IMPROPER AND ABUSIVE WRITTEN DISCOVERY REQUESTS IN SINGLE AND MULTIPLE-PLAINTIFF EMPLOYMENT CASES

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INTRODUCTION

ñOur discovery system is broken.ò[1] A recent law review article led with this statement, which reflects the sentiment of attorneys and judges nationwide, [2] including many labor and employment litigators, regardless of whom they represent. Indeed, many view the modern discovery process as ñdysfunctional[,]ò[3] with members of the trial bar using words like ñnightmare,ò ñquagmire,ò ñmonstrosity,ò and ñfiascoò to describe it.[4] At the heart of the problem is that many lawyers see discovery not as a means to uncover relevant information in the prosecution or defense of a case; rather, they see it as a mechanism to wear down their opponent, financially and otherwise. Indeed, ñ[m]any litigants with valid claims or defenses simply cannot rationalize the time and expense that must be devoted to bringing or defending a civil case, with the waves of discovery that normally follow.ò[5] Moreover, discovery abuse drains judicial

[1] Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather than the Exception*, 87 DENVER UNIV. L. REV. 513, 513 (2010).
[2] *Id.* at 513.
[3] John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010).
[4] *See* Netzorg, *supra* note 1, at 513.
[5] *Id.* at 516, 523-24 (outlining the increasing lengths of time cases are taking to get to trial in federal court and attributing such delays, in part, to discovery abuse). ñBy some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case.ò Beisner, *supra* note 3, at 549.

resources[6] and increases the level of professional irritation and downright nastiness in legal proceedings.[7]

Unfortunately, abuse cannot occur without abusers. And, in the case of discovery, attorneys are their own worst enemies. In response to a survey conducted in 2008 by the American College of Trial Lawyers (ñACTLò) Task Force on Discovery and the Institute for the Advancement of the American Legal System (ñIAALSò), forty-five percent of participants responded that they believed discovery is abused in ñ*almost every case*[.]ò[8] If the abuse is occurring, it is because the controls in place to restrict abuse simply do not work, with attorneys and the courts largely responsible for the current state of affairs.

Nevertheless, this article does not seek to impugn the legal profession. On the contrary, it recognizes that the job of an attorney is a difficult one during the discovery phase. The adversarial system demands zealous advocacy and jockeying for strategic benefits, including placing pressure on the other side to consider settlement.[9] Moreover, the threat of malpractice suits lingers in attorneysô minds as they draft requests, often forcing attorneys to adopt a

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[6] Beisner, *supra* note 3, at 549.

[7] *See, e.g., Banks v. Office of Sergeant-at-Arms*, 222 F.R.D. 7, 11 (D.D.C. 2004) (ñWhile the parties claim in their motions that they have fulfilled [their ethical] responsibility, all they seem to do is exchange nasty letters and equally nasty phone callsò); *Alford v. Aaron Rents, Inc.*, No. 3:08-cv-683 MJR-DGW, 2010 WL 2765260, at *3 (S.D. Ill. May 17, 2010) (noting that the in-person discovery dispute conference with the judge became so unprofessional that the court took most of the issues under advisement; the court issued each sideôs attorney to pay $3,750.00 in sanctions); Ryan J. Reilly, *Federal Judge Invites Lawyers To "Kindergarten Party" To Teach Them Not To Waste His Time*, TPM MUCKRAKER, Sept. 1, 2011, http://tpmmuckraker.talkingpointsmemo.com/2011/09/federal_judge_invites_lawyers_to_attend_kindergarten_party_to_teach_them_not_to_waste_his_time.php?ref=fpblg (explaining how a judge invited parties to attend a kindergarten party to teach them a number of lessons, including how to draft reasonable discovery and appropriately communicate).

[8] Netzorg, *supra* note 1, at 515 (emphasis added) (citing AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT & 2008 LITIG. SURVEY OF THE FELLOWS OF THE AM. COLL. OF TRIAL LAWYERS 4 (2008), http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf).

[9] Beisner, *supra* note 3, at 549 (calling this method a ñno stone unturnedò approach).

demand-everything approach to discovery.[10] In addition, many clients want to see their lawyer ñget toughò and ñbury the other sideò with discovery, and the livelihood of lawyers, regardless of whom they represent, depends entirely on client satisfaction. Judges do not fare better in the fray: they must serve as gatekeepers of information, as decision-makers with respect to discovery disputes, and, sometimes, as babysitters to litigators who cannot solve on-going differences in discovery.[11]

Rather, this article seeks to remind practitioners engaging in written discoveryð particularly within the context of single or multi-plaintiff employment litigationð of their ethical obligations within the Federal Rules of Civil Procedure with respect to written discovery. While this article focuses specifically on written discovery, the emergence of electronic discovery, and its costs and burdens, makes it even more important to correct the improper and abusive written discovery practices that currently exist.[12] Additionally, it examines possible ñgray areasò of ethical conduct that arise in the context of employment litigation. Specifically, Part I of the article surveys the ethical obligations imposed upon attorneys by the Federal Rules and other sources. Part II examines potential abuses that occur in the drafting of written discovery in single or multi-plaintiff employment cases, and seeks to delineate the line between ethical and unethical attorney conduct. And, finally, Part III contains our concluding thoughts on the issue of abusive written discovery in employment cases, and recommendations that may help curtail it.

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[10] *Id.*

[11] *See, e.g., Ross v. Kansas City Power & Light Co.*, 197 F.R.D. 646, 649 (W.D. Mo. 2000) (calling the discovery process in the case ñan arduous and painful journeyò because of the parties); *Alford*, 2010 WL 2765260, at *3 (expressing dissatisfaction that the discovery motions at issue ñcumulatively, easily comprise thousands of pages of text[]ò and chiding the parties for their ñargumentative tenor and toneò during the discovery hearings and for making the court engage in hand-holding throughout the discovery process).

