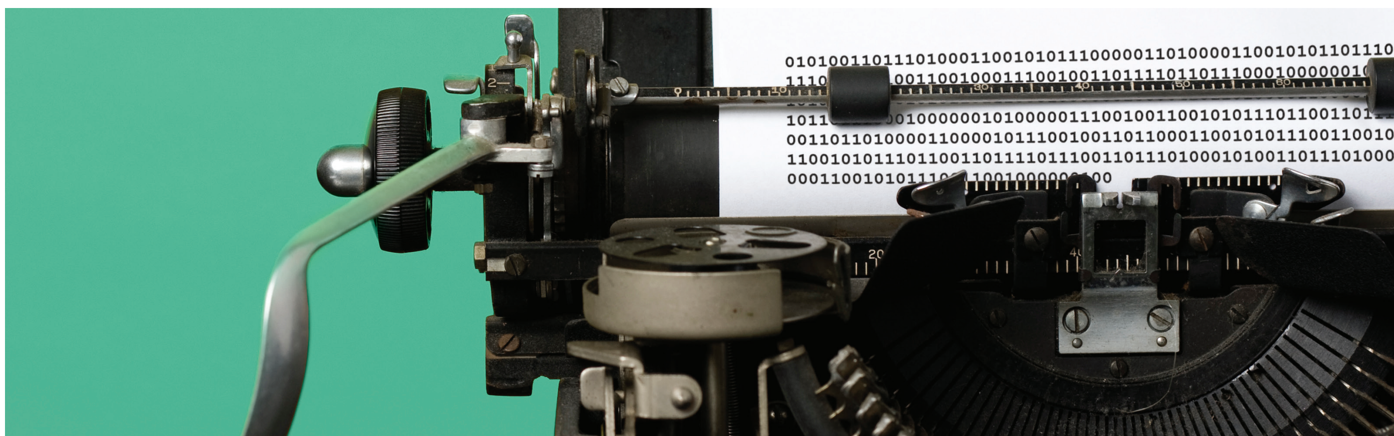

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Learning to Cooperate

As recent developments in case law and the Federal Rules of Civil Procedure have shown, counsel can better serve their clients by adopting a cooperative and engaged approach to the discovery process. Counsel must learn how to be masters of dialogue and not just debate.

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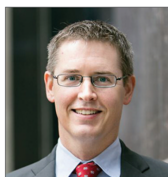

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Disputes over discovery started long before the widespread use of electronically stored information (ESI). New age issues such as the scope of preservation and form of production were not even imagined at that time. This well-quoted remark was penned almost 25 years ago:

> "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."

(*Krueger v. Pelican Prods. Corp., No. 87-2385-A, slip op. (W.D. Okla. Feb. 24, 1989) (Alley, J.)*.)

Various bar reports and studies show continued dissatisfaction with the discovery process today. One remedy to this discontent that has gained currency is the idea of "cooperation" in discovery. While attractive in concept, cooperation in practice causes unease among litigators, who question:

- What cooperation means.
- Whether cooperation is truly required, including its impact on traditional notions of advocacy and protection of clients' interests.

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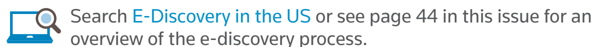
- What cooperation entails and how to facilitate cooperation with opposing counsel.



Search E-Discovery in the US or see page 44 in this issue for an overview of the e-discovery process.

THE MEANING OF COOPERATION

When The Sedona Conference published The Cooperation Proclamation in 2008, it inadvertently created a significant amount of confusion with its stated goal of promoting "transparent" discovery. The meaning of transparent is too expansive without context. It could mean that adversaries have the same level of access to clients or data, or it could mean simply being collaborative and cooperative regarding the use of procedures and exchanges of information needed to facilitate targeted and efficient discovery. The Sedona Conference has since made clear that the latter meaning of transparent is the intended usage.

WHAT COOPERATION IS NOT

The Sedona Conference explicitly states that cooperation:

- Is not capitulation.
- Is not an abdication of appropriate and vigorous advocacy.
- Does not require volunteering legal theories to opposing counsel or suggesting paths along which discovery might take place.

(*The Case for Cooperation, 10 Sedona Conf. J. 339, 340, 359 (2009).*)

Still, when courts cite only The Cooperation Proclamation's call for transparent discovery without any of this context, litigants are reasonably hesitant to start down the path of cooperation for fear of where it might ultimately lead. However, cooperation does not mean that counsel:

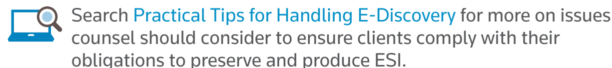
- Should not ask for the materials they need in discovery. Counsel can and should use the allowed discovery mechanisms as appropriate.
- Cannot lodge objections or seek to narrow preservation and production obligations. Counsel can and should make objections and seek relief where appropriate.
- Must guide adversaries to "hot" documents.
- Must give adversaries unrestricted access to witnesses or free rein to rifle through its client's cabinets, computers and data systems.
- Will always reach agreement with opposing counsel. Reasonable minds will disagree and counsel will likely still have discovery disputes and motions even in an ideal world.
- May reveal client secrets or confidences in response to discovery questions absent client consent. The traditional rules regarding the attorney-client privilege and work product protection still apply.

