The Sedona Conference Journal®

Volume 10 Supplement ❖ Fall 2009

Articles

The Sedona Conference®

Antitrust Law, Complex Litigation and Intellectual Property Rights

THE SEDONA CONFERENCE JOURNAL®

VOLUME 10 SUPPLEMENT

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FALL 2009

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Cite items in this volume to "10 Sedona Conf. J. ____ (2009 Supp.)."

PREFACE

I was invited to write the preface to this special Supplement to The Sedona Conference Journal® as a result of my participation in the Georgetown Data Deluge Summit in March, 2007, and concerns I expressed at the Summit about the legal system's capacity to handle the data deluge. The Sedona Conference® Cooperation Proclamation, and supporting document, The Case for Cooperation, suggest that if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy. I believe this to be a laudable goal, and hope that readers of this Journal will consider the articles carefully in connection with their efforts to try cases.

Associate Justice Stephen G. Breyer
Supreme Court of the United States
Washington, DC
October 9, 2009

The Sedona Conference® gratefully acknowledges the substantial contributions of its Conference faculties, Working Group Series Sustaining and Annual Sponsors, participants, members and observers, and our Advisory Board members, whose volunteer efforts and contributions make The Sedona Conference® a "thought-provoking and inspiring" experience providing content of immediate benefit to the Bench and Bar.

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THE SEDONA CONFERENCE® COOPERATION PROCLAMATION

Author:
The Sedona Conference®

The Sedona Conference® launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a "just, speedy, and inexpensive determination of every action."

The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.

With this Proclamation, The Sedona Conference® launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes.

Cooperation in Discovery is Consistent with Zealous Advocacy

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests - it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. Indeed, all stakeholders in the system – judges, lawyers, clients, and the general public – have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.

The effort to change the culture of discovery from adversarial conduct to cooperation is not utopian.[1] It is, instead, an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.

1 Gartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System,* 1D# G00148170, (April 20, 2007), *available at* http://www.h5technologies.com/pdf/gartner0607.pdf . (While noting that "several . . . disagreed with the suggestion [to collaborate in the discovery process] . . . calling it 'utopian,'" one of the "take-away's" from the program identified in the Gartner Report was to "[s]trive for a collaborative environment when it comes to eDiscovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.").

Cooperative Discovery is Required by the Rules of Civil Procedure

When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, "discovery" was understood as an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial. Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself. The 2006 amendments to the Federal Rules specifically focused on discovery of "electronically stored information" and emphasized early communication and cooperation in an effort to streamline information exchange, and avoid costly unproductive disputes.

Discovery rules frequently compel parties to meet and confer regarding data preservation, form of production, and assertions of privilege. Beyond this, parties wishing to litigate discovery disputes must certify their efforts to resolve their difficulties in good faith.

Courts see these rules as a mandate for counsel to act cooperatively.[2] Methods to accomplish this cooperation may include:

1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;

2. Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;

3. Jointly developing automated search and retrieval methodologies to cull relevant information;

4. Promoting early identification of form or forms of production;

5. Developing case-long discovery budgets based on proportionality principles; and

6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

The Road to Cooperation

It is unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation. Lawyers frequently treat discovery conferences as perfunctory obligations. They may fail to recognize or act on opportunities to make discovery easier, less costly, and more productive. New lawyers may not yet have developed cooperative advocacy skills, and senior lawyers may cling to a long-held "hide the ball" mentality. Lawyers who recognize the value of resources such as ADR and special masters may nevertheless overlook their application to discovery. And, there remain obstreperous counsel with no interest in cooperation, leaving even the best-intentioned to wonder if "playing fair" is worth it.

This "Cooperation Proclamation" calls for a paradigm shift for the discovery process; success will not be instant. The Sedona Conference® views this as a three-part process to be undertaken by The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1):

> Part I: Awareness - Promoting awareness of the need and advantages of cooperation, coupled with a call to action. This process has been initiated by The Sedona Conference® Cooperation Proclamation.

2 *See, e.g., Board of Regents of University of Nebraska v. BASF Corp.* No. 4:04-CV-3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. [citations omitted]. If counsel fail in this responsibility—willfully or not—these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.").

Part II: Commitment - Developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding. This will take the form of a "Case for Cooperation" which will reflect viewpoints of all legal system stakeholders. It will incorporate disciplines outside the law, aiming to understand the separate and sometimes conflicting interests and motivations of judges, mediators and arbitrators, plaintiff and defense counsel, individual and corporate clients, technical consultants and litigation support providers, and the public at large.

Part III: Tools - Developing and distributing practical "toolkits" to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency. Components will include training programs tailored to each stakeholder; a clearinghouse of practical resources, including form agreements, case management orders, discovery protocols, etc.; court-annexed e-discovery ADR with qualified counselors and mediators, available to assist parties of limited means; guides for judges faced with motions for sanctions; law school programs to train students in the technical, legal, and cooperative aspects of e-discovery; and programs to assist individuals and businesses with basic e-record management, in an effort to avoid discovery problems altogether.

Conclusion

It is time to build upon modern Rules amendments, state and federal, which address e-discovery. Using this springboard, the legal profession can engage in a comprehensive effort to promote pre-trial discovery cooperation. Our "officer of the court" duties demand no less. This project is not utopian; rather, it is a tailored effort to effectuate the mandate of court rules calling for a "just, speedy, and inexpensive determination of every action" and the fundamental ethical principles governing our profession.

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THE CASE FOR COOPERATION

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EXECUTIVE SUMMARY

The Sedona Conference® issued its *Cooperation Proclamation* in 2008. The *Proclamation* initiated a comprehensive nationwide effort to promote the concept of cooperation in pretrial discovery. The *Proclamation* calls for information sharing, dialogue, training, and the development of tools to facilitate cooperative, collaborative, and efficient discovery. The *Proclamation* has been well received, especially by those judges who regularly confront discovery disputes that could be avoided by cooperative conduct among counsel. Indeed, nearly one hundred state and federal judges have already endorsed the *Proclamation* and the number continues to grow.

Cooperation in this context is best understood as a two-tiered concept. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices. The parties need not agree on issues, but must make a good faith effort to resolve their disagreements. If they cannot resolve their differences, they must take defensible positions.

Then, there is the second level. While not required, this enhanced cooperative level offers advantages to the parties. At this level, the parties work together to develop, test and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving electronically stored information ("ESI"). The parties jointly address questions of burden and proportionality, seeking to narrow discovery requests and preservation requirements as much as reasonable. At this level, cooperation allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and generally get to the litigation's merits at the earliest practicable time.

* The *Case for Cooperation* was the subject of robust dialogue at two meetings of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1), and we thank all of the WG1 members who contributed to the dialogue vastly improving this paper. In addition, we wish to acknowledge editorial contributions from The Hon. Shira A. Scheindlin (SD NY), Hon. James M. Rosenbaum (D MN), and Prof. Steve Gensler (U of OK School of Law). We also want to thank Jeannine Kenney, an associate who works with William Butterfield, for her research and assistance in preparing this paper. Finally, we wish to acknowledge our Working Group Series Sustaining and Annual Sponsors, whose generous support enables us to pursue our Working Group Series activities (see www.thesedonaconference.org/content/sponsorship for a listing of our WGS Sponsors).

The line between the first and second level cooperation is, of necessity, difficult to draw. There is no precise definition of "cooperation," as there are no precise definitions of good faith or reasonableness. However, absent a more cooperative posture in the discovery process, the cost of litigation and the burden imposed as courts are forced to attempt to resolve more and more discovery disputes, will ultimately bring the system to a halt.

Discovery disputes have existed since discovery began. But ESI has vastly increased the quantities of available information and the way it can be accessed. With almost all information electronically created and stored, there has been an exponential increase in the amount of information litigants must preserve, search, review, and produce. ESI is often stored in multiple locations, and in forms difficult and expensive to retrieve. These reasons compel increased transparency, communication, and collaborative discovery. The alternative is that litigation will become too expensive and protracted in a way that denies the parties an opportunity to resolve their disputes on the merits. As a result, in order to preserve our legal system, cooperation has become imperative.

Such cooperation is not in conflict with the concept of zealous advocacy. Cooperation is not capitulation. Cooperation simply involves maintaining a certain level of candor and transparency in communications between counsel so that information flows as intended by the Rules. It allows the parties to identify those issues that truly require court intervention. The parties may not always agree, but with cooperation their real disputes can be addressed sooner and at lower cost. As discussed in this paper, the concept of discovery cooperation is not new. It finds support in the Federal Rules of Civil Procedure, ethical standards, court decisions, economic considerations, and common sense. In a survey of 2,690 attorneys recently involved in federal litigation, more than 90% of respondents, representing both plaintiffs and defendants, "agreed" or "strongly agreed" with the statement, "[a]ttorneys can cooperate in discovery while still being zealous advocates for their clients."

This Cooperation initiative is being implemented in stages. First came The Sedona Conference's® *Proclamation*, which alerted stakeholders to the need for cooperation and its advantages. The announcement was an expression of support for the concept. Now, in this paper, we offer arguments supporting cooperation. The final stage will provide practical examples to train and support lawyers, judges, and others in cooperative discovery techniques. Using these steps, The Sedona Conference® will offer solutions to many of the problems associated with contemporary discovery, and allow litigants to devote their resources toward a resolution of their disputes on the merits.

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I. OVERVIEW

"If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."
— Judge Wayne E. Alley in Krueger v. Pelican Products Corp.[1]

Although lawyers may be relieved that Judge Alley's authority does not extend beyond the mortal confines of the courtroom, his comments signal a shared and growing distaste, if not disdain, by judges for the cost, delay, and disruption resulting from unnecessary or abusive discovery disputes.[2] That *Krueger* was decided twenty years ago, prior to the explosion of routine electronic communications, demonstrates that the problem is not new. However, the advent of electronically stored information ("ESI") has dramatically exacerbated the problem, increasing the volume of potentially discoverable material, the complexity and cost of the discovery process, and the opportunities for not only unduly burdensome and overly broad discovery requests, but also responses and production that obfuscate and evade. "Hide the ball" has become "hide the byte."

As this paper argues, the growth in ESI has not changed the obligation of cooperation in discovery that attorneys owe to the court and opposing counsel under both the Federal Rules of Civil Procedure and the rules of professional conduct.[3] Those obligations have long existed and were reinforced with respect to electronic discovery by the 2006 Amendments to the Rules.[4] However, the explosion of ESI has made the development of parameters to guide cooperation in discovery more essential than ever. The complexity of ESI has created uncertainty over what constitutes cooperation and good faith regarding preservation, search, review, and production. Additionally, the magnitude of the ESI has dramatically increased costs to the judicial system generally, and clients, specifically. Cooperation can help mitigate both difficulties.

Cooperation in this context is best understood as a two-tiered concept. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations, and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices. The parties need not agree on issues, but they must make a good faith effort to resolve their disagreements. If they cannot resolve their differences, they must take defensible positions.

Then, there is the second level of cooperation. While not required, this enhanced cooperative level offers advantages to the parties. At this level, the parties work together to develop, test, and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving ESI. The parties jointly address questions of burden and proportionality, in order to narrow discovery requests and preservation requirements as much as reasonable. At this level, cooperation allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and address the litigation's merits at the earliest practicable time.

The line between first and second level cooperation is, of necessity, difficult to draw. There is no precise definition of "cooperation," as there are no precise definitions of good faith or reasonableness. However, counsel understand that absent a more cooperative posture in the discovery process, the cost of litigation and the burden imposed as courts are forced to attempt to resolve disputes, will ultimately bring the system to a halt.

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1 *Krueger v. Pelican Products. Corp*., C/A No. 87-2385-A (W.D. Okla. 1989).

2 Judge Alley's opprobrium has been quoted in *Dahl v. City of Huntington Beach*, 84 F.3d 363, 364 (9th Cir. 1996), *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 n.3 (D. Md. 2008) and *Network Computing Servs. v. Cisco Sys., Inc.*, 223 F.R.D. 392, 395 (D.S.C. 2004). *See also* W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 895, 906 (1996) (noting courts are "imposing public duties upon lawyers in discovery that . . . have content and carry severe sanctions for their violation" and noting that discovery conduct is provoking judicial backlash).

3 As discussed more fully *infra* Part II, the Federal Rules presume cooperation in discovery. *See, e.g.,* Fed. R. Civ. P. 1, 1993 Advisory Committee Note (noting that Rule 1 imposes on attorneys a shared responsibility to ensure that civil litigation is resolved without undue cost or delay).

4 For example, Rule 26(f)(3) was amended to include in the 26(f) conference any issues relating to preservation, disclosure, or discovery of ESI and the form in which it should be produced. *See* Fed. R. Civ. P. 26 (f), 2006 Advisory Committee Note.

One commentator has visualized these tiers of cooperation as concentric circles forming a target with a "bull's eye" in the center. An outer ring is what the rules clearly require. An inner ring goes beyond the requirements to the level of cooperation that can be achieved with creative energy applied to mutual self-interest. The rules require that attorneys hit the target somewhere, but make it clear that attorneys should aim for the center.[5]

A. The Costs of Unnecessary Discovery Disputes

Unnecessary discovery battles affect not just judicial tempers, increasing the likelihood of sanctions, but also impair the functioning of the judicial system by overburdening already stretched courts,[6] preventing adjudication of meritorious claims or forcing settlement of meritless ones due to excessive costs,[7] and undermining the very purpose for which discovery obligations exist — to allow adjudication on the merits.[8] Clients ultimately bear the costs of responding to lengthy and often repetitive or overly broad interrogatories and document requests — and boilerplate objections to them — or of sifting through reams of unresponsive electronic and physical documents, followed, in many cases, by time-consuming motion practice and hearings.[9] Substantively, the client may be no better off upon resolution of the dispute by the court since parties often find themselves in the same position they would have been in had they cooperated at the outset.[10]

But client costs may extend beyond financial outlays from drawn-out disputes. For example, failure of counsel to evaluate whether a discovery request is reasonable and not unduly burdensome before making it, or objecting to requests with boilerplate rather than fact-based objections, can warrant sanctions that impair adjudication on the merits, such as deeming facts admitted or objections waived.[11] Where counsel has not cooperated to identify appropriate parameters for electronic discovery, courts may reject later claims that discovery is overbroad, forcing unnecessary discovery costs on the client.[12]

B. The Benefits of Cooperation for E-Discovery

The appropriate level of transparency and communication with opposing counsel on the thorny issues involved in e-discovery can provide some degree of protection from the costs and potential sanctions that may result from lack of cooperation. For example, transparency and cooperation in initial phases of discovery may help identify both what must be preserved and the routine destruction policies in place that may help establish good faith if destruction is later challenged,[13] avoiding costly delays and possible spoliation sanctions. Good faith efforts to identify the sources and custodians of relevant ESI early in discovery and communication of that information to opposing counsel may help to not only avoid subsequent duplicative and costly searches, but also may rebut inferences of bad faith in discovery planning or intentional suppression of information if additional relevant sources are later identified. Early, transparent discussions on data storage systems

5 *See* Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 Sedona Conf. Journal at 370-372 (2009 Supp.).

6 *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 508 (2000) (noting the number of opinions in which courts have addressed discovery disputes has risen significantly compared with the prior decade).

7 *See* Final Report, Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Advanced_Search&section=PR_2009&template=/CM/ContentDisplay.cfm&ContentFileID=889.

8 *See* Wendel, *supra* note 2, at 906 n.41.

9 *See, e.g.*, Gary E. Hood, *Refuse to Play the Game: An Alternative Document Production Strategy in Intellectual Property Litigation*, 16 INTELL. PROP. & TECH. L. J. 1+, 1–2 (2004) (discussing the routine nature of lengthy discovery disputes in intellectual property litigation).

10 For example, in *Mancia v. Mayflower Textile Servs. Co.*, after several sets of interrogatory and document requests, four months of motions practice, and a court hearing on discovery violations, the court ordered parties to develop a discovery budget, determine whether additional discovery sought could be provided from less duplicative and expensive sources, attempt to reach agreement on additional discovery, including phased discovery, provide a status report to the court on any disputes, and if necessary return to the court for resolution. *See* 253 F.R.D. 354, 364-65 (D. Md. 2008). The outcome — an order for cooperation and communication — put the parties in nearly the same positions they would have been in had the disputes not ensued. *See id.*

11 *Id.* at 357 (noting Fed. R. Civ. P. 26 (g) requires counsel to certify that a discovery request, response, or objection is consistent with the rules of procedure, is not made to delay or increase the costs of litigation, is not unreasonably burdensome or expensive, and that violation is subject to sanction). The *Mancia* court noted that making boilerplate objections without identifying the specific basis for the objections is prima facie evidence of a Rule 26(g) violation and grounds for finding the objection waived. *Id.* at 358-59. *See also* Wendel, *supra* note 2, at 912-13 (discussing *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981) in which the court upheld the sanction of finding a fact admitted when defendants submitted a boilerplate response to admission requests and found such responses abused discovery and were not consistent with the requirement of good faith).

12 *See Kipperman v. Onex Corp.*, 2008 WL 4372005, at *8 (N.D. Ga. Sept. 19, 2008) (rejecting defendants objections that plaintiffs' requested e-mail search was burdensome where the court had previously offered defendants the opportunity to narrow the search terms).

13 Fed. R. Civ. P. 26(f) (parties must discuss issues regarding preserving discoverable information). *See also id.* 37(e) (absent exceptional circumstances, sanctions may not be imposed for failing to provide ESI lost due to routine, *good faith*, operation of an ESI system) (emphasis added).

employed by the parties puts each on notice as to what information may not be reasonably accessible, possibly avoiding the need for later motions to compel and post hoc explanations as to why documents were not produced.[14] Additionally, consultation about technical issues that arise in discovery can avoid later inferences of bad faith.[15] Further, transparency may establish the form in which a party normally maintains ESI, potentially avoiding disputes over whether data should have been produced in native format.[16]

Courts increasingly recognize that "electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI."[17] For instance, working cooperatively with opposing counsel to identify a reasonable search protocol, rather than making boilerplate objections to the breadth of a requested protocol or unilaterally selecting the keywords used without disclosure to opposing counsel,[18] may help avoid sanctions or allegations of intentional suppression. Indeed, because knowledge of the producing party's data is usually asymmetrical, it is possible that refusing to "aid" opposing counsel in designing an appropriate search protocol that the party holding the data knows will produce responsive documents could be tantamount to concealing relevant evidence.[19]

C. Cooperation in Discovery and Zealous Advocacy Are Not Conflicting Concepts

Still, from the perspective of many practitioners, abandoning a purely adversarial stance during discovery in favor of cooperation appears antithetical to the concept of zealous advocacy.[20] This paper demonstrates that cooperation — in the sense intended by the *Proclamation* — and zealous advocacy are not conflicting concepts under professional conduct rules. Cooperation requires neither conceding nor compromising the client's interests. Nor does it require foregoing court resolution of *legitimate* discovery disputes. Court criticism has centered on *unnecessary* disputes — those that could have been avoided by cooperating and communicating according to procedural and ethical obligations — rather than those arising from good faith disagreements about the parameters and progress of discovery that may require court intervention. Cooperation avoids unnecessary disputes and violation of ethical rules while preserving for court resolution of those disputes that cannot be resolved through good faith cooperation.

Cooperation, as envisioned by the *Proclamation*, requires, for example, that counsel adequately prepare *prior* to conferring with opposing counsel to identify custodians and likely sources of relevant ESI, and the steps and costs required to access that information. It requires disclosure and dialogue on the parameters of preservation. It also requires forgoing the short term tactical advantages afforded one party by information asymmetry so that, rather than evading their production obligations, parties communicate candidly enough to identify the appropriate boundaries of discovery. Last, it requires that opposing parties evaluate discovery demands relative to the amount in controversy. In short, it forbids making overbroad discovery requests for purely oppressive, tactical reasons, discovery objections for evasive rather than legitimate reasons, and "document dumps" for obstructionist reasons. In place of gamesmanship, cooperation substitutes transparency and communication about the nature and reasons for discovery requests and objections and the means of

14 Fed. R. Civ. P. 26 (b)(2)(B) provides that parties need not provide discovery of ESI that is not reasonably accessible due to undue burden or cost.

15 *See In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) (shielding technical staff from opposing party rather than cooperating by fostering consultation "is not an indicum of good faith").

16 Fed. R. Civ. P. 34 (b)(2)(E) (party must produce ESI in the form in which it is ordinarily maintained).

17 *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009). *Accord Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 112 (2d Cir. 2002) ("as a discovery deadline or trial date draws near, discovery conduct that might have been considered 'merely' discourteous at an earlier point in the litigation may well breach a party's duties to its opponent and to the court"); *In re Seroquel*, 244 F.R.D. at 662 (party was obligated to cooperate with opposing counsel to identify key word protocol rather than unilaterally selecting limited terms); *Bush Ranch v. Du Pont,* 918 F. Supp. 1524, 1543 (M.D. Ga. 1995) ("It is the obligation of counsel under the rules, as officers of the court, to cooperate with one another so that in pursuit of truth, the judicial system operates as intended."); *Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *3-4 (S.D. Miss. Mar. 17, 2008) ("This Court demands the mutual cooperation of the parties. It hopes that some agreement can be reached . . . this Court will [not] hesitate to impose sanctions on any one-party or counsel or both - who engages in any conduct that causes unnecessary delay or needless increase in the costs of litigation.").