[12] Debra Lyn Bassett, *E-Pitfalls: Ethics and E-Discovery*, 36 N. KY. L. REV. 449, 450 (2009).

I. ETHICAL GUIDELINES WITHIN THE FEDERAL RULES OF CIVIL PROCEDURE

A. THE FEDERAL RULES HAVE AN ETHICAL COMPONENT

ñ[A] lawyerôs ethical obligations are governed by a combination of sources.ò[13] These sources include: the Federal Rules of Civil Procedure, state rules and laws governing attorney conduct, and local rules and laws regarding the same.[14] Ethics opinions supplement and expound upon these obligations.[15] Moreover, model codes, promulgated by the American Bar Association and the American Law Instituteôs *Restatement (Third) of Law Governing Lawyers*, inform statesô policies regarding attorneysô ethical obligations.[16] While this article focuses on the ethical obligations imposed by the Federal Rules, attorneys should be aware of state and local rules that impact or expand their responsibilities.

Although attorneys and judges often think of the Federal Rules as procedural in nature, complying with them carries both a procedural *and* an ethical component.[17] As one district court judge recently noted:

> A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost of his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace *is . . . hindering the adjudication process, and . . . violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve.*[18]

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[13] *Id.*
[14] *Id.* at 450-52.
[15] *Id.* at 451.
[16] *Id.*
[17] *Id.* at 477.
[18] *See Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362-63 (D. Md. 2008) (emphasis added).

Indeed, this ethical component to the Federal Rules acknowledges the fact that conduct abusive of the discovery process ñrepresents more than [a] violation of court orders and rules (which in itself is sanctionable); rather, it has had serious órealworldô effects.ò[19] Among these ñreal worldò effects of discovery abuse are: ñ(1) increas[ing] the cost of litigating the case for the parties, (2) wast[ing] judicial resources, and (3) [bringing] dishonor upon [particular] attorneys and the profession as a whole.ò[20]

B. THE FEDERAL RULES THAT GOVERN ATTORNEY AND JUDICIAL CONDUCT IN DISCOVERY

In keeping with the goal of limiting abuse in discovery, the Federal Rules of Civil Procedure impose certain ethical requirements upon attorneys and judges. With respect to a judgeôs responsibilities, Federal Rule 26(b)(2) controls. While the Federal Rules authorize broad discovery into ñany non-privileged matter that is relevant to any partyôs claim or defense[,]ò[21] they also insist upon a proportionality requirement that each judge must weigh when rendering a decision in a discovery dispute:

> On motion or on its own, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
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> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
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> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
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> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the

[19] *Ross*, 197 F.R.D. at 664.
[20] *Id.*
[21] FED. R. CIV. P. 26(b)(1).

> case, the amount in controversy, the partiesô resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[22]

Thus, judges have a duty to ensure that discovery is proportional to the issues at hand and that the parties are not manipulating the discovery system for unauthorized or unseemly purposes.

With respect to attorneysô ethical obligations in discovery, Federal Rule 26(g) provides parameters. Specifically, this rule establishes a duty for an attorney to conduct a reasonable investigation prior to writing, responding to, or objecting to discovery, as well as a duty for an attorney to certify that written discovery meets certain thresholds:

> é [E]very discovery request, response, or objection *must* be signed by at least one attorney of record in the attorneyôs own name ð or by the party personally, if unrepresented ð and must state the signerôs address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the personôs knowledge, information, and belief *formed after a reasonable inquiry*:
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> (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
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> (B) with respect to a discovery request, response, or objection, it is:
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> (i) consistent with these rules and warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
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> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
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> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in

[22] FED. R. CIV. P. 26(b)(2) (emphasis added).

> controversy, and the importance of the issues at stake in the action.[23]

If an attorney or unrepresented party fails to sign the written discovery, a court must strike the discovery.[24] Moreover, as discussed in the next section, courts can issue other sanctions for failure to comply with the obligations imposed by the discovery rules.[25]

The Federal Rules establish additional obligations on attorneys, which can lead to pitfallsð including court sanctionsð when not heeded. For instance, the Federal Rules ñimpose an affirmative duty on the [] party [objecting to a discovery request] to particularize with facts, not conclusory statements, the basis for [the] objections.ò[26] They also require parties to meet and confer prior to the filing of a motion for a protective order or a motion to compel.[27] Moreover, they confer upon attorneys the duty to supplement their responses to interrogatories, requests for production, and requests to admit in a timely fashion.[28]

C. THE FEDERAL RULES REQUIRE SANCTIONS FOR DISCOVERY ABUSE

Courts are not only authorized to issue sanctions for conduct abusive of the discovery process; they are obligated to do so. For instance, a court *must* penalize an attorney (or party) who violates Rules 26 without substantial justification:[29]

> If a certification violates this rule without substantial justification, the court, on motion or on its own, *must impose an appropriate sanction* on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the

[23] FED. R. CIV. P. 26(g)(1) (emphasis added).
[24] FED. R. CIV. P. 26(g)(2).
[25] *See* Section II.C, *infra*.
[26] *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 38 (D. Md. 2000); *see also* FED. R. CIV. P. 26(b)(5).
[27] *See* FED. R. CIV. P. 26(c)(1) (governing motions for protective orders); FED. R. CIV. P. 37(a)(1) (governing motions to compel).
[28] FED. R. CIV. P. 26(e)(1).
[29] FED. R. CIV. P. 26(g)(3).

