



Outside Counsel

Expert Analysis

If The Sedona Conference Builds It, Will They Cooperate? Year in Review

It turns out that Jean-Paul Sartre's famous pronouncement that "hell is other people" was overly broad. Other people per se are not the problem, but rather other lawyers—and uncooperative ones at that. A federal judge in the late 1980s confirmed as much, as a recent e-discovery opinion reminds us: "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."¹

If hell is the last stop for attorneys who are "eternally locked in discovery disputes," then The Sedona Conference—a non-profit research and educational institute—wants to be the guardian angel that keeps counsel cooperative and away from that realm. Working Group 1 of The Sedona Conference consists of judges, attorneys and other experts who meet, discuss, and publish on issues relating to electronic discovery. Federal judges are now referring with increasing regularity to the e-discovery guidelines set forth in various publications of The Sedona Conference, including the recently issued The Sedona Conference Cooperation Proclamation. See The Sedona Conference, The Sedona Conference Cooperation Proclamation (July 2008) (available at www.thesedonaconference.org).

The Cooperation Proclamation asks a timeless question: Can't we all just get along? Although this pronouncement by The Sedona Conference is only a few pages long, its drafters seek no less than a "paradigm shift for the discovery process."² Specifically, the Cooperation Proclamation encourages "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."³ On



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the theory that overzealous discovery costs too much and yields too little, the Cooperation Proclamation aims to curb the knee-jerk and often counterproductive aggression sometimes exhibited by counsel in discovery. In this respect, its goal is the same as that of Rule 1 of the Federal Rules of Civil Procedure: to promote the "just, speedy, and inexpensive determination of every action."⁴

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Anticipating critics who might dismiss the proposal as "utopian," the Cooperation Proclamation makes a series of practical recommendations for fostering a cooperative culture in discovery. For example, it proposes "[u]tilizing internal ESI discovery 'point persons' to assist counsel in preparing requests and responses," as well as the development of "case-long discovery budgets" that are predicated on principles of proportionality.⁵

The Cooperation Proclamation also suggests that discovery disputes increasingly be handled by those who are better (or perhaps, best) situated to understand the underlying issues: court-appointed experts, volunteer mediators, or formal alternative dispute resolution programs. In addition, the Cooperation Proclamation proposes "[d]

veloping and distributing practical 'toolkits' to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency," so that current and future generations of the bar and bench will be equipped to handle e-discovery issues.⁶

The impact of the Cooperation Proclamation probably will not be fully understood for some time, until the "trickle effect" upon counsel has had an opportunity to take hold. As the drafters themselves recognize, "success will not be instant." As of Jan. 1, 2009, 44 judges around the country had endorsed the Cooperation Proclamation.⁷ At last count, however, this number had grown to nearly 100 judges from coast to coast, at both the federal and state levels.⁸ Therein lies its heft and its ticket out of the dustbin of utopian history. Moreover, a number of judges have already cited the Cooperation Proclamation in their opinions, including several of the signatories themselves.⁹ From these opinions, a few early trends can be identified.

Courts Demand Courtesy

Although cooperation among counsel is not a novel concept, the Cooperation Proclamation has breathed new life into this old ideal.¹⁰ The need to cooperate is embedded in the Federal Rules of Civil Procedure, particularly in Rule 26(f), which requires parties to meet and confer regarding "any issues about disclosure or discovery of electronically stored information," and, specifically, regarding the scope of discovery, the format of production, and the assertion of privilege.¹¹

In addition, parties bringing discovery-related motions before the court have long been required to certify that both sides previously attempted in good faith to resolve the issue. Now that the Cooperation Proclamation has been issued, however, courts are increasingly sending parties back to work out their discovery differences among themselves.¹²

The first opinion to cite to the Cooperation Proclamation was *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008). That opinion, by Chief United States Magistrate Judge Paul Grimm (one of the Cooperation Proclamation signatories), was