18 *See In re Seroquel*, 244 F.R.D. at 662.

19 In a survey of 2,690 attorneys recently involved in federal litigation, more than 90% of respondents, representing both plaintiffs and defendants, "agreed" or "strongly agreed" with the statement, "[a]ttorneys can cooperate in discovery while still being zealous advocates for their clients." Emory G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey, 62-63 (Federal Judicial Center October 2009), *available at* http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=363B0DBDB772C35D85257648007A18B7. At least one commentator, Jason R. Baron, has argued that in circumstances where a party is certain that opposing counsel's proposed search protocol would not capture documents it knows would be responsive violates Rule 3.4 of the Model Rules of Professional Responsibility by failing to suggest or use additional search terms that would result in production; such conduct is tantamount to suppression. *See* Symposium, *Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, 60 Mercer L. Rev. 863, 877 (2009).

20 Model R. Prof'l Conduct Preamble Paragraph 2 (2006).

resolving disputes about them. In at least twelve recent decisions, jurists have recognized the need for discovery cooperation and cited with approval the *Cooperation Proclamation*.[21]

As noted in the Overview section of this paper, to understand what is meant by the word "cooperation" in this context, it is useful to think of a two-tiered approach. First, there is a level of cooperation required by the Federal Rules, ethical considerations and common law. This limited level of cooperation requires communication and good faith by parties.[22] It requires that parties refrain from engaging in abusive discovery practices. It does not require agreement on issues, but it requires that parties take defensible positions if agreement cannot be reached.[23] But there is also a second level of cooperation. While not specifically required, this enhanced level of cooperation is usually advantageous for parties. As noted by one commentator, this enhanced level of cooperation "urges [parties] to seek out new ways to work together, and it urges them to do so not in spite of their interests but in furtherance of them."[24] Thus, parties engaging in this level of cooperation will work together to develop and test search criteria. They will jointly explore the best method of solving difficult problems like data discovery. They will address burden and proportionality by seeking to narrow discovery requests and preservation requirements as much as is reasonable. Through such cooperation, parties save money, maintain more control over what information is disseminated, engender good will with courts, and generally get to the merits of litigation much sooner.

This paper lays out the legal and ethical foundations for the duty to cooperate in discovery and the economic case for cooperation independent of those foundations. It begins with a discussion of cooperation required, either expressly or impliedly, by the Federal Rules of Civil Procedure. Second, it presents professional conduct rules that embody the duty to cooperate and discusses illusory conflicts with other professional conduct rules. It argues that the concept of zealous advocacy, properly understood as bounded by an attorney's duties as an officer of the court and to follow the law, does not conflict with the duty to cooperate in discovery. Third, evolving legal authority for the duty to cooperate is presented through a discussion of recent case law that addresses, in particular, cooperation in electronic discovery and growing court frustration with bad faith litigation conduct. A discussion of the practical reasons for cooperation — economic and strategic benefits — concludes the analysis.

II. THE FEDERAL RULES OF CIVIL PROCEDURE ASSUME COOPERATION IN DISCOVERY

A. The Evolution of American Discovery Procedures

The Federal Rules of Civil Procedure do not explicitly require counsel to cooperate in discovery, but the duty is implicit in the structure and spirit of the Rules. Indeed, the liberalization of discovery beginning in 1938 with the adoption of the Rules was designed to promote the resolution of disputes. Such resolution was intended to be based on facts underlying the claims and defenses with a minimum of court intervention, rather than on gamesmanship that prevented those facts from coming to light entirely or at least far too late in the process to serve the fair and efficient administration of justice. A brief look at the history of the modern Federal Rules makes clear that cooperation has been an essential element of the logic underlying them.

The modern Federal Rules were adopted in reaction to the pre-1938 system. Prior to 1938, lawyers prepared for trial principally through a process of formal pleadings, with complex rules for

21 *See Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431, at *2 (S.D.N.Y. Aug. 13, 2009); *In re Direct Sw., Inc., Fair Labor Standards Act (FLSA) Litig.*, 2009 WL 2461716, at *1, 2 (E.D. La. Aug. 7, 2009); *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, No. 3:07-cv-449, 2009 WL 2243854, at *2 (S.D. Ohio July 24, 2009); *Dunkin' Donuts Franchised Rests. LLC v. Grand Cen. Donuts, Inc.*, 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 424-25, 427 (D.N.J. May 19, 2009); *Neuman v. Borders, Inc.*, 257 F.R.D. 1, 3 (D.D.C. Apr. 6, 2009); *William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. March 19, 2009); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. Jan. 13, 2009); *Covad Commc'ns. Co. v. Revonet, Inc.*, 254 F.R.D. 147, 148-49 (D.D.C. Dec. 24 2008); *Gipson v. Sw. Bell Tel. Co.*, Civ. No. 08-2017, 2008 U.S. Dist. LEXIS 103822, at *4 (D. Kan. Dec. 23, 2008); *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 353-56, 358-59, 362 (S.D.N.Y. Nov. 21, 2008); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359, 363 (D. Md. 2008).; *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 363 (D. Md. 2008).

22 See discussion *infra* Parts II, III, and IV. *See also* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 550 (2009).

23 *See* Gensler, *supra* note 22, at 552.

24 *Id.* at 556.

replies and responses that put a premium on gamesmanship at the expense of concealing critical facts until trial.[25] Attorneys relied primarily on an opponent's pleadings for discovery, without much disclosure.[26] By contrast, the new Rules allowed counsel to discover information about the opponent's case before trial through the devices outlined in the Rules. As the Supreme Court has recognized, the more liberal approach to discovery made "trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[27]

> The Court has also noted that these new instruments of discovery were designed to serve
>
> (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark.[28]

In the first set of amendments to Rule 26 in 1946, the Advisory Committee sought to clarify that the "purpose of discovery is to allow a broad *search* for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case."[29]

> In *Hickman v. Taylor*, the Supreme Court identified the value of pre-trial discovery:
>
> The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[30]

The Court further cautioned that counsel may not hide "any material, non-privileged facts" from the opposing party.[31] Reflecting a core principle underlying the *Cooperation Proclamation*, the Court recognized that the inherent role of "a lawyer [as] an officer of the court" requires attorneys to "work for the advancement of justice while faithfully protecting the rightful interests of his clients."[32] By permitting disclosure of even privileged information in some circumstances, the Court struck a balance between the ostensibly competing duties of attorneys to the court and to their clients. It noted that a chief objection to liberal discovery — that it promotes a fishing expedition — had been rejected because of the mutual benefits of discovery.[33]

Discovery was further liberalized in 1970 when the requirement to show "good cause" to obtain discovery under Rule 34 was eliminated.[34] Other 1970 changes in the mechanics of discovery were designed "to encourage extrajudicial discovery with a minimum of court intervention,"[35] preserving, of course, the ultimate authority of the courts to "limit discovery in accordance with [the] rules" even as to matters within the scope of Rule 26(b).[36] The rules thus contemplated that while discovery was to be managed largely by the parties, courts may intervene to limit or otherwise manage discovery when necessary.

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25 *See Moore's Federal Practice,* Paragraph 26.02 at 26-31 (3d. ed. 2008).
26 *See* George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 28 (2007), *available at* http://law.richmond.edu/jolt/v13i3/article10.pdf.
27 *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).
28 *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).
29 Fed. R. Civ. P. 26, 1946 Advisory Committee Note (emphasis added) (citing case law for the proposition that the Rules "permit 'fishing' for evidence as they should").
30 329 U.S. at 507.
31 *Id.* at 513.
32 *Id.* at 510.
33 *See id.* at 508 n.8.
34 *See* Fed. R. Civ. P. 34, 1970 Advisory Committee Note.
35 *Margel v. E.G.L. Gam Lab Ltd.*, 2008 U.S. Dist. LEXIS 41754, at *10 (S.D.N.Y. May, 29 2008) (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2288 at 655-56 (2d ed. 1994)).
36 Fed. R. Civ. P. 26, 1970 Advisory Committee Note.

In 1980, the Rules were amended to address growing concerns with discovery abuse. Despite the intent that liberalized discovery rules would advance the interests of fair administration of disputes, concern mounted that adversarial, rather than cooperative, conduct drove the process. In a landmark 1978 law review article, Magistrate Judge Wayne Brazil of California made an impassioned plea for substantial changes to both procedural and ethical standards. Such changes, he argued, were necessary and appropriate because:

> The adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed. The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution.[37]

Specifically, along with more far-reaching recommendations, Brazil proposed, "shifting counsel's principal obligation during the investigation and discovery stage away from partisan pursuit of clients' interests and toward the court [and] expanding the role of the court in monitoring the execution of discovery."[38]

Beginning in 1980, a series of amendments to Rule 26 addressed discovery abuses. The amendments encouraged cooperation by suggesting — and later requiring — parties to "meet and confer" to, *inter alia*, develop a discovery plan.[39] By 1993, parties were made *jointly* responsible for development of the discovery plan and "for attempting in good faith" to agree to one.[40] When good faith discussions failed to produce an agreement, the Rule contemplated that parties may seek court assistance.[41] However, court intervention should be invoked only after "counsel . . . has attempted without success to effect with opposing counsel a reasonable program or plan for discovery."[42] Narrow disputes were not to be resolved by resorting to requests for protective orders or conferences with the court.[43] The Advisory Committee observed that parties' discovery obligations are intertwined with the underlying goal of the Federal Rules to promote the administration of justice:

> Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. As a result . . . the rules have not infrequently been exploited to the disadvantage of justice. These practices impose costs on an already overburdened system and impede the fundamental goal of the just, speedy, and inexpensive determination of every action.[44]

The amendments also provided courts with explicit authority to sanction parties who failed to meet their obligations to engage in "good faith" discovery planning.[45]

Acknowledging the reality that the discovery process "cannot always operate on a self-regulating basis," Rule 26(b)(1) was amended to address overbroad and unnecessary discovery, and introduce the notion of proportionality, intending "to encourage judges to be more aggressive in identifying and discouraging discovery overuse."[46] The amendments also recognized the duties of counsel to "reduce repetitiveness and *oblige lawyers to think through their discovery activities in advance*

37 Wayne Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1978).
38 *Id.* at 1349.
39 Rule 26(f) was added to the Federal Rules in 1980 to provide parties with a means for judicial intervention when facing abusive discovery tactics. *See* Fed. R. Civ. P. 26(f), 1993 Advisory Committee Note. The Rule was initially designed as an elective procedure used only in special cases upon a party's request. *See id.* In 1993, the Rule was amended to require all parties to meet as soon as practicable and formulate a discovery plan for submission to the court. *See id.* A 2006 amendment explicitly required the Rule 26(f) conference to include discussion regarding discovery of ESI and assertion of privileges in cases where those topics apply. *See id.*, 2006 Advisory Committee Note.
40 Fed. R. Civ. P. 26 (f)(2).
41 *See id.*, 1993 Advisory Committee Note.
42 *Id.*, 1980 Advisory Committee Note.
43 *See id.*
44 *Id.*, 1983 Advisory Committee Note (citations and quotations omitted).
45 *Id.* 37(f).
46 *Id.* 26(b), 1983 Advisory Committee Note.

so that full utilization is made of each deposition, document request, or set of interrogatories."[47] Recognizing again that discovery is not to be used as an adversarial tool, but instead to ensure the administration of justice, the Advisory Committee noted that discovery was not to be used to "wage a war of attrition or as a device to coerce a party."[48] Finally, by imposing on counsel the duty to sign each discovery request, response, or objection and, thus certify the reasonableness of each, Rule 26(g) imposed "an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes" of the Rule.[49] With false certification subject to sanctions and a determination of reasonableness ultimately in the hands of the court, the amended Rule reflected the role of the courts as a backstop when parties failed to meet their obligations rather than to diminish those obligations: "If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."[50]

In 1993, Rule 26(f) was amended to omit provisions requiring a court scheduling conference after the parties met and conferred, reserving judicial supervision of the timing, scope, and extent of discovery until after the parties had conferred.[51] Former subdivision (f) "envisioned the development of proposed discovery plans as an optional procedure,"[52] whereas the new Rule directed, with few exceptions, "in all cases . . . litigants must meet . . . and plan for discovery" prior to submitting proposals to the court.[53] The Rule requires parties to "attempt in good faith to agree on the contents of the proposed discovery plan."[54]

In 2000, the scope of Rule 26(a) disclosures was narrowed to information the party intended to use to support its claims or defenses.[55] While courts retained ultimate authority over the scope of discovery, the Advisory Committee Note makes clear that cooperation prior to court intervention was the expectation of the rule:

> The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. *In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention*. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action.[56]

Principles of party cooperation were carried forward in the 2006 amendments to Rule 26(f), directing parties to discuss issues relating to ESI, including the form in which it should be produced.[57]

It can hardly be questioned that the amendments subsequent to Judge Brazil's 1978 critique did not fully mitigate adversarial, rather than cooperative, discovery conduct.[58] However, a failure of the parties to comply with their obligations to cooperate, and of courts to enforce those obligations, does not negate the inherent obligation to cooperate embodied in the Rules. As discussed below, courts faced with complex and confrontational e-discovery disputes have increasingly recognized that obligation. The following section discusses in more detail the specific Rules that impliedly assume cooperation.

B. The Federal Rules of Civil Procedure Assume Cooperation

Consistent with the history just described, a careful analysis of the Federal Rules of Civil Procedure demonstrates that the Rules both promote and assume cooperation in discovery between

47 *Id.* (emphasis added).
48 *Id.*
49 *Id.* 26(g), 1983 Advisory Committee Note.
50 *Id.*
51 *See id.* 26(f), 1993 Advisory Committee Note.
52 *Id.*
53 *Id.*
54 *Id.*
55 *See id.* 26(a)(1), (b)(1), 2000 Advisory Committee Note.
56 *Id.* 26(b)(1) (emphasis added).
57 *See id.* 26(f), 2006 Advisory Committee Note.
58 *See, e.g.,* Beckerman, *supra* note 6, at 513 (arguing that "civil discovery suffers from conceptual inconsistencies and structural flaws" requiring far-reaching changes to the rules).

litigating parties throughout the litigation. While the Rules do not always precisely define how and when cooperation is expected in the context of discovery, their framework identifies both how and why cooperation is assumed. The specific Federal Rules of Civil Procedure that provide a framework for the expectation of cooperation during discovery include Rules 1, 26, and 37.[59]

Rule 1 directs that all of the Rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[60] Thus, because cooperation in discovery can reduce both the duration of the discovery period and its costs, specific Rules governing discovery that require good faith discussions and conduct should be construed to promote cooperation. Moreover, Rule 1 reinforces the primacy of attorneys' obligations to ensure the objectives of the Rules are achieved — the Advisory Committee Note directs that attorneys, "as officers of the court," share responsibility with the court to ensure that "civil litigation is resolved not only fairly, but also without undue cost or delay."[61] Cooperation by counsel to conduct discovery, particularly electronic discovery, efficiently and in good faith to ensure information sought and produced is consistent with fair administration of the litigation is thus implicit in Rule 1's command. Conduct that uses discovery for illegitimate adversarial purposes — to oppress, coerce, delay or evade — contravenes attorneys' obligations under Rule 1.

More specifically, several subsections included in Rule 26 assume a certain level of cooperation regarding discovery in the earliest stages of a case. Rule 26(a) imposes obligations on parties and counsel to disclose certain information at the outset of litigation, including the categories of relevant ESI.[62] Pursuant to Rule 26(f), the parties must confer at an initial conference about the nature of the claims involved and certain other specifics relating to the scope of discovery.[63] These obligations extend to conferences regarding the production of ESI.[64] In both instances of early discussion, the opportunity exists for counsel to cooperate beyond simply disclosing plainly required information. Though cooperation is not explicitly mandated under Rule 26(f), Rule 26's command that counsel engage in "good faith" efforts to develop a joint discovery plan suggests that counsel must do more than meet to announce their absolute positions on contested discovery issues, without any attempt to resolve those disputes based on the *legitimate* needs of the parties. The requirement to "confer" mandates, at a minimum, a good faith basis for disagreements. If cooperation were not an element of the required conference, the requirement that parties "confer" would be surplusage.

The Rules also require that parties must have a legitimate basis for their discovery demands and disputes, based on some prior, reasonable factual inquiry. This type of augmented duty to cooperate, beyond the mandated initial disclosures and conferences, may under certain circumstances be imposed by the obligations contained in Rule 26(g). That rule requires that parties sign discovery requests, responses and objections certifying, *inter alia*, that each is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and is not "unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[65] Whether parties can so certify without good faith communication and transparency with the opposing party to identify needs, costs, and other issues seems unlikely. Thus, the type of cooperation The Sedona Conference® advocates in this context goes beyond the mere disclosure of certain mandated facts, requiring, in addition, assistance and joint effort to achieve the very best discovery protocol. In *Mancia v. Mayflower Textile Services Co.,* the court held that Rule 26(g)'s obligation of certification, following a "reasonable inquiry," was "intended to impose an 'affirmative duty' on counsel to behave responsibly during discovery" — which requires cooperation and communication,

59 In a companion paper discussing how the Federal Rules address cooperation, Professor Steven Gensler organizes the Rules into clusters. *See* Gensler, *supra* note 5, at 366-368. First, he notes that several provisions of the Rules impose duties on parties to communicate and give consideration to positions held by opposing parties as they engage in discovery planning. *See id.* (citing Fed. R. Civ. P. 26(f)(1), 26(f)(2), 26(f)(3) and 37(f)). Next, Professor Gensler concludes that a second cluster of rules require communication and good faith conduct by parties after discovery disputes arise. *See id.* (citing Fed. R. Civ. P. 26(c), 37(a)(1), 26(c)(3) and 37(a)(5). Finally, Professor Gensler recognizes a third cluster of rules that demand good faith regarding the content and purpose of discovery requests and responses. *See id.* (citing Fed. R. Civ. P. 26(g)(1), 26(g)(1(B)(i), 26(g)(1)(B)(ii) and 26(g)(1)(B)(iii)).

60 Fed. R. Civ. P. 1.

61 *Id.*, 1993 Advisory Committee Note.

62 *See id.* 26(a)(1)(A)(ii).

63 *See id.* 26(f).

64 *See id.* 26(f)(3)(c).

65 *Id.* 26(g)(1)(B).

particularly in the realm of e-discovery.[66] This construction of Rule 26(g) is supported by Rule 1 and the Advisory Committee Note to Rule 26(g), which provides in part:

> Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obligates each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests.[67]

Any certification of discovery requests or responses that violates the requirements of Rule 26(g) is subject to sanction, absent "substantial justification."[68]

Finally, Rule 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions." Specifically, Rule 37(f) provides for sanctions for failure to "participate in good faith in developing and submitting a proposed discovery plan." The requirement of "good faith" requires an honesty of intent in discovery planning. That standard cannot be met by a party who has failed to confer with the opposing side about the scope of the claim and likely defenses in order to determine the appropriate scope of discovery; to conduct pre-meeting and ongoing due diligence regarding the availability, location and costs of discovering information and sharing that information with the opposing party; to seek agreement on the form of production and the means of searching and retrieving information; and to develop a reasonable discovery budget consistent with the nature of the claim.

In addition to the Federal Rules of Civil Procedure, 28 U.S.C. Section 1927 allows the imposition of costs and attorneys' fees when attorneys engage in dilatory conduct not justified by *legitimate* needs of the client, providing that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[69]

Consistent with the approach of the *Cooperation Proclamation*, sanctions envisioned by the statute focus on unjustified delay — delay legitimately based on a client's needs is not sanctionable under the statute.[70] The *Proclamation* requires cooperation to identify and flesh out legitimate disputes and to provide courts with a factual foundation on which to make a decision should the parties be unable to reach a resolution absent court intervention.

These mechanisms give the courts the broad discretionary authority to issue an array of sanctions against parties who fail to cooperate during discovery. Considered *in toto*, the Federal Rules impose on attorneys an obligation not to engage in conduct that delays, burdens or renders litigation unfair. The means by which parties can fulfill their obligations under Rule 1 can be found in the specific rules governing discovery conduct. The goal of the *Cooperation Proclamation* and associated resource materials is to provide parameters for what good faith, cooperative conduct in electronic discovery entails and what it does not.

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66 253 F.R.D. 354, 357-58 (D. Md. 2008).
67 Fed. R. Civ. P. 26 (g), 1983 Advisory Committee Note.
68 *Id.* 26(g)(3).
69 28 U.S.C. § 1927 (2000).
70 *See* H. CONF. REP. NO. 96-1234 (1980), as reprinted in 1980 U.S.C.C.A.N. 2781, 2782.