> reasonable expenses, including attorneyôs fees, caused by the violation.[30]

This provision is modeled after Federal Rule 11,[31] which governs attorneysô representations to courts, but does not apply to discovery requests, responses, and objections.[32]

Additionally, Federal Rule 37(d) authorizes sanctions for attorney misconduct in discovery. It requires a court to impose sanctions when a party fails to answer, object to, or respond to written discovery unless the failure is ñsubstantially justifiedò or ñotherwise unjust.ò[33] Under Federal Rule 37, sanctions can include: (1) directing facts be taken as established for purposes of the action; (2) prohibiting the disobedient party from supporting or designating certain claims or defenses; (3) striking pleadings; (4) staying proceedings; (5) dismissing the action; or (6) rendering a default judgment.[34] ñInstead of or in addition to these sanctions, the court *must require* the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorneyôs fees, caused by the failure, *unless* the failure was substantially justified or other circumstances make an award of expenses unjust.ò[35]

Sanctions for abuse of the discovery process serve a number of purposes. First, they penalize non-compliant lawyers and parties.[36] Second, they serve as ña general deterrent to enforce a strict adherence to the óresponsibilities counsel owes to the Court and to their

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[30] FED. R. CIV. P. 26(g)(3) (emphasis added).
[31] *Mancia*, 253 F.R.D. at 357 (quoting the FED. R. CIV. P. 26(g) advisory committeeôs notes, which explain that the amendments to Rule 26(g) parallel the amendments to Rule 11).
[32] FED. R. CIV. P. 11(d) (expressly removing discovery requests, responses, and objections from the ambit of Rule 11). However, notably an attorneyôs intimations and disclosures to a court during discovery disputes or discovery motions can still form the basis of Rule 11 sanctions. *See, e.g., Perkins v. Gen. Motors Corp.*, 129 F.R.D. 655, 658-59 (W.D. Mo. 1990) (discussing both Rule 11 and Rule 26(g) sanctions for plaintiffôs discovery misconduct).
[33] FED. R. CIV. P. 37(d).
[34] FED. R. CIV. P. 37(d)(3).
[35] FED. R. CIV. P. 37(d)(3).
[36] *Mancia*, 253 F.R.D. at 358; *see also* FED. R. CIV. P. 26(g)(3) advisory committeeôs notes (ñBecause of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it.ò).

opponents.ö ö[37] In other words, a courtôs imposition of sanctions ñrecognize[s] that a litigantôs failure to abide court orders and rules, or his disregard of obligations inherent in the conduct of litigation, harm not only the system, but the other participants in the process.ò[38] From a commonsense standpoint, the requirements seek to ñoblige[] each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection[.]ò[39]

While these sanctions are available and required in certain situations, judges are very reluctant to use them.[40] Courts reason that only ñunexcused and willful violations justify harsh sanctions[.]ò[41] And while judges have dismissed plaintiffôs cases for failure to comply with discovery rules, they typically only do so after repeated, egregious violations.[42] More alarming, however, is that courts also appear reluctant to conduct proportionality assessments and issue less aggressive sanctions (such as limitations on future discovery requests) to parties that engage in unethical conduct during discovery.[43]

II. CONDUCT IN THE WRITTEN DISCOVERY PROCESS THAT VIOLATES APPLICABLE RULES AND HOW COURTS RESPOND TO SUCH CONDUCT

When drafting discovery requests, many attorneys tend to adopt a ñno stone unturnedò approach.[44] As discussed below, while courts regularly refuse to grant motions to compel responses to broad, harassing, or otherwise deficient requests, they do not regularly sanction

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[37] *Alford*, 2010 WL 2765260, at *4.
[38] *Id.* (internal quotations omitted and citing *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990)).
[39] FED. R. CIV. P. 26(g) advisory committeeôs notes.
[40] Beisner, *supra* note 3, at 551 (ñ[F]or a variety of reasons, courts have been reluctant to assertively manage the discovery process or to impose meaningful sanctions for abuse.ò).
[41] *Godlove v. Bamberger, Foreman, Oswald, and Hahn*, 903 F.2d 1145, 1148 (7th Cir. 1990).
[42] *See, e.g., id.* at 1148-49 (affirming sanction of dismissal in unjust termination case where plaintiff repeatedly issued argumentative discovery, failed to attend depositions, and refused to let court do in-camera review of potentially privileged documents).
[43] Beisner, *supra* note 3, at 583-84.
[44] *Id.* at 549; *see also Mancia*, 253 F.R.D. at 358 (ñDespite the requirements of [Rule 26(g)], however, the reality appears to be that with respect to certain discovery, principally interrogatories and document production requests, lawyers customarily serve requests that are far broader, more redundant and burdensome than necessary to obtain sufficient facts to enable them to resolve the case[.]ò).

parties for the drafting of such requests. The following subsections examine areas of discovery ripe for potential abuse within the single and multi-plaintiff litigation context and how courts have addressed these challenges.

A. INUNDATION BY SHEER VOLUME OF REQUESTS

Perhaps the most obvious ethical question that arises in the context of discovery is: how much is too much? In other words, at what point does an attorney cross the line from engaging in the adversarial, fact-finding process to simply inundating his or her opponent with an unethical amount of discovery? This question becomes particularly important in single and multi-plaintiff employment lawsuits, where a plaintiff may be an individual of moderate means who will spend significant money to respond to discovery, or an employer may be a small business with a limited budget and administrative resources and simply cannot absorb the costs of searching for thousands of records. Unfortunately, as with many discovery issues, the answer to the question is not clear.

