem to be aware of this and are experienced in dealing with ESI. The lawyers politely tell me that they have it under control (and from the absence of many disputes I am called on to resolve involving ESI, this appears to be the case), and that settles that matter. In other cases, the lawyers say that the case really does not involve ESI, which is curious because there really are not many cases where the documentary evidence relevant to the claims is not in digital format. Either way, the standard discovery order does address ESI discovery, but I let them know that I am available to address this type of discovery if the need arises.

6. Federal Rule of Evidence 502

The standard discovery order I issue also informs the lawyers about a very helpful rule of evidence that has been in existence since 2008, but inexplicably is not often taken advantage of. Succinctly put, Fed. R. Evid. 502 is designed to address the consequences of actual disclosure of

31. See generally *Zubulake v. UBS Warberg LLC*, 220 F.R.D. 212 (2003).

32. See FED. R. CIV. P. 37(e).

attorney client privileged communications and attorney work product in federal proceedings.³³

Most importantly, it provides protections against waiving privilege or protection by inadvertent production during discovery. It allows the parties to enter into non-waiver agreements that can reduce the cost of document production by relieving the producing party of the need to spend what may be a disproportionately long and expensive amount of time painstakingly reviewing all document productions to insure there is no waiver. The rule also allows the court to enter an order to the effect that the production of privileged or protected information in a particular case pending before it does not result in a waiver, and that order is binding on parties, non-parties, and in all other litigation, either state or federal.³⁴

Despite the obvious benefits of agreeing to a Rule 502 order,³⁵ I have found that the bar in general is largely uninformed about the rule and what it offers. So, to avoid problems down the line, the standard discovery order that I issue contains a Fed. R. Evid. 502(d) order that protects them automatically from inadvertent waiver of these important protections. I have never had an instance where a party asked me to rescind that order, nor have I had a case where one party took the position that the other waived attorney client privilege or work product protection by a discovery production after I had issued the order.

7. Resolve Discovery Disputes During Discovery

Finally, the standard discovery order makes it very clear that absent a showing of due diligence and exceptional circumstances, once the discovery deadline passes, any unresolved dispute about discovery will not be grounds for re-opening discovery. Given the amount of attention I give to the discovery process during the initial scheduling conference, the expedited procedure I put in place to raise and resolve discovery disputes that do arise, and the speed with which I address discovery disputes, there really is no justification for raising a discovery issue following the close of discovery, unless there is no way that—with due diligence—it could not have been addressed during discovery. Simply put, very little is more disruptive than to be advised after discovery has closed and dispositive motions practice has begun that a lawyer or party wants to re-open

33. See FED. R. EVID. 502.

34. See FED. R. EVID. 502 (a)-(e).

35. Does any lawyer really want to be in the position of advising a client that attorney client privilege or work product protection has been waived because the lawyer inadvertently produced a privileged or protected communication during discovery?

discovery to get additional information that was requested, but not produced, before the discovery cut-off. In rare instances this is warranted because the lawyers were diligent and something unforeseen came up after discovery closed. But usually, the request is made because one party or both parties were not diligent and discovery was undertaken hastily at the last minute, or legitimate disputes were not brought to my attention when they first became apparent. When this happens, there is seldom justification to re-open the discovery process, and the standard discovery order makes this clear at the outset.

II. CONCLUSION

As the 2015 changes to the Federal Rules of Civil Procedure made quite clear, the parties, their lawyers, and the court share the responsibility to make sure that all civil cases are handled in such a way as to achieve a just, speedy, and inexpensive resolution. This aspirational language is not self-executing. While lawyers are officers of the court with duties beyond simply representing an individual client in a particular case, they nonetheless have an obligation to protect the interests of their clients. The parties seldom see themselves as having to rise above their own self-interest in the outcome of a case.

