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Margo Braman of Studio D: [mbraman@sedona.net](mailto:mbraman@sedona.net).

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# A BULL'S-EYE VIEW OF COOPERATION IN DISCOVERY

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*Steven S. Gensler\**

*University of Oklahoma College of Law  
Norman, OK*

First issued in July 2008, The Sedona Conference® Cooperation Proclamation launched a campaign to promote cooperative, non-adversarial discovery.<sup>1</sup> Since then, The Sedona Conference® has been working on other documents designed to support the campaign, including one called the Case for Cooperation.<sup>2</sup> These documents are part of a coordinated effort to show how clients, lawyers, and judges alike can benefit from increased discovery cooperation and to give guidance on how to adopt cooperative strategies.

I enthusiastically support the campaign for cooperation. The Cooperation Proclamation is exactly right when it urges lawyers to see cooperation as a means for advancing their clients' interests and not as a retreat from their duties as loyal advocates. As I have written elsewhere, the lawyers who default to battle mode in discovery – who fail even to consider whether cooperation might yield better results – are the ones who truly fail to serve their clients' interests.<sup>3</sup>

One of the most important tasks for the proponents of cooperation is to develop a unified theory of cooperation – that is, a theory that both specifies what cooperation means and explains why parties should cooperate. That's a more difficult task than it might sound. There are a great many things that might be characterized as cooperation, and the reasons for doing them will vary. In order to adequately explain why parties should cooperate, one must differentiate the various types of cooperation and make the case for each type separately. At the same time, we do not want to lose sight of the larger picture. Thus, the goal is to develop a model that identifies and justifies the different types of cooperation in a way that reinforces – rather than diminishes – the overall campaign.

This essay offers one such model -- the Bull's-Eye View of Cooperation. With the full range of cooperative behaviors as our overall target, the different types of cooperation can be thought of as occupying the rings of a bull's-eye. The outer ring of the bull's-eye represents the range of cooperative behaviors that are required by the Federal Rules. The two inner rings then represent different types of voluntary cooperation. Part of the campaign for cooperation must be devoted to ensuring that litigants and judges fully appreciate the types of cooperation that the Federal Rules require. In bull's-eye terms, there remains much work to do to make sure that litigants are at least behaving in ways that hit the outer ring. But an equal part of the campaign for cooperation must be to encourage litigants to strive for more – to make choices that get them as close as possible to the center of the bull's-eye as the circumstances of their cases allow.

## I. DEFINING COOPERATION IN DISCOVERY

Before attempting to explain why parties must or should cooperate in discovery, we must first define what we mean by cooperation. The Federal Rules do not provide a definition. Neither the term "cooperate" nor any derivative (e.g., "cooperative" or "cooperation") appears in the text of any

\* Welcome D. & W. DeVier Pierson Professor, University of Oklahoma College of Law. I want to thank The Sedona Conference® for inviting this contribution, the University of Oklahoma College of Law for providing research support, and Meredith Walck for her citation and editing assistance.

1 The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009). The Cooperation Proclamation and related materials, including a roster of endorsing judges, are available at The Sedona Conference® Cooperation Proclamation website at [http://www.thosedonaconference.org/content/tsc\\_cooperation\\_proclamation](http://www.thosedonaconference.org/content/tsc_cooperation_proclamation).

2 10 SEDONA CONF. J. 339 (2009), also available at [http://www.thosedonaconference.org/content/tsc\\_cooperation\\_proclamation](http://www.thosedonaconference.org/content/tsc_cooperation_proclamation).

3 See Steven S. Gensler, *Some Thoughts on the Lawyer's Evolving Duties in Discovery*, 36 N. KY. L. REV. 521, 555-56 (2009) (Electronic Discovery Issue).

rule.<sup>4</sup> It does appear in the *title* to Rule 37, which reads “Failure to Make Disclosures *or to Cooperate* in Discovery; Sanctions.” Its appearance there, however, is almost certainly an editing error.

Readers may recall that the original version of Rule 26(f) did not provide for mandatory discovery planning meetings in all cases, but instead only required them upon the request of one of the parties.<sup>5</sup> When the original version of Rule 26(f) was proposed in 1978, it included a provision authorizing the court to impose sanctions on a party who, after such a request had been made, failed “without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.”<sup>6</sup> A parallel provision was proposed for Rule 37.<sup>7</sup> The published proposed amendments also would have amended the title of Rule 37 from “Failure to Make Discovery; Sanctions” to “Failure to Make *or Cooperate in* Discovery; Sanctions.”<sup>8</sup> However, the Advisory Committee later deleted the term cooperation from this round of amendments in response to comments that the term was too broad.<sup>9</sup> The republished version – which eventually was adopted – substituted the phrase “participate in good faith” in the text of Rule 37 but left “cooperate” in the title.<sup>10</sup> By all indications, that was simply an oversight; it probably should have joined the text on the cutting room floor.

In the absence of any rules-based definition, one might turn to the dictionary. Webster’s New Collegiate Dictionary defines cooperate as follows: “1: to act or work with another or others: act together 2: to associate with another or others for mutual benefit.”<sup>11</sup> This definition certainly suggests taking a broad view of cooperation. But dictionary definitions are not dispositive – we remain free to give the term whatever meaning we think it warrants in this context.

At the Mid-Year meeting for Working Group 1,<sup>12</sup> a split of opinion emerged on whether to take the broad definition – which would include all of the behaviors where parties work together and/or with the court to facilitate information exchange – or whether to narrowly define cooperation as limited to those activities that are mandated by the Federal Rules. On the surface this might seem like mere semantics. If we define cooperation as limited to the required activities, then we can just come up with some other term or terms to refer to all of those other, non-required activities. So why does it really matter?

The principal difference between the two approaches lies in the linkage between what we mean by cooperation and what we identify as the reason or justification for cooperating in discovery. Under the narrow approach, one can accurately say that cooperation is mandatory. Of course, the statement is accurate because the narrow approach defines cooperation as including only the mandatory behaviors. Under the broad approach that embraces the widest range of behaviors in which the parties work together in discovery, one cannot make the universal statement that cooperation is mandatory. One can still say that some of it is mandatory, but not all of it.

