Learning to Cooperate

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This Article examines the meaning of cooperation in discovery, whether cooperation is truly required, what cooperation entails, and how to facilitate cooperation with opposing counsel.

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Disputes over discovery started long before the widespread use of electronically stored information (ESI). This well-quoted remark by Judge Wayne E. Alley was penned more than 30 years ago, at a time when new-age arguments over the scope of preservation or form of production were not even imagined:

> "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.).)

Dissatisfaction with the discovery process remains the norm today. One remedy to this discontent that has gained currency is the idea of cooperation in discovery. Although attractive as a concept, cooperation in practice causes unease among litigators, who question:

- What cooperation means (see *The Meaning of Cooperation*).
- Whether cooperation is truly required, including its impact on traditional notions of advocacy and protection of clients' interests (see *Cooperation Is Required*).
- What cooperation entails and how to facilitate cooperation with opposing counsel (see *Cooperation in Action*).

See *Practice Note, E-Discovery in the US: Overview* for an explanation of the e-discovery process.

The Meaning of Cooperation

In 2008, the Sedona Conference published *The Cooperation Proclamation*, an advisory document promoting cooperation during pre-trial discovery. The Cooperation Proclamation received judicial endorsements from hundreds of state and federal court judges across the country, but it also inadvertently created a significant amount of confusion with its stated goal of promoting transparent discovery. The meaning of transparent is too expansive without context. The Sedona Conference has since made clear that it did not intend to suggest, for example, that adversaries should have equal access to one another's clients and their data. Identifying transparency as a goal was meant only to encourage mutually beneficial collaboration in the use of procedures and exchanges of information needed to facilitate targeted and efficient discovery. In short, instead of always defaulting to maximalist adversarial positions in discovery, The Cooperation Proclamation pointed out that greater transparency in parts of the discovery could produce a win-win for all parties.

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 may ultimately lead. So let it be known that cooperation does not constrain counsel's advocacy in discovery. As the following examples illustrate, counsel can engage in cooperative discovery while continuing to zealously advocate for their clients:

- Cooperation does not preclude counsel from asking for the materials they need in discovery. Counsel can and should use the allowed discovery mechanisms as appropriate.

- Cooperation does not preclude counsel from lodging objections or seeking to narrow preservation and production obligations. Counsel can and should make objections and seek relief where appropriate.

- Cooperation does not require counsel to guide adversaries to so-called hot documents.

- Cooperation does not require counsel to give adversaries unrestricted access to witnesses or free rein to rifle through their client's cabinets, computers, and data systems.

- Cooperation does not mean that counsel will always reach agreement with opposing counsel. Reasonable minds will disagree, and counsel will likely still have discovery disputes and motions despite well-intentioned cooperation.

- Cooperation does not mean that counsel 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.

The aspiration, even the intent, to cooperate also need not be formalized into an express promise such as a written discovery protocol. Indeed, while cooperation in discovery should be the parties' goal, memorializing that goal in an agreement or protocol can be dangerous (see, for example, Evans, G., "A Tale of Two Cases: TAR Trouble Arises from ESI Protocol" (2021) (warning against "feel-good provision[s] regarding cooperation" in ESI protocols and comparing outcomes in two cases, one involving such a provision and one that did not)). However, even if express cooperation agreements are not necessarily advisable, cooperation should still be promoted as the foundational stance of the parties engaged in discovery; lawyers and parties should not view particular cautionary tales as reason to shy away from cooperation or wave off cooperation writ large.

What Cooperation Is

The level of transparency encouraged in *The Cooperation Proclamation* is "translucency": instead of a picture window, imagine frosted or etched glass. Translucency implies disclosure but not unrestrained revelation. Cooperation does not eliminate the arm's-length, adversarial element of pre-trial litigation. Instead, cooperation means that counsel will act in good faith and with candor in an effort to make discovery more efficient and less costly for all parties. In particular, counsel should always seek to cooperate on those aspects of discovery which are process-related instead of substantive (see *Opportunities for Cooperation* and *The ABCs of Cooperation*).

Cooperation Is Required

At the time of its release in 2008, *The Cooperation Proclamation* provided attorneys with an aspirational, although still practical, framework to understand cooperation. Today, there is no longer a question of whether 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; cooperation in discovery can lead to significant cost savings in what is becoming a prohibitively expensive battlefield in litigation.