The Federal Rules do not limit the number of requests for production or requests to admit, although Federal Rule 26(g)(1) imposes a duty on each practitioner to not propound more requests than which is reasonably necessary for purposes of the case.[45] In contrast, the Federal Rules explicitly limit the number of interrogatories to 25 unless otherwise stipulated by counsel or ordered by the court.[46] However, ñRule 33 has never authorized oppression by interrogatories, a reality emphasized by the 1993 imposition of [the] limitation on the number of interrogatories a party can ask without leave of court[.]ò[47]

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[45] *Sommerfield v. City of Chicago*, 251 F.R.D. 353, 354 n.3 (N.D. Ill. 2008); *see also* FED. R. CIV. P. 34 (not regulating the number of requests for production); FED. R. CIV. P. 36 (not regulating the number of requests to admit).
[46] *See* FED. R. CIV. P. 33(a)(1).
[47] 8B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2174 (3d ed.).

Regarding oppression by interrogatory, courts appear reluctant to punish all but the most egregious examples, which is perhaps not surprising given that there is no ñbright-line testò for determining when a party is using compound interrogatories to sneak around the Federal Rulesô numerical limit.[48] As one district court judge stated, the test to evaluate abuse of interrogatories is ñreminiscent of Justice Stewartôs memorable ódefinitionô of pornography [i.e., you know it when you see it.]ò[49] Nevertheless, too much is just too much in certain instances, such as the filing of 209 interrogatories containing 432 separate questions within the context of a single-plaintiff employment case brought before the numerical limits came into force.[50] Unfortunately, it is not obvious when the volume of interrogatories go from being permissible to plain harassing or burdensome, and, at the very least, the presence of a numerical limit serves to discipline lawyers who otherwise would not exercise restraint.[51] Of course, the specter of unnecessarily voluminous interrogatories lurks in multiple plaintiff cases, where attorneys frequently issue 25 interrogatories on behalf of each plaintiff even though the factual grounds for each plaintiffôs claim are nearly identical, such as in the case of a reduction-in-force.

With respect to requests to admit and requests for production, again only the extreme examples appear to disturb judges. For instance, one district court granted a plaintiffôs motion for a protective order in a discrimination case when the defendant served 1,664 requests to admit

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[48] *See Ginn v. Gemini, Inc.*, 137 F.R.D. 320, 321 (D. Nev. 1991) (noting differences in how various district court judges and magistrate judges count interrogatory subparts for the purposes of determining whether a party is violating Federal Rule 33).

[49] *See Banks*, 222 F.R.D. at 10.

[50] *Boyden v. Troken*, 60 F.R.D. 625, 626 (N.D. Ill. 1973) (granting defendantôs motion to strike plaintiffôs interrogatories in Section 1981 case where plaintiff filed hundreds of interrogatories).

[51] *See, e.g., Stephens v. City of Chicago*, 251 F.R.D. 353, 354 (N.D. Ill. 2008) (noting that the court had previously excused the city from answering 658 numbered requests to admit, many with multiple subparts, because they were unduly burdensome); *Williams v. Bd. of County Comm'rs*, 192 F.R.D. 698, 701-02 (D. Kan. 2000) (refusing to grant defendant employerôs motion to compel when their interrogatories contained 117 subparts); *EEOC v. Dawes County*, No. 8:07CV376, 2008 U.S. Dist. LEXIS 74035, at *6-11 (D. Neb. June 19, 2008) (refusing to grant plaintiffôs motion for additional interrogatories when plaintiff served three times the allowable number of interrogatories).

upon an individual plaintiff.[52] The court rejected defendantôs arguments that the requests were necessary ñto pin plaintiff down and force her to choose which version of the facts she will rely on at trial[.]ò[53] While the court noted that the requests bordered on harassment, it did not issue any sanctions, although the court had the authority to do so, whether on its own motion or otherwise.[54]

Nevertheless, in some instances, courts appear willing to impose punishments or sanctions against offending parties when they swamp their opponents with a large volume of requests. For instance, one court struck the offending requests in an employment case.[55] Moreover, monetary sanctions may be warranted if it appears the number of requests is meant to harass the other side.[56] Yet, often, as in many discovery disputes, a court simply will tell the parties to ñwork it out.ò[57]

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[52] *See Wigler v. Electronics Data Sys. Corp.*, 108 F.R.D. 204, 205 (D. Md. 1985) (granting plaintiffôs motion for a protective order and stating that ñ[a]nswering these requests in a conscientious and timely way would have taxed the powers of Hercules, even before he cleaned the Augean Stables.ò). Several other courts have refused to enforce excessive requests to admit in employment cases. *See, e.g., Godlove*, 903 F.2d at 1147 (noting that the district court found had struck a number of plaintiffôs 180 requests for admission that were ñprolixò rather than ñdirected at simplifying the issues [in the case]ò); *Taylor v. Great Lakes Waste Servs.*, 06-CV-12312-DT, 2007 U.S. Dist. LEXIS 97966, at *5-6 (E.D. Mich. Feb. 2, 2007) (ñIn light of the number of requests generally found to be acceptable in an uncomplicated case such as this one, the Court finds 297 requests for admission to be oppressive and unduly burdensome.ò). *But see Sommerfield*, 251 F.R.D. at 354 n.3 (refusing to grant employerôs motion for protective order on the grounds of number of requests to admit alone when plaintiff in Title VII case issued 177 requests to admit);
Lurensky v. Wellinghoff, 258 F.R.D. 27, 31 (D.D.C. 2009) (refusing to grant employer a protective order when plaintiff sought 109 document requests in individual discrimination suit, and granting plaintiffôs motion to compel).

[53] *Wigler*, 108 F.R.D. at 205.

[54] *See id. Cf. Wirtz v. Capitol Air Serv., Inc.*, 42 F.R.D. 641, 642-43 (D. Kan. 1967) (holding that thirty-nine requests to admit and thirty-three interrogatoriesð one more than the local rules allowedð were not oppressive).

