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TECHNOLOGY FOR THE LITIGATOR

Newsletter Articles

The Sedona Conference Cooperation Proclamation

By Michael D. Berman

Several years ago, many Courts and Bar Associations, interested in increasing professionalism, promulgated civility codes aimed at preventing abrasive and inappropriate litigation behavior. For example, the 1997 Maryland code states: "Civility is the cornerstone of the legal profession." The need for such codes had become clear.

For example, during a deposition one attorney called the other a profane name and remarked that the opposing counsel "could gag a maggot off a meat wagon." *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 54 (Del. 1994). In another deposition, one attorney said to another attorney: "I don't have to talk to you, little lady." He then said: "Tell that little mouse over there to pipe down," and asked, "What do you know, young girl?" *Principe v. Assay Partners*, 586 N.Y.S.2d 182 (Sup.Ct. 1992); see also *Cache La Poudre Feeds LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 618 n. 3 (D. Col. 2007)(noting acrimonious discovery disputes and stating: "Both sides have engaged in discovery conduct that unnecessarily protracted the litigation and increased its attendant costs for all parties. The unnecessarily rancorous tone of counsels' rhetoric, both in writing and during court hearings, has only exacerbated the situation and hindered the parties' ability to find a reasonable solution to their discovery disputes.").

Similarly, in *Freeman v. Schointuck*, 192 F.R.D. 187 (D.Md. 2000), defendant's counsel was sarcastic, threatening, and "repeatedly and flagrantly" insulting. The Court noted: "No one expects the deposition of a key witness in a hotly contested case to be a non-stop exchange of pleasantries. However, it must not be allowed to become an excuse for counsel to engage in acts of rhetorical road rage against a deponent and opposing counsel. . . ." The opinion noted that the "cooperative exchange of information without the need for constant court intervention" is the "very fabric which holds together the process of pretrial discovery. . . ." The Court ordered a written apology and professionalism training.

Mullaney v. Aude, 126 Md.App. 639, cert. denied, 356 Md. 18 (1999), presented a situation where an attorney called opposing counsel "babe." When counsel stated, "Babe? What generation are you from?," the response was: "At least I didn't call you a bimbo." The appellate court noted that "[t]he absence of civility and respect exhibited by lawyers towards one another has been for years the subject of significant concern for bar and bench leaders." Similarly, the New York court in *Principenoted*: "An attorney who exhibits a lack of civility, good manners and common courtesy tarnishes the image of the legal profession."

The emergence of broad discovery, often conducted in deposition rooms outside of the presence of judicial officers, and the implosion of trial practice, has provided a forum in which antagonistic conduct can occur, often "under the radar." See *Mullaney*, 126 Md.App. at 654; P. Grimm, et al., *Maryland Discovery Problems and Solutions* (MICPEL 2008), xiii. Professionalism programs, and State and local civility codes, took aim at this conduct.

A series of procedural developments, while aimed at redressing problems such as these, as well as others, also occasionally operated to increase antagonistic conduct. The attorney certification requirement of Rule 11, a mechanism for discouraging unjustified pleadings, frequently led to knee-jerk filing of sanctions motions. In fact, the United States District Court for the District of Maryland promulgated Local Rule 105.8, stating that sanctions motions should not be filed "as a matter of course," and providing that a party targeted in such a motion need

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ABOUT THE AUTHOR

Michael Berman is Counsel with Rifkin, Livingston, Levitan & Silver, LLC in Greenbelt, Maryland. His email address is MBerman@rls.com.



not respond, unless the Court, after review of the motion, directed a response.

Similarly, Rule 26(g), adding a certification requirement in connection with the filing of disclosures and discovery pleadings, has placed attorneys in the position of challenging the conduct of other attorneys. See *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. 2008), *vacated in part and remanded*, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. 2008), *appeal dismissed*, 2008 U.S. App. LEXIS 9103, 18934 (Fed. Cir. 2008) (“The Court finds that each of the following attorneys contributed to Qualcomm’s monumental discovery violation and is personally responsible. . . .”); *Land O’Lakes*, 244 F.R.D. at 626, 636 (deposition of general counsel). And, of course, rules imposing sanctions for discovery lapses, such as Rule 37, often had the same effect.

This is not to say that the Rules are misplaced or poorly drafted; however, one could assert that the sanctions components of Rules 11, 26(g), and 37, as well as motions directed at the courts’ inherent powers, developed a civil procedure analog to a *Brady* attack on alleged prosecutorial misconduct. In short, under the sanctions rules, civil litigators could obtain a tactical advantage by alleging deficiencies in the performance of opposing counsel. The opposing attorney, countering such allegations, was often tempted to respond in kind. Civility suffered.

