Professional Perspective

Cooperation in the Discovery Process After the Sedona Conference Proclamation

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The Federal Rules of Civil Procedure were crafted based on the assumption that parties to a civil case largely would manage discovery and resolve any discovery disputes on their own, without the need for judicial intervention. See Fed. R. Civ. P. 26 (2000 Adv. Comm. Notes, 2015 Adv. Comm Notes). Judges, scholars, and practitioners have encouraged cooperation.

Actual cooperation, however, has proven elusive in practice. Parties often mire themselves in numerous motions to compel and make allegations of misconduct or bad faith. Lawyers continue to send midnight "nastygrams" and attempt to leverage good-faith mistakes into case-terminating sanctions. At the same time, judges are often asked to rule on a myriad of discovery issues, from scope of preservation to the adequacy of privilege log entries.

The resulting intensity leads to frustration for many practitioners and burnout for some, accompanied by the overwhelming sense that discovery can be not only unduly expensive, but also the most challenging—and least appreciated—aspect of any case.

In this article, we explore whether the objective of cooperation is misunderstood—or simply misinterpreted—and we suggest steps that might be taken to create a more tolerable path forward in appropriate circumstances.

The Meaning of Cooperation

For almost 30 years, the federal rules have required parties to discuss discovery issues early in a matter. See Fed. R. Civ. P. 26(f) (1993 Adv. Comm. Notes). There was however little legal literature exploring the concept of cooperation in discovery until 2008. In July of that year, the Sedona Conference first published its Cooperation Proclamation, by which it sought to launch "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.'" See 10 Sedona Conf. J. 331 (2009 Supp.). The Cooperation Proclamation identified six methods to accomplish cooperation:

- Utilizing Electronically Stored Information point persons to assist counsel in preparing requests and responses.
- Exchanging information on relevant data sources or scheduling early disclosures on the topic of ESI.
- Jointly developing automated search and retrieval methodologies to cull relevant information.
- Promoting early identification of form or forms of production.
- Developing discovery budgets based on proportionality principles.
- Considering third parties (court-appointed experts, volunteer mediators, or formal ADR programs) to solve discovery disputes.

The authors of the Cooperation Proclamation realized that it was "unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation" and they did not expect success to be "instant." Nevertheless, it received almost immediate support—notably in Judge Paul Grimm's October 2008 decision in *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008)—and in subsequent legal publications including The Sedona Conference's *Case for Cooperation*. See 10 Sedona Conf. J. 339 (2009 Supp.).

Efforts to encourage cooperation continued through the lengthy process to amend the federal rules in 2015. The amended rules emphasized the concept of judicial management of discovery in Rule 16(b). Acknowledging the parties' role in managing discovery, the Advisory Committee Notes to Rule 1 also stated that "[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."

The Challenges of Data Volume & Technology

However, neither the amended rules nor the Advisory Committee anticipated two issues that have undermined efforts to foster efficient management, cooperation, and proportionality in discovery.

First, the evolution of information technologies and the accompanying explosion of data volumes have made managing that data in the regular course of business and discovery significantly more challenging.

Second, it does not seem reasonable to assume that all judges have sufficient time or technical acumen to manage many of the disputes that arise in today's world of collaborative technologies hosted in the cloud, ephemeral messaging, and artificial intelligence tools.

What then can be done to help practitioners realize the mutually beneficial aspects of cooperation? How can we create better alignment in our practices with the goals of Rule 1? The Cooperation Proclamation and some of the ESI protocols and checklists incorporated in judicial standing orders tend to be more granular and focus on specific aspects of ESI such as metadata, production specifications, privilege logging requirements, and other technology-related issues.

Revisiting Core Concepts

We submit that the goals of Rule 1 and the Cooperation Proclamation may be better advanced by taking a step back and revisiting two core concepts.

First, cooperation in the discovery context and even as contemplated by The Sedona Conference does not require achieving consensus. Fed. R. Civ. P. 26(b) does not require one party to capitulate to another's discovery demand. Instead, it defines the scope of discovery by focusing on nonprivileged matters that are relevant to the claims and defenses of a case, and proportional to the needs of that case. A party need not agree to discovery that goes beyond those requirements. Although a party may choose to do so for strategic, financial, or reputational reasons, "cooperation" does not require it.

Cooperation also does not require transparency. Indeed, nowhere in the Rules or their Notes do the words "transparency" or "transparent" appear. Rather, as The Sedona Conference made clear in its 2009 *Case for Cooperation,* cooperation is best explained as a two-tiered concept—the first tier is defined by the federal rules, ethical obligations, and common law, which "requires honesty and good faith." The second tier involves "the parties work[ing] together to develop, test and agree upon" discovery issues. The second tier is also not mandatory but offers benefits to the parties.

At the first tier, the parties must make good faith efforts to resolve their disagreements but need not agree on issues. If they are unable to resolve their disagreements, they must take defensible positions. In cooperation, lawyers must neither concede nor compromise the client's interests. It does not require foregoing court resolution of legitimate discovery disputes. 10 Sedona Conf. J., at 344.