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issued one week after the press conference announcing the Cooperation Proclamation. *Mancia*, which resolved a motion to compel challenging defendants' alleged boilerplate discovery objections, culminated in Judge Grimm ordering the parties to meet and confer to work out their differences, i.e., "to cooperate and communicate."¹³ In so doing, Judge Grimm commented on the affirmative duty of counsel to act consistently with the "spirit and purposes" of the federal rules. This duty "requires cooperation rather than contrariety, communication rather than confrontation."¹⁴

Judge Grimm also commended the Cooperation Proclamation's "laudable goal" of facilitating "cooperative, collaborative, transparent discovery" for future litigants.¹⁵ Since *Mancia*, the Cooperation Proclamation has also been cited with approval by other courts faced with a variety of discovery skirmishes, including those relating to metadata,¹⁶ electronic forms of production,¹⁷ restoration of backup tapes,¹⁸ 30(b)(6) depositions,¹⁹ and search methodology.²⁰

Several courts have recently recognized that "the best solution in the entire area of electronic discovery is cooperation among counsel."²¹ Further, in a case with more than 115 motions and 462 docket entries in less than a year, one court even issued a sua sponte order to stem the overuse of motion practice involving discovery and other matters that the parties ought "to be able to resolve without judicial involvement."²²

In light of these decisions, there is by now a "perceptible trend in the case law that insists that counsel genuinely attempt to resolve discovery disputes."²³ By no means, however, do the opinions citing the Cooperation Proclamation (much less the Proclamation itself) suggest that lawyers engaging in discovery need to be pushovers. It is up to counsel to strike the appropriate balance, with an eye toward implementing the principles of proportionality that consider both the stakes of the case and the cost and scope of discovery.

Two to Tango

The message from the bench is clear: "Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI."²⁴ However, it takes two to tango, so to speak, which raises the question of how a lawyer who is willing to cooperate should proceed when opposing counsel is not.

Uncooperative opposing counsel span every generation. New lawyers may not yet have developed the confidence or skills to cooperate effectively, and seasoned veterans may reflexively try to "hide-the-ball," as many have done throughout their careers. Judge Grimm has preemptively reached out to lawyers of all experience levels laboring under the misconception that effective advocacy

requires them to be adversarial at every turn, observing that "there is nothing inherent in [the legal system] that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends."²⁵

Overly broad discovery and roadblock responses by counsel, according to Judge Grimm, violate the duty of loyalty to the "procedures and institutions the adversary system is intended to serve."²⁶ The so-called overzealous advocate should be concerned about his duty of loyalty to the court system and the goal of reaching a "just, speedy, and efficient" resolution of the litigation, rather than fancying himself a warrior intent on beating the opposition into submission.

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Unfortunately, the warrior mentality remains prevalent and probably will continue to manifest itself in the discovery process until the Cooperation Proclamation becomes even more widely recognized. In situations involving an unwilling dance partner, the best course of action simply may be to document cooperative overtures and the basis for making them—as well as the uncivil responses received. Down the road, if the dispute ends up before a judge or special master, such documentation will help to keep the cooperative counsel out of that special place in hell—and put the nasty adversary in the hot seat.

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1. *Kreuger v. Pelican Prod. Corp.*, C/A No. 87-2385-A, slip. op. (W.D. Okla. Feb. 24, 1989), quoted in *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 n.3 (D. Md. 2008) (Grimm, Mag. J.).

2. Cooperation Proclamation at 3.

3. Cooperation Proclamation at 1.

4. Cooperation Proclamation at 1; Fed. R. Civ. P. 1.

5. Cooperation Proclamation at 2.

6. Cooperation Proclamation at 3.

7. Judicial Endorsement as of Jan. 1, 2009 (available at www.thesedonaconference.org/content/tsc_cooperation_proclamation) [last visited Oct. 9, 2009].

