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COOPERATION

Crowell & Moring attorneys David. D. Cross and Luke van Houwelingen explain how the call for a more cooperative spirit among adversaries is being answered.

Effective Advocacy Need Not Be Adversarial

BY DAVID D. CROSS AND LUKE VAN HOUWELINGEN

Cooperation probably is not the first word that comes to mind when one thinks of lawyers, but there is a growing movement to foster a stronger culture of cooperation in legal proceedings. The goal is to save time and money.

Courts are increasingly frustrated by what they see as an unnecessarily contentious approach to litigation, especially discovery. Just because the justice system is adversarial by design does not mean litigants and their counsel should approach every issue in an adversarial way. Many issues can and should be resolved through meaningful cooperation rather than resorting to posturing and table pounding, which ultimately wastes considerable time and money on unnecessary motions practice. Courts increasingly are emphasizing—and requiring—cooperation between counsel, and even at times sanctioning those who refuse to ''play nice in the sandbox.''

Roots in Sedona. Several years ago, The Sedona Conference® called for increased cooperation in discovery in its ''Cooperation Proclamation.'' Since then, a growing number of courts have encouraged cooperation and commended those who do so. The Cooperation Proclamation has to date received about 150 judicial endorsements, a number that is almost certain to increase as

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Representative Decisions

*Apple Inc. v. Samsung Electronics Co., Ltd.*The court extended cooperative principles to discovery from third parties. It admonished third-party Google for failing ''to participate in transparent and collaborative discovery'' in response to a subpoena, noting that ''[t]hird-party status does not confer a right to obfuscation or obstinacy,'' and it criticized Apple for failing ''to collaborate in its efforts to secure proper discovery from Google.''

*U.S. Bank National Assoc. v. PHL Variable Ins. Co.*After being faced with ''six discovery disputes in seven months,'' the court chided the parties for failing to act cooperatively as encouraged by both the federal and local rules, and ''urge[d] the litigants to take seriously their obligation to cooperate in discovery so as to avoid burdening the Court with repeated disputes.''

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more and more courts press lawyers to resolve disputes outside the courtroom through compromise and concessions where appropriate.

Sanctions. More significantly, clients and counsel who refuse to cooperate in discovery may increasingly find themselves facing sanctions. More so than ever, courts expect lawyers to effectively balance their duties as advocates with their duties as officers of the court. This trend will require litigants to pick their battles more carefully and avoid tactics aimed at delay or at driving up the other side's costs.

Cooperation does not mean surrendering one's rights, however. It means fighting only those battles that really matter and doing so in a reasonable way. As courts around the country increase their push for cooperation, litigants will need to become more adept at finding the right balance between zealousness and cooperation.

Memorialization in FRCP. Proposed changes to the Federal Rules of Civil Procedure, intended to reduce ever-increasing discovery costs, further reflect this trend of growing cooperation in litigation, which already has been captured in the local rules of courts around the country.

The Rules Advisory Committee proposes to amend Rule 1 to explicitly make litigants—not just the courts—responsible for ''the just, speedy, and inexpensive determination of every action and proceeding.'' The committee notes accompanying the proposed changes emphasize that this change is intended to make clear that the parties share responsibility with the courts to effectuate the goals of Rule 1. The notes go on to affirm that effective advocacy ''is consistent with—and indeed depends upon—cooperative and proportional use of procedure.''

The desire for greater cooperation also is reflected in the proposed changes to the Federal Rules governing pre-trial discovery.

For example, Rule 16 would provide that pre-trial orders could contain non-waiver agreements negotiated by the parties under Federal Rule of Evidence 502 to protect privilege without costly review and logging of privileged documents. The Rules Advisory Committee notes that this change is intended to remind litigants of the value of such agreements and to promote their use, which of course requires cooperation.

Proposed amendments to Rule 26 would permit parties to serve document requests early, even before the already-required initial discovery planning conference, without triggering the time to respond to the requests. The stated goal is to facilitate more productive discussion of discovery at the conference and to help foster early resolution of any disputes through enhanced cooperation. If amended, Rule 26 would also give greater prominence to the principle of ''proportionality'' in discovery.

The proposed rules changes capture the same spirit of cooperation the courts have been emphasizing. They are likely to drive parties to cooperate more and to do so earlier in a case when such cooperation can best set a less antagonistic tone for what follows.

Other Benefits. Cooperation is valuable not only for resolving disputes, but avoiding them in the first place. It reduces risk, expense, and inefficiency in litigation. Once that is understood, there is no good reason not to cooperate. And with courts increasingly expecting cooperation, litigants may no longer have a choice to cooperate or not.

Guidance From Local Court Rules

■ **Local Rule 26(F) of the Western District of Washington:** ''Counsel are expected to cooperate with each other to reasonably limit discovery requests, to facilitate the exchange of discoverable information, and to reduce the costs of discovery.''

■ **Northern District of California E-Discovery Guidelines 1.02:** The court ''expects cooperation'' on e-discovery issues and ''an attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner.''

■ **Local Civil Rules of the Southern and Eastern Districts of New York:**''Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.''

■ **Discovery Guidelines of the District of Maryland:** ''[P]arties and counsel have an obligation to cooperate in planning and conducting discovery'' and have a ''duty to confer early and throughout the case'' to ensure that discovery is just, speedy, and inexpensive, and proportional to what is at issue in the case.

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