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When to Leave the Stones Unturned: Using Proportionality to Navigate Discovery Efficiently, Effectively, and Ethically

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WHEN TO LEAVE THE STONES UNTURNED: USING PROPORTIONALITY TO NAVIGATE DISCOVERY EFFICIENTLY, EFFECTIVELY, AND ETHICALLY

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Discovery is intended to be an efficient, truth-seeking process with the ultimate goal of achieving just, speedy, and inexpensive dispute resolution. However, the consistent and extensive abuse of discovery has cast a shadow on the intended purpose of the process. For various ill- and well-intentioned reasons, attorneys abuse the process by conducting unnecessarily excessive and expensive discovery. One such reason for excessive and expensive discovery—and the focus of this Article—is the over-zealous advocacy of attorneys who leave no stone unturned out of fear of legal malpractice claims. To combat such excessive and expensive discovery, the Federal Rules of Civil Procedure emphasize a proportionality principle to limit the scope of discovery. But, despite the many revisions and amendments, the practicalities of the proportionality principle still remain ambiguous.

In an attempt to resolve ambiguity, this Article offers realistic methods attorneys can implement to achieve proportionality in discovery, such as early case assessments, fact-finder assessments, written agreements with clients, and early judicial involvement. Furthermore, this Article proposes an ethical safe-harbor to be added to the ABA Model Rules of Professional Conduct to protect well-intentioned attorneys who utilize the suggested proportionality methods. With these suggested proportionality methods and the proposed safe-harbor, this Article endeavors to curtail discovery abuse, protect attorneys, and allow for greater access to affordable and attainable justice.

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These rules govern the procedure in all civil actions and proceedings in the United States district courts. . . . They should be construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive* determination of every action and proceeding.

- Federal Rule of Civil Procedure 1 (emphasis added)

I. INTRODUCTION

A cornerstone of our democracy is that disputes are resolved in courts of law, and not in the streets.[1] Our system of civil litigation is extensively developed[2] and designed to deliver justice[3]—it gives disputing parties the ability to uncover truth and the opportunity to fairly resolve the matter before a jury of their peers.[4] Moreover, the laws that are applied to these disputes are continually evolving, with courts actively seeking to promote fairness and balance in this dynamic judicial system.[5]

But when the pursuit of justice is so expensive and delayed that the average American cannot afford to litigate their claims, our system fails.[6] The process

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1. *See Purposes and Responsibilities*, NAT'L ASS'N FOR CT. MGMT., https://nacmcore.org/competency/purposes-and-responsibilities/ [https://perma.cc/KQX4-W2R9] (explaining that "courts exist to do justice, to guarantee liberty, to enhance social order, to resolve disputes, to maintain rule of law, to provide for equal protection, and to ensure due process of law").

2. *See Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/HL3E-45XA] (explaining that the Judicial Conference of the United States is charged with the critical task to "carry on a continuous study of the operation and effect of the general rules of practice and procedure"). As part of this continuous study, the Judicial Conference also amends rules on the practice of law in federal courts. The federal rulemaking process is a detailed, elaborate process that involves a minimum of seven stages of formal comment and review that typically spans over two to three years. *Id.*

3. *See* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 631 ("American civil process puts into the parties' hands an elaborate, searching, and finely tuned official legal process.").

4. *See* Elizabeth Fraley, James Wren & Bradley J.B. Toben, *Was Texas Tort Reform Necessary? An Update on the Judges' View of Jury Verdict Accuracy*, 71 BAYLOR L. REV. 168, 176 (2019) (explaining that despite tort reformists' belief that juries run rampant and come to improper verdicts, studies show that trial judges possess a strong confidence in the ability of juries to get the right answer as juries reach the right result in the great majority of cases).

5. *See, e.g.*, JUD. CONF. U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 4 (2020), https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf [https://perma.cc/2FM6-VPGX] (discussing the federal judiciary's continuous planned strategies to ensure efficient, fair, and impartial justice); *see also Pending Rules and Forms Amendments*, U.S. CTS., https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments [https://perma.cc/7BLH-6CJC] ("Any change to the federal rules must be designed to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.").

6. *See* Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 599 (2011) ("Yes, we would like some speed in resolving litigation. We also would like the process to be inexpensive. But there is a third word in Rule 1. That word is 'just' . . . I think we are forgetting the importance of that third word, and

of discovery—the uncovering of facts necessary to determine the truth—has become so complicated and expensive that the means for justice have destroyed the ends.[7] Many litigants thus choose to ignore their disputes or pursue justice through the civil litigation system without the help of a lawyer.[8]

It need not—and *should not*—be this way. Discovery should, when it functions well and serves its true objectives, lead to a more effective system of civil procedure that gives parties rapid and lower-cost access to dispute resolution.[9] The very first rule of the Federal Rules of Civil Procedure commands it.[10] However, this purpose has been lost as attorneys, whether they recognize it as such or not, continuously abuse the discovery process through unnecessary and excessive discovery.[11] American lawyers are especially guilty of excessive discovery—the American approach to gathering evidence is internationally known as "leaving no stone unturned."[12] While the law requires zealous advocacy, this "no stone unturned" mentality can cross the line from advocacy to harming the attorney's own client by driving the cost of litigation—and thus justice—out of reach.

Recent amendments to the Federal Rules of Civil Procedure in 2015 reflect the consensus that the high costs and burdens of discovery, especially e-

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after more than seventy years, the application of the Federal Rules seems to have lost its moorings and some of us in the bench and bar have lost sight of the direction a well-ordered procedural system should take."); *see also* Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1942 (1997) ("Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details—in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the factfinder and the choreography of the trial. But few litigants or courts can afford it.").

7. *See* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 362–63 (D. Md. 2008); *see also* Peter B. Rutledge, *The Proportionality Principle and the Amount in Controversy*, *in* THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 175, 180 (F.H. Buckley ed., Yale University Press 2013); *see also* Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. BAR FOUND. RSCH. J. 217, 230–31 n.24.

8. *See* Stephen L. Rispoli, *Courting Access to Justice: The Rule of Law, The Rule of the Elite, and Non-Elite Non-Engagement with the Legal System*, 29 S. CAL. REV. L. & SOC. JUST. 333, 343 (2020).

9. *See* ANDREW B. BROD, MECHANISM DESIGN AND BEHAVIORAL ECONOMICS: INCENTIVIZING OPTIMAL PRE-TRIAL DISCOVERY 1 (2021), http://hdl.handle.net/20.500.13051/17935 [https://perma.cc/394U-2CPS]; *see also* William W. Schwarzer, *Mistakes Lawyers Make in Discovery*, LITIG., Winter 1989, at 31, 31.

10. *See* FED. R. CIV. P. 1.

11. *Mancia*, 253 F.R.D. at 362–63.

12. Lori A. Fields, Société Nationale Industrielle Aérospatiale v. United States District Court: *The Supreme Court Undermines the Hague Evidence Convention and Confounds the International Discovery Process*, 22 LOY. L.A. L. REV. 217, 217 (1988).

discovery, are distorting the purpose of the U.S. civil justice system. Because discovery is so expensive and burdensome, the 2015 Amendments emphasize a principle of proportionality to serve as attorneys' guiding light.[13] However, evaluating proportionality in every case is not always simple. Proportionality is naturally subjective and "has taken on an 'I know it when I see it' quality."[14] Nevertheless, lawyers can wade through this fog, achieve proportionality, and protect themselves from disciplinary action by using methods such as early case assessments, fact-finder assessments, judicial involvement, and written client agreements to narrow the scope of discovery in a manner that protects clients' interests without wasting time and money. Furthermore, this Article proposes that for attorneys who adhere to the concept of proportionality and follow these suggested methods, an ethical safe harbor should be created in the American Bar Association ("ABA") Model Rules of Professional Conduct[15] to shield them from disciplinary action charging attorneys with improper discovery practices.

