12/14 Ed.

JUDGE PRATTER'S GENERAL GUIDELINES REGARDING DISCOVERY

NOTE: Counsel are strongly encouraged to share these guidelines with the litigants themselves in the matter pending before the Court.

The Federal Rules of Civil Procedure 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. A discovery order may be issued in furtherance of this obligation that will govern discovery in this case, absent further order of the Court or stipulation by the parties. Any such discovery order(s) shall be read in conjunction with the scheduling order in this case, which scheduling order likely provides discovery deadlines. ***Throughout the pendency of this case, counsel are encouraged to confer and propose to the Court for approval modifications to any discovery order that are agreeable to all counsel.*** The Court's approval is not required in the event counsel are in agreement regarding scheduling discovery past the deadlines set for discovery in the scheduling order, provided that no other deadlines, such as those for dispositive motions. Daubert motions, or trial pool date are implicated by such post-deadline discovery.

The following guidelines are intended to communicate to counsel and to the litigants many of the principles the Court considers important with respect to discovery.

1. **Scope of Discovery – Proportionality**. Discovery is expected to 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 causes 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. While there is no presumption in favor of phasing, to achieve the goal of proportionality, and pursuant to Fed. R. Civ. P. 26(b)(1), in appropriate cases where counsel discuss with each other and propose possible phasing of discovery, and if it will not cause undue delay, the Court will consider ordering that discovery be conducted in phases, as follows.

a. **Phase 1 Discovery**. The first phase of discovery should focus on the facts that are most important to resolving the case, whether by trial, settlement or dispositive motion. Accordingly, the parties' Phase 1 Discovery may seek facts that are not privileged or work product protected, and that are likely to be admissible under the Federal Rules of Evidence and material to proof of claims and defenses raised in the pleadings. Phase 1 Discovery likely should be narrower than the general scope of discovery stated in Rule 26(b)(1) ("discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," even if not admissible, if "reasonably

calculated to lead to the discovery of admissible evidence" (emphasis added)). Discovery sought during Phase 1 Discovery may not be withheld on the basis that the producing party contends that it is not admissible under the Federal Rules of Evidence, if it otherwise is within the scope of discovery permitted by Rule 26(b)(1), as modified by any order of the Court. Rather, a party from whom discovery is sought ("Producing Party") by an adverse party ("Requesting Party") must produce requested Phase 1 Discovery subject to any evidentiary objections, which must be stated with particularity.

b. **Phase 2 Discovery**. Unless the parties stipulate otherwise, the Court, upon a showing of good cause, may permit discovery beyond that obtained under Phase 1 Discovery. In Phase 2 Discovery, the parties may seek discovery of facts that are not privileged or work product protected, are relevant to the claims and defenses pleaded or more generally to the subject matter of the litigation, and are not necessarily admissible under the Federal Rules of Evidence, but are likely to lead to the discovery of admissible evidence. A showing of good cause must demonstrate that any additional discovery would be proportional to the issues at stake in the litigation, taking into consideration the costs already incurred during Phase 1 Discovery and the factors stated in Rule 26(b)(2)(C)(i)–(iii). If the Court determines that additional discovery is appropriate, the Requesting Party will be required to show cause why it should not be ordered to pay all or a part of the cost of the additional discovery sought.

2. **Cooperation During Discovery**. 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. The failure of a party or counsel to cooperate will be relevant in resolving discovery disputes and allocating costs associated with such disputes. Whether a party or counsel has cooperated during discovery also will be relevant in determining whether the Court should impose other sanctions in resolving discovery motions.

3. **Pre-Motion Conference with the Court**.

a. Generally, a discovery-related motion will not be substantively considered unless the moving party attempted in good faith, but without success, to resolve the dispute. Every discovery motion must include counsel's certification as to such specific efforts.

b. Unless otherwise permitted by the Court, discovery-related motions and responses thereto should not exceed five, double-spaced pages, in twelve-point font, ***including*** any exhibits, appendices or the like.

c. Counsel should be very slow to present to the Court copies of their e-mail "battles" leading up to the discovery motion, except for the rare e-mail that is actually germane to material merit(s) of the motion.

4. **Objections to Discovery**. Boilerplate objections (e.g. objections without a particularized basis, such as "overbroad, irrelevant, burdensome, not reasonably calculated to identify admissible evidence, harassing", etc.) as well as incomplete or evasive answers will be treated as failure to answer.

5. **Requests for Production of Electronically Stores Information (ESI)**.

a. 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:

i. from more than ten (10) key custodians;

ii. that was created more than five (5) years before the filing of the lawsuit;

iii. from sources that are not reasonably accessible without undue burden or cost; or

iv. 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.

b. 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.

c. The Court has available for the convenience of the parties and counsel two standard orders dealing with frequently encountered ESI discovery matters.

d. In appropriate cases the Court will consider appointing a Special Master in connection with ESI-related matters.

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

a. The parties are obliged by law and rule 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 evidence, including ESI, the Court will consider, inter alia:

i. whether the party under a duty to preserve ("Preserving Party") took measures to comply with the duty to preserve that were both reasonable and proportional to what was at issue in known or reasonably-anticipated litigation, taking into consideration the factors listed in the Federal Rules of Civil Procedure;

ii. whether the failure to preserve evidence was the result of culpable conduct, and if so, the degree of such culpability;

iii. the relevance of the information that was not preserved;

iv. the prejudice that the failure to preserve the evidence caused to the Requesting Party;

v. whether the Requesting Party and Producing or Preserving Party cooperated with each other regarding the scope of the duty to preserve and the manner in which it was to be accomplished; and

vi. whether the Requesting Party and Producing or Preserving Party sought prompt resolution from the Court regarding any disputes relating to the duty to preserve evidence.

7. **Non-Waiver of Attorney–Client Privilege or Work Product Protection**.

a. 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 nonwaiver agreement pursuant to Fed. R. Evid. 502(e).

b. 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.

c. 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).

d. 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.

8. **Importance of Becoming Familiar With the Court's Other Guidelines.**

Counsel are reminded of the importance of becoming familiar with the Court's general practices, policies and procedures, copies of which are available on the Court's website and by contacting the Court's Chambers.

S/Gene E.K. Pratter
Gene E.K. Pratter
United States District Judge