[55] *See Boyden*, 60 F.R.D. at 626 (ñWhether plaintiffôs method of procedure amounts to harassment, as defendants claim, or merely represents an optimistic attempt by plaintiffôs counsel to have her adversary prepare her case for her in one convenient package need not be decided. In the interest of justice plaintiff should be required to discard this set of interrogatories and start over.ò)

[56] *See Wigler*, 108 F.R.D. at 205 (ñThe filing of such an unjustifiable number of requests lends itself at least to the appearance of harassment [. . .] which would plainly justify the imposition of sanctions[.]ò).

[57] *See Banks*, 222 F.R.D. at 11 (ñTo solve this problem I am going to demand that the parties do something that, in my judgment, they have yet to do: cooperate.ò)

B. PROCEDURAL GAMESMANSHIP

Another area of potentially unethical conduct in discovery occurs when parties attempt to use written discovery requests to trick their opponents or ñgame the system.ò For instance, in one case, a plaintiff attempted to use requests to admit in order to gather facts about an amended claim the party had been allowed to add late in the proceedings.[58] The court had allowed such an amendment only because of counselôs representation that no additional discovery would be necessary.[59] Nevertheless, plaintiff served 177 requests to admit seeking a variety of admissions with respect to this claim.[60] The magistrate judge refused to allow the requests, reasoning: ñThe discovery rules are not a ticket . . . to an unlimited never-ending exploration of every conceivable matter that captures an attorneyôs interest.ò[61]

The Eleventh Circuit likewise cautioned parties against gamesmanship with respect to written discovery. In a discrimination case, the plaintiff served the employer with the complaint and, simultaneously, 40 requests for admission that mirrored the allegations in the complaint almost exactly.[62] Several months later, the plaintiff served 72 more admissions, many of which were verbatim copies of earlier requests.[63] The defendants failed to respond to the requests to admit in a timely fashion, and the district court deemed the items admitted; their admission ultimately resulted in a $5.7 million verdict against the employer.[64] The Eleventh Circuit overturned the district courtôs ruling regarding the admissions and chided the plaintiff for using requests to admit in such a manner:

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[58] *See Sommerfield*, 251 F.R.D. at 356-57.
[59] *See id.* at 356.
[60] *See id.* at 357 (granting employerôs motion for a protective order on this issue but not issuing costs or fees to employer).
[61] *See id.* at 354, 357.
[62] *See Perez v. Miami-Dade County*, 297 F.3d 1255, 1258 (11th Cir. 2002).
[63] *See id.* at 1259.
[64] *See id.* at 1261-62.

> [W]hen a party uses the rule [regarding requests to admit] to establish uncontested facts and to narrow the issues for trial, then the rule functions properly. When a party . . . however, uses the rule to harass the other side, or as in this case, with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements (that the party has already denied in its answer), the ruleôs time-saving function ceases; the rule instead becomes a weapon, dragging out the litigation and wasting valuable resources.[65]

Other courts have likewise refused to enforce requests that seek to trick or confuse the other side, such as requests to admit legal conclusions.[66] Nevertheless, sanctions rarely follow in these cases, thereby tacitly encouraging lawyers who engage in such conduct to continue their gamesmanship, knowing the worst possible outcome is a verbal admonition.[67]

C. BLANKET REQUESTS FOR INFORMATION BETTER OBTAINED BY DEPOSITION OR PRE-TRIAL DISCLOSURE

From an ethics perspective, employment attorneys should remain mindful about the proper or more compelling places from which to request information. While interrogatories can be helpful for targeting discrete issues,[68] more broad information should be sought from

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[65] *See id.* at 1268.

[66] *See, e.g., Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 1, 2-3 (D.D.C. 2006) (denying employerôs motion to have matters in requests for admission taken as true when they sought to have party admit legal conclusions, such as whether or not various actions were required by the Americans with Disabilities Act); *Taylor*, 2007 U.S. Dist. LEXIS 97966, at *5-6 (refusing to grant defendantôs motion to compel where employer sought requests to admit that requested plaintiff to admit the company did not violate her FMLA rights in a variety of circumstances because doing so required legal conclusion); *Reichenbach v. City of Columbus*, No. 2:03-CV-1132, 2006 U.S. Dist. LEXIS 3058, at *5-7 (S.D. Ohio Jan. 19, 2006) (refusing to grant plaintiffôs motion to compel on requests for admission that sought to have defendant admit that a ramp was not in compliance with the ADA, as such a request sought a legal conclusion); *Stallings-Daniel v. Northern Trust Co.*, No. No. 01 C 2290, 2002 U.S. Dist. LEXIS 4488, at *4-6 (N.D. Ill. Mar. 18, 2002) (refusing to grant plaintiffôs motion to compel when plaintiff asked defendant to admit that it ñôpurposefullyô omitted certain information about the plaintiff from the position statement to the EEOC because the word ñpurposefullyò is vague and subject to differing interpretations and thus . . . improperò).

[67] *See* footnote 65, *supra*, in which none of the courts issued sanctions.