"How much justice can you afford?"[16]

II. OUT OF FEAR OF DISCIPLINARY ACTION, LAWYERS ARE LEAVING NO STONE UNTURNED IN THE DISCOVERY PROCESS, CONSEQUENTLY DRIVING UP DISCOVERY COSTS AND ATTORNEY FEES FOR THEIR CLIENTS

Lawyers and courts have recognized excessive and expensive discovery as a consistent and troubling problem for some time. Beginning in the 1970s, the ABA found discovery abuses fell into three consistent complaints: (1) "discovery was too costly," (2) "discovery procedures were being misused," and (3) "discovery was subject to 'overuse.'"[17] Federal judges likewise

13. FED. R. CIV. P. 26(b)(1) ("Parties may obtain 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.").

14. Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 147 (2012).

15. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2023).

16. Elayne E. Greenberg & Noam Ebner, *How Much Justice Can You Afford?*, ALTS. TO HIGH COST LITIG., May 2020, at 72, 72 ("Remember the *New Yorker* cartoon, in which a lawyer and the client sit at a table, and the lawyer assesses the client's legal problem? 'You have a pretty good case,' the lawyer informs him, 'How much justice can you afford?'").

17. Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 25 (2015).

recognized these abuses in a 1979 study identifying "unnecessary, expensive, overburdening discovery as a substantial threat to the efficient and just functioning of the federal trial system for civil litigation."[18] In a 1980 survey, practitioners estimated that 60% of discovery materials did not justify the cost associated with obtaining them.[19] Excessive discovery continued into the 1990s with discovery estimated to account for 80% of all litigation costs.[20] Despite these costs, experienced litigators acknowledged "that they rarely use[d] more than 5 percent of the documents produced."[21]

The rise of e-discovery in the 2000s only exacerbated the problem of excessive and expensive discovery.[22] Previously, "e-mail was the principle data source for [e-discovery]."[23] Today, with the evolution of various forms of electronic communications, including text messaging, instant messaging, social media, digital phone calls, and numerous other platforms, parties are obligated to conduct e-discovery on *any* platform in *any* format that has relevant content.[24] Furthermore, e-discovery "involves not only electronic communications, but electronic data managed or stored in other systems," such as shared files, corporate financial systems, inventory systems, and web applications.[25] To add another level of complexity, most e-discovery is not located on desktops or computers anymore, and is instead scattered across mobile devices, datacenter servers, and intangible, virtual environments like the Cloud.[26]

Because of the ease in which e-discovery enables innumerable documents to be stored, organized, and searched, the amounts of documents requested and produced have increased exponentially.[27] As a result of the sheer volume of

18. Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 360 (D. Md. 2008) (citing S. Rep. No. 101-650, at 20–21 (1990)).

19. Brazil, *supra* note 7.

20. Rutledge, *supra* note 7.

21. Schwarzer, *supra* note 9, at 34.

22. Scott A. Moss, *Litigation Discovery Cannot be Optimal but Could be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 900–05 (2009).

23. STEVEN WILLIAMS & ALLEN GURNEY, CAPAX DISCOVERY, THE 10 STEPS TO HIGH PERFORMANCE EDISCOVERY 8 (2016), http://www.armana.co.uk/Guides/ARMANA_10_Steps_for_High_Performance_eDiscovery.pdf [https://perma.cc/4MSQ-9QZT].

24. *Id.*

25. *Id.*

26. *Id.* at 8–9.

27. *See* Sara Metzler, *Moving Discovery Forward in the Technology Age*, 29 GEO. J. LEGAL ETHICS 1153, 1153 (2016).

information that can be stored in these aforementioned formats, e-discovery costs more time and money to search and produce information, consequently "'creat[ing] more headaches' than conventional, paper-based discovery."[28] To put this tremendous amount of information into perspective, research estimates that every five minutes, the electronic world creates the digital equivalent of all of the information stored in the Library of Congress.[29] A federal court noted in a 2008 case that the volume of production of electronic documents would, if printed, be equivalent to a stack of paper 137 miles high.[30] As a result of e-discovery, the ABA found that 82% of the lawyers surveyed believed discovery to be too expensive.[31] In the same ABA study, 51% of the lawyers surveyed believed lawyers commonly abused discovery, and 66% believed that lawyers particularly abused e-discovery.[32] "In 2015, the average discovery cost for cases in federal courts was just over $4,000, but one 2018 study estimated that the average discovery cost per case for large corporations was at least $1 million."[33]

The causes behind excessive and expensive discovery have generally remained unchanged throughout time. The root of the problem is that it is generally attorneys, rather than clients, driving excessive discovery efforts.[34] Abuse of discovery generally arises from three types of attorney behaviors. First, and "perhaps the most common form of discovery abuse, is the inartful, and thus inefficient, use of discovery procedures by unskilled attorneys."[35] For example, some courts perceive boilerplate discovery requests and objections to

28. *See* JOHN H. BEISNER, U.S. CHAMBER COM. INST. FOR LEGAL REFORM, THE CENTRE CANNOT HOLD: THE NEED FOR EFFECTIVE REFORM OF THE U.S. CIVIL DISCOVERY PROCESS 2 (2010), http://www.instituteforlegalreform.com/uploads/sites/1/ilr_discovery_2010_0.pdf [https://perma.cc/W89H-2XYA]. Although artificial intelligence programs are constantly being developed to combat this expense through time-saving mechanisms such as predictive analysis, the sheer volume of information will continue to make this a balancing act rather than a complete solution. *See* Karl Sobylak, *Big Data Challenges in eDiscovery (and How AI-Based Analytics Can Help)*, JD SUPRA (June 7, 2021), https://www.jdsupra.com/legalnews/big-data-challenges-in-ediscovery-and-4861243/ [https://perma.cc/ZMD8-4LW4]; *see also* Laporte & Redgrave, *supra* note 17, at 22–23.

29. Metzler, *supra* note 27, at 1153.

30. *In re* Intel Corp. Microprocessor Antitrust Litig., 258 F.R.D. 280, 283 (D. Del. 2008).

31. John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 456 (2010).

32. *Id.*

33. Marilyn G. Mancusi, *Attorneys, E-Discovery, and the Case for 37(g)*, 97 NOTRE DAME L. REV. 2227, 2234 (2022).

34. *See* Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather than the Exception*, 87 DENV. L. REV. 514, 515 (2010).

35. William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH L. REV. 261, 272 (1994).

lack civility and professionalism[36] as they result in costly and time-consuming activities that are "typically disproportionate to the nature of [the] case, the amount involved, or the issues or values at stake."[37]

Another form of discovery abuse involves the deliberate misuse and gamesmanship of discovery procedures to exhaust and burden the opposing party.[38] Many cases of excessive and abusive discovery include these bad-faith tactics used to purposely drive up the costs of litigation to unnecessary and unreasonable degrees that cause delay or bully opposing parties into settlement.[39]

However, well-intentioned actions can also lead to excessive and expensive discovery.[40] A third form of discovery abuse, and the central focus of this Article, involves the overuse of discovery by well-intentioned attorneys determined to "leave no stone unturned."[41] This determination derives from the fear of surprise at trial, the hope "that more discovery may produce that priceless gem of evidence," and the need to protect themselves from malpractice liability.[42] Thus, one reason for this drive in excessive discovery is the ethical dilemma that discovery poses for attorneys. The Model Rules of Professional Conduct task lawyers to act with reasonable diligence in representing a client.[43] The comments to this rule further elaborate that lawyers shall "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[44] Some attorneys struggle with the distinction between zealous advocacy and over-zealous advocacy—they interpret this duty of zealous advocacy as requiring them to fully utilize every

36. *See* Matthew L. Jarvey, *Boilerplate Discovery Objections: How They are Used, Why They are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 930–31 (2013) (citing Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 125 (3d Cir. 2009)) (holding that general objections and requests for production "lack[ed] the civility and professionalism one expects from . . . experienced attorneys").

37. *Id.* at 927.

38. Underwood, *supra* note 35, at 273.

39. *See* Scott Y. Stuart, *The Power and Pitfalls of Amended FRCP 26*, LITIGATOR'S PERSP., Sept. 2016, at 34, 35.