This essay adopts the broad definition. Ultimately, the campaign for cooperation in discovery is about changing how people behave in the discovery process – or at least about getting them to think twice about how they might benefit from behaving differently. All of those behaviors are an integral part of getting lawyers to rethink their approach to discovery. The greatest impact that the campaign for cooperation could have is to persuade lawyers to stop looking for reasons to fight and start looking for ways to facilitate the discovery process. We want to encourage lawyers to look far and wide for ways to facilitate or improve the process by working with each other instead of against each other.

Taking a broad approach to cooperation also helps place the campaign in context with the evolution of the discovery process. From a historical perspective, the most relevant reference point is

4 The term cooperate does appear in various Local Rules. The meaning and significance of the term as used in Local Rules is discussed in Part III *infra*.

5 See Gensler, *supra* note 3, at 526.

6 Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 625-26 (March 1978).

7 *Id.* at 652 (authorizing sanctions against a party who “fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(f)”).

8 *Id.* (emphasis added).

9 Minutes of the Advisory Committee Meeting, July 6, 1978, page 9; Transmittal Letter to Committee on Rules of Practice and Procedure, June 14, 1979, page 10.

10 Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323, 344-46 (Feb. 1979).

11 Webster’s New Collegiate Dictionary 247 (1980).

12 Working Group 1 is The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1). The Mid-Year Meeting of WG1 was held on May 14-15, 2009. For information on WG1 and its activities, see <http://www.thesedonaconference.com/wgs>.

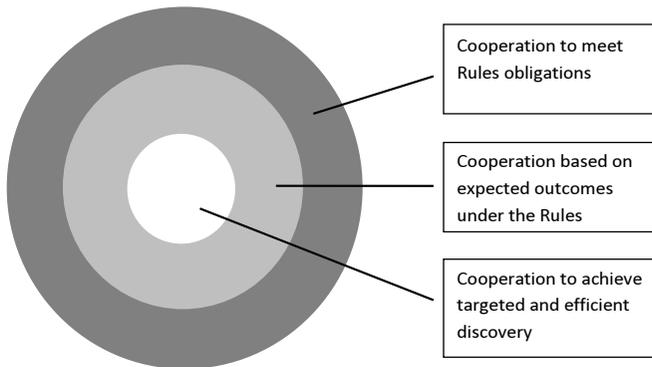
practice under the Federal Rules circa 1970, a time before the emergence of the case management movement, before we had any discovery planning rules, before the adoption of an express proportionality requirement, and immediately after Rule 34 was changed so that parties no longer had to show good cause and get permission from the judge to serve a document request.<sup>13</sup> Professor Marcus has referred to this period as the “apogee of the Liberal Ethos” of discovery.<sup>14</sup> One might also think of it as the era of the silent gunslinger: at this time, no rule stood in the way of a lawyer who wanted to “shoot first and ask questions later.”<sup>15</sup> By defining cooperation broadly, we capture all of the ways in which lawyers today – for whatever reason – depart from the silent gunslinger approach, either by solving their disagreements without shootouts or at least by gathering information and communicating before reaching for their pistols.

The trade-off is that a broad definition of cooperation makes the justification for cooperating more complicated. Since 1970, various changes to the Federal Rules now require lawyers to do things that can be seen as forms of cooperation. But other aspects of “working together” – e.g., voluntary disclosure and making compromises – are not mandated by the Federal Rules and might even appear (at least on the surface) to be contrary to zealous advocacy. If much of what we mean by cooperation is a choice that parties make, what justifies taking that path? Part II now turns to those issues.

## II. THE COOPERATION BULL’S-EYE

Accepting that the campaign for cooperation should seek to promote the full range of cooperative behaviors, the task then becomes to do that in a way that convincingly makes the case for *all* of those behaviors. That presents a bit of a conundrum. On the one hand, because the reasons for cooperating vary across the different types of cooperation, each type of cooperation must be addressed separately. On the other hand, analyzing the different types of cooperation separately runs the risk of making them seem like unrelated fragments. What is needed is a framework that identifies and explains the reasons for engaging in each of the different types of cooperation while still presenting them as being part of an integrated approach.

This essay attempts to make an integrated case for the full range of cooperative behaviors by organizing them according to the underlying rationale for cooperating. The scheme yields three categories. The first category consists of what one might term “mandatory” cooperation – that is to say, the cooperation that is required by the Federal Rules. The second and third categories both consist of voluntary cooperation. The second category consists of parties agreeing to do things in discovery because they think the court would order them to do those things if the matter were litigated. The third category consists of parties agreeing to do things in discovery in order to expedite and facilitate the discovery process. These three categories can be seen as the rings of a Bull’s-Eye:



<sup>13</sup> See FED. R. CIV. P. 34 advisory committee's note (1970) (discussing elimination of good cause requirement); see generally Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748-49 (1998) (discussing state of discovery in 1970).

<sup>14</sup> Richard L. Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 304 (2008).

<sup>15</sup> The silent gunslinger image is taken from the so-called spaghetti western films of this era – e.g., “A Fistful of Dollars” and “The Good, the Bad, and the Ugly” – which usually featured lone gunmen known more for their marksmanship than their conversation or diplomacy skills. See [http://en.wikipedia.org/wiki/Spaghetti\\_Western](http://en.wikipedia.org/wiki/Spaghetti_Western) (entry as of Sept. 2, 2009).

The following subparts explore each of these rings in more detail.

### A. The Outer Ring: Cooperative Behaviors Required by the Federal Rules.

This category consists of conduct required by the Federal Rules. The Federal Rules do not explicitly use the term cooperation.<sup>16</sup> To the extent the Federal Rules “require” the parties to cooperate in discovery, they do so via five rule subdivisions: Rule 26(c); Rule 26(f); Rule 26(g); Rule 37(a); and Rule 37(f).<sup>17</sup> As I have written elsewhere, precision is critical when talking about whether and how the Federal Rules require cooperation.<sup>18</sup> The following sections take a closer look at these provisions, organized into clusters based on their principal function.