WHAT COOPERATION IS

A more accurate term to describe the level of transparency encouraged in The Cooperation Proclamation is "translucency." This implies disclosure, but not unrestrained revelation. Cooperation means that counsel will act in good faith and with candor in an effort to make discovery more efficient and less costly. In particular, counsel should cooperate on those aspects of discovery which are process-related rather than substantive (see below *Opportunities for Cooperation*).

COOPERATION IS REQUIRED

At the time of its release, The Cooperation Proclamation provided attorneys with a practical, if aspirational, framework to understand cooperation. Today, there is really no longer a question of whether or not counsel should cooperate in discovery. Cooperation is required by the current and proposed rules, expected by the courts and consistent with attorneys' ethical obligations. Perhaps most important, cooperation is also what the clients want.



Search Practical Tips for Handling E-Discovery for more on issues counsel should consider to ensure clients comply with their obligations to preserve and produce ESI.

THE IMPACT OF THE COOPERATION PROCLAMATION

The impact of The Cooperation Proclamation would have been negligible had it not tapped into a sea of discontent surrounding the modern discovery process. As reflected in the quote from the *Krueger* case, by the late 1980s discovery had become just another "scorched-earth battlefield" in the fight for strategic advantages in litigation. With the rapid growth of ESI in the last decade, the costs and inefficiencies of this "win-at-all-costs" attitude threatened to undermine the capacity of the civil justice system to resolve disputes on their merits. Indeed, judges, attorneys and academics became more concerned than ever that the costs associated with bringing or defending a case in court may effectively preclude rightful litigants from having a dispute adjudicated in the court system.

Almost immediately after its publication in 2008, courts began to embrace The Cooperation Proclamation. Within a week of its announcement, federal Magistrate Judge Paul W. Grimm (now a district court judge and Chair of the Discovery Subcommittee to the Federal Advisory Committee on Civil Rules) cited to The Cooperation Proclamation (see *Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 359 (D. Md. 2008)*).

To date, 38 court opinions have cited to The Cooperation Proclamation and over 125 judges have endorsed it publicly (see, for example, *William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (Peck, Mag. J.); U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co., No. 12-cv-6811, 2013 WL*

Practice Notes

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*1728933, at *7 (S.D.N.Y. Apr. 22, 2013) (Francis, Mag. J.); Cartel Asset Mgmt. v. Ocwen Fin. Corp., No. 01-cv-01644, 2010 WL 502721, at *15 (D. Colo. Feb. 8, 2010)*).

More significantly, courts are beginning to use The Cooperation Proclamation as a tool to compel attorneys to reach agreement on discovery matters. For example, some courts have declined to intervene where the record fails to show that the parties attempted to cooperate in good faith to resolve discovery disputes (see, for example, *Am. Fed'n of State Cnty. & Mun. Employees v. Ortho-McNeil-Janssen Pharms., Inc., No. 08-cv-5904, 2010 WL 5186088, at *5 (E.D. Pa. Dec. 21, 2010)*).

Additionally, courts have repeatedly invoked The Cooperation Proclamation in attempts to "resolve discovery disputes by agreement rather than pugnacious contention and judicial fiat" (*Kleen Prods. LLC v. Packaging Corp. of Am., No. 10-cv-5711, 2013 WL 120240, at *1 (N.D. Ill. Jan. 9, 2013)*; see also *Tadayon v. Greyhound Bus Lines, Inc., No. 10-cv-1326, 2012 WL 2048257, at *6 (D.D.C. June 6, 2012) (Facciola, Mag. J.)* (requiring joint discovery submissions and biweekly telephone conferences with the court to ensure the parties were making "genuine efforts to engage in the cooperative discovery regimen contemplated by The Sedona Conference Cooperation Proclamation")).

THE FRCP ASSUMES COOPERATION

Although the American civil justice system is adversarial, it does not endorse or support a win-at-all-costs approach to litigation. The overriding theme of 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" (*Bd. of Regents of Univ. of Neb. v. BASF Corp., No. 04-cv-3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007)*).