40. *See* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 641 (1989) ("Lawyers practicing in good faith, therefore, engage in extensive discovery; anything less is foolish.").

41. Underwood, *supra* note 35, at 272.

42. William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 178 (1991).

43. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2002).

44. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2002).

available means of discovery.[45] "Reflexively, [these] attorneys over-request, over-object, and advise clients to over-preserve,"[46] which drowns their clients in exorbitant fees and costs.

Both ill- and well-intentioned lawyers who partake in excessive discovery lose sight of discovery's purpose—"just, speedy, and inexpensive"[47] access to facts so that the truth may be ascertained. Losing sight of this purpose threatens the principle and integrity of the process because discovery becomes no longer just about uncovering the heart of a matter; rather, it becomes a competition of how much of the truth each party can afford to unearth.[48] In 2015, "data showed that the average median cost for discovery in cases that lasted over [four] years and were tried was $15,000 for plaintiffs and $20,000 for defendants."[49] Moreover, the data "also showed that cases in the top 5% of the survey, where both plaintiffs and defendants requested electronically stored information [(ESI)], had an average median cost of $850,000 for plaintiffs and $991,900 for defendants."[50] In this manner, discovery has morphed into a battle of the purses; but turning the discovery process into a battle of the purses "culminates in a denial of justice."[51] For example, "abuse of discovery may create an *in terrorem* effect, forcing parties to settle prematurely out of fear of unmanageably [high] and disproportionate costs."[52] Lawyers may take advantage of their clients—inadvertently or not—as "discovery is particularly ripe territory for billing fuzziness, especially when the client cannot see how his or her money is actually being spent" or the actual extent of benefit received.[53]

In addition to harming clients and marring the integrity of the discovery process, excessive and expensive discovery can also put attorneys at risk. A failure to follow the client's decisions or budget could subject an attorney to

45. Griffin B. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 12 (1992).

46. *See* Laporte & Redgrave, *supra* note 17, at 45.

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

48. Netzorg & Kern, *supra* note 34, at 517.

49. Laporte & Redgrave, *supra* note 17, at 31 n.38.

50. *Id.*

51. Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOYOLA. L.A. L. REV. 819, 823 (2004).

52. Brod, *supra* note 9, at 3.

53. Colin E. Flora, *It's a Trap! The Ethical Dark Side of Requests for Admission*, 8 ST. MARY'S J. LEGAL MAL. & ETHICS 1, 47–48 (2018).

disciplinary action from the court as well as malpractice liability.[54] In an effort to zealously serve their clients, attorneys are potentially risking disciplinary action and legal malpractice. Of course, at the opposite end of the spectrum, the *failure* to conduct adequate discovery to investigate claims and defenses could also lead to disciplinary action and legal malpractice claims.[55] So, what should attorneys do? To address this problem, the Federal Rules of Civil Procedure promote proportionality in discovery.

III. THE FEDERAL RULES OF CIVIL PROCEDURE AIM TO PRESERVE THE PURPOSE OF THE DISCOVERY PROCESS BY PRIORITIZING PROPORTIONALITY

In an attempt to curb both ill- and well-intentioned discovery abuse, the Federal Rules of Civil Procedure emphasize the concept of proportionality. The current scope of discovery outlined in Rule 26(b)(1) explicitly prioritizes proportionality:

> Parties may obtain 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.[56]

However, proportionality is not a new notion—the 1983 amendments first introduced proportionality into Rule 26 due to "increasingly expensive, time-consuming and vexatious" discovery.[57] The 1983 amendments added new provisions to address the problem of over-discovery and set forth a cost-benefit analysis designed "to address the problem of discovery that [was] disproportionate to the individual lawsuit."[58] Factors included in the cost-benefit analysis were the case's "nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak

54. David J. Beck & Alex B. Roberts, *Legal Malpractice in Texas: Third Edition*, 70 BAYLOR L. REV. 217, 219 (2018).

55. *See* Bell, Varner & Gottschalk, *supra* note 45.

56. FED. R. CIV. P. 26(b)(1) (emphasis added).

57. A.B.A., *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 138 (1980).

58. Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1094 (2016).

litigant . . . and the significance of the substantive issues, as measured in philosophic, social, or institutional terms."[59] The proportionality rule intended to send the message that it "will not permit litigants to use a bazooka where a water pistol will do."[60] However, the message was not transparently delivered as these factors are vague and give little practical guidance to attorneys attempting to evaluate their cases.[61] As a result of this confusion, attorneys failed to adhere to proportionality requirements and courts failed to enforce them.[62]

Excessive discovery continued after the introduction of this cost-benefit analysis. As a result, the 1993 amendments added two factors to the considerations that were "intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery."[63] Those factors included whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues."[64] Again, these imprecise factors gave little practical guidance for the attorney attempting to evaluate the case.

The 2000 amendments, acknowledging a frustration with the lack of emphasis on proportionality, added a statement to Rule 26(b)(1) to direct attorneys' focus to the cost-benefit analysis: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii) [now Rule 26(b)(2)(C)]."[65] "The accompanying Note explained that courts were not using the proportionality limitations as originally intended," and that the cross-reference was added to stress the need for "active judicial use of subdivision (b)(2) to control excessive discovery."[66]

In 2006, the advisory committee changed the Federal Rules of Civil Procedure once again to address concerns about the increasing expense and burden caused by ESI. It amended Rule 26(b)(2) "to address issues raised by

59. *Id.*

60. Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 789 (1985).

61. *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, 99 JUDICATURE, Winter 2015, at 47, 49.

62. *See* Laporte & Redgrave, *supra* note 17, at 29.

63. John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411, 416 (2015).

64. *Id.*

65. *Id.*

66. *Id.*

difficulties in locating, retrieving, and providing discovery of some electronically stored information."[67]

In the 2015 amendments, proportionality finally made its headlining appearance in the Rule 26(b)(1) foundational definition for the scope of federal discovery. The revised version of Rule 26(b)(1) placed new and more fervent emphasis on relevance and proportionality of discovery.[68] The defining scope of discovery changed from "any relevant subject matter involved in the action" and information "reasonably calculated to lead to the discovery of admissible evidence," to "information *relevant to any party's claim or defense and proportional to the needs of the case*."[69] This reorganization is intended to "force parties and the courts to confront questions of discovery cost containment at the outset of litigation and thereby lessen the likelihood that pretrial costs will spiral out of control."[70] Instead of promoting costly and delay-inducing efforts to look under every rock in an e-discovery world populated by many, many rocks, the 2015 amendments "crystalize[] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality."[71] Moreover, the 2015 amendments also assign judges a more involved role in the discovery process.[72] A 2016 case stated it is now "the power—and *duty*—of the district courts actively to manage discovery and to limit discovery that exceeds its proportional and proper bounds."[73]

While the 2015 amendments assert that attorneys must strive for proportionality, *how* to achieve such proportionality still remains ambiguous.[74] As a result, lawyers are still "zealously advocating" for their clients by going the extra mile in discovery. In reality, this method is, at best, hurting their clients' wallets and, at worst, precluding litigants from seeking justice at all. Clients are not the only ones suffering from this problem—over-zealous

67. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2006 amendments.

68. Sara Anne Hook, *Early Case Management*, *in* DISCOVERY UNDER THE NEW FEDERAL RULES OF CIVIL PROCEDURE 1, 13 (2016).

69. *Id.* at 13–14.

70. Edward D. Cavanagh, *The 2015 Amendments to the Federal Rules of Civil Procedure: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?*, ANTITRUST SOURCE, April 2014, at 7, 9.