It really comes down to the court to manage the case in a way that coordinates what all the stakeholders must do to meet Rule 1. This means that judges must be skilled in knowing what they can do in each of their cases to expedite the time from filing to conclusion, allow sufficient but not disproportionate discovery, and rule quickly and fairly on disputes that arise along the way. In the process, judges—all of whom have demanding caseloads—must adopt procedures that lend a hand with what they must do.

This Article has tried to set out several: prompt, “live”, and substantive initial scheduling conferences, pre-motion conferences, and standard discovery orders. Looked at individually, they are modest, common sense, and practical. Lofty thinking is not required, just a commitment to employ them to get the job done. Using myself as an example, I have tried to explain how these procedures have helped me (and, I fervently hope, the parties as well). They are flexible enough to be modified to fit the needs of any case, whether simple or complex. And, with a little imagination, I am sure that they can be expanded and improved upon. Drawing on their own common sense, past experience, and the unique culture of their particular court and practicing bar, judges can use these procedures and others they may devise to find their own

ways to manage their cases in a way that meets the expectations of Rule 1. All that is needed is a commitment to try, determination to find the time to do so, and a willingness to try out new ways that may continue to improve the process.

III. APPENDIX

A. *Pre-motion Letter Order*

**UNITED STATES DISTRICT COURT DISTRICT OF
MARYLAND**

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
(301) 344-0670
(301) 344-3910 FAX

Date

RE: [Case Caption]

LETTER ORDER REGARDING THE FILING OF MOTIONS

In order to promote the just, speedy, and inexpensive resolution of this case, *see* Fed. R. Civ. P. 1, the following procedure will be followed with respect to the filing of **substantive motions** (such as motions to dismiss, to amend the pleadings, or case dispositive motions); **discovery motions** (such as motions to compel, motions for a protective order, or motions seeking the imposition of sanctions); and **post-judgment motions** or other **motions following dismissal of the case** (such as motions for attorneys' fees, motions for reconsideration, and motions to reopen). Any party wishing to file a motion first will serve on all parties and file with the Court a letter (not to exceed three pages, single spaced) containing a brief description of the planned motion and a concise summary of the factual and legal support for it. If the intended motion is a discovery motion, counsel shall confer with one another concerning the dispute and make good faith attempts to resolve the differences between them before filing the letter regarding the dispute, and the party filing the letter also shall file a certificate that complies with Local Rule 104.7. Unless I notify you otherwise, no response to the letter should be filed. I will review the letter and determine whether to schedule an expedited telephone conference (usually within a week) to discuss the requested motion and to determine whether the issues may be resolved or otherwise

addressed without the need for formal briefing. Where it would be more efficient simply to approve the request to file the motion, I will issue an order directing that the motion may be filed.

If a telephone call is scheduled and the issues raised cannot be resolved during that call, I will consult with you to set a reasonable briefing schedule. If the letter described above is filed within the time allowed by the Federal Rules of Civil Procedure, Local Rules of Court, or any order issued by me in which to file the motion that the letter addresses, the time for filing the motion will be tolled to permit the scheduling of the telephone conference without the need to request an extension of time.

Although informal, this is an Order of the Court and shall be docketed as such.

/s/
Paul W. Grimm
United States District Judge

B. Standard Discovery Order

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND**

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
(301) 344-0670
(301) 344-3910 FAX

DISCOVERY ORDER

Fed. R. Civ. P. 26(b)(1), 26(b)(2)(C), and 26(g)(1)(B)(iii) require that discovery in civil cases be proportional to what is at issue in the case, and require the Court, upon motion or on its own, to limit the frequency or extent of discovery otherwise allowed to ensure that discovery is proportional. This Discovery Order is issued in furtherance of this obligation. Having reviewed the pleadings and other relevant docket entries, the Court enters the following Discovery Order that will govern discovery in this case, absent further order of the Court or stipulation by the parties. This Discovery Order shall be read in conjunction with the Scheduling Order in this case, which provides discovery deadlines, and will be implemented in compliance with the Discovery Guidelines for the United States District Court for the District of Maryland (see paragraph 3, below). **With respect to the limitations imposed in paragraphs 6, 7, and 9 on interrogatories, requests for production of documents, and fact depositions, counsel are encouraged to confer and propose to the Court for approval any modifications that are agreeable to all counsel.**