Indeed, at its core, the Federal Rules of Civil Procedure (FRCP) is a party-controlled set of procedures that relies on cooperation to work. Beginning with FRCP 1, the goal of the civil justice system is "to secure the just, speedy, and inexpensive determination of every action and proceeding" (*FRCP 1*). To achieve this goal, the FRCP assumes cooperation in discovery between the parties and authorizes sanctions for litigants who fail to cooperate and act in good faith. For example, under the FRCP:

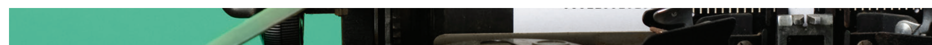
- Parties must disclose certain information, including categories of ESI, that the disclosing party has in its possession, custody or control and may use to support its claims or defenses (*FRCP 26(a)*).
- Parties are jointly responsible for conducting a meaningful conference to develop a discovery plan, which must address the parties' views on various discovery subjects, including phased discovery, discovery of ESI, forms of production and the process for claiming attorney-client privilege and work product protection (*FRCP 26(f)*).
- Counsel must certify, under threat of sanctions, that their discovery requests, responses and objections are consistent with the FRCP, have not been interposed for an improper purpose and are not unreasonable or unduly burdensome (*FRCP 26(g)*).
- Parties can be sanctioned for failure to participate in good faith in developing and submitting a proposed discovery plan as required by FRCP 26(f) (*FRCP 37(f)*).

THE PROPOSED AMENDMENTS TO THE FRCP PROMOTE COOPERATION

If there is any doubt about the future of cooperation in discovery, the 2013 proposed amendments to the FRCP include a reference to cooperation in the Advisory Committee Note to FRCP 1. It states that effective advocacy "is consistent with — and indeed depends upon — cooperative and proportional use of procedure" (*FRCP 1 Advisory Comm. Note (Proposed Official Draft 2013)*). While the committee note is not a binding rule, its inclusion in the proposed amendments reinforces that cooperation is an essential element of discovery practice to attain the just, speedy and inexpensive determination of legal matters.

COURTS EXPECT COOPERATION

Even without a specific mandate in the FRCP, several districts have adopted local court rules, guidelines and default standards for electronic discovery that address and promote cooperation. In some cases, these rules set only an expectation that the parties will cooperate. In others, the rules mandate that the parties cooperate on particular areas of discovery. Regardless of their level of specificity, the common thread connecting these rules is the belief that cooperation in discovery is not an



Contrary to popular conception, zealous advocacy has never been carte blanche for litigants to engage in win-at-all-costs discovery tactics.

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ideal, but an expected norm. Examples of this expectation are demonstrated by the following:

- "An attorney's representation of a client is improved by conducting discovery in a cooperative manner" (see *7th Cir. Elec. Discovery Comm., Principles Related to the Discovery of Electronically Stored Info., Principle 1.02 (Cooperation)*; *D. Kan. Guidelines for Cases Involving ESI, Guideline 2: Principle of Cooperation*; *N.D. Ill. Standing Order Relating to the Discovery of Electronically Stored Info., § 1.02 Cooperation*).
- "Cooperative discovery arrangements in the interest of reducing delay and expense are mandated" (see *S.D. Ill. L. Civ. R. 26.1(d)*).
- "The Court expects cooperation on issues relating to the preservation, collection, search, review, and production of ESI" (see *N.D. Cal. Guidelines for the Discovery of Electronically Stored Info., Guideline 1.02 (Cooperation)*).
- "Parties are expected to reach agreements cooperatively on how to conduct discovery under Fed. R. Civ. P. 26-36" (see *D. Del. Default Standard for Discovery, Std. 1*).
- "Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process" (see *S.D.N.Y. and E.D.N.Y. L. Civ. R. 26.4*).
- "The court expects the parties to cooperatively reach agreement on how to conduct e-discovery" (see *N.D. Ohio Default Standard for Discovery of Electronically Stored Info., Std. 1*; *M.D. Tenn. Default Standard for Discovery of Electronically Stored Info., Std. 1*).

THE ETHICAL RULES ARE CONSISTENT WITH COOPERATION

Despite judicial calls for cooperation, many litigators have a lurking belief that cooperation is inconsistent with their ethical requirement of "zealous advocacy" in the representation of clients. However, this resistance toward cooperation is founded on a fundamental misunderstanding of advocacy under the Rules of Professional Conduct. The duty to be a zealous advocate has never been unconstrained. In fact, the word "zeal" was removed from the rules in 1983 and placed in a non-binding comment.

Moreover, while attorneys have an ethical duty to their clients, they have simultaneous duties to the tribunal, the judicial system, opposing counsel and opposing parties. Attorneys are both representatives of their clients and officers of the legal system (*Model Rules of Prof'l Conduct Preamble ¶ 1*). They must conform their conduct to the law and should "use the law's procedures only for legitimate purposes and not to harass or intimidate others" (*Model Rules of Prof'l Conduct Preamble ¶ 5*). Further, attorneys may not abuse the legal process to advance their clients' interests, if those interests run afoul of the ethical obligation to expedite litigation (*Model Rules of Prof'l Conduct Rule 3.2 & cmt.*).