#### 1. *Discovery Planning.*

The first cluster of cooperation provisions relates to the duty to engage in discovery planning at the start of the case:

<b>Cooperation and Discovery Planning</b>	
Rule 26(f)(1)	The parties must confer in advance of the issuance of the Scheduling Order.
Rule 26(f)(2)	The parties must consider their claims and defenses, discuss preservation, and develop a proposed discovery plan.
Rule 26(f)(2)	The attorneys and all unrepresented parties must “attempt[] in good faith to agree on the proposed discovery plan....”
Rule 26(f)(3)	A discovery plan must state the parties’ views and proposals on a wide range of issues including: <ul style="list-style-type: none"> <li>• the subjects on which discovery may be needed;</li> <li>• whether to phase discovery or focus on certain issues;</li> <li>• discovery of ESI, including form of production; and</li> <li>• the process for claiming privilege or work-product protection.</li> </ul>
Rule 37(f)	The court may sanction any party or attorney who “fails to participate in good faith” in developing and submitting a proposed discovery plan.

As noted earlier, none of these rules provisions explicitly requires “cooperation.” Rather, what these provisions actually require might best be described as communication and consideration. The parties must talk about their discovery needs and their discovery capabilities. They must consider whether agreement is available by trying “in good faith” to agree on various important discovery parameters. But the parties are not required to reach agreement. Most critically, neither party is required to compromise from a valid position.<sup>19</sup> Nor do any of these rules impose any new or expanded duties to make required disclosures of information.<sup>20</sup> So long as the parties take defensible positions, communicate those positions, and listen to what each other has to say, they have done everything that the “discovery planning” cluster of rules requires them to do.

<sup>16</sup> The lone exception is that the term “cooperate” appears in the title to Rule 37. As discussed earlier, however, that appears to be an editing oversight. *See supra* text accompanying notes 5-10.

<sup>17</sup> In some rules, cooperation is implicit in their design or function, but not required. For example, Rule 29 allows parties to enter into stipulations about discovery procedure. *See* FED. R. CIV. P. 29. While such stipulations certainly *reflect* cooperation between the parties, the decision even to pursue them is left entirely to the parties. In a different vein, Rule 26(d) leaves the sequence of discovery to the parties on the premise that the parties will choose to cooperate in order to avoid mutually assured destruction. *See* FED. R. CIV. P. 26(d) and advisory committee’s note (1970). But Rule 26(d) does not demand cooperation; any party may seek to impose its own schedule and sequence (subject to court order) if it is willing to endure the hassle when the other side starts doing the same.

<sup>18</sup> *See* Gensler, *supra* note 3, at 555.

<sup>19</sup> *See* Gensler, *supra* note 3, at 548.

<sup>20</sup> Rule 26(f) instructs the parties to settle their arrangements for making the required disclosures listed under Rule 26(a), but it does not expand the universe of information that must be disclosed. *See* FED. R. CIV. P. 26(f)(3)(A).

Functionally, the discovery plan provisions are educational and preventive in nature.<sup>21</sup> Rule 26(f) operates from the premise that lawyers who are informed about their own client's systems and discovery needs and who can inquire into those issues with opposing counsel will make much better decisions about discovery planning. An informed and candid dialogue holds the promise of fewer goose chases in what is sought and fewer false steps in the response process. It also can prevent predictable practical problems such as disagreements about search methods, form of production,<sup>22</sup> or even preservation. The underlying theme is that parties who are informed, who communicate, and who try to understand each other's needs and abilities will avoid the types of mistakes associated with misunderstandings and miscommunication.

Beyond that, Rule 26(f) can serve a very valuable role as a platform for additional, *voluntary* cooperation. While Rule 26(f) does not *require* the parties to make additional informal disclosures or to reach discovery agreements where legitimate disputes exist, it very clearly expresses the hope that the parties will choose to do so. Rule 26(f) sends an unmistakable signal urging and encouraging the parties to work together and find ways to expedite and facilitate the discovery process. But it operates by encouragement, not mandate.

## 2. *Specific Discovery Disputes.*

The second cluster of cooperation provisions also pivots on communication, but it deals with specific discovery disputes after they have arisen rather than preventive discovery planning:

<b>Cooperation and Specific Discovery Disputes</b>	
Rule 26(c)	A party moving for a protective order must certify that it has "in good faith" conferred or attempted to confer with other affected parties in an effort to resolve the dispute.
Rule 37(a)(1)	A party moving for an order compelling discovery must certify that it has "in good faith" conferred or attempted to confer with the non-producing party in an effort to resolve the dispute.
Rule 26(c)(3) Rule 37(a)(5)	After resolving a motion for protective order or a motion to compel, the court must award the prevailing party its reasonable expenses incurred in making or opposing the motion, including attorney's fees, unless the other side's position was "substantially justified."

The actual duties here are essentially the same as in the first cluster. The parties must communicate and try in good faith to work out specific discovery disputes. But here too, the parties are not required to reach agreement or to compromise from valid positions in order to do so. So long as a party takes a defensible position (and communicates it), the party may stand on that position and let the judge decide.<sup>24</sup>

This cluster of rules does not prevent discovery disputes from occurring. Indeed, it presumes that one has occurred and is now on the precipice of a motion. Rather, what it seeks to do is

21 Originally, the principal role of discovery planning under Rule 26(f) was to generate information for the judge to assist in the formation of the Rule 16 case management order. *See* Gensler, *supra* note 3, at 529. We now appreciate that the Rule 26(f) process also offers an important opportunity for the parties to educate themselves and each other about the discovery needs of the case. *Id.* The 2006 e-discovery amendments fully embrace this latter mission, using the Rule 26(f) conference as a platform for requiring the parties to investigate their own clients' data capacities so that it can be shared with opposing counsel. *See* FED. R. CIV. P. 26(f) advisory committee's note (2006).