While electronic discovery has been percolating through the courts for decades, and became well-recognized with the 18-1/2 minute gap in the Watergate tapes, the December 2006 amendments to the Federal Rules of Civil Procedure, coupled with the emergence of the personal computer, the initial Sedona Conference “best practices” guidelines, *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (March 2003), and *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004) (one in a series of decisions), introduced a new dimension to civil litigation. For example, the *Intel Microprocessor* case involved electronically stored information that would reach approximately 137 miles high, if it had been printed on paper. *In Re Intel Microprocessor Antitrust Litigation*, 2008 WL 2310288 * 2 (D. Del. 2008). Concepts like “terabytes” of information began to creep into legal jargon. Electronically stored information, with its unique characteristics, such as large volume, fragility and persistence, metadata, variety of storage media, differences in form (“native” v. “static”), and potential high costs, presented new and different issues. The “information explosion” provided additional impetus to change the litigation system toward a more cooperative model. G. Paul and J. Baron, “Information Inflation: Can the Legal System Adapt?,” 13 *Rich. J. Law & Tech.* 10, 16-17 (2007) (“Without greater cooperation among adversaries, parties are doomed to any number of defeating consequences, . . .”). Courts imposed significant sanctions for e-discovery lapses, e.g., *Zubulake*, 229 F.R.D. at 422; *Thompson v. U.S. Dept. of HUD*, 219 F.R.D. 93 (D. Md. 2003), and delved deeply into attorney-client communications. P. Grimm, et al., *Discovery About Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?*, 37 *U. Balt. L. Rev.* 413, 429-37 (2008) (collecting cases); *Major Tours, Inc. v. Colorel*, 2009 U.S. Dist. Lexis 68128 (D.N.J. Aug. 4, 2009); *Intel Microprocessor*, 2008 WL 2310288 *18 (ordering disclosure of redacted attorney work product related to client interviews of 1,023 employees). Decisions created situations where the interests of in-house and retained counsel might be at odds with each other. *Qualcomm*, 2008 U.S. Dist. LEXIS 51748 *11 n.6 (“Qualcomm’s self-serving statements that ‘outside counsel selects. . . the custodians whose documents should be searched’ . . . does not relieve Qualcomm of its obligations. . . . Qualcomm is a large corporation with an extensive [in-house] legal staff; it clearly had the ability to identify the correct witnesses and determine the correct computers to search and search terms to use. Qualcomm just lacked the desire to do so.”); see *Swofford v. Eslinger*, 2009 WL 3818593 *4, 11 n.10 (M.D. Fl. Sept. 28, 2009). Again, there was a need for guidance.

Many courts promulgated local rules to provide that guidance. For example, in the winter of 2006, the United States District Court for the District of Maryland, in conjunction with the Bar, formed a committee to draft a Suggested Protocol for the Discovery of Electronically Stored Information. The Protocol was the product of more than twenty attorneys and forensic experts who labored for months, and was posted on the Court website to provide voluntary, non-binding guidance. The goal of the Protocol is to provide “a comprehensive framework to address and resolve a wide range of ESI issues” and to “facilitate the just, speedy, and inexpensive conduct of discovery involving ESI in civil cases, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without court intervention.” In short, the Protocol is a road map to cooperative handling of ESI issues.

The Sedona Conference has, for years, written about the need for reason and dialog in the ESI context. See *Best Practices, Recommendations & Principles*, cited above at 2 (stating that a “rule of reasonableness” is a useful guide). In July 2008, it issued the “Cooperation Proclamation.” The Proclamation notes that “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.” The Proclamation “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.”

The Cooperation Proclamation notes that: “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.” The Proclamation states: “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." *Accord Hopson v. Mayor and C.C. of Balt.*, 232 F.R.D. 228 (D.Md. 2005) ("The days when the requesting party can expect to 'get it all' and the producing party to produce whatever they feel like producing are long gone."). In the words of the Sedona Conference: "This 'Cooperation Proclamation' calls for a paradigm shift for the discovery process. . . ." The Proclamation concludes: "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."

As The Sedona Conference notes: "This [Cooperation Proclamation] 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." The Cooperation Proclamation supported the holding of the court in *Mancia v. Mayflower Textile Servs., Co.*, 2008 U.S. Dist. LEXIS 83740 (D.Md. 2008). In that decision, battling litigants were directed to meet, confer, develop a "discovery budget," and attempt to resolve their differences in light of that budget. In fact, more than 90 trial and appellate Judges across the nation have endorsed the [Cooperation Proclamation](#), and it has been repeatedly cited by the courts.

Courts have not hesitated to negatively comment on a refusal to cooperate. *Kay Beer Distributing, Inc. v. Energy Brands, Inc.*, 2009 WL 1649592 * 6 (E.D.Wisc. June 10, 2009) (describing "three separate emails from counsel for Energy Brands offering to work with Kay Beer's counsel in formulating search terms to locate emails that might be relevant. . . . Instead of working with Energy Brands' counsel, Kay Beer seems to have persisted in its demand that Energy Brands turn over all ESI that even mentions its name or some variant thereof."). The steady march of discovery decisions away from an adversarial model provides guidance and shows the likely approach toward pre-litigation preservation conduct. *In Re Seroquel Prod. Liability Litigation*, 244 F.R.D. 650, 652 (M.D.Fla. 2007) ("AZ's failure to cooperate in the production of the databases" was a significant factor in holding that there had been sanctionable conduct).

Prior Sedona Conference publications have had a major impact on civil litigation. If history is a guide to the future, the Cooperation Proclamation will be one tool used by the courts to reduce the costs of discovery, and increase professionalism and civility.

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