71. Helena Agri-Enterprises, LLC v. Great Lakes Grain, LLC, 988 F.3d 260, 273 (6th Cir. 2021).

72. Noble Roman's, Inc. v. Hattenhauer Distrib. Co., 314 F.R.D. 304, 306 (S.D. Ind. 2016).

73. *Id.*

74. *See* Singer, *supra* note 14; *see also* Laporte & Redgrave, *supra* note 17, at 44.

discovery practices are sparking disciplinary actions against lawyers in the process.[75]

IV. ATTORNEYS CAN IMPLEMENT SEVERAL TACTICS TO ENSURE PROPORTIONALITY IN DISCOVERY AND GUARD THEMSELVES ETHICALLY

Even though the 2015 amendments do not explicitly provide any methods for determining proportionality, we do have tools. Lawyers can use these tools to concentrate and particularize the scope of discovery as well as bring their discovery within the confines of the proportionality rule, and thus, safeguard themselves from disciplinary action for excessive discovery. Furthermore, a safe harbor should be adopted for those well-intentioned attorneys who employ these recommended precautions. Early case assessments, fact-finder assessments, written agreements with clients, and early judicial involvement are tools attorneys should use to achieve proportionality and protect themselves under the Model Rules of Professional Conduct. By doing so, we can make litigation more affordable and uphold our democratic values by ensuring that people still have affordable access to our court system for dispute resolution.

A. Early Case Assessments

In the United States, about 95% of all cases settle prior to trial.[76] In this way, "discovery has become a *de facto* form of dispute resolution."[77]

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75. *See, e.g.*, Pritchard v. Portfolio Recovery Assoc., LLC, No. 3:14-CV-293-TAV-HBG, 2015 WL 13757783, at *1 (E.D. Tenn. Sept. 4, 2015) (threatening sanctions against plaintiff for neglecting to consider the vast scope or the cost of compliance of the requested discovery and against defendant for boilerplate objections); Schmelzer v. IHC Health Servs., Inc., No. 2:19-CV-00965-TS-JCB, 2022 WL 16646456, at *2 (D. Utah Feb. 10, 2022), *objections overruled*, No. 2:19-CV-965 TS, 2022 WL 1224976 (D. Utah Apr. 26, 2022) (imposing sanctions for discovery requests that were overbroad and disproportionate to the needs of the case); *In re* Weinberg, 163 B.R. 681, 686 (Bankr. E.D.N.Y. 1994) (ordering sanctions against an attorney for going "beyond the zealous representation of his client's rights" when the attorney conducted excessive discovery despite the absence of express bad faith or intent); *see also* Margaret Rowell Good, *Loyalty to the Process: Advocacy and Ethics in the Age of E-Discovery*, 86 FLA. BAR J. 96, 96 (2012) ("Even when the conduct isn't intentional or willful, courts are increasingly imposing sanctions on parties and, occasionally, on counsel. The most egregious e-discovery blunders have resulted in dismissals, million dollar sanctions, bar association referrals, adverse inference instructions, and subsequent malpractice claims.").

76. *What Percentage of Lawsuits Settle Before Trial? What Are Some Statistics on Personal Injury Settlements?*, L. DICTIONARY, https://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements/ [https://perma.cc/XMW2-Z2LL].

77. *Document Review*, LOGIKCULL, https://www.logikcull.com/guide/early-case-assessment [https://perma.cc/93C6-ZGGS].

Accordingly, "the early phases of discovery are arguably the most important of any legal battle or dispute."[78] Because cases do not often survive past the discovery phase, attorneys should conduct early case assessments at the outset of a case to rapidly focus the discovery plan on the most important aspects of the case. Early case assessment (ECA) is "a disciplined, proactive case management approach designed to assemble, within 60 days, enough of the facts, law, and other information relevant to a dispute to evaluate the matter, to develop a litigation strategy, and to formulate a settlement plan."[79] Attorneys can implement ECAs in evaluating a case in its entirety, or alternatively, attorneys can use ECAs specifically for evaluating e-discovery.

ECAs consider the expected value of the case, which, even in rough form, can assist attorneys in anticipating the amount or potential range of a monetary award, establishing parameters for settlement negotiations, and constructing a litigation budget with the client.[80] "It can also set boundaries for the amount of money a party is willing to spend on discovery."[81] ECAs can help attorneys target discovery, thus saving precious time and effort and generating the results attorneys actually need.[82] For example, implementation of an ECA allowed General Electric to reduce litigation costs from $120.5 million to $69.3 million in just a span of three years.[83] Using the information generated by an ECA enables attorneys to concentrate resources on the efforts most likely to be effective and avoid efforts that are less likely to be effective.[84] Furthermore, research shows that with a successful ECA, attorneys will often know 80% of what they will ever know about a case in the first sixty days.[85] Conducting an ECA with a firm timeline in place ultimately saves both time and money, and keeps the focus on the most critical matters.

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78. *Id.*

79. John DeGroote, Robert M. Manley & Frank C. Vecella, *Effective Litigation Management: Doing a Good Job at Herding Cats*, *in* STATE BAR OF TEXAS 11TH ANNUAL ADVANCED IN-HOUSE LEGAL COUNSEL COURSE 1, 1 (2012).

80. *See* Mary G. Manetti, *Controlling Outside Counsel Costs*, *in* MANAGING A CORPORATION'S LAW DEPARTMENT 117 (1988).

81. *See* Singer, *supra* note 14, at 165.

82. *See* Lisa C. Wood, *Early Case Evaluation (Litigation Efficiency is Not an Oxymoron)*, 23 ANTITRUST 90, 91 (2009).

83. DeGroote, Manley & Vecella, *supra* note 79, at 3.

84. *See* Wood, *supra* note 82.

85. Rees Morrison, *Well-Done ECA (Early Case Assessment) Uncovers 80% of What You Will Ever Know*, L. DEPT. MGMT. BLOG (Nov. 25, 2009), https://www.lawdepartmentmanagementblog.com/well-done-eca-early-case-assessment-uncovers-80-of-what-you-will-ever-know/ [perma.cc/3EF9-YQFW].

1. ECAs for the Entire Litigation

General ECAs include four main areas of information to gather and organize—the facts, the law, the forum and opposition, and the plan.[86] The first area—the facts—should include information such as a claim's summary, the opposing side's position, a timeline showing the relevant facts and key dates, and interview summaries from witnesses.[87] Additionally, if available, the facts should also include the ten best and worst documents for each side of the case, a summary of expert testimony required, and each side's likely themes.[88] This phase is also the best time to interview the client for crucial information regarding discovery, such as evidence relevant to litigation, the key players, where relevant information resides and its accessibility, and the existence of copies of necessary documents.[89]

Next, the law phase should include a draft jury charge and a summary of additional legal issues, including the likelihood of success of salient legal motions.[90] New technological tools, such as artificial intelligence using predictive analytics from LexMachina,[91] Context,[92] Trellis,[93] Wolters Kluwer,[94] or LexPredict[95] can help lawyers identify the likelihood of success of legal motions so that they can make informed decisions about the best manner in which to proceed.[96] For example, if a lawyer uses LexMachina and learns that

86. DeGroote, Manley & Vecella, *supra* note 79, at 1–2.

87. *Id.* at 1.

88. Wood, *supra* note 82.

89. Hook, *supra* note 68, at 15.

90. John DeGroote, *The Early Case Assessment Checklist: Early Case Assessments Part II*, SETTLEMENT PERSP. BLOG (Oct. 24, 2008), http://www.settlementperspectives.com/2008/1O/the-early-case-assessment-checklist-early-case-assessments-part-ii/ [https://perma.cc/M4FA-9UM7].

91. Rhys Dipshan, *With Analytics Tools, Law Firms Are Adding Predictive Power to Their Advice*, AM. LAW. (June 3, 2022, 11:06 AM), https://www.law.com/americanlawyer/2022/06/03/with-analytics-tools-law-firms-are-adding-predictive-power-to-their-advice/ [https://perma.cc/8QYN-U6QY].

92. Roy Strom, *Lexis's New Context Tool Knows Every Federal Judge's Favorite Case*, LAW.COM (Nov. 29, 2018, 8:00 AM), https://www.law.com/legaltechnews/2018/11/29/new-data-analytics-tool-knows-every-federal-judges-favorite-cases-397-14291/ [https://perma.cc/YH9R-Q7KA].