III. COMPLIANCE WITH PROFESSIONAL CONDUCT RULES REQUIRES COOPERATION IN DISCOVERY[71]

The duty to cooperate is likewise embodied in the professional conduct rules to which attorneys are bound. Though ethical rules discuss an attorney's obligation to act with zeal in asserting the client's interests,[72] that duty is not unqualified.[73] It is bounded by an attorney's ethical duties to opposing counsel, opposing parties, third parties, and importantly, the tribunal and the judicial system as a whole.[74] As the *Mancia* court 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 for 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 a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is . . . hindering the adjudication process, and making the task of the "deciding tribunal not easier, but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve. Thus, rules of procedure, ethics and even statutes make clear that there are limits to how the adversary system may operate during discovery.[75]

Professional conduct rules require attorneys to simultaneously meet ethical duties to their clients and the tribunal and to conform their conduct to the requirements of the law.[76] Indeed the Preamble to the Model Rules of Professional Conduct ("MRPC") upon identifying zealous advocacy as the attorney's role immediately confines that duty — it is subject to the "rules of the adversary system."[77] Other limitations on zealous advocacy are replete throughout the Preamble,[78] and are reflected in specific rules.

The need for litigators to balance simultaneous ethical duties is nothing new.[79] Apart from the ethical duties implicated by discovery conduct, discussed below, the list of ethical obligations to ensure the fairness and integrity of the justice system that trump attorneys' duties to their client is lengthy and familiar. For example, counsel has a duty to inform unrepresented persons with interests potentially adverse to the client of that adversity and must refrain from giving them any legal advice,

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71 While professional conduct is governed by state-adopted ethical rules, the discussion in this section necessarily focuses on Model Rules. The Model Rules, and much of their commentary, however, have been adopted, in large part, by nearly every state. *See* Model Rules of Professional Conduct, Dates of Adoption, Am. Bar Ass'n, *available at* http://www.abanet.org/cpr/mrpc/alpha_states.html; State Adoption of Comments To Model Rules of Professional Conduct as of February 2009, Am. Bar Ass'n, *available at* http://www.abanet.org/cpr/jclr/comments.pdf. In addition to state conduct rules, other relevant state-issued guidelines, apart from ethical rules, may apply. *See, e.g.,* California Attorney Guidelines of Civility and Professionalism, Sec. 9, *available at* www.calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf; The Texas Lawyer's Creed, Sec. 3, Paragraphs 14-19, *available at* http://www.texasbar.com/Content/ContentGroups/Bar_Groups/Foundations1/Texas_Bar_Foundation/TX_Lawyers_Creed.htm.

72 *See* Model R. Prof'l Conduct Preamble Paragraph 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *Id.* 1.3 cmt. 1 (The obligation to serve a client diligently requires the attorney to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

73 See Sylvia Stevens, *Whither Zeal? Defining "Zealous Representation,"* Oregon State Bar Bulletin, July 2005, *available at* http://www.osbar.org/publications/bulletin/05jul/barcounsel.html; Allen K. Harris, *Zealous Advocacy: Duty or Dicta: Have the 'Z' Words Become a Disservice to Lawyers?*, OKLAHOMA BAR JOURNAL , *available at* http://www.okbar.org/obj/articles_03/121303harris.htm. Both commentators note that when the ABA Model Rules replaced the Code of Professional Responsibility, the term "zeal" was not included in Rule 1.3. While the word "zeal" remains in the Preamble and Comment to Rule 1.3, the duty imposed by the Rule is "reasonable diligence and promptness." Model R. Prof'l Conduct, 1.3. This conclusion is consistent with the Restatement (Third) of the Law Governing Lawyers, which notes that a lawyer's obligation to act "zealously" on behalf of the client is not unlimited: "The Preamble to the ABA Model Rules of Professional Conduct (1983) and EC 7-1 of the ABA Model Code of Professional Responsibility (1969) refer to a lawyer's duty to act 'zealously' for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence." *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Section 16 cmt. d.

74 Commentary to Model Rule 1.3 confines the obligation to act with zeal to "whatever lawful and ethical measures are required to vindicate a client's cause." Model R. Prof'l Conduct 1.3, cmt. 1.

75 *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362-63 (D. Md. 2008).

76 *See* Model R. Prof'l Conduct Preamble Paragraph 1 (lawyer is both representative of clients and officer of the court); *id.* Paragraph 5 ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. . . . While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.").

77 *Id.* Paragraph 2.

78 *See id.* Paragraph 4 ("lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law"); *id.* Paragraph 9 (lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.").

79 *See* Wendel, *supra* note 2, at 895.

though doing so may be beneficial to the client.[80] To fulfill their duties as officers of the court, attorneys must report adverse controlling authority to the court, even where opposing counsel has not done so, and correct even inadvertent misstatements of material fact or law, though doing so is contrary to the client's interest.[81] Moreover, counsel is bound by these duties to the tribunal even where compliance requires disclosure of confidential information.[82] Similarly, counsel must withdraw from representation, regardless of the impact on the client (subject, of course, to court approval) when continued representation would require a violation of ethical rules or other law.[83] The list of mandatory ethical obligations that may be contrary to the client's interest goes on.

Thus, lawyers' obligation of zealous advocacy is confined by, rather than in conflict with, their obligations to the court.[84] As discussed below, while there is a place for zealous advocacy in discovery, an attorney's ethical and procedural obligations to cooperate with opposing counsel are not subjugated to the concept of zealous advocacy. Meeting one's duty to a client does not excuse failure to identify sources of and produce basic evidence sought in discovery,[85] frivolous discovery requests, unfounded objections in discovery,[86] false representations or certifications to the court,[87] or discovery delay for delay's sake.[88]

A. The Duty to Expedite Litigation Requires Cooperation

First and fundamentally, an attorney's ethical duty to conform his or her conduct to the requirement of the law unquestionably requires, in the context of discovery, compliance with procedural rules of the court.[89] As discussed *supra* Part II.B, those rules include Rule 1 of the Federal Rules of Civil Procedure, noting an attorney has an obligation, as an officer of the court, to avoid undue delay and cost;[90] Rule 26(f), which assumes a certain degree of cooperation in discovery planning; and Rule 26(g), requiring an attorney to certify that discovery requests and responses are not made for an improper purpose. Consistent with those rules, Rule 3.2 of the MRPC requires attorneys to make reasonable efforts to expedite litigation. Refusal to cooperate in discovery by making overly broad or unnecessarily costly discovery requests or objecting to requests without legitimate foundation is inconsistent with the duty to expedite litigation. Cooperation in discovery planning is thus assumed not only by the Civil Rules, it is among the obligations of Rule 3.2 of the MRPC.

Cooperating to expedite discovery does not conflict with any notion of zealous advocacy. First, the duty to expedite must be "*consistent with the interests of the client*."[91] Thus, neither Rule 3.2 nor the cooperation envisioned by the *Proclamation* would require counsel to forego pursuing even time-consuming resolution of discovery disputes necessary to serve the legitimate interests of the client. For example, cooperation does not foreclose objections to expansive discovery requests after a thorough inquiry about the nature and sources of responsive information. Cooperation *does*, however, require communicating with opposing counsel about the basis for the objection and making a good faith effort to narrow discovery and achieve a mutually agreeable solution. Second, failure to make reasonable efforts to expedite can only be founded on the *legitimate* interests of the client. What Rule 3.2 and the procedural rules, as emphasized here and advanced in the *Proclamation, do* forbid is discovery delay for the purpose of delay only. Though delay for delay's sake

80 *See* Model R. Prof'l Conduct 4.3, cmt. 1.
81 *See id.* 3.3(a), cmt. 11 (noting that the truth-seeking judicial process takes precedence over the client's interest in such cases).
82 *See id* 3.3(c).
83 *See id.* 1.16(a)(1).
84 For an actual conflict to exist between rules regarding zealous advocacy and duties to the court, it must be impossible for an attorney to comply with both obligations. However, the MRPC, by making clear which rules are mandatory and which are aspirational, establishes that some duties will take precedence over others.
85 *See In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 665 (M.D. Fla. 2007) (failure to produce usable and reasonably accessible documents resulting from failure to cooperate was sanctionable conduct).
86 *See* Model R. Prof'l Conduct 3.1, 3.4(d).
87 *See id.* 3.3.
88 *See id.* 3.2, cmt. 1 ("The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.").
89 *See id.* 3.4(c) (an attorney may not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists"); *id.* Preamble Paragraph 5 ("lawyer's conduct should conform to the requirements of the law"); *see also* Wendel, *supra* note 2, at 919 (Rules 3.4 (c) and 3.4(d) require attorneys to make good faith efforts to abide by civil discovery rules).
90 *See* Fed. R. Civ. P. 1, 1993 Advisory Committee Note.
91 Model R. Prof'l Conduct 3.2 (emphasis added).

may benefit the client, the rules do not recognize that benefit as a *legitimate* interest.[92] Consequently, good faith cooperation in discovery to meet the obligations of Rule 3.2 works in tandem with, not in opposition to, the concept of zealous advocacy.

B. The Duties of Candor to the Tribunal and Fairness to the Opposing Party Require Cooperation

The duty to cooperate in discovery is also embodied in Model Rule 3.4 which prohibits a party from obstructing another party's access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value. When failure to cooperate in preservation, discovery planning, and production results in obstruction or destruction, attorneys violate not only procedural rules that risk court-imposed sanctions, they risk discipline by the state ethics enforcement authorities.[93] Where ESI is involved, obstruction or destruction does not require affirmative acts — it can result when counsel simply does nothing. For example, failure to engage opposing counsel in a meaningful dialogue about preservation obligations can result in destruction of relevant evidence from routine operation of document destruction and retention systems. Additionally, failure to cooperate in discussions regarding a meaningful electronic discovery plan based on information about each party's custodians and electronic storage systems may in itself be obstruction. As discussed more fully *supra* Part II, the Federal Rules require participation in a Rule 26(f) conference to discuss ESI issues. In addition to Model Rule 3.4's candor and fairness requirements, Model Rule 1.1 requires that counsel provide "competent representation," which is defined as requiring "legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation." To fulfill these corollary obligations to meet and confer in candor and with competence, counsel must be sufficiently informed and knowledgeable about the client's existing sources of ESI and data management and storage systems, and prepared to discuss them, at the Rule 26(f) conference. That is because, as one commentator noted, in an age of electronic information, "it is, as a practical matter, impossible to get meaningful discovery if one side refuses to discuss the parameters of what constitutes a reasonable search, leading to unfair and oppressive results."[94] Likewise, a responding party engages in obstructionist conduct forbidden by ethical rules when it refuses to discuss means of narrowing the opposing side's proposed search protocol, though it has superior information about what methodology is likely to produce responsive documents, and then dumps a clearly unmanageable number of documents on the requesting party.[95]

A knowing failure to comply with civil discovery rules that assume cooperation could likewise violate Rule 3.4(d)'s admonition that an attorney may not knowingly disobey the rules of a tribunal except when based on a non-frivolous assertion that no valid obligation exists. Thus, attorneys who sign discovery requests, disclosures, or objections that were made with an improper purpose or that are unreasonable or unduly burdensome violate not only Rule 26(g), they also violate Model Rule 3.3 by making a false statement of fact to the tribunal. Rule 26(g) was intended to impose on counsel an affirmative duty to behave responsibly in discovery. That obligation, as the *Mancia* court noted, "requires cooperation by counsel to identify and fulfill legitimate discovery needs" while avoiding unduly costly and burdensome discovery.[96] In the context of electronic discovery, it will nearly always be preferable for counsel to certify the propriety of their discovery requests or objections after engaging in extensive cooperation prior to the commencement of discovery. For example, producing parties can, with more certainty, conclude requests are overly broad or unduly burdensome or that sources requested to be searched are unlikely to yield documents admissible in evidence after meeting with opposing counsel to discuss the opposing side's needs, investigating and evaluating the client's existing sources of ESI and the client's data

92 Commentary to Rule 3.2 recognizes that the benefits of "improper delay" — one without a "substantial purpose other than delay" or for the "purpose of "frustrating an opposing party's attempt to obtain rightful redress or repose" — are "not a legitimate interest of the client". Model R. Prof'l Conduct 3.2 cmt. 1.

93 *See Qualcomm Inc. v. Broadcomm Corp.*, 539 F. Supp. 2d 1214 (S.D. Cal. 2007). In a patent infringement action, the defendant alleged that the plaintiff had intentionally hidden the existence of certain patents from an international standard-setting consortium until the consortium had set standards and, to comply with those standards, the industry had developed products that necessarily infringed on the plaintiff's patents. The court found for the defendants on the merits and following trial entered an order detailing the plaintiff's actions to obstruct discovery and instructing plaintiff's counsel to show cause why they should not be sanctioned and face professional discipline. The court characterized plaintiff's counsel's actions as "gross litigation misconduct," the court detailed "constant stonewalling, concealment, and repeated misrepresentations," including the withholding of over 200,000 pages of relevant emails and electronic documents.

94 *Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, *supra* note 19, at 874.

95 *See id.* at 875-877 (discussing *Kipperman, supra* note 12*)*.

96 *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008).

management and storage systems, and communicating with the opposing side about those systems. Similarly, parties requesting discovery can more accurately certify that the request is neither "unreasonable nor unduly burdensome" — that it is narrowly tailored — after conferring with the opposing side to understand potential sources of information, the means by which that information will be retrieved, the costs of doing so, and potentially less burdensome sources of information.[97]

While neither Rule 3.2 nor Rule 3.4 explicitly require cooperation, attorneys will be hard pressed to meet their obligations under these provisions without cooperating on the scope, nature, and means of discovery both prior to discovery's initiation and throughout the litigation.

C. Ethical Rules Do Not Subordinate the Duty to Cooperate to the Duty of Confidentiality

The duty of confidentiality has long co-existed with discovery obligations and other ethical duties to the court. Though some have argued that seeking an informational advantage by minimizing documents provided to the opposing party is firmly grounded in the duty to preserve client secrets and protect privileged information,[98] that assertion does not answer whether an attorney violates his ethical duties to the court, not to mention his obligation to follow federal and local rules, when he withholds information requested by opposing counsel that is *not privileged*. At least one court has firmly rejected the argument that zealous advocacy obligates counsel to construe discovery requests narrowly to withhold documents harmful to the client.[99] The duty of attorneys to conform their conduct to the law prohibits them from withholding information that the Federal Rules require be produced upon good faith discovery requests or that would be produced if the parties engaged in good faith discussion about the nature and scope of discovery sought. While cooperation does not require attorneys to *volunteer* smoking gun documents that opposing counsel has not requested, it does require good faith efforts to produce information that the attorney reasonably understands is being sought.

In the context of electronic discovery, the duties of confidentiality, loyalty and zealous advocacy do not excuse failure to cooperate with opposing counsel in identifying likely sources of responsive ESI and developing appropriate search protocols that are likely to produce documents counsel knows the client possesses and the opposing party seeks. This does not mean that counsel must steer the opposing side to harmful documents. However, counsel may not use his superior information as to the location or nature of responsive documents to thwart good faith discovery requests by refusing to engage cooperatively to identify the sources likely to contain relevant information and the search terms likely to produce responsive documents.[100]

Thus, where the Federal Rules assume cooperation, the ethical duties discussed above will likewise require attorneys to adhere to the cooperation expected under the Federal Rules. Moreover, even under circumstances where the Federal Rules do not explicitly address discovery cooperation, an attorney's ethical obligations under Rules 3.3 and 3.4 might nonetheless require cooperation.

IV. COURTS RECOGNIZE BOTH THE NEED FOR COOPERATION AND THE OBLIGATION TO COOPERATE

Courts have long recognized the need for attorneys to work cooperatively to conduct discovery, a need that has grown with the volume of ESI now typically involved in litigation. More recently, this recognition is often expressed as frustration over having to decide an avoidable dispute or simply an exasperated call for cooperation among counsel. For example, faced with overreaching

97 *See id.* at 358 (noting that although overbroad discovery requests are served in part because parties do not have enough information to narrowly tailor them, that difficulty is avoided by cooperating prior to serving the request).

98 *See* Beckerman, *supra* note 6, at 526.

99 *See* Wendel, *supra* note 2, at 914-18 (discussing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993)). In *Washington State Physicians*, defendant objected to plaintiff's request for documents for any drug other than the specific product at issue in the litigation where defendant knew documents relating to other drugs contained information about the toxicity of the active ingredient in the product in suit. The court rejected defendant's argument that its ethical duties to the client required it to both construe discovery requests narrowly and avoid turning over damaging documents, concluding that defendant's objections "did not comply with either the spirit or the letter of the discovery rules and thus were signed in violation of the certification requirement." 858 P.2d at 1083.

100 *See Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, *supra* note 19, at 874-877.

discovery demands by one side and obstinate resistance to production by the other, one court observed that "the gravest error committed by the Magistrate was thinking that the parties could meet and confer to discuss any outstanding discovery requests" and concluded simply that "[t]his Court demands the mutual cooperation of the parties."[101] Courts further recognize that counsel's role as advocate in an adversarial system is not inconsistent with cooperating "to achieve orderly and cost effective discovery of the competing facts on which the system depends" and that the "rules of procedure, ethics, and even statutes make clear that there are limits to how the adversary system may operate during discovery."[102] As noted by the court in *In re Seroquel Products Liability Litigation*:

> [T]he posturing and petulance displayed by both sides on this issue shows a disturbing departure from the expected professionalism necessary to get this case ready for appropriate disposition. Identifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take. This is not to say that the parties cannot have reasonable disputes regarding the scope of discovery. But such disputes should not entail endless wrangling about simply identifying what records exist and determining their format. This case includes a myriad of significant legal issues and complexities engendered by the number of plaintiffs. Dealing as effective advocates representing adverse interests on those matters is challenge enough. It is not appropriate to seek an advantage in the litigation by failing to cooperate in the identification of basic evidence. [103]

As discussed in Part II above, courts also recognize that the Federal Rules of Civil Procedure encourage and in many respects assume cooperation during discovery. "The overriding theme of [the 2006] amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable."[104] Thus, courts have held that counsel must confer and engage in good faith, meaningful discussions with the opposing party on discovery issues;[105] refrain from making discovery requests that are overly burdensome, costly, or disproportionate to the issue at stake;[106] make a reasonable inquiry into the factual basis for discovery objections and avoid boilerplate objections;[107] refrain from substantially unjustified discovery arguments;[108] perform a reasonable search for documents on a timely basis;[109] negotiate reasonable and workable search protocols;[110] provide accurate information to the court about steps taken in discovery;[111] provide a knowledgeable 30(b)(6) witness on IT issues;[112] and, in appropriate situations, either introduce expert testimony to support the suitability of search and review protocols, or avoid the need for expert testimony by cooperating with opposing counsel to create a mutually agreeable protocol.[113]

Even where courts decide discovery disputes without determining that the conduct of either side has violated procedural or ethical rules, courts are increasingly urging parties, often in frustrated or blunt language, to attempt to resolve or avoid such disputes by discussion and cooperation. Faced with a discovery dispute caused by the failure of the parties and a nonparty to provide "careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms" for the production of ESI, one court found itself "in the uncomfortable position of having to craft a keyword search methodology for the parties," and concluded simply that "the best solution in the entire area of electronic discovery is cooperation among counsel."[114] After a detailed but restrained

101 *Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *3-4 (S.D. Miss. Mar. 17, 2008) (internal quotations omitted). *See also In re Seroquel,* 244 F.R.D. 650, 660 (M.D. Fla. 2007).
102 *Mancia*, 253 F.R.D. at 361-62 (citing the *Cooperation Proclamation*).
103 244 F.R.D. at 660.
104 *Board of Regents of the Univ. of Nebraska v. BASF Corp*, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007).
105 *See Mancia*, 253 F.R.D. at 364–65. *See also CBT Flint Partners, LLC v. Return Path, Inc.*, 2008 WL 4441920, at *3 (N.D. Ga. Aug. 7, 2008); *Mikron Indus., Inc. v. Hurd Windows & Doors*, 2008 WL 1805727, at *1 (W.D. Wash. Apr. 21, 2008).
106 *See Mancia*, 253 F.R.D. at 358; *Marion*, 2008 WL 723976, at *2, *4.
107 *See Mancia*, 253 F.R.D. at 358–59, 364.
108 *See CBT Flint Partners*, 2008 WL 4441920, at *2–3.
109 *See Keithley v. The Home Store.com, Inc.*, 2008 WL 3833384, at *8, *12, *14–15 (N.D. Cal. Aug. 12, 2008).
110 *See SEC v. Collins & Aikman Corp.*, 256 F.R.D. at 414, 418 (S.D.N.Y. 2009) (citing the *Cooperation Proclamation*). *See also In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662, 664 (M.D. Fla. 2007).
111 *See Keithley*, 2008 WL 3833384, at *1, 10, 13, 15–16.
112 *See Ideal Aerosmith v. Acutronic USA, Inc.*, 2008 WL 4693374, at *2–3 (W.D. Pa. Oct. 23, 2008).
113 *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 n.10 (D. Md. 2008).
114 *Gross Constr. Assocs. v. Am. Mfers. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (citing the *Cooperation Proclamation*).

discussion of a series of unnecessary disputes over the scope of document requests and interrogatories, the adequacy of responses to such, and claims of privilege, another court noted that "the costs associated with adversarial conduct in discovery have become a serious burden not only on the parties but on this Court as well."[115] The court went on to comment that "counsel's obligations to act as advocates for their clients and to use the discovery process for the fullest benefit of their clients . . . must be balanced against counsel's duty not to abuse legal procedure," and "reiterate[] its advice to counsel to communicate and cooperate in the discovery process."[116] Indeed, courts faced with protracted discovery disputes often lament the conduct of both sides and initially decline to make a decision, instead instructing the parties to confer and attempt to resolve the issues.[117] Other courts, having decided some or all pending discovery disputes, urge (if not plead with) the parties to meet and confer as to future disputes rather than repeat the process.[118]

V. THE BENEFITS OF COOPERATION

As these cases suggest, attorneys can expect courts to increasingly enforce cooperation obligations imposed by procedural and ethical rules and to urge parties in increasingly strong terms to cooperate in ways that may go beyond what such rules and ethical requirements require.[119] Given this pressure from the bench, the unrelenting growth in the volume of electronic data, the economics of modern litigation, the financial and strategic benefits of cooperation, and the costs and risks of obstructionist conduct, cooperation in discovery is no longer merely desirable or laudatory, but rather is imperative to advance a client's interests.