22 One can make a strong case that Rule 34(b)'s provisions regarding form of production also qualify as rules requiring cooperation in discovery planning. Rule 34(b)(1)(C) allows (but does not require) a party seeking documents to specify the form or forms desired. Rule 34(b)(2)(D) requires the responding party to specify the form or form it intends to use if it either objects to a requested form or is responding when no request was made. The design of these provisions is to get the parties discussing form of production before production occurs in order to avoid problems (including costly "do-overs") later. *See* FED. R. CIV. P. 34(b) advisory committee's note (2006).

23 The Federal Rules do require initial disclosures – without waiting for a formal discovery request – for certain types of information. *See* FED. R. CIV. P. 26(a)(1), (2), (3). Beyond that, voluntary exchange is *encouraged* but not required. *See* FED. R. CIV. P. 26(f) advisory committee's note (1993) ("The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.")

24 *See* FED. R. CIV. P. 37(a)(5) (sanctions against the motion loser not appropriate where that party's position was "substantially justified"); *see generally* Gensler, *supra* note 3, at 548-49.

to ensure that the parties only present “real” discovery disputes to the judge, not sloppy misunderstandings or uninformed stonewalling. And, like Rule 26(f), these rules create a platform for the parties to resolve even legitimate discovery disputes by voluntary agreement.

### 3. *Certification of Content and Purpose.*

The third cluster of rules provisions is located in Rule 26(g) and deals with the content and purpose of discovery requests and responses:

<b>Cooperation and Certification of Content and Purpose</b>	
Rule 26(g)(1)	Every discovery request, response, or objection must be signed by an attorney of record (or by a party, if unrepresented). The signature certifies that any discovery request, response, or objection meets the following criteria:
Rule 26(g)(1)(B)(i)	It is consistent with the Federal Rules and warranted by law.
Rule 26(g)(1)(B)(ii)	It is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.
Rule 26(g)(1)(B)(iii)	It is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Rule 26(g) is modeled after Rule 11.<sup>25</sup> Like Rule 11, it is designed to get lawyers to “stop and think” before making or responding to discovery requests.<sup>26</sup> On the surface, it is not obvious whether or how this type of “stop and think” rule gives rise to a duty to cooperate: the activities it regulates are, for the most part, activities that the lawyers undertake on their own. As applied, however, this cluster of rules provisions intersects with discovery cooperation in two ways.

First, there is a direct connection between the purpose and content duties under Rule 26(g) and the duties under Rule 26(f) and Rule 37(a) to attempt “in good faith” to reach discovery agreements. The duty to attempt “in good faith” to agree on discovery imposes a duty to not be unreasonable. In order for a party to be acting reasonably, at a minimum it must be advancing positions that are valid and defensible. Thus, when conferring about the discovery plan, or when conferring about a specific discovery dispute, “good faith” must at least mean not taking positions that would violate the purpose or content criteria set forth in Rule 26(g).

Second, Rule 26(g) imposes a duty on the lawyers to, as the Advisory Committee notes put it, “engage in pretrial discovery in a responsible manner that is consistent with the spirit and purpose of Rules 26 through 37.”<sup>27</sup> As Magistrate Judge Paul Grimm has noted, lawyers who default to battle mode without any serious effort to engage in the communication and consideration required by Rules 26(f) and 37(a) are not meeting their obligation to behave responsibly.<sup>28</sup> More specifically, lawyers who fail to communicate about the discovery needs of the case will, in all likelihood, be ill-equipped to meet the proportionality directive incorporated into Rule 26(g)(1)(B)(iii).<sup>29</sup>

### 4. *Summary.*

If the parties are fulfilling their rules-based obligations, then we can expect the following to be true: (1) the parties will be conferring about discovery planning and specific disputes; (2) the

<sup>25</sup> See Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 364 (March 1983).

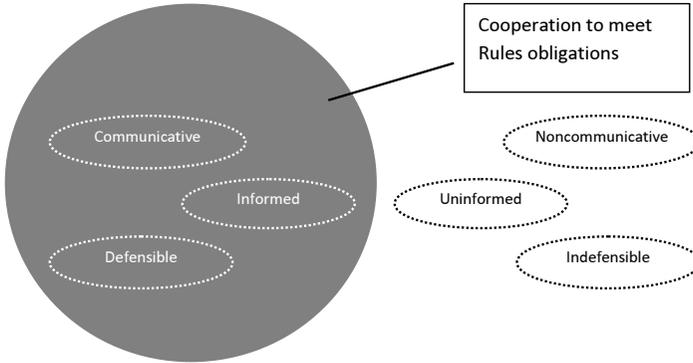
<sup>26</sup> See FED. R. CIV. P. 26(g) advisory committee’s note (1983).

<sup>27</sup> FED. R. CIV. P. 26(g) advisory committee’s note (1983).

<sup>28</sup> See *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008).

<sup>29</sup> *Id.* at 358.

parties will be attempting in good faith to agree on discovery planning and to resolve specific disputes; and (3) the parties will have taken informed and defensible positions in discovery. To relate this to the Cooperation Bull's-Eye, the parties should be conducting themselves well within the boundaries of the outer ring:



As discussed in the next subpart, the campaign for cooperation aspires to do more than just remind lawyers of their rules-based obligations and elicit greater compliance with them. At the same time, it would be a serious mistake to undervalue the impact that greater compliance with the rules would have on the discovery process. It is an unfortunate reality that lawyers too often fail even to hit the outer ring – i.e., by not communicating or by articulating uninformed or indefensible positions. If the only effect of the campaign for cooperation was to get more lawyers “on target,” it would greatly reduce both the number and difficulty of discovery disputes. By itself, that would be a great advance over the current situation.

### B. The Middle Ring: Cooperation Based on Expected Outcomes.

Even when the parties can dig in their heels in discovery and do no more than the minimum required by the Federal Rules, they often choose a different path. For instance, parties sometimes produce information voluntarily, without waiting for or insisting upon a formal discovery request.<sup>30</sup> And when a request has been made and there is a legitimate disagreement (i.e., both sides have defensible positions), the parties do not always press the dispute to a court ruling. Rather, parties sometimes resolve legitimate discovery disputes on their own, usually by reaching some type of compromise.