93. Dipshan, *supra* note 91.

94. *Id.*

95. Jnana Settle, *Predictive Analytics in the Legal Industry: 10 Companies to Know in 2018*, DISRUPTOR DAILY (Jan. 29, 2018), https://www.disruptordaily.com/predictive-analytics-legal-industry-10-companies-know-2018/ [https://perma.cc/9JK9-2WYK].

96. Dipshan, *supra* note 91.

the judge only grants a certain motion 29% of the time, yet the cost to research, craft, and litigate the motion may exceed $100,000, then she can help the client make an informed, data-driven decision about whether it is worth the time and expense to proceed with the motion.[97] By conducting this analysis early in the litigation, the lawyer can help the client save money for other, more efficient and effective avenues for success.

The recommended third ECA category is an accumulation of different factors such as the forum and the opposition.[98] A study of the forum would include evaluating the jury pool and the past rulings of the trial court and applicable appellate court on issues similar to those in the case.[99] To best estimate the costs and necessary extent of discovery, attorneys should not only evaluate their own side's circumstances, but also obtain as complete a picture as possible of the opposing side's capabilities, cost constraints, number of custodians, scope of litigation, volume of discovery, and other sources of potentially relevant documents.[100]

After completing these preceding steps, attorneys will have adequate information to appraise the value of the case and develop a plan. The plan should reflect the value of the case, include the strategy that the attorney and the client develop together, a realistic budget, and a possible settlement plan.[101] With the necessary information gathered, attorneys are now in the position to answer five critical questions:

1. How much does each side expect to spend in attorneys' fees to take the case through trial or arbitration?
2. What is the worst outcome after trial or arbitration?
3. What is the best outcome after trial or arbitration?
4. What is the reasonably likely range of damages they stand to win or lose?

97. Justin Smith, *Lex Machina: 10 Years of Legal Analytics*, CIO REV., Feb. 2020, at 1, https://lexmachina.com/wp-content/uploads/CIO-Review-10-years-legal-analytics.pdf [https://perma.cc/V77L-5FHB].

98. Wood, *supra* note 82.

99. *Id.*

100. MARCELLUS A. MCRAE & KAHN A. SCOLNICK, CASE ASSESSMENT AND EVALUATION 3 (2019).

101. *See id* at 3–4.

5. What is the chance of their winning or losing at numbers within that range?[102]

With the answers to these questions, attorneys can provide their clients with a transparent and realistic evaluation of the case that enables clients to make informed decisions and give consent to the proposed plan.

2. ECAs for e-Discovery

ECAs tailored specifically for e-discovery assess how much ESI there is to review, relevant keywords and search terms, the cost for reviewing data, and how that data can be applied to strengthen the case.[103] ECAs in e-discovery involve five key steps:

1. *Custodian Interviews*. Attorneys should conduct custodian interviews to provide a helpful overview of where to start and direct attorneys to what data to look for, the size of the data, and location of that data.[104]
2. *Data Dives*. Attorneys should delve deeper into the data and identify keywords to uncover the most relevant documents.[105]
3. *Right Technology Team*. Attorneys should expand their team and identify the key information technology personnel or artificial intelligence programs that can help with data sources and collection.[106]
4. *Organize the Information*. Once all information is collected, the information must be prioritized and organized by significance and relevance.[107]
5. *Analyze*. Most importantly, the collected data must be analyzed for significance and relevance with a system for preparing the data for future use.[108]

By conducting this e-discovery ECA, the scope of discovery narrows greatly, resulting in a focused, manageable area for development and exploration. While there will naturally be information uncovered that is not

102. PETER R. SILVERMAN, ANNE S. JORDAN & LES WHARTON, FASTER, CHEAPER, BETTER: THE NEW STANDARD FOR DISPUTE RESOLUTION 20 (2016), https://nysba.org/NYSBA/Meetings%20Department/Section%20Meetings/Dispute%20Resolution/AM2017%20Materials/Combined%20Panel%202.pdf [https://perma.cc/HPM7-S8N4].

103. LOGIKCULL, *supra* note 77.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

particularly relevant or helpful for the underlying claim, this process will help reduce the amount of time spent on less fruitful efforts.

B. Fact-Finder Assessments to Drive Discovery Decision-Making

When determining the future of a case and evaluating the risks and costs involved with moving the case forward, attorneys benefit when they "view the case through the eyes of prospective jurors."[109] Therefore, as part of the ECA strategy, attorneys should use fact-finder assessment methods, such as focus groups or mock trials, to determine what information will be important to prospective jurors. While focus groups are not necessarily predictive of the case outcome, they can provide attorneys with an advance view of potential juror reactions to issues in the case and help direct attorneys to more targeted, cost-effective discovery. The use of jury focus groups and small group research in the ECA constitutes a form of due diligence that can justify obtaining written, informed consent from the client to narrow the scope of discovery and ethically protect the attorney.

Focus groups and mock trials come in various forms that achieve diverse purposes. This discussion will focus upon two types of focus groups—concept and structured—and mock trials, which all serve various purposes and can be used at separate times throughout the litigation process.[110] Each case is unique, and effective ECAs may involve the use of only one of these fact-finder assessment methods or all three (even multiple times).

1. Concept Focus Groups

"Concept focus groups resemble a brainstorming approach to developing themes for trial" and are commonly used early in the discovery phase.[111] Lawyers use these focus groups as a general diagnostic and exploratory tool to identify problems with the case early on when there is plenty of time to make adjustments.[112] In this way, concept focus groups serve as a "community

109. McRae & Scolnick, *supra* note 100.

110. While proximity to trial is noted above in describing each type of focus group or mock trial, each case is unique. For example, a particular set of facts may warrant a structured focus group or mock trial early in the litigation, followed by a concept focus group, before conducting another structured focus group or mock trial for further refinement.

111. Douglas L. Keene, *The "Why" and "How" of Focus Group Research*, JURY EXPERT, Aug. 2013, at 16, 16.

112. JIM WREN & LAURA BROWN, PROVING DAMAGES TO THE JURY § 12:13 (4th ed. 2018).

thermometer"[113]—focus group members respond to issues and facts of the case, help attorneys grasp how to best order and communicate the story, and educate attorneys regarding the most important avenues to explore in supplemental discovery.[114] These groups provide information about biases that may show up at trial and suggest ideas for how to address them as well as highlight areas for discovery that have been overlooked.[115] In concept focus groups, a moderator primarily leads the brainstorming session, presenting the facts as a story to elicit reactions from the participants, and also inquiring as to what questions these facts raise.[116] Moreover, the moderator should have the participants "explain why their questions are meaningful to them, what they will do with answers in one direction or the other," and the significance of the answers to their assessment of the case.[117] With these answers, attorneys can then concentrate on the facts and issues that affected the participants most as they move forward with discovery.

2. Structured Focus Groups

Whereas concept focus groups encourage a loosely-controlled approach, structured focus groups involve a higher degree of preparation of opposing presentations designed to highlight competing facts and arguments that are anticipated at trial.[118] Structured focus groups can take the information gathered from concept focus groups and subsequent discovery in the case to make adjustments and turn the rough brainstormed ideas into an organized presentation.[119] Lawyers often use structured focus groups after initial document discovery and depositions of parties, and they may include the use of key exhibits or video excerpts.[120] While concept focus groups implement a brainstorming approach, structured focus groups employ diverse approaches, such as the adversarial or mediator approaches. The adversarial approach is similar to a mock trial in that dual attorneys present both sides of the case as opposing counsel.[121] Conversely, the mediator approach involves only one

113. *Types of Focus Groups and Their Purpose*, JURY ANALYST (May 11, 2020), https://juryanalyst.com/blog/types-focus-groups-legal-industry/ [https://perma.cc/F2SQ-4CGQ].