[68] *See Hilt v. SFC Inc.*, 170 F.R.D. 182, 187 (D. Kan. 1997) (ñWhenever a decision is made to propound interrogatories, counsel should have clearly in mind what information he seeks. . . . Interrogatories should be targeted at discrete issues, rather than blanketing the case, and should be few in number.ò)

depositions or other sources.[69] For instance, attorneys should be wary of filing blanket requests that seek ñeach and every fact supporting all of the allegationsò in each count of the complaint, [70] or requests that seek ñeach document . . . that supports those allegations,ò[71] as such requests are often unduly burdensome and overly broad. A particularly egregious example of such a ñfacially overbroadò request occurred in a case brought under the Family Medical Leave Act, during which the plaintiff requested from the defendant-employer ñ[a]ny documents bearing [plaintiffôs] name that you have in your possession or control.ò[72] In refusing to grant the plaintiffôs motion to compel the production of documents, the court held that such a request would ñrequire[] the answering party to engage in mental gymnastics to determine what information may or may not be responsive[,]ò and would require the defendant to ñsearch through every other employeeôs correspondence to determine what had been sent from other employees to plaintiff.ò[73] As such, the request was overly broad and unduly burdensome.[74]

Similarly, courts have held that an interrogatory may be unduly burdensome when it seeks information more easily obtained at a different time or from a better source during the

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[69] *See Stephens*, 203 F.R.D. at 361-62 (holding that where plaintiff requested information about ñcomments and suggestionsò by defendant, ñplaintiff can obtain the information through a less onerous medium, to-wit: depositions.ò); *Hilt*, 170 F.R.D. at 187 (ñIn many instances, depositions, rather than interrogatories, will better serve the purpose of obtaining detailed facts,ò such as when three interrogatories that sought ñeach and every factò would number almost 132 in number if the court counted their subparts).

[70] *Aikens v. Deluxe Fin. Servs., Inc.*, 217 F.R.D. 533, 538 (D. Kan. 2003) (granting defendantôs motion for protective order and holding that requests for production were unduly burdensome on their face when they used omnibus terms of ñrelating toò or ñregardingò with respect to general categories or groups of documents); *Hilt*, 170 F.R.D. at 186 (refusing to compel plaintiff to answer this interrogatory because ñ[t]his would require plaintiff to provide the equivalent of a narrative or otherwise detailed account of her entire case in chief, together with identification of virtually all supporting evidence for each factò); *Anderson v. UPS, Inc.*, No. 09-2526-KHV-DJW, 2010 U.S. Dist. LEXIS 123878, at *6 (D. Kan. Nov. 22, 2010) (ñThis Court generally finds interrogatories overly broad and unduly burdensome on their face when they ask for ôeveryô or ôall factsô that support identified allegations or defenses.ò).

[71] *See Whitlow v. Martin*, 259 F.R.D. 349, 354-55 (C.D. Ill. 2009) (refusing to compel defendant to answer interrogatory subpart that required identification of precise documents that support each allegation because such a request was unduly burdensome).

[72] *See Moss v. Blue Cross Blue Shield of Kan., Inc.*, 241 F.R.D. 683, 692-93 (D. Kan. 2007) (refusing to grant plaintiffôs motion to compel for this document request).

[73] *See id.*

[74] *Id.*

proceedings, such as from depositions or during Rule 26(a) disclosures.[75] As an example, in a single-plaintiff employment suit stemming from a managerôs termination, the plaintiff sought, via interrogatory, a list of all trial witnesses and the substance of their testimony.[76] The court held that such a request was improper for two reasons: it was unduly burdensome because Federal Rules and local rules required such a disclosure later in the process and because ñif [the request] does not directly trespass on information protected by the work product doctrine, it certainly comes close to doing so.ò[77] The court did not impose sanctions on either party since both appeared to have failed to confer, but it did warn the parties:

> [T]here is blame enough to be shared such that sanctions are not presently warranted. Counsel are cautioned, however, that their conduct will be judged by a more exacting standard should there be future discovery disputes submitted to the Court for resolution.[78]

Other courts have imposed similar logic in denying motions to compel such information.[79]

D. UNREASONABLE REQUESTS FOR COMPANY-WIDE RECORDS

Another frequent area of discovery abuse occurs when litigants seek national or regional information in employment cases where the conduct at issue is largely confined to a particular facility or location or decision-maker. Plaintiffsô attorneys in these cases frequently cite the need for such information for purposes of generating statistical data or on the premise that, while the issues in dispute may be local, they are part of a larger institutional ñpattern and practiceò of discrimination and harassment. Courts generally have declined to expand the geographic scope

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[75] *See Marens*, 196 F.R.D. at 42-43.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 43.
[79] *See, e.g., Banks*, 222 F.R.D. at 15 (denying interrogatory request for witness names and summaries as premature in light of Rule 26(a)(3) which only requires the names of witnesses expected to testify at trial 30 days in advance of the trial date as well as violative of the work product doctrine).

of discovery based on such argument although, typically, no sanctions are imposed on attorneys who overreach.

For instance, in *Balderston v. Fairbanks Morse Engine*,[80] two former employees brought an age discrimination suit against their former employer arising out of their termination as a part of a company-wide reduction in force. The plaintiffs in *Balderston* requested company-wide personnel information so that they could gather statistical evidence ñin order to show a pattern or practice of discriminationò and other information pertaining to individuals that were not ñsimilarly situatedò to the plaintiffs, as that concept has been defined by the Seventh Circuit.[81] The District Court affirmed the magistrate judgeøs ruling that the plaintiffs were only permitted to engage in discovery as to individuals who were ñ*similarly situated*ò to the plaintiffs, and, accordingly, limited the plaintiffsô request to the relevant corporate department in which the plaintiffs were employed, similarly situated employees, similar time period, and similar decision-makers.[82] The Seventh Circuit, citing its precedent, affirmed the District Courtøs ruling on this issue, and rejected the plaintiffsô claim that such information was necessary because it was a ñpattern and practiceò case and that they needed information of individuals and subjects that did not specifically relate to the specific claims brought by the individual plaintiffs:

> In order to be considered, the statistics must look at the same part of the Company where the plaintiff worked; include only other employees who were similarly situated with respect to performance, qualifications, and conduct; the plaintiff and the other similarly situated employees must have shared a common supervisor; and treatment of the other employees must have occurred during the same RIF as when the plaintiff was discharged.[83]

[80] 328 F.3d 309 (7th Cir. 2003).
[81] *Id.* at 319.
[82] *Id.* at 320.
[83] *Id.*

Courts in other jurisdictions have taken a similar view in the absence of a compelling need for information beyond the employing unit.[84] Yet, again, rarely is a sanction imposed if an attorney overreaches, leaving the subject of the discovery in a ñlose, loseò situation, i.e., bear the costs of responding to unreasonable discovery requests or bear the costs of litigating a motion to compel, with only an infinitesimal likelihood of recovering attorneysô fees and costs.

