

Techniques Used by Judges to Achieve Proportionality

Active judicial management	<i>Judge monitor progress of case and intervenes when needed to keep discovery on track and proportional</i>
Appointment of special master or neutral	<i>Frequently done in patent litigation, some courts have developed volunteer discovery mediators to assist parties during discovery</i>
Requiring/encouraging cooperation between counsel and parties	<i>Judge educates parties on benefits of cooperative approach to discovery, encourages or even directs counsel/party cooperation</i>
Cost shifting	<i>Cost shifting or allocation has been ordered in cases involving voluminous ESI, or discovery from sources that are not readily accessible</i>
Court implemented informal discovery resolution methods	<i>Example includes requiring pre-motion conference with court before filing motions; requiring short letter "motions" instead of fully briefed ones, holding informal conferences with counsel instead of formal motions</i>
Narrowing scope of discovery	<i>Court restricts or narrows discovery requests by parties to focus on sources of information most likely to contain relevant information. Closely related to phased discovery</i>
Phasing discovery	<i>Court orders discover phased to focus on highest value information first, or on particular issues (as opposed to all issues in the case)</i>
Prohibition of boilerplate objections	<i>Boilerplate/non-particularized objections add to discovery costs because they lead to disputes and the filing of discovery motions which delay case and add to cost</i>
Use sampling to avoid need to individually review voluminous documents	<i>Particularly useful in cases involving large volumes of ESI, enables parties to sample and produce from large data populations without review of each document in the population sampled</i>
Order discovery from less burdensome source or by less burdensome method	<i>Court attempts to identify least burdensome or expensive source or method of discovery and directs discover from that source or by that method before parties pursue more burdensome discovery</i>
Use of Standing Orders, Protocols, Local Rules	<i>Many courts have adopted standing orders, protocols, local rules that implement cost saving discovery methods</i>
Encourage use of Technology to lessen Costs	<i>Often done in cases involving ESI (i.e. TAR)</i>

<p>Estimate range of possible recovery and range of discovery costs to arrive at a discovery budget</p>	<p><i>Court identifies with counsel foreseeable range of recovery if plaintiff successful, and attempts to estimate discovery costs to try to develop dollar or time limits to discovery to reduce costs</i></p>
<p>Impose limits on number of discovery methods or numbers of discovery requests, cap time/money to be spent on discovery</p>	<p><i>Court reduces number of document requests or interrogatories, caps the amount of time a party must spend responding to discovery request</i></p>
<p>Enforce Rule 26(g)(1) certifications/obligations</p>	<p><i>Court educates counsel to Rule 26(g)(1) obligations to conduct adequate investigation when seeking, responding or objecting to discovery requests, and duty to certify that discovery sought is not disproportional</i></p>
<p>Encourage/order use of Rule 502 orders to reduce discovery costs</p>	<p><i>Especially helpful in cases with ESI discovery, Court enters Rule 502(d) non-waiver order to permit review/production of discovery with less comprehensive review, yet without waiving attorney client privilege/work product objections</i></p>