114. Keene, *supra* note 111, at 17.

115. JURY ANALYST, *supra* note 113.

116. Keene, *supra* note 111, at 17.

117. *Id.*

118. *Id.*

119. JURY ANALYST, *supra* note 113.

120. WREN & BROWN, *supra* note 112.

121. Keene, *supra* note 111, at 17.

attorney who presents the case as a neutral third party.[122] In both approaches, attorneys lead the presentation rather than the moderator.[123] After the presentation, the moderator then steps in to passively guide the jury's deliberation without providing any additional facts or information.[124] As a result, structured focus groups provide lawyers more specific feedback and allow lawyers to identify issues in their presentations that may adversely affect their case.[125]

Structured focus groups can potentially be conducted in a half-day. Often the first two hours include delivery of opposing presentations and collection of preliminary private verdict forms from the jurors before group deliberations begin, and the second two hours allow group deliberations by the jurors. More than one panel of jurors may be recruited to simultaneously deliberate, to help assess the degree of commonality (or not) between the panels in their reactions to the evidence and issues.

3. Mock Trials

As a third alternative, lawyers can conduct mock trials to explore even more extensively the issues in their case. Whereas focus groups are designed to delve into the biases, initial reactions and misconceptions, and thought processes of jurors, mock trials are "designed to study the changing decision-making process of jurors based on their reactions" to specific evidence and arguments.[126] Moreover, mock trials are often more comprehensive than focus groups in that attorneys can present both sides of an entire case in phases, including opening statements, witness examinations, and closing statements.[127] Between each phase of the presentation, the jurors describe their reactions to the presentations, the facts, and the issues.[128] These reactions "are collected at each decision

122. *Id*. at 18.

123. *Id.*

124. *Id*. It is important that the moderator be impartial and not give additional information to the jurors, or the jurors may turn to the moderator more and more to glean information that was not clear during the presentation(s). This is not helpful during the focus group, as the jurors' gaps in knowledge are instructive to the lawyers about the presentation of their case. The true purpose of the moderator is to ensure that the conversation moves along in the time permitted, that charge questions are answered (and thus impressions about those issues discussed), and to ensure that no member of the focus group dominates the conversation or remains completely silent.

125. Richard Gabriel, *Making the Most of Focus Group and Mock Trial Research*, PRAC. LITIG., Jan. 2008, at 7, 19.

126. *Id.* at 14.

127. *Id.* at 18.

128. *Id.*

juncture during the day," or across two days, "so that the jurors' decision-making path can be analyzed and tracked to discover exactly which issues moved juror decision-making at particular points."[129]

4. Using All Available Tools to Better Understand Potential Jurors' Impressions of Your Case

Focus groups and mock trials offer attorneys insight into what specific facts and arguments pique jurors' interests—positively and negatively—and what discovery still needs to be done. While it does take time and money to conduct these processes, they can also save money by preventing unnecessary and costly discovery (and ultimately by avoiding the use of ineffective presentations at trial).[130] Moreover, for cases with amounts in controversy that do not justify expensive jury consultants, lawyers can learn to independently run their focus groups and mock trials.[131] By learning how to conduct focus groups and mock trials and recruiting the participants with the help of in-house staff, lawyers can greatly reduce the cost to the client, narrow the scope of the discovery needed, and learn a great deal about their case.

C. Written Agreements with Clients

As part of the ECA, attorneys should confer and reach an agreement with the client regarding the case objectives and case plan to ensure that they are representing the client in the way the client wishes to be represented, while also precisely defining the scope of the attorney's work. A clear, comprehensive agreement early on will deter conflict over the nature or extent of services and shield attorneys from possible malpractice claims.[132]

After conducting an ECA, attorneys should visit with the client to discuss what was learned during the process and how that information can be incorporated into a plan that works for the attorney and especially for the client.[133] During this conversation, the attorney can give a more informed opinion of the case to the client and provide feasible options.[134] These options

129. *Id.*

130. *See* DeGroote, Manley & Vecella, *supra* note 79, at 3 (providing studies showing that conducting ECAs enable attorneys to reduce the litigation expenses in 50% of their cases on average).

131. *See* Sharon R. Vinick, *Do-It-Yourself Focus Groups That Won't Break the Bank*, PLAINTIFF (Oct. 2012), https://www.plaintiffmagazine.com/recent-issues/item/do-it-yourself-focus-groups-that-won-t-break-the-bank [https://perma.cc/3VMW-TKDA].

132. *See* Schwarzer, *supra* note 9, at 31.

133. *See* McRae & Scolnick, *supra* note 100, at 6.

134. *See id*. at 2.

can include the bare-bones approach all the way up to an "everything and the kitchen sink" approach. At this point, a thorough discussion of the proposed scope of discovery should include the pros, cons, and other considerations of each option.

The discussion of these options will necessarily involve discussion of what the client is willing to spend and the scope of work expected based upon the stakes and value of the case. Thus, creating a practical budget and a projected value of the case is essential to transform the ECA from abstract to reality, as even the best strategy and analysis are merely theoretical if the costs of implementation are prohibitive or the client is unwilling to incur the necessary expenses and the range of value of the case is uncertain.[135] However, by conducting a thorough ECA, the attorney can make an informed recommendation for a tailored and pragmatic approach that maximizes the client's return on the expense needed to progress the case.[136] Once the client has made a decision, the attorney should put the options—with their associated pros and cons—in writing.

Written agreements between attorneys and clients should clearly state the scope of what the attorney will or will not be doing in the course of representation.[137] This agreement must be carefully crafted as "[t]he extent of a lawyer's duties to [the] client can and will be measured by those words."[138] In the description of duties, attorneys should avoid overly vague and broad guarantees that may unnecessarily and precariously raise the bar, and consequently, heighten the client's expectations.[139] The ABA's Model Rules of Professional Conduct permit attorneys to make these agreements. Model Rule 1.2 states that an attorney "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[140] The comment to this rule further elaborates that an agreement with the client may limit the scope of a lawyer's services.[141] An agreement that limits

135. *Id*. at 5.

136. *See* John DeGroote, *Better Settlements From Better Information: Early Case Assessments IV*, SETTLEMENT PERSP. BLOG (Nov. 7, 2008), http://settlementperspectives.com/2008/11/better-settlements-from-better-information-early-case-assessments-iv/ [https://perma.cc/Q7YE-T39N].

137. Ronald Levine, *Limiting the Scope of Representation Is Critical for Lawyers*, LAW360 (Oct. 5, 2022, 5:47 PM), https://www.law360.com/real-estate-authority/amp/articles/1536720 [https://perma.cc/MR6N-MMKT].

138. *Id.*

139. *Id.*

140. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2002).

141. MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 6 (AM. BAR ASS'N 2002).

representation may be appropriate when the client has narrow objectives for the representation or wishes to exclude actions that are too costly.[142] When limiting representation, the lawyer must also fully explain to the client any material risks arising from the proposed limited scope and obtain informed consent from the client.[143]

The written agreement should also include plainly understood fee arrangements.[144] Because an ECA provides an accurate scope of the forthcoming work, attorneys can substitute a billable hour and instead set a fixed value on the work and give the client the total cost upfront.[145] The agreement can incorporate a provision that allows the attorney and client to revisit the scope and total cost at periodic intervals to ensure that any changes in circumstances are addressed in an equitable manner for the client and the lawyer.[146] Once an agreement is reached, the attorney should send an engagement letter that outlines the purpose of the employment and the amount to be paid for the services discussed.[147]

D. Judicial Involvement

Another proactive measure attorneys can take is to involve the judge early in the discovery process. When proposing the 2015 amendments to Rule 26, the advisory committee recognized that there was a limit to what rule changes alone could accomplish, and what was needed could be "described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management."[148] Commentators strongly support the notion that "managerial judging has the potential to ameliorate over-discovery to a significant extent."[149] Moreover, many attorneys believe this to be an essential

142. *Id.*

143. Levine, *supra* note 137.

144. Scott Garner, *Spotlight on Ethics: The Benefits of an Engagement Letter*, CAL. LAWS. ASS'N (Sept. 2020), https://calawyers.org/california-lawyers-association/spotlight-on-ethics-the-benefits-of-an-engagement-letter/ [https://perma.cc/6DZA-B9V2].