A. The Economic Imperative to Cooperate in Discovery

The most straightforward reason for parties to cooperate throughout the discovery process is simple economics — unnecessarily combative discovery wastes time and money. While this has always been the case, the increased volume and complexity of discoverable ESI in modern litigation has increased the costs of combative approaches to discovery as well as the potential savings of a more cooperative approach. While a 1983 study found "relatively little discovery occurs in the ordinary lawsuit" and "no evidence of discovery in over half our cases,"[120] a lawsuit between corporations may now involve "more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space."[121] Obviously, this increase in the volume of documents and other information potentially responsive to discovery requests directly increases discovery costs. Moreover, the inherent complexity of ESI (such as multiple storage locations, varying formats, obsolete technology, metadata, and dynamic information) further increases the costs of preservation, review, and production. As a result, an adversarial approach to discovery, which might once have resulted in a minor but tolerable increase in litigation costs, could today substantially multiply such costs, potentially changing litigant behavior and often making discovery costs case-determinative.

Evidence increasingly indicates "that the sheer volume and complexity of electronically stored information (ESI) can increase litigation costs, impose new risks on lawyers and their clients, and alter expectations about likely court outcomes."[122] Where such expansive discovery may once have been the exception to the rule,[123] it can now account for as much as ninety percent of total litigation expenses.[124] Increased volume is a primary culprit, as modern discovery "may encompass hundreds of thousands, if not millions, of electronic records."[125] For example, the amount of ESI is estimated to have increased thirty

115 *Gipson v. Sw. Bell Tel. Co.*, 2009 WL 790203, at *21 (D. Kan. Mar. 24, 2009) (citing Rule 26(g) and *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008)).
116 *Id.*
117 *See, e.g.*, *Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc.*, 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009) (citing the *Cooperation Proclamation*).
118 *See, e.g., Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *4 (S.D. Miss. Mar. 17, 2008).
119 *See Newman v. Borders, Inc.*, 257 F.R.D. 1, 3 n.3 (D.D.C. 2009) (noting "the perceptible trend in the case law that insists that counsel genuinely attempt to resolve discovery disputes" and citing the *Cooperation Proclamation*).
120 David M. Trubek, et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89–90 (Oct. 1983).
121 Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH. 53, at *21 (2004).
122 James N. Dertouzos, Nicholas M. Pace & Robert H. Anderson, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research*, RAND Institute for Civil Justice, 2008, at ix, *available at* http://rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf (hereinafter "Dertouzos, et al.").
123 *See, e.g.*, Trubek, *supra* note 120, at 91.
124 *See* Mike Dolan & John Thickett, *Unbundling and Offshoring*, 71 TEX. B. J. 730, 730 (Oct. 2008).
125 *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005).

percent annually from 1999 through 2002 alone.[126] Businesses in North America alone send and store an estimated 2.5 trillion new e-mails per year.[127] Consequently, larger corporate parties have expansive amounts of discoverable ESI,[128] while even individuals and small businesses often have quantities of data "substantially out of proportion to their ability to bear" the resulting costs of discovery.[129]

The inherent complexity of ESI also creates new and potentially costly issues in discovery. Deleted information is often not actually destroyed.[130] ESI often changes dynamically and can even change merely by being accessed.[131] Hidden metadata can include responsive information but can be difficult for the unprepared to preserve and produce.[132] Difficult to manage backup data may be responsive and need to be preserved, even if not searched and produced.[133] In addition, ESI typically resides in many locations, including hard drives, network servers, floppy disks, backup tapes, PDAs, thumb drives, smart cards, and cell phones.[134] It includes voice recordings as well as text documents, and instant messaging. And, emerging social media promise to increase the complexity and cost of e-discovery.[135] These complications magnify the cost issues raised by the sheer quantity of electronic documents. In addition, they can expose unprepared parties to spoliation claims for failure to preserve and produce.[136]

This increase in the volume and complexity of documents in today's digital world has not, however, altered the basic rules of discovery.[137] Documents must still be preserved, collected and produced, often at great cost. In one case, restoration of data from two hundred backup tapes was estimated to cost $9.75 million even before the recovered documents were reviewed.[138] Beyond the cost of preservation and collection, ESI is still generally reviewed by attorneys for relevance and privilege — an activity that some now estimate may account for as much as 75-90 percent of the costs of e-discovery.[139] Production and review, even in smaller cases, can cost hundreds of thousands of dollars.[140] Businesses now frequently spend more money to prepare for electronic discovery through technology upgrades and revised IT processes — an expenditure that smaller companies may be

126 *See* Dertouzos, et al., *supra* note 122, at 1 (citing School of Information, University of California at Berkeley, *How Much Information?* (2003)).
127 Daniel Hodgman, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 101 NW. U. L. REV. 259, 276 (2007) (citing David Narkiewicz, *Electronic Discovery and Evidence*, 25 PENNSYLVANIA LAWYER 57 (2003)).
128 *See* Brownstone, *supra* note 121, at 53.
129 Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 349 (2000).
130 *See, e.g.*, *United States v. Crim. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 46 n.8 (D. Conn. 2002) ("When a user deletes a file, the data in the file is not erased, but remains intact . . . where it was stored until the operating system places other data over it.").
131 *See* Hodgman, *supra* note 127, at 275 (citing THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2007)).
132 "Courts generally have ordered the production of metadata when it is sought in the initial document request and the producing party has not yet produced the documents in any form." *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 357 (S.D.N.Y. 2008); *In re Priceline.com Inc. Sec. Litig.*, 233 F.R.D. 88, 91 (D. Conn. 2005) (production ordered in TIFF format with corresponding searchable metadata databases); *Williams v. Sprint/United Mgmt. Co.,* 230 F.R.D. 640, 654 (D. Kan. 2005) (ordering production of Excel spreadsheets with metadata even though no request had been made initially because producing party should reasonably have known that metadata was relevant). *But see Wyeth v. Impax Lab., Inc.,* 248 F.R.D. 169, 171 (D. Del. 2006) ("reviewing [metadata] can waste litigation resources"); *Williams,* 230 F.R.D. at 651 ("Emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata"); *Michigan First Credit Union v. Cumis Ins. Soc., Inc.*, 2007 WL 4098213 (E.D. Mich. Nov. 16, 2007) (declining to require production of documents in native format due to burden concerns).
133 *See, e.g.*, *Wells v. Xpedx*, 2007 WL 1200955 (M.D. Fla. Apr 23, 2007) (producing party has duty to search hard drives, servers, and backup tapes for responsive deleted emails and files); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (requiring recovery and production of all deleted emails relevant to discrimination and retaliation claims); *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57 (2003) (requiring production of backup tapes after finding that numerous relevant emails were deleted); *Samide v. Roman Catholic Diocese of Brooklyn*, 5 A.D.3d 463 (N.Y. App. Div. 2d Dep't 2004) (requiring recovery and production of all relevant deleted emails). *See also* Thomas Y. Allman, et al., *Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, The Sedona Conference Working Group on Electronic Document Retaliation & Production (2008) *available at* http://www.thesedonaconference.org. *But see Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 WL 1723509 (S.D. Ohio June 12, 2007) (upon objection, requesting party may have to establish that requested deleted information is both relevant and retrievable); *Oxford House, Inc. v. City of Topeka,* 2007 WL 1246200 (D. Kan. Apr. 27, 2007) (deleted files not required to be produced due to undue burden).
134 *See* Dertouzos, et al., *supra* note 122, at 2; THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2007).
135 *See Covad Commc'ns Co. v. Revonet, Inc.*, 258 F.R.D. 5, 16 (D.D.C. 2009) ("[T]he universe of items to be considered for production is ever expanding with the ubiquity of e-mail and other forms of electronic communication, such as instant messaging and the recording of voice messages. Electronic data is difficult to destroy and storage capacity is increasing exponentially, leading to an unfortunate tendency to keep ESI even when any need for it has long since disappeared. This phenomenon - the antithesis of a sound records management policy - leads to ever increasing expenses in finding the data and reviewing it for relevance or privilege.").
136 *See, e.g.*, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 674885, at *1 (Fla. Cir. Ct. Mar. 23, 2005) (failure to use good faith in production and preservation of e-mails exposed company to liability for spoliation); *In re Telxon Corp. Sec. Litig.*, 2004 WL 3192729, at *23 (N.D. Ohio July 16, 2004) (sanctions imposed for bad faith modification of electronic records, loss of electronic files, and failure to produce relevant e-mails).
137 *See* Gensler, *supra* n. 22, at 581.
138 *See* Richard Van Duizend, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices, at vi (2006) *available at* http://www.ncsconline.org/images/EDiscCJGuidelinesFinal.pdf.
139 *See* Dertouzos, et al., *supra* note 122, at 3. *See also Covad Comm'ns,* 258 F.R.D. at 14 ("Experience shows" that review for relevance and privilege "may dwarf the cost of the search").
140 *See, e.g.*, *Oxford House, Inc. v. City of Topeka,* 2007 WL 1246200, at *4 (D. Kan. Apr. 27, 2007) (production of deleted files estimated to cost more than $100,000); *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d 1090, 1104 (Ala. 2007) (acknowledging producing party's evidence that discovery burden would "entail thousands of hours and will cost hundreds of thousands of dollars").

unable to make.[141] Ultimately, these discovery cost increases "could dominate the underlying stakes in dispute" and even lead parties to decide against litigating meritorious claims or defenses.[142]

Against this backdrop of increasing volume and complexity of ESI magnifying the costs of discovery, antagonistic discovery strategies can be even more expensive and problematic than in the past. Such strategies "lead to delay as well as expenditures of much time and money on repetitive scope-of-discovery issues."[143] With the smaller scope and complexity of paper-based document discovery in litigation in prior years, these delays and cost increases could be minimal, or at least more tolerable. However, given the already substantially increased cost of discovery in light of the increased volume and complexity of ESI, the incremental costs imposed by combative approaches to discovery and unnecessary discovery disputes can be even more problematic.

This additional burden on parties and the judicial system is, in large part, avoidable. Commentators note that electronic discovery's complications and expense can be most problematic when the information is "not managed properly."[144] While the proliferation of ESI and its particular attributes have increased discovery costs in many ways, ESI by its very nature is particularly susceptible of being properly managed so as to limit costs. For example, ESI can be more accessible than paper records. Once identified and collected, ESI is generally easier to de-duplicate, sort, search and otherwise process in bulk. It can also be easier to actually handle and produce.[145]

Agreement between parties on key parameters such as the identity of custodians whose data will be preserved and/or collected; the date ranges, search terms, and methodologies to be employed by the parties to identify responsive data; and the format(s) in which document production will occur has the potential to unlock ESI's more useful attributes to reduce discovery expenditures for all parties. Early agreement on such key parameters makes it much less likely that a party will be ordered to supplement its production (and thus incur the expense of repeating searches, reviews, and production) because its opponent convinces a court that the producing party's unilateral choices were too narrow or otherwise inappropriate. In a survey of 2,690 attorneys recently involved in federal litigation, more than 60% of respondents, representing both plaintiffs and defendants, "agreed" or :strongly agreed" with the statement, "[t]he parties ... were able to reduce the cost and burden of the ... case by cooperating in discovery." Lee ET AL., *supra* note 19, at 30-31.

In this regard, cooperation does not mean simply volunteering data or information. Rather, cooperation suggests early, candid, and ongoing exchanges between counsel. For each side, these exchanges must address both the potentially discoverable information which that side possesses and its needs for information in the possession of the other side. Such dialogue can facilitate reciprocal agreements regarding preservation and production obligations that can enable each party to fulfill its own discovery obligations at lower cost and with less risk and to obtain the information it needs from the other side without undue expense or tribulation.

Indeed, cooperation in discovery is not an "all or nothing" matter. The parties can mutually reduce costs and risks by agreeing on many or most issues even if they cannot resolve all potential discovery disputes. Even in cases where both parties follow a good faith, cooperative approach, there may still be issues on which the parties legitimately disagree. Nonetheless, when that occurs, both sides should consider whether a cooperative, negotiated approach may be preferable to a judicial determination. Most cases settle because the parties elect not to face the expense of litigating to a conclusion on the merits and the risk of an unfavorable result. Similarly, parties who follow a cooperative approach to discovery can often resolve quite legitimate differences regarding discovery through negotiated resolutions by, for example, finding a livable middle ground between two fully defensible positions, or trading "wins" on multiple issues to create an overall resolution. Indeed, early cooperation on basic discovery parameters not only directly prevents or limits the additional litigation expense which might otherwise be imposed by discovery disputes on those matters, but it may also

141 *See* Dertouzos, et al., *supra* note 122, at ix.
142 *Id.* at 3 (noting, however, a lack of empirical research on "[t]he extent to which costs have increased"). *See also id.* at 13 ("[S]everal interviewees claimed that the significant burdens of e-discovery outweighed the benefits of going to trial, especially in low-stakes cases.").
143 Brownstone, *supra* note 121, at 53.
144 Dertouzos, et al., *supra* note 122, at ix.
145 *See id.* at 15.

foster a less confrontational approach in which the parties are able to resolve downstream differences without involving the court.

Overreaching discovery demands, obstructionist responses to legitimate discovery and unproductive discovery disputes all unnecessarily drain the resources of litigants and slow, or even prevent, adjudication on the merits. In contrast, when parties conduct discovery in a diligent but cooperative and candid manner, each can obtain the discovery it needs to adjudicate the dispute on the merits (or to reach a mutually agreeable settlement) while minimizing discovery expense. In any given case, it is thus in the interest of both sides to embrace a mutually cooperative approach to the exchange of discoverable documents and data. While either party could upset this balance by pursuing overreaching discovery, responding to legitimate discovery in an obstructionist manner, or forcing unnecessary discovery disputes, courts may use the rules of civil procedure and professional conduct to encourage compliance with a cooperative approach.[146] Aware of the already large cost of discovery of ESI and of the significant but unnecessary cost of discovery disputes, encouraged or pushed toward cooperation rather than gamesmanship by the courts and the rules of procedural and professional responsibility, and armed with better tools to effectuate such cooperation, it is in the self-interest of all parties to pursue a cooperative approach to discovery.

B. The Strategic Benefits of Cooperation

One potential difficulty in attempting to follow such a cooperative approach is that, particularly at the outset of a dispute, tensions are high, clients are unhappy if not angry, and the suggestion by counsel that a case may be resolved more efficiently and effectively by taking a cooperative approach to discovery may be interpreted by the client as weakness. Model Rule 2.1 states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." At the same time, as discussed in Part III, other professional responsibility rules, guidelines for civility and professionalism, and court rules instruct lawyers that civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation are essential to the fair administration of justice and conflict resolution. When a client understands these professional responsibilities of an attorney, the mandate of Rule 2.1 is consistent with a cooperative, reasonable approach to discovery. However, a client driven by distrust, fear, or a desire for retribution or to win at any cost may perceive discovery as just another opportunity to penalize the opponent and cooperation as a weakness. Such client motivations and perceptions can put the attorney in the middle and create a fundamental impediment to the reasonable cooperation in discovery so essential in the age of ESI.

Cooperation, however, is in the interest of even an aggressive client, and an attorney who persuasively explains this to the client serves both the client and his or her own professional obligations. Such a client must first understand what cooperation is and is not. Cooperation in the discovery context does not mean giving up vigorous advocacy; it does not mean volunteering legal theories or suggesting paths along which discovery might take place; and it does not mean forgoing meritorious procedural or substantive issues. Cooperation does mean working with the opposing party and counsel in defining and focusing discovery requests and in selecting and implementing electronic searching protocols. It includes facilitating rather than obstructing the production and review of information being exchanged, interpreting and responding to discovery requests reasonably and in good faith, and being responsive to communications from the opposing party and counsel regarding discovery issues. It is characterized by communication rather than stonewalling, reciprocal candor rather than "hiding the ball," and responsiveness rather than obscuration and delay.

Cooperation defined in this manner is not only largely compelled by the attorney's obligation to comply with legal rules, ethical obligations and the professional rules of conduct, but it also offers the client the benefits of creating and maintaining credibility with the court and the opposition, enhancing the effectiveness of advocacy, and minimizing client costs and risks. A client

146 *See* discussion *supra* at Parts II and III.

should be informed and understand that the attorney's duties to the client[147] are not unlimited[148] but are circumscribed both by court rules[149] and obligations of civility and professionalism.[150] Statements of civility and professionalism published by many courts and bar associations are particularly informative in explaining to a client the limits of representation and the obligations of an attorney to the administration of justice. These statements discuss conduct that may not be unethical but would be considered unprofessional and hence unacceptable.[151] The California Guidelines provide, for example, that an attorney has obligations of "civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and *cooperation*, all of which are essential to the fair administration of justice and conflict resolution."[152] Statements of professionalism and civility such as these provide important foundational justifications that can be brought to bear when persuading clients bent on being overly aggressive and resistant to take a more cooperative approach to dispute resolution.

Moreover, both counsel and clients should recognize that an obstructionist, overreaching, or simply non-cooperative approach to discovery invites adverse consequences for the non-cooperative party itself. This can take the form of non-cooperative conduct in return from the other side, leading the parties to conduct discovery "the hard way," with each party incurring unnecessary expense as a result of the other side's non-cooperative approach, but neither gaining a strategic or tactical upper hand. It can also take the form of an adverse decision or even sanctions on the discovery dispute in question. Non-cooperative conduct early in the discovery process can lead a court to view that party's position less favorably when discovery disputes ripen and come before the court.

In addition, a cooperative approach that actively engages the other side on search methodologies and other e-discovery parameters and which incorporates the opposing party's legitimate needs into the production process makes it more likely that the court will accept the producing party's efforts as reasonable when a dispute later arises. That reduces the likelihood that the court will require the client to engage in costly repeat searches, reviews, and other discovery tasks.[153]

Similarly, non-cooperative conduct by a requesting party early in discovery can make the court reluctant to require further discovery from an opponent that has tried to cooperate. Thus, one court has recently recognized that, where the producing party asked opposing counsel "repeatedly to suggest search terms" but was rebuffed, "it is unfair to allow [the requesting party] to fail to participate in the process and then argue that the search terms were inadequate. This is not the kind of collaboration and cooperation that underlies the hope that the courts can, with the sincere assistance of the parties, manage e-discovery efficiently and with the least expense possible."[154]

Moreover, both counsel and the client should understand the desirability if not necessity of creating and maintaining credibility with the court, court staff, and opposing counsel. The most effective advocate is one who is believed and one who can be trusted. Indeed, the credibility of the attorney transcends a particular case or a particular client. A client must understand that an attorney's obligations to other clients mandates candor with both the court and with opposing counsel. The attorney's word must be trusted and that attorney's professional credibility cannot be compromised for one case or one client. The benefits of being represented by an attorney with a reputation of trustworthiness and candor is that the court and opposing parties will be more willing to accept representations and the need to prepare and present "proof" (and thus briefing, hearings and other formal proceedings) may be lessened. Furthermore, an attorney who has a reputation for being

147 *See* Model. R. Prof. Conduct 1.2 ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued").

148 For example, abiding by the client's decisions does not extend to counseling or assisting in criminal or fraudulent conduct, asserting frivolous positions, making false statements or presenting false evidence to a court or other tribunal, or unlawfully obstructing access to evidence or concealing or destroying evidence. *See id.* 2.1(d), 3.1, 3.3, 3.4.

149 The Federal Rules of Civil Procedure and analogous state rules define the substantive duties with which attorneys must comply. For example, Rule 26(a) mandates that the parties make certain initial disclosures; Rule 26(b) limits the scope of permitted discovery; and Rule 26(f) requires meeting for the exchange of initial information.

150 *See* Van Duizend, *supra* note 138.

151 *See id*.

152 California Attorney Guidelines, *supra* note 71, at 3 (emphasis added).

153 *See, e.g., Kipperman*, *supra* note 12, at *8 (defendant's failure to cooperate as to search terms led to rejection of argument that plaintiff's requested search was overbroad).