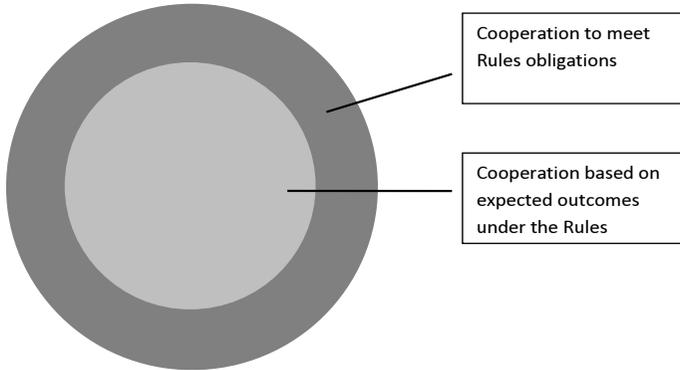
What leads parties to produce information without a formal request or to reach agreement on discovery disputes? Traditionally, cooperation of this type is the byproduct of the parties’ assessment of what the outcome would be under the rules. In other words, the lawyers assess how the judge would be likely to rule if the matter were pressed to the court and then act accordingly. Thus, if the lawyers can agree that certain types of information are subject to discovery, they might agree to voluntarily produce it without the need for formal discovery requests. In the case of disputes over pending discovery requests, the lawyers might assess how the judge is likely to rule and then agree to conduct discovery in conformity with that expected outcome, or at some point bargained within a range of expected outcomes.

When lawyers cooperate in this way, they are seeking to serve their own self-interest. For example, formal discovery adds cost and delays the exchange of information. If the parties can agree that certain information is fair game for discovery, they can save each other time and money by honoring informal requests for it. Sometimes this might mean voluntarily producing documents that are clearly discoverable. But it could also be something as simple as answering a question – e.g., about whether certain information exists or where it is kept – that obviates the need for a formal interrogatory to elicit that information.

<sup>30</sup> By *voluntary* production, I am referring to the parties producing or disclosing information *beyond* what is covered by the required initial disclosures under Rule 26(a). While the Rule 26(a) disclosures are made without a party-issued discovery request, they are nonetheless required disclosures, with the provisions of Rule 26(a) serving as “[t]he functional equivalent of court-ordered interrogatories.” See FED. R. CIV. P. 26(a) advisory committee’s note (1993).

Formal discovery disputes add even more cost and cause even more delay. Here too, the parties can save time and money by cooperating. In the end, every discovery motion pressed to the court will yield an answer to the dispute when the judge issues his or her ruling. If the parties can agree on what that result is likely to be, they can bypass the judge, agree to act in conformity with the expected result, and move on with the case. If they can at least agree on a range of expected outcomes, the parties may be able to choose a point within that range and conform to that. When parties engage in expected outcome-based cooperation, they are, in essence, choosing to take the shortest, fastest, and least costly path to what the rules, as applied, ultimately would require them to do anyway.

Returning to the Cooperation Bull's-Eye, adding in expected outcome-based cooperation gives us this:



Expected outcome-based cooperation has played a large role in discovery for years and should continue to do so. Many aspects of discovery are sufficiently straightforward that informal requests and voluntary exchange should suffice. In particular, lawyers could greatly streamline the discovery process by freely sharing information about what sources they have and where they are kept, rather than forcing each other to serve interrogatories or take depositions to gather this type of foundational information. Similarly, many discovery disputes, while legitimate, do not warrant costly briefing. Lawyers should continue to consider whether they can arrive at the same result that the judge will supply – or something close to it – by agreement.

Neither Rule 26(g) nor Rule 37(a) requires the parties to do these things. But lawyers who do their homework and then communicate – as those rules do require – frequently will find that they can fairly predict what will happen if they insist upon formal discovery and press all disputes to the court. From that point, the lawyers then can make an informed decision about whether it really makes sense to do that, or whether they are better off taking the shorter and faster path by cooperating.

### C. The Center Ring: Cooperation to Achieve Targeted and Efficient Discovery.

Up to this point, the driving factor in the discussion has been the parties' rights and obligations under the rules. Subpart A addressed the minimum requirements for cooperation under the rules. Subpart B addressed voluntary cooperation beyond that, but the discussion was still tied to the rules. Parties who engage in expected outcome-based cooperation accept the rules-driven outcome as their finishing point and look for ways to get to that point faster, cheaper, or with fewer headaches.

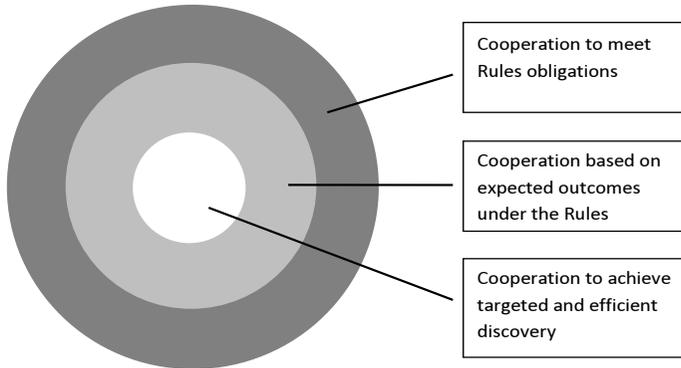
This subpart considers a qualitatively different mode of cooperation. In this mode, the parties work together to identify and pursue a discovery process that they construct themselves based on reason and efficiency. As discussed above, the Federal Rules will, through the judge, eventually provide an answer to every question regarding discovery scope and procedure. And that answer

generally will – I believe – be a good and fair answer.<sup>31</sup> That does not mean, though, that the rules-based answer is the *only* possible answer. Nor does it mean that it is the *best* possible answer. There are several ways in which the parties can improve upon what the court's rules-based answer would be.