145. DeGroote, Manley & Vecella, *supra* note 79, at 2.

146. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-458 (2011) (discussing the permissibility of modifying existing fee arrangements).

147. *See* Garner, *supra* note 144.

148. JUD. CONF. ADVISORY COMM. ON CIV. RULES & COMM. ON RULES OF PRAC. & PROC., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 4 (2010), http://www.uscourts.gov/file/reporttothechiefjusticepdf [https://perma.cc/D4PK-WUYB].

149. W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 902 (1996).

measure to take, with some stating that "[j]udges need to actively manage each case from the outset to contain costs [because] nothing else will work."[150] "The mere knowledge that a judge is willing to . . . resolve discovery disputes has a deterrent effect against . . . disproportionate discovery."[151] "Lawyers are less likely to initiate disproportionate discovery or engage in discovery misconduct when they know the judge is watching and willing to" step in.[152] Thus, attorneys may want to consider advising the court of the desire for a proportional discovery phase with an emphasis on transparency, cooperation, and managerial judging so that the clients' best interests may be served.[153]

Attorneys can encourage judges to perform a multitude of tasks to limit discovery and its costs. Judges can implement formal methods, such as ordering that the discovery be conducted in phases.[154] Initial phases focus on the information most likely to be relevant to resolving the central claims and defenses, while additional phases are permitted based on the result of the initial phase.[155] These divided discovery phases enable parties to prioritize the most important facts and issues in the case.[156]

As another formal method, attorneys can seek preliminary legal opinions from the court regarding disputed legal standards in the case. "The preliminary legal opinion [is a] procedure [that] enables a holistic view of [a] case so that the parties and court[s] can determine what legal issues [need to be] address[ed] early in the discovery period to avoid [a] potential waste of resources."[157] This procedure would be especially useful in cases where the legal standard is disputed in a way that could drastically affect the scope of discovery, "such as

150. Carroll, *supra* note 31, at 463.

151. 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, 147 (2017).

152. *Id.*

153. *See* Laporte & Redgrave, *supra* note 17, at 64 (explaining that open and transparent discussions between parties regarding discovery, such as identification of custodians, databases, and other sources of information, serve parties and clients better than engaging in costly and potentially wasteful formal discovery).

154. *See, e.g.*, Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 300–01 (S.D.N.Y. 2012) (noting that phasing discovery would promote proportionality).

155. *See, e.g.*, Fisher v. Fisher, No. WDQ-11-1038, 2012 WL 2050785, at *5 (D. Md. June 5, 2012) (initiating phased discovery to focus on the most important facts, and informed plaintiff that the possibility of further discovery would depend upon the results of the initial discovery).

156. *Id.*

157. Bennett Rawicki, *A Litigation Move That Could Conserve Discovery Resources*, LAW360 (Feb. 3, 2023, 3:00 PM), https://www.law360.com/articles/1570339/a-litigation-move-that-could-conserve-discovery-resources [https://perma.cc/NPK9-HCXK].

whether a statute of limitations applies, whether the defendant's subjective intent is relevant to liability or how egregious conduct must be to lack coverage under a particular immunity."[158] For example, in a case that was filed in 2013 but did not get to trial until ten years later in 2023, the court granted a motion in limine one week before trial that excluded a crucial expert opinion after ruling that the opinion was irrelevant according to the legal standard adopted by the court.[159] As a retrospective learning tool, if the attorneys had sought a preliminary legal opinion early in the discovery process, they could have avoided altogether the time and cost associated with that expert, or asked the expert to opine on a different, relevant issue.[160]

The procedure for a preliminary legal opinion is efficient and effective and can be achieved in four straightforward steps. First, the parties should confer to identify the disputed aspects of the relevant legal standards.[161] Next, the parties file with the court a list of the identified disputed aspects on which they mutually, or unilaterally, request the court's opinion.[162] The court then will request briefing on the issues it considers pertinent in relation to the specific stage of the case.[163] Lastly, "[t]he court decides, at its discretion, whether to issue a preliminary legal opinion and which issues to address."[164] While such opinions can potentially be revisited by the court, they do provide parties with guidance as to the germane issues and what discovery to prioritize, thus allowing for the appropriate allocation of resources.[165]

Additionally, when discovery involves voluminous documents or ESI, judges can reduce the costs of reviewing the documents for relevance and privilege by ordering that the parties employ representative sampling.[166] Also, when faced with a case in which a party seeks discovery from a source or by a

158. *Id.*

159. *See* United States *ex rel*. Fesenmaier v. Cameron-Ehlen Grp., Inc., No. 13-cv-3003 (WMW/DTS), 2023 WL 36174, at *17–20 (D. Minn. Jan. 4, 2023).

160. Rawicki, *supra* note 157.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *See id.*

166. *See* FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendment ("[T]he parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery."); *see also, e.g.*, Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012).

means that is not cost-efficient, courts can redirect them to less-costly sources. This power derives from the Federal Rules of Civil Procedure that require the court, on its own or in response to a motion, to limit the extent of discovery if it determines that "the discovery sought . . . can be obtained from some other source that is more convenient, less burdensome, or less expensive."[167]

To further deter burdensome and excessive discovery, judges can refuse to review boilerplate objections should a dispute arise, instead treating boilerplate objections as a waiver of such objections.[168] In practice, it is common for attorneys to object to opposing counsel's discovery requests with general objections such as "overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence."[169] Instead, "[p]articularized objections facilitate a cooperative dialogue between counsel and enable" attorneys to revise requests in "response to legitimate objections without . . . requiring the requesting party to file a motion to compel."[170]

Courts also have the authority to define the "frequency or extent of discovery otherwise allowed" if necessary to achieve proportionality.[171] This authority includes ordering additional limitations on the number of interrogatories, document requests, depositions, or the amount of time that each deposition may take.[172] However, despite this discretionary authority to impose discovery limitations, judges should allow sufficient discovery and not deny discovery rights that the Federal Rules of Civil Procedure protect.[173]

Judges can also apply informal methods of dispute resolution to encourage lawyers to work together toward solutions. For example, judges can allow parties to submit brief letters outlining the issues followed by a telephone

167. FED. R. CIV. P. 26(b)(2)(C)(i).

168. Jarvey, *supra* note 36, at 925; *see, e.g.*, Sabol v. Brooks, 469 F. Supp. 2d 324, 328 (D. Md. 2006) (holding that failure to make particularized objections to document requests constitutes a waiver of those objections).

169. Grimm, *supra* note 151, at 161.

170. *Id.* at 160–61.

171. FED. R. CIV. P. 26(b)(2)(C).

172. *See, e.g.*, Fisher v. Fisher, No. WDQ-11-1038, 2012 WL 2050785, at *5 (D. Md. June 5, 2012).

173. *See* Bailey v. KS Mgmt. Servs., LLC., 35 F.4th 397, 404 (5th Cir. 2022) (ruling that the trial court's bar of summary judgment discovery resulted in a complete lack of a discovery period and provided the plaintiff "no opportunity to conduct discovery absent court approval"); *see also* Jessica M. Barnes, *Fifth Circuit Instructs Court to Follow Federal Rules and Allow Sufficient Discovery*, AM BAR ASS'N (July 17, 2022), https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2022/fifth-circuit-instructs-court-to-follow-federal-rules-and-allow-sufficient-discovery/ [https://perma.cc/F867-GNFK].

conference;[174] require a pre-motion conference with parties to address and attempt informally to resolve discovery issues without any briefing at all;[175] and have informal discovery conferences in lieu of in-court hearings.[176] Courts often prefer these informal techniques because they "can suggest resolutions without having to enter an actual ruling, and can give guidance on measures the parties can take, [thereby] focusing on problem solving rather than assessing blame or imposing sanctions."[177]

These formal and informal methods that attorneys can request from the courts underscore the need for proportionality and managerial judging and the inherent relationship between the two. Rule 26(b) and its proportionality test are explicitly "intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse."[178] In other words, judicial involvement is imperative in the enforcement of proportionality and ethical protection of attorneys. Thus, those attorneys who strive to uphold the intention of Rule 26(b) by invoking judicial involvement should be protected from disciplinary action.