154 *Covad Commc'ns. Co. v. Revonet, Inc.*, 254 F.R.D. 5, 14 (D.D.C. 2009) (citing the *Cooperation Proclamation*). *Accord Wells Fargo Bank v. LaSalle Bank Nat'l Ass'n*, 2009 WL 2243854, at *2-3 (S.D. Ohio July 24, 2009) (refusing to require defendant to restore and search back-up tapes after close of discovery where the parties could have avoided the dispute "by conferring appropriately early in the case about ESI," citing the *Cooperation Proclamation,* describing parties' conduct as filing "one paragraph boilerplate statements about ESI" in the Rule 26(f) report and "waiting for the explosion later" rather than "deal[ing] systematically with ESI problems at the outset of the litigation").

credible will likely have the adversarial advantage over the course of the dispute resolution process, particularly over an attorney who has below par credibility. Success in advocacy and persuasiveness on substantive issues is enhanced by the cooperative approach to discovery. Cooperatively working through procedural issues can have the effect of building a reservoir of goodwill and trust that can be drawn upon in advocating for the client's position on important substantive issues. Likewise, reasonableness, civility and flexibility begets a like response.

In short, a cooperative approach is more likely to speed up the time for reaching a resolution, to enhance the possibility of settlement, enhance the likelihood of an optimum result and lower the overall cost of the dispute resolution process.

C. Avoiding the Prisoner's Dilemma

When both sides to litigation pursue a cooperative approach to discovery, each party benefits by reducing its discovery expense while it still obtaining necessary information to which it is entitled. However, the phenomenon which game theory refers to as the "Prisoner's Dilemma" suggests that the fear of being disadvantaged if the other side were to take a non-cooperative approach to discovery could lead both sides to reject cooperation, thus raising litigation expenses for both sides while giving neither any advantage as a result of this additional cost. Either party in a particular case may perceive that one could gain an advantage over the other by employing obstructionist, overreaching or combative tactics, potentially preventing its opponent from obtaining needed and discoverable data, but itself reaping the benefits of receiving full discovery from its more cooperative opponent. In the classic Prisoner's Dilemma, the prospect that an opponent might seek such an advantage could lead both sides to defensively pursue a non-cooperative approach, so that, in the end, neither gains a unilateral advantage over the other and both are actually worse off than if both had cooperated.[155] In discovery, this would result in each spending more on discovery than would have been the case if both sides had taken a cooperative approach, but with neither party gaining the benefits of mutual cooperation much less an upper hand over the other side.

However, the Prisoner's Dilemma phenomenon breaks down where the actors involved must repeatedly face the same or similar decisions with the same or similar costs, benefits and risks. Under these circumstances, a party considering taking a non-cooperative approach in an attempt to gain an advantage over the other side must evaluate the risk of the other side responding with similar conduct during a subsequent "round."[156] In the discovery setting, for example, an obstructionist approach regarding e-discovery parameters during a Rule 26(f) conference may lead to non-cooperative conduct by the other side in subsequent meet-and-confer situations where the first party would itself benefit from mutually cooperative resolutions. Indeed, even in a single Rule 26(f) conference or other individual meet-and-confer situation, there are often multiple issues to address, each of which can be viewed as a "round" in which non-cooperative conduct by one side could induce non-cooperative conduct by the other side in subsequent rounds.

Thus, a party's non-cooperative conduct in each round potentially has later adverse consequences for that very party, and the threat of such can lead both sides to a cooperative approach.[157] This leads the parties, each following its own self-interest, to pursue a cooperative approach that leads both to the mutually beneficial result — here, lowering discovery expenses. The opportunity (indeed, the requirement) imposed by the civil rules and many local rules to address and attempt to agree upon key discovery parameters early in each case, coupled with the high likelihood that there will be many additional downstream steps in each case can induce both sides to behave in a cooperative manner.

The Prisoner's Dilemma phenomenon further breaks down where the actors involved can communicate with each other to develop and exchange enforceable, reciprocal commitments; where each actor can learn about the other's reputation for trustworthiness as to such commitments from the

155 *See* Robert Axelrod, THE EVOLUTION OF COOPERATION, at 7-10, 125 (Rev. Ed., Perseus Books Group 2006); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514-15 (1994).
156 *See* Axelrod, *id.* at 12, 20-21, 125; *see also* G. Paul & J. Baron, *supra* note 26, at 56 note. 134.
157 *See* Axelrod, *id.* at 131-32.

other's prior interactions with third parties; and where each actor must be concerned with the impact of its own present conduct on its reputation and thus its ability to elicit conduct that it may seek from others in the future.[158] Unlike the two isolated hypothetical individuals in the Prisoner's Dilemma who *cannot* communicate with each other, attorneys and parties in litigation can cooperatively bargain for interdependent commitments on specific issues before actually performing and conveying benefits on the other side. They can also enforce such commitments through court involvement, consider the reputation of the opposing counsel and party in deciding whether to enter such agreements, and consider the consequences of their actions on their own reputation, all of which permits and encourages cooperative solutions.[159]

Finally, the circumstances of litigation introduce a variable not present in the classic Prisoner's Dilemma: the possibility of an intervening enforcement authority. In litigation, the attorneys and parties conducting discovery must also consider how a court will view and potentially reward or penalize their actions. As discussed in Section B above, an obstructionist or overreaching approach by a party in discovery may lead to unfavorable decisions by the court as to that very issue or as to other discovery disputes in the same case. Moreover, forcing the court to address an unnecessary discovery dispute or taking an inappropriately aggressive or unsupported position may undermine the credibility of counsel and the party on subsequent procedural or substantive issues. This threat can provide incentives for each party to pursue a cooperative approach. Of course, judicial willingness to support reasonable discovery approaches and to penalize overreaching and obstructionist positioning will increase the effectiveness of this incentive. Indeed, that attorneys will again appear before the courts, and their clients may as well, creates a dynamic in which the threat of future obstructionist conduct by opponents, or risk of gaining a reputation among the judiciary as unduly combative during discovery, encourages cooperative behavior.

Thus, while there may remain cases in which a party opts for a contentious, non-cooperative approach to discovery, potentially forcing onto the opponent disputes not of its choosing and their attendant costs, in most cases, mutual self-interest should lead both sides to a cooperative approach. Indeed, as the explosion in electronic data and the economics of litigation, and pressure from the courts induce more attorneys and parties to conduct discovery in a cooperative manner, those who continue to pursue unduly combative approaches may find that their conduct increasingly stands out as inappropriate to both courts and other counsel, rendering such conduct increasingly counter-productive.

VI. CONCLUSION

If parties are expected to continue to manage discovery in the manner envisioned by the Federal Rules of Civil Procedure, cooperation will be necessary. Without such cooperation, discovery will become too expensive and time consuming for parties to effectively litigate their disputes.

158 *See id.* at 11-12.
159 *See* Gilson & Mnookin, *supra* note 155, at 564 (counsel's concern about reputation may facilitate cooperative solutions).

A BULL'S-EYE VIEW OF COOPERATION IN DISCOVERY

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First issued in July 2008, The Sedona Conference® Cooperation Proclamation launched a campaign to promote cooperative, non-adversarial discovery.[1] Since then, The Sedona Conference® has been working on other documents designed to support the campaign, including one called the Case for Cooperation.[2] These documents are part of a coordinated effort to show how clients, lawyers, and judges alike can benefit from increased discovery cooperation and to give guidance on how to adopt cooperative strategies.

I enthusiastically support the campaign for cooperation. The Cooperation Proclamation is exactly right when it urges lawyers to see cooperation as a means for advancing their clients' interests and not as a retreat from their duties as loyal advocates. As I have written elsewhere, the lawyers who default to battle mode in discovery – who fail even to consider whether cooperation might yield better results – are the ones who truly fail to serve their clients' interests.[3]

One of the most important tasks for the proponents of cooperation is to develop a unified theory of cooperation – that is, a theory that both specifies what cooperation means and explains why parties should cooperate. That's a more difficult task than it might sound. There are a great many things that might be characterized as cooperation, and the reasons for doing them will vary. In order to adequately explain why parties should cooperate, one must differentiate the various types of cooperation and make the case for each type separately. At the same time, we do not want to lose sight of the larger picture. Thus, the goal is to develop a model that identifies and justifies the different types of cooperation in a way that reinforces – rather than diminishes – the overall campaign.

This essay offers one such model -- the Bull's-Eye View of Cooperation. With the full range of cooperative behaviors as our overall target, the different types of cooperation can be thought of as occupying the rings of a bull's-eye. The outer ring of the bull's-eye represents the range of cooperative behaviors that are required by the Federal Rules. The two inner rings then represent different types of voluntary cooperation. Part of the campaign for cooperation must be devoted to ensuring that litigants and judges fully appreciate the types of cooperation that the Federal Rules require. In bull's-eye terms, there remains much work to do to make sure that litigants are at least behaving in ways that hit the outer ring. But an equal part of the campaign for cooperation must be to encourage litigants to strive for more – to make choices that get them as close as possible to the center of the bull's-eye as the circumstances of their cases allow.

I. DEFINING COOPERATION IN DISCOVERY

Before attempting to explain why parties must or should cooperate in discovery, we must first define what we mean by cooperation. The Federal Rules do not provide a definition. Neither the term "cooperate" nor any derivative (e.g., "cooperative" or "cooperation") appears in the text of any

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1 The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009). The Cooperation Proclamation and related materials, including a roster of endorsing judges, are *available at* The Sedona Conference® Cooperation Proclamation website at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation.

2 10 SEDONA CONF. J. 339 (2009), also *available at* http://www.thesedonaconference.org/content/tsc_cooperation_proclamation.

3 *See* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery,* 36 N. KY. L. REV. 521, 555-56 (2009) (Electronic Discovery Issue).

rule.[4] It does appear in the *title* to Rule 37, which reads "Failure to Make Disclosures *or to Cooperate* in Discovery; Sanctions." Its appearance there, however, is almost certainly an editing error.

Readers may recall that the original version of Rule 26(f) did not provide for mandatory discovery planning meetings in all cases, but instead only required them upon the request of one of the parties.[5] When the original version of Rule 26(f) was proposed in 1978, it included a provision authorizing the court to impose sanctions on a party who, after such a request had been made, failed "without good cause to have cooperated in the framing of an appropriate discovery plan by agreement."[6] A parallel provision was proposed for Rule 37.[7] The published proposed amendments also would have amended the title of Rule 37 from "Failure to Make Discovery; Sanctions" to "Failure to Make *or Cooperate in* Discovery; Sanctions."[8] However, the Advisory Committee later deleted the term cooperation from this round of amendments in response to comments that the term was too broad.[9] The republished version – which eventually was adopted – substituted the phrase "participate in good faith" in the text of Rule 37 but left "cooperate" in the title.[10] By all indications, that was simply an oversight; it probably should have joined the text on the cutting room floor.

In the absence of any rules-based definition, one might turn to the dictionary. Webster's New Collegiate Dictionary defines cooperate as follows: "1: to act or work with another or others: act together 2: to associate with another or others for mutual benefit".[11] This definition certainly suggests taking a broad view of cooperation. But dictionary definitions are not dispositive – we remain free to give the term whatever meaning we think it warrants in this context.

At the Mid-Year meeting for Working Group 1,[12] a split of opinion emerged on whether to take the broad definition – which would include all of the behaviors where parties work together and/or with the court to facilitate information exchange – or whether to narrowly define cooperation as limited to those activities that are mandated by the Federal Rules. On the surface this might seem like mere semantics. If we define cooperation as limited to the required activities, then we can just come up with some other term or terms to refer to all of those other, non-required activities. So why does it really matter?

The principal difference between the two approaches lies in the linkage between what we mean by cooperation and what we identify as the reason or justification for cooperating in discovery. Under the narrow approach, one can accurately say that cooperation is mandatory. Of course, the statement is accurate because the narrow approach defines cooperation as including only the mandatory behaviors. Under the broad approach that embraces the widest range of behaviors in which the parties work together in discovery, one cannot make the universal statement that cooperation is mandatory. One can still say that some of it is mandatory, but not all of it.

This essay adopts the broad definition. Ultimately, the campaign for cooperation in discovery is about changing how people behave in the discovery process – or at least about getting them to think twice about how they might benefit from behaving differently. All of those behaviors are an integral part of getting lawyers to rethink their approach to discovery. The greatest impact that the campaign for cooperation could have is to persuade lawyers to stop looking for reasons to fight and start looking for ways to facilitate the discovery process. We want to encourage lawyers to look far and wide for ways to facilitate or improve the process by working with each other instead of against each other.

Taking a broad approach to cooperation also helps place the campaign in context with the evolution of the discovery process. From a historical perspective, the most relevant reference point is

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4 The term cooperate does appear in various Local Rules. The meaning and significance of the term as used in Local Rules is discussed in Part III infra.
5 *See* Gensler, *supra* note 3, at 526.
6 Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 625-26 (March 1978).
7 *Id.* at 652 (authorizing sanctions against a party who "fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(f)").
8 *Id.* (emphasis added).
9 Minutes of the Advisory Committee Meeting, July 6, 1978, page 9; Transmittal Letter to Committee on Rules of Practice and Procedure, June 14, 1979, page 10.
10 Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323, 344-46 (Feb. 1979).
11 Webster's New Collegiate Dictionary 247 (1980).
12 Working Group 1 is The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1). The Mid-Year Meeting of WG1 was held on May 14-15, 2009. For information on WG1 and its activities, *see* http://www.thesedonaconference.com/wgs.

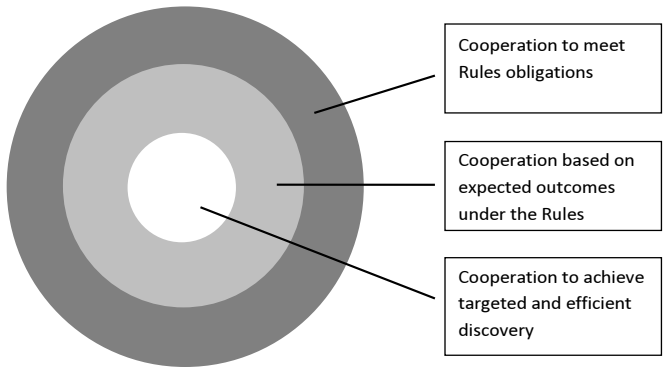
practice under the Federal Rules circa 1970, a time before the emergence of the case management movement, before we had any discovery planning rules, before the adoption of an express proportionality requirement, and immediately after Rule 34 was changed so that parties no longer had to show good cause and get permission from the judge to serve a document request.[13] Professor Marcus has referred to this period as the "apogee of the Liberal Ethos" of discovery.[14] One might also think of it as the era of the silent gunslinger: at this time, no rule stood in the way of a lawyer who wanted to "shoot first and ask questions later."[15] By defining cooperation broadly, we capture all of the ways in which lawyers today – for whatever reason – depart from the silent gunslinger approach, either by solving their disagreements without shootouts or at least by gathering information and communicating before reaching for their pistols.

The trade-off is that a broad definition of cooperation makes the justification for cooperating more complicated. Since 1970, various changes to the Federal Rules now require lawyers to do things that can be seen as forms of cooperation. But other aspects of "working together" – e.g., voluntary disclosure and making compromises – are not mandated by the Federal Rules and might even appear (at least on the surface) to be contrary to zealous advocacy. If much of what we mean by cooperation is a choice that parties make, what justifies taking that path? Part II now turns to those issues.

II. THE COOPERATION BULL'S-EYE

Accepting that the campaign for cooperation should seek to promote the full range of cooperative behaviors, the task then becomes to do that in a way that convincingly makes the case for *all* of those behaviors. That presents a bit of a conundrum. On the one hand, because the reasons for cooperating vary across the different types of cooperation, each type of cooperation must be addressed separately. On the other hand, analyzing the different types of cooperation separately runs the risk of making them seem like unrelated fragments. What is needed is a framework that identifies and explains the reasons for engaging in each of the different types of cooperation while still presenting them as being part of an integrated approach.

This essay attempts to make an integrated case for the full range of cooperative behaviors by organizing them according to the underlying rationale for cooperating. The scheme yields three categories. The first category consists of what one might term "mandatory" cooperation – that is to say, the cooperation that is required by the Federal Rules. The second and third categories both consist of voluntary cooperation. The second category consists of parties agreeing to do things in discovery because they think the court would order them to do those things if the matter were litigated. The third category consists of parties agreeing to do things in discovery in order to expedite and facilitate the discovery process. These three categories can be seen as the rings of a Bull's-Eye:



13 *See* FED. R. CIV. P. 34 advisory committee's note (1970) (discussing elimination of good cause requirement); *see generally* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748-49 (1998) (discussing state of discovery in 1970).
14 Richard L. Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 304 (2008).
15 The silent gunslinger image is taken from the so-called spaghetti western films of this era – e.g., "A Fistful of Dollars" and "The Good, the Bad, and the Ugly" -- which usually featured lone gunmen known more for their marksmanship than their conversation or diplomacy skills. *See* http://en.wikipedia.org/wiki/Spaghetti_Western (entry as of Sept. 2, 2009).

The following subparts explore each of these rings in more detail.

A. The Outer Ring: Cooperative Behaviors Required by the Federal Rules.

This category consists of conduct required by the Federal Rules. The Federal Rules do not explicitly use the term cooperation.[16] To the extent the Federal Rules "require" the parties to cooperate in discovery, they do so via five rule subdivisions: Rule 26(c); Rule 26(f); Rule 26(g); Rule 37(a); and Rule 37(f).[17] As I have written elsewhere, precision is critical when talking about whether and how the Federal Rules require cooperation.[18] The following sections take a closer look at these provisions, organized into clusters based on their principal function.

1. *Discovery Planning*.

The first cluster of cooperation provisions relates to the duty to engage in discovery planning at the start of the case:

Cooperation and Discovery Planning	
Rule 26(f)(1)	The parties must confer in advance of the issuance of the Scheduling Order.
Rule 26(f)(2)	The parties must consider their claims and defenses, discuss preservation, and develop a proposed discovery plan.
Rule 26(f)(2)	The attorneys and all unrepresented parties must "attempt[] in good faith to agree on the proposed discovery plan...."
Rule 26(f)(3)	A discovery plan must state the parties' views and proposals on a wide range of issues including: • the subjects on which discovery may be needed; • whether to phase discovery or focus on certain issues; • discovery of ESI, including form of production; and • the process for claiming privilege or work-product protection.
Rule 37(f)	The court may sanction any party or attorney who "fails to participate in good faith" in developing and submitting a proposed discovery plan.

As noted earlier, none of these rules provisions explicitly requires "cooperation." Rather, what these provisions actually require might best be described as communication and consideration. The parties must talk about their discovery needs and their discovery capabilities. They must consider whether agreement is available by trying "in good faith" to agree on various important discovery parameters. But the parties are not required to reach agreement. Most critically, neither party is required to compromise from a valid position.[19] Nor do any of these rules impose any new or expanded duties to make required disclosures of information.[20] So long as the parties take defensible positions, communicate those positions, and listen to what each other has to say, they have done everything that the "discovery planning" cluster of rules requires them to do.

16 The lone exception is that the term "cooperate" appears in the title to Rule 37. As discussed earlier, however, that appears to be an editing oversight. *See supra* text accompanying notes 5-10.

17 In some rules, cooperation is implicit in their design or function, but not required. For example, Rule 29 allows parties to enter into stipulations about discovery procedure. *See* FED. R. CIV. P. 29. While such stipulations certainly *reflect* cooperation between the parties, the decision even to pursue them is left entirely to the parties. In a different vein, Rule 26(d) leaves the sequence of discovery to the parties on the premise that the parties will choose to cooperate in order to avoid mutually assured destruction. *See* FED. R. CIV. P. 26(d) and advisory committee's note (1970). But Rule 26(d) does not demand cooperation; any party may seek to impose its own schedule and sequence (subject to court order) if it is willing to endure the hassle when the other side starts doing the same.

18 *See* Gensler, *supra* note 3, at 555.

19 *See* Gensler, *supra* note 3, at 548.

20 Rule 26(f) instructs the parties to settle their arrangements for making the required disclosures listed under Rule 26(a), but it does not expand the universe of information that must be disclosed. *See* FED. R. CIV. P. 26(f)(3)(A).

Functionally, the discovery plan provisions are educational and preventive in nature.[21] Rule 26(f) operates from the premise that lawyers who are informed about their own client's systems and discovery needs and who can inquire into those issues with opposing counsel will make much better decisions about discovery planning. An informed and candid dialogue holds the promise of fewer goose chases in what is sought and fewer false steps in the response process. It also can prevent predictable practical problems such as disagreements about search methods, form of production,[22] or even preservation. The underlying theme is that parties who are informed, who communicate, and who try to understand each other's needs and abilities will avoid the types of mistakes associated with misunderstandings and miscommunication.

Beyond that, Rule 26(f) can serve a very valuable role as a platform for additional, *voluntary* cooperation. While Rule 26(f) does not *require* the parties to make additional informal disclosures or to reach discovery agreements where legitimate disputes exist, it very clearly expresses the hope that the parties will choose to do so. Rule 26(f) sends an unmistakable signal urging and encouraging the parties to work together and find ways to expedite and facilitate the discovery process. But it operates by encouragement, not mandate.