1. Disclosure of Damage Claims and Relief Sought. By the date set in the Scheduling Order, any party asserting a claim against another party shall serve on that party and provide to the Court the information required by Fed. R. Civ. P. 26(a)(1)(A)(iii) regarding calculation of damages. The party also shall include a particularized statement regarding any non-monetary relief sought. Unless otherwise required by the Scheduling Order, the disclosures required by Fed. R. Civ. P. 26(a)(1)(A)(i), (ii), and (iv) need not be made.

2. Scope of Discovery – Proportionality. Pursuant to Fed. R. Civ. P. 26(b)(1) and 26(g)(1)(B)(ii)–(iii), the discovery in this case shall be

proportional to what is at issue in the case. While the monetary recovery a party seeks is relevant to determining proportionality, other factors also must be considered, including whether the litigation involves cases implicating “public policy spheres, such as employment practices, free speech, and other matters [that] may have importance far beyond the monetary amount involved.” Fed. R. Civ. P. 26(b) advisory committee’s note to 1983 amendment. If a party objects to providing requested discovery on the basis of a proportionality objection, it must state the basis of the objection with particularity.

3. For cases involving claims of employment discrimination, the parties are encouraged to follow the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, which may be found 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. Cooperation During Discovery.

As encouraged by Fed. R. Civ. P. 1, and Discovery Guideline 1 of the Discovery Guidelines for the United States District Court for the District of Maryland, D. Md. Loc. R. App. A (July 1, 2011), <http://www.mdd.uscourts.gov/localrules/LocalRules-Oct2012Supplement.pdf>, the parties and counsel are expected to work cooperatively during all aspects of discovery to ensure that the costs of discovery are proportional to what is at issue in the case, as more fully explained in *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 357–58 (D. Md. 2009). Whether a party or counsel has cooperated during discovery also may be relevant in determining whether the Court should impose sanctions in resolving discovery motions, if it determines that a party has acted in a manner that violates the Rules of Civil Procedure, Order of Court, Local Rule, or Discovery Guideline.

5. Discovery Motions Prohibited Without Pre-Motion Conference with the Court.

a. In accordance with Fed. R. Civ. P. 16(b)(3)(B)(v), no discovery-related motion may be filed unless the moving party attempted in good faith, but without success, to resolve the dispute and has requested a pre-motion conference with the Court to discuss the dispute and to attempt to resolve it informally. If the Court does not grant the request for a conference, or if the conference fails to resolve the dispute, then upon approval of the Court, a motion may be filed.

b. Unless otherwise permitted by the Court, discovery-related motions and responses thereto will be filed in letter format and may not exceed three, single-spaced pages, in twelve-point font. Replies will not be filed unless requested by the Court following review of the motion and response.

c. Unresolved discovery disputes are to be raised as required by this paragraph before the end of discovery. Absent a showing of due diligence and exceptional circumstances, discovery disputes will not be heard after the discovery cutoff.

6. *Interrogatories.* Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 33 interrogatories shall be limited to fifteen (15) in number. Contention interrogatories (in which a party demands to know its adversary's position with respect to claims or defenses asserted by an adversary) may be answered within fourteen (14) days of the discovery cutoff as provided in the Scheduling Order. All other interrogatories will be answered within thirty (30) days of service. Objections to interrogatories will be stated with particularity. Boilerplate objections (e.g., objections without a particularized basis, such as "overbroad, irrelevant, burdensome, not reasonably calculated to identify admissible evidence"), as well as incomplete or evasive answers, will be treated as a failure to answer pursuant to Fed. R. Civ. P. 37(a)(4). For that reason, boilerplate objections are prohibited.