The Impact of The Cooperation Proclamation

The impact of *The Cooperation Proclamation* was magnified by tapping 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 two decades, the costs and inefficiencies of this win-at-all-costs attitude have threatened to undermine the capacity of the civil justice system to resolve disputes on their merits. Indeed, judges, attorneys, and academics continue to be concerned that the discovery costs associated with bringing or defending a case in court may effectively preclude rightful litigants from having a dispute adjudicated in the court system.

Courts began to embrace *The Cooperation Proclamation* almost immediately after its publication in 2008. 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* and opined that if its goals could be achieved, "the benefits will be profound." (*Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 359 (D. Md. 2008)*).

To date, at least 68 court opinions have cited to *The Cooperation Proclamation* and dozens of judges have endorsed it publicly (see, for example, *Electro-Mech. Prods., Inc. v. Alan Lupton Assocs. Inc.*, No. 1:22-CV-00763-PAB-SBP, 2025 WL 51205, at *9 (D. Colo. Jan. 8, 2025); *Equal Emp. Opportunity Comm'n v. Glob. Med. Response, Inc.*, No. 1:22-CV-02544-DDD-SBP, 2024 WL 5397527, at *8 (D. Colo. Oct. 1, 2024); *In re Insulin Pricing Litig.,* No. 23-MD-3080 (BRM) (RLS), 2024 WL 2808083, at *1 (D.N.J. May 28, 2024); *Paieri v. W. Conf. of Teamsters Pension Tr.,* No. 2:23-CV-00922-LK, 2023 WL 8717173, at *5 (W.D. Wash. Dec. 18, 2023); *Benanav v. Healthy Paws Pet Ins. LLC,* No. C20-00421-LK, 2022 WL 3587982, at *3 (W.D. Wash. Aug. 22, 2022)*; Guy v. Absopure Water Co.,* No. 20-12734, 2021 WL 5511722, at *1 (E.D. Mich. July 13, 2021); *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.); *Perez v. Mueller,* No. 13-C-1302, 2014 WL 2050606, at *6 (E.D. Wis. May 19, 2014); *Hyles v. New York City,* No. 10CIV3119ATAJP, 2016 WL 4077114, at *2 (S.D.N.Y. Aug. 1, 2016); *Lawson v. Love's Travel Stops & Country Stores, Inc.,* No. 1:17-CV-1266, 2019 WL 7102450, at *5 (M.D. Pa. Dec. 23, 2019)).

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) (directing the parties to meet and confer "in good faith" while "commend[ing]" *The Cooperation Proclamation* to them and "strongly suggest[ing] they take [it] . . . seriously")).

Even where courts do intervene in discovery disputes, they have also ordered the parties to cooperate in determining how to comply with their orders (see, for example, *Stephan Zouras LLP v. Marrone,* No. 3:20-CV-2357, 2022 WL 4007296, at *6–7 (M.D. Pa. Sept. 1, 2022) (granting motion to compel production of documents but ordering the parties to "engage in [a] collaborative process . . . consistent with the Sedona principles" to determine how to comply with the order); *Benanav*, 2022 WL 3587982, at *6 (granting motion to compel and ordering the parties "to meet and confer in good faith to negotiate search terms that are designed to capture" responsive documents).

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")); *Boulder Falcon, LLC v. Brown*, No. 222CV00042JNPJCB, 2023 WL 2914343, at *5 (D. Utah Apr. 12, 2023) (citing *Tadayon* and requiring the parties to appear at biweekly status conferences through the end of fact discovery "[given the acrimonious nature of the parties' conduct during discovery in this case.").

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)*).

See Practice Note, E-Discovery in the US: Overview for information on issues counsel should consider to ensure clients comply with their obligations to preserve and produce ESI.

The 2015 Amendments to the FRCP Promote Cooperation

The Federal Rules of Civil Procedure were updated in 2015, and one of the most notable amendments that was made to was to Rule 1. As Chief Justice John Roberts explained in his 2015 Year-End Report, the rule was expanded to "make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation" and to "highlight the point that lawyers—though representing adverse parties—have an affirmative duty to work together . . . to achieve prompt and efficient resolutions of disputes." The Advisory Committee Note to FRCP 1 also states that effective advocacy "is consistent with—and indeed depends upon—[lawyers' and parties'] cooperative and proportional use of procedure." (FRCP 1 Advisory Comm. Note).