2. *Specific Discovery Disputes.*

The second cluster of cooperation provisions also pivots on communication, but it deals with specific discovery disputes after they have arisen rather than preventive discovery planning:

Cooperation and Specific Discovery Disputes	
Rule 26(c)	A party moving for a protective order must certify that it has "in good faith" conferred or attempted to confer with other affected parties in an effort to resolve the dispute.
Rule 37(a)(1)	A party moving for an order compelling discovery must certify that it has "in good faith" conferred or attempted to confer with the non-producing party in an effort to resolve the dispute.
Rule 26(c)(3) Rule 37(a)(5)	After resolving a motion for protective order or a motion to compel, the court must award the prevailing party its reasonable expenses incurred in making or opposing the motion, including attorney's fees, unless the other side's position was "substantially justified."

The actual duties here are essentially the same as in the first cluster. The parties must communicate and try in good faith to work out specific discovery disputes. But here too, the parties are not required to reach agreement or to compromise from valid positions in order to do so. So long as a party takes a defensible position (and communicates it), the party may stand on that position and let the judge decide.[24]

This cluster of rules does not prevent discovery disputes from occurring. Indeed, it presumes that one has occurred and is now on the precipice of a motion. Rather, what it seeks to do is

21 Originally, the principal role of discovery planning under Rule 26(f) was to generate information for the judge to assist in the formation of the Rule 16 case management order. *See* Gensler, *supra* note 3, at 529. We now appreciate that the Rule 26(f) process also offers an important opportunity for the parties to educate themselves and each other about the discovery needs of the case. *Id.* The 2006 e-discovery amendments fully embrace this latter mission, using the Rule 26(f) conference as a platform for requiring the parties to investigate their own clients' data capacities so that it can be shared with opposing counsel. *See* FED. R. CIV. P. 26(f) advisory committee's note (2006).

22 One can make a strong case that Rule 34(b)'s provisions regarding form of production also qualify as rules requiring cooperation in discovery planning. Rule 34(b)(1)(C) allows (but does not require) a party seeking documents to specify the form or forms desired. Rule 34(b)(2)(D) requires the responding party to specify the form or form it intends to use if it either objects to a requested form or is responding when no request was made. The design of these provisions is to get the parties discussing form of production before production occurs in order to avoid problems (including costly "do-overs") later. *See* FED. R. CIV. P. 34(b) advisory committee's note (2006).

23 The Federal Rules do require initial disclosures – without waiting for a formal discovery request – for certain types of information. *See* FED. R. CIV. P. 26(a)(1), (2), (3). Beyond that, voluntary exchange is *encouraged* but not required. *See* FED. R. CIV. P. 26(f) advisory committee's note (1993) ("The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.").

24 *See* FED. R. CIV. P. 37(a)(5) (sanctions against the motion loser not appropriate where that party's position was "substantially justified"); *see generally* Gensler, *supra* note 3, at 548-49.

to ensure that the parties only present "real" discovery disputes to the judge, not sloppy misunderstandings or uninformed stonewalling. And, like Rule 26(f), these rules create a platform for the parties to resolve even legitimate discovery disputes by voluntary agreement.

3. *Certification of Content and Purpose.*

The third cluster of rules provisions is located in Rule 26(g) and deals with the content and purpose of discovery requests and responses:

Cooperation and Certification of Content and Purpose	
Rule 26(g)(1)	Every discovery request, response, or objection must be signed by an attorney of record (or by a party, if unrepresented). The signature certifies that any discovery request, response, or objection meets the following criteria:
Rule 26(g)(1)(B)(i)	It is consistent with the Federal Rules and warranted by law.
Rule 26(g)(1)(B)(ii)	It is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.
Rule 26(g)(1)(B)(iii)	It is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Rule 26(g) is modeled after Rule 11.[25] Like Rule 11, it is designed to get lawyers to "stop and think" before making or responding to discovery requests.[26] On the surface, it is not obvious whether or how this type of "stop and think" rule gives rise to a duty to cooperate: the activities it regulates are, for the most part, activities that the lawyers undertake on their own. As applied, however, this cluster of rules provisions intersects with discovery cooperation in two ways.

First, there is a direct connection between the purpose and content duties under Rule 26(g) and the duties under Rule 26(f) and Rule 37(a) to attempt "in good faith" to reach discovery agreements. The duty to attempt "in good faith" to agree on discovery imposes a duty to not be unreasonable. In order for a party to be acting reasonably, at a minimum it must be advancing positions that are valid and defensible. Thus, when conferring about the discovery plan, or when conferring about a specific discovery dispute, "good faith" must at least mean not taking positions that would violate the purpose or content criteria set forth in Rule 26(g).

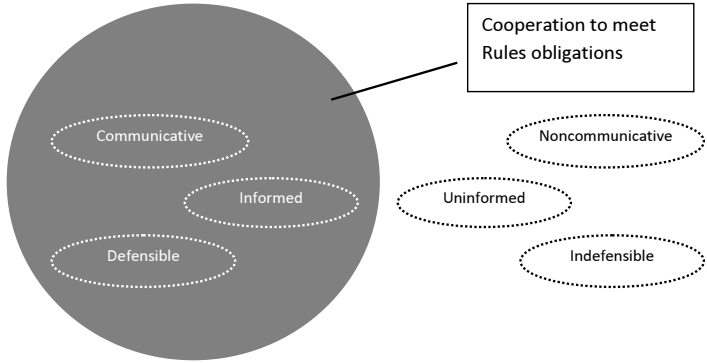
Second, Rule 26(g) imposes a duty on the lawyers to, as the Advisory Committee notes put it, "engage in pretrial discovery in a responsible manner that is consistent with the spirit and purpose of Rules 26 through 37."[27] As Magistrate Judge Paul Grimm has noted, lawyers who default to battle mode without any serious effort to engage in the communication and consideration required by Rules 26(f) and 37(a) are not meeting their obligation to behave responsibly.[28] More specifically, lawyers who fail to communicate about the discovery needs of the case will, in all likelihood, be ill-equipped to meet the proportionality directive incorporated into Rule 26(g)(1)(B)(iii).[29]

4. *Summary.*

If the parties are fulfilling their rules-based obligations, then we can expect the following to be true: (1) the parties will be conferring about discovery planning and specific disputes; (2) the

25 *See* Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure,* 66 JUDICATURE 363, 364 (March 1983).
26 *See* FED. R. CIV. P. 26(g) advisory committee's note (1983).
27 FED. R. CIV. P. 26(g) advisory committee's note (1983).
28 *See* Mancia v. Mayflower Textile Services Co., 253 F.R.D. 354, 357-58 (D. Md. 2008).
29 *Id.* at 358.

parties will be attempting in good faith to agree on discovery planning and to resolve specific disputes; and (3) the parties will have taken informed and defensible positions in discovery. To relate this to the Cooperation Bull's-Eye, the parties should be conducting themselves well within the boundaries of the outer ring:



As discussed in the next subpart, the campaign for cooperation aspires to do more than just remind lawyers of their rules-based obligations and elicit greater compliance with them. At the same time, it would be a serious mistake to undervalue the impact that greater compliance with the rules would have on the discovery process. It is an unfortunate reality that lawyers too often fail even to hit the outer ring – i.e., by not communicating or by articulating uninformed or indefensible positions. If the only effect of the campaign for cooperation was to get more lawyers "on target," it would greatly reduce both the number and difficulty of discovery disputes. By itself, that would be a great advance over the current situation.

B. The Middle Ring: Cooperation Based on Expected Outcomes.

Even when the parties can dig in their heels in discovery and do no more than the minimum required by the Federal Rules, they often choose a different path. For instance, parties sometimes produce information voluntarily, without waiting for or insisting upon a formal discovery request.[30] And when a request has been made and there is a legitimate disagreement (i.e., both sides have defensible positions), the parties do not always press the dispute to a court ruling. Rather, parties sometimes resolve legitimate discovery disputes on their own, usually by reaching some type of compromise.

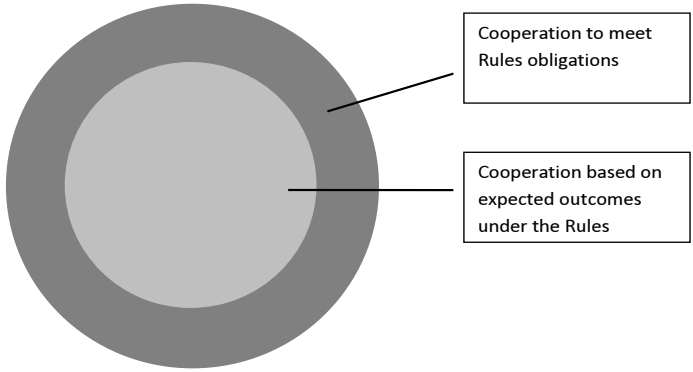
What leads parties to produce information without a formal request or to reach agreement on discovery disputes? Traditionally, cooperation of this type is the byproduct of the parties' assessment of what the outcome would be under the rules. In other words, the lawyers assess how the judge would be likely to rule if the matter were pressed to the court and then act accordingly. Thus, if the lawyers can agree that certain types of information are subject to discovery, they might agree to voluntarily produce it without the need for formal discovery requests. In the case of disputes over pending discovery requests, the lawyers might assess how the judge is likely to rule and then agree to conduct discovery in conformity with that expected outcome, or at some point bargained within a range of expected outcomes.

When lawyers cooperate in this way, they are seeking to serve their own self-interest. For example, formal discovery adds cost and delays the exchange of information. If the parties can agree that certain information is fair game for discovery, they can save each other time and money by honoring informal requests for it. Sometimes this might mean voluntarily producing documents that are clearly discoverable. But it could also be something as simple as answering a question – e.g., about whether certain information exists or where it is kept – that obviates the need for a formal interrogatory to elicit that information.

30 By *voluntary* production, I am referring to the parties producing or disclosing information *beyond* what is covered by the required initial disclosures under Rule 26(a). While the Rule 26(a) disclosures are made without a party-issued discovery request, they are nonetheless required disclosures, with the provisions of Rule 26(a) serving as "[t]he functional equivalent of court-ordered interrogatories." *See* FED. R. CIV. P. 26(a) advisory committee's note (1993).

Formal discovery disputes add even more cost and cause even more delay. Here too, the parties can save time and money by cooperating. In the end, every discovery motion pressed to the court will yield an answer to the dispute when the judge issues his or her ruling. If the parties can agree on what that result is likely to be, they can bypass the judge, agree to act in conformity with the expected result, and move on with the case. If they can at least agree on a range of expected outcomes, the parties may be able to choose a point within that range and conform to that. When parties engage in expected outcome-based cooperation, they are, in essence, choosing to take the shortest, fastest, and least costly path to what the rules, as applied, ultimately would require them to do anyway.

Returning to the Cooperation Bull's-Eye, adding in expected outcome-based cooperation gives us this:



Expected outcome-based cooperation has played a large role in discovery for years and should continue to do so. Many aspects of discovery are sufficiently straightforward that informal requests and voluntary exchange should suffice. In particular, lawyers could greatly streamline the discovery process by freely sharing information about what sources they have and where they are kept, rather than forcing each other to serve interrogatories or take depositions to gather this type of foundational information. Similarly, many discovery disputes, while legitimate, do not warrant costly briefing. Lawyers should continue to consider whether they can arrive at the same result that the judge will supply – or something close to it – by agreement.

Neither Rule 26(g) nor Rule 37(a) requires the parties to do these things. But lawyers who do their homework and then communicate – as those rules do require – frequently will find that they can fairly predict what will happen if they insist upon formal discovery and press all disputes to the court. From that point, the lawyers then can make an informed decision about whether it really makes sense to do that, or whether they are better off taking the shorter and faster path by cooperating.

C. The Center Ring: Cooperation to Achieve Targeted and Efficient Discovery.

Up to this point, the driving factor in the discussion has been the parties' rights and obligations under the rules. Subpart A addressed the minimum requirements for cooperation under the rules. Subpart B addressed voluntary cooperation beyond that, but the discussion was still tied to the rules. Parties who engage in expected outcome-based cooperation accept the rules-driven outcome as their finishing point and look for ways to get to that point faster, cheaper, or with fewer headaches.

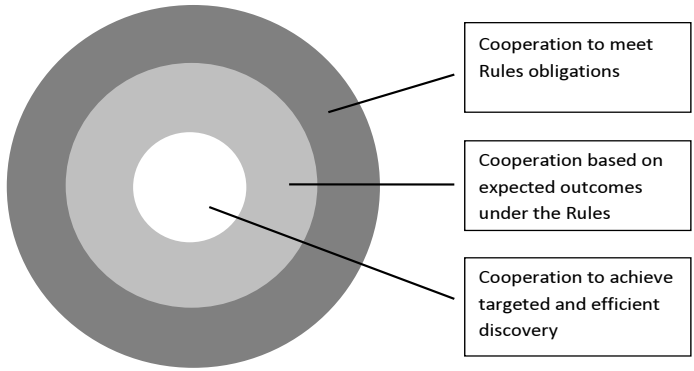
This subpart considers a qualitatively different mode of cooperation. In this mode, the parties work together to identify and pursue a discovery process that they construct themselves based on reason and efficiency. As discussed above, the Federal Rules will, through the judge, eventually provide an answer to every question regarding discovery scope and procedure. And that answer

generally will – I believe – be a good and fair answer.[31] That does not mean, though, that the rules-based answer is the *only* possible answer. Nor does it mean that it is the *best* possible answer. There are several ways in which the parties can improve upon what the court's rules-based answer would be.

First, the parties can greatly streamline the discovery process by reaching agreement on scope and source issues.[32] The parties know best where the "low hanging fruit" is located. The parties know best what issues are *most important* to advancing the case, where that information is *most likely* to be found, and how that information can be accessed with the *least amount* of cost or burden. While judges can issue detailed discovery orders under Rule 26(b)(2), it is the parties who are in the best position to make these determinations. In its most advanced form, party cooperation on scope and source issues can result in an iterative process in which the parties begin with what they consider to be the most targeted and focused inquiries and then proceed as needed.

Second, some aspects of electronic discovery present obvious opportunities for the parties to reach practical agreements based on facilitating the process. The clearest example is agreements regarding the search process for ESI. If forced to, a judge could prescribe a search process or, more likely, rule after the fact on whether the use of a particular set of search terms constituted a reasonable search. Far better, though, for the parties to get together and develop an agreed set of search terms.[33] (Moreover, the agreement on search terms could itself be part of an agreed iterative process in which the results of that search are used to determine the need for and scope of later searches.) Other areas of e-discovery where the parties would be well-served by practical agreements designed to facilitate the process include form of production and preservation.[34]

With that foundation, we can now add the final ring to the Cooperation Bull's-Eye:



In sum, the center ring of cooperation involves the parties working together to facilitate a fair, sensible, and cost-effective discovery process. As with expected outcome-based cooperation, the motivation for cooperating is self-interest. What is different is the mind frame of the parties. Here, the objective is not to replicate rules-based outcomes faster and cheaper but to identify discovery

31 While the Federal Rules are not perfect, I think they reflect an appropriate balance between creating access to information and the costs and burdens of locating and providing that information. Perhaps more accurately, I think the Federal Rules give judges the tools needed to balance the need for information in litigation with the costs and burdens of getting that information. So for every contested discovery issue, federal judges applying the Federal Rules can (and, I think, generally do) supply *an* answer that is fair to the parties and appropriate to the circumstances.

32 *See* FED. R. CIV. P. 26(b)(1) advisory committee's note (2000) (stating in conjunction with new provisions regarding the scope of discovery that "it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention").

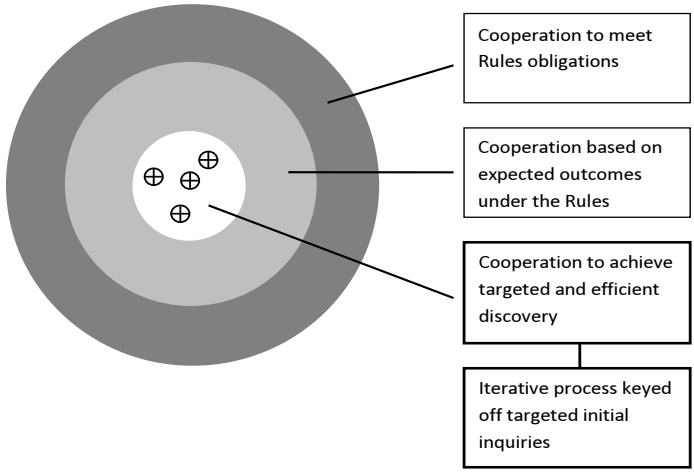
33 *See, e.g.*, *Dunkin Donuts Franchised Rests., LLC v. Grand Central Donuts, Inc.,* No. CV 2007-4027, 2009 WL 1750348, at * 4 (E.D.N.Y. June 19, 2009) (citing The Sedona Conference® Cooperation Proclamation and ordering the parties to "meet and confer on developing a workable search protocol" for email discovery); *Covad Communications Co. v. Revonet, Inc.*, 258 F.R.D. 5, 14 (D.D.C. 2009) (stating that it would be unfair to allow party that rebuffed invitation to negotiate search protocol to now argue that the terms used were inadequate); *William A. Gross Constr. Assocs. Inc., v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (stating that "the best solution [to the selection of appropriate search terms] is cooperation among counsel" and endorsing Cooperation Proclamation); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 405 (S.D.N.Y. 2009) (citing Cooperation Proclamation and instructing the parties to confer on a workable search protocol).

34 *See, e.g., Ford Motor Co. v. Edgewood Properties, Inc.,* 257 F.R.D. 418, 426 (D.N.J. 2009) (noting that dispute over form of production would not have arisen if parties had communicated earlier); *Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Security*, 255 F.R.D. 350, 358 (S.D.N.Y. 2008) (citing The Sedona Conference® Cooperation Proclamation and noting that party communication regarding form of production is best way to resolve issues regarding production of metadata); *Covad Communications Co. v. Revonet, Inc.*, 254 F.R.D. 147, 149 (D.D.C. 2008) (citing Cooperation Proclamation and chiding the parties for not conferring about the form of production).

processes and solutions that make sense, even if they might vary from what a judge might or even could order. The rules and the parties' views on expected outcomes still will be influential, but not controlling.

There is one final image to explore. In March 2009, the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers hosted a summit on the Civil Rules.[35] As one might expect, one of the major topics for discussion was discovery cost and containment. One of the metaphors that emerged from the discussion was that lawyers should take "rifle shot" discovery rather than serving expansive and ill-focused discovery requests. By this, the lawyers meant that discovery should have a clear and specific target.

The image of a rifle shot is powerful, and it strikes me as a perfect complement to the Bull's-Eye view of cooperation:[36]



What is critical is to recognize the link between cooperation and targeted discovery. No Federal Rule *forbids* lawyers from taking rifle shot discovery. Correspondingly, no Federal Rule *requires* lawyers to – if you'll permit me to indulge the metaphor – conduct discovery by carpet-bombing. But you can only take targeted discovery if you know what your target is. That brings us back to cooperation. If lawyers learned to work together – by communicating and by developing agreed plans that took an iterative approach – then they would be in a much better position to trade in their cannon for rifles.

III. LOCAL RULES AND COOPERATION

A number of districts now have local rules addressing discovery cooperation. This Part explores the range of content of those local rules and assesses how they intersect with the campaign for cooperation.

A. Local Rules That Restate or Elaborate Upon Existing Duties.

Many of the "cooperation" provisions found in local rules restate or elaborate upon the cooperation duties set forth in Rules 26 and 37.[37] For example, Local Rule 26.1 of the Middle District of Pennsylvania provides that "counsel shall discuss and seek to reach agreement on" a long list of topics including preservation of ESI, the scope of e-mail discovery, e-mail search protocols, form of production, and the need to search sources that are difficult to access.[38] The District of

35 *See* http://www.du.edu/legalinstitute/events.html (last visited August 31, 2009).
36 My thanks go to Ken Withers, who first pointed out to me how perfectly the rifle shot image fits within the Bull's-eye diagram.
37 *See supra* Part II.A.
38 M.D. Pa. Local R. 26.1(c).

Kansas "Guidelines for Discovery of Electronically Stored Information (ESI)" instruct the parties to "confer regarding" and "attempt to agree on" a substantially similar list of e-discovery topics.[39] Other local rules instruct the parties to confer regarding and attempt to agree on various specific e-discovery issues.[40]

These types of provisions do not add any new duties. As discussed in Part II.A., Rule 26(f) already required the parties to confer about discovery and to attempt in good faith to agree on the topics to be addressed in the discovery plan. The 2006 amendments to Rule 26(f) specifically added "issues about disclosure or discovery of electronically stored information" to that list.[41] Thus, the function of these local rules is to flesh out and particularize the Rule 26(f) duties as they apply to e-discovery.

That being said, local rules or court guidelines that elaborate on the existing Rule 26(f) duties can be enormously helpful. Lawyers who read these rules will be hard pressed to argue that they did not fully appreciate the scope of issues they are required to discuss and about which they are required to pursue agreement in good faith. For some lawyers, the extra guidance might be genuinely educational. For others, the detailed guidance will serve to cut off claims of ignorance of confusion by those who are disinclined to carry out their duties under Rule 26(f). Either way, local rules that supplement Rule 26(f) can serve a valuable role by explaining what Rule 26(f) requires and eliciting compliance.