E. REQUESTS FOR SENSITIVE INFORMATION MEANT TO EMBARRASS OPPOSING PARTY

An issue that sometimes arises in the context of employment cases involves written discovery that, arguably, harasses or embarrasses a party. For instance, this situation can occur when, in the context of a lawsuit for sexual harassment, an employer seeks information about a plaintiffôs sexual history. Indeed, wary of these concerns, courts appear reluctant to compel the production of such information. [85] Likewise, within the employment context, courts have ruled

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[84] *See also Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000) (ñdifferent employment decisions, concerning different employees, made by different supervisors . . . sufficiently account for any disparity in treatment, thereby preventing an inference of discriminationò); *Sandaram v. Brookhaven Nat'l Lab.*, No. CV-94-2330 (TCP), 1996 U.S. Dist. LEXIS 22811, at *5 (W.D. N.Y. March 11, 1996) (ñ. . .statistical evidence would generally have meaning only if based on an examination of the employment decisions made by the decisionmakers who made the decision that the plaintiff is challengingò); *In re Western District Xerox Litg.*, 140 F.R.D. 264 (W.D.N.Y. 1991) (ñThe so-called pattern and practice or statistical evidence sought here has limited relevance in a disparate treatment case. The courts have often disparaged the probative value of statistical evidence outside the decision-makers particular employing unit or facility in these treatment casesò); *Earley v. Champion International Corp.*, 907 F.2d 1077, 1084 (11th Cir. 1990) (finding that age discrimination plaintiffôs discovery was properly limited to the location where the plaintiffs worked and further noting that ña vague possibility that loose and sweeping discovery might turn up something . . . does not show particularized need and likely relevance that would require moving discovery beyond the natural focus of the inquiryò); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 95 (2d Cir. 1984) (statistics were ñmeaningless absent a departmental breakdownò because relevant employment decisions were made on a decentralized basis); *Mack v. The Great Atlantic and Pacific Tea*, 871 F.2d 179, 187 (1st Cir. 1989) (affirming denial of discovery beyond employing unit at issue and noting that ñparties have a correlative obligation to tailor interrogatories to suit the particular exigencies of the litigation . . . they ought not to be permitted to use broadswords where scalpels will suffice, nor to undertake wholly exploratory operations in the vague hope that something helpful will turn upò).

[85] *See Macklin v. Mendenhall*, 257 F.R.D. 596, 602 (E.D. Cal. 2009) (expressing concern that ñ[t]he possibility that discovery tactics such as that used by the defendant herein [in requesting information about plaintiffôs sexual past] might intimidate, inhibit, or discourage Title VII plaintiffs . . . from pursuing their claims[.]ò) (internal citations and quotations omitted); *Williams*, 192 F.R.D. at 701-02 (refusing to grant defendantôs motion to compel on interrogatory in sex harassment case when interrogatory sought information about plaintiffôs sexual history); *Priest v. Rotary*, 98 F.R.D. 755, 761 (N.D. Cal. 1983) (ñThis Court is deeply concerned that civil complaints based on

that requests to seek a plaintiffôs immigration status may be harassing, especially when the court previously granted a protective order regarding such information.[86]

F. "FISHING EXPEDITIONS" BEYOND AN INDIVIDUAL'S CLAIMS

As one commentator has suggested, ñ[w]ild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm.ò[87] In employment discrimination lawsuits, the threat of ñfishing expeditionsò occurs when parties seek to gather information about similarly situated individuals or patterns of misconduct by the defendant. For instance, in one case the plaintiff sought employee profiles of about 1,000 employees, regardless of their position within the company.[88] The court held that such a request was unduly burdensome and oppressive because it was not limited to those individuals similarly situated to plaintiff.[89]

Some courts treat these requests that seek information beyond the scope of the individualôs claims with suspicion, both on the grounds that the information is not relevant to the individualized claims in the complaint[90] and on the grounds that such a request is unduly

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sexual harassment in the workplace will be similarly inhibited, if discovery tactics such as the one used by defendant herein are allowed to flourishò).

[86] *See Benitez v. Amer. Standard Circuits, Inc.*, No. 08 CV 1998, 2009 WL 4043290, at *5 (N.D. Ill. Nov. 23, 2009) (refusing to grant defendantôs motion to compel responses to interrogatories and requests for production that sought information about plaintiffsô use of aliases, but failing to award costs or fees to either side for the motion).

[87] Beisner, *supra* note 3, at 561-62.

[88] *See McDougal-Wilson v. Goodyear Tire and Rubber Co.*, 232 F.R.D. 246, 251-52 (E.D.N.C. 2005) (holding that former employer would not be compelled to produce employee profiles on all employees in North Carolina from 1995 to present, as such a request would cover 1,000 employees not similarly situated to plaintiff and thus was unduly burdensome, oppressive and not likely to lead to the discovery of relevant evidence).

[89] *See id.* (refusing to grant plaintiffôs motion to compel).