To the extent the parties go beyond what is required by the rules, ethical obligations, and common law: Cooperation "allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with the courts, and generally get to the litigation's merits at the earliest practicable time." 10 Sedona Conf. J., at 339.

Second, the role of discovery is to prevent unfair surprise and to prepare for trial or settlement. The role of discovery is not to give the requesting party the means to become a subject matter expert in the producing party's data. As a general rule, and especially in cases of information asymmetry, responding parties can best evaluate the procedures, methodologies and technologies suitable for preserving and producing their own ESI. See The Sedona Principles, Principle 6, 19 Sedona Conf. J., at 118 (2018). This is a matter of common sense. Each party will know more about its own information systems, its workflows, its custodians, its data, etc.

This concept is also reflected in the 2015 amendments to the federal rules, which expressly rejected the notion that discovery should extend to information "reasonably calculated to lead to the discovery of admissible evidence."

Alluding to the narrowed scope of discovery, Chief Justice John Roberts emphasized in his 2015 year-end report on the federal judiciary that "[t]he amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need."

Thus, while a certain amount of discovery into sources of relevant and proportional information is typical and may be appropriate, using discovery to develop unwarranted expertise in an opponent's systems, methodologies, and processes is unnecessary and inappropriate.

Tools to Establish Practical Cooperation

Moving beyond these fundamental concepts, we offer some tools the practitioner seeking to establish cooperation—as defined above—may want to consider with opposing counsel. We recognize that the practical application of these ideas will vary with the specifics of a matter, a judge's orders, or the unique personalities of counsel.

However, we believe that these proposals may also be used to create a framework for mutually beneficial cooperation that does not compromise an attorney's duty to advocate vigorously and ethically for the client's objectives.

Be Strategic About Discovery Needs

Fed. R. Civ. P. 26(f) conferences can be helpful for setting discovery goalposts and agreed-upon guidelines, but also digging early into your own strategic needs and vulnerabilities will help you create a more effective discovery plan. E-discovery obligations are now much more complicated than they were in 2008 when the Cooperation Proclamation was issued.

- New and different technologies have proliferated, with many of them being in the cloud.
- Corporations and individuals use multiple devices and apps to conduct their work.
- The amount of data has exploded and the way we work has changed dramatically—including most recently the work-from-home revolution during the Covid-19 pandemic.

Lawyers should analyze early on how typical e-discovery issues may affect their client, and how they can be positioned to minimize negative consequences down the road. For example, lawyers should think early in a matter about consulting with the client's Information Technology department to understand whether any imminent plans may affect relevant data that their client has a duty to preserve.

Does IT plan to migrate relevant data, or to sunset a system or application that contains relevant data? Do sources of relevant information have auto-delete policies in place? If so, what due diligence should IT perform to ensure no relevant data is lost, and should that due diligence be tested by inside or outside counsel?

Contemporaneous documentation of decisions and validations may assist counsel in establishing reasonableness and lack of intent to spoliate if a dispute later arises. Bringing IT and other key players on board early before problems develop and socializing them to the needs of the case may avoid significant problems at a later date.

Build Rapport & Open Channels of Communication

Instead of meeting and conferring for a solitary Fed. R. Civ. P. 26(f) conference or only when discovery disputes arise, consider establishing regular discovery calls where counsel for the parties can provide updates, ask questions, and raise concerns.

Such meetings may eliminate unwarranted concerns of requesting parties; resolve disputes before they require formal meet-and-confer correspondence or judicial intervention; and help persuade courts that when a dispute is presented for adjudication, the parties have proceeded in good faith and have a legitimate dispute worthy of court intervention. Another important goal is to establish civility, rapport, and trust through regular, non-confrontational contact.

Appoint an ESI Liaison

ESI liaisons often are required in multidistrict litigation (MDL) proceedings and employed for class actions or other complex litigation, but there may be benefits to appointing such individuals in all cases requiring substantial e-discovery. Whatever division of labor is appropriate within a party's litigation team, presenting a single point of contact for eDiscovery issues to an opposing party creates efficiencies.

First, concentrating the technical and factual knowledge in one person should reduce unforced errors due to superficial understanding of facts or technology. Second, key communications are streamlined, and important information is less likely to be misunderstood or forgotten.

Tier Custodians & Data Sources

Tiering custodians and data sources are tactics frequently employed in MDLs and complex matters. Tiering is consistent with concepts of proportionality and focusing on information that is necessary and relevant to preparing a matter. See, e.g., The Sedona Principles, Comments 5.e, 5.g, and Principle 8, 19 Sedona Conf. J., at 108-9, 111-12, 134.

Flexibility in designing the tiers means that the same technique can be scaled to efficiency in all types of cases. Because the scope of relevance can be elastic, there is no need to agree at the outset of the case on an exact definition of each tier. See The Sedona Principles, 19 Sedona Conf. J., at 96.