B. Local Rules that Encourage Cooperation.

A number of local rules explicitly promote or encourage cooperation in discovery. The Northern District of Ohio makes this point directly: "The parties are encouraged to cooperate with each other in arranging and conducting discovery . . . ."[42] The District of Massachusetts has a local rule section specifically titled "Cooperative Discovery" providing that "[t]he judicial officer should encourage cost effective discovery by means of voluntary exchange . . . [such as] informal, cooperative discovery practices in which counsel provide information to opposing counsel without t resort to formal discovery procedures."[43] While it never actually uses the term cooperation, the District of Maryland's Suggested Protocol for Discovery of Electronically Stored Information provides extensive guidance to the parties on how to discuss and structure e-discovery in order "to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention."[44] Other local rules urge cooperation more generally.[45]

A different – and, in my view, intriguing – way for districts to promote cooperation is to require the parties to appoint an e-discovery coordinator or liaison. Under the Default Standards for Discovery of Electronic Documents (E-Discovery) adopted by several districts, each party must designate a single individual to serve as their "e-discovery liaison" (or coordinator) in order to "promote communication and cooperation between the parties."[46] This person – who may be a client (or an employee of the client), an attorney, or a third party consultant retained to assist with discovery – is responsible for organizing the party's e-discovery activities "to insure consistency and thoroughness and, generally, to facilitate the e-discovery process."[47]

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39 D. Kan. Guidelines for Discovery of Electronically Stored Information (ESI), Guideline 4, *available at* http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf.

40 *See* D.N.J. Local R. 26.1(d)(3) ("During the Fed. R. Civ. P. 26(f) conference, the parties shall confer and attempt to agree on computer-based and other digital discovery matters, including [preservation and production, inadvertent production, deleted information, legacy data, form of production, and cost allocation.]"); D. Colo. Local Civ. R. Appx. F (Instructions for Preparation of Scheduling Order) (stating that parties "must discuss any issues relating to the disclosure and discovery" of ESI and "should make a good faith effort to agree on a mutually acceptable format for production" of ESI); M.D. Tenn. Default Standard for Discovery of Electronically Stored Information (providing that parties "shall use their best efforts to reach agreement" as to search methods and search terms and "shall attempt to reach agreement" on preservation).

41 FED. R. CIV. P. 26(f)(2), (3) and advisory committee's note (2006).

42 N.D. Ohio Local R. 26.1.

43 D. Mass. Local R. 26.1(A).

44 D. Md., Suggested Protocol for Discovery of Electronically Stored Information ("EDI"), *available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf.

45 *See* M.D. Fla., Middle District Discovery (2001), at 1 ("Discovery in this district should be practiced with a spirit of cooperation and courtesy."); W.D.N.Y. Local Civ. R. ("Cooperation Among Counsel in the Discovery Context") (referencing Civility Principles, *available at* http://www.nywd.uscourts.gov/document/civilityprincpreamle.pdf).

46 *See* D. Del., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 3; N.D. Ohio, Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 3; M.D. Tenn., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 3.

47 *See* D. Del., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 3; N.D. Ohio, Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 3; M.D. Tenn., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 3.

Local rules or court guidelines that encourage the parties to cooperate strike me as both valid and beneficial. Whether the purpose is to encourage cooperation in the sense of complying with the rules (outer ring) or whether it is to encourage parties to voluntarily do more (inner rings), it is an appropriate use of the court's authority and bully pulpit. Encouraging discovery cooperation is surely no less valid than encouraging parties to settle on the merits.[48] To the extent these provisions either help lawyers better appreciate their cooperation duties or lead lawyers to give increased thought to the benefits of voluntary cooperation, they make a valuable contribution to the just, speedy, and inexpensive administration of justice.[49]

C. Local Rules that Require "Cooperation" or Agreement.

The final category to consider is local rules that require "cooperation" or agreement. For example, the Default Standards for Discovery of Electronic Documents state: "It is expected that parties to a case will cooperatively reach agreement on how to conduct e-discovery."[50] In the Southern District of Illinois, "[c]ooperative discovery arrangements in the interest of reducing delay and expense are mandated."[51] In the Eastern District of New York (but not the Southern District), "[c]ounsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures."[52] At the farthest end of the spectrum, some local rules seem not just to require the parties to cooperate in discovery but to actually reach agreement on discovery. For example, the Default Standards for Discovery of Electronic Documents (as adopted by the District of Delaware and the Northern District of Ohio) state that the parties "shall reach agreement" as to search terms and methodology.[53]

Local Rules that mandate "cooperation" raise once more the question of what cooperation means. As discussed in Part II.A., one component of cooperation is to confer with the other side and attempt in good faith to reach agreement. The Federal Rules already require this. Local rules that restate the obligation are certainly valid, and, as discussed above, can serve as useful reminders. On the other hand, cooperation can also mean voluntary disclosure of information or compromise agreements. Perhaps the local rules expressing the "expectation" that the parties will cooperate, or that they will reach discovery agreements, are designed to encourage voluntary disclosures or discovery agreements rather than compel them. As discussed above, there is nothing wrong with judges promoting voluntary cooperation.

However, to the extent local rules are construed as ordering parties to disclose information that would otherwise be the subject of formal discovery, or as mandating that the parties reach discovery agreements when there is a genuine dispute, they likely go too far. The scope of the required initial disclosures is set by Rule 26(a), and they have a contentious history that counsels strongly against reading other rules as expanding or augmenting their scope.[54] As to mandatory discovery agreements, the Federal Rules stop conspicuously short of mandating that the parties actually reach agreement on discovery issues. Indeed, Rule 37(a)(5) is quite clear that expense-shifting against the losing party in a discovery dispute is not proper if the losing party's position was substantially justified.[55] Thus, to the extent these local rules are construed as requiring the parties to make additional required disclosures or to make concessions from informed and defensible positions, they present serious questions of validity in terms of inconsistency with the Federal Rules.[56]

48 The permissibility of encouraging settlement is beyond cavil. *See, e.g.*, 28 U.S.C. Section 651(b) (requiring each district court to adopt local rules establishing an alternative dispute resolution program); FED. R. CIV. P. 16(a)(5) (listing "facilitating settlement" as one purpose of pretrial conferences).

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

50 D. Del., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Std. 1; N.D. Ohio, Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 3; M.D. Tenn., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 3.

51 S.D. Ill. Local R. 26.1(d).

52 E.D.N.Y. Local Civ. R. 26.5.

53 D. Del., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Std. 5; N.D. Ohio, Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 5. Notably, the Middle District of Tennessee altered this language when it adopted the Default Standards; in its version, the parties need only "use their best efforts to reach agreement" on these topics. *See* M.D. Tenn., Default Standards for Discovery of Electronic Documents ("E-Discovery"), Standard 5.

54 *See* Gensler, *supra* note 3, at 542-43 (discussing the controversial nature of the 1993 version of Rule 26(a) and the 2000 amendments that narrowed its scope).

55 FED. R. CIV. P. 37(a)(5) and advisory committee's note (1970).

56 *See* 28 U.S.C. Section 2071(a) (authorizing districts to make local rules so long as they are "consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072"); FED. R. CIV. P. 83(a) (local rules must be consistent with the Federal Rules). *See generally* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 1052 (2009) ("A local rule can conflict with the Federal Rules either if it directly contradicts a Federal Rule or if it establishes a requirement or procedure that conflicts with the spirit or purpose of a Federal Rule.").

IV. CONCLUSION

The benefits of cooperation in discovery are not new. The original drafters of the Federal Rules fully appreciated that the discovery process would work best in the hands of litigants and lawyers who sought to facilitate the fair and efficient exchange of information rather than hinder it. True, the original 1938 Federal Rules did not contain cooperation obligations – not even the "communication and consideration" duties currently set out in Rules 26(f) and 37(a). But that was because the original drafters assumed (naively, it turns out) that litigants and lawyers would realize that cooperation was in their best interest and act accordingly.[57]

Even though the general concept of cooperation in discovery is not new, the importance of cooperation has never been greater. In the age of e-discovery, it is nigh impossible to imagine judges hearing and deciding every potential discovery dispute. One also shudders to imagine the expense of it all. Just in terms of scope and expense, e-discovery has been a game-changing event for the federal discovery process.

On a more positive note, e-discovery can serve as a catalyst for changing the way lawyers view the discovery process. The drafters of the 2006 e-discovery amendments recognized the power of bringing the parties to the table to discuss the discovery process. Building on the existing Rule 26(f) architecture, the drafters expanded the list of discussion topics to include those aspects of e-discovery that are most likely to cause problems in the absence of informed communication. In so doing, the drafters highlighted the value of early attention and advance planning by lawyers who are informed and educated about their client's discovery needs and their own information capacities. At the same time, they sent a strong signal that parties could – and really should – do even more to expedite and facilitate the discovery process.

Avoiding errors of misunderstanding and miscommunication is a good start. For that reason, the campaign for cooperation is right to emphasize the need for lawyers to take their duties under Rules 26(f), 26(g), and 37(a) seriously. But the campaign for cooperation is equally right to emphasize that more is possible. To put it in terms of the rules structure, since the lawyers are already required to come to the table and talk, let's hope that while they are at the table they also consider the full spectrum of cooperation options available to them and the benefits they can attain by pursuing them. Or, to put it in terms of the imagery of this essay, so long as the lawyers know they have to take aim at the bull's-eye, let's hope they are inspired to aim for the center.

57 *See* Gensler, *supra* note 3, at 524-25.

MANCIA V. MAYFLOWER BEGINS A PILGRIMAGE TO THE NEW WORLD OF COOPERATION

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The Sedona Conference® Cooperation Proclamation was first announced on October 7, 2009. One week later, Magistrate Judge Paul W. Grimm became the first judge to cite and endorse the proclamation in *Mancia v. Mayflower Textile Services. Co.*, 253 F.R.D. 354 (D.Md. Oct. 15, 2008). By September of 2009, at least twelve judicial opinions had already cited *The Sedona Conference® Cooperation Proclamation* ("the Proclamation"). This was just the beginning of a pilgrimage that many judges in the country will likely undertake to help lead the legal profession into a new world of cooperative discovery.

These first dozen opinions are interesting in their own right, but this article primarily focuses on uncooperative attorney conduct that spurred citation to the Proclamation. Study of these opinions reveals a common theme of iconoclastic lawyers that one federal judge criticized as a litigation culture of "fierce warriors" gone haywire.[1] The old habits of litigators built up over generations will take time to overcome. But overcome them we must, for otherwise our system of discovery will break down under the strain of new technologies and vast amounts of electronic information that most litigants maintain. The legal profession can no longer afford the old attitudes. Moreover, as these first twelve cases show, the law does not permit it. These twelve opinions and the Proclamation point to a way out of our current discovery quandary; they point to a collaborative model of discovery where lawyers can ride the wave of new technology, instead of be drowned by it.

Below are the first twelve opinions citing the Proclamation:

1. *Mancia v. Mayflower Textile Servs. Co*., 253 F.R.D. 354 (D. Md. 2008 Oct. 15, 2008).

2. *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.,* 255 F.R.D. 350 (S.D.N.Y. Nov. 21, 2008).

3. *Gipson, et al v. Southwestern Bell. Tel. Co.,* 2008 U.S. LEXIS 103822 (D. Kan. Dec. 23, 2008).

4. *Covad Communications Co. v. Revonet, Inc.,* 254 F.R.D. 147 (D.D.C. Dec. 24, 2008).

5. *S.E.C. v. Collins & Aikman Corp*., 256 F.R.D. 403, Fed. Sec. L. Rep. P 95,045 (S.D.N.Y. Jan. 13, 2009).

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1 Ken Withers, *When E-Mail Explodes*, SAN DIEGO LAWYER, Nov.-Dec. 2008, at 36, 37-38.

6. *William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.,* 256 F.R.D. 134 (S.D.N.Y. March 19, 2009).

7. *Newman v. Borders, Inc.*, 257 F.R.D. 1 (D.D.C. April 6, 2009).

8. *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418 (D.N.J. May 19, 2009).

9. *Dunkin' Donuts Franchised Restaurants LLC v. Grand Cen. Donuts, Inc.*, 2009 WL 1750348 (E.D.N.Y. June 19, 2009).

10. *Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n*, 2009 WL 2243854 (S.D. Ohio July 24, 2009).

11. *In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation*, 2009 WL 2461716 (E.D. La. Aug. 7, 2009).

12. *Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009).

Mancia v. Mayflower Textile Servs. Co.

Judge Grimm began the judicial pilgrimage with a case that does not involve e-discovery at all. ***Mancia v. Mayflower Textile Services Co.***[2] concerned a dispute over a defendant's boilerplate objections to the plaintiff's discovery requests.[3] Mancia illustrates that even though the Proclamation was born out of the heady problems and expense of electronic discovery, it applies to discovery of all kinds. This is an important case, not just for being the first to cite the Proclamation, but also for providing a scholarly review of the law behind the collaborative approach to discovery. Judge Grimm illustrated how the rules of procedure, ethics, and the common law all require collaboration in discovery.

Mancia is also important for its discussion of Federal Rule of Civil Procedure 26(g), which Judge Grimm calls the least understood and most frequently violated discovery rule of them all.[4] Rule 26(g) requires counsel to make a *reasonable inquiry* before signing their name to a discovery response. It is similar to Rule 11, but applies only to the discovery pleadings. Notably, Federal Rule of Civil Procedure 11 does not apply to discovery pleadings.

Counsel for both parties in *Mancia* violated Rule 26(g). The thirty page opinion points out in precise detail what each party did wrong, including the plaintiff's unrestrained, over-broad interrogatory and production requests and the defendants meaningless boiler-plate responses. This kind of knee-jerk discovery shows that the attorneys did not make reasonable inquiries of the facts before promulgating or responding to discovery. Moreover, it illustrates that the parties did not make an adequate effort to collaborate. Even in cases involving limited discovery such as *Mancia*, the traditional uncooperative approach to discovery needlessly drives up the cost of litigation. As Judge Grimm notes, such behavior also violates existing law:

> Although judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, what has been missing is a thoughtful means to engage all the stakeholders in the litigation process - lawyers, judges and the public at large - and provide them with the encouragement, means and incentive to approach discovery in a different way. The Sedona Conference, a non-profit, educational research institute best known for its *Best Practices Recommendations and Principles for Addressing Electronic Document Production,* recently issued a *Cooperation Proclamation* to announce

2 253 F.R.D. 354, 355 (D. Md. 2008 Oct. 15, 2008).
3 *Id.* at 355.
4 *Id.* at 357.

> the launching of "a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery." *Cooperation Proclamation, supra,* at 1. To accomplish this laudable goal, the Sedona Conference proposes to develop "a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding," as well as "[d]eveloping and distributing practical 'toolkits' to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency." *Id.* at 3. If these goals are achieved, the benefits will be profound. In the meantime, however, the present dispute evidences the need for clearer guidance how to comply with the requirements of Rules 26(b)(2)(C) and 26(g) in order to ensure that the Plaintiffs obtain appropriate discovery to support their claims, and the Defendants are not unduly burdened by discovery demands that are disproportionate to the issues in this case.[5]

Judge Grimm then continues in *Mancia* to spell out what was required by the parties to complete discovery. He notes that defendant's boilerplate objections to Plaintiffs' document production requests, where there were no particularized objections, naturally led to one of two conclusions:

> [E]ither the Defendants lacked a factual basis to make the objections that they did, which would violate Rule 26(g), or they complied with Rule 26(g), made a reasonable inquiry before answering and discovered facts that would support a legitimate objection, but they were waived for failure to specify them as required. Neither alternative helps the Defendants' position, and either would justify a ruling requiring that the Defendants provide the requested discovery regardless of cost or burden, because proper grounds for objecting have not been established.[6]

The boilerplate response of defense counsel was a serious strategic error, one that was costly to their client. Here, behavior of plaintiff's counsel was equally objectionable and thus Judge Grimm was not inclined to find a complete and expensive waiver of all objections. Instead, he essentially ordered the attorneys to meet, try to cooperate, and reach agreement on several issues specified by Judge Grimm. The issues included trying to reach agreement on a range of damages that were likely if the plaintiff were to prevail. This is a critical fact issue that must be determined to establish a reasonable budget for discovery in this case, and every other case. Judge Grimm correctly notes that without a damage range it is impossible to perform an analysis under Rule 26(b)(2)(C), *Federal Rules of Civil Procedure* on the "overbreadth or burden" of the discovery propounded by the plaintiff.

The parties were ordered to report back to Judge Grimm after their meetings on these issues. The report required them to delineate their agreements and disagreements whereupon he would quickly rule to resolve the remaining issues. This procedure implements the cooperative approach heralded by the Proclamation and as Judge Grimm explains, this is entirely consistent with the adversary system of justice:

> It is apparent that the process outlined above requires that counsel cooperate and communicate, and I note that had these steps been taken by counsel at the start of discovery, most, if not all, of the disputes could have been resolved without involving the court. It also is apparent that there is nothing at all about the cooperation needed to evaluate the discovery outlined above that requires the parties to abandon meritorious arguments they may have, or even to commit to resolving all disagreements on their own. Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful

5 *Mancia, supra* note 2, at 363.
6 *Id.* at 364.

> information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute. Finally, it is obvious that if undertaken in the spirit required by the discovery rules, particularly Rules 26(b)(2)(C) and 26(g), the adversary system will be fully engaged, as counsel will be able to advocate their clients' positions as relevant to the factors the rules establish, and if unable to reach a full agreement, will be able to bring their dispute back to the court for a prompt resolution. In fact, the cooperation that is necessary for this process to take place enhances the legitimate goals of the adversary system, by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting the time when the case may be resolved on its merits, or settled. This clearly is advantageous to both Plaintiffs and Defendants.[7]

This is a clear explanation of the role of cooperation in the adversary process and begins the pilgrimage on the right foot.

Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.

The pilgrimage continued in Manhattan with Judge Frank Maas's opinion in *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*[8] *Aguilar* is an e-discovery case wherein the plaintiff sought to compel the production of metadata. *Aguilar* is well known for its phrase that Metadata has become "the new black" and contains a good discussion on when and how metadata should be requested.[9]

The attorneys in *Aguilar* did not reach any agreement on metadata at the beginning of the case; they did not even discuss it. They did their clients a disservice via silence as Judge Mass noted:

> This lawsuit demonstrates why it is so important that parties fully discuss their ESI early in the evolution of a case. Had that been done, the Defendants might not have opposed the Plaintiffs' requests for certain metadata. Moreover, the parties might have been able to work out many, if not all, of their differences without court involvement or additional expense, thereby furthering the "just, speedy, and inexpensive determination" of this case. *See* Fed.R.Civ.P. 1. Instead, these proceedings have now been bogged down in expensive and time-consuming litigation of electronic discovery issues only tangentially related to the underlying merits of the Plaintiffs' *Bivens* claims. Hopefully, as counsel in future cases become more knowledgeable about ESI issues, the frequency of such skirmishes will diminish.[10]

Judge Moss directed attorneys to cooperate by referring them to both the *Sedona Principles* and the Proclamation:

> The *Sedona Principles* also stress the need for the parties to resolve issues concerning metadata. As the Conference explains, the purpose of the amended Federal Rules is "to require parties, not courts, to make the tough choices that fit the particular discovery needs of a case." *Sedona Principles 2d* Cmt. 12c. This is appropriate because it is not the court but the parties who have the greatest knowledge of the documents in a case and whether the metadata accompanying those documents is relevant. Indeed, the Conference recently has issued a "Cooperation Proclamation," in which it stresses that the Federal Rules are a mandate that counsel act cooperatively in resolving discovery issues. *See Sedona Conference Cooperation Proclamation* 2 (2008), http://www.thesedona conference.org/content/misc Files/Cooperation_Proclamation. pdf.[11]

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7 *Id.* at 365.
8 255 F.R.D. 350 (S.D.N.Y. Nov. 21, 2008).
9 *Id.* at 359.
10 *Id.* at 364.
11 *Id.*

Gipson, et al v. Southwestern Bell. Tel. Co.

The third endorsement was from Magistrate Judge David J. Waxse in *Gipson, et al v. Southwestern Bell. Tel. Co.*[12] This is a case with attorneys and *pro se* litigants where 115 motions and 462 docket entries were filed in the first year. Judge Waxse stated that many of the motions concerned minor issues that the parties should have been able to resolve on their own and directed them to the Proclamation:

> To help the parties and counsel understand their discovery obligations, counsel are directed to read the Sedona Conference Cooperation Proclamation, which this Court has previously endorsed.[13]

Judge Waxse directed the parties to confer and stated that he would appoint a special master for discovery if they could not make progress on their own.

Covad Communications Co. v. Revonet, Inc.