[90] *See Moss*, 241 F.R.D. at 691-92 (stating that ñother claims of discrimination against a defendant are discoverable only if limited to the same form of discrimination[,]ò and thus limiting interrogatory to only FMLA complaints lodged by other employees) (internal quotations omitted); *Marshall v. Dist. of Columbia Water & Sewage Auth.*, 214 F.R.D. 23, 25 (D.D.C. 2003) (ñin race discrimination lawsuit, court denied plaintiffôs request for the ónames, race, sex, and ageô of all the defendantôs employees during several years of his employment; stating ñ[b]ecause plaintiff has made neither a claim of sex discrimination nor age discrimination, the gender and age of employees at [plaintiffôs place of employment] are irrelevant[.]ò); *Prouty v. Nat'l R.R. Passenger Corp.*, 99 F.R.D. 545, 549 (D.D.C. 1983) (ñBecause plaintiff only alleges age discrimination, he is not entitled to any information pertaining to

burdensome or oppressive.[91] Nevertheless, rather than issue sanctions, courts appear more likely to simply narrow the scope of the request on their own.[92]

III. CONCLUDING REMARKS

While the Federal Rules impose strict rules governing attorney conduct in the written discovery process, and provide courts with broad discretion to regulate and punish abuse of those rules, our survey of cases reveals that attorneys regularly violate these rules and, at the same time, are rarely punished for it by judges beyond verbal admonition. These twin forces have resulted in a written discovery process that creates few disincentives for attorneys to restrain themselves from abusing the written discovery process. Moreover, because parties that are subjected to discovery abuse are unlikely to recover their fees if they oppose and prevail in defeating a motion to compel, they face the choice of (1) acceding to unreasonable discovery requests, and the attendant administrative burdens; or (2) expending significant financial resources in challenging abusive discovery, with the strong likelihood that, even if they establish that the discovery sought was well beyond the scope of discovery, the court will not issue sanctions, notwithstanding the mandatory sanctions provision contained in Federal Rule 26(g)(3). Thus, attorneys and courts are both responsible for the current state of affairs, which undermines the legal profession as a whole.

But, is the status quo inevitable? Below are some recommendations that may

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race.ò); *Cf. Twigg v. Pilgrim's Pride Corp.*, No. 3:05-CV-40, 2007 WL 676208, at *6-7 (N.D. W. Va. Mar. 1, 2007) (holding that request for production was appropriate when it sought only settlement agreements relating to FMLA complaints rather than other types of discrimination).

[91] *See, e.g., EEOC v. Dist. of Columbia Pub. Schs.*, 217 F.R.D. 12, 15-16 (D.D.C. 2003) (granting defendantôs motion for a protective order when plaintiff requested all discipline documents for each and every teacher employed by defendant for an academic year since such a request would ñdisruptò the entire office and would require defendant to comb through thousands of personnel files).

[92] *See Moss*, 241 F.R.D. at 691-92 (ordering each side to bear their own costs); *Marshall*, 214 F.R.D. at 27 (imposing no sanctions); *Prouty*, 99 F.R.D. at 549, 551 (not addressing sanctions); *EEOC*, 217 F.R.D. at 16 (denying motions for sanctions).

alleviate both unreasonable and unethical conduct in the written discovery process:

(a) Institute a numerical limitation on the amount of document requests and requests to admit that a party may issue. This may be done in the pre-discovery Federal Rule 26(f) Planning Report, and its state law equivalent, whereby counsel must mutually agree on the number of document requests and requests to admit that may be issued in the case, with the court to resolve any disagreement prior to the conduct of discovery. Of course, a change in the Federal Rules limiting the number of document requests and requests to admit to a reasonable numerical sum, in the absence of good cause, would also achieve the same objective.

(b) While, as practitioners, we are reluctant to recommend a greater imposition of sanctions, it is difficult to see a meaningful change in attorney conduct if the refereesð the courtsð are reluctant to apply the tools at their disposal to meaningfully sanction lawyers who cross reasonable limits (as opposed to only sanctioning egregious, repeated, and willful violations, a standard many courts seem to employ, and that which is much higher than those imposed by the Federal Rules). One commentator has opined that ña major improvement in the moral education of litigators would be affected by increased sanctioning of smaller, more annoying discovery abuses with smaller, more annoying punishments.ò[93]

(c) Because written discovery disputes rarely reach the Circuit Courts of Appeal, there is a substantial lack of consistency in the way that discovery issues are resolved at the district court level, with each judge and/or magistrate judge largely having his or her own unique set of expectations in addition to, at times, his or her own rules. We recommend more robust Local Rules, with examples of prohibited conduct and the promise of penalties for non-compliance. If lawyers know what to expect, they will, over time, do a better job of self-policing.

(d) Finally, attorneys must remember that, as officers of the court, they have an ethical duty to not engage in abusive discovery. While one commentator noted that a ñtwelve-step programò for discovery abusers would not work since ñfew lawyers have a strong desire to change,ò[94] we think that most practitioners would significantly prefer an environment with far more limited discovery abuse than currently exists, as it drains resources, increases client dissatisfaction, and reduces the enjoyment of law practice. The Federal Rules provide the proper ethical guidelines and, per their ethical duties, attorneys should follow their letter and their spirit.

[93] Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1620, 1640-41 (1996).
[94] Yablon, *supra* note 92, at 1640.

These generally modest steps, and other similar efforts to curtail discovery abuse, would have a number of benefits: they would reduce litigation costs; they would result in resolutions of cases that are driven more by the merits of the case rather than the burdens of the discovery process; they would ultimately reduce the involvement of courts in discovery disputes once attorneys recognize that sanctions, rather than admonitions, will result from discovery abuse; and, lastly, they would improve the quality of law practice, both from a technical and professional satisfaction perspective, as attorneys would be required to exercise better judgment with a reduced allotment of discovery requests.