First, the parties can greatly streamline the discovery process by reaching agreement on scope and source issues.<sup>32</sup> The parties know best where the “low hanging fruit” is located. The parties know best what issues are *most important* to advancing the case, where that information is *most likely* to be found, and how that information can be accessed with the *least amount* of cost or burden. While judges can issue detailed discovery orders under Rule 26(b)(2), it is the parties who are in the best position to make these determinations. In its most advanced form, party cooperation on scope and source issues can result in an iterative process in which the parties begin with what they consider to be the most targeted and focused inquiries and then proceed as needed.

Second, some aspects of electronic discovery present obvious opportunities for the parties to reach practical agreements based on facilitating the process. The clearest example is agreements regarding the search process for ESI. If forced to, a judge could prescribe a search process or, more likely, rule after the fact on whether the use of a particular set of search terms constituted a reasonable search. Far better, though, for the parties to get together and develop an agreed set of search terms.<sup>33</sup> (Moreover, the agreement on search terms could itself be part of an agreed iterative process in which the results of that search are used to determine the need for and scope of later searches.) Other areas of e-discovery where the parties would be well-served by practical agreements designed to facilitate the process include form of production and preservation.<sup>34</sup>

With that foundation, we can now add the final ring to the Cooperation Bull's-Eye:



In sum, the center ring of cooperation involves the parties working together to facilitate a fair, sensible, and cost-effective discovery process. As with expected outcome-based cooperation, the motivation for cooperating is self-interest. What is different is the mind frame of the parties. Here, the objective is not to replicate rules-based outcomes faster and cheaper but to identify discovery

31 While the Federal Rules are not perfect, I think they reflect an appropriate balance between creating access to information and the costs and burdens of locating and providing that information. Perhaps more accurately, I think the Federal Rules give judges the tools needed to balance the need for information in litigation with the costs and burdens of getting that information. So for every contested discovery issue, federal judges applying the Federal Rules can (and, I think, generally do) supply *an* answer that is fair to the parties and appropriate to the circumstances.

32 See FED. R. CIV. P. 26(b)(1) advisory committee's note (2000) (stating in conjunction with new provisions regarding the scope of discovery that "it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention").

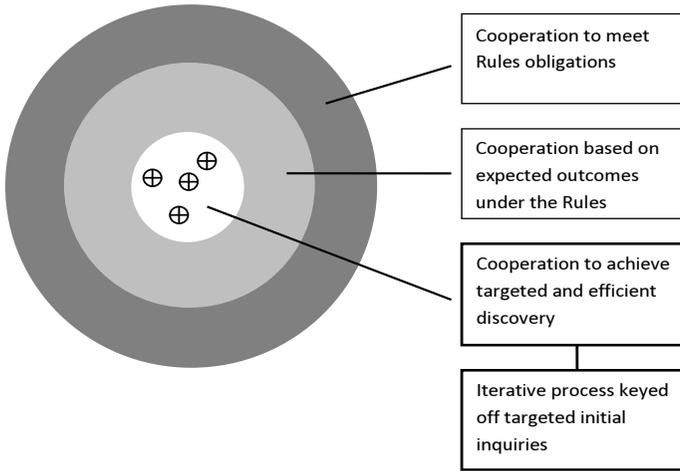
33 See, e.g., *Dunkin Donuts Franchised Rests., LLC v. Grand Central Donuts, Inc.*, No. CV 2007-4027, 2009 WL 1750348, at \* 4 (E.D.N.Y. June 19, 2009) (citing The Sedona Conference' Cooperation Proclamation and ordering the parties to "meet and confer on developing a workable search protocol" for email discovery); *Covad Communications Co. v. RevoNet, Inc.*, 258 F.R.D. 5, 14 (D.D.C. 2009) (stating that it would be unfair to allow party that rebuffed invitation to negotiate search protocol to now argue that the terms used were inadequate); *William A. Gros Constr. Assocs. Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (stating that "the best solution [to the selection of appropriate search terms] is cooperation among counsel" and endorsing Cooperation Proclamation); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 405 (S.D.N.Y. 2009) (citing Cooperation Proclamation and instructing the parties to confer on a workable search protocol).

34 See, e.g., *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418, 426 (D.N.J. 2009) (noting that dispute over form of production would not have arisen if parties had communicated earlier); *Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Security*, 255 F.R.D. 350, 358 (S.D.N.Y. 2008) (citing The Sedona Conference' Cooperation Proclamation and noting that party communication regarding form of production is best way to resolve issues regarding production of metadata); *Covad Communications Co. v. RevoNet, Inc.*, 254 F.R.D. 147, 149 (D.D.C. 2008) (citing Cooperation Proclamation and chiding the parties for not conferring about the form of production).

processes and solutions that make sense, even if they might vary from what a judge might or even could order. The rules and the parties' views on expected outcomes still will be influential, but not controlling.

There is one final image to explore. In March 2009, the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers hosted a summit on the Civil Rules.<sup>35</sup> As one might expect, one of the major topics for discussion was discovery cost and containment. One of the metaphors that emerged from the discussion was that lawyers should take "rifle shot" discovery rather than serving expansive and ill-focused discovery requests. By this, the lawyers meant that discovery should have a clear and specific target.

The image of a rifle shot is powerful, and it strikes me as a perfect complement to the Bull's-Eye view of cooperation:<sup>36</sup>



What is critical is to recognize the link between cooperation and targeted discovery. No Federal Rule *forbids* lawyers from taking rifle shot discovery. Correspondingly, no Federal Rule *requires* lawyers to – if you'll permit me to indulge the metaphor – conduct discovery by carpet-bombing. But you can only take targeted discovery if you know what your target is. That brings us back to cooperation. If lawyers learned to work together – by communicating and by developing agreed plans that took an iterative approach – then they would be in a much better position to trade in their cannon for rifles.

### III. LOCAL RULES AND COOPERATION

A number of districts now have local rules addressing discovery cooperation. This Part explores the range of content of those local rules and assesses how they intersect with the campaign for cooperation.