Next to join the journey was Judge John Facciola, in *Covad Communications Co. v. Revonet, Inc.*[14] *Convad,* like *Aguilar*, is an e-discovery opinion on the form of production. *Covad* involved paper production versus original native format, where metadata would be included. The attorneys not only failed to cooperate on deciding an appropriate form of production for ESI, but they failed to discuss the issue. Needless to say, little cooperation occurs when opposing counsel will not even speak with one another. As Judge Facciola put it:

> It does not appear that Covad and Revonet ever discussed what form this (or any other) production should take. Instead the parties seem to be making assumptions based on each others' behavior: Covad expecting its documents in electronic form because Revonet hired a company to collect electronically stored information, and Revonet assuming that they should produce 35,000 pages of e-mails in hard copy because Covad produced its documents in that format. As there is no agreement, the parties invite me turn to the language of the requests themselves to determine whether Revonet can produce the e-mails other than in their native format.[15]

Judge Facciola then directed attorneys to the Proclamation and the need to talk to each other about e-discovery and reach agreement. The alternative of excessive motion practice is both a waste of the clients' money and an unnecessary expenditure of judicial resources. There is nothing to be gained over pointless disputes concerning relatively inconsequential issues, such as form of production, except for hour churning and big attorney fees. This kind of behavior is exactly what newly revised Rule 26(f) was designed to try to prevent by requiring parties to discuss these issues. As Judge Facciola observed:

> Rule 26(f), as amended, specifically requires the parties to discuss the form that production of electronically stored information should take. Fed.R.Civ.P. 26(f)(3)(C). This controversy predates that provision, and underscores its importance. *See Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dep't of Homeland Sec.,* No. 07-CV-8224, 2008 WL 5062700, at *8-9 (S.D.N.Y. Nov.21, 2008) (emphasizing the need for cooperation between counsel in defining the form of production) (citing *The Sedona Conference Cooperation Proclamation* (2008), available at http://www.thesedonaconference.org/dlt Form?did=Cooperation_Proclamation.pdf).[16]

12 2008 U.S. LEXIS 103822 (D. Kan. Dec. 23, 2008)
13 *Id.*
14 254 F.R.D. 147 (D.D.C. Dec. 24 2008).
15 *Id.* at *2.
16 *Id.*

The failure of the attorneys in *Convad* to discuss the issue of form before they made production caused unnecessary work to later try to sort out the disputes that followed. Some attorneys call this the "paper or plastic" choice, and every supermarket bagboy knows to ask the customer if they want paper or plastic *before* they put the groceries in a bag, not after.

The plaintiff here did not specify the form of production in the boilerplate request for production that they used. The defendant also failed to ask about the plaintiff's preferred form of production after receiving the vague request. The defendant unilaterally decided to produce emails in paper format. After the plaintiff received the paper production, the plaintiff then demanded plastic. The plaintiff wanted the same emails re-produced to them in their original native form. This usually means they are produced on CD-ROM, and thus the reference to "plastic."

Judge Facciola ended up ordering the reproduction of the emails and other ESI in plastic, the original native form, but required the plaintiff to pay for part of the expenses. Judge Facciola explained this holding in his usual wonderful language:

> Since both parties went through the same stop sign, it appears to me that they both should pay for the crash.[17]

S.E.C. v. Collins & Aikman Corp.

Judge Shira Scheindlin became the first District Court judge to cite to the Proclamation in *S.E.C. v. Collins & Aikman Corp.*[18] *Collins* is a very interesting e-discovery case in its own right, addressing the Government's discovery obligations in civil litigation. This is a large securities fraud case wherein a defendant asked the SEC to "produce for inspection and copying the documents and things identified" in fifty-four separate categories.[19] The SEC responded with what is commonly called a document dump. As Judge Scheindlin described it:

> The SEC produced 1.7 million documents (10.6 million pages) maintained in thirty-six separate Concordance databases - many of which use different metadata protocols.[20]

They might as well have given the defendant a key to the Library of Congress and told him to help himself, and that the answers to his requests were somewhere in the archives. Naturally, the defendant objected to the SEC's tactic. He wanted to be told where in the 10.6 million pages he might find the categories of documents he was looking for. He wanted the SEC to make some effort to look for these documents, not just put the entire burden and cost upon him. He complained that this kind of document dump was a way for the government to hide the relevant evidence.

To make matters worse, it turns out that the government had already sorted through most of the data themselves to retrieve the documents they thought were relevant. But the SEC took the position that this was secret work product, and, unlike a criminal case, they should not be required to disclose this selection process to defendants in this civil action. The SEC argued that it should only be required to produce the ESI in the manner in which it is ordinarily maintained in its usual course of business, which meant lumped in the several large databases it produced, not in the culled down editions it prepared for the case and refused to produce.

The government's response constitutes an interesting adversarial tactic to be sure, but Judge Scheindlin was not buying the dodge to meaningful disclosure. She referred to the Advisory Committee Note to Rule 34, *Federal Rules of Civil Procedure.* The Note explained that the purpose of the new rule language added in 1980 to require production by categories or according to usual course of business organization was to eliminate the practice of "deliberately [mixing] critical documents with others in the hope of obscuring significance."[21] Judge Scheindlin understood that the intent of the rule

17 *Id.* at 151.
18 256 F.R.D. 403, Fed. Sec. L. Rep. P 95,045 (S.D.N.Y. Jan. 13, 2009).
19 *Id.* at 406.
20 *Id.* at 407.
21 *Fed.R.Civ.P.* 34 1980 Advisory Committee Note (quoting Section of Litigation, Am. Bar Ass'n, *Report of the Special Committee for the Study of Discovery Abuse,* at 22 (1977), *reprinted in* 92 F.R.D. 149 (1982)).

to allow for the production of documents as they "are actually kept in the usual course of business" was to minimize the burden of production while maintaining the "internal logic reflecting business use."[22] Judge Scheindlin reasoned that:

> In most cases, documents produced pursuant to Rule 34 will be organized by subject matter or category. The provision prohibits "simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought."[23]

Judge Scheindlin also addressed the work product objections that the government lawyers raised to try to justify their document dump. This is an objection that is often made to try to justify an uncooperative approach to discovery. Judge Scheindlin's analysis of this issue bears close scrutiny:

> It is first necessary to determine the level of protection afforded to the *selection* of documents by an attorney to support factual allegations in a complaint. Such documents are not "core" work product. Core work product constitutes legal documents drafted by an attorney - her mental impressions, conclusions, opinions, and legal theories. This highest level of protection applies to a compilation only if it is organized by legal theory or strategy. The SEC's theory - that every document or word reviewed by an attorney is "core" attorney work product - leaves nothing to surround the core. The first step in responding to any document request is an attorney's assessment of relevance with regard to potentially responsive documents. It would make no sense to then claim that an attorney's determination of relevance shields the selection of responsive documents from production. …
>
> The question of "undue hardship" is more interesting. The SEC contends that Stockman can search through the ten million pages and find substantially the same documents identified by the SEC without impinging on the thought processes of the SEC attorneys. Indeed - at significant expense and delay - Stockman could search the document databases using appropriate search terms, but the inaccuracy of such searches is by now relatively well known. A page-by-page manual review of ten million pages of records is strikingly expensive in both monetary and human terms and constitutes "undue hardship" by any definition.
>
> It is patently inequitable to require a party to search ten million pages to find documents already identified by its adversary as supporting the allegations of a complaint. Thus, under either the undue hardship analysis of Rule 26 or the equities suggested by the Second Circuit, the 175 file folders prepared by the SEC's attorney are not protected by the work product doctrine.[24]

Judge Scheindlin concludes her analysis with a call for all lawyers, especially the SEC lawyers in this case, to read and understand the Federal Rules of Civil Procedure and the Proclamation:

> With few exceptions, Rule 26(f) requires the parties to hold a conference and prepare a discovery plan. The Rule specifically requires that the discovery plan state the parties' views and proposals with respect to "the subject on which discovery may be needed ... and whether discovery should be conducted in phases or be limited to or focused on particular issues" and "any issues about disclosure or discovery of electronically stored information ...." Had this been accomplished, the Court might not now be required to intervene in this particular dispute. I also draw the parties' attention to the recently issued *Sedona Conference Cooperation Proclamation*, which urges parties to work in a cooperative

22 *Id*. at 409 (citing *Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. at 177).
23 *Id*.
24 *Id.* at 410-411.

> rather than an adversarial manner to resolve discovery issues in order to stem the "rising monetary costs" of discovery disputes. The Proclamation notes that courts see the discovery rules "as a mandate for counsel to act cooperatively." Accordingly, counsel are directly to meet and confer forthwith and develop a workable search protocol that would reveal *at least some* of the information defendant seeks.[25]

Judge Scheindlin ordered the SEC to produce or identify some of the documents organized in response to Stockman's requests and to negotiate an appropriate search protocol to locate the rest, including agency e-mail, and to do it all within twenty days. The judge acknowledged that the SEC had raised legitimate concerns about the burdens imposed by the requests, but admonished the SEC for unilaterally determining that those burdens outweighed the defendant's need for discovery. In Judge Scheindlin's words:

> At the very least, the SEC must engage in a good faith effort to negotiate with its adversaries and craft a search protocol designed to retrieve responsive information without incurring an unduly burdensome expense disproportionate to the size and needs of the case. The parties are therefore directed to engage in a cooperative effort to resolve the scope and design of a search …

Judge Scheindlin concluded by stating that if the parties could not reach agreement, she was prepared to appoint a special master to supervise remaining discovery.

William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.

Judge Andrew J. Peck is the next to join in with another excellent e-discovery case concerning the issue of keyword search. *William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.*[26] The case begins with this oft-quoted line:

> This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or "keywords" to be used to produce emails or other electronically stored information ("ESI").[27]

Gross Construction involved a multi-million dollar dispute over alleged defects and delay in the construction of the Bronx Criminal Court Complex. The parties subpoenaed a non-party, a large construction company, and demanded production of its ESI by using thousands of different search terms, including words such as: "sidewalk," "change order," "driveway," "access," "alarm," "budget," "build," "claim," "delay," "elevator," and "electrical." The subpoenaed construction company objected, pointing out the obvious, that if all of these keywords were used, they would have to produce virtually all of their data for all of their construction projects. They did not, however, suggest any alternative.

Judge Peck made the following observation about the failure of the attorneys in *Gross* to conduct a proper search:

> This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails.[28]

Gross Construction is an example of another piece of major litigation where the lawyers not only failed to cooperate on e-discovery, they failed to even talk about it. Also, once again, we have a judge placed in what Judge Peck called "the uncomfortable position of having to craft a keyword search methodology for the parties, without adequate information …"[29]

25 *Id.* at 414-415.
26 256 F.R.D. 134 (S.D.N.Y. March 19, 2009).
27 *Id.* at 134.
28 *Id.* at 135.
29 *Id.*

Judge Peck ended up specifying certain keywords, but in other cases judges have refused to do this for the attorneys and have instead suggested they need to work it out themselves or retain experts and come back with expert testimony. For instance, in *Victor Stanley*, Judge Grimm held:

> Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology.[30]

Judge Facciola was even more emphatic when faced with a similar situation in *O'Keffe* where he held:

> Whether search terms or "keywords" will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman and requires that any such conclusion be based on evidence that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence.[31]

Here Judge Peck selected key words for the parties, but not without also telling all attorneys in New York that they need to get with the cooperation program:

> Of course, the best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses *The Sedona Conference Cooperation Proclamation* (available at www.TheSedonaConference.org).
>
> Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar - even those lawyers who did not come of age in the computer era - understand this.

Newman v. Borders, Inc.

The next to cite the Proclamation is another opinion by Judge Facciola: *Newman v. Borders, Inc.*[32] This was a straightforward race discrimination case where the plaintiff moved to compel an eighth deposition to discuss defendant's electronic document retention policy. In looking into this motion Judge Facciola was "stunned by how much time and effort has been spent on discovery in a case." He was, as he put it, "well past being convinced that the potential legal fees in this case, thanks to the many discovery disputes, will dwarf the potential recovery, if there is one."[33] Judge Facciola then resolved the latest dispute and admonished them to cooperate:

> I understand from their papers that the parties attempted to resolve the controversy by trying to agree to an affidavit from Borders that spoke to the issues that arose during Morrow's deposition. They did not try hard enough. Accordingly, in lieu of a 30(b)(6) deposition Borders will submit an affidavit from a Borders representative who is truly knowledgeable that will speak to the following questions … Counsel should become aware of the perceptible trend in the case law that insists that counsel genuinely attempt to resolve discovery disputes.[34]

30 *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260, 262 (D. Md. 2008).
31 *United States v. O'Keefe*, 537 F.Supp.2d 14, 24 (D.D.C. 2008).
32 257 F.R.D. 1 (D.D.C. April 6, 2009).
33 *Id.* at *3.
34 *Id.*

Ford Motor Co. v. Edgewood Properties, Inc.

The next judge to join in is Magistrate Judge Esther Salas in her opinion, *Ford Motor Co. v. Edgewood Properties, Inc.*[35] This is another form of production, paper or plastic case. But this one has a twist. The requesting party asked for plastic, original native with full metadata. The responding party said they would produce in modified paper, here TIFF image files with some metadata.[36] Judge Salas called this "dueling declarations" where it was clear no agreement was reached, but then the responding party "unilaterally adopted its own objection and produced them in TIFF format."[37] The requesting party then stood silent after the TIFF production began. Only later, after all production was complete, did they file an objection and ask the court to intervene and require a reproduction of the same documents in native form.

Judge Salas held that the requesting party had waited too long and had waived the objection. The requesting party should have complained as soon as the first paper production was made. Judge Salas then went on to explain cooperation to counsel and how simple measures could have avoided this whole problem:

> The Sedona Principles and Sedona commentaries thereto are the leading authorities on electronic document retrieval and production. *William A. Gross Const. Assc., Inc. v. American Mfrs. Mut. Ins. Co.,* 256 F.R.D. 134, 136 (S.D.N.Y.2009) ("[t]his Court strongly endorses *The Sedona Conference Cooperation Proclamation"); John B. v. Goetz,* 531 F.3d 448 (6th Cir.2008) (following principles); *Aguilar v. Immigration and Customs Enforc. Div. of U.S. Dep't of Homeland Sec.,* 255 F.R.D. 350 (S.D.N.Y.2008) (same). Relying on the principles and on the Federal Rules, *Aguilar* explicated the procedure by which parties are to propound electronic discovery requests upon each other, and the parties' concomitant obligations thereto. …
>
> The Court finds Edgewood's objection to be out of time. It is beyond cavil that this entire problem could have been avoided had there been an *explicit* agreement between the parties as to production, but as that ship has sailed, it is without question unduly burdensome to a party months after production to require that party to reconstitute their *entire* production to appease a late objection. The advent of E-Discovery does not serve to destroy parties' discovery obligations that would exist in the ordinary course were other media involved. Parties would be best to heed the admonition of a recent court that "the best solution in the entire area of electronic discovery is cooperation among counsel." *William A. Gross, supra,* 256 F.R.D. at 136l.[38]

Dunkin' Donuts Franchised Restaurants LLC v. Grand Cen. Donuts, Inc.

Back in Manhattan, Judge Marilyn Go, joined the cooperation pilgrimage with her opinion in *Dunkin' Donuts Franchised Restaurants LLC v. Grand Cen. Donuts, Inc.*,[39] Once again the e-discovery dispute concerns search protocols for email. The plaintiff wanted a broad production, which defendant claimed would be too burdensome. The dispute was not well developed with no real facts about proposed search alternatives. With a vague background indicating a lack of discussion by the attorneys involved, Judge Go pointed counsel to the Proclamation:

> Finally, the parties have been unable to agree on the appropriate scope of Dunkin's search for emails relevant to the claims and defenses in this case. Rule 26(f) requires the parties to formulate a discovery plan which includes "any issues about disclosure or discovery of electronically stored information." *Fed.R.Civ.P.* 26(f). In addition, *The Sedona Conference Cooperation Proclamation* recommends

35 257 F.R.D. 418 (D.N.J. May 19, 2009).
36 *Id.* at 424.
37 *Id.*
38 *Id.* at 424, 426.
39 2009 WL 1750348 (E.D.N.Y. June 19, 2009).

> that parties cooperate to resolve discovery disputes in order to reduce the rising costs associated with such disputes. *See SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414-15 (S.D.N.Y.2009) (quoting *The Sedona Conference Cooperation Proclamation*). Accordingly, the parties are directed to meet and confer on developing a workable search protocol to obtain the information sought by the defendants in light of what was discussed at the motion hearing. Defendants' proposed search can be narrowed temporally and the scope of the search terms sought tailored to each employee, since some employees may have knowledge of only issues relevant to one set of counterclaims but not the other. The defendants must provide Dunkin with a list of the employees or former employees whose emails they want searched and the specific search terms to be used for each individual depending on whether they were likely to be involved with issues relating to the termination of the franchise agreement or the performance of the store development agreement.[40]

Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n

Magistrate Judge Michael R. Merz became the next *pilgrim-citator* in *Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n*.[41] This case involved a dispute between the parties as to whether they should search for ESI on backup tapes. The Court declined to address the merits of the case, pointing out that the motions had been filed four months after the discovery cut-off date. The briefing on motions, including motions to compel production of ESI on backup tapes, were not completed until just two months before trial. Under these circumstances, the Court declined to even consider the disputes and pointed out that the tardiness of the motions could have been avoided had the rules been followed and the attorneys cooperated:

> Amendments to the Federal Rules of Civil Procedure in 2006 to acknowledge and accommodate the digital revolution were five years in the drafting and recognized in part the potential for ESI to overwhelm the litigation system. The Rules Advisory Committee sought to avoid that result by providing for early consultation among counsel to prevent ESI problems. More recently, The Sedona Conference has issued its *Cooperation Proclamation* to attempt to move litigators in the direction of cooperating by suggesting methods for doing so:
>
> 1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;
>
> 2. Exchanging information of relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
>
> 3. Jointly developing automated search and retrieval methodologies to cull relevant information;
>
> 4. Promoting early identification of form or forms of production;
>
> 5. Developing case-long discovery budgets on proportionality principles; and
>
> 6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.
>
> (*The Sedona Conference Cooperation Proclamation*, July, 2008, at 2; available at thesedonaconference.org). The current dispute is a mild example of the sorts of problems which result when counsel do not deal systematically with ESI

40 *Id.* at *4.
41 2009 WL 2243854 (S.D. Ohio July 24, 2009).

> problems and possibilities at the outset of litigation, instead of filing one-paragraph boilerplate statements about ESI and waiting for the explosion later.
>
> Whether it would have been appropriate for the Court to wade into the middle of this ESI dispute earlier in the case, the Court declines to do so now.

Judge Merz goes one step further than the prior opinions by setting forth the six methods suggested in the Proclamation to start to get litigators to cooperate.

In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation

Judge Sally Shushan takes the Proclamation into the deep south with an e-discovery search opinion: *In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation*.[42] Here the parties had competing lists of search terms. The responding party claimed that the requestors list was too burdensome, that it would produce too many hits and cost an additional $100,000 to review for privilege. As is still common both north and south of the Mason Dixon, this dispute was brought to the court for resolution at the end of the case, not the beginning as the rules contemplate. Here is Judge Shushan's reaction:

> The defendants cite *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Company*, 256 F.R.D. 134 (S.D.N.Y.2009), where the court said the decision "should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce emails or other electronically stored information...."
>
> After reviewing some of the cases and commentators discussing the issue, the court said "the best solution in the entire area of electronic discovery is cooperation among counsel," and cited *The Sedona Conference Cooperation Proclamation. Id.* at 136. The undersigned echos this statement. Unfortunately counsel are not able to reach agreement on the search terms . . . The issue raised by this motion should have been resolved at the beginning of the discovery process and not at the end.

Judge Shushan then ruled against defendant, the party who cited to *Gross Construction*, and compelled discovery. This decision thus shows once again that e-discovery issues must be raised early in a case in order to receive protection from the court from burdensome requests. Do not put it off. Try to cooperate and start talks early, and if it fails, seek relief right away.

Capitol Records, Inc. v. MP3tunes, LLC

In *Capitol Records, Inc. v. MP3tunes, LLC* Judge Frank Maas. issued a complicated opinion concerning search.[43] The case cites to both *Gross Construction* and Proclamation.[44] Judge Maas had earlier directed the attorneys to the Proclamation, but they apparently did not get the message. The attorneys continued to engage in a series of self-serving letters that Judge Mass characterized as "dueling epistles for submission to the Court." The court here resolved some of the many issues presented and ordered the parties to meet and confer on several remaining issues to allow for a reasonable search of the ESI.

Conclusion

With twelve decisions in less than a year the Proclamation is well on its way to judicial acceptance. The lawyers who practice before these judges, and the many other judges that I predict

42 WL 2461716 (E.D. La. Aug. 7, 2009).
43 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009).
44 *Id.* at 2.

will follow, are bound to hear and eventually to heed the call. Attorneys are bound to start to change their ways and cooperate on the many technical issues involved in discovery, especially in e-discovery.

Strategic cooperation on discovery as part of the adversary process makes good sense. It is a waste of time and money to battle over *paper or plastic* or engage in dueling search term lists. If we can cooperate on these discovery issues, we can significantly reduce the transaction costs of litigation and channel the parties arguments towards their proper sphere: legitimate disagreement on application of the law to facts and on the validity of contested facts. Scarce judicial resources should not be wasted on substantively meaningless discovery quarrels. The Bench and Bar alike should work together to continue this important movement towards efficiency and justice in our courts.

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