V. A SAFE HARBOR SHOULD BE ADOPTED TO PROTECT THE LAWYERS WHO TAKE THE AFOREMENTIONED STEPS FROM DISCIPLINARY ACTION

Lawyers following the steps outlined above would ostensibly have protection from malpractice under ABA Model Rule 1.2(c): "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[179] However, this rule, without a specific comment, is imperfect for this use as it is typically invoked for limited-scope representation agreements, where clients can only afford a lawyer to handle a specific portion of the case. For the purposes of this Article, it is not that the lawyer is limiting the scope of the representation; instead, the lawyer is attempting to narrow the manner in which the litigation is handled while remaining responsible for the case overall.

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174. *See, e.g.*, Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168, 2012 WL 1299379, at *1 (D.N.J. Apr. 16, 2012); *see also, e.g.*, *In re* Morgan Stanley Mortg. Pass-Through Certificate Litig., No. 09-CV-02137, 2013 WL 4838796, at *1 (S.D.N.Y. Sept. 11, 2013).

175. *See, e.g.*, Raza v. City of New York, 98 F. Supp. 2d 70, 73–74 (S.D.N.Y 2013).

176. *See, e.g.*, Willnerd v. Sybase, Inc., No. 1:09-cv-500-BLW, 2010 WL 4736295, at *1 (D. Idaho Nov. 16, 2010).

177. Grimm, *supra* note 151, at 151.

178. COMM. ON RULES OF PRAC. & PROC., JUD. CONF. OF THE U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 18 (2014).

179. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2002).

Comment [6] is closest in application, but does not conclusively cover this situation:

> [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.[180]

Moreover, an explicit safe harbor outlining these methods and tools would foster their use to narrow discovery and save clients money. Thus, a new comment [7] would be helpful:

> [7] The scope of services to be provided by a lawyer may be narrowed by conducting a proportionality assessment of a case. A lawyer may fulfill the requirements of a proportionality assessment by: (1) conducting an early case assessment, (2) utilizing a focus group (or other fact-finder assessment method) to determine the facts and issues that will be most relevant at trial, (3) creating a written discovery plan that is intended to focus upon the facts and issues present in the case as identified by the assessment and focus group, and (4) obtaining informed consent of the client to proceed with the discovery plan. By performing these steps and following through on the proportionate discovery plan, a lawyer is presumed to have conducted adequate discovery for the case.

By adding this comment, the Model Rules will explicitly encourage proportionality while providing guidance and protection for the lawyers attempting to save time and money for their clients.

In addition to the Model Rules of Professional Conduct, there should be a corollary comment added to the ABA Model Code of Judicial Conduct. Model Rule 2.5 of the Code of Judicial Conduct is most applicable to oversight of discovery, which provides:

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180. MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 6 (AM. BAR ASS'N 2002).

> (a) A judge shall perform judicial and administrative duties, competently and diligently.
> (b) A judge shall cooperate with other judges and court officials in the administration of court business.[181]

Comment [4] to this rule states, "A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs."[182] This statement is helpful, but given the outsized role that discovery plays in the life-cycle of a case—often without judicial involvement unless a dispute arises—a more detailed comment specifically relating to discovery would assist judges and lawyers with the proportionality requirement. A new comment [5] would illustrate the proper role of the judge:

> [5] In keeping with the spirit of securing "just, speedy, and inexpensive determination of every action and proceeding,"[183] a judge should encourage the parties to engage in proportionate discovery. A judge should work with the parties to ensure that each party has conducted a proportionate discovery assessment and be available to quickly and informally resolve disputes related to discovery. Informal methods of discovery dispute resolution may include telephone or video conferences without written submission of issues or requesting one-page written submissions for relief. If these informal methods fail, a judge is encouraged to set a hearing or written submission of issues deadlines for quick resolution of the dispute.

By bringing the judge into the conversation earlier and less formally when disputes emerge, the discovery process can be more effectively managed. Rather than extended debate between the lawyers and delayed judicial resolution, thus increasing each client's bill, the lawyers can swiftly and successfully resolve disputes when they arise. Moreover, when lawyers know that the judge is a phone call away, they may be more likely to quickly work it out amongst themselves rather than involve a third party that may leave both sides wanting.

These changes to the ABA Model Rules of Professional Conduct and Model Code of Judicial Conduct will encourage lawyers and judges to adopt more efficient discovery plans and practices. Through effective and economical management of discovery, lawyers will achieve their clients' goals without also breaking their clients' wallets. With so many articles about the negative effects

181. MODEL CODE OF JUD. CONDUCT r. 2.5 (AM. BAR ASS'N 2020).

182. MODEL CODE OF JUD. CONDUCT r. 2.5 cmt. 5 (AM. BAR ASS'N 2020).

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

of stress on lawyers,[184] if this process also reduces or eliminates prolonged interpersonal conflict between lawyers, our profession will be better for it.

VI. CONCLUSION

Legal uncertainty is claimed—appropriately so—to be the godfather of discovery abuse.[185] During the onset of litigation, so much remains uncertain—the facts, the issues, the plan, the truth, as well as how much and what kind of discovery is needed to bring to light these uncertainties. As a result, the discovery process is susceptible to abuse as lawyers who wish to fervently serve their clients and protect themselves from disciplinary action are conducting excessive discovery in an attempt to make these uncertainties certain. Because of these uncertainties that lead to routinely excessive and abusive discovery of both ill- and well-intentioned attorneys, judges and litigants describe modern discovery as a "morass," "nightmare," "quagmire," "monstrosity," and "fiasco."[186] But despite the abuses, discovery provides invaluable benefits by "enabling the enforcement of public policies, promoting deterrence, increasing oversight, providing transparency,"[187] and most importantly—uncovering the truth in the furtherance of justice. Therefore, to sustain these benefits and to provide some certainty for well-meaning attorneys, the Federal Rules of Civil Procedure provide a proportionality rule for discovery. Yet, attorneys who adhere to the proportionality rule are still at risk of disciplinary action for lack of guidance on the best method to achieve proportionality.

To prevent further abuse and to preserve the purpose and benefits of discovery, the ABA and state bars around the country should implement an ethical safe harbor that shields attorneys who take the measures described in this Article to achieve proportionality. If we, as a profession, do not incorporate these proportionality assessment tools into our routine discovery procedures,

184. *See Groundbreaking Study Focuses on Attorney Mental Health and Well-Being*, L.A. TIMES (Aug. 25, 2021), https://www.latimes.com/b2b/law/story/2021-08-25/groundbreaking-study-focuses-on-attorney-mental-health-and-well-being [https://perma.cc/S4F2-DUGN]; Nicole Black, *ABA Survey: Lawyers Are Stressed Out*, ABOVE LAW (Aug. 5, 2021, 4:46 PM), https://abovethelaw.com/2021/08/aba-survey-lawyers-are-stressed-out/ [https://perma.cc/LQ4F-DAWB]; *see also* Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46, 46–52 (2016).

185. Easterbrook, *supra* note 40, at 644.

186. Netzorg & Kern, *supra* note 34.

187. *Access to Justice Denied:* Ashcroft v. Iqbal: *Hearing Before the Subcomm. on the Const., Civ. Rights & Civ. Liberties, Comm. on the Judiciary*, 111th Cong. 18 (2009) (statement of Arthur R. Miller, Professor, New York University School of Law).

discovery will continue to be a battlefield of uncertainty and, consequently, be excessive and expensive. Without such action, excessive discovery will interfere with the just, speedy, and inexpensive determination of disputes, as promised by the Federal Rules of Civil Procedure.[188] In a sea of uncertainties, one thing is certain—excessive discovery will burden clients with justice that they cannot afford.

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