8. As of Oct. 7, 2009, a dozen New York judges had endorsed the Cooperation Proclamation. At the federal level, those judges include Judge David E. Peebles of the Northern District of New York, Judge Marilyn D. Go of the Eastern District of New York, and Judges Frank Maas, Andrew Peck, Shira Scheindlin, Lisa Margaret Smith and Richard J. Sullivan of the Southern District of New York. At the state level, those judges include Judges Leonard B. Austin and Richard B. Lowe III of the New York State Supreme Court, Judges Carolyn E. Demarest and Ira B. Warshawsky of the New York State Supreme Court, Commercial Division, and Judge Helen Freedman of the New York State Appellate Division. Richard

G. Braman, executive director of The Sedona Conference®, provided this information. An updated list of Cooperation Proclamation signatories is expected to be publicly released by The Sedona Conference in fall 2009.

9. See, e.g., *Neuman v. Borders Inc.*, No. 07-492, 2009 WL 931545, at 3 n.3 (D.D.C. April 6, 2009) (Facciola, Mag. J.); *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009); *Mancia*, 253 F.R.D. at 363.

10. There is a long and storied history of courts urging cooperation among parties, as developed in a highly entertaining footnote in *Mancia* (which also contains the quotation set forth in the opening paragraph of this article). 253 F.R.D. at 361 n.3.

11. Fed. R. Civ. P. 26(f)(3). Although Rule 26(f) was amended in 2006 to explicitly refer to "electronically stored information," the rules have, since 2000 (the year in which local exemption from the Rule and the requirement to meet in person were eliminated), uniformly required parties to meet and confer about discovery issues prior to the commencement of discovery.

12. See, e.g., *Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts Inc.*, No. CV 2007-4027, 2009 WL 1750348 (E.D.N.Y. June 19, 2009) (Go, Mag. J.) (ordering parties to meet and confer to develop a workable search protocol, pursuant to Fed. R. Civ. P. 26(f) and the Cooperation Proclamation); *Collins & Aikman Corp.*, 256 F.R.D. at 415 (same).

13. *Mancia*, 253 F.R.D. at 365.

14. *Mancia*, 253 F.R.D. at 358.

15. *Mancia*, 253 F.R.D. at 363 (citing and quoting the Cooperation Proclamation).

16. See *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 359 (S.D.N.Y. 2008) (Maas, Mag. J.).

17. See *Ford Motor Co. v. Edgewood Props. Inc.*, No. 06-1278, 2009 WL 1416223, at 5 (D.N.J. May 19, 2009) (Salas, Mag. J.); *Covad Commc'ns Co. v. Revonet Inc.*, 254 F.R.D. 147, 149 (D.D.C. 2008) (Facciola, Mag. J.).

18. See *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) (Merz, Mag. J.).

19. See *Neuman*, 2009 WL 931545, at 3 n.3.

20. See *Capitol Records Inc. v. MP3tunes LLC*, No. 07 Civ. 9931, 2009 WL 2568431, at 2 (S.D.N.Y. Aug. 13, 2009); *Dunkin' Donuts*, 2009 WL 1750348, at 4; *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (Peck, Mag. J.); *Collins & Aikman Corp.*, 256 F.R.D. at 415.

21. *Gross*, 256 F.R.D. at 136; see also *Ford Motor Co.*, 2009 WL 1416223, at 8 (same).

22. *Gipson v. Sv. Bell Tel. Co.*, Civ. No. 08-2017, 2008 U.S. Dist. LEXIS 103822, at 2 (D. Kan. Dec. 23, 2008) (directing the parties to read the Cooperation Proclamation, which the court had previously endorsed).

23. *Newman*, 2009 WL 931545, at 3 n.3 (citing the Cooperation Proclamation).

24. *Gross*, 2009 WL 724954, at 3.

25. *Mancia*, 253 F.R.D. at 361.

26. *Mancia*, 253 F.R.D. at 362 (internal citations omitted).