#### A. Local Rules That Restate or Elaborate Upon Existing Duties.

Many of the "cooperation" provisions found in local rules restate or elaborate upon the cooperation duties set forth in Rules 26 and 37.<sup>37</sup> For example, Local Rule 26.1 of the Middle District of Pennsylvania provides that "counsel shall discuss and seek to reach agreement on" a long list of topics including preservation of ESI, the scope of e-mail discovery, e-mail search protocols, form of production, and the need to search sources that are difficult to access.<sup>38</sup> The District of

<sup>35</sup> See <http://www.du.edu/legalinstitute/events.html> (last visited August 31, 2009).

<sup>36</sup> My thanks go to Ken Withers, who first pointed out to me how perfectly the rifle shot image fits within the Bull's-eye diagram.

<sup>37</sup> See *supra* Part II.A.

<sup>38</sup> M.D. Pa. Local R. 26.1(c).

Kansas “Guidelines for Discovery of Electronically Stored Information (ESI)” instruct the parties to “confer regarding” and “attempt to agree on” a substantially similar list of e-discovery topics.<sup>39</sup> Other local rules instruct the parties to confer regarding and attempt to agree on various specific e-discovery issues.<sup>40</sup>

These types of provisions do not add any new duties. As discussed in Part II.A., Rule 26(f) already required the parties to confer about discovery and to attempt in good faith to agree on the topics to be addressed in the discovery plan. The 2006 amendments to Rule 26(f) specifically added “issues about disclosure or discovery of electronically stored information” to that list.<sup>41</sup> Thus, the function of these local rules is to flesh out and particularize the Rule 26(f) duties as they apply to e-discovery.

That being said, local rules or court guidelines that elaborate on the existing Rule 26(f) duties can be enormously helpful. Lawyers who read these rules will be hard pressed to argue that they did not fully appreciate the scope of issues they are required to discuss and about which they are required to pursue agreement in good faith. For some lawyers, the extra guidance might be genuinely educational. For others, the detailed guidance will serve to cut off claims of ignorance or confusion by those who are disinclined to carry out their duties under Rule 26(f). Either way, local rules that supplement Rule 26(f) can serve a valuable role by explaining what Rule 26(f) requires and eliciting compliance.

### B. Local Rules that Encourage Cooperation.

A number of local rules explicitly promote or encourage cooperation in discovery. The Northern District of Ohio makes this point directly: “The parties are encouraged to cooperate with each other in arranging and conducting discovery . . . .”<sup>42</sup> The District of Massachusetts has a local rule section specifically titled “Cooperative Discovery” providing that “[t]he judicial officer should encourage cost effective discovery by means of voluntary exchange . . . [such as] informal, cooperative discovery practices in which counsel provide information to opposing counsel without resort to formal discovery procedures.”<sup>43</sup> While it never actually uses the term cooperation, the District of Maryland’s Suggested Protocol for Discovery of Electronically Stored Information provides extensive guidance to the parties on how to discuss and structure e-discovery in order “to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention.”<sup>44</sup> Other local rules urge cooperation more generally.<sup>45</sup>

A different – and, in my view, intriguing – way for districts to promote cooperation is to require the parties to appoint an e-discovery coordinator or liaison. Under the Default Standards for Discovery of Electronic Documents (E-Discovery) adopted by several districts, each party must designate a single individual to serve as their “e-discovery liaison” (or coordinator) in order to “promote communication and cooperation between the parties.”<sup>46</sup> This person – who may be a client (or an employee of the client), an attorney, or a third party consultant retained to assist with discovery – is responsible for organizing the party’s e-discovery activities “to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.”<sup>47</sup>

39 D. Kan. Guidelines for Discovery of Electronically Stored Information (ESI), Guideline 4, *available at* <http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf>.

40 *See* D.N.J. Local R. 26.1(d)(3) (“During the Fed. R. Civ. P. 26(f) conference, the parties shall confer and attempt to agree on computer-based and other digital discovery matters, including [preservation and production, inadvertent production, deleted information, legacy data, form of production, and cost allocation.]”); D. Colo. Local Civ. R. Appx. F (Instructions for Preparation of Scheduling Order) (stating that parties “must discuss any issues relating to the disclosure and discovery” of ESI and “should make a good faith effort to agree on a mutually acceptable format for production” of ESI); M.D. Tenn. Default Standard for Discovery of Electronically Stored Information (providing that parties “shall use their best efforts to reach agreement” as to search methods and search terms and “shall attempt to reach agreement” on preservation).

41 Fed. R. Civ. P. 26(f)(2), (3) and advisory committee’s note (2006).

42 N.D. Ohio Local R. 26.1.

43 D. Mass. Local R. 26.1(A).

44 D. Md., Suggested Protocol for Discovery of Electronically Stored Information (“EDI”), *available at* <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>.

45 *See* M.D. Fla., Middle District Discovery (2001), at 1 (“Discovery in this district should be practiced with a spirit of cooperation and courtesy.”); W.D.N.Y. Local Civ. R. (“Cooperation Among Counsel in the Discovery Context”) (referencing Civility Principles, *available at* <http://www.nywd.uscourts.gov/document/civilityprinciplespreamble.pdf>).

46 *See* D. Del., Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 3; N.D. Ohio, Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 3; M.D. Tenn., Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 3.

47 *See* D. Del., Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 3; N.D. Ohio, Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 3; M.D. Tenn., Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 3.