Additional amendments relevant to cooperation were made to discovery-related rules. Parties' discovery plans must now address not only disclosure and discovery of ESI but also preservation of ESI, making explicit another opportunity for parties to come to cooperative agreement (FRCP 26(f)). However, more fundamentally, the amendments to Rule 26(b)(1) changed the language defining the scope of discovery to emphasize what Chief Justice Roberts called "the common-sense concept of proportionality." (2015 Year-End Report). As the Advisory Committee Note to Rule 26 states, consideration of this common-sense concept to resolve disputes is a "collective responsibility" of the parties and the court.

As Chief Justice Roberts noted, the success of this renewed emphasis on proportionality and collective responsibility, as well as the amendments to Rule 1 and other rules, will depend on whether counsel and parties will "affirmatively search out cooperative solutions . . . and assume shared responsibility with opposing counsel to achieve just results." (2015 Year-End Report, emphasis added).

Courts Expect Cooperation

Separate from the 2015 amendments to the Federal Rules of Civil Procedure, various federal courts have local court rules, guidelines, and default standards for electronic discovery that address and promote cooperation. In some cases, these local court 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 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 *D. Kan. Guidelines for Cases Involving ESI, Guideline 2: Principle of Cooperation*).
- "An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner" and "[t]he failure . . . to cooperate . . . raises litigation costs and contributes to the risk of sanctions." (7th Cir. Elec. Discovery Comm., Principles Related to the Discovery of Electronically Stored Info., Principle 1.02 (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. 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.

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.

Clients Want Cooperation

Particularly for litigators who are hesitant to embrace 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 that such an approach invites, rarely (if ever) serves their interests, strategically or economically (see, for example, *Electro-Mech. Prods., Inc.*, 2025 WL 51205, at 18* (awarding over $23,000 in attorney's fees and expenses incurred by third party in resisting overbroad subpoena request, where plaintiff had failed to cooperate with subpoenaed party to narrow the scope of the request); *Uhlig, LLC v. Shirley*, 895 F. Supp. 2d 707 (D.S.C. 2012) (applying a 60% reduction to successful plaintiff's request for attorney's fees in an effort not to "reward [Plaintiff] for its considerable contribution to making this litigation more complicated and prolonged than necessary," including via disputes over discovery of ESI)). 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 stance is 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, rather than 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 cooperative translucency.

Cooperation in Action

It should be clear that cooperation in discovery does not require, let alone mandate, 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 ultimately going to arrive, but with far less pain and expense.

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 (TAR) protocols.
- Sampling or exemplars.
- Phasing or tiering discovery.
- Narrowing the scope of discovery requests.

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

The Judge's Role in Cooperation

If the parties refuse to cooperate on discovery matters, counsel should anticipate that a court will use its considerable persuasive powers to make the parties cooperate (see, for example, *Benanav*, 2022 WL 3587982, *at *6* (ordering parties to seek agreement on search terms within seven days)*; In re Actos Antitrust Litig.,* 340 F.R.D. 549, 554 (S.D.N.Y. 2022) (ordering parties to seek agreement on terms of a privilege log protocol); *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 search protocol that would include date range restrictions and search terms tailored to specific claims)).

Courts may also take a more aggressive tack in enforcing cooperation or punishing its absence (see, for example, *Jarboe v. Cherry Creek Mortg. Co.*, No. 19-CV-01529-CMA-KLM, 2020 WL 6074254, at *2 (D. Colo. Oct. 15, 2020) (noting that appointment of a special master with "the ability to apportion costs as she sees fit based on her assessment of the parties' responsibility for her involvement would encourage the parties to "confer . . . to avoid unnecessary and wasteful disputes"); *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 3288058, at *1 (D. Kan. June 18, 2020) (shifting costs of technology assisted review of ESI to the plaintiff whose tactics "unnecessarily perpetuated and exacerbated ESI/TAR expenses").

Key Benefits of Cooperation

It may, admittedly, take more effort to cooperate with opposing counsel than reflexively opposing everything proposed by the opposing party. However, this time and effort is well worth the investment, because 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.

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 basics 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.

The views expressed in this article are those of the authors and not necessarily those of Redgrave LLP or its clients.