Contrary to popular conception, zealous advocacy has never been carte blanche for litigants to engage in win-at-all-costs discovery tactics. As the FRCP requires, and courts and judges have made clear, attorneys have a competing ethical obligation to make the discovery process work in a just, speedy and inexpensive manner. Cooperation is inherently ethical because it helps attorneys meet this obligation.

The ABCs of Cooperation

Cooperation requires active preparation and the ability to stay focused on key issues. Attorneys cannot get sidetracked by petty slights and hostility that may corrode their interactions over the course of litigation. There is no set prescription to achieve cooperation, but the following "ABCs" of cooperation provide a good starting point:

- Assess which topics are the best candidates for cooperation and be armed with reasonable proposals on these topics. This may include proposals regarding:
  - preservation;
  - date ranges;
  - custodian limitations;
  - targeted requests for information; and
  - search methodologies.
- Be flexible. Like any negotiation, counsel may have to compromise or use alternative means to get the discovery or relief that the client needs.
- Consider what discovery is truly needed, and not just desired.
- Document the agreements reached with opposing counsel, as well as any areas of dispute, and try to obtain resolution without the court's intervention where possible.
- Explain to clients the benefits of cooperation, such as lower costs and reduced risk, and obtain consent for disclosures that may be warranted.
- Focus on the directive of FRCP 1 — to achieve a just, speedy and inexpensive outcome.

CLIENTS WANT COOPERATION

The best argument in favor of cooperation is that clients want it. Clients are beginning to realize that a scorched-earth approach to discovery, and the wasteful and time-consuming discovery disputes such an approach invites, rarely (if ever) serves their interests. Moreover, clients want cooperation because they recognize that being cooperative enhances their attorneys' credibility with the court.

If reasonableness and good faith are the touchstones of winning discovery disputes, cooperation makes it more likely either that discovery disputes can be avoided altogether or that a court will view the client's efforts as reasonable, reducing the likelihood of an onerous court order. Further, a cooperative environment is

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often a far better way to address contentious and difficult issues when they arise because the disagreements are more likely to be crystallized through dialogue and based on reasonable disagreements on facts or law and not charged emotions or petty disputes. In short, attorneys should save the battlefield mentality for the fight on the merits. In discovery, the client's interests are better served by translucency and cooperation.

COOPERATION IN ACTION

It should be clear that cooperation in discovery does not entail absolute harmony between opposing counsel. Rather, cooperation in discovery involves making the process more efficient, less wasteful and, ultimately, less costly. This type of cooperation gets the parties to where they were going anyway, but involves far less pain and expense.

If the parties refuse to cooperate, counsel should anticipate that a court will use its considerable persuasive powers to make the parties cooperate.

OPPORTUNITIES FOR COOPERATION

A particular litigation matter may offer a myriad of opportunities for cooperation, after appropriate consultation with the client. Most matters will lend themselves to cooperation on one or more of the following topics:

- Limitations on preservation (for example, specifying or excluding locations or types of evidence based on costs, burdens or duplication of other, more accessible sources).
- Number of custodians subject to preservation or collection.
- Relevant time periods and appropriate date ranges for data collection or culling purposes.
- Forms of production.
- Privilege issues and processes for addressing privilege claims, including privilege log requirements and exclusions, claw-back agreements and orders under Federal Rule of Evidence 502(d).
- Search protocols or methodologies, including keywords, search terms and more sophisticated technology-assisted review protocols.
- Sampling or exemplars.
- Phasing or tiering discovery.
- Narrowing the scope of discovery requests.

If the parties refuse to cooperate on these topics, counsel should anticipate that a court will use its considerable persuasive powers to make the parties cooperate (see, for example, *Moore v. Publicis Groupe, 287 F.R.D. 182, 184 (S.D.N.Y. 2012)* (advising counsel to seek agreement on the use of predictive coding); *SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 415 (S.D.N.Y. 2009)* (directing parties "to meet and confer forthwith and develop a workable search protocol"); *Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc., No. 07-cv-4027, 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009)* (directing the parties to meet and confer on a workable e-mail search protocol that would include date range restrictions and search terms tailored to specific claims)).

Search E-Discovery Project Management for a Checklist of ways to prepare for a meet and confer with opposing counsel and some of the production, processing and review issues involved.

KEY BENEFITS OF COOPERATION

It may, admittedly, take more effort to cooperate. However, cooperation offers a legion of upsides for attorneys and their clients, including:

- Fewer discovery disputes.
- Decreased motion practice.
- Lower potential for sanctions.
- Reduced discovery costs, especially in cases where both sides work together to focus discovery on the most relevant information.
- Enhanced credibility in the eyes of the court.

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