Instead of engaging in extensive negotiations to create a single, final discovery plan, consider whether the parties can agree to stage discovery. For example, can they agree on the top five—or some other reasonable number—most important, custodians? Can they agree to collect from sources x, y, and z for those custodians, and not from all sources? Can they agree to table until a later date whether and what additional proportional information should be provided after the initial data set has been reviewed?

This proposal would not prevent the requesting party from seeking additional custodians or discovery, but it would require it to articulate what more is required, and why that is proportional to the needs of the case.

Maybe imaging phones is not necessary for that next set of custodians, and instead producing non-duplicative email is sufficient. Perhaps collecting only the text messages of select custodians that contain unique material information that should be considered for review and production. Avoiding a fixed and final discovery approach at the start of a matter may be more efficient than trying to hammer out discovery limits before the parties feel comfortable doing so.

If Cooperation Fails

If, despite best efforts to resolve discovery issues in meet-and-confer discussions, parties remain at an impasse and make a good faith determination that judicial resolution is the only path forward, should they drop all pretense of cooperating?

It is certainly not uncommon for parties to disagree legitimately on the scope of proportionality, appropriate assertions of privilege, or the best way to apply technological tools to document collection and review. It is also not uncommon that one party's vigorous advocacy may be interpreted as unreasonable and obstinate by the other party—or by the court.

We believe that, if the approaches suggested above are unsuccessful, the parties may still use cooperative techniques when presenting such disputes for judicial resolution. Such techniques can minimize the need for extensive briefing, lengthy allegations of misconduct, and submitting to the court self-serving declarations attaching scads of email chains among counsel.

Use Succinct Discovery Charts

One potential option is to borrow a page from Redfern and Hunter's indispensable guidance on international arbitration and adopt a litigators' version of the so-called "Redfern Schedule," a chart penned jointly by the parties and submitted to the court for the resolution of particular issues. See Redfern and Hunter on International Arbitration (2015), ¶ 1.238 and Figure 1.1, ¶¶ 6.100 6.102.

In this schedule, the parties can lay out the nature of any discovery dispute, stating requests, relevance, and objections, summarizing the results of meet-and-confers or other discussions that have taken place to try to work through these disagreements, and including a brief—and non-argumentative—statement of each side's position.

Unless required by the court, parties can also rely on their duty of candor to the court to represent the facts of a dispute without attaching voluminous meet-and-confer documentation.

Such a joint effort, even when documenting the need for judicial intervention, would still embody the spirit of cooperation contemplated under the rules, negate the need for posturing and fighting during case management conferences, and likely obviate the need for extensive briefing.

Bucket Privilege Issues

Another technique that may be useful in disputes over privilege logs is for counsel to bucket documents raising a particular issue, agree on representative exemplars of documents to be submitted to the court, and state their respective positions succinctly—and, again, non-argumentatively—in a package jointly presented to the court for its decision. Details about the number of exemplars, and who selects the exemplars, will vary depending on the needs of the case.

This approach would spare the court from conducting extensive in camera reviews of documents whose privilege treatment will depend on the resolution of identical issues—e.g., the role of in-house counsel, waiver by disclosure to third parties, applicability of certain laws, etc. The same approach can be used when seeking a judicial determination on confidentiality or trade secrets.

Request a Special Master

Yet another option to keep cooperation lanes open is for the parties to seek and consent to a special master—per Fed. R. Civ. P. 53 or state law equivalent—to address discovery questions and disputes more efficiently and on an as-needed—or even on-demand—basis.

Subject to the contents of the order appointing the special master, a discovery special master can manage a discovery plan, issue orders resolving discovery disputes, make recommendations to the judge, and monitor ongoing discovery. A discovery master also could sit in on, or be remotely available during, particularly contentious depositions and resolve disputes as they arise.

Some may think that the appointment of a special master must inherently indicate discovery cooperation has gone off the rails. The authors do not. Parties in litigation often face unique challenges when it comes to discovery.

Sometimes those challenges are caused by a limited understanding of the appropriate scope of discovery, concerns about the realistic timing for completion of discovery, and disagreements about how the discovery rules should be interpreted.

Other times, those challenges are caused because attorneys feel boxed into a position by a client's past litigation decisions or current business needs. Yet still other times, they are caused because busy judges trying to juggle criminal and civil case loads do not have the bandwidth to dig into the minutiae of discovery disputes that may initially appear to be the result of unwarranted intransigence by the parties.

Involving a special master with a high degree of expertise in e-discovery and a proven track record of efficiently addressing contested issues can expedite resolution of such disputes and assist the parties with interpreting their obligations reasonably in line with the law and best practices. Far from indicating that the parties have failed to cooperate, the authors believe that involving this type of special master is a sign the parties cooperatively are seeking to unburden the trial judge and move discovery forward in an efficient and expedient manner.

Conclusion

The authors recognize that these suggestions will not lead to a panacea of cooperative discovery practice, but we hope and believe they may reduce current stress levels for practitioners, as well as minimize burdens on the courts called on to resolve discovery disputes.