7. *Requests for Production of Documents.*

a. Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 34 requests for production shall be limited to fifteen (15) in number. A response to these requests shall be served within thirty (30) days and any documents shall be produced within thirty (30) days thereafter, absent Court order or stipulation by the parties. Any objections to Rule 34 requests shall be stated with particularity. Boilerplate objections (*see* ¶ 5 above) and evasive or incomplete answers will be deemed to be a refusal to answer pursuant to Rule 37(a)(4). Pursuant to Fed. R. Civ. P. 34(b)(2)(C), "an objection must state whether any responsive materials are being withheld on the basis of that objection."

b. Requests for production of electronically-stored information (ESI) shall be governed as follows:

i. Absent an order of the Court upon a showing of good cause or stipulation by the parties, a party from whom ESI has been

requested shall not be required to search for responsive ESI:

- a. from more than ten (10) key custodians;
- b. that was created more than five (5) years before the filing of the lawsuit;
- c. from sources that are not reasonably accessible without undue burden or cost; or
- d. for more than 160 hours, *inclusive* of time spent identifying potentially responsive ESI, collecting that ESI, searching that ESI (whether using properly validated keywords, Boolean searches, computer-assisted or other search methodologies), and reviewing that ESI for responsiveness, confidentiality, and for privilege or work product protection. The producing party must be able to demonstrate that the search was effectively designed and efficiently conducted. A party from whom ESI has been requested must maintain detailed time records to demonstrate what was done and the time spent doing it, for review by an adversary and the Court, if requested.

ii. Parties requesting ESI discovery and parties responding to such requests are expected to cooperate in the development of search methodology and criteria to achieve proportionality in ESI discovery, including appropriate use of computer-assisted search methodology, such as Technology Assisted Review, which employs advanced analytical software applications that can screen for relevant, privileged, or protected information in ways that are more accurate than manual review and involve far less expense.

8. *Duty to Preserve Evidence, Including ESI, that is Relevant to the Issues that Have Been Raised by the Pleadings.*

- a. The parties are under a common-law duty to preserve evidence relevant to the issues raised by the pleadings.
- b. In resolving any issue regarding whether a party has complied with its duty to preserve ESI, the Court will comply with Fed. R. Civ. P. 37(e).

9. *Depositions.* Absent further order of the Court upon a showing of good cause or stipulation by the parties, depositions of fact witnesses other than those deposed pursuant to Fed. R. Civ. P. 30(b)(6) shall not exceed four (4) hours. Rule 30(b)(6) and expert witness depositions shall not exceed seven (7) hours.

10. Non-Waiver of Attorney–Client Privilege or Work Product Protection. As part of their duty to cooperate during discovery, the parties are expected to discuss whether the costs and burdens of discovery, especially discovery of ESI, may be reduced by entering into a non-waiver agreement pursuant to Fed. R. Evid. 502(e). The parties also should discuss whether to use computer-assisted search methodology to facilitate pre-production review of ESI to identify information that is beyond the scope of discovery because it is attorney–client privileged or work product protected.

In accordance with Fed. R. Evid. 502(d), except when a party intentionally waives attorney–client privilege or work product protection by disclosing such information to an adverse party as provided in Fed. R. Evid. 502(a), the disclosure of attorney–client privileged or work product protected information pursuant to a non-waiver agreement entered into under Fed. R. Evid. 502(e) does not constitute a waiver in this proceeding, or in any other federal or state proceeding. Further, the provisions of Fed. R. Evid. 502(b)(2) are inapplicable to the production of ESI pursuant to an agreement entered into between the parties under Fed. R. Evid. 502(e). However, a party that produces attorney–client privileged or work product protected information to an adverse party under a Rule 502(e) agreement without intending to waive the privilege or protection must promptly notify the adversary that it did not intend a waiver by its disclosure. Any dispute regarding whether the disclosing party has asserted properly the attorney–client privilege or work product protection will be brought promptly to the Court, if the parties are not themselves able to resolve it.

Dated: _____

_____/S/
Paul W. Grimm
United States District Judge