Local rules or court guidelines that encourage the parties to cooperate strike me as both valid and beneficial. Whether the purpose is to encourage cooperation in the sense of complying with the rules (outer ring) or whether it is to encourage parties to voluntarily do more (inner rings), it is an appropriate use of the court's authority and bully pulpit. Encouraging discovery cooperation is surely no less valid than encouraging parties to settle on the merits.<sup>48</sup> To the extent these provisions either help lawyers better appreciate their cooperation duties or lead lawyers to give increased thought to the benefits of voluntary cooperation, they make a valuable contribution to the just, speedy, and inexpensive administration of justice.<sup>49</sup>

### C. Local Rules that Require “Cooperation” or Agreement.

The final category to consider is local rules that require “cooperation” or agreement. For example, the Default Standards for Discovery of Electronic Documents state: “It is expected that parties to a case will cooperatively reach agreement on how to conduct e-discovery.”<sup>50</sup> In the Southern District of Illinois, “[c]ooperative discovery arrangements in the interest of reducing delay and expense are mandated.”<sup>51</sup> In the Eastern District of New York (but not the Southern District), “[c]ounsel 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.”<sup>52</sup> At the farthest end of the spectrum, some local rules seem not just to require the parties to cooperate in discovery but to actually reach agreement on discovery. For example, the Default Standards for Discovery of Electronic Documents (as adopted by the District of Delaware and the Northern District of Ohio) state that the parties “shall reach agreement” as to search terms and methodology.<sup>53</sup>

Local Rules that mandate “cooperation” raise once more the question of what cooperation means. As discussed in Part II.A., one component of cooperation is to confer with the other side and attempt in good faith to reach agreement. The Federal Rules already require this. Local rules that restate the obligation are certainly valid, and, as discussed above, can serve as useful reminders. On the other hand, cooperation can also mean voluntary disclosure of information or compromise agreements. Perhaps the local rules expressing the “expectation” that the parties will cooperate, or that they will reach discovery agreements, are designed to encourage voluntary disclosures or discovery agreements rather than compel them. As discussed above, there is nothing wrong with judges promoting voluntary cooperation.

However, to the extent local rules are construed as ordering parties to disclose information that would otherwise be the subject of formal discovery, or as mandating that the parties reach discovery agreements when there is a genuine dispute, they likely go too far. The scope of the required initial disclosures is set by Rule 26(a), and they have a contentious history that counsels strongly against reading other rules as expanding or augmenting their scope.<sup>54</sup> As to mandatory discovery agreements, the Federal Rules stop conspicuously short of mandating that the parties actually reach agreement on discovery issues. Indeed, Rule 37(a)(5) is quite clear that expense-shifting against the losing party in a discovery dispute is not proper if the losing party's position was substantially justified.<sup>55</sup> Thus, to the extent these local rules are construed as requiring the parties to make additional required disclosures or to make concessions from informed and defensible positions, they present serious questions of validity in terms of inconsistency with the Federal Rules.<sup>56</sup>

48 The permissibility of encouraging settlement is beyond cavil. *See, e.g.*, 28 U.S.C. Section 651(b) (requiring each district court to adopt local rules establishing an alternative dispute resolution program); FED. R. CIV. P. 16(a)(5) (listing “facilitating settlement” as one purpose of pretrial conferences).

49 *See* FED. R. CIV. P. 1.

50 D. Del., Default Standards for Discovery of Electronic Documents (“E-Discovery”), Std. 1; N.D. Ohio, Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 3; M.D. Tenn., Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 3.

51 S.D. Ill. Local R. 26.1(d).

52 E.D.N.Y. Local Civ. R. 26.5.

53 D. Del., Default Standards for Discovery of Electronic Documents (“E-Discovery”), Std. 5; N.D. Ohio, Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 5. Notably, the Middle District of Tennessee altered this language when it adopted the Default Standards; in its version, the parties need only “use their best efforts to reach agreement” on these topics. *See* M.D. Tenn., Default Standards for Discovery of Electronic Documents (“E-Discovery”), Standard 5.

54 *See* Gensler, *supra* note 3, at 542-43 (discussing the controversial nature of the 1993 version of Rule 26(a) and the 2000 amendments that narrowed its scope).

55 FED. R. CIV. P. 37(a)(5) and advisory committee's note (1970).

56 *See* 28 U.S.C. Section 2071(a) (authorizing districts to make local rules so long as they are “consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072”); FED. R. CIV. P. 83(a) (local rules must be consistent with the Federal Rules). *See generally* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 1052 (2009) (“A local rule can conflict with the Federal Rules either if it directly contradicts a Federal Rule or if it establishes a requirement or procedure that conflicts with the spirit or purpose of a Federal Rule.”).

#### IV. CONCLUSION

The benefits of cooperation in discovery are not new. The original drafters of the Federal Rules fully appreciated that the discovery process would work best in the hands of litigants and lawyers who sought to facilitate the fair and efficient exchange of information rather than hinder it. True, the original 1938 Federal Rules did not contain cooperation obligations – not even the “communication and consideration” duties currently set out in Rules 26(f) and 37(a). But that was because the original drafters assumed (naively, it turns out) that litigants and lawyers would realize that cooperation was in their best interest and act accordingly.<sup>57</sup>

Even though the general concept of cooperation in discovery is not new, the importance of cooperation has never been greater. In the age of e-discovery, it is nigh impossible to imagine judges hearing and deciding every potential discovery dispute. One also shudders to imagine the expense of it all. Just in terms of scope and expense, e-discovery has been a game-changing event for the federal discovery process.

On a more positive note, e-discovery can serve as a catalyst for changing the way lawyers view the discovery process. The drafters of the 2006 e-discovery amendments recognized the power of bringing the parties to the table to discuss the discovery process. Building on the existing Rule 26(f) architecture, the drafters expanded the list of discussion topics to include those aspects of e-discovery that are most likely to cause problems in the absence of informed communication. In so doing, the drafters highlighted the value of early attention and advance planning by lawyers who are informed and educated about their client’s discovery needs and their own information capacities. At the same time, they sent a strong signal that parties could – and really should – do even more to expedite and facilitate the discovery process.

Avoiding errors of misunderstanding and miscommunication is a good start. For that reason, the campaign for cooperation is right to emphasize the need for lawyers to take their duties under Rules 26(f), 26(g), and 37(a) seriously. But the campaign for cooperation is equally right to emphasize that more is possible. To put it in terms of the rules structure, since the lawyers are already required to come to the table and talk, let’s hope that while they are at the table they also consider the full spectrum of cooperation options available to them and the benefits they can attain by pursuing them. Or, to put it in terms of the imagery of this essay, so long as the lawyers know they have to take aim at the bull’s-eye, let’s hope they are inspired to aim for the center.

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<sup>57</sup> See Gensler, *supra* note